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The Right to Access to Justice: Its Conceptual Architecture

DANIEL BONILLA MALDONADO*

The right to access to justice is a global issue—both theoretically and practically. From a theoretical perspective, the right to access to justice is a central component of the web of concepts that constitutes the modern State. This right, along with principles like separation of powers, legality, and liberty—and rights like the rights to vote, equality, and expression—form a central part of the modern legal and political imagination.¹ These categories shape the axes that construct the horizon of understanding that subjects committed to enlightened modernity are implicitly or explicitly immersed. These categories are also the lenses through which the legal and political world is constructed and interpreted by subjects committed to enlightened modernity. The right to access to justice occupies a central place in this horizon of understanding: it makes explicit the reason why abstract, autonomous, rational subjects create the State and conceive of the core function that it should fulfill, this is, resolving conflicts between individuals and keeping the peace.² This right is generally understood as the capacity of all members of a political community to call upon the State to solve their differences impartially and efficiently.³

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2. See infra Section I. For an analysis of the aims of the right to access to justice, see DEBORAH L. RHODE, ACCESS TO JUSTICE 5-7 (2004).

3. Cappelletti has defined access to justice in the following terms: "The right of effective 'access to justice' has emerged with the new social rights. Indeed, it is of paramount importance ... Effective access to justice can be seen as the most basic requirement, the most basic human right, of a system which purports to guarantee legal rights." Jon Robins, Access to Justice is a Fine Concept. What Does it Mean in View of Cuts to Legal Aid?, THE GUARDIAN (Oct. 5, 2011, 19:04 EDT), https://www.theguardian.com/law/2011/oct/06/access-to-justice-legal-aid-cuts. In his 1978 book series, Cappelletti and Garth argue that access to justice has had three stages: in the first, access to justice meant the right to have a day in court; in the second, access to justice also meant strategic litigation of structural social problems, and in the third, it meant alternative methods for

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From a practical perspective, all modern liberal democracies face numerous challenges for the realization of the right to access to justice. The realization of this right is, therefore, a transnational problem. As mentioned in the introduction to this special issue: class, epistemological, and legal services market inequalities generate the access to justice deficit that all contemporary liberal democracies face in varying degrees. Although the specific characteristics of this deficit might differ, all liberal democracies have a gap between the normative and the descriptive dimensions of the right to access to justice. All of them are troubled by socioeconomic and knowledge inequalities that impede its materialization. All of them are burdened by the monopoly that lawyers usually have over the legal services market that put into question the efficacy of the right to access to justice.

In order to understand the characteristics and causes of these practical challenges, and the relevance that the right to access to justice has in the modern legal and political imagination, we must first comprehend its conceptual architecture. The way modern liberal democracies imagine the structure of this right determines, at least in part, the challenges they face for its realization. Paradoxically, when the right to access to justice is examined, the theoretical dimensions of the right are often not explored, and its foundations or its conceptual architecture are often not analyzed. The specialized literature is generally focused on one of three dimensions. First, it examines the content of the right to access to justice as a fundamental constitutional right. This approach, the constitutional right approach, analyzes the components of access to justice and specifies the constitutional limits of the right. This perspective sheds light on the elements necessary for individuals to be able to turn to the administration or the judiciary to solve their conflicts efficiently. Thus, this approach studies issues like the meaning of the right to have an attorney, the free and impartial character of the administration of justice, the challenges imposed by the translation of proceedings for those who do not speak the official

dispute resolution. See 1 ACCESS TO JUSTICE, A WORLD SURVEY 21 (Mauro Cappelletti & Bryant Garth eds., 1978); see also Riding the Third Wave: Rethinking Criminal Legal Aid Within an Access to Justice Framework, DEPT OF JUSTICE, http://www.justice.gc.ca/eng/rp-pr/csjsjic/ccsaajc/rr03_5/p2.html#sec10f (last visited Sept. 13, 2017) (discussing the third wave of access to justice and how it applies to the criminal justice system).

4. See, e.g., Menaka Guruswamy & Bipin Aspatwar, El Acceso a la Justicia en la India: la Jurisprudencia (y la Autoprotección) del Tribunal Supremo, in CONSTITUCIONALISMO DEL SUR GLOBAL (Daniel Bonilla Maldonado ed., 2015) (examining the jurisprudence of access to justice as evolved by the Supreme Court of India); see also EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS & COUNCIL OF EUR., HANDBOOK ON EUROPEAN LAW RELATING TO ACCESS TO JUSTICE (2016) (examining the key European legal principles in the area of access to justice).
language of the State, and the levels of efficacy to solve social conflicts. This approach also examines how this right is articulated in the text of different constitutions and how authoritative interpreters (generally courts) construe its content.

