NATURAL RIGHTS IN CONTRACTUALIST THOUGHT

Ivan Matić

NATURAL RIGHTS IN CONTRACTUALIST THOUGHT

Publisher
Institute for Political Studies
Dobrinjska 11/4, Belgrade

Director
Dr. Miša Stojadinović, Principal Research Fellow

Reviewers
Dr. Miša Stojadinović, Principal Research Fellow
Prof. Dr. Milorad Stupar
Prof. Dr. Marko Simendić

Book Cover Design
Snežana Stanković

Print
Dobrotoljublje, Belgrade

Circulation
50

ISBN 978-86-7419-404-1

This monograph was created within the scientific research activity of the Institute for Political Studies, financed by the Ministry of Science, Technological Development and Innovation of the Republic of Serbia.

IVAN MATIĆ

NATURAL RIGHTS IN CONTRACTUALIST THOUGHT

Institute for Political Studies
Belgrade, 2024

AUTHOR'S FOREWORD

The subject of this book is the concept of natural right in the social contract theories presented by Thomas Hobbes, John Locke and Jean-Jacques Rousseau. Its goal is to establish, explain, and defend the original meaning of this doctrine, through the use of the methods of conceptual, normative and historical analysis, as well as the method of thought experiment, and the critical and evaluative methods. In order to achieve this, a short overview of historical circumstances of the period in which this doctrine was founded will be presented first, along with its general theoretical framework. Here, the changing social circumstances that laid the foundations for contractualist[1] theory will be analyzed, and particular attention will be dedicated to its authors' refutation of its 'rival' doctrine of the divine right of kings.

The relevant aspects of the foundation of natural rights – the social contract theory – will be analyzed next. In this regard, the key parallels between the teachings of Hobbes, Locke and Rousseau will be accentuated, whilst their key differences are also examined. The condition of the state of nature, its normative consequences and the need for its transcendence will take center stage here. The central portion will be dedicated to the analysis of the natural rights doctrine itself: this will first involve presenting the theological conception of natural rights, as well as its secular alternatives. Afterward, fundamental rights, the rights to life, liberty and property will be individually considered, with attention being given both to their status in the state of nature, and the legal implications in the civil state. Finally, the properties of naturalness, inalienability, negativity and individuality that set fundamental rights apart from others will be discussed in detail, with a brief overview of the similarities and differences between natural rights and human rights.

---

[1] We use the term *contractualist* to refer to ideas and theories under the social contract 'umbrella' in general and do not deal with the specific contractualist/contractarian distinction developed by Scanlon and Gauthier.

The following portion of the book will present a detailed consideration of the basic currents in the critique of natural rights: the thrasymachean, positivist, liberal, conservative and the descriptive-normative. We will draw a distinction between critiques of natural rights that are of a purely theoretical nature, and those that were inspired by political events and documents that were partly inspired by the social contract theory. We will then also see how a consistent interpretation of the contractualist theory of natural rights can enable its defense from these critiques. The final portion will be dedicated to the analysis of key legal and political documents that were particularly influenced by the natural rights theory.

CONTENTS

INTRODUCTION

Rights – the principles by which we determine the ownership of concrete and abstract goods by acting subjects – have from the very origin of organized human communities presented one of the most complex topics of the social sciences. How were they created? Why do they exist? According to what are they determined? What are they limited by? In the context of philosophy, however, the question asked regarding rights ontologically precedes all others and can historically be traced as far back as the famous debate between Socrates and Thrasymachus in Plato's *Republic*: what is their origin?

Throughout the history of philosophy, many answers to this question have been given, which can essentially be reduced to one of two sources: nature or the state. According to the state model of explaining the genesis of natural rights, these principles came into being after the inception of organized society as they were instrumental for its preservation. In this regard, they can only ever be the consequence of social norms, whether it be customs or laws. Seeing as the origin of the state precedes the introduction of these norms and represents the *conditio sine qua non* of their existence, it would be nonsensical, according to this view, to discuss the existence of rights outside of society and absurd to conceive of any non-state origin of rights.

It is clear of course that this model of interpretation inarguably stands for certain rights: taking into account that it is impossible to have voting, judging, healthcare or education without a well-ordered social system, the rights to these goods and services are impossible without society and the long process of historical development that was necessary for their creation. However, can the same be said of all rights? Can we speak of rights to goods that we possess outside of the state without reference to the state? Or is organized society necessary for the existence of all rights?

This brings us to the second interpretation of the origin of rights: the natural. According to this model, some elements of which have roots in the Antiquity and early Christian philosophy, and which

reaches its apex in the classical contract theory, humans as rational beings possess certain rights independently of it. But where do these rights originate from and what guarantees them? The most frequent historical response to this question has been: from God, which provides them to humans as his greatest creation and punishes their breaking. This simultaneously represents the greatest weakness of the natural model: it is based on abstract, metaphysical concepts that cannot be proven, unlike the state model, which references the tangible, real state of affairs and material properties.

Alongside the creation of rights, the question of their maintenance is of great importance. The state model of interpreting rights affirms the force of law as their guarantee: absent the former, what is it exactly that upholds natural rights? Despite these problems, the doctrine of natural rights based on the social contract theory not only had a strong influence on the later development of the philosophy of politics and law, but also on legal tradition, serving as the cornerstone of key legal documents in countries of its origin as well as across the world. Beside its obvious theoretical significance, this can give us a practical reason for its reexamination: if a certain doctrine, despite its flaws, has had positive influence on the development of human society, we have to ask ourselves if its flaws are of a purely theoretical character and, if they are, if it is possible to resolve them.

The topic of this book will, therefore, be this very doctrine: the doctrine of natural rights in the specific domain of the classical contract theory. After offering a brief overview of the historical surroundings within which the social contract theory came to be, its theoretical framework will be thoroughly analyzed (in the main, the theories of Thomas Hobbes, John Locke and Jean-Jacques Rousseau). Then the theory itself will be examined in detail based on the analysis of its particular characteristics and aspects, which will then be synthesized into one theoretical whole. Afterward, the critiques of this theory will be examined in detail, as well as the great documents in the history of law and politics that were significantly influenced by it.

The goal of this book is, first and foremost, to present a clear and unequivocal interpretation of the doctrine of natural rights, aimed at removing the many uncertainties that have historically plagued it.

In that regard, an emphasis will be placed on analyzing the whole of this doctrine, rather than its isolated interpretation in the works of individual authors of the contractualist tradition. This interpretation will also enable a secular, empirical understanding of the genesis of natural rights, overcoming the historical problem of their theological, metaphysical foundation. Lastly, this interpretation will enable a rebuttal to the many critiques that were levelled against this doctrine, defending natural rights as a necessary criterion of legitimacy. In this regard, the greatest attention will be dedicated to the liberal and conservative critiques, a more general critique that goes along the 'might makes right' model, its more sophisticated form which culminates with the positivist critique as well as the descriptive-normative critique as related to the 'is/ought' problem.

The fundamental literature for this topic will be the thematically most relevant works of the authors of the classical contract theory from the field of philosophy of politics and law: Hobbes' *Leviathan*, Locke's *Two Treatises of Government* and Rousseau's *Social Contract*. Beside these books, numerous analyses will be referred to, some of which originate from historical works, while others represent the monographs, repertories and papers of contemporary authors. The critique of the doctrine of natural rights will covered by the works of Kant, Bentham, Burke, Maistre, and many other authors. Lastly, historical legal documents like the English Bill of Rights, or the French Declaration of Rights of Man and of the Citizen will provide the historical examples of the impact of the doctrine of natural rights.

Subject, Goal and Method

Developed within the scope of the social contract theory, the doctrine of natural rights postulates that humans as rational beings possess certain essential rights independent of the existence of organized communities: these rights are natural in so much as their existence can ontologically, if not historically, be traced to the state of nature, within which the state, comprehended as the legitimate holder of the monopoly over force and coercion, does not exist. In this sense, natural rights are 'older' than the state because they refer

to goods that precede and exist independently of it: life, liberty and property.

The critique of this idea, as we've seen, is based on the fact that the origin and guarantee of natural rights cannot be adequately determined: if we can't agree on what makes natural rights natural, or what guarantees them absent the laws of the state, how can we even claim they exist, or assign to them the status of rights, inevitably putting them on equal footing with state rights? The answer to this question, fundamental for the philosophy of politics and law, is provided by the social contract theory as a whole and simultaneously represents the main subject of this book.

Its goal, based on the detailed analysis of the classical contract theory, will be to offer an interpretation of natural rights which will liberate this doctrine from the theoretical baggage of theological and metaphysical elements and put forth its secular, empirical elements. This will require a detailed overview of the social contract theories of the leading contractualist thinkers, though their views won't be approached in isolation, as individual interpretations of different ideas, but as the compatible and complementary understandings of one and the same phenomenon. Taking into account the very nature of the social contract theory, the method of thought experiment will be widely applied, which will, in certain instances, be helped by the method of historical analysis, taking into account the knowledge of prehistorical, early historical and anthropological factors in early modern times and the contemporary period. Beside this, the method of comparative analysis will help us draw the distinction between the full domain of natural rights and fundamental rights, which are of a narrower scope and maintainable in the social state.

The central hypothesis of this work, on which the whole of this interpretation of the doctrine of natural rights will repose, will concern the analysis of certain parts of this doctrine and demand that we prove certain essential attributes of fundamental rights: their naturalness, inalienability, negativity and individuality. When determining the naturalness of fundamental rights, primarily founded upon the earlier mentioned justifiability of the distinction between natural and social and natural and fundamental rights, we will primarily use the analytical as well as the interpretative model, taking into account the importance of interpreting the works of authors of

the classical contract theory in this domain. Proving the inalienability of fundamental rights will require the use of the method of normative analysis, seeing as it will be important to determining exactly what it entails, what it is limited by and why. Explaining the negativity and individuality of these rights will founded upon the analytical and interpretative methods; distinctions will be made between positive and negative and individual and collective rights. Fundamental rights – the rights to life, liberty and property – will be individually analyzed based on the method of normative analysis.

Seeing as one of the goals of this book is the defense of the doctrine of natural rights from the numerous critiques that were laid against it throughout history, or rather, its reformulation that should immunize it to these critiques, the analytical method will be necessary in order to determine the original understanding of this doctrine and the weaknesses it carried with it. Further, confronting the critiques of the doctrine of natural rights will require the interpretative method, as well as the critical and evaluative method; beside the works of critics, interpretations and analyses by other authors will be used, all with the purpose of creating a better understanding of the initial shortcomings of the doctrine of natural rights.

Lastly, as part of the interpretation of key legal documents that were theoretically based on the doctrine of natural rights and put forth in circumstances of great social upheaval, the method of historical analysis will be used. In this regard, we will look at the social circumstances in which these documents were created, the conditions that contributed to their inception, the motivations of their authors and the intellectual culture of these periods. Here, special attention will be dedicated to the theoretical aspects of natural rights and their 'translation' into practice.

Chapter Structure

The first chapter will offer an overview of the crucial subjects and issues that will be the topic of this book. Afterward, the basis of the social contract theory will be examined, taking into account the overall characteristics of the contractualist model, with particular analyses of the key elements of Hobbes', Locke's and Rousseau's

conception. Significant attention will also be dedicated to the problem of comparing the state of nature and the state of war and, finally, the question of the relationship between natural rights and natural law.

The analysis of the concept of the social contract as the transition from the natural into the social state will be the topic of the second chapter. Differing interpretations of the state of nature in theories of Hobbes, Locke and Rousseau will be analyzed, as well as the way in which they influence the criteria of a future society, primarily in the context of the mode of government, laws and the somewhat more abstract issue of legitimacy. We will first be interpreting the social contract as the act of the creation of the state, focusing on the similarities and differences that the contractualists establish within it. Afterward, we will analyze the complex topic of the transfer of rights with the transition into the social state, particularly accentuating the preservation of fundamental rights. Finally, we will test the status and limits of rights in extreme instances, such as war, conquest and slavery.

The central chapter of this book will focus on the fundamental topic using the theoretical framework developed in earlier chapters. Based on the previous analysis of the state of nature and the social contract, we will be able to determine what natural rights actually entail, how they are founded, and what determines and limits them. Here, we will first examine the original, theological conception of natural rights, as well as its critique. We will then present the alternative, secular conception that will enable us to overcome the flaws of the theological conception and lay the foundations for defending the doctrine of natural rights from other critiques, examined later in the book. We will also draw the distinction between natural and fundamental rights. The essence of this chapter will be the detailed analysis of natural rights, first through their fundamental characteristics, and then through their categorization. The rights to life, liberty and property will be analyzed individually, and then the characteristics of naturalness, inalienability, negativity and individuality. We will also draw the distinction between the contractualist conception of natural rights and the contemporary conception of human rights.

The subject of the next chapter will be the analysis of various critiques of the doctrine of natural rights. Its goal will be to defend the contractualist conception from the numerous critiques leveled against it, based on the previously offered interpretation. The first critique discussed will be the oldest and most widely used critique of natural rights, which will, according to its theoretical and philosophical roots, be called the thrasymachean critique. We will then examine its most developed outgrowth, in the form of the positivist critique. The next will be the liberal, as well as the conservative critique, followed by the descriptive-normative critique.

The final chapter of this book will be dedicated to the examination of the influence of the contractualist understanding of natural rights on several key legal historical documents. The focus of this analysis will be the specific elements from these documents that establish a legal precedent for the defense of fundamental rights, based either on their naturalness, or their inalienability. Here, we will examine the English Bill of Rights, the U. S. Declaration of Independence, the U. S. Bill of Rights, i. e. the first ten amendments to the U. S. Constitution and, finally, the French Declaration of the Rights of Man and of the Citizen. Based on historical analysis, the goal here will be to establish a theoretical connection between the contractualist view of natural rights and its application in legal history.

In the conclusion, we will recapitulate the basic arguments of the book and summarize the examination presented herein. In this regard, we will first establish the fulfilment of the primary goal of this book: determining the meaning of natural rights and placing this doctrine in the contextual framework of the classical contract theory. We will also point out how the two primary goals were accomplished: finding a secular alternative to the traditional, theological understanding of the genesis of natural rights and precisely determining fundamental rights through the criteria of naturalness, inalienability and negativity.

Historical Circumstances

The social contract theory grew out of the unique political and socio-economic circumstances of the seventeenth and eighteenth

century. During this period, western Europe was at a crossroads between feudalism and capitalism: on the one hand, the nobility, whose privileges were a relict of its once-important military role, still had significant political influence, supported by church teachings; on the other hand, the bourgeoisie, the growing civic class which had the dominant economic share in society, wasn't adequately represented politically under absolute monarchies, which reigned over the majority of European states.

The political tension between these two estates, which was largely material in nature, was intellectually reflected by reexamining the origins of the state, which tended to generate two opposing conceptions: the divine right of kings, which openly reaffirmed monarchy and the social contract theory, which, while it had no clear 'horse in the race' of the system of government, implicitly had a tendency to support the ideas of equality that the civic estate was inclined toward. It represented somewhat of a culmination of humanist thought, the origins of which can be traced back to the roots of the Renaissance in the thirteenth and fourteenth century, with the rediscovery of Aristotle's works, which had fallen into oblivion in Europe during the so-called Dark Ages, i. e. the early middle ages.

A significant factor in the establishment of the social contract theory was the Thirty Years' War, a hard war that engulfed most of Europe and followed the reformation of the Catholic Church. Beside the inevitable political divisions, this war also resulted in a tendency toward the separation between church and state. Though it retained a broader social and intellectual influence, the church began to lose direct political authority: this process was most apparent in England, whose tradition of limiting authority and developing civil rights extends all the way back to the *Magna Carta Libertatum* (1215), which significantly limited the king's authority in favor of the feudal aristocracy.

The national protestant church of this country had undergone strict hierarchization after the Thirty Years' War (Marshall 1994, 33), with the majority of the English society clamoring for increasing tolerance toward minority Christian denominations, as well as other religions (Marshall 1994, 40). This intellectual climate significantly contributed both to the reemergence of antique ideas, such as republicanism, and the development of new ones, such as the social

contract theory. In other European states, absolutism had shown itself to be a blessing in disguise: despite the nominally limitless power they possessed, the rulers of these states often permitted open intellectual discourse, limited only by loyalty: the famous creed of the Prussian king Frederick the Great states: "Argue as much as you want and about whatever you want, but obey!" (Kant 2006a, 23) The tolerance symbolized by this quote led Kant to call his age the "age of enlightenment, or the century of *Frederick*" (Kant 2006a, 22).

All of these factors, therefore, created a very 'fertile ground' for the spread and development of Enlightenment ideas; despite this, the social contract theory still wasn't broadly accepted, even in the second half of the eighteenth century: according to the estimate offered by Christopher Betts, in 1762. most educated Europeans still believed that kings had the divine right to rule, while those who adopted the social contract theory still preferred monarchy over other forms of government (Betts 1994, xii). However, the very fact of the shifting of the scales, which culminated with Rousseau's theory already represented a kind of victory for the Enlightenment, given that the social contract theory's defense of monarchy is quite unlike the one offered by the divine right of kings. Taking the importance of the distinction between these two conceptions into account, particularly with the background practical conflict between the aristocracy and the civic class in mind, we will examine their similarities and differences in detail in the following chapter.

THEORETICAL FRAMEWORK

The humanist shift that marked the Renaissance and culminated in the era of the Enlightenment was founded upon the abandonment of religious doctrine, particularly in the areas of art, morality and politics. It comprehended turning away from God and toward man, which was nowhere more obvious than in the divide between the divine right of kings and the social contract theory. While the first attempts to trace the divine origin of its earthly authority, the second finds it in human cooperation. Literally interpreting the Holy Bible, the doctrine of the divine right of kings postulates that Adam had kingly authority over his offspring, which was generationally transmitted to contemporary rulers (Harrison 2003, 170).

Due to its divine origin, government, according to this view, rises above earthly obstacles and human institutions: it is exalted, unyielding and eternal. Questioning its legitimacy, therefore, not only constitutes law breaking, but also the denial of divine will. Explaining the inherent connection between the divine right of kings and monarchy as the form of government isn't necessary; but here we can draw an interesting parallel with the social contract theory, since one of its authors – Thomas Hobbes – also claims that questioning the actions of the government isn't legitimate. His reasoning, however, is substantially different: according to Hobbes' view, every citizen indirectly becomes the author of all actions of the sovereign by establishing the social contract: in protesting the actions of the sovereign, he would be protesting himself (Hobbes 1996, 117).

Based on the example above, we can see that even when they completely align in defense of legitimacy, the divine right of kings and the social contract theory approach the issue completely differently: much like Plato and Aristotle in Raphael's *School of Athens*, while one points the finger toward the sky, the other gestures to the ground. The first this sees the divine and the second the human will as the origin of all earthly government. It should also be noted here that the doctrine of the divine right of kings partially inspired the social contract theory: John Locke dedicates his first *Treatise of*

Government to the overthrow of the "false principles and foundations of Sir Robert Filmer and his followers" (Locke 2003a, 1). The theorist in question, author of the work *Patriarchia*, was one of the most influential proponents of the divine right of kings, who defended this conception based on the claim of the divine origin of rulers.

Following the Bible, he claimed that Adam, as the father of all humankind, had absolute authority over his offspring. The implicit indivisibility between godly, kingly and fatherly authority will later lead not only Locke, but also other social contract theorists to examine these three sources of authority separately. Filmer, however, postulates that every state is an absolute monarchy, the consequence being that no man, whatever his birthplace, isn't free: seeing as men aren't free, they cannot choose either their rulers or forms of government (Locke 2003a, 8).

The assumption of the natural freedom of mankind, therefore, according to Filmer's argument, constitutes a denial of Adam's creation (Locke 2003a, 14). This conclusion leads Locke to ask the question: what does Adam's creation, which boils down to his having been created, have with his acquiring sovereignty over anything (Locke 2003a, 14)? Filmer broadens this claim, explaining that Adam, though he had no formal title, was nonetheless the ruler of his offspring in practice (Locke 2003a, 16). Locke, however, notes two issues with this thesis: to be a ruler "in practice" is, plainly speaking, to be none at all (Locke 2003a, 17). Furthermore, accepting the claim of Adam's absolute authority over his offspring would cause their paradoxical dual status as slaves (in relation to Adam) and absolute monarchs (in relation to their own offspring) (Locke 2003a, 46).

Filmer concludes his defense of absolutism with the claim that contemporary rulers, tracing their descent from Adam, have as much authority over their descendants and subjects as he had over his (Harrison 2003, 170). Locke points out that even if were to accept the entirety of Filmer's argument, we would be able to trace the descent of today's rulers to Adam (Locke 2003a, 74), which is why crowns and scepters belong to kings no more than they do their subjects (Locke 2003a, 65). Additionally, Filmer contradicts himself in certain instances: thus, for example, he postulates that the law is nothing more than the will of the one who bears the heavenly father's

authority (Locke 2003a, 12), only to later claim that the legitimate king is the bearer of absolute authority, however he managed to obtain it (Locke 2003a, 53), which essentially undermines the thesis of the transfer of divine authority through descent.

Jean-Jacques Rousseau also confronts the "detestable" theory of Sir Robert Filmer, claiming that a legitimate social order must recognize the distinction between the private and the public economy, a distinction that is fundamentally reducible to that between the state and the family (Rousseau 1994b, 6), which was recognized since the time of Aristotle. However, he primarily focuses on defeating the thesis that might makes right: in that regard, Rousseau agrees with Aristotle that some men are born for freedom and others for slavery (Aristotle 1998, 10), but claims that Aristotle confuses the cause and the effect: "If there are slaves by nature, it is because slaves have been made against nature." (Rousseau 1994a, 47)

The consequence will, as Rousseau further explains, change with the cause: surrendering to force is an act of necessity, not consent, which entails that a government founded upon force would vary in accordance with said force (Socrates used a very similar argument to counteract Thrasymachus' thesis in Plato's *Republic*) (Rousseau 1994a, 48). If we accept the opposite thesis, namely that all power comes from God, we have to ask ourselves if it's legitimate to seek the help of a doctor, given that all disease also comes from God (Rousseau 1994a, 49). Finally, if force is indeed the source of all right, would we not also be obliged to hand over all our belongings to a highwayman, given that his pistol also constitutes force (Rousseau 1994a, 48)?

"Since no man has a natural authority over his fellow", Rousseau concludes, "and since strength does not confer any right, it follows that the basis remaining for all legitimate authority among men must be agreed convention." (Rousseau 1994a, 49) This quote summarizes the essence of the social contract theory. Its goal was to reexamine the genesis of the state: starting with the typically named sources of government, its authors found their weaknesses through thorough analysis and exposed them through detailed critique. Without divine right or force as legitimate foundations of

government, only one possibility remains: a voluntary transfer of power to a collectively chosen political body.

The Classical Contract Theory

"Find a form of association which will defend and protect, with the whole of its joint strength, the person and property of each associate, and under which each of them, uniting himself to all, will obey himself alone, and remain as free as before. This is the fundamental problem to which the social contract gives the answer." – Jean-Jacques Rousseau (1994a, 54-55)

The previous analysis has demonstrated the central differences between the classical contract theory[2] and the doctrine of divine right of kings: both conceptions attempt to answer the question of the origin of the state but whereas one founds it upon divine will, the other establishes it upon human cooperation. This, however, leaves us with one crucial question: if government didn't always exist, how did humans function before its inception? For the doctrine of the divine right of kings, this is no issue: as we saw in Robert Filmer's theory, given that Adam is of divine descent, and that he had kingly and fatherly authority over his offspring, the first human 'state' was *de facto* created with the birth of Adam's sons, Cain and Abel, soon after the exile from heaven.

However, given that the social contract theory cannot afford the 'luxury' of directly referencing the Bible, insomuch as its speculative ambitions transcend the limits of Christianity, its description of the primordial state has to find a convergence between empirical fact and philosophical analysis. So, what are the fundamental characteristics of the state in which people live without an organized political body, with a will that rises above any individual or group under it? The main social contract theorists, Thomas Hobbes, John Locke and Jean-Jacques Rousseau apparently diverge considerably on this issue: we stress apparently, because a

[2] We use the term *classical* contract theory to distinguish its Enlightenment, version from the later, contemporary one, such as in the works of John Rawls or Robert Nozick.

detailed analysis in the next chapter will show the opposite: that despite the initial impression of divergence, there is no substantial conceptual disagreement between them.

Their point of undeniable agreement, though, is that the primordial state is called the state of nature, and that it is characterized by complete freedom: "To understand political power right, and derive it from its original", Locke explains, "we must consider what all men are naturally in, and that is a state of perfect freedom to order their actions and dispose of their possessions and persons, as they see fit" (Locke 2003a, 101). In such a state, according to Hobbes' view, "every man has a right to every thing; even to one another's body" (Hobbes 1996, 87); Rousseau points out that every man is born free, but is everywhere in chains, as well as that "Whereas the social order is a sacred right, and provides a foundation for all other rights. Yet it is a right that does not come from nature; therefore, it is based on agreed conventions." (Rousseau 1994a, 54, 55)

This, however, leads us to the following dilemma: if the state of nature is truly a state of complete freedom and independence, as the social contract theorists describe it, where does the need to transcend it arise from? Why would people, endowed with the right to all things, elect to subjugate themselves to any government, even a collectively chosen one? The answer to this question lies in an earlier quote from Hobbes, that Locke and Rousseau would also have to accept with accordance to their own theoretical postulates: complete freedom, that is, the right to all things, consistently interpreted, also comprehends the right to what isn't ours.

Of course, this can be problematized further: since, according to the social contract theorists, there is no government as a collectively recognized authority to litigate what belongs to whom, the categories of 'mine' and 'yours' can rightly be called into question. However, here we are sticking to the most rudimentary form of propriety: assuming that all humans are rational and functionally autonomous beings, we can minimalistically claim that, if nothing else, at least their own bodies belong to themselves. The aforementioned absolute freedom, or the right to all things, calls even this most rudimentary propriety into question.

One of the central questions of the social contract theory is certainly the question of nature of the state of nature: in other words, when to social contract theorists claim that people have absolute freedom in the state of nature, what kind of state are they actually describing? In the end, Robert Filmer himself would easily stand behind Rousseau's words that, though born free, man is "everywhere in chains" (Rousseau 1994a, 45). If there actually is a seemingly paradoxical agreement between the social contract theorists and the proponents of the divine right of kings regarding the non-existence of the state of nature, what is the point of even discussing it as a concept?

Here we have to problematize the question of nature of the state of nature based on a paragraph in Locke's second *Treatise of Government*. He first quite rightly points out that absence of evidence isn't evidence of absence: discussing the basic issues brought up against the concept of the state of nature, one, that history gives us no example of a people who lived in equality prior to forming a state, and, two, that, given that all people live under some government, they have no right to form a new one. Locke points out that, though history does not record the childhoods of soldiers in Xerxes' army, it is reasonable to assume that they once had to have been children (Locke 2003a, 143). This comparison is illustrative insomuch as the state of nature can be thought of as the infancy of mankind.

Further, quoting Josephus Acosta, the Spanish Jesuit missionary who preached in Latin America, Locke claims that no state ever existed in Brazil, Peru or Florida, and that people in those places lived in primitive communities, and elected temporary leaders in times of peace as well as war (Locke 2003a, 144). Hobbes only briefly touched upon the issue of the historical foundations of the state of nature, while Rousseau did not. For these two theorists, the evidence of its existence primarily comes from different sources: according to Hobbes, a return to the state of nature is imminent in cases of governmental collapse and civil war, which precisely illustrate the non-existence of a commonly recognized authority between men (Hobbes 1996, 7). Rousseau, however, considers the human existence in the state of nature to be akin to that of animals: they are few and scattered across a resource-rich land, and rarely come into contact, which is largely peaceful (Rousseau 1994a, 54).

Rousseau's case is additionally complicated by the fact that he brings forward two different versions of the state of nature and the social contract, namely in the *Discourse on Inequality* and *The Social Contract*. The simplest explanation for this dichotomy can be found in the fact that the *Discourse* was written as a contribution to the project of the academy of Paris that was aimed at explaining the origin of inequality; *The Social Contract*, on the other hand, is Rousseau's *magnum opus* – the central work of his political theory. With this in mind, the question that remain foggy in the works themselves can be answered by the circumstances of their inception: while the *Discourse* attempted to put forth the answer to the question of how existing inequality came to be, *The Social Contract* envisions the foundations of a just, equal and free society.

The central thread that connects the views of all three theorists is the legal status of interpersonal relations in the state of nature, or, more precisely, the lack thereof. Namely, seeing as all social contract theorists agree in describing the state of nature as the lack of a commonly recognized authority between men, it follows that disputes and conflicts cannot be resolved withing it: according to Locke, the lack of a common judge puts people in the state of nature (Locke 2003a, 144); in his absence, Rousseau assumes that "there is a point in the development of mankind at which the obstacles to men's self-preservation in the state of nature are too great to overcome by the strength that any one individual can exert in order to maintain himself in this state." (Rousseau 1994a, 54) Finally, Hobbes goes beyond this, calling the state without a commonly recognized authority between men a state of war (Hobbes 1996, 84). As we'll see in the next chapter, Locke strongly opposes his view of the state of nature; however, the critique that he offers isn't aimed at the essence of Hobbes' argument, but at his nomenclature.

It's clear, then, that, despite nuances of disagreement, the social contract theorists shared their opinions with regard to the fundamental elements of this conception: the state hadn't existed forever, but had to have been created at some point; despite the shared acceptance of Christian teachings, its genesis cannot be traced back to the original sin, but to the empirical circumstances that preceded it. These circumstances point to a state in which men, lacking a commonly recognized authority, cannot solve interpersonal conflicts:

the consequence is the long-term unsustainability of the state of nature that must hence be transcended through the social contract. In that regard, political theorist John Simmons views Locke's state of nature not as an empirical description of human behaviour, but as the specification of a normative state (Simmons 1989, 451): his interpretation can equally be applied to the ideas of Hobbes and Rousseau, though the description of human behaviour and the specification of a normative state aren't necessarily mutually exclusive.

The State of Nature – A State of War or Peace?

"Hereby it is manifest, that during the time men live without a common power to keep them all in awe, they are in that condition which is called war; and such a war, is of *every man against every man*." – Thomas Hobbes (1996, 84)

"And here we have the plain "difference between the state of nature and the state of war;" which, however some men have confounded, are as far distant as a state of peace, good-will, mutual assistance and preservation, and a state of enmity, malice, violence, and mutual destruction, are from one another." – John Locke (2003a, 108)

Seeing as the social contract theorists were in agreement with regard to the essence of the state of nature – that it is characterized by a lack of commonly recognized authority, the consequence of which is absolute political freedom and independence – it remains to be seen how this state actually functions. Here, it seems, we find the greatest divergence, especially between Hobbes and Locke. The quotes above illustrate the complete incompatibility of their positions: despite their parallel view of the state of nature on a strictly normative level, different understandings of human nature, derived from different empirical sources and, as we'll see later, postulated with divergent political goals, lead these authors to conclusions that create the impression of complete opposition.

According to Hobbes' view, humans are, by nature, relatively equal: this means that, no matter how much one man may be physically superior over others, they can defeat him, either through

cunning, or through alliance (Hobbes 1996, 82): "From this equality of ability, ariseth equality of hope in the attaining of our ends. And therefore if any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies" (Hobbes 1996, 83). He concludes that the unrealizable equal hope in the obtaining of the same ends, together with a lack of resources, results in permanent conflict: seen in this manner, the state of nature *is* the state of war, due to the fact that both terms describe essentially identical parameters and conditions of human existence.

To this, one could add Hobbes' famous dictum "man is wolf to man" (lat. *homo homini lupus est*); however, it's important to note that this quote from near the beginning of Hobbes' precursor to the *Leviathan, On the Citizen* (lat. *De Cive*), actually refers to the relation between the rulers of states, and not individual people in the state of nature (Hobbes 1998, 3-4). In *De Cive*, however, Hobbes is no milder in his understanding of the state of nature, writing that: "On the basis therefore of the foundation I have laid I show first that the condition of men outside civil society (the condition one may call the state of nature) is no other than a war of all men against all men; and in that war all men have right to all things." (Hobbes 1998, 11-12)

Compare this to Locke's view: the non-existence of government is still the foundation of the state of nature, but guided by a milder understanding of human nature, supported by historical examples of rudimentary communities, he describes this state as the state of common human life in line with reason: "But force, or a declared design of force, upon the person of another, where there is no common superior on earth to appeal to for relief, is the state of war" (Locke 2003a, 108). Within the same paragraph, Locke elaborates further: while the non-existence of a common judge puts people in the state of nature, "force without right, upon a man's person, makes a state of war, both where there is, and is not, a common judge." (Locke 2003a, 108)

While Hobbes, then, reduces the state of war to the lack of a common government, Locke defines it through the unjust use of force. It's clear how, based on Locke's argument, one can deduce a justified distinction between the state of nature and the state of war. It isn't clear, however, how one can, within the normative domain of the state of nature, establish a distinction between just and unjust, or

what it is exactly that causes the kind of human behaviour that leads to the degradation of the state of nature into a state of war. Regarding the first question, Hobbes tells us the following: "*justice is the constant will of giving to every man his own*." (Hobbes 1996, 96), in cases where, due to the non-existence of the state, every man has a right to every thing, nothing is unjust (Hobbes 1996, 96).

Locke disagrees with Hobbes even in this regard, at least nominally: according to his view, the man who kills another makes himself the enemy of all mankind through his act of unjust violence (Locke 2003a, 104). From this, however, it follows that even if a murderer can be rightly punished in the state of nature, that punishment, for lack of a common power, still constitutes an act of war against the offender, seeing as there is no earthly authority for him to appeal to for help (Locke 2003a, 109). At this point, we come to the root of the essential convergence between Locke's and Hobbes' views: though these theorists define the state of nature and the state of war differently, their understanding of conflict in the state of nature is functionally identical: when it erupts, the non-existence of a higher authority that could resolve it necessarily results in war, in which the divergence in defining just and unjust loses its importance.

This, however, still leaves us confused with regard to the second question regarding the divergence between Hobbes and Locke: if the state of nature and the state of war are essentially different, as Locke claims, what is it that causes the kind of behaviour that results in the state of war? The answer to this question, which additionally supports Simmons' earlier mentioned interpretation of the state of war, is to be found in a relatively obscure paragraph from the *Leviathan*, which directly follows Hobbes' description of the state of nature as the war of every man against every man and represents its explanation: "For as the nature of foul weather, lieth not in a shower or two of rain; but in an inclination thereto of many days together: so the nature of war, consisteth not in actual fighting; but in the known disposition thereto, during all the time there is no assurance to the contrary." (Hobbes 1996, 84)

The 'disposition to fighting' and 'lack of assurance to the contrary' have to be particularly highlighted here because, disagreement in definitions notwithstanding, they still represent the

essential common element of not only Hobbes' and Locke's, but also Rousseau's understanding of the state of nature. These elements are inextricably linked, because the disposition to fighting necessarily grows out of a lack of assurance to the contrary: the only thing that could provide that assurance is a commonly recognized and accepted government, that would not only have the authority to offer solutions that opposing parties might accept, but also the force to uphold solutions that opposing parties cannot refuse.

Its non-existence is, as Locke points out, what puts people in the state of nature (Locke 2003a, 144), and the state of nature is necessarily the state of war, at least in the potential sense, insomuch as the lack of a governing authority by itself creates the disposition toward fighting, even in conditions of relative plentitude. Recall that, in Locke's view, though it is possible to punish a murderer in the state of nature, that punishment, even if right, still constitutes an act of war against the offender (Locke 2003a, 109). The reason for this is exactly what Hobbes bases his own elaboration of the state of nature upon: the lack of a common power. It's important to point out here that the issue of human nature and misery in the state of nature are of no particular consequence for this thesis: let's assume that, instead of many things, there was only one over which humans would fight one another – this alone is enough for the state of nature to degenerate into the state of war, which in itself illustrates the fact of the potential permanence of the state of war where there is no common authority.

