

## THE NATURAL LAW IN THE RENAISSANCE PERIOD\*

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### I

**T**HE Renaissance period is usually associated with the Arts and with Literature; it is considered as a new birth of the Greek and Roman classics but also as the discovery of a new sense of life, as a period in which the autonomous individual, as the person in a pronounced meaning, escapes from the pre-eminence of the clergy and a morality determined by the Church. Nourished by the rediscovered philosophy of life of the classics, an emancipation takes place of the man of the world, of the man of secular learning, and of the artist and the poet, who set themselves up as of their own right beside, not against, the secular clergy and the learned monk. In politics this means the dissolution of the medieval union of Church and Empire in favor of the now fully developed nation-states and city-republics which stress their autonomy against the Church as against the Empire. While the Renaissance, thus conceived, was of tremendous significance, it is nevertheless true that as such it contributed little for the development of the theory of Natural Law. The reason for this is that the Humanists were admirers of the stoic philosophy and of the great orator, Cicero, the elegant popularizer of the stoic philosophy and of the philosophical ideas of the Roman Law, which,

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at that time, freed from the Canon Law, conquered the world again. But for this reason the philosophers of the Renaissance, in the customary meaning, have little to contribute to our theme, since they are satisfied with what they read and reread in their beloved ancients. One could, of course, object that Machiavelli should here be mentioned as the great sceptic of the idea of the Natural Law, as the man who first separated Politics and Ethics, who first was concerned with a political science free from value-judgments, interested only in the means, in the techniques of gaining and holding an in itself morally indifferent Power in which he saw the only meaning of Politics. Yet the spirit of the time did not permit him — just as a century later, it did not permit Hobbes — to state openly his utter contempt of the Natural Law.

When we speak of the Natural Law in the Renaissance period, we must look elsewhere. We must turn our attention to another field, much neglected — the great revival of the philosophy of the Natural Law in the second flowering of Scholasticism. This also was a Renaissance, namely of the aristotelean-thomistic philosophy. As the other Renaissance had to overcome the empty subtleties of the Nominalists in their meaningless hairsplitting and their consequently crude Latin, so the second flowering of scholasticism had to overcome the same decay of the scholastic method and the philosophy of the *via moderna*. Just as the one went back to the stoics as its great masters, so this other Renaissance went back to St. Thomas. Yet it had to conduct its great controversies, at the same time, against the Reformers, whose exclusive Supernaturalism led to a distrust in philosophy, in natural reason, and to a

hollowing out, as a consequence, of the very substance of the Natural Law. We are, therefore, justified if we restrict ourselves in the following discussion to that other Renaissance which alone has contributed positively to the theory of Natural Law, by saving the idea of Natural Law from the stranglehold of Nominalism and by protecting it against the suffocating Supernaturalism of the Reformers.

The great line of Natural Law philosophers begins with Vittoria, who introduced the *Summa Theologica* instead of the Sentences of Peter of Lombard as the basis of teaching — a practice which became general when St. Ignatius ordained that the professors of his order make the *Summa* the basis of their studies and courses, and reaches to St. Robert Bellarmine. Though originating in the Iberian Peninsula, and in its world famous universities, such as Salamanca the Great, and Coimbra the Glorious, attended by students from all nations, this Second flowering of Scholasticism spread through the whole of Christian civilization, as is proven when one considers the publication places of the works of Suarez, Soto, Lessius, Bellarmine, and Molina and their use as texts in the leading universities of France, Italy, and Germany. For instance, the *De Legibus* of Suarez, the Masterwork in legal and political theory and in Natural Law, was published in Coimbra, Cologne, Lyon, Antwerpen and Mayence.

While a Renaissance is at the same time a revival of a great earlier period and an overcoming of a desolate period before it, it must be more than a mere repetition to be pregnant of the future: it must be a new rethinking

and broadening, a "*vetera novis augere et perficere.*" Nominalism and its consequence at least in part, the Reformation, constituted the dissolving desolate period in the theory of the Natural Law: the development of what was implicit in St. Thomas, and an enrichment of the theory of its application to the problems of its time was its own everlasting contribution.

