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BEFORE AND AFTER NATURAL LAW

Models of Natural Law in Ancient and Modern Times

1. CHANGES AND CONTINUITY IN THE HISTORY OF NATURAL LAW

The history of natural law is a constitutive part both of the history of the modern state and of the history of political theories in the last four centuries. To a certain extent the beginning of modern natural law theory was at the same time the beginning of the modern state. If we think about the works of great modern philosophers as Thomas Hobbes, John Locke or Immanuel Kant it is clear that the main results in the political thought of the seventeenth and eighteenth century were achieved by applying and developing some basic elements such as natural freedom, state of nature, natural rights and covenant which belong to the very instruments of natural law doctrines. And this served both to enlarge the sphere of action of the sovereign and to restrict it. But it is at the same time true that the territorial state of the early modern centuries could not have imposed its pervasive control over all subjects living within its boundaries if it had not had at its disposal the convincing power of these same theories. This assumption is even more important when, as we shall see, the modern state consists first of all in a rational process to bind together the will of the subjects through the will of the sovereign.

Natural law theories gave the modern state a rational theoretical frame for the first time in the seventeenth century. However the idea of a natural law is much older and was well known both in Antiquity and in the Middle Ages. Reflection upon the existence and the features of natural law was a main concern of the theology and jurisprudence of the late Roman Empire; so that interest in this topic, which grew so rapidly in the political science of the seventeenth century, continued a thousand-year-old tradition. But how should we understand this continuity? Do we find a single structure of concepts and ideas, which persisted through the centuries and remained unaltered from the antiquity to the modern times and up to now? What sort of changes affected natural law? Did they affect the words or the concepts or both?

Modern natural law was officially established as an academic teaching in Heidelberg in 1661, when a chair of *ius gentium* was for the first time offered to Samuel Pufendorf. This discipline, which soon spread over the German Empire and Europe,¹ aimed consciously at a philosophical foundation of the law pointing out its rational principles and its structural connection with a theory of political authority.

privatum, which describes mankind in the condition of nature, and in the *ius publicum*, insofar as this one concerns the relationships between individuals. In both cases civil law appears as a set of juridical prescriptions deduced from the general principles of natural law.

2. MODELS OF NATURAL LAW: THE ANCIENT TRADITION

The formal features of natural law show some basic differences between the ancient and the modern tradition. It is however possible to draw the same conclusion also with regard to the contents of the doctrines, which differ in six main respects.

2.1 *Natural Law as Innate Idea*

Natural law was conceived in late antiquity and in the Middle Ages as a set of innate rules, which God engraved upon the heart of the human beings when he created mankind. This idea was clearly expressed by Cicero in one of his speeches, in which he presented self-defence as a right possessed by everyone from birth without any learning.⁶ In the *Epistle to the Romans* the Apostle Paul acknowledged the existence of a “written law in their [Gentile] hearts”, which contains the same commandments as the revealed law.⁷ Church Fathers too insisted on the topic of innate ideas,⁸ and the same doctrine was accepted in the Middle Ages not only in philosophy, but also in jurisprudence. Commentators both on canonical and on Roman law admitted that prescriptions which guide the actions of animals and men are self-evident, and therefore deserve the name of *ius naturae*.⁹ Nevertheless the theory of an innate natural law attracted the largest interest within medieval Scholasticism, and became an obligatory matter of dispute.¹⁰ Its importance grew to such a degree that it was included even in the expositions of those theologians, who resolutely denied the theory of innate ideas in general. This is the case with Thomas Aquinas.

Commenting on the passage of Augustine: “*Lex scripta in cordibus hominum, quam nec ulla quidem delet iniquitas*”,¹¹ the *doctor angelicus* identified *lex naturae* with some general prescriptions which are well known to all human beings and cannot be deleted at all from the human heart.¹² These rules correspond to the divine reason and let us understand what is right and what is wrong. They can be present in our soul only by means of an “impression of the divine light on us” so that natural law itself must be conceived as “participation of the eternal law in a rational creature”.¹³ Such a natural law is common to mankind, although some differences are possible; they concern however only the particular conclusions derived by different people from the same immutable principles.¹⁴ General and common statements are: “You should pursue good and avoid evil”, “You should preserve yourself”, “You should avoid ignorance” ... From these basic truths every human being can immediately gain the same practical rules which are enclosed in the Ten Commandments, as for instance in the prohibition of theft.¹⁵

The implications involved in the definition of Thomas Aquinas were pointed out in the commentaries on the *Summa theologiae* of the sixteenth century. Domingo de Soto explained in his great commentary *De iustitia et iure* that the rules of natural



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