A second dimension of the literature on access to justice focuses on the sociological perspective of access to justice. This perspective thus explores, for example, how class, ethnic, or racial inequalities prevent people from being able to access the administration or courts. It likewise studies how institutional designs facilitate or impede access to justice, and how the monopoly on the legal market—usually held by lawyers in liberal democracies—influences the possibility of obtaining quality legal representation. This approach to the right to access to justice also examines the reasons for the distance that exists—to varying degrees in all liberal democracies—between written rules, which give the right a universal character, and the rules in action, which allow only certain members of the political community to exercise it.

The third dimension of the literature explores the normative dimensions of the right to access to justice. This approach is focused not on the systematization of the elements that form the right or on its efficacy, but on the way it should be interpreted or on the ideal institutional designs for its realization. This perspective offers arguments related to the meaning that the right to legal representation should have, what should be understood by the impartiality of judges, how the right's demands and the financial costs required for it to be realized should be balanced, and how institutions or practices like the public defender's office and pro bono work should be constructed so that they can contribute to making the right to access to justice effective. This way of addressing the right is also common in constitutional law, and represents the other side of the coin from the analytic and systematic dimensions noted above.

5. See RHODE supra note 2, at 3-5. But see, e.g., Rebecca L. Sandefur, Access to Civil Justice and Race, Class, and Gender Inequality, 34 ANN. REV. SOC. 339 (2008) (discussing three mechanism through which inequality may be reproduced or exacerbated); see also Laura Nader, Processes of Constructing (No) Access to Justice (for Ordinary People), 10 WINDSOR Y.B. ACCESS JUST. 496 (1990) (discussing how law and legal institutions do not reflect the interests of participants in the process).

6. See generally Jackie Dugard, Courts and Structural Poverty in South Africa: To What Extent has the Constitutional Court Expanded Access and Remedies to the Poor?, in CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA 293 (Daniel Bonilla Maldonado ed., 2013) (examining the Constitutionals Court’s record of grappling with key fault lines for advancing transformative adjudication, access, and remedies for the poor); see generally Wayne Martin, Access to Justice, 16 NOTRE DAME AUSTL. L. REV. 1 (2014) (examining how access to justice applies to users of the legal system and the public).
Each of these perspectives has been used to contribute to describing and evaluating the right to access to justice in a notable way. These approaches help us to understand the multiple components and links of this right, as well as central matters related to this rights' efficacy and legitimacy. In this article, however, I would like to examine one of the theoretical aspects of access to justice that is usually ignored by constitutional law and legal sociology: its conceptual architecture. In this article, I will examine the foundational underpinnings of access to justice, its relationship to other central concepts of the modern State, and where it fits in the modern legal and political imagination.

The aim of this article is descriptive and analytical, rather than normative. This article aims to contribute to the current understanding of the ways in which modern legal consciousness builds, and is built by, the concept of access to justice. This concept, as part of the web of meanings that structures modern legal culture, provides the context in which modern subjects make sense of who they are and how they should interact with the world around them. This article examines the subjectivities, conceptual geographies, and interpretations of history created by the right to access to justice. It also examines a part of the horizon of understanding inhabited by the modern legal subject.

Part I of this article examines the relationship between the right to access to justice and contractualism, the paradigmatic way of founding the modern State. Contractualism, of course, is not the only way to ground this type of State. However, contractualism is one of its prototypical forms. Consequently, the place that access to justice occupies in this web of legal meanings allows for an understanding of its

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role as part of the modern legal consciousness. This part examines contractualism through Hobbes's and Locke's versions of social contract theory. While the theories of these two philosophers are not the only available interpretations of this form of grounding the modern state, their models were central to the emergence of contractualism and have left important traces in its complex and discontinuous genealogy. This section explores the conceptual geography created by the right to access to justice—the state of nature versus the civil state—and the role of access to justice in the decision made by autonomous, rational subjects to move from the former state to the latter. Access to justice is fundamental in the modern legal and political imagination for it motivates subjects to move from pre-political life to political life. Conceptually, access to justice is relevant not only because it is considered a fundamental constitutional right by the constitutions of contemporary liberal democracies, but also because it constitutes one of the conceptual pillars of the modern State. In this imagined geography, nature is presented as the opposite of politics and law. In the state of nature, there is no impartial third party that has the power to solve conflicts or produce binding decisions; in civil state, the sphere of politics and the law, however, this collective subject is created as a consequence of the agreement achieved by individuals. The State is an instrument constructed to represent and act on behalf of all citizens.

