Legal Relational Approaches: Roots before Wings[1]?

Jérémie Van MEERBEECK
Professor at Saint-Louis University in Brussels

« We are all relationalists now »
(R.E. Scott)

Résumé *: La présente contribution tend à montrer que le concept de relation est intrinsèquement lié à la naissance du droit occidental, particulièrement dans la théorie de la justice d'Aristote. Cette conception relationnelle a, cependant, été progressivement remise en cause par le paradigme juridique de l'individu, qui atteint son apogée aux 17ème et 18ème siècles. Depuis, ce paradigme a toutefois révélé ses failles et a dû abandonner son monopole autrefois incontesté.*

Mots clés *: Aristote – Relation – Individu – Paradigme juridique*

Abstract: This article aims to show that the concept of relation is intrinsically linked to the birth of Western law, particularly in Aristotle's theory of justice. This relational conception has however been progressively challenged by the individual's legal paradigm, which reached its peak in the 17th and 18th centuries. Yet, since then, this paradigm has revealed its flaws and has had to abandon its former unchallenged monopoly.

Key words: Aristotle – Relation – Individual – Legal paradigm

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Emmanuel Jeuland recently wrote[2] that one would need to study the history of law to support Jean Carbonnier's statement that "classical legal scholars were right to make legal relationships one of their main key concepts"[3]. Achieving such an objective would require extensive research, beyond the ambition of these pages. We therefore limit ourselves to the more modest task of paving the way for such an undertaking.

[1] *Des racines et des ailes* is a French-language television documentary series. The author would like to thank Anne-Sophie Milard and Eadaoin Ni Chaoimh for their valuable help with the English translation of this text.
[2] E. JEULAND, *Théorie relationiste du droit. De la French Theory à une pensée européenne des rapports de droit*, Paris, L.G.D.J., 2016, p. 393.
[3] J. CARBONNIER, *Sociologie juridique*, PUF, coll. Quadrige, 2008, p. 341 (Free translation).

To that end, we aim to show that while the legal relational[1] approach is directly linked to the emergence of Western law, it has been eclipsed in the legal discourse by the progressive development of the legal paradigm centred on the individual (I). We will then highlight the circumstances that allow this individual paradigm to be questioned (II).

I. FROM THE RELATIONAL TO THE INDIVIDUAL

Time and space preclude us from developing this review to the extent that it deserves. We will therefore simply outline the history of legal thought through the prism of the transition from a legal relational approach (A) to the individual's legal paradigm (B).

A. From a classical relational approach[2] *...*

Western law unquestionably finds its oldest source in ancient times, be it Greek or Roman. It may seem extremely difficult to return to such a time in which a radically different conception of the world prevailed. In the first Greco-Roman societies, the social foundation was not the individual but the family, submitted to the unique authority of the *paterfamilias*. Originally, the Greek conception made no clear distinction between nature (*phusis*) and culture (*nomos*), cosmos and social order. Such notions were situated on a kind of social continuum, where each entity had a goal (*telos*) to pursue so that its nature could come to fruition and contribute to the pre-ordered harmony of things. Only human beings (equipped with *logos)* could fully understand such natural order[3].

Quickly enough though, Sophists emphasized the necessity to distinguish nature from convention and came to the conclusion either that justice was to be identified with the principle that "might is right" or that law was mere conventions. Such a sceptical approach notably led to the reaction of Aristotle, who strove to promote a teleological conception of a justice intimately tied to the life of the City[4].

Men being political animals, fitted with *logos*, their "final cause" (what all human beings strive for, what they potentially are and what they are expected to become in "acts" is to be virtuous citizens, committed to justice[5]. Indeed, this

[1] At this point, the term "relational" is to be understood as widely and neutrally as possible, with regard to the notion of relation.
[2] The term "classical" is to be understood as opposed to "modern".
[3] L. SIEDENTOP, *Inventing the Individual. The Origins of Western Liberalism*, Penguin Books, 2014, pp. 18-42.
[4] M. VILLEY, *La formation de la pensée juridique moderne*, P.U.F., 2003, pp. 62-64.
[5] L. SIEDENTOP, *Inventing the Individual*, *op. cit.*, pp. 35-45. Pour les Grecs, ne pas être patriote, ne pas être un citoyen actif, c'était être un « idiot » (étymologie : celui qui se retire de la vie de la cité). Cet auteur relève que religion, famille et territoire étaient inséparables, de sorte que le patriotisme était la vertu la plus élevée de l'ancien citoyen, la défense de la cité s'identifiant à la défense de son identité (pp. 24-25).

"sense of good and evil, of just and unjust, and the like, and the association of living beings who have this sense makes a family and a state" [1] is what makes them human.

Starting from the concept of the 'unjust man', Aristotle distinguishes between, on the one hand, he who does not respect the law and, on the other hand, he who disrupts "equality" for his own benefit and collects more than what is due to him[2]. From that assumption, Aristotle distinguishes two types of justice: the first one, the comprehensive virtue, implies respect for the law, whereas the second, the particular virtue, means respecting equality. Universal justice, wrote Aristotle, is "complete virtue, with the addition that it is displayed towards others", so that it is considered "as the chief of the virtues". He adds that "neither evening nor morning star is so lovely". It is "a virtue at its utmost level of comprehensiveness" since "the one who possesses it may use it for the others' benefit and not only for his own benefit". In addition, "it is also complete because he that has it is able to exhibit virtue in dealing with his neighbours, and not merely in his private affairs"[3].

