# Francisco Suárez and Hugo Grotius on distributive justice and imperfect rights

Olsthoorn, J.

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# FRANCISCO SUÁREZ AND HUGO GROTIUS ON DISTRIBUTIVE JUSTICE AND IMPERFECT RIGHTS

*Johan Olsthoorn*[1,2]

**Abstract:** This paper argues that Francesco Suárez (1548–1617) and Hugo Grotius (1583–1645) grappled with the same conundrum: how to incorporate a conception of 'subjective' rights as moral powers into the received Aristotelian typology of justice; and, this having been achieved, how to understand the difference between various types of justice? Both thinkers maintained innovatively that distributive justice essentially differs from other forms of justice in exclusively governing 'imperfect' rights — while disagreeing over the meaning of the latter notion. My analysis suggests that the widespread early modern association and even identification of distributive justice with imperfect duties like charity and liberality is best regarded as inspired by Grotius' conceptual innovations.

**Key Words:** Francisco Suárez, Hugo Grotius, distributive justice, individual rights, property rights, charity.



## Introduction

Distributive justice is today commonly understood to be a moral norm governing societal property arrangements. It entitles everyone, regardless of their personal qualities, to a level of material resources needed for a decent living. Samuel Fleischacker has argued that distributive justice, so understood, is a fairly modern idea.[3] The term itself may be of old pedigree — going back at least to Aristotle — but the underlying concept has changed dramatically over the last two hundred years. In its Aristotelian, pre-modern sense, distributive justice 'called for deserving people to be rewarded in accordance with their merits, was seen as bearing primarily on the distribution of political status, and was not seen as relevant at all to property rights'.[4] This is a far cry from modern distributive justice, which presumably captures the idea that humans have a basic right to welfare to be guaranteed by society.

[1] University of Amsterdam, Dept. of Political Science, Nieuwe Achtergracht 166, 1018 WV, Amsterdam, The Netherlands; KU Leuven / FWO-Flanders, Institute of Philosophy, Andreas Vesaliusstraat 2, BE-3000, Leuven, Belgium. Email: j.c.a.olsthoorn@uva.nl

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[3] S. Fleischacker, *A Short History of Distributive Justice* (Cambridge MA, 2004); S. Fleischacker, 'A Right to Welfare: Historical and Philosophical Reflections', in *Distributive Justice Debates in Political and Social Thought: Perspectives on Finding a Fair Share*, ed. C. Boisen and M.C. Murray (New York, 2016), pp. 9–25.

[4] Fleischacker, *Short History*, p. 5.

This paper makes a small but significant contribution to the growing literature on the conceptual history of distributive justice. It contrasts two towering figures in early modern philosophy: the Spanish Jesuit theologian Francesco Suárez (1548–1617) and the Dutch jurist and statesman Hugo Grotius (1583–1645).[5] Both, I shall argue, grappled with the same conundrum: how to incorporate a conception of 'subjective' rights as moral powers into the received Aristotelian typology of justice; and, this having been achieved, what are the distinctive features of the various types of justice? Both Suárez and Grotius rejected two standard Thomist ways of differentiating commutative from distributive justice: by the kinds of equality (arithmetic vs geometric) and the kinds of social relations they regulate (private vs communal). Rather, the two thinkers concurred, commutative and distributive justice each govern a different kind of subjective right.

Both denied that distributive justice deals with property rights in things. The *iura* pertaining to what a person can properly call their own are the exclusive concern of commutative justice. For Suárez, distributive justice nonetheless deals with actionable claims. The object of distributive justice — *ius ad rem* — provides individuals marked out as proper recipients of relevant *distribuenda* with some legal standing. *Ius ad rem* is not a property right, strictly speaking, but an entitlement to receive a good based on an earlier promise. Grotius, by contrast, subsumed *ius ad rem* and all other actionable claims under commutative justice. To this end, he redefined the meaning of 'facultas'. The Dutchman agreed with Suárez that distributive justice deals with some kind of subjective right. But he invented an entirely new category



[5] Abbreviations, editions and citation style used for works by Suárez: *DL*: 'De Legibus, ac Deo Legislatore', in *Suárez: Selections from Three Works*, ed. T. Pink (Indianapolis, 2015) (cited by book-chapter-paragraph). *I&I*: 'Disputatio De Iustitia et Iure', in *Die Gerechtigkeitslehre des jungen Suárez: Edition und Untersuchung seiner römischen Vorlesungen De iustitia et iure*, ed. J. Giers (Freiburg im Breisgau, 1958) (cited by disputation-question-1958 page number). *ID*: 'De Iustitia, qua Deus Reddit Præmia Meritis, & Poenas pro Peccatis', in *Francisco Suárez: Opera Omnia*, Vol. 11, ed. M. André and C. Berton (Paris, 1858), pp. 514–82 (cited by book-chapter-paragraph). Translations of *I&I* and *ID* are mine unless otherwise noted.

Abbreviations, editions and citation style used for works by Grotius: *DIBP — The Rights of War and Peace*, ed. R. Tuck (3 vols., Indianapolis, 2005) (cited by book-chapter-paragraph), for the original Latin I have consulted the critical edition by B.J.A. De Kanter-Van Hettinga Tromp (Leiden, 1939), paragraph numbering follows the Liberty Fund edition; *DIP — Commentary on the Law of Prize and Booty*, ed. M.J. Van Ittersum (Indianapolis, 2006) (cited by 2006 page number); *DML* — 'Defense of Chapter V of *Mare Liberum*', in *The Free Sea*, ed. D. Armitage (Indianapolis, 2004), pp. 77–130 (cited by 2004 page number); *DS — De Satisfactione Christi*, ed. E. Rabbie, trans. H. Mulder (Assen, 1990) (cited by chapter-paragraph); *JH — The Jurisprudence of Holland*, ed. R.W. Lee (Oxford, 1926) (cited by book-chapter-paragraph); *ISP — De Imperio Summarum Potestatum Circa Sacra*, ed. H.J. van Dam (2 vols., Leiden, 2001) (cited by chapter-paragraph).

of such rights: 'aptitudes' (mere worthiness to receive an actionable right). Aptitudes are enforceable neither in court, nor on the battlefield.

This article shows that Grotius' classification of rights and justice is considerably more original than commonly claimed. Some of Fleischacker's claims about the nature of pre-modern distributive justice hence need to be amended. (The only scholastic figuring in his short history is Aquinas.) My analysis does not question Fleischacker's contention that pre-modern distributive justice allocates *distribuenda* according to personal merit. But it does show that resultant merit-based titles were sometimes seen as actionable. I conclude by suggesting that the early modern association of distributive justice with imperfect duties like charity and liberality is best regarded as inspired by Grotius.



## I
## Francisco Suárez

This section summarizes Francesco Suárez' intriguing and original theory of distributive justice, scattered throughout various writings. His magnum opus *De legibus ac deo legislatore* (1612) discusses distributive justice in the context of legal validity and taxation. The concept is discussed at greater length in the important lecture series *De iustitia et iure* (1584), delivered at the Jesuit *Collegio Romano*, and in the *Disputatio de iustitia dei*, published in *Opuscula theologica* (1599). The following analysis is largely based on these three texts.[6] Since Suárez developed his typology of justice in response to prevailing peripatetic ones, I shall begin by briefly expounding Aristotle's classification of justice.

In the *Nicomachean Ethics*, Aristotle distinguished universal from particular justice and then subdivided the latter further. Universal justice (A) is equivalent to the whole of morality, 'not without qualification, but in relation to another person'.[7] Universal justice consists of all social virtues, including for instance beneficence and gratitude. Particular justice (B) is a specific virtue aiming at fair equality. It comes in two main types.[8] Commutative justice (B1) — sometimes translated as corrective justice — regulates interactions,

[6] Suárez mentions distributive justice in several other writings, including his disputation on charity and his lecture on merit (1598). The latter text is discussed in Daniel Schwartz's insightful 'Suárez on Distributive Justice', *Interpreting Suárez: Critical Essays*, ed. D. Schwartz (Cambridge, 2012), pp. 163–84. Suárez' views on justice are summarized in I. Englard, *Corrective and Distributive Justice from Aristotle to Modern Times* (Oxford, 2009), pp. 32–5, 86–90.

[7] Aristotle, *Nicomachean Ethics*, ed. R. Crisp (Cambridge, 2000), V.1 (1129a20).