All this leaves us with one crucial question: if Locke's and Hobbes' views are substantially a lot closer than their formal differences imply, where do those differences originate from? In other words, if Locke really does have more points of agreement than disagreement, how do we explain his particular effort to distance himself from Hobbes' conception of the state of nature, bearing in mind that his quote on the difference between the state of nature and the state of war is a direct critique of Hobbes, and that Locke also explicitly critiques him in the second *Treatise of Government*? If we hold to Simmons' interpretation – namely, that the description that Locke offers is primarily the specification of a normative condition, rather a description of human behaviour, the distinction between him and Hobbes essentially disappears.

However, if we consistently interpret Locke himself, this clearly wasn't his goal – quite the opposite, though he would have to admit that, despite positive factors, war is inevitable for lack of a common power, he prioritized disagreeing with Hobbes, primarily on the level of human nature, which he interprets as reasonable and oriented toward cooperation (Locke 2003a, 108). Further, let's remember that even Rousseau, who not only shares Locke's benevolent view of human nature, but also considers the state of nature a state of plenty, still assumes that it becomes inhospitable for human life at some point, which makes entering into the social contract existentially necessary (Rousseau 1994a, 54).

It is important, however, to point out Rousseau's formal critique, both of Hugo Grotius, the Dutch jurist and legal theorist, and of Hobbes, whom he 'puts in the same basket' as Grotius, primarily with the claim that, were they faced with the belief that the human race belongs to a hundred men, or that a hundred men belong to the human race, they would both lean toward the former (Rousseau 1994a, 47). The primary goal of Rousseau's critique is countering Grotius' justification of slavery as a result of conquest: the reason why Hobbes is included here is most likely due to his 'overly sharp' description of the state of nature, drawing the equivalence between the state of nature and the state of war in particular. Rousseau opposes his views on an empirical level, claiming that human contact in the state of nature is too rare and infrequent to be viewed as either a state of peace or war (Rousseau 1994a, 51), but his primary critique is terminological.

Namely, Rousseau states that a private war between two individuals cannot exist, whether in the state of nature, where no permanent property exists, or in the civil state, in which everything is under the control of laws (Rousseau 1994a, 51). Further, fights, duels and other chance encounters aren't actions that produce a permanent state of affairs and hence cannot be described as war.[3] Finally, he concludes that the civil state is the precondition of war, and that even within it, war cannot be a relation between individuals,

[3] Here, Rousseau doesn't hesitate to comment on private wars that were, due to material and legal circumstances, a frequent occurence under feudalism: according to his view, feudalism is an "unjust and absurd form of government that degrades the human race" (Rousseau 1994a, 127).

but states, while individuals within it become enemies, not as men, or even as citizens, but as soldiers (Rousseau 1994a, 51).

Here, then, we have another substantial agreement with Hobbes that is, as in Locke's case, overshadowed by a formal disagreement: Rousseau offers a different definition of war, limits it to the civil state and the relation between states, but still recognizes that human life in the state of nature becomes unbearable, necessitating its abandonment. While Locke considered the state of nature a state of peace, Rousseau denies is both the characterization of peace, or war, but both equally agree with the normative state of things that Hobbes postulates: the lack of government, like bad weather, is characterized not by constant rain, but the inclination of several days thereto – an inclination that, in the political parallel, has to be overcome through the social contract, due to existential necessity.

The Right of Nature and the Law of Nature

"The right of nature, which writers commonly call *ius naturale*, is the liberty each man hath, to use his own power, as he wills himself, for the preservation of his own nature; that is to say, of his own life ... a law of nature, (*lex naturalis*,) is a precept, or general rule, found out by reason, by which a man is forbidden to do, that, which is destructive of his own life, or taketh away the means of preserving the same." – Thomas Hobbes (1996, 86)

In the previous chapters, we established the agreement between social contract theorists regarding the description of the state of nature as the state of complete political freedom and independence; we then analyzed the 'dark side' of this freedom – the fact that its absolute character leads to the permanent insecurity of life due to the insolvability of conflicts in the absence of higher political instances that would be empowered to give judgement. We explained that this state, independent of scarcity or plenty, or the mildness or severity of human nature, makes human existence unmaintainable long-term. What remains is to examine the legal character of the state of nature.

Of course, it is clear this term may legitimately sound absurd: namely, if there is no authority or government that would establish laws according to which we may determine what belongs to whom, can we speak of any right at all? According to Hobbes, "A crime, is a sin, consisting in the committing (by deed, or word) of that which the law forbiddeth, or the omission of what it hath commanded." (Hobbes 1996, 193) With this in mind, one could say that a discussion on the status of right and law in the state of nature simply has no place. However, it's important to point out that, no matter the limitation of its domain, it still does necessarily exist: namely, as we've previously seen in Hobbes, the very fact that the non-existence of the state entails that every man has a right to every thing (Hobbes 1996, 87) already comprehends the existence of a certain legal status, no matter how minimal.

Nonetheless, he does not stop there, but develops a complex theory of normativity based on the state of nature that, in the final instance, makes the very foundation of the doctrine of natural right. According to the quote from the *Leviathan* at the beginning of this chapter, we see that Hobbes defines natural right as the freedom every man has to his own power, as he wills it, for the preservation of his own life (Hobbes 1996, 86). In *De Cive*, he phrases it a little differently, but the essence is the same: "Therefore the first foundation of natural *Right* is that *each man protect his life and limbs as much as he can*." (Hobbes 1998, 27) By itself, this doesn't seem problematic: since it follows that, for lack of any outside legal or political restrictions that characterizes the state of nature, everyone has a right to everything, it is clear that each man can also exercise that right for his own self-preservation.

The law of nature, which Hobbes defines as a principle according to which it is forbidden for a man to take any action that is destructive of his own life, or that takes away the means of preserving thereof (Hobbes 1996, 86), however, does not follow directly from the circumstances of the state of nature, but is indirectly connected to it. Namely, while the social contract theorists agree that the state of nature cannot be maintained permanently, they still leave open the possibility of its duration (no matter how short), which inevitably leads to another question: how is it that humans are able to survive in the state of nature, regardless of its duration, especially when taking

into consideration the circumstances of scarcity and tendency toward conflict that characterizes Hobbes' interpretation?

The answer to this question lies in the law of nature: though the severity of outside circumstances and the non-existence of government place people in the state of nature, which has a tendency to degenerate into the state of war, human possess certain rational inclinations even in this state, and they guide them toward cooperation with (or at least non-violence toward) others, which can all be boiled down to the need for self-preservation, which is within the domain of the right of nature. Philosopher and historian of ideas Leo Strauss notes that Hobbes bases his conception on Machiavelli's realism and his critique of the utopian tradition: his goal was to preserve the law of nature, but liberate it from the idea of human perfectibility. In Strauss' words, "only if natural law can be deduced from how men actually live, from the most powerful force that actually determines all men, or most men, most of the time, can it be effectual or of practical value." (Strauss 1965, 12)

With this criterion in mind, Hobbes situates the law of nature withing the broader theoretical context with the aim of explaining the possibility of survival in the state of nature: despite the scarcity of resources and the severity of the nature of man, coupled with the non-existence of government, men can, at least for a time, survive in the state of nature because their reason represses their tendency toward conflict that would inevitably lead to their extinction. In this regard, Hobbes points out that the first law of nature postulates that, in order to preserve one's own life, one ought to strive toward peace, and to use any and all means of war is peace is unobtainable (Hobbes 1996, 87);[4] the second is that man should abandon his right to all things and settle with the same amount of freedom that he would allow others from himself (Hobbes 1996, 87).

Here, however, we first have to examine the normative condition of the law of nature, according to Hobbes' view: namely, what exactly does it mean that the state of nature forbids man from abandoning the means of preserving his own life, or that it compels

[4] This 'first' law of nature is further reinforced in *De Cive*, where Hobbes writes that "*to seek peace when some hope of having peace exists, and to seek aid for war when peace cannot be had, is a dictate of right reason, i.e. a law of Nature*" (Hobbes 1998, 31).

him to strive toward peace, especially bearing in mind that the state of nature is the state of absolute political freedom? The philosopher A. G. Wernham offers us the answer to this question: the freedom that stems from the circumstances of the state of nature is *political*; the freedom limited by the law of nature is *ethical*: if in the state of nature, person A wants to attack person B who does not pose a threat to them, A *can* attack B in the first sense (political freedom), but *isn't allowed* to attack them (ethical freedom) (Wernham 1965, 119).

Beside the aforementioned basic two, which deal with striving toward peace when possible and abandoning the right to all things, Hobbes names a number of other laws of nature: fulfilling obligations, practicing gratitude, mutual accommodation, the ability to forgive, regard for future good when taking revenge, abstaining from insulting, suppressing one's own pride and arrogance, equality, etc. (Hobbes 1996, 95, 100-103) All these laws are aimed at enabling and improving human social life: since they follow from the right of nature and the fundamental law of nature, it's not necessary to announce them, since the whole world is in agreement with regard to them and they can be summed up with a negative version of the famous golden rule in ethics: "*Do not that to another, which thou wouldest not have done to thyself*." (Hobbes 1996, 104)

Locke's conception of the law of nature is very similar to Hobbes', barring the fact that in his case, there is a stronger connection between the right of nature and the law of nature: much like Hobbes, Locke points out that in the state of nature, man has complete freedom with himself and his property, but doesn't have the right to destroy himself (Locke 2003a, 102). In this regard, he points out that, though the state of nature is a state of *freedom*, it is not a state of *licentuousness*: it is governed by the law of nature which obliges all men to refrain from harming the life of another, as well as his health, liberty and property (Locke 2003a, 102). The connection between the law of nature and the right of nature is stronger in this case, because the entire domain of natural rights falls within the purview of the law of nature is protected by it.

This seemingly leads us off-track from progressing toward the social contract that was necessitated by the state of nature: namely, if the law of nature truly compels everyone toward cooperation equally, is the state of nature really unmaintainable and is the social contract

necessary? Though formulations again differ, social contract theorists again substantially agree on this issue: the power of the law of nature is, sadly, limited: while Locke appeals to men to follow it (Locke 2003a, 102), Hobbes points out that, while natural and state laws have many parallels, natural laws aren't real laws, but merely virtues that guide men toward peace and obedience (Hobbes 1996, 177); these virtues, however, run contrary to our natural passions and therefore, cannot give any guarantees without the fear of an outside power that would compel men to uphold them (Hobbes 1996, 111). And since they aren't obligatory, they aren't sufficient, which brings us back on track to the inevitable need to transcend the state of nature through the social contract.

THE SOCIAL CONTRACT

"Since no man has a natural authority over his fellow, and since strength does not confer any right, it follows that the basis remaining for all legitimate authority among men must be agreed convention." – Jean-Jacques Rousseau (1994a, 49)

The previous analysis has demonstrated that, according to the shared understanding of the social contract theorists, the long-term survival of mankind in the state of nature isn't feasible. Whether the state of nature is that of war or peace, whether human nature is severe or mild, whether resources are plentiful or scarce, or the law of nature is a universal moral principle or merely a virtue, Hobbes, Locke and Rousseau are unanimous in their view that the state of nature is unmaintainable and that human life within it is uncertain. Despite their formal disagreements, the substantial element that all three authors share with regard to the state of nature is that all of its defects for human life proceed from the same source – the non-existence of a commonly recognized authority that would be endowed with the power to make laws and pass judgement.

The weight of this problem, of course, varies with the positions of the authors regarding the nature of man, resources and relations: while Rousseau, on the one hand, considers the state of nature that of peace and plenty, marked by rare and amicable human interactions (Rousseau 1994a, 51), Hobbes, on the other, makes clear that the bellicose character of the state of nature necessarily leads to the non-existence of industry, culture, and knowledge: according to his famous quote, human life in the state of nature is "solitary, poor, nasty, brutish, and short" (Hobbes 1996, 84). When to this we add Locke's description of the state of nature as a state of peace and cooperation, the impression of a confusing mosaic of ideas with few common elements can easily emerge. It's indisputable, however, that they all agree on the one essential factor – the necessity of overcoming the state of nature, independently of its specific, variable circumstances and conditions.

What remains to be examined, then, is what exactly this transition would look like, and what would enable it. But to understand it accurately, we first have to look into Hobbes', Locke's and Rousseau's understanding of political power, the state, and sovereignty. While analyzing these issues, it's important to keep in mind that authors of the classical contract theory didn't have the definitions of these phenomena that we now possess in the social sciences, and that their views in a way represent the 'rounds of the ladder' to what would later become common knowledge.

The social contract theorists' understanding of these concepts is somewhat explicated by the titles of their works: Hobbes' *Leviathan* (named after a monster in the Holy Bible) (Hobbes 1996, 212) is a synonym for the state. Locke's first *Treatise of Government* is, as we'll recall, dedicated to the overthrow of the "false principles and foundation of Sir Robert Filmer and his followers", and the second to the "true original, extent, and end of civil government" (Locke 2003a, 1). Finally, Rousseau's *Social Contract* directly references the central element of all three theories.

Let's begin, then, with Hobbes' understanding of fundamental political terminology. Famed for the accuracy of his definitions, in epistemology, as well as philosophy of politics, he espouses an early form of organicism in his interpretation of a political community: according to his interpretation, the state is no less than an imitation of man – an artificial man, where the sovereignty is the soul, the magistrates – the joints, etc. (Hobbes 1996, 7) Consistently following this metaphor through to the end, he sees social peace as health, unrest as disease and civil war as death. In all this, the central element is the artificial character of the state and all its elements, which is best illustrated by Hobbes' comparison of men to ants and bees.

He first claims that certain irrational beings (ants and bees, whom he, following the footsteps of Aristotle, lists as political beings) naturally live in society, though they have no means of communication and coordination.[5] He the proceeds to explain why the same cannot be true of humans: they are always in competition

[5] At the time, the concept of pheromones that insects use to communicate with one another was unknown.

with one another; besides, irrational animals cannot find fault with the current government, and hence, cannot fight to replace it, as they are unable to differentiate between the private and public spheres; lastly, Hobbes adds to this the rudimentary means of communications that cannot be used to manipulate and foment revolt (Hobbes 1996, 113).

Hobbes goes into greater detail on this topic in *De Cive*, where he explains that Aristotle's famous maxim, that man is a political animal (Greek *zoon politikon*), while widely accepted, is nonetheless false, and proceeds from a superficial view of human society (Hobbes 1998, 22). Men join one another not out of love, but in pursuit of mutual advantage: they need society to live as infants and need it to live well as adults; hence, all men are born unfit for society and "very many" remain so as adults to mental illness or lack of training, but both infants and adults have the same human nature: "Therefore, man is made fit for society not by nature, but by training." (Hobbes 1998, 25)

According to his conception of the state as an artificial man, Hobbes defines the social contract as the joining of many into one person for the purpose of creating the great *Leviathan*, or *mortal God* (Hobbes 1996, 114). Though he does not offer a definition of the state outside of the human body metaphor, he points out at the very end of his magnum opus that the primary cause of the collapse of states is their imperfect foundation, which is primarily reducible to a lack of absolute and arbitrary legislative power (Hobbes 1996, 470). As we'll later see, the idea that legislative power ought to be absolute and arbitrary can be called into question based on Hobbes' own understanding of fundamental rights.

Locke defines political power as the right to enact laws and establish punishments, regulating and maintaining property, and the defense of the state, "and all this only for the public good" (Locke 2003a, 101). He derives political power from the state of nature, which he believes to be the only way for it to be understood properly: while people have absolute freedom in it, they do not have absolute and arbitrary power over others (Locke 2003a, 103). This opposition to absolute power translates to Locke's understanding of the political community, in which he insists that absolutism is worse than the state

of nature, since in the later, there is at least a rudimentary balance of power between men (Locke 2003a, 105).

On the social contract, Locke tells us the following: since all men in the state of nature have the executive power of the law of nature, its transfer to the community is necessary for the creation of society. Further, he explains that, wherever humans live without an organized political body, they are still in the state of nature, no matter the level of their association (Locke 2003a, 138). Finally, Rousseau shares Hobbes' position on sovereignty (Rousseau 1994a, 63, 67), even using a similar metaphor and, according to his belief that human life in the state of nature becomes unfeasible at some point, establishes the necessity of forming the social contract, which, in his view, consists in transferring all rights to the community (Rousseau 1994a, 55).

The transfer of rights and the issue of its extent will be analyzed in a separate chapter; it now remains to briefly examine sovereignty, particularly in regard to Hobbes' and Rousseau's agreement on the matter. Namely, it is interesting that, though these two authors have vehemently opposing viewpoints in regard to the state of nature and state order, with Hobbes being a proponent of absolutism (Hobbes 1996, 470), but necessarily absolute monarchy,[6] while Rousseau champions direct democracy (Rousseau 1994a, 66), their understanding of sovereignty is practically identical: both see it as inalienable, indivisible (Hobbes 1996, 116, 120), and untransferable (Rousseau 1994a, 63-65).

This interesting phenomenon can be explained by the fact that Hobbes and Rousseau, despite their many disagreements with regard to the character of the state of nature, or the optimal form of government, tried to find the essential characteristics of political power, which, when realized, make up the state. What they discovered, independently of their value-based disagreements, is that a political body becomes a state when it creates a government that,

[6] Hobbes certainly favoured absolutism as a political system, which led some authors to harshly condemn his "despotical doctrine" (Tarlton 2001); it is necessary, however, to differentiate between Hobbes' favouring of absolutism and his defining sovereignty as absolute, regardless of whether the state in question is a monarchy or a democracy, though he points out that a popular assembly may seem absurd as a sovereign (Hobbes 1996, 121).

being the highest instance of power, cannot be taken away from that body, as well as that the sovereignty that it possesses, as its defining factor, cannot be shared with other bodies, nor transferred to them, except in cases of delegating authority to the lower organs of government, for which purpose they serve an executive role.

It's interesting to note here that Hobbes and Rousseau, besides sharing positions on sovereignty, also nominally agree with regard to the tripartite separation of powers as described by Montesquieu (Montesquieu 1989): Hobbes, namely, claims that the separation of powers leads to civil war (Hobbes 1996, 120), while Rousseau describes it as a concept that theorists use to confuse citizens. Their agreement is nominal, though, since Rousseau simultaneously recognizes that, unlike laws which are within the domain of the general will of the body politic, governmental decisions such as declarations of war aren't laws, but their application (Rousseau 1994a, 64-65), which opens his theory to at least the separation of powers between the legislative and the executive.

The Creation of the State

"Now as men cannot generate new strength but only unify and control the forces already existing, the sole means that they still have of preserving themselves is to create, by combination, a totality of forces sufficient to overcome the obstacles resisting them." – Jean-Jacques Rousseau (1994a, 54)

With the terminological distinctions of the social contract theorists in mind, it remains for us to examine exactly how the process of establishing the social contract works. According to the differences in their understanding of the state of nature, they posit different conditions of its overcoming. In this regard, perhaps the most memorable is Hobbes' account of life in the state of nature as "solitary, poor, nasty, brutish and short" (Hobbes 1996, 84). Due to the burning need to overcome such a state, his criteria for establishing the social contract are the mildest: Hobbes insists merely on a majority vote, with the minority that voted against the contract having to accept it the same as the majority that voted for it (Hobbes 1996, 115).

This leads us to Locke's critique of Hobbes: let's remember, first of all, that he favours the state of nature over absolutism, since there is somewhat of a balance between the powers of men in it (Locke 2003a, 105). He later develops this concept further, opposing Hobbes' defense of absolutism (Hobbes 1996, 123, 470): "To ask how you may be guarded from harm, or injury, on the side where the strongest hand is to do it, is presently the voice of faction and rebellion: as if when men quitting the state of nature entered into society, they agreed that all of them but one should be under the restraint of laws, but that he should still retain all the liberty of the state of nature, increased with power, and made licentuous by impunity. This is to think that all men are so foolish, that they take care to avoid what mischiefs may be done them by pole-cats, or foxes; but are content, nay think it safety, to be devoured by lions." (Locke 2003a, 140)

Hobbes, however, foresaw this kind of critique: having described the state of nature as the state of war, he noted that such a harsh description may sound strange to someone who hasn't examined these issues thoroughly. May such a man ponder, Hobbes recommends, why he travels armed and in the company of others; why he locks the doors before going to sleep, and why, even in his own house, he locks his coffers, all that knowing that police and laws exist to protect him: "Does he not there as much accuse mankind by his actions, as I do by my words?" (Hobbes 1996, 84-85)[7] But, as he explains further, "neither of us accuse man's nature in it." (Hobbes 1996, 85): the desires and passions of men are in themselves no sin; nor are the actions that proceed from them, until a law is enacted that forbids them, and that law cannot exist until people agree upon a sovereign that shall make it (Hobbes 1996, 85).

It's also important to note here that Locke's critique of Hobbes doesn't take into consideration the aforementioned distinction between Hobbes' favouring of absolutism as a social order and defining sovereignty as absolute: namely, though his position that absolute monarchies are the best form of government is indisputable (Hobbes 1996, 124-127), he still recognizes the division

[7] In *De Cive*, Hobbes gives the exact same example, but ends it with the question "Can men express their universal distrust of one another more openly?" (Hobbes 1998, 10-11)

of government (according to the number of executives) to monarchy, aristocracy and democracy (while also pointing out that their so-called "defective" forms – tyranny, oligarchy and anarchy – aren't distinct forms of government, but merely names for the former three, when misliked) (Hobbes 1996, 123); however, Hobbes makes clear that sovereignty must be absolute, regardless of whether a state is ruled by a king, a council, or an assembly. Locke apparently misses this element when claiming that, according to Hobbes' view, men, when forming the social contract, all except one become bound by laws, and that the one becomes "licentuous by impunity".

It's undoubtable, however, that Locke's critique and Hobbes' preemptive defense remain divided, given the fact of their different interpretation of the state of nature: though they agree on the central element – the necessity of its overcoming – the theoretical discrepancies between them remain too great for them to be able to agree on the means of overcoming it. Locke, whose view of the state of nature is significantly milder than Hobbes, insists that men, being free and equal, can only create a society through the agreement of every individual, and that only later decisions can be made by a majority vote (Locke 2003a, 142).

Rousseau is in agreement with Locke in this regard: continuing on from his critique of Grotius, according to whom a people can willingly give themselves over to a king, he points out the error in thinking that a people can even become a people before choosing a king (Rousseau 1994a, 53-54). Instead, he claims that, since it would be illegitimate to impose upon the minority without its consent, the law of majority decision comprehends that a unanimity was reached at least once (Rousseau 1994a, 54): this unanimity refers, of course, to the decision by which the social contract is established and the state of nature overcome.

Given that the social contract is a somewhat abstract theoretical concept, an example of the establishment of which cannot be found in history, the issue of the social contract theorists' views on the explicitness of agreement remains to be examined. According to Hobbes, the state of nature in the literal sense – as that of a complete absence of government and of the war of every man against every man – has never existed, so the life of Indians, civil wars, and the relation between kings give us the best insight into it – not as a

general war between individuals, but as many individual wars between families, tribes and peoples (Hobbes 1996, 85). Hobbes thus does not examine the exact means of giving consent upon forming the social contract, but the implication seems to be that the act is explicit.

Examples that support this thesis can be found in several instances: first, Hobbes defines a contract as a mutual transfer of rights which, when applied to the transition into a state, implies explicit consent (Hobbes 1996, 89); besides that, he critiques Aristotle's defense of slavery, pointing out that the relation between master and servant wasn't established by a difference in wit, but by consent (Hobbes 1996, 102). Finally, Hobbes considers obtaining rule through conquest legitimate, in which case a defeated people submits in exchange for their lives (Hobbes 1996, 115). The issue of obtaining rule through conquest will be examined in the next chapter: its relevance in this context is merely tied to the fact that it gives us yet another example of explicit consent.

Locke also examines the question of the character of consent that people give when they form society: he first points out that, being born free, nothing can legitimately cause a person to submit other than his own consent (Locke 2003a, 152). Given that explicit consent is clear enough in itself, he considers the issue of implicit, tacit consent: the conclusion he arrives at is that in whatever case a person has not given explicit consent, they ought to be considered as having given it as long as they have possessions or a role in the political structure of a certain government (Locke 2003a, 152).

Finally, Rousseau approaches this issue more universally than Locke; what's more, his understanding of consent can be compared with Hobbes' conception of natural laws: he recognizes that the conditions of the social contract have never been formally announced (Rousseau 1994a, 55), but as in Hobbes' view of natural laws – that they are universal principles that need no formal recognition, but are approved by the whole world (Hobbes 1996, 180), Rousseau believes that the conditions of the social contract are fundamentally identical everywhere, and are as such recognized and accepted (Rousseau 1994a, 55).

The Transfer of Rights

"And this puts men out of a state of nature into that of a commonwealth, by setting up a judge on earth, with authority to determine all the controversies and redress the injuries that may happen to any member of the commonwealth." – John Locke (2003a, 138)

In the preceding chapters, we examined the terminological structure of Hobbes', Locke's and Rousseau's social contract theories, as well as the conditions of forming society. Now we will take on the issue of the relationship between individual contractors and the community that they are forming, that is, we will consider the issue of the transfer of rights. We will firstly take a look at several definitions formulated by Hobbes, and which are of a universal character, so can be applied to all three theorists, regardless of the normative differences.

Beginning with the claim that surrendering the right to a certain good comprehends giving up the freedom to prevent another from gaining the utility of that good, Hobbes points out that there is a difference between abandoning a certain right and transferring it: when abandoning a right, the subject cares not who will gain its benefits, whereas when transferring it, the subject surrenders it in favour of a given person or group (Hobbes 1996, 87-88). Based on this, Hobbes defines a contract as a mutual transfer of rights (Hobbes 1996, 89). Rousseau offers a similar definition, barring the fact that, instead of speaking of a contract in general, he refers to the social contract in particular, emphasizing that it entails mutual obligations toward other citizens, as well as to the state (Rousseau 1994a, 57).

In the context of forming the social contract, however, the issue isn't the transfer of rights from one person to another, or even from a person to a group, but that of a group to the political body that they are in the process of forming. Therefore, the most important question from a legal aspect becomes the content of the transferred rights: in other words, which exactly are the rights that people, when forming a community, transfer to the political body that is created by their joining. In order to fully and properly understand the answers that the social contract theorists offer to this question, we first have

to remember the foundation of this issue: namely, as we saw earlier in Hobbes, in the state of nature, every man has a right to every thing (Hobbes 1996, 87). Abandoning this right, which the law of nature compels us to for the sake of our long-term preservation (Hobbes 1996, 87), is an obvious foundation of the formation of the sate state; however, the question necessarily arises: which rights does the state get endowed with and which rights are transferred to it?

The social contract theorists share certain foundational agreements on this issue, but nonetheless have many disagreements. According to Hobbes' definition, to endow a man with sovereign power means to empower him to levy taxes for raising an army, as well as creating magistrates for civil administration (Hobbes 1996, 92). Locke agrees in this regard, but goes into somewhat more detail: according to his view, political power comprehends the right to enact laws and establish punishments (both capital and all lesser), regulating and maintaining property, employing the community executing laws, and defending the state from foreign attack, all for the common good (Locke 2003a, 101).

In the context of the transfer of rights, these definitions might come across as somewhat strange. Namely, thought it goes without saying that the state has to be endowed with the rights that Hobbes and Locke name in order to function, the concept of their transfer from individuals to the state seems confusing, given the fact that no man possesses these rights in the state of nature. In other words, the rights to levy taxes, enact laws, maintain an army or form magistrates aren't natural since these institutions don't exist in the state of nature: the question that naturally arises, then, is how these rights can be transferred and what their transfer exactly entails?

The root of the answer to this question is offered by Rousseau, who points out that, through the social contract, men lose their natural freedom and the right to whatever they want and can obtain, but gain civic freedom and the right of property over whatever they possess (Rousseau 1994a, 59). To this we should add Hobbes' interpretation of the law of nature, according to which, in the state of nature, it is imperative for men to strive toward peace whenever possible and that lasting peace can only be obtained by everyone's abandonment of the right to all things (Hobbes 1996, 87). However, we still have to ask the question: what does this have to do with the concrete rights that

Hobbes and Locke name as essential for the political power of the state that is created by the social contract?

Namely, though these rights depend on the existence of social institutions that they refer to, and, hence, cannot exist in the state of nature, they still can be reduced to one key aspect of the right to all things that Hobbes and Rousseau speak of: that is, of course, the arbitrary[8] use of force. It is exactly this right, in Hobbes' words, enables a man to have power over the body of another, or, in Rousseau's words, that enables him to obtain whatever he can. Hence, even though the rights to levy taxes, enact laws, or to raise an army don't exist in the state of nature, all of them can be transferred, via the social contract, to the state, simply by the universal abandonment of the right to the arbitrary use of force.

Of course, in itself, the act of abandoning the right to all things by all people striving to form the state does not result in its immediate creation: it is only the beginning of the process, the final instance of which is the forming of a government. In this context, Locke emphasizes that men form a community for the protection of property, which is only the first stage of the social contract, the second and final being the forming of a government and the election of magistrates. In Rousseau's view, all men, upon forming a community, give themselves and their resources over to it (Rousseau 1994a, 60); when this gets connected to his definition according to which people lose their natural and gain civic freedom, one can get the impression that, upon forming the social contract, individuals retain nothing of the right to all things and that all they have gets reduced to what Rousseau calls "positive legal acts" that make them the owners of certain goods and bar them from access to all others.

This takes us back to the 'state' model of the genesis of rights that we touched on in the introduction, according to which all rights are reducible to the laws of the state. As we'll see later, Rousseau, contrary to the implication of the claim above, is not a proponent of this model. As in the case of the contradictory thesis on the division of government and the infamous phrase "forced to be free" (Rousseau 1994a, 58), which actually only refers to the necessity of executing

[8] By "arbitrary", we are referring here to any instance of the use of force that isn't tied to self-defense. The issue of the legitimacy of self-defense in the social state will be discussed in the chapter on the right to life.

laws for the preservation of civic freedom, this is also one of his many obscurities the real meaning of which is resolved when viewed from the context of his theory as a whole. However, this definition does correctly represent the state model of the genesis of rights: even if its proponents were to accept the existence of natural rights, which, as we'll see, many didn't, they would necessarily have to argue for their complete abandonment and replacement by the positive rights created by the state.

The biggest obstacle to this interpretation is formulated by a quote of Hobbes' to which we ascribe the achievement of setting up the theoretical foundations of the doctrine of natural rights in the classical contract theory, and which will be presented and analyzed in great detail in the central portion of this book. The essence if his point is that, given that people enter into the social contract and transfer their rights to the state in order to enable lasting peace and prosperity, there are certain rights the transfer or abandonment of which does not contribute to this, which is why they cannot be foresworn (Hobbes 1996, 88).

War, Conquest and Slavery

"Conquest is as far from setting up any government, as demolishing a house is from building a new one in its place. Indeed, it often makes way for a new frame of a commonwealth by destroying the former; but, without the consent of the people, can never erect a new one." – John Locke (2003a, 178)

In the last portion of this chapter, we will take on the most controversial instances of the transfer of rights. War, conquest and slavery deserve a separate examination because, unlike the usual forming of a social contract, there is a characteristic element of severe coercion in these three instances which can potentially call into question the legitimacy of the transfer of rights. This interpretation, however, can be called into question, given that in certain theories (Hobbes' in particular comes to mind here), the very state of nature can be interpreted as a factor of extreme coercion, considering the severity of its description. Nonetheless, all three contractualists discuss these instances separately and, as we'll see, as in the case of

different criteria for forming the social contract, their stances in this regard also differ.

Let's begin, then, with Hobbes: according to his view, the state, besides by the social contract, can also legitimately be founded upon the conquest of an enemy, who willingly submit in exchange for their lives (Hobbes 1996, 115). He shares this position with Grotius, who develops it in much greater detail in his theory, while Rousseau sharply criticizes it in the first part of his *Social Contract*. Considering the process of gaining power through the act of conquest, Hobbes emphasizes that the conqueror becomes the ruler when the vanquished, either by words or other sings, submit so as to avoid death (Hobbes 1996, 134). The only condition is that the servant must retain his right to life and bodily autonomy; beyond that, his master may use him as he pleases.

However, Hobbes does point our that the source of the relationship between master and servant isn't *victory*, but *submission*: this means that, if a man is defeated and captured, though he becomes a slave, he may legitimately flee, or even slay his master (Hobbes 1996, 135). The thing that binds the servant to the master, the thing that morally prohibits him from escaping, is his own consent – a kind of contract – no matter the severity of circumstance it was formed under. Despite its rudimentary nature, this act does constitute a certain transfer of rights between servant and master: while the servant obliges himself to remain by his master's side and to abstain from causing him harm, the master obliges himself to not slay his servant, and to give him bodily autonomy. Lastly, in discussing different forms of government, Hobbes points out that territories occupied by aristocracies and democracies don't have the same form of government as their conquerors, but are ruled monarchically (the monarchy of one people over another) (Hobbes 1996, 127).

Locke's understanding of these issue is indirectly opposed to Hobbes': discussing war, conquest and slavery, he first emphasizes that a man, not having full rights over his own life (which is in the hands of God), cannot by contract make himself the slave of another. In this regard, he defines slavery as "the state of war continued, between a lawful conqueror and a captive" (Locke 2003a, 110). Here we can precisely identify the rift between Locke and Hobbes: namely, by using the term "lawful conqueror" in the context of the

continuation of the state of war, Locke makes it clear that under such conditions, there is no legitimate transfer of rights, by which a man can make himself a slave.

Despite this, however, there is an implicit parallel between Hobbes' and Locke's views: namely, when pointing out that forming any kind of contract means certain compromises on both sides, Locke, explains that contracting and slavery aren't compatible, which follows from the fact that a conqueror, in recognizing certain rights of the conquered as inalienable, necessarily does not hold absolute power over him. He illustrates this via a historical example regarding ancient Jewish and Greek civilization and their practice of drudgery. This form of servitude, that can probably be best described as 'debt slavery', involved men falling into servitude as a result of not being able to pay their debts; their masters, however, would have to liberate them at an agreed-upon point, and would be prohibited from killing or harming they while in his service (Locke 2003a, 110). The conceptual relationship between the conditions that Hobbes and Locke set up and the ancient legal systems is clear here.

Locke also differs from Hobbes on the issue of forming the state, or expanding territory through conquest: discussing this form of obtaining power, he compares it to demolishing a house and emphasizes that, though it creates space for a new political framework, conquest in itself cannot create that framework, since its establishment is contingent upon the consent of the people (Locke 2003a, 178). In Hobbes' interpretation, this consent would be in the surrender of a vanquished people to their conquerors, and the form of government would necessarily be monarchical, since the conquered would lose their right to self-determination.

Commonly recognizing the elements of consent and limited authority as the main conditions of the legitimacy of the relationship between master and servant, Hobbes and Locke certainly share substantial common positions on slavery, even when they terminologically disagree. Neither supports absolute slavery: while Locke considers it the continuation of war between the conqueror and the vanquished, Hobbes recognizes the right of the slave to flee, or even slay his master. Both, however, consider this relationship legitimate when the conquered, in exchange for retaining certain rights, submit to their conquerors by their own consent.

