

MEDIEVAL CONCEPTIONS OF NATURAL LAW

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DURING the slow decline of the Roman world conceptions of justice and respect for legal procedures did not perish. Even when the power diminished to give the conceptions adequate support in practice, the respect in which they were held appears to have continued. Though confusion and violence mounted as the result of forces which men of the period did not know how to combat, memories of a better-ordered world persisted. Procedures that had once been effective were clung to even when their present usefulness was impaired, and they were thus preserved as a heritage of value to later centuries. The principles of justice, moreover, which formed the basis of Roman law, still commanded veneration; and they were slowly modified and invigorated by the far nobler doctrines of the Christian Church. Anyone who reads the letters which St. Gregory the Great wrote at the troubled close of a disastrous century cannot fail to see that in his mind and heart reverence for the divine law was completely in unison with a sense of equity handed down from an earlier time. Along with his zeal as defender of the faith and his sternness in reproving error went an eager care that justice be done to men of all degrees: to ecclesiastics if falsely accused, to peasants if they were in danger of oppression, to Jews if there had been interference with their worship. His rectitude, a

strict adherence to law both human and divine, was as marked as his Christian humility and kindness. If it be said that St. Gregory was not typical of his age — and in what age would there be many like him? — he nevertheless showed that conceptions of orderly justice were not alien to his century.

Earlier in the sixth century, indeed, the unwieldy corpus of Roman law had been explored and to some degree codified at Constantinople. It is well to remember that Justinian, through whose initiative this was accomplished, was a barbarian, not a member of one of the races which had been drawn into the immediate orbit of Rome and felt her civilizing influence. If the compilers of the *Institutes*, the legal manual which rounded out the *Corpus Iuris*, erred in setting down as their basic axiom the sentence quoted from a third century commentator: "Ius naturale est quod natura omnia animalia docuit," the confusion in terms did little harm to the thinking of the medieval period that was to follow. The dictum at least asserted the supremacy of law in the world, and not till relatively modern times did men often forget that natural law as applied to rational beings does not mean an absence of law and a descent to a so-called "state of nature."

By the early part of the seventh century, when Isidore of Seville explicitly stated that the divine law rested "upon nature," the human "upon custom," churchmen and jurists had agreed upon the identification of the law of nature with the law of God, which was to be the foundation for the theories, political and legalistic, of the Middle Ages. The doctrine had not yet been perfectly

explored, or the notions derived from Greek and Roman philosophy and practice fully adapted to Christian belief, but a basis for later study had been established.

During the centuries that followed, the eighth, ninth, and tenth, there appears to have been little speculation as to problems of government or jurisprudence. In the struggle for power and place among rival dynasties there would have been little incentive for calm study of the social and political organism. The Church was extending and strengthening its domain; for a moment the Empire of the West seemed to be recovering something of its former glory, only to sink again into feeble discord; and regional groups of mixed blood were by slow degrees settling into place as inchoate nations. Intellectual activity did not lessen, as we know from the record of achievement in various fields. There were devoted scholars like Bede of Jarrow, who in a secluded monastery close to the edge of the known world displayed a breadth of interest and a capacity for taking pains that would have been notable at any era. In one way and another Christian civilization was extended, even though the Iberian peninsula, not without later profit to the rest of Europe, fell into the hands of the Moslems. We cannot suppose that men failed to think about the laws they were endeavoring to enforce, but we need not be surprised that they did not attempt to define in new ways the foundations of juristic practice. The law-givers were engrossed in war and in improvised expedients of government, while men of learning tried as best they could to perpetuate the civilizing ideas of the past. It was a period of absorption and instruction, marked, however, by one phenomenon

which gave evidence of an intellectual vigor newly developed and prophetic of activities in various fields during later centuries. In certain languages of the north hitherto never put to literary use there appeared poetry and prose of a high order. Europe was making ready for the triumphs of imagination and reason that distinguish the Middle Ages.

Before the middle of the twelfth century, as the discussions of many basic problems of theology and philosophy grew more and more active, the validity of governmental control could not fail to come into question. How was the good order to be secured which was so necessary for society, and on what grounds could it be demanded? The disruption out of which the European world was emerging, the violent passions which still convulsed it and which led to ventures frequently noble in purpose but sordid in execution, gave the matter an immediate interest which it would not have had under other conditions. Men of good will craved security as they must always do when there is no peace in the world. They wished to find out how to get order, since they lived in a time still troubled by inherited confusions. Inquiry as to the foundations of law was not then what we call an "academic question": such inquiry was a matter of vital concern. Whatever may be true of it in other eras, the art of jurisprudence was of tremendous and troubling importance in the Middle Ages. Quite possibly laymen in later periods, lost in a fog of carefully exact phrases, have sometimes underestimated its value.