[8] Whether 'reciprocal justice', which demands that goods exchanged are of equal value, should be seen as a third type of particular justice is contested. For an argument in favour, see T. Scaltsas, 'Reciprocal Justice in Aristotle's *Nicomachean Ethics*', *Archiv für Geschichte der Philosophie*, 77 (3) (1995), pp. 259–60.

both voluntary (like selling, hiring and lending at interest) and involuntary ones (like theft, murder and 'enticing away slaves').[9] It demands that people get what they deserve in these 'commutations' and requires rectification if they do not. Aristotle contended that commutative justice targets numerical equality: each individual within its scope counts equally, regardless of their personal worth or merit. This makes commutative justice non-comparative. By contrast, distributive justice (B2) is comparative. It calls for allocating common goods (including honours, the spoils of war and political offices) in proportion to prospective recipients' merit.[10] How much a person ought to receive of a scarce resource divided among a group depends on each member's personal merit. As Aristotle put it, 'all men agree that what is just in distribution must be according to merit [ἀξια]'.[11] Distributive justice requires so-called geometric equality: 'that whole is to whole as each part is to each part'.[12]

Aquinas adopted and further developed Aristotle's typology. He proposed a further difference between the two kinds of particular justice: they aim to establish and preserve different orderings. Commutative justice deals with mutual interactions between private citizens. Distributive justice, on the other hand, regulates the order of the community to the individual.[13] Another significant aspect of Aquinas' theory of justice was his identification of particular justice with the well-known Roman law definition of justice: 'the will to give everyone their due' (*suum cuique tribuere*).[14] This equation allowed later thinkers to suggest that commutative and distributive justice differ with respect to the kind of 'due' they govern.

Suárez formulated two main objections against the received Thomistic typology of justice. He argued, first, that particular justice comes in *three* types: legal, commutative and distributive justice. Second, he claimed that these types of justice are properly differentiated through their objects — i.e. through the kind of *ius* they regulate. I shall first explain what Suárez meant by 'justice' and 'right' and then discuss each of these two critiques in turn.

As Suárez explained in *De legibus*, 'justice' and 'right' (*ius*) each have several meanings. Alluding to the Aristotelian distinction between universal and particular justice, he wrote: ' "justice" sometimes signifies a special virtue;

[9] Aristotle, *Nicomachean Ethics*, V.2 (1131a).

[10] *Ibid*., V.2–5. According to Keyt, distributive justice for Aristotle is primarily concerned with the distribution of political authority, and only secondarily with material goods. D. Keyt, 'Aristotle's Theory of Distributive Justice', in *A Companion to Aristotle's Politics*, ed. D. Keyt and F.D. Miller (Oxford, 1991), pp. 238–78.

[11] Aristotle, *Nicomachean Ethics*, V.3 (1131a25).

[12] *Ibid.* (1131b).

[13] Aquinas, *Summa Theologiae*, 2a.2ae.61.1.

[14] *Ibid*., 2a.2ae.58.1. The Roman law definition of justice is found in *Justinian's Institutes*, ed. P. Birks and G. McLeod (London, 1987), 1.1; *The Digest of Justinian*, Vol. 1, ed. A. Watson (Philadelphia, 1985), 1.1.10.

while at other times it refers to all the virtues'.[15] Suárez retained the Thomistic identification of Aristotelian particular justice with the *suum cuique* definition of justice. Particular justice is 'the special virtue which renders to another that which is due'.[16]

*Ius* may either mean 'lex' (law) or 'iustum' / 'aequum' (that which is just / equitable).[17] Suárez rejected an outright equation of *ius* with *lex*, claiming that *ius* is better understood as 'that which is prescribed or measured by *lex*'.[18] As *iustum*, *ius* is the object of justice. The meaning of *ius*, thus understood, differs depending on whether we interpret justice in a wide or a narrow sense. As the object of universal justice, *ius* denotes 'whatever is fair and in harmony with reason'. As the object of particular justice, *ius* signifies 'the equity which is due to each individual as a matter of justice'.[19] This latter signification is in Suárez' view 'the true meaning of the word *ius*'.[20]

Law is defined as a measure of rectitude.[21] Laws are commands prescribing just things; precepts prescribing what is 'unjust or base' do not count as law. Justice — and its object, *ius* — are thus necessary properties of law: 'it is inherent in the nature and essence of law that it shall prescribe just things'.[22] An unjust law is no law since it 'lacks the force or validity necessary to impose a binding obligation'.[23]

Justice places three formal validity conditions on law-making according to *De legibus*. Each of these conditions, or 'stand-points', corresponds to a type of particular justice.[24] Whereas Aristotle and Aquinas appeared to have recognized only two types of particular justice, Suárez added a third: legal justice.[25] Legal justice demands that laws be necessary and useful and serve the welfare of the community.[26] Commutative justice requires that 'the legislator shall not



[15] *DL* 1.9.2; also *I&I* 4.1 [92].

[16] *DL* 1.2.4. Also e.g. *ID* 2.3; *I&I* 4.1 [94].

[17] *DL* 1.2.1–6.

[18] *DL* 1.2.4; also *DL* 1.2.6.

[19] *DL* 1.2.4.

[20] *DL* 1.2.5.

[21] *DL* 1.1.6.

[22] *DL* 1.9.2.

[23] *DL* 1.9.4. E.g. *DL* 1.1.6. On Suárez' theory of legal validity, see E.G. Valdés, 'Two Models of Legal Validity: Hans Kelsen and Francisco Suárez', in *Normativity and Norms: Critical Perspectives on Kelsenian Themes*, ed. S.L. Paulson and B. Litschewski Paulson (Oxford, 1998), pp. 263–71.

[24] *DL* 1.9.13–16.

[25] Suárez averred, unwarrantedly, that Aquinas shared his tripartite classification. Suárez, 'De Virtute et Statu Religionis: Tractatus Primus', in *Francisco Suárez: Opera Omnia*, Vol. 13, ed. M. André and C. Berton (Paris, 1859), 3.4.7. Aquinas had in fact identified 'legal justice' with universal justice (i.e. justice as a general virtue) in *Summa Theologiae* 2a.2ae.58.5.

[26] *DL* 1.7.

exceed his own power in laying down his commands'.[27] Even if a prince commands something inherently just, if he lacks the requisite authority, the command fails to be true law.

Distributive justice expresses a third validating condition. It requires that whatever burdens the law imposes on citizens should accord with proportionate equality: 'For in the process of laying down commands for the multitude, [law] distributes the burden, as it were, among the various parts of the state, for the good of the latter, and must therefore preserve in that distribution a proportionate equality, which is a matter pertaining to distributive justice.'[28] Distributive justice prohibits legal discrimination: to except a class of persons from being subject to a law for arbitrary reasons is unjust. Tax burdens must likewise be placed upon all subjects proportionally. This means that taxes must be commensurate with citizens' abilities to pay (i.e. with their income and wealth): 'the imposition of equal burdens upon all persons, without regard to the strength or capacity of each, is also contrary to reason and to justice'.[29]

In the lecture series *De iustitia et iure*, delivered some thirty years before the publication of *De legibus*, Suárez had already stressed the tripartite nature of particular justice, without however connecting it to legal validity.[30] There Suárez argues that the three types of justice differ with respect to their object.[31] I will here bracket legal justice, which aims at the common good, and focus instead on commutative and distributive justice.[32] Suárez was adamant that commutative and distributive justice are distinct kinds of justice. After all, only violations of commutative justice warrant compensation;[33] and distributive justice has a unique opposing vice: 'acception of persons'.[34] However, Suárez

[27] *DL* 1.9.13.

[28] *Ibid*.

[29] *DL* 1.9.16; also *DL* 5.16.1. Harro Höpfl provides a helpful overview of ideas on taxation in Suárez and his contemporaries in *Jesuit Political Thought: The Society of Jesus and the State, c.1540–1640* (Cambridge, 2004), pp. 306–13.

[30] *I&I* 4.2 [94].

[31] Suárez further argued that this tripartite division exhausts the realm of particular justice: neither vindicative justice nor equity constitute distinct types of justice (*I&I* 4.4–5).

[32] On Suárez' conceptions of legal justice and the common good, see R. Wilenius, *The Social and Political Theory of Francisco Suárez* (Helsinki, 1963), pp. 41–4.

[33] *I&I* 4.3 [102]. Also *ID* 3.14, 3.20; *I&I* 4.3 [104]: 'Negabitur enim iustitiae distributivae violationem non inducere obligationem restitutiones. Quia illa numquam est propria, nisi cum violatore simul commutativa iustitia.'

