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Models in History of Natural Law *

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 such as Thomas Hobbes, John Locke or Immanuel Kant, it is clear that the main results in the political theories of the seventeenth and eighteenth centuries were achieved by applying and developing some basic elements such as natural freedom, the state of nature, natural rights and covenant, which belong to the very instruments of natural law doctrines; and this both to enlarge the sphere of action of the sovereign and to restrict it. However, 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. Aristotles for instance divided the justice of city into what is right by nature (τὸ φυσικὸν δίκαιον) and what is right by a particular law of the city (τὸ νομικὸν δίκαιον).¹ Cicero recognized

* A briefer version of this contribution is going to appear in the book edited by PETER SCHRÖDER und TIM HOCHSTRASSER, *Early Modern Natural Law Theories: Contexts and Strategies in the Early Enlightenment*, Dordrecht: Kluwer Academic Publisher, in print. I would like to thank the editors for having kindly given me permission to publish this longer version and Michael Stolleis for having accepted it in *Ius commune*.

¹ ARISTOTELES, *Ethica Nichomachea*, V, 1, 1129^a 1–25.

the existence of a *ius naturae* that is not produced by human opinion, but is present in the human soul by some kind of natural force. This natural law concerns religion, the respect for family and country, friendship, the impulse to revenge injuries, the acknowledgment of authorities and ranks within a human society and the search for truth.² It is based upon a "heavenly", universal, eternal and unchangeable law, which corresponds to the rational order of the world and to the will of the gods who govern all things.³ Through the mediation of Cicero the Stoic idea of a divine and natural law became part of the Christian theology.

Lactantius quotes in his *Divinae institutiones* a very important and otherwise unknown passage from Cicero's *De republica*, in which the Roman author defends the idea that there is an eternal and immutable law, created by God to rule over the universe.⁴ Ambrosius held that there are two kinds of law: the natural law, which is innate and engraved into the hearts of all men, and the written law, which results

² CICERO, *De inventione*, II, 53, 160–161: "Naturae ius est quod non opinio genuit, sed quaedam in natura vis inest, ut religionem, pietatem, gratiam, vindicationem, observantiam, veritatem. Religio est, quae superioris cuiusdam naturae, quam divinum vocant, curam caerimoniamque affert; pietas, per quam sanguine coniunctis patriaeque benivolum officium et diligens tribuitur cultus; gratia, in qua amicitiarum et officiorum alterius memoria et remunerandi voluntas continentur; vindicatio, per quam vis aut iniuria et omnino omne, quod obfuturum est, defendendo at ulciscendo propulsatur; observantia, per quam homines aliqua dignitate antecedentes cultu quodam et honore dignantur; veritas, per quam immutata ea quae sunt aut ante fuerunt aut futura sunt dicuntur."

³ CICERO, *De legibus*, II, 4, 8: "Hanc igitur video sapientissimorum fuisse sententiam, legem neque hominum ingeniis excogitatum nec scitum aliquod esse populorum, sed aeternum quiddam, quod universum mundum regeret imperandi prohibendique sapientia. Ita principem legem illam et ultimam mentem esse dicebant omnia ratione aut cogentis aut vetantis dei; ex quo illa lex, quam di humano generi dederunt, recte est laudata; est enim ratio mensque sapientis ad iubendum et ad deterrendum idonea."

⁴ LACTANTIUS, *Institutiones divinae*, VI, 8: "Suscipienda igitur Dei lex est, quae nos ad hoc iter dirigat, illa sancta, illa caelestis, quam Marcus Tullius in libro *De republica* tertio paene divina voce depinxit: cuius ego, ne plura dicerem, verba subieci. 'Est quidem vera lex recta ratio naturae congruens, diffusa in omnes, constans, sempiterna, quae vocet ad officium iubendo, vetando a fraude deterreat; quae tamen neque probos frustra iubet aut vetat nec improbos iubendo aut vetando movet. Huic legi nec obrogari fas est neque derogari ex hac aliquid licet neque tota abrogari potest, nec vero aut per senatum aut per populum solvi hac lege possumus, neque est quaerendus explanator aut interpret eius alius, nec erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et omnes gentes et omni tempore una lex et sempiterna et immutabilis continebit, unusque erit communis quasi magister et imperator omnium deus, ille legis huius inventor, disceptator, lator; cui qui non parebit, ipse se fugiet ac naturam hominis aspernatus hoc ipso luet maximas poenas, etiamsi cetera supplicia, quae putantur, effugerit'" = Cicero, *De re publica*, III, 22, 33.

from the decisions of different human authorities, varies from country to country and requires to be known by its subjects.⁵ Augustine identified natural law with the divine order of the universe, which ought to be preserved by mankind⁶.

Medieval Scholasticism developed the arguments of Church Fathers into a large number of *quaestiones*, which were among the main theological and philosophical topics debated in universities. The *Sententiarum libri quattuor* of Petrus Lombardus, the textbook of theological faculties until the early sixteenth century,⁷ and the commentaries on this book discussed the law of nature particularly in the section about marriage.⁸ Alexander of Ales presented in his *Summa* the *lex naturae* as the second of four different kinds of law (*aeterna, naturae, Moysi* and *evangelica*), while Thomas Aquinas organized two important and very influential sections of his *Summa theologiae* as a treatise upon justice and right (IIa IIae, qq. 57–122) and a treatise upon law (Ia IIae, qq. 90–108), in which he distinguished eternal,

⁵ AMBROSIUS, *De fuga saeculi*, III, 15; AMBROSIUS, *Libri sex Hexaemeron*, V, 21, 66–68. Cf. below n. 37.

⁶ AURELIUS AUGUSTINUS, *Contra Faustum Manichaeum libri triginta tres*, XXII, 27: "Ergo peccatum est, factum vel dictum vel concupitum aliquid contra aeternam legem. Lex vero aeterna est ratio divina vel voluntas Dei, ordinem naturalem conservari iubens, perturbari vetans. Quisnam igitur sit in homine naturalis ordo, quaerendum est. Constat enim homo ex anima et corpore, sed hoc et pecus. Nulli autem dubium est, animam corpori naturali ordine praeponebam. Verum animae hominis inest ratio, quae pecori non inest. Proinde, sicut anima corpori, ita ipsius animae ratio caeteris eius partibus, quas habent et bestiae, naturae lege praeponeatur; inque ipsa ratione, quae partim contemplativa est, partim activa, procul dubio contemplatio praecellit."

⁷ Cf. I. 4. dist. 33: "Quaeritur hic de antiquis patribus".

⁸ Cf. GUILIELMUS ANTISSIODORENSIS, *Summa aurea in quattuor libros Sententiarum* [...], Parisiis [1500], reprint Frankfurt a.M. 1964, IV, "Utrum matrimonium sit de iure naturali", fol. 286^v and IV, "Utrum 'unicam esse unius' sit de iure naturali", foll. 286^v–287^r; ALEXANDER DE ALES, *Glossa in quattuor libros Sententiarum Petri Lombardi*, ed. by the Patres collegii S. Bonaventurae, Quaracchi Florentiae 1957, IV, 33, 1–2, pp. 516–520; INNOCENTIUS V PAPA, *In IV. librum Sententiarum commentaria* [...], Tolosae 1651, IV, dist. 33, quaest. 1: "De bigamia", pp. 333–334; quaest. 2: "De concubinato", pp. 335–336; BONAVENTURA A BALNEOREGIO, *Commentaria in quattuor libros Sententiarum magistri Petri Lombardi. Tomus IV. In quartum librum Sententiarum*, in: BONAVENTURA A BALNEOREGIO, *Opera omnia* [...], ed. by the Patres collegii a S. Bonaventurae, Ad claras aquas prope Florentiam (Quaracchi) 1899, IV, 33, art. 1, quaest. 1–3, pp. 746–750; RICHARDUS DE MEDIAVILLA, *Super quattuor libros Sententiarum Petri Lombardi quaestiones subtilissimae* [...], Brixiae 1591, reprint Frankfurt a.M. 1963, IV, 33, art. 1–2, t. 4, pp. 464–468; THOMAS DE ARGENTINA, *Commentaria in III. libros Sententiarum* [...], Venetiis 1564, reprint Ridgewood New Jersey 1965, IV, 33, art. 3, t. 2, fol. 156^r; PETRUS DE AQUILA, *Quaestiones in 4 libros Sententiarum*, [Spirae] 1480, reprint Frankfurt a.M. 1967, IV, 33, quaest. 2, [s. p.].

natural, human and divine law. The problem of natural law was discussed also by William of Ockham⁹ and his followers until the beginning of the sixteenth century.¹⁰

The Reformation and Counter-reformation showed a renewed interest in this question. At almost the same time the Lutheran theologians in Wittenberg and the Dominican scholars in Salamanca proposed an elaborate doctrine of natural law, in both cases closely related to theology.¹¹ Philipp Melanchthon inserted in the first issue of his *Loci communes theologici* a discussion of natural law, which in the following editions of this theological textbook grew into a long section about the different kinds of law and their dependence upon divine will.¹² In 1533–1534 Francisco de Vitoria gave lectures on the doctrines of Thomas Aquinas concerning law, and in 1535–1536 he wrote a commentary upon the questions of the *Summa theologiae* about justice.¹³ In 1538–1539 Domingo de Soto, a former pupil of Vitoria, who succeeded him to the chair of theology in Salamanca, held a course *De legibus* and published in 1555–1556 a commentary *De iustitia et iure*,¹⁴ in which he discussed in systematic order the matter presented

⁹ GUILIELMUS DE OCKHAM, *Dialogus de imperio et pontificia potestate*, pars III, tract. 2, lib. 3, cap. 4, in: GUILIELMUS DE OCKHAM, *Opera plurima*, Lyon 1494–1496, reprint London 1962, vol. 1, p. 263.

¹⁰ GABRIEL BIEL, *Epitome et collectarium ex Occamo circa quatuor Sententiarum libros*, [Tubingae 1501], reprint Frankfurt a. M. 1965, III, dist. 37, art. 1, not. 1, lit. c–e. Cf. WILHELM KÖLMEL, Von Ockham zu Gabriel Biel: Zur Naturrechtslehre des 14. und 15. Jahrhunderts, in: *Franziskanische Studien* 37 (1955), pp. 218–259.

¹¹ Cf. Merio Scattola, *Notitia naturalis de Deo et de morum gubernatione*: Die Naturrechtslehre Philipp Melanchthons und ihre Wirkung im 16. Jahrhundert, in: *Melanchthon und die Marburger Professoren (1527–1627)*, ed. by BARBARA BAUER, Marburg 1999, pp. 865–882.

¹² PHILIPP MELANCHTHON, *Loci communes rerum theologicarum*, 1521, in: MELANCHTHON, *Opera quae supersunt omnia. Volumen XXI*, ed. by KARL GOTTLIEB BREITSCHNEIDER and HEINRICH ERNST BINDSEIL, Brunsvigae 1854, coll. 116–124; MELANCHTHON, *Loci communes theologici*, 1535, in: MELANCHTHON, *Opera quae supersunt omnia. Volumen XXI*, (n. 12), coll. 388–406; MELANCHTHON, *Loci praecipui theologici*, 1559, in: MELANCHTHON, *Opera quae supersunt omnia. Volumen XXI*, (n. 12), coll. 685–720; MELANCHTHON, *Philosophiae moralis epitomes libri duo*, 1538–1546, in: MELANCHTHON, *Opera quae supersunt omnia. Volumen XVI*, (n. 12), coll. 21–31 and 70–78; MELANCHTHON, *Ethicae doctrinae elementorum libri duo*, 1550, in: MELANCHTHON, *Opera quae supersunt omnia. Volumen XVI*, (n. 12), coll. 226–231; MELANCHTHON, *Enarrationes aliquot librorum ethicorum Aristotelis*, 1529–1532, V, 2, in: MELANCHTHON, *Opera quae supersunt omnia. Volumen XVI*, (n. 12), coll. 383–392.

¹³ FRANCISCO DE VITORIA, *Comentário al tratado de la ley (1. 2. qq. 90–108)*, Madrid 1952; FRANCISCO DE VITORIA, *De iustitia*. Tomo primero (2. 2. qq. 57–66), ed. by VICENTE BELTRÁN DE HEREDIA, Madrid 1934.

¹⁴ DOMINGO DE SOTO, *De legibus (Ms. Ottob. lat. n. 782)*, ed. by FRANCISCO PUY and LUIS NÚÑEZ, Granada 1965; DOMINGO DE SOTO, *De iustitia et iure libri decem. De la justicia y*

by Thomas Aquinas. Other distinguished Spanish theologians, such as Luis de León or Luis de Molina, revived the same discussion, which in 1612 reach a highlight in the *De legibus* of the Jesuit Francisco Suarez.¹⁵ During the religious wars of the sixteenth century natural law theory was used in the Protestant field as an important argument in theological controversies. Niels Hemmingsen, pupil and friend of Philipp Melanchthon, wrote in 1562 a short exposition of natural law,¹⁶ while Johannes Oldendorp used Melanchthon's arguments to harmonize the Christian teaching and the tradition of Roman law.¹⁷ The topic of a natural law, which God engraved into the heart of every man by the Creation, was applied by Melanchthon himself to justify resistance against tyrannical authorities. His example was imitated by other Lutheran writers during the Schmalkaldic war and after the Peace of Augsburg by the German Calvinists, who integrated the doctrine of innate ideas with the theory of covenant. In the first decades of the seventeenth century two theologians from the university of Wittenberg, who followed the doctrines of Melanchthon, reacted to the Spanish Scholastic, but accepted at the same time some of its suggestions such as, for instance, the existence of an eternal law.¹⁸ This was the last step in the discussion about natural law before the masterpiece of Hugo Grotius *De iure belli ac pacis libri tres* (1625) was printed, which since the eighteenth century has been understood as the beginning of modern natural (and international) law.¹⁹

del derecho en diez libros, Salmanticae 1556, reprint ed. by VENANCIO DIEGO CARRO, Madrid 1967.

¹⁵ FRANCISCO SUÁREZ, *Tractatus de legibus ac Deo legislatore*, Coimbra 1612.

¹⁶ NIELS HEMMINGSEN, *De lege naturae apodictica methodus*, Wittebergae: Georgius Rhaw 1562. Other issues: Vittebergae: Johannes Crato 1564 and Wittebergae: Johannes Crato 1577.

¹⁷ JOHANN OLDENDORP, *Iuris naturalis, gentium et civilis εισαγωγή. Leges XII. tabularum, interpretationibus ad forum adcommoatis, illustratae*, Coloniae 1539.

¹⁸ BALTHASAR MEISNER, *Dissertatio de legibus, in quatuor libellos distributa, quorum primus agit de lege in genere, secundus de lege aeterna, tertius de lege naturae, quartus de legibus humanis, tum politicis tum ecclesiasticis*, Wittebergae 1616; BENEDIKT WINCKLER, *Principiorum iuris libri quinque. In quibus genuina iuris, tam naturalis quam positivi, principia et firmissima iurisprudentiae fundamenta ostenduntur*, Lipsiae 1615.

¹⁹ Cf. JOHANN SAUTER, *Die philosophischen Grundlagen des Naturrechts*, Wien 1932, reprint Frankfurt a.M. 1966, pp. 91–98; HANS THIEME, *Das Naturrecht und die europäische Privatrechtsgeschichte*, Basel 1947, reprint in: THIEME, *Ideengeschichte und Rechtsgeschichte. Gesammelte Schriften*, Köln and Wien 1986, vol. 2, pp. 822–870, especially pp. 835–838; HANS WELZEL, *Naturrecht und materiale Gerechtigkeit*, 4th ed.,

As this brief historical summary makes clear, the reflexion upon the existence and the features of natural law was a chief concern of the philosophical and theological disciplines both in the Middle Ages and in early modern times. The interest in natural law, which grew so rapidly in the political science of the seventeenth century after Grotius, thus 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 since antiquity until modern times and up to now? What sort of changes affected natural law? Did they affect the words or the concepts or both?

2. The Academic Discipline of Natural Law

We can compare modern and ancient natural law, particularly the doctrines of the sixteenth and seventeenth centuries, by contrasting their form and their contents. By the term "form" we assume all those features that concern the organization and the transmission of a theory.

As regards the formal or external side, our perception of the natural law doctrines of early modern times remains partly distorted by the literature of the last century, which divided authors and traditions into two great fields corresponding to different confessions: the Protestant natural law of Melancthon and the Catholic school of Salamanca.²⁰ This distinction is misleading in two senses: on the one hand, it attributes too much importance to religious differences; on the other

Göttingen 1980, (1st ed. 1951), pp. 89–113; ERNST REIBSTEIN, *Völkerrecht. Eine Geschichte seiner Ideen in Lehre und Praxis. I. Von der Antike bis zur Aufklärung*, Freiburg i. Br. 1958, pp. 313–361; WILHELM G. GREWE, *Epochen der Völkerrechtsgeschichte*, Baden-Baden 1984, pp. 237–268; HASSO HOFMANN, Hugo Grotius, in: *Staatsdenker im 17. und 18. Jahrhundert*, ed. by MICHAEL STOLLEIS, 2nd ed., Frankfurt a. M. 1987, pp. 52–77, here pp. 59–65 and 72–75.

²⁰ Cf. for example KARL VON KALTENBORN, *Die Vorläufer des Hugo Grotius auf dem Gebiete des ius naturae et gentium sowie der Politik im Reformationszeitalter*, Leipzig 1848, reprint Frankfurt a. M. 1965, pp. 190–250; HERMANN FRIEDRICH WILHELM HINRICHS, *Geschichte der Rechts- und Staatsprinzipien seit der Reformation bis auf die Gegenwart in historisch-philosophischer Entwicklung*, Leipzig 1848, reprint Aalen 1962, vol. 1, pp. 11–53; OTTO WILHELM KRAUSE, *Naturrechtler des sechzehnten Jahrhunderts. Ihre Bedeutung für die Entwicklung eines natürlichen Privatrechts*, Frankfurt a. M. 1982, (Dissertation 1949), pp. 102–106; JAVIER HERVADA, *Historia de la ciencia del derecho natural*, Pamplona 1987, pp. 263–265.

hand, it ignores the influence of Roman law as a third important tradition beside philosophy and theology.

In fact, beyond all the religious divisions that arose in the Christian world after the Reformation, the whole system of human knowledge maintained in the sixteenth century a strong topologic structure. Similarities and differences were due much more to features of academic teaching than to religious denomination. Human wisdom was considered as a closed amount of knowledge, which contained all possible subjects and needed to be organized in a rational system. Each *locus* had a particular relationship to all other topics and occupied a definite place in the building of human knowledge. This place is the *sedes* or the *topos* of an argument and the description of all *topoi* or *loci* about a question represents its *topica*.

Loci sunt argumentorum sedes, unde probabilia educunt argumenta ad id quod in controversia positum est atque probandum [...]. Non ergo aliud est locus quam communis quaedam rei notio, cuius admonitu quid in quaque re probabile sit possit inveniri. Ex his locis petenda sunt argumenta, sed ordine certo.²¹

An academic discipline of the late sixteenth or of the early seventeenth century such as politics or ethics can be imagined as a set of *topoi*, which belong together and are complementary to each other. Each subject is identified by the connections that it entertains with the other arguments of the same discipline. Therefore, it can be treated only in a certain way and admitted a specific type and a certain number of questions and answers. Certainly, the same subject can be part of different academic disciplines, but in this case, it is discussed in different ways according to the particular framework of common places, which constitutes the subject-matter of teaching.

Niels Hemmingsen, for instance, wrote in 1562 twice about the different kinds of law: once in a philosophical treatise *De lege naturae* and a second time in his *Enchiridion theologicum*, a brief theological

²¹ CLAUDIUS CANTIUNCULA, *Topica tractata per exempla legum*, Basileae 1535, in: *Primum volumen tractatum ex variis iuris interpretibus collectorum, continens eos tractatus, qui de cognitione et interpretatione iuris ac verborum significatione summam et in genere tractant*, Lugduni 1549, fol. 253^{vb}. Cf. JOHANN OLDENDORP, *Topicorum legalium, hoc est locorum seu notarum ex quibus argumenta et rationes legitime probandi sumuntur* [...] *traditio*, Lugduni 1555; NICOLAAS EVERAERTS, *Loci argumentorum legales*, Lugduni 1568; LORENZ NEIDECKER, *Dialectica iuris civilis*, Moguntiae 1601; MATTHIAS STEPHANI, *Dialectica iuris exactissima et absolutissima. Ex omnibus optimorum iurisconsultorum libellis dialecticis et topicis*, [Francofurti] 1610.

exposition of the Christian doctrine. In the first case he followed the scholastic tradition and considered the Ten Commandments as a repetition of natural law, in which were expressed the same rules given by God to mankind during the Creation. By contrast, in his theological handbook Hemmingsen ignored the existence of natural law altogether and described the Ten Commandments as an expression of divine will.²²

Balthasar Meisner went farther in classifying the arguments of natural law: he identified five definitions of natural law, that is five different ways of treating this matter: *definitiones philosophorum, patrum, scholasticorum, iurisconsultorum* and *recentium*. Very interesting is the distinction between jurisprudence and philosophy, as the first understands as natural law all that behaviour which humans share with animals, such as reproduction and education, while the second considers only what is common to all nations. Thus, what the philosophers present as *ius naturale* is called *ius gentium* by the jurists, and the natural law of the latter does not appear at all in the system of the former.²³ We should therefore assume that the same subject, natural rights, has different structures in different disciplines.

The definitions mentioned by Meisner describe therefore the different communities in which the discourse about natural law takes place in early modern times. Actually, they refer to learned communities, in which all members acknowledge each other as participating in the same language and tradition. Each of these groups recognises a common number of authorities and shares a certain system of literary genres. Thus, it can also be described as the ensemble of those people, who quote each other.