Such speculations were focussed by the compilation shortly before 1150 of the work usually known as the

Decretum of Gratian, though that somewhat shadowy figure may well have had the help of other scholars in a vast undertaking comparable with the one instigated by Justinian six centuries earlier. The canons of the Church were in a state of confusion, and probably only at Bologna could the work of setting them in order have so well been undertaken. In establishing, as it did, the principles of Canon Law, the *Decretum* based all justice on natural law, which was older than *ius gentium* or *ius civile*, terms in a tripartite division taken over from Isidore of Seville. The law of nature, indeed, goes back to the beginning of human creatures (*ab exordio rationalis creaturae*), and it is immutable, since moral precepts do not change. Any customs or legislative enactments which run counter to it *vana et irrita sunt habenda*. By asserting at the outset that natural law is *quod in lege et evangelio continetur*, "by which everyone is commanded to do to another what he wishes to be done to himself, and is forbidden to do to another what he is unwilling to have done to himself," the *Decretum* identified it with the divine law. This assimilation though fundamental was not so logically deduced, however, that it required no further exposition. What is the true bond between the law of God embodied in the Golden Rule and natural law?

This question was perhaps best answered by Rufinus, a canonist of Bologna and Bishop of Assisi, who wrote a *Summa Decretorum* some ten years after the completion of the *Decretum*.¹ He postulated a "certain power implanted by nature in the human creature, impelling him to do good and to avoid the contrary." This divinely

¹ Ed., with elaborate introduction by H. Singer, 1902.

ordered power is the law of nature.² Though a succession of learned continental jurists continued to refine the doctrine of the *Decretum* throughout the remainder of the twelfth century and well into the thirteenth, it is not apparent that they did very much more to clarify the fundamental problems of jurisprudence.

Meanwhile, in 1150, John of Salisbury produced his influential *Polycraticus*, which without dealing specifically with natural law in detail expressed ideas as to the source and the basis of justice which were of great consequence. "Law is the gift of God, the mould of equity, the pattern of justice, the image of the divine will," he wrote.³ Since nature is the will of God, according to Plato, nothing takes place contrary to nature;⁴ and the true prince is he who acts in accordance with law, while the tyrant is he who fails to observe the law and plunges a people into servitude. This distinction was to become a commonplace in the following century and thereafter. Equity, John declared, is a harmony of things, *rerum convenientia est*, "which equalizes everything by reason, assigning to everyone what is his own." Law is the interpreter of equity.⁵ Throughout all its stages the Golden Rule remains immutable.⁶ No more than Gratian, it will be observed, and less clearly than Rufinus, did John undertake to explain how the law of nature operates to control human behavior except by divine ordinance. That

² *Est itaque naturale ius vis quedam humane creature a natura insita ad faciendum bonum cavendumque contrarium.* Pars I, Dist. 1.

³ *Polycraticus*, ed. C. C. I. Webb, 1909, viii, Ch. 17.

⁴ *Op. cit.* 1, Ch. 12.

⁵ *Op. cit.* iv, Ch. 2.

⁶ *Op. cit.* iv, Ch. 7.

problem was left for solution to the theologians of the next century.

Until the earlier part of the thirteenth century, indeed, the discussion of natural law had been carried on for the most part by jurists. Theologians had been concerned to explain such deviations from approved social behavior as the polygamy of certain Old Testament figures, but they did not enter conspicuously into inquiries about most legal questions. The scholarly ardor of the new orders of teachers and preachers, however, which resulted in fruitful speculations along so many lines, brought many problems of jurisprudence into fresh review, and among them what we may call the nature of nature. Dominicans took the lead in the search for a clear definition of natural law and its function in the universal scheme, though other ecclesiastical philosophers were equally concerned with the question.