[34] *I&I* 4.3 [102]; *ID* 3.14. The notion that *acceptio personarum* is the distinct sin opposing distributive justice can be traced back to Aquinas, *Summa Theologiae* 2a.2ae.63. On scholastic discussions of 'acception of persons', see N. Reinhardt, *Voices of Conscience: Royal Confessors and Political Counsel in Seventeenth-Century Spain and France* (Oxford, 2016), pp. 136–46.

claimed that neither difference is foundational: they rather follow from the nature and subject matter of the two types of justice.[35]

The theologian enumerated six ostensible differences between commutative and distributive justice suggested by his predecessors.[36] None of them captures in his view an essential difference. While commutative justice usually deals with commutations and distributive justice with distributions, this functional difference is not universal: a just sentence falls under commutative justice, yet it distributes goods and punishments.[37] Nor does commutative justice exclusively govern relations between citizens, and distributive justice public–private affairs. Commutative justice binds republics to keep their contracts — for instance to pay hired soldiers. Moreover, distributive justice applies to certain private acts as well, such as preparing testaments.[38] The last consideration disproves that distributive justice only deals with common goods.[39] Suárez also denied that the two types of justice respond to different kinds of equality. Commutative justice does sometimes require repayment according to proportion, for instance if an indebted person lacks the means to repay all creditors.[40]

Suárez concluded his critical analysis by highlighting a truly foundational difference between commutative and distributive justice: each governs different kinds of *iura*. Commutative justice deals with *ius in rem*, i.e. with property rights. Suárez emphasizes that these rights are strict and perfect ('perfectum et rigorosum').[41] Distributive justice, by contrast, deals with *ius ad rem*, i.e. with rights *to* things. *Ius ad rem* are wide and imperfect ('latum et imperfectum').[42] Grotius, too, linked distributive justice with so-called imperfect rights. But, as we shall see, he meant something rather different by 'imperfect'.



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35 *ID* 3.14.

36 These differences are discussed by J. Giers, *Die Gerechtigkeitslehre des jungen Suárez: Edition und Untersuchung seiner römischen Vorlesungen De iustitia et iure* (Freiburg im Breisgau, 1958), pp. 176–80. Schwartz highlights Suárez' denial that distributive justice essentially deals with proportionate equality in D. Schwartz, 'Suárez on Distributive Justice', pp. 166–8, 175.

37 *I&I* 4.3 [102].

38 *I&I* 4.3 [103].

39 *I&I* 4.3 [101]. By denying that distributive justice exclusively governs the allocation of *common* goods, Suárez incidentally precluded the standard Thomist way of distinguishing liberality from distributive justice. For Aquinas, liberality regulates handing out private goods, distributive justice common goods. Reinhardt, *Voices of Conscience*, pp. 140, 144–6.

40 *I&I* 4.3 [104]; also *ID* 3.7.

41 *I&I* 4.3 [105].

42 *I&I* 4.3 [105]: 'Quia ius hoc, de quo loquimur, non est perfectum et rigorosum — ut est in re propria vel quasi propria, quod ius est obiectum huius iustitiae commutativae — sed est latum et imperfectum ius ad rem communem aut tamquam commune.' Also *ID* 3.16.

The notion *ius ad rem* which Suárez tied to distributive justice derives from medieval canon law. It has been traced back to early thirteenth-century discussions on the nature of the right that elected but not yet instituted clergy have to church positions.[43] It was believed that elected clergy have an actionable claim to these positions before being installed — without, however, having a property right in them. *Ius ad rem* can be regarded as a right to actually receive the pledged office. Landau calls it 'eine Exspektanz auf eine bestimmte Pfründe, Dignität oder ein Kanonikat'.[44] Since the right to be handed the promised clerical position could neither be clearly localized in the thing itself, nor in the person petitioning for it, *ius ad rem* was construed as a separate right — a right to receive the *ius in rem*.[45]

It was this special kind of right, I contend, which Suárez made the object of distributive justice. Indeed, *Iustitia dei* explicitly discussed the kind of right elected church officials have to their pledged office. 'Those who are presented for a clerical benefit or position never have dominium, or its possession, or another equivalent thing as long as the other still has to give, yet if he is a worthy person, he has a kind of right to it.'[46] This shows, Suárez contended, that commutative and distributive justice deal with different claims, with diverging deontic statuses. The object of commutative justice is 'strict right in one's own goods', that of distributive justice '*ius ad rem*'.[47] Particular justice prohibits agents from denying others something to which they have a just title, regardless of whether that title is a *ius ad rem* or *ius in rem*.[48]

The distinction between *ius in rem* and *ius ad rem* recurs in *De legibus*. That text, we have seen, defines particular justice as 'the virtue that renders to every man his own right [*ius suum*], that is to say, the virtue that renders to



[43] P. Landau, 'Zum Ursprung des "Ius ad rem" in der Kanonistik', *Proceedings of the Third International Congress of Medieval Canon Law, Strasbourg 3–6 September 1968*, ed. S. Kuttner (Vatican City, 1971), pp. 81–102, esp. pp. 100–2; F. Gillmann, 'Zum Problem vom Ursprung des ius ad rem', *Archiv für katholisches Kirchenrecht*, 113 (1933), pp. 463–85.

[44] Landau, 'Zum Ursprung', p. 83.

[45] *Ibid.*, p. 96. The sin of *acceptio personarum* was likewise originally discussed in the context of distributing clerical benefices by Aquinas and his interpreters. Reinhardt, *Voices of Conscience*, pp. 139, 143, 155.

[46] *ID* 3.15: 'qui beneficium vel cathedram prætendit, nunquam habuit dominium, vel possessionem eius, vel alterius rei æquivalentis, quam pro altera dederit habet tamen, si sit digna persona, ius quoddam ad talem rem: quia secundum quandam æquitatem ei potius quam alteri tribuenda est'.

[47] *I&I* 4.5 [112]: 'vel illud ius est rigorosum et in re propria. Et sic virtus inclinans ad illam epieikeiam erit ipsa commutativa iustitia. Vel est ius ad rem seu bona communia distribuenda. Et sic erit iustitia distributiva. Vel est ius communitatis seu rei publicae. Et sic erit iustitia legalis.' For definitions of commutative justice, see *ID* 2.3; *ID* 3.14.

[48] *I&I* 4.3 [103].

every man that which belongs to him'.[49] Things can belong to a person in two ways, corresponding to the two main kinds of particular justice: 'a right *in* a thing and a right *to* a thing' [*ius in re*, *vel ad rem*].[50] 'For it is thus that the lord is said to have a right *in* the thing, and the worker is said to have a right *to* his wages, for which reason it is said that he is "worthy of his wages" '.[51] The worker has a right to be paid for performed services.

Suárez proceeds to define 'ius' in its strict sense as 'a certain moral power [facultas quaedam moralis] which every man has, either over his own property or with respect to that which is due to him'.[52] The kind of moral power expressed by *ius* is also called an *actio*: 'this right to claim [*actio*], or moral power, which every man possesses with respect to his own property or with respect to a thing which in some way pertains to him, is called *ius*'.[53] Contributors to the long-standing debate on the origin of modern 'subjective' rights have pointed out that the equation of *ius* with moral faculties and actionable claims is non-classical.[54] When Aquinas called *'ius'* the object of justice, he had in mind 'objective right' — 'the just thing itself' — not something a person *has*.[55] Much time has been spent examining and locating this apparent shift towards subjective rights. Yet the question of what any such shift meant for theories of justice has been all but neglected. This is remarkable since Suárez expressly claims that *ius* in its subjective sense — as an *actio* or *facultas moralis* — is 'the true object of justice'.[56]



[49] *DL* 1.2.5.

[50] *Ibid.*

[51] Citing Luke 10:7. *DL* 1.2.5: 'sic enim dominus rei dicitur habere jus in re, et operarius dicitur habere jus ad stipendium, ratione cujus dicitur dignus mercede sua' (my translation).

[52] *DL* 1.2.5: 'Et juxta posteriorem et strictam juris significationem solet proprie jus vocari facultas quaedam moralis, quam unusquisque habet, vel circa rem suam, vel ad rem sibi debitam.' Jean Gerson had defined *ius* in terms of *facultas* in his 1415 *De Potestate Ecclesiae* 13: 'ius est facultas seu potestas propinqua conveniens alicui secundum dictamen primae iustitiae'. Scholarship on the history of subjective rights is vast. Helpful texts include A. Brett, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (Cambridge, 1997); M. Koskenniemi, 'Empire and International Law: The Real Spanish Contribution', *The University of Toronto Law Journal*, 61 (1) (2011), pp. 1–36.