## II

The idea of Natural Law finds its full meaning only if certain fundamental verities are accepted, otherwise a corrosive criticism all too easily produces that kind of cynical relativism which we know in the philosophy of law as positivism. True, the Natural Law is so "engraved in the hearts of men" that it cannot be wholly wiped out at any time in all the people. Yet that corrosive criticism, first decomposing the idea of Natural Law in the minds of the legal profession and the Intellectuals, oozes down slowly into the mind of the so-called common man and then produces the loss of common moral principles and indubitable convictions of what is justice, which finally leads to the assertion that the Bill of Rights is a propagandist trick of the Bourgeoise mind to fool the Proletariat. If anywhere, then here, the good and ever-valid rule "*Principiis obsta*" should be followed. It is on account of this that the verities which are philosophically fundamental for the idea of Natural Law deserve our attention.

The following are such fundamental verities. The human mind recognizes the essence or the nature of things out of which the order of the Universe presented in the

Eternal Law arises, so that man recognizes in the natures of created things also the order of creation as a whole. Furthermore, the essence of a thing is also its end; the *causa formalis* becomes in the process of production or self-realization of a thing the *causa finalis*, the rule for acts which realizes the idea, the nature of a thing. A created thing is the more perfect the fuller it "realizes" its idea; it has the more goodness, the more it is a realization of the idea or nature. Finally, the intellect is superior to the will in God as well as in Men. The intellect recognizes the nature of created things and the order of the universe, and *per analogiam* and imperfectly, the Creator and His Eternal Law, by which the order was created and is preserved. The natures and their order recognized by the intellect as "oughtness," as to be realized by free acts of man, become then the rule of action for the will. St. Thomas points out frequently this interdependence of the ideas of Truth, objective order, and of Justice. For instance, he points out that the Justice of God which constitutes the order among the things in conformity to God's Wisdom, which is the Law of the Order, may appropriately be called Truth. (S. Th. I, qu. 21, a. 2) The natures of the created things and the order in the Creation are thus in the last analysis related to God's Intellect and Wisdom. Consequently, this order, the *Lex Aeterna* and the Natural Law which, by participation, is the same *Lex Aeterna* applied to the free act of rational beings, is necessarily immutable. This means that perjury or the killing of an innocent is always and under all circumstances wrong, that they are in themselves by nature wrong, not exclusively by the positive Will of God or of a

human legislator. Even God cannot make by His omnipotent Will, by positive order, that right what is by contradiction to God's Essence and Wisdom intrinsically wrong, because this is metaphysically against God's very Essence. The Natural Law is, ergo, truly natural, i.e. a dictamen of Reason recognizing the intrinsic goodness or evil of certain free acts, because they agree with or contradict nature and the natural order, and it is immutable as participation of the *Lex Aeterna*, which issues from God's Intellect and Wisdom and rules the Creation.

Occam, the *venerabilis inceptor*, held that God is primarily absolute and omnipotent Will and that the natures and essences of things are not recognizable by man's intellect, and consequently that the natural order of being, which belongs to practical reason, advising us what ought to be done or omitted is not knowable to us. In God, so Occam says, there cannot be any necessity; the decree of God, the *Lex Aeterna* and the *Lex Naturalis*, do not issue necessarily from the Essence of Him who promulgated them. For that would make the absolute freedom and the absolutely arbitrary omnipotent Will of God dependent on a superior necessity. All precepts of the Eternal and of the Natural Law are only absolutely arbitrary decrees of God's omnipotent Will. That which Occam continues to call natural law is neither Natural Law because it is *arbitrarily* posited by God, nor is it immutable because God in His arbitrary infinite freedom could without any contradiction to His Wisdom and Goodness ordain something wholly contradictory to the now posited natural law, else God would not be wholly free and omnipotent. God could, therefore, without inner contradiction

ordain that the created will hate Him and that this hatred should be meritorious. (In. Sent. IV, qu. 14 D) Occam denies an intrinsic goodness or evilness of a human act, such as the love of God or the hatred of God.