This is exactly what Rousseau strongly opposes: sharply condemning the positions of Hobbes and Grotius, who, according to him, lean toward the view that the human race belongs to one man (Rousseau 1994a, 47), he first directs his critique against Aristotle, who believed that some people are born for mastery and others for servitude (Aristotle 1998, 11). Rousseau writes that Aristotle was right, but that he mistook the consequence for the cause: "If there are slaves by nature, it is because slaves have been made against nature." (Rousseau 1994a, 47)

Rousseau recognizes that a thorough critique of slavery must be founded upon a correct understanding of rights in times of war, which in turn depends on the precise interpretation of the state of war. Recall that he saw the state of nature as neither a state of war, nor peace, since human contact within it was too sparce and permanent property did not yet exist (Rousseau 1994a, 51). Rousseau applies this interpretation to war in general, concluding that war in the social state cannot be a relation between men, since everything is regulated by laws. War, then, is a relation between things, not men.

Further, he considers situations that could be considered exceptions to this principle –private duels and feudal wars: these are relevant insomuch as duels as a matter of honor could end in the death of participants, though this wasn't a rule, and personal conflicts between feudal lords were often *casi bellorum* between states. Still, Rousseau emphasizes that private duels do not produce a permanent state of affairs, and that feudal conflicts were an abuse of an absurd system, contract to natural law and sound social order (Rousseau 1994a, 51).

War, then, is a relation between states: from this, it follows that individuals within it do not become enemies as *men*, or even as *citizens*, but as *soldiers*; not as members of their nations, but as their defenders. Rousseau infers from this that soldiers can be killed in war while bearing arms: when they lay them down, they become merely people again (Rousseau 1994a, 52). As such, they cease being the enemy of the conqueror who thus has no right over their lives, and hence they need not exchange their freedom for them. Based on this, Rousseau concludes that slavery, even when contracted, is the state of war continued between the conqueror and the vanquished.

This definition can sound very similar – essentially identical – to Locke's. However, it's important to pay attention to the subtle distinction between Locke's "lawful conqueror" and Rousseau's condemnation of even contracted slavery. Namely, though he defines slavery as the continuation of the state of war Locke makes an exception – drudgery – which, due to the fact that it isn't complete slavery, can be 'excused'. This means that, following in Hobbes' and Locke's footsteps, the necessity of the mutual transfer of rights, no matter how rudimentary, can give legitimacy to certain forms of slavery. Rousseau, however, is much more stern in this regard: his definition, though only subtly different terminologically, is opposed to all forms of slavery without exception, independent of whether they were formed through conquest alone, or consent in the form of submission. He concludes that a right to slavery is absurd, because *slavery* and *right* are contradictory and mutually exclusive.

THE DOCTRINE OF NATURAL RIGHTS

"Whensoever a man transferreth his right, or renounceth it; it is either in consideration of some right reciprocally transferred to himself; or some other good he hopeth for thereby. For it is a voluntary act: and of the voluntary acts of every man, the object is some *good to himself*. And therefore there be some rights, which no man can be understood by any words, or other signs, to have abandoned, or transferred." – Thomas Hobbes (1996, 88)

The comparative analysis of Hobbes', Locke's and Rousseau's social contract theory in the earlier chapters has, despite many surface-level disagreements and tonal opposition, affirmed the unanimity of these thinkers with regard to the essential, central elements of their works: before the dawn of civilization, humans lived without a common power on earth. Its non-existence carried with it the inability to solve conflicts; this state of nature, despite a certain functional longevity, isn't sustainable in the long-term and threatens the survival of humanity; its transcendence is necessary, and it require the social contract, the act by which the members of a community transfer their rights to a political body, creating sovereignty.

One of the most philosophically interesting and historically most influential questions regarding this theory is the issue of the status of rights that humans possess in the state of nature, of which some are transferred to the state upon forming the social contract. As we'll see later, positivist critics deny the existence of any rights in the state of nature: since state laws are the source of all rights, these can be no such things as natural rights. This way of thinking not only simplifies the philosophically complex question of the genesis of rights, but also inevitably stands for certain rights, both individual and collective.

Thus, for example, we obviously cannot speak of natural rights to healthcare, education or voting, since they are founded upon a long historical process of social development. The same can be said of the earlier mentioned rights to enact laws, raise armies or levy

taxes, the rights of the sovereign that clearly cannot exist in the state of nature. All this inevitably leads us to the question: how were the conditions for the creation of any of these rights even established, to which the contractualists would reply: through the social contract and the transfer of rights. Recall Hobbes' observation that in the state of nature, there is no industry, culture or knowledge (Hobbes 1996, 84): in this context, it means that all state rights, individual and collective, which were created through a long process of socio-cultural development, can causally be traced back to the social contract and the original transfer of rights.

What are these rights, however? Where do they come from and what are they limited by? These questions represent the fundamental dilemmas of the doctrine of natural rights and the central topic of this book. Let's begin with what the social contract theorists themselves tell us: according to Hobbes, the state of nature, defined by a lack of government, is necessarily that of war of every man against every man. In such a state, in Hobbes' words, "every man has the right to every thing; even to one another's body." (Hobbes 1996, 87) Locke tells us that in the state of nature, every man is judge and executioner (Locke 2003a, 137), while Rousseau writes that, beside natural freedom, everyone has a right to whatever they can obtain (Rousseau 1994a, 59). This *right to everything* indirectly proceeds from the normative circumstance of the state of nature: since there is no government that could enact laws which would determine what belongs to whom, everyone who has the power to obtain something also lays a legitimate claim upon that thing.

Here, however, we have to take into account the critique that could be laid against the social contract theory from the positivist perspective: namely, based on the fact that there is no government or law, it could indeed follow that everyone has a right to everything, but it could just as much follow that no one has a right to anything. Therefore, we have to ask ourselves what it is about the normative conditions of the state of nature that enables us to claim the former, rather than the later. To answer this question, we have to go back to Hobbes definition of natural right: "The right of nature, which writers commonly call *ius naturale*, is the liberty each man hath, to use his own power, as he wills himself, for the preservation of his own nature; that is to say, of his own life" (Hobbes 1996, 86).

We see, then, that right, independent of the existence of the state, is no mere abstraction: it is necessarily tied to certain – in the context of natural right – *existential* interest, which exists in the state of nature just as much as it does in the social state. According to Hobbes' view, which Locke and Rousseau would necessarily subscribe to in this context, men claim the right to things which are in their interest, which is why rights and interests cannot be separated, or examined independent of one another. Based on this, it becomes clear why, in the context of the normative character of the state of nature, we have to speak of everyone's right to everything, rather than no one's to anything

The doctrine of natural rights in the classical contract theory is, therefore, founded upon the idea that in the state of nature, absent a sovereign state, everyone has the right to everything. This, however, is merely marginally connected to its most important and defining element: the claim that certain elements of the right of nature are necessarily maintained even after forming the social contract. As we saw earlier, the act of the creation of state, the social contract, comprehends the transfer of rights from individuals to the community that they enter into and onto the government that they create thereby. However, in Hobbes' words, there are certain rights that cannot be either forsaken or transferred (Hobbes 1996, 88). These rights, which we can call *inalienable* or *fundamental* rights, are the rights to life, liberty and property.

It's interesting to not here that the natural rights tradition isn't the only one that recognizes a domain of individual rights that cannot legitimately be abridged. As we'll see in the chapter of the critique of natural rights, positivists, early liberals, and even early conservatives carve out certain individual rights that the government cannot legitimately infringe upon. However, this parallel still doesn't bridge the fundamental gap: though the 'state right' theorists recognize the individual domain, they view it merely as a subset of positive rights that the state grants to individuals. Individual rights, according to this interpretation, do not differ from collective ones in their foundation: the right to life, then, can be traced to the positive legal acts in the same way as the right to free elections or to levying taxes.

For social contract and natural rights theorists, this interpretation represents a great problem, especially if we take into account that one of their goals was undermining the legitimacy of feudalism, as well as other rudimentary social systems and forms of government. Therefore, if indeed there is no difference between various kinds of rights, and if the state is the source of them all, it can withhold them in the same way as it granted them. The legitimacy of such an action could certainly be called into question, but not based on a clearly formulated ontology and hierarchy of rights, which could enable the defense of political systems whose legitimacy was called into question in contractualist works.

In other words, natural rights theorists cannot be satisfied with the postulate that the social contract is the source of fundamental rights – the rights to life, liberty and property. Instead, these rights necessarily have ontological primacy in their view, since they not only predate the state, but must 'survive' its creation. This whole concept, however, remains abstract so long as a clear foundation for it isn't established: as we saw earlier, Hobbes, Locke and Rousseau agree on the existence of natural rights, but the equally important question of their source remains unanswered. To that end, we must first examine Hobbes' concept of the inalienability of natural rights, which laid the foundations of this doctrine as well as the different concepts of its origin.

Natural Rights and Fundamental Rights

"From this fundamental law of nature, by which men are commanded to endeavour peace, is derived this second law; that a man be willing, when others are so too, as far forth, as for peace, and defense of himself he shall think it necessary, to lay down this right to all things; and be contented with so much liberty against other men, as he would allow other men against himself." – Thommas Hobbes (1996, 87)

Regardless of their differing nuances in defining this concept, the social contract and natural rights theorists agree that, in the state of nature, everyone has the right to everything, but, as we've seen, they also insisted on the importance of abstaining from exercising it in every occasion and, more importantly, in transferring it through

the social contract. At the same time, however, Hobbes, Locke and Rousseau explicitly carve out a limited domain of individual rights that, unlike the right to everything, cannot be transferred, or abandoned. These rights – the rights to life, liberty and property are natural in the same way as the right to all things; what sets them apart from the latter is that their abandonment is unnecessary for the creation of society. Moreover, their maintenance by is actually a key criterion of legitimacy.

Thus, for example, Hobbes (Hobbes 1996, 88) and Locke (Locke 2003a, 110) explicitly call these rights *inalienable*, while Rousseau especially emphasizes their importance, claiming that the state was formed for their preservation, as is the case with the right to property (Rousseau 1994b, 32). It's important to note here again that the social contract theorists consider the rights to life, liberty and property natural in the exact same way as the right to all things: hence, it isn't their source, but the (il)legitimacy of their transfer or abandonment that sets them apart. This enables us to draw a philosophical distinction between the right to everything (which is natural, but the abandonment of which is necessary for forming the social contract) and the rights to life, liberty and property (which are also natural, but the inalienability of which is a basic criterion of legitimacy). Based on their domain, framework and role, we can call the rights to life, liberty and property *inalienable* or *fundamental rights*.

We have to examine, though, what it is that makes these three specific rights inalienable: if the natural right is at its core the right to all things, why is it that, upon its abandonment, the rights to life, liberty and property must remain within the individual domain of the contractors? In other words, why is it that these three – and only these three rights – are 'spared' in the process of the transfer of rights? In order to fully understand the specificity and limitations of fundamental rights, we have to start with the theory in which they were first conceived of: namely, Hobbes', in which these rights were discussed in great detail in the intro to the social contract. To avoid any mistakes in interpretation, here is Hobbes' passage in full:

"Whensoever a man transferreth his right, or renounceth it; it is either in consideration of some right reciprocally transferred to himself; or some other good he hopeth for thereby. For it is a

voluntary act: and of the voluntary acts of every man, the object is some *good to himself*. And therefore there be some rights, which no man can be understood by any words, or other signs, to have abandoned, or transferred. As first a man cannot lay down the right of resisting them, that assault him by force, to take away his life; because he cannot be understood to aim thereby, at any good to himself. The same may be said of wounds, and chains, and imprisonment; both because there is no benefit consequent to such patience; as there is to the patience of suffering another to be wounded, or imprisoned: as also because a man cannot tell, when he seeth men proceed against him by violence, whether they intend his death or not. And lastly the motive, and end for which this renouncing, and transferring of right is introduced, is nothing else but the security of a man's person, in his life, and in the means of so preserving life, as not to be weary of it. And therefore if a man by words, or other signs, seem to despoil himself of the end, for which those signs were intended; he is not to be understood as if he meant it, or that it was his will; but that he was ignorant of how such words and actions were to be interpreted." (Hobbes 1996, 88-89)

Let's go back to the connection between fundamental rights and existential interests: as we can see from this quote, Hobbes' understanding of inalienable rights stems directly from his definition of the right of nature as the right to life, or the right to whatever is necessary for its preservation (Hobbes 1996, 86). Since the preservation of his own person is his existential interest, a man, first and foremost, cannot forsake the right to life, which is in the most rudimentary sense, the right of resisting a forceful assault. However, this isn't all: insomuch as there are certain conditions on which the preservation of a man's life indirectly depends, there are other rights that cannot be abandoned, or transferred.

First among these is the right to liberty, which is the condition of a man's ability to use his own body with the aim of preserving his life. Beside it, however, there is another condition, equally important to the preservation of one's life, and hence, the realization of the right to life. This is the right to the "means of preserving life", that is, the basic necessities of life, like shelter, food, water, and such: this minimalist conception of the right to property was the first one developed in the social contract theory, and would later be much

expanded upon by Locke and Rousseau. However, in its initial form put forth by Hobbes, it is derived from the right to life and is conditioned upon it, and limited by it.

Hobbes' understanding of fundamental rights gives us the clearest insight into their specificity and the reasons why these very rights are carved out from the right to all things as the special, inalienable domain. These rights are directly tied to fundamental existential interests: life and the means of preserving thereof. His understanding of the genesis of rights is contrary to Locke's, though they are in agreement in regard to their content. In other words, though Hobbes and Locke agree on which rights are fundamental, they arrive at their status as such from different angles, which will become especially apparent in the analysis of the theological and secular conceptions of natural rights.

According to Locke, "freedom from absolute, arbitrary power, is so necessary to, and closely joined with, a man's preservation, that he cannot part with it" (Locke 2003a, 110). This stems from the fact that a man, not having power over his own life (which is in God's hands), cannot choose to become a slave, or give himself over to the absolute, arbitrary power of another (Locke 2003a, 110). In the later portions of the second *Treatise of Government*, Locke is more explicit on this issue: "yet it being only with an intention in every one the better to preserve himself, his liberty and property (for no rational creature can be supposed to change his condition with an intention to be worse); the power of the society, or legislative constituted by them, can never be supposed to extend farther than the common good" (Locke 2003a, 156). Lastly, he emphasizes that the state cannot have absolute and arbitrary power over people: since it is created by their joining, and since none of them has arbitrary power over his own life, liberty and property in the state of nature, they cannot transfer it (Locke 2003a, 159).

As we'll see later, Rousseau opposes Locke's theological conception of natural rights, but simultaneously explicitly recognizes a domain of fundamental rights; besides emphasizing the importance of the right to property and the key role of the state in its preservation (Rousseau 1994b, 32), he maintains that the life and liberty of citizens are necessarily separate from the public domain of the government, and that a distinction must be established between the duties that

individuals have as *citizens* and the natural rights that they have as *men* (Rousseau 1994a, 67). Also, much like Hobbes and Locke, he points out that people, being born equal, abandon their rights only in exchange for some good (Rousseau 1994a, 46).

This brings us back to the right to everything and the necessity of its abandonment for the forming of the social contract: in different ways, all three theorists recognize that it exists in the state of nature, as well as the fact that most aspects of it must be forsaken. Its transfer from each individual contractor is what enables the creation of the state and sovereignty. The specific domain of the right to all things whose abandonment is the central condition in this context is the right to the arbitrary use of force, which a person uses in the state of nature to, in Rousseau's words, gain "anything by which he is tempted and can obtain" (Rousseau 1994a, 46).

Since the existence of the state comprehends governmental sovereignty and permanence of property (as opposed to its temporary character in the state of nature), it is clear why the abandonment of the right to all things is an essential condition of its creation. This, of course, does not mean that the right to everything is any less natural than the rights to life, liberty and property; merely that it is unmaintainable in the social state. As we've seen in the chapter on the transfer of rights, its abandonment is the first step from nature to society – the foundation of the social contract and the state that proceeds therefrom.

The point in establishing a distinction between natural and fundamental or inalienable rights as their narrower domain, therefore, isn't in tracing their differing genesis, or diverse ontological levels. The right to all things differs from the rights to life, liberty and property not in its source, but in the legitimacy of its transfer: while that of the former is necessary, that of the latter is unjustifiable. All this, however, still reposes upon the assumption that these rights are indeed natural, which cannot simply be adopted without significant theoretical elaboration. What remains to be seen, then, is what makes natural rights *natural*.

Where do Natural Rights Originate From?

"For a man, not having the power of his own life, cannot, by compact, or his own consent, enslave himself to any one, nor put himself under the absolute, arbitrary power of another, to take away his life when he pleases." – John Locke (2003a, 110)

The social contract and natural rights theorists postulate that the state is founded upon the transfer of the rights that people possess independently of it, in the state of nature. However, the question inevitably comes up: what exactly in nature is the source of these rights? Seeing as no positive laws predate the state that rights could be founded upon, the social contract model must be able to provide a non-state source of rights.

As we'll see in the following two chapters, the attempts to to explain a natural source of rights can be categorized as either theological or secular. This categorization is based on the arguments used within a given conception on how natural rights originate. Due to the non-existence of the state and laws, the source of these rights can only be found in something that predates them and exists independently of them: in one interpretation, their source is God.

The other, however, is tied to a somewhat more abstract, but simultaneously less theoretically 'bulky' source. Namely, given that the state of nature is defined by the non-existence of the state and government, the secular interpretation of the source of natural rights is founded upon the circumstances that this state is characterized by. In other words, the secular alternatives to the theological conception do not attempt to base natural rights upon some entity that predates the state and is independent of it, but derive them from the very circumstances of the state's non-existence.

The Theological Conception of Natural Rights

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." – United States Declaration of Independence

Let us first examine the theological conception of the origin of natural rights: as we can see from the quote above, it was the one more widely accepted and historically influential. Given the fact that its creator, John Locke, was the most influential social contract theorist when it came to the doctrine of natural rights (Curran 2002, 64), it's not hard to understand why the theological conception can be seen as having no alternative.[9] Since Locke created the theological conception and was simultaneously the only social contract theorist to express it explicitly, we will treat his ideas here as its sole representation.

The reason behind this, beside his inarguable contribution, partially lies in the ambivalence of the other two theorists with regard to the issue of the existence of God: for example, in the first portion of the *Leviathan,* which primarily deals with epistemology, Hobbes defines the fear of an invisible power, conceived by the mind or imagined based on things that are publicly allowed *religion,* while those imagined based on things not publicly allowed, *superstition* (Hobbes 1996, 37). He simultaneously emphasizes that religion is real if the power we imagine is as we imagine it, however, this does not negate his explicitly skeptical regard of theological issues.

Rousseau's case here is perhaps even more problematic: though he emphasizes the importance of religion for social life, he simultaneously limits it to social life, implicitly denying its spiritual domain. This, he favours a civic religion (Rousseau 1994a, 158), the aim of which is not the salvation of souls, but the development of the moral character of citizens that will make the republic as a whole more successful. In that regard, Rousseau shares far more with Machiavelli (Machiavelli 1996, 36), whose political theory influenced him greatly, than with his own contemporaries.

On the other hand, Locke, despite his sharp critique of certain elements of Christianity, particularly the cruel methods of religious conversion (Locke 2010a, 4-5) is noted for his religiosity: in the debate with English theologian Jonas Proast, some of the elements of which will later be analyzed, Locke accentuates the importance of

[9] Critiques of the natural rights doctrine often point to the impossibility of proving the existence of God, or, as we'll see later, deriving 'ought' from 'is' as some of their central flaws, which implies regarding the theological conception of natural rights as the only one.

Christian virtues on many occasions, emphasizing its exaltedness and inevitable triumph over other religions, assuming their equal legal footing (Locke 2010b, 69). His commitment to Christianity is thus unquestionable, but in this context, it is relevant that he also points out that faith, even with the highest degree of assurance, isn't sufficient to produce knowledge – moreover, that nothing that can't be demonstrated, and isn't self-evident can produce knowledge (Locke 2010c, 171).

Let's take into consideration Locke's claim that man, not having power over his own life cannot, by contract or consent, make himself the slave of another, nor submit himself to the absolute and arbitrary power of another, or take away his own life (Locke 2003a, 110): here the emphasis must be placed on the first point – namely, that has no power over his own life. That power is, according to Locke's view, in God's hands. Beside that, though he is a social contract theorist, he claims that God created government to subsume the violence between men, for whom, seeing as they have executive power in the state of nature, it isn't reasonable to be judges in their own cases (Locke 2003a, 111).

Explicitly placing the rights to life and liberty within the domain of divine authority, Locke does the same with the right to property: "God, who hath given the world to men in common, hath also given them reason to make use of it to the best advantage of life and convenience." – every man is thus the owner of his own being, as well as the fruits of the labour of his body and hands (Locke 2003a, 111). Starting from this, he strives to show that people, regardless of the divine mandate of the common ownership over the world, still strove to create differences in property. However, this isn't directly relevant for the theological conception: as we saw, it comprehends that a person's life and liberty, and hence the property that is gained through the free disposition with one's own body is, in the highest instance, submitted to divine authority, and hence doesn't belong fully to the subject. Because of this, no man can abandon or transfer his rights to life, liberty and property.

At first glance, Locke's theological conception not only calls into question the theoretical foundations of natural rights that were laid out by Hobbes, but also seemingly endangers the secular reading of the social contract, which Locke explicitly supports: recall his

view that men, being free and equal, can form society only based upon an agreement that requires the consent of every individual (Locke 2003a, 142). The position that God "created government" to put an end to the violence between men is obviously not compatible with the above; however, this theoretical discrepancy can be explained away by Locke's specification that God gave man the incentive to seem the company of other men and form community (Locke 2003a, 133).

From this perspective, God's creation of government is direct, but indirect – he didn't create the state, but gave mankind the inclination toward association that would eventually result in the forming of the social contract. This, however, still leaves us with Locke's unique understanding of the source and status of fundamental rights: although, like Hobbes and Rousseau, he observes men as functionally autonomous, he doesn't tie the inalienability of their rights to life, liberty and property to their existential interests, but to divine will.

According to the theological conception of natural rights, therefore, all that exists – from the world to mankind, is God's creation and, hence, his domain. Since God, among other things, created rational beings, he also gave them the right to various aspects of his domain. Given that God's cause, according to the assumption that this conception is implicitly based upon, is the survival of mankind as his greatest creation, he gives humans not only the rights to the goods that satisfy their existential interests, but also the tendency toward forming society with the goal of overcoming the severe conditions of the state of nature.

All this, however, remains quite problematic, both within Locke's theory, as well as outside of it: recall his claim that nothing that can't be demonstrated, and isn't self-evident can produce knowledge (Locke 2010c, 171). Since the existence of God cannot be directly demonstrated, it *could* produce the knowledge that *would* confirm the theological conception of natural rights only *if* it were self-evident. Still, we know that this isn't the case in Locke's theory, given the fact that he introduces this distinction precisely in order to call into question the possibility of knowledge of God's existence.

Even within the boundaries of the theological conception, then, its foundations remain uncertain: in order to bake into a political

theory the claims that God creates mankind and the world, gives humans fundamental rights and makes them inalienable, one would first have to be able to prove that God *exists*. In spite of the numberless theological arguments offered throughout history, the question of God's existence as the implicit foundation of the theological conception of natural rights, remains unresolved, which makes the conception itself utopian, for lack of an adequate theoretical groundwork. However, is the case necessarily the same for the doctrine of natural rights as a whole? Or can a source of these rights that does not rely on unprovable assumptions and metaphysical entities be found?

Secular Alternatives to the Theological Conception

"Neither Locke nor Nozick was able to provide an effective argument demonstrating that Lockean natural rights can be derived from such values. This of course, does not mean that such arguments may not be found, and, indeed, such arguments constitute the holy grail of the natural rights theory." – John Hasnas (2005, 145)

The necessity of finding a secular alternative to the theological conception of natural rights can unequivocally be derived from the impossibility of proving the existence of God. However, due to the enormous difficulty of this undertaking, legal theorist John Hasnas justifiably calls it the *holy grail* of this theory (Hasnas 2005, 145). The only flaw that can be ascribed to his description here is the position that there can only be *one* alternative to the theological conception – namely, the one derived from fundamental moral values (Hasnas 2005, 145). As we'll see in this chapter, at least two are possible, and their sources, though they share a common foundation, are nonetheless very different.

We have to start by specifying the object of our analysis: namely, we have to begin from the identifying what exactly is a secular alternative to the theological conception of natural rights, or, more specifically, which criteria a given explanation of natural rights has to satisfy in order to be considered secular. At its foundation, a secular alternative to the theological conception first has to identify a source of natural rights without reference to unidentifiable

metaphysical entities, that is, it has to point to something within the state of nature itself that generates these rights; it then has to establish the sustainability of these rights, that is, the guarantee of the possibility of obtaining the goods they refer to, again while exclusively referring to the circumstances of the state of nature itself.

John Hasnas offers exactly this kind of conception: in the paper titled "Toward a Theory of Empirical Natural Rights", he first notes that, though the arguments for limited government based on inalienable rights are very convincing, their persuasive power can be no greater than that of the arguments for the existence of natural rights that they are based on (Hasnas 2005, 111). Based on this, Hasnas notes that, though Locke's arguments derived from natural rights are valid, they lose their persuasive power when applied to those who aren't convinced in the idea of the existence of natural rights (Hasnas 2005, 118). This leads him to try and construct an alternative conception that is founded empirically and makes no reference to metaphysical entities.

Hasnas begins by defining the general theoretical model of natural rights: the first step is to define the state of nature and the pre-political rights therein; then, the social contract is identified as the only deliverance from existential crisis; finally, the transfer of rights is limited according to the criterion of necessity for public power, and legitimacy is only recognized to those state that adhere to such limitations (Hasnas 2005, 112). He draws a sharp distinction between Hobbes' and Locke's social contract theory: according to his view, Simmons' description of the state of nature as normative (Simmons 1989, 451) can only be ascribed to Locke's theory (Hasnas 2005, 113).

According to Hasnas, Hobbes' state of nature is a state of complete lawlessness, while Locke's isn't, because there is a normatively binding law within it (Hasnas 2005, 113). Though he tries to defend Locke's understanding of natural rights, Hasnas explicitly critiques Locke's theological conception and claims that even his own secular argument, according to which there is a duty toward reciprocal mutual wellbeing (Locke 2003a, 102), has theological foundations, because it is based on the belief that God created men as equal (Hasnas 2005, 119).

Noticing inherent problems with the theological conception, Hasnas attempts to 'save' natural rights from problems that arise from the impossibility of proving God's existence. In the alternative he offers, people live without government, but have mutual arrangements (Hasnas 2005, 124). Hasnas claims that the risk of producers' property from a criminal minority leads them to attempt various measures of collective protection, which leads to the most effective model being kept (Hasnas 2005, 125). Based on this, he concludes that in the state of nature, natural rights are *solved problems* (Hasnas 2005, 127). Developing his empirical conception of natural rights further, Hasnas claims that the typical historical examples of the state of nature are ancient Israel and medieval Iceland, but he personally uses England after the fall of the Roman empire and at the time of the Norman conquest, as well as mercantile laws in medieval Europe (Hasnas 2005, 128-130).

In the situations he considers, Hasnas notes that people, having no commonly recognized authority to which to appeal to for solving various issues, form relations themselves that gradually evolve into permanent institutions. The empirical natural rights that come about in this manner are a result of human action, but not an execution of human designs, which makes them more flexible and less philosophically 'perfect' than traditional natural rights (Hasnas 2005, 135). In Hasnas' interpretation, natural rights are, hence, nothing else than the rights that derive from institutions and practices based upon free human cooperation and without any state intervention.

Despite the inarguable originality of Hasnas' empirical conception of natural rights, it is still faced with many issues. Firstly, his limitation of Simmons' description of the state of nature as a normative condition to Locke ignores Hobbes' specification that the war of every man against every man never existed as such, and that the state of war he describes pertained to families, tribes and kings (Hobbes 1996, 85). What's worse, when analyzing historical examples that he uses to support his empirical conception, Hasnas delves into the so-called blood feud as one of the earliest models of righting wrongs. This institution involved the family of a murdered person killing the murderer, forming a kind of rudimentary method of crime prevention (Hasnas 2005, 128), but its arbitrariness is

exactly why Hobbes counts it among the historical examples of the state of war (as the war between families).

The next issue with Hasnas' conception is viewing the state of nature as substantially different between Hobbes and Locke, specifically with regard to the law of nature. This is problematic because Hobbes, just like Locke, emphasizes the importance of the law of nature as a source of (at least temporary) security of human life in the state of nature, but also because neither Hobbes, nor Locke consider it to be sufficient for long-term sustainability. Recall Locke's appeal for men to heed the law of nature (Locke 2003a, 102) and Hobbes' specification that the laws of nature are merely virtues that direct people to peace and obedience (Hobbes 1996, 177), but that are contrary to our passions and, hence, uncertain without fear of a common power that would make us hold to them (Hobbes 1996, 111).

Both Hobbes' and Locke's state of nature are, from a strictly normative aspect, in Hasnas' words, "states of complete lawlessness" (Hasnas 2005, 113), insomuch as there is no institution that would have the capacity to establish and maintain universal legal norms. However, in both cases, there are moral norms that enable some level of sustainability; however, in both cases, the law of nature simply isn't enough for the long-term sustainability of human life, from whence arises the need to establish the social contract and transcend the state of nature.

This leads us to yet another problem in Hasnas' conception: namely, we saw that he mentions ancient Israel and medieval Iceland as examples of the traditionally considered sources of illustrating the state of nature, and that he uses early medieval England and European mercantile laws from the time of feudalism (Hasnas 2005, 128-130). It is true that the social contract theorists often mention various political (Locke 2003a, 110) and religious (Hobbes 1996, 108) aspects of ancient Israel; however, they never do it to illustrate the state of nature. Instead, the ancient Jewish state is brought up with regard to Judaism and Christianity, various legal institutions, etc. For practical illustrations of life in the state of nature, Hobbes (Hobbes 1996, 108) and Locke (Locke 2003a, 144) use the rudimentary societies of American natives, which is quite consistent, both with Hobbes' description of the arbitrariness of legal relations absent a

state (Hobbes 1996, 85) and Locke's specification that even when people live in a community, if there is no higher authority to resolve disputes, they are still in the state of nature (Locke 2003a, 138).

We see, then, that the social contract theorists reserve the description of the state of nature only for non-state communities in which there is no fixed governmental structure. Hence, Hasnas' example of England after the fall of the Roman empire could fit this description, but England at the time of the Norman conquest could not, since there was both a king, and an early form of feudal division of territory. The case with medieval European mercantile laws is much more problematic: namely, the regulation of trade relations in the Middle Ages did begin without initial state participation, seeing as most of the exchange took place within cities that enjoyed a degree of independence from the rule of kings and lords. However, cities, even the ones with the highest degrees of political autonomy (such as those located in southern Germany, Northern Italy and the Netherlands) also had complex governmental structures: various political functions, courts, armies, etc.

Therefore, though the regulation of trade relations initially took place *without the state*, it did not take place *outside of the state*: it was first and foremost the domain of guilds, and under the scrutiny of the merchants themselves, but the fact that the state didn't intervene doesn't mean it could not have intervened. Beside this, the basic problem with this example as a potential illustration of the state of nature is that the regulation that took place in it concerned a very limited sphere of life – namely, the exchange of goods. In case of endangerment of life or liberty, property disputes and criminal acts, the state was the foremost authority, the rudimentary character of feudalism as a system of government notwithstanding.

The central problem of Hasnas' conception, however, goes far beyond its empirical foundations and historical examples. Namely, it is his interpretation of the very concept of natural rights and the meaning he ascribes to it in the theories of contractualist thinkers. The critique of this element of Hasnas' conception will simultaneously pave the way for the second secular alternative, whose foundation will be one of the main points of this book, and which will primarily be founded upon a consistent interpretation of Hobbes, Locke and Rousseau.

***

As we saw, Hasnas points to the validity of arguments for limited government on the basis of natural rights (Hasnas 2005, 111), but simultaneously disputes their persuasiveness in case of a lack of prior conviction of the existence of these rights (Hasnas 2005, 118). To this, we should add his interpretation according to which natural rights are "moral entitlements that human beings possess simply by virtue of their humanity" (Hasnas 2005, 134). To this 'traditional' understanding of natural rights, Hasnas counterposes his own 'empirical' natural rights, which he describes as not being inherent, nor arising from human nature, or fundamental moral principles (Hasnas 2005, 134).

In order to understand why Hasnas' view is problematic, we again have to go back to Simmons' interpretation of Locke's state of nature as a specification of normative conditions (Simmons 1989, 451). Though we established that this interpretation is equally applicable to Hobbes and Rousseau, it also doesn't preclude an empirical 'reading' of the state of nature. What's more, we know this to be the case in both Hobbes' and Locke's theory, though the normative element has the greater significance, since the need to form the social contract is based on it; the empirical element, however, is no less prevalent, with direct examples to support it. In Rousseau's case, the empirical element is absent, since he doesn't consider concrete examples of the state of nature; however, he unequivocally considers it to have existed.

The sharpness of Simmons' description in Hasnas' application, therefore, isn't quite justified, especially if we take into account the fact that he specifies that a certain normative condition arises from empirical circumstances independent of human will (Hasnas 2005, 134). The same goes for the state of nature as described by the social contract theorists, keeping in mind that, if we were to deny the normative character to the state of nature of contractualist theory, we would have to do the same for Hasnas' interpretation, given that in his case, the state and laws aren't the source of what he labels empirical natural rights.

However, this is still only pertains to the margins of the central problem of Hasnas' conception, and that is the interpretation according to which 'traditional' natural rights are moral principles,

inherent to people, which arise based on fundamental moral values (Hasnas 2005, 134). In order to understand the issue at hand, let's first go back to Hobbes: "The right of nature, which writers commonly call *ius naturale*, is the liberty each man hath, to use his own power, as he wills himself, for the preservation of his own nature; that is to say, of his own life." (Hobbes 1996, 86) As we can see, there is no mention of moral principles here, their inherent character, or moral values as their source.

On the contrary, Hobbes, starting with circumstances of the state of nature, defined by the non-existence of the state, derives a normative principle according to which everyone in such a state has the right to anything necessary for his own preservation. Fundamental rights don't constitute moral principles, seeing as, beside them, every man also has a right to every thing, but, as we've seen, its application is usually immoral, because it is contrary to the law of nature. They also aren't inherent to people,[10] because they aren't derived from human nature, but from the normative circumstances of the state of nature, not fundamental moral principles.

The problem arises when the central natural right – the right to life – exists in parallel with everyone's right to everything (Hobbes 1996, 87). We have to ask ourselves: can we truly say that we have a right to life if someone else has the right to *everything* – including killing us? As strange as the answer may sound, the answer is *yes*. In order to understand why this is, we have to dispel another widespread misconception regarding natural rights that Hasnas implicitly holds to, and it that these rights imply protections from *other people*. Based on our analysis of the social contract theory thus far, however, it is clear that there is no reliable mechanism for this in the state of nature, which explains the burning need to form the social contract. In spite of this, Hobbes, Locke and Rousseau believe that fundamental rights not only *exist* in the state of nature, but also that it is their *source*.

If we adopt Hasnas' belief that natural rights comprehend protection from other people, we are inevitably forced into a theoretical corner. On the one hand, in the state of nature, everyone

[10] Theoretically, if intelligent non-human beings existed, fundamental rights (as well as the right to everything in the state of nature) would apply to them in equal measure.

has the right to life, liberty and property, while on the other, everyone also has the right to everything (including taking away the life, liberty and property of others). The problem, then, seems unsolvable, barring a change in perspective. However, that is exactly where the solution lies: namely, though they considered protection from other individuals to be a major political imperative, dedicating their works to its realization, the social contract theorists didn't view natural rights as filling that role. On the contrary, they exclusively referred to the possibility of obtaining the goods they refer to, and to which the ultimate obstacle would be an absolute and arbitrary power in the form of unrestrained government. This is supported by Hobbes', Locke's and Rousseau's treatment of natural rights as *inalienable*. Carving these rights out from the social contract and denying the possibility of their transfer, they unequivocally recognize their special normative status.

