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Hobbes as the founding father of modern political philosophy[1]

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I. Hobbes's break with tradition

It is Hobbes who carries out the first revolution in the philosophy of Right and in this respect opens up the modern era.[2] This revolution begins with the realisation that mankind is by nature in a state of war of all with all.[3]

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1 References to the Latin and English versions of De Cive are to the editions published by H. Warrender: *Thomas Hobbes*, De Cive (Latin Version (L) and English Version respectively), Oxford: Clarendon Press, 1983. Since Hobbes's "Epistle Dedicatory" (= Epist. Ded.) is not paragraphed and in his "Preface to the reader" (= Preface) the paragraphs are not numbered, I shall refer to the paragraphing Arabic numerals, printed (in square brackets) in the margin of both versions. – References to "The Elements of Law" are to the edition by F. Tönnies: *Thomas Hobbes*, The Elements of Law, Natural and Politic, London: Simpkin, Marshall, And Co., 1889; Reprint London: Frank Cass & Co., 1969 (hereafter abbreviated as El). According to the suggestion of H. Warrender (De Cive, Latin Version, p. 54), the chapters of the two parts of this work are renumbered to run continuously. – In the case of "Leviathan", references to the English version are made to the edition by Richard Tuck, Cambridge University Press 1991; references to the Latin version are to the edition by William Molesworth , London 1839 – 45, Second Reprint Aalen: Scientia 1966. My own numbering of the paragraphs corresponds to the order in which they appear in the respective chapters. – References to Hobbes's "Answer to Bishop Bramhalls's Book, called >The Catching of the Leviathan<" are to the Molesworth edition (English Works = EW). – With regard to all texts, the Roman numeration applies to chapters, the Arabic numeration to paragraphs. – My additions within quotations are in square brackets. Such brackets also indicate omissions. My italics = m/it; my translation = m/tr.

2 The most concise and stringent version of Hobbes's main intellectual steps presented here can be found in *De Cive.* This does not mean that in the later *Leviathan* Hobbes made any substantial changes in his train of thought discussed here. But in *Leviathan* he also offers a wealth of – quite plausible, but not purely juridical-philosophical – considerations, which are obviously, in the midst of the civil war, addressed to the English-reading public in an almost imploring manner. The fact that Hobbes published his English translation of *De Cive* at the same time as *Leviathan* (1651) shows how little Hobbes considered *De Cive* to be 'outdated' and how much, on the contrary, he considered it to be of equal importance. By the way, the version of *De Cive* from 1651 had the title *Philosophicall Rudiments Concerning Government and Society.*

3 *De Cive* I 12; Lev XIII 8; see also El XIV 11. It is precisely here, with regard to the interpretation of the state of nature and war of all with all, that most misunderstandings concerning Hobbes's legal philosophy have their origin, – of course with correspondingly serious consequences for the entire 'rest' of Hobbes-interpretation and the 'insights' gained from it. For example, when that war is interpreted as a radical expression of the friend-foe dichotomy, allegedly central to Hobbesian thought, or as an expression of anthropological pessimism; or when Hobbes is regarded as a philosophical representative of so-called bourgeois early capitalism and his metaphor of war of all with all as the description – which, incidentally, is

Even in the circle of astute scholars in which Hobbes moved during his 11-year exile in Paris, the Aristotelian doctrine of man as a "zoon politikon" seems to have been irrefutable. In any case, Hobbes's (well-founded) thesis that man would be "by nature" so unsuited to political community and thus to peace, that, rather conversely, war would be natural to him, must have been a scandal. And Hobbes certainly owes this thesis the reputation of having considered man to be a kind of wolf.[4]

In fact, for Hobbes[5] not only is man *in general not* evil by nature, but also the evil man *in particular* is not simply evil *by nature.* Rather, like all men, he too is at first merely an animal with his instinctive nature and the desires and passions that naturally arise from it, which *as natural* are neither good nor evil; and only certain actions conditioned by them *can* be evil (namely if they are harmful and, moreover, contrary to duty[6]).

Now there had also been a long tradition specifically in Christianity, from Paul to Augustine to Luther, which – in contrast to Hobbes – really did consider man to be radically evil. For this tradition, war is the inevitable consequence of man's (evil) nature, and so it is his depravity that makes the State necessary. If the whole world were truly Christian, Luther believed, then neither sword nor legal order would be necessary. He refers to a Paul's Epistle: "law is not enacted for the righteous, but for the lawless."[7] However, since no one is Christian and pious by nature, but rather everyone is a sinner and wicked, God has forbidden all externally wicked actions through the law.[8]

Quite different the position of Hobbes: man is quite simply not "*born* fit for society",[9] whether he wants peace or not; thus, neither the Christian, nor the pious, nor the righteous. The quality of will, the 'good' or 'evil' nature of man, is completely irrelevant for Hobbes's doctrine of the State. Mankind is *by nature incapable* of making peace, not (merely) *unwilling* to do so; and so even a strict submission of all to the law of God could not change the fact that this mankind is by nature in a state of war; and – the height of scandal – it is precisely that incapability that distinguishes humans

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considered to be correct – of an unrestrained striving for power by individual private owners that is not tamed by State coercion.

What all these interpretations have in common is the assumption that Hobbes's philosophy of right is based on very specific anthropological presuppositions. This assumption, however, obscures from the outset the view of Hobbes's real pioneering work in philosophy of right.

4 Hobbes himself, however, said this: "To speak impartially, both sayings are very true; *That Man to Man is a kind of God; and that Man to Man is an arrant Wolfe:* The first is true, if we compare Citizens amongst themselves; and the second, if we compare Cities." (*De Cive*, Epist. Ded. 1 – 2); cf. also Kant's remark about "benign and right-loving" men (*Kant*, Doctrine of right, AA 06.312; m/tr).

5 For the following see in particular: *De Cive*, Preface; Lev XIII 10.

6 Only within the framework of a doctrine of duty – which is not yet comprehensible at this point – can we judge good and evil. And only if and insofar as man has duties, can he also be evil. Without leaving the purely empirical-theoretical level, it would therefore be quite impossible for Hobbes to make any moral judgements at all.

7 1.Tim. I 9.

8 See *Martin Luther*, Von weltlicher Obrigkeit etc., Weimar Edition, vol. XI, p. 249.

9 *De Cive* I 2 (m/it)

from animals: "the agreement of these creatures is natural; that of men, is by covenant only, which is artificial"[10]. Such a thesis must have caused offence in Christian Europe, in fact it must have seemed to be blasphemy. However, the following considerations will take away all its 'scandalousness'.

Hobbes, as he makes unmistakably clear in a lengthy annotation to the second edition of *De Cive* (1647), in no way denies human suitability for society and a corresponding neediness. He merely disputes mankind's natural fitness for a *civil society*[11] as a peace order, even if everyone would want it. Hobbes thus does not deny that man is an "animal sociale", but only that he is also an "animal civile" in the sense of the Aristotelian doctrine. Living in *community* with other people is also for Hobbes a biological and 'cultural' necessity. But this in no way also implies for him a natural desire and ability to form a "*commonwealth*" ("res publica")[12].

Nevertheless, Hobbes, and he in particular, could also say of man that he is truly a "ζῷον πολιτικόν" (political animal) – different in essence from the other "animals" – albeit for a reason that is completely at odds with Aristotle's definition:[13] All other "animals" ("animalia") need nothing more than their "naturall inclination" ("naturalis appetitus") in order to "preserve" ("conservare") the "consent of minds" ("consensio animorum") and "by consequence" peace with each other. For man, on the other hand, his natural inclination is not instinct, but will ("voluntas"),[14] and it is precisely because of this that the human species finds itself in natural disagreement between its members. These must therefore first establish agreement and peace (through contract), and keep the artificial union[15], thus created, artificially 'alive' by an equally artificial (i. e. not natural) general coercive power.

This foundation of a unity of will is a political act, indeed, the epitome of a political act; and by the necessity of this act, which arises from the fundamental peacelessness of the natural state of mankind, man is 'in fact' a "political animal", but in relation to a state (the State), which itself is just not "by nature" and for this very reason already requires justification.

II. The natural condition of mankind[16]

In methodological contrast to Aristotle, who in his political thought understands man as being born into a natural community (of the house, the village, the polis) with his equals, Hobbes, who incidentally does not dispute this as an empirical fact, takes, as the starting point of his analysis of the decisive political problem, the individual human being as such, and that means: as a subject of will and possible author

10 Lev XVII 12; likewise *De Cive* V 5.

11 "societas civilis" (*De Cive* I 2 annotation).

12 *De Cive* I 2.

13 For the following see *De Cive* V 5.

14 "Man is made fit for society not by nature, but by education" (*De Cive* I 2 annotation).

15 "societas contracta artificiosa".

16 See Lev XIII; *De Cive* I: "Of the state of men without Civill Society".

of actions. In short: the starting point is, as Hobbes makes unmistakably clear in the title of the first and fundamental main chapter of *De Cive*, *liberty* (external[17] freedom[18]). Nevertheless, as in turn the heading of the first sub-chapter makes – just as unmistakably – clear, it is by no means about the state of liberty of *man*[19], but rather about the state of *mankind* in *community* with one another,[20] in fact about that state of mankind in relation to the liberty of all in which it finds itself – according to the idea – "by nature",[21] i. e. if one imagines it "without Civill Society"[22], i. e. without positive legislation and general coercive power.

Hobbes adopts the traditional definition of man as a sensible rational being.[23] From the idea of man's (sensible[24]) neediness in conjunction with his (rational) capacity for deliberate action in unavoidable spatio-temporal community with others, Hobbes first develops a 'logic of collective action', or more correctly: a logic of individual action in the collective. Its result is "that the beginning of mutuall society is from fear".[25] And as if this thesis were not enough to make him an anthropological pessimist, Hobbes elsewhere says: "All men in the [s]tate of nature have a desire, and will to hurt […]."[26]

To understand these theses, which are not necessarily immediately convincing, a few preliminary explanations may be pertinent. It is *fear* (metus) in the broadest sense (and by no means specifically the fear of the horrors of an [impending] civil war) that Hobbes speaks of as the "beginning of mutuall society"[27]. It is precisely the mildest

17 See Lev XIV 2; XXI 1; 2.

18 "estate of (natural) liberty" (El XIV 11; 12).

19 "status naturalis in se".

20 "status *hominum*"; "state of *men*" (*De Cive* I 1; m/it).

21 "natural condition of mankind" (Lev XIII title); not "natural condition of man"!

22 *De Cive* I 1 title. "[…] which state we may properly call the state of nature" (*De Cive*, Preface 14).

23 "definition of man": "animal and rational" (El I 4). "Rational" is to be taken in the sense of being endowed with reason, not in the sense of being (possibly consistently) determined by reason.

24 Hobbes uses the same terminology as later Kant. He also distinguishes between intelligible (intelligibilis) and sensible (sensibilis). Thus he writes in *De Cive* (Preface 12): "they [men] are meerly sensible Creatures" ("animalia"). In *De Cive* (XV 3), he speaks with regard to God of "the Rationall word, the sensible word" ("Verbum rationale. Verbum sensibile") and of "Right reasoning, sense" ("Ratiocinatio recta, Sensus"). See also De Cive (XIII 7): "sensible, and intelligible" ("sensibiles intelligibilesque"). The terms "sensuous" and "sensory", which are also used in English literature instead of "sensible", do not appear at all in *De Cive*; the term "sensual" appears once, but with a pejorative touch (*De Cive* I 2).

Peter Heath in his CE-translation of Kant's "Vigilantius"-Lectures on the metaphysics of morals always says "sensible" for "sinnlich": "sensible nature", "sensible world", "sensible being", "sensible impulses", "sensible propensity". But Gary Hartfield in his CE-translation of the *Prolegomena* transfers "sinnlich" into: "sensible world", "sensory cognition"; "sensory representation", "sensory intuition"; "sensory determination"; "sensory condition"; "sensibility". And George di Giovanni in his CE-translation of "Religion within the boundaries of mere reason" mostly transfers "sinnlich" into "sensible", but sometimes also into "sensuous" and "sensory".

25 "Societatis civilis initium esse a mutuo metu." (*De Cive* I 2 marginal note).

26 *De Cive* I 4.

27 *De Cive* I 2 marginal note.

forms of fear, "take heed" and "provide"[28], that are the most interesting for understanding Hobbes's train of thought. As reasons for acting with foresight and precaution (however harmless), by which a possible obstacle[29] to the attainment of an "object of the will"[30], and for Hobbes that means: a good[31], is removed, they also fall under the general concept of "fear". In this sense, for example, every stockpile purchase is made out of pre-caution, i. e. out of fear of not being able in the future to dispose of the coveted, but not purchased good. Now, within the spatio-temporal community in which mankind finds itself, any act of one person can collide at any time with any act of any other person in any way and thus be jeopardised in its execution. Therefore, fear within the human *community* refers especially to the possible restrictions of free action by other people; and accordingly, precaution cannot be limited to the directly necessary goods, but must also extend to the means necessary to *secure* them, which thereby also become goods.

This leads to the concept of *power*, which Hobbes brings into play particularly in *Leviathan* and which is notoriously misunderstood as an anthropological peculiarity of his doctrine. Hobbes understands this to mean – "to take it universally", i. e. always and everywhere – "[man's] present means, to obtain some future apparent Good"[32]. Power, as a precautionary measure, is therefore, as it were, the counterpart to fear. It consists – "universally" – in anything and everything that ensures the satisfaction of future natural, i. e. inevitable needs,[33] whereby the goal is "principally their [the people's] owne conservation, and sometimes their delectation only".[34] Hobbes puts "for a generall inclination of all mankind, a perpetuall and restlesse desire of Power after power, that ceaseth only in Death", and he continues: "And the cause of this, is not alwayes that a man hopes for a more intensive delight, than he has already attained to; or that he cannot be content with a moderate power; but because he cannot assure the power and means to live well, which he hath present, without the acquisition of more".[35] The nature of *man* plays a role in these considerations only to the extent, that every person has, every day anew and this literally until death, a "perpetuall and restlesse desire" for, say, a piece of bread to live on. Only the "natural condition of *mankind*", i. e. the situation in which man finds himself in the community with his peers, adds a new dimension to that desire: the *additional* desire for the power required to dispose of that piece of bread *at will.* It is not the primordial needs stemming from human nature, but rather the need for power with its own – potentially explosive – momentum, inevitably arising in the natural community of human beings, that gives the empirical picture, which Hobbes so memorably paints of the state of nature,[36] its characteristic features (all of which, incidentally, can already be discovered in Thucydi-

28 *De Cive* I 2, 2nd annotation.

29 As such an "evil" (*De Cive* I 2nd annotation).

30 *De Cive* I 2.

31 *De Cive* I 2nd annotation.

32 Lev X 1.

33 See Lev XI 1.

34 Lev XIII 3.

35 Lev XI 2.

36 See especially Lev XIII 8; *De Cive* I 2, 2nd annotation.

des's *The History of the Grecian War*", translated into English by Hobbes and published in 1628). Nevertheless, as will be shown, even this new, conflict-laden situation, in which mankind finds itself "by nature", is not the basis for Hobbes's doctrine of the *unconditional* necessity of leaving the state of nature.

Finally, as far as the general "*will to hurt*" claimed by Hobbes for the state of nature is concerned, this is a necessary consequence of the general will to self-preservation and is in its effect even identical with it. The harm inflicted to another is any total or partial prevention of the realization of that other's will. Now, every measure of defense of liberty and property against another consists in depriving this other person of the possibility of successful attack or access, and thus in turn in an attack or access to the other's natural liberty to act as he wishes.

But the analysis of the will to hurt can be taken even further. Human action inevitably takes place in a spatio-temporal continuum that one shares with other people (status *hominum*). As a result, however, not only any action whatsoever (before all defence), but even one's own existence is, through the mere use of space and time, a (more or less large) obstacle to the realisation of the will of others and in this respect a harm. First of all, everybody harms all other people simply by occupying a certain place on earth and taking possession of a certain object that these others cannot (any longer) dispose of; for example, when he sits in a theatre or eats a doughnut. How important or even existential such a harm can be, can be seen when someone in a queue buys the last doughnut or the last theatre ticket or grabs the saving plank of a ship carrying only one person or the last available parachute in a crashing airplane before someone else. The harm caused by such actions is not necessarily intended *as such*, but as an unavoidable consequence of these actions it is nevertheless intended *with them* and is, by the way, in no way different from harm intended as such. It doesn't make the slightest difference to a theatre lover's freedom, to go to the theatre, whether he leaves the queue empty-handed, because the neighbour in front of him is also a theatre lover or because he is a sadist.[37]

The momentum of the striving for power results from the interaction of fear and the will-to-harm. One knows that the other person, like oneself, has the ability and – as far as possible – the will to harm. The resulting own fear leads through the increased need for security to an increased will to power, i. e. to harm, and thus in turn for the other … ad infinitum: "though the wicked were fewer then the righteous, yet because we cannot distinguish them, there is a necessity of suspecting, heeding, anticipating, subjugating, selfe-defending, ever incident to the most honest, and fairest condition'd".[38]

The empirical analysis of human action in the collective leads Hobbes to the conclusion that the "natural condition" of mankind (as a species of rational beings under the natural compulsion of self-preservation) is characterised by a general lack of security with regard to this very self-preservation, – a lack which is inherent in the "nature" of this condition itself and thus in principle.

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[37] It should be said here in advance that the ability and the will to harm by no means disappear in the civil state. But they are brought under general laws and thereby stripped of their universal-reciprocal arbitrariness.

[38] *De Cive*, Preface 12.