These communities corresponded in the sixteenth century exactly to the four faculties of the universities; each of them included a canon of sources and prescribed the accepted methods of teaching, learning and discussing each specific topic. The *corpus Aristotelicum* was the main source for the philosophical faculty; Galen was read and commented in the faculty of medicine; the *Corpus iuris* was the basis of teaching for jurisprudence; the *Sententiae* of Petrus Lombardus or the *Summa*

²² NIELS HEMMINGSEN, *Enchiridion theologicum*, Lipsiae 1562, p. 121; HEMMINGSEN, *De lege naturae*, 1562 (n. 16), fol. 12^v.

²³ MEISNER, *Dissertatio de legibus* (n. 18), III, 2. pp. 214–221.

theologiae of Thomas Aquinas were the sources and the models of the theological faculty.

With the evident exception of medicine, the medieval faculties represent also the communities or the streams of the natural law discourse in the sixteenth and seventeenth century. We can therefore establish the existence of three separate natural law traditions in these centuries. To the theological belongs the Late Scholasticism of the School of Salamanca, which included names like Vitoria and Soto. Protestant scholars following the teaching of Melancthon represent the philosophical tradition. Both these streams and their influence upon Grotius and modern international law are well known and are matters of continuous research. Less investigated is the reflexion upon natural law in the field of jurisprudence, which was no less important with regard to Grotius.

Natural law was in fact a main topic for legal scholars, since *ius naturae* was an important source of rights in Roman law. The first parts of the *Digestum* and of the *Institutiones* bear the titles *De iustitia et iure* (*Digestum*, I, 1 and *Institutiones*, I, 1) and *De iure naturali, gentium et civili* (*Institutiones*, I, 2) and contain some indications about the general features and the essence of natural law. The jurisprudence of the late sixteenth and early seventeenth centuries engaged itself in a continuous elaboration of the statements collected under those titles partly in great commentaries on the whole of the *Corpus iuris civilis*²⁴ partly in specific literary genres such as the dissertation *De iustitia et iure*,²⁵ the

²⁴ On the German commentators of the late sixteenth century cf. RODERICH STINTZING, *Geschichte der Deutschen Rechtswissenschaft*, München 1880, part I, pp. 367–423; ALDO MAZZACANE, *Scienza, logica e ideologia nella giurisprudenza tedesca del sec. XVI*, Milano 1971; VINCENZO PIANO MORTARI, *Il pensiero politico dei giuristi del Rinascimento*, in: *Storia delle idee politiche, economiche e sociali*, ed. by LUIGI FIRPO, Volume terzo: *Umanesimo e Rinascimento*, Torino 1987, pp. 411–509.

²⁵ Cf. for example DANIEL SCHEDIUS, *Theses de iustitia et iure*, resp. FABIANUS A. KOTWITZ, Francofurti 1569; ARNOLD VON REYGER, *De iustitia et iure, et concordante titulo Institutionum De iustitia et De iure naturali, gentium et civili*, in: *Axiomata sive enunciata Digestorum iuris civilis Romani, disputationum exercitio in inclitya academia Iulia, quae est Helmstadii, proposita*, Helmstadii 1585; MARSILIUS KOCH and BERNARDUS DE PUTEO, *Theses de iustitia et iure ex Digesto*, resp. HENRICUS KERCKERINCK, Coloniae Agrippinae 1588, in: *Theses sive conclusiones materiarum iuris Digesti veteris, ordinarie iuxta receptam et antiquam celeberrimi utriusque iuris collegii Agrippinensis consuetudinem, publice disputatae anno 1588. et 1589.*, Coloniae Agrippinae 1589; HIERONYMUS TREUTLER, *De iustitia et iure*, resp. IOANNES REM, in: TREUTLER, *Selectae disputationes ad Pandectarum iuris civilis Iustiniani partem I. II. et III.*, Marpurgi 1592; PAUL GRASECK, *Theses de iustitia et iure eiusque partibus seu speciebus atque causis*, resp. PHILIPPUS REINHARTUS, Argentorati 1594; JOHANNES GOED-

treatise *De arte iuris*²⁶ and the introduction to the study of law.²⁷

This tradition achieved important results in the definition of natural law. The starting point was the opinion of Ulpian, who defined *ius naturale* as that set of behaviour which is common to human beings and animals.²⁸ A main difficulty of this point of view is that it assumes that humans and animals take part in the same community of right, but nobody can create a legal obligation with an animal nor an animal with a human being. The commentators solved the problem by resuming the medieval distinction between *ius primaevum* and *secundarium*. Both *ius naturae* and *ius gentium* were divided into a primary and a secondary part so that at the end there were four kinds of law: *ius naturae primaevum et secundarium* and *ius gentium primaevum et secundarium*. The "primary natural law" was excluded from any juridical treatment because it concerns only the instinctive actions of animals. On the other end, the "secondary law of nations" was in the same way ignored as containing all the agreements between nations made by human decision. The commentators turned their attention to the "secondary natural law" and the "primary law of nations", which are exactly alike: they contain all the rules that arise from the use of natural reason and therefore are recognized by all human beings in every age. This distinction in three classes, which was achieved by humanistic jurisprudence during the sixteenth century, is discussed also in the treatises of the early seventeenth century and offered a

daeus, *Theses iuridicae de iustitia et iure*, resp. GEORGIUS HAUNSCHILD A FIRSTENFELDT, Marpurgi Cattorum 1596; DENIS GODEFROY, *Disputatio I. de iustitia et iure tam naturali quam gentium et civili ex libri 1. Institutionum titulo 1. et 2. desumpta*, resp. DAVID KUGLERUS, Argentorati 1597; EVERHARD VAN BRONKHORST, *De iustitia et iure, legibus, consuetudine, ac statu hominum*, resp. FRANCISCUS DEHNIIUS, Lugduni Batavorum 1598; HUBERT VAN GIFFEN, *Theses de principiis iuris: sumptae ex Digesti et Codicis titulo De iustitia et iure, et titulo De legibus*, resp. PAULUS VOLKAMER, Altorphii 1598.

²⁶ JOACHIM HOPPER, *De iuris arte, libri tres*, 1553, in: CORAS and HOPPER, *Tractatus de iuris arte*, Coloniae Agrippinae 1582, pp. 293–608; JEAN DE CORAS, *De iuris arte liber, quatuor partibus conclusus*, 1560, in: CORAS and HOPPER, *Tractatus de iuris arte*, pp. 1–292.

²⁷ Cf. the collection *Varii iuxta ac utiles clarissimorum tam veterum quam recentium iurisconsultorum tractatus in duos libros digesti: quorum prior viam ac rationem de studio legali recte instituendo, alter brevissimam civilis et pontificii iuris oeconomiam continet*, Coloniae 1580. On the humanistic introduction to the study of law cf. VINCENZO PIANO MORTARI, *Dialettica e giurisprudenza. Studio sui trattati di dialettica legale del sec. XVI*, 1957, in: PIANO MORTARI, *Diritto, logica, metodo nel secolo XVI*, Napoli 1978, pp. 115–264.

²⁸ *Digestum*, I, 1, 1, 3.

conceptual frame to Grotius and to the doctrine of natural law after him.

Formally, the modern discourse upon natural law inherited some elements of the former traditions. Is this enough to say that there is a continuity between natural law of the sixteenth and of the seventeenth century? Did the same tradition continue throughout modern times, or did any kind of breach occur?

Modern natural law was officially established as an academic subject in Heidelberg in 1661, when a chair of *ius naturae* was for the first time offered to Samuel Pufendorf. This discipline, which soon spread throughout the German Empire and Europe,²⁹ aimed consciously at a philosophical foundation of the law pointing out its rational principles and its structural connection with a theory of political authority. Modern natural law maintained a close relationship to the idea of the state as the exercise of sovereignty in two senses. On the one hand, an important part of natural law, the *ius publicum universale*, was intended to explain the origin and the existence of every commonwealth; on the other hand, sovereignty was regarded as the basic condition for enforcing natural rules.

Such a foundation of political society on the basis of natural law and the idea that natural law could be taught in an academic framework and provide a philosophical system were unknown until the seventeenth century. Ancient natural law could not be an academic discipline and could not offer any philosophical foundations because it was chiefly conceived as a law in force. Natural laws of the ancient tradition are by no means universal principles, inapplicable to practical cases, and supplying only general guidelines in order to deduce all the rules of ordinary life. On the contrary, the prescriptions of ancient natural law were immediately in force beside, not above, the rules of the civil law.

While in the modern age the whole complex of law and right could be thought of as a series of circles one above the other or one within the other, the ancient jurisprudence knew three circles one beside the other, to which corresponded three distinct spheres of human life. In

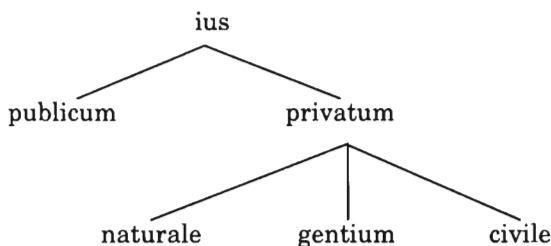
²⁹ Cf. HORST DREITZEL, *Spätaristotelismus, Naturrecht und Reichsreform: Politische Ideen in Deutschland 1600–1750*, in: *Pipers Handbuch der politischen Ideen*, ed. by IRING FETSCHER and HERFRIED MÜNKLER, München 1986, vol. 3, pp. 239–240; MICHAEL STOLLEIS, *Geschichte des öffentlichen Rechts in Deutschland. Erster Band: Reichspublizistik und Policywissenschaft (1600–1800)*, München 1988, vol. 1, pp. 268–270 and 277–284.

the *Corpus iuris civilis* the domain of physical survival (self-defence und reproduction) was under the control of *ius naturale*; marriage and property were ruled by the *ius gentium*; all others matters fell under the *ius civile*.

In the Roman tradition natural law did not constitute in any sense a system, nor did it include universal principles; rather it was a *summa* or a conglomerate of different rights.³⁰ In the same sense Thomas Aquinas and the whole medieval Scholasticism could identify the *lex naturae* with a number of clear prescriptions and statements known by all human beings, and then with the Ten Commandments. For Philipp Melanchthon divine and natural law had the same positive contents and both commanded the worship of God.³¹

The differences between the ancient and the modern tradition of natural law become evident when we compare the distribution of the different kinds of law in Roman jurisprudence and in the modern teaching of *ius naturae et gentium*.

In the Corpus iuris civilis



In a famous passage of the *Digestum*³² Ulpian divides the whole complex of *ius* in two branches: *ius publicum* and *ius privatum*. The

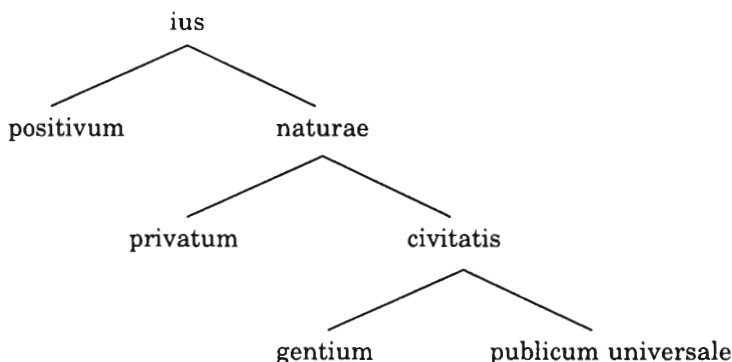
³⁰ CARLO ALBERTO MASCHI, *La concezione naturalistica del diritto e degli istituti giuridici romani*, Milano 1937, p. 346 and ALBERTO BURDESE, Il concetto di *ius naturale* nel pensiero della giurisprudenza classica, in: *Rivista italiana per le scienze giuridiche* 8 (1954), pp. 407–421; MERIO SCATTOLA, *Das Naturrecht vor dem Naturrecht. Zur Geschichte des ius naturae im 16. Jahrhundert*, Tübingen 1999, p. 116.

³¹ SCATTOLA, *Notitia naturalis de Deo et de morum gubernatione* (n. 11), p. 872.

³² *Digestum*, I, 1, 1, 2–4 (Ulpianus, *Libro primo Institutionum*): “Privatum ius tripartitum est: collectum etenim est ex naturalibus praeceptis aut gentium aut

former belongs only to Rome because it describes the religious ceremonies and authorities and the civil officers of the city. A general theory of the *ius publicum* is therefore excluded. The *ius privatum* on the contrary can be collected from the prescriptions of natural law, of the law of nations or of the civil law. All of these kinds of law are valid at the same time. A Roman citizen therefore obeys in some cases the *ius naturale* and in other cases the *ius gentium* or *civile*. If he defends his life against aggression, he applies a natural right. If he marries or gives a dowry to his daughter or acquires some goods, he uses rules of the *ius gentium*. If he brings a suit against somebody in a court he refers to the civil law. Both natural law and the law of nations are therefore parts of private law and regulate directly some of the private relations between Roman citizens. They are independent of the civil law and of the Roman political system and would be in force even if Rome did not exist. They are not more general or more philosophical than the civil law; they only have a different source.

In the modern doctrine



civilibus. Ius naturale est, quod natura omnia animalia docuit: nam ius istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est. Hinc descendit maris atque feminae coniunctio, quam nos matrimonium appellamus, hinc liberorum procreatio, hinc educatio: videmus etenim cetera quoque animalia, feras etiam istius iuris peritia censer. Ius gentium est, quo gentes humanae utuntur. Quod a naturali recedere facile intellegere licet, quia illud omnibus animalibus, hoc solis hominibus inter se commune sit.”

In the modern teaching of the *ius naturae et gentium* of the seventeenth and eighteenth centuries³³ law falls primarily into positive and natural law. *Ius naturae* does not offer any practical rules to decide the cases of ordinary life or those of the law courts. In fact, it is conceived as a part of practical philosophy and as a science,³⁴ which acts only as a theoretical foundation according to reason. Its principles are realized by private and public law, which produce general rules suitable for all political societies. Both the *ius gentium* and *ius civile* are subjects of the *ius naturae*. The former, which applies to political society the natural laws originally intended for individuals in the condition of nature, considers every commonwealth as an individual acting in the state of nature. The latter is contained both in the *ius privatum*, which describes mankind in the condition of nature, and in the *ius publicum*, insofar as the latter concerns relationships between individuals. In both cases, civil law appears as a set of practical prescriptions deduced from the general principles of natural law.

3. 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.

3.1. *Natural Law as Innate Idea*

Natural law was conceived in late antiquity and in the Middle Ages as a set of innate rules that God engraved upon the heart of 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.

There does exist therefore, gentlemen, a law which is a law not of the statute-book, but of nature; a law which we possess not by instruction, tradition, or reading, but which we have caught, imbibed, and sucked in at Nature's own breast; a law which comes to us not by education but by constitution, not by training but by intuition – the law, I mean, that,

³³ This diagram simplifies the classification proposed by GOTTFRIED ACHENWALL and JOHANN STEPHAN PÜTTER, *Elementa iuris naturae*, Gottingae 1750.

³⁴ *Ibid.*, § 211, p. 54. Cf. below n. 145.

should our life have fallen into any snare, into the violence and the weapons of robbers or foes, every method of winning a way to safety would be morally justifiable.³⁵

In the *Epistle to the Romans* the Apostle Paul acknowledged the existence of a "written law in their [*scil.* of the Gentiles] hearts", which contains the same commandments as the revealed law.³⁶ The Church Fathers too insisted on the topic of innate ideas. Resuming the passage of the Apostle Paul, Ambrosius divided the law into two parts: *lex naturalis et scripta*. Natural law is engraved in hearts; written law in books. All human beings are therefore subject to the former and all of them give themselves their law following the prescriptions of their heart. Therefore nobody needs to learn the rules of natural law because they are evident by themselves and manifest themselves in the moral conscience confirming or disapproving the moral behaviour of human beings.³⁷

The doctrine of innate ideas was accepted in the Middle Ages not only in philosophy but also in jurisprudence. Commentators both on canonical and Roman law admitted that some prescriptions guiding the actions of animals and men are self-evident, and therefore deserve the

³⁵ MARCUS TULLIUS CICERO, *Pro T. Annio Milone*, IV, 10, in: CICERO, *Cicero in Twenty-Eight Volumes*, ed. by N.H. Watts, Cambridge Massachusetts 1979, (1st ed. 1953), vol. 14, pp. 16–17: "Est igitur haec, iudices, non scripta, sed nata lex, quam non didicimus, accepimus, legimus, verum ex natura ipsa arripuimus, hausimus, expressimus; ad quam non docti, sed facti, non instituti, sed imbuti sumus, ut, si vita nostra in aliquas insidias, si in vim et in tela aut latronum aut inimicorum incidisset, omnis honesta ratio esse expediendae salutis."

³⁶ *Romans*, 2, 14–15: "For when the Gentiles, which have not the law, do by nature the things contained in the law, these, having not the law, are a law unto themselves. Which show the work of the law written in their hearts, their conscience also bearing witness, and their thoughts the mean while accusing or else excusing one another."

³⁷ AMBROSIIUS, *De fuga saeculi*, III, 15, in: *Patrologiae cursus completus. Series Latina*, ed. by MIGNE, 1845, vol. 14, col. 605: "Lex autem est gemina, naturalis et scripta. Naturalis in corde, scripta in tabulis. Omnes ergo sub lege, sed naturali. Sed non est omnium, ut unusquisque sibi lex est. Ille autem sibi lex est qui facit sponte quae legis sunt et in corde suo scriptum opus legis ostendit"; AMBROSIIUS, *Ambrosius Irenaeo*, 73, 3, in: *Patrologiae cursus completus. Series Latina*, ed. by MIGNE, 1845, vol. 16, col. 1251: "Ea igitur lex non scribitur, sed innascitur; nec aliqua percipitur lectione, sed profluo quodam naturae fonte in singulis exprimitur et humanis ingeniis hauritur. Quam debuimus vel futuri iudicii metu servare, cuius testis conscientia nostra tacitis cogitationibus apud Deum ipsa se prodit, quibus vel redarguitur improbitas vel defenditur innocentia"; AMBROSIIUS, *Libri VI. Hexaameron*, V, 21, 68, in: *Patrologiae cursus completus. Series Latina*, 1845, ed. by MIGNE, vol. 14, col. 249: "Sunt enim leges naturae non scriptae litteris, sed impressae moribus: ut leniores sint ad puniendum, qui maxima potestate potiuntur."

name of *ius naturae*.³⁸ Nevertheless, the theory of an innate natural law found the largest interest within medieval Scholasticism and became an obligatory matter of dispute.³⁹ 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",⁴⁰ 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.⁴¹ These rules correspond to 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".⁴² 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.⁴³ General and common statements are: "Bo-

³⁸ STEPHANUS TORNACENSIS, *Die Summa über das Decretum Gratiani*, ed. by Johann Friedrich von Schulte, Gießen 1891, repr. Aalen 1965, dist. 1, "Humanum genus", p. 7: "Et notandum, ius naturale quatuor modis dici. Dicitur enim ius naturale, quod ab ipsa natura est introductum et non solum homini, sed etiam ceteris animalibus insitum, a quo descendit maris et feminae coniunctio, liberorum procreatio et educatio [...] Vel si quintam iuris naturalis acceptionem non abhorreas, intellige, hic dici ius naturale, quod hominibus tantum et non aliis animalibus a natura est insitum, scil. ad faciendum bonum vitandumque contrarium."

³⁹ Cf. for instance ALEXANDER DE ALES, *Summa theologica*, ed. by the Patres collegii S. Bonaventurae, Ad claras aquas prope Florentiam (Quaracchi) 1948, lib. 3, pars 2, inquis. 2: "De lege naturali", t. 3, pp. 337-364; GUILIELMUS ALVERNUS, *De legibus*, in: GUILIELMUS ALVERNUS, *Opera omnia*, Parisiis 1674, reprint Frankfurt a. M. 1963, pp. 18-102.

⁴⁰ AUGUSTINUS, *Confessiones*, II, 4.

⁴¹ THOMAS AQUINAS, *Summa theologiae*, Ia IIae, q. 94, a. 6, resp.: "Ad legem naturalem pertinent primo quidem quaedam praecepta communissima, quae sunt omnibus nota [...] Quantum ergo ad illa principia communia, lex naturalis nullo modo potest a cordibus hominum deleri in universali." On the natural law of Thomas Aquinas cf. MARTIN GRABMANN, *Das Naturrecht der Scholastik von Gratian bis Thomas von Aquin*, in: GRABMANN, *Mittelalterliches Geistesleben. Abhandlungen zur Geschichte der Scholastik und Mystik*, München 1926, pp. 65-103; ODON LOTTIN, *La loi naturelle depuis le début de XII^e siècle jusqu'à saint Thomas d'Aquin*, in: LOTTIN, *Psychologie et morale aux XII^e et XIII^e siècles*, Louvain 1948, tome 2, par. 1, pp. 69-100; ROBERTO BAGNULO, *Il concetto di diritto naturale in San Tommaso d'Aquino*, Milano 1983, pp. 106-112.

⁴² THOMAS AQUINAS, *Summa theologiae*, Ia IIae, q. 91, a. 2, resp.

⁴³ *Ibid.*, Ia IIae, q. 94, a. 4, resp. Cf. *ibid.*, Ia IIae, q. 94, a. 1, ad secundum: "Praecepta legis naturalis [...] sunt prima principia operum humanorum."

num est faciendum et malum vitandum", "Conservatio sui appetenda est", "Liberi sunt educandi", "Ignorantia vitanda est" or "Alii non sunt offendendi". From these basic truths, every human being can immediately gain the same practical rules that are enclosed in the Ten Commandments, as for instance in the prohibition of theft.⁴⁴

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 law must be "engraved and imprinted" in our soul.⁴⁵ Otherwise, they were only human opinions. The doctrine of Thomas Aquinas that the *ius naturae* is a "ray of light" in the mind of human beings may not therefore mean that it is a pure ability, a *habitus*, because a skill cannot be a judgement or a prescription, but is the capability or the virtue to gain by reason prescriptions and judgements. As it cannot be conceived as ability or disposition, the natural law should be defined as a rule or a set of rules, which are the product of a virtue. *Habitus* in the proper sense of the word is conscience or *synderesis*; natural law is on the contrary a "collection of principles regarding practical questions". In this sense natural law is "innate" (*indita*), and it operates as an ensemble of prescriptions left in the human memory.⁴⁶

Here Soto has to answer a question that arises from the Thomistic doctrine of knowledge. Assuming that the ideas in the human mind result always from perceptions of the senses, how can Soto admit that some rules of natural law are present and operate in the soul before any experience? Given the premise that "Nihil est in intellectu, quod prius non fuerit in sensu", innate ideas seem to be altogether impossible.