William of Auxerre, who embodied his teachings in a *Summa Aurea* somewhat before 1225, illustrates very well the direction in which the thought of the time was moving, which was toward the solutions arrived at by St. Thomas later in the century. William recognized, as had the later canonists, that the term natural law was used in at least three different senses: 1. a *concordia omnium rerum*; 2. the conception of the Roman jurists, involving all instinctive functions and therefore all animate creatures; and 3. *quod dictat naturalis ratio*, which affects human beings only. It is in the last-named sense that natural law serves as the *origo et principium omnium virtutum et motuum ipsarum*, operating as it does both through the teachings of experience and through percep-

tions divinely implanted in the human mind. The emphasis given reason and the frank acknowledgment that man, being what he is, must live as best he can under imperfect conditions preserve the doctrine from cloudy idealism. Only by the path of reason can he find the guidance which will free him from error.⁷

Some two decades after William of Auxerre wrote, Albertus Magnus completed his *Summa de Creaturis*, the third part of which contains his views on the law of nature.⁸ His treatment of the matter reveals, as one might expect, the independent and trenchant quality of his mind. He would have nothing to do with the Roman opinion that the term natural law should be used as governing animals as well as men, and he discarded the refinements of the commentators on Gratian. To him *est ius naturale nihil aliud quam ius rationis*. The law of nature, thus defined and limited, was present in every field of human action, even the most instinctive, *natura ut natura*, for reason is not totally divorced from them. Procreation, the education of the young, the preservation of life are in the domain of natural law, thus considered. In another way acts of moral virtue, the concern of justice or religion, for example, are both rational and yet anchored in nature, which has the seeds of good in it. There is, again, a third category of acts, which are based on fundamental axioms of natural law and are deduced from it

⁷ My citations are taken from O. Lottin, *Le droit naturel chez Saint Thomas*, 2nd ed., 1931, pp. 33-35.

⁸ Not included in editions, but conclusively shown to be genuine by M. Grabmann, *Drei ungedruckte Teile der Summa de Creaturis Alberts des Grossen*, Heft 13 of *Quellen und Forschungen zur Geschichte der Dominikanerordens in Deutschland*, 1919. I follow the synopsis with copious citations from MS. Bibl. royale de Bruxelles 603 in Lottin, *op. cit.*, pp. 42-44.

by human reason. By such means authority in government has been established to secure the good of society, and private property has been found necessary. The law of nature, Albertus asserted, is not the finality—*conclusio*—of law so much as the first principle of it. Institutions may vary with circumstances, but the obligations laid upon man by the Decalogue are there because in the beginning he was endowed with reason.

It is no disparagement of the other great thinkers who made the thirteenth century illustrious to say that of them all Thomas Aquinas had the acutest mind and the most compelling power of exposition. Certainly his analysis better than any other brought into sharp focus the conception of natural law which prevailed, however expressed, during the later medieval centuries. At least three times he dealt with the subject, most fully in his last great work, the *Summa Theologiae*. Though in some details of emphasis his ideas changed during the two decades in which he reverted to the problem, particularly through his greater regard for Roman law as time went on,⁹ his general position was clear from the beginning. Throughout he kept constantly in view and reiterated the three axioms upon which he rested his arguments for the existence of natural law. 1. There is a divine order in the universe, an eternal law. 2. Man is a social and political animal, and cannot live by and to himself. 3. Man has been endowed with reason.

With these axioms as premises, St. Thomas approached the problem as to whether there is prevailing in us any natural law,¹⁰ and asked how it could be operative in

⁹ See O. Lottin, *op. cit.*, pp. 61-63.

¹⁰ *Summa* Pars I-II, Ques. xci, Art. 2.

man, since man is governed by divine law. Is there not a contradiction in saying that both have validity? St. Thomas denied the contradiction, and went to the heart of the matter by explaining that man, inasmuch as he is a rational creature, participates in eternal reason. "And such participation by the rational creature in eternal law," he went on, "is called natural law." And further: "The light of natural reason, by which we discern what is good and what is evil, which pertains to natural law, is nothing else than the impress of the divine light in us." This from the *Summa*. In *De Regimine Principum* St. Thomas had already used an analogy which helps one to a clear understanding of his thought. "For, just as the universe of corporeal creatures and all spiritual powers come under divine government, in like manner are the members of the body and the other powers of the soul controlled by reason, and thus, in a certain proportionate manner, reason is to man what God is to the world."¹¹ The scope of divine law, obviously, is immensely wider than that of natural law, since it governs all created things, and is the basis of human law, even though the latter sometimes follows it imperfectly.¹²

St. Thomas was not blind, of course, to those attributes shared by man with other animals which had so often led jurists to make the law of nature cover the whole range of animate life. He did not for a moment deny that tendencies in man which are irrational and instinctive are indeed "natural," for man has a double nature, being at once a creature of instinct and a creature en-

¹¹ I, Ch. 12. Quoted from the translation by the Rev. Gerald B. Phelan, *On the Governance of Rulers*, 1935.