[53] *DL* 1.2.5: 'illa ergo actio, seu moralis facultas, quam unusquisque habet ad rem suam, vel ad rem as se aliquot modo pertinentem, vocatur jus, et illud proprie videtur esse objectum justitæ.'

[54] J. Finnis, *Natural Law and Natural Rights: Second Edition* (Oxford, 2011), pp. 206–7; B. Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law, 1150–1625* (Atlanta, 1997), pp. 303–4.

[55] Aquinas, *Summa Theologiae*, 2a.2ae.57.1–2.

[56] *DL* 1.2.5; also *DL* 2.17.2.

A pleonasm in English, the term 'subjective right' is dreadfully imprecise.[57] The notion does not carve out a single type of right. Nor is the sense in which right-holders 'have' rights fixed. I shall use the locution as short for '*ius* as a moral power or moral quality of persons'. But we should be aware that early modern philosophers put forward various conceptions of subjective rights, so understood.[58]

Suárez advanced what I shall call an *actionable* conception of individual rights.[59] Subjective *ius* essentially expresses a kind of 'dominion or quasi-dominion over a thing, that is, a claim [*actionem*] to its use'.[60] As he put it elsewhere, *ius* 'signifies a moral power of use: and this is ownership or quasi-ownership; for it may include an established right in holding a thing or a right to have a thing'.[61] The last quote could be read as identifying *ius in rem* with *dominium* and *ius ad rem* with quasi-*dominium*.[62] Whether or not this is correct, Suárez no doubt embraced a threefold extensional equivalence of *ius*, (quasi-)*dominium*, and actionable claims to the use of resources. This equation is not contravened by Suárez' claim that (quasi-)property rights in things are the exclusive object of commutative justice. For *ius ad rem* are never property rights *in* things; they rather express actionable titles *to receive* a right



[57] T. Mautner, 'How Rights Became "Subjective" ', *Ratio Juris*, 26 (1) (2013), pp. 111–32. John Austin blamed the Germans for introducing the confused idea of 'subjective right', calling it 'a grave offense against good sense and taste' in *The Province of Jurisprudence Determined*, ed. H.L.A. Hart (Indianapolis, 1998 [1832]), p. 287n.

[58] For illustration and further development of this point, see J. Olsthoorn, 'Grotius and Pufendorf', in *The Cambridge Companion to Natural Law Ethics*, ed. T. Angier (Cambridge, 2019), pp. 62–5.

[59] As Brett points out, Suárez also endorses a stronger thesis: every person stands 'in a relation of *dominium* to his own *dominium*', i.e. 'he has property in his rights' and can hence sell or alienate these rights. An *actionable* conception of *ius*, as I shall understand it, is a view of what subjective rights *are*; it does not entail a further claim about *how* we possess such rights. A. Brett, 'Individual and Community in the "Second Scholastic": Subjective Rights in Domingo de Soto and Francisco Suárez', in *Philosophy in the Sixteenth and Seventeenth Centuries: Conversations with Aristotle*, ed. C. Blackwell and S. Kusukawa (Aldershot, 1999), p. 163.

[60] *DL* 2.14.16: 'diximus enim jus aliquando significare legem; aliquando vero significare dominium, vel quasi dominium alicujus rei, seu actionem ad utendum illa'.

[61] *DL* 7.1.9: 'jus dupliciter dici: uno modo, de illo quod consistit in facultate utendi, quod est dominium, vel quasi dominium: nam potest includere jus in re, et ad rem, et generaliter dici potest jus dominii, vel quasi dominii, et ita in rigore spectat ad factum'. Also *DL* 2.17.2.

[62] That would be in line with the Italian civilian Bartolus (1313–57) who, it has been claimed, regarded rights to promised things as 'quasi-dominium'. H. Coing, 'Zum Eigentumslehre des Bartolus', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte — Romanistische Abteilung*, 70 (1) (1953), p. 366: 'der Verpfändung eines Rechtes, des *quasi dominium*'. On the scholastic background to the equivalence of *ius* and *dominium*, see Brett, *Liberty, Right and Nature*, esp. pp. 10–48.

in a thing.[63] The key point is that for Suárez, all subjective rights, understood properly as what is due to individuals as a matter of commutative or distributive justice, are actionable.

Distributive justice only governs those *iura ad rem* that are grounded in a person's dignity or merit.[64] Merit is no self-standing ground for *ius*, as the following example shows. If unbeknownst to me someone cultivates my garden, I am under no obligation of justice to reward their work: 'Otherwise someone would fall under obligation by the private will and action of somebody else, without his consent or the authority of law, which is absurd.' Had I previously agreed to hire them, then they *would* have an enforceable claim to their wages: 'therefore this promise is necessary for every merit of justice, and also among men'.[65] The actionable claims regulated by distributive justice thus depend on prior pacts.[66]

The last example may suggest that for Suárez distributive justice is non-comparative. Instead of dividing scarce resources among multiple candidates according to personal merit, it merely requires handing out pledged goods. That is not necessarily so: many pledges are indeterminate with respect to their beneficiaries. Pledged public prizes, for instances, must be awarded to the best candidate as a matter of distributive justice. When adjudicating a contested case, judges are likewise bound by distributive justice to compare the merits of the contenders' claims and to decide accordingly. 'For that is an act of distributive justice, in which the more worthy party is to receive the preference; and he is the more worthy party who enjoys the more probable right.'[67] In all such cases, the worthiest contender can *claim* the contested good as a matter of distributive justice: 'this is not a matter of proportion but of *right*; the right that the worthiest candidate has to the thing, in comparison to the less worthy'.[68] However, the claim to the prize (*ius ad rem*) is conditional on the earlier decision to institute the prize. The duties imposed by distributive justice are thus conditional. *If* one decides to hand out prizes or academic offices, *then* one must do so in accordance with the rules of distributive justice.[69] Distributive justice does not require that one distributes goods to begin with. This further sets it apart from virtues like charity and clemency, as well as from modern distributive justice.



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[63] *I&I* 4.3 [105]: 'in re propria vel quasi propria, quod ius est obiectum huius iustitiae commutativae'.

[64] Schwartz, 'Suárez on Distributive Justice', pp. 170, 179.

[65] Suárez, *Relectio de merito*, 18.12, quoted in Schwartz, 'Suárez on Distributive Justice', p. 172.

[66] Schwartz, 'Suárez on Distributive Justice', p. 173.

[67] Suárez, 'On Charity', in *Suárez: Selections from Three Works*, ed. T. Pink (Indianapolis, 2015), 13.6.2.

[68] *ID* 3.9, quoted in Schwartz, 'Suárez on Distributive Justice', p. 167.

[69] *I&I* 4.3 [104]; cf. *DL* 1.1.8.

In sum, distributive justice regulates actionable claims grounded in merit, although merit is no self-standing ground for a right: a prior tacit or explicit promise is required to make merit a ground for a right. What about taxation? As we have seen, *De legibus* discusses the three types of particular justice primarily in relation to legal validity. While Suárez' masterpiece reiterated the distinction between *ius in rem* and *ius ad rem*, these notions are not explicitly linked to commutative and distributive justice — unlike in his earlier works. Schwartz offers an intriguing suggestion as to how equitable taxation is theoretically accounted for by Suárez. According to Schwartz, the state incurs the obligation to allocate benefits and burdens fairly to its citizens in the original social contract.[70] The state's promise to govern equitably would thus provide citizens with certain rights to receive *distribuenda* grounded in their personal dignity.

Why did Suárez redefine the grounds of distributive justice, rejecting the standard Thomist ways of differentiating it from commutative justice? Schwartz plausibly cites soteriological considerations: distributive justice gives the virtuous no absolute claim to salvation, independent of God's previous salvific promise.[71] The redefinition also ensures that God can non-metaphorically be called just. Whatever his motivation, on Suárez' parsimonious account, both commutative and distributive justice respond to actionable claims. This, in turn, permitted the Jesuit to make strict *ius*, understood as a moral power, the exclusive object of particular justice — thus successfully incorporating a subjective and actionable conception of *ius* into his typology of justice. Suárez indirectly grounded *ius ad rem* in personal merit, rendered effectual by a prior promise. His was therefore not a modern conception of distributive justice in Fleischacker's sense: distributive justice does not by itself generate entitlements. Yet since it does govern enforceable claims to resources, Fleischacker's grand narrative requires some tweaking. Indeed, we shall see that Fleischacker's account of pre-modern distributive justice is overly reliant on post-Grotian conceptual developments.