⁴⁴ *Ibid.*, Ia IIae, q. 94, a. 2, resp. and Ia IIae, q. 100, a. 3, resp.

⁴⁵ SOTO, *De iustitia et iure libri decem* (n. 14), I, 4, 1, p. 29^a: "Lex naturalis in mentibus nostris insculpta est et impressa [...] Ergo Deus, qui cuncta suaviter disponit, veluti naturae autor impressit mentibus nostris lumen, per quod legem eius aeternam participant actiones nostras ad debitum finem, quo suapte natura feruntur, dirigemus;" and I, 3, 1, p. 22^a: "Mox, quia idem Deus author est naturae, singulis rebus suos indidit instinctus et stimulos quibus in suos fines agerentur, sed homini praecipue naturalem normam mente impressit qua se secundum rationem, quae illi naturalis est, gubernaret; atque haec est lex naturalis, eorum scilicet principiorum quae absque discursu lumine naturali per se nota sunt, ut: id facias aliis quod tibi fieri vis et similia."

⁴⁶ *Ibid.*, I, 4, 1, p. 29^b: "Itaque sicuti scriptura sacra dicitur fides nostra, quia est collectio eorum omnium quibus per habitum fidei assentimus, ita collectio principiorum agendarum rerum dicitur habitus, quia virtute synderesis illis assensum praebemus. Quod si quaeras quidnam est hoc, quod per modum habitus permanet praeter synderesin? Respondetur, esse species in memoria derelictas."

Soto can unify both statements – that the natural law is innate and that it is not originally present in the human mind –, because he assumes that the *lex naturae* corresponds to a number of well-determined prescriptions that are produced by the conscience spontaneously. Before a human being has some experience of the moral world, his/her mind does not contain any knowledge regarding natural law. Truly, the human soul has only the faculty to gain all rules it needs as soon as it knows the first terms of moral life: good, evil, virtue, vice and so on. Therefore, the prescriptions or contents of natural law are not present since birth, but are subsequently produced immediately, without effort, *nullo negotio*, as if they were really innate.⁴⁷

Thomas Aquinas and Soto belong to a tradition that denies the doctrine of innate knowledge; nevertheless, they come to admit the existence of an innate or quasi-innate law of nature. Other traditions such as Lutheran Philippism and German Calvinism could hold the same theory with fewer problems. Philipp Melanchthon, who followed a voluntaristic argument in the explanation of the divine law, assumed for instance that natural law is composed of a collection of *notitiae inditae*, which “God engraved on everybody’s soul”. These innate ideas must be conceived as *principia communia* or *conclusiones primae* or “common notions”.⁴⁸ They are considered to be present in the mind before any experience of the world, even though by this assumption we must reject the teaching of Aristotle that nothing can be in the soul, which has not previously gone through the senses.⁴⁹ On the other hand, these prescriptions should accord with reason and be *notitiae*. In fact, we could assume that natural law guides human actions through natural tendencies and instincts, so that our behaviour would be as natural as that of animals. Nevertheless, in this case all instinctive

⁴⁷ *Ibid.*, I, 4, 1, p. 29^b: “Respondetur, propterea legem naturae dici nobis a natura inditam et impressam, quod apprehensis terminis boni et mali illico virtute synderesis intellectus efformat iudicia haec et dictamina: Bonum est amplectendum, et malum repudiandum ac similia, quae scilicet eiusdem intellectus lumine innotescunt. Quare nulla opus fuit specierum infusione, sed illae postea nullo negotio acquiruntur”.

⁴⁸ MELANCHTHON, *Loci communes rerum theologicarum*, 1521 (n. 12), coll. 116–117: “Est itaque lex naturae sententia communis, cui omnes homines pariter adsentimur, atque adeo quam Deus insculpsit cuiusque animo, ad formandos mores adcommodata. Nam ut sunt in disciplinis theoreticis, ut mathematicis, quaedam communia principia, sive κοινὰ ἐννοιαὶ ἢ προλήψεις, quale illud est, totum esse maius partibus. Ita sunt quaedam in moralibus tum principia communia, tum conclusiones primae, utendum est enim docendi gratia istorum vocabulis, regulae omnium humanarum functionum.”

⁴⁹ *Ibid.*, col. 117.

actions were good, and we could neither give moral judgement, nor distinguish good and evil, although some instincts produce evil and vices.⁵⁰

The same doctrine, that some basic commandments are naturally present from birth in the human soul, was a commonplace in the sixteenth century both in theology and in the ethical and political literature, especially in the writings of the German Calvinists. Johannes Althusius recalls it at the beginning of his treatise about the science of law.⁵¹ For Kaspar Olevian and Matthias Martinius, two important representative authors of the theology in the late sixteenth century and in the early seventeenth century, the natural law was the content of the first covenant between God and the mankind that promised salvation.⁵²

3.2. Natural Law and the Ten Commandments

The second general characteristic of medieval natural law is that it corresponds to the Ten Commandments. The identity between Old Testament law, the Gospel and natural law is a commonplace in the canonical tradition, which was asserted at the very beginning of the *Decretum*⁵³ and was repeated by the commentators during the Middle Ages.⁵⁴ In the same sense Thomas Aquinas argued that moral precepts, that is those commandments of Old Testament law which concern good actions, should accord with reason. However, every rule of human reason derives from natural reason and this is in its turn expressed by natural law. Consequently, the true source of the prescriptions in the Decalogue is natural law and the Ten Commandments

⁵⁰ MELANCHTHON, *Ennarationes aliquot librorum Ethicorum Aristotelis* (n. 12), col. 385.

⁵¹ JOHANNES ALTHUSIUS, *Iurisprudentiae Romanae methodice digestae libri duo*, Herbornae 1592, (1st ed. 1586), I, 1, p. 1; JOHANNES ALTHUSIUS, *Dicaeologicae libri tres*, Francofurti 1618, (1st ed. 1617), I, 13, 11, pp. 36–37.

⁵² KASPAR OLEVIAN, *Der Gnadenbund Gottes*, Herborn 1590, pp. 8–9; KASPAR OLEVIAN, *De substantia foederis gratuiti inter Deum et electos*, Genevae 1585, I, 8, 5, p. 169; MATTHIAS MARTINIUS, *Memoriale biblicum*, Herbornae Nassoviorum 1614, (1st ed. 1603), "Summula doctrinae de federe", §§ 1–5, pp. 3–4 and MATTHIAS MARTINIUS, *Disputatio III. De lege in genere*, resp. BERNHARDUS CRUSIUS, in: MARTINIUS, *Christiana pietas et aequitas*, Bremae 1618, p. 59.

⁵³ *Decretum*, dist. 1, pr.

⁵⁴ STEPHANUS TORNACENSIS, *Die Summa über das Decretum Gratiani* (n. 9), dist. 1, "Humanum genus", p. 7.

repeat exactly the contents of the *lex naturae*.⁵⁵ The same doctrine returns in the sixteenth century both in the commentaries of the Spanish Scholastics⁵⁶ and in Melanchthon's theological system.⁵⁷ In both traditions the recognition and the worship of the only God, asserted in the first table, are constitutive parts of the natural law.⁵⁸ To a certain extent, human beings have therefore a natural knowledge of God, which is not given by divine law and which is valid for the whole of mankind before any divine revelation.

Both the Catholic and the Lutheran tradition explain why this natural knowledge is insufficient to achieve salvation and why natural law had to be renewed with the Ten Commandments. Both agree that our ancestors in Paradise did not need to be taught by means of law as they could recognize the true and the good with their natural reason or natural will.⁵⁹ But original sin obscured this natural capacity to follow the laws of God. Pride persuaded the wicked that their natural reason would suffice for salvation, while the good were not able to fulfil the prescriptions written in their heart because of the darkness produced by the growing sin. Therefore, God gave Moses the Ten Commandments to convince the former of their sin, condemning them through the Law (*Rom.* 3, 20), and to help the latter to seek a virtuous life: "Therefore it was right that the Old Testament law was given between the law of nature and the law of grace".⁶⁰

⁵⁵ THOMAS AQUINAS, *Summa theologiae*, Ia IIae, q. 100, a. 1, resp. and a. 3, resp.

⁵⁶ SOTO, *De iustitia et iure* (n. 14), III, 1, 3, p. 198^a.

⁵⁷ MELANCHTHON, *Ethicae doctrinae principiorum practicum, et conclusionum ex his extructarum, de regendis moribus, congruentes cum aeterna et immota norma mentis divinae, insitae nobis divinitus, ut sint testimonia, quod sit Deus, et qualis sit, et regant nos, ut congruat obedientia nostra cum voluntate Dei. Harum notitiarum conclusiones recitantur in decalogo, et inde expeditissimum est, summam legum naturalium sumere.* Cf. MELANCHTHON, *Loci praecipui theologici*, 1559 (n. 12), coll. 715–716.

⁵⁸ THOMAS AQUINAS, *Summa theologiae*, Ia IIae, q. 100, a. 4; MELANCHTHON, *Loci communes rerum theologicarum*, 1521 (n. 12), coll. 117–119.

⁵⁹ THOMAS AQUINAS, *Summa theologiae*, Ia IIae, q. 98, a. 6, ad primum; MELANCHTHON, *Loci praecipui theologici*, 1559 (n. 12), coll. 712–713.

⁶⁰ THOMAS AQUINAS, *Summa theologiae*, Ia IIae, q. 98, a. 6, resp. Similar arguments are developed by MELANCHTHON, *Loci communes theologici*, 1535 (n. 12), coll. 399–400 and MELANCHTHON, *Loci praecipui theologici*, 1559 (n. 57), coll. 712–713.

3.3. *A Plurality of Principles*

The third difference between ancient and modern natural law is that the former always includes a plurality of independent principles or rules. This peculiarity is particularly evident in the voluntaristic tradition of Melanchthon, who refers to natural law as a collection of "common principles", "common ideas or anticipations" and "first conclusions" for theoretical as well as practical knowledge.⁶¹ Melanchthon arranges the general rules of natural law within a system of premises, statements and inferences provided with a different degree of logical necessity, which depends on the relative position of each sentence. By virtue of this order, the lower principles must yield to the upper ones when they eventually come into conflict.⁶² In the history of the sacrifice of Isaac for instance the principle that everyone should preserve one's own children struggled with the principle that everyone should obey the orders of God. The first table of the Decalogue is higher in rank than the second one because it regards the worship of God and the salvation of the soul while the precepts of the second table rule over the virtuous life in human society. Consequently, the commandments of the second table must be neglected when they conflict with the commandments of the first table. Generally speaking, the order among the principles, which is valid also for theoretical knowledge, prescribes that necessary in an absolute sense and therefore inviolable are only those laws whose transgression causes the destruction of human nature. All other principles of natural law are placed in a lower rank and can be infringed to the advantage of higher precepts.⁶³ With regard to these conclusions, Melanchthon's doctrine of natural law cannot be understood as a deductive system in which all rules may be obtained by means of geometrical reason from a first, absolute principle. This is a modern idea, which cannot be applied to the natural law of the sixteenth century. The fact that the rules form a whole does not imply a deduction, but only means that there is a rank among the principles, which are plural and cannot be inferred from other statements.

The same conclusions may be applied to Thomist Scholasticism. Thomas Aquinas asks explicitly in his *Summa Theologiae* (Ia IIae, q. 94, a. 2) whether the natural law contains just one or many precepts,

⁶¹ MELANCHTHON, *Loci praecipui theologici*, 1559 (n. 12), coll. 711–712.

⁶² MELANCHTHON, *Ethicae doctrinae elementorum libri duo* (n. 12), coll. 228–229.

⁶³ MELANCHTHON, *Ethicae doctrinae elementorum libri duo* (n. 12), col. 229.

and defends the assumption that “prima praecepta indemonstrabilia sunt plura”. In the practical as well as in the theoretical reason there are some first principles which cannot be demonstrated and constitute the foundations of all subsequent arguments. Some of these general statements are immediately known to all human beings, whereas some others can be clearly understood only by the wise after long reflection. The fact that all rules of natural law are founded upon first principles means that there is a necessary order among its notions. Actually, the first and simplest notion must be included in the knowledge of the second one and in all other inferior ideas. Therefore, the non-contradiction principle, which is the first non-demonstrable truth of theoretical reason, derives from the first determination of being and not-being, and is included in every other statement upon any kind of being. Each other subsequent principle adds a particular specification and thus enriches the content of a notion until this can describe an individual being. The same argument must be applied also to practical reason, whose first principle is “Everything searches for the good”.⁶⁴

The first principle states a general rule that is valid for all beings in the world. All of them aim at the good, but how will each of them seek for the good that suits its particular nature? How will an animal, a human being, a European of the twenty-first century reach the good? To answer this question, which is the conclusion of a syllogism, we have to add some other conditions, which specify the nature of that particular being. These specifications cannot be simply derived from the first principle. We cannot conclude for example that human beings need to live in a society in order to realize the virtuous life merely from the fact that they search for their good. As far as we know, it could also happen that a human being needs to live a solitary life. The additional specifications, which we necessarily must assume in order to describe

⁶⁴ THOMAS AQUINAS, *Summa theologiae*, Ia IIae, q. 94, a. 2, resp.: “In his autem quae in apprehensione omnium cadunt, quidam ordo invenitur. Nam illud quod primo cadit in apprehensione, est ens, cuius intellectus includitur in omnibus quaecumque quis apprehendit. Et ideo primum principium indemonstrabile est quod *non est simul affirmare et negare*, quod fundatur supra rationem entis et non entis: et super hoc principio omnia alia fundantur [...] Et ideo primum principium in ratione practica est quod fundatur supra rationem boni, quae est, *Bonum est quod omnia appetunt*. Hoc est ergo primum praeceptum legis, quod bonum est faciendum et prosequendum, et malum vitandum. Et super hoc fundantur omnia alia praecepta legis naturae: ut scilicet omnia illa facienda vel vitanda pertineant ad praecepta legis naturae, quae ratio practica naturaliter apprehendit esse bona humana.”

the nature of a particular being, show two qualities. Firstly, they are not included in the superior principles and cannot be derived from them. Therefore, they are independent. Secondly, the inferior statements have to be consistent with the superior ones. In other words, what is affirmed in a higher rule must be contained as well in all lower ones.

Thomas Aquinas describes the different levels of this order as the series of rational inclinations that operate in every single being. After the first principle of natural law – “Everything searches for the good” –, the second one is that a human being should defend his own life in the same way as any other being of the natural world preserves its existence. The third principle, which is in common with all other animals, states that man and woman should marry and procreate. The fourth one concerns what is proper only to human beings, which are endowed with reason, and, following their own essence, search for truth and virtuous life in a mutual society. The general rules of natural law are disposed in the same sequence of the order of being, and in fact they reflect the determinations that correspond to each step of the created world. Superior principles are more general and pertain to a larger number of events. Inferior principles are increasingly specific and include the content of all superior truths. Thus, Thomas Aquinas draws the conclusion that the law of nature consists of “many precepts that have a common root”.⁶⁵ Just as happened with the doctrine of Melancthon, this communication or foundation cannot be understood as a deduction or derivation from a single first source, but it is an order of consistence among many principles, distributed in a scale of importance, as each step implies a further determination in the order of creation.

Domingo de Soto explained the same argument as follows. The precepts of natural law, that is its first indemonstrable principles, must be plural because the basic commands impressed in our hearts correspond to the single parts of our nature, which at least comprehends the being in general, the animal and the human being.⁶⁶ Moreover, not only the first principles belong to the law of nature, but also all those conclusions which appear in the human mind without extensive argument and therefore have the status of independent

⁶⁵ *Ibid.*, Ia IIae, q. 94, a. 2, ad secundum.

⁶⁶ Soto, *De iustitia et iure* (n. 14), I, 4, 2, p. 31^{a-b}.

precepts. Such are for example the Ten Commandments.⁶⁷ That the inferior is based on the superior means therefore that there is a plurality of independent principles, and that a consistent order rules among them.

3.4. *Universal Order*

3.4.1. *Natural and Eternal Law*

The fourth point in our model refers to the fact that ancient natural law is part of the universal order of justice that governs the whole creation. As we have already seen, Thomas Aquinas lets natural law follow the sequence of the order of being. In the Thomist tradition the same idea of universal justice is expressed by the doctrine that natural law partakes of eternal law, that is of the divine reason, which comprehends and prescribes the order of the universe.

Just as every author carries in his mind the concept of the object that he is going to shape, so God too conceived the plan of the world before he began to create it. With regard to things that are to be done the plan or notion of the object is “art or example or idea”; with respect to things that are to be governed the pre-existing model or “idea” has the character of law. God, who is the creator of all things, is in the same relation to them as the artificer to the products of his art. Moreover, he governs all acts and movements of each single creature. Divine wisdom has the character of art, exemplar or idea inasmuch as all things are created by it, whereas it bears the character of law inasmuch as it moves all things to their due end. “Accordingly, the eternal law is nothing else than the essence of divine wisdom, as directing all actions and movements.”⁶⁸ The eternal law denotes the plan of God directing all things and acts of the world towards an end. Wherever there is a

⁶⁷ *Ibid.*, I, 4, 3, p. 33^b: “Illae virtutes dicuntur de lege naturae, ad quas statim natura inclinatur, non solum tanquam ad prima principia, verum tanquam ad conclusiones ex eisdem principiis absque humano discursu pullulantes[...] Pervia sunt exempla. Praecepta Decalogi sunt de iure naturae. Nam ex illo principio quod bonum est diligendum atque ex altero quod unaquaeque res suum esse et vitam diligit, statim absque longo rationis discursu prodeunt praecepta primae tabulae, scilicet quod Deum Optimum Maximum, cuius beneficio et saeculari vita donati sumus et sempiternam expectamus, amemus neque eum iurandi abusu contemnamos, sed feriatis diebus colamus et veneremur. Ex alio autem, id facias aliis quod tibi fieri vis, idque ne facias quod tibi non cupis, deducuntur mandata cuncta secundae tabulae, quae omnia in officiis iustitiae posita sunt.”

⁶⁸ THOMAS AQUINAS, *Summa theologiae*, Ia IIae, q. 93, a. 1, resp.

hierarchy of causes and movers, as is the case in the creation, the power of the lower derives from the power of the higher since the one receives its movement from the other. The same can be observed in the government of cities and kingdoms, where the command flows from the king or supreme magistrate to the inferior governors and to the subjects. "Since then the eternal law is the plan of government in the supreme governor, all the plans of government in the inferior governors must be derived from the eternal law. However, these plans of inferior governors are all other laws beside the eternal law. Therefore all laws, in so far as they participate in right reason, are derived from the eternal law."⁶⁹ The natural, the human and the divine law, which are the three recognized kinds of inferior law, flow from the eternal one, accord with it and are valid only inasmuch as they are congruent with it.

The same doctrine of the universal order of justice is also present in those traditions, like Lutheran natural law, that refuse the idea of an eternal law and lean towards a voluntarist doctrine. Philipp Melancthon for instance defined the law as "a rule, which commands good and forbids evil",⁷⁰ but besides the *lex naturae*, *humana* and *divina* he also distinguished a *lex Dei*, which performs to some extent the same function as the *lex aeterna* of Aquinas.⁷¹ The "law of God" cannot in fact be identified with the "divine law", by which God revealed his will immediately to the people of Israel, because from it derives not only the Decalogue, but also natural law impressed on human hearts since the creation. The "law of God" should therefore be understood as the common root of any other kind of law. It states first of all the duty of every human being to obey the divine commands. It prescribes how we should act, what we should do, and what we should avoid. It requires a perfect obedience to the orders of God and promises eternal damnation to sinners.⁷² Since the "law of God" derives from divine will and not

⁶⁹ *Ibid.*, Ia IIae, q. 93, a. 3, resp.; SOTO, *De iustitia et iure libri decem* (n. 14), I, 3, 1, p. 22^b; I, 3, 2, p. 23^b; I, 3, 3, pp. 24^b-25^b; I, 3, 4, pp. 25^b-28^b.

⁷⁰ MELANCHTHON, *Lucubratiuncula Philippi Melanthonis*, 1520, in: MELANCHTHON, *Opera quae supersunt omnia*. Volumen XVI. (n. 12), coll. 23-24.

⁷¹ About the differences between the *lex aeterna* of Thomas Aquinas and the *lex Dei* of Philipp Melancthon cf. SCATTOLA, *Notitia naturalis de Deo et de morum gubernatione* (n. 11), pp. 868-863.

⁷² MELANCHTHON, *Loci praecipui theologici*, 1559 (n. 12), col. 685: "Lex Dei est doctrina a Deo tradita, praecipiens, quales nos esse et quae facere, quae omittere oportet, et requirens perfectam obedientiam erga Deum ac pronuntians irasci Deum et punire aeterna morte non praestantes perfectam obedientiam."

from divine wisdom, it cannot be deduced by rational means by the human intellect⁷³ and was therefore stated three times during the history of the creation: as natural law, in the Decalogue and in the Gospel.

Here is the main difference between the *lex Dei* of Melanchthon and the *lex aeterna* of Aquinas. Melanchthon assumes that the commands of the "law of God" have been repeated without changes in the other sorts of law. Natural law and divine law are therefore different versions of the same precept, which always regards the whole of human life. Actually, there is for Melanchthon only one possible human perfection, which can be achieved by obeying the law of God. The "eternal law" of Aquinas on the contrary permits the existence of different levels of perfection since natural, divine and human law govern over separate fields of human existence. A person who respects the rules of natural law will achieve earthly happiness; but a person who also obeys the commands of divine law will reach heavenly blessedness. Therefore, the different kinds of law are single and separate parts of the eternal law; they were revealed in different times and together form the whole content of the eternal law.