Part II analyzes how the right to access to justice imagines the subjects that create and exercise the right. In the state of nature, contractualism imagines a single type of subject: a dual subject that is formed by both reason and passion. In the state of nature, human beings privilege their animal side in practice, though they have the capacity to act autonomously and rationally. Violence, motivated by passion, is converted into the means by which human beings resolve their conflicts. The absence of an impartial third party does not leave individuals with other options to protect their life and property. Nevertheless, this animal subject recognizes that the only option for achieving peace and prosperity is the creation of a sovereign who can solve conflicts and monopolize the capacity to exercise violence in the political community. The animal subject is then converted into a political subject. The potential to become a full human being by means of politics goes hand-in-hand with the creation of an impartial third party and with the construction of a legal order that the third party should use to solve conflicts between citizens. Along with the animal subject and the political subject, a compound collective subject emerges in the civil state: the State which has the primary objective of creating

10. See generally KAHN, supra note 8, at 77-86.
the conditions for peace and prosperity of all political subjects. To meet this objective, the collective subject must solve conflicts between citizens and, if necessary, use its coercive power to make political subjects abide by its decisions.

Part III examines the relationship between access to justice and legal history in social contract theory. Legal history is the history that the political subject constructs and experiences. Natural law governs in the state of nature. Therefore, there is no legal history. The time of natural law is divine time: eternity. The creation of the State as an impartial third party marks the start of legal history. The time of access to justice is the time of the sovereign and the State. As long as the civil state exists, access to justice will exist. If the State, as an impartial third party, ceases to exist, there will be a return to nature, a return to the conceptual space where the animal component of human beings, (that of passion) is prioritized.

THE STATE OF NATURE, THE CIVIL STATE, AND ACCESS TO JUSTICE

Contractualism is the paradigmatic means by which the modern State is founded. The theories of Thomas Hobbes and John Locke represent the two primary versions of contractualism. Although each philosopher justifies the construction of the State by means of individual autonomy, they differ on the model of the State they favor: Hobbes's theory is committed to absolute monarchy, while Locke's is dedicated to constitutional monarchy. Hobbes defended the existence of a sovereign without limits, while Locke defended one with restrictions. While many philosophers have examined contractualism in the centuries since Hobbes and Locke have published their theories, few have addressed the link between the social contract and the right to access to justice. Similarly, legal literature has not focused on the theoretical foundations of access to justice, or how this right is interlaced with contractualism. This section is devoted to analyzing these connections. In this section, therefore, I explore the intersection of access to justice and contractualism as a way to explore the modern

11. See Bonilla-Maldonado, supra note 9, at 247-60.
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legal and political imagination. More precisely, I study the conceptual geography inhabited and constructed by the right to access to justice; as a result, I study the conceptual opposition between the state of nature and the civil state.

Hobbes thought that, in the state of nature, all human beings are fundamentally equal,¹⁵ that all human beings have analogous mental and physical capacities, and that no human being has the capacity to permanently impose themselves on another. Nevertheless, in this state, everyone competes for what Hobbes called “gains and reputation.”¹⁶ This competition creates insecurity and fear of losing what has been obtained.¹⁷ Ultimately three elements—gains, reputations, and insecurity—are the causes of war between human beings in the state of nature.¹⁸ Conflict is created by the competition for material and nonmaterial goods, as well as the uncertainty created by the fear that others will snatch them. Resources are scarce in the state of nature. The war between human beings puts biological life in danger and makes it impossible to have a contented life, one in which individuals can have a comfortable life by means of their work.¹⁹ Hobbes argues that nothing is unjust in the state of nature.²⁰ Any action is valid to protect life and property. In the state of nature, human beings have “a right to everything.”²¹

Nevertheless, natural law is part of the state of nature.²² Natural law states that human beings have the freedom to use their power to preserve life. According to Hobbes, natural law is in conflict with the twenty-nine natural laws created by God.²³ Nevertheless, the first three

¹⁵. See HOBBS, supra note 14, at 74.
¹⁶. On this regard Hobbes says: “[f]rom this equality of ability ariseth equality of hope in the attaining of our ends. And therefore, if any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies; and in the way to their end, which is principally their own conservation, and sometimes their delection only, endeavour to destroy or subdue one another . . . [s]o that in the nature of man we find three principal causes of quarrel: first, competition; secondly, diffidence; thirdly, glory.” See id. at 75-76.
¹⁷. See id. at 78.
¹十八. Id. at 76-78.
¹º. Id. at 77-78.
²⁰. Hobbes says on this respect: “[d]oes he not there as much accuse mankind by his actions, as I do by my words? But neither of us accuse man's nature in it. The desires and other passions of man are in themselves no sin. No more are the actions that proceed from those passions, till they know a law that forbids them—which till laws be made they cannot know. Nor can any law be made, till they have agreed upon the person that shall make it.” Id. at 77.
²¹. Id. at 80.
²². See id. at 79.
²³. Id. at 80-100.
Hobbesian natural laws occupy a central place in the type of contractualism he defends. The first law indicates that all human beings must make an effort to achieve peace, but also that they can turn to war when this objective cannot be achieved. The second law ordains that all human beings must be willing to renounce their right to everything, if others are also willing to do so to defend life and property. The third law states that human beings have a duty to comply with their agreements.