It is precisely at this point, no earlier and no later, that, with the discussion of what is traditionally and also here called "natural right", Hobbes's real political philosophy[39] begins, and as such it is philosophy of *right.*[40]

III. The juridical state of nature

The passages[41] preceding the first appearance of the concept of natural right serve to constitute the basic problem of all 'modern' (post-medieval) political philosophy, which can be summarised as follows: As a consequence of the ability of human beings to act according to any (naturally possible) purpose, and the necessity of such action due to the natural neediness of them, men can get within their unavoidable spatio-temporal community into any conflict of action with each other at any time, whereby this "natural condition" has its own dynamic that promotes and aggravates conflict precisely because of the general uncertainty that prevails in it. What can be done about this ominous state of affairs that permanently threatens everyone's natural freedom? The empirical apparent solution to the problem is: since in this situation there is no procedure for the allocation of objects which are desired by several people, in the event of a conflict, the disputed "good" goes to the person who finally gets it ("the strongest"); and this "must be decided by the Sword"[42].

With regard to this passage in particular – and the corresponding one in *Leviathan*[43] – Hobbes has repeatedly been interpreted as presupposing the scarcity of goods. But firstly, this is not the case; and secondly, this would not change the outcome of his argument in the least. Even the assumption of a natural quantity of goods completely sufficient for all,[44] does not deprive the state of nature of the quality of a state of arbitrarily possible collisions between the subjects defining their claims to a right in a sovereign manner. When it comes to the question of which *particular* object from the given abundance may be used by which *particular* person, the natural claims of the individuals always stand side by side on an equal footing and mutually negate each other. The 'abundance argument' does not fulfil Hobbes's critics' expectations; the possibility of conflict would remain *in principle.*

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39 "philosophia civilis" (Opera Latina vol. I; De Corpore; Epist. Ded.; I 7; I 9; VI 7; Lev (L) IX 9); "civill philosophy" (Lev IX Table); scientia civilis"; "civill Science" (*De Cive*, Preface 2); "scientiae politicae"; "political science" (*De Cive* III 13); "doctrina civilis"; "Doctrine of Civill Society" (*De Cive* I 2); "civill knowledge" (*De Cive*, Preface 3).

40 "scientia justitiae"; "Science of Justice" (*De Cive*, Preface 6); "Philosophia […] de iure naturali (tractans)" (= Philosophia "Moralis"); "Philosophy […] treating of […] naturall right, Moralls" (*De Cive*, Epist. Ded. 5); "elements of laws" (El I 1).

41 See *De Cive* I 1 – 6; Lev (esp.) XIII.

42 *De Cive* I 6.

43 Lev XIII 3; 4.

44 See eg *John Locke*, Second Treatise of Civil Government, V 31; 33; 36.

With the transition[45] from the discussion of the "nature of *men*" ("natura *hominum*")[46] to the discussion of "natural right", Hobbes paves the *juridical* way for a (non-violent) general conflict resolution.

1. The bare state of nature[47] (of mere natural right)

Whereas men in community with one another were previously the subject of investigation only as sensible-rational living beings in the (as it were natural) state of nature, they are now the subject of investigation as subjects of natural right in the (juridical) state of nature. From now on "the matters in question are not of *Fact*, but of *Right*"[48]; and the state of nature is no longer a possible empirical entity, but a juridical fiction for analytical purposes.

Unfortunately, Hobbes does not give a careful and convincing reasoning for his transition from the "certain impulsion of nature"[49] to preserve itself, to a "natural right" to self-preservation. His reasoning seems to be:[50] a s a living being, man naturally requires self-preservation; not to preserve oneself would be contrary to nature and – with reference to man as a rational being – at the same time contrary to reason.[51] To deny man the right to self-preservation would mean destroying him in principle, and would thus also be contrary to nature and reason; and so "naturall reason"[52] – as part of human nature and in its service,[53] as the "voice of nature"[54] – attests to man "by nature" a right to self-preservation. This "natural right" is by no means identical with "naturall and savage"[55] liberty[56]. Not just any action, "the Liberty […] of doing any thing […]"[57], is right,[58] but only that which makes use of the natural faculties, i. e. of natural

45 In *De Cive* I 7; Lev XIV 1.

46 *De Cive*, Preface 24. – The nature of *man* is the subject of anthropology (in *De Homine* as well as in *Elements of Law* and in *Leviathan*), which Hobbes places, in accordance with his systematic plan, at the beginning.

47 "status meré naturalis" (*De Cive* I 10). It is the state of the human community before any act of establishing *rights*. In this sense, and only in this sense, we are speaking here of a state in which human beings find themselves in community with their equals "by nature", "even now sprung out of the earth, and suddainly (like Mushromes), come to full maturity without all kind of engagement to each other" (*De Cive* VIII 1).

48 Lev Conclusion 15.

49 *De Cive* I 7.

50 See *De Cive* I 7.

51 As natural and necessary (by his sensible nature) as the satisfaction of his needs is to man, so natural and necessary (by his rational nature) is for him the volitional fulfilment of this satisfaction.

52 "ratio naturalis" (*De Cive*, Preface 16 ; II 1).

53 See *De Cive* XIV 16.

54 "vox naturae" (*De Cive* XIV 14).

55 *De Cive* VII 18.

56 In the sense of "absence of external impediments" (Lev XIV 2).

57 Lev XIV 1.

58 "every action in its own nature is indifferent" (*De Cive* XII 1).

(subjective) reason and natural desires, in accordance with right (objective) reason,[59] namely in the service[60] of self-preservation. Since self-preservation is the empirically necessary condition for any other use of freedom, its pursuit is "the first foundation of naturall Right"[61].

Without the means necessary for an end, the end cannot be achieved. Thus, without the right to these means, the right to the end would be ineffective and practically nullified. Thus, the right to the necessary means follows analytically from the right to the end. Man therefore also has a natural right to the means necessary for his self-preservation.[62]

This in turn gives rise – again analytically – to a further natural right, namely to decide sovereignly which means are necessary for self-preservation.[63] It's not that this right follows from the empirical fact that one usually knows these means best oneself; it follows purely in terms of juridical logic from the fact that on the one hand, a right to decide, which means are necessary for the *preservation of another*, would contradict itself as a universal right, and that on the other hand, without the right to one's own decision about the means necessary for *one's own preservation*, also the right to these means and thus "the first foundation of naturall *Right*", the right to self-preservation itself would become obsolete.

In *Leviathan* the three natural rights defined so far are summarised in the sentence: the right of nature "is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and *consequently*, of doing any thing, which in his own Judgement, and Reason, hee shall conceive to be the aptest means thereunto."[64]

So, in the (juridical) state of nature, everyone is his own judge.[65] At the same time, this result raises, through purely rational analysis, the juridical argumentation to a new level of the philosophy of right. It is no longer about the right to any *empirical facts* (self-preservation and its means), but about the right to a decision about *rights* under

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59 See *De Cive* I 7.

60 See Lev XIV 1.

61 *De Cive* I 7. The status of this natural "right" is not easy to determine. On the one hand, it is the (moral) authorisation, granted to the isolated individual, to preserve itself. On the other hand, however, it is – only as such the subject of further considerations – the (juridical) right in relation to other people as subjects of right. In this respect too, however, it has only authorising character: one does no injury to anyone if one pursues self-preservation at their expense; but no one is obliged to let it happen. This right cannot be used to coerce others, let alone to rule over others, because it is precisely the respectively equal right of the others that stands in opposition to it. This right merely means the liberty to do what is necessary for self-preservation without being prevented from doing so by others; in other words, the right not to be subject to external coercion with regard to the use of one's liberty. The corresponding duty is one's own duty to oneself. It arises from the limits of that right, in the violation of which consists the corresponding "injury", – a "breach of the naturall Law, and an injury against God". See *De Cive* I 10 annotation; III 4 annotation; III 27 annotation; VI 13 annotation.

62 See *De Cive* I 8.

63 See *De Cive* I 9.

64 Lev XIV 1 (m/it).

65 See *De Cive* I 9; Lev XIV 30; XXVII 3.

the conditions of the state of nature. This has decisive consequences for further analysis: if the (juridical) state of nature was initially the state of a community of (equal) subjects of rights, it is now the state of a community of judges who are equally entitled to issue a verdict about rights.

What does this mean for the state of nature as a state of right, as a state of natural right? What is now, as it were, the natural 'juridical situation' of mankind? What is the right or are the rights, man really has in this "natural condition"? The fact that man is his own judge with regard to his natural right does not change anything about this right; it remains a right only to self-preservation (and its means). Therefore, any harm inflicted on another human being, that is not done in (subjectively) strict exercise of this right, is "a breach of the naturall Law, and an injury against God",[66] even if a verdict on it can only be made by the acting person himself, as the only judge possible by right. In the (*internal*) relationship of man to his own conscience as a juridical court ("forum internum"[67]), the distinction between "right" ("jus") and "injury" ("injuria") or between "just" ("justum") and "unjust" ("injustum")[68], made possible by the definition of the original[69] right (to self-preservation), thus remains possible (and morally necessary). But in the (*external*) relationship of man to other people whose liberty is restricted by his actions, the possibility of such a distinction is of no significance; for in a dispute over rights, everyone, as his own judge, is always "right" (in the juridical sense). The right to the objectively necessary means[70] is thus transformed not only into the right to the means subjectively *deemed* necessary, but in relation to the other subjects of rights even into the right to the means *declared* necessary.[71] Such a result must drive the juridical train of thought further.

For the individual human being, not in reality indeed, but in possibility, absolutely everything can come into consideration as a means of self-preservation. This means that in a person's community with others there is, in principle, nothing for these others which that person could not *rightfully*[72] (*iure*) claim as a means for his preservation. This, however, turns the original right to self-preservation into the natural right of everyone to everything,[73] irrespective of the fact that before the "forum internum" one still 'only' has a right to self-preservation and its necessary means. The restriction of the use of freedom to "right reason"-conformity, which is decisive for the definition of the (original) right, is, it is true, by the right to all things – as already mentioned – not removed for the *individual* subject of rights *as such*, but it is so for the *community* of subjects of rights as a natural-right-community

66 *De Cive* III 27 annotation; likewise I 10 annotation; see also El XIX 2; *De Cive* III 9.

67 *De Cive* III 27.

68 See for this *De Cive* III 3 – 5 and below pp. 24 – 27.

69 "the first foundation of naturall *Right*" (*De Cive* I 7).

70 See *De Cive* I 8.

71 See *De Cive* I 10 annotation.

72 The term "rightful", used several times in this article and also once by Hobbes in De Cive (XVI 16), has here, as in Hobbes, the exclusive meaning of "by right", "with right", "iure" ("jure"). The term "juridical", also used here, is an equivalent.

73 See *De Cive* I 10. "even to one anothers body" (Lev XIV 4; see also El XIV 10).

For Hobbes, the natural right to all things "is that which is meant by that common saying, *nature hath given all to all*".[74] In no way, does he understand this to mean that nature, in a kind of pre-stabilised harmony, has provided for all; and also not, that all "collectively" own it together. Rather, *each* individual is in rightful possession of *nature as a whole.* The juridical contradiction inherent in this takes the argument further.

Strictly speaking, within a community of "a common Right [of nature] to all things"[75], the concept of right itself loses all meaning, since there is no use of freedom in the external relationship between people to which it would *not* apply, so that it does not fulfil the function of a concept at all, namely to enable a distinction; – 'anything goes'. In fact, a universal right to all things in its universal-reciprocal effect is "almost […] no Right at all"[76]. Man, thus, has in the state of nature ("by nature") a right that he does not have in this very state.

Contrary to the opinion of some critics, this paradoxical result would not change in the slightest, if there were a (God-ordained) pre-stabilised harmony of the ends of all people and if thus the universal right to self-preservation were not self-contradictory and, with a corresponding general distribution of the necessary means, everyone could, in a quasi objective assessment, get their (predetermined) share. Since the reason for the (absolutely inevitable) disharmony of the state of nature is the universal individual right to decide about rights.

At this point it becomes extremely clear, that, and why, man is not *born* fit for peace. The state of nature as a state of natural right is *as such* at the same time "a state *devoid of justice* (status iustitia vacuus), in which when rights are *in dispute* (ius controversum), there would be no judge competent to render a verdict having rightful force."[77] It contains juridically an unavoidable and irrevocable self-contradiction. One cannot conceive a human *community* of (natural) right in the state of nature without at the same time conceiving it as a self-cancelling *rightful* community.

Of this very "naturall state of men" Hobbes says that it is "a War of all men, against all men".[78] This assertion does not refer to the conflict-laden situation of mutual fear and insecurity in which mankind, as a community of individuals, finds itself for *empirical* reasons,[79] but to the situation in which mankind, as a community of persons, finds itself for reasons of *right.*

The universal right to one's own valid decision about rights, which is analytically linked to the natural right to self-preservation, means that any verdict of one person can contradict any verdict of any other person in any way at any time, without a gen-

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74 *De Cive* I 10.

75 *De Cive* I 11.

76 See *De Cive* I 11; also El XIV 10; XVII 6.

77 Kant, Doctrine of Right, AA 06.312 (CE-translation). – I refer only to the Akademie Edition (AA), since the reader can easily find the corresponding pages in the Cambridge Edition. The number before the (first) full stop refers to the volume, the number after it to the page. Translations of quotations from Kant are taken or adapted, *unless indicated otherwise*, from the *Cambridge Edition of the Writings of Immanuel Kant*, Cambridge: Cambridge UP, 1992.

78 *De Cive* I 12; see also Lev XIII 8.

79 See above chapter II.

eral, juridically binding judgement being possible at all in the state of nature. The essential characteristic of the state of nature is not a permanent current dispute over rights, but rather the *fundamental* impossibility of a solution wherever an asserted right is disputed; in other words: where right could and should fulfil its function in the first place. (Juridical) state of nature means the fundamental and permanent absence of a (juridically) secured peace.

This reveals the meaning of the notoriously misunderstood talk of a war of all against all. Neither actual nor potential physical acts of war as such are meant, but the ubiquitous existence of grounds of *right* for such acts. In this – and only in this – *purely juridical* sense is the natural state of mankind a state[80] of *universal* war "perpetuall[81] in its own[82] nature"[83]; and the natural incapacity of mankind for peace

[80] See *De Cive* I 12, 13; Lev XIII 8. Kant gives a commentary on this: "*Hobbes*'s statement, status hominum naturalis est bellum omnium in omnes, has no other fault apart from this: it should say, est status belli . . . etc. For, even though one may not concede that actual *hostilities* are the rule between human beings who do not stand under external and public laws, their *condition* (status iuridicus), i. e. the relationship in and through which they are capable of rights (of their acquisition and maintenance) is nonetheless one in which each of them wants to be himself the judge of what is his right vis-a-vis others, without however either having any security from others with respect to this right or offering them any: and this is a condition of war, wherein every man must be constantly armed against everybody else." (*Kant*, Religion within the boundaries of mere reason, AA 06.97 annotation [CE-translation]; see also Kant, AA 19.476 – 477; 19.603; 27.591). In fact, Hobbes and Kant are of the same opinion. Incidentally, Hobbes himself says a little later: "[…] in statu naturae, hoc est, in statu belli […]" (*De Cive* I 15).

[81] Just as Kant speaks of "eternal peace" (and not, as it is usually, but incorrectly translated into English, of "perpetual peace"), he would here also, for the same reason, speak of "eternal war". In a sense preluding Kant, Hobbes speaks of "Immortall Peace" (*De Cive.* Epist. Ded. 6).

A side remark may be allowed:

When the peace, established by Augustus, was called "pax perpetua" on coins, for example, and this formula was used throughout the Middle Ages and still with reference to the Peace of Westphalia, it was intended to be permanent. This is precisely not what Kant had in mind when he spoke – literally meta-physically – of "eternal peace". (Incidentally, also Kant's reference to an innkeeper's signboard with the graveyard speaks in favour of the reading "eternal" instead of "perpetual": on gravestones one reads "eternal peace", not "perpetual peace".) The dimension of time plays no significant role in this idea. "What is *in time*, is *perpetual*, but not eternal". (Refl 4134, AA 17.429; m/tr) In relation to historical reality, eternal peace is not to be understood as a temporal (permanent) state. The epithet "eternal" expresses the fact that with the establishment of the civil state, the *fundamental* insolubility of disputes over rights, that characterises the state of nature, has been *completely* eliminated. It means "the end of *all* hostilities"; only in this respect does it make sense that Kant calls the expression "eternal peace" "a suspicious pleonasm". (Towards eternal peace, AA 08.343; m/it) One could also speak of a "duratio noumenon" (The end of all things, AA 08.327). "Eternal peace" is a purely juridical term and belongs to the intelligible world ("mundus noumenon"), not, like "perpetual peace", to the sensible world ("mundus phaenomenon"). And unfortunately, the (temporal) duration even of an "eternal" peace, once established on earth, can be short. The *juridical* peace is an ideal of reason independent of all temporal determination, an "eternal" (timeless) task (cf. Towards eternal peace, AA 08.386.27 – 33) facing mankind a priori. In this – and only in this – sense, Kant, on the one hand, can say: "the state must be regarded as eternal" (Doctrine of Right, AA 06.367; m/tr), and, on the other hand, with regard to a golden *age*, i. e. from a historical, not a juridical perspective, speak of an "everlasting peace" (see Conjectural beginning of human history, AA 08.122).

[82] So not because of the (evil) nature of man!

[83] *De Cive* I 13.

is essentially the incapacity for juridical peace. The fundamental, universal and absolute insecurity of right, however, also means the permanent and, in the state of nature, unalterable threat of violence, not as the 'ultima ratio', but as the only 'ratio' to make one's "right" effective in the event of a dispute. So, in the state of nature, even a conflict over *rights* can only be decided by the (private) sword.

