Modern Legal and Political Thought

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By

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GENERAL INTRODUCTION

This book covers modern legal and political thought from roughly 1450 to 1950–from the beginning of the Renaissance with a unique turn to secularism until the end of World War II with the Nuremberg Trial and the founding of the United Nations. The idea that conscience is connected to law and politics is taken over from the Medieval period where the idea of conscience was cast in religious terms and transformed to a distinctly secular conscience in the Renaissance. The Reformation also featured the idea of conscience, especially as it grounded individual moral objection to received authority. By the middle of the 20th century, the idea of the conscience of humanity was employed to explain why some crimes were cosmopolitan in nature and needed an international response.

As in my previous books in the history of legal and political thought,[1] I will focus on institutions as much as explicit theories. So, in the case of Rousseau, I will of course spend time discussing his "On the Social Contract" but will also look to the constitutions of Poland and Corsica that he drafted. We will look to the Constitution of Venice as well as the theoretical writings of Machiavelli. Of course, we will look at the Federalist Papers but also at the US Constitution itself as well as important legal cases that interpreted that Constitution. And we will examine the Cherokee Constitution as well. Legal and political thought is thus understood in light of laws and constitutions as well as political treatises and commentaries. And I also look at certain non-Western societies, including the Ottoman Empire, India, Japan, Yoruba, and the Cherokee Nation.

In substantive terms, I will argue that there is not a sharp break between the end of the Medieval period and the Renaissance–certainly not a radical break in favor of humaneness. The idea of human rights is an advance in the modern age, and there are very important advances in the implementation of institutions that protect humaneness especially at the end of World War II. In the final chapter I will show how the Universal

[1] See Larry May, *Ancient Legal Thought*, Cambridge University Press, 2019; and Larry May, *Medieval Legal and Political Thought*, Cambridge Scholars Publishing, 2022.

Declaration of Human Rights stands out as a clarion call for peace and the protection of humanity from the horrors and suffering of war.

Political philosophy took a more prominent role in the contrasting understandings of law in the modern era. We will see various forms of liberalism and conservativism, socialism and communism, fascism and anti-colonialism, all having distinct influences on how law and justice were understood. In the 17th century, philosophers engaged in debates with lawyers, and we have the fascinating case of a legal practitioner and theorist, Edward Coke, arguing with a king, James I, over the meaning and limits of sovereignty. In the 18th century, French and American revolutionaries were also often political theorists. Karl Marx and John Stuart Mill came to define the 19th century by their philosophical writings but also by their attacks on, and use of, the law. And by the 20th century, legal and political theorists mingled with institution builders to create the framework for a new world order where international law was more prominent than national law, specifically in the founding of the United Nations and other transnational institutions.

This work is not a comprehensive history but a series of snapshots of legal and political thinking over the 500 years of the Modern era. I end with the UN Charter and Nuremberg Trial as definitive statements of a liberal political view of the world. But also, we need to think about the legal and political views of fascism, Nazism, and communism that had vied for dominance just before the UN and international trials could be founded. I will argue that the history of the Modern era, especially the Renaissance and Enlightenment, as well as the French and American Revolutions, clearly set the stage for these 20th century cosmopolitan institutions. What will be the fate of the world is still yet to be written, but perhaps something can be gleaned from the texts and institutions discussed in the following chapters.

I am very grateful to Elizabeth May for excellent editorial work on this text and for constructing the Index.

PART A:
THE SIXTEENTH CENTURY

Introduction to Part A

The two main movements of legal and political thought in the 16th century were the Renaissance and the Reformation. And there were various reactions to these movements, both linked in various ways to the dominant religion of the time, Roman Catholicism. We shall see how law and its relation to politics changed in the 16th century in ways that were harbingers of the more radical break with Medieval scholasticism in the 17th century.

Two outstanding examples of Renaissance thought, Thomas More and Desiderius Erasmus set the tone for much of what was to follow–a humane approach to understanding law and politics, highly reminiscent of some of the Medieval authors yet without the starkly religious dimension. And one other early thinker in this period, surely the best known still today, Niccolo Machiavelli, set out a whole new agenda for assessing law and politics in largely pragmatic terms while redefining what virtue meant.

In the Reformation again there were outstanding individual examples of unparalleled thought by Martin Luther and John Calvin, each the founder of a new religion but also a relatively new way to see politics and law as influenced by religion. Calvin led a political movement not merely a religion that rejected large swaths of Catholicism. We also find the Counter-Reformation, which was almost as important in the way that certain legal and political ideas crystallized conceptions of natural law that were to be more palatable to later secular theorists.