However, the last four laws articulated by Hobbes are relevant for understanding the importance of access to justice within his social contract theory. These laws state that: (i) human beings who have a conflict must solve it by means of an arbitrator, (ii) no person must be both a judge and a party in a case, (iii) no human being may be appointed to be a judge if there are reasons to think that they will not be impartial, and (iv) a judge must not trust parties to decide a conflict, but should turn to witnesses to resolve it. Hobbes argues that all of these laws can be known by means of reason. The challenge, Hobbes argues, is that these laws run counter to human passion. Therefore, in the state of nature, human beings constantly violate natural laws, and do so with impunity because there is no impartial third party that can solve the conflicts that these violations create between human beings. In the absence of a third party, the violence of the strongest individual will always triumph.

Hobbes argues that the only way for human beings to achieve a contented life, is to cede their natural right to everything to a third party who has been created by means of an agreement of wills. This

24. *Id.* at 80, 88-89.
25. *Id.* at 98.
26. See *id.* at 79.
27. On this regard Hobbes says: "[f]or the laws of nature (as justice, equity, modesty, mercy, and (in sum) doing to others as we would be done to) of themselves, without the terror of some power to cause them to be observed, are contrary to our natural passions, that carry us to partiality, pride, revenge, and the like. And covenants without the sword are but words, and of no strength to secure a man at all." *Id.* at 106.
28. For Hobbes: "Therefore notwithstanding the laws of nature (which everyone hath then kept, when he has the will to keep them, when he can do it safely), if there be no power erected, or not great enough for our security, every man will, and may lawfully rely on his own strength and art, for caution against all other men." *Id.*
29. According to Hobbes, this choice "[t]his is more than consent, or concord; it is a real unity of them all, in one and the same person, made by covenant of every man with every man, in such manner as if every man should say to every man I authorize and give up my right of governing myself to this man, or to this assembly of men, on this condition, that thou give up thy right to him, and authorize all his actions in like manner. This done, the multitude so united in one person is called a COMMONWEALTH, in Latin CIVITAS. This is
third party, described here as the collective subject, is what Hobbes calls
the republic, which can take the form of a democracy, an aristocracy, or
a monarchy. The possibility of war, which is always looming in the
state of nature, though not always realized, can only be neutralized by
the emergence of a third party with the following characteristics: (i) it is
stronger than each of its creators so it may impose its decisions; (ii) it
has the power to create positive law, which must be coherent with
natural law; and (iii) it can solve conflicts between members by using
positive law. As a consequence of the agreement, the sovereign shall
have absolute power, and is therefore not subjected to positive law. The
actions of this collective subject should also be understood as the
actions of its creators.

Locke's contractualism is analogous to that of Hobbes on two
central points: the will of individuals legitimizes the State and the
justification of the social contract is articulated by means of the
conceptual opposition between the state of nature and the civil state.
Nevertheless, Hobbes and Locke differ in part on the characterization of
this conceptual geography and on the absolute character of the power
that, according to Hobbes, the sovereign holds as a consequence of the
pact. For Locke, the pre-political moment of human beings is formed by
two situations: the state of nature and the state of war. In the state of
nature, human beings are equal as divine creatures: they have the same
faculties, and are all regulated by natural law, which can be known
through reason. Natural law mandates that no one may destroy their
life, that no one may negatively affect the life, liberty, or property of
third parties, and that no human being may subordinate another, which
breaks with the natural equality of all human beings as creatures
constructed by God. In the state of nature, all human beings are equal,
and all are free, though this freedom is limited by natural law.

the generation of that great LEVIATHAN, or rather (to speak more reverently) of that
Mortal God to which we owe, under the Immortal God, our peace and defence." Id. at 109.

30. "The difference of commonwealths consisteth in the difference of the sovereign, or
the person representative of all and every one of the multitude . . . . For the representative
must needs be one man or more; and if more, then it is the assembly of all or but of a part.
When the representative is one man, then is the commonwealth a MONARCHY; when an
assembly of all that will come together, then it is a DEMOCRACY, or popular
commonwealth; when an assembly of a part only, then it is called an ARISTOCRACY." Id. at
118.

31. See id. at 110-18.
32. Id. at 173-74.
33. See LOCKE, supra note 14, at 4-10, 10-13.
34. Id. at 4.
35. Id. at 5-6.
36. Id.
37. Id. at 4-5.
consequence, in Locke's description of the state of nature, human beings live in harmony and are guided by reason, without a higher authority governing them.