Taken purely *empirically*, Hobbes's speaking of a war of *all* against *all*, or of *everyone* against *everyone*, would simply be wrong;[84] taken *juridically*, however, it is the precise characterization of the natural state of mankind as a state of universal-reciprocal (objective) juridical controversy. Only in this sense, Hobbes can speak of this war as a *perpetual* one.[85] As long as the state of nature lasts, men could become saints without anything changing in the juridical state of war: to each his *own* (private) right – each his *own* judge – and the *own* (private) sword included! The perpetual dispute over rights can only be brought to an end by abolishing the very condition that makes it unavoidable: to all a *common* (public) right – to all a *common* judge – and the *common* (public) sword included.

The particular (extreme) *physical* insecurity, which Hobbes often evokes so forcefully, is only a consequence of the total *juridical* insecurity of the bare state of nature.- The universal powerlessness of the right of nature, i. e. all people's *practical* lack of rights, has the consequence that people are *inevitably*, "however benign and right-loving they may be thought to be"[86], physically threatened. Collisions of action are possible at any time; and in the absence of the possibility to decide on the basis of universally binding right, the right to take any action must be decided by the sword. The problem for mankind, emerging in the analysis of the state of nature, is thus by no means the elimination of human *disposition* for fighting, but the elimination of possible *grounds of right* for fighting. For it is these that necessarily make peacemaking impossible.

The natural right to *all* things (with regard to self-preservation and its means) now indeed also implies the right to exercise dominion over one's equals (for the purpose of self-preservation and securing its means).[87] However, this right of dominion – like all rights in the bare state of nature – is a right without any binding effect in relation to the dominated and thus towards them without any possible juridical claim to obedience;

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84 The fact that Hobbes's arguments are essentially not empirical but juridical, thus purely rational, is already evident here (quite apart from the following discussions of private and public right), not least because otherwise the central sections (from the natural right to self-preservation to the right to all things), the importance of which Hobbes himself emphasises in the annotation to the second edition of *De Cive* (I 10), would lose all meaning. This lies in the indispensability of those sections for Hobbes's *juridical* justification of the State. They would be completely superfluous for an *empirical* (historical-anthropological) justification.

85 See *De Cive* I 13; VIII 10.

86 Kant, Doctrine of Right, AA 06.312 (m/tr). The CE-translation contains two mistakes; one of which is serious: "however well disposed and law-abiding [!] human beings might be [!]". With the second mistake, the translation shifts from Kant's purely rational level to an empirical one. With the first, it misses Kant's (and Hobbes's) crucial point: it is about the ineffectiveness of *natural right* – even with all the "love" on the part of the subjects of right – in a public *lawless* condition.

87 See *De Cive* I 14; XV 5.

because that right is opposed by the equal right of any other person. No one is therefore wrong to oppose a power that invokes this right. It does 'legitimise', it is true, existing power and exercised rule; but it does not establish a rightful claim to it; as a 'right of command' it is nothing other than the 'right of the strongest' and changes its effectiveness, in which also its entire validity is exhausted, with the bearer of power.[88] It is therefore particularly unsuitable for legitimising *State* rule and for establishing the rights and duties of the citizen and of the State.[89]

Not only in the bare, but even in the contractual[90] state of nature[91], in which spheres of action are demarcated by agreements according to private right, the insecurity of rights (and thus *necessarily* also physical insecurity) is not *finally* eliminated even in this respect, i. e. for the respective area of application of the agreements. This is because, with regard to the respective rights arising from the agreements, everyone continues to be their own judge. However, in contrast to the bare state of nature, in which the juridical situation is completely contradictory, it is now, as far as clear agreements exist, 'in itself' (objectively) indisputable, although disputes about the agreements themselves are of course still possible. However, there is at least a certain degree of security of rights vis-à-vis the "benign and right-loving".

In principle, though, the juridical situation becomes secure once and for all only in the civil state with the institution of public right, of the general judge and – for the (non-sacred) people[92] – of a general coercive power. Here, physical insecurity is no longer the (necessary) consequence of a dispute over rights that is undecidable in principle.

In the bare state of nature,[93] there is juridically perpetual war. In the contractual state of nature[94], there is juridically provisional "truce"[95] insofar as contracts are concluded and observed. Not until and only in the ('national' and 'international') civil state[96] does real and perpetual peace juridically prevail in principle. It does not necessarily mean physical security, but it does mean security of rights: in this state, the *rightful* grounds for war are eliminated, and thus also physical peace is possible *in principle.*

These considerations are of the utmost importance for the correct understanding of the legitimation of State rule and the associated claim to obedience, i. e. for under-

88 Cf. *Rousseau*, Du Contrat Social I 3.

89 See *De Cive* Epist. Ded.; XIII; El XXVIII

90 Hobbes does not use a separate term for this counterpart to what he calls the "bare" state of nature. Cf. however the similar distinction in: *Christian Wolff*, Jus naturae I 1 § 128: "status naturalis originarius" and "status naturalis adventitius".

91 See in detail below pp. 16–32.

92 "as men are [not "as they should be"], there is a coercive power (in which I comprehend both right and might) necessary to rule them." (*De Cive* XVI 15).

93 Or: state of mere natural right.

94 Or: state of mere private right.

95 Cf. *De Cive* X 17: "what else, are many Common-wealths, then so many Camps strengthened with armes and men against each other, whose state (because not restrained by any common power, howsoever an uncertain peace, like a short truce, may passe between them) is to be accounted for the state of nature; which is the state of War."

96 Or: state of public right resp. state of secured private right.

standing the justification of the rights and duties of the State and of the citizen.[97] "[…] for the making of the said right [of dominion] *effectual*"[98], thus for the creation of a right of dominion that is *binding* on the subjects, a contract is needed by which it is first *acquired* as a binding right by the ruler from those to be ruled.[99] It is precisely for this reason that Hobbes must first develop the foundations of the right of contract,[100] before discussing the establishment of the State and its right.[101]

It might be helpful to relate already here Hobbes's (still to be discussed) considerations about contract right to the results of his analysis of the state of nature. The natural state of mankind as the state of a community of natural right is at the same time, as has been shown, a state of complete lack of rights. In this sense, we can say with reference to it: "nature itself is destroyed"[102]. The necessary abolition of the state of nature is then, as it were, the restoration of 'nature' or – with reference to the omnilaterally paralysed "right of nature" in the state of nature – the reinstatement of 'nature' in its right.[103] The scandal of the 'non-civil' state does *not* lie in the natural right of the individual to self-preservation, but in the natural-state mode of determining the limits of this right in accordance with one's own juridical reason and of securing them with one's own sword. Accordingly, the contract (of submission) that puts an end to this state does not demand the surrender of that natural right, but 'only' that of the "right to all things" that necessarily arises from it in the state of nature.[104] It is precisely the *function of securing* this right from which the sovereign gains the justification for his use of power. If he is no longer able to adequately fulfil this function internally or externally, he loses with regard to the respective affected individual his right to rule: that individual regains his "right to all things" and must exercise it himself in relation to the underlying natural right to self- preservation.[105]

2. The contractual state of nature[106] (of private right)

a) Contracts and the conditions of their validity

The immediate result of the purely *rational* (juridical) analysis of the (bare) *natural* state of mankind is "the first and fundamentall Law of Nature"[107] as[108] a "Dictate of

97 See *De Cive* Epist. Ded. 9–11.

98 El XXII 2 (m/it).

99 "all obligation derives from Contract" (*De Cive* VIII 3); "It is not […] the Victory, that giveth the right of Dominion over the Vanquished, but his own Covenant." (Lev XX 11).

100 See *De Cive* II; III; Lev XIV; XV.

101 See *De Cive* VI; Lev XVIII.

102 El XIV 12.

103 On the fact that this reinstatement in the case of Hobbes's philosophy must fail because of the internal contradictoriness of a universal natural right to self-preservation, see below pp. 41–46.

104 See eg *De Cive* II 18; III 14.

105 See eg Lev XXI.

106 This state of nature, which is not (or no longer) "bare", is the still non-civil state of human beings, in which they are mutually bound, i. e. obligated, through the transfer of rights, in particular through the conclusion of contracts, i. e. *by establishing* and *acquiring* certain rights;

right Reason"[109] to seek peace if possible and to provide for self-defence otherwise.[110] This endeavour is the original *duty* to self-preservation[111] corresponding to the original natural right to self-preservation. From this duty all other natural duties of right are derived.[112] The ultimate goal for shaping the condition of mankind is peace.[113] All "special" laws of nature, derived from the fundamental one,[114] concern the (necessary) way to get there.

It should be remembered that at this point in the train of thought both the existence of a natural right to self-preservation and the total insecurity of this right in the state of nature are established. Assuming a will to have one's right secured, the necessity of which Hobbes, it's true, nowhere points out,[115] but without which, admittedly, the adoption of a standpoint of right becomes meaningless, it is undoubtedly a dictate of right reason to also want the necessary condition of the security of that natural right, to wit, peace. But peace is fundamentally impossible if people are not ready to subordinate their actions – aimed at their *own* preservation – to the law of enabling and taking into account the preservation *of all others too.*

The reason, which ascertains this law and imposes the resulting duties on people, is indeed the respective individual "right reason", but at the same time the 'objective' "right reason", aiming at universality.[116] It is this reason that says that a real safeguarding of self-preservation and of the right to it is possible only *universally* as a safeguarding for all, determined by the "law of nature". However, this law entails duties (of right). Thus one can say (at least hypothetically): whoever asserts a natural right (to self-preservation), also has the corresponding "natural law" duty; whoever wants the right, must also want the duty, namely as the necessary condition for the effectiveness of this very right. And as clearly as "right reason" attests a natural *right* to man as a rational being, as clearly it subjects him at the same time in accordance with the "law of nature" to an equally natural *duty* of right.[117] Hobbes's political philosophy is, as a

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and in this respect, they have already relinquished their natural "right to all things". Thus, on the one hand, contracts don't yet, by any means, lead out of the state of nature, and, on the other hand, they do not require a civil state for their binding force, i. e. for their *validity*, although they do – as will be shown – for their *effectiveness.*

107 *De Cive* II 2.

108 See for this also below pp. 34–41.

109 *De Cive* II 1.

110 See *De Cive* I 15; II 2.

111 See *De Cive* II 1.

112 See *De Cive* II 2.

113 "the law of nature, the sum whereof consisteth in making peace." (El XV 2).

114 See *De Cive* II 3.

115 Perhaps not, because he considers it to be unquestionably given by the "natural necessity" (De Cive II 3) of the will to self-preservation, at least in people who are 'of sound mind' ("compos mentis"; see *A* Dialogue between a Philosopher and a Student of the Common Law of England, EW VI 88) and thus accessible to his speech at all.

116 "recta ratio"; see for this below pp. 32–34.

117 Cf. Lev XIV 4, where "Law of Nature" and "Right of Nature" are united in one and the same "generall rule of Reason".

doctrine of duties of right,[118] the doctrine of the necessary conditions for the effectiveness of the right of nature.

The first step for mankind now (and, at the same time, the only rightful possibility) to escape the omnilateral war of the bare state of nature and the inevitable threat to self-preservation therein, and thus the "first and [literally] fundamental" step on the juridical path to peace, is for people to renounce their universal-reciprocally disastrous right to all things by transferring or relinquishing certain rights in order to mutually delimit their rightful freedom.[119]

Hobbes's purely juridical-rational argumentation is clearly evident. The 'juridical situation' in the bare state of nature – and not some 'wolf nature' of man – is the reason for war in the sense of being ready to use force or of even really using it. The right to all things makes it *juridically possible*, and the complete insecurity of the original right to self-preservation makes it *juridically necessary* to secure the objects of one's right by force if necessary. The acts of war, in principle (and thus necessarily) at any time possible, can *juridically* only be avoided by relinquishing the right to all things and thus the right to go to war. Leaving the state of nature is therefore a juridical necessity.[120]

The following consideration shows once again that the decisive course of proof cannot possibly proceed empirically and anthropologically.

While the 'justified' threat to everyone by everyone, which necessarily follows from the 'juridical situation' of the bare state of nature, is completely cancelled by leaving this state and establishing a civil state, the purely physical threat continues to exist in principle; at best greatly reduced by the threat of punishment by the State and by the possibility of making one's right effective by legal means. "Indeed, to make men altogether safe from mutuall harmes, so as they cannot be hurt, or *injuriously* kill'd, is impossible […]. But care may be had there be no *just* cause of fear".[121] It is therefore not about – and cannot be about – abolishing the possibility of violence at all, but only about abolishing the possibility of arbitrary and at the same time justified violence; not about depriving people of the *desire* for war, but about depriving them of the *juridical grounds* for it: so that everyone "may live securely, that is, that he may have no *just* cause to fear others, so long as he doth them no injury."[122]

In terms of philosophy of right, the "first special Law of Nature" (derived from the fundamental one), that "our Rights to all things ought not to be retain'd"[123], is of such a relevance that cannot be overestimated. It means – together with its premises – nothing less than the purely rational demonstration of the rightful necessity of "abolishing the

118 See *De Cive*, Preface 1.

119 See *De Cive* II 3.

120 This is precisely what Kant's well-known reflection refers to: "The state of nature: Hobbes's ideal. Here the right in the state of nature and not the *factum* is considered. It is to be proved that it would not be arbitrary to leave the state of nature, but instead necessary according to the rules of right." (Refl. 6593; AA 19.99 – 100; CE-translation).

121 *De Cive* VI 3 (m/it).

122 *De Cive* VI 3 (m/it).

123 *De Cive* II 3 marginal note.

community of all things" and "the introduction of *meum* & *tuum*"[124] i. e. of the rightful necessity of so-called private property in the sense of individual power of disposal over external objects that are mine. At the same time, the law implies through its derivation, that one has to renounce only as much right as is necessary to attain peace.[125]

The required renunciation of the right to all things can be absolute or relative.[126] In the first case, it takes place by unconditional renunciation of a particular right in relation to everyone; in the second case, by conveyance of a particular right in relation to a particular other person. In both cases, a declaration of intent is required from the person who waives his right; and in both cases, this person declares that he himself wants a particular action of his own, which until now was literally done "by Right" ("iure"), to be "unlawfull" ("non licitum") in the future.[127] The case of conveyance is more productive in terms of philosophy of right, because it is not an absolute waiver of a right in favour of the totality of all other subjects of right, but the right, at the same time as it is waived, is conveyed to another particular subject of rights. This means that two particular persons enter into a particular rightful relationship with each other. Only the waiver of rights by conveyance will still be discussed below.

With the will to be declared for the renunciation of rights, which must be recognisable and identifiable as such, that factor – hitherto only latently present – comes actively into play which is of fundamental importance for the acquisition of rights and thus ultimately for the overcoming of the disastrous and hopeless state of nature. The will of the individual person (and thus the freedom of man)[128] is the building block with which Hobbes erects the edifice of his philosophy of right, including the philosophy of the State.[129]

With the declaration of will – "the last act of deliberating"[130] concerning action, the actual decision and determination of the will – a particular action, that was previously possible by right, is now excluded by right. This end of liberty is a freely willed end, and the obligation, that begins with it, is pure self-commitment.[131]

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124 *De Cive* IV 4.

125 See El XVII 2; Lev XV 22.

126 See *De Cive* II 4.

127 See *De Cive* II 4.

128 It was therefore by no means a coincidence that the Oxford University decree of July 21, 1683, to which *De Cive* and *Leviathan*, among others, fell (fire) victim, first and foremost condemned the doctrine that all civil authority originally emanated from the people. See Ferdinand Tönnies, Thomas Hobbes, Leben und Lehre, 3. Ed., Stuttgart 1925, p. 65; H. Warrender, *De Cive* Latin Version, p. 20.

129 See for this *De Cive* V; VI; Lev XVI-XVIII; *De Homine* XV.

130 *De Cive* II 10.

131 See *De Cive* II 10; also El XII 1; 2. – Ultimately, by the way, a commitment between people cannot be thought of in any other way than as a self-commitment. Quite apart from the question of how one could conceive of an externally determined will as a self-determining faculty, the idea of being obligated through the will of another – conceived universally and reciprocally – presents the same insurmountable difficulty as the idea of being the judge of the means of another's preservation. Accordingly, *Leviathan* (XXI 10) states: "[…] in the act of our *Submission*, consisteth both our *Obligation*, and our *Liberty*; […] there being no Obligation on any man, which ariseth not from some Act of his own […]" The first source and the ultimate

The waiver of the right to all things means in the state of nature merely the declaration of a person A that he will not *resist* another person B if B does something that A previously could have rightfullly resisted; since the right to do so has already been granted to B by his right to all things. B "onely procures himself", through the waiver of the "resisting Right" ("iusta resistentia")[132] by A , "security, and freedome from *just* molestation in the enjoyment of his Primitive Right[133] [to all]".[134] Security here does not mean physical security, but only security of right.[135] For, firstly, empirically the renunciation of rights can be disregarded at any time (by breaking the agreement) without there being an authority (State) endowed with general coercive power that compels compliance; and secondly, security is in any case only gained with regard to the person renouncing the right, while with regard to all others nothing has changed juridically and of course also empirically.[136]

While the unconditional and absolute waiver of a right becomes rightfully possible and binding through a unilateral declaration of intent by the waiver party, the juridical validity of a conveyance of rights to another party also requires[137] the latter's declaration of intent.[138] Also with regard to the acquisition of rights, i. e. of something that is generally regarded as something good, one is therefore free, i. e. not at the mercy of someone else's will; nothing can become mine against my will. Whether the will of the renouncer is a good one or whether the right he is renouncing is something good, is therefore completely irrelevant for the conveyance of rights. For that, the two declarations of intent of the renouncer and of the accepting party are both necessary and sufficient, i. e. the only conditions.

The transfer of a right can be effected not only by *spatial* restriction to particular external objects, but also by *temporal* restriction of the use of external objects. For the fact of the conveyance of rights, the intended time of the beginning of that use is irrelevant; the only decisive factor is that the respective intent is *declared* (in the past or – at the latest[139] – at the present time). And with the declared intent of the contracting parties, the right is also conveyed, regardless of whether the use is also already rightfully possible or not.[140]

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ground of juridical obligation is the self-binding will of the individual subject of right, i. e. freedom (and by no means, as "legal positivism" would have it, the State). This is why *De Cive* (II 18) states quite clearly: "Faith only is the Bond of Contracts".