I will argue that the Renaissance, Reformation, and Counter-Reformation thinkers were not so much a clear break with Medieval thinkers about law and politics as a subtle change that set the stage for more radical ideas in the 17th and especially the revolutions of the 18th centuries. We will also see that there were very important developments in the institutions of legal systems that proved significant for the more detailed discussions in the 17th century especially in England. We will also see that in Islamic societies challenges to the old order were also taking place if a bit more subtly than in the West.

CHAPTER 1

CONSCIENCE AND LAW IN THE RENAISSANCE

The Renaissance is primarily a European movement and a historical period, although in this section of my book I will also extend the range to cover those other ideas of the Ottoman Turks and of the Americas, over roughly the period from 1450 to 1600. In my view, the Renaissance legal and political thought encompasses several not necessarily related threads of legal and political thought. First, there is an embrace of the Classical Greek Democracy and the Roman Republic as models for the beginning of the modern age. Greece and Rome were not only seen as models of political philosophy but also of legal theory. Conceptually, there is a yearning for a method of thinking that is less rigid than Medieval scholasticism. New forms of legal redress were employed and wholly new codes of law grounded in an egalitarian spirit were instituted.

Third, and perhaps most importantly, there is an embrace of morality as a key component in legal and political thought. Yet this is by and large a secular morality rather than the highly religious morality of the Middle Ages, and of the periods immediately to follow the Renaissance. There is strong inclination to discuss the morality that is deeply embedded in the law in secular rather than religious terms. And fourth there is a sense that legal thought should be conducted with the goal of solving not just theoretical problems but also real-world problems. Each of these components of Renaissance legal and political thought is controversial, or at least it is controversial that many or any Renaissance thinkers embraced all four of these threads.

In the first section, I will spend time discussing the work of the Florentines, Petrarch and Pico as well as the Dutch scholar Erasmus on legal principles that would long survive this period where they were regarded as guiding lights of the Renaissance. In the second section I begin our focus on the English Renaissance with a man who today is still considered the paradigm of a thinker who put conscience at the center of his legal thought, Thomas More, as well as the writings of his English countrymen John Fortescue and Christopher Saint Germain. In the third

section I move to Machiavelli, perhaps the most important political philosopher of the Renaissance who also had a profound influence on legal thought. In the fourth section I look at a short selection of laws and court opinions from England and Venice that exemplify the concerns of conscience in solving real-world legal problems of the Renaissance. And I end with a discussion of some of the work of Francisco Vitoria, the Renaissance thinker who made some of the most important contributions to the emerging modern understanding of international law.

I. Western European Renaissance and Humanism

An early figure expressing Renaissance ideas already in the fourteenth century, Petrarch, was praised for his poetry but it is one of his letters that is perhaps his best-known works, the letter of April 26 c.1336, written while climbing Mount Ventoux. We see many of the same themes that were expressed a century and a half later by Pico, at the height of the Renaissance. Here are just a few passages from that letter by Petrarch:

> Gazing this way and that, intent at one moment on acquiring earthly knowledge, at another on raising my thoughts to higher things… Then happy to have seen enough of the mountain, I turned my inner eye upon myself, and from that moment no one heard a word from me until we reached the plain… I silently reflected how poor are the moral resources of mortal men, who neglect the noblest part of themselves, drifting from one distraction to another, lost in vapid entertainment of the eye, and looking in the outer world for what could have been found within. At the same time I marveled at the noble origins of the human soul… How often that day, you may suppose, I turned around as we came down, and looked back at the mountain peak! It seemed barely a foot or two high by comparison with the heights the human mind can reach if it is not mired in the filth of earth.[2]

This 14th century text expresses some of the energy that marked the ensuing renaissance or rebirth in literature and the arts but also came to have profound effects on legal and political thought, such as that of Pico, as we will see.

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[2] Petrarch, "Letter to Dionigi de Borgo San Sepolcro" (c.1336), in *The Essential Petrarch*, edited and translated by Peter Hainsworth, Indianapolis, IN: Hackett Publishing Co., Inc., 2010, pp. 224-226.

Pico Della Mirandola is sometimes seen as one of the first of a new breed of Renaissance theorists, based largely on his late 15th century book, *Oration on the Dignity of Man*. In this work, Pico says:

> I wished to bring to light the opinions not only of a single doctrine (as some would have liked) but of every school of thought, so that through the comparison of many schools and the discussion of several philosophies, that "effulgence of truth" which Plato mentions in his letters might more intensely illuminate our minds, like the sun rising from the deep. Inasmuch as all wisdom has flowed from the barbarians to the Greeks and from the Greeks to us, what would have been the point of dealing only with the philosophy of the Latins–that is, Albert, Thomas, Scotus, Giles, Francis, and Henry–while leaving the Greek and Arab philosophers aside?[3]

We see the comprehensive sweep of the method and the search for overarching principles, paying special attention to ancient Greek sources, which were the hallmark of the Renaissance thinkers.