With this question concerning the meaning of the *lex aeterna* of Aquinas the Late Scholastics of the sixteenth century dealt directly. Domingo de Soto asked about the true content of eternal law and explained what had remained unexpressed in the *Summa theologiae*. Soto claims that eternal law differs from the other three kinds of law because it is the very origin of them all.⁷⁴ *Lex naturae*, *divina* and *humana* are done und determined; *lex aeterna* is on the contrary the doer and the determining. The other kinds of law have always a specific object and are stated in a peculiar way. Therefore, it is always possible to say whether a right or a duty belongs to natural, divine or human

⁷³ *Ibid.*, col. 686–687.

⁷⁴ SOTO, De iustitia et iure libri decem (n. 14), I, 3, 1, p. 22^{a-b}: "Non eodem modo species istae legum differunt. Aeterna enim differt a caeteris tribus quod ipsa fons illarum est et origo: non utique lata sed ferens; non impressa, sed imprimens; non denique alterius participatio, sed lux cuius aliae sunt participationes. Reliquae vero inter se hoc distant quod lex naturalis est impressio facta in ipsa creatione naturae; lex vero humana est regula ab homine posita per facultatem sibi divinitus collatam; lex vero divina est lumen infusum homini, quam ideo Hieremias [31, 33] vocat legem scriptam in cordibus. Igitur quamvis lex aeterna, divina etiam sit, differt tamen a divina positiva, quod illa in Deo ab aeterno existit, haec vero in nobis ex tempore." Cf. *ibid.*, I, 3, 3, p. 24^b: "Omnis in universum lex, praeter aeternam, qua ratione iusti quippiam continet, ab illa aeterna derivatur."

law. We have just to consider the form of the command: whether it is written in the human heart or is stated by a divine or by a human authority. On the contrary, eternal law has no particular content. It is impossible to determine which rights and duties are part of eternal law because all of them belong to it regardless of their particular form. In fact, every prescription takes part in the eternal law insofar as it is part of natural or of human law.⁷⁵ The very content of the eternal law is therefore the whole complex of all other laws. Moreover its content is the harmony among all precepts of the world: it expresses the simple fact that the universal and divine order rules over all different kinds of law.

3.4.2. *Order and Tyranny*

Both the Scholastic tradition of Thomas Aquinas and the Lutheranism of Melanchthon suppose the existence of a superior, universal order in which all existing rules play a role. A main consequence of this idea of participation, which is expressed both in the Thomistic eternal law and in the Melanchthonian law of God, is that good and evil, virtue and vice, command and prohibition correspond with an objective order, which is given and cannot be changed. The human mind can rationally reconstruct the order of the law by following the order of being from its beginning until the latest conclusions, but reason cannot find or invent a new order.

The order of universal justice speaks immediately to every human being in several ways: through natural law, in the Old Testament law of the Ten Commandments and in the words of Christ. Every human being has therefore direct access to this universal order and can perceive in his conscience whether he or she acts rightly or wrongly. This idea also has important consequences for the political thought of early modern times. For as the universal order can be understood by every person or by every political subject, they may always be able to recognize whether their rulers are governing in accordance with justice or against it. The existence of a universal order therefore makes possible the difference between good and bad governments. The king who does not rule for the sake of his subjects, but only seeks his own private advantage, turns into a tyrant, who infringes the law of nature

⁷⁵ *Ibid.*, I, 3, 1, p. 22^a (cf. n. 91) and I, 3, 2, p. 23^b (cf. n. 93).

and will be punished both by men and by God. The existence of a universal order also makes it possible for subjects to identify the tyrant, to reject him and to struggle against him. In fact, there is an objective set of rules, which is eternal and independent of the will of the king and can be used as a standard to measure the rightness or justice of a government. This naturally does not imply that the subjects should substitute their rulers and govern by themselves. Only through their corporate representatives can they recognize the good prince: they are not able to act as a prince.

Nor does this imply that subjects continually give advice to their governors, or judge and remove them. The active opposition of subjects against a tyrant takes place only in a very few and very extreme cases when the corrupt king violates the holiest laws of nature and rejects all legitimate requests and good advice. Anyway, the struggle against him depends by no means on the decisions of the single subjects because only the representatives and the lower magistrates can act in the name of the people and lead the resistance against the tyrant.

In the religious wars of the sixteenth century and in the early seventeenth century all the competing confessions, Lutheran, Calvinist and Catholic, held the theory that subjects have a legitimate right to resist when the king or the supreme magistrate commands something that is against the (true) faith. The legal counsellors of the Schmalkaldic League developed a doctrine, based upon the Golden Bull of the Emperor Charles IV, that the lower magistrates of the Holy Roman Empire, the seven Electors, had the right to oppose, even by force, the orders of the emperor, if they were impious. Martin Luther accepted this theory and defended it in his *Warning to his Dear German People* in the year 1531.⁷⁶ The issue became particular significant during the Schmalkaldic War (1546–1547) and the siege of the city of

⁷⁶ MARTIN LUTHER, *Warnung an seine lieben Deutschen*, 1531, in: MARTIN LUTHER, *D. Martin Luthers Werke. Kritische Gesamtausgabe* (Weimarer Ausgabe), Weimar 1910, vol. 30, pp. 276–320. Cf. also MARTIN LUTHER, *Tischreden*, in: *Werke* (n. 76), no. 2285 (1531), vol. 2, 1913, pp. 405–406 and no. 4342 (1539), vol. 4, 1916, pp. 235–241; MARTIN LUTHER (with JUSTUS JONAS, JOHANNES BUGENHAGEN and PHILIPP MELANCHTHON), *Luther an Kurfürsten Johann den Beständigen von Sachsen*. [Wittenberg] 6. März 1530, in: *Das Widerstandsrecht als Problem der deutschen Protestanten. 1523–1546*, ed. by HEINZ SCHEIBLE, Gütersloh 1969, pp. 60–63; FRANCIS OAKLEY, *Christian Obedience and Authority, 1520–1550*, in: *The Cambridge History of Political Thought. 1450–1700*, ed. by JAMES HENDERSON BURNS, Cambridge 1991, pp. 163–175; MERIO SCATTOLA, *Il concetto di tirannide nel pensiero politico tedesco della prima età moderna*, in: *Filosofia politica* 10 (1996), pp. 391–420, here pp. 392–401.

Magdeburg (1550), when the Protestant party, overcome by the imperial forces, tried to sustain the idea of resistance by all means. In two forewords to reprinted writings of Luther concerning this issue, Philipp Melanchthon defended the argument that God gave to all human beings a right to defend their lives against unjustified violence and that such a right to self-defence may be invoked against tyrannous rulers.⁷⁷ The same theory appears in a pamphlet by Basilius Monner and in a short book by Justus Menius, which was probably written in part by Philipp Melanchthon himself.⁷⁸ All these writings base the resistance upon the existence of a natural order in which political authority too takes part and which provides the measure for the actions both of individuals and of societies.⁷⁹ This connection was explained in the clearest way by Justus Menius and in an anonymous book attributed to Georg Maior, a friend and collaborator of Melanchthon's, in which God himself describes the good and natural order of human society and declares both pope and emperor guilty of *crimen laesae maiestatis*.⁸⁰

⁷⁷ PHILIPP MELANCHTHON, Vorrede Philippi Melanthon, in: MARTIN LUTHER, *Warnunge D. Martini Luther an seine lieben Deudschen/ vor etlichen Jaren geschrieben auff diesen fall/ so die feinde Christlicher Warheit diese Kirchen unnd Land/ darinne reine Lere des Evangelij geprediget wird/ mit Krieg uberziehen/ unnd zerstören wolten. Mit einer Vorrede Philippi Melanthon, Witteberg 1546, fol. c1^{r-v}, PHILIPP MELANCHTHON, Vorrede Philippi Melanthonis, in: MARTIN LUTHER, *Erklerung D. Mart. Lutheri von der frage/ die Notwehr belangend. Mit Vorreden Philippi Melanthonis und Doct. Joh. Bugenhagen Pomers/ Pastors der Kirchen zu Wittemberg, Wittemberg 1547, fol. *2^r-3^r.**

⁷⁸ BASILIUS MONNER [ps. REGIUS SELINUS], (*Quod defensio sit ex lege naturali.*) *Von der Defension und Gegenwehr/ Ob man sich wieder der Obrigkeit Tyranny und unrechte Gewalt wehren/ und Gewalt mit Gewalt (Jure) vertreiben müge [...]*, [s.l.] 1632, (1st ed. 1546), pp. 12-18; JUSTUS MENIUS, *Von der Notwehr unterrichtet [...]*, Wittemberg 1547, (edition IIb according to Peterson), foll. C3^v-E2^v. On the authorship and the different editions of the book of Menius cf. LUTHER D. PETERSON, Melanchthon on Resisting the Emperor: The *Von der Notwehr Unterricht* of 1547, in: *Regnum, Religio et Ratio. Essays Presented to Robert MacCune Kingdon*, ed. by JEROME FRIEDMAN, Kirksville Missouri 1987, pp. 133-144 and LUTHER D. PETERSON, Justus Menius, Philipp Melanchthon, and the 1547 Treatise, *Von der Notwehr Unterricht*, in: *Archiv für Reformationsgeschichte* 81 (1990), pp. 138-157.

⁷⁹ [NICLAS AMSDORFF], *Confessio et apologia pastorum et reliquorum ministrorum ecclesiae Magdeburgensis. Anno 1550. Idibus Aprilis [...]*, Magdeburgi, [1550], fol. D4^r; [anonymous], *Grundtlicher bericht aus heilliger schrifft/ wie ferne man den Oberherrn/ gehorsam schuldig/ auch wer/ wie/ unnd in welcherley fellen/ man den verderblichen Tyrannen/ möge widerstand thun [...]*, [Magdeburg] 1552, fol. A2^v. On the author of the *Confessio et apologia ecclesiae Magdeburgensis* cf. ROBERT KOLB, *Nikolaus von Amsdorf (1483-1565). Popular Polemics in the Preservation of Luther's Legacy*, Nieuwkoop 1978, pp. 82-87.

⁸⁰ [GEORG MAIOR], *Euiger: Göttlicher/ Allmechtiger Maiestat Declaration/ Wider Kaiser Carl/ König zu Hispanien et c. Und Bapst Paulum den dritten [...]*, [Wittenberg]

Many of the topics used by the Lutherans, whose interest in the theory of resistance decreased after the Peace of Augsburg, were inherited by the Calvinists,⁸¹ who enriched them with the idea of a covenant between God, the chosen people and its officers.⁸² Both the theological and the political works of this tradition refer to the doctrines of divine order and of natural law, which was conceived as a set of innate rules written in the human heart since the creation. The same argument about the right of nature and the right to resist a tyrant was used by Calvinist writers also in the first textbooks of political doctrine, which began to appear in the Holy Roman Empire in the early seventeenth century. Thus, Bartholomaeus Keckermann wrote that "defence is part of the natural law, especially when the injury is notorious and irreparable. But the resistance of the subjects against the tyrant is a defence; therefore and consequently it is rightful in the highest degree."⁸³

[1546], fol. E2^{r-v}: "Derhalben unsere Göttliche ordnung die ist/ das ein Oberkeit jr Regiment/ nach ordnung des natürlichen Rechten/ und nach dem liecht/ und erkenntnis menschlicher Vernunft/ füre und regiere/ Welches von uns menschlicher natur darumb gegeben und eingepflantz/ das sie recht könne richten und urteilen/ was recht oder unrecht/ was gut oder böß sey/ Welche Oberkeit nu nach des natürlichen Rechens Regel und liecht regiret/ und das gute fordert und schützet/ das böse aber straffet und jm stewret/ ob es auch schon ein Heidnische Oberkeit were/ deren sol man gehorsam sein/ und nicht widerstreben/ Es sey denn sach/ das sie was gebiete wider unser Ordnung und Befehl/ So sol man uns/ als Gott und Schepffer aller Creatur/ mehr denn Menschen gehorsam sein." Cf. SCATTOLA, *Das Naturrecht vor dem Naturrecht* (n. 30), pp. 55–66.

⁸¹ ROBERT MACCUNE KINGDON, *The First Expression of Theodore Beza's Political Ideas*, in: *Archiv für Reformationgeschichte* 46 (1955), pp. 93–95, reprint in KINGDON, *Church and Society in Reformation Europe*, London 1985, no. X; ROBERT MACCUNE KINGDON, *The Political Resistance of Calvinists in France and in the Low Countries*, in: *Church History* 27 (1958), pp. 220–233, reprint in KINGDON, *Church and Society* (n. 81), no. XI; ROBERT MACCUNE KINGDON, *Calvinism and Resistance Theory*, in: *The Cambridge History of Political Thought. 1450–1700* (n. 76), pp. 193–218.

⁸² PIETRO MARTIRE VERMIGLI, *In Epistolam S. Pauli apostoli ad Romanos [...] commentarii*, Basileae 1560, (1st ed. 1558), pp. 1378–1397; ZACHARIAS URSINUS, *Refutatio obiectionis, quod religio armis non propagetur*, in: URSINUS, *Exercitationum liber secundus*, Neustadii Palatinorum 1590, p. 567; KASPAR OLEVIAN, *Der Gnadenbund Gottes*, Herborn 1590, pp. 8–9.

⁸³ BARTHOLOMAEUS KECKERMAN, *Systema disciplinae politicae*, Hanoviae 1608, I, 28, p. 428: "Defensio est iuris naturae, praesertim cum iniuria est notoria et irreparabilis. At resistentia subditorum contra tyrannum est defensio: ergo et per consequentiam est summe licita". Cf. KLEMENS TIMPLER, *Philosophiae practicae pars tertia et ultima complectens politicam*, Hanoviae 1611, V, 3, 9, p. 564, no. 7; JOHANN HEINRICH ALSTED, *Encyclopaedia*, Herbornae Nassoviorum 1630, reprint Stuttgart 1990, vol. 4, XXXIII, 12, 5, p. 1427^b.

The ideas that the world is governed by a universal order, that this order can be understood both by rulers and by subjects, and that the latter can refer to it to oppose a legitimate king who has turned into a tyrant, were shared also by Catholic theology.⁸⁴ Domingo de Soto assumed that God accorded political power to the governors by nature in order that they would preserve their subjects from evil and lead them to good.⁸⁵ But when a king obtains his power by crime or when he uses it for his own interest, then it is not possible to say that his authority derives from God, for it is only an instrument of evil and must be opposed. We must therefore distinguish – continues Soto – between the authority or office on the one hand, which, as the Apostle Paul says in *Romans*, 13, 1, is always instituted by God, is good and requires obedience, and the person on the other hand, who can err and in particular cases can be disobeyed.⁸⁶

3.4.3. *The Visibility of Order*

The order in which, in the terms of the Apostle Paul, both “the authorities” and “the souls” share, is not immediately visible. In the tradition of the Late Scholastic this idea is expressed on the assumption that the eternal law is superior to all human knowledge, and may not be known in itself.

Thomas Aquinas argued that a thing may be known in two different ways: first in itself and secondly in its effects. With regard to eternal law, only the blessed and the angels may know it in itself because they see God in his essence. On the contrary, human beings may not comprehend God in himself, but only through his effects. In the same way, we cannot see the sun directly, since looking straight to it would destroy our sight, but we may know it from the rays of light coming from it. In addition, the eternal law may be understood only in its effects. The reflections of the eternal law that allow rational creatures to know it are the principles of natural law, which are present in their soul. Thus, all human beings inasmuch as they are rational creatures

⁸⁴ Soto, *De iustitia et iure* (n. 14), I, 3, 1, p. 22^a (cf. n. 91) and I, 3, 2, p. 23^b (cf. n. 93).

⁸⁵ *Ibid.*, V, 3, 5, p. 429^b: “Est enim haec potestas ab ipsissima natura concessa ad cohibendos homines a malo adducendosque in bonum; quae quidem concessio [...] non expediebat privatis fieri, propterea quod permature iudicio mandari debet executioni”.

⁸⁶ DOMINGO DE SOTO, *In Epistolam divi Pauli ad Romanos commentarii*, Antverpiae 1550, in cap. 13, pars prima, “Non est enim potestas”, p. 347.

participate in the eternal law at least through the first common truths and have a minimal knowledge of it. Actually, all of them admit that they should pursue the good. On the other hand, with regard to the inferior common principles and to the other natural knowledge, which follows from them, there must be many degrees of wisdom because human beings are very different in the capacity of reaching the truth by means of arguing. Consequently, some human beings have a better knowledge of the eternal law while some others have only a restricted sight of it.⁸⁷ In any case, no human being may have a complete understanding of the eternal law because it comprehends the whole divine order, according to which the world is created, and therefore cannot manifest itself in all its effects. Although someone can know some parts of the eternal law through its reflections, nobody can understand it in its totality. Consequently, the order of the universe can be described only in small or large singular parts, but cannot be comprehended as a whole.

Reply to Objection 2. Although each one knows the eternal law according to his own capacity, in the way explained above, yet none can comprehend it: for it cannot be made perfectly known by its effects. Therefore, it does not follow that anyone who knows the eternal law in the way aforesaid, knows also the whole order of things, whereby they are most orderly.⁸⁸

⁸⁷ THOMAS AQUINAS, *Summa theologiae*, Ia IIae, q. 93, a. 2, resp. and ad primum: "Respondeo dicendum quod dupliciter aliquid cognosci potest: uno modo, in se ipso; alio modo, in suo effectu, in quo aliqua similitudo eius invenitur; sicut aliquis non videns solem in sua substantia, cognoscit ipsum in sua irradiatione. Sic igitur dicendum est quod legem aeternam nullus potest cognoscere secundum quod in se ipsa est, nisi solum beati, qui Deum per essentiam vident. Sed omnis creatura rationalis ipsam cognoscit secundum aliquam eius irradiationem, vel maiorem vel minorem. Omnis enim cognitio veritatis est quaedam irradiatio et participatio legis aeternae, quae est veritas incommutabilis, ut Augustinus dicit, in libro *de Vera religione* [cap. 31]. Veritatem autem omnes aequaliter cognoscunt, ad minus quantum ad principia communia legis naturalis. In aliis vero quidam plus et quidam minus participant de cognitione veritatis; et secundum hoc etiam plus vel minus cognoscunt legem aeternam. Ad primum ergo dicendum quod ea quae sunt Dei, in seipsis quidem cognosci a nobis non possunt: sed tamen in effectibus suis nobis manifestantur, secundum illud *Rom. I*, [20]: 'Invisibilia Dei per ea quae facta sunt, intellecta, conspiciuntur'."

⁸⁸ *Ibid.*, Ia IIae, q. 93, a. 2, ad secundum: "Ad secundum dicendum quod legem aeternam etsi unusquisque cognoscat pro sua capacitate, secundum modum praedictum, nullus tamen eam comprehendere potest: non enim totaliter manifestari potest per suos effectus. Et ideo non oportet quod quicumque cognoscit legem aeternam secundum modum praedictum, cognoscat totum ordinem rerum, quo omnia sunt ordinatissima."

Also Domingo de Soto assumed that the *lex aeterna* might not be known in itself, but only in its effects.⁸⁹ Since it reveals itself through the other kinds of law, it may appear only in the natural, divine and human law. But as the eternal law cannot be understood as a whole, also the universal order of justice, which manifests itself in the other kinds of law, may not be comprehended in its totality. Moreover, each one of the three particular forms of law – natural, divine and human – cannot be known as a whole, but only to some extent. Thus understanding of justice remains incomplete in two senses: firstly, because “the order of Divine Wisdom, as directing all actions and movements”⁹⁰ cannot be perceived thoroughly; secondly, because all the particular levels on which this *ratio* or *ordo* articulates itself present some dark sides, which cannot be illuminated at all.

Soto explains the genesis of law as follows. God, the governor of the universe, thought or, better, thinks since eternity of the disposition of the entire world in his intellect. As a command is involved in such a divine plan, it bears the name of “eternal law”. Furthermore, since God is the creator of all singular things, he gave to each of them particular instincts or tendencies in order that they could reach their ends. Nevertheless, he impressed into the mind of human beings a rule that allows them to govern themselves in accordance with reason. This is the natural law, which therefore contains some principles that are immediately known to everybody. Besides, God permits human beings to adapt natural law to different conditions of time, place and circumstances producing in this way human law. Finally, the ultimate aim of human life is not earthly happiness, but the salvation of soul and to this end God gave the divine law in the Old and New Testament.⁹¹

⁸⁹ SOTO, De iustitia et iure (n. 14), I, 3, 2, p. 23^b: “Et per haec concordia conciliatur inter illud Pauli 1. ad Corinthos 2. v. 11: ‘Quae sunt Dei nemo novit nisi spiritus’ atque alterum ad Romanos 1. v. 20: ‘Invisibilia Dei per ea quae facta sunt intellecta conspiciuntur’. Divinorum enim cognitio in seipsis soli Deo propria est et beatis quibus ipse praesens refulget; nobis autem eandem donatur aeternam legem per effectus conspicere. Nemo autem praeter ipsum potest ea comprehendere.”

⁹⁰ THOMAS AQUINAS, *Summa theologiae*, Ia IIae, q. 93, a. 1, resp.: “Ratio divinae sapientiae, secundum quod est directiva omnium actuum et motionum”. Cf. Soto, De iustitia et iure (n. 14), I, 3, 2, p. 23^a: “Igitur cum lex [...] nihil aliud sit quam dictamen rationis practicae in principe qua cuncta sibi subdita gubernat, fit ut lex aeterna in Deo nihil aliud sit quam sempiterna ratio suae sapientiae, qua mundi universitatem regit.”