## II
## Hugo Grotius

Commentators strongly disagree about whether Grotius' classification of rights and justice departs from Suárez'. According to Haakonssen, the Dutchman badly disguised his 'breach with tradition'.[72] Tierney, on the other hand, claims that Grotius' 'tripartite understanding of *ius* . . . is precisely what we

[70] Schwartz, 'Suárez on Distributive Justice', pp. 174–6.

[71] *Ibid.*, pp. 172–3.

[72] K. Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (Cambridge, 1996), p. 26.

find in Suarez'.[73] This section highlights a significant difference between Suárez' and Grotius' philosophies of right, expressed in their sharply diverging conceptions of distributive justice.

Suárez, we have seen, made *ius* — equated with *'actio, seu moralis facultas*' — the object of both commutative and distributive justice.[74] While recognizing various kinds of *actio* and *dominium* (in particular: *ius in rem* vs *ius ad rem*), all subjective rights are in the end faculties or powers that individuals have over or to things. Every subjective right is thus an actionable claim. For Grotius, by contrast, not every *ius* vested in a person is a moral power or actionable claim. Hence the striking omission of the term *'facultas'* in his definition of subjective right: 'a *moral Quality* annexed to the Person, enabling him to have, or do, something justly'.[75] For Grotius, faculties are one type of subjective rights, namely *perfect* moral qualities. The other type are *imperfect* moral qualities, or 'aptitudes'. Aptitudes express neither legal claims nor forms of ownership. Since they are nevertheless a type of subjective *ius*, it follows that Grotius does *not* have an actionable conception of subjective rights. The suggestion that Grotius' account of subjective rights is copied 'straight from' Francisco Suárez and earlier Spanish scholastics should therefore be rejected.[76] This section argues that Grotius used his new distinction between perfect and imperfect rights to revolutionize thinking about distributive justice.

Grotius adopted the scholastic identification of faculties with strict *ius* [*ius proprie aut stricte*]. Yet he proceeded to reinterpret the meaning of this notion: 'Civilians call a *Faculty* that Right which a Man has to his *own*; but we shall hereafter call it a *Right properly, and strictly taken*'.[77] Strict *iura* (perfect rights) come in three different types: *potestas*, *dominium* and *creditum*. *Potestas* includes both rights over ourselves (i.e. liberty) and rights over others. *Dominium* covers all sorts of property titles — including those that do not

[73] Tierney, *Idea of Natural Rights*, p. 326. Also e.g. D. Recknagel, *Einheit des Denkens trotz Konfessioneller Spaltung: Parallelen zwischen den Rechtslehren von Francisco Suárez und Hugo Grotius* (Frankfurt am Main, 2010), pp. 62, 67, 100. Terence Irwin argues that Grotius' natural law theory is substantially similar to that of Suárez; he does not, however, examine the originality of Grotius' theory of rights and justice. T. Irwin, *The Development of Ethics, Volume II: From Suarez to Rousseau* (Oxford, 2008), pp. 88–99.

[74] *DL* 1.2.5.

[75] *DIBP* 1.1.4: 'quo sensu ius est Qualitas moralis personae competens ad aliquid iuste habendum vel agendum'.

[76] A. Brett, 'Natural Right and Civil Community: The Civil Philosophy of Hugo Grotius', *The Historical Journal*, 45 (1) (2002), p. 38, also p. 34. Also Tierney, *Idea of Natural Rights*, p. 326.

[77] *DIBP* 1.1.5. In 1615, Grotius still called *ius* a 'moral faculty over a thing . . . that is, I have ownership over it or use or something similar' (*DML* 107). Cf. *ISP* 5.11: ' "Ius" hic vocamus facultatem moralem, quam iustitia specialis considerat, quale est dominium, imperium, ius habendae servitutis, ius activum obligationis.'

presuppose ownership, such as tenancies and servitudes. *Creditum*, finally, is 'the Faculty of demanding what is due'.[78] 'For he to whom any Thing is due, hath a Right against him from whom it is due'.[79] *Creditum* thus seems to capture the idea of *ius ad rem*.

Overlooking Grotius' reinterpretation, many commentators wrongly equate *facultas* with 'one's suum'.[80] Grotius had good reason to reject the civilian's narrow definition of *facultas* as 'that Right which a Man has to his *own*'.[81] The Dutch jurist denied, for instance, that the right of jurisdiction (*imperium*) presupposes ownership.[82] The right to punish is another perfect moral quality not owned by the person to whom it annexes. In the 1617 *De satisfactione*, Grotius argued at length that the 'right of punishment in the ruler is neither the right of absolute ownership nor a personal right.'[83] He proffered two main reasons for this. First, one possesses the right to punish for the sake of the community, not for one's personal welfare (as is the case for *dominium* and *creditum*). It follows, second, that right-holders lack the discretion to choose whether or not to exercise their *ius puniendi* — a freedom that individuals do have with respect to what is properly their own.[84] Nor, significantly, do we own the things we can in strictness demand from others (*creditum*).[85] Grotius, I contend, subsumed *creditum* under *facultas* to ensure that all actionable rights fall under the category of perfect rights. This allowed him to introduce a second basic category of subjective rights, of essentially non-actionable rights.

Such imperfect moral qualities are called 'Aptitude or Merit, which doth not contain in it a Right strictly so called, but gives Occasion to it'.[86] Imperfect rights express one's *worthiness* to receive a perfect right; they denote that it is *fitting* or *proper* for you to be accorded something. To have an imperfect right to amnesty, for instance, means that the world would be morally better for you to receive reprieve. At the same time, however, you cannot *claim* amnesty as your due. Imperfect rights do not entail the distinct moral authority to demand whatever one is worthy to receive. Grotius therefore said that perfect rights stand to imperfect ones as actual stands to potential in natural things.[87] Aptitudes, the Dutchman lamented,



[78] *DIBP* 1.1.5.

[79] *DIBP* 2.20.2.2.

[80] E.g. K. Olivecrona, 'The Concept of a Right according to Grotius and Pufendorf', in K. Olivecrona, *Law as Fact* (London, 2nd edn., 1971), pp. 275–96.

[81] *DIBP* 1.1.5.

[82] *DML* 127–30; *DIBP* 2.3.13, 15.

[83] *DS* 2.16; also *DS* 2.4, 5.15.

[84] *DS* 2.16, 2.22; also *DIBP* 2.20.23.

[85] Finnis, *Natural Law*, p. 207, underlines the originality of Grotius' conception of *creditum* as a kind of *facultas*.

[86] *DIBP* 2.20.2.2.

[87] *DIBP* 1.1.4.

> many both of the Ancients and Moderns take to be a part of Right properly and strictly so called; when notwithstanding that Right, properly speaking, has a quite different Nature, since it consists in leaving others in quiet Possession of what is already their own, or in doing for them what in Strictness they may demand.[88]

Quintessential to imperfect rights is that they entail no 'Right to any other over us'.[89] Imperfect rights are unenforceable in court and in the extra-judicial process of war.[90] Moreover, failure to properly respect such rights does not warrant punishment[91] and damage done by their violation does not need to be repaid: 'from a mere Aptitude or Fitness, which is improperly called a Right . . . arises no true Property, and consequently no Obligation to make Restitution; because a Man cannot call that his own, which he is only capable of, or fit for'.[92]

What about justice? Grotius rejected the two standard criteria for distinguishing commutative and distributive justice (arithmetic vs geometric equality; private vs communal orderings). Like Suárez, he held that the two types of justice essentially differ with respect to 'the Matter, about which it is conversant'.[93] Commutative justice governs perfect rights (faculties). Since such rights are exactable, Grotius preferred the name 'expletive justice' or 'Justice properly and strictly taken'.[94] Expletive justice 'consists wholly in abstaining from that which is another Man's'. Injustice, in turn, 'consists in nothing, else, but in the usurpation of what belongs to another'.[95] As noted, not every perfect right expresses a right of personal possession (*suum*). The right to punish, for instance, falls under expletive justice although it does not refer to something we 'own'. Since the duty of restitution only applies to what is properly our own, it follows that not every violation of expletive justice triggers this duty.