Yet, Pico also says that he wishes "to speak, though, from my own conscience" which is a "spirit [that] exists in all men."[4] So, even as Pico wants to synthesize all past philosophies, he also says that he has learned from the study of philosophy "to rely upon my own conscience, rather than upon the opinions of others."[5] And by adopting this singular method, Pico comes to an understanding of the most important of the humanist principles: "there is nothing to be seen more wonderful than man."[6]

We learn what the wonder of humans is when Pico talks of the dignity of humans as unconstrained by laws, yet choosing to follow the law:

> man is rightly called, and thought to be, a great miracle and a being worthy of admiration… Once defined, the nature of all other beings is constrained within the laws we have prescribed for them. But you, constrained by no limits, may determine your nature for yourself, according to your own free will, in

[3] Pico Della Mirandola, *Oration on the Dignity of Man* (1486), translated by Francesco Borghesi, Michael Papio, and Massimo Riva, Cambridge: Cambridge University Press, 2012, p. 213.
[4] Ibid., pp. 194 and 195.
[5] Ibid., p. 189.
[6] Ibid., p. 109.

> whose hands we have placed you… We have made you neither of heaven nor of earth, neither mortal nor immortal, so that you may, as the free and extraordinary shaper of yourself, fashion yourself in whatever form you prefer.[7]

Here the radical freedom of humans is put forth as the source of the dignity of all humans.

The wonder and dignity of humans is one of the guiding ideas of the Renaissance. And we see here that it is the judgments of human conscience that in effect place laws over humans, and that these laws are of human making–once again separating Renaissance from Medieval legal thought. In Medieval legal thought conscience is the voice of God's law in man; in Renaissance legal thought conscience is the voice of a creature that has made himself or herself and can continuously refashion himself or herself.

We can round out this brief section on some of the main currents of the Renaissance by looking at a few quotations from Erasmus, often considered the most significant of the Renaissance figures. In his colloquy, "The Godly Feast," Erasmus has one member of his dialogue, Eusebius, provide the following commentary on a Biblical text:

> "Every way of a man is right in his own eyes; but the Lord pondereth the hearts. To do justice and judgment is more acceptable to the Lord than sacrifice"… Putting aside the various conjectures of the commentators, I think its moral sense is this. Other mortals can be swayed by warnings, scoldings, laws, and threats; the king's heart, if you oppose it, is annoyed rather, since it fears nobody. And therefore, whenever princes have their minds set on anything they should be left to their whims, not because they always desire what is best, but because God sometimes uses their madness or wickedness to correct sinners…[8]

This advice seems to caution against trying to punish kings for violating the law or for their immorality, but it may be an ironic cautionary tale about trying to treat kings and princes with legal sanctions in the same way ordinary mortals are treated. Erasmus had a healthy respect for legal institutions but also recognized their limits in dealing with rulers.

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[7] Ibid., pp. 113 and 117.

[8] Erasmus, "The Godly Feast" (1522), in *Erasmus's Ten Colloquies*, translated by Craig R. Thompson, NY: The Liberal Arts Press, 1957, pp. 143-144.

For Erasmus, laws only restrain those who feel their sting. And tellingly, the same is true of God's divine laws. What restrains people is the rationality of obeying a given law or system of law. There is a sense in which in the Renaissance reason replaced God as what gave law its binding force. And while religion continued to have force on legal thought in the Renaissance, as was true in the Middle Ages, it was the rationality or perhaps better the reasonableness of religion that was the key to the appeal of religion in legal disputes. We must remember that Erasmus was a cleric, even as he was also a strong defender of secular ideas of the power of rationality. But there were limits–as we can see when Erasmus was careful never to stray too far from Catholic Church orthodoxy, realizing that his close friend Thomas More had paid with his life.

II. English Renaissance Lawyers and Conscience

Thomas More had epic battles with King Henry VIII over the desire of Henry to remarry to secure a male heir. In these battles both More and Henry cited their consciences as driving their views of the law of marriage. More is also, along with his friend Erasmus, an exemplar of the Renaissance. He was a scholar of Latin and Greek literature and also a writer who produced one of the best-known pieces of fiction in the Renaissance, *Utopia*. More was a trained lawyer and the first non-cleric to hold the post of Lord Chancellor of England. Indeed, it was the training of lawyers in settings outside the universities that is cited as a significant development in the Renaissance. Here is Frederic William Maitland:

> No English institutions are more distinctively English than the Inns of Court…these groups of lawyers formed themselves and in course of time evolved a scheme of legal education: an academic scheme of the medieval sort, oral and disputatious…We may well doubt whether aught else could have saved English law in the age of the Renaissance… At all events let us notice that Littelton and Fortescue lectured, there; Robert Rede lectures, Thomas More lectures…[9]

Yet even though Thomas More lectures in the Inns of Court, he had a curious view of the law.