132 *De Cive* II 4.

133 "right original" (Lev XIV 6).

134 *De Cive* II 4 (m/it).

135 Any molestation of the beneficiary of the waiver by the waiving party is henceforth an injury. See also *De Cive* VI 3; El XXII 2; Lev XX 12; Lev (L) XX 11.

136 Cf. *De Cive* VIII 5; XIV 7; also El XXII 4.

137 A conveyance of rights is therefore a *conditional* waiver.

138 See *De Cive* II 5.

139 A declaration of the form "I shall intend" is not the declaration of intent required for a conveyance of rights, but merely the announcement of such a conveyance.

140 See *De Cive* II 6. For example, anyone who rents a hotel room on January 01 for the following December 31, already has a right to this room on January 01, namely for December 31. So he does not receive a (new) right on December 31, but this day is merely the date on which he can make rightful use of the hotel room. It is also incorrect, although common, to say that he can

The first step out of the bare state of nature *in terms of juridical logic* is the (in each case) unilateral and at the same time unconditional renunciation of a right. The second step is the unilateral, but conditional renunciation in favour of a specific other person, as occurs in the case of a voluntary gift.[141] The third step, which is up to now the most important for both private right and the intended solution to the problem, is the mutual conditional renunciation by two (or more) persons, the so-called contract.[142]

Contracts, in which both parties perform immediately, are unproblematic in terms of their juridical validity, since the mutual fulfilment also unequivocally establishes the mutual will with regard to the contract and thus the right is conveyed to both parties.[143] Those contracts, however, in which at least one party does not fulfil immediately,[144] but merely promises fulfilment, the so-called covenants,[145] require further juridical considerations with regard to the possibility of their validity.

If one of the two partners performs, his performance together as well as the acceptance of this performance by the other is the certain proof that the declared intent of *both* is present and therefore the covenant is valid, even if the performance of the other only takes place in the future.[146] This is because, as shown, the validity of a transfer of rights depends solely on the presentness of the declarations of intent.

It becomes more complicated with regard to the validity of covenants based on mutual trust, i. e. where neither partner performs immediately.[147] Also such contracts *are* perfectly valid in the state of nature, provided that the required mutual declaration of intent exists. But they can *lose* their validity if in one of the partners arises "a just suspicion"[148]. Hobbes makes it clear in an annotation to the 2nd edition of *De Cive* that only a *new* reason arising *after* the conclusion of the "compact" renders it invalid;[149] for a reason that could not prevent the conclusion of the covenant must also not (rightfully) prevent its fulfilment. And this new reason must also be a reason for *fear*, i. e. it must concern the trust in the partner's will to fulfil the covenant. On the other hand, with regard to one's own advantage (apart from mere self-preservation, which, however, always exonerates), even a new reason would not affect the validity of the covenant. The obligatory nature of contracts is based exclusively on the will of the contracting parties and not at all on the fact that the contract is a necessary means for a (presumed) end. It is not because the contracting parties have an *interest* in the contract and its fulfilment that it is binding, but because they (freely) *wanted* it –

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only *make use* of his right on December 31. He *has* a right on January 01; and he makes use, and this with right, of an external object on December 31.

141 See *De Cive* II 8.

142 *De Cive* II 9.

143 See *De Cive* II 9.

144 These are the empirically far more important ones.

145 "pactum" (*De Cive* II 9).

146 See *De Cive* II 10.

147 See *De Cive* II 11.

148 "a just fear"; "iustus metus" (*De Cive* II 11).

149 *De Cive* II 11; see also *De Cive* III 2.

for whatever 'selfish' or 'altruistic' interest – i. e. "man […] ought to perform for his promise sake"[150].

In the English version of *De Cive* the text itself once says: "invalid"[151]; and it is indeed Hobbes's thesis that contracts based on mutual trust can, in the state of nature, lose their validity in the sense of being binding or obligatory. In the marginal title of the text, on the other hand, it says: "in vain, and of none effect"[152]; and this also corresponds to a (different!) thesis of Hobbes, namely that *security* with regard to a right acquired by a (valid) contract does not also come about through this contract, but only through a power of the State, enforcing the fulfilment of the contract, if necessary.[153] In this sense, one can also say of valid (and remaining valid!) contracts, in which only one fulfils immediately, that in the state of nature they are "in vain, and of none effect"; – rightfully valid, but without the force of right.[154] Right is only effective – and therefore real – as positive right.[155]

The fact that in the state of nature *all* right is powerless, i. e. ineffective in the case of non-observance of the claim based on it, now has the consequence in the case of contracts based on mutual trust, beyond their *ineffectiveness*, that *these* contracts can become precisely because of that at the same time *invalid*, namely if – and admittedly only if – in the event of justified (new) fear the *reciprocal* fulfilment of the contractual obligations, which exist only *as reciprocal* ones, is called into question. Non-fulfilment of a contract where the partner has already performed, as well as the non-fulfilment of a contract based on mutual trust without a new reason for fear, is *also in the state of nature* a breach of contract; the non-fulfiller therefore commits an injustice, albeit without consequences *in terms of rights.* On the other hand, the non-fulfilment of a contract on mutual trust, if a new reason for fear is given, is in the state of nature according to right; the non-fulfiller is (*juridically!*) right if he does not fulfil a contract that is *then no longer* valid.[156]

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150 *De Cive* XIV 2 annotation.

151 *De Cive* II 11.

152 *De Cive* II 11 marginal note.

153 See *De Cive* VI 4.

154 The marginal note of the Latin version of *De Cive* (II 11) reads: "frustrà et inualida"; and in post-classical Latin "invalidus" means powerless, weak.

155 Unfortunately, especially with regard to the term "validus" and related (Latin and English) expressions, Hobbes is not entirely clear and consistent. (Compare only in Chapter II of *De Cive* the formulations in the actual text and in the marginal notes; also El XVII 10; XXII 2; Lev XIV 7; 18; 19; 27; 29; XV 3; XVII 2; XVIII 4; XX 20.) In general, however, he speaks of 'obligare'; 'oblige' (including the related Latin and English terms) with reference to the obligatory character, i. e. to the validity of contracts, but of 'effect', 'force', 'strength', 'utilis', with reference to their effectiveness. In *Leviathan* ([L] XVIII 4) he distinguishes between "*obligationes*, quae fiunt per verba, et *ligationes*, quae fiunt per capistra"; i. e. between obligations, which come about through words, and bonds, which come about through the bridle. The sentence "Covenants, without the Sword, are but Words" (Lev XVII 2) is thus to be read (freely) as follows: Contracts become through words (declarations of intent) only valid, juridically effective, however, only through the coercive power of the State.

156 The high practical significance of this result for the area of international treaties should be easy to understand.

With regard to the goal set by the fundamental dictate of right reason: peace, it is therefore not sufficient that people contract with each other on mutual trust, unless a general coercive power securing right is authorised by a general treaty to decide in a universally binding manner what is to be regarded as right and, if necessary, to make its validity effective by means of coercion.[157] The function of the State is therefore not to make contracts binding, to give them *validity* and thus to establish right in the first place; but to give valid contracts the *force of right* and thus to (publicly) secure existing (private) right. Accordingly, it says in *Leviathan*, that "the *Originall* of Justice [is] the *making* of Covenants" and "the nature of Justice, consisteth in keeping of valid Covenants: but the Validity of Covenants begins not but with the Constitution of a Civill Power, sufficient to compell men to keep them"[158]. The validity of contracts itself cannot possibly depend on the State, because the State itself comes into being only through a (valid) contract.

However, even if the conditions, discussed so far, are met, contracts are only valid if they do not violate a "law of nature",[159] and that means: a "dictate of right reason".[160] For it is impossible for this reason to assert the binding nature of a contract that violates reason's own law, and to command the fulfilment of the contract. The old rule "ultra posse nemo obligatur" thus refers not only to a physical, but also to a juridical[161] impossibility.[162]

Strictly speaking, "Covenants therefore oblige us not to perform just the thing it selfe covenanted for, but our utmost endeavour; for this onely is, the things themselves are not in our power."[163] Thus, not only the contract itself, but also its fulfilment, i. e. the act of obligation and the content of the obligation are completely linked to the fact of will; even more: to the fact of will *as such*, because any specific contents of will (ends) do not appear in the entire analysis of private right.

Also contracts "extorted from us, through fear" (of death) are valid in the state of nature.[164] The possible empirical motive for making an (externally free) declaration of intent may be as strong as one wishes, but the binding nature of that declaration and therefore also the validity of contracts cannot possibly depend on it. Apart from the fact that there are always (also) some empirical motives involved in the determination of will, between which, however, no juridically relevant distinction can be made, in the case of juridical relevance of motives all contracts would in fact be deprived of their secure ground (of right). With the destruction of the contract as a nec-

157 See *De Cive* I 2; V 5; Lev XVII 12, 13.

158 Lev XV 3 (m/it). Either "validity" means here effectiveness or "begins" is to be read in such a way that the validity of contracts only has effect under the coercive power of the State, thus acquires, as it were, force.

159 See *De Cive* II 13.

160 See for this below pp. 32 – 34.

161 For example, in the case of a contract that conflicts with a previously concluded contract. See *De Cive* II 17.

162 See *De Cive* II 14.

163 *De Cive* II 14.

164 See *De Cive* II 16; cf. also El XII 3; XV 13; Lev XXI 2, 3.

essary instrument of mutual determination of rights, however, also the establishment of peace based on right would be made impossible in principle.

Contracts initially have the function of establishing peace by renouncing the right to all things and by mutually determining the respective rights, thereby securing the primitive right to self-preservation in the first place. It is therefore impossible for a contract to give rise to an obligation to endure total or partial destruction of the self.[165] From a point of view of pure juridical logic, a contract in which one of the partners (*as a subject of rights* concluding the contract) would be obliged to make himself (*as a subject of rights*) available for arbitrary disposition, is juridically contradictory and therefore void; for such an obligation would presuppose that very 'person', who is supposed to be obliged to allow himself, to be treated as a 'non-person'.

At this point, the fundamental importance of the analysis of the binding nature of contracts in the state of nature becomes particularly clear, insofar as this analysis brings into view certain facts that are characteristic of "the very nature of compacts"[166] in general. If no one is obliged "by any *Contracts* whatsoever"[167], to offer no resistance to an aggressor, then this also applies in relation to the State-establishing contract and thus also in the State and towards the State. The passage is therefore later of the greatest importance for the (*negative*) answer to the question of whether the citizen, as a subject of the State, is obliged on the basis of the civil contract to offer no resistance if his self-preservation is threatened by the State.

The result achieved so far also applies without restriction to the relationship between States. *As such*, States are *always* in a state of nature with each other.[168] And the existence of so-called international treaties does not change this state of State relations at all. This is because it is the respective individual State that ultimately in its *private* rightful judgement decides on their binding nature and corresponding compliance. The rightful capacity to make such a decision is called (external) sovereignty. The lack of willingness to give up this sovereignty step by step in cooperation with (the) other States is, according to Hobbes's analysis, *identical* with the lack of willingness to make peace. The ideas of world peace and State sovereignty are in irrevocable contradiction to each other. Positive international right is just not public right, but private right between States and as such merely 'civilisation', but not the fundamental abolition of the state of the "right of Warre" ("jus belli")[169]. So-called peace treaties between States are in reality non-aggression or truce pacts (possible at any time under private right), through which a contractual state of nature is created, from which, on the basis of their own (sovereign) juridical judgement, the States can return at any time to the bare state of nature, in which the previously relinquished right of attack is *restored* and the never relinquished right of defense *continues* to exist.[170]

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165 See *De Cive* II 18.

166 *De Cive* II 18.

167 *De Cive* II 18.

168 See *De Cive* X 17; XIII 7; El XXIX 10; Lev XXI 7.

169 *De Cive* II 18.

170 See *De Cive* II 18.

b) Duties of right

If the rightfully binding nature of contracts, discussed so far with regard to its conditions, is taken for granted, then results – as the second derived and therefore special law of nature – the dictate to keep valid contracts;[171] because the right to breach a contract would render the juridical institution of the contract itself obsolete and consequently make the peacemaking, intended and made possible in the first place by the conclusion of contracts, impossible *in principle.* Furthermore, the dictate applies to everyone without exception,[172] because by the very conclusion of the contract, the other contractual partner is recognised as not only able and willing to enter into the contract, but also – implicitly – to fulfil it. The argument is based merely on juridical logic: *any* conceivable exception to the rule of "pacta sunt servanda" would introduce a contradiction into the logic of contractual behaviour, that would completely nullify the function of contracts. Therefore, (valid) contracts must be kept *unconditionally.* An objection against another party could be rightfully effective only *before* the contract is concluded, namely by not concluding a contract at all. In the state of nature, however, this means declaring war on the other party.[173]

Breach of contract ("breaking of a bargain") is – correctly – called injury (in the juridical sense) because it literally happens "without Right"[174], which was rather transferred to the partner by the very contract. This concept of injury is determined purely rationally by the mere contradiction, contained in every breach of contract, between the (contractual) will that something should happen, and the will to break the contract, that this something should not happen at the same time; whereby this "at the same time" is to be related to the idea of an identical will, independent of space and time, of one and the same person (in the juridical sense).[175] Injury is thus not characterised by a certain content of the will, but by a certain form of the will, namely by the form of (practical) contradictoriness that leads the will itself ad absurdum and thus abolishes it. Injury is something that cannot *reasonably* be willed at all; it is a practical absurdity.[176] And so it is an unconditional "dictate of right reason" to refrain from injury.

Injury[177] as a violation of a certain right[178] presupposes such a right. Now, according to Hobbes, one acquires a right only by covenant or by gift. According to Hobbes, injury against others is therefore not possible in the *bare* state of nature.[179] Hobbes does not know a rightful acquisition without the act of transfer, namely by mere empowerment of an external object; and he cannot know it at all, since such an acquisition is

171 See *De Cive* III 1.

172 See *De Cive* III 2.

173 See *De Cive* III 2.

174 "sine iure" (*De Cive* III 3).

175 See *De Cive* III 3; furthermore El XVI 2.

176 See *De Cive* III 3.

177 "The word injustice relates to some Law: Injury to some Person, as well as some Law." (*De Cive* III 4 annotation).

178 Not as "*a breach of the naturall Law, and an injury against God*" (*De Cive* III 27 annotation).

179 See *De Cive* III 4.

fundamentally opposed by the natural right to self-preservation, for which in principle everything is a necessary means.

In contrast to injury, injustice[180] is a breach of the law and, as a breach of a (general) law, always injustice against everyone. Acting in violation of a *law* is as such an injustice and at the same time as acting in violation of a *right* an injury. For example, a breach of contract is as a breach of the natural law "pacta sunt servanda" an injustice, and at the same time an injury against the contracting party. A breach of the laws of the State is as such an injustice and at the same time an injury against the State and against the citizenry as a whole, but not against an individual citizen.

While breach of contract is already in the state of nature an injury against the person concerned, homicide and theft only become injuries for Hobbes in the State, and only against the State.[181] This reveals a fundamental weakness of both Hobbes's "first foundation of naturall *Right*"[182] and his private right. Unless one has a contract with the person one kills that excludes the right to homicide, one does *him* no injury; because Hobbes's original natural right to self-preservation just does not exclude that right. The weakness of his private right, in turn, lies in the aforementioned impossibility of an original acquisition by mere empowerment of an external object. Without the possibility of such an acquisition (binding on everyone), the rightful claim to one's external mine remains completely and exclusively limited to the respective contractual partner, insofar as he has waived his right to all things. This, however, means, that a *general* property order (even if only 'provisional') prior to the foundation of the State and as something merely to be secured by the State, is inconceivable for Hobbes. Rather, property in a generally binding (not merely effective) sense is created in the first place by the State.[183] Theft is then in the State a violation of property and therefore injury only because it violates a right created by the State. This is one of the possible points of access for what might be called Hobbesian juridical positivism malgré lui.

As far as the concept of justice is concerned, a distinction can and must be made between its reference to actions and that to the persons acting. Just actions are "done with Right" ("iure") and unjust actions are done "with injury". A person who does "some just thing" is therefore not himself just, but merely "guiltlesse". But a person is just, "properly said",[184] only when he acts justly "because the law commands it"[185], i. e. when the law itself (and not the threat of punishment possibly contained in it or the advantage to be expected from its observance) is the *reason*[186] for his actions. This Hobbesian distinction[187] corresponds to the distinction between (juridical) legality, which exists when an action – performed for whatever moral or non-moral

180 "injustitia" (*De Cive* III 4 annotation).

181 See *De Cive* III 4 annotation.

182 *De Cive* I 7.

183 See especially Lev XIII 13.

184 *De Cive* III 5.

185 "propter preceptum legis" (*De Cive* III 5; see also *De Cive* IV 21).

186 See *De Cive* III 30.

187 See also *De Cive* XIV 18; *De Homine* XIV 7.

reasons – does not violate any right (law of right), and morality, when a rightful action is performed out of a rightful disposition. Of course, one can act in conformity with right at any time without any rightful disposition;[188] and even with the strongest rightful disposition, a violation of right, i. e. an injury (for which one is responsible *by right*[189]), is possible at any time.