Distributive justice, relabelled 'attributive justice', Grotius claimed governs imperfect rights (aptitudes): '*Attributive Justice*, stiled by *Aristotle Distributive*, respects Aptitude or *imperfect Right*, the attendant of those Virtues that are beneficial to others, as Liberality, Mercy, and Prudent Administration

[88] *DIBP* Prol.10.
[89] *DIBP* 2.11.3.
[90] *DIBP* 2.22.16, 2.25.3.4.
[91] *DIBP* 2.20.20.1.
[92] *DIBP* 2.17.3.1; also *DIBP* 2.17.9.
[93] *DIBP* 1.1.8.1; also *DIBP* 2.20.2.
[94] *DIBP* 1.1.7.
[95] *DIBP* Prol.45: 'cum tamen iniustitia non aliam naturam habeat quam alieni usurpationem'. Also e.g. *DIBP* 2.12.9.2.

of Government.'[96] This passage raises an interpretive question. Is distributive justice a separate virtue, that happens to track the same imperfect rights as virtues like liberality and mercy do? Or do these last virtues rather fall under distributive justice? Pufendorf opted for the first reading: 'For this reason *Grotius* calls *Attributive* Justice the companion of those Virtues which tend to the Benefit and Advantage of others, as Liberality, Mercy, Humanity, and the like. For these Dues Men receive only by Imperfect Right'.[97] Grotius' editor Jean Barbeyrac favoured the second: 'the Justice in question regulates the Exercise of those Virtues, which consists in doing such Things in favour of others, as cannot in Rigour be demanded'.[98]

Three considerations support Barbeyrac's reading. First, the idea of secondary virtues annexed to justice was not exceptional. It can be found, for instance, in Aquinas.[99] Second, Grotius did not individuate expletive justice by any particular habit-formed disposition inducing us to abstain from committing injustices.[100] The passions prompting unjust actions are likewise many: 'the very Nature of Injustice consists in nothing else, but in the usurpation of what belongs to another; nor does it signify, whether it proceeds from Avarice, or Lust, or Anger, or imprudent Pity, or Ambition'.[101] By parity of reasons, distributive justice can be regarded as the general norm ordering respect for imperfect rights. Third, it is unclear what distributive justice would consist in for Grotius if it were an independent virtue, distinct from 'distributive' virtues such as liberality and prudent administration of government. After all, for Grotius, the unique distinguishing feature of distributive justice is its object: imperfect rights.[102] But that criterion does not suffice to distinguish it from charity and liberality, which prescribe giving away rights to people who deserve but cannot claim them.[103] Whether or not Barbeyrac's reading is correct, these three considerations have arguably induced subsequent theorists to associate or even identify distributive justice with virtues like charity (*infra*).



[96] *DIBP* 1.1.8.1: 'aptitudinem respicit Attributrix quæ Aristoteli *dianemetikē*, comes earum virtutum quæ alijs hominibus utilitatem adferunt, ut liberalitatis, misericordiæ, providentiæ rectricis.' Also *DIBP* 2.17.3.1.

[97] Samuel Pufendorf, *Of the Law of Nature and Nations*, trans. B. Kennett (London, 1729 [1672]), 1.7.11.

[98] *DIBP* 1.1.8.1n.

[99] E.g. Aquinas, *Summa Theologiae*, 2a.2ae.80.1. See P. Haggenmacher, 'Droits Subjectifs et Systèmes Juridiques chez Grotius', in *Politique, Droit et Théologie chez Bodin, Grotius et Hobbes*, ed. L. Foisneau (Paris, 1997), p. 126.

[100] J.B. Schneewind, 'The Misfortunes of Virtue', *Ethics*, 101 (1) (1990), pp. 46–8.

[101] *DIBP* Prol.45.

[102] *DIBP* 1.1.8.1.

[103] Perhaps distributive justice differs from other 'distributive' virtues in being essentially comparative, always involving multiple prospective beneficiaries whose respective merits must be weighed against another.

Grotius developed his innovative, dualist theory of subjective rights to explain which moral faults justify coercive responses. *The Rights of War and Peace* offers a systematic account of the just causes for war, dissevered from jurisdictional authority. Grotius postulated a single foundational moral principle governing the permissible use of force: 'Right reason . . . does not prohibit all Manner of Violence, but only that which is repugnant to Society, that is, which invades another's Right'.[104] Conversely, only violations of perfect rights can be just causes for defensive war. What constitutes a ground for legal proceedings within the state, makes for *casus belli* outside it: 'as many *Sources* as there are of *judicial* Actions, so many *Causes* may there be of *War*'.[105] In conjunction with this judicialization of the just causes of war, Grotius' conceptualization of perfect moral qualities (*facultas*) as essentially actionable rights produced a clear and parsimonious account of which moral wrongs justify resort to force.[106]

Failures to respect imperfect rights never entitle those thereby disadvantaged to use compulsion:

> if a Man owes another any Thing, not in Strictness of Justice but by some other Virtue, suppose Liberality, Gratitude, Compassion, or Charity, he cannot be sued for it in any Court of Judicature, neither can War be made upon him on that Account; for to either of these it is not sufficient, that that which is demanded ought for some moral Reason to be performed, but besides it is requisite we should have some Right to it.[107]

Though never warranting compulsion, the exercise of virtues corresponding to imperfect rights and distributive justice is nevertheless sometimes obligatory: 'It happens in many Cases, that we may lay ourselves under an Obligation, and at the same Time give no Right to any other over us, as appears in the Duties of Compassion and Gratitude'.[108] Nor are only perfect rights 'owed'. Alms are 'due' to the poor even though they lack the right to coerce derelict almsgivers. Perfect and imperfect rights rather capture two distinct ways in which things can be owed or due. 'Due, not according to expletive or rigorous Justice [*non ex iure expletorio*], but Κατ ἀξίαν, *By way of Decency and Fitness*'.[109]

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[104] *DIBP* 1.2.1.3: 'Recta autem ratio ac natura societatis . . . non omnem vim inhibet, sed eam demum quae societati repugnat, id est quae jus alienum tollit.'

[105] *DIBP* 2.1.2.1.

[106] On the structure of Grotius' just war theory and the place of perfect and imperfect rights in it, see J. Olsthoorn, 'Grotius and the Early Modern Tradition', in *The Cambridge Handbook of the Just War*, ed. Larry May (Cambridge, 2018), pp. 33–56.

[107] *DIBP* 2.22.16.

[108] *DIBP* 2.11.3. Also e.g. *DIBP* 2.5.3; *DIBP* 2.7.4.1; *DIBP* 2.14.6.1; *DIBP* 2.25.3.3–4. For further discussion, see J. Olsthoorn, 'Grotius on Natural Law and Supererogation', *Journal of the History of Philosophy*, 57 (3) (2019), pp. 439–65.

[109] *DIBP* 2.7.10.1; also *JH* 3.1.6–7.

Aptitudes, it bears stressing, are a kind of subjective *ius* for Grotius: they allow agents to have something 'justly'. O'Donovan argues that this complicates Grotius' theory of distributive justice. Distributive justice was traditionally seen as allocating to citizens both benefits and burdens (fiscal, military, etc.). Grotius' theory seems to imply, paradoxically, that citizens have an imperfect right to their share of these burdens. O'Donovan considers this absurd. He therefore maintains that Grotian distributive justice only deals with division of *benefits*.[110] Grotius indeed associated distributive justice with 'those Virtues that are *beneficial* to others'.[111] However, aptitudes also pertain to just punishment: 'when we say that Punishment is due to any one, we mean no more than that it is fit he should be punished'.[112] The criminal is *worthy* of punishment: he possesses an imperfect moral quality expressing that it would be just for him to receive punishment. Grotian aptitudes denote that it is morally fitting for a person to receive something, rather than what they can claim as of right (at their own discretion). This interpretation, if correct, suggests that Grotius' conception of subjective rights is less individualistic than is often claimed. *Pace* neo-Thomists like Villey and Finnis, early modern subjective rights are not necessarily conceived in opposition to what is objectively right and just.[113]

We can now see that Suárez' and Grotius' conceptions of imperfect rights are radically different. For Suárez, imperfect rights are actionable claims (*ius ad rem*) which worthy persons have to receive pledged goods (in virtue of a prior promise). For Grotius, having an imperfect right to something signifies nothing else than being worthy to receive it. The two thinkers agree that failing to allocate resources according to merit violates distributive justice. Moreover, both consider such a misallocation unjust in virtue of contravening the imperfect right of the worthiest person. Yet only Suárez holds that this misallocation *wrongs* the latter, as only on his conception do imperfect rights generate grounds for legal proceeding (entitling the right-holder to sue to obtain the goods due to her).