In his book, *Utopia*, More discusses the place of laws and lawyers in his ideal society:

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[9] Frederic William Maitland, *English Law and the Renaissance*, Cambridge: Cambridge University Press, 1901, p. 27.

> They have very few laws because very few are needed for persons so educated. The chief fault they find with other peoples is that almost innumerable books of laws and commentaries are not sufficient. They themselves think it most unfair that any group of men should be bound by laws which are either too numerous to be read through or too obscure to be understood by anyone. Moreover, they absolutely banish from their country all lawyers, who cleverly manipulate cases and cunningly argue legal points. They consider it a good thing that every man should plead his own cause and say the same to the judge as he would tell his counsel. Thus there is less ambiguity and the truth is more easily elicited when a man, uncoached in deception by a lawyer, conducts his own case, and the judge skillfully weighs each statement and helps untutored minds to defeat the false accusations of the crafty… with the Utopians each man is expert in law.[10]

Equity and conscience are central to More's ideal scheme for a legal system even though he does not use these terms in *Utopia*.

It is perhaps startling that More was the epitome of a Renaissance lawyer but also one of the chief critics of Renaissance lawyers. Indeed, this paradoxical stance of Thomas More is also noted by the historian and political theorist, Quentin Skinner:

> Some scholars have treated *Utopia* simply as a contribution to a more general 'programme' of humanist reform, a programme which More is said to have worked out in close agreement with Erasmus, Vives, Elyot, and their followers. There is no doubt that this interpretation helps us capture much of the spirit of More's book. But it also prevents us from grasping what is arguably one of the most important keys to understanding its meaning: the fact that while *Utopia* is unquestionably the greatest contribution to the political theory of the northern Renaissance, it also embodies by far its most radical critique of humanism written by a humanist.[11]

In pursuing radical justice and equity, More advocated the elimination of class differences, and to do this he also advocated the elimination of laws supporting private property. And, as we have seen, he

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[10] Thomas More, *Utopia* (1516), edited by Edward Surtz, New Haven, CT: Yale University Press, 1964, p. 114.

[11] Quentin Skinner, *The Foundations of Modern Political Thought*, Cambridge: Cambridge University Press, 1997, vol. I, pp. 255-256.

advocated the elimination of lawyers as they existed in the Renaissance, even as he continued to lecture to law students at the English Inns of Court.

Christopher Saint Germain was, like More, a trained lawyer who wrote theoretically sophisticated legal texts, including the most famous legal text of the Renaissance, *Doctor and Student; or a Dialogue Between a Doctor of Divinity and a Student in the Laws of England: Containing the Grounds of Those Laws; Together with Questions and Cases Concerning the Equity Thereof*. Saint Germain employs the terms conscience and equity extensively in his legal writings.

In his treatise, Saint Germain gave the following account of conscience and its relationship to law:

> The word conscience, which in Latin is called *conscientia*, is compounded of the preposition *cum*, that is to say in English, *with*, and of this noun *scientia*, that is to say in English, *knowledge*, and so conscience is as much to say as knowledge of one thing with another… conscience is an actual applying of any cunning of knowledge to such things as are to be done; whereupon it followeth, that upon the most perfect knowledge of any law or cunning… follows the most pure… conscience… And if there be default in knowing of the truth of such a law, or in the applying of the same to particular acts, then thereupon follow an error or default in conscience… In some cases it is necessary to leave the words of the law… to temper and mitigate the rigor of the law.[12]

It is to conscience that lawyers should turn in order to reach the perfect knowledge of how laws should be written and applied. The judges and lawyers are to look to their consciences, not to the revealed authority of religion or even to the texts of the statutes, in order to ascertain what the just or equitable application of the law is to a particular person's case.

Another important English jurist in the Renaissance, John Fortescue, writes that the word conscience is derived from "'to know with God' to wit: to know the will of God as near as one reasonably can." One recent scholar interprets Fortescue as follows:

> The observation is significant for various reasons–notably it makes judgment in conscience an effort to discern and do God's will. This fairly firmly places the measure of conscience

[12] Christopher Saint Germain, *Doctor and Student* (1518), London: A. Strahan and W. Woodfall, 1787, p. 42-45.

> in the law of God, and suggests that the judge in conscience is attempting, in some sense, to know as God knows… Chancery was referred to as a "Court of Conscience"… The conscience invoked appears not to have been particularly that of the litigant nor of the Chancellor, but rather a somewhat disembodied or impersonal notion…. the common complaint is that a person acted "against conscience," not "against *his* conscience."[13]

Here we see that the legal use of conscience in the Renaissance seems to be not a person's subjective judgment–and not relativized to any particular judge.