¹² *Summa* I-II, Ques. xciii, Art. 1 and 3.

dowed with reason. Natural law, in the view of St. Thomas, holds sway over all actions of man whatsoever, but only through the operation of reason.¹³ Here as elsewhere, it must be said, the Angelic Doctor did not evade observed realities. His common sense was as admirable as his subtle logic.

Similarly, there is a difference in the way the law of nature exercises control. Though the rational spirit is inclined to virtue, not all virtuous acts are equally spontaneous.¹⁴ Precepts against murder or theft are so clear to human reason that they need no teaching; others must be learned from one's elders, like respect for the aged; and still others, like "Do not take the name of thy God in vain," are established by divine injunction.¹⁵ All such rules of conduct, however, spring from one root.¹⁶ Whatever can be controlled by reason lies within the domain of natural law. The views of St. Thomas concerning its operation in the experience of the individual have been well summed up by a recent writer as follows: ". . . the best description of its purpose and meaning is perhaps that which has been made many times, of a bridge thrown, as it were, across the gulf which divides man from his divine Creator. In natural law is expressed the dignity and power of man, and thus of his reason, which allows him, alone of created beings, to participate intellectually and actively in the rational order of the universe."¹⁷

¹³ *Summa* I-II Ques. xciv, Art. 2.

¹⁴ *Summa* I-II Ques. xciv, Art. 3.

¹⁵ *Summa* I-II, Ques. c, Art. 1.

¹⁶ *Summa* I-II Ques. xciv, Art. 2.

¹⁷ A. P. d'Entreves, *The Medieval Contribution to Political Thought*, 1939, p. 21.

As with individuals, so with the human multitude. The difference between the way the two are affected is one of quantity but not of quality.¹⁸ St. Thomas contends that Isidore's statement, *Ius naturale est commune omni nationi*, is true if it be meant that the first principle of it are everywhere the same, again because "all the inclinations of men" are guided by reason. Although these principles are immutable, natural law must be supplemented to meet conditions as they exist or come into being. Because of the corruption of human nature, intrinsically sound though it be, men may fail to distinguish between good and evil, and thus they do need control. Further than that, the possession of all things in common and individual liberty of action have been modified for the sake of the general good, not because men are evil but because they must live with one another. There must be positive law, controls somehow established.¹⁹ What St. Thomas called *subjectio civilis*, the relationship of obedience to authority, a political relationship, is a necessity in no way derogatory to man. As long as positive law does not contravene the principles of natural law, upon which it is based, it may rightly take different forms, since those principles cannot be applied in the same way to "the great variety of human affairs."²⁰

It is impossible in brief space to give an adequate notion of the elaborate pattern of thought by which St. Thomas explained the meaning of natural law and its operation in the scheme of things. The complexities are

¹⁸ *De Reg. Prin.* I, Ch. xiv.

¹⁹ *Summa* I-II, Ques. xciv, Art. 4-5; I, Ques. xcii, Art. 1; I, Ques. xcvi, Art. 4.

²⁰ *Summa* I-II, Ques. xcv, Art. 2.

present because he probed deeply and weighed with deliberate care so many questions converging on the central theme. Man as an individual being, man as a member of society, man as a child of God, all had to be taken into account. In following through what he wrote about natural law on various occasions one is equally impressed by his honest candor, his acumen, and his expository power. He took into account the views that had been held by juristic thinkers from Aristotle onward, and he was not impatient of their wisdom, but he came to conclusions for himself which rested on solid foundations and were inescapable by logical deduction from his premises. There was no confusion in his thought, but throughout a clear-sighted understanding of the nature of man. As has been said, he brought into focus medieval conceptions of the law of nature, and, more than that, he so firmly established those conceptions that nothing essential was added to them or subtracted from them by later political philosophers of his era.

