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Towards a New Narrative of Natural Law Thinking in Early Modern Scholasticism

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The presence of moral theology and scholasticism in the recently published *Oxford Handbook of Legal History* and *Oxford Handbook of European Legal History* is very limited. The first volume aims to be iconoclastic. It explicitly does not seek to provide a kind of global historical account but instead presents some of the innovative methodological perspectives guiding current legal historical research. Thomas Duve, writing about the contribution of the School of Salamanca to the theorization of a certain framework of »indigenous rights« during the period of colonial domination, is thus the only contributor to this volume who mentions moral theology. In the *Handbook of European Legal History*, there are two articles on important scholastic contributions to legal history that also deal with the influence of Salamanca and related scholastic authors to equally wide fields of legal thinking. Wim Decock discusses authors of the second scholasticism in the context of the law of property and obligations (611–632), and David Ibbetson writes on natural law (566–582). In the following, I will focus on Ibbetson's chapter, which only partially matches the ambitious intended aims of the volume editors (Pihlajamäki, Dubber, Godfrey): to »chart the landscape of contemporary research« and to show the global impact that European legal systems had »from the fifteenth century onwards«.

David Ibbetson is Professor of Civil Law at the University of Cambridge and has written authoritative books and articles in the field of legal history covering a wide chronological range.[1] In this chapter, he addresses a topic in which the significance of second scholasticism – Catholic and Protestant – absolutely cannot be silenced or diminished: the re-emergence of the concept of natural law in the mid-16th century and the importance that this concept – and the argumentation dependent on it – gained in legal discourses and practices during the early modern period.

After a very brief introduction – a mere eight lines long – summarizing the ancient roots and early modern doctrinal developments he will cover in his *exposé*, Ibbetson presents the antecedents of the modern idea of natural law that were formulated by Aristotle and Cicero (Section I, 1). Natural law did not have »any jurisprudential weight« either in Republican or in Imperial Rome, as the function of the principles that some philosophical schools considered to be part of it was always unclear (Section I, 2). Ibbetson therefore quickly abandons the Greek and Roman context and focuses on the way in which Aquinas (Section I, 3) and particularly certain Spanish Renaissance Thomists (Domingo de Soto and Luis de Molina, Section I, 4) assigned to natural law the function of a normative mirror against which human / positive laws should be compared in order to avoid excessive and unjustified distortions. After this brief review of the above-mentioned antecedents, the writings of Grotius (Section II, 1), Pufendorf, and other central figures (Section II, 2) of the natural law school of thought in central and northern Europe are examined as the main exponents of the idea of natural law's validity not depending on divine authority (with the famous Grotian sentence *Etsi Deus non daretur*). These thinkers sought to identify its elusive first principles in order to deduce from these the main substantial contents of *ius gentium* and positive law. Ibbetson closes his examination of the abovementioned keystones of

1 His publications deal with such diverse topics as the Roman law tradition in the Early Middle Ages and legal education in contemporary England. See e. g. David Ibbetson, A Historical Introduction to the Law of Obligations, Oxford 1999, and idem, European Legal Development: The Case of Tort, Cambridge 2012.

early modern juridical thinking by presenting the problems raised by a natural law method constructed as an imitation of the *mos geometricum* in vogue in metaphysics and natural philosophy at the time: irreconcilable conflicts between first principles of natural law, lack of evidence of certain deductions and superficial objectivity of the great systems constructed by modern jurists, giants with feet of clay.

The historical account of books and writers of Sections I and II is followed in Section III by a thematic discussion of the parallel theorization of the *ius gentium* in the early modern period, which has usually been represented as having been dependent on the definition and hierarchization of the *ius naturale*. Even in this thematic section, however, Ibbetson remains anchored to the same chronological and geographical schema he uses to construct his whole article, travelling from 16th-century Spain to the 17th-century Netherlands and Enlightenment Germany. To the above-mentioned names he adds references to the works of Rachel, Textor, and Wolff.

In Section IV, Ibbetson shows the affinities between the thinking of Grotius or Wolff and the Enlightenment movement. Both gave a central role to reason and were optimistic regarding the possibility of human beings gaining objective knowledge from nature, whether from physical realities or from moral and legal principles. In this rationalistic commitment, Ibbetson sees the intellectual foundation of the evolution from the mere »collections of the law in force« of the 17th century to the 18th century's systematic legal codifications »in accordance with reason«. Ibbetson touches on codes and codification projects coming from different German states, the Habsburg monarchy, Russia, and France. In perhaps the best section of his contribution, Ibbetson analyses why only some of these codes – for example, the Napoleonic *Code Civil* of 1804 – can be considered true natural law codifications. Many others, while containing indirect references to the work of the main natural law jurists, did not abandon Roman Law as a necessary mediation between the abstract principles of natural law and positive written law.