So how was the Chancery judge supposed to ascertain what conscience would dictate if the Chancery judge could not refer to his own conscience? At least in part the answer sometimes given was that the Chancery judge could avail himself of more facts than could a normal judge in a common law court. The Chancery Court could consider facts that might be otherwise ruled out on grounds of evidentiary relevance. The rules of evidence were supposed to protect defendants in various ways, but Chancery's court of conscience was not limited in these ways. This had both positive and negative consequences–and the legal analysis adds various layers of nuance to the ideas of equity and conscience.

Positively the Chancellor was encouraged to seek broader possible remedies and hence to be able to correct inequities that might arise from too strict an interpretation of a given statute. A famous example, first discussed by Cicero and then by Medieval legal theorists, concerned a law which prohibited the gatekeeper from opening the city gates after sundown. When a band of citizens fleeing home after dark tried to enter, the gatekeeper opened the gates to them and closed them quickly against their enemies. While strictly against the law, the judicial consensus was that equity would dictate that the gatekeeper would not be punished since even though there was no exception in the law for this case, opening the gates was surely the right thing to do as a matter of equity as fairness. Conscience seemed to be offended by punishing the gatekeeper for doing the right thing and saving the lives of his fellow citizens. Or to put the point only somewhat differently, the gatekeeper did the right thing legally, even though he violated the law, since he acted on the basis of equity and conscience.

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[13] Dennis Klinck, *Conscience, Equity, and the Court of Chancery in Early Modern England*, Burlington, VT: Ashgate Publishing Co., 2010, p. 17.

Negatively defendants were afforded less protections in equity proceedings than in other English court proceedings. We can see the worst of the possible abuses when considering another infamous court that arose in Medieval England–the Court of Star Chamber-where considerations of equity and conscience were also at play. To garner more facts, Star Chamber proceedings used increasingly grotesque forms of torture, administered in the infamous Tower of London, to get people to state the "truth" when it was more likely that it was merely what the judges wanted to hear. Giving judges discretion, especially the kind of wide discretion often advocated by the Chancellor, opened the door for biased or arbitrary rulings. John Seldon quipped in the 17th century that using the Chancellor's conscience to settle legal matters might be as variable as using the length of the Chancellor's foot to establish the general length of a foot.[14]

The idea that judicial decisions should be made based on conscience often seemed to result in decisions based on the sense of morality of a particular judge. And here is the broader problem: giving judges wide discretion, while sometimes good for plaintiffs, meant that the strict procedures of the statute law, crafted over the centuries to provide maximally just decisions, could easily be undermined.

Yet the influence of a largely secular understanding of conscience as influencing judges and lawyers marks an important turn toward the modern age of legal thought. Conscience had been a huge influence in Medieval legal thought. Now, in the Renaissance the idea of conscience was adapted for secular ends. And the idea of equity was also adapted during its long history, especially throughout Ancient legal thought, to meld with the secularized conscience.

III. Machiavelli as Anti-Humanist?

Humanistic principles of the Renaissance include, as we have seen, the inherent dignity of each person and the value of respect for each person. In addition, as we saw in More's *Utopia* there was a strong concern for the poor and those who struggled to defend themselves. If these are indicative of Renaissance principles, then there is some justification in thinking that Machiavelli was an anti-humanist since he stressed the inherent bad rather than good in all people and championed a

[14] Dennis Klinck, ibid., p.2.

selfish or at least a strongly self-interested ideology in morals and politics.[15]

Niccolo Machiavelli was a politician and political theorist who lived during the Italian Renaissance of the late 15th and early 16th century. Here are just a few of Machiavelli's better known pieces of advice for those Princes who wish to rule successfully:

> It should be observed here that men should either be caressed or crushed; because they can avenge slight injuries, but not those that are very severe. Hence any injury done to a man must be such that there is no need to fear his revenge…[16]

> A controversy has arisen about this: whether it is better to be loved than feared, or vice versa? My view is that it is desirable to be both loved and feared. But it is difficult to achieve both, and if one of them has to be lacking, it is much better to be feared than loved. For this may be said of men generally: they are ungrateful, fickle, feigners and dissemblers, avoiders of danger, eager for gain… excessively self-interested…[17]

> [A] ruler, especially a new ruler, cannot always act in ways that are considered good because in order to maintain his power, he is often forced to act treacherously, ruthlessly, or inhumanely, and disregard the precepts of religion… capable of entering on a path of wrongdoing when it becomes necessary.[18]

> For Machiavelli, rulers should be willing to do whatever it takes to be successful, or else they would not be able to do what the people want which is to provide peace and prosperity for them. If rulers are "merciful, trustworthy, upright, devout, and humane," they will often be too weak to be successful. According to Machiavelli, to be successful, rulers only need to "seem to be" virtuous.[19]

Machiavelli's understanding of virtue as only something one needs to seem to exhibit is deeply at odds with the Renaissance ideas of