As far as "particular justice" is concerned, it is split into distributive justice, which consists in giving to each person what is owed to him according to his own merits, and commutative justice, which aims at restoring an initial balance, by addressing the wrong due, for example, to the defaulting performance of a contract or some harm inflicted on someone. While the second type follows an arithmetic formula (bringing it back to its pristine state), distributive justice is based on a geometric proportion. In this way, what is just, said Aristotle, is "in some sort proportionate, (…) proportion meaning equality of ratios, and requiring four terms at least"[4]. Hence, someone who would be twice more deserving than another person should only be awarded twice more, or he would infringe the proportionality rule.

What is key to our discussion is the language used by Aristotle: On the one hand, universal justice is considered as a comprehensive virtue but not as an absolute one since it is built in relation to others. On the other, distributive justice is thought, not in an abstract and individual way (each individual owns such or such right), but rather, in a proportional way, by taking into account the relations between individuals, after having assessed the merits of each. As Michel Villey notes, the Aristotelian concept of justice is, strictly speaking, about social

[1] ARISTOTE, *La politique*, trad. par J. Tricot, Paris, Vrin, 1995, p. 29.
[2] Let us note straight away that the term equality should not be interpreted with our modern legal eyes (the English translation uses the term "fairness" which refers to the notion of equity). The Greeks though were, in spite of the Athenian democracy, fundamentally unequal.
[3] ARISTOTE, *Ethique à Nicomaque*, trad. J. Tricot, Paris, Vrin, 1983, pp. 218-219.
[4] *Ibid*., p. 228.

relationships: justice gives each one his due[1]. For her part, Sophie Klimis notes Aristotelian distributive justice cannot be identified with simple reciprocity. It is defined by proportion rather than equality[2].

Without entering the subtle debate on the place of the individual and the subject in Greek philosophy[3], we can agree that this place is much less central than in our modern conception, and that the Greeks did not develop a doctrine of individual natural rights[4]. Broadly speaking, in Greece, law was not clearly distinguished from the notion of justice, which was in turn closely linked to politics (and hence to life in the City) [5].

Things evolved differently in Rome. Originally very religious (priests ruled on legal matters), Roman law progressively became more secular but kept, at least until the third century AD, some characteristic aspects: a customary, judge-made and casuistical law that was guided by experts, as well as being asymmetrical, fluid and in constant movement[6]. According to Michel Villey, Roman *jus* does not constitute the individual's power but the obligation itself, the *link* between the debtor and the creditor[7]. In Roman law, rites play a decisive role: procedure, proceedings, forms of action progressively adapted by the pontiffs[8].

Contrary to preconceived opinions, natural law penetrated the Roman legal discourse gradually, and at a much later stage. Aldo Schiavone notes that references to justice and equity in the anonymous text entitled *Rhetorica ad Herennium*, which appeared during the first century BC, is an almost absolute novelty in Roman language[9]. It took several centuries before Ulpian, quoted in the Justinian's *Digest*, derived the word law (*ius*) from justice (i*ustitia*)[10] and defined

[1] M. VILLEY, *La formation de la pensée juridique moderne*, P.U.F., 2003, p. 69. See also the introduction of D. Agacinski in the translation by R. Bodeus of *Ethique à Nicomaque* : « La leçon majeure de la philosophie du droit d'Aristote est la limitation du champ du droit aux relations entre les hommes (…) » (*Ethique à Nicomaque*, L. V, trad. par R. Bodéüs, *op. cit.*, p. 24). It is therefore not possible to follow E. JEULAND when he writes that one « should go back to Aristotle to see substance favoured over relationship » (*Théorie relationiste du droit, op. cit.*, p. 382, free translation). It is true that his relational conception is not an Aristotelian one.

[2] S. KLIMIS, *L'énigme de l'humain et l'invention de la politique*, Louvain-La-Neuve, De Boeck, 2014, p. 255.

[3] On the topic, see S. KLIMIS, « Individualité et subjectivation dans l'*Iliade* d'Homère », in *La fabrique du sujet. Histoire et poétique d'un concept*, C. DUMOULIE (dir.), Paris, Ed. Desjonquères, 2011, pp. 21-38.

[4] B. TIERNEY, *The Idea of Natural Rights*, Cambridge, William B. Eerdmans Publishing Company, 1997, p. 45.

[5] Mr. VILLEY notes that the Greek language has only one word (*dikaion*) for law and justice and that Plato does not dissociate law from justice. (*La formation de la pensée juridique moderne*, *op. cit.*, pp. 66-68).

[6] A. SCHIAVONE, *Ius. L'invention du droit en Occident*, trad. par G. et J. Bouffartigue, Belin, 2008, pp. 53-64.

[7] M. VILLEY, *La formation de la pensée juridique moderne, op. cit.*, p. 246.

[8] Annette Ruelle insists, here again, on the relational (even though conflicting) dimension of a Roman trial : « le dispositif rituel de l'action est (…) au service de la mise en évidence de la relation interpersonnelle à partir de ses sujets d'une manière qui témoigne de la rationalité de l'interaction sociale (…) » (A. RUELLE, « La parole antique en procès. Droit romain, théâtre grec, langue latine », in *Le droit malgré tout. Hommages à François Ost*, Presses de l'Université Saint-Louis, 2018, pp. 502 et 526).

[9] A. SCHIAVONE, *Ius. L'invention du droit en Occident*, *op. cit.*, p. 411.