The obvious reason for this is their connection to existential goods, but it still isn't enough to explain the limitation of transfer, seeing as the right to use force against other people can also be of existential value in certain circumstances. The essential reason for specifying fundamental rights as inalienable is recognizing that only the state as the wielder of absolute (and, absent legal limitations, *arbitrary*) power has the capacity to render fundamental rights unrealizable. At first glance, this does not seem intuitive when taking into consideration the inherent chaotic character of the state of nature as described by the social contract theorists. However, while life, liberty and property are inevitably *uncertain* in it, they aren't *unrealizable*: Hobbes (Hobbes 1996, 82) and Locke (Locke 2003a, 105) point out that, despite the strength of some, others can defeat them through coalition, creating a rudimentary balance of power.

This state ought to be counterposed, as Locke does, to absolute and arbitrary government (Locke 2003a, 105), which, if it chose to shatter the rights to life, liberty and property of people, they could not prevent it, even through coalition. If, however, the people were to unify against a tyrannical government and create a force so large that, upon its collision with the state, a civil war arose,

sovereignty would, at least temporarily, cease to exist.[11] On the other hand, seeing as people can unify in the state of nature to overcome others, they can use that same power for the preservation of life, liberty and property.

We see, then, that despite their many disagreements, social contract theorists again share substantial agreements with regard to natural rights: though their description of the state of nature is primarily normative, it is also empirical. The intersection of these two perspectives offers us the answer to Hasnas' mystery of the holy grail of the doctrine of natural rights – the problem of its secular foundation. As we've seen, these rights are explicitly derived from the circumstances of the state of nature, which simultaneously affords humans the realization of the goods they refer to, regardless of the length and difficulty of the process, which is why forming the social contract still remains an imperative.

The issue of natural rights and the social contract can be summarized according to the criterion of the absoluteness and arbitrariness of power: in the state of nature, which is defined by the non-existence of a state, power is necessarily arbitrary, given that there is no hierarchical structure that orders it. Upon forming the social contract, power becomes absolute through sovereignty,[12] but not necessarily arbitrary. The arbitrariness of power comes about if there are no constitutional principles that would prevent it, resulting in a state worse than that of nature (Locke 2003a, 105). The optimal compromise between the state of nature, in which fundamental rights exist, but the goods they refer to can only be obtained and kept with great difficulty, and unrestrained government, in which order and security may come at the cost of an unrecoverable loss of rights, is a constitutionally limited government that balances the absolute

[11] In the classical contract theory, there are significant disagreements regarding the issue of civil wars. On the one hand, Hobbes, as we saw, considers civil wars the death of the state, implicitly condemning them (Hobbes 1996, 7), while on the other, Locke believes that shattering the social contract is impossible, and that in the case of the fall of a government, power goes back to the poeple, who elect a new government (Locke 2003a, 209).

[12] It is again essential to draw the key distinction here between Hobbes' favouring absolutism and defining sovereignty as absolute (Hobbes 1996, 120); Rousseau offers a very similar interpretation (Rousseau 1994a, 64).

character of sovereignty with recognizing the inalienability of fundamental rights.

The Division of Natural Rights

"The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, 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, or possessions." – John Locke (2003a, 102)

Considering the distinction between the right to everything and fundamental rights as its narrower domain, which, according to the social contract theorists is not only maintainable in the civil state, but also a necessary criterion of legitimacy, we emphasized that these natural rights encompass the right to life, the right to liberty and the right to property. In the following chapters, we will analyze these rights independently, comparing their status in the theories of Hobbes, Locke and Rousseau. We will take into consideration the various ways in which the social contract theorists approach them, as well as their interconnectedness.

In that regard, it will be especially important to establish a clear hierarchy of natural rights, which will be based on the different value that contractualist theorists ascribe to them. We will see, for example, that in certain instances, certain rights are derived from others, and are hence conditioned upon them. This will be of particular importance when considering the central issue connected to every one of these three rights – namely, what exactly does possessing the right to a certain good actually entail and what it is limited by. As we'll see, certain rights are limited even in the state of nature, where said limitation proceeds from the intersection with the domain of another right. This kind of conflict is best illustrated by Hobbes' distinction between the right of nature, which is defined as a person's freedom to do what is necessary for the preservation of their life and the law of nature, which prohibits one from doing what is destructive of one's life, or takes away the means of its preservation (Hobbes 1996, 86).

Here we already see the conflict between the right to life and the right to everything, which in this case is limited by anything that is destructive of life. In a similar fashion, the rights that are derived from other rights are often limited by the rights they are derived from, and without which they would cease to function. This, as we'll see, is the universal characteristic of the relations between fundamental rights – the right to life, liberty and property. Though these rights take up at least somewhat different positions in the theories of Hobbes, Locke and Rousseau, their normative interconnectedness and hierarchical relation remain the same. In the social state, the only natural rights that subsist are fundamental rights, though their status remains somewhat problematic, which is why our goal here will be to discern exactly what upholding these rights upon forming the social contract actually entails.

The Right to Life

"As first a man cannot lay down the right of resisting them, that assault him by force, to take away his life; because he cannot be understood to aim thereby, at any good to himself." – Thomas Hobbes (1996, 88)

The most fundamental right – the right all other rights are derived from – is *the right to life*. Let's again recall Hobbes' definition the right of nature: "The right of nature, which writers commonly call *ius naturale*, is the liberty each man hath, to use his own power, as he wills himself, for the preservation of his own nature; that is to say, of his own life." (Hobbes 1996, 86) As we can see, the importance of the right to life is great in his theory, that he defines the whole of natural rights upon its foundation. However, what does it actually entail? As we saw in Hobbes' elaboration of the concept of inalienable rights, the right to life comprehends, first of all, a man's liberty to defend himself against those that threaten his life (Hobbes 1996, 87); however, it also entails the right to obtain goods necessary for the preservation of life.

Simultaneously, while the right of nature determines freedoms that concern existential needs, the law of nature limits them, preventing someone from doing whatever is destructive of their

life, or that which takes away the means of its preservation (Hobbes 1996, 86). Locke is in complete agreement with Hobbes in this regard and points out that a man has complete freedom in the state of nature, but has no power to destroy himself (Locke 2003a, 102), which again emphasizes the status of the right to life as the most fundamental natural right. Leo Strauss notes that, since the preservation of life is the *conditio sine qua non* of fulfilling any desire whatsoever, Hobbes bases the right of nature and the law of nature upon it (Strauss 1963, 15), pointing out that fear of violent death, pre-rational in its genesis, but rational in its effect is, according to Hobbes, the root of all rights and hence of all morality (Strauss 1963, 17-18).

John Watkins also notes the importance of fear as the central motivator in Hobbes' understanding of right and morality, pointing out his view that all people seek to avoid unnatural death with a kind of natural impulse, no less than rocks fall under the influence of gravity (Watkins 1963, 249). Taking into consideration the importance of the preservation of life within the context of Hobbes' understanding of the right of nature, it not only becomes clear why its abandonment isn't possible, but also why natural rights in general and fundamental rights as their narrower domain in particular are founded upon the right to life. Locke's understanding, though functionally parallel to Hobbes', is derived from a different source: as we saw in our analysis of his theological conception, he also recognizes the inalienability of the natural rights to life and liberty. However, in Locke's case, these rights aren't directly founded upon man's existential interests; instead, their source is the will of God (Locke 2003a, 110).

Regardless of the inherent problems of the theological conception of natural rights, Locke's dedication to the right to life is unequivocal; though, like Hobbes, he recognizes the inalienability of fundamental rights, its source is indirect in his case. Namely, instead of being derived directly from humans, based on their need for self-preservation, it is derived from God, whose interest is also the survival of humanity. The central argument that Hobbes and Locke share in this regard, despite the differing sources of the inalienability of the right to life, is called into question by Rousseau, who opposes the view that the right to life cannot be transferred based on its inalienability. In other words, Rousseau calls the inalienability of the

right to life into question, arguing that a man can risk his life in order to save it, as, for example, when jumping out of a building to escape a fire (Rousseau 1994a, 71).

What Rousseau loses sight of in his critique is that the state of nature in which the right to life originates is characterized by constant mortal danger, as well as that, according to Hobbes' definition of the right of nature, a man can do whatever is necessary for the preservation of his own life (Hobbes 1996, 86). Had Rousseau developed his critique further, he could have called this into question on the basis of Hobbes' definition of the law of nature (Hobbes 1996, 86), but we ought to keep in mind here that the law of nature explicitly prohibits that which is destructive of life, or that which takes away the means of its preservation. In the example Rousseau gives, the choice clearly boils down to certainty of death in the fire, or the possibility of death in jumping out of a building.

Quite like this example, Hobbes, while analyzing the right to life, points out that a contract by which one obliges oneself not to defend himself from chains, injury or death cannot be formed, seeing as, when faced with the choice between certainty of death in non-resisting and likelihood of death in resisting, people always choose the latter, which explains why those faced with the death penalty are always escorted by armed guards (Hobbes 1996, 93). Although he clearly mixes up *risking life* with *abandoning the right to life*, it is evident that Rousseau was trying to illustrate the necessity of the death penalty in certain cases, which leads us to the issue of the status of the right to life withing the social state, that is, upon forming the social contract and establishing sovereignty. We saw that Rousseau, like Hobbes and Locke, considers natural rights inalienable (Rousseau 1994a, 67). It remains to be considered, then, how recognizing the right to life is reflected in state laws.

We have to start here with Locke's perspective, which is somewhat different from Hobbes' and Rousseau's. Namely, he observes life, liberty and property as one essential whole, which is *propriety* and emphasizes that people have a right to it and its defense in the state of nature,[13] while in the social state, they rely on the

[13] So much so that he considers the abridgement of this right punishable by death, but the lack of a commonly recognized legal authority reintroduces the problem of such an act still constituting war upon the offender.

government for its defense (Locke 2003a, 136). Locke's observation of life, liberty and property as one whole does not exclude a hierarchical relation between these rights, but certainly places an even greater emphasis on their protection. The right to propriety, therefore, predates the state and, in the state of nature, rudimentary means of its preservation do exist; however, due to their impermanence and uncertainty, people unite their power in order to defend their life, liberty and property in common (Locke 2003a, 141). Locke points this out in order to explain that, taking into account the original motive of people for forming the state, no one would elect a government the authority of which surpasses the public good (Locke 2003a, 156).

The state, therefore, according to Locke's view, was created by the joining of the power of men, none of whom has absolute and arbitrary power over their own propriety in the state of nature, and hence cannot transfer it (Locke 2003a, 159). But what exactly does the inalienability of fundamental rights entail and how is it reflected upon state institutions? Seeing as we're discussing the right to life here, we first have to examine the status of self-defense and the death penalty. Only Locke doesn't say much on this issue, though he does emphasize the right of the state to establish the death penalty and its justifiability in cases of disobedience in the army (Locke 2003a, 162).

The case is similar with Rousseau, who does, however, discuss this issue in much more detail. As we saw, his goal was to justify the death penalty, but he deals with it primarily in the context of civil life. He points out that, since the purpose of the social contract is the preservation of life of those that enter into it, he who wishes that his life be preserved at the expense of others' must be ready to lay down his own for them (Rousseau 1994a, 71). In accordance with this, Rousseau explains that, since pursuing a certain goal necessarily also entails pursuing the means of its realization, men, in order to avoid being killed, accept being killed if they themselves become killers (Rousseau 1994a, 71). He does point out, however, that the execution of the death penalty, even in order to set an example for other, must be reserved for those whose lives cannot be maintained without endangering society (Rousseau 1994a, 72).

Lastly, the question of the status of the right of life in the social state is analyzed in the greatest detail by the theorist who

founds all other rights upon it: Hobbes. Firstly, he points out that the right of the sovereign to life and death is consistent with the freedom of his subjects, taking into account the inalienability of fundamental rights (Hobbes 1996, 141). With this in mind, Hobbes, like Locke and Rousseau, also defends the death penalty, but he does so with a particularly nuanced perspective. In discussing the *true* freedoms of subjects, he points out that a man, even if *justly* condemned, cannot be expected to submit to execution, torture, admission of guilty without the guarantee of pardon (Hobbes 1996, 144), or even performing any kind of dangerous or dishonorable duty, *unless his refusal frustrates the end for which sovereignty was ordained* (Hobbes 1996, 145).

As we can see, Hobbes' criteria for the right to life are developed in great detail, and a wide spectrum of cases in which individuals can legitimately resist the government is recognized, the only unbreakable boundary being the end for which sovereignty was ordained, that being the preservation of life, liberty and property and suppressing the arbitrariness and uncertainty that would result from a return to the state of nature. Like Locke, Hobbes also touches upon disobedience in the military, pointing out that, though it can be punished with death, citizens, unless they are professional soldiers, do have the right to disobey orders,[14] unless, as in the case above, the survival of the state depends on their service (Hobbes 1996, 145).

In defense of the right to life, Hobbes goes even further than Locke and Rousseau, pointing out that, though a man has no right to resist the 'sword of the state' in defense of another, those who oppose the sovereign can unite against the state, this right being denied only to those who are pardoned for their crimes (Hobbes 1996, 145). Lastly, Hobbes is the only contractualist theorist who considers the right to self-defense, which is central to the right of life in the state of nature: he points out that killing in self-defense isn't a crime even in the social state, unless there is time for authorities to intervene (Hobbes 1996, 198). This specification illustrates his commitment to fundamental rights on the one hand and the absoluteness of

[14] Hobbes draws the distinction here between citizens that are called upon to serve in the military, and professional soldiers, because the latter, having accepted money for their service in advance, are morally obliged to defend the state (Hobbes 1996, 145).

sovereignty on the other: as the absolute wielder of sovereignty, the government is the only legitimate coercive agent in the social state. However, exceptions can and must be made in cases where the government cannot intervene, and in which the goods for the preservation of which it was established are under threat.

All this gives us a relatively clear picture of the status of the right to life upon forming the social contract: its inalienability does not mean the illegitimacy of the death penalty, which, as we saw, all three contractualist theorists support. The same goes for the right to self-defense, which is only conditionally permissible. The fundamental purpose of the right to life in the social state is to prevent the arbitrary killing of citizens, which, as we can derive from Locke's (Locke 2003a, 159) and Rousseau's (Rousseau 1994a, 67) views, relates to extrajudicial killing, or establishing an estate-based death penalty. As we'll see in the following chapter, the rights to liberty and property also primarily refer to the extrajudicial or estate-based deprivation of the subjects of these goods.

The Right to Liberty

"Man was born free, and everywhere he is in chains. There are some who may believe themselves masters of others, and are no less enslaved than they." – Jean-Jacques Rousseau (1994a, 45)

We saw earlier how Hobbes underlines the lack of an absolute and arbitrary legislative as the key factor of the imperfect foundation of the state and, therefore, the primary cause of its collapse (Hobbes 1996, 470). Our analysis of his understanding of the right to life, however, has called this into question: though the absoluteness of sovereignty, keeping in mind his understanding of this term, is essential, the arbitrariness of government was called into question by the many instances in which the right of citizens to oppose it was recognized. The following interpretation of the right to liberty will additionally specify the limitation of government in the social state in Hobbes, but also Locke and Rousseau. However, as in the case with the right to life, we must begin with the normative origin – the state of nature.

For Hobbes, the right to liberty in the state of nature essentially comprehends the freedom to resist those who attempt to put us in chains, insomuch as, when someone attacks us, we cannot know if they mean to take away our freedom or life, which is why this right isn't substantially different from the right to life (Hobbes 1996, 88). With Locke, the case here is very similar again, keeping in mind that, due to his essentialist approach to the right to propriety, he defends the right to liberty alongside the rights to life and property (Locke 2003a, 102). Here, however, we simultaneously come upon a key example of the hierarchy of rights: both Hobbes (Hobbes 1996, 86) and Locke (Locke 2003a, 102) explicitly limit the right to liberty with the right to life, emphasizing that, though a man has complete freedom in the state of nature, he has no right to destroy himself, or take away the means of his life's preservation. The reason for this is the status of the right to liberty as derived from the right to life, the purpose of which would disappear along with its source. This hierarchy of natural rights will become even more significant and complex in our discussion about the right to property.

The issue of the domain of the right to liberty, however, becomes especially relevant in the context of its meaning in the social state. In this regard, Hobbes points out that the sovereign determines propriety, which comprehends the actions a subject may undertake and the goods he may possess, reminding us that the lack of such an authority takes us back into the state of war (Hobbes 1996, 119). James Pennock, however, calls this into question, emphasizing that even in the state of nature, the right to life comprehends guidance by existential needs and that its abridgement breaks the law of nature (Pennock 1963, 110), and concludes that, based on this, the right to all things can be called into question even in the state of nature (Pennock 1963, 111).

What Pennock misses here is that the right to everything isn't tied to either the right to life, or the right to liberty: as we saw in the distinction between natural and fundamental rights, only their source is identical. Outside of that, the right to all things is derived from the normative circumstances of the state of nature (specifically, the lack of a common authority which would determine propriety), and is tied only to it, while fundamental rights 'survive' the social contract. Hobbes specifies that the liberty of subjects proceeds from the

domain that is passed over by the sovereign: to buy, sell, form contracts, freely choose their living space, food and occupation, school their children, etc. (Hobbes 1996, 141) He points out that other freedoms depend on the 'silence' of the law: this means that, if the sovereign has neither obliged his subjects to a certain action, nor prohibited such an action, they can freely choose whether or not to do it (Hobbes 1996, 146).

Finally, we come to the quote that directly calls into question the arbitrariness of the judiciary, and indirectly, of the legislative: namely, Hobbes specifies that punishments can only be proscribed by public authority and that they demand a public trial, emphasizing that "evil inflicted by public authority, without precedent public condemnation, is not to be styled by the name of punishment; but of an hostile act" (Hobbes 1996, 206). The importance of the limitation of government that Hobbes defines here will be particularly emphasizes within the context of historical legal acts that were philosophically founded upon the doctrine of natural rights. The limitation which he specifies possibly frames the meaning of fundamental rights in the social state in the best way possible: above all else, it comprehends that the government cannot take away the subjects' goods to which their rights refer to arbitrarily, that is, without a legitimate judgement based on a public trial and according to laws that were established beforehand.

Locke emphasizes the protection of propriety as the primary goal in forming the social contract and specifies the process of its transfer to government in many instance (Locke 2003a, 110, 136, 141, 154). As we saw earlier, the argument that underlines his second *Treatise of Government* is that men in the state of nature effectively have complete freedom (limited only by the right to life and the somewhat elusive law of nature). However, seeing as this state is also uncertain and unmaintainable, they unify for the purpose of protecting their propriety (their life, liberty and property) from others, while at the same time holding onto their right to propriety, which protects their persons and their properties from the state, limiting its domain to the public good.

This argument becomes especially important within the context of the right to liberty because, unlike Hobbes, Locke states more explicitly that the state cannot have absolute and arbitrary

power over people: he bases this argument upon a claim that is derived from the theological conception of natural rights: that men, not having absolute power over their own life, liberty and property in the state of nature, cannot transfer such power (Locke 2003a, 159). We saw that in this way, Locke arrives at a fundamentally similar position regarding the inalienability of natural rights as Hobbes (Hobbes 1996, 88), barring their different sources. Locke's understanding, however, enables him to lay down stricter limitations of government: thus, he emphasizes that, the power of the state being limited to the public good, its goal is to preserve its subjects, which is why it can never destroy, enslave, or impoverish them by design (Locke 2003a, 159).

Locke also uses this opportunity to confront absolutism, pointing out that someone who is under the arbitrary power of he who leads a hundred thousand men is in a far worse position than someone who is under the arbitrary power of a hundred thousand individual men, since, in the former case, the power of the ruler is a hundred thousand times greater (Locke 2003a, 161). According to this, he emphasizes that absolute power, where it exists, mustn't be arbitrary, but limited by reason (Locke 2003a, 162), and concludes that, seeing as the protection of propriety is the highest goal of government, it cannot take away any part of his propriety without his consent, because, if it was created for its protection, it cannot take away that which it was designed to protect (Locke 2003a, 161). Insomuch, Locke emphasizes that the legislative is legitimately overthrown when it invades the propriety of subjects and seeks to dominate their lives, liberties and property; the same goes for the executive, being that it harms its subjects twice over by such actions (Locke 2003a, 197, 198).

Locke discusses the right to liberty at great length in his *Letter Concerning Toleration* and the following written debate with the Anglican theologian Jonas Proast. These are some of the earliest writings in which freedom of religion and speech are explicitly emphasized. Thus, for example, Locke, when considering the religious doctrines of Catholics, Jews and pagans from the perspective of a dedicated Protestant, writes the following: "I readily grant that these opinions are false and absurd; but the business of laws is not to provide for the truth of opinions, but for the safety and

security of the commonwealth, and of every particular man's goods and person." (Locke 2003b, 241) In the same spirit, responding to Proast's suggestion that "moderate" punishments ought to be used as a method of religious conversion (Proast 2010, 59), Locke responds that all punishment is immoderate where there is no fault to be punished, and that the contrary opinion confuses disagreement with crime (Locke 2010a, 75, 94). Beside this, he points out that society was created for the protection of individuals, and protection from forceful conversion is among one of the duties of the state (Locke 2010b, 141).

Rousseau's views regarding the right to liberty may seem quite controversial, however, their placement within the broader context of his theory removes most of these problems. Firstly, we saw that, according to his view, people abandon their natural freedom strictly for some other good (Rousseau 1994a, 46). Forming the social contract, according to Rousseau, entails losing this freedom and the right to all things, but reciprocally grants civic freedom and the right of property over everything one owns (Rousseau 1994a, 59). This distinction between natural and civic freedom isn't developed in any greater detail, but we can assume it refers to freedom within the boundaries of law.

This interpretation is supported by Rousseau's (in)famous quote, according to which he who neglects the general will, will be forced to obey it by the entire legislative body, "which means nothing else than that he will be forced to be free" (Rousseau 1994a, 58). As soon as we're able to shake the inherent feeling of contradiction in this quote, it becomes clear that he is referring to the necessity of the equal application of law for all citizens as the condition of the possibility of the civic freedom he discusses. Unlike Locke's, Rousseau's critique of absolutism isn't explicit, however, its importance in establishing these principles of government mustn't be underestimated.

Rousseau emphasizes the obedience of citizens to the general will, the supreme principle of legislative authority, pointing out that only it can guarantee the life, liberty and property of all citizens, by placing them under common protection (Rousseau 1994b, 10). Like Locke's specification that the power of government mustn't transcend the public good, seeing as it was created for the protection

of citizens (Locke 2003a, 156), Rousseau points out that, while sovereignty is absolute, the government must distinguish between the duties its subjects have as citizens and the natural rights they enjoy as men (Rousseau 1994a, 67). Also, like Locke, he emphasizes that, though sovereignty is absolute, it cannot be arbitrary: beside the above-mentioned criterion of natural rights, it is also limited by the general will (Rousseau 1994a, 67).

The Right to Property

"As much as any one can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in: whatever is beyond this, is more than his share, and belongs to others." – John Locke (2003a, 113)

The status of the right to property as natural, even if we accept the foundation of these rights that the social contract theorists offer, seems quite problematic. Namely, it is obvious that, between Hobbes' (Hobbes 1996, 87) and Rousseau's (Rousseau 1994a, 59) right to everything and everyone's equal position as judge and executioner in Locke's understanding (Locke 2003a, 137), there simply is no place for permanent property as we view it today. Therefore, we could legitimately ask ourselves whether the right to property, unlike the rights to life and liberty, can even be placed into the circumstances of the state of nature. This dilemma is resolved by Hobbes in his analysis of natural rights.

As we saw earlier, beside the right to life, upon which the right of nature as a whole is founded, he also considers rights to goods without which life isn't possible: the right to liberty, but also the right to "the means of so preserving life as not to be weary of it." (Hobbes 1996, 88-89). We identified this last bit as the original, minimalist interpretation of the right to property, though it isn't explicitly defined as such. The justification of this interpretation, however, is found in Hobbes' understanding of the right to property upon forming the social contract. Holding to his theory, in which the primary value isn't property, but life (Thomas 1963, 225), he emphasizes that the law cannot compel a man to abandon his own preservation, and that

stealing in a time of poverty or famine is therefore legitimate (Hobbes 1996, 200).

Keith Thomas notes that in the seventeenth century, this wasn't a purely academic question, since the tailors of Hobbes' city of birth were reduced to pilfering in 1614. (Thomas 1963, 225) He emphasizes that, in recognizing this principle, Hobbes actually revives a doctrine that originated in the middle ages and was officially supported by the Vatican in 1279. and according to which everything is common in a time of poverty (Thomas 1963, 225). This unequivocally establishes Hobbes' interpretation of the right to the means of life's preservation as the initial, minimalist understanding of the right to property in the state of nature, as well as in the social state: it, therefore, doesn't refer to the private sphere as we understand it today, but only to the basic necessities of life.

Outside of this minimalist domain of property which is necessary for the preservation of life, Hobbes takes a positivist approach toward the right to ownership: since, in the state of nature, goods belong to he who can seize them by force and keep them, property only comes into existence upon forming the social contract and its distribution and transfer are fully within the domain of the sovereign (Thomas 1963, 164). According to this, the ownership of one subject excludes that of another, but not that of the sovereign (Thomas 1963, 164), which brings us back to the question of the inalienability of fundamental rights. Hobbes' view of the boundless authority of the sovereign over the ownership of subjects seemingly violates this principle, but we mustn't forget the importance of his distinction between the minimalist *right to property* and the *right to ownership*.

The source of this distinction is of particular theoretical importance, and it accentuates the relevance of the hierarchy of natural rights: as we saw, Hobbes establishes the right to liberty entirely upon the right to life: it exists in order to enable the preservation of life and is limited by anything that would endanger life. The status of the right to property is much the same: it comprehends the inalienability of the right to goods which are necessary for the preservation of life, and those goods only. In other words, the right to property is determined and limited by the right to life, which is why all property that transcends basic needs is in the

legitimate domain of the sovereign. Hobbes' conception is especially different from Locke's, who particularly accentuates the importance of the protection of property.

As we saw earlier, Locke places property, alongside life and liberty, under propriety and accentuates the maintenance of the rights to these goods by citizens after the social contract is entered into. In accordance with the theological conception upon which he founds inalienable rights, he emphasizes that God gifted the earth to men equally and that, everyone being the owner of his own body, everyone is also the owner of the labour of his hands (Locke 2003a, 111). Based on this, Locke derives the principle that the produce of work becomes the exclusive ownership of the producer, under the condition that *enough*, and *as good*, is left in common for others (Locke 2003a, 112). This criterion is very influential even in contemporary discourse on the social contract theory and is known as the sufficiency proviso, or the Lockean proviso (Waldron 2005, 89).

Considering the common ownership of land, Locke emphasizes that the privatization of any of its parts does not depend on the explicit consent of all who share it, but that an individual fixes his ownership of it through his labour (Locke 2003a, 112), and concludes that "as much as any one can make use of to any advantage of life before it spoils, so much he may by his labour fix a property in: whatever is beyond this, is more than his share, and belongs to others." (Locke 2003a, 113). The consistency of his position here can be called into question, however, due to the fact that he considers even the labour of a servant as fixing the property of his master (Locke 2003a, 112): this is an issue because it essentially constitutes one's appropriation of common land through the labour of others.

It's indisputable, however, that productivity is the fundamental source of Locke's motivation for setting up these criteria for gaining ownership: Paul Rahe points out that, according to Locke, the "king" of a large, fertile territory in America is less well situated, dressed and fed than a workman in England (Rahe 2005: 15). Locke, therefore, emphasizes that he who takes only so much as to leave enough for another effectively takes nothing at all, and that the earth is given to the most industrious and most rational to make use of (Locke 2003a, 114). Based on this, he calls into question the

legitimacy of Indian ownership of the vast lands of America, implicitly justifying colonialism (Locke 2003a, 116). All this is based on the idea that, though God gave the earth to all men equally, productivity justifies inequality.

In the social state, Locke puts an emphasis on the protection of property, accentuating that the government was created to protect it (Locke 2003a, 161). What's more, he insists that even in the army, where an officer can order a soldier to march to the muzzle of an enemy cannon, he cannot take a single coin from his purse, since the former is tied to the protection of society, and the latter is not (Locke 2003a, 162). Beside this, Locke emphasizes that, despite the fact that the costs of maintaining a government are high, taxes cannot legitimately be levied without the consent of the citizens (Locke 2003a, 163).

We see, then, that Locke's conception of the right to property is substantially different from Hobbes': while with the latter, it encompasses only the basic means of life, with the former, it comprehends whatever can secure any advantage in life, the only limitation being leaving enough, qualitatively and quantitatively, for others to make use of. The reason behind this divergence is a fundamentally different source of the right to property between these two theorists: for Hobbes, it is based on the right to life; for Locke, however, it is based on the right to liberty, since work – the source of legitimate appropriation of property – is understood as a free application of one's own activity upon some outside object.

The sufficiency proviso that Locke puts up as the criterion of the appropriation of property is to this day an object of fierce debate between contemporary social contract theorists. On the one hand, the principle behind it made perfect sense in Locke's day, when there was plenty of unoccupied land to go around. The same, however, cannot be said in today's industrial age, in which opportunities to appropriate unworked common land practically don't exist. This led various theorists to take up different positions on the Lockean proviso – from its consistent application, to its questioning and rejection.

One of the most interesting arguments about this issue was put forth by Edward Feser, who notes that the question of redistribution of goods is usually posed due to some irregularity in their appropriation (Feser 2005, 58). He confronts this tendency

toward redistribution with a controversial claim: "There is no such thing as an unjust initial acquisition." (Feser 2005, 58) To support his claim, he points out that, if someone was the first to appropriate some good, whatever it may be, they did no harm or injustice to anyone, simply because that good did not have a previous owner. At the same time, Feser recognizes the difference between *initial acquisition* and *theft*, pointing out that someone who appropriates a source of water in the desert that other people were using does not commit an injustice in the acquisition of that good, but in its transfer (since it had other users, even if there was no nominal owner) (Feser 2005, 68).

According to Feser, therefore, while there is no such thing as an unjust initial acquisition of goods, their transfer can be unjust, and not only if some good has a nominal owner, but also if it is has multiple informal users. The exception that Feser makes, much like Locke, is that he who appropriates a certain good should not do so through the act of force that would dissuade others, but through mixing his labour with that good (Feser 2005, 69). Taking into account the problem of scarcity, which remains unresolved even today, it is clear that this and similar interpretations come from the Lockean perspective that emphasizes the protection of property, instead of the Hobbesian that focuses on the basic means of life.

Much like Locke, Rousseau discusses the right to property in great detail, but he mainly does so in his *Discourse on Political Economy*. At the very beginning of his work, he states that, though the property of subjects precedes the institution of government, its protection is the primary purpose of the state (Rousseau 1994b, 4). He later goes further than this, emphasizing that the right to property is "the holiest" of all rights and that property is in certain cases even more important than freedom, primarily because it is more tightly connected to survival, but also because it is more difficult to keep than freedom, and it is the foundation of civil society (Rousseau 1994b, 25). At the same time, however, Rousseau recognizes that, because the state, the existence of which is the only guarantee of property, itself needs financial support in order to be sustained, all members of society must contribute to its preservation with their own property (Rousseau 1994b, 26).

In discussing taxes, Rousseau introduces several criteria: the first is the quantitative relation: the man who has ten times the property ought to pay ten times higher taxes. Then, needs and luxuries ought to be considered: a man who has just enough to cover his basic needs ought to pay no taxes at all, while one with enormous property ought to pay accordingly, the upper limit being the property that would satisfy his basic needs. Rousseau confronts the claim that needs and luxuries vary with estate, pointing out that great nobles have two legs and one stomach, just like ordinary shepherds. Finally, he takes into account the equal protection of property that society gives to both rich and poor (Rousseau 1994b, 34).

Rousseau dedicates particular attention to factors in production and exchange that influence taxes: thus, for example, he claims that land is best cultivated in England and the Netherlands, where farmers pay the lowest taxes (Rousseau 1994b, 36), and points out that, if a man loses the fruits of his labour, indolence becomes a gain, which is why he calls the taxation of labour a strange way of preventing indolence (Rousseau 1994b, 37). Rousseau names China as a positive example, claiming that it has the highest taxes, but that basic goods such as maize and rice are exempt from them (Rousseau 1994b, 40). Based on this, he claims that high taxes should be applied to carriages, mirrors, gardens, fine clothes, gold and jewels as well as "unnecessary occupations" such as singing and dancing, and emphasizes that the rich, who would rather lose their lives than their status, would eagerly pay the taxes on these luxuries, so as to demonstrate their wealth (Rousseau 1994b, 41).

In the *Social Contract*, Rousseau also notes that, at the moment of the creation of the state, a man is made the legal owner of some goods by the same act that excludes him from others (Rousseau 1994a, 60). Like Locke, he also emphasizes that, though a subject transfers as much freedom and property as is necessary for the common good, the sovereign cannot place any burden upon him that is of no use to the community (Rousseau 1994a, 68). Finally, Rousseau formulates three criteria according to which land can be gained: first, it must not be already owned; second, a man can only take so much of it as is necessary for his basic needs and, third, land cannot be taken by "empty ceremonies", but may only be appropriated through labour and cultivation (Rousseau 1994a, 60).

His conditions are, as we can see, much more stern than Locke's in this regard: beside the criterion of labour, which they both share, Rousseau's condition of satisfying basic needs only, is counterposed to Locke's allowance of appropriation for any advantage in life.

We see, then, that Rousseau's views on property occupy a nebulous middle ground between Hobbes' and Locke's: unlike the other two theorists, who unequivocally base the right to property upon the right to life (in the case of Hobbes) or the right to liberty (in the case of Locke), he relies on both criteria. On the one hand, he bases the acquisition of property on labour, the foundation of which is freedom. However, he simultaneously, both in the *Discourse on Political Economy*, and in the *Social Contract*, consistently uses the criterion of the basic means of life as the condition of property: the condition, which, as we saw earlier, was established by Hobbes.

Properties of Fundamental Rights

"Law can only prohibit such actions as are hurtful to society. Nothing may be prevented which is not forbidden by law, and no one may be forced to do anything not provided for by law." – Declaration of the Rights of Man and of the Citizen

At the beginning of this thematic portion, we established a distinction between natural and fundamental rights, whereby the former refer to the entire domain of rights in the state of nature that Hobbes (Hobbes 1996, 87) and Rousseau (Rousseau 1994a, 59) identify as the right to all things, and the latter refer to their significantly narrower domain that individuals keep after they enter into the social contract. Now we will turn to the analysis of the properties that determine fundamental rights – the rights to life, liberty and property – and set them apart from others, giving them a special normative status compared to all other rights.

In that regard, we will discuss *naturalness*, *inalienability*, *negativity* and *individuality*. *Naturalness* of fundamental rights refers to the fact that the state of nature is their normative source: this means that, unlike state rights, fundamental rights precede the state, which is not only not their original source, but is often also an obstacle for them. *Inalienability* describes the special status of these rights, by

which an infringement upon these rights by the government cannot be considered legitimate under any circumstance, nor can their limitation be justified. *Negativity* concerns the content of fundamental rights and means that the state isn't allowed to deny its subjects the goods these rights refer to, rather than being obliged to provide it to them. Lastly, the *individuality* of fundamental rights concerns their domain and comprehends that they exclusively pertain to people as individuals, and not to collectives, whatever the criterion of grouping may be.

It's important to emphasize here that fundamental rights can share any of these four criteria with any other natural, as well as state rights, and even collective rights, as we'll later see in numerous examples. This, however, doesn't affect their importance; on the contrary, the most important element of naturalness, inalienability, negativity and individuality with regard to the defining of fundamental rights is that these four criteria can simultaneously apply only to fundamental rights. In other words, while some civic rights can be negative, or some state rights can be individual, fundamental rights – and only fundamental rights – must be natural, inalienable, negative and individual all at once.