Hobbes's political philosophy is, as I said, a doctrine of duties, in fact, a doctrine of duties of right (mainly with reference to the external relationship between people[190]), not (also) a doctrine of duties of virtue (with reference to one's own ends).[191] Also the third "law of nature"[192], which commands gratitude, is – as a law pointing the way to peace[193] – a law of *right:* its observance is an (empirically)[194] necessary condition of general trust, and thus in particular of contracts[195] and therefore of peace in terms of right. However, this duty of right is not about strict right (ius strictum), as in the case of contracts, but about right in a wider sense (ius latum); not about "injury"[196] ("under [the] strict, and exact notion of injury"[197]), but about "ingratitude"[198] (towards a benefactor).[199]

For Hobbes, "equity" has, on the one hand, the narrower meaning of distributive justice in the sense of the act of an arbitrator, by which it is defined what is just.[200] It is contrasted with "justice" in the narrower sense of justice in acquiring from one another ("commutative justice"), especially with regard to the observance of contracts.[201] But, on the other hand, Hobbes also uses the term, especially in the neg-

188 "so much as belongs to externall obedience" (*De Cive* IV 21).

189 See *De Cive* XIV 18.

190 Cf. however *De Cive* III 27.

191 "[…] the Lawes of Nature, dictating *Peace*, for a means of the conservation of *men in multitudes*; and *which onely concern the doctrine of Civill Society.* There be other things tending to the destruction of *particular men*, […] which […] are not necessary to be mentioned, nor are pertinent enough to this place." (Lev XV 34; m/it).

192 See *De Cive* III 8.

193 See El XV 1.

194 A methodological remark seems necessary here: With regard to the question of how peace *among men can be realised*, i. e. in the *application* of his purely rationally derived juridical principles, Hobbes may and must also take *empirically* necessary conditions into account. The unconditional validity of these principles is not affected by this; rather, the principles, specifically related to human beings, on their part derive their own (conditional) validity from it.

195 "there can be no contract where there is no trust" (*De Cive* VIII 9).

196 "iniuria" (*De Cive* III 8).

197 *De Cive* VII 14.

198 *De Cive* III 8.

199 "Ingratitude […] hath the same relation to Grace, that Injustice hath to Obligation by Covenant." (Lev XV 16).

200 See Lev XV 15; 24; El XVII 2; *De Cive* III 15.

201 See Lev XV 3. It is possible that Hobbes has these conceptual provisions in mind when he takes "justitia et aequitas" ("justice and equity") together in *De Homine* (XIII 9; see also *De Homine* XIV 5) and distinguishes them as "moral virtue" ("virtus moralis") in the sense of compliance with civil laws from "charity" ("charitas") as compliance with "mere natural laws" ("leges mere naturales").

ative form of "iniquity", to characterise in general[202] that transgression of the "laws of nature" which is not injury and injustice in the "strict and exact" sense.[203] These consist of a breach of contract and the precisely determinable violation of rights and laws that lies therein and is, strictly speaking, only possible in the State.[204] Where, however, in the absence of a generally binding determinability of an external rightful relation, also a violation of rights and laws cannot be objectively determined (in foro externo), and therefore the "laws of nature" are only binding before the conscience (in foro interno), their violation is an inequity and a sin.[205] Equity is therefore the observance of "mere natural laws", whereas "the nature of Justice, consisteth in keeping of valid Covenants"[206] and in the observance of the laws of the State and thus also of the "laws of nature"[207] that are positivised in them.

The sought-after peace can in principle only be achieved if all those involved in the war are regarded and treated as *rightfully* equal with regard to the conclusion of peace.[208] Just as everyone initially has the same right to self-preservation and its means, to decision about rights, to all things, so subsequently everyone also has the same right to war, to peace, to the conditions necessary for it, – and thus also the same right to the same (own) reservation of rights and to the same renunciation (by others) of rights, and of course also the same duties corresponding to the respective rights. Privilege and discrimination are contrary to the laws of nature and consequently, like everything that violates these laws, not a possible (and by right necessary) subject to be generally agreed on in the peace treaty strived for.

The equality at issue here is a purely juridical fiction. This fiction means that we only ever speak of indistinguishable (rightful) persons, never of distinguishable (empirical) individuals. Therefore, labeling Hobbes's philosophy of right as 'individualistic' is completely misleading; in its principles it is 'universalistic' in that it understands mankind not as a set of isolated individuals, but as a community of subjects of rights. Only by abstracting from all *natural* determinations of human willing and acting is it possible for Hobbes to create the foundations of a doctrine of right, which is based (like Kant's) solely on the use of external freedom, and which is only by that, in the first place, universally binding.

Incidentally, Hobbes does not, of course, deny the existence of natural differences in people's aptness and the possibility of resulting differences in physical possession, including physical power, resulting *from those differences.* He only claims – and this radically against the teachings of Aristotle – that the differences between "lord and servant" cannot even be justified empirically, let alone juridically; that no claims to

202 In keeping with his time; cf. Pufendorf, De jure naturae et gentium I 3 § 6.

203 See *De Cive* VII 14; Lev XVIII 6; XXI 7.

204 See *De Cive* XII 1; Lev XV 3; Lev (L) XVIII 5.

205 See *De Cive* VI 13; VII 14; XII 2; Lev XVIII 6; XXI 7.

206 See Lev XV 3.

207 *See El XXIX 5; De Cive XIV 14; Lev XXVI 8; De Homine* XIII 9.

208 See *De Cive* III 13 – 15.

a right whatsoever can be derived from natural differences between people, least of all those to a ('natural') rule of people over people.[209]

The subjects of right, being in a state of war with each other, must first be brought to treaty negotiations, before the peace treaty, demanded by the first dictate of reason as a law of nature, can be concluded. This requires mediation. But this in turn cannot be had without safety. Therefore, reason dictates that "we must give all security to the Mediators for *Peace*".[210]

Even if there is general agreement on the laws of nature and an equally general readiness to obey them, the question of whether such a law has been violated can still lead at any time to "the Question of Right"[211]. Since this question cannot be settled in the bare state of nature, a state of nothing but judges in their own cause, it is the natural duty of right of the disagreeing parties to submit by "mutuall compacts" to a common judge and his possible judgement,[212] whereby the necessary conditions for the impartiality of this arbiter[213], required by the law of nature, must also be guaranteed.[214]

"Right reason" ("recta ratio") as expressing the laws of nature would contradict itself, if it did not also dictate the addressee of its commandments to "preserve the faculty of right reasoning" to recognise them.[215] One is therefore juridically responsible for self-inflicted imputability (eg drunkenness).

As far as the *mode of application* of the laws of nature is concerned, they all apply unconditionally and without exception. But as laws derived from the one fundamental law of seeking peace, they have (unconditional and unexceptional) validity only with regard to the supreme goal of peace respectively to the natural right to self-preservation on which this goal is based. Where seeking peace or one's own security of rights appears to be jeopardised, the derived laws of nature only give rise to the obligation to be *mentally ready* to comply with them. The mode of application of the laws is unaffected by this. Always and everywhere, therefore, the obligation to strictly observe the derived laws remains, whenever and wherever such compliance at the same time represents the fulfilment of the (supreme) commandment to seek peace.[216]

In the state of nature, it is therefore sufficient for the "*fulfilling*"[217] of the laws of nature, to *observe*[218] them where this can be done without loss to one's own safety, and otherwise the constant "*readinesse of mind to observe* them", "when it may be

209 See *De Cive* III 13.

210 See *De Cive* III 19; Lev XV 29.

211 "quaestio iuris" (*De Cive* III 20).

212 See *De Cive* III 20.

213 "umpire" (*De Cive* III 20 marginal note).

214 See *De Cive* III 21–24.

215 See *De Cive* III 25.

216 See *De Cive* III 27.

217 "adimpletio" (*De Cive* III 27 annotation).

218 "exercitium"; "observatio"; "exercise"; "observation" (*De Cive* III 27).

done with safety".[219] In the civil state, on the other hand, such a readiness is in no way sufficient; rather, observation itself is *always* necessary to fulfil the laws of nature, since by making them positive in the State, (reciprocal) observation on the part of the respective other parties becomes an enforceable duty of right, and thus a loss of safety is juridically excluded.

The distinction, already made with regard to contracts, between validity and effectiveness can also be made with regard to laws of nature: they only acquire force and thus universal reciprocal effectiveness in the State (in foro externo)[220] as positive laws: "authoritas, non veritas, facit legem."[221] But they already have validity (in foro interno) in the state of nature – through their moral truth. And it is only this moral truth and internal obligation, "by virtue whereof the civil laws are valid",[222] whereby also and especially the sovereign is bound "in foro conscientiae" to the laws of nature.[223]

Hobbes makes use of the traditional distinction between "forum internum" and "forum externum", "internal court" and "external court".[224] The former is the (individual) conscience,[225] the latter a court of men. A "forum externum" presupposes that an *external* judge (be it a State judge or an arbiter appointed by disputing parties in the state of nature) is in a position to rule on the breach of a law. This is precisely not the case with regard to the "mere laws of nature"[226] as such, because in the bare state of nature the juridical character of actions does not depend on these themselves, which can juridically not be qualified at all, but only on the "Counsell, and Conscience"[227] behind them. If, however, the observation of the laws can take place without loss of safety, as in the case of a contract based on mutual trust in which the other party has already performed, then the laws of nature are also in the state of nature binding "in foro externo".[228] Nevertheless, Hobbes says in general that the breach of the laws of nature is always and everywhere a sin, but a crime only under State law.[229] The reason for this is that in the state of nature in *every* case, including the one just mentioned, everyone remains his own judge and can therefore decide according to his own juridical judgement whether, for example, a valid contract exists at all, whether the other party has really performed in accordance with the contract, whether arbitration proceedings

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219 See *De Cive* III 27 (m/it); furthermore El XVII 10: "a constant intention to endeavour and be ready to observe them"; *De Cive* V 1; Lev XVII 2.

220 El XVII 10.

221 Lev (L) XXVI 21.

222 See *De Cive* XIV 21.

223 See *De Cive* (L) IX 14.

224 See *De Cive* III 27.

225 "conscientia" (*De Cive* IX 14); theologically also: the voice of God; Lev XXX 30: "conscience […] where not man, but God reigneth".

226 "leges mere naturales" (*De Homine* XIII 9).

227 "consilium et conscientia" (*De Cive* III 27 annotation).

228 Despite Hobbes's unequivocal formulation, the literature often contains the view – which completely misses his doctrine – that according to him the laws of nature are *only* binding "in foro conscientiae". See also Lev XV 36.

229 See Lev XXVII 2; 3.

are to be accepted, etc.[230] And yet, if he himself considers the contract to be valid and, in his judgement, the other party has also performed in accordance with the contract, he can*not* before his conscience invoke an obligation of the natural laws *merely* "in foro interno" and, accordingly, merely be *ready* at any time to comply with them. Rather, in this case he is obliged to really comply with them – "in foro externo" according to the *suitability* of the case. If he refuses to fulfil his own contractual obligations, he commits subjectively an injury, even if this cannot be objectively established in a state of nature. And if someone thinks that an act, which is actually in accordance with the laws of nature, does not serve peace, and nevertheless or even for this reason performs it, then he breaches the law of nature and commits an injury against God; but 'in foro externo' his act is "done with Right".[231]

The distinction between "forum internum" and "forum externum" corresponds to the distinction between fulfilment and observation of natural laws. And the following applies to both distinctions: they are *not* congruent with the distinction between "state of nature" and "civil state", but they are in close and decisive agreement with it. However, neither of these distinctions affects the unconditional binding nature of the natural laws.

These laws are "immutable, and eternall"[232], because as "dictates of right reason" they arise *a priori* from the idea of the juridical natural state of mankind; and only through such a purely rational procedure did their universally binding nature come to light. Positive laws, on the other hand, can vary from time to time and from space to space. But they too, as laws *of right*, are based on the always and everywhere same (juridical-practical) reason and thus the always and everywhere same (juridical-practical) laws of nature and the always and everywhere same right of nature.

These considerations are of the utmost importance for the later question of whether any exercise of rule in the civil state is to be regarded as a right – with a legitimate claim to obedience – or whether every claim to rule, including and especially one made with the help of positive law, must prove its conformity with the juridical principles of *reason* in order to be binding.

Notwithstanding his view that a good is only "the object of the Will, i. e. that, which *everyone* of those, who gather together, propounds *to himselfe* for good"[233], Hobbes also recognises a common good[234], which he distinguishes from the private good[235]. For humans, however, this common good is not a direct "natural" object of the will. In the case of animals, "the Common good differeth not from the Private; and being by nature enclined to their private, they procure thereby the common benefit"[236]; that's why "the agreement of these creatures is Naturall"[237]. For human beings, how-

230 Cf. practices in the area of the right of nations.

231 See *De Cive* III 27 annotation.

232 *De Cive* III 29.

233 *De Cive* I 2 (m/it); see also *De Homine* XI 4.

234 "bonum commune" (*De Cive* V 4; Lev XVII 8).

235 "bonum privatum"; "private interest" (*De Cive* V 4; Lev XVII 8).

236 Lev XVII 8; see also *De Cive* V 4.

237 Lev XVII 12.

ever, the common good is not something they strive for by nature; that's why their "agreement […] is by Covenant only, which is Artificiall".[238]

This common good is, as in the tradition, also for Hobbes an unconditionally binding "supreme Law" ("suprema lex")[239] of right. But its content has changed completely compared to tradition. The only task (and the only justification) of the State (as the institution responsible for the common good) is now only "the safety of the people" ("salus populi")[240], which does not only refer to "bare Preservation", but also to "all other Contentments of life, which every man by lawfull Industry, without danger, or hurt to the Common-wealth, shall acquire to himselfe", *however*, "not by care applyed to Individualls, further than their protection from injuries, when they shall complain; but by a generall Providence, contained in publique Instruction, both of Doctrine, and Example; and in the making, and executing of good Lawes, to which individuall persons may apply their own cases"[241]. In short: the foundation of peace is exclusively about securing the conditions for the possible pursuit only of one's own respective "private interest" ("bonum privatum"), by no means of the "private interest" in general. The subjective right to the actions, necessary for the respective individual, to obtain private goods (as a means of self-preservation in the broadest sense), has the fatal consequence that the natural state of mankind is a state of possible disharmony throughout. The individual conditions for satisfying "the private Appetite"[242] cannot possibly be brought under a general principle as their common denominator. The only permanently attainable thing is external peace in the sense of security of rights for *all* in the attempt to attain what is by the respective individuals considered good. As a necessary condition for the unhindered pursuit of one's own "private interests", peace is necessarily a *common* good.

The agreement on this (future) good, that is reached in the civil contract as a peace treaty, does not in any way mean the harmonisation of the respective individual judgements and objectives, but 'merely' an agreement on the termination of the state of war and the establishment of peace as a state of general reciprocal independence of judgement and action. Peace therefore does not consist in the abolition of natural state disharmony, but in the 'civilisation' of this disharmony as the guarantee of the possibility

238 Lev XVII 12. – As far as I know, it was Leslie Stephen, who is said to have called Mandeville's "The Fable of the Bees" (1705) a "beer-bench edition" of Hobbes.. But this assertion is quite wrong in its reference to Hobbes. In fundamental contrast to the community of bees, for Hobbes in the natural community of human beings not only do their private interests not coincide by natural law with the public interest, but their *natural* coincidence is even completely excluded. In Mandeville's famous formula (the subtitle of the "Fable"): "Private Vices – Publick Benefits", one could replace "private vices" even with "private virtues", without "publick benefits" following from this for Hobbes, because the sum of the many independent individual wills does not result in any 'public' will as a unified general will. Whereas Mandeville's "publick benefits" arise unintentionally, as it were automatically, Hobbes's "public benefits" require a specific act of will (the contract of submission). For Hobbes, a peacemaking "invisible hand" only reigns in the animal kingdom.

239 *De Cive* XIII 2.

240 *De Cive* XIII 2; Lev Introduction.

241 Lev XXX 1; 2; see also *De Cive* XIII 2; 3; 4; El XXVIII 1.

242 Lev XLVI 32.

for everyone to determine their actions according to their own judgement, i. e. (externally) freely.

Both the *recognition* of peacemaking as the necessary condition for securing external freedom, and the *conscious creation* of this condition, i. e. the real safeguarding of peace through general agreement and submission to a general coercive power, are the (political) "work of Reason"[243]. Admittedly, this does not directly concern the condition of *man*, but only that of *men* (as a community of right); and the established peace is only external (juridical) peace, not internal (spiritual) peace, – peace of men with each other, not peace of man with himself (his conscience, his God).

Excursus: right reason

Right reason[244] (and neither the anthropologically ascertainable sensible nature of man nor a nature interpreted as creation and the will of God behind it) is the reason why Hobbes's philosophy of right is a doctrine of natural right (jus naturae) and of natural duty of right (lex naturae), – both in the subjective and objective sense. It is reason which, albeit in Hobbes under the empirical condition of the necessity of self-preservation, says what right is "by nature" and what its – equally "natural" – laws[245] (of right) are, under which it inevitably stands through the "dictate of right reason"[246]. Thus reason is the determining ground for the rightfulness of the use of freedom; and only because self-preservation appears to be in conformity with reason, does its pursuit become a right, which then also includes the means appropriate according to right reason.

In keeping with the context, Hobbes limits his explanations of "right reason" to its significance in the "naturall state of men". In this state, "(in which […] no man can know right reason from false, but by comparing it with his owne) every mans owne reason is to be accounted not onely the rule of his owne actions which are done at his owne perill, but also for the measure of another mans reason, in such things as doe concerne him."[247] Therefore, in the state of nature, right reason is always and everywhere only one's own reason.

This does not mean, however, the other way round, that one's own reason is always the (objectively) right one. Consequently, Hobbes speaks not only of one's own, but also of "true ratiocination": only under the condition, that one's own act of reasoning is "concluding from true principles rightly fram'd", is one's own reason also the right one. In the state of nature, though, again only each individual himself has the right to judge whether this condition is fulfilled

The argument about whether Hobbes adopted a 'subjectivist' or an 'objectivist' position is quite pointless, as it misses the actual point. Hobbes, on the one hand, is of the opinion, difficult to dispute, that right reason does not exist 'for itself',[248] i. e. inde-

243 "opus rationis" (*De Cive* III 31).