⁹¹ *Ibid.*, I, 3, 1, p. 22^a: “Deus in primis universalis gubernator ab aeterno universorum ordinem ac dispensationem et regimen mente concepit; cuius conceptionis instar leges omnes constituendae sunt. Illa ergo ordinatio et praeceptio lex aeterna secundum naturam suam nuncupatur. Mox, quia idem Deus author est naturae, singulis rebus

In this sequence only the eternal law remains really outside time. Since right is only what is rightful and equity takes place only within time, there cannot be any eternal right. Actually, right can be constituted either by natural or by human law. In both cases it came into existence only after the world was created.⁹²

The same idea that *ius* can be known and acknowledged only when it appears in time and space affects to some extent also the doctrine of eternal law. As divine rationality, which sees all future in the present, the eternal law has been in God since eternity. But like any other kind of law, it requires to be promulgated, which happens when the lawgiver declares it and its subjects hear about it. The promulgation of the eternal law falls outside time because it is contemporary with the thoughts of God, which are in eternity. Nevertheless, its subjects can perceive it only within time, because there is no other eternal substance than God. Thus, as concerns its obedience, the eternal law is acknowledged only increasingly and partially. At first, it was known through natural law, then was renewed by the Old Testament law and finally it was revealed in the New Testament.⁹³

suos indidit instinctus et stimulos quibus in suos fines agerentur, sed homini praecipue naturalem normam mente impressit qua se secundum rationem, quae illi naturalis est, gubernaret; atque haec est lex naturalis, eorum scilicet principiorum quae absque discursu lumine naturali per se nota sunt, ut: id facias aliis quod tibi fieri vis et similia. Deinde et eidem homini facultatem tribuit ut pro temporum, locorum ac negotiorum qualitate per eandem legem naturae quas alias expedire iudicaret, ratiocinando constitueret, quae ideo leges ab auctore suo humanae nuncupantur. Attamen quia non ad finem tantum naturalem, qui est pacificus quietusque reipublicae status conditi sumus, ad quem finem praedictae leges sufficerent, verum et ad supernaturalem foelicitatem creati, aliam Deus nobis insuper posuit supernaturalem legem, tam veterem scilicet quam novam, quae ad illum supernaturalem finem nos perduceret. Et haec est lex divina."

⁹² *Ibid.*, I, 3, 1, p. 22^b: "Etenim quia ius pro eo quod est iustum, aequitas illa est quae in temporariis rebus constituitur, nullum est ius hoc modo aeternum, licet sit lex aeterna. Iustum autem hoc aut constituitur a rerum ipsa natura in qua lex naturalis versatur, uti mutuum aut depositum reddere, aut constituitur a lege positiva."

⁹³ *Ibid.*, I, 3, 2, p. 23^b: "Ad primum igitur argumentum respondetur, rationem illam, quae lex est, ab aeterno exstitisse in Deo, sola scilicet ratione ab eius substantia differentem, qua futura cuncta ut sibi praesentia inspectabat [...] Promulgatio autem eius et verbo praecellenti ordine et scripto fit. At quoniam promulgatio et loquutionem denotat promulgantis et subditorum auditum, ratio prioris aeterna fuit: nempe divinum verbum expressa mentis conceptione genitum et liber vitae sempiterna quoque mente conscriptus. Ratio vero posterioris esse nequivit nisi temporalis: nam aeternus nemo fuit qui audiret. Coepit ergo lex illa innotescere in mundi primordio per legem naturalem et antiquis patribus praescriptam, ac denique nobis per Evangelicam, quam Verbum ipsum, homo factum, nobis promulgavit. Ex hoc fit consequens, legem

Human beings recognize the eternal law or the order of the universe through natural, human and divine law, that is through its effects. A complete understanding of the eternal order is therefore excluded. On the other hand, all human beings have a certain degree of participation in the eternal law: thus, it should be known, but it could not be known at all.⁹⁴

The eternal law cannot be understood by human beings not only because it cannot be perceived in its totality, but also because each of the other kinds of law that derive from it may be known only partly. For example, the arguments of natural law, descending from general and necessary principles to contingent and accidental circumstances, admit an unavoidable degree of uncertainty and error. Consequently all human beings will be aware in the same way of the first practical principles, but only the wise will comprehend certain particular practical conclusions. The more particular a practical argument is, the smaller is the number of person who can understand it.⁹⁵ The same assumption is valid also for human law.⁹⁶

In the doctrine of the eternal law we encounter a conception of universal order in which justice truly exists and can be achieved, but is not already or completely available in this world so that human beings have first to seek for it. This search after truth and justice is not linear because the circumstances in which human actions take place are obscure and uncertain. The parties involved in this process may have different views about what is right and good, which can lead them into conflict. Order implies disorder, peace contains war and justice needs struggle.

aeternam solis post angelos hominibus, eisdemque universis esse notam; illi scilicet foelicibus coelicolis per essentiam, quam facie ad faciem intuentur, nobis autem per irradiationem, sicuti sol videtur in aula, eandemque plus minusve susceptam."

⁹⁴ *Ibid.*, I, 3, 2, p. 23^b: "Nulli enim mortalium existunt quibus non cognitio quaecumque veritatis effulgeat; veritas autem omnis (ut libro De vera religione, 31 autor est Augustinus) irradiatio quaedam est et participatio legis aeternae; omnibus ergo est, licet gradibus inaequalibus, nota."

⁹⁵ *Ibid.*, I, 4, 4, p. 34^{a-b}: "In ratione autem practica, quia ex necessariis principiis discurrit ad contingentia in quibus actiones humanae consistunt, necesse est quandoque defectus contingere, ac tanto plures quanto inferius ad particularia descenditur [...] Ex his fit consequens postrema conclusionis particula: nempe quod quanto conclusiones practicae magis ad particularia coaptantur, minus innotescunt." Cf. *ibid.*, I, 4, 2, p. 31^a.

⁹⁶ *Ibid.*, I, 7, 1, pp. 73^b-74^a.

This necessary implication of conflict in the pursuit of justice represents the foundation of the discourse of tyranny, which is only the extreme case in a doctrine of government which assumes that subjects share with their governors the search after good and right. Domingo de Soto applies a similar argument also to the doctrines of war and of legal judgement. He assumes that the essence of the (just) war involves justice. In every war, there is a right and a wrong side. Nevertheless, in some cases this distinction is not possible, and both parties are convinced that they are in the right or both doubt that the other's claims are justified. They have therefore to take the risk of defending their opinion with violence although the outcome of the war will not represent a divine judgement.⁹⁷ In the same manner, an innocent person condemned by an unjust judge may flee or resist arrest even with violence.⁹⁸ In all these cases – tyranny, war and judgement – justice is the product of actions and reactions, which realize an order partially, which yet remains undetermined.

3.5. *Conditions of Validity*

The fifth general feature of the ancient doctrine of natural law regards its conditions of validity. In fact, it conceives the rules contained in natural law as prescriptions that are immediately in force within civil society.

Soto argues whether the rules of natural law are truly precepts or are valid only when a human or divine law confirms them. The negative argument asserts that a law cannot oblige us unless a superior authority promulgates it. Since nature is not our superior or judge, only God or a human minister of his may command us. Therefore, natural law, when a divine or human command does not enforce it, does not exert any constraint and the transgression of its prescriptions is not an evil.⁹⁹

Soto answers that we must distinguish between evil and guilt. Even if – which is impious and impossible – God or all other human lawgivers

⁹⁷ *Ibid.*, V, 1, 7, p. 400^b.

⁹⁸ *Ibid.*, V, 6, 4, pp. 460^a–464^b.

⁹⁹ *Ibid.*, I, 4, 2, p. 30^b: "Tertio arguitur contra praecepti nomen. Lex nulla obligat nisi qua ratione a superiore edicitur. Natura autem non est nobis superior nec iudex noster, sed Deus atque eius ministri homines. Ergo lex naturae, nisi adesset divinum ius aut humanum, nullam haberet vim obligandi ut eius transgressio esset peccatum."

did not exist, the broken order of rationality and justice would cause murder or theft to be true evils in a moral sense. However, guilt, as something that deserves blame and punishment, depends on the existence of an authority that can exert obedience. Consequently, natural law alone identifies its transgression as evil alone, and not as guilt. Nevertheless, natural law derives from eternal law, which is from God, the highest lawgiver, and produces therefore both an obligation to avoid evil and a guilt when evil has been done.¹⁰⁰ The conclusion is that the prescription of natural law creates precepts with the same force and validity as all other rules of human and divine law.

Soto clarifies further this assumption in a passage in which he asks what would happen if human laws suddenly disappeared from a civil society. He replies that human law is nothing but a specification of natural law,¹⁰¹ which implies that the latter would continue to exist and to operate in a not specific way even in absence of every human law. Soto offers an example: if the Emperor suspended the validity of the *Constitutio penalis Carolina*, thieves could no more be punished by hanging. Nevertheless, natural law would be valid: stealing would still remain a crime and would be punished in all other possible ways. The failure of human law does not imply the disappearance of natural law, because the former can only determine *how* the latter operates, but not the fact *that* it operates.¹⁰²

¹⁰⁰ *Ibid.*, I, 4, 2, p. 32^{a-b}: "Ad tertium argumentum, quod praecipuum est, per distinctionem respondetur. Enimvero in pravis moribus, licet re vera connexa sint ambo, duo tamen considerantur: scilicet ratio mali et ratio culpae. Et quidem ratio naturalis mali, etiam si per impossibilis cogitationem loquendo nec Deus esset neque alius superior, solus ipse perversus rationis ordo esset causa ut homicidium et furtum et similia essent mala moralia: sicuti claudicatio est malum naturale, quia obliquitas est a gradiendi regula. Attamen ratio culpae, quae dicit inimicitiam et supplicii meritum, non intelligitur nisi ubi est superior cui obedire tenemur[...] Responsio ergo argumenti est quod sola quidem natura obligaret ut transgressio esset mala, licet non culpa. Verum tamen quia natura effectus est Dei lexque naturalis derivatio divinae legis aeternae, fit ut praecepta naturae obligent ut transgressio eorum sit non solum mala, sed vera culpa."

¹⁰¹ *Ibid.*, I, 5, 2, pp. 40^a–41^b and I, 5, 4, pp. 44^b–45^b.

¹⁰² *Ibid.*, I, 7, 1, p. 75^a: "Primum si legislator, penes quem summa est potestas, legem sine causa tolleretur, factum teneretur: hoc est nullam haberet deinde vim legis, nisi quatenus vim retineretur iuris seu naturalis seu divini. Tametsi dum lex reipublicae conduceretur, grave crimen committeretur. Videlicet, si papa tolleretur annuam confessionem maneret ius tantum divinum confessionis; et si Caesar abrogaret legem suspendendi fures maneret duntaxat naturale ius ut punirentur saltem."

Among the precepts of natural law, some are immediately valid, without exception, whereas some others require a particular knowledge.¹⁰³ First principles are general propositions such as "Everything searches for its own good" or "You should do to others what you want to be done to you"; they are known to everybody in every time¹⁰⁴ and are immutable.¹⁰⁵ Secondary principles or conclusions are those which are deduced from the first ones, but can be identified with a quasi-immediate operation of the mind. In some particular and very rare circumstances they may be limited or changed. The Ten Commandments belong to this class of secondary principles and are therefore to be seen as those specific precepts of natural law, which are immediately valid in every civil society.¹⁰⁶

The idea that natural law contains a number of particular natural rights rather than a system of philosophical principles is even clearer in the tradition of Roman law. The ancient jurist Gaius admitted the existence of two kinds of law: some laws are stated by different peoples and some others are common to all human beings. The latter are called the "law of nations", are produced by human reason and are held in respect by all mankind.¹⁰⁷ This *ius gentium* does not preside over the relationships between cities and nations, but contains some precepts of private law, which are or should be valid all around the world. They comprehend for instance the duties which arise from consanguinity or marriage, and the obligation between master and servant.¹⁰⁸ The ancient *ius gentium* has therefore nothing to do with our "international law", but is a part of what we now call "private law": it does not deal with states or political societies, but mainly with individuals and with some of the most common problems in the relationships between "private persons".

Later jurists such as Paul or Ulpian, reviving notions of the Stoic tradition, adopted a much more elaborate philosophical foundation and spoke of a *ius naturale* beside the *ius gentium* and the *ius civile*. However both natural law and the law of nations remained a conglom-

¹⁰³ *Ibid.*, I, 4, 2, pp. 30^b-32^b.

¹⁰⁴ *Ibid.*, I, 4, 4, pp. 34^b-35^a.

¹⁰⁵ *Ibid.*, I, 4, 5, p. 36^b.

¹⁰⁶ *Ibid.*, I, 5, 4, p. 45^{a-b}.

¹⁰⁷ GAIUS, *Institutionum commentarii* IV, in: *Istituzioni di diritto romano*, ed. by ENZO NARDI, Milano 1986, I, 1, vol. A, p. 1. Cf. *Digestum*, I, 1, 9.

¹⁰⁸ GAIUS, *Institutionum commentarii* IV (n. 107), I, 156, p. 24; II, 65, pp. 38-40; III, 119^a, p. 190; *Digestum*, IV, 5, 8.

erate of basic rights that are directly in force and have been used by every people in every age to regulate the fundamental spheres of family, property and the exchange of goods.¹⁰⁹ In all these cases the term "natural" means something which is so common and empirically self-evident that it does not need any further explanation. Consequently, these "natural rights" are neither theoretical principles nor part of a deductive system, but form a heterogeneous set of different precepts, which can be unified only in a pragmatical sense.

3.6. *Natural Law and the Law of Nations*

The sixth difference between the ancient and the modern doctrine of natural law concerns the relation between natural law and the law of nations (*ius naturale* and *ius gentium*).

Roman law elaborated the conceptual and terminological distinction between natural law and the law of nations in the classical era of Roman jurisprudence. Gaius, who lived in the second half of the second century A. D., recognized a kind of law based on "natural reason", but called it "law of nations".¹¹⁰ Paul identified "natural law" with that law "which is always right and good".¹¹¹ Ulpian, who lived in the first half of the third century A. D., developed the division of private law into three parts (*ius naturale*, *gentium* and *civile*) that was adopted in Justinian's *Institutiones* and thus became the authoritative framework of the Roman law.

The study of law consists of two branches, law public and law private. The former relates to the welfare of the Roman state; the latter to the advantage of the individual citizen. Of private law then we may say that it is of threefold origin, being collected from the precepts of nature, from those of the law of nations, or from those of the civil law of Rome. The law of nature is that which she has taught all animals; a law not peculiar to the human race, but shared by all living creatures, whether denizens of the air, the dry land, or the sea. Hence comes the union of male and female, which we call marriage; hence, the procreation and

¹⁰⁹ SCATTOLA, *Das Naturrecht vor dem Naturrecht* (n. 30), pp. 122–123.

¹¹⁰ *Digestum*, I, 1, 9: "Omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim communi omnium hominum iure utuntur. Nam quod quisque populus ipse sibi ius constituit, id ipsius proprium civitatis est vocaturque ius civile, quasi ius proprium ipsius civitatis; quod vero naturalis ratio inter omnes homines constituit, id apud omnes peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur." Cf. GAIUS, *Institutionum commentarii* IV (n. 57), I, 1, p. 1.

¹¹¹ *Digestum*, I, 1, 11.

rearing of children, for this is a law by the knowledge of which we see even the lower animals are distinguished. The civil law of Rome, and the law of all nations, differ from each other thus. The laws of every people governed by statutes and customs are partly peculiar to itself, partly common to all mankind. Those rules which a state enacts for its own members are peculiar to itself, and are called civil law: those rules prescribed by natural reason for all men are observed by all people alike, and are called the law of nations. Thus the laws of the Roman people are partly peculiar to itself, partly common to all nations; a distinction of which we shall take notice as occasion offer.¹¹²

This classification imagines the law as composed of three different circles of validity: the largest circle embraces all those precepts which are common to human beings and animals; the middle one the rules which are proper to mankind; the smallest circle comprehends the particular laws of a state.¹¹³ Each of these three fields is based upon a different source of law: the *ius naturale* derives from the nature or instincts of all living creatures; the *ius gentium* is a product of human reason, which is common to all human beings, and *ius civile* is declared by the will of a state. Although the different kinds of law form three concentric domains, they are not in a logical descending order so that the precepts of the civil law are deduced from the law of nations, which in its turn derives from the natural law. On the contrary, the specifications of one lower level may contradict the prescriptions of a higher one. The clearest case is that of slavery which in Roman law is endorsed by the law of nations against the principles of the law of nature.¹¹⁴

Law of nature and the law of nations differ in the objects they deal with. All principles of the former have to do with the survival of individuals and the reproduction of mankind: marriage, generation, education and self-defence. To the law of nations belong on the contrary all those rights or duties which have their origin in a change in the state of nature caused by human rationality: slavery, civil association, property, boundaries and war.¹¹⁵ All these rights limit the original

¹¹² *The Institutes of Justinian*, trans. by B. MOYLE, 3rd ed., Oxford 1896, I, 1, 4–I, 2, 1, pp. 3–4. The sources for these statements are Ulpian and Gaius. Cf. *Digestum*, I, 1, 1, 2–3 and I, 1, 9.

¹¹³ Cf. ENNIO CORTESE, *La norma giuridica*, Milano 1962, vol. 1, pp. 37–96.

¹¹⁴ *Digestum*, I, 5, 4, 1: "Servitus est constitutio iuris gentium, qua quis dominio alieno contra naturam subicitur."

¹¹⁵ *Digestum*, I, 1, 2–I, 1, 5, especially I, 1, 5: "Ex hoc iure gentium introducta bella, discretæ gentes, regna condita, dominia distincta, agris termini positi, aedificia collocata, commercium, emptiones venditiones, locationes conductiones, obligationes institutæ: exceptis quibusdam quæ iure civili introductæ sunt."

freedom and equality of all human beings and destroy the claim to use all natural goods, which each human being legitimately enjoys in the state of nature. Although law of nature and the law of nations refer to different objects as their subject, the person who applies them remains the same, and is the Roman citizen. In fact, both are constitutive parts of Roman private law.

Ulpian's divisions underwent further developments in the Middle Ages. The Glossators proposed to add another distinction within the law of nature in order to answer the objection, raised against the Roman doctrine, that human beings and animals cannot share rights or duties in the proper sense. Thus, Iohannes Bassianus und Azo Portius thought that *ius naturale* may be considered either according to the sensual impulses or to the impulses of reason. In the first case, it is common both to animals and to human beings; in the second case, it is proper only to human beings.¹¹⁶ Medieval and early modern commentators came therefore to the following conclusion: natural law comprehends all those behavioural traits that are seemingly common to animals and human beings. Nevertheless, when they perform the same action, the former are governed by instinct, whereas the latter are led by rationality. Thus, natural law is the rational behaviour of human beings that can sometimes also be found among animals.¹¹⁷ To the law of nations belong on the contrary all those rights and duties which have their origin in human reason through discourse and are proper only to human beings.

The late Scholasticism of the sixteenth century came to the same conclusions using a different language that stresses more the unity among the three kinds of law and suggests a new system. Soto assumes that each law should participate in the right reason or in eternal law. However, the latter expresses itself first of all through natural law, which is therefore the source of all other rules.¹¹⁸ Accordingly, human law can be defined in two different ways: either by adding a minor premise to a principle and thereby obtaining the conclusion, or by

¹¹⁶ CORTESE, *La norma giuridica* (n. 113), pp. 53–56.

¹¹⁷ ANTONIO DA GOUVEA, *Lectionum iuris variarum libri duo*, 1552, in: DA GOUVEA, *Opera*, Lugduni 1599, I, 19, p. 804; HUGUES DONEAU, *Commentariorum de iure civili tomus primus*, in: DONEAU, *Opera omnia*, Lucae 1762, I, 6, col. 34; FRANÇOIS CONNAN, *Commentariorum iuris civilis libri X.*, Basileae 1567, (1st ed. 1553), I, 4, 7, p. 18; MATTHAEUS WESENBECK, *In Pandectas iuris civilis et Codicis Iustiniani libros IIX. commentarii: olim Paratitla dicti*, Basileae 1593, (1st ed. 1563), I, 1, coll. 16–17.

¹¹⁸ SOTO, *De iustitia et iure* (n. 14), I, 5, 2, p. 40^{a-b}.

restraining the meaning of a genus by introducing a further determination of a species. In the former case, we built a syllogism and obtain rational knowledge, a necessary conclusion deduced from principles. In the latter case, the specification occurs through human will. The former law belongs to the law of nations, the latter to civil law.¹¹⁹

In general, the right (*ius*) can be divided into three classes.

Therefore, natural right is written in our mind without arguing. The right of nations requires some argumentations and is deduced through a long reasoning without postulating a meeting of all human beings. On the contrary, civil right is constituted by the will of some people gathered together in a council.¹²⁰

Nevertheless, since natural right is directly present in the human mind, whereas both the right of nations and civil right require a further investigation, the adequate division is that between natural and positive right. All right is therefore either natural or positive, and the latter may be either the right of nations or civil right.¹²¹

The fact that the right of nations is derived from natural right does not mean that the one is included in the other, as a conclusion is included in higher principles. Soto explains further that natural right is immediate because it concerns the very essence of human beings. The right of nations on the contrary considers a person only in the light of particular circumstances. Since these conditions may be partly described in a rational way, it is obvious that all rational beings would share some conclusions. One sort of right does not substitute or make void another right, but both remain valid, one beside the other, each in its peculiar dominion. For instance, natural right regulates the sphere of procreation, a part of the human essence, and the right of nations rules over property, which requires the existence of particular ends and conditions.¹²²

¹¹⁹ *Ibid.*, I, 5, 2, pp. 44^b–45^a.

¹²⁰ *Ibid.*, I, 5, 4, p. 45^a.

¹²¹ About the differences between the doctrines of Soto and Thomas Aquinas cf. MERIO SCATTOLA, *Naturrecht als Rechtstheorie: Die Systematisierung der res scholastica in der Naturrechtslehre des Domingo de Soto*, in: *Die Ordnung der Praxis. Neue Studien zur Spanischen Spätscholastik*, ed. by FRANK GRUNERT and KURT SEELMANN, Tübingen, forthcoming.

¹²² SOTO, *De iustitia et iure* (n. 14), III, 1, 3, pp. 196^b–198^b.