Naturalness

"To understand political power right, and derive it from its original, we must consider what state all men are naturally in, and that is, a state of perfect freedom to order their actions and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature; without asking leave, or depending upon the will of any other man." – John Locke (2003a, 101)

The social contract theory begins from a concept called the state of nature – a state that is defined by a lack of government, which carries with it the consequence of lack of a normative system that could be used to force wrongdoers to abide by the rules. We saw that Hobbes (Hobbes 1996, 86) and Locke (Locke 2003a, 102) believe in the existence of a law of nature that makes the state of nature at least somewhat survivable, but also that, at the same time, Hobbes (Hobbes 1996, 87) and Rousseau (Rousseau 1994a, 59) recognize

everyone's right to all thigs as the inevitable consequence of this state, which necessitates its transcendence. All three authors, however, emphasize a narrow domain of rights that are exempt from transfer to the state in the process of its creation.

According to the social contract theorists, men in the state of nature, therefore, have the right to all that exists within it, that is, all goods that exist independent of civilization and social progress. The right to all things is, accordingly, a natural right, even though it cannot be established upon any need, or justified by any claim. Taking into account not only the normative circumstances of the state of nature, but also the complete agreement between Hobbes (Hobbes 1996, 87), Locke (Locke 2003a, 136) and Rousseau (Rousseau 1994a, 59) with regard to the necessity of the transfer of this right upon making the social contract, it requires no justification. Here, however, we come across the essential distinction between the right to all things and the rights to goods upon which human existence directly depends.

The importance of this distinction is first noted by Hobbes: as we saw, he points out that, despite the importance of the transfer of rights for the long-term survival and development of humanity, certain rights are inalienable and these include life, liberty and property (Hobbes 1996, 88). In setting these rights apart, Hobbes doesn't call the state of nature as their source into question, but merely points out that, taking into account the goods they refer to, they must maintain a special normative status in relation to the right to all things. Though their understanding of these rights, especially the right to property, somewhat differs, Locke and Rousseau fully agree with Hobbes' with regard to this.

Naturalness as a property of fundamental rights, therefore, isn't sufficient, given the fact that it also characterizes the right that must be transferred upon the creation of the state. However, this does not lessen its importance. In this regard, the importance of feudal and absolute monarchies and the abuse of power within them must be emphasized as the source of the contractualist theorists' inspiration for embarking on a journey to discover the origins of government (Locke 2003a, 149), as well as the discovery of rudimentary societies in the New world, the simplicity of which called into question the idea that the state is as old as mankind itself (Locke 2003a, 9). These

inspirations precipitated the "classical age" of natural rights with Hobbes' and Locke's theory (Oakley 2005, 89).

Beginning with the idea that the state hadn't existed forever, the social contract theorists opened up the possibility of its creation through a collective transfer of rights from individuals to the political body they were entering into. In this case, the state isn't the original owner of rights that gives them out to people, but is itself endowed with rights by their joining. The importance of this reversal stems from the fact that if the 'direction' of the gaining of rights is from the people to the state, instead of the other way around, the people cannot transfer to the state the rights that they themselves don't possess: this is one of the central arguments in Locke's critique of absolutism (Locke 2003a, 110).

Every transfer of rights must be justified, so if individuals are the original bearers of rights, the necessity of their transfer requires some source of legitimacy. In the case of the right to everything, the legitimacy of its transfer is indisputable, given that it is the *conditio sine qua non* of the creation of the state, and with it, the transcendence of the state of nature. Quite unlike it is the case with the rights to life, liberty and property, whose transfer not only isn't necessary for the social contract, but would also call into question man's ability to sustain his life, which leads Hobbes to emphasize that the transfer of these rights is impossible (Hobbes 1996, 88). Viewing individuals as the original possessors of rights and state power as having been founded upon human joining places a particular accent on the existential interests of people in the transfer of rights.

In this regard, it is important to once again emphasize Hobbes' equivocation of the right of nature with the right to life (Hobbes 1996, 88): the founding of fundamental rights upon the right to life simultaneously supports the argument for their inalienability. In this context, it is important to also look at Locke's interpretation, insomuch as he notes the two threats to the possibility of the realizing these rights: on the one hand, though people possess them in the state of nature, the goods they refer to are insecure, while, on the other, the state itself is the greatest threat to them in the social state, given the absolute character of its power (Locke 2003a, 136). The same problem is noted by Rousseau, which is why, despite recognizing a very broad public domain, he emphasizes the special normative status

of the natural rights of men, which is outside of the legitimate boundaries of government (Rousseau 1994a, 67).

Inalienability

"The phrases *can* and *can not*, are employed in this way with greater and more pernicious effect, inasmuch as, over and above physical and moral impossibility, they are made use of with much less impropriety and violence to denote legal impossibility." – Jeremy Bentham (1843, 495)

Inalienability as a property of fundamental rights is originally based upon Hobbes' consideration of the transfer of rights, the ultimate purpose of which was to set up the theoretical framework for forming the social contract. As we saw, in analyzing the problem of the abandonment of rights, Hobbes concluded that certain rights are inalienable and numbered life, liberty and property (in a minimalistic sense) among them (Hobbes 1996, 88). The reasoning which he uses to support the special status of these rights as inalienable is that the goods these rights refer to are of an existential character, and that, since a person cannot be expected to abandon their own preservation, they also cannot be expected to forsake the rights to the goods which are necessary for this goal.

We also saw that this criterion of existential necessity of goods that are in the domain of fundamental rights makes up the distinction between natural and fundamental rights. Therefore, the right to everything, which is also natural, cannot at the same time be inalienable: its preservation by individuals isn't necessary for their survival (in fact, it may run contrary to it), and its abandonment is the normative foundation of the social contract. Since naturalness as a property of fundamental rights comprehends that they proceed from the circumstances of the state of nature, their inalienability, the key property that distinguishes them from the right to all things, is derived from the existential necessity of the goods they refer to. The importance of this distinction will shine through in particular in our discussion of the descriptive-normative critique of natural rights.

Hobbes additionally supports his positions on the inalienability of fundamental rights, emphasizing that, though

contracts must be respected, a contract by which a man abandons his right to defend himself from imprisonment, injury or death is necessarily null and void (Hobbes 1996, 93), as follows from the law of nature. He points out that men rather choose the risk of death in resisting, rather than the certainty of death in not resisting, which is why prisoners are escorted by armed guards (Hobbes 1996, 93). Beside the rights that he explicitly describes as inalienable, Hobbes once again touches upon the distinction between the rights which must be abandoned and those that have to be kept, such as the rights to air, water and the freedom of movement, emphasizing their importance to the preservation of life (Hobbes 1996, 102).

Finally, Hobbes touches upon the social state, pointing out that the law cannot compel a man to abandon his self-preservation, even if its breaking is punishable by death (since at least some time of life is gained) (Hobbes 1996, 200). This means that even a legal prohibition of actions that are necessary for the preservation of life (under penalty of death) cannot be enough to dissuade a man from doing them, because a man, even if he's aware of the punishment that follows for breaking such a law, will strive to extend his life as much as is in his power to do. The context in which Hobbes refers to this is the earlier mentioned issue of stealing in a time of poverty: his position in this regard is that during times of scarcity, pilfering ought not to be punished.

As we saw earlier, Locke's interpretation of fundamental rights diverges from Hobbes'; however, in spite of the different foundation, he also arrives at inalienability as their essential property. According to his view, people enter into the social contract and transfer their power to the state in order to save themselves from the arbitrary and chaotic state of nature; however, absolute and arbitrary power is even more deadly (Locke 2003a, 105), which is why the transfer of rights is limited. When we add the theological conception as Locke's foundation of fundamental rights to this, it becomes clear that, whether they want to or not, men simply cannot transfer their rights to life, liberty and property to the sovereign, seeing as they themselves do not have them unconditionally (Locke 2003a, 110).

Although Locke, like Hobbes, partially founds the inalienability of fundamental rights upon their necessity for man's survival, this property is essentially based upon divine will as the

source of all rights in his theory (Locke 2003a, 110). Also, like Hobbes, Locke draws the distinction between rights that are transferred by the social contract (among which he numbers the individual right to punish) (Locke 2003a, 155), and fundamental rights, emphasizing that no rational being can be assumed to worsen their position on purpose (Locke 2003a, 156). The distinction he establishes here primarily relates to the public and private spheres, where the first concerns the interests of all people, which is in the legitimate domain of the government, while the second refers to the individual rights of the citizens, from which the state must be excluded.

Based on the synthesis of the inalienability of fundamental rights with divine will as their source, and the importance of the distinction between the private and public domains as the limiting factors of government, Locke concludes that the state cannot have absolute and arbitrary power over citizens' rights. It was founded through the joining of their powers, and since they don't have absolute power over their propriety (life, liberty and property) in the state of nature, they cannot transfer it (Locke 2003a, 159). Locke later affirms this point further, pointing out that God and nature can never allow a man to abandon his own preservation: because of this, he can neither take away his own life, nor empower another to do the same (Locke 2003a, 175).

Unlike Hobbes and Locke, Rousseau attempts to affirm the inalienability of fundamental rights even upon certain historical institutions, claiming, for example, that the public trials that existed in ancient Sparta, Macedon and Rome can be interpreted as examples of the recognition of inalienability of certain rights (Rousseau 1994b, 19-20). Though these rights do not align in content with the natural rights of the social contract theory, the very fact of the existence of a particular normative status of any rights bears witness to the possibility of such protection.

Beyond a strictly historical context, Rousseau touches upon inalienability in his discussion of rights in times of war, pointing out that just rulers will take away the public property of their vanquished enemies, but not their private property (Rousseau 1994a, 52). Along those same lines, he disputes the theoretical foundation of slavery, based upon the idea that the right of the conqueror to enslave an

enemy is based on his right to kill him, with the conquered exchanging their freedoms for their lives. Rousseau explains that men come to the defense of their countries not as citizens, but as soldiers, and that, upon laying down their weapons, they cease to be the conqueror's enemies, who consequently has no right over either their lives or their freedoms (Rousseau 1994a, 52). Based on this, Rousseau concludes: "One has the right to kill an enemy only when it is impossible to make a slave of him: therefore, the right to enslave him does not come from the right to kill him" (Rousseau 1994a, 52), which unequivocally demonstrates his dedication to the idea of the inalienability of fundamental rights, even in times of war.

Beside this, Rousseau also mentions the importance of the protection of these rights by individuals in the peaceable circumstances of the social state. Much like Locke, he draws the distinction between the private and public spheres, pointing out that the absolute power of the state, guided by the principle of the general will, obliges individuals to service, but that it must simultaneously draw the distinction between the duties that they perform as citizens and the natural rights they enjoy as men (Rousseau 1994a, 67).

As we saw in the previous chapter, naturalness as a property of fundamental rights does not only apply to them, and is, as such, insufficient for their definition: it also applies to the right to everything, which isn't maintainable in the social state. Inalienability also doesn't uniquely apply to fundamental rights: beside them, it also, for example, characterizes the freedom of the press, which is guaranteed in many constitutional republics (U. S. Bill of Rights). For obvious reasons, the freedom of the press isn't a natural right, but depending on the legal framework, it can be inalienable. Lastly, we should keep in mind that the inalienability of fundamental rights is compatible with the previously analyzed hierarchy of rights: thus, for example, Christopher Morris claims that even a minimal state can prevent us from doing anything harmful to ourselves (Morris 2005, 318): this interpretation is perfectly consistent with the limitation to the right to liberty by the right to life, as formulated by Hobbes and Locke.

Negativity

"No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law..." – excerpt of the Fifth Amendment, U. S. Bill of Rights

Unlike naturalness and inalienability, negativity as a property of fundamental rights isn't explicitly named anywhere in the theories of Hobbes', Locke's and Rousseau's social contract theory. However, as we'll see, it is not only present, but represents a central element of these rights. Here we must first specify exactly what we mean when we define certain rights as negative: namely, this property exclusively means that the state cannot take away the goods that these rights refer to from citizens. The contrary case would be with rights which entail the state providing citizens with goods that certain rights refer to.

This distinction is precisely illustrated by Jeremy Waldron, who points out that fundamental rights, or "first generation rights", as he calls them, only require that the government refrain from various acts of tyranny and repression (Waldron 2005, 105). He contrasts these rights with the so-called "second generation rights", or socio-economic rights, the fulfillment of which requires the government to be bound with the positive duty to help citizens (Waldron 2005, 105). As we'll see later, despite the inarguably higher price and difficulty of realizing socio-economic rights, the precedent for their fulfilment can be found even in the social contract theory.

Here, however, in following the above-mentioned distinction, we will look into the works of Hobbes, Locke and Rousseau in order to point out the moments where they, without explicitly recognizing negativity as the property of fundamental rights, nevertheless emphasize its importance. First and foremost, the seed of the evidence of this property can already be found in the way in which Hobbes defines fundamental rights: namely, in his analysis of the right to life, he points out that other people are not bound to provide us with the means of our survival, but merely that they may not take them away from us (that is, we cannot abandon the right to defend these means) (Hobbes 1996, 88).

We come across something more specific, however, in Hobbes' analysis of court processes, in which he points out that a contract by which a man obliges himself to accuse himself, without guarantee of pardon, is necessarily invalid (Hobbes 1996, 93). In his words, the reason behind this is that "in the condition of nature, where every man is judge, there is no place for accusation: and in the civil state, the accusation is followed with punishment; which being force, a man is not obliged not to resist." (Hobbes 1996, 93) In this case, negativity as a property of fundamental rights has to be noted in particular: the absence of the obligation to not resist unequivocally means that the rights this property refers to do not involve the duty of society to provide citizens with a certain good, but in the illegitimacy of its seizure (which, in this case, refers to forcing an individual to admit guilt without assurance of pardon).

Finally, evidence of negativity as a property of fundamental rights in Hobbes can be found even in the way he defines rights that subjects have in the social state: namely, they involve the domain that the sovereign has "praetermitted" (Hobbes 1996, 141) and are found in the "silence" of laws (Hobbes 1996, 146). In other words, these rights and freedoms do not proceed from legal regulation, but the exact opposite – the lack of legal regulation in a given domain. The importance of the descriptors which Hobbes uses here, as well as in the example above regarding confessions under coercion will come through in particular in our analysis of historical legal documents and their connection with the doctrine of natural rights in the classical contract theory.

In the case of Locke's theory, the importance of negativity as a property of fundamental rights isn't found explicitly, but it can be discerned from the way he defines certain rights. For example, in the aforementioned quote that no rational being can be assumed to change its condition with the desire of making it worse, Locke emphasizes that it is exactly because of this that the power of the government must extend beyond the common good (Locke 2003a, 156). Fundamental rights, therefore, do not come from the state's positive duty toward citizens, but are based upon its exclusion from their personal domain.

As we saw earlier, Locke names the preservation of property as the primary goal of government, emphasizing that it cannot take

away what it was created to protect without the consent of the governed (Locke 2003a, 161). Based on this, he derives that the government, even when it is absolute, cannot be arbitrary (Locke 2003a, 162), and that, should its overreach its boundaries and invade the property of its citizens, it can legitimately be overthrown (Locke 2003a, 197). Among other things, we established earlier that Locke explicitly supports freedom of speech (Matić 2021). This right is negative insomuch as it does not require any active state participation in order to be realized, but is merely conditioned upon the withdrawal of the state from the domain of public expression.

Finally, we also implicitly find negativity as a property of fundamental rights in Rousseau: according to his definition of these rights, the state isn't obliged to provide citizens with anything, but is merely bound to be excluded from their personal domain. This comes into the forefront with the right the protection of property in particular, which Rousseau considers to be the fundamental role of the state (Rousseau 1994b, 25), and, like Locke, insists on the importance of its preservation. We find a somewhat more specific reference, however, in his understanding of the process of the forming of the social contract, in which he emphasizes that property is formed through a legal act by which a man becomes the owner of certain goods and is simultaneously excluded from all others (Rousseau 1994a, 60).

In her analysis of the transformation of rights in Hobbes' theory, Eleanor Curran arrives at a similar conclusion: she notes that in his understanding of the state of nature, rights (or, more precisely, the goods they refer to) are unprotected, but they become so in the process of transfer. The protection of rights, therefore, does not come about on the basis of new rights, but through the elimination of obstacles which are based on other people's abandonment of the rights to goods they are not entitled to (i. e. the right to everything) (Curran 2002, 71). In other words, the rights of a certain person in Hobbes' theory become protected by transfer insomuch as others abandon their won rights to those same goods – this protection is founded upon the correlation with the duty of other not to disturb the subject of these rights in realizing the goods that they refer to (Curran 2002, 86) and it is based not upon moral values, but legal

punishments (the reason for this being that, in Hobbes view, nothing is broken more easily than a man's word) (Hobbes 1996, 88).

For comparison's sake, negativity, while a defining property of fundamental rights, isn't only their property, as was the case with naturalness and inalienability. For example, it also characterizes the right to privacy. The inalienability of this right inevitably proceeds from the functioning of a proper constitutional system, but it certainly isn't natural: given that the social contract is the basis of a government, an explicit distinction between the public and private spheres cannot exist before its establishment. However, the right to privacy, like fundamental rights, does not oblige a state to any positive act; it merely prevents it from engaging in actions that would harm this right.

Individuality

"To resist the sword of the commonwealth, in defense of another man, guilty, or innocent, no man hath liberty; because such liberty, takes away from the sovereign, the means of protecting us; and is therefore destructive of the very essence of government." – Thomas Hobbes (1996, 145)

Like negativity, individuality as a property of fundamental rights isn't explicitly stated anywhere in the social contract theory. In spite of this, it permeates the doctrine of natural rights, which particularly comes into the fore in the concept of forming the social contract: as we saw, Hobbes, Locke and Rousseau believe that people abandon the state of nature, in which they find themselves even if they live in communities, but without government (Locke 2003a, 106).[15] Though they also possess fundamental rights in the state of nature (absent an absolute and arbitrary power that could deny them), its chaotic nature makes obtaining the goods that these rights relate to difficult, so individuals sacrifice the right to all things in order to gain safety and security.

[15] Hobbes emphasizes this point in particular, pointing out that communities without governments are "mere gatherings" absent a transfer of rights as under a social contract (Hobbes 1998, 24).

This aspect of the social contract theory does not directly reflect upon individuality as a property of fundamental rights, but it certainly sets its foundation. Namely, recall how Hobbes, when defining fundamental rights, emphasizes that the goal of voluntary acts of every individual is some good to themselves (Hobbes 1996, 88), or how Locke in that same context points out that no rational being can be assumed to change the circumstances of its life with the intention of making it worse (Locke 2003a, 156). It's important to also keep Rousseau's view in mind, according to which the social contract provides the answer to the question of how to find a form of government "which will defend and protect, with the whole of its joint strength, the person and property of each associate, and under which each of them, uniting himself to all, will obey himself alone, and remain as free as before." (Rousseau 1994a, 54-55)

The aforementioned views unequivocally point to the primacy of the individual and the realization of their rights as the fundamental criterion of the legitimacy of the social contract: in other words, the state that the social contract theorists favour is as successful as its citizens are able to realize their rights within it. Taking into account the earlier parameters of the state of nature, this criterion is certainly justified, but has its limits. Namely, the individuality that is expressed by it may appear as an obstacle for confronting a government that abridges fundamental rights: in this case, the unjustifiability of collective action against the state that acts tyrannically calls into question the possibility of its overthrow.

This phenomenon is somewhat problematic in Hobbes, who explicitly states that no man has the right to resist the 'sword of the state' in defense of another, even if he is innocent (Hobbes 1996, 145). However, he recognizes the right of a group of people to resist the state collectively, even if such resistance is unjust, with the exception of those among them who received a pardon (Hobbes 1996, 145). All this is based on Hobbes' view that men cannot legitimately oppose any act of the sovereign, because they are its indirect authors, that is, because, upon entering into the social contract, they formed a collective body the will of which is based on their own. It follows from this that the decisions of the sovereign cannot be unjust or harmful to the subjects (Hobbes 1996, 117). Hobbes later expands this principle, claiming that religious and political factions are

unjust,[16] because they are harmful for peace and security of subjects, and because they take away the proverbial sword from the hands of the sovereign.

Similarly to Hobbes, Locke insists on the element of insecurity of propriety (life, liberty and property) in the state of nature as the main reason for forming the social contract (Locke 2003a, 141). Beside this, he, like Rousseau, points out the element of joining together with the goal of protecting the goods referred to by fundamental rights (Locke 2003a, 154). However, he analyzes the specific issues regarding these rights in much greater detail in his *Letter Concerning Toleration*, in which he also primarily reduces the role of the state to the protection of citizens and the advancement of their interests (Locke 2003b, 218). Here, however, we also come upon specific religious rights, to which Locke ascribes individual character as civic rights, rather than treating them as rights of religious groups. For example, he points out that the state, in order to restock the supply of cattle can prohibit the *slaughter*, rather than the *sacrifice* of calves (Locke 2003b, 236), emphasizing that such prohibitions must not be used as a tool of repression against any particular religion (Locke 2003b, 237).

Although, as in Hobbes, fundamental rights in Locke are also characterized by individuality, he, unlike Hobbes, recognizes the right of citizens to unite in the overthrow of the legislative, should it overreach and endanger their propriety (Locke 2003a, 197, 199). Rousseau shares a similar view in this regard, metaphorically comparing revolutions to sickness and cure, emphasizing their rejuvenating effect on states (Rousseau 1994a, 80). His view of the individuality of fundamental rights is similar to Hobbes' and Locke's, but, as is usual, he emphasizes the importance of the general will in its protection.

This may seem paradoxical, given the fact that the general will is collective, but it is exactly there that its strength in defending individual rights lies: since the goods these rights refer to can only be defended by the state, and since the general will is its foremost

[16] In Hobbes' view, justice, or injustice as a property of an action can only be measured according to the law: thus in the state of nature, no action is unjust (Hobbes 1996, 84), while in the civil state, all state laws are just even if they contradict the law of nature (Hobbes 1996, 142).

lawmaking principle, the life, liberty and property of all become guaranteed through protection by all (Rousseau 1994b, 10). This, of course, does not change the individual character of fundamental rights, but only affirms the necessity of a collective body as the foundation for their security. Since the wielder of this role in Rousseau is the principle of the general will, he notes the danger of its invasion upon the individual domain, which is why he emphasizes the distinction between the duties citizens have toward the state and the natural rights they enjoy as men (Rousseau 1994a, 67). Implicitly, a government that invades upon fundamental rights does not act in accordance with the general will and its overthrow may be justified.

Lastly, as an example of an individual right which is not natural, we can name the right to a fair and speedy public trial, which, like the aforementioned freedom of the press, is guaranteed in most constitutional systems. It is clear, of course, that this right is conditioned upon long civilizational development as the foundation of a legal structure that can guarantee it; despite this, however, it is an individual right, much like fundamental rights are. As this analysis has, therefore, demonstrated, though the properties of naturalness, inalienability, negativity and individuality may be found beyond the scope of fundamental rights, these rights – and only these rights – are characterized by all four properties simultaneously.

Natural Rights and Human Rights

"Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." – Universal Declaration of Human Rights

In this chapter, we will briefly turn our attention to the issue of the relation between fundamental rights from contractualist theories and the human rights that often pervade contemporary political discourse. We will take a look at what human rights comprehend and how they differ from natural or, more specifically, fundamental rights, but also at the similarities that these two

conceptions share. Lastly, we will look into the link between human rights and social contract theory and find the influence of contractualist thought upon contemporary human rights.

The chief world document dedicated to human rights is the Universal Declaration of Human Rights, while at the European level, it is the European Convention on Human Rights. Both documents point out the importance of fundamental rights and freedoms, as well as protection from tyranny (UDHR), international cooperation and the development of a just global order (ECHR). The "fundamental rights" referred to here, however, are very different from the ones in the classical contract theory, though they do share the same roots.

Thus, for example, articles 3, 4 and 9 of the Universal Declaration of Human Rights recognize the right to life and liberty, and prohibit slavery and arbitrary imprisonment (UDHR). The same is true of articles 2, 4 and 5 of the European Convention on Human Rights (ECHR). Therefore, we find here a near-perfect parallel between the natural rights of the classical contract theory and contemporary human rights. Beside these, the Universal Declaration and European Convention also recognize equal legal protections, the right to fair trial (UDHR), freedom of assembly and the freedom of thought and religion (ECHR), which, though they are not directly counted among the fundamental rights of the classical contract theory, can be derived and defended upon argumentation developed directly within it.

The relation between natural and human rights, however, fades when the contemporary conception steps into the domain of positive rights that involve expenses by the state or non-state institutions in order to be realized. Among these are the rights to education, healthcare and an adequate standard of living (including food, clothing, living quarters, etc.) (UDHR). The reason why these rights create a rift between the natural rights of the classical contract theory and contemporary human rights is, as we've seen, the fact that fundamental rights, among other properties, have to be characterized by negativity. In other words, they don't bind the state to some positive duty toward the citizens, but merely recognize a certain individual domain that the government cannot infringe upon (UDHR).

On the other hand, we can legitimately ask ourselves if this necessarily stands: namely, can we truly consider the right to life to be realized in a state in which, though there is great prosperity, some people die of hunger? As counter-intuitive as it may sound, the answer is: yes. The reason for this can be found as far back as Hobbes' definition of the right of nature and inalienable rights: "The right of nature, which writers commonly call *ius naturale*, is the liberty each man hath, to use his own power, as he wills himself, for the preservation of his own nature; that is to say, of his own life." (Hobbes 1996, 86) In this context, we must emphasize "*to use his own power*" as central for this definition, while in the definition of inalienable rights, the inability of a man to abandon his right to resist those who assault him by force with the intention to take away his life, is the central feature (Hobbes 1996, 88).

In neither of these two cases do we find a positive duty of the community to supply people with anything: in both cases, the sole point is the freedom of men to gain or keep something through their own ability. Locke's (Locke 2003a, 110) and Rousseau's (Rousseau 1994a, 25) views on this issue mostly align with Hobbes'. However, the fact that neither the right to life, nor the rights to liberty and property involve a positive duty of the state to supply citizens with basic goods does not mean that such a duty doesn't exist, especially if we take into consideration a rich and highly developed society. In other words, the fact that the rights to food, healthcare and living quarters don't come under the purview of the right to life, doesn't mean that they shouldn't exist. These may not be natural or fundamental (in the contractualist sense), but they can be rights all the same.

The most interesting thing to look into in this context is whether these positive human rights from the contemporary legal-political framework can trace their roots to the classical contract theory. We established earlier that the social contract theorists implicitly recognize the hierarchy of natural rights: in other words, they establish limitations on certain rights based upon primary rights that these are derived from: nowhere is this more obvious than in Hobbes' definition, in which the right of nature is equivalent with the right to life, which unequivocally emphasizes its primacy in relation to the rights to liberty and property (Hobbes 1996, 86).

As we saw earlier, this hierarchy is explicit in the definition of the law of nature, which limits man's freedom by anything that is destructive of his life, or takes away the means of its preservation (Hobbes 1996, 86). We find a similar limitation in Locke, who points out that, despite man's boundless freedom in the state of nature, he simultaneously has no right to destroy himself (Locke 2003a, 102). Since it is derived from the right to life, and since it is necessary for its preservation, the right to liberty must be limited by what it is conditioned upon, and for the purpose of which it exists. The case is similar with the right to property, which is also limited by the rights it is derived from in many instances.

Namely, in Hobbes, as our analysis has shown earlier, the right to property is limited and determined by the right to life, which is why it is restricted merely to the means of its preservation (Hobbes 1996, 88). Locke, however, derives the right to property from the right to liberty, which gives him a significantly wider domain, which includes all with which a man mixes his labour (Locke 2003a, 113), as long as there is quantitatively and qualitatively enough left over for others (Locke 2003a, 112). In Rousseau's case, as we've seen, both criteria come into play: man can gain property only through labour, and may only keep what is necessary for the preservation of his life; beyond that, everything else can be taxed (Rousseau 1994a, 60).

Regardless of whether it is derived from the right to life (Hobbes), the right to liberty (Locke), or both (Rousseau), the right to property is conditioned and limited, either directly by the right to life, or indirectly, by the right to liberty, which is itself conditioned upon the right to life. Having this hierarchy of rights in mind, we will more easily be able to understand the precedent for establishing certain positive rights within the classical contract theory. Namely, though only fundamental rights are negative, they are founded upon the importance of human life and its preservation, even at the expense of liberty and property.

Thus, for example, Hobbes, going back to the concept of inalienable rights upon having defined it, emphasizes that, beside the fact that men must abandon certain rights, it necessary for their lives that they preserve others, among which he includes the right to their own bodies, air, water and freedom of movement (Hobbes 1996,

102). Along those same lines, Locke emphasizes that men, having the right to their own preservation, also have the right to meat, drink, and other things necessary for their survival (Locke 2003a, 111). Though neither of these two examples explicitly contains any positive rights, it is interesting to note that Locke establishes the right to the means of one's preservation *before* the right to property. With Hobbes, however, we find something even more direct: considering taxes and the distribution of property, he points out that, should men lose the ability to sustain themselves by their own labour, the state should provide for them, rather than leaving them to the uncertainty of charity (Hobbes 1996, 230). This reaffirms the primacy of the preservation of life as the ultimate good, and lays the foundations for contemporary positive human rights.

THE CRITIQUE OF NATURAL RIGHTS

"Government is not made in virtue of natural rights, which may and do exist in total independence of it; and exist in much greater clearness, and in much greater degree of abstract perfection: but their abstract perfection is their practical defect. By having a right to everything they want everything. Government is a contrivance of human wisdom to provide for human *wants*." – Edmund Burke (1951, 57)

This portion of the book will be dedicated to the detailed analysis of the greatest and most influential currents in the critique of natural rights. The social contract theory, as well as the doctrine of natural rights based upon it, were largely ignored by critics at a time when their theoretical aspects didn't find a practical expression in the great political movements and social changes that began at the end of the eighteenth century. The American war of independence and the French revolution ignited a wave of radical political-economic overturns, in the Old as well as in the new world, which urge their defenders and critics to dedicate particular attention to the philosophical and political works that inspired the revolutionaries' ideas: above all others, the works of the social contract theorists and the concepts they developed.

The ultimate goal of the argumentation and analysis in the next several chapters will be to defend the natural rights theory from critiques that were either directly, or implicitly laid against it, based upon the interpretation that was presented in the central portion of the book. For clarity's sake, the discussion of these critiques will be divided into five chapters: the thrasymachean, the positivist, the liberal, the conservative, and the descriptive-normative critique. Though they inevitably share some common elements, these critiques are grouped as they are due to the specific characteristics that differentiate them from the rest: in the majority of cases, they deny one of the properties of natural rights that were discussed earlier.

The thrasymachean critique of natural rights is based upon the rudimentary model according to which 'might makes right'. It is

named thusly because its philosophical roots can be traced to the famous debate between Socrates and Thrasymachus in Plato's Republic, in which the sophist lays out the thesis that justice is the will of the stronger (Plato 2004, 15). The theoretical development of this critique toward its logical conclusion results in the far more sophisticated positivist critique. According to this view, all rights are founded upon state laws, from which it follows that if the state does not exist, then neither do laws, and, hence, rights. Therefore, there can be no such thing as natural rights.

The liberal critique is positivist in its foundation, while its primary focus is pointing out the destabilizing social effect of the natural rights theory. This critique is particularly interesting because, though it comes from a perspective that puts individual rights on a pedestal, nevertheless identifies the concept of a non-state character of these rights as the intellectual spark that can cause the tumbling of society and the destruction of rights. Unlike the previous two, which are of a somewhat more abstract, timeless character, the liberal critique is directly tied to the French revolution and the Reign of Terror that proceeded therefrom.

Much like it, the conservative critique also had a practical motivation, also inspired by the French revolution. The authors of this critique see the revolution as the ultimate expression of the spiritual stagnation of Europe and the final product of all the intellectual achievements of the eighteenth century, which is why they call into question both rationalism and scientific materialism as a whole. Early conservative thinkers emphasize human irrationality, ignorance and the importance of tradition and religion as the most powerful driving forces in society, which is why they deny the possibility of a rational social order and progress. Among other things, the concept of pre-state rights is a particular target of their critique, as the supposed justification of numerous violent excesses of the French revolution.

Finally, the descriptive-normative critique, though not explicitly directed at the doctrine of natural rights, can be derived from Hume's analysis of rationalist conceptions of morality. It establishes a logical principle according to which a normative conclusion cannot be derived from descriptive premises. Analyzing this critique in the context of natural rights is relevant insomuch as

Hume levels it against every system of morality he has ever come across (Hume 1888, 469). Although the doctrine of natural rights, as our earlier analysis has shown, isn't a system of morality, it nevertheless constitutes a normative system that involves descriptive premises, which is why this critique can certainly be levelled against it.

In the next several chapters, we will first take a look at how the arguments of the critics of natural rights reflect upon the general interpretation, according to which these rights are, in the words of John Hasnas, "moral entitlements that human beings possess simply by virtue of their humanity" (Hasnas 2005, 134). We will look into whether these critiques tear down the thus-conceived doctrine of natural rights, and, if they do, we will see whether a change in perspective based upon the consistent interpretation of contractualist theories positively reflects upon the defense of natural rights.

The Thrasymachean Critique

"If one were to begin a sentence with the phrase "natural rights are," that sentence would already be false. Natural rights are not ... Despite the carefully parsed semantic rigging, a "natural right" is nowhere to be found in nature, and unlike an actual legal or customary right, it confers no protection upon its claimant." – Conor Hartin (2008, 21)

In the first book of Plato's famous dialogue *The Republic*, Socrates poses the question: "What is justice?" (Plato 2004, 5), to which Polemarchus, quoting the Greek lyricist Symonides, answers that justice is giving to each man his own (Plato 2004, 6), which is quite similar to one of Hobbes' definitions from the *Leviathan* (Hobbes 1996, 96). The sophist Thrasymachus soon jumps into the conversation, first asking Socrates for money in exchange for his teachings, and then defining justice as the advantage, or interest, of the stronger (Plato 2004, 15).

Apparently confused, Socrates asks Thrasymachus whether beef is good for all men since it is good for the pankratist[17] Polydamus (Plato 2004, 15). Criticizing Socrates' irony, the sophist responds that the principle he laid out applies to political systems, and that tyrannies, aristocracies and democracies enact laws that benefit the ruling element; these laws are always in the interest of the system they were enacted in, which necessarily makes them just (Plato 2004, 15). Thrasymachus' thesis isn't foreign even to social contract theorists: for example, Hobbes also believes laws to be the measure of justice and that, even if some actions run contrary to the law of nature, there can be no justice or injustice without state laws (Hobbes 1996, 176).

In a broader theoretical context, however, Thrasymachus' definition of justice represents one of the more famous formulation of the principle according to which 'might makes right'. What's more, this principle is so widespread, that Rousseau dedicates a sizeable portion of the first book of his *Social Contract* to arguing against it, primarily in order to counter defenses of slavery (Rousseau 1994a, 49). In spite of this, 'might makes right' remains a popular and, due to its inherent simplicity, attractive model for establishing the validity (or invalidity) of certain rights.

On the most basic level, its correctness can hardly be disputed: if we were to define a right as the guarantee of the possibility of realizing a certain good, which is the definition that Hobbes, Locke and Rousseau implicitly use, might really does make right in the sense that, absent the power to take and keep something, we cannot successfully lay claim to that thing. The relevance of the broader implications of this principle, as well as the domain of its applicability is something that must be critically examined. However, correct or no, the idea that might, independent of context, makes right, represents the foundation of one kind of critique of natural rights – a critique which, taking into account its philosophical roots, we shall call *thrasymachean*.