The state of war, in the pre-political moment, is the space of enmity and destruction. This space emerges due to threats to the life and the goods of individuals, which allows them to call upon violence to protect themselves following the natural law of self-preservation. It also emerges due to the fact that each human being may interpret and apply natural law. Locke argues that the interpretation and enforcement of natural law can always be motivated by undue reasons, such as passion. For Locke and Hobbes, the risk that human beings' natural rights face in the pre-political state can be confronted by the creation of the civil state. By an agreement of wills, human beings create the impartial third party that can solve the differences that emerge among them by applying positive law, which must reflect and develop natural law.

The contractualism of both Hobbes and Locke each has important points in common that are relevant for the analysis of the conceptual architecture of the right to access to justice. The first, and most important, commonality is that each theory is structured around the conceptual opposition between nature and politics. The two categories

38. Id. at 10.
39. Id.
40. Id. at 6 (“And in this case, and upon this ground, every man hath a right to punish the offender, and be executioner of the law of nature.”).
41. Locke points out: “[t]o this strange doctrine-viz., That in the state of nature everyone has the executive power of the law of nature-I doubt not but it will be objected that it is unreasonable for men to be judges in their own cases, that self-love will make men partial to themselves and their friends: and on the other side, that ill-nature, passion, and revenge will carry them too far in punishing others; and hence nothing but confusion and disorder will follow; and that therefore God hath certainly appointed government to restrain the partiality and violence of men.” Id. at 8.
42. Locke highlights: “I easily grant that civil government is the proper remedy for the inconveniences of the state of nature, which must certainly be great where men may be judges in their own case . . . .” Id.
43. Locke also says on this regard: “[b]ut where no such appeal is, as in the state of nature, for want of positive laws and judges with authority to appeal to, the state of war once begun continues, with a right to the innocent party to destroy the other whenever he can, until the aggressor offers peace, and desires reconciliation on such terms as may repair any wrongs he has already done, and secure the innocent for the future. Nay, where an appeal to the law and constituted judges lies open, but the remedy is denied by a manifest perverting of justice and a barefaced wresting of the laws, to protect or indemnify the violence or injuries of some men or party of men, there it is hard to imagine anything but a state of war.” Id. at 12.
44. See DAVID BOUCHER & PAUL KELLY, The Social Contract and its Critics: An Overview, in THE SOCIAL CONTRACT FROM HOBBES TO RAWLS 1-29 (David Boucher & Paul
are closely tied; one cannot exist without the other. The absence of the political is what characterizes the state of nature. The presence of the State and law, as basic units of the political, is what characterizes the civil state. The central element that differentiates the two components of this conceptual opposition is therefore the absence or presence of an impartial third party who can maintain order by using positive law and coercion.

These conceptual geographies have a high degree of abstraction, and the conceptual pillars that characterize them correspond negatively; what exists in one does not exist in the other. The first conceptual space—nature—is a geography of divine creation. Nature is a product of the will of God. Human beings, its creatures, who have access to the material conditions that would allow for their survival and flourishing, inhabit it. However, the resources available are always scarce. In addition to these material conditions, God gave human beings the immaterial variables that allow them to live in peace, and a set of rules to regulate their behavior: natural law. The state of nature is, therefore, not an unregulated space. Although general, divine norms are clear and they instruct human beings how they should behave. These rules are knowable by means of reason. Any human being can know them by means of the adequate use of this faculty; all members of the species have it at their disposal.

However, these creatures of divine origin (human beings) are not only identified by their rational character; they are dual individuals that are constituted by both reason and passion. Human beings are also ardor, rapture, and instinct. However, this duality is not adequately balanced in the state of nature. Passion usually triumphs over reason. Passion, the side that the contractualists identify with the animalistic dimension of human beings, ends up being privileged. Prioritizing passion leads to war, which can endanger or destroy life and property. Human beings’ autonomy allows their actions to violate natural law when giving free rein to their passions. Nevertheless, autonomy is also what allows human beings to build a new space that will allow them to have a contented life.

45. See Bonilla, supra note 9, at 241.
47. See id. at 3, 234-35; Locke, supra note 14, at 5.
50. See Hobbes, supra note 14, at 74-78; Locke, supra note 14, at 4-10.
The civil state is, therefore, an artifact, a human creation. Art is opposed to nature in the space of the political. God keeps governing this conceptual geography but its reign is now limited to spiritual life. Natural law still exists in the political community. Nevertheless, it is now understood as the source of positive law—the set of rules and principles that the sovereign applies in order to guarantee peace and prosperity. The Leviathan and the law it applies are a human creation. In this conceptual geography, the duality that characterizes human beings does not disappear. Yet, the balance between the units that constitute the members of the species changes: reason is now privileged over passion. Autonomy, guided by reason, makes individuals enter into this agreement. The step taken in modernity, from the divine legitimization of the State to its legitimization by popular will, is realized in this argumentative movement.