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[15] See J. H. Dexter, *The Vision of Politics on the Eve of the Reformation*, NY: Basic Books, 1973, Chapter 3.
[16] Niccolo Machiavelli, *The Prince* 1513, Ch. III, translated by Russell Price, Cambridge: Cambridge University Press, 1988, p. 9.
[17] Machiavelli, *The Prince*, Ch. XVII, ibid., p. 59.
[18] Machiavelli, *The Prince*, Ch. XVIII, ibid., p. 62.
[19] Ibid.

dignity and respect for people. Yet this is a controversial point, since Machiavelli spoke somewhat differently when giving advice to those establishing republics as opposed to those who aspired to be successful monarchs. And perhaps unsurprisingly it is in Machiavelli's *The Discourses*, rather than in *The Prince*, that one finds the clearest statements of Machiavelli's legal thought. Indeed, there is a strong respect for the rule of law in *The Discourses* as we see here:

> although the crimes of Appius merited the highest degree of punishment, yet it was inconsistent with a proper regard for liberty to violate the law, and especially one so recently made. For I think there can be no worse example in a republic than to make a law and not observe it; the more so when it is disregarded by the very parties that made it.[20]

Laws have a central place in *The Discourses* in ways that were lacking in *The Prince*. In *The Discourses*, Machiavelli also criticizes the Venetians of his day for not displaying dignity:

> If there had been one spark of true valor in the Venetians, they could easily have recovered… But their miserable baseness of spirit, caused by a wretched military organization, made them lose at a single blow their courage and their state. And thus it will ever happen to those who are governed in the same way the Venetians were; for insolence in prosperity and abjectness in adversity are the result of habit and education. If this be vain and feeble, then their conduct will be likewise without energy.[21]

Machiavelli criticized the humanitarian spirit as naïve even as he recognized that brute power alone was not enough for political success in the republics of his time. In the next section we turn to some of the important legal ideas put forth especially in the republic of Venice and the courts of England

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[20] Niccolo Machiavelli, *The Discourses*, First Book, Chapter XLV, in Niccolo Machiavelli, *The Prince and the Discourses*, translated by Christian E. Detmold, NY: The Modern Library, 1950, p. 229.

[21] Machiavelli, *The Discourses*, Third Book, Chapter XXXI, in ibid., pp. 502-503.

IV. Renaissance Laws in Venice and England

Gasparo Contarini, a 16th century Catholic cardinal and diplomat provided a clear description and analysis of the laws and government of Venice, his city. We begin this section simply by listening to what he tells us. In stark contrast to the way that Machiavelli described the relationship between the prince and the laws, Contarini says that in Venice,

> the authority of the magistrates is so restricted that no one, no matter how eminent, can decide anything significant, except by decision of the ducal council…Likewise, the prince abides by the same rights and restrictions as everyone in the Great Council, such that he cannot vote for a candidate who is a kinsman or relative. From what I said, it is clear that the doge of Venice has been deprived of every capacity to abuse his position and act as a tyrant.[22]

Even though the doge is like a prince or king the system of laws of the Venetian republic puts serious constraints on him.

To see how strongly Venice supported the rule of law, one can turn to Contarini's account of the procedures for criminal prosecutions.

> I must not fail to mention an ancient custom that has continued into our own time. If by chance someone who is prosecuted possesses little family wealth, so that he is unable to sustain the expense of hiring advocates to defend his cause, the Republic pays two advocates to hold this office and defend that poor person. In such a way, the law prevents anyone from being punished without the cause being pleaded.[23]

This funding of criminal defense attorneys for the indigent is something that even today most jurisdictions in the world could not claim to support, yet it is of the utmost importance for a fair criminal justice system.

And here is a summary of the way the criminal trial proceeds that would be the envy of most of the world today as well.

> Once the Quarantia criminal has gathered, an officer of the Avogaria acts as prosecutor and presents a rigorous case

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[22] Gasparo Contarini, *The Republic of Venice*, edited by Filippo Sabetti and translated by Giuseppe Pezzini and Amanda Murphy, Toronto: University of Toronto Press, 2020, p. 36.

[23] *The Republic of Venice*, ibid., p. 65.

> against the prosecuted. First, he presents the crimes and offenses, then he reinforces the accusations using witness testimony and corroborates them with plausible hypotheses. After he has concluded his indictment, the case is pleaded by the advocate appointed by the defendant. Afterwards, if an Avogaria officer or attorney wishes to interrogate the defendant again before the judges pass a sentence, he has the opportunity to speak. Similarly, the advocate of the defendant may respond and refute the crimes. In the same way, both sides may go back and forth until one side, either the defendant or that officer of the Avogaria upon whom the role of speaker has fallen, declares that he does not want to argue any further.[24]

Contarini admits that this procedure follows the ancient Greek model. And it would seem it also somewhat follows the ancient Romans as well. But what is distinctive is that the defendants are afforded representation regardless of their ability to pay and regardless of their status in the society. We see then the strong influence of the ancients, as was characteristic of the Renaissance in general, but also a more egalitarian treatment of defendants than had occurred in Ancient or Medieval times.