4. Models of natural law: the modern age

The six general marks of the ancient and medieval natural law may be summarized as follows: 1. The law of nature is innate; 2. It corresponds to the Ten Commandments; 3. It contains a number of prescriptions; 4. It reflects a universal order of justice which is independent of human decision; 5. It is valid within political society and is in force like other kinds of law; 6. Natural law and the law of nations are two kinds of law which exist at the same time in the same society and are not in a hierarchy.

Let us now see how these six points are refracted in the modern theory of natural law.

4.1. *Deduction from a Principle – Innate Ideas*

4.1.1. *The Principle as an Idea*

The modern theory of natural law refuses the doctrine of innate ideas because they evade rational investigation and impose themselves immediately as unquestionable truths. While the ancient doctrine considered the human being as full of truth – the truths that God wrote in the soul during the creation – the modern theory of natural law assumes that the human being is fundamentally empty. Thus, only those rules that are produced by rational argument may be subsumed into the theory of natural law. Gottfried Achenwall, who taught *ius naturae* in Göttingen in the middle of the eighteenth century, acknowledged as actions pertaining to natural law only those ones which derive from the “higher faculty of the soul”; this is peculiar to human beings and consists in the capability of “making notions, judgements and arguments by means of observing, comparing and abstracting”.¹²³ Only these notions are truly deduced in a correct way and deserve to be part of right reason. In the human soul are present other forces too, which arise from some obscure imaginative derivation. Such are the instincts which we share with animals, and are basically different from the rational will, the true object of practical philosophy.¹²⁴ These

¹²³ ACHENWALL and PÜTTER, *Elementa iuris naturae et gentium* (n. 33), § 30, p. 9 and §§ 45–46, p. 13.

¹²⁴ *Ibid.*, §§ 40–47, pp. 12–13, specially § 41, p. 13: “Dantur praeterea in anima conatus quidam ex representatione boni vel mali obscura orti, qui vocantur instinctus seu stimuli naturales”.

obscure motions of a lower order, which do not belong to the law of nature, correspond to the innate ideas of the old tradition.

Samuel Pufendorf tried to explain directly the difference between the doctrine of the *notitiae inditae* and the modern law of nature. We can accept – argues Pufendorf – the teaching that human beings immediately know a kind of natural law. Nevertheless, this assumption does not mean that in the heart of all human beings there exist some real and clear statements about the actions to do or to avoid. On the contrary, we should understand this common opinion in two ways. On the one hand, it means that we can investigate and comprehend all laws of nature with our reason; on the other hand these laws are so clear and simple that all human beings agree about them and they cannot be forgotten once they have been understood. Only in this sense we should expound the Holy Bible where it is said that the laws of nature are written in the human hearts.¹²⁵

The laws of nature are therefore by no means formed by a set of actual and determined innate ideas (*actuales et distinctae propositiones*), which are present in the human mind since we have been born. Indeed our soul lacks any pre-existing notions and is empty. The contents of natural law are not given to us, but we must search for them, find out or synthetise them.

If we could penetrate the mind of a newborn, we would find only two things: one single and simple truth and the faculty of rational calculation. The first principle is the starting point of the whole system, which is produced by applying to that first simple truth rational capability. Natural law is a transformation and a derivation from the principle by means of reasoning.

¹²⁵ SAMUEL PUFENDORF, *De officio hominis et civis iuxta legem naturalem libri duo*, Cantabrigiae 1682, reprint ed. by WALTHER SCHÜCKING, Oxford 1927, I, 3, 12, p. 23: "Quod vulgo dicitur, isthanc legem natura notam esse, id non ita capiendum videtur, quasi in animis hominum iam nascentium inhaereant actuales et distinctae propositiones circa agenda et fugienda. Sed partim quod illa per lumen rationis investigari possit, partim quod saltem communia et praecipua capita legis naturalis ita plana et liquida sint, ut statim assensum invenient, et ita animis inolescant, ut nunquam inde iterum deleri queant, utut forte homo impius ad sopiendas conscientiae vellicationes eorundem sensum plane studeat extinguere. Quo nomine etiam in Sacris Literis cordibus hominum inscripta dicitur. Inde et cum a puero ex vitae civilis disciplina eorundem sensu inbuamur, et vero recordari non possimus id tempus, quando primum eadem hauserimus, non aliter de ea cognitione cogitamus, ac si illa nobis nascentibus iam adfuisset. Id quod cuilibet etiam circa linguam ipsi vernaculam contingit."

The first principle of natural law must be immutable, eternal and indispensable. From it derives the endless number of the particular laws of nature.¹²⁶ Consequently, it is necessary to formulate within natural law the difference between principle and reason, between basic truth and power to deduce all inferior laws from the first law. The first principle cannot in fact itself be derived from natural law:¹²⁷ therefore it must be given to the conscience. Nevertheless, it derives from the general nature of the human being, which consists in the capability of reasoning.¹²⁸ From the point of view of natural law the deduction of all other laws requires two elements, a principle and the power of reason, but from the higher point of view of the human essence the human reason is the highest principle from which derive both contents and means.

The principle itself is an empty idea. On the one hand, it expresses a general rule, which remains indeterminate. Such general rules are "*Cuilibet homini quantum in se colendam et servandam esse societatem*" (Pufendorf) or "*Ne turbes aliorum conservationem*" (Achenwall). On the other hand, the principle has only an intellectual existence; it is an idea, a concept of the mind, which does not work immediately upon human actions, but can operate only through the logical consequences that it produces. When Pufendorf assumes sociability to be the first truth of the natural law this does not imply that human beings are naturally social and that they are urged by a natural impulse to act as social beings: to live together, help each other, respect individual rights . . . They only recognize the *idea* that human beings are social, and from this principle they deduce all precepts necessary to order their lives. In the old tradition theft was directly prohibited by natural law and by the seventh commandment. Human beings recognized directly in their conscience in advance of any teaching or reasoning that stealing was a crime; they felt aversion to this action and were filled with remorse after having stolen something. This acknowledgment happened instantaneously or, as Thomas Aquinas said, nearly immediately without extensive reasoning. In fact, everyone identified

¹²⁶ ACHENWALL and PÜTTER, *Elementa iuris naturae et gentium* (n. 33), §§ 112–113, pp. 30–31: "*Haec lex prima naturalis est immutabilis, aeterna, indispensabilis. Perfectio hominis est perfectio maxime composita. Hinc clarum est, ex lege prima naturali infinitas deduci posse leges subordinatas.*"

¹²⁷ *Ibid.*, § 212, p. 55.

¹²⁸ *Ibid.*, § 20, pp. 5–6.

the command in his heart or mind and this command was able to drive his action by exercising attraction or repulsion.

According to the modern theory, the impulse to obey the law is on the contrary purely of an intellectual nature; human beings are actually moved only by the conviction that something is right. When they have once agreed on the notion that they are social beings, they act according to natural law even if their natural instincts and all other forces in their souls are completely asocial. With regard to the example of theft, human beings have at the beginning not the slightest idea about property and theft. In their mind they find only a general idea, which they acknowledge as true, and the logical rules needed to deduce true propositions from this first statement. The first principle – for instance “You should not disturb the well-being of other human beings” – does not say anything about stealing and does not produce any particular inclination to do or not to do something. But a rational human being can deduce from this pure idea the conclusions that property is necessary to the preservation of the individual, that it should therefore be preserved and that stealing or damaging the property of others is a crime, which must be avoided and punished once it is done. Only this last conclusion is capable of guiding the behaviour of an individual. The whole of such rational propositions forms natural law.

Since its principle is an empty idea, the modern law of nature cannot tolerate the existence of innate ideas. In fact, the doctrine of the *notitiae inditae* underwent a particular trajectory in the early modern times. It flourished until the first decade of the seventeenth century before the modern theories of Grotius, Hobbes and Pufendorf; it vanished in the seventeenth century and appeared again in the second half of the eighteenth century when modern natural law began to be criticized for being an abstract theory and instinct was again chosen as first principle within a historical foundation of political society.¹²⁹

¹²⁹ JOHANN CHRISTIAN CLAPROTH, Schreiben von den natürlichen Trieben des Menschen, in: CLAPROTH, *Sammlung iuristisch-, philosophisch- und kritischer Abhandlungen*, Göttingen 1743, St. 3, pp. 404–524; JOHANN CHRISTIAN CLAPROTH, *Grundriß des Rechts der Natur*, Göttingen 1749; JOHANN CHRISTIAN CLAPROTH, Anmerkungen über Herrn Johann Friedrich Hombergks zu Vach *Dubia iuris naturae* ad Generosissimum Dominum ***, in: CLAPROTH, *Grundriß* (n. 129), pp. 1–32; JOHANN JAKOB SCHMAUSS, *Dissertatio an ex utilitate ius ortum sit*, Gottingae [1735]; JOHANN JAKOB SCHMAUSS, *Vorstellung des wahren Begriffs von einem Rechte der Natur*, Göttingen 1748; JOHANN JAKOB SCHMAUSS, *Neues systema des Rechts der Natur*, Göttingen 1754; JOHANN JAKOB SCHMAUSS, *Kurze Erleuterung und Vertheydigung seines Systematis iuris naturae*, Göttingen 1755.

4.1.2. Rational Calculation

The second basic element in the construction of modern natural law is human rationality, which consists in the mechanical capability of inferring true conclusions from true premises. The description of the rational faculty common to all human beings, and the explanation of its necessary connection with moral actions is a constitutive part of every modern theory of natural law. It would in fact be impossible to start the deduction of the whole system without having demonstrated that human behaviour is led by rational forces and by what means each action is produced. The first part of every system of natural law is therefore occupied by a theory of human actions.

There are two elements of this rational anthropology in which the concepts and truths of human behaviour are inferred. Firstly, the essence of the human being consists of the superior parts of the human understanding, which are the faculties of observing, comparing and abstracting,¹³⁰ and of the will. Only human beings act according to reason and (free) will.¹³¹ Secondly, between these elements there is a logical connection because free will necessarily wants what the rational power declares to be the good.¹³² In this sense the true aim of the theory of action is to found obligation by deducing all its elements from human rationality. In fact in this tradition obliging someone to do something means connecting the representation of a good with the idea of an action so that the will is led to want that action.¹³³ This doctrine presumes therefore that the simple representation of an idea may force the will to perform the corresponding action.

4.1.3. Constraint by Reason

The main effect of the theory of human action developed by the modern natural law is that the force of reason is the only actual constraining

¹³⁰ ACHENWALL and PÜTTER, *Elementa iuris naturae et gentium* (n. 33), § 30, p. 9.

¹³¹ *Ibid.*, §§ 45–46, p. 13.

¹³² *Ibid.*, § 37, p. 11: "Ex cogitatione boni seu perfectionis, ad se ipsum relatae, oritur conatus versus bonum, id est ad bonum obtinendum; ex cogitatione mali, seu imperfectionis, ad se ipsum relatae, nascitur conatus adversus malum, id est ad fugiendum malum." Cf. *ibid.*, § 43, p. 12 and §§ 49–50, p. 14.

¹³³ *Ibid.*, §§ 80 and 82, pp. 23–24: "Obligat in sensu generalissimo, qui nectit bonum vel malum consecretarium cum actione spontanea [...] Qui obligat ad actionem liberam, determinat voluntatem per notionem boni vel mali, id est per motivum. Hinc obligatio moralis vocatur connexio motivi cum actione libera."

power in moral and juridical behaviour. Human beings act as moral subjects because they are led by logical consistency and honour it as the most important quality of their essence. Why does an individual obey the law of nature? Because he is rationally persuaded. Why does he respect the life of the other human beings and not commit murder or hurt them? He recognizes himself as a rational essence and acknowledges a first principle as the starting point of any other deduction. From this empty idea he gains a chain of inferences, at the end of which he realizes that homicide is against the first principle, against his own good as a human being and incongruent with his rational nature. This contradiction involves a prohibition, and therefore the subject of the natural law will not act against the life and preservation of other human beings.

This simple example shows that the compelling power of modern natural law consists in a truly internal constraint, which flows from the rational essence of the human being. Reason has in this sense only an *individual* dimension, as in the whole deduction of the natural law no external authority is admitted and no external intervention takes place. Natural law is constructed within the individual, in a small personal world, which is completely and perfectly isolated from the outside. The subject of natural right could be alone, he could be the last man on this earth: he would nevertheless be able to synthesise natural law. He needs other human beings only as objects of his rights and duties and as a necessary environment made of equal men; but he does not need them as source of right. The only recognized authority capable of producing right and law is the *individual* reason; every human being believes only his own particular intellect and obeys only it. There is no other possibility to convince him than by appealing to the promptings of his own reason.

The premise that each individual acts in an environment of equivalent individuals assures the conditions for the intersubjective validity of natural law. Since all human beings are equal, that is equally rational, the deduction of the commands of natural law must be the same in every individual; therefore the system of law of every person will be consistent with every one else, and the behaviour of one person will be compatible with the behaviour of all other people. If the individual X is a rational being and if she or he comes to the conclusion that murder is prohibited by natural law, also the individual Y and all other men and women would approve the same law, as far as they are rational beings.

4.1.4. A Deduction of the Whole System in Every Action

A further consequence deriving from the rationality of natural law is that it necessarily builds a system. Christian Wolff, for instance, divided all duties into "primitive" and "derived obligations". The former result immediately from the human essence; the latter are duties produced by other duties, whose compelling power remains nevertheless unchanged because truth descends in equal measure through all steps in the deduction of the *ius naturae*.

The connection of all rights and duties with one another is steady, so that some may be deduced from others keeping the thread of argument unbroken and all together build a whole of connected truths, which is called 'system' and which we too call 'system' by its true name.¹³⁴

The internal consistency or systematic order of natural law is the condition of validity for every moral or juridical choice. In fact, as individual reason is the only and definitive authority, we must assume that the whole system of natural law is theoretically deduced in the mind of the subject before each action. We can say that something is right or wrong because we can show that it accords with the first principle of natural law. We have therefore to demonstrate that a continuous, uninterrupted chain of interrelated truths joins certain commands or prohibitions with that principle. We have therefore to prove the consistency of a rule with the system: only this rational conformity may supply the necessary constraint. However, as individual rationality admits only the obligation which it produces with its own ratiocinating, it will necessarily be activated in every individual statement. The quality of being rational, when referred to the system of natural law, means that it is continuously deduced and it constantly proves to be rational. Rationality cannot therefore be stated once and

¹³⁴ CHRISTIAN WOLFF, *Institutiones iuris naturae et gentium*, Halae Magdeburgicae 1750, reprint in WOLFF, *Gesammelte Werke*, Abt. II, Bd. 26, ed. by MARCEL THOMANN, Hildesheim 1969, § 62, p. 32: "Ceterum obligatio alia primitiva est, quae rationem proximam in essentia atque natura hominis habet; alia derivativa, quae eandem in alia obligatione vel aliis obligationibus et iuribus simul habet. Et idem intelligitur de officiis, et quia ex obligationibus descendunt iura ideoque cum iis simul ponuntur, de iuribus quoque valet. Constans nimirum omnium obligationum ac iurium inter se nexus est, ut alia ex aliis deduci continuo ratiocinationis filo possint et veritatum inter se connexarum compagem constituent, quod systema appellatur ac a nobis systema veri nominis dici solet." In a similar sense Gottfried Achenwall and Johann Stephan Pütter speak of a "nexus consectoriorum" in the obligation. Cf. ACHENWALL and PÜTTER, *Elementa iuris naturae et gentium* (n. 33), § 96, p. 27.

for all, but must be exercised every time. The prohibition of murder, for instance, once it has been determined by rational means, can certainly be remembered and thus will influence through memory human behaviour. But remembering in a rational way means repeating and proving all the steps of a demonstration, so that there cannot be real memory in a rational system, but only active rationality.

Consequently the whole system of natural law must be completely deduced from its beginning before each particular decision, and only this condition assures us the validity of a decision. In general this means that obeying natural law consists in the continuous (right) deduction of the whole system; it means that before each of our moral actions we must go back to the principle and then descend to the particular case and verify the consistency of both ways of reasoning, both ascending and descending; and it means that (modern) natural law can regulate our behaviour so long as this continuous argument and reasoning, which involves all the members of a social or juridical community, proves to be systematically consistent.¹³⁵

The systematic essence of modern natural law exerts an influence also on the meaning and function of the corresponding "science". By the term "science" we understand here the doctrine, explanation or teaching of natural law that almost took place in the European universities of the seventeenth and eighteenth century. Let us ask now: In the light of the foregoing reflexions, what does "science" look like in modern theory? What does it mean explaining a doctrine or a "science" of natural right and how does it differ from the real law of nature?

A conclusion from our previous argument is that the modern scholarship of natural law may not be a pure description of something real and existing by itself, because the "real natural law" as effective rule

¹³⁵ The geometrical nature of the modern natural law has been pointed out by Wolfgang Röd, who assumes that it is peculiar to those natural law systems which expressly adopt the Euclidian method: Hobbes, Pufendorf and Wolff. But the systematic intention is not just a quality of a few authors: in fact it represents one of the basic elements of the whole tradition of the modern natural law, and can therefore be found in every exposition of the late seventeenth and eighteenth century. Cf. WOLFGANG RÖD, *Geometrischer Geist und Naturrecht. Methodengeschichtliche Untersuchungen im 17. und 18. Jahrhundert*, München 1970, pp. 6–7. Norberto Bobbio too stressed the rational methodological features that form the basis of the modern natural law. Cf. NORBERTO BOBBIO, *Il giusnaturalismo*, in: *Storia delle idee politiche, economiche e sociali*, ed. by LUIGI FIRPO, Volume quarto: *L'età moderna*, Torino 1980, t. 1, pp. 491–558 and NORBERTO BOBBIO, *Il giusnaturalismo moderno*, in: *Il pensiero politico dell'età moderna*, ed. by ALBERTO ANDREATTA and ARTEMIO ENZO BALDINI, Torino 1999, pp. 169–196.

has the same structure as its scholarship. In other words: the practice of natural law is itself scholarship. Let us take an example to show the difference to the ancient tradition.

What does the *Summa theologiae* add to the law of nature expressed in the Decalogue? Probably nothing. The Ten Commandments would have existed even though Aquinas had never written all his great works. Between the real law (the innate ideas or the Ten Commandments) and the doctrine (the academic teaching, the books) there is no necessary relation. The Ten Commandments are a particular thing, and the *Summa theologiae* is another thing: the Ten Commandment do not become better or worse for being explained in the *Summa theologiae*. On the contrary, the deduction of the natural law produced in or by modern scholarship is the same proceeding that takes place when we obey the real natural law. The science of *ius naturae* has therefore existed since the first human being appeared on earth. Of course it was active in all past times, but was not conscious: human beings deduced and applied the rules of justice even though they could only partly identify the true principle and were not able to build a scientific system.¹³⁶ Therefore natural law in the past suffered some inconsistencies and mistakes, which were due to insufficient knowledge. The intellectual scholarship of the *ius naturae et gentium*, the doctrine taught in the universities, repeats and purifies the actual practice of natural law, which is itself an intellectual activity. Thus, the intellectual doctrine is by no means indifferent to practice, but can improve and substitute it. The science sets the ideal conditions for a perfect and definitive use of natural law. In other words, the real existing natural law is realized only by scholarship.¹³⁷

¹³⁶ ACHENWALL and PÜTTER, *Elementa iuris naturae et gentium* (n. 33), § 23, pp. 6–7: “*Ius naturae, quod cum incunabilis mundi singulorum hominum et societatum simplicium, deinde familiarum et tandem gentium quoque dirigere actiones coepit, ipso usu nulli umquam aevo incognitum fuit. Sed systematica eius tractatio diutissime neglecta effecit, ut sero admodum nobilissima doctrina inter reliquas disciplinas in formam artis redactas locum invenerit.*”

¹³⁷ Truly, the principle of natural law is not present in the human mind at the birth of each individual. This is only a fiction of the doctrine. The principle is on the contrary found by the science of the natural law during its history, which means that without the discipline no natural law is really possible. The whole history of mankind is the history of the progressive discover of *ius naturae*. Consequently the natural law that is performed by human beings is actually discovered by science, and human beings need science to act in accordance with natural law.

4.2. Rational Religion – the Ten Commandments

The theoretical essence of the foundation principle excludes the possibility that the first laws of nature are written in the human heart and that they coincide with the Ten Commandments. In fact, worship either is ignored, or is rationally deduced from the law of nature as one of the three kinds of duties: towards others, towards oneself and towards God.¹³⁸ In fact it is possible to identify the fundamental truths of a natural religion because, arguing on the grounds of natural law, all human beings would agree that God exists, that he is the creator of the world, that he is the sovereign of all creatures and of human kind, that he is the most perfect being and that he should be worshipped.¹³⁹

In the old tradition the Ten Commandments are an episode in the enforcement of natural law, which was assured, in different times and occasions. The older tradition of natural jurisprudence recognizes a history of natural law, which describes how God gave and repeated his commands to human kind so that they could be clearly understood and obeyed. This “history of the revelation of natural law” presumes a certain degree of continuity in the history of mankind: the Decalogue figures as the repetition of the first law; this was once obscured by original sin, but has never been completely erased; the Decalogue restores, saves and ensures a law that was endangered and threatened, but is still present. Consequently, the *lex naturae* is based on the primitive and uncorrupted essence of the human being. For sure, this has been obscured after original sin, but the general lines of natural law still reflect the same precepts that guided the actions of our ancestor Adam.

Furthermore, the natural law expressed in the Ten Commandments contains within itself the rules of the religious life. A distinction between a moral and a religious sphere of action cannot really take place, and the worship of the true God is itself one of the first innate ideas which belong to the original law and were repeated in the Decalogue. In the same way, it is impossible to separate external actions, which may be compelled by legitimate force, from internal intentions, which are truly valid only in a moral or theological sense. Moral theology is a constitutive part of the natural law and cannot be

¹³⁸ The former is the position of Achenwall; the latter is the solution of Pufendorf. Cf. PUFENDORF, *De officio hominis et civis* (n. 125), I, 3, 13, pp. 23–24.