In the civil state, citizens can also act motivated by passion. However, individual autonomy, guided by reason, has already created the mechanisms to neutralize this type of act: positive law and the State. The Leviathan will be responsible for solving the conflicts created by human passions, and will impose due punishments and compensation to guarantee order and respect for citizens' rights. This step shows three central elements in the modern imagination that are important for understanding the right to access to justice: (i) the identification between reason and full humanity, (ii) the identification between reason and law, and (iii) faith in law and the State. Faith in God will guarantee eternal life, and faith in law and in the State will guarantee that life on earth is contented. These two artifacts will prevent the brutality and cruelty that are always possible in the state of nature.

Law and the State are not understood as instruments for oppression. They are not understood as tools created by some groups of individuals to subordinate other groups of individuals. On the contrary, they are artifacts that emancipate all human beings from their passions and from the violence they create. The state of nature is then imagined as the space of conflict that is resolved by means of violence. The civil state, as the space of conflict that is resolved by the

51. HOBBES, supra note 14, at 12, 110–11; LOCKE, supra note 14, at 48–49.
52. See HOBBES, supra note 14, at 177; LOCKE, supra note 14, at 48–49.
53. See HOBBES, supra note 14, at 106–10; LOCKE, supra note 14, at 48–50.
55. Id.; see also Bonilla, supra note 9, at 241.
57. See HOBBES, supra note 14, at 106-10; LOCKE, supra note 14, 8-13.
reason of law, supported by the State monopoly of coercion. Likewise, the civil state is imagined as the space where conflicts are reduced by the combination of the normative power of the legal system, and the dissuasive power of the ever-present threat of State violence.

Therefore, access to justice is in the center of the conceptual opposition between nature and politics. Human beings move from nature to politics by means of art to be able to access an impartial third party that can solve conflicts. Equal human beings who create the Leviathan and positive law must therefore be equal citizens.\textsuperscript{58} Equal citizenship fundamentally means being able to call upon the State to guarantee the protection of life and property. The contented life cannot be achieved until all citizens have the capacity to call upon the State to eliminate the obstacles that prevent them from achieving it. Accessing justice does not only mean being able to turn to judges; it also means being able to call upon the administration. The tripartite division of public power does not appear clearly and precisely in social contract theories.\textsuperscript{59} In these theories, judges are typically understood as a part of the executive branch. They are the representatives of the absolute, or constitutionally limited, monarch.\textsuperscript{60} Other areas of the administration also maintain some powers of adjudication.\textsuperscript{61} Some conflicts must be resolved by other types of bureaucrats who represent the sovereign, such as police officers or ministers.

As a consequence, the inability to access justice involves a double violation of values central to the modern legal and political imagination. First, it involves a violation of the basic equality of all human beings, which has been translated into equal citizenship in the political community. The motivation for creating the civil state thus becomes impracticable for some individuals. Natural and political equality is broken when only certain citizens can call upon the State to solve their conflicts and live in peace. This hierarchy creates the distinction between first- and second-class citizens. First-class citizens can experience the consequences of the autonomous decisions they made in the pre-political moment: they experience the benefits of moving from nature to civil life. The peace and prosperity that the State guarantees makes explicit the rationality of their decision.


\textsuperscript{59} Locke says: "[w]here the legislative and executive power are in distinct hands (as they are in all moderated monarchies and well-framed governments) there the good of the society requires that several things should be left to the discretion of him that has the executive power." Locke, \textit{supra} note 14, at 80.

\textsuperscript{60} M. J. C. Vile, \textit{Constitucionalismo y Separación de Poderes} 66 (2008).

\textsuperscript{61} \textit{Id.}
Second-class citizens, in practice, are sent to the state of nature. They must use their own means to protect their life and property. States with a notable deficit in the realization of the right to access to justice illustrate this argument. For example, the impossibility of accessing courts or the administration, or the failure to comply with their aims for reasons of impunity or inefficacy increases the levels of violence in society, and decreases the normative power and dissuasive effect that law and the State should have. Citizens who can only partially access the administration or courts are sent to the margins of the political community. Their life and property are always in danger. The State thus unjustly distinguishes between citizens when meeting the objectives for which it was created: the State protects the life and property of some, but not all. The State then becomes an agent that creates conflict that can lead to violence. Second-class citizens will not only have to resort to violence to resolve their differences, they may also want to exercise violence against first-class citizens as a consequence of the unequal treatment they receive.