In England, we can also find court decisions that made reference to the secular version of conscience that epitomized the Renaissance. Here are extracts from Thomas More's trial for treason, written down by his son-in-law William Roper, that purport to provide verbatim testimony by More in his own defense in the trial of 1535.

> There are four principal heads, if I be not deceived of this indictment, every of which I purpose, God willing, to answer in order. To the first that is objected against me, to wit, that I have been an enemy of a stubbornness of mind to the King's second marriage… I being demanded my opinion by so great a prince in a matter of such importance, whereupon the quietness of the kingdom dependeth, I should have basely flattered him against my own conscience, and not uttered the truth as I thought… My second accusation is that I have transgressed the statute… that I would not disclose unto them my opinion… whether the King were supreme Head of the Church or no, but answered them that this law belonged not to me… I know that I could not transgress any law or incur any crime of treason, for neither this statute nor any law in the world can punish a man for holding his peace… the King's Attorney interrupted to say "Although we have not word or deed of yours to object

[24] *The Republic of Venice*, ibid., p. 66.

> against you, we have your silence."... I now come to the third capital matter of my indictment whereby I am accused that I maliciously… wrote eight sundry packets of letters, while I was in the Tower, unto Bishop Fisher, by which I exhorted him to break the same law… I would have these letters produced and read to me…But you tell me the Bishop burnt them all…I wrote unto him again–that I already settled my conscience, let him settle his own good liking–and no other answer I gave him… The last objected crime is, that being examined in the Tower I did say that this law was like a two edged sword, for in consenting thereto I should endanger my soul, in refusing I should lose my life… I unfeignedly avouch that I never spake word against this law to any living man…[25]

We see here that More relies repeatedly on claims about his conscience to justify that he remained silent when asked about the legality of Henry's divorces and remarriages, as well as Henry's claim to be the head of the Catholic Church in England. Nonetheless, More was beheaded in the Tower of London for his crime of "not speaking."

V. Francisco Vitoria and International Law

Francisco Vitoria was a Dominican friar, who taught at the University of Salamanca and who in 1532 delivered his lecture, "On the Indians," which was posthumously published in 1557. In this work Vitoria examined the claims of the Spanish Conquistadors to have religious reasons that gave them a just cause to wage war against the South American Indians. Here is a crucial selection from that work:

> The Indians in question are not bound, directly the Christian faith is announced to them, to believe it, in such a way that they commit mortal sin by not believing it, merely because it has been declared and announced to them that Christianity is the true religion… From this proposition it follows that, if the faith be presented to the Indians in the way named only and they do not receive it, the Spaniards can not make this a reason for waging war on them or for proceeding against them under the law of war. This is manifest, because they are innocent in this respect and have done no wrong to the Spaniards. And this corollary receives confirmation from the fact that, as St.

[25] "Trial of Sir Thomas More, 1535," in *Tudor Constitutional Documents*, A.D. 1485-1603, edited by J. R. Tanner, Cambridge: Cambridge University Press, 1930, 1951, pp. 433-436.

> Thomas lays it down (*Secunda Secundae*, qu. 40, art. 1), for a just war "there must be a just cause, namely they who are attacked for some fault must deserve the attack." Accordingly, St. Augustine says (*Liber* 83 *Quaestionum*): "It is involved in the definition of a just war that some wrong is being avenged, as where a people or a state is to be punished for neglect to exact amends from its citizens for their wrongdoing or to restore what has been wrongfully taken away." Where, then, no wrong has previously been committed by the Indians, there is no cause of just war. This is the received opinion of all the doctors, not only of the theologians, but also of the jurists.[26]

Here we have a clear and concise statement of the Catholic doctrine of just cause in the Just War tradition, where Augustine and Aquinas were the most significant authorities in the Middle Ages.

According to Vitoria's argument against the Conquistadors, there is no just cause to go to war to convert heathens or anyone else merely because they do not accept the Christian religion. A just cause to go to war against a people requires that that people has done some wrong. And it is not a wrong to hear even what is thought to be the true religion and yet not to accept it. For war, and its attendant violence, to be justified the people warred against must be non-innocent in that they deserve to be harmed for their wrongdoing.

It is easy to see how Vitoria's argument about the Conquistadors and the Indians can be generalized to most of the wars fought for religious reasons. If as a result of believing in a religious creed a people were to slaughter the innocent, then there could be a just cause to wage war against them, but in this case it is the slaughter of the innocent not the holding of a religious creed that is the wrong which can be avenged by war. Erasmus and other contemporaries of Vitoria also argued that having a plurality of religions in the world was a good thing, not something to be changed by war.