¹³⁹ *Ibid.*, I, 4, pp. 24–30.

detached from it. This is why on the basis of this natural law or Decalogue people who never knew the preaching of the Gospel such as the American natives could be accused and condemned for impiety and idolatry. As they had a natural duty to worship the true God and as this command was written in their hearts, they were considered guilty before God just because of natural law.¹⁴⁰

The modern tradition of natural jurisprudence relies on the contrary upon a sharp discontinuity between the primitive condition and the present state of mankind, and between external and internal actions. Since the primordial law, the law that God gave to human beings during the creation, is not immediately evident, it must be found out and established by means of human debate. As this happens in the corrupted state in which mankind actually lives, the former "history of the revelation of the natural law" is now replaced by a theory of the state of nature, which is immutable and provides the conditions for the validity of *ius naturae*: to the old doctrine of the Decalogue corresponds in modern teaching a theory of the state of nature.

Thus, Samuel Pufendorf declares that the discipline of natural law presumes the human being in the corrupted state, as an animal torn between uncontrolled passions. He therefore draws the conclusions that each man is able to recognize the disorder dominant in his soul, but none would be able, without divine revelation, to acknowledge original sin as the source of evil and therefore to imagine the law as it was in the original condition before the Fall of Man.¹⁴¹

At the same time, and in consequence, natural law concerns only this earthly life, and aims at making the individual capable of living among

¹⁴⁰ SOTO, De iustitia et iure (n. 14), V, 3, 5, p. 431^a: "Infideles autem tertii ordinis sunt, qui neque iure neque facto nobis subditi sunt, neque vero nobis infesti, quales sunt illi qui vel Christianum nomen non audierunt vel quod eodem recidit per oblivionem omni memoria superiorem excusantur. Tametsi proprie excusatur nemo: quia cum universus orbis teneatur fidem, dum eius praedicationem audierint, suscipere, si recte servassent naturae legem, Christus illis via aliqua sua irradiaret fide. Licet excusari dicantur eo quod, dum nihil de ea audiunt, sua infidelitas non est peccatum." Cf. THOMAS DE AQUINO, *Summa theologiae*, IIa IIae, q. 10, a. 1.

¹⁴¹ PUFENDORF, De officio hominis et civis, (n. 125), "Lectori benevolo", fol. A8^v: "Unde et illud patet, necessarium esse, ut in disciplina iuris naturalis homo nunc consideretur prout ipsius natura est corrupta, adeoque prout est animal multis pravis cupidinibus scatens. Nam etsi nemo tam stupidus sit quin in seipso inordinatos ac in devia tendentes affectus deprehendat, tamen nisi divinae literae praelucent, nemini iam constare posset, istam affectuum rebellionem per culpam primi hominis provenisse. Et consequenter cum ius naturale ad ea non abeat, quo ratio pertingere nequit, incongruum foret, idem ex natura hominis integra velle deducere."

others without conflicts, whereas moral theology in the modern sense directs its efforts towards the eternal life.¹⁴² Therefore, natural law conceives the human being as a pure animal or a naked body, whose main concern is preservation of physical life. Thus, the fundamental condition of modern natural law is the reduction of humanity to physical existence.¹⁴³

This distinction is based on a further difference between natural law and moral theology: the former rules only over the external actions and does not require any particular disposition of the heart; the latter concerns first of all the internal motivations of human behaviour and requires the presence of true love in every authentic moral action.¹⁴⁴

4.3. A Single Principle – Plurality of Principles

The strict rationality of natural law, the fact that it may be achieved only by the use of human reason, depends on the existence of a single principle. In fact, the discipline of natural law can be a science only if it follows the right method of rational demonstration.¹⁴⁵ In this sense, it

¹⁴² *Ibid.*, “Lectori benevolo”, fol. A7^v: “Illud porro discrimen longe maximum est, quod finis disciplinae iuris naturalis tantum ambitu huius vitae includatur, adeoque ea hominem formet, prout hanc vitam cum aliis sociabilem exigere debeat. Ast theologia moralis hominem Christianum informat, cui propositum esse debet non hanc solum vitam honeste transire, sed qui fructum pietatis post hancce vitam maxime expectat, quique adeo πολίτευμα suum in coelis habet, heic autem viatoris duntaxat aut peregrini instar gerit.”

¹⁴³ *Ibid.*, I, 3, 2, p. 19: “Id igitur homo habet commune cum omnibus animantibus, quois sensus sui inest, ut seipso nihil habeat carius, seipsum studeat omnibus modis conservare; ut quae bona sibi videntur acquirere, mala repellere nitatur. Qui quidem affectus regulariter tantus est, ut reliqui omnes eidem cedant.”

¹⁴⁴ *Ibid.*, Lectori benevolo, fol. A8^r: “Inde et iuris naturalis scita ad forum duntaxat humanum adaptantur, quod ultra hancce vitam sese non extendit; quae ipsa multis in partibus prave ad forum divinum adplicantur, circa quod theologiae maxime curae est. Ex quo et illud fluit, ut, quia forum humanum circa externas tantum hominis actiones occupatur, ad ea autem quae intra pectus latitant nec aliquem effectum aut signum foras produnt, non penetret, adeoque nec circa eadem sit sollicitum; ius quoque naturale magnam partem circa formandas hominis exteriores actiones versetur. Ast theologiae morali non sufficit exteriores hominis mores utcunque ad decus composuisse, sed in eo maxime laborat, ut animus eiusque motus interni ad placitum Numinis fingantur, et illas ipsas actiones improbat, quae extrinsecus quidem recte se videntur habere, ab animo tamen impuro promanant.”

¹⁴⁵ ACHENWALL and PÜTTER, *Elementa iuris naturae et gentium* (n. 33), §211, p. 54: “Ius naturale est pars philosophiae practicae. Doctrina philosophiae, quo fiat certa atque indubitata, requirit ut secundum rectam demonstrandi methodum proponatur. Hinc uti philosophia tamquam genus definitur per scientiam, ius etiam naturale

requires the existence of a principle from which all rights and duties may be deduced.

First of all, the principle should be universal so that all rules of natural law may be derived immediately or indirectly from it: it contains therefore the whole doctrine synthetically. Secondly, the principle is specific to natural law and only produces rules that belong to *ius naturae*. It is not a general or generic rule of practical reason, but it is the very standard of judgement which permits the identification and description of natural law as a particular discipline, a species within the genus of practical philosophy. Only what derives from this principle can be called a part of natural law and natural law in its turn can conceive of itself as an independent discipline only through the activity of this principle. Thirdly, the principle must be prior and primary: the whole natural law is deduced from it, but it does not derive from the natural law. It is therefore the highest source of law, and all other rules are on inferior levels. From the fact that the principle is universal and prior it follows that it is also single. If there were two or more principles operating at the same time none of them would be either universal and inclusive of all natural laws or the first or the highest because all of them would be at the same level of universality. However, if one principle were higher or more universal than the others it would be their source and thus would be the single one. Fourthly, the principle must be appropriate: the whole natural law has to be derived from it without having recourse to other rules.¹⁴⁶

Each author of the seventeenth and eighteenth century imagined the source of natural law in a different way: sociability, fear, perfectibility. . . Nevertheless the problem of the principle remained a central concern in the academic teaching of the *ius naturae et gentium* and produced a specific branch in the literary production of this discipline.¹⁴⁷

tamquam species per scientiam definiri debet. Est itaque ius naturale scientia legum perfectarum naturalium."

¹⁴⁶ *Ibid.*, § 212, p. 55: "Ius naturae quum cognoscatur ratione, ideoque ratiociniis eruatur, admittere debet principium aliquod cognoscendi: 1. universale, ex quo omnes leges perfectae naturales deduci possint; 2. domesticum, quod continetur in ipso iure naturali, nec tamen plurium propositionum rationes complectitur, quam quae in iure naturae obveniunt; 3. primum, quod ex ipso iure naturae demonstrari nequit, et 4. adaequatum, unde nec plures nec pauciores propositiones, quam quae ad ius naturae pertinent, erui possunt."

¹⁴⁷ Cf. for instance: JOHANN NIKOLAUS HERTIUS, *Dissertatio de socialitate*, primo naturalis iuris principio, resp. CAROLUS BAVERUS, 1695, in: HERTIUS, *Commentationum*

4.4. Natural Disorder – Natural Order

4.4.1. A Condition for Modern Natural Law

A basic premise for the existence of modern natural law is the disorder of the human condition. Human beings in themselves are equal, enjoy the same rights and are equally free.¹⁴⁸ Therefore in the “pure state of nature”, which is a condition of equality and admits neither superior nor inferior,¹⁴⁹ everyone’s actions are independent of the will of the others and everybody depends in his behaviour only on his own will. Everyone follows only the personal judgement and does not need to give reason for his actions when he does not infringe upon the rights of other people.¹⁵⁰ This principle is sufficient to govern the relations and to make up most of the quarrels between human beings in the state of nature. However, because of the original condition of freedom and equality it is impossible to solve by agreement all those cases in which both parties assert their right over the same object. Only individual reason may persuade one or the other to give up his pretensions. Nevertheless, when the one is not able to recognize the right of others the only means left to establish presumed right and to settle the quarrel is war. This kind of war is rightful on both sides: both parties pursue a justified right; both may take possession of the enemy’s goods, may defend with violence their own goods against the enemy and seek

atque opusculorum [...] volumen primum, ed. by IOHANNES IACOBUS HOMBERGK, Francoforti ad Moenum 1737, pp. 61–90; HENRICUS COCCEJUS, *De principio iuris naturalis unico, vero et adaequato*, resp. SAMUEL COCCEJUS, Francofurti ad Viadrum [1699]; SAMUEL COCCEJUS, *Tractatus iuris gentium, de principio iuris naturalis unico, vero et adaequato*, Francofurti ad Viadrum 1702; THEODOR PAULI, *Tractatus theoreticus de veris iuris et iurisprudentiae principiis*, Francofurti et Lipsiae 1700; EPHRAIM GERHARD, *Delineatio iuris naturalis sive de principiis iusti libri tres*, Ienae 1712; MICHAEL HEINRICH GRIBNER, *Principiorum iurisprudentiae naturalis libri IV. Quibus iuris naturae et gentium publici et privati universalis summa capita exhibentur*, Vitembergae 1717; JOHANN JAKOB SCHMAUSS, *Dissertationes iuris naturalis quibus principia novi systematis huius iuris, ex ipsis naturae humanae instinctibus extruendi, proponuntur*, Gottingae 1740.

¹⁴⁸ ACHENWALL and PÜTTER, *Elementa iuris naturae et gentium* (n. 33), § 260, p. 70: “Aequalitas, identitas iurium, libertas naturalis plena, existimatio bona simplex pertinent ad suum hominis connatum.”

¹⁴⁹ *Ibid.*, § 246, p. 66.

¹⁵⁰ *Ibid.*, § 249, pp. 66–67: “Ob hanc libertatem naturalem actiones hominis in statu mere naturali sunt independentes a voluntate alterius cuiuscumque nec is in agendo dependet nisi a se ipso. Hinc 1. homini eiusmodi permittendum ut in determinandis actionibus suis suum sequatur iudicium; 2. nec ulli hominum rationem reddere tenetur, cur hoc faciat vel non faciat, dummodo tibi nihil faciat, ad quod non faciendum tibi perfecte obligatur.”

to destroy him. The end of this war, which cannot be decided by a third person, occurs when one of the adversaries dies or when they come to an agreement.¹⁵¹ Such a war cannot be avoided in the "pure state of nature" because there is no authority to judge over uncertain cases; this is the reason why human beings enter civil society.

A certain degree of disorder is admitted by all modern systems of *ius naturae et gentium* and is a constitutive condition for the deduction of natural law from individual reason. The proposals of the modern authors vary in imagining the intensity of this disorder and may be disposed between two extremes. At one end are philosophers such as Thomas Hobbes and Samuel Pufendorf, who assume the theory of the "bellum omnium contra omnes", that the condition of nature is intrinsically uncertain and violent because natural law itself, in its logical structure, is contradictory and permits different subjects to lay a justified claim upon the same object. Samuel Pufendorf, for instance, not only admits the intellectual frailty of the human mind, which is responsible for the uncertainty of the right in general,¹⁵² but also supposes that in the human soul there is present an instinct to hurt and damage other human beings.¹⁵³

At the other end of the scale are those authors such as Christian Wolff, Gottfried Achenwall and Johann Stephan Pütter who reject the

¹⁵¹ *Ibid.*, §§ 531–534, pp. 147–148: "Quodsi in placidam rationem non consentiunt, armorum iudicium experiendum. In lite de debito dubio uterque litigantium suo iudicio standi ius habet. Igitur uterque ius suum iuste persequitur, uterque iustum gerit bellum, uterque iuste et eripit res et invadit iura ac petit ipsam personam alterius litigantis, et quod ereptum, invasum, petitem, alter iusta violentia recuperat, defendit, repetit. Nam quum hoc casu laesio sit dubia, et damnum erit dubium et quod acquiritur erit dubii iuris, immo omne suum evadet incertum, quippe violentiae alterius expositum [...] Itaque bellum ipsum non finit controversiam, nec victoria decedens finit litem. Sed modi, quibus finitur bellum, sunt modi finiendi eiusmodi litem. Finitur vero omne bellum vel morte alterutrius hostis vel pacto. Pactum, quo lis hostium finitur, est pactum pacis. Itaque modi, quibus lis hostium de debito dubio finitur, sunt interitus hostis et sanctio pacis."

¹⁵² PUFENDORF, *De officio hominis et civis* (n. 125), I, 3, 6, p. 21: "Denique et in genere humano considerata est insignis illa ingeniorum varietas, qualis in singulis brutorum speciebus non cernitur; quippe quae consimiles fere inclinationes habent, parique affectu et appetitu ducuntur. Ast inter homines quot capita tot sensus, et suum cuique pulchrum. Nec simplici aut uniformi cupidine omnes agitantur, sed multiplici et varie inter se mixto. Imo unus et idem homo saepe sibi dissimilis cernitur et quod uno tempore concupivit ab eodem alio tempore valde abhorret. Nec minor in studiis, institutis et ad exserendum animi vigorem inclinationibus varietas, quae iam in infinitis fere vitae generibus conspicitur. Per quae ne mutuo collidantur homines, sollicita temperata et moderamine opus est."

¹⁵³ *Ibid.*, I, 3, 4–5, pp. 19–21, especially § 5, pp. 20–21: "Sed et maxima vis inest hominibus ad noxas mutuo inferendas. Nam etsi neque dentibus neque unguibus aut

idea of a permanent war in the state of nature and presume on the contrary that the original condition was one of "pax omnium cum omnibus".¹⁵⁴ In this sense, the state of nature is essentially rightful and disorder is a kind of necessary accident, which restricts the validity of justice, but does not corrupt the essence of the human being. Nevertheless, the possibility of disorder cannot be eliminated at all, which means that natural right remains always imperfect. This imperfection is unavoidable because it is a direct consequence of the fact that the right depends on the understanding of individuals, whose weakness always affects, fully or partly, the practice of justice.

4.4.2. *End of Tyranny*

An important consequence of the presence of disorder in modern natural law is that tyranny cannot take place in it. In the older tradition the possibility of identifying and fighting the tyrant depended on the existence of a universal order. But the fundamental problem in the modern tradition is that it seems impossible to find such universal justice; moreover, modern natural law conceives itself as a solution to this question in order to establish right in a world in which justice has disappeared. Since the eternal law has now faded away, nothing permits subjects to condemn the tyrant and to resist him.

Already some of the late Aristotelian theorists of the seventeenth century recognized that the so-called "corrupted forms of commonwealth" were real constitutional phenomena which deserved to be described and studied as specific objects of political doctrine. In particular circumstances, democracy, oligarchy and tyranny were the best possible constitutions, as for instance when the population was not inclined to freedom.¹⁵⁵ Furthermore, Late Aristotelianism developed

cornibus sint formidabiles ut multa brutorum, tamen habilitas manus in efficacissimum nocendi instrumentum evalescere potest, et solertia ingenii astu et per insidias grassandi facultatem dat, qua aperta vi pertingere non licet. Sic ut facillimum fit, hominem homini gravissimum malorum naturalium, nempe mortem, inferre."

¹⁵⁴ ACHENWALL and PÜTTER, *Elementa iuris naturae et gentium* (n. 33), § 469, p. 130.

¹⁵⁵ HERMANN CONRING, *De civili prudentia liber unus*, Helmestadii 1662, pp. 10–11: "Nec tamen id ulla ratione admitti debet quod video nonnullis persuasum esse, omnem rationem dominantium status iniustam esse. Si enim dominium aliquod privatum in mancipium et iure gentium et divino naturalique permissum imo constitutum est, nihil etiam ab aequo discedit si integer populus aut magna aliqua multitudo serviat, cum primis si non serviat mancipii utilitate: id quod per omnem terrarum orbem, ex quo bella coeperunt, usque ad haec tempora, indubitati ac recepti iuris semper est visum.

particularly the theory of the *dominatus*, a third kind of government beside monarchy and tyranny, in order to explain those constitutions in which the king is above the law and legitimately pursues his own advantage.¹⁵⁶ As forms of *dominatus* were interpreted not only the ancient and contemporary empires of Persians, Egyptians, Russians and Turks, but also some modern European monarchies.¹⁵⁷

Thomas Hobbes put an end to the discourse about tyranny:

There be other names of government, in the histories, and book of policy; as *tyranny*: but they are not the names of other forms of government, but of the same forms misliked. For they that are discontented under *monarchy*, call it *tyranny*; and they that are displeased with aristocracy, call it *oligarchy*; so also, they which find themselves grieved under a *democracy*, call it *anarchy*, which signifies want of government. I think no man believes, that want of government, is any new kind of government: nor by the same reason ought they believe, that the government is of one kind, when they like it, and another, when they mislike it, or are oppressed by the governors.¹⁵⁸

The sovereign of modern natural law is produced by a covenant, in which the subjects give up their will and transfer it to the sovereign.

Eiusmodi civitatem minus exacte mereri civilis societatis cognomentum, nec omnibus ex voto bene in illa esse, haud diffiteor; at vero hinc non efficitur, eandem iniustam esse aut omnino nulli hominum ordini convenire. Imo fieri potest, ut respublica omnium spectans commodum vere iniusta sit, quando nimirum per iniuriam populus in libertatem sese asseruit, novo illo statu condito. In hac vero statuum differentia, necessum est multis quoque modis inter sese differre rationem status, ut et ea quae ad sui tutelam ac salutem isthaec exigit. Praeterquam enim quod alia ad heriles respublicas faciant, alia ad illas magis exoptentur, quae communis commodi ergo instituantur, singulae rerumpublicarum species seorsim suis quaeque principiis ac remediis nituntur."

¹⁵⁶ HERMANN CONRING, *De morbis ac mutationibus rerumpublicarum*, resp. ERNESTUS VON WARTENSSLEBEN, Helmestadii 1640, §§ 58–63, fol. D3^v–E1^r; HERMANN CONRING, *De regno et tyrannide*, resp. CONRAD-ASCANIUS VON MARENHOLTZ, Helmestadii 1640, §§ 15–21, fol. A4^v–B1^r and § 43, fol. C1^r–^v; HERMANN CONRING, *De regno*, resp. ANDREAS CURTIUS, Helmaestadii 1650, §§ 6–14, fol. A3^v–B2^r; BALTHASAR CELLARIUS, *Politica succincta*, Ienae 1653, II, pp. 101–122; JOHANN HEINRICH BOECKLER, *Institutiones politicae*, Argentorati 1674, pp. 175–181; JOHANN HEINRICH BOECKLER, *Dissertatio XV. De regno. Ad locum Taciti 1. Historiarum*, 16, 7, in: BOECKLER, *Dissertationes politicae ad selecta veterum historicorum loca*, in: BOECKLER, *Institutiones politicae* (n. 156), pp. 395–401; JOHANN HEINRICH BOECKLER, *Dissertatio XVI. De tyrannide. Ad loca Taciti 4. Historiarum*, 8, 3. et 4. *Historiarum*, 74, 4., in: BOECKLER, *Dissertationes politicae* (n. 156), pp. 401–421.

¹⁵⁷ MICHAEL PICCART, *In Politicos libros Aristotelis commentarius*, Lipsiae 1615, III, 14, pp. 458–459.

¹⁵⁸ THOMAS HOBBS, *Leviathan or the Matter, Form, and Power of a Commonwealth Ecclesiastical and Civil*, in: HOBBS, *The English Works of Thomas Hobbes*, ed. by WILLIAM MOLESWORTH, vol. 3, 1839, reprint Aalen 1962, II, 19, pp. 171–172.

They therefore oblige themselves to recognize as their own will the will of the sovereign. Thus, the subjects are the true authors of actions done by the political actor, the king, a council or the assembly. What the sovereign does is really wanted by the subjects: the latter cannot therefore refuse to obey the commands of the king because they cannot refuse to obey themselves. Every decision or action of the sovereign is legitimate and may not be resisted inasmuch as it does not threaten the life of the subjects. The actions of the king could appear as good and right or wrong and tyrannical only if they were measured on an external standard. Now the subjects cannot appeal to any kind of moral order of the good, universal, independent or unrelated to the decisions of the sovereign. They can neither identify nor fight the tyrant: the tyranny is simply impossible, unthinkable.

The same conclusions were also clearly arrived at by Johann Christoph Beckmann, a German thinker of the late seventeenth century. Though Beckmann substituted Hobbes' covenant with the divine origin of majesty in order to explain the absolute superiority of the sovereign, the result remains the same.¹⁵⁹ God gave the kings the power to rule over their subjects, which in turn should obey all their commands even if they are unjust and injurious. The subjects should bear the inefficient and wicked kings: every form of resistance is illicit.¹⁶⁰ In addition, the use of the name "tyrant" is unlawful: the only one who may condemn a king is God. Only God will judge whether a sovereign was good or tyrannical in his lifetime. When subjects call their king a tyrant they usurp a divine right and commit a crime of *lèse-majesté* against God. So, the names "tyrant" and "tyranny" should be forbidden forever.¹⁶¹

¹⁵⁹ JOHANN CHRISTOPH BECKMANN, *Dissertatio de non abutendo nomine principum seu suspecta doctrina de tyrannis ac tyrannide*, resp. JOH. CHRISTOPHORUS TAUBER, *Francofurti ad Viadrum* 1680, in: BECKMANN, *Dissertationum academicarum in universitate Francofurtana praeside Johanne Christophoro Becmano [...] institutarum volumen unum*, Francofurti ad Oderam 1684, II, 1, 2, pp. 11–12.