The second violation of the values central to the modern legal and political imagination is of individual autonomy. Unresolved conflicts, or those only resolved by means of violence, prevent individuals from exercising their autonomy. As an aim of civil life, the contented life cannot be realized if citizens cannot make decisions about their body and their goods due to the actions of third parties. Autonomy cannot be realized if there is no impartial third party that will stop and punish them. Autonomous, rational human beings enter civil life to be able to develop these capacities fully. If the mechanism created to achieve this objective does not function, or does not function adequately, citizens will not be able to realize what makes them different from animals. Passion and violence, common in the animal kingdom, will again be the dominant dimensions of individuals. Autonomy will, therefore, be only a potential capacity, and remain one that is very difficult to realize.

HUMAN DUALITY AND THE UNITY OF THE STATE

The conceptual geography that constructs the opposition between nature and politics has a high degree of abstraction. Nevertheless, it is not an empty geography; it is inhabited by a particular way of imagining human beings and the collective subject of the State. The former are dual, conflictive subjects that are constituted by both reason

63. See id. at 188; see also Guruswamy & Aspatwar, supra note 4.
64. See Waldron, supra note 54, at 137.
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and passion.\(^{65}\) In the state of nature, subjects privilege passion over reason;\(^{66}\) they are animal subjects. As divine creatures, they have autonomy and reason. Nevertheless, these faculties are subordinated to passion, which creates war. This type of subject privileges its animal side, that which calls upon violence to resolve conflicts and to protect its life and goods.

However, these same subjects, motivated by self-interest, voluntarily decide to create the civil state.\(^{67}\) Human beings do not lose their duality in the move from the pre-political moment to the political one. In the daily life of the political community, citizens will also let themselves be carried away by their passion and will violate positive law. Nevertheless, in the political moment, there is already an impartial third party that, guided by the reason of law, can solve conflicts.\(^{68}\) The animal subject is then converted into a political subject. The animal subject had already created the mechanism to control its passion. Reason triumphs over passion, not because the animal subject makes it disappear, but because it creates the instruments to dissolve conflicts, to punish damage caused by controversies, and to dissuade citizens from acting motivated by passion. The justice administration, as well as the possibility of accessing it, make explicit the existence of this political subject and facilitate its survival and prosperity.

Their conflictive structure is what characterizes both the animal subject and the political subject. Conflict is internal, in that there is tension between the dimensions that constitute these subjects. However, conflict is also external; when the animal dimension triumphs over the political dimension, violence ensues, affecting the integrity and property of others. The recognition of the essential conflictive nature of human beings is what motivates the move from nature to politics.\(^{69}\) It is also what motivates the continued existence of the State and the possibility that citizens can turn to the administration or the judiciary to keep the peace and protect their rights.

Dual, conflictive human beings are not the only subjects that inhabit this conceptual geography. In the civil state, a compound collective subject emerges—the sovereign.\(^{70}\) This collective subject is imagined in contractualism, particularly by Hobbes, as an individual

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\(^{65}\) See Hobbes, supra note 14, at 38-47; Locke, supra note 14, at 44-47.


\(^{67}\) See Hobbes, supra note 14, at 79-80; Locke, supra note 14, at 48.

\(^{68}\) See Kahn, The Cultural Study of Law, supra note 8, at 77-86.

\(^{69}\) Hobbes, supra note 14, at 80-81; Locke, supra note 14, at 44-47.

\(^{70}\) See Kahn, The Cultural Study of Law, supra note 8, at 36.
that acquires their own life.\textsuperscript{71} The sovereign can be the monarch, the people, or a set of individuals. Nevertheless, while sovereign, it is a unitary entity that is imagined and experienced as an autonomous subject. It is also imagined as a subject that is formed by the individuals that create it. This image appears in a particularly powerful manner on the very cover of the first edition of \textit{Leviathan} published in 1652, in the design of which Hobbes participated actively.\textsuperscript{72}

In this image, the sovereign appears in the center of the cover, represented as a human being. However, this human being is constituted by a series of small individuals: the political subjects that gave it life. The sovereign is one, but is constituted in multiple ways. The sovereign exists by the will of the individuals it represents. The collective subject is thus legitimized in a secular manner. The sovereign, much larger and more powerful than each of its creators, has the sword in one hand, and a crosier in the other. The former is the symbol of the States' coercive power—the power that allows for controlling and punishing citizens' passion. The sword is the threat that supports positive law. The latter is the symbol of religious power that the political power controls on earth. Religion remains important for human beings, but the power of the church is displaced from the earthly world to the spiritual, and is subordinated to the sovereign in the political realm. In the "valley of tears," the Leviathan has control over religious power.