I have argued that Grotius revolutionized the received Aristotelian typology of justice by incorporating within it a substantively new distinction between perfect and imperfect rights. These innovations are not found in Grotius'

[110] O. O'Donovan, 'The Justice of Assignment and Subjective Rights in Grotius', in *Bonds of Imperfection: Christian Politics, Past and Present*, ed. O. O'Donovan and J.L. O'Donovan (Grand Rapids MI, 2004), p. 186.

[111] *DIBP* 1.1.8.1, emphasis added.

[112] *DIBP* 2.20.2.2.

[113] Knud Haakonssen makes a similar point more strongly in 'The Moral Conservatism of Natural Rights', in *Natural Law and Civil Sovereignty: Moral Right and State Authority in Early Modern Political Thought*, ed. I. Hunter and D. Saunders (Basingstoke, 2002), pp. 28–34. Haakonssen arguably overstates his non-individualistic reading of Grotius on rights. Property rights (*dominium*) *are* individualistic in the sense that their validity is largely independent of 'proper' or 'objectively right' use.

earliest work on jurisprudence, the juvenile *De iure praedae* (1604–8).[114] That treatise, from which only the twelfth chapter was published in Grotius' lifetime (under the title *Mare liberum* in 1609), contains, in Tuck's words, a 'straightforwardly Aristotelian account' of distributive justice:[115]

> distributive justice allots public possessions to various owners on a comparative basis of individual merit, and assigns duties and burdens to the various citizens in accordance with the strength of each. Corrective justice [*iustitia commutatrix*], on the other hand, is concerned not only with the preservation of equality among individuals, but also with the bestowal of appropriate honours and rewards upon deserving patriots, and with the punishment of persons who are injuring the community.[116]

*De iure praedae* highlights three conventional differences between distributive and commutative justice. The two norms entail two kinds of equality, govern different social orderings, and only distributive justice is comparative in nature.[117] In claiming that commutative justice regulates division of public honours, Grotius was weighing in on a long-standing dispute: does criminal justice fall under commutative or distributive justice? This question is addressed anew in *The Rights of War and Peace*. Grotius argued there again, albeit on rather different grounds, that punishment belongs to expletive justice.[118] Crucially, *De iure praedae* makes no attempt to differentiate forms of justice by the kind of rights they regulate. Its discussion of justice is fairly traditional and includes an endorsement of the peripatetic 'doctrine of the mean' — ridiculed in *The Rights of War and Peace* as Aristotle's 'Principle of Mediocrity'.[119]



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[114] On its composition history, see M. van Ittersum, 'Dating the Manuscript of *De Jure Praedae* (1604–8): What Watermarks, Foliation and Quire Divisions can tell us about Hugo Grotius' Development as a Natural Rights and Natural Law Theorist', *History of European Ideas*, 35 (2) (2009), pp. 125–93.

[115] R. Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge, 1979), p. 60. In a later work, Tuck glosses *De iure praedae*'s typology of justice rather differently: 'Grotius, very extraordinarily in the eyes of contemporary Aristotelians, insisted that these distinctions were misleading: universal justice should be regarded as the commutative justice of the Aristotelian tradition, and particular justice was solely distributive justice.' R. Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford, 1999), p. 88.

[116] *DIP* 37, also *DIP* 28–9, 116, 208.

[117] *DIP* 28–9.

[118] *DIBP* 2.20.2. Cf. J.S. Geddert, 'Beyond Strict Justice: Hugo Grotius on Punishment and Natural Right(s)', *The Review of Politics*, 76 (4) (2014), pp. 559–88; A. Blom, 'Owing Punishment: Grotius on Right and Merit', *Grotiana*, 36 (2015), pp. 3–27.

[119] *DIBP* Prol.45. *DIP* P12. Cf. A. Blom, 'Grotius and Aristotle: The Justice of Taking Too Little', *History of Political Thought*, 36 (1) (2015), pp. 84–112. Straumann claims that Grotius tweaks the Aristotelian classification in *De iure praedae* by interpreting corrective justice along the lines of Roman law doctrines of property and legal obli-

Despite its lengthy discussion of divine justice and the right to punish, and its copious quotations from Suárez' 1599 *De iustitia*, Grotius' 1617 theological treatise *De satisfactione* does not contain anything like the 'faculties vs aptitudes'-distinction either. *De imperio summarum potestatum*, written in the same year, does contrast *ius* and *aptitudo* — albeit to make a slightly different point: 'fitness to judge [*aptitudinem iudicandi*] must not be confounded with the right [*iure*] of public judgement . . . things are not so that the most fit person possesses this right, or that someone who is not fit for it loses the right'.[120] One does not acquire a right merely in virtue of being the one best capable of exercising it; conversely, misusing a right does not entail its forfeiture. *De imperio summarum potestatum* frequently returns to the distinction between having a right and its proper use.[121]

Grotius first defined particular justice in terms of individual rights in the *Jurisprudence of Holland*, written while imprisoned in Loevenstein Castle in 1619–20 and first published, in Dutch, in 1631. In that text, Grotius differentiated commutative and distributive justice in terms of property [*toebehooren*] and merit [*waerdigheid*]: 'Of the justice which has regard to right, narrowly understood, the kind which takes account of merit is called "distributive justice"; the other kind which gives heed to property is called "commutative justice".'[122] Merit is defined as 'the fitness of a reasonable being for any object of desire', while '[p]roperty means that something is called ours'.[123] The kind of justice which pertains to merit, Grotius suggested intriguingly, is subject to public law.[124] Unfortunately, despite repeated promises to the contrary, the *Jurisprudence* contains no further discussion of either public law or merit.

The text does include a fine-grained analysis of the concept of property [*toebehooren*]. Instead of *The Rights of War and Peace*'s tripartite division between *potestas*, *dominium* and *creditum*, the *Jurisprudence* favours a bifurcation between real rights [*beheering*] and personal ones [*inschuld*].[125] Real rights are equated with *ius in rem*: 'a right of property existing between a man and a thing without necessary relation to another man'.[126] It includes



gations. B. Straumann, *Roman Law in the State of Nature: The Classical Foundations of Hugo Grotius' Natural Law*, trans. Belinda Cooper (Cambridge, 2015), pp. 123–4.

120 *ISP* 5.14.

121 E.g. *ISP* 6.1, 7.11, 8.2, 10.28.

122 *JH* 1.1.10. The terms 'commutative' and 'distributive justice' are cited in the marginalia. The *Jurisprudence* still maintains that 'the first employs the rule of proportion, the second the rule of simple equality' (*JH* 1.1.10).

123 *JH* 1.1.7–8; also *JH* 2.1.57–60.

124 *JH* 1.11.10, 2.1.57.

125 *JH* 2.1.57.

126 *JH* 2.1.58.

*dominium* and quasi-*dominium*,[127] as well as rights over ourselves.[128] Personal right — *jus in personam sive creditum* — covers both *creditum* and *potestas* over others (whether originating in consent or in crime). A personal right 'is a right of property which one man has against another entitling the first to receive from the second some thing or act'.[129] Paradoxically, for Grotius, personal rights are thus property titles without being *ius in rem*.

The category of personal rights (*creditum*) captures some of Suárez' *ius ad rem*.[130] Rights to pledged offices qualify as personal rights: 'not that personal right gives ownership, complete or incomplete, or possession, but it gives the right to demand from a person the ownership or free possession; and in that case the duty is termed an obligation to give'.[131] Unfortunately, Grotius did not explicitly address the question of what kind of right, if any, the best contender has to a public prize. For Suárez, the failure to award the prize to the most suitable candidate violates distributive justice and the candidate's *ius ad rem*. By contrast, for Grotius, not to make good on a promise that conveys a right contravenes expletive justice. Distributive justice does require allocating *distribuenda* according to merit (aptitudes). But merely being worthy to receive a right, although a subjective moral quality, never generates actionable claims.