The comments of a great English jurist, Sir Frederick Pollock, on the general outcome of medieval thinking about natural law, which was brought to a brilliant climax by St. Thomas, are worth pondering. "The so-called 'state of nature' is, from the point of view of the schoolmen, merely human society conceived as governed by the 'secondary law of nature' in default of positive ordinance, or any human society so far as it is actually found in that condition. What the canonists and schoolmen added to the classical Roman theory was the identification of the law of nature with the law of God as revealed in human reason. . . . The natural revelation

through reason and the supernatural revelation committed to the Church are equally divine, and cannot contradict one another; and the law of nature is no less paramount to any positive rule or custom of human origin than express revelation itself. . . . Hence the scholastic theory . . . was on the whole rationalist and progressive. . . . Nothing can more strongly illustrate the confusion which resulted from neglecting this distinction" (between fundamental principles and rules deduced from them which may be modified as convenient) "than the modern belief that natural law as a whole depends on the 'state of nature,' or assumes it to be better than civilization. The scholastic habit of mind was alien from ours in many ways; but at any rate the schoolmen took some pains to know what they were talking about."²¹

To say that Thomistic conceptions of natural law so prevailed during the later medieval centuries that little essential modification of them by later writers can be discerned does not imply any lack of interest in the subject by political thinkers. What impresses one is that men so diverse in their interests and tendencies as Egidius Romanus, William Occam, and John Wyclif, had little to say about the law of nature which had not already been said and accordingly agree with one another to a notable extent. One can only conclude that the influence of Aristotle and St. Thomas was so pervasive, and that the arguments of the latter were so solidly based that new arguments led to similar conclusions. Not until the sixteenth century, when a different approach was made to the problem, did any fundamental change appear.

²¹ H. S. Maine, *Ancient Law*, ed. F. Pollock, issue of 1924, pp. 114-115.

I do not find that the makers of what we call imaginative literature, the poets and story-tellers of the period, were much concerned with the law of nature in its juristic and philosophical sense, at least to the extent of frequent allusion to it. Those among them who were seriously concerned with problems of human fate could not well have been unaware of views about the ordering of the world which were so unanimously held; but the law of nature had been thoroughly integrated with divine law, most satisfactorily by St. Thomas, and no doubt could be taken for granted. The absolutism of Dante, which pervades the *Divine Comedy* and is explicit in *De Monarchia* and the *Convivio*, rests upon assumptions in which he was at one with St. Thomas, even though he held divergent views as to the relative authority of church and state. During the latter part of the same century, Geoffrey Chaucer, who was a widely read man and had some practical acquaintance with legal matters, used the term *natural law*, or *law of kind*, as well as the adjective *natural*, in contexts which clearly indicate an understanding of the juristic theory, but did not dwell upon it. The same assumptions are clearly evident also in *Piers Plowman*, that great allegory of spiritual education by Chaucer's contemporary Langland. His professed disciple Thomas Occleve, it may not be amiss to note, made a verse translation of a famous treatise on government by Egidius Romanus, of which there was also a version in French prose.

It was through the lively discussion of governmental theory, indeed, that interest in natural law made itself most apparent as the Middle Ages drew to a close. The treatises of Sir John Fortescue, the English Lord Chief

Justice whose long and active career ended between 1477 and 1479, furnish perhaps the best illustration that could be found. Fortescue's two Latin works, *De Natura Legis Naturae*²² and *De Laudibus Legum Anglie*²³ leaned heavily on St. Thomas and Egidius in their review of the history and theory of natural law, but in the application of it to political organization they showed such independence of thought that they must always be regarded as important monuments of jurisprudence. In them, as well as in *The Governance of England*,²⁴ which is of major interest as the first work on constitutional theory to be written in English, the primacy of natural law is firmly upheld. Though the English book is little more than a translation and recasting of the relevant portions of *De Laudibus*, it serves to show the vigor of the conviction held by all thoughtful men of the period that law is more than an artificial convention. It was to them, as it must always be in a healthy society, the implement and indeed the synonym of justice.

Though it is true that medieval jurists and philosophers were led by their desire for a well-ordered world to a faith now repugnant to us in the undivided authority of individuals, they were saved by their belief in a law of nature, divinely instituted, from thinking the state more important than man. No king, no legislature could contravene natural law with impunity, and tyranny of any sort was abhorrent. What St. Thomas taught was what his predecessors and followers from Gratian to Fortescue asserted: the dignity of man under the sovereignty of God.

²² Ed. Lord Clermont, 1864.

²³ Ed. S. B. Chrimes, 1942.

²⁴ Ed. C. Plummer, 1885.