[10] This is a false etymology or rather an inverted etymology, the word *iustitia* being « an absolute rarity in the lawyers' language and conceptual device » (*Ibid.*, p. 569).

it, following Cicero and the Greek philosophers, as being "the constant and perpetual willingness to allocate to each one his due" [1]. This right, says Michel Villey, is however not a predefined subjective right but "the issue to be solved by the lawyer", who must "take into account all the circumstances and interests at stake in order to establish or maintain a fair distribution"[2]. From the same definitions, Xavier Dijon concludes that law is less to be found in positive law than "in its final aim, which is to establish a fair relation between the legal subjects"[3].

The question as to whether the concept of individual right, or even subjective right, might be identified in Roman law is certainly a complex one. It is however clear that it was not at the heart of such legal order[4]. As Aldo Schiavone wrote, Roman legal thought elaborated neither "a theory of subjectivity capable of withstanding the radicality of an individualistic shift" nor a "true doctrine of human rights"[5].

Paradigms of the Greek *nomos* and the Roman *ius* thus developed in different directions: the former was dealing with the substantial idea of *justice* and centred on a more ethical than specifically legal reflexion, which was tied to *politics* as part of a public experience of social ordering. The latter initially concentrated on *legality* and was structured by a formalism assigned to a rigorous and powerful science[6]. Beyond such differences, these thinkers nevertheless shared the view that the starting point for law and justice was not the individual but rather the relationship, which lies at the heart of the Greek concept of justice and of the Roman trial. Specifically, the Greeks considered relationships in a context of harmony and consensus, while the Romans dealt with relationships in a context of conflicts and dissents. Neither considered the individual as the source or aim of law[7]. This is why the total reversal which is about to follow is all the more striking.

[1] *Digeste*, I.1.1, 1 et 10.
[2] M. VILLEY, *La formation de la pensée juridique moderne, op. cit.*, p. 484.
[3] X. DIJON, « Esquisse historique des références philosophiques du droit à la nature », in *Droit naturel : relancer l'histoire ?*, L.-L. CHRISTIANS e.a. (dir.), Bruxelles, Bruylant, 2008, p. 35 (we stress).
[4] If Mr VILLEY (*La formation de la pensée juridique moderne, op. cit.*, p. 245) and L. SIEDENTOP (*Inventing the Individual, op. cit.*, p. 151) have come to the conclusion that subjective rights did not exist under Roman law, B. TIERNEY is more nuanced: « Roman jurists did not conceive the legal order as essentially a structure of individual rights in the manner of some modern ones » (*The Idea of Natural Rights*, *op. cit.*, p. 18).
[5] A. SCHIAVONE, *Ius. L'invention du droit en Occident*, *op. cit.*, 2008, p. 437 (free translation).
[6] *Ibid*., pp. 404 et 405.
[7] As concluded by Mr WALINE, the idea that the individual is not the goal of the law « seems to have dominated pagan Antiquity » (*L'individualisme et le droit*, Ed. Domat Montchrestien, 2ème éd., 1949, p. 55).

B. … To the individual's legal paradigm

1. The birth of the individual

During the Hellenistic period, some philosophers started reflecting on the universal or human nature underlying the various social conventions and extending beyond the City[1]. As such, Stoics were of the opinion that natural law was inherent to humanity, the expression of the will of God that permeated and organised the whole cosmos. Cicero subsequently mentioned human beings' innate strength thanks to which they could detect the *ius naturae* they had to respect[2]. In parallel, Jewish monotheism started offering, at a time when the world was subordinated to the Roman *Imperium*, a religious counterpart to the dominant social experience: the submission to a superior will, rather than to the dictates of *reason*. According to the American philosopher Larry Siedentop, the Christian message substituted the assumption of natural inequality for moral equality, linked to universal human freedom, by associating Stoic speculations about a universal nature with the Jewish concern over the conformity to a divine will. Such will was no longer simply external but was internalised: Saint Paul made a link between divine will and human action and suggested that those two elements could be merged in each human being. Such merging, according to Siedentop, marks the (true) birth of the individual, through the creation of conscience, and exalts the individual's freedom and power in a universal perspective[3].

During the centuries following the collapse of the Western Roman Empire, the intellectual world was essentially dominated by the Christian Church[4]. Saint Augustine highlights this new source of justice, this "true" justice which "is to be found in the faith in Christ"[5], and initiates a doctrine of downward verticality, where commandments come from above and are of divine or human origins[6]. Augustine's interpretation of the traditional definition of justice emphasizes the contrast with Antiquity thought: "justice is that virtue which gives every one his due. Where, then, is the justice of man, when he deserts the true God and yields himself to impure demons? Is this to give every one his due? "[7]. It is no longer a question of determining, in a given situation, what is due to every one according to the principles of distributive justice, but of respecting divine justice, the content

[1] L. SIEDENTOP, *Inventing the Individual. op. cit.*, pp. 45-47.
[2] B. TIERNEY, *The Idea of Natural Rights*, *op. cit.*, pp. 45-46.
[3] L. SIEDENTOP, *Inventing the Individual op. cit.*, pp. 51-65. According to him, those who celebrated the Renaissance made a confusion between the research for *individuality*, which is an aesthetic notion, with the invention of the *individual*, which is a moral one. (*Ibid*., pp. 333-338).
[4] J.M. KELLY, *A Short History of Western Legal Theory*, Oxford University Press, 1992, pp. 102-104.
[5] AUGUSTIN, « La cité de Dieu », in *Les œuvres complètes*, trad. par MM. Péronne, Ecalle, Vincent, Charpentier, Paris, Ed. Louis Vivès, 1870, Livre XXI, chap. 16, p. 29.
[6] A. PAPAUX, *Introduction à la philosophie du « droit en situation* », L.G.D.J., 2006, pp. 72-74.
[7] AUGUSTIN, « La cité de Dieu », *op. cit.*, p. 31.

of which is not to be construed but is given by revelation. However, from a legal point of view, we are still far from the notion of natural rights inherent to the human species or of positive law as a source of individual rights.