Occam, thus, in his metaphysics, has torn asunder God and His Creation, insofar as he teaches that, besides God being the external creative cause, there exists no intrinsic relation between God and the World, between God's Essence and the moral order, the foundation of which is the general *analogia entis* and the God-likeness of man. There is neither in man nor in the Creation a natural, a necessary and fundamental order to God as the origin and as the ultimate end of all being, which in its immutability would become for the free rational being the ever-valid moral norm of its acts. The absolute unity of Reason and Will in God is denied and a "theological irrationalism" arises. The Natural Law is hollowed out in its substance though the term is still used, and in its place steps a moral positivism, the doctrine that we know what is right and wrong only *sola fide*.

We have long since given up the idea that the Reformation "errupted" so to speak, out of the Christian conscience so crudely deceived by the superstitions of Romanism, so ruthlessly violated by the arrogance of a power-hungry, morally corrupt Curia. Many of the theological doctrines which were espoused by the Reformers are only the ultimate and ruthlessly drawn conclusions from the speculations and discussions of the adherents of the *via moderna* in its two branches: first, Fideism, which means a crippling of natural Theology and an utter weakening of the *Praeambula fidei*, because human rea-

son is not to be trusted, from which issues the outspoken tendency towards positivism; second, a particular form of mystical Theology centered around the individual person, his religious experiences, his subjective longings culminating in the question: How do I find a merciful God in the abyss of my essential sinfulness? The Reformers rejected as superstitious, as pagan, the doctrine of the sacraments and the sacramentals, the hierarchical structure of the Church, the Papal authority and that of Tradition, and the Canon Law. Luther's public burning of the *Corpus Juris Canonici* set him irrevocably on the road to "Protestantism." The Catholic morality was, in their eyes, a despicable Pelagianism, with rules for a meritorious bargaining with God by doing external good works, such as giving alms, fasting, indulgences, etc. To them the very essence of man under the curse of original sin became the utter depravation of man's nature. Our nature is wholly depraved, our will unable to realize the good, our reason blind to truth. Nature is not vulnerated or weakened by original sin, it is destroyed. Nothing good remains in us. Of our God-given natural gifts (*donum naturale*) remain only "deformed ruins." Thus from the part of Theology the very foundations of the Natural Law are denied, particularly the inner relation between the Eternal Law and the Natural Law by reason of the participation and conformity of the Natural Law with the divine revealed law as the Catholic tradition taught. As a consequence arises that significant dualism between the Kingdom of God and the World, of the Spiritual and the Secular, which Ernst Troeltsch has pointed out. Yet it would be foolish to deny that the Reformers explicitly



reject the Natural Law; they do that as little as the Occamists did. They follow rather the tradition, cite the Natural Law, use the term, and only slowly, if at all, do they become aware that between the Natural Law and their Theology there exists an irreconcilable contradiction. This is today a kind of *opinio communis* of scholars in this field. The Reformers push this idea of the Natural Law more and more into the background, just because of this contradiction between the Natural Law and their Theology in the doctrines on the state and law, and use the Bible and what they conceive the positive Divine Law in the Bible as the basis of their political, juridical and moral doctrine. (This is indirectly confirmed by the observation that the Theology of Crisis and its founder, Karl Barth, who wants to revive, as against the liberal Protestant Theology, the original doctrine of the Reformers, vehemently attacks the idea of Natural Law as one basis of Christian ethics, and instead recognizes only the other basis, the revealed, that is, the positive, Divine Law.) But if later the Faith in the Divine Law fades away by reason of Bible criticism and the rise of deistic Rationalism, then the Divine Law as revealed Law disappears and in Morality and Law remains only relativist positivism. This positivism produces then what Leo XIII called the *Modern Law* emancipated from the Divine Law, and deviating from the Christian and the Natural Law. (*Immortale Dei*) Yet the links which, according to the theory of participation of all laws, bind human law to the Natural, and this to the Eternal Law, may never be broken without penalty. Furthermore, only if in the personal God the absolute unity of

His reason and of His will is upheld, and only if the intellect is considered superior to the Will, can the conformity of the Eternal Law and the Natural Law, of the revealed Divine Law and of the Natural Law be accepted.