The *par excellance* example of such a critique is the book titled *The Myth of Natural Rights* by author Lou Rollins. In its

[17] Its name translating as "all powers" (Greek *pan* = all, *kration* = strength, power), the fighting sport of pankration combined boxing and wrestling, thereby sharing some similarity with modern mixed martial arts.

introduction, essayist Conor Hartin laments the fact that Rollins' name cannot be found in scientific publications, given the fact that he reduces the hallowed libertarian axioms to phlogistons[18] and makes every previous work on the subject antiquated (Hartin 2008, 20). Hartin further convinces us that Rollins solves the issues that scholars drunk on dogma obfuscate (Hartin 2008, 22), and, further, that the philosophers who 'invented' natural rights have an advantage over engineers insomuch as their mistakes won't blow up in their faces (Hartin 2008, 23). Unlike them, Hartin emphasizes, Rollins is a principled amoralist to whom nothing is holy (Hartin 2008, 25): hence, those who read his book and remain committed to the idea of natural rights are akin to creationists (Hartin 2008, 27).

Hartin's relentless assault on the philosophy of politics and law aside, we will see if one can indeed read Rollins' book and continue defending the idea of natural rights without sounding as absurd as someone who claims that the Earth was created six thousand years ago. Despite his obvious disdain for natural rights theories, Hartin does indeed hit a relevant note in this context: as we saw in Hasnas earlier, the arguments derived from within this doctrine have great persuasive power only if people have a prior commitment to the idea of the existence of these rights (Hasnas 2005, 118). Thus, despite the fact that Rollins and Hartin are essayists and not philosophers, or otherwise experts in the field of social sciences and humanities, their arguments ought to be taken into account, just as Socrates did with Thrasymachus.

Rollins begins his work by pointing out that one of the pervading myths of the modern era is the myth of natural rights, rights that people allegedly possess simply by virtue of being human (Rollins 2008, 33). Already here, we see a strong parallel with Hasnas' definition of 'traditional' natural rights, according to which these are moral entitlements that people possess simply by virtue of being human (Hasnas 2005, 134). Rollins notes that natural rights are often connected to natural law, which prescribes how people should act (Rollins 2008, 34) and emphasizes that both concepts are actually false, and at best, metaphors (Rollins 2008, 35). It's interesting to

[18] In the eighteenth century, before the development of modern chemistry and the discovery of oxygen, phlogistons were a hypothetical flammable substance which was believed to enable fire to burn.

note that Rousseau, at least in the context of natural law, agreed with Rollins: "As long as we are content to define the word in metaphysical terms alone, we shall go on failing to understand what we are arguing about, and even when we have defined a law of nature we shall be no closer to knowing what a law of the state is." (Rousseau 1994a, 73)

In pointing out the dubiousness of natural law, at least in the social state, Rousseau unequivocally opposes Hobbes and Locke, but, like them, defends the concept of natural rights (Rousseau 1994a, 67), which points to the fact that the law and right of nature need not be connected. Rollins further attacks Ronald Dworkin's thesis, according to which natural rights are political trumps in the hands of individuals, insisting that these rights could not stop the police if it were to enact violence according to an 'unjust' law (Rollins 2008, 35). Lastly, Rollins confronts Eric Mack's view that Lockean rights represent a moral-philosophical barrier that prevents the state's intrusion upon society, claiming that the "moral-philosophical barrier" is metaphorical, and that it won't prevent the state's intrusion upon "society"[19] any more than a metaphorical shield will stop an arrow (Rollins 2008, 35-36).

When compared to most academic publications, Rollins' book has the advantage of extreme clarity and simplicity: at first glance, his arguments seem almost obvious. So much so, that an attempt to counter them might seem as absurd as claiming that people lived alongside dinosaurs. But, how do these things actually stand? Firstly, let's see if Hasnas' formulation of 'traditional' natural rights, which can be seen as representative for most contemporary theorists, 'survives' Rollins' critique.

We are thus speaking of moral entitlements that people possess simply by virtue of being human (Hasnas 2005, 134). As we saw, Rollins calls these rights "metaphorical" and equivocates their ability to defend people from extreme repression with the ability of a metaphorical shield to stop an arrow (Rollins 2008, 35-36). Rollins is obviously right. Indeed, no matter how they are formulated, or the eagerness with which they are put forth, moral principles, if they have

[19] By putting the term *society* under quotation marks, Rollins implicitly calls into question the legitimacy of the philosophical distincition between society and state.

no force of law behind them, cannot prevent the state's intrusion upon the individual domain. What's worse, if state laws are directed against these principles, they are reduced to something that can hardly even be characterized as a metaphorical barrier.

The general understanding of natural rights, thus, falls under Rollins' critique, which, again, takes us back to the necessity of a change in perspective, based on a consistent interpretation of the classical contract theory. According to the analysis laid out in the central chapters, natural rights that are presented within it are not moral entitlements, are not unique to humans and do not come about from human nature. These rights, instead, are normative principles that proceed from the very circumstances of the state of nature, defined by the non-existence of government and they refer not to *protection from other people* (which is the purpose of the social contract), but to *protection from the state*.

Rollins' critique, however, affects natural rights even in this case: in the introduction to his work, Conor Hartin claims that natural rights, despite the carefully parsed semantic rigging, cannot be found anywhere in nature, and that, unlike real legal or customary rights, provides no protection upon its claimant (Hartin 2008, 21). Beside protection from the state, we could respond to Hartin, due to either the fact of its non-existence (in the state of nature), or constitutional restraint (in the social state). This takes us back to the genesis of natural rights in the secular conception that we presented earlier.

At the heart of Rollins' and Hartin's argument is the idea that natural rights as a principle, unless supported by the legal system, have no power whatsoever. In the social state, under, say, a repressive regime, this is obviously true. What they seem to be forgetting, however, is that philosophical precedent had to be established at some point that would eventually bring fundamental rights under the purview of legal systems. To put it plainly, under systems that recognized no fundamental rights, someone actually had to conceive of a different system that does recognize them before such a system could actually be developed.

Naturalness as a property of fundamental rights comprehends that they originate from the state of nature. We saw that fundamental rights, just like the right to everything, do not constitute moral entitlements and that people don't possess them simply by virtue of

being human, but because the state they find themselves in before the creation of the society has a certain normative framework from which these rights necessarily proceed. Given the fact that there are no laws in the state of nature that would determine what belongs to whom, every man has a right to every thing that he can obtain. Hobbes, Locke and Rousseau, however, recognize that in this practically limitless domain of rights, there are those that, due to their connectedness to man's survival, have to enjoy a special status. We named these rights – the rights to life, liberty and property – fundamental rights.

However, after the social contract is entered into, the danger to which Rollins points actually does exist: namely, that the state could either abridge laws or, worse, enact laws that alienate inalienable rights, by making the goods they refer to unobtainable. This necessitates some additional clarifications regarding the inalienability of fundamental rights. Namely, we saw that Locke points to absolutism as the worst social order, worse than even the state of nature (Locke 2003a, 105). We also saw that, according to Hobbes (Hobbes 1996, 120) and Rousseau (Rousseau 1994a, 64), sovereignty, in order to exist, must be absolute.

Here, however, we come across a distinction we established earlier, namely, between absoluteness as a property of sovereignty and absolutism as a political system. While the state of nature is necessarily characterized by the arbitrariness of power (in Locke's words: the arbitrary power of a hundred thousand men), the social state is characterized by the absoluteness of power, though it need not be arbitrary. If it is, which is the case with absolute monarchies (in Locke's words: the arbitrary power of one man with a hundred thousand under his command), fundamental rights become unmaintainable (Locke 2003a, 161).

We see, then, that, according to the social contract theorists, the only guarantee of the survival of the rights to life, liberty and property in the social state is limited government, the power of which is necessarily absolute (absoluteness as a necessary condition of sovereignty), but not simultaneously arbitrary. Inalienability as a property of fundamental rights thus does not imply the literal inability of the state to deny these rights to people, regardless of circumstances. Contractualist theorists were well acquainted with the

ability of governments to infringe upon fundamental rights, considering the times they lived in; their description of these rights as inalienable should not, therefore, be understood as a mere moral appeal, but as a principle which establishes a precedent for the legal limitation of government, such that the chance of their infringement by the state is minimized.

Here we also come across the rift between the social contract theory and Rollins' critique that no interpretation can resolve. His thrasymachean perspective comprehends that laws, being the only criteria of legitimacy, are themselves always just, regardless of their content. Though Hobbes would undoubtedly agree, the issue of legitimacy would remain open, but taking his positions on the mutual conditioning of natural and state law into consideration, as well (il)legitimacy of 'punishments' enacted without public trials, we can assume that he would at least lean toward the side of establishing criteria of legitimacy that the justice of laws would be conditioned upon.

The Positivist Critique

"Although something external can be acquired by seizure or contract according to everyone's concepts of right, such acquisition is only provisional as long as it does not possess the sanction of a public law." – Immanuel Kant (2006, 112)

In this chapter, we will examine the critique of natural rights that can be viewed as the perfected form of the previous one: like the thrasymachean, the positivist critique denies the existence of natural rights; however, unlike it, it does not reduce rights to mere force. The sophistication of the positivist critique in comparison to the thrasymachean is founded upon its identification of state law as the source of all rights. Therefore, rights do not proceed directly from force and do not solely exist where power is greatest, but are founded upon social development which results in the establishment of the state and laws.

Laws, from this perspective, represent the only possible source of rights, and it must be emphasized that state laws are the only ones relevant here. In the positivist critique, there is no room for

the law of nature, which, even if it were to exist before the state, would cease with the forming of the social contract. According to this view, therefore, there can be no such thing as natural rights, whether their source is God, or the normative circumstances of the state of nature. In other words, even if, before the creation of the state, people have the ability to gain and keep certain goods, the normative relations underlining these abilities cannot be called rights – nothing that isn't based on state laws can bear the name of *rights*.

The theory that we will take as exemplary here is particularly interesting within the philosophy of politics and law because its author, Immanuel Kant, was himself a social contract theorist, but also an opponent of the natural rights doctrine as espoused by Hobbes, Locke and Rousseau. In this context, we will first give a brief overview of the elements in which Kant's social contract theory aligns with those of his predecessors, and then turn to his conception of the normative character of the state of nature.

Much like Hobbes (Hobbes 1996, 84), Kant equivocates the state of nature with that of war, not because he considers it to be characterized by constant enmity, but by a constant *threat* of enmity (Kant 2006b, 72). This is, among other things, because in the dilemma on whether people are social or solitary and reluctant to cooperate, the latter ought to be assumed (Kant 2006c, 165). Kant metaphorically points out that nothing completely true can be made out of the crooked wood mankind was made from (Kant 2006d, 9), however, he also notes that nature compels men to enter into society through asocial sociability. Although it represents a kind of source of society, this antagonism, due to its dialectical character, carries with it the threat of its collapse (Kant 2006d, 6).

Here, we come upon an interesting rift between Kant and Locke, according to whose view, God was the one that gave men the incentive to enter into society for their own survival (Locke 2003a, 133); Kant, on the hand, ascribes this process to nature and dialectical antagonism. His view is thus secular and, therefore, closer to Hobbes'; the parallels with Hobbes, however, are not exhausted here and, what's more, become even more explicit in Kant's analysis of the social state. Quite like Hobbes, he emphasizes that the sovereign has no duties toward citizens, only rights, from which it follows that subjects can answer harms that the state caused them through

complaints, but not through resistance (Kant 2006c, 118). This in the final instance comprehends that the highest state authority cannot be punished (Kant 2006c, 128), to which Hobbes would only add that the reason for this is that the sovereignty was formed by the social contract, which makes citizens the indirect authors of the actions of the sovereign – in opposing him, they would be opposing themselves (Hobbes 1996, 117).

With regard to the rights and freedoms of subjects in relation to the state, Kant points out enlightenment as the primary criterion for limiting the authorities. Therefore, he notes that the private use of reason can be significantly limited, while the public must always be free: a soldier thus has to follow orders, but can simultaneously publicly question them, just as a citizen must pay taxes, while simultaneously questioning their legitimacy (Kant 2006a, 19). The reason for Kant's particular dedication to enlightenment is his distinction between the rational and sensual character of human beings, with the first being positive and the second negative: hence, there is no objective conflict between morality and politics, but subjectively, our tendency toward selfishness causes conflict.

The idea by which Kant's social contract theory outstrips those of his predecessors in sheer ambition alone is the cosmopolitan conception of the world federation of states. Much like Hobbes, Locke and Rousseau, Kant examines the issue of human relations in the state of nature. However, unlike them, he also considers the character of the relation between different states after the social contract is formed, and concludes that in the social state, antagonism between people transforms into antagonism between states (Kant 2006d, 9). From this relation arises a kind of second state of nature, in which the conflicting parties aren't men, but states, which, like men in the state of nature, have no common authority to appeal to for resolving disputes. Hobbes was on the verge of this idea when he noted that, among other things, the relation between kings gives us some insight into the state of nature (Hobbes 1996, 85).

It was Kant, however, that developed this idea to its logical conclusion: in order to resolve all conflicts long-term, it is necessary to establish a world federation in which all state, even the smallest ones, enjoy equal rights, not due to their own power, but due to the federation itself (Kant 2006d, 10). In order to establish such a

federation, many conditions would have to be met: among others, states would have to refrain from violently involving themselves into the governments of other states, standing armies would have to gradually be abolished and, in times of war, states would have to abstain from tactics that make peace impossible, such as the use of assassins and poisoners, ignoring surrender and fomenting treason (Kant 2006b, 69-70).

As the first defining act of perpetual peace, Kant emphasizes that the civic establishment of every state would have to be republican, which entails the freedom and equality of all members of society and their dependence upon one common lawgiver (Kant 2006b, 74). Unlike peace treaties, a peaceable federation established thusly would not tend toward ending one war, but all wars for all time (Kant 2006b, 80). The federation of republics Kant speaks of thus represents a kind of social contract between states insomuch as it tends to create on an international level the same kind of structure that the social contract creates between people on a national level.

Kant's social contract theory, therefore, shares many elements with those of Hobbes, Locke and Rousseau and even supersedes them in some. However, in this context, we are primarily interested in his understanding of the state of nature and, more specifically, natural rights. Firstly, we saw that, like Hobbes, Kand equivocates the state of nature with that of war, its defining feature being the constant threat of enmity due to a lack of common authority (Kant 2006b, 72). Based on this characterization, he puts forth two seemingly contradictory views on the state of nature in his *Metaphysics of Morals*: firstly, following Rousseau (Rousseau 1994a, 51), he emphasizes that this state isn't a state of injustice, but rather a state in which justice is absent (Kant 2006c, 112), only to later specify that the term "unjust enemy" in the state of nature is redundant because the state of nature is a state of injustice (Kant 2006c, 144).

However, this disparity can be explained away by the fact that in the latter instance, Kant, in calling the state of nature a state of injustice is referring to the absence of justice, rather than its opposite. Despite this, he considers this state insightful, pointing out that, while people should not seek to go back to it, they ought to look back to it from their current perspective (Kant 2006c, 170). This view

simultaneously represents Kant's resolution of the rift between Rousseau's Discourse on the Origin of Inequality and his Social Contract (Kant 2006c, 169). Kant emphasizes that experience demonstrates the overruling maxim of violence and malice between men, who, before the creation of a binding outside law, war with one another (Kant 2006c, 111). Therefore, before the establishment of a general legal system, people cannot be protected from violence due to everyone's right to do what they consider to be justified (Kant 2006c, 111).

Seeing as the abandonment of the state of nature entails establishing sufficient outside legal power, men are faced with a choice: they can either abandon any concept of right whatsoever, or quit the state of nature by uniting with one another and submitting themselves to legal force (Kant 2006c, 112). Regarding everything that was said thus far, Hobbes, Locke and Rousseau would doubtless agree with Kant. However, in addition to abandoning any concept of right absent a state, he again distances himself from the natural rights theory by saying that "although something external can be acquired by seizure or contract according to everyone's concepts of right, such acquisition is only provisional as long as it does not possess the sanction of a public law" (Kant 2006c, 112). He still leaves open the space for the provisional legality of obtaining goods as a condition of the possibility of the social state and emphasizes that, if at least a provisional "mine" and "yours" did not exist in the state of nature, then neither would the duty to enter into the social contract (Kant 2006c, 112).

Though it isn't developed in great detail, Kant's turn in the interpretation of the normative relations in the state of nature is reducible to an early version of the positivist critique of natural rights: as a social contract theorist, he is bound to accept at least a provisional character of right in the state of nature, without which the social contract would have no basis. However, unlike his predecessors, Kant negates the status natural rights as such, specifically due to the non-existence of state laws. The justification for his position can be traced to the observation that, absent a legal order, people cannot be protected from violence due to everyone's right to do what he considers justified (Kant 2006c, 111). But this simultaneously introduces an interesting dilemma: the

aforementioned point clearly implies that Kant recognizes the right to all things that was directly outlined by Hobbes and Rousseau, and indirectly by Locke.

However, he simultaneously negates the natural character of fundemental rights – the rights to life, liberty and property, and based on the fact that the goods these rights refer to are uncertain in the state of nature. This is, of course, correct, and would, like the thrasymachean critique, doubtless take down the generally accepted view that natural rights are moral entitlements that people possess simply be virtue of being human. Kant's predecessors would no doubt agree with him on this point, which is why they all advocate for the social contract for long-term security. Despite this, natural rights, as our analysis has demonstrated, do not entail protection from other people, but protection from the state.

Although, then, due to the right to everything that Kant also recognizes, life, liberty and property are inherently uncertain, it does not follow that fundamental rights don't exist in the state of nature, or that they only exist provisionally. The reason for this is that the existence of the right to life, liberty and property does not entail that these goods are guaranteed by law, but that there is no absolute and arbitrary power in the form of an unchecked state that could take them away. Here, it is important to once again draw the distinction between the uncertainty and unrealizability of fundamental rights: as we saw in Hobbes, and especially in Locke, who is particularly precise in this regard, though the non-existence of the state and laws necessarily entails the uncertainty of goods, men can still obtain and defend them through cunning and alliance.

On the other hand, the arbitrary power of a despotical state would, due to the absoluteness of its sovereignty which isn't restrained by constitutional limitations, make fundamental rights unrealizable, insomuch as people would have no power whatsoever to secure the goods these rights refer to. In the best-case scenario, an alliance of oppressed citizens for battling such a government would result in civil war and the temporary collapse of sovereignty, whether or not such a process resulted in a return to the state of nature (Hobbes 1996, 210), or in a return to an initial level of the social state, in which a new social order and form of government is elected (Locke 2003a, 209).

The Liberal Critique

"That which has no existence cannot be destroyed—that which cannot be destroyed cannot require anything to preserve it from destruction. Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense,—nonsense upon stilts." – Jeremy Bentham (1843, 457)

Here, we come upon a critique of natural rights from a truly unique perspective – a critique that, taking its intellectual foundations into account, apparently shouldn't even exist. Jeremy Bentham was one of the founders of modern liberalism and utilitarianism and throughout his lifetime, he was particularly dedicated to individual rights. Hobbes, Locke and Rousseau, on the other hand, laid the theoretical foundations for limited government and the separation of the private and public domains. The first impression one might have, therefore, is that these two intellectual currents – contractualism and early liberalism – are fully compatible and complement each other. Bentham, however, called natural rights "anarchical fallacies", "nonsense upon stilts" and "terrorist language" (Bentham 1843, 498). What, then, was the problem and where does such a rift between these two conceptions emerge from?

Firstly, unlike the previous two currents in the critique of natural rights, here we bear witness to particularly sharp language. In place of the earlier theoretical disputes with a metaphor or two sprinkled in, we find here the harshest judgement that far outstrips philosophical disagreements. The obvious reason for this is the time during which Bentham's critique was written in, and the event that inspired it: the French revolution. Hugo Adam Bedau notes that, though Bentham's essay against natural rights was written in 1796, it wasn't published until 1816, when it first appeared in Geneva in French, with the English edition only coming out in 1834 (Bedau 2000, 262).

Bedau emphasizes that Bentham lived in time in which the upper echelons of English society greatly feared 'the masses' due to the excesses of the French revolution (Bedau 2000, 268). Though he was very dedicated to individual rights, Bentham was simultaneously exposed to the significant influence of the anti-populist climate of his

surroundings. Taking into account the events of the French revolution, especially toward its end, when the Reign of Terror was established, the concerns he expresses are quite legitimate. However, basing a general critique of natural rights upon one singular event is, as we'll see, quite problematic.

From a theoretical standpoint, Bentham's critique is conceived as a step-by-step rebuttal of the articles of the Declaration of the Rights of Man and of the Citizen which 'crowned' the French revolution. His essay, *Anarchical Fallacies,* attacks the doctrine of natural rights from a perspective that is positivist at its core, but which also narrows and sharpens this viewpoint. Namely, while the positivist critique tends toward refuting the naturalness of fundamental rights, the liberal critique also attempts to refute their inalienability. Beyond that, it's worth noting that Bentham's critique outstrips all others in terms of rhetoric, and thus sounds 'the most convincing', regardless of whether or not this is relevant theoretically.

Firstly, Bentham emphasizes the use of the phrases "possible" and "impossible" in the context of the alienation of rights outlined in the Declaration, which, according to his interpretation, goes beyond the physical and moral and entails legal impossibility (Bentham 1843, 495). In-between these terms, man's mind loses its footing and becomes prey to the violence that marked the French revolution; in justifying this violence, the authors of the Declaration invite it, thus sowing the seeds of anarchy (Bentham 1843, 495-496). Therefore, Bentham notes that, while one ill-chosen word in a scenario or a novel is still just one word, in the law, it is a national disaster (Bentham 1843, 497).

He reserves particular ire for the article according to which all men are born free and remain equal in rights, condemning it as "anarchist trampling of truth and decency": instead, Bentham emphasizes that all men are born in absolute submission – that of a helpless child (Bentham 1843, 498). The next article in the Declaration that Bentham sets his sights on is that the goal of every political association is to maintain the natural and inalienable human rights. Bentham discerns that this article implies that: 1) there are rights that precede government; 2) these rights cannot be alienated and 3) existing governments are founded upon contracts. He wonders

what the truth of these things is and comes to the conclusion that there are no rights prior to the establishment of government, and no natural rights as opposed to state rights (Bentham 1843, 500).

Further, Bentham calls the concept of founding states upon contracts a plain fiction which cannot be confirmed in even a single instance (Bentham 1843, 501). In that regard, he emphasizes that states created contracts, not the other way around. To say that nature has given all men the right to all things is to say that it has given no man the right to anything, given that this nominal universality of rights equates to their actual non-existence (Bentham 1843, 502). In matters of property everyone's right to everything is no one's right to anything (Bentham 1843, 503).

Bentham's basing of his critique of natural rights exclusively upon the Declaration becomes particularly problematic with later examples of social change that didn't end devolve into violence and anarchy. The American war of independence could certainly be numbered among these, but Hugo Adam Bedau names an even less controversial example: the Universal Declaration of Human Rights, of which he wonders if Bentham would equally condemn it (Bedau 2000, 263). Holding to Bentham's definition, according to which fallacies represent false arguments that have the purpose of misleading or creating false opinions, Bedau points out that the French Declaration isn't an argument, but a political manifesto (Bedau 2000, 264).

Bedau does admit that the Declaration can be read as the product of an implicit argument in a broader sense, insomuch as it is based upon certain principles and beliefs; however, he notes that Bentham's critique isn't justified even in that case, because the alleged dishonesty of the authors of the Declaration isn't proven anywhere (Bedau 2000, 265). Though Bentham believes that violating any of the principles of the Declaration is a cause for revolt, Bedau specifies that the Declaration itself offers no recourse for citizens whose rights are violated (Bedau 2000, 266-267). He notes that Bentham overlooks the possibility of non-violent protests against extreme repression and invites anyone to give an example of even one anarchical act that was inspired by the U. S. Bill of Rights or the Universal Declaration of Human Rights. Bedau concludes that, quite the opposite to Bentham's fears, violence in the context of human

rights which he warned of actually comes from the government and the police when they crack down on non-violent protests (Bedau 2000, 268-269).

In that regard, however, it is, perhaps, even more interesting to turn to the views of Hobbes, Locke and Rousseau on the points that Bentham brings up, looking at both the ways they could have answer his critiques, as well as the solutions they offered well before he 'discovered' the problems with their conception of society. For starters, let's take his position that men, quite opposite to the freedom and equality that social contract theorists speak of, are born to the absolute submission of a helpless child (Bentham 1843, 498). On this issue, Locke says the following: children are not born in a state of equality, but they are born *to* it – parents, therefore, have a certain authority over their children, but this paternalistic power ceases with the child coming of age (Locke 2003a, 123).[20]

Bentham, among other things, calls into question the existence of natural rights due to the fact that these rights aren't recognized in any state (Bentham 1843, 498). Though legitimate, this point fundamentally demonstrates a lack of imagination. On this issue, Hobbes tells us the following: "we see, there has not hitherto been any commonwealth, where those rights have been acknowledged, or challenged ... and as the art of well building, is derived from principles of reason ... so, long time after men have begun to constitute commonwealths, imperfect, and apt to relapse into disorder, there may, principles of reason be found out, by industrious meditation, to make their constitution (excepting by external violence) everlasting." (Hobbes 1996, 223) If we take into account the states the legal norms of which were based on the principles laid out in contractualist theories, Hobbes' hope was certainly justified.

However, in this regard, Bentham's most important critique is his refutation of the theses that: 1) there are rights that precede government; 2) these rights cannot be alienated and 3) existing

[20] Hobbes believes that men are born unfit for society, and that many remain so in adulthood (Hobbes 1998, 25). Nevertheless, he also believes that men need society to live as children and to live *well* as adults (Hobbes 1998, 24); none of these beliefs 'interfered' with his view that all men are born equal (Hobbes 1996, 82).

governments are founded upon contracts. As we saw, his argument against these theses, rhetorical sophistication notwithstanding, is reduced to plain denial: natural rights, as opposed to state rights simply do not exist (Bentham 1843, 500). Seeing as the explanation of the way in which the social contract theorists understood this term was covered in great detail in the previous chapters, we shall not elaborate on it further here. It is sufficient to say that, opposite to the positivist conception, the natural rights spoken of in the social contract theory originate from the normative circumstances of the state of nature and protect people from absolute and arbitrary government, whether due to its non-existence, or its constitutional limitation.

This, however, brings us to the second thesis that Bentham derives from the Declaration, namely, that government cannot alienate these rights, which, in his interpretation, beside physical and moral, also implies legal impossibility (Bentham 1843, 495). The social contract theorists wrote about inalienability as a property of natural rights in great detail, but they were not, unfortunately, faced with a critique this specific. However, based on the views they did express, we can gain some sense of their interpretation of this concept: namely, just as we implied in the chapter on the thrasymachean critique, inalienability does not concern physical, nor legal impossibility of eliminating fundamental rights.

The reason for this is offered to us by Locke, who defined unlimited government as absolute and arbitrary, which is why he prefers the state of nature to absolute monarchy (Locke 2003a, 161). It is clear, therefore, that the government unequivocally has the power to eliminate fundamental rights: thus they cannot be either physically or legally inalienable in the literal sense. Therefore, in refuting this thesis, Bentham attacks a strawman, seeing as the social contract theorists never actually claimed otherwise. This leaves us with moral inalienability, which Bentham also touches upon and which, unlike physical and legal, certainly can be ascribed to Hobbes, as well as Locke and Rousseau.

It's important to emphasize here, however, that contractualist theorists, especially Hobbes, do not limit themselves strictly to moral inalienability: emphasizing that man cannot abandon his right to the defense of his own life, liberty and the means of preserving life, he

concludes that men cannot form a contract that involves their abandonment or transfer of these rights (Hobbes 1996, 88). This certainly bears with it the moral inalienability of fundamental rights, but it also transcends it: if we were to connect Hobbes' views on this matter with his recognition of numerous instances in which individuals can refuse to obey the government unless their refusal frustrates the end for which it was established (Hobbes 1996, 144-145), we can conclude that he, like Locke, sets the precedent for a limited government that does not harm the individual domain of its citizens.

The nature of the property of inalienability thus remains in question, which can be explained by the relation between the state of nature and the social state: in the first, fundamental rights are literally physically and legally inalienable simply due to the non-existence of an absolute and arbitrary power which would have the ability to alienate them. In the second, inalienability is primarily, but not exclusively moral, insomuch as the social contract theorists wish to set up a principle that would prevent arbitrary government. This, of course, entails recognizing moral inalienability on the one hand, but also the fact that rights can be physically and legally alienated, which is made most difficult through the establishment of a limited government.

The third thesis that Bentham derives from the Declaration is that existing governments are founded upon contracts (Bentham 1843, 500). Bentham's argument against this thesis, which he calls "plain fiction" (Bentham 1843, 501), is particularly convincing, particularly if we take into account his rhetorical 'diamond', namely, that states created contracts, not the other way around (Bentham 1843, 502). The social contract theorists, however, do offer a defense of this thesis, which can be divided into two parts: the first regards the existence of a pre-social state, and the second concerns the conceptual possibility of tracing the creation of states on the basis of consent.

With regard to the first, it's important to again emphasize Hobbes' specification that, though the state of nature normatively equates to the war of every man against every man (Hobbes 1996, 84), this war has never actually existed, and the best insight into it is given to us by Indians, civil wars and the relation between kings

(Hobbes 1996, 85). Locke, as we saw earlier goes deeper into this issue, pointing out that history truly does not record examples of people living without government, but that it also does not record the childhoods of individual soldiers in Xerxes' army. However, just as it is reasonable to assume that Xerxes' soldiers were once children, it is also reasonable to assume that people once lived without government (Locke 2003a, 143).

The reason for this is found in the second portion of the defense of the social contract theory, namely, in the possibility of founding states upon consent. Locke references the research of Spanish Jesuit missionary Jose de Acosta, who confirmed that American natives in Peru, Brazil and Florida freely chose their leaders, in times of war, as well as peace (Locke 2003a, 144). The obvious implication of this example is that, though the state wasn't necessarily directly formed by contract, the process of its foundation can be traced to various acts of consensually transferring authority.

Finally, let's tackle Bentham's view that the nominal universality of rights is reduced to their actual non-existence (Bentham 1843, 502), and that, in matters of property, everyone's right to everything is no one's right to anything (Bentham 1843, 503). It is interesting to note that Hobbes, Locke and Rousseau would agree with Bentham in this regard: the necessity of forming the social contract, due to the long-term unsustainability of the state of nature and the right to everything that characterizes it, is essentially the main point of their theories. However, unlike Bentham, the social contract theorists would not derive from this the conclusion that naturalness as a property of fundamental rights loses all relevance.

The fact that the rights to life, liberty and property, according to their interpretation, exist before and independently of the right to the state gives these rights a special status, especially since neither their transfer, nor their abandonment, unlike that of the right to all things, is necessary for forming the social contract. Hobbes, Locke and Rousseau would, thus, nominally agree with Bentham's observation, but would also note that his nihilistic view of natural rights misses a larger point – both regarding the ontological origin of these rights and the importance of their protection in the state – not because of its power, but in spite of it.

The Conservative Critique

"The Constitution of 1795, like its predecessors, was made for man. But there is no such thing as man in the world. In my lifetime I have seen Frenchmen, Italians, Russians, etc.; thanks to Montesquieu, I even know that *one can be Persian*. But as for *man*, I declare that I have never in my life met him; if he exists, he is unknown to me." – Joseph de Maistre (2003, 53)

The second current in the critique of natural rights that was inspired by the French revolution disputed this doctrine as a whole. Namely, unlike Bentham's liberal critique, which shares the fundamental goals of natural rights theories – the protection of individual rights – but simultaneously opposes them regarding the means of achieving that end, the conservative critique of natural rights rejects both the means and the ends. It's important to emphasize here that, unlike contemporary conservatives, who mostly support republicanism and elective democracy, but insist on the importance of maintaining traditional moral norms and social institutions, early conservative thinkers rejected most, if not all achievements of modernity.

For purposes of simplicity and clarity, we will divide this chapter into two parts, with the first focusing on the critique of the social contract theory from the perspective of traditional conservatism, as exemplified by Joseph de Maistre, while the second will analyze the perspective of modern conservatism, as exemplified by Edmund Burke. According to their political differences, Burke's critique is notably milder and more nuanced, and mainly focuses on refuting the doctrine of natural rights, while Maistre's goal is to overthrow the very foundations of the Enlightenment, which is why he targets the whole of the social contract theory.

Written at the same time as Bentham's *Anarchical Fallacies*, in the year 1796, Joseph de Maistre's *Considerations on France* emphasizes the inherent irrationality of human nature and the spiritual character and being of France that the revolution undermined. Isaiah Berlin quotes Emile Faguet, who describes Maistre as a "a fierce absolutist, a furious theocrat, an intransigent legitimist, apostle of a monstrous trinity composed of Pope, King and

Hangman", whose Christianity is "terror, passive obedience and the religion of the state" (Berlin 2003, xi). According to Berlin, Maistre's goal was to destroy everything that the eighteenth century had created (Berlin 2003, xiii); in place of progress and freedom, he preached of the holiness of the past and of tradition (Berlin 2003, xv); he had no positive teaching and, if he were forced to choose between liberty and death, he would have chosen death (Berlin 2003, xxxiv).

Berlin's characterization of Maistre is obviously far too sharp and comes from an unequivocally negative perspective. However, there is some truth in it: in order to properly understand his thought, which is entirely opposed to the social contract theory, we have to begin with the closest thing to his equivalent of the state of nature. Namely, Maistre interprets human history as an enormous catalogue of violence which unequivocally demonstrates that war is the usual state of mankind, with peace merely being a temporary respite (Maistre 2003, 23). He quotes the French naturalist Buffon, who notes that most animals are fated for a violent death and emphasizes that the same should be believed of men (Maistre 2003, 28).

Maistre, however, interprets this inevitability of war and violent death positively, emphasizing that the human spirit, suffocated in laziness and decadence, can only be tempered in blood. He claims that the state of war directly produces art, science and all other achievements, metaphorically calling blood the manure of the plant called genius (Maistre 2003, 29). Based on the thus-interpreted history, Maistre claims that a great republic cannot exist, just as a die that showed a 1, 2, 3, 4 and 5, but never a 6, must either have a blank side, or a repeating number (Maistre 2003, 32). This isn't the only instance where later history refuted his reasoning: Maistre also critiques the deliberation and humanity that marked the then-new American state, prophesizing that the city of Washington will never be built and that Congress will never meet there (Maistre 2003, 61). This prognosis was overturned in a mere five years: Congress met in Washington for the first time in late 1800.

Confronting the rational foundations of states (Berlin 2003, xx), Maistre insists that every nation, just like every individual, has its mission in the world, and that France's is to be Europe's most Christian country (Maistre 2003, 9). Therefore, he places particular emphasis on the "satanic" character of the revolution, which, beyond

all else, undermines the spiritual foundations of the nation (Maistre 2003, 41). Maistre sees the roots of this process in the battle between Christianity and *philosophism* (Maistre 2003, 45), and claims that, due to the balance of opposites, it was inevitable that the *Goddess of Reason* would attack France the hardest (Maistre 2003, 21).

In regard to Christianity and religion in general, Maistre puts forth particularly interesting views: namely, he fully separates the theoretical and practical domains of religion, emphasizing that, whether true of false, religious ideas form the foundation of all stable institutions. In this context, he criticizes Rousseau in particular, noting that he arrived at this observation, but didn't follow it through to its logical conclusion (Maistre 2003, 42). His critique references Rousseau's earlier mentioned views on the civic religion, the goal of which should not be the salvation of souls, but the development of civic virtues (Rousseau 1994a, 158). However, this only marginally touches upon Maistre's critique of the social contract theory.