2. The individual, a rights holder

According to Marcel Gauchet, the first millenium represents a decisive rupture with the past, which had a direct impact on Western history. It is then that emerged what had been possible ever since the monotheistic invention, and in particular Christianity: namely the distinction between the visible and invisible worlds, which allowed humans to interact differently with this world. For the first time in history, Gauchet wrote, "our lowly world becomes an horizon by itself": that was the beginning of man's empowerment with regard to heavens and the birth of the concept of material growth[1]. As one may expect it, such an evolution had strong implications and generated socio-economic, politico-religious and philosophic-legal changes.

From a socio-economic point of view, the resurgence of urban life is one of the most remarkable aspects of the 11th and 12th centuries in Europe. Towns turned into markets and, thanks to the progressive emancipation of the boroughs, artisans and merchants constituted a new social class devoted to trade, composed of formally equal people, free to move, buy and sell, who aspired to a secured environment and who became known as the bourgeoisie[2].

At the same period of time, ongoing tensions opposed the temporal and the spiritual, illustrated by the famous Investiture Controversy, an indication of the considerable crisis within the Church[3]. If the empowerment of the earthly world justified the Church's position as a mediator, it also limited its political claims while paving the way for kingdoms, those entities which were more limited than empires in territorial terms but aspired to full authority within a limited sphere[4]. Kings ceased to be the direct agents of the spiritual and papacy admitted the autonomous jurisdiction of the temporal, announcing the decline of the feudal system and the creation, several centuries later, of Modern States[5].

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[1] M. GAUCHET, *La condition historique*, Entretiens avec Fr. Azouvi et S. Piron, Gallimard, 2005, pp. 167-196 (free translation).
[2] L. SIEDENTOP, *Inventing the Individual, op. cit.*, pp. 265-276.
[3] What was at stake was to understand who, from the Emperor or the Pope, was in charge of bishops' investiture.
[4] M. GAUCHET, *La condition historique*, *op. cit.*, pp. 167-196.
[5] L. SIEDENTOP, *Inventing the Individual, op. cit.*, p. 220. He notes that, in the process aimed at centralising laws and ideas, not only did kings create States but they also made it possible to have a society composed of individuals. (*Ibid.*, pp. 340-347). He also emphasizes that it is only from the 15th century that the word "individual" is to be commonly found in French and English dictionaries, at the same time as "State", understood as the provision of a sovereign authority (*Ibid.*, p. 347).

Last but not least, the 10th and 11th centuries marked the rediscovery, thanks to the Arab occupation of the Iberian Peninsula, of a large part of the Greek heritage, notably Aristotle's work, which fascinated authors such as St Thomas of Aquinas. At the beginning of the 12th century, a professor from Bologna named Irnerius taught not Germanic laws, but Justinian's *Corpus Iurus Civilis*, thought to have disappeared since the 7th century[1]. If Augustine's medieval Christian law was sufficient for rural communities and small feudal groups, it appeared too vague to regulate economic renewal and could not compete with the structure, the logic and above all the method of Justinian's codified Roman law[2]. In parallel, secular leaders drew some inspiration from the division, within the papacy, of the various sections in charge of legislation, jurisdictional decisions and administration[3]. From there, legal innovation became the heart of the sovereign authority and stopped claiming to be a mere rediscovery of a neglected custom. In the shadow of the normative authority, individuals, initially disarmed, were nevertheless about to acquire a status, which, in time, would make them the source of political power, thanks to social contract theories.

Departing from Michel Villey's opinions, which ties the birth of subjective law to William of Ockham's thoughts in the 14th century[4], Brian Tierney demonstrates that the doctrine of individual rights goes back to work carried out by 12th and 13th-century canonists. Specifically, the latter used the language of reason and free will for legal purposes and explained the various occurrences of the terms *ius naturale* they came across in the *Decretum Gratiani* (1140). Since the 12th century, this notion was associated with a kind of subjective power or capacity inherent to individuals, which facilitated the development of a new theory of *natural rights* alongside the old theory of *natural law*[5]. In 1160, decretist Rufinus wrote, "natural law is a certain force instilled by nature in every human creature to do good" [6]. The difference between this conception and that of the Stoics should, however, be underlined. While the latter were thinking of a force that would allow us to identify the rightful reason presiding over the pre-established and external order of things, canon lawyers had in mind a subjective force or capacity inherent to humans: Stoics were thinking in terms of cosmic determinism, while the canonists were pondering over human free will[7]. According to Larry Siedentop, this transition formalised in legal terms (requirement of equal freedom) the moral and egalitarian Christian vision, impregnated by the reciprocity of the golden rule, and set the scene for modern liberalism[8].