### III

It was the providential task of the great masters of the second flowering of Scholasticism to reassert these fundamental verities against the Reformers and Occamism. They were able to do so, because they went back, as we said already, to St. Thomas, whom they revered as the *Doctor Angelicus*, and from whose doctrines they deviated only after the most scrupulous research. They show this so salutary combination of loyalty to St. Thomas and yet they possess a personal independence which characterizes all the great philosophical schools in the history of the human mind. Consequently this revival of Scholasticism is not a mere philological one, so to speak; it is not a mere repetition of the tradition, but a re-thinking and a renewal. Not only had the tradition to be sifted and freed of obsolete matter, but new experiences and the new spirit of the era had to be assimilated insofar as it was possible, without the surrender of such doctrines as once and for all belong to the *Philosophia Perennis*. In other words the task of these masters was, as the great historian of Theology, Petavius, succinctly put it, to evolve what had been implicit and to develop fully what the masters of the Middle Ages had left more in the stage of fundamental theses. Furthermore, they enriched the doctrine of Natural Law in two directions: first, by refuting such subtle attacks on its philosophical foundations as were

espoused by the Occamists, and had never been made before; and by this refutation Suarez, Soto, Molina and Bellarmine had to enlarge the field of inquiry and of explication of all the parts of the doctrine which had been scarcely touched before; secondly, they stood in their time before new problems that cried for solutions, problems which, again, could not even have been anticipated in the Middle Ages, such problems as the *Jus inter Gentes*, the relations between pagan and Christian States, the Divine Right theory of kings etc., and in answering such questions, they prepared the way for a further development of Natural Law as the basis for the natural rights as they have found their positive constitutional form in our modern Bill of Rights.

Though they kept the proved and honored scholastic method, they nevertheless show some distinctive methodological features which we do not yet find in the Middle Ages. They are, so to speak, nearer to the concrete problems of their era; they are great controversialists as the works of Bellarmine and Suarez against the Divine Right-theory and Vittoria's treatises for the Indians so distinctly show. In all these controversies they have to base their arguments, to a great degree, on the Natural Law, as we will see. They are, moreover, more history-conscious than the Middle Ages were. This is caused by their stronger regard for the Individual, the person as a secondary cause, that in the World, in History, the field of contingent Being produces, by its free decisions, by its free initiative under the Divine and Natural Law, its civilization. That is no wonder, if we imagine what an expansion of experience and learning had taken place:

the great discovery of the New World, the rise of the nation-states and their national laws as against the Imperium and its Civil Law stemming from the Romans, the rise of international trade, the great religious controversies caused by the Reformation, the danger to the Church universal by the rising national churches, the formation of a new class, the lay "intelligentsia" so mightily furthered by the Renaissance. All these produce, so to speak, a change in the intellectual climate. The tendency to autonomy, to freedom from the guardianship of the theologians in philosophy, politics, literature and in the sciences and in secular culture permeate this period. This need not mean enmity to the Faith, to the Church-authority. But it means a new relation between Church and State, between Community and person, between contemplative and active life in the World. It means a "*weltzugewandte Frommigkeit*" not flight from the world, but Christian ethics for this new world of a more autonomous political and cultural consciousness of the contemporaries. It is significant of the more "personalist" tendency of this era that the greatest controversy in theology is that of the relation between free Will and Grace, known better as the controversy between Thomists and Molinists.