¹⁶⁰ *Ibid.*, II, 1, 3–8, pp. 12–14.

¹⁶¹ *Ibid.*, II, 7 and 9, pp. 19 and 21.

4.5. Conditions of Validity

4.5.1. The Enforcement of Natural Law in Political Society

The natural law of the modern tradition is not really in force in the state of nature. In the original condition it may certainly be deduced, but it can by no means persist and must transform itself into the law of a civil society. The doctrine of *ius naturae et gentium* conceives this passage in a plurality of ways which can be placed on different levels depending on the degree of disorder present in the state of nature. Firstly, there is the position of Hobbes, who denies the existence of a right in the proper sense in the state of nature and admits it only in civil society, in which law is the same as the sovereign's will. In this case, the sovereign is the source of the law. Secondly, there are most of the authors of the *ius naturae et gentium*, who try to deduce natural law in the state of nature, but accord real validity to law only in the civil state. In this case, the sovereign is the defender of the natural law.

Samuel Pufendorf, who builds his system on the principle of human sociability, deduces the whole doctrine of private law from the natural state. Thus, human beings can establish their relations and pursue their happiness outside political society, as free and equal individuals. But at the end of this reasoning, once the whole system of rights and duties has been determined, Pufendorf finds that human beings in the natural state are too weak and confused to live according to natural law. They need an independent judge to settle their quarrels and need someone who defends them from the injuries of the wicked. In fact although a certain kinship exists between human beings, which should restrain them from hurting one another, natural freedom weakens mutual love to such an extent that they consider each other as faithless friends, if not as enemies. The consequence is that human beings in the natural state are open to all eventualities and really try continuously to injure each other. They live therefore in a condition of continual suspicion and distrust, in which each individual tries to prevail over the others or to prevent their attacks and attempt to increase his power, leading the others to ruin.¹⁶² Consequently, August Ludwig

¹⁶² PUFENDORF, *De officio hominis et civis* (n. 125), II, 1, 9–11, pp. 101–103, especially 11, p. 103: "Quam quam autem natura ipsa inter homines aliquam cognationem esse voluerit, cuius vi nefas sit alteri homini nocere et potius fas sit cuiusvis aliorum commodis sese dispensare, tamen inter eos qui in naturali libertate invicem vivunt haec cognatio sat debiles fere exserit vires, ita ut quisvis homo qui non est noster civis seu quicum in statu naturali vivimus non quidem pro hoste, sed tamen pro amico parum firmo sit

Schlözer, professor for political science in Göttingen, could say in 1793: "Natural man is alone and weak against untamed nature, against animals and against brutal persons. Therefore there is no liberty in the state of nature: what is the good of rights which I cannot assert?"¹⁶³ Schlözer's answer is clear: free individuals have to take refuge in civil society, which grants them the enjoyment of all their rights undisturbed. In fact, civil society does not produce or add a new kind of law, but accepts and sustains through political authority the rights rationally stated in the state of nature. "All the rights of man and of citizen remain valid: just to secure them or to enjoy in peace as much liberty as possible the individual subdues himself to a sovereign. He insures a capital of 100 for a premium between 3 and 6 per cent. In fact the individual is submitted to the government of the sovereign only in those actions in which he is not alone, but mixes with other people."¹⁶⁴

In the modern tradition the civil law, the law used by the citizens of the same commonwealth, is for the most part the natural law enforced by the political power. Natural law has no validity in the state of nature: it is really valid only within civil society, where it is asserted by political power. Regarding the source of obligation there are no different levels or categories of law as in the ancient tradition. This last acknowledged a number of independent authorities, which could produce independent types of law. In the modern tradition the source of the law, once this is stated by reason, is always the same political authority so that in the end there can be only one source of obligation, sovereignty, and just one kind of law.

habendus. Cuius rei ratio est quod homines non solum sibi invicem maxime possint, sed et variis de causis saepissime velint nocere. Alios quippe pravitas ingenii aut dominandi et superflua habendi libido ad laedendos alios incitat, alii modesto licet ingenio, studio se conservandi et ne ab aliis praeveniantur in arma ruunt. Multos eiusdem rei desiderium, alios ingeniorum contentio committit. Inde in isto statu tantum non perpetuae vigent suspiciones, diffidentia, studium aliorum vires subruendi, libido alios praeveniendi aut ex aliorum ruina vires suas augendi."

¹⁶³ AUGUST LUDWIG SCHLÖZER, *Allgemeins StatsRecht und StatsVerfassungsLere*, Göttingen 1793, p. 37: "Schwach ist der einsame NaturMensch, gegen oft unbezwingliche Natur, gegen Tiere, und Tierartige Menschen. Folglich ist im NaturStande keine Freiheit; was nützen mir Rechte, die ich nicht geltend machen kann?"

¹⁶⁴ SCHLÖZER, *Allgemeins StatsRecht* (n. 163), p. 94: "Alle Rechte des Menschen und Bürgers bleiben: eben um beide zu sichern, die höchstmögliche Freiheit ungestört zu genießen, untergibt er sich einem Herrscher. Er läßt sich ein Capital von 100, für eine freiwillig angebotene Prämie von 3 bis 6 pro Cent assecuriren: denn blos in solchen Handlungen, bei welchen der einzelne Mensch nicht mit sich allein, sondern mit andern MitMenschen zu thun hat, wird er der Direction des Herrschers unterworfen."

30 Natural law, which is discovered by means of reason in the state of nature, is therefore a pure hypothesis, a mental construct, which has no validity and reality at all. To gain reality it must be restated in political society. Thus, the authors of the eighteenth century mentioned a *ius mere naturale* or *absolutum* and a *ius naturale hypotheticum*. This concept and the oppositions that it produces are meant in different ways: some authors intend to separate the natural law for a perfect mankind from the natural law of corrupted human beings;¹⁶⁵ others defined with this distinction the state of the individuals when they are imagined alone and when they entertain mutual relations such as the appropriation of shared goods.¹⁶⁶ Anyway, these expressions always mean that natural law in the state of nature is either something "absolute", detached from the exchange of rights and duties, or something hypothetical, which is based on an intellectual assumption, but does not exist in historical reality.

On the same basis it is possible to answer the question about the reality of the state of nature: was it a real historical condition of mankind or is it only a useful hypothesis of the science? Pufendorf has no hesitation in declaring that a state of nature has never existed. Imaging that the whole of mankind lived in the earliest times in such a way that everyone governed himself and was subjected to nobody else, is always possible and even necessary. However, human beings cannot survive without the help of parents and relatives. Thus, in the most

¹⁶⁵ JUSTUS HENNING BÖHMER, *Introductio in ius publicum universale*, 2nd ed., Halae Magdeburgicae 1726, (1st ed. 1710), Pars specialis, I, 1, 1, n. a, p. 126; CHRISTOPH AUGUST HEUMANN, *Observatio moralis de distinctione iuris naturalis in absolutum et hypotheticum, item de discrimine iusti, honesti, aequi ac decori*, in: *Acta eruditorum*, Supplementa, t. IV, sect. 9. Lipsiae 1711, pp. 410–419, especially p. 411: "Hinc itaque ius naturale recte dispesco in absolutum et hypotheticum. Illud voco, quod simpliciter praescribit, quae ad felicitatem humanae naturae in se consideratae spectant, adeo ut iis servandis homo sit omnibus numeris beatus perfectusque. Absoluti huius iuris naturae praecepta ex universali illo principio "Sectare bonum" emanantia haec sunt: Ama Deum, te ipsum et homines alios. Hypotheticum dico, quod naturam depravatam ac perversam supponit, adeoque non haberet locum, nisi natura hominum morbis affecta esset gravissimis. Hoc proinde eatenus solum valet ac tamdiu, quamdiu natura humana non est mutata in melius"; NIKOLAUS HIERONYMUS GUNDLING, *Ius naturae ac gentium connexa ratione novaque methodo*, 3rd ed., Halae Magdeburgicae 1736, (1st ed. 1714), I, 19–21, pp. 8–9; I, 28, p. 34; NIKOLAUS HIERONYMUS GUNDLING, *Vorbericht zu denen Winter-Lectionen MDCCX.*, in: GUNDLING, *Sammlung kleiner Teutscher Schriften, und Anmerkungen*, ed. by GOTTLIEB STOLLE, Halle 1737, pp. 94–142, especially p. 128.

¹⁶⁶ JOACHIM GEORG DARJES, *Institutiones iurisprudentiae universalis in quibus omnia iuris naturae socialis et gentium capita [...] explanantur*, Ienae 1745, (1st ed. 1740), Praeconoscenda, I, 14, p. 7; LUDWIG GOTTFRIED MADIHN, *Grundsätze des Naturrechts [...] Zweyter Theil: Hypothetisches Naturrecht*, Frankfurt an der Oder 1789.

primitive state of humanity, in the only historically possible state of nature, human beings lived gathered in families. Really free from one another, independent and equal were therefore only families, not individuals.¹⁶⁷ Both natural law and the state of nature are therefore hypotheses of science: they have never had a real existence, but they are nevertheless necessary to deduce the system of laws, even though this last exists only in civil society.

4.5.2. *Two Foundations of Natural Law*

The fact that natural law appears in the condition of nature, but is valid only in the civil state, is reflected in the structure of the scientific system of the *ius naturae*, which can include two different foundations of the natural law, one in the natural state and one in the civil society.

This problem was outrightly discussed by some authors in the eighteenth century. Johann Gröningen was aware of the danger of splitting the discipline into two separate doctrines and pointed out that the part of the *ius naturae* concerned with the foundation of the commonwealth does not possess its own principles, but should be deduced from the same first principle of natural law.¹⁶⁸ On the same basis Theodor Pauli critically observed that Samuel Pufendorf derives the whole of natural law from the sociability of mankind, but founds the political society on the need for self-preservation. In this solution sociability is lost and replaced by its contrary, true selfishness.¹⁶⁹ Michael Heinrich Gribner tried to solve the same difficulty assuming that only political society may be founded on self-preservation, that is on the fear, while natural law needs another principle.¹⁷⁰ Of course, he fell into the same contradiction pointed out by Pauli.

¹⁶⁷ PUFENDORF, *De officio hominis et civis* (n. 125), II, 1, 6–7, pp. 99–100.

¹⁶⁸ JOHANN GRÖNINGEN, *Bibliotheca iuris gentium Europaea seu de iuris naturae et gentium principiis iuxta doctrina Europaeorum libri III.*, Hamburgi 1703, Discursus praeliminaris, § 11, pp. 8–10. Cf. BÖHMER, *Introductio in ius publicum universale* (n. 165), Pars generalis, II, 22, n. d, pp. 67–69.

¹⁶⁹ THEODOR PAULI, *Tractatus theoreticus de veris iuris et iurisprudentiae principiis [...]*, Francofurti et Lipsiae 1700, II, 12, p. 88: “Ex quo patet, iuxta sententiam Dn. Pufendorffii amorem sui ipsius amicum, collegam et quasi suffraganeum esse socialitatis [...] Interim si verum est, hominem propter hunc finem, nempe ut ipse servetur, societatem appetere, sine dubio sequetur, societatem hoc pacto non esse fundamentum vel finem ipsum, sed saltem medium necessarium, sine quo finis iste obtineri non potest.”

¹⁷⁰ MICHAEL HEINRICH GRIBNER, *Principiorum iurisprudentiae naturalis libri IV. Quibus iuris naturae et gentium publici et privati universalis summa capita exhibentur*, Vitembergae 1717, II, 1, 3, pp. 155–156.

Karl Ferdinand Hommel developed a double foundation for natural law based on Roman law. He observed that a true obligation exists only in the civil state, and that therefore the natural state is a condition of perfect freedom and equality. Consequently what anyone can do applying his natural resources is rightful. In the natural condition right is the same as power.¹⁷¹ While natural law is based on the principle of liberty and produces violence and disorder, civil society is ruled by the law of nations, which aimed at the preservation of everyone and is governed by the principle of honesty.¹⁷² Righteousness acts through covenants, which alone can produce true obligation towards others. Thus, the law of nations can exist only within civil society. In the state of nature human beings use natural law, in civil society they use the law of nations. Between these kinds of law there cannot be any continuity: where the one begins, the other must cease.

According to the two foundations of natural law, some systems of the *ius naturae* are divided in two different sections. Nikolaus Hieronymus Gundling identified two main *status* of the human condition, the *status naturae* and the *status civilis*. He consequently deduced always every rule twice: once before and once after the foundation of the state.¹⁷³ Daniel Nettelbladt distinguished "natural jurisprudence" from "civil jurisprudence": the former includes the natural law of the natural state; the latter comprehends the public and the private law inasmuch as they are valid within a civil society. Nettelbladt states expressly that a right or duty in natural law can be accepted within civil society only if it is not removed or restricted by political authority. In other words, natural law does not persist in civil society by itself, but has to be permitted by political order. The consequence is that often what is rightful in the natural condition is not so in civil society.¹⁷⁴ Ludwig

¹⁷¹ KARL FERDINAND HOMMEL, *Propositum de novo systemate iuris naturae et gentium ex sententia veterum Ictorum concinnando* [...], Lipsiae 1747, §§ 56–61, pp. 48–51.

¹⁷² *Ibid.*, §§ 88–89, pp. 70–71.

¹⁷³ NIKOLAUS HIERONYMUS GUNDLING, *Ius naturae ac gentium connexa ratione novaque methodo* [...], 3rd ed., Halae Magdeburgicae 1736, (1st ed. 1714), on the *status* especially III, 5, p. 38. Cf. also NIKOLAUS HIERONYMUS GUNDLING, *Ausführlicher Discours über das Natur- und Völker-Recht* [...], Frankfurt und Leipzig 1734, III, 1–38, pp. 62–64.

¹⁷⁴ DANIEL NETTELBLADT, *Systema elementare universae iurisprudentiae naturalis*, 5th ed., Halae Magdeburgicae 1785, (1st ed. 1749), § 1505, p. 633: "Non nisi eatenus conveniunt iura et obligationes naturales, quae [...] homines in statu naturali viventes obtinent, cum iuribus et obligationibus subditorum, quatenus non per iura regiminis superioris reipublicae tam generalia quam specialia vel per se cessant vel vi potestatis rectoriae superioris restrictum vel sublatum est, quod vi libertatis naturalis licitum

Julius Höpfner used a similar system and described both public and private law as parts of the state law (*Staatsrecht*) since all rights and duties of citizens depend on the presence of the state.¹⁷⁵

The same problem appears also in the *Doctrine of Law* of Immanuel Kant, who gave a very precise formulation to it. Kant, who assumes that individual right can be ensured only by a general will, identifies the right of property in the natural condition only in a temporary way. In fact, although human beings in the natural condition can assert their individual property through natural law, a true *meum et tuum* can exist only within the political society when the sovereign will acknowledges it.¹⁷⁶

How can we explain this division in the structure of modern natural law? Why should natural law be founded twice: once in the natural state, and once in civil society?

We can answer this question by remembering that the doctrine of Hobbes, who applied in the most radical way the idea that "authority and not truth makes law", does not need a double foundation. In fact, the whole law is identical with the will of the sovereign. Since in the natural state everyone can claim a legitimate right to everything, this right to all things turns immediately into a right to nothing. In fact it is impossible to gain any kind of right in the natural state because my right does not correspond to a duty on the part of others.¹⁷⁷ The conclusion is that there is no right at all in the natural condition and therefore that natural right does not exist at all. A right in the proper sense, capable of producing a symmetrical obligation, is possible only in political society. This brilliant solution produces in its turn another problem. We must in fact give up every idea of an independent law. Since right is produced by the sovereign will, it does not exist independently of it. Covenant, agreement, property, succession and all other institutions of private law, which seem to be to an extent prior to and independent of political power, and furthermore perhaps all the

erat. Quorsum praesertim referri debet persecutio iuris perfecti per viam facti, quae vi potestatis iudiciariae superioris in republica per se iam valde restricta est; nec non vi potestatis politicae eius saepe non idem iustum esse in statu civili, quod in statu naturali pro iusto habendum."

¹⁷⁵ LUDWIG JULIUS FRIEDRICH HÖPFNER, *Naturrecht des einzelnen Menschen, der Gesellschaft und der Völker*, 2nd ed., Gießen 1783 (1st ed. 1780), § 173, pp. 151–152.

¹⁷⁶ IMMANUEL KANT, *Doctrine of Law*, I, 1, 1, § 8.

¹⁷⁷ Cf. *ibid.*, I, 1, 1, § 8.

basic terms of jurisprudence such as injury, guilt, responsibility, truth, action, equity, duty, law and right, are now determined in such a way by sovereign will, that this can change them without reason and continually. The sovereign may decide not only what a law says, but also what is law, duty or contract. This is a paradox: the state should preserve right, but the state destroys right while saving it.

The double foundation of natural law is a way of evading this contradiction. It accepts the assumption that true right exists only in civil society as stated by the political power, but it imagines that a kind of weaker right, the mere idea of the right, can exist without the sovereign in the state of nature, and accords to this natural law a conditional existence, so that it can influence to some extent the enforcement of law through political authority. Of course, it is still a paradoxical solution of the contradiction, which cannot deny that true right can be only the law as stated in the political society.

4.6. *Natural and International Law*

The sixth and final point of the comparison between ancient and modern natural law concerns the affinity between natural and international law. In the ancient tradition *ius naturale* and *ius gentium* 1. are two separated kinds of law; 2. originate in two different sources and 3. pertain to different objects. Some things in the world are ruled by natural law, and some others by the law of nations. Natural law is produced by human reason or by instinct, the law of nations by human agreement. The commands of the former are completely different from the commands of the latter.

The discipline of *ius naturae et gentium* of the seventeenth and eighteenth centuries conceives on the contrary natural and international law as the same law, which derives from the same source, the rational calculation of the individual, but is applied to different subjects. In the modern tradition the objects, that is the content of the rules – what should be done and when and how –, remain the same; what differs are the subjects that perform the commands of law: individuals in natural law, societies in international law. The same subject cannot enjoy at the same time natural and international rights because natural and international law represent two different levels of the same law. In the ancient doctrine on the contrary all kinds of law which ruled different parts of the human life could be attributed to the same individual.

The equation between individuals and societies is granted by the political covenant:

Because of the common good that they intend and of the same common end which they pursue, to the members of a society should be ascribed one single will, one single understanding and unity of forces. Therefore, the members of a society should be conceived as a single person, and such a fictitious person, who is composed by many other persons, is called a moral or a mystical person.¹⁷⁸

Since political society is produced by a covenant, which unifies the separate will of individuals into a single will, it is possible to conceive society as a whole, a person, which enjoys rights and duties like every other real person. Therefore natural law which governs single human beings may be applied to societies without changing its contents:¹⁷⁹ the same natural law is called *ius naturae* in the proper sense when it concerns individuals, and it is called *ius gentium* when it is applied to *civitates, respublicae, societates civiles* or states.

Two cities or commonwealths are in the state of nature like two individuals. They are consequently free and equal, and admit only the mutual rights and duties that can be deduced by means of individual reason. The identity between individuals and states is so perfect that Pufendorf admits that in a truly historical sense the state of nature existed and still exists only between societies, whereas single human beings never lived fully as individuals in the state of nature.¹⁸⁰

¹⁷⁸ ACHENWALL and PÜTTER, *Elementa iuris naturae et gentium* (n. 33), § 540, pp. 150–151: "Sociis ob idem commune bonum, quod appetunt, et eundem finem communem, quod persequuntur, tribuenda una voluntas, unus intellectus, unitas virium. Hinc socii considerantur ut una persona, qualis persona ficta ex pluribus composita dicitur moralis seu mystica."

¹⁷⁹ *Ibid.*, §§ 541–542, p. 151: "Pone societatem, pones duos vel plures homines, 1. quorum quilibet singulus iurium atque obligationum humanarum capax est; 2. qui coniunctim sumti tamquam una persona iurium atque obligationum habiles sunt. Itaque applicari ad societates recte possunt leges iuris naturalis singulorum hominum. Quale ius actu applicatum vocatur ius sociale." Cf. *ibid.*, § 898, p. 269: "Itaque ad gentes applicari potest ius naturale singulorum hominum quod actu applicatum vocatur ius gentium."

¹⁸⁰ PUFENDORF, *De officio hominis et civis* (n. 125), II, 1, 6, p. 100: "Sed status naturalis, qui revera existit, id habet, ut quis cum aliquibus hominibus peculiari societate iungatur; cum reliquis autem omnibus nihil praeter speciem humanam obtineat commune, nec alio nomine quidquam ipsis debeat. Qualis status iam inter diversas civitates ac cives diversarum rerum publicarum existit et quondam inter patresfamilias segreges obtinebat."

The conclusion is that natural law and international law are the same thing and differ only inasmuch as a real individual differs from an imagined person. They should therefore be conceived not as a genus and a species, but as two separate species stemming from a larger genus:¹⁸¹ the natural law in the broad sense, the law produced by individual reason, which is the only existing general law, capable of governing all subjects of the world, if only they are rational.

¹⁸¹ ACHENWALL and PÜTTER, *Elementa iuris naturae et gentium* (n. 33), § 899, p. 269: "Quatenus itaque singularis homo in statu naturali et gens integra inter se conveniunt, eatenus ius naturae singulorum hominum seu ius naturae in specie et ius gentium sunt unum idemque. Quatenus autem individuum humanum et gens inter se differunt, eatenus etiam a singulorum hominum iure naturali distat ius gentium [...] Differt ius gentium a iure naturali singulorum hominum non ut a specie genus, sed ut a conspecie cospecies."