[1] J.M. KELLY, *A Short History of Western Legal Theory*, *op. cit.*, pp. 114-121.
[2] A. PAPAUX, *Introduction à la philosophie du « droit en situation »*, *op. cit.*, pp. 82-83.
[3] L. SIEDENTOP, *Inventing the Individual, op. cit.*, pp. 255-264.
[4] M. VILLEY, *La formation de la pensée juridique moderne, op. cit.*, pp. 240-247.
[5] B. TIERNEY, *The Idea of Natural Rights, op. cit.*, pp. 8 et 42.
[6] Cited and translated by B. TIERNEY, *The Idea of Natural Rights, op. cit.*, p. 68.
[7] B. TIERNEY, *The Idea of Natural Rights, op. cit.*, p. 68.
[8] L. SIEDENTOP, *Inventing the Individual op. cit.*, pp. 243-244.

It is worth noting that, at the same time, notions of material growth and individual rights started developing. As such, the seeds of the end of the feudal period were sown, leaving, with time, individuals alone before the State. Care should, however, be taken to avoid anachronistic reflex. Brian Tierney actually insists on the fact that canon lawyers would have never imagined that their rhetoric on individual rights would have led one day to a moral universe, where each individual seeks his own advantage[1]. He underlines that, in medieval thought, individual and Christian community values were praised with the same passion[2].

The reflexion on individual rights became public with the controversy which inflamed the 14th century, opposing Pope John XXII to the Franciscans with respect to the former's right to property. William of Ockham sustained the idea whereby it was necessary to distinguish between, on the one hand, the natural right to use objects that are necessary to survive, a common right not to be waived, and, on the other hand, a positive right to property, established by an act or a convention, which Franciscans had previously renounced. In a society where legal needs had substantially increased, positive and subjective law became, with Ockham, essential. It was thanks to his work that the language of canon lawyers persisted in subsequent writings, not forgetting encyclopaedic works from "late" medieval lawyers, such as Gerson or Summenhart, well known to 16th-century Spanish scholastics[3]. It is actually the former who resumed and deepened the issue on individual rights. Horrified by the way Native Americans were being treated, members of the School of Salamanca (such as Vitoria or Suarez) developed the idea of natural rights inherent to the human soul[4] and presented law as a set of acts granting subjective rights[5].

3. The subject of modern law

During the 17th century, a new paradigm emerged in Western thought, transcending the sphere of physics and exact sciences. The Scientific Revolution, mainly associated with the works of Galileo, Newtown, Leibniz and Descartes, was founded on the central role of both the individual and reason, as well as on a mechanical conception of nature[6]. The modern legal world did not escape the impact of the rational method and the development of individualism, which were embodied in the natural rights theory initiated by Grotius. Considered as the father of the modern natural law school, Grotius viewed law as a coherent and

[1] B. TIERNEY, *The Idea of Natural Rights*, *op. cit.*, p. 77.
[2] *Ibid.*, pp. 77 et 212.
[3] *Ibid.*, pp. 76 ; 93-94 ; 121-122 ; 190.
[4] A. DUFOUR, « Le discours et l'événement. L'émergence des droits de l'homme et le christianisme dans l'histoire occidentale », in *L'histoire du droit entre philosophie et histoire des idées*, A. DUFOUR (dir.), Bruxelles, Bruylant, 2003, pp. 407-412.
[5] M. VILLEY, *La formation de la pensée juridique moderne*, *op. cit.*, pp. 330-364.
[6] S. TOULMIN, *Cosmopolis. The Hidden Agenda of Modernity*, The University of Chicago Press, 1992, p. 76.

comprehensive system, where reason could, from man's sociable nature, deduce the first legal principles, followed by some other rules and individual rights[1]. Modern jusnaturalism was entirely built on the theory of the subject. Natural rights did not derive from law but were conceived as extensions of the individual, defined out of any social determination[2]. Michel Villey considers that such philosophy sounded the death knell of Aristotle's distributive justice: "no more need for the public function which aimed to establish within the City an equitable sharing between men and making the necessary adjustments; rights are provided in advance; the only purpose of law is to protect them"[3]. In our terminology, the legal relational approach is undeniably the main collateral damage of the legal recognition of such individual's legal paradigm.

In an era where the State and political institutions faced a crisis of legitimacy, the social contract was naturally going to prevail, offering the best justification for a political authority chosen by free and rational individuals. In this respect, it is fundamental to avoid falling into the semantic trap of the contractualist language. As thought by its main protagonists (Hobbes, Locke and Rousseau), the social contract does not form part of a legal relational approach, at least within the meaning of Aristotle[4]. Guillaume de Stexhe confirms the link between the contractualist theories' individualism and the atomistic and mechanistic ontology behind modern sciences and technique and concludes that, in the historic social contract figure, the "introduction of sociality is only the invention of a new figure of the self" [5].

For Thomas Hobbes, the state of nature was a permanent state of war, in which men were equal in capacity (but not in law) and where they each held a natural right (Right of Nature, *Jus Naturale*) they could use as they saw fit for self-preservation. However, as long as that right persisted, there would be no security for anyone. This is why both passions (fear of death, desire for a comfortable life) and natural laws (Laws of Nature, *Lex Naturalis*) drove men to conclude a social pact, by waiving their rights to everything and establishing a Leviathan[6]. For John Locke, men also concluded such a social contract to escape from the insecurity of