The method of the Masters of the second flowering of Scholasticism, compared to that of the Middle Ages, is more empirical and, by reason of the great amount of knowledge meanwhile accumulated, is comparative-analytical, as is appropriate to the contingent character of historical reality. In our subject this means a more critical attitude towards existing social and political

forms, an avoidance of the temptation to declare something as "natural" because it has been accepted, without being questioned, for a long time. The institution of slavery is thus much more critically studied and firmly rejected than was ever done in the Middle Ages. In legal and political philosophy we find, for instance, that Suarez is not only concerned with a more accurate statement of the relation between the common good and the private good of the persons, but also with the limitations of the human law. Thus he has already the doctrine against the *ex post facto* law. Suarez makes one exception — provided that the act is not a grave and imputable violation of the first and generally known principles of the Natural Law. (*cp.* the juridical basis of the Nuernberg Trials in the matter of Crimes against Humanity); in such a case a crime is recognized by all as such even without a positive law declaring it a crime. The same tendency appears in the answer to the question, whether the state can command an internal act and punish for an internal act. The answer is that by its very nature the intimate sphere of the person is closed to the positive law which must and can be satisfied with the external conformity to its law, and not with the internal motivation of this conformity, for the human laws are concerned with the external peace of the human community. The comparative-analytical approach is obvious in every chapter of the works of these masters. They cite profusely not only the Roman civil law, but also the laws of France, of Spain, of Venice, of Florence, etc. When Molina studies the problems of slavery, he tells us about the inquiries he made about the Negro slave trade with ship

owners and with traders, with the port authorities and with the central authorities; he cites the various pertinent documents in nine columns of his *De Justitia et de Jure*. Vittoria tells us that he observed Indians and that he objected to the claim that they were barbarians and by nature slaves of the civilized Spaniard, by pointing out to his opponents that there were many peasant-folk in Spain who were not more intelligent or well-bred than these Indians, and yet nobody denied civil liberty to these peasant folk.

This historical-analytical and comparative-empirical character of the method of the great Doctors explains why they often give up the commentary, which was up to that time the usual form of scholarly work. Instead they write their voluminous treatises "On the Laws" or "On Justice and the Laws" in which they treat extensively and with great detail the subject matter that St. Thomas treats in the nineteen *quaestiones* of the first part of the second volume of the *Summa Theologica*. The familiarity of the Doctors with the contemporary literature in civil and canon law, with the philosophers and theologians of the medieval era and of the following centuries is astonishing. On a question which one might think St. Thomas has sufficiently or even exhaustively treated, we may find a multitude of new points of view. This broadness does not produce a certain superficiality as one might suspect, but on the contrary almost all scholars who have studied the works of our masters from Grotius on assert that they are of an amazing profundity and rich in fine but well proved and scholarly distinctions. It is thus easily comprehended that these works were used

even in Protestant Universities as textbooks and why they present truly encyclopedic works for the jurist and political philosopher of our time, as is affirmed by such eminent scholars as Hauriou, Mesnard, Barcia Trelles, del Vecchio etc., and that they represent one of the high-marks in the history of Natural Law theory.

#### IV

Let us now discuss some of the particular themes which occupied the minds of the masters under the heading "Natural Law." One important result of their effort was the abolishment of the distinction between a primary Natural Law as it existed before the Fall of Man and a second Natural Law valid after that event. This theory goes back to the stoic philosophy and the Roman Law and was upheld by the Medieval Theologians. The stoics and the Roman Law used it to find an explanation for some generally accepted social institutions such as war, slavery, private property or the division of goods, with its implied injustices of the few wealthy, and the many poor institutions, which could not be considered as just in the sense of the ideal Natural Law. The Roman jurists ascribed these institutions, e.g. slavery, to the *Jus Gentium*, because according to the Natural Law all men are born free. The *Jus Gentium* is then a kind of secondary Natural Law, which Reason has instituted and which all nations observe. In the Middle Ages the distinction served partly for the same purposes; partly to save on the one hand, the immutability of the Natural Law, and on the other hand to explain certain sentences in the Scriptures, when God is said to have ordered something which is against the Natural Law. This distinction and