244 "recta ratio" (*De Cive* II 1 annotation).

245 "leges naturales" (*De Cive* II; III; Lev XIV; XV).

246 "dictamen rectae rationis" (*De Cive* II 1).

247 *De Cive* II 1 annotation; Lev XIII: "Naturall Condition of Mankind".

248 "right reason is not existent" (El XXIX 8).

pendently of an (respectively individual) *subject* of reason, in whose reasoning it first becomes 'real'. Therefore, in the state of nature, reason, although as reason "it selfe is alwayes Right Reason", can only ever be one's own reason; and therefore, '"for want of a right Reason constituted by Nature"[249], an 'objectivisation' of reason, a 'safe standard'[250], must be 'artificially' established in the State and through the State: "when men that think themselves wiser than all others, clamor and demand right Reason for judge; yet seek no more, but that things should be determined, by no other mens reason but their own, it is as intolerable in the society of men, as it is in play after trump is turned, to use for trump on every occasion, that suite whereof they have most in their hand."[251] On the other hand, for Hobbes, for example, that doctrine of the necessary artificial (practically determining) 'objectivisation' of right reason is itself the expression of objective (practically recognising) right reason; and whoever rejects this 'objectivisation' and claims right reason in controversies for himself, "bewray[s] [his] want of right Reason, by the claym [he] lay[s] to it".[252]

With regard to right reason, a strict distinction must be made depending on whether it concerns questions of cognition or questions of the right of nature. Pythagoras' theorem of the right-angled triangle and Hobbes's theorem of the juridical contradictoriness of the state of nature are just as much an expression of right reason and therefore (universally) valid, as Aristotle's theorem of being a slave 'by nature' and Locke's theorem of the real state of nature as a state of peace are not. But in the state of nature, Pythagoras and Hobbes, like Aristotle and Locke, have the same right to take their theorem as an expression of right reason *and*, if relevant, to align their actions with it. In short: the objective cognitive validity does as such by no means result in objective juridical obligation.

Incidentally, with his annotation on right reason, Hobbes also determines the role of the philosophy of right in respect to the state of nature. This is nothing other than the explication of the methodically correct acts of reasoning which, starting from "true Principles", arrive "by right reasoning"[253] at the laws of nature as the dictate of (objective) right reason. As the reader comprehends these acts of reasoning and makes the result his own, the laws of nature become dictates of his own (subjective) right reason. The laws of nature have the character of 'objectivity' insofar as they are the compelling result of acts of reasoning, which come about through a procedure ("mos geometricus") that is binding for all human beings as rational beings[254] and are thus removed from all subjective discretion. At the same time, however, they also have the character of 'subjectivity', insofar as they are binding dictates of right reason only for those who themselves have recognised them as such. Subjective validity therefore exists when a recognising consciousness sees the facts claiming objective validity and accepts the claim. Only as 'known' can theoretical and practical laws be principles of explanation resp. determination of will and action. In this sense, Hobbes can rightly say: that

249 Lev V 3.

250 "mensura certa" (*De Homine* XIII 8, 9).

251 Lev V 3; see also Lev XXVI 11; *De Cive* XVII 12.

252 Lev V 3.

253 "recté ratiocinando" (*De Cive* II 1).

254 See Lev XXVI 13.

"Lawes, if they be not known, oblige not, nay, indeed are not Lawes."[255] A duty not recognised as such is no more a duty for the non-recogniser than a truth not recognised as such is a truth for the non-recogniser. Admittedly, the truth of what is recognised is nevertheless completely independent of what is held to be true.

As far as validity is concerned, the philosophy of right thus claims objectivity. With regard to its recognition and consideration in action, however, it is in the state of nature completely subject to the subjective judgement of each individual.[256]

Excursus: right of nature and law of nature[257]

Whoever approaches Hobbes's doctrines with questions regarding moral-philosophical principles will easily be disappointed – not so much by Hobbes's errors, but rather by his very restricted treatment of this matter. Nevertheless, the few words with which he hints at rather than clarifies it,[258] may serve as a starting point for commenting (albeit far from exhaustively) on some fundamental issues that have played a more or less important role in many of the preceding considerations, but which can only now, in retrospect, be dealt with collectively. Some fundamental remarks about what Hobbes calls "civil philosophy" or, preferably, "civil science"[259] seem particularly pertinent.

What Hobbes presents, especially in *De Cive*, is the attempt – successful in important parts – of a *purely rational doctrine of right.* In Kantian terminology, we may say that *De Cive* provides us with elaborate and sophisticated "Metaphysical first principles of the doctrine of right", both the doctrine of private right and the doctrine of public right (right of the State). As careful, thorough and detailed as these "first principles" are, as deficient is their moral-philosophical foundation. Again in Kantian terminology, we can say that in the philosophy of Hobbes there is neither a "Groundwork of The metaphysics of morals" nor a "Critique of practical reason", not even in rudimentary form; nor is there, incidentally, a "Doctrine of virtue" as the counterpart to the "Doctrine of right".[260]

In the literature on Hobbes, especially since the middle of the last century, scholars have devoted much diligence and ingenuity to shedding light on the darkness left behind by Hobbes. To go into this in detail is beyond the scope of the aim pursued here.

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255 *De Cive* III 26.

256 On its possible role in the State ("civill Doctrine") see *De Cive* XIII 9.

257 "ius naturae"; "lex naturae".

258 See eg *De Cive* I 7; II 1; III 33.

259 See above footnotes 40; 41.

260 Where Hobbes deals with the "laws of nature" as the embodiment of the conditions necessary for self-preservation, he takes into consideration only those, concerned with making and keeping peace between men. (see eg Lev XV 34) This means that he confines himself to a doctrine of rights and duties *of right* (i. e. with regard to the *outer* freedom *between* men). Thus far, it is neither necessary nor even possible for him to give a *general* doctrine of duties. That is, why he can even identify moral philosophy ("Moralls") and philosophy "treating […] of naturall right" (*De Cive*, Epist. Ded. 5; cf. also Lev XV 34, 40). See also what he says about "doctrine of morality" (officiorum doctrina) in *De Cive*, Preface 5.

Rather, I will confine myself to a few remarks that might be useful for a deeper understanding of the *De Cive*-text and its role in Hobbes's philosophical thought.

a) In his fundamental theoretical considerations, Hobbes always assumes that man is a *sensible* being endowed with reason.[261] This is indeed perfectly correct for the *constitution* of the basic political problem which emerges from the possibility of domination of man over man: it is the sensible-rational dual nature of man which puts mankind into a peculiar "state of nature", fundamentally different from the natural state of animals. But Hobbes bases at certain points also his attempt to *solve* that problem, as a *juridical* one, on the very same dual nature – which is fatal for a (*normative*) doctrine of right (although certainly not for an *empirical* theory of politics!). Thus he says at the end of *Leviathan:* "I ground the Civill Right of Soveraigns, and both the Duty and Liberty of Subjects, upon the known naturall Inclinations of Mankind, and upon the Articles of the Law of Nature".[262]

Especially for Hobbes's establishment of his doctrine of "natural right" ("ius naturae") and "natural law" ("lex naturae") that dual nature plays a decisive role, which partially explains the mixture of pure rationality and empiricism characteristic of Hobbes's doctrine.

Hobbes himself further complicates the understanding of his doctrine through the ambivalence of his concept of nature and his concept of reason. "Nature" refers to both the sensible nature ("animal"; "cupiditas naturalis") and the rational nature ("natura rationalis") of man.[263] "Reason" means, on the one hand, the *subjective*, "natural", purely individual reason, that serves man as a living being and, as it were, compensates for the lack of animal instinct; but, on the other hand, also – as "right reason" – an *objective* authority that concerns man as a rational being and constitutes its own lawfulness (order of law).[264]

b) For Hobbes, man has a "right of nature",[265] not as a (practical) *rational* being, but as a (rational) *sensible* being. This right is (initially) not a right to liberty, but a right to self-preservation. Man has this right, not because otherwise he would not be conceivable as a practical-rational (free) being in spatio-temporal community with his equals, but because without it he could not live as a sensible (dependent) being, not even in isolation from his equals.[266] How is this to be understood?

A nature which would provide man with the *need* for self-preservation, but not with the *will* to it would be (thus far) self-destructive. Accordingly, just as man's sensible nature makes the satisfaction of his needs a natural necessity, so does his rational nature make the purposive realisation of that satisfaction naturally necessary. For

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261 "animal and rational"; El I 4; cf. El XIV 1; *De Cive* I 1; Lev I–VI.

262 Lev Conclusion 13; cf. also Lev XIII 14.

263 *De Cive*, Epist. Ded. 10: "the *concupiscible* part […] the *rationall* [part]"; cf. also *De Cive* II 1; III 30; XV 4; El I 4.

264 See *De Cive*, II 1 annotation.

265 See El XIV 6; *De Cive* I 7; Lev XIV 1.

266 Perhaps that is why Hobbes once attributes such a natural right even to animals. See *De Cive* VIII 10.

Hobbes, man *may* want self-preservation, because he *must* want it by nature:[267] "[…] the naturall right of Preservation which we all receive from the uncontroulable Dictates of Necessity"[268]. The only problem is that if he truly had to, i. e. could not do otherwise, the talk of "may" and of "right" would be meaningless; but if the "must" is not strict, i. e. strictly no must at all, it cannot justify a right either: one cannot infer a *normative* statement about a right from an *empirical* statement about a natural necessity.

Presumably, Hobbes is of the opinion that it would be "contrary to right reason"[269] to deny man, as a rational being dependent on self-preservation, a right to self-preservation. From this, however, it would only follow that self-preservation cannot possibly be wrong per se, but by no means in what way it is right – especially in relation to other people. Rather, if one takes self-preservation seriously as a natural right and, accordingly, conceives it *universally*, then one can easily see that it contradicts itself and thus nullifies itself as a right. This is a fate which the right to self-preservation has in common with any 'right' derived directly from whatever *end.*

One might perhaps try to defend Hobbes against the reproach of naturalistic fallacy by arguing that, *prior* to attesting the natural right to self-preservation, the same "right reason" has declared self-preservation, recognised as being necessary by nature, to be a dictate of reason[270], so that the natural right emanates from reason and its dictates.[271] But this argument would only shift the problem, since also a *duty* cannot be derived from an *empirical fact.* And that which reason recognises as being against nature (not preserving oneself) is by no means eo ipso against reason.

Whichever may have primacy according to Hobbes's doctrine, the right to self-preservation or the duty to self-preservation, – with reference to both, right reason is only 'ratio cognoscendi'. 'Ratio essendi', however, is the purely empirical fact of physical neediness. But from this, one cannot derive neither a right nor a duty in the sense of an (unconditional) 'ought', but merely the hypothetical imperative of a (conditional) 'must': *if* one wants to live, *then* one *must* pursue self-preservation. This does not answer the question of right either.

c) With regard to the laws of nature the situation does not seem to be any better. Just like the natural right, also the "first and fundamentall Law of Nature"[272] (and thus all laws derived from it) *ultimately* has its reason in "a certain impulsion of nature".[273] As a "Dictate of right Reason" it is conditioned by the end of self-preservation, predeter-

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267 "to have a care of ones selfe is not a matter so scornfully to be lookt upon, as if so be there had not been a power and will left in one to have done otherwise; […] and this he doth, by a certain impulsion of nature, no lesse than that whereby a Stone moves downward […]" (*De Cive* I 7).

268 *De Cive* (E), Epist. Ded. 2 (only in the English version); *De Cive* I 7: "the first foundation of naturall *Right* is this, That *every man as much as in him lies endeavour to protect his* life and members."

269 *De Cive* I 7.

270 See *De Cive* (L), Epist. Ded. 10, where Hobbes speaks of the "[postulatum] rationis naturalis" (as a "certissim[um] naturae humanae postulat[um]") to avoid a violent death.

271 Cf. Lev XIV 1; 2.

272 *De Cive* II 2; Lev XIV 4.

273 *De Cive* I 7; *De Cive* (L) I 7: "necessitate quadam naturae".

mined by nature.[274] Its 'necessity' is entirely dependent on the 'necessity' of self-preservation and thereby it has only hypothetical (although assertoric) validity. In this respect, the natural laws are "but Conclusions, or Theorems concerning what conduceth to the conservation and defence of themselves [men]".[275]

d) If, however, one assumes a natural right as already given (as is actually the case with Hobbes with the *first* appearance of the "fundamental law of nature"),[276] then this law (and thereby all laws derived from it) can indeed be understood as not being subject to any (further) condition. The "dictate of right reason" to seek peace then surely applies not merely under the condition that one wants to secure one's natural right to self-preservation (resp. self-preservation itself), but *unconditionally*, because in the state of nature, i. e. without peace, mankind inevitably violates this right in the person of everyone;[277] – by the way, completely independent of the factor of self-preservation and the underlying anthropological assumptions. Insofar as man has at all a *natural* right (of whatever kind and on whatever grounds) and is thus a *natural* subject of rights, he also has (and now unconditionally) the duties of right developed by Hobbes in a purely rational way.[278]

Incidentally, this may also explain why Hobbes's doctrine of duties has an apodictic-categorical 'touch',[279] even independently of any link between the "laws of nature" and divine authorship.[280]

In Hobbes's equation of "laws of nature" and "dictates of reason"[281], the afore-mentioned conceptual ambivalence comes into full effect. The dictates of reason are laws of *nature* insofar as they presuppose the nature of man (and thereby his instinct for self-preservation) and relate to it.[282] But the laws of nature are dictates of *reason* insofar as they are obtained, on the basis of a natural right of human beings, through purely rational[283] analysis.[284]

Reason, which is referred to in the context of "civil science", is, firstly, "natural reason"[285] which instrumentally serves man as a *living being*; it reflects on the *natural*

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274 Cf. *De Cive* III 27: "to the end for which they [the laws of nature] were ordain'd"; "ad finem ad quem ordinantur".

275 Lev XV 41; see also *De Cive* III 33.

276 See *De Cive* I 15; II 1, 2.

277 See *De Cive* I 11.

278 See *De Cive* II – III; Lev XIV – XV.

279 Cf. *De Cive* II 13, 16, 17, 22; III 2, 3; IV 21; XIV 23; Lev XV 10.

280 Cf. *De Cive* III 33; Lev XV 41; XXX 1; but also *De Cive* XIV 4.

281 See eg El XV 1; *De Cive* I 15; II 1; III 27; IV 1; Lev XIV 3.

282 Hobbes does not yet seem to be familiar with the idea of reason as the *supreme* determining ground of all practical legislation.

283 "by reasoning", "ratiocinando" (*De Cive* IV 1).

284 As a result, the "Liberty"- part of *De Cive* contains a doctrine of rights and duties of right, being in its essential parts purely rational, but starting from empirical premises that, on the one hand, are not even needed by the doctrine itself, but, on the other hand, have a disastrous effect in the subsequent doctrine of the State.

285 "ratio naturalis"; see eg *De Cive* (L), Epist. Ded. 10.

laws of life to which man is subject and provides him with the means to achieve the ends necessarily arising from his sensible nature. As "right reason"[286], however, it becomes, as it were, independent of that "natural reason". It is still instrumental, but in the service of man as a *rational* sensible being, and it reflects accordingly on the particular *rational* laws to which this being is subject.

The juridical laws are, firstly, laws of *reason*,[287] – and laws of *nature* only in the sense that they are laws of man's "rational nature"[288]. Man is subject to them as a rational being. The "fundamental law of nature" which drives man out of the state of nature is, indeed, a "dictate of reason"[289]; a law of man's rational nature and with regard to this rational nature: it drives man out of that state as a *sensible-rational* being, not simply as a *living* being. Safeguarding self-preservation by law is possible for man only by juridical and, therefore, rational laws and not by natural laws. It is directly man's reason (and not his sensible nature) that gives, in one and the same "generall rule of Reason", both "the first, and Fundamentall Law of Nature; which is, to seek Peace, and follow it", and "the summe of the Right of Nature; which is, By all means we can, to defend our selves."[290] The idea of (objective as well as subjective) right is determined by conformity to reason; and already the natural right to self-preservation is a concept of reason – albeit one that is empirically conditioned.

Even if the basis of the entire system of natural rights and of duties according to the laws of nature is always self-preservation and the system as a whole therefore has merely assertoric-hypothetical validity: – the purely rational establishment of natural private right and of the necessity of natural public right as well as of the laws of nature remains untouched by this. In this entire area (including the fundamental law of nature to seek peace), reason is also the (immediate, if not ultimate) 'ratio essendi'. The attestation of a natural right – however justified – implies in its juridical-logical consequence[291] at the same time and inevitably the 'subordination' of man to a specific order of non-natural laws, i. e. of laws of reason as laws of right.

It is the *empirical* element in his concepts of natural right and of a civil contract that prevents Hobbes from completing the path of purely rational juridical thinking that he had opened up. And it is, at the same time, the *consistent* pursuit of this path (in contrast to Locke, for example) that prevents him from developing an *empirical* "civil philosophy" that takes account of the empirical conditions of mankind.

Some scholars have sought to see in Hobbes's prioritising the concept of natural right over the idea of duty[292] a decisive break with tradition.[293] No doubt, the work of Hobbes *is* the beginning of a new era in political philosophy, albeit by virtue of

286 See *De Cive* II 1 annotation.

287 See *De Cive* II 1, 2.

288 *De Cive* III 30; XV 4. "the voice of nature, or naturall reason" (*De Cive* XIV 14; cf. El XV 1).