The compound collective subject, the anthropomorphized sovereign, rules over the city (the \textit{polis}).\textsuperscript{73} The urban architecture represents the political space \textit{par excellence}, where the sovereign governs. This is the space where the sovereign solves social conflicts by means of positive law, either directly or through its delegates: state bureaucrats. The

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\textsuperscript{73} Regarding the state as an artificial man Hobbes says: "and where men build on false grounds, the more they build, the greater is the ruin; and of those that study and observe with equal time and diligence, the reasons and resolutions are, and must remain, discordant: and therefore it is not that \textit{juris prudentia}, or wisdom of subordinate judges, but the reason of this our artificial man, the commonwealth, and his command, that maketh law; and the Commonwealth being in their representative but one person, there cannot easily arise any contradiction in the laws; and when there doth, the same reason is able, by interpretation or alteration, to take it away." See HOBBS, \textit{supra} note 14, at 176-77.
\end{quote}
sovereign presides over the city, but the city—the citizens—must be able to call upon the sovereign to protect their lives and property. Without equal access for the citizens to the justice the State provides, the city would disappear. The passion of those who form the State would lead to war, and war would lead to the destruction of the conditions that would allow for having a contented life.

**Eternity, Legal History, and Access to Justice**

The conceptual opposition between nature and politics, bridged by access to an impartial third party that all citizens should have access to, marks the start of legal history. The state of nature is the space of eternal natural law. Natural law “is” from the beginning of time. It “is” since God’s will created it for human beings. Natural law does not have history—once it emerges, it remains forever. The unit of divine time fosters natural law. Natural law also exists as a temporal unit that is not divided. Dual human beings cannot change natural law. They cannot be part of its narrative; they can comply with it or not, but they do not have the power to change its contents.

The step taken to the civil state marks the start of legal history; it marks the beginning of human law. In social contract theory, positive law must always make natural law concrete, and never violate it. Of course, natural law continues to exist in the political moment. Nevertheless, the vagueness of the mandates of the law of divine origin requires its interpretation. The move from the generality of natural laws to the concretion and variety of positive law rules is materialized through the work of an interpreter. These interpretations can vary between political communities and can change within a political community. The sovereign, which concentrates the capacity to create law, has the power to make positive law concrete, and to change it according to its will.

However, legal history does not only begin and develop with the creation of positive legal norms by the compound collective subject that is the sovereign. Legal history is not only the history of statutes or of the norms created by the sovereign as legislator, it is also the history of the norms created by the sovereign when it uses pre-existing statutes to solve social conflicts. The possibility of access to justice as an aim of the social contract does not only require that there be positive norms that

75. See Waldron, supra note 54, at 140-42.
regulate behaviors, impose sanctions, and determine possible compensation. It also requires that these norms be converted into jurisprudence and that they be interpreted to adjudicate rights and duties. The history that starts with the creation of the Leviathan, is also the history of the law created by judges and the administration when it holds the power to solve particular cases.

The history of the impartial third party is the history of the political community. The time of the compound collective subject is concomitant with the time of the civil state. It will exist as long as the political community exists, and the political community will only survive as long as the Leviathan does. The contingent characteristics of the Leviathan may vary to adjust to changes in society. Nevertheless, its necessary characteristics may not vary without destroying the political community. The Leviathan—without a sword, without the power to create law, and without the capacity to keep the peace by means of the evaluation and punishment of violations of positive law—will entail a return to the state of nature. The artifact disappears, and nature reappears.

CONCLUSION

Access to justice is one of the central components of the modern legal and political imagination. Understanding this right involves knowing the elements that form it. It involves knowing the constitutional doctrine that describes the elements attributed to the right by a particular political community, by the constitution and by constitutional jurisprudence. Understanding the right also requires understanding its normative interpretations. Additionally, approaching the right requires knowing its best expressions; how it should be. These two perspectives, which come from constitutional law, must be complemented with a sociological one. This sociological perspective would examine the class, epistemological, and legal services, market obstacles and incentives that exist (or could exist) in different political communities for the realization of the right to access to justice. Access to justice, therefore, is a global issue, both theoretically and practically.

Nevertheless, to understand the right fully, we also need to describe and analyze its conceptual architecture. We need to understand the place the right occupies in the modern legal and political imagination, as well as its grounds. We need to understand how the right is articulated with the conceptual opposition between nature and politics that cuts across the paradigmatic basis of the modern State: the social contract. The conceptual geographies that this conceptual opposition creates, the way of thinking about history, and the type of
subject that this theory constructs, determine an important part of the individual and collective identities of modern individuals. Understanding these issues, therefore, involves understanding who we are. The right to access to justice determines in part how modern individuals describe themselves and their political communities.