the vague ambiguous character of the *Jus Gentium* which contains, first, the conclusions from the first principles of the Natural Law, second, those positive legal institutions which the jurists found among all or almost all nations at all times, and third, also the principal institutions of the international public law, is either given up or freed from ambiguity. Suarez, for instance, declares that all necessary conclusions from the Natural Law belong to it and not the *Jus Gentium*. This is, according to Suarez, *proprie dictum*, a general law of civilized nations ruling such general legal matters as contracts, forms of properties, the legal division of property among men; it is in its character positive law and represents a general theory of such positive legal institutions which we find among almost all civilized nations because they have been instituted *natura instigante*. But they are not of the Natural Law and they are not immutable either; for they are the product of human convention and of consent. From this *Jus Gentium* in the sense of such a general law, common to civilized nations, Suarez distinguishes, then, the *Jus Gentium* in the strict sense as a *Jus inter Gentes*, as the positive part of the public international law which rules the relations between nations as subjects of rights and duties, as members of the community of nations. The positive law of war and peace, of legations and armistices, of international intercourse and trade is meant here, as it was introduced by conventions, treaties and customs. Quite evidently the Natural Law is valid for the relations among nations also, and so is the Divine Law. Suarez is not a positivist in the doctrine of the Law of Nations.



Suarez has no use for a distinction between the primary and secondary Natural Law. The fall of man has not changed the Natural Law as such, but has only added to the political authority the compulsory power which it would not have needed before the fall. The exegetical difficulties are matters of exegesis, not of the Natural Law. The consequence of the abandonment of this distinction is that such bothersome institutions as forms of servitude, warfare, forms of government (Monarchy as a more natural form of government) are now all strictly institutions of positive human law and therefore changeable. The right to conduct a just war in order to enforce one's rights may become obsolete by the introduction of an obligatory procedure of international arbitration. Slavery is now an imperfection of the human positive law and cannot any more be espoused as existing by nature, as we will show below. We may now understand why a modern scholar (J. Kusters) says that after the labors of Suarez, after his classification of fundamental concepts, the fruits on the tree of international law were ripe for Grotius to pluck. The masters of the second flowering of Scholasticism are the actual founders of the modern theory of the International Law, as Hugo Grotius himself admits, when he speaks of the *Magistri Hispanorum* and the gratitude he owes them for their pioneering work. He follows the Scholastics to a great degree and mentions their books on almost every page of *De Jure Belli ac Pace*.

## V

A very interesting application of the Natural Law in a concrete situation is the criticism of the colonial method

in America by the masters of the second flowering of Scholasticism. The espousers of the rather ruthless conquest of the Americas by the Conquistadores were first attacked by the missionaries sent to convert the Indians under the leadership of Las Casas. This missionary bishop asked to have Vittoria as his theological consultant. Vittoria and almost all the other Doctors in their special treatises on the Indians and on the *Jus Belli*, or in their general treatises "On Law and Justice," treated broadly and with great care the moral and juridical issues in this burning problem. They all became the defenders of the human dignity of the Indians and of the independence of their states. One by one they tear to pieces all the arguments of the espousers of that colonial imperialism and defend against these, the rights of the Indians on the basis of the Natural Law. Sepulveda, a court theologian of the Spanish Monarchs, justified the conquest of the Indian states and the brutal methods of colonization with these theses: first, the Pope is the Supreme Lord of the World — a thesis, formed in the Middle Ages by the canonists or curialists in their fight against the claims of the Emperor to the supremacy of the World, that small world of Christendom and its arch-enemies, the Mohammedans — therefore the Pope has the right, especially in order to spread the Christian Faith, to grant Christian Kings the political overlordship of the newly discovered Americas. The rulers of Spain and Portugal consequently could claim to be the legitimate sovereigns of these territories, their inhabitants and their chieftains, with the promulgation of Alexander VI's edicts, especially the edict *Inter Cetera* of 1493. This "*Donatio*" by the Pope was,