The core of his critique is the opposition to abstractions in political thought (Berlin 2003, xvi): Maistre believes that no social order is a product of prior deliberation, but merely a declaration of previously established relations (Maistre 2003, 49). Therefore, he claims that rights originate from concessions of the sovereign, but that the king and aristocracy have "neither date, nor author" (Maistre 2003, 50). Finally, in his critique of the French constitution of 1795, he emphasizes the futility of the term *man*, given that he *does not exist*: "In my lifetime I have seen Frenchmen, Italians, Russians, etc.; thanks to Montesquieu, I even know that *one can be Persian*. But as for *man*, I declare that I have never in my life met him; if he exists, he is unknown to me." He concludes that a constitution written for all nations was written for none, and is, as such, a pure abstraction (Maistre 2003, 53).

With regard to the origins of government, Maistre's claim that the king and aristocracy have neither date, nor authors, sadly, has no evidence backing it. Like Bentham's claim that natural rights simply don't exist, it is supposed to be self-evident. However, sa we saw in the previous chapter, the social contract theory was partly inspired by the discovery of peoples living in rudimentary communities, characterized, among other things, by a lack of permanent institutions and the elective character of temporary functions (Locke 2003a, 144).

Regarding the famous thesis about the non-existence of man, however, Maistre refutes his own point to some degree: namely, as we saw earlier, in considering history, he treats it universally – in his words, "abstractly" – as *human* history, and from its lessons derives various points regarding the *human* soul and the nature of *man*. How does all this reflect upon the 'non-existent' man? In Maistre's defense, we could say that the lessons he derives from history only concern the most general human traits, and not specific political goals. This, however, would only marginally contribute to his point, seeing as it would not refute the idea of *man* in a political sense, as a generalization that is legitimate in numerous cases.

We come upon a far greater problem, however, if we apply Rousseau critique of Aristotle's defense of slavery to Maistre's opposition to the term *man*. Recall how Rousseau writes that Aristotle is right in claiming that some people are born to be masters and others slaves, but also, that he confuses the cause for the effect: "If there are slaves by nature, it is because slaves have been made against nature." (Rousseau 1994a, 47) Aristotle's point was disputed in a similar manner by Hobbes, who emphasized that master and servant were not created by nature, but by human consent (Hobbes 1996, 102). A very similar critique can be derived if we apply this model to Maistre's claim that man as such does not exist.

The reason why in modern times one can be French, Italian, Russian, and "even Persian", but not *a man*, is that the long process of history has brought about the creation of these political groups, which gradually received a deterministic character, shaping collective preferences, culture and political goals. This fact additionally problematizes Maistre's view that the king and aristocracy have neither date, nor author: though their date and author cannot be precisely determined, counterposing the societies of American natives to developed modern nations unequivocally demonstrates that the feudalism he so fiercely defended was not timeless, just as the later development of large republics demonstrated that history is not a game of dice and numbers.

***

As the founder of modern conservatism, Edmund Burke staunchly opposed the French revolution. However, unlike Joseph de Masitre's unrelenting judgement, his critique was significantly

milder – so much so that it could be described as occupying a somewhat unique spot between Maistre's and Bentham's. The reason for this, among other things, is that Burke, while condemning the French revolution, simultaneously defended the rights of the American colonists who rebelled against the British crown: thus, he did not oppose the social contract theory as a whole, along with the other achievements of modernity, but concentrated his critique against the doctrine of natural rights.

Like Maistre, Burke considered society to be an organic whole and opposed critical thinking for running contrary to collective beliefs. He thought that authentic beliefs can only be founded upon laws that can trace their roots back to tradition and customs, and that natural rights represent a complete abstraction. Unlike Bentham's critique, which, alongside naturalness, also denied the inalienability of these rights, Burke's denies their negativity. At the very beginning of his Reflections on the Revolution in France, Burke proclaims his love for moral, regulated freedom and wonders if a highwayman who managed to escape prison ought to be congratulated for the recovery of his natural rights (Burke 1951, 6).

Unlike Maistre, who treats all aspects of monarchy and aristocracy as timeless and hallowed, Burke believes that a state which has no means of change, has no means of survival (Burke 1951, 19-20), and emphasizes that preservation and reform are entirely different: in reforming, a system maintains all of the old elements that were useful (Burke 1951, 164). With regard to the inequality between men, Burke balances between its justification and paving the way for its overcoming: on the one hand, he somewhat vaguely emphasizes that all positions in society should be open, but not equally for all men (Burke 1951, 48). Therefore, Burke points out that legal occupations aren't necessarily honorable, and that, while the state ought not to repress hairdressers and florists, it itself becomes repressed if they are allowed to rule (Burke 1951, 47). Finally, Burke emphasizes that in every collective effort, men ought to have the same rights, but not to the same things, so that the man who has five shillings has the same rights as one with five hundred pounds, but not to an equal portion (Burke 1951, 56).

Based on all this, Burke derives that the most fundamental rule of society is that *no man should be the judge in his own case*,

and that, in order to secure liberty, men must entirely trust it to the community (Burke 1951, 57). Here, we come upon a perfect parallel with the social contract theorists: Locke wrote the exact same thing regarding people being judges in their own cases (Locke 2003a, 111); also, recall Hobbes' view that, for the preservation of life, it is necessary for men to transfer certain rights, but maintain others (Hobbes 1996, 102), and Rousseau's understanding of the social contract as a transformative transfer of rights in which men give up their natural freedom for the sake of the community, but simultaneously gain equal civic and moral freedom (Rousseau 1994a, 55).

In spite of this parallel, Burke doesn't derive views from it that are even remotely similar to those of the social contract theorists. This particularly comes into the fore in his work when it comes to the understanding of rights: he believes that there are no means of preserving rights other than as hereditary entitlements in a hereditary monarchy (Burke 1951, 23). In that regard, he points out the petition of the English parliament to Charles I, in which the representatives specify that the king's subjects inherited their rights not as abstract human rights, but as the rights of Englishmen, derived from their forefathers (Burke 1951, 30). Therefore, in opposing the "abstract rights" of the revolutionaries, Burke denies not the real, but the imagined human rights, claiming that real rights are exclusively founded upon relations in a civic society (Burke 1951, 56).

Beside this, he also opposes other elements of contractualist thought, claiming that man is constitutioned as a religious animal (Burke 1951, 87-88), and that though society is based on a contract, that contract is hallowed and surpasses all base interests (Burke 1951, 93). The very core of his critique, though, is directed at the natural rights theory, which he considers to be the main inspiration behind the excesses of the revolution: in this regard, he goes so far as to claim that, unlike the French confiscators, their Roman counterparts knew of no human rights, which is why they did not act quite as harshly (Burke 1951, 112). His central position regarding natural rights is particularly interesting:

"Government is not made in virtue of natural rights, which may and do exist in total independence of it; and exist in much greater clearness, and in much greater degree of abstract perfection: but their

abstract perfection is their practical defect. By having a right to everything they want everything. Government is a contrivance of human wisdom to provide for human *wants*." (Burke 1951, 57) Firstly, we ought to note that this is one of the rare critiques from a broadly positivist perspective that actually recognizes the existence of natural rights. Perhaps even more interesting is the fact that Burke does not appear to do this cynically, but honestly, believing that recognizing the "abstract" existence of natural rights can serve as a good foundation for demonstrating their practical futility.

Along these same lines, Burke later specifies that the alleged rights of these theorists are all extreme and that, proportional to their *metaphysical* truth, they are *morally* and *politically* false (Burke 1951, 57). Lastly, he wonders what the usefulness is in discussing the abstract human rights to food and medicine, given that the issue of their acquisition and distribution is a concrete one, and concludes that he would much rather consult a farmer or a doctor about these issues than a professor of metaphysics (Burke 1951, 58). Burke's critique of natural rights represents a kind of contrast to Bentham's: instead of harsh judgement and fiery rhetoric, he proceeds carefully and modestly. However, his honest attempt at a balanced critique is rendered hollow due to a thorough lack of understanding of the natural rights theory. Let's carefully analyze his positions one by one.

Firstly, in claiming that government is not made in virtue of natural rights, Burke unintentionally agrees with the social contract theorists: as we saw in numerous instances earlier, they also did not believe that government was made in virtue of natural rights: quite the opposite, they thought that the creation of government necessitated the abandonment of the natural right to all things. Afterward, we see that Burke recognizes the existence of natural rights completely independently of government, but points out their "abstract perfection" as their "practical defect". We know, however, that establishing "abstract", or any other kind of perfection was never the goal of the doctrine of natural rights: quite the opposite, it merely recognizes the existence of certain rights as a consequence of the non-existence of the state, and infers that those rights which are existentially most relevant and the transfer of which if not necessary for social stability ought to remain inalienable.

Burke's view that government is a contrivance of human wisdom to provide for human wants is thus common sense for Hobbes, Locke and Rousseau, however, the claim that precedes it, namely, that men, in having the right to everything, want everything, demonstrates his fundamental lack of understanding of the social contract theory and natural rights. We saw earlier that the right to all things that proceeds from the normative circumstances of the state of nature is the essential reason why Hobbes, Locke and Rousseau consider the social contract necessary. Without the right to all things, which necessarily leads to unsolvable conflict – what Hobbes calls the war of every man against every man – the state of nature would be maintainable and the social contract – unnecessary.

We see, then, that Burke makes a critical error in conflating the right to everything and fundamental rights: his confusion in this regard can certainly be justified to some degree, given that both come from the state of nature and, therefore, exist independently of the state. However, the key fact that he leaves out here is that Hobbes, Locke and Rousseau unequivocally emphasize the necessity of abandoning the right to all things as the *conditio sine qua non* of entering into the social contract, while simultaneously framing the inalienability of fundamental rights as a condition of legitimacy. In claiming that men want everything when they have the right to everything, Burke expresses a nominally perfect parallel to the views of the social contract theorists. However, the implication of his interpretation clearly demonstrates his lack of understanding of the basic points of the theory he is criticizing, which is further supported by his later quotes.

Namely, in claiming that the alleged rights of the social contract theorists are morally and politically false proportionally to their metaphysical truth, Burke is attacking a strawman, given that Hobbes, Locke and Rousseau never even touched upon the metaphysical truth of natural rights, which is, given the practical character of contractualism, entirely irrelevant. Lastly, Burke's quip that he would much rather consult farmers and doctors on issues of food and medicine than a professor of metaphysics is a kind of theoretical 'low blow', a common sense point that Hobbes, Locke and Rousseau would whole-heartedly agree with, and one that does not shake the foundations of their theories in any way.

However, this quip does demonstrate another significant point of confusion with regard to the natural rights theory: namely, Burke mixes up fundamental rights, whose property of *negativity* is crucial in this context, with the *positive* rights to food and medicine. As we saw earlier, Hobbes did indeed recognize even certain positive rights (Hobbes 1996, 230), but he didn't characterize them as natural in order to secure their "abstract perfection". Instead, he merely expressed that the state ought to help citizens who cannot provide for themselves, but not based on fundamental rights. Hobbes, as we saw, defines the right to life as man's freedom to use his own power for the purpose of his own preservation (Hobbes 1996, 86): there is no mention here of a parallel duty of others to help someone in need. This duty can be derived from some moral principle or positive right, but the later would require the existence of the state and, hence, could not be natural.

The Descriptive-Normative Critique

"In every system of morality, which I have hitherto met with, I have always remark'd, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpriz'd to find, that in stead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that is not connected with an *ought*, or an *ought not*. This change is imperceptible; but is, however, of the last consequence." – David Hume (1960, 469)

Here, we finally arrive at the critique that was neither inspired by the excesses of the French revolution, nor even directly laid out against the natural rights theory. Namely, we are dealing with Hume's critique of ethical systems which is based on a sharp distinction between speculative and practical philosophy, and reason and morality. Laid out in Hume's *Treatise of Human Nature*, this critique's primary goal is to refute the rationalist view that reasonable perception of the moral quality of a certain act can inspire us to that act (Finnis 2011, 37). Therefore, though it isn't directed specifically against the doctrine of natural rights, a descriptive-normative critique

can be derived from it that also affects the views of the social contract theorists.

Hume firstly affirms the epistemic position, which can be traced back to Hobbes (Hobbes 1996, 9), that nothing is present in the mind, except perception. However, he extends this view to moral principles, pointing out immediately afterwards that the preference of one character, as well as disdain for another, is only a matter of different perception (Hume 1960, 456). Hume draws a sharp distinction between speculative and practical philosophy, emphasizing that morality belongs to the later: since morality influences actions, it cannot be derived from reason; based on this, morality cannot be discovered by reasonable deduction (Hume 1960, 457). He notes that reason is, on the one hand, the discovery of truth and falsehood, while action, on the other, can be worthy of praise or critique, but cannot be *reasonable* or *unreasonable* (Hume 1960, 458).

Hume thus notes that, though certain incorrect assumptions can lead to wrong actions, those actions still aren't *immoral*. He further notes that though an error in the domain of *facts* cannot be a crime, an error in the domain of *law* can and emphasizes that this assumes a real distinction between right and wrong, which is unproven (Hume 1960, 460). However, according to the earlier established difference, this distinction cannot be founded upon reason, since it influences our action, which is beyond the capability of reason (Hume 1960, 462). In that regard, Hume emphasizes the tendency of many a philosopher to preach that morality can be demonstrated, though no one has advanced by even a single step in that direction (Hume 1960, 463), and concludes that it isn't possible to refute a system that no one has thus far even explained (Hume 1960, 464).

According to the earlier distinction between reason and morality, Hume explains that judging a character or an action as evil strictly expresses the disgust of the one making the judgement and compares vice and virtue with sounds and colors, and warmth and cold, which he claims aren't qualities of objects, but perceptions of the mind (Hume 1960, 469). Finally, Hume notes that the authors of every system of morality he has ever studied first establish the existence of God and make various observation regarding human

relations, only to make an imperceptible 'leap' from propositions regarding what *is* to what *ought to be*. He emphasizes that this change has lasting consequences, since ought and ought not express new relations which have to be explained and cannot be reduced to those that are substantially different from them (Hume 1960, 469). Hume concludes that this small change would refute all "vulgar" systems of morality and reveal that the distinction between vice and virtue isn't founded upon the relation between subjects, but upon perceptions of the mind (Hume 1960, 470).

John Finnis offers two interpretations of Hume's central point about the imperceptible change from *is* to *ought*, that is, from the *descriptive* to the *normative* domain: according to the first, Hume states a logical truth, which was widely announced since the second half of the nineteenth century, namely, that a moral conclusion cannot be derived from any group of non-moral premises. According to the second, which is somewhat more specific, Hume directly attacks the eighteenth-century rationalists (Samuel Clark in particular), who claimed that rational perception of the moral quality of an action can give us the motivation for that action (Finnis 2011, 37).

Though Hume refutes Clark's argument that speculative observation of moral truths offers a sufficient, conclusive reason for moral behaviour (Finnis 2011, 42), we are primarily interested here in Finnis' first interpretation of Hume's argument – namely, that no group of non-moral premises can generate a moral conclusion. How does this reflect upon the natural rights theory? If we were to broaden the domain of Hume's critique from the moral to the normative in general, so that, in addition to morality, it can also encompass law, we can establish that no normative conclusion can be derived from any group of descriptive premises.

This point would potentially affect natural rights because the normative circumstances of the state of nature are used in contractualist thought as a kind of precedent for certain legal principles in the social state. Specifically, Hobbes, Locke and Rousseau emphasize the pre-state character of fundamental rights and point out that, despite the transfer of rights which the social contract is conditioned upon, these rights – the rights to life, liberty and property – have to remain within the individual domain of the contractor. From Hume's point of view, this would mean that, if we

were to accept the foundations of the natural rights theory, it would follow that fundamental rights *ought to exist* in the social state as inalienable because they *exist* in the state of nature.

The right to everything would, of course, be exempt from this principle, since its abandonment is the condition of the possibility of entering into the social contract, but this exception still wouldn't 'save' fundamental rights from the descriptive-normative critique. We can, however, establish a defense of the doctrine of natural rights from this critique based upon the earlier distinction between the different properties of fundamental rights. Namely, as we saw earlier, these rights are characterized by properties of naturalness, inalienability, negativity and individuality, some of which fundamental rights share with many other rights, but which only they themselves possess all together.

We noted that, though fundamental rights, as well as the right to all things, come from the state of nature, which grants them the property of naturalness, the right to everything isn't simultaneously inalienable – quite the opposite, its abandonment is the central condition of the state's formation. Based on this, we can derive a key distinction: *inalienability isn't derived from naturalness*. This argument simultaneously offers a defense of the doctrine of natural rights from the descriptive-normative critique: namely, if fundamental rights were inalienable *because they were natural*, Hume's critique would refute this concept; however, according to our earlier distinction, this isn't the case. The point here isn't that the naturalness of fundamental rights in Hobbes, Locke and Rousseau gives these rights a special status compared to the rest; however, important though it may be, the naturalness of fundamental rights isn't the source of their inalienability.

Contrary to what the implication of naturalness may be, it isn't sufficient on its own for the derivation of inalienability. This, namely, doesn't mean that there is no connection between the two in the arguments of the social contract theorists: indeed, they recognize the special status of fundamental rights partly because these rights originate from the state of nature. However, though this property puts them on a kind of normative pedestal, it is only one of four properties that define fundamental rights. The works of Hobbes, Locke and

Rousseau, however, point to a different source of inalienability altogether.

Namely, we saw earlier that in Hobbes, the rights to life, liberty and property are inalienable not because they are natural, but because the goods they refer to are directly tied to the possibility of man's survival. Therefore, no man can abandon the right to the defense of his own life and the means of preserving it (Hobbes 1996, 88), not because these rights exist in the state of nature, but because their abandonment would violate the fundamental law of nature, which prohibits one from doing anything that is destructive of his life, or that takes away the means of its preservation (Hobbes 1996, 86). This principle does not cease to apply in the social state, which necessitates the transfer and abandonment of some rights, but also the preservation of fundamental rights (Hobbes 1996, 102).

We find something quite similar in Locke: the rights to life and liberty are necessary for man's survival, which is why no man can become the slave of another by contract (Locke 2003a, 110). Since men enter into society with the goal of securing their propriety (life, liberty and property), the power of society cannot extend beyond the common good (Locke 2003a, 156). Given the fact that the protection of propriety is the end for which government was formed, it cannot take away that which it was created to protect without the consent of the subjects. (Locke 2003a, 161). Rousseau also recognizes that men are born free and equal and that they abandon their freedom only in exchange for something useful (Rousseau 1994a, 46), which in the social state entails that the general will must distinguish between the duties they have as citizens and the natural rights they enjoy as men (Rousseau 1994a, 67).

In all three cases, then, we see that, though the naturalness of fundamental rights in itself has great significance for the social contract theories, it simultaneously isn't the basis of the inalienability of these rights. Instead, their inalienability is founded upon the idea that the public good, for which the social contract was made, is the only legitimate domain of the government, and the everything outside of it is in the domain of the people themselves, whose life, liberty and property must be protected by the limitation of state authority.

PRACTICAL HISTORY OF NATURAL RIGHTS

"We see, there has not hitherto been any commonwealth, where those rights have been acknowledged, or challenged ... and as the art of well building, is derived from principles of reason ... so, long time after men have begun to constitute commonwealths, imperfect, and apt to relapse into disorder, there may, principles of reason be found out, by industrious meditation, to make their constitution (excepting by external violence) everlasting." – Thomas Hobbes (1996, 223)

In the final portion of this book, we will examine the influence that the natural rights doctrine has had on key documents in the history of politics and law. Here, we will dedicate particular attention to the connection between the views that Hobbes, Locke and Rousseau expressed in their theories, and the declarations and bills in which these theoretical concepts later found practical expression. We will first examine the English Bill of Rights of 1689, then the American Declaration of Independence from 1776, followed by the American Bill of Rights (i. e. the first ten amendments to the U. S. Constitution), and, finally, the French revolutionary Declaration of the Rights of Man and of the Citizen.

Particular emphasis will be placed on the elements of these documents which we know were inspired by the works of the social contract theorists, based on the biography of their authors, but we will also examine lesser-known influences and numerous parallels. Thus, for example, in the context of the American Bill of Rights, we will particularly emphasize Locke's influence on the authors of the Bill, which historically documented in great detail. However, we will also point out elements of Hobbes' influence, which isn't as well documented, but, as we'll see, is no less important.

The importance of the practical aspect of the doctrine of natural rights is borne out not only in the significance of its influence upon documents that are recognized as being tremendously important to this day, but also in the visionary character of the ideas that Hobbes, Locke and Rousseau expressed in their theories. Just as Hobbes' quote above explains, these theorists were aware of the fact

that made up the foundation of most critiques, namely, that their prescriptions hadn't found a practical application in any of the thus-far existing systems. In spite of this, they held on to hope that social progress would one day secure a 'fertile ground' for the realization of their ideas.

As it turned out, the circumstances that were necessary for the practical realization of fundamental rights came with revolutionary changes, brought about by the English civil war (1642-1651), the American war of independence (1775-1783) and the French bourgeois revolution (1789-1799). These conflicts resulted in radical changes to society which were primarily borne out in the transfer of political power from the nobility, clergy and colonial empires to the 'third estate', the citizenry and the colonists. Seeing as these social strata were inspired by the ideas of the social contract theorists, their victories enabled the natural rights doctrine its legal canonization.

The English Bill of Rights

"Excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The first historical legal document in which we can glean the influence of the doctrine of natural rights is the English Bill of Rights. It was enacted in 1689, the same year that Locke's *Two Treatises of Government* and *A Letter Concerning Toleration* were published. It was preceded by the so-called *glorious* or *bloodless* revolution,[21] which enabled lasting peace and shored up the power of the English parliament (Zuckert 1994, 5). Michael Zuckert notes that, thought the English Bill is legally analogous to the American Declaration of Independence, it not only lacks any discussion on natural rights, but also other ideas from the social contract theory that were expressed in the American Document (Zuckert 1994, 5-6).

Despite this, some concepts that were expressed in Hobbes' and Locke's theory did find their practical expression in the English

[21] This revolution bears its characteristic name because it involved the English parliament overthrowing king James II with minimal resistance; the last Catholic king of England was replaced by the Protestant William III.

Bill of Rights. Though its primary goal was to limit the power of the king to the benefit of the parliament, the Bill also established boundaries that provided individuals with certain protection from the Government. Among other things, the English Bill abolished the right to the government to establish ecclesiastical commissions (English Bill), which in the past were entitled to direct the Anglican church. This suspension expressed the strong alliance between the parliament and the church that contributed to the glorious revolution (Marshall 1994, 34).

The Bill of Rights, among other things, prohibits the suppression of public petitions, as well as levying taxes without the consent of the parliament (English Bill). We find similar ideas in Hobbes and Locke: with regard to petitions, Hobbes emphasizes that they ought to be legal when brought up against decrees of representative bodies (Hobbes 1996, 152), and that they should be illegal only when issued by groups of people so large that the police cannot enforce order (Hobbes 1996, 158). With regard to taxes, Locke goes even further than the Bill, emphasizing that, though the expenses of maintaining a government are vast, taxes can only be justified, not by the consent of the parliament, but by the direct consent of the citizens (Locke 2003a, 163). Locke bases this condition upon the earlier established idea that the legitimate domain of the government is exclusively the public good, which is why it cannot legitimately infringe upon the rights of individuals (Locke 2003a, 162).

The element of the English Bill that is deceptively reminiscent of Locke's theory is the article regarding public expression: it allows for freedom of speech and debate, but limits the entitlement to the parliament, meaning that discussions within this body will not be punished outside of it (English Bill). The connection to Locke's theory is deceptive here because Locke, as we saw earlier, emphasizes that the purpose of laws isn't the truth of opinions, but the security of the state, which is why citizens should have the right even to the expression of opinions one might deem false and absurd (Locke 2003b, 241). This unequivocally refers to public life in general, and not just the actions of the parliament to which the English Bill of Rights limits freedom of speech. Thus, this isn't an example of *freedom*, but *license* of speech (Matić 2019).

Taking into account the time when it was written, we can discern the theoretical approach that this article was inspired by: namely, it seems to be early modern republicanism, as exemplified by the works of Nicollo Machiavelli and Francesco Guicciardini (Matić 2016). In this regard, Guicciardini also emphasizes that public speech ought to be free, but limits said freedom to the ruling bodies (Guicciardini 1998, 139, 141). Unlike Locke's, which emphasizes the sanctity of individual rights, his approach, which is reflected in the English Bill, is strictly utilitarian. Thus, freedom of speech isn't an end in itself, merely the means to the optimal functioning of government.

The parallels between early modern republicanism and the English Bill of Rights don't stop there: in accordance with Machiavelli's emphasis on the importance of an armed citizenry for the defense of the republic (Machiavelli 1998, 44, 50), one of the articles of the Bill confirms the right of the citizens to possess weapons for defense, but, taking into account the alliance between the parliament and the church, as well as the religious background of the deposed, and of the newly crowned king, limits this right to Protestants (English Bill). Though undoubtedly important, none of the above-mentioned governmental limitations, therefore, does not enact a universal protection of individuals.

This brings us to the article which enabled the English Bill of Rights to secure its importance throughout history: namely, it prohibits excessive bail and fines, and abolishes "cruel and unusual punishments" (English Bill). With regard to bail and fines, "excessive" remains undefined here, but the most interesting thing here is the right to bodily integrity, which is established by the second portion of the article. It is of particular historical relevance because in the previous centuries, the death penalty was usually executed by excessively cruel methods, which usually involved hours of brutal torture prior to death.

As we saw in the analysis of the right to life, Hobbes was the one that delved the most into the broader implications of this right: among other things, he emphasized that a man, even if legally condemned, cannot be expected to submit to torture and execution, nor even to admit guilt without the promise of a pardon (Hobbes 1996, 144), unless his refusal frustrates the end for which sovereignty

was ordained (Hobbes 1996, 145). Though Hobbes does not establish a principle that universally prohibits torture and execution, his position unequivocally has the goal of exposing the illegitimacy of such actions in nearly all situations, with the exception of those when the survival of the state is uncertain.

Although, then, the limited influence of doctrine of natural rights on the English Bill of Rights can primarily be explained by the time of its enactment, it still is the first great legal document in which the influence of contractualist ideas is discernable. Given that the primary goal of the Bill was to limit the king's authority to the advantage of the parliament, as well as empower Protestants, a trace of the practical expression of natural rights is all that can be found in it, and will take a whole century for it to reveal itself in full glow, in the founding documents of the American and French republics.

American Declaration of Independence

"When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation."

The first battles between the American colonists and the British army, at Bunker Hill, and Lexington and Concord, happened during 1775. Though far smaller in proportion to the European battles of the time, these battles, along with a great anti-colonial protest of 1773, the so-called Boston tea party, served as the spark that would light the fire of the American war of independence. This war, which ended in 1783, was waged on the American side by a loose confederation of thirteen colonies that would go on to become the first federal units of the United States. However, though the constitution of the unified republic was enacted in 1787, the date of the founding of the United States of America is the fourth of July, 1776 – the day when the representatives of the thirteen colonies signed the Declaration of Independence.

This document, whose primary author was Thomas Jefferson, who would go on to become the third president of the United States, had the goal of explaining the reasons why the thirteen American colonies of the British empire were leaving their parent country. Given their intention, this document is dominated by enumerating the instances in which the British crown and king George III infringed upon the rights of the American colonists, both with overly high taxes and lack of political representation, as well as the constant presence and excesses of the standing army in times of peace (U. S. Declaration).

However, in the context of the practical history of the social contract and natural rights, the most noteworthy portion of this document is the preamble, which establishes the fundamental political principles and values of the signatories of the Declaration: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." (U. S. Declaration) Already at the very beginning of this document do we see the unmistakable inspiration by social contract theories: despite their differences, Hobbes (Hobbes 1996, 82), Locke (Locke 2003a, 122) and Rousseau (Rousseau 1994a, 46) were unanimous in their belief that all men are born equal and that their fundamental rights are inalienable.

In the next sentence, the Declaration emphasizes that government was created to protect these rights, that it draws its legitimacy from the consent of the governed, and that, should it violate these rights, the people can legitimately overthrow and replace it with another (U. S. Declaration). Here, we find a somewhat more specific point, which is primarily rooted in Locke's theory, but which simultaneously diverts from it: namely, Locke not only recognizes human consent as the origin of government (Locke 2003a, 142), but also the legitimacy of overthrowing a government that has infringed upon the fundamental rights of citizens. However, his views of the protection of fundamental rights, as we saw in the central portion of the book, are somewhat different from those of the authors of the Declaration. In this regard, Locke, much like Hobbes and Rousseau, recognizes fundamental rights as natural, and the state as the greatest threat to them, which is why he emphasizes in many

instances that the government, even when *absolute*, mustn't be *arbitrary*, and must never violate the rights to life, liberty and property (Locke 2003a, 110, 136, 156).

Thus, although the American Declaration of independence shares Locke's views on the origin of government and the legitimacy of its overthrow in case of violation of fundamental rights, it takes a view that is, in one aspect, opposite to his: instead of the greatest potential threat to fundamental rights, the state is the main source of its protection. This discrepancy can be explained as a consequence of a simplified interpretation of Locke's social contract theory: namely, he claims that people come together and form states in order to preserve the goods that fundamental rights refer to (Locke 2003a, 154), but that the rights themselves, as the possibility of realizing these goods, precede the state and are potentially threatened by its existence. A similar interpretation is offered by Michael Zuckert, who claims that Jefferson merely outlined a more concise, simplified version of Locke's views (Zuckert 2004, 8).

Despite this discrepancy, it should be noted that the U. S. Declaration of Independence is nevertheless primarily inspired by Locke's theory: among other things, we saw that its first sentence unequivocally espouses the theological conception of natural rights – the conception that, of all the social contract theorists, only Locke directly expressed. In the rest of the preamble, the authors of the Declaration emphasize that the government ought not be changed for minor reasons, but that the English crown has subjected the colonists to a number of usurpations and mistreatments, the ultimate goal of which is to bring them under "absolute despotism and tyranny" (U. S. Declaration).

According to Zuckert's interpretation, the relation between the state and fundamental rights that Locke and Jefferson espouse represents a substantial contrast to Hobbes', whose sovereign can freely infringe upon rights (Zuckert 2004, 8). The nominal correctness of this interpretation, however, is overshadowed by the broader point that it misses: namely, Hobbes really does recognize that the government has the power to violate fundamental rights, however, he does so only in the context of its pure political capacity to do so (Hobbes 1996, 142). With regard to the legitimacy of such an act, Hobbes unequivocally writes that "the evil inflicted by public

authority, without precedent public condemnation, is not to be styled by the name of punishment; but of an hostile act; because the fact for which a man is punished, ought first to be judged by public authority, to be a transgression of the law" (Hobbes 1996, 206).

Much like Hobbes, Locke also recognizes the raw power of the state to violate fundamental rights, which is why he emphasizes that government, even when absolute, must never be arbitrary (Locke 2003a, 162), and that absolute monarchy is even worse than the state of nature (Locke 2003a, 105), due to the arbitrary power of one man who has a hundred thousand under his command (Locke 2003a, 161). The opposite claim, which Zuckert expresses above, namely, that government isn't entitled to infringe upon fundamental rights, would entail their inalienability in the most literal sense. This meaning of inalienability is, however, untenable, as demonstrated by Bentham's critique.

With regard to the fundamental values expressed at the beginning of the Declaration, Paul Rahe notes that there is an interpretation according to which Jefferson replaced the right to property from the social contract theory with the right to pursue happiness, because he didn't consider property to be that important (Rahe 2005, 5). Rahe refutes this interpretation in great detail, emphasizing Jefferson's dedication to the right to property, as shown in his revision of the Virginia state law and during his presidential terms (Rahe 2005, 5). He connects Jefferson's understanding of property to Locke's, emphasizing Locke's view that, though no one has the right to appropriate more than he can make use of, the hoarding of gold coins isn't problematic because they have no value themselves, but are only used for exchange (Rahe 2005, 15).

Beside the largely Lockean interpretation of the American Declaration of Independence, Michael Zuckert also emphasizes the so-called *republican synthesis*, prominent in the works of Gordon Wood and John Pocock, according to which the early ideology of America, beside fundamental rights, was also dominated by the republicanism of Aristotle and Machiavelli (Zuckert 2005, 5). In addition to some ideas of the classical, Zuckert also recognizes the influence of Montesquieu's modern republicanism on the American revolutionaries, which is primarily expressed in three central ideas: firstly, ancient Sparta as a state model in republican theory; second,

the community of republics as the territorial foundation of the state and, lastly, the free society theory ordered after Great Britain (Zuckert 2005, 19). However, despite the indubitable importance of the constitutions of certain states for the American founding fathers, the influence of these examples ought to be interpreted cautiously, because, in Jefferson's words, "History, in general, only informs us of what bad government is." (Zuckert 1994, 24)

American Bill of Rights

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Though they expressed their fundamental political values and beliefs in the Declaration of independence, the founding fathers of the United States of America did not offer any specification regarding the content of the rights espoused in that document. In other words, though the Declaration unequivocally recognizes the rights to life, liberty and the pursuit of happiness, their inalienability, and the legitimacy of bringing down a government that infringes upon them, exactly what the possession of these rights by citizens entails isn't defined. This issue is resolved by the American Bill of Rights, in which the influence of the social contract theorists, particularly Hobbes and Locke, is especially noteworthy.

Written as an 'appendix' to the U. S. Constitution, which was enacted in 1787, the Bill of Rights is specifically dedicated to the rights of citizens in relation to the state. In other words, unlike most later constitutions, which define both the social order and the rights of citizens, the American constitution is limited to determining the roles of various political functions and branches of government, while the Bill of Rights that follows it specifically discusses the rights of the citizens. These rights are, as we'll see, mostly negative, that is to say, they determine not what goods the state is obliged to provide citizens with, but what it is prohibited from taking away from them.

The Bill is made up of ten amendments, some of which explicitly limit the powers of the Congress, the two-tier supreme legislature in the American system; however, these limitations also apply to all 'lesser' legislative institutions. With regard to the content of these amendments, we can see both the strong influence of the English Bill of Rights, as well as the codified, practical expression of the striving of American colonists toward self-determination. Thus, for example, the eight amendment of the American Bill of Rights is actually a direct copy of the act of the English Bill of Rights that prohibits excessive bail, fines and cruel and unusual punishments (U. S. Bill). Simultaneously, the third amendment addresses the legitimacy of the use of civilian homes by the military in times of war, touching upon some of the many problems the American colonists had with the British military, that contributed to their desire to fight for independence (U. S. Bill).

In order to better interpret this document, it is important to understand the intellectual climate that marked its enactment. Michael Zuckert primarily notes its legal-political ambition, emphasizing that, though the American system does not mark the first appearance of the legal order, it certainly represents the first attempt at its implementation (Zuckert 1994, 24). Zuckert notes the rich evidence of Locke's influence on the pre-revolutionary works of American authors, among whom was the protestant preacher Elisha Williams (Zuckert 1994, 42-44). In the same vain, he quotes Donald Lutz that Locke was by far the most influential author in American political writings (Zuckert 1994, 42), while according to Steven Dworetz, even this does not exemplify Locke's influence quite adequately, since looking only at explicit quotes substantially undercuts his role (Zuckert 1994, 43).

In the following analysis, we will see that Dworetz's analysis can also be applied to Hobbes, with whose social contract theory the U. S. Bill of Rights shares many parallels. Aside from that, we will also consider certain elements of the *Federalist Papers*, the publication which Alexander Hamilton, James Madison and John Jay all contributed to under the pseudonym *Publius* in defense of the U. S. Constitution. Hamilton, the first secretary of the U. S. Treasury, effectively the finance minister, was the primary author of these papers, having written over seventy out of a total of eighty-five. John

Jay, the first Chief Justice of the U. S. Supreme Court, was the author of several papers, whereas James Madison, the fourth President of the United States was both and author of some papers and co-authored others with Hamilton.