In his work "On Law," Vitoria himself generalizes his view about why America's Indians were not liable to be killed by the Conquistadors when he argued as follows:

> The question is whether a law becomes law at the very moment it is enacted before it is promulgated. For instance if the Pope were to move the fasting now prescribed for Fridays to Wednesdays and if we were to eat meat on a Wednesday

[26] Francisco Vitoria, *De Indis* (*On the Indians*), 1532, translated by John Pawley Bate, Washington DC: The Carnegie Institution of Washington, 1917, p. 143.

> just before this ruling were promulgated, would we be breaking the law? This is not the same as asking whether we would be pardoned on the grounds of ignorance, which is quite a different question. After all, the barbarians break Christ's law, but this is pardonable if they never heard anything about it… [But if] a man commits fornication not knowing that it is prohibited by natural law, he breaks the law, even though he may be pardoned on the grounds of ignorance. The proof is the general consensus of men. Everyone says of such a man that he must be ignorant, but if he was not bound by that law, he would not be pardoned on the grounds of ignorance. Ignorance, then, is when a man thinks he is not bound by a law, but is.[27]

Vitoria is here putting distance between himself and the Medieval Catholic theorists such as Thomas Aquinas.

On the idea of the general legality and morality of war, Vitoria builds on the Medieval work of Aquinas and Augustine. Here is how Vitoria summarizes the three rules of war that must be followed for a war to be just:

> 1. First Canon: since princes have the authority to wage war, *they should strive above all to avoid provocations and causes of war*. If it be possible, the prince should seek as much as lieth in him to live peaceably with all men… The prince should only accede to the necessity of war when he is dragged reluctantly but inevitably into it.
> 2. Second Canon: once war has been declared for just causes, the prince should press his campaign not for the destruction of his opponent but *for the pursuit of the justice for which he fights and the defense of his homeland*, so that by fighting he may eventually establish peace and security.
> 3. Third Canon: once the war has been fought and victory won, he must use his victory with moderation and Christian humility…. Let him remember above all that for the most part, and especially in wars between Christian commonwealths, it is the princes themselves who are completely to blame; for subjects usually fight in good faith for their princes.[28]

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[27] Francisco Vitoria, "On Law" (1534), in *Vitoria: Political Writings*, edited by Anthony Pagden and Jeremy Lawrence, Cambridge: Cambridge University Press, 1991, pp. 159-160.

[28] Francisco Vitoria, "On the Law of War" (1539), in *Vitoria: Political Writings*, ibid., pp. 326-327.

Here we have a clear summary of all three branches of the just war tradition: *jus ad bellum*, *jus in bello*, and *jus post bellum*. We will consider each in turn to end this chapter.

The *jus ad bellum*, or justice of initiating war, is the lynchpin of Aquinas' understanding of the just war. Vitoria expands on Aquinas' ideas and puts emphasis on the requirement that war must be a necessity. Wars fought for simple gain are not just wars, and so are wars that seem to be necessary only because of unjustified provocation. Indeed, the default condition should always be one of peace not of war, as Augustine had argued. And in any event, war must be initiated for a just cause in order for the war to be just. This position is in keeping with the long Catholic Just War tradition.

The *jus in bello*, or justice of fighting war, is at this time becoming a key component of the just war tradition. Vitoria states quite plainly that war must be conducted so as to attain peace. For this to be accomplished, the destruction of the enemy should not be the goal of war, unless this is strictly necessary for the defense of homeland. Some had argued that once war was begun for a just cause, then there were no morally relevant restrictions on war. Vitoria again follows the emerging Catholic doctrine that war's tactics and goals must also be morally just for the war itself to be just.

The *jus post bellum*, or justice of ending war, is relatively new to the Just War tradition at Vitoria's time. Victory with moderation, rather than all encompassing victory, is grounded in Christian charity and mercy, for Vitoria. And we have an extremely strong statement at the end of the account: princes are to blame for war, not the soldiers who fight it. Vitoria holds the view that soldiers generally fight justly because soldiers act in good faith when they do what their princes have told them to do. All the blame for an unjust war, either initiating, waging, or ending the war, is laid at the feet of the prince.

Vitoria marks somewhat of a transition, between the largely secular Renaissance figures and a return to religiously influenced legal and political thought in the second half of the 16th century. We will next explore the legal and political thought of the Ottoman Turks and the Spanish Neo-scholastics, before looking at the Reformation and its reaction in the Counter-Reformation at the end of the 16th century. But in both of the next chapters, legal and political thought is again highly influenced by religion.

Machiavelli provides a good largely pragmatic contrast to Vitoria's moral view of international law in his book, *The Art of War*. We end this chapter with a brief look at Machiavelli's views on war.