NATURAL LAW
An Introduction to Legal Philosophy

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tides of inspiration which issues finally in a shape identifiably new. This remark by a recent student of “rationalism in politics” fully applies to the modern theory of natural law. Both in the American and in the French Declaration the rationalist style is easily identifiable, and startling enough. But it is not so easy to trace its origin and to ascertain the moment in which it shows itself unmistakably for the first time. The emphasis laid on the continuity of the natural law tradition has led, in this as in other instances which we have examined, to some misconstructions which must be carefully assessed.

Hugo Grotius, a Dutchman (1583-1645), has long been considered the founder of the modern theory of natural law. This judgment goes back to Pufendorf (1632-1694), the first holder of a chair of Natural Law in a German university, and the greatest academic expounder of the theory in the seventeenth century. Pufendorf praised Grotius as the vir incomparrabillis who dared to go beyond what had been taught in the Schools, and to draw the theory of the law of nature out of the “darkness” in which it had lain for centuries. That judgment is still repeated in many handooks. Along with Bacon and Descartes in the field of philosophy, with Galileo and Newton in the field of experimental science, Grotius has a special place reserved in the field of jurisprudence as one of the prophets of our brave new world.

This view has been challenged by some modern historians. They have gleefully set to work revising the accepted version and displacing Grotius from his pedestal. There is nothing new, nor original—so the story is now told—in the notion of natural law which Grotius used as the foundation of his treatment of the Laws of War and Peace (1625). The tradition of natural law had continued to flourish in Europe all through the sixteenth century, notwithstanding the fact that the unity of Christendom had been torn asunder by the Reformation of which Grotius was a son. That notion had been accepted by Catholic as well as by Protestant writers. Grotius did nothing but borrow it from the late Scholastics, particularly from the Spanish theologians and legal philosophers to whom he


acknowledged his indebtedness. His thought, therefore, is “a direct continuation of the great Natural Law tradition which stretches from St. Augustine to Suarez, and which culminated in St. Thomas.” His famous dictum that natural law would retain its validity even if God did not exist (si tamen daretur non esse Deus), can be traced back to earlier writers. It is far less revolutionary than it seems, and it is actually accompanied by very important cautions and qualifications.

Once again the quest for precedents has led historians to forget that a doctrine must not be judged by the letter, but by the spirit. There is no doubt that all the great thinkers who open up our modern age have their roots in the age that preceded them. But the fact that Descartes—as has been conclusively shown—drank deep at the well of Scholastic philosophy is certainly no reason for mistaking him for a Schoolman. Nor is the possibility of tracing a large literature On the Government of Princes in the Middle Ages an excuse for overlooking the startling novelty of Machiavelli’s Prince. If Grotius—like Machiavelli and Descartes, and many other great thinkers—was considered by his contemporaries and his immediate successors to have broken with the thought that preceded him, we must try to understand the reasons which led to that opinion. These reasons are not difficult to ascertain. They throw light upon the emergence of that “rationalist” notion of natural law which found its complete expression one and a half centuries later.

It is not in its content that Grotius’ theory of natural law breaks away from Scholasticism. It is in its method (Cassirer). His definition of natural law has nothing revolutionary: c When he maintains that natural law is that body of rules which man is able to discover by the use of his reason, he does nothing but restate the Scholastic notion of a rational foundation of ethics. Indeed, his aim is rather to restore that notion which had been shaken by the extreme Augustinianism of certain Protestant currents of thought. When he declares that those rules are valid in themselves, independently of the fact that God willed them, he repeats an assertion which had already been made by

some of the Schoolmen for reasons which will be discussed in the following chapter. He is careful to put forward that view in such a way as to avoid any suggestion of blasphemy.

"What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him" (De Iure Belli ac Pacis, Prolegomena, § 11).

This is a purely hypothetical argument. It is quite clear that Grotius, still deeply imbued with the spirit of Christianity, would never have conceded that God did not take any part in the affairs of men. The law of nature is implanted in man by God. It has therefore unquestionably a divine origin (ibid. § 12). The revealed laws of God confirm and assist men in their knowledge of the law of nature (§ 13).