289 See *De Cive* II 2.

290 Lev XIV 4.

291 See particularly *De Cive* I–III; Lev XIV–XV.

292 See however Lev XIV 4; also *De Cive*, Preface 1.

293 Cf. eg Leo Strauss, Natural Right and History, Chicago 1953.

his theory of the state of nature and of the purely rational demonstration of the (juridical) necessity of the State contained in this theory. As far as the concept of natural right is concerned, however, Hobbes does not, in my opinion, overcome tradition. For him, it is true, there is no longer a highest good ("greatest Good", "Summun Bonum") and a final end ("utmost ayme", "finis ultimus"),[294] the pursuit of which could justify human action with regard to others; but for him, too, natural right is bound to an end, namely self-preservation.[295]

e) As is well known, Hobbes asserts not only an identity of "natural (moral) law" with "divine law" and their identity in turn with "right reason",[296] but also the dependence of those laws *as laws* on the authorship of God.[297]

Epistemologically the question arises as to how, in fact, the divine authorship of a law can be recognised.[298] Insofar as this is (only) possible through one's own reason, divine law and law of reason are *practically* the same for man. To this would correspond Hobbes's talk of "Reason, which is the *law of Nature*, […] given by God to every man for the rule of his actions".[299] But insofar as "revelation" is required for it,[300] such a law lacks a universal bindingness: "[…] the laws of nature […] before, being not known by men for any thing but their own natural reason, they were but theorems, tending to peace, and those uncertain, as being but conclusions of particular men, and therefore not properly laws."[301]

In any case, Hobbes seems to regard the "tacit dictates of Right reason"[302] as a "natural", world-immanent expression ("natural law") of the divine will and its law ("divine law").[303] Thus, he speaks of the "Kingdome unto God: *Naturall*, in which he reignes by the dictates of right reason, and which is universall over all who acknowledge the Divine power, by reason of that rationall nature which is common to all"[304]; that is, common to all those who recognise the bindingness of the dictates of reason which are as such the expression of the divine authority. And in *Leviathan*, he says: "As far as they [the Holy Scriptures] differ not from the Laws of Nature, there is no doubt, but they are the Law of God, and carry their Authority with them, legible to all men that have the use of naturall reason: but this is no other Authority, then that

294 Lev XI 1; *De Homine* XI 15.

295 For the resulting aporias, which, however, only have an effect in the dominion theory, see below pp. 41–46.

296 See El XVIII 1; *De Cive* IV 1, 2; XIII 2.

297 See El XVII 12; *De Cive* III 33; Lev XV 41; XXX 1, 30.

298 Cf. Lev XXXIII 22.

299 *De Cive* IV 1; see also *De Homine* XIV 5.

300 "as they are delivered by God in holy Scriptures, […] they are most properly called by the name of Lawes" (*De Cive* III 33).

301 Hobbes in an *Answer to a book published by Dr. Bramhall*, EW IV, p. 284–5.

302 "tacitum dictamen rationis" (*De Cive* XV 3).

303 See *De Cive* IV 1.

304 *De Cive* XV 4.

of all other Moral Doctrine consonant to Reason; the Dictates whereof are Laws not *made*, but *Eternall.*"[305]

In terms of moral philosophy, the question arises – not to be discussed here – as to how the divine will, as a will that is alien to one's own will, could possibly be obligatory for this will.

However the questions raised may be answered, God definitely plays no role within Hobbes's "civil science". The divine laws, insofar as they "oblige all Mankind", are "Naturall" "in respect of God, as he is the Author of Nature" and "Lawes" "in respect of the same God as King of Kings".[306] In other words, also and especially man as a rational being is understood as a creature of God and the dictates of reason are understood as willed by God. Hence, the *form* of the obligation of the laws of nature is thus founded in the divine will. Its *content* and justification, however, are attained in a purely rational way ('ratiocinando'). It is the "certain Clue of Reason […] by the benefit of whose Conduct, wee are led as 'twere by the hand into the clearest light"[307] of the world of justice. *That* the dictates of reason are binding may for Hobbes 'ultimately' have its basis in the divine will. But it is reason, and reason alone, that says *what* is dictated and therefore binding. The purely rational character of Hobbes's doctrine of right would thus remain untouched regardless of its possible theonomic foundation. Incidentally, the 'ultimate justification' of the bindingness of juridical statements does not belong in the doctrine of right itself, but in a general moral philosophy preceding it, which – as already mentioned – is not available to us in Hobbes's case.

f) Whether one considers Hobbes's derivation and definition of natural right to be acceptable or not, and whether one ascribes to his doctrine of duties categorical or merely hypothetical validity, and whether one assumes a theonomic moral philosophy in him or not; – the philosophical value of his *doctrine of right* (especially as found in *De Cive*) is completely independent of this. This applies in particular to Hobbes's pioneering work in the philosophy of right, namely to the juridical analysis of the natural state of mankind (including the *general* theory of contract[308]) and to the proof of the juridical necessity of the State based on it. And whether seeking peace is categorically commanded or merely hypothetically 'recommended', – it can in any case only be *successful* under the conditions outlined by Hobbes: mankind is to be understood as a community of natural and equal subjects of rights, the natural state of mankind as a state, that cannot be legitimised under any condition, and the State as a state established by contract in order to secure right.

Nobody understood better than Hobbes that in the case of laws of *right*[309] their purely rationally justified binding force can, if necessary, be replaced by the authority of the State and the voluntary nature of compliance by the coercion of the State. It is not the objectivity of the validity of the juridical dictates of reason that is affected by the lack of a basic moral philosophical doctrine, but only the *status* of this validity as a

305 Lev XXXIII 22.

306 Lev XXX 30.

307 *De Cive*, Epist. Ded. 8.

308 See *De Cive* II–III; Lev XIV–XV.

309 as distinguished from laws of *virtue.*

hypothetical or categorical one. "The problem of establishing a State", i. e. the *problem of peace*, "is soluble even for a people of devils (if only they have understanding)"[310], because mere *rules of prudence* suffice. They are not sufficient, however, to solve the *problem of legitimisation.* Nevertheless, whoever wants to justify the rule by men over men can only do so by following the path that Hobbes took and which he has travelled a long way down.

IV. The civil state (of public right and thus of secured private right)

Remarkably, even for Hobbes, as in the Hellenistic-Christian tradition he attacked, the original right of nature still refers to a specific end, in his case to self-preservation. And also the right to all things, resulting, according to his doctrine, from that "first foundation of naturall *Right*"[311], can – as he himself sees[312] – be interpreted in the Medieval-Christian sense as the right to the fruits of the earth, given to all in common by God for the end of satisfying creaturely needs. But – and here he stands in stark contrast to tradition – precisely because of this right to all things, for him the natural state of mankind is a state of unavoidable and, within this state, also irremovable, i. e. thoroughly pre-stabilised general uncertainty of right.[313] Human beings may be entitled or even obliged to pursue the end presupposed by the right of nature, but they still require the use of their free choice in order to set the necessary causal processes in motion. However, they can be prevented from this very use by any other person in any, at the same time justified, way. For even a pre-stabilised harmony in the ends of all people would not have the slightest effect on the possible agreement of people in their *external actions.* And so, in a state of natural freedom,[314] people are unconditionally dependent on the arbitrariness of others and therefore simply not free.

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310 Kant, Towards eternal peace, AA 08.366 (CE- and m/tr).

311 *De Cive* I 7.

312 "And this is that which is meant by that common saying, Nature hath given all to all, from whence we understand likewise, that in the state of nature, Profit is the measure of Right." (*De Cive* I 10. Cf. eg Cicero, De officiis, I 21; *Thomas Aquinas*, S. theol. Sec. sec. quaest. LXVI, art. II; *Hugo Grotius*, De iure belli ac pacis, II 2 § 2.

313 It is therefore nonsensical to oppose Hobbes's idea of the state of nature as a philosophical fiction concerning rights with another idea as the 'truer' or 'more appropriate to man'. Hobbes's idea does not aim at any particular empirical reality at all; neither at an early historical pre-State stage of human socialisation, nor even at a pre-societal state of isolated individuals. Rather, Hobbes wants to use this idea to examine the (conceivable) juridical consequences for a mankind that is in a spatio-temporal community (of whatever form of society and whatever level of culture), but not – as Hobbes says – in a "civill Society" ("societas civilis"), i. e. not in the "Civill State" ("status civilis") and under positive right. Thus, the hypothetical construct of Hobbes's state of nature as a heuristic device can only be criticised with regard to its suitability for the sought-after solution to the problem, but not with regard to a non-existent and also not aspired reference to reality and corresponding truth content.

314 The chapter on the state of nature in *De Cive* is as a whole "under the titles of Liberty", "sub titulo libertatis" (*De Cive*, Index).

Thus the state of peace as a state of secured right of all is not already inherent in the natural community of men and as such merely to be kept.[315] Rather, it must be sought[316] first and foremost, and the reason for seeking it lies precisely where also the source of mankind's natural discord lies: in man's practical rational nature, i. e. in free choice itself. The same practical reason, still classically called "recta ratio" by Hobbes, which previously attested the natural right to self-preservation, now says (as the law of one's own rational will) that for the sake of this very right one must leave the state of nature, in which it must remain eternally ineffective, and together with all others establish a civil state, in which this right is secured – namely through positive right and a general coercive power,[317] i. e. through a State.[318] With reference to the idea of the state of nature, the original right to self-preservation thus presents itself as a natural right of man to a State.

This in no way means that, because one has a right to self-preservation and consequently a right to all things, one (also) has a right to a State. Rather, because of the internal contradictoriness of the state of that natural right, the subject of this right is subject to the dictate of right reason: one has the duty of right to leave this state, which is devoid of justice by natural law necessity, and one has therefore also the right to force others to do so. The natural right to live in a State thus not only corresponds to, but is preceded – and underpinned – by a natural duty to live in a State as the necessary condition for universal peace. This is the only reason why Hobbes can speak of a dictate. This is by no means a mere rule of prudence, indeed not a hypothetical imperative at all, but a categorical imperative.[319]

The purely rational[320] deduction of the necessity of the State is Hobbes's revolution in the philosophy of right. For the first time, the necessity of the State has been demonstrated *purely a priori*, namely from the juridical contradictoriness of the natural state of mankind, i. e. dominion has been legitimised by its necessity *with reference*

315 Therefore, as Hobbes clearly recognises, the conditions of its possibility cannot be found in a natural end of man.

316 *De Cive* I 15; II 2.

317 Right can fulfil its reality-shaping function only as a positive system of order secured by a general coercive power. Hobbes's 'positivism', which is as often reviled as it is misunderstood, is a necessary consequence of his right of nature. This is precisely what Hobbes's decisive insight into the rational necessity of the State with its function to secure positive right implies.

318 *De Cive* V; Lev. XVII. The demand for the foundation of a State is of course – in accordance with the function of the idea of the state of nature – to be understood as the demand to imagine the already real State as constituted for the aforementioned reason.

319 See for this A. E. Taylor, The Ethical Doctrine of Hobbes, in: Philosophy, 13 (1938), 406 ff.; H. Warrender, The Political Philosophy of Hobbes, Oxford 1957; as well as the discussion that follows on from this, particularly in the English-speaking world, eg in: K. C. Brown (ed.), Hobbes Studies, Oxford 1965.

320 Pure (practical) reason, to which reference is made several times here, simply means the faculty of practical cognition, and in no way beyond that the faculty of being the determining ground of choice. This implies in particular, that the considerations, presented here with regard to Hobbes's philosophy of right, are completely independent of the answer to the question of the autonomy of the will.

to the idea of right;[321] – *without any recourse to experience*,[322] above all without any recourse to any empirical nature of man,[323] i. e. without any anthropological presupposition.[324]

The demonstration of the necessity of dominion for peace does, however, not also already reveal the juridical basis of dominion. Since this basis cannot possibly be found in the natural right of each individual, not to be subject to coercion by anyone, and thus any kind of transfer of an already existing right to rule is out of the question, the only remaining option is the creation of such a right from the will of all united by a contract. By concluding a mutual contract, all agree that a general coercive power that restricts their freedom, shall rule over them all in order to establish peace. Since such a contract is required by one's own rational will, the general conclusion of such a contract can be regarded as both necessary and voluntary. And thus the right of the State to rule would seem to be justified, were not the contract itself – as will be shown shortly – despite its seeming generality, necessity and voluntariness, contrary to right and therefore null and void, as Rousseau then argues against Hobbes.

Hobbes presents this contract as a contract of unconditional submission of all contracting parties in favour of an empirical will of a natural or juristic person that is in no way bound by this contract.[325] The only will declared by this contract is the will to submit unconditionally to the rule of the State (allegedly legitimised by that contract) and to the restriction, whatever it may be, of freedom declared by the State to be a right.[326]

Now, in fact, (one's respective own) reason demanded a contract with all others to create a general ruling power in order to be protected by this very power in the pursuit of the natural interest in self-preservation from the obstructive coercion of others, i. e. to be sure of one's natural right to self-preservation. With the unconditional submis-

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321 On this Kant: "The state of nature: Hobbes's ideal. Here the right in the state of nature and not the *factum* is considered. It is to be proved that it would not be arbitrary to leave the state of nature, but instead necessary according to the rules of right." (Refl. 6593; AA 19.99 – 100; CE-translation).

322 Also the transfer (of rights to the ruler) itself should not be considered an empirical act, but rather a transfer 'in idea': the 'civitas' receives *as 'civitas'* justification for its supreme coercive power through the *idea* of having arisen from a (rationally necessary) transfer of rights on the part of its "cives". "[…] the matters in question are not of fact, but of right […]" (Lev Conclusion 15; see also 8, 9).

323 Therefore, the objection – already raised during Hobbes's lifetime, for example by Pufendorf, who was particularly influential in 18th century political thought – that man has a natural inclination towards socialisation, is completely irrelevant to the problem posed and solved by Hobbes.

324 The only 'assumptions' made at the beginning, namely man's ability and need to act in unavoidable spatio-temporal community with his equals, are not 'preconditions' for the solution of the problem, but rather the reason for its necessity. Incidentally, it is not claimed that Hobbes has no anthropological theory (he does) or does not use it in his philosophy of right (he does). It is only claimed that he does not need it for his fully consistent, purely rational deduction of the juridical necessity of the State. Where he does use it (far more in *Leviathan* than in *De Cive*), he does provide a wealth of impressive empirical arguments, but this obscures – as the reception history to this day shows – some reader's view of Hobbes's truly epoch-making achievement.

325 *De Cive* VI; Lev XVIII; XXVIII.

326 See however below pp. 50 – 51.

sion presented by Hobbes, however, one surrenders oneself contractually, i. e. by right,[327] completely to an empirical will. In order to secure one's natural right against *any* arbitrariness, one renounces all one's right against a *particular* arbitrariness. Such a contract is not only completely ineffective, because one cannot secure a right by renouncing it; but it is also, and above all, juridically completely contradictory and therefore absolutely contrary to right and without any binding force. Firstly, the content of the contract negates exactly what its form (rightly) presupposes: that the signatory is a subject of rights. Secondly, however, renouncing the status of a subject of rights is in contradiction with the very idea of right, which would lose, with the subject of rights as the bearer of possible rights and duties of right, its object.

The shortcoming of Hobbes's 'solution' is obviously that it does not represent a way out of the problem, but rather a circular path. For vis-à-vis the (empirical) will, in whose favour all (who are not all) submit unconditionally, the problem of the state of nature, of being dependent on another's will, continues to exist; and with regard to securing the right to self-preservation, ruler as well as subjects still remain necessarily each their own judge. The path, that Hobbes forges with his razor-sharp intellect through the jungle of the problem and which almost seems to bring him to his goal, actually ends at the starting point. State rule continues to be without a rightful basis, its claim to obedience without *jus*tification.

The fact now, that Hobbes, by working with a materially determined concept of natural right – like the Christian-medieval tradition –, cannot arrive at any other doctrine of the right of the State, given his own relentless radicalism of thought, is of the greatest significance in terms of philosophy of right. With regard to happiness and its realisation, "people differ in their thinking about happiness and how each would have it constituted, their wills with respect to it cannot be brought under any common principle and so under any external law harmonising with everyone's freedom".[328] Because of the lack of universalisability, inherent in the Hobbesian (and any other materially determined) concept of natural right, the formation of a general will, by which a possible ruler could be legally and thus by right bound in the exercise of his rule, is a priori excluded. Thus, if people nevertheless want their self-preservation, being 'justified' by nature, (and, according to Hobbes, they want this with the necessity of a natural law), they have no choice but to submit, as it were, on the off chance, to an arbitrary will (of the 'ruler') with regard to the determination of their will, necessary for their self-preservation, and thus, however, to have no rights whatever directly vis-à-vis that arbitrary will and indirectly also vis-à-vis the arbitrary will of all others. Consequently, in the attempt to find peace – to be sought according to the dictate of right reason – with the help of the submission contract, they will entirely lose their right and thus also their freedom and yet not find peace, because it dissolves, together with right and freedom, into nothing.