In a fifth section, Ibbetson deals with the role of natural law thinking in England. He deliberately discusses this separately from continental Europe because the English system, in contrast to the continental ones, was never structured around Roman law, and also knew no codification movement similar to the projects undertaken in France, Spain, or the German states. As in previous sections, Ibbetson focuses on a few milestones of juridical thinking to explain the particular evolution of the debates on natural law in the English realm. Starting with Edward Coke's famous *Institutes of the Laws of England* (1628), Ibbetson reviews the scholarly contributions of figures such as Selden, Hobbes, Locke, or Hale, in which he detects a certain Grotian influence. The final paragraphs follow the echo of Pufendorf's *De Iure Naturae et Gentium* in the works of 18th-century English writers of juridical treatises, specifically Ballow, Pothier, Buller, and Blackstone. Ibbetson here mentions natural law thinkers' influence on English legal doctrines related to contracts, negligence, the first laws concerning copyright, and even the increasing trend to present and explain technical customary laws within rational and systematic frameworks.

To begin with the critical evaluation of Ibbetson's contribution, we can say that all the elements he covers are *sine qua non* – their absence would be hard to explain in a survey of natural law thinking within the historiographical genre of a handbook, which imposes significant thematic and space limitations. In the face of these external constraints, the author seems to have opted for a deliberately classical approach that appears to stand in contrast to both *Handbooks'* avowed emphasis on groundbreaking and innovative approaches.

Different elements could perhaps have been mentioned in passing in order to reinforce the link between the chapter's contents and the editors' motivations. For example, more attention could have been paid to the debates on natural law in geographical regions located at the periphery of the already well-studied continental axis, such as in Scandinavia or Southern and Eastern Europe.

The article does not discuss the current state of research, but a brief survey of the existing – and abundant – literature on natural law in the early modern period would have been useful in order to underline the methodological challenges and to identify the main gaps with which contemporary researchers are dealing, or will have to deal with, in the following years.

Another *vacuum* in Ibbetson's account on the development of natural law in early modern juridical thinking is the absence of an explanatory hypothesis allowing the reader to understand why natural law – defined and partially explored,

as Ibbetson mentions, by ancient and medieval philosophers and theologians but not by their contemporaneous jurists – attained an importance in the early modern period that it had never seen before and became a decisive juridical authoritative referent.

The link between the impressive succession of theoretical developments in the field of natural law in early modern thinking and the European Reformation could have served as such a general explanatory hypothesis. As other scholars dealing with this issue have shown,[2] the »need for finding new rationales for obligating men« in a Europe split by the Reformation could explain why the 1530s and the 1540s were so decisive for both the consolidation of the Protestant movement and the reemergence of natural law. These two decades were precisely the period in which first systematizations and hierarchizations of natural law – within the overarching notion of *ius* – were elaborated by the first generation of members of the so-called School of Salamanca and contemporary Protestant theologians and jurists.

Nevertheless, Ibbetson does not take into account one of the two main roots of early modern natural law thinking, the Protestant one. Protestant reflection on natural law began long before Grotius' *De Jure Belli ac Pacis* with key figures such as Melanchthon and Oldendorp.[3] On the Catholic side, Ibbetson takes Soto alone as »the most important« representative of the way in which the *salmantinos* emphasized natural law as the guiding framework against which to evaluate positive law and to correct any excessive deviations from that framework. Why Soto deserves to be mentioned in this historical and theoretical account but not jurists such as Azpilcueta, Covarrubias, Castro, or Vázquez de Menchaca (all of whom worked under the same normative paradigm and should be considered as of equal importance regarding this issue) is not explained. A propensity to make crucial and problematic choices without explaining the intellectual motivations behind them is, in fact, a recurring problem throughout the text. Even within the constraints of the handbook genre, the omissions could at least have been signaled in order to avoid the creation of a monolithic narrative.

In addition to the important intra-European and intra-Christian historical factors mentioned above, events and processes taking place outside Europe, in the lands of »infidels«, strongly influenced European ideas on natural law. A first challenge concerned the need to legitimize the Spanish presence in the Americas by appealing to non-confessional, supra-positive norms that could be taken as solid foundational »titles« by contemporary European powers. I refer to the urgent and permanent need to discredit the pretensions of those who did not accept papal bulls and donations as legitimizing instruments.

The second challenge to early modern natural law thinkers resulting from the discovery of the »New World« was independent of any kind of European rivalries around the proper sources of law and legitimacy. The encounter with the unexpected and radical otherness of the American natives played a crucial role in the pioneering developments of natural legal thinking. It concerned the unparalleled and problematic *convivencia* of Spaniards with a great number of heterogeneous pagan peoples, whose unusual and almost »fantastical« customs the Christian invaders began, little by little, to notice and understand. The respect due to a myriad of popular practices, rites, and customary ways of ruling, obeying, taxation, etc. complicated the already complex multinormative legal system brought to America by the Spaniards even more.