It is sometimes claimed that Grotius reduced distributive justice to Aristotelian universal justice: 'the "rights" protected by Aristotle's universal justice were imperfect and mere "aptitudes" (i.e. such as is "fitting" or "suitable")'.[132] The *Jurisprudence* disproves this reading. It distinguishes between right in a wide and a narrow sense. The latter includes both faculties and aptitudes:

> Just is what corresponds with right. Right is understood widely or narrowly. Right widely understood is the correspondence of the act of a reasonable being with reason, in so far as another person is interested in such act. Right,

[127] *JH* 2.1.60, 2.3.9–11.

[128] *JH* 2.1.42.

[129] *JH* 2.1.59, 3.1.1.

[130] Van Warmelo notes that canon lawyers employed *ius ad rem* to denote a personal right (*ius in personam*), while 'at a later stage, the distinction between *jus in re* and *jus ad rem* was understood to signify the difference between ownership . . . and the other real rights less than ownership'. P. Van Warmelo, 'Real Rights', *Acta Juridica*, 84 (1959), pp. 85–6.

[131] *JH* 3.1.13.

[132] K. Haakonssen, 'Hugo Grotius and the History of Political Thought', *Political Theory*, 13 (2) (1985), p. 254. Also e.g. Fleischacker, *Short History*, p. 22; Blom, 'Grotius and Aristotle', p. 94. Geddert likewise assigns to distributive justice a much wider meaning than is textually warranted, in part by loosening its link with imperfect rights. On his complex yet Procrustean reading, attributive justice 'points toward what is honourable, which includes all the virtues'. J.S. Geddert, *Hugo Grotius and the Modern Theology of Freedom: Transcending Natural Rights* (New York, 2017), p. 47, also pp. 46–57.

> narrowly understood, is the relation which exists between a reasonable being and something appropriate to him by *merit or property*.[133]

'The justice which has regard to right, widely understood', Grotius explained, 'is termed by learned men either "universal justice" . . . or "legal justice" '. Universal justice 'comprises virtuous acts of every kind, but in a particular aspect, namely so far as the same serve to maintain any society of men'.[134] The justice which has regard to right narrowly understood includes both distributive and commutative justice.[135] The distinction between particular and universal justice recurs in *The Rights of War and Peace* — notwithstanding Pufendorf's claim to the contrary.[136] I conclude that distributive justice remains a distinct form of particular justice for Grotius. But his reinterpretation of particular justice by means of the distinction between perfect and imperfect rights did raise questions about the status of distributive justice for later moral philosophers.

## Conclusion

Suárez and Grotius, I have argued, both grappled with the same problem. How to incorporate subjective rights into a theory of justice? More specifically, can commutative and distributive justice be differentiated by the subjective rights they govern? This paper has argued that the two arrived at divergent solutions. Suárez, for whom all subjective rights are actionable, argued that distributive justice governs *ius ad rem* — actionable claims to pledged resources. Grotius subsumed such personal rights under commutative justice, extending the meaning of 'perfect rights' to cover rights that are not rights of ownership along the way. In addition, he introduced a second type of subjective right — *aptitudes* — to correspond to distributive justice.

Grotius' solution carried the day — shaping Fleischacker's claims about the nature of 'pre-modern distributive justice'. The distinction between perfect rights, governed by justice, and imperfect rights, regulated by distributive justice, was hugely influential in the early modern period. It was taken up by almost all the major natural law theorists (Pufendorf, Cumberland, Leibniz) as well as by the main eighteenth-century moral theorists (from Hutcheson to Adam Smith). 'Grotius's handling of this Aristotelian distinction', Haakonssen writes, 'was to determine the modern debate . . . what we see is that Grotius's

[133] *JH* 1.1.2–6, emphasis added.

[134] *JH* 1.1.9.

[135] *JH* 1.1.10.

[136] *DIBP* 2.23.13.1: 'Justice is taken in a Particular Sense, or in that general Signification under which are comprehended all Sorts of Rectitude'. Also *DIBP* 1.1.9. Cf. Pufendorf, *Of the Law of Nature and Nations*, 1.7.11: '*Grotius*'s Opinion concerning Justice, which he, neglecting the usual Distinction of *General* and *Particular*, divides into *Expletive* and *Attributive*'.

theory of rights sharpens the division between justice and other virtues.'[137] Grotius' restrictive conception of expletive justice, as dealing exclusively with what we can properly call our own, reverberates, for instance, in Locke ('where there is no property there is no injustice') and Pufendorf ('Justice only is done to a Man, which in his own right he could have *demanded*').[138]

At the same time, Grotius' linkage of distributive justice to imperfect rights created long-lasting conceptual confusion about the status of distributive justice. How to differentiate distributive justice from other virtues that respond to imperfect rights, such as beneficence and liberality? Indeed, for some it was unclear whether distributive justice was a form of justice at all. Early modern natural lawyers increasingly associated, or even identified, distributive justice with 'distributive' virtues like charity, equity and beneficence. Hobbes, for instance, subsumed distributive justice under equity;[139] and according to Leibniz, distributive justice is better called 'equity, or if you prefer charity':

> and this I extend beyond the rigor of strict right to include those obligations which give to those whom they affect no ground for action in compelling us to fulfil them, such as gratitude and alms-giving — to which, as Grotius says, we do not have an enforceable claim but only an aptitude . . . It is, then, here that distributive justice belongs.[140]

Other philosophers went even further and equated distributive justice with Aristotle's universal justice. Gershom Carmichael, who introduced protestant natural jurisprudence to Scottish universities, explained that '[t]he justice which inclines men to imperfect duties is called *universal*; Grotius calls it *attributive*; it embraces all the other virtues which pertain to other men'.[141] Adam Smith shared this mistaken interpretation of Grotius: 'distributive justice . . . consists in proper beneficence, in the becoming use of what is our own, and in the applying it to those purposes either of charity or generosity, to



[137] Haakonssen, 'Hugo Grotius', pp. 254–5.

[138] John Locke, *An Essay Concerning Human Understanding*, ed. P.H. Nidditch (Oxford, 1975), 4.3.18. Samuel Pufendorf, *The Whole Duty of Man*, ed. I. Hunter and D. Saunders (Indianapolis, 2003), 1.2.14.

[139] Thomas Hobbes, *Leviathan*, ed. N. Malcolm (3 vols, Oxford, 2012), 15.3, 15.14–15. J. Olsthoorn, 'Hobbes's Account of Distributive Justice as Equity', *British Journal for the History Philosophy*, 21 (1) (2013), pp. 13–33.

[140] G.W. Leibniz, *Political Writings*, ed. P. Riley (Cambridge, 2nd edn., 1988), p. 172.

[141] Gershom Carmichael, *Natural Rights on the Threshold of the Scottish Enlightenment: The Writings of Gershom Carmichael*, ed. J. Moore and M. Silverthorne (Indianapolis, 2002), 1.4.

which it is most suitable, in our situation, that it should be applied. In this sense justice comprehends all the social virtues'.[142]

A third group of thinkers preferred to discard the Grotian classification of rights and justice altogether: 'Grotius's division of right into perfect and imperfect is not that helpful. For all right is perfect, and an imperfect right does not have injury as its opposite', Thomasius wrote.[143] '[W]e would feel even happier if we could do without the Aristotelian division of justice, which is more suited to torturing minds than to educating them'.[144]

This brief overview amply attests, I trust, that the yet-to-be-written reception history of Grotius' theory of rights and justice should be of some interest. That history may well further complicate Fleischacker's account of pre-modern ideas of distributive justice. This article has revealed that two such 'pre-modern' philosophers, Suárez and Grotius, arrived at startlingly different views about the nature of distributive justice and the rights it governs, despite considerable underlying theoretical agreement. My analysis, however limited in scope, has suggested moreover that Grotius' association of distributive justice with unenforceable imperfect rights ('worthiness') was a conceptual rupture of some momentum.

*Johan Olsthoorn*
UNIVERSITY OF AMSTERDAM
FWO-FLANDERS/KU LEUVEN



[142] Adam Smith, *The Theory of Moral Sentiments*, ed. D.D. Raphael and A.L. Macfie (Indianapolis, 1982), 7.2.1.10. Also e.g. Johann Gottlieb Heineccius, *A Methodological System of Universal Law*, ed. T. Ahnert and P. Schröder (Indianapolis, 2008), 1.4.118.

[143] Christian Thomasius, 'Foundations of the Law of Nature and Nations', in *Institutes of Divine Jurisprudence*, ed. T. Ahnert (Indianapolis, 2011), 1.5.23.

[144] *Ibid*., 1.1.106, also 3.7.4.