[1] A. PAPAUX, *Introduction à la philosophie du « droit en situation »*, *op. cit.*, pp. 114-122. It is relevant that, by distinguishing the various meanings of the word *ius*, Grotius defines first what today would be qualified as subjective law ("law is a moral quality attached to a person to have or do something rightly") then objective law, understood as « synonymous of the term law, in the broadest sense" (H. GROTIUS, *Le droit de la guerre et de la paix*, trad. par P. Pradier-Fodéré, Paris, Ed. Guillaumin et Cie, 1867, pp. 64-66).
[2] Y. THOMAS, *Mommsen et L'Isolierung du droit (Rome, l'Allemagne et l'État)*, Paris, De Boccard, 1984, p. 18.
[3] M. VILLEY, *La formation de la pensée juridique moderne, op. cit.*, p. 184 (free translation).
[4] On the individualist dimension of the social contract theories, see M. VILLEY, « Préface », in E. KANT, *Métaphysique des mœurs. 1, Doctrine du droit*, translated by A. Philonenko, Paris, Vrin, 1971, pp. 17-18 ; Y. THOMAS, *Mommsen et L'Isolierung du droit (Rome, l'Allemagne et l'État)*, *op. cit*., p. 18.
[5] G. DE STEXHE, « Négociation : le degré zéro et l'événement », *in Droit négocié, droit imposé ?*, PH. GERARD, F. OST et M. VAN DE KERCHOVE (dir.), Bruxelles, Publ. des F.U.S.L., 1996, pp. 200 et 210-211.
[6] Th. HOBBES, *Leviathan*, New York, Dover Publications, 2006, pp. 68-93.

the state of nature (which he nevertheless distinguished from the state of war), so that institutions could protect their lives, freedoms and belongings[1]. As pointed out by Guillaume de Stexhe, the English philosopher's thought is decisive as it promotes a technique to distribute possessions rather than a form of cooperation, which leads the social contract towards individualism[2].

Locke's thinking was extremely influential in the 1776 American Declaration of Independence, which in turn influenced the 1789 Declaration of the Rights of Man and of Citizens. Specifically, Article 2 of the latter states: "The goal of any political association is the conservation of the natural and imprescriptible rights of man" which are "liberty, property, safety and resistance against oppression". We find the same idea in both texts according to which governments are established to guarantee man's inalienable rights. This is why Charles Beudant wrote, at the beginning of the 20th century, that "the 1789 Revolution removed the ties which, during the Ancient Regime, linked the individual to the State; it opened up an era of individualism: such is the spirit of the Declaration of the Rights of Man"[3]. Seventy years after the French Revolution, John Stuart Mill wrote in his essay *On Liberty* that his aim was "to assert one very simple principle, instituted to govern absolutely the dealings of society with the individual in the way of compulsion and control", according to which "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others"[4]. For the one who is considered, with Bentham, as the father of utilitarianism[5], societies were merely groupings of individuals and the interest of society was only to develop individual personality. Individualism opened the door to liberalism "as its practical corollary (…) to the point they have often been confused"[6], as well as to thinkers such as Friedrich Hayek[7].

II. THE FLAWS OF THE INDIVIDUAL'S LEGAL PARADIGM

The individual's legal paradigm, a product of modernity with very old roots, has nonetheless faced various circumstances that challenged its monopolistic position. Without claiming to be exhaustive, one can mention the criticisms of individualism (A), the promotion of State law and institutions (B) and some new legal relational theories (C).

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[1] J. LOCKE, *Second Treatise of Government*, Cambridge, Hackett Publishing, 1980.
[2] G. DE STEXHE, « Négociation : le degré zéro et l'événement », *op. cit.*, p. 207 (free translation).
[3] Ch. BEUDANT, *Le droit individuel et l'État : introduction à l'étude du droit*, Paris, Rousseau & Cie, 1920, 3ème éd., p. 1. In the same spirit, M. WALINE wrote several years later : « l'idée même d'une Déclaration des droits est individualiste » (*L'individualisme et le droit*, *op. cit.*, p. 375-379).
[4] J.S. MILL, *De la liberté*, trad. par L. Lenglet, Paris, Gallimard, 1990, p. 27.
[5] The utilitarian philosophy, notes L. SIEDENTOP, contributed to promote an "atomised" society model, where individual preferences are considered as being given, whereas little attention is paid to the role of norms or the process of socialisation (*Inventing the Individual, op. cit*, pp. 337-338).
[6] M. WALINE, *L'individualisme et le droit*, *op. cit.*, p. 10 (Free translation).
[7] The rest of the story is usually well known: readers will forgive us not to dwell further on it.

A. A critique of individualism

Already in 1840, Alexis de Tocqueville warned of possible abuses due to individualism, which "at first dries up only the source of public virtues" but in the long run "attacks and destroys all the others and will finally merge with egoism"[1]. During the 19th-century Romanticism, several writers even rejected the Enlightenment natural law theories, as being too "atomistic", too rational to promote values inherent to groups living in historic communities[2]. We can mention, amongst others, Savigny's Historical School, which, nurtured with German Romanticism, conceived law as the product and expression of the people's consciousness, evolving from popular customs and traditions[3].

By the end of the 19th century, French criticism of individualism had multiplied. Mention can be made of Paul Lafitte's interesting observation of what he called, in 1887, "the paradox of equality": "there are only individuals in a society and they are all equal". Behind such paradox, he continued, "there is a doctrine. The individual is the beginning and the end of the society"[4]. He then defined individualism with the following words: "Citizens equal in aptitudes, equal in rights, facing an all powerful State, and nothing between them"[5].

Criticism of individualism persisted throughout the last century. Marcel Gauchet points out the difficulty to translate into a political regime the individualistic approach of legitimacy in our societies. Nowadays, the fear of an absolute State gives way to the State disconcertment in front of an absolute individual, who asserts his/her rights and freedoms but refuses his/her obligations. The French philosopher invites us to rethink the synthesis of people's independence and collective autonomy, starting with the disengagement of the 18th-century notion of the abstract individual, in order to consider the individual in society[6].