Vitoria, Soto and other prominent members of the School of Salamanca recognized that Christians could not ask American »infidels« to obey divine law or convert them by force. They also took into account that Christianity was lacking a

2 Among the most recent accounts, I consider von Friedeburg's particularly valuable. See Robert von Friedeburg, The Rise of Natural Law in the Early Modern Period, in: Ulrich Lehner et al. (eds.), The Oxford Handbook of Early Modern Theology, 1600–1800, Oxford 2016, 625–641.

3 Antti Raunio, Natural Law in the Lutheran Tradition, in: Norman Doe (ed.), Christianity and Natural Law, Cambridge 2017, 77–97; Mary A. Plaatjes van Huffel, Natural Law in the Reformed Tradition, in: ibid., 121–139.

common answer to the question of what should be considered as the real contents of this elusive divine law. Natural law therefore from the very beginning of the colonization process acted as a decisive authoritative point of reference. This is true even for the – until now rather understudied – period before Vitoria.[4] By the middle of the 16th century, natural law had become such an important authoritative referent that, in order to facilitate the *convivencia* with pagans and neophytes, many theologians and jurists[5] proposed a temporary tolerance of jurisdictional, tributary or matrimonial native customs that – even if far away from the prescriptions of Christian divine law – were not flagrant violations of the first principles of natural law. Even if it might seem paradoxical at first sight, the encounters with the American »other« and the missionary and civilizatory campaigns to which many of the Iberian scholastic thinkers contributed stimulated the secularization of natural law. Not only in Ibbetson's text, but in many handbooks and encyclopedic accounts, too,[6] such a complex and multistage process tends to be represented as the result of Grotius' speculative genius.

Moving on to other issues, a certain attention to neglected legal spheres, such as public law or canon law, could have also been useful to avoid the relative isolation in which the English debates on natural law are presented in Section V. Within this sphere, already by the mid-16th century there were substantial discussions on the natural law of self-defense in almost all of the treatises justifying resistance against illegitimate royal provisions and officers (Hobbes' re-theorization of this alleged right of self-defense in fact presupposes an attack on these kinds of writings). Arguments coming from natural law could act also as connecting bridges between England and the Continent regarding many other juridical issues. In canon law thinking there were strong ties, e. g. between the doctrines on marriage and dispensation elaborated by Cardinal John Fisher and the first generation of Salamanca's masters (Vitoria, Soto, Vera Cruz, …), an issue in which natural law played a crucial role.

A last critical remark concerns the fact that the practical dimension of the topic of natural law remains in an almost total obscurity within this contribution, as it does in many other approaches coming from the field of the history of ideas.[7] I am referring specifically to the increasing presence of arguments coming from different natural law theories in the European courts of the early modern period, a subject recently studied by Richard Helmholz in his challenging *Natural Law in Court. A History of Legal Theory in Practice* (Cambridge 2015). New scholarly perspectives on the field of natural law seem to come from a new wave of mixed theoretical-empirical studies on natural law as a »living law« in the early modern period. Unfortunately, these are missing from Ibbetson's contribution to the *Oxford Handbook of European Legal History*.

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4 For the case of the debates taking place at the Junta de Burgos of 1512 and the importance given to natural law, see José Luis Egío García, Matías de Paz and the Introduction of Thomism in the *Asuntos de Indias*: A Conceptual Revolution, in: Rechtsgeschichte – Legal History 26 (2018) 236–263, online: http://dx.doi.org/10.12946/rg26/236-262; Christiane Birr, *Dominium* in the Indies. Juan López de Palacios Rubios' *Libellus de insulis oceanis quas vulgus indias appelat* (1512–1516), in: Rechtsgeschichte – Legal History 26 (2018) 264–283, online: http://dx.doi.org/10.12946/rg26/264-283.

5 A paradigmatic case would be that of Alonso de la Vera Cruz, who was active in the Viceroyalty of New Spain. See Virginia Aspe Armella, Integración cultural y ley natural en el Speculum Coniugiorum de Alonso de la Veracruz, in: Revista Estudios 32 (2016) 377–402; Anastasía Assimakópulos, Sebastián Contreras, Matrimonio y derecho natural en Alonso de Veracruz (1507–1584), in: Revista de Estudios Histórico-Jurídicos 39 (2017) 173–193.

6 Hans Schlosser, Neuere Europäische Rechtsgeschichte, 3rd ed., Munich 2017.

7 Annabel Brett, Nature and the Limits of the City in Early Modern Natural Law, Princeton 2011; Annabel Brett, Liberty, Right and Nature: Individual Rights in Later Scholastic Thought, Cambridge 1997; Merio Scattola, Before and After Natural Law. Models of Natural Law in Ancient and Modern Times, in: Tim J. Hochstrasser, Peter Schröder (eds.), Early Modern Natural Law Theories. Contexts and Strategies in the Early Enlightenment, Dordrecht 2003, 1–30; Richard Tuck, Natural Rights Theories: Their Origin and Development, Cambridge 1979; Alessandro Passerin d'Entrèves, Natural law: an introduction to legal philosophy, London 1970.