In a state in which the 'human right' to self-preservation were a universal law, no one would by right be secure in the freedom granted by this right, and thus this right itself would be a mere appearance. Conversely, it would be no different: in a state of

327 Not just physically; that is unavoidable, because the ruler is always a human being with the ability to coerce.

328 Kant, On the common saying, AA 08.290 (CE-translation).

general legal restriction of freedom, that right would be abolished *as a natural right.* There is really no State to be created with this natural right. Consequently, Hobbes would have to abandon his contradictory concept of natural right. The problem inherent in retaining it drives him – now again quite consistently – to that doctrine of the right of the State which Kant, and Rousseau before him, find so "appalling"[329]. According to it, the ruler of the State – regardless of whether he is (in the historical-political sense) an 'absolutist' or 'constitutional-monarchical' or 'parliamentary-democratic' one – is literally 'legibus solutus'. He cannot do an injury to his subjects because, in relation to him, they do not have any rights at all which could be violated. The infamous 'absolutism' in Hobbes has its reason in the paradoxical idea of a legitimate power being unlimited in its right. Public justice is what the ruler determines as such in sovereign, lawless arbitrariness. It is the rule of pure discretion, i. e. tyranny in the strictest sense. It should be noted that this is not a tyranny because the ruler is a so-called tyrant, i. e. someone who uses his rule to serve his private interests and not the common good; but because the ruler, in the absence of a specified lawful will determining his right to rule, has no choice, but to rule according to his private arbitrary will and thus "as he should think fit"[330]. This means that the subjects are subject to another's will by virtue of their 'original social contract', i. e. by right unfree and without rights.[331]

The reasons for the failure of Hobbes's doctrine of the right of the State have also made it clear what steps still need to be taken in order to put the purely rational doctrine of right, which Hobbes decisively coined, on a firm footing: the concepts of natural right and of right in general and the idea of the contract, establishing the right of dominion, require a radical revision. It was Rousseau who undertook the revision of the doctrine of contract. It was Kant who provided the purely rational determination of the concept of right and of the concept of the right of humanity as well as the foundation of the State-establishing contract in the right of humanity.

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329 Kant, op. cit., AA 08.304 (CE-translation).

330 "arbitrio suo" (Lev XXVIII 2). For Kant, this is "the greatest *despotism* thinkable (a constitution that abrogates all the freedom of the subjects, who in that case have no rights at all)" (On the common saying, AA 08.291; CE-translation). If Hobbes refers to the moral obligation of the ruler ("excepting the limits set him by natural law" (Lev XXVIII 2) precisely in this context – albeit only in the English, not in the later Latin version of *Leviathan* – this does not change the tyrannical character of the rule at all. For from this "natural law", the ruler can, even with the best will in the world, take no lawful provisions for ruling his State.

331 All those who criticise Hobbes because of the consequences of his right of the State and who themselves advocate an idea of 'material justice' – especially the supporters of a Christian natural right of universal salvation; the supporters of a liberalism that says freedom. but means private happiness; the supporters of a Marxist social theory which, if it has any concept of right at all, believes that it can or even must bind it to any interests of any classes or of an amorphous mankind; – whether they all now want a State of 'guardians of virtue' or a State of 'night watchmen' or the abolition of the State as an order to secure rights; – they all fail to see that they too, like Hobbes, succumb to the disastrous error of being able to determine right on the basis of possible human ends, – a position which Hobbes, after all, makes the starting point of an otherwise grandiose philosophy of right, whose fatal consequences those critics – like John Locke and John Stuart Mill – escape only because they have no principles or do not adhere to them.

Excursus: Politics and religion in Hobbes

From the days of the publication of *De Cive* to the present day, there has been a never-ending and yet quite idle dispute about Hobbes's 'theological' position and about the location and function of his 'theological' statements within his "civil science"; in particular, as to whether Hobbes was an atheist or possibly a Christian, and whether the third part of *De Cive* (on "religion") and, above all, the entire second half of *Leviathan* ("Of a Christian Common-wealth" and "Of the Kingdom of Darknesse") only served to disguise, in fact, his basically 'unchristian' intentions or were rather the culmination, indeed even the foundation of his train of thought.

With respect to the mentioned part of *De Cive*, Hobbes is as open and honest as he is precise in stating its meaning: it is an "appendage"[332], i. e. this part is without *systematic* necessity, and it has no strict systematic connection with the first two parts of *De Cive* on "Liberty" and "Dominion" ("Empire"), as these have with each other.[333] Regarding this appendage "concerning the Regiment of God", Hobbes says that it "hath been done with this intent, that the Dictates of God Almighty in the Law of nature, might not seem repugnant to the written Law, revealed to us in his word."[334] With the declared intent, Hobbes places himself in the medieval-Christian tradition, which sought to recognise the divine will in two ways: philosophically, via the "lumen naturale" of reason through insight into the "lex naturalis", and theologically, via faith and its 'insight' into the revealed law of God.[335]

What Hobbes himself now presents in terms of reasoned knowledge, is pure philosophy and completely independent of pseudo-theological "appendages". But even the appearance of a contradiction between the "laws of nature" he claimed, and what was then considered to be the revealed will of God, could have led him to the stake. In this regard, one need only recall the storm of indignation that the thoroughly Christian Hugo Grotius caused by simply and innocuously declaring (1625) in the *Conditionalis*, that his considerations on the right of war and peace would be valid *even if* there were no God.[336] In fact, *De Cive* was placed on the Index of the Roman Catholic Church in 1654, and in 1683, less than four years after Hobbes's death, the book was proscribed and publicly burned by decree of Oxford University, along with *Leviathan* and other "Pernicious Books and Damnable Doctrines", allegedly being "false, seditious and impious; and most of them … also Heretical and Blasphemous, infa-

332 "adiectum" (*De Cive*, Epist. Ded. 11).

333 Cf. in passing, the arrangement of the image on the engraving on the title page of the first edition of *De Cive* (Paris 1642): the curtain, bearing the title of the book, hangs only in front of the "LIBERTAS"-"IMPERIUM"-part, which visibly forms a unit; the completely separate RELIGIO"-part hovers, as it were, above it, reminiscent of a "kingdom" that is 'not of this world'. Objectively speaking, the *Philosophicall Elements of A true Citizen* (the title of *De* Cive [1651] inside the book after Epist. Ded., Preface and Index) do not require a doctrine of the Last Judgement in any way; on the other side, the possible relevance of the "civil science" for a doctrine of the Last Judgement (as shown in the upper part of the engraving) is not the concern of a philosopher who deals with "the true citizen".

334 *De Cive* Epist. Ded. 11.

335 One of the reasons for the triumph of Aristotelian philosophy in the High Middle Ages was its particular suitability as the "handmaid" of theology. Cf. Lev XLVI 13.

336 See *Hugo Grotius*, De iure belli ac pacis, Prol. 11, 12.

mous to Christian Religion, and destructive of all Government in Church and State".[337] Apart from his interest in his own personal safety, Hobbes must of course have been concerned, in view of his new "scientia civilis", not to antagonise his readers from the outset with the aforementioned appearance of a contradiction. He therefore attempts to show them that his doctrine of the State's right to rule and of the citizen's duty of obedience is in no way at odds with religion in general or with the Christian religion in particular.[338] The 'digression' into theological areas, associated with the "appendage" in *De Cive*, serves Hobbes in this respect merely to 'secure' his "civil science" externally, but by no means to justify or 'crown' it internally; philosophically it is irrelevant.[339]

But there is for Hobbes still an entirely different reason, rooted in the core problem of the "civil science" itself, for engaging with theological questions (and their advocates): "the points of doctrine concerning the Kingdome of God, have so great influence on the Kingdome of Man […]".[340] The kingdom of man, however, is the specific object of the "civil science". What Hobbes discusses in this respect in relation to religious and ecclesiastical matters is relevant from the perspective of philosophy (of the *right of the State*), not of theology, even if it is also of high theological quality.

The problem, inevitably imposed on Hobbes by the course of time, is generated by the claim of a spiritual or ecclesiastical rule being independent of secular ("civil") rule and equal or even superior to it; in short: the traditional problem of the doctrine of the two swords. While Hobbes deals with this highly topical and explosive issue in the philosophically stricter version of his doctrine, in *De Cive*, only in passing, as it were, in the "appendage", in the 'popular' version of *Leviathan* he devotes the entire second half of the text to it.

His solution of the problem is as clear as it is unconditional: the two swords in two different hands mean the incompatibility of peace and religion,[341] a State within a State,[342] and ultimately the dissolution of the State[343] and civil war.[344] The claim of spiritual or ecclesiastical authorities to their own sword, if realised, would be nothing less than the usurpation of power.[345] For the maintenance of public justice and thus for the preservation of peace on earth, there can be only one ruling power that wields *both*

337 Quoted from Warrender-Edition of *De Cive*, Latin Version, pp. 19–20.

338 Cf. also *De Cive*, Preface.

339 Nota bene: Where it might have been of relevance to Hobbes – though not necessarily of philosophical significance – namely in his theory of obligation, he contents himself with the assertion that the "laws of nature" become (obligatory) laws in the strict sense only as given by God in the Holy Scriptures and known *as such.* See *De Cive* III 33; Lev XV 41.

340 Lev XXXVIII 5.

341 El XXVI 10.

342 *De Homine* XIII 7.

343 Lev XXXVIII 1.

344 Lev XXXIX 5.

345 Lev XLVI 42.

swords: the secular power of the State.[346] "[…] the points of doctrine concerning the Kingdome of God, have so great influence on the Kingdome of Man, as not to be determined, but by them, that under God have the Soveraign Power."[347]

Hobbes has to make use of "certain Texts of Holy Scripture, alledged by me to other purpose than ordinarily they use to be by others", namely for the purpose of justifying the right of the State to rule, because these very passages "are the Outworks of the Enemy, from whence they impugne the Civill Power".[348] Again, he makes use of religious facts merely for the purpose of effectively supporting his – in itself quite adequate – purely rational expositions on the right of the State: "And thus much shall suffice, concerning the Kingdome of God, and Policy Ecclesiasticall. Wherein I pretend not to advance any Position of my own, but only to shew what are the Consequences that seem to me deducible from the Principles of Christian Politiques, (which are the holy Scriptures,) in confirmation of the Power of Civill Soveraigns, and the Duty of their Subjets."[349] There can be absolutely no question of a specific justification of a Christian State by Hobbes. The State he is talking about is conceived in purely secular terms and is in any case the opposite of a theocracy: not the State is subjected to the spiritual regime, but the latter (whatever it may be) to the State, as far as is required by the State's function to secure right.[350] Even if Hobbes sometimes expresses sympathy for Christianity, the content of religion does not play the slightest role in the outcome of the "civil science".[351] Accordingly, the State ruler's authority to decide on religious (church) teachings has nothing to do with their (possible) 'truth', but only with their 'political' relevance: "I never said that princes can make doctrines or prophesies true or false; but I say every sovereign prince has a right to prohibit the public teaching of them, whether false or true."[352] The aim of State decisions in controversial religious matters is not truth, but peace. In a variation of the famous Hobbes dictum "authoritas, non veritas, facit legem"[353], one could say here: authoritas facit pacem, non veritatem.

To speak of "political theology" in relation to the second half of *Leviathan* is quite absurd. Rather, it is the application of pure "civil science" to concrete claims to power and liberties from the clerical sphere; claims that Hobbes strips of their theological-religious aura and which he treats as what they are: as a problem of right (of the State).

346 See the 'politicised' front cover of the first edition of *Leviathan*, as well as the complete title of *Leviathan*, in comparison with the engraving of the first edition of *De Cive* inspired purely by Hobbes's philosophy of right.

347 Lev XXXVIII 5; see also the conjunction in the complete title of *Leviathan:* "Leviathan: or, the Matter, Form and Power of a Commonwealth, Ecclesiastical *and* Civil" (m/it).

348 Lev Dedication.

349 Lev XLIII 24.

350 See *De Cive* XVII 10, 21; XVIII 13; Lev XXXIX 5; XLIII.

351 Cf. also *De Cive* XIII 5 and El XXVIII 2.

352 Hobbes in an *Answer to a book published by Dr. Bramhall*, EW IV, p. 329.

353 Lev (L) XXVI 21.

Excursus: Hobbes and Kant on supreme authority[354]

For Hobbes, the hope for the "benefit arising from [a] doctrine of morality, truly declared"[355] must prove illusory wherever the principle of the absoluteness of sovereign power and thus the condition for a "civil state", resistant to a relapse into the (natural) state of civil war, are violated. By mentioning one or the other "erroneous doctrine" in the preface to *De Cive*, Hobbes refers to the context of justification of his theory of sovereignty, which he develops in great detail in the "Imperium"-part of *De Cive*[356] and with the same critical intention. In order to prevent any misunderstanding of this – for him decisive – part of his political theory, Hobbes already makes it clear in the preface, that the rightful absoluteness of the State is an absolutely necessary condition of the civil state as a state securing natural right,[357] – and not merely a specific feature of the monarchical form of government favoured by him. For Hobbes, the concept of "*supreme* power" implies that this power cannot be restricted *in its rights* by any other authority in the State. Supreme power, however, is necessarily vested in the State for its function of guaranteeing security of rights. An external limitation of the right of State power would thus be tantamount to an abolition of sovereignty and ultimately to a dissolution of the State. It goes without saying that with the rule of an absolute sovereign, any possibility of private justice on the part of the citizens is excluded by right. That's why, according to Hobbes, the citizens have no *right* to revolution under any circumstances.[358]

Hobbes is of the opinion that *any* genuine separation of State powers would lead to the abolition of (internal) sovereignty and thus to the dissolution of the State; – in other words, not only the *abolition* of the State's rightful monopoly of power, but also the transfer of the *exercise* of this monopoly to *different* independent political bodies.[359] But even in the modern democratic State under the rule of law with its sophisticated system of checks and balances, there is (necessarily) a *supreme* power which, however strong the reciprocal control and restriction of the *separate* constitutional bodies may be, yet is always a supreme power, to be taken as *juridically 'final* instance': whenever and wherever it has a right to rule at all (namely regarding the determination and safeguarding of public justice), this right is externally absolute. According to its idea, the "civil state" is the state of mankind in which alone – thanks to the general coercive power of the State – this mankind, first and foremost, can be sure of its rights. And so – even and especially in the modern democratic State under the rule of law – there cannot possibly be a right against the power of the State which is the very guarantor of the *effectiveness* of right. With reference to Hobbes, this means: without a State, man's natural right to self-preservation is completely insecure; the function of the State is to secure this right (by establishing peace); hence, it is impossible for this very right to

354 "supreme power" (*De Cive* VI passim); "SUPREME POWER, or CHIEFE COMMAND, or DOMINION" (*De Cive* V 11).

355 *De Cive* (L), Preface 5: "ab officiorum doctrina bene tradita Utilitas".

356 See especially *De Cive* XII: "Of the internall causes, tending to the dissolution of any Government".

357 Cf. *De Cive* V 5; VI 1.

358 Cf. *De Cive* VI 13.

359 See esp. *De Cive* VII 4; XII 5; El XX 16; Lev XVIII 16; XXIX 12

give rise to a right against the power of the State, which alone guarantees security of right (and for this purpose is necessarily supreme).

Kant, who fully agrees with Hobbes on this point, nevertheless objects, as already said, that his doctrine of the State is "appalling": "According to him (*De Cive,* Chap. 7, §14), a head of state has no obligation to the people by the contract and cannot do a citizen any wrong (he may make what arrangements he wants about him). This proposition would be quite correct if a wrong were taken to mean an injury that gives the injured party a *coercive right* against the one who wronged him; but stated so generally, the proposition is appalling."[360] From the fact, that State injustice does not grant the subject a *coercive* right against the State, it by no means follows that the citizen has no right at all against the ruler (and the ruler has no duty of right towards the citizen).

In a certain respect, Hobbes's doctrine, even on this point, is in principle not so far removed from Kant's. Where the State is not (or is no longer) able or willing to fulfil its protective function, i. e. where the security of the natural right is not (or is no longer) guaranteed by the State, there also for Hobbes the duty of obedience ceases.[361] If one takes into account, with regard to the passage perhorresed by Kant, Hobbes's distinction between injury in the strict and in the wide sense[362] and, furthermore, his doctrine "[c]oncerning the duties of them who bear Rule"[363], then it is, at first glance, difficult to discover a *fundamental* difference to Kant. For both, an order, issued by the State in violation of natural right, lacks itself the character of right; it has no binding force whatsoever.[364] And for both, the subjective natural right of the subject, to refuse to obey such an order, and the objective duty of natural right of the State ruler not to give such an order, are unconditionally valid only in relation to the internal court of their respective own conscience (in foro interno); an external court (forum externum) is not even conceivable here, since the only instance coming into consideration for such a court would, again, be the State, and here the State is itself party.

In another respect, however – which Kant has in mind in his critique – Hobbes's doctrine of the State is, in its result, truly "appalling", – not, admittedly, because of the *absoluteness* of the State's right to rule, but because of its *boundlessness.* Unlike the absoluteness of the Kantian 'republican' State's right to rule, the absoluteness of the Hobbesian 'despotic' State's right to rule is not based on any principle that determines the right to rule. In the case of Hobbes's 'original social contract', the people, with regard to the determination of their rights, submit themselves by right unconditionally to the empirical will of the ruler, so that he is not bound by right at all through the contract; – and with regard to his obligation under the law of nature, to protect the natural right of his subjects, he is reaching into the void for the exercise of his sovereign power faced with a natural right (to self-preservation) that, as a universal one,

360 Kant, On the common saying, AA 08.303 – 304 (CE-translation).

361 Cf. Lev XXI 20; *De Cive* XVIII 13 and Kant, On the common saying, AA 08.304 f.; Towards eternal peace, AA 08.382 f.; Doctrine of right, AA 06.371.21 – 22; Refl. 7680 AA 19.487.

362 See *De Cive* VII 14.

363 *De Cive* XIII title; *De Cive* (L) XIII title: "de officiis eorum qui summum imperium administrant"; see esp. XIII 2.

364 Cf. eg *De Cive* VIII 1; Lev XXVI 41; XXXI 1.

contradicts itself. With such a 'handicap', he can, even with the best will, determine the (positive) right of his subjects only at his own discretion, according to his private will, i. e. only lawlessly and thus despotically. "[…] the Subjects did not give the Soveraign that right[365]; but onely in laying down theirs[366], strengthned him to use his own, *as he should think fit*[367], for the preservation of them all: so that it was not given, but left to him, and to him onely; and (excepting the limits set him by naturall Law) as entire, as in the condition of meer Nature, and of warre of every one against his neighbour".[368]

365 This refers to the right to punish.

366 The right to all things.

367 Lev (L): "arbitrio suo".

368 Lev XXVIII 2 (m/it).