B. Promotion of State law and institution

For Locke, the State was obligated to guarantee the necessary legal security so that every individual could feel secure and peacefully enjoy his possessions. In his

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[1] A. DE TOCQUEVILLE, *De la Démocratie en Amérique*, vol. II, Paris, Garnier-Flammarion, 1981, p. 125 (Free translation).
[2] B. TIERNEY, *The Idea of Natural Rights*, *op. cit.*, p. 208.
[3] J. M. KELLY, *A Short History of Western Legal Theory*, *op. cit.*, p. 320 ; A. PAPAUX, *Introduction à la philosophie du « droit en situation »*, *op. cit.*, pp. 129-131.
[4] P. LAFITTE, *Le paradoxe de l'égalité*, Paris, Hachette, 1887, pp. 147-148.
[5] *Ibid.*, p. 149. He also wrote: « Isolated, scattered individuals, without discipline, without organisation, are disarmed in front of upwards or downwards enterprises. Individualism favours absolute power, be it called Committee of Public safety or Bonaparte". (*Ibid.*, p. 168).
[6] M. GAUCHET, *La condition historique*, *op. cit.*, pp. 399-420.

Doctrine of Right, Kant subtlety operated a reversal of this conception. According to the German philosopher, natural law actually only presents a provisional character and only public law may offer a perfect juridicity: for him, only in a civil condition can something external be mine or yours[1]. Consequently, a natural law principle exists whereby each may impel the other by force to leave this state of nature and enter into a rightful condition [2]. Once the State has been established, it is out of the question to undermine its authority, as advocated by Hobbes and Rousseau: the Sovereign has only rights against his subjects and no duties[3].

As noted by Alexis Philonenko, Kant's whole natural law theory is in view of the State and justified by the State. It is political law which ensures the validity of natural law, and not natural law which contains the justification of political law[4]. More radically, Michel Villey wrote that, in the Kantian doctrine of law, Positive Law "obliterates" Natural Law, which results in legal positivism[5]. All he can see is a simple extension of the subjective law logic to the State: "such is the almost fatal outcome of the modern individualistic thought, first initiated by Hobbes or Rousseau and followed by Fichte, all of them avoiding anarchism to better fail in tyranny"[6].

Be that as it may, Kant induced a conception of law which no longer started from the individual and his natural rights but favoured the State institution and the norms it adopted. Hegel developed the idea of an individual reduced to the rank of means, who only exists by and for the State[7].

In a less radical way, positivist theories discredit natural law and affirm, in substance, that the only individual rights that exist are those derived from law adopted by State authority. At the beginning of the previous century, Léon Duguit wrote an in-depth review of what he called the "individualistic doctrine", whose "dogmatic formula" was given by Locke and according to which "law, therefore exists, but only as purely derived" whereas "the bedrock of law is the real power, the human being's autonomy; it is the subjective right, the metaphysical power of the individual's willingness"[8]. Finally, institutional theory, which in France is

[1] E. KANT, *Métaphysique des moeurs. Doctrine du droit*, trad. par A. Philonenko, Paris, Vrin, 1993, p. 116.
[2] *Ibid*., pp. 198-199.
[3] *Ibid*., pp. 277-278.
[4] A. PHILONENKO, « Introduction », in E. KANT, *Métaphysique des moeurs. 1, Doctrine du droit*, trad. par A. Philonenko, Paris, Vrin, 1971, p. 32-35.
[5] M. VILLEY, « Préface », in E. KANT, *Métaphysique des moeurs. 1, Doctrine du droit*, trad. par A. Philonenko, Paris, Vrin, 1971, p. 29.
[6] *Ibid*., p. 30 (Free translation).
[7] M. WALINE, *L'individualisme et le droit*, *op. cit.*, p. 55. According to the author, however, the idea that a State or a society transcends individuals and constitutes a purpose that is distinct from them leads to anti-individualistic ideologies such as fascism in Italy or fascism in Germany (*Ibid*., p. 56).
[8] L. DUGUIT, *Traité de droit constitutionnel*, Paris, Ancienne Librairie Fontemoing & Cie, 1927, pp. 203-204 (Free translation).

associated with Maurice Hauriou, has contributed to the theory of the welfare State, as well as, if not in lieu of, the individualistic theory of law[1].

C. Relational approaches of modern laws

Emerging from this historical detour is an apparent consensus that law is primarily composed of legal rules and of individual rights. Some authors, such as Hauriou, prefer to start from the notion of institution. Yet the legal relational approach *seems* to have disappeared from the legal radar. "Seems", because if one looks closely, it is possible to identify some legal relational approaches in the history of modern thought, albeit discrete or very different from the Aristotelian concept.

According to Emmanuel Jeuland, it is possible to identify in each legal tradition a legal relational approach[2]. In France, for example, relationships have an important place in the works of Jean Domat[3] or Eugène Lerminier[4]. Jeuland nevertheless admits that, "the notion of legal relationship has been relegated to second place, to favour subjective rights and the legal situation" [5]. The author has also identified an "Italian relational school", influenced by Savigny, which might have been "overwhelmed by the normative theories which have incorporated the notion of legal relation conceived as a norm relation". A further example is the "Coimbra, Bucharest, Moscow axis", which professes "humanistic, objective and concrete relationism" [6].