Madison was also the primary author of the U. S. Constitution, though he himself modestly refused such description, insisting that the document is a work of "many heads and many hands" (U. S. Archives). The Bill of Rights itself, however, was the result of Madison's analysis of the arguments of the anti-federalists, which pointed to the limitations of the Constitution in its original form. These critics, among other things, pointed to the lack of codification of numerous principles central to the preservation of the rights of citizens, which Hamilton also noted toward the end of the Federalist Papers (Hamilton, No. 85). In an attempt to address their critiques, Madison put forth twelve amendments, ten of which were ratified in 1791, forming the Bill of Rights.

The first amendment to the U. S. Constitution establishes the freedom of speech, press and religion by prohibiting Congress from making any law that would infringe upon these rights (U. S. Bill). The precedent set up by this amendment, however, also applies to all lower instances of legislature. Locke's and Hobbes' theories are on completely opposite sides regarding its content, seeing as the former was among the earliest proponents of freedom of speech and religion, while the later was a proponent of strict censorship, even going so far as to suggest that discreet authors should "correct" the works of Greek and Roman authors so as to root out their anti-state "venom" (Hobbes 1996, 217).

On the other hand, Locke was quite principled in his affirmation of universal freedom of speech and religion, a devout Protestant who defended the rights of Catholics, pagans and Jews, all of whose opinions he considered to be "false and absurd" (Locke 2003b, 240). His defense of this principle was, as we saw earlier, inspired by a minimalist interpretation of laws, according to which their goal isn't to provide for the truth of opinions, but to guarantee the security of the state (Locke 2003b, 241). Locke's overwhelming influence upon the American founding fathers over Hobbes' is, therefore, obvious in the context of the first amendment.

The second amendment, however, significantly departs from the works of the social contract theorists: in it, according to the republican synthesis in the interpretations of Wood and Pocock, instead of Locke's and Hobbes', we primarily find Machiavelli's influence. This amendment emphasizes the importance of a well-organized militia for the security of a free state, thereby establishing the right of the citizens to keep and bear arms (U. S. Bill). Machiavelli's influence is primary in this amendment insomuch as this Florentine theorist discussed the concept of the militia at great length, considering it the only true source of a republic's defense (Machiavelli 1998, 44, 50), as opposed to either foreign mercenaries, or a professional standing army.

We came across a similar act in the English Bill of Rights, however, the key difference between the two documents is that the English Bill limits this right to Protestants, whereas the American guarantees it to all citizens. Hamilton notes that the militia is the "most natural" means of defense for a free state and emphasizes that its organization ought to be carried out by the federal unit (in the American system, a state) in which it is recruited. He also addresses the critics that called the existence of a militia into question as a potential danger for the republic, noting that, out of all available forms of armed forces, the militia is most compatible with a free state (Hamilton, No. 29).

The third amendment, as we mentioned earlier, concerns the housing of soldiers in civilian homes in times of war, while the fourth protects citizens from "unreasonable" searches and seizures, establishing the necessity of a court warrant for police searches (U. S. Bill). Though they concern the safety of property that the social contract and natural rights theorists spoke of at great length, these amendments are dedicated to detailed legal specifications that, due to the primarily theoretical character of their works, neither Hobbes, nor Locke discussed at any point.

The fifth amendment to the U. S. Constitution, however, represents the proverbial crown of the practical expression of natural rights theories and, as such, shares numerous parallels with Locke's, and particularly Hobbes' theory. It first guarantees that no one will be held for a severe crime without prior conviction by jury, except in times of war, in the army, navy, or militia; then, that no person will

be tried twice for the same offense, and that no one will be forced to bear witness against one's self; finally, this amendment guarantees that no one will be stripped of their life, liberty or property without the due process of law, and that private property will not be seized for public use without adequate compensation (U. S. Bill).

Locke wrote about the topic of the final portion of this amendment in great detail: according to his view, men unify and form the social contract primarily for the protection of their propriety, which consists of their life, liberty and property (Locke 2003a, 154). Since they do not have absolute rights over their propriety (which is in God's hands), men cannot fully transfer the rights to life, liberty and property when entering into a community, which is why the community formed thereby cannot be authorized to infringe upon these rights (Locke 2003a, 159). This means that the state doesn't have the right to seize the property of its citizens without their consent and without public need (Locke 2003a, 161), and the violating this principle legitimizes the overthrow of the government and the establishment of a new one.

In Hobbes' work, however, we find parallels with every single point of the fifth amendment: firstly, he emphasizes that no man can be forced to accuse himself (in the Bill: bear witness against himself): in the state of nature, because every man is judge, and in the social state, because accusation is followed by punishment, which, being force, no man is obliged not to resist (Hobbes 1996, 93). Then, we saw that Hobbes, speaking of *true* freedoms, emphasizes that no one, even if lawfully found guilty, can be expected to submit to torture and execution, or admit guilt without the assurance of pardon, *unless* his refusal frustrates the end for which sovereignty was ordained (Hobbes 1996, 144, 145).

This last point simultaneously addresses specific circumstances of service in the army, the navy, or the militia, which are laid out in the fifth amendment. Lastly, in the *Leviathan*, Hobbes also touches upon the due legal process which is noted in this amendment in relation to stripping people of life, liberty and property. In this regard, Hobbes subscribes to the principle of *nullum crimen, nulla poena sine lege* from Roman law, according to which no action can be punished as a crime without the prior establishment of a law that defines it as such (Hobbes 1996, 195).

The sixth amendment to the American Constitution concerns legal actions and guarantees the right of citizens to a fair and speedy trial by an unbiased jury, as well as the right of the accused to confront the witnesses, and the right to legal counsel (U. S. Bill). The social contract theorists did not discuss this issue in detail, but Hobbes has emphasized that legitimate punishments have to be founded upon public trials, and that, in every other case, the evil inflicted by the government ought not to be considered a punishment, but a hostile act (Hobbes 1996, 206). Hamilton points out the exceptional character of trial by jury, emphasizing that it has one great advantage over legal magistrature, primarily in preventing corruption, since it is far easier to meddle with professional, long-standing courts than private bodies that are gathered for the purpose of single trial (Hamilton, No. 83).

The seventh amendment guarantees the trial by jury in all cases of customary law in which the value of property surpasses twenty dollars (just under seven hundred dollars today), while the eight amendment, as we saw earlier, *verbatim* transcribes the act from the English Bill of Rights that prohibits excessive bail, fines and cruel and unusual punishments (U. S. Bill). The specificities of these amendments, as was the case with some of the earlier ones, are far too detailed for parallels to be able to be drawn with the works of the social contract theorists, but some of Hobbes points can certainly be interpreted as potentially prohibiting cruel and unusual punishments.

Lastly, the ninth and tenth amendments take up a specific spot in the American Bill of Rights, seeing as they don't determine the content of any specific rights: instead, they emphasize that enumerating certain rights does not entail denying others, which are kept by the people, that is, that the powers which the constitution delegates to the United States, or those it does not deny to those federal units, are kept by the states and the people (U. S. Bill). Outside of the historical context, the specifications of these amendments might seem strange, however, Madison's reason for introducing them were some of the critiques of the anti-federalists, according to which even the very act of codifying certain rights was problematic insomuch as it could entail the abandonment and violation of others.

Beside that, we should keep in mind the doctrinary connection of these amendments with Hobbes' theory: he first emphasizes that the liberty of the subjects encompasses all those things that the sovereign has passed over (Hobbes 1996, 141), later specifying that freedom depends upon the 'silence' of the law: in other words, that, if the law hasn't obliged subject to carry out a certain action, or refrain from it, they can freely choose how to act (Hobbes 1996, 146). These are exactly the kinds of rights discussed in the ninth and tenth amendments. As a whole, though the U. S. Bill of Rights, much like the Declaration of Independence, is inspired by Locke's theory, the U. S. Bill can be considered as the closest possible realization of Hobbes' hope that the science of natural justice which he expressed in the *Leviathan* would, in the hands of a good sovereign, be transformed from speculative truth to practical application (Hobbes 1996, 244).

Declaration of Rights of Man and of the Citizen

"The law shall provide for such punishments only as are strictly and obviously necessary, and no one shall suffer punishment except it be legally inflicted in virtue of a law passed and promulgated before the commission of the offense."

We finally arrive at the analysis of the legal-political document which, as we saw earlier, was the target of boundless ire for Bentham, Burke and Maistre. The Declaration of Rights of Man and of the Citizen was composed a mere several weeks after the fall of the Bastille – the event that marked the beginning of the French bourgeois revolution. This Declaration, the authors of which were Joseph Sieyes and Marquis de Lafayette (who consulted Thomas Jefferson), preceded all French constitutions and, like the American Bill of Rights, was dedicated to the rights of citizens in relation to the state.

Unlike the documents we analyzed earlier, the French Declaration was primarily inspired by Rousseau's social contract theory, beside the works of other Enlightenment thinkers. Therefore, though the doctrine of natural rights left a significant mark on this document, its perspective differs from those of the declarations and

bills upon which Hobbes' and Locke's influence was primary. As such, the French Declaration, beside the negative, also lists a number of positive rights and, much like an impromptu constitution, also covers certain state entitlements.

Its first article expresses that men are born and remain free, and that social distinctions can only be based upon the common good (Declaration of Rights). The influence of Rousseau's work is immediately obvious: he is famous for his views that all men are born free and equal, that they alienate their freedom only for some other use, and that freedom and equality are the necessary goals of every legal system (Rousseau 1994a, 46). It is interesting to note that, though he considers the issue of interest groups and political factions, Rousseau doesn't dedicate particular attention to the question of social distinctions according to wealth and status, considering, for example, that property taxes ought to be equal, since the state gives equal protection to nobles' estates and villagers' houses (Rousseau 1994b, 34).

The second article of the Declaration of Rights of Man and of the Citizen, much like the U. S. Declaration of Independence, states that the goal of every political association is the preservation of natural and inalienable rights, among which are freedom, property, security, and resistance to repression (Declaration of Rights). It is hard to say why the right to life isn't explicitly found on this list, though it can be assumed that the right to security is its functional equivalent. The state, as we saw earlier, isn't the source of fundamental rights, but the greatest threat to their existence, in the eyes of the social contract theorists. Still, we can find a precedent for this simplified formulation in Rousseau's work: namely, much like Locke, who describes absolute monarchy as worse than the state of nature, Rousseau emphasizes that the social contract is pointless and contradictory if it establishes boundless government on the one side, and absolute subservience on the other (Rousseau 1994a, 50).

Beside this, in the context of the second article of the French Declaration, we should remember Rousseau's view that men lose their natural freedom by forming the social contract, but gain civic and moral freedom, thus remaining as free as they were before (Rousseau 1994a, 55). Simultaneously, it's important to keep in mind that Rousseau was aware of the potential encroachment of the

government upon the individual domain, which is why he emphasized that the government must differentiate between the duties that individuals have as citizens and the natural rights they enjoy as men (Rousseau 1994a, 67).

The fourth article of the Declaration establishes the criterion of the limitation of rights, stating that people have the right to do everything that harms no one, that is, that their natural rights have no limits beside doing things that would prevent others from enjoying these same rights (Declaration of Rights). Here, we find a close parallel to Rousseau's *Discourse on Political Economy*, where he emphasizes that the freedom of the individual can be defended without harming that of the collective, namely, by establishing provisions that would limit said freedom only if it violated the freedom of others (Rousseau 1994b, 10).

The sixth article of the French Declaration establishes the equal right to political participation, as well as the right of all citizens to conduct public functions. However, in the context of parallels to Rousseau's theory, its first sentence is the most important: "Law is the expression of the general will." (Declaration of Rights) Though we didn't discuss the general will in detail, since it surpasses the scope of the topic of this book, the general will is the central political principle of Rousseau's theory (Matić 2014), the fundamental aspects of which were outlined in his *Discourse on Political Economy* (Rousseau 1994b, 10, 14), and which took center stage in his *Social Contract* (Rousseau 1994a, 50). The formulation we find in the Declaration points to the great care its authors took in interpreting Rousseau's theory: namely, though he nominally opposed the concept of the separation of powers, considering it a trick that politicians use to mislead people (Rousseau 1994a, 64), he also emphasized that the decisions of the executive are not laws, but merely their application, while only the laws can be the expression of the general will (Rousseau 1994a, 65).

The eight article of the Declaration establishes the precedent for strictly necessary punishments, and that based on previously established and declared laws (Declaration of Rights). This principle of customary law was, as we saw in the example of the U. S. Bill of Rights, explicitly subscribed to by Hobbes (Hobbes 1996, 141). The ninth article concerns legal actions and establishes the presumption

of innocence, which is why, in the event of an arrest, excessive use of police force that isn't necessary to secure the prisoner is punished (Declaration of Rights). With regard to this point, Rousseau emphasizes that the security of the individual is so important to society, that the social contract would cease to apply if a man died whose life could have been saved, or if another was unjustly imprisoned; he concludes that the sacrifice of an innocent life for the benefit of the masses is the surest maxim of tyranny (Rousseau 1994b, 18, 19).

The tenth and eleventh article concern the freedom of religion and speech. Rousseau did not discuss these issues in detail, and it's interesting to note the divide between French Declaration and the Lockean principles in the U. S. Bill of Rights. Namely, though the tenth article limits freedom of religion only by the potential disturbance of public order, the eleventh declares that every citizen can freely write, speak and publish, but will be held accountable for the abuses of said freedom (Declaration of Rights). Exactly how the public expression of views that don't align with the interests of the government can be considered "abuses" of freedom of speech sadly remains undefined. The first amendment to the U. S. Constitution is a positive counterexample, clearly stating that Congress shall make *no law* that limits freedom of speech or of the press (U. S. Bill). The vagueness of the former, as opposed to the clarity of the later offers a good contrast, which illuminates how freedom can best be preserved (Matić 2019).

The sixteenth article of the French Declaration postulates that a society in which obedience to the law isn't guaranteed, and the separation of powers isn't defined, has no constitution at all (Declaration of Rights). The first part of this article could have found inspiration in the *Social Contract*, where Rousseau defines a republic as any state which is governed by the law, independent of its social order, and emphasizes that all legitimate governments are republican (Rousseau 1994a, 75). Its second part, however, nominally departs from Rousseau's theory, taking into consideration his previously stated views regarding the separation of powers. Instead, the second portion of this article primarily finds inspiration in Montesquieu's theory, in which the tripartite separation of powers (legislative, executive and judicial) is a central element (Montesquieu 1989).

Lastly, the seventeenth and final article of the Declaration expresses that the right to property is sacred and inviolable, which is why the government only has the right to alienate someone's property based upon a legally defined public necessity, and with the obligation of informing the owner in due time (Declaration of Rights). As we saw in our analysis of the right to property, Rousseau discussed this issue in great detail in his *Political Economy*, which is why parallels with this article should not be surprising. Namely, he states that right to property is the most sacred of all civic rights, often even more important than the right to liberty, insomuch as property is more essential for the preservation of life, but also because it is more easily claimed and harder to defend (Rousseau 1994b, 25). He later goes even further than this, stating that property is the very foundation of the social contract, which is why everyone must be guaranteed the peaceful enjoyment of what he possesses (Rousseau 1994b, 32).

CONCLUSION

"Since no rational creature can be supposed to change his condition with an intention to be worse, the power of the society, or legislative constituted by them, can never be supposed to extend farther than the common good." – John Locke (2003a, 156)

The main goal of this book was to offer an original, consistent interpretation of the doctrine of natural rights in contracualist thought. For that purpose, it was necessary to first examine the historical circumstances and theoretical framework within which this doctrine is situated. As we saw, the social contract theory in the seventeenth and eighteenth century had strong theological competition when it comes to the interpretation of the foundation of the state (Betts 1994, xii). However, while the authors of the classical contract theory strove to precisely explain this phenomenon based upon the knowledge gained from the great geographical discoveries and the early development of science, the doctrine of the divine right of kings, alongside its many contradictions (Locke 2003a, 17, 46, 53), took up a purely dogmatic approach, the goal of which was to project a biblical vision of the state upon science.

The great geographical discoveries, among other things, introduced Europeans with peoples living on a significantly lower technological level, which was, in the context relevant to the classical contract theory, reflected in the non-existence of the state. Therefore, though they all recognized the enormous difficulty in tracing the historical creation of the state, Hobbes (Hobbes 1996, 85) and Locke (Locke 2003a, 144) called upon its non-existence in the societies of American natives as evidence of the fact that it was not, in fact, eternal, but that it had to have been created at some point.

The analysis of the state of nature, the state in which people live prior to the forming of the social contract and the creation of the state, demonstrated that the social contract theorists, despite their many differences, were still unanimous in their belief in the necessity of transcending this state. We saw that, regardless of their understanding of human nature and the plentitude or scarcity of

natural resources, Hobbes (Hobbes 1996, 111), Locke (Locke 2003a, 109) and Rousseau (Rousseau 1994a, 54) all share the view that people seek to liberate themselves from the uncertainty and arbitrariness of the state of nature. The main reason for the unsustainability of this state is the lack of a commonly recognized authority, empowered to resolve disputes, which makes conflict inevitable. Different theorists gave different weight to this problem, though the most pessimistic is certainly Hobbes' characterization of the state of nature as the war of every man, against every man (Hobbes 1996, 84).

Regardless of the severity or mildness of this key characteristic of the state of nature, however, all three contractualist theorists agree that it carries with it the seed of the unsustainability of this state: this phenomenon is perhaps best described by Hobbes' metaphor, according to which war, like bad weather, doesn't entail a constant shower of rain, or battle, but the constant tendency thereto (Hobbes 1996, 84), The key to transcending this state, then, lies in forming the social contract – the act which entails the transfer of rights from individuals onto a political body – the creation of sovereignty, state and government.

We further saw that different authors formulate the concrete conditions of these acts mostly according to the severity of the state of nature in their view: thus, for example, Hobbes favours the mild condition of a majority vote due to his severe view of the state of nature (Hobbes 1996, 117), while Locke (Locke 2003a, 142) and Rousseau (Rousseau 1994, 54) establish a stricter condition of *unanimity* as the necessary source of legitimacy, due to their milder view of the state of nature. However, regardless of the strictness of the conditions in various interpretations, the social contract theorists are once again unanimous in their belief that there are some rights that cannot be transferred, and remain in the individual domain of the contractors.

The consequence of the non-existence of a commonly recognized authority in the state of nature, another key element regarding which Hobbes (Hobbes 1996, 87), Locke (Locke 2003a, 137) and Rousseau (Rousseau 1994a, 59) are in agreement, is that everyone effectively has the right to everything. It is easy to understand why everyone's laying claim to the same (limited) scope

of goods leads to the insolvability of conflict in a state characterized by this kind of discord. The social contract theorists all recognize that the solution to this problem lies *outside* of this state, and in its opposite, which is characterized by common government and a stable legal order. Simultaneously, however, they recognize that, beside the obvious benefits, the social state carries with it inevitable threats, as well. Here, the historical circumstances in which these authors wrote come into the forefront again, particularly the absolute and arbitrary governments of a majority of European countries at the time, which Locke was the sharpest critic of (Locke 2003a, 161).

According to this, the social contract theorists recognize the necessity of maintaining certain rights by the individuals which enter into the social contract. These rights, the rights to *life*, *liberty* and *property*, are called *inalienable* or *fundamental* rights. Their existence predates the social contract, given that they are encompassed in the state of nature by the right to all things. However, unlike this right, the abandonment of which is the necessary condition of the possibility of the state's creation, this isn't the case with fundamental rights, since their maintenance by citizens does not affect the government, which is limited to the public domain as its legitimate scope.

Fundamental rights were first outlined and defined by Hobbes, in whose theory, they are based upon the right to life, which is synonymous with the right of nature (Hobbes 1996, 86). By binding these rights to the existential interests of people, he understood the right to property minimalistically, as the right to the means of life's preservation (Hobbes 1996, 88), while simultaneously recognizing the right of subjects to resist the government in numerous cases, under the condition that the survival of the state does not depend on their obedience (Hobbes 1996, 144, 145). Locke took an essentialist view of these rights, grouping the rights to life, liberty and property under the right to propriety, the protection of which he saw as the highest priority (Locke 2003a, 154). Recognizing that people tend toward the transcendence of the state of nature due to the arbitrariness within it, but also, that the creation of the state bears with it the institution of absoluteness of power, he accentuated the *coexistence* of the two characteristics as the greatest threat to fundamental rights (Locke 2003a, 159, 161).

Rousseau didn't deal with the issue of individual rights in great detail in his *magnum opus*, but he still emphasized that a legitimate government must distinguish between the duties individuals have toward society as citizens and the natural rights they enjoy as men (Rousseau 1994a, 67). He dealt with the issue of fundamental rights, and particularly the right to property in his *Discourse on Political Economy* in which, among other things, he tried to demonstrate that transferring rights to the state simultaneously secures the optimal means of their preservation (Rousseau 1994b, 10). In later portions of this discourse, he developed a conception of the right to property that combines Hobbes' (Hobbes 1996, 102) criterion of the means of life's preservation and Locke's (Locke 2003a, 113) criterion of labour as the only legitimate source of property (Rousseau 1994b, 34).

After a detailed analysis of the rights to life, liberty and property, we explained that these rights are distinguished from all others based upon four central properties. We emphasized that, though they may share some of these properties – *naturalness*, *inalienability*, *negativity* and *individuality* – with other rights, only fundamental rights possess all four properties combined. Beside that, we noted that, though positive rights from contemporary declarations and bills, which oblige the state to certain ways of helping citizens in need, are not a part of the doctrine of natural rights, the precedent for their implementation can be found in the social contract theory, Hobbes' in particular.

In the next part of the book, we presented a detailed analysis of the main currents of critique of natural rights. The accent here was on the ease with which these critiques refute the popular contemporary conception, according to which these rights are moral entitlements that people possess simply by virtue of being human (Hasnas 2005, 134). On the other hand, the interpretation of the various currents in the critique of natural rights revealed the resilience of the original conception of these rights, according to which they are the guarantee of the possibility of realizing certain goods, that stems from the lack of an absolute and arbitrary power in the state of nature. According to their argumentation, we divided these currents of critique to the *thrasymachean*, the *positivist*, the *liberal*, the *conservative*, and the *descriptive-normative*.

We first saw that, in establishing might as the only source of right, the thrasymachean critique inadvertently *supports* the doctrine of natural rights (due to the non-existence of absolute power in the state of nature). Beside that, the analysis of this critique put us on track to fully discovering the meaning of inalienability, which would come into the fore in the chapter on the liberal critique. The interpretation of the positivist critique pitted Hobbes, Locke and Rousseau against Kant, himself a social contract theorist, demonstrating that the social contract theory and the doctrine of natural rights don't necessarily go hand-in-hand. The defense from this critique additionally illuminated certain elements of the state of nature and demonstrated the way in which they reflect upon the inevitably vague status of rights within it.

The analysis of the liberal and conservative critiques offered us the opportunity to confront ideas that were levelled against one the earliest practical expressions of the natural rights theory, in the form of the Declaration of Rights of Man and of the Citizen. In these chapters, beside the many mistaken interpretations by critics, the highlighted elements were the liberal critique's negation of the property of naturalness and the conservative critique's negation of the property of negativity. Beside illuminating the original meaning of these terms, the defense of the natural rights theory from the liberal and conservative critiques additionally deepened our understanding of the properties of inalienability and negativity.

Lastly, the descriptive-normative critique, though not directed at the doctrine of natural rights directly, offered perhaps the most intriguing point against this conception, perhaps because it wasn't structured around the claim that natural rights don't exist. Instead, this critique, which is derived from Hume's refutation of rationalist morality, called into question the inalienability of fundamental rights, under the assumption of their naturalness. However, as our defense of the natural rights theory from the descriptive-normative critique demonstrated, there is an essential difference between these properties, which is why one isn't derived from the other: specifically, it was established that fundamental rights are inalienable, not because they are natural, but because their alienation cannot be justified by the public good.

Finally, we turned our attention to the realization of the hope of the social contract theorists – that social progress will enable the practical expression of their ideas (Hobbes 1996, 223), turning their speculative truth into practical use (Hobbes 1996, 244). In accordance with this, the subject of the final portion of the book was the analysis of key historical documents from the fields of politics and law upon which the social contract theory and the doctrine of natural rights left a clear mark. We considered the English Bill of Rights, the American Declaration of Independence and Bill of Rights, and the French revolutionary Declaration of Rights of Man and of the Citizen, focusing on the numerous parallels between the views of their authors and the ideas that were put forth by Hobbes, Locke and Rousseau.

The ultimate goal of the contractualist thinkers was to explain that men as rational beings, which strive to improve the conditions of their lives, can unify for their own preservation, and in a way that will not simultaneously expose them to an even worse danger than the one they tried to secure themselves against (Locke 2003a, 156). They successfully founded this endeavour upon the concept of fundamental rights – rights that are natural in their origin, but the maintenance of which by people defines the legitimacy of government and state which is entrusted with their protection.

REFERENCES

Primary references:

Hobbes, Thomas. 1996. *Leviathan*, J. C. A. Gaskin (ed.). Oxford: Oxford University Press.

Hobbes, Thomas. 1998. *On the Citizen*, Richard Tuck (ed.). Cambridge University Press.

Locke, John. 2003a. *Two Treatises of Government*, in: Ian Shapiro (ed.) *Two Treatises of Government and A Letter Concerning Toleration*. New Haven: Yale University Press.

Locke, John. 2003b. *A Letter Concerning Toleration*, in: Ian Shapiro (ed.) *Two Treatises of Government and A Letter Concerning Toleration*. New Haven: Yale University Press.

Rousseau, Jean-Jacques. 1994a. *The Social Contract*, in: Christopher Betts (ed.) *The Social Contract*. Oxford: Oxford University Press.

Rousseau, Jean-Jacques. 1994b. *Discourse on Political Economy*, in: Christopher Betts (ed.) *The Social Contract*. Oxford: Oxford University Press.

Secondary references (books):

Alford, C. F. 2010. *Narrative, Nature and the Natural Law: From Aquinas to International Human Rights*. Palgrave-Macmillan.

Aristotle. 1998. *Politics*, C. D. C. Reeve (ed.). Indianapolis: Hackett Publishing Company.

Bentham, Jeremy. 1843. *Anarchical Fallacies*, in: John Bowring (ed.), *The Works of Jeremy Bentham, Volume II*. London: Simpkin, Marshall & Co.

Burke, Edmund. 1951. *Reflections on the Revolution in France*. London: J. M. Dent & Sons Ltd.

Finnis, John. 2011. *Natural Law and Natural Rights*. Oxford: Oxford University Press.

Guicciardini, Francesco. 1998. *Discorso di Logrogno*, in: Athanasios Moulakis (ed.), *Republican Realism in Renaissance Florence*. Lahnam: Rowman & Littlefield.

Harrison, Ross. 2003. *Hobbes, Locke and Confusion's Masterpiece*, Cambridge: Cambridge University Press.
Hume, David. 1888. *A Treatise of Human Nature*, L. A. Selby-Bigge (ed.). Oxford: Claredon Press.
Kant, Immanuel. 2006a. *An Answer to the Question: What is Enlightenment?*, in: Pauline Kleingeld (ed.). *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*. New Haven: Yale University Press.
Kant, Immanuel. 2006b. *Towards Perpetual Peace: A Philosophical Sketch*, in: Pauline Kleingeld (ed.). *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*. New Haven: Yale University Press.
Kant, Immanuel. 2006c. *Metaphysics of Morals, Anthropology From a Pragmatic Point of View*, in: Pauline Kleingeld (ed.). *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*, New Haven: Yale University Press.
Kant, Immanuel. 2006d. *Idea For a Universal History from a Cosmopolitan Perspective*, in: Pauline Kleingeld (ed.). *Toward Perpetual Peace and Other Writings on Politics, Peace, and History*. New Haven: Yale University Press.
Locke, John. 2010a. *A Second Letter concerning Toleration*, in Richard Vernon (ed.) *Locke on Toleration*. Cambridge: Cambridge University Press.
Locke, John. 2010b. *A Third Letter for Toleration*, in Richard Vernon (ed.) *Locke on Toleration*. Cambridge: Cambridge University Press.
Locke, John. 2010c. *A Fourth Letter for Toleration*, in Richard Vernon (ed.) *Locke on Toleration*. Cambridge: Cambridge University Press.
Machiavelli, Nicollo. 1996. *Discourses on Livy*. Chicago: University of Chicago Press.
Machiavelli, Niccolo. 1998. *The Prince*, Chicago: University of Chicago Press.
Maistre, Joseph de. 2003. *Considerations on France*, Richard A. Lebrun (ed.). Cambridge: Cambridge University Press.
Marshall, John. 1994. *John Locke: Resistance, Religion and Responsibility*. Cambridge: Cambridge University Press.

Montesquieu, Charles-Louis. 1989. *The Spirit of the Laws*, Raymond Guess, Quentin Skinner (eds.). Cambridge: Cambridge University Press.
Oakley, Francis. 2005. *Natural Law, Laws of Nature, Natural Rights: Continuity and Discontinuity in the History of Ideas*. Continuum.
Plato. 2004. *Republic*, C. D. C. Reeve (ed.). Indianapolis: Hackett Publishing Company.
Proast, Jonas. 2010. *The Argument of the Letter Concerning Toleration, Briefly Considered and Answered*, in: *Locke on Toleration*, Richard Vernon (ed.). Cambridge: Cambridge University Press.
Rollins, Lou. 2008. *The Myth of Natural Rights*. Charleston: Nine-Branded Books.
Strauss, Leo. 1963. *The Political Philosophy of Hobbes*, Chicago: University of Chicago Press.
Zuckert, Michael P. 1994. *Natural Rights and the New Republicanism*. Princeton: Princeton University Press.

Secondary references (articles):

Bedau, Hugo Adam. 2000. ""Anarchical Fallacies": Bentham's Attack on Human Rights". *Human Rights Quarterly*. Baltimore: John Hopkins University Press. 261-279.
Curran, Eleanor. 2002. "Hobbes's Theory of Rights – a Modern Interest Theory". *Journal of Ethics* 6 (1). 63-86.
Feser, Edward. 2005. "There is no Such Thing as an Unjust Initial Acquisition", in: Ellen Paul, Fred Miller, Jeffrey Paul (eds.). *Natural Rights Liberalism From Locke to Nozick*. Cambridge: Cambridge University Press. 56-80.
Hasnas, John. 2005. "Toward a Theory of Empirical Natural Rights", in: Ellen Paul, Fred Miller, Jeffrey Paul (eds.). *Natural Rights Liberalism From Locke to Nozick*, Cambridge: Cambridge University Press. 111-147.
Matić, Ivan. 2014. „Opšta volja i teorema porote". *Theoria* 2/2014, vol. 57. Beograd: Filozofski fakultet. 73-86.
Matić, Ivan. 2016. "The Concept of Mixed Government in Classical and Early Modern Republicanism". *Belgrade Philosophical Annual*, vol. 29. Belgrade: Faculty of Philosophy. 179-197.

Matić, Ivan. 2019. "The Right to be Wrong: Theoretical and Practical Aspects of Freedom of Speech in Public Discourse". *Discourse and Politics*. Belgrade: Institute for Political Studies. 123-147.
Matić, Ivan. 2021. „Razdvajanje države i crkve kao temelj religijske tolerancije u Lokovoj političkoj misli". *Theoria* 3/2021, vol. 64. Beograd: Filozofski fakultet. 81-90.
Morris, Christopher W. 2005. "Natural Rights and Political Legitimacy", in: Ellen Paul, Fred Miller, Jeffrey Paul (eds.). *Natural Rights Liberalism From Locke to Nozick*, Cambridge: Cambridge University Press. 314-329.
Pennock, J. Roland. 1963. "Hobbes' Confusing 'Clarity' – The Case of 'Liberty'", in K. C. Brown (ed.). *Hobbes Studies*. Oxford: Basil Blackwell. 101-116.
Rahe, Paul A. 2005. "The Political Needs of a Toolmaking Animal: Madison, Hamilton, Locke, and the Question of Property", in: Ellen Paul, Fred Miller, Jeffrey Paul (eds.). *Natural Rights Liberalism From Locke to Nozick*. Cambridge: Cambridge University Press. 1-26.
Simmons, John. 1989. "Locke's State of Nature", *Political Theory*, Vol. 17, No. 3 (1989). 449-470.
Strauss, Leo. 1965. "On the Spirit of Hobbes's Political Philosophy", K. C. Brown (ed.) *Hobbes Studies*. Oxford: Basil Blackwell. 1-29.
Tarlton, Charles. 2001. "The Despotical Doctrine of Hobbes, Part I: The Liberalization of Leviathan". *History of Political Thought* 22(4). 587-618.
Thomas, Keith. 1963. "The Social Origins of Hobbes' Political Thought", in K. C. Brown (ed.), *Hobbes Studies*. Oxford: Basil Blackwell.185-236.
Waldron, Jeremy. 2005. "Nozick and Locke: Filling the Space of Rights", in: Ellen Paul, Fred Miller, Jeffrey Paul (eds.). *Natural Rights Liberalism From Locke to Nozick*. Cambridge: Cambridge University Press. 81-110.
Watkins, John W. N. 1963. "Philosophy and Politics in Hobbes", in K. C. Brown (ed.), *Hobbes Studies*. Oxford: Basil Blackwell. 237-262.
Wernham, A. G. 1965. "Liberty and Obligation in Hobbes", K. C. Brown (ed.) *Hobbes Studies*. Oxford: Basil Blackwell. 117-139.

Zuckert, Michael P. 2004. "Natural Rights and Modern Constitutionalism". *Northwestern Journal of International Human Rights*. Northwestern University School of Law.
Zuckert, Michael P. 2005. "Natural Rights and Imperial Constitutionalism", in: Ellen Paul, Fred Miller, Jeffrey Paul (eds.). *Natural Rights Liberalism From Locke to Nozick*. Cambridge: Cambridge University Press. 27-55.

Internet sources:

Universal Declaration of Human Rights, https://www.un.org/en/universal-declaration-human-rights/
European Convention on Human Rights, https://www.echr.coe.int/Documents/Convention_ENG.pdf
English Bill of Rights of 1689. Yale Law School: Lillian Goldman Law Library, https://avalon.law.yale.edu/17th_century/england.asp
U. S. Declaration of Independence. American Founding Documents, U.S. Government Archive, https://www.archives.gov/founding-docs/declaration-transcript
U. S. Bill of Rights. American Founding Documents. U.S. Government Archive, https://www.archives.gov/founding-docs/bill-of-rights-transcript
Declaration of Rights of Man and of the Citizen. Lillian Goldman Law Library. Yale Law School, https://avalon.law.yale.edu/18th_century/rightsof.asp
Hamilton, Alexander. *Federalist*, No. 29. U. S. Library of Congress, https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-29
Hamilton, Alexander. *Federalist*, No. 83. U. S. Library of Congress, https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-83
Hamilton, Alexander. *Federalist*, No. 85. U. S. Library of Congress, https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-85

CIP - Каталогизација у публикацији
Народна библиотека Србије, Београд

340.12
172.1
141.7

MATIĆ, Ivan, 1990-
Natural rights in contractualist thought / Ivan Matić. - Belgrade : Institute for Political Studies, 2024 (Belgrade : Dobrotoljublje). - 175 str. ; 23 cm

Tiraž 50. - Napomene i bibliografske reference uz tekst. - Bibliografija: str. 171-175.

ISBN 978-86-7419-404-1

а) Природно право б) Теорија друштвеног уговора

COBISS.SR-ID 154462473