But Grotius' aim was to construct a system of laws which would carry conviction in an age in which theological controversy was gradually losing the power to do so. He therefore proceeded on the hypothesis further than anyone had done before him—much further than even the judicious Hooker, whose inclinations and thought bear so close a resemblance to his. He proved that it was possible to build up a theory of laws independent of theological presuppositions. His successors completed the task. The natural law which they elaborated was entirely "secular". They sharply divided what the Schoolmen had taken great pains to reconcile.

The doctrine of natural law which is set forth in the great treatises of the seventeenth and eighteenth centuries—from Pufendorf's De Iure Naturae et Gentium (1672) to Burlamaqui's Principes du Droit Naturel (1747), and Vattel's Droit des Gens ou Principes de la Loi Naturelle (1758)—has nothing to do with theology. It is a purely rational construction, though it does not refuse to pay homage to some remote notion of God. But, as C. Becker remarked, God is increasingly withdrawn from immediate contact with men. The laws of nature are to Jefferson the Laws of Nature's God. The French legislators solemnly put themselves "in the presence and under the auspices of the Supreme Being". But Nature's God or the Supreme Being are not more akin to the God Omnipotent of the Creed than Deism is to Christianity. What Grotius had set forth as a hypothesis has become a thesis. The self-evidence of natural law has made the existence of God perfectly superfluous.

Here we touch on another point in which Grotius' influence was decisive. If natural law consists in a set of rules which are absolutely valid, its treatment must be based upon an internal coherence and necessity. In order to be a science, law must not depend on experience, but on definitions, not on facts, but on logical deductions. Hence, only the principles of the law of nature can properly constitute a science. Such a science must be constructed by leaving aside all that undergoes change and varies from place to place.

"I have made it my concern to refer the proofs of things touching the law of nature to certain fundamental conceptions which are beyond question; so that no one can deny them without doing violence to himself. For the principles of that law, if only you pay strict heed to them, are in themselves manifest and clear, almost as evident as are those things which we perceive by the external senses" (De Iure Belli ac Pacis, Prolegomena, § 39).

[The analogy with mathematics is at hand. It provides the best illustration that natural law cannot be altered even by God.]

"Measureless as is the power of God, nevertheless it can be said that there are certain things over which that power does not extend... Just as even God cannot cause that two times two should not make four, so He cannot cause that that which is intrinsically evil be not evil" (De Iure Belli ac Pacis, I, i, x).

[It provides the new methodological assumption which Grotius prides himself on having introduced into the study of law.

"With all truthfulness I aver that, just as the mathematicians treat their figures as abstracted from bodies, so in treating law I have withdrawn my mind from every particular fact" (Ibid., Prolegomena, § 58).]
Grotesus claimed for his treatment of legal problems the merit of clarity, self-evidence and coherence. These qualities were fully appreciated by his successors.

Nowhere is the "rationalist" character of the new conception more apparent than here. The analogy between mathematics and justice had precedents which went back to Plato. It was fully developed by Pufendorf and Leibniz, and survived even in Montesquieu. It was destined, however, to decline in the eighteenth century under the impact of empirical and utilitarian thought. But the idea that the theory of law should be based on clarity, self-evidence and coherence, remained the dominating mark of legal philosophy down to the revolutionary era.

Rationalism indeed is here the very synonym of antihistoricism. The evidence of history cannot shake the absolute validity of natural law. Its only interest is to provide an object for further generalisations, or illustrations of the "ignorance" and "darkness" which has long befallen humanity and which reason must dispel. Vico, a lonely voice, pleaded in vain for a different conception. For him, the "ideal, eternal law" could be fully revealed only in the long ordeal and suffering of mankind. But for the rationalist thinker the self-evident law of nature was in want of no confirmation. It could make history if necessary. It actually did so in the end.

Rationalism, however, is not the only distinctive character of the modern conception of natural law. Its impact upon thoughts and events would not have been so great if it had only expressed a particular manner of thinking. It was an assertion of values as well. The new value is that of the individual. Individualism is the second outstanding feature of modern natural law. The word is not less ambiguous than rationalism. There had been a Greek individualism as well as a Roman. There is a Christian individualism which has deeply pervaded our religious interpretation of life. The quest after "origins" would again lead us far back, perhaps to Protagoras' dictum that man is the measure of all things.

But when we read the American or the French Declarations we know that we are confronted with a complete architecture, about the style of which there can be no mistake. It is a poli-