According to Professor Jeuland, the starting point of the German thought, especially the Kantian one, is more individualistic and normativist[7]. It is true that Michel Villey repeatedly insists that Kant mentioned an "*individualistic* language, which was conceived according to the person, his freedoms, his powers, his subjective rights"[8] and that Kant "sees law only in relation to and from the *individual*" who "considers law as a springboard for his own personal fulfilment"[9].

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[1] E. JEULAND, *Théorie relationiste du droit, op. cit.*, p. 262.
[2] *Ibid.*, p. 32.
[3] *Ibid*., p. 393.
[4] E. LERMINIER, *Introduction générale à l'histoire du droit*, Paris, éd. Alexandre Mesnier, 1829, pp. 3-4. Pierre-Joseph Proudhon could also be cited, with Domat and Lerminier, as he denounced the risk that justice might lead « to its own subversion », which "would certainly still occur if, as under the Revolution, the substitution of the Rights of Men by the respect of the top resulted in making man an autolatrous, i.e. a God ». However, he wrote, justice "implies at least two terms, two people united by the common respect of their nature, which are different and rival for all the others » (*Justice*, 4 vol., Ed. Marcel Rivière, 1930, I, p. 421). Commenting this text, P. ANSART wrote that Proudhon's concept is « relational » (« La critique de la relation public/privé par les philosophes anarchistes », *in Public/privé*, Paris, P.U.F., 1995, p. 82).
[5] E. JEULAND, *Théorie relationiste du droit, op. cit.*, p. 430 (Free translation).
[6] *Ibid*., pp. 407 et 425 et s.
[7] *Ibid.*, p. 34.
[8] M. VILLEY, « Préface », *op. cit.*, p. 9.
[9] *Ibid*., p. 20.

However, while this critique is not unfounded, it cannot justify the automatic exclusion of Kant (and Fichte) from the relational school of thought.

In fact, Kant defines the concept of law as the "external and, in truth, practical relation of one person to another, in so far as they can influence upon each other, immediately or mediately, by their actions as facts"[1]. Law is "the aggregate of those conditions under which the will of one person can be conjoined with the will of another in accordance with a universal law of freedom". Accordingly, his universal principle consists in "every action which by itself or by its maxim enables the freedom of each individual's will to co-exist with the freedom of everyone else with a universal law"[2]. Kant eventually defines "public law" (i.e. State law as opposed to natural law) as "a system of laws for a people, that is a multiplicity of human beings, or a multiplicity of peoples, which, because they affect one another, need a rightful condition under a will unifying them, a constitution"[3].

If it is difficult to challenge Kant's emphasis on the legal relation. Yet, his theory remains distinct from the traditional (ancient) relational approach, it being built from the individual (more precisely from each individual's free will), to be extended to other individuals and then to society as a whole. As such, it is one person's individual freedom which prompts consideration of the other's freedom; a third party (the law) is charged with ensuring that no one infringes the others' rights. Legal relations are to be viewed in terms of equality and reciprocity, rather than, as with Aristotle, in a proportional way - in other words, on the register of identity rather than difference. The same idea is to be found with Fichte, who defines the concept of law as being "the concept of the relation which is necessary to be free with one another". He then specifies that such a concept "must be a concept originating from pure reason", which becomes necessary "because the reasonable being cannot consider himself as such, with self-awareness, without posing as an individual, as one, within a plurality of reasonable beings that he accepts besides him as soon as he accepts himself"[4].

CONCLUSION

In recent years, relational approaches to law seem to have taken off again, thanks to the work of Jennifer Nedelsky, Alexander Somek and Emmanuel Jeuland[5].

[1] E. KANT, *Métaphysique des moeurs. Doctrine du droit*, *op. cit.*, p. 150.
[2] *Ibid*., pp. 150 et 151.
[3] *Ibid*., p. 265 (our emphasis).
[4] J.G. FICHTE, *Fondement du droit naturel selon les principes de la doctrine de la science*, translated by A. Renaut, Paris, P.U.F., 1984, pp. 23-25.
[5] On those theories, see E. JEULAND, « L'approche relationiste dans les pays de droit civil », *Droit et relation : une approche comparative. Autour de Jennifer Nedelsky*, J.-FR. BRAUNSTEIN and E. JEULAND (coord.), Paris, IRJS, 2018, pp. 27-42.

This can only be a positive development. Still, such analyses remain rooted in the origins of Western law.

It is against this backdrop that we suggest remobilising the traditional conception of legal relationships, as developed by Aristotle. Compared to the modern approach, which insists on the similarity between individuals, the traditional relational concept emphasises both the individual's singularity and the singularity of each relation, which almost always presents a different configuration. Let us not forget that, for the Stagirite, distributive justice requires thinking in the geometric terms of proportionality. When it comes to giving everybody his or her due, one must consider what is attributed to the other, or to others. Usually, the legal solution to a problem cannot be gleaned in an abstract way, without accounting for the specific circumstances of all parties concerned (and the way they will be impacted). In other words, the deciding public authority cannot take as its starting point each individual (and the predefined right he invokes or the interest he asserts). Rather, it must start from the existing configuration and take into account the various interests at stake in their particular arrangement.

The solution therefore no longer pre-exists, it is not a ready-made one but has to be built up by respecting the principle of proportionality, in relation to others. As Aristotle wrote, it is precisely because whoever possesses the virtue of justice "may use it for the others' benefit and not only for his own benefit" that "neither evening nor morning star is so lovely".

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