of course, kept in the terms of the Feudal Law; and it was the kings who applied to the Popes for the "grant" of these territories as "fiefs" according to the Feudal Law. Nevertheless at that time the Feudal Law was already giving way to the modern law of national sovereignty, and the political meaning of the Edict was in the last analysis to establish the political sovereignty of the conquering discoverers. Some theologians used the theocratic ideas of a Henry of Segusia for the same purpose; the Pope, representing the Church, has received from God the Lordship of the World for the Christianization of the World. By reason of this divine authority, the Pope may appoint Christian kings as legitimate political rulers over pagan nations. Another title to the same sovereignty was deduced from the medieval theory cast also in the formula of Feudal Law, that the Emperor was the supreme lord of the world and that he consequently could grant these territories as fiefs of the Christian princes. A third claim was based on the right and duty of Christian kings to suppress the pagan barbarism, the habitual blasphemies and the idolatry of the pagans, so offensive to God and His Christendom. Finally it was claimed that the Christian civilized nations had by Natural Law according to Aristotle, and with the approval of St. Thomas Aquinas, Duns Scotus and many other authorities, the right to subject the Indians, because they were only "speaking animals," because they were full of vices and bare of intellect and unable to rule themselves. They were, therefore, by nature slaves and could, nay, ought to be subjected, in their own interests, to the "*Regimen despoticum*" of Christian rulers. (Lest we judge too hard about these

arguments, let us remember that many of these were literally repeated by the Puritans in New England against the Indians and by the defenders of Negro slavery in the South.)

One by one the masters tear these arguments to pieces. The thesis so generally accepted in the Middle Ages, that the Pope or the Christian Emperor is the Lord of the World by divine institution or by succession to the Roman Emperor is rejected and, instead, the so-called Natural Law theory of the State, as St. Thomas had established it, though without drawing all the consequences of his time, is elaborated. The state exists and the rulers rule by force of the Natural Law. Man lived in true states before there was a Church and a Pope. The rights and duties of rulers and ruled, because they follow from the Natural Law, are and remain independent of the State of Grace. *Non eripit mortalia, qui regna dat coelestia*. In the Scriptures we find not one sentence by which it could be proved that Christ conferred any *political* power on St. Peter or the Apostles; neither did Christ exempt the Christians from the rule of pagan princes. Referring to the famous *Donatio Constantina*, the Masters assert that this is a spurious document of no value at all. By Divine Law, the Pope is not Master of the World. Neither is he that by Natural Law. By Natural Law, on the contrary, the pagan states of the Indians are fully sovereign states. If the Pope claims any rights of intervention into the internal affairs of these sovereign states, this claim must be based on the Natural Law or on the Law of Nations. To send armed forces into the lands of the Indians with the pretense that they only served to

protect the missionaries is unlawful and would give these states a cause for a just war. But what if the pagan sovereigns do not admit the missionaries or forcefully deport them? Then, say the Masters, the Pope may appeal to Christian princes to compel the pagan states to admit the missionaries. Why? Because the pagan states were then violating a recognized rule of the Law of Nations, they were in the wrong. For at that time it was held that the rule of free travel, intercourse and sojourn in the territories of the states was part of the Law of Nations and thus established a right of the missionaries to sojourn there and preach the Gospel. (Yet Las Casas would not even accept this argument.) What is interesting here is that the whole argument is based on the Natural Law and on the Law of Nations and that all claims based on the theocratic ideas of the Curialists are simply shoved aside.

The same arguments apply to the thesis that the Emperor is Lord of the World. The partisans of the *Imperium Sacrum* held that the Christian Emperor is instituted by Christ as ruler over Christendom, or that he gained the rule of the World by translation of the Roman Empire or by succession into the rights of the Old Roman Emperor, as the Jurist Bartolus, the famous post-glossator, tried to prove from Roman Law, coming to the strange conclusion that he who denies that the Emperor is Lord of the World, is certainly a heretic. But the Masters argue that such claims are absurd; they are not based on any positive law, they are disproved by history, which shows that even at the time of the Roman Emperor there existed independent states and certainly even at the time

of Bartolus, the East-Roman Byzantine Emperor was sovereign and also the Kings of Spain and France have been sovereign kings for centuries. We see that the medieval theocratic and empirical theories based on the *Civitate Dei* of St. Augustine found no love with the Masters. In addition, and thus crowning their arguments, by Natural Law the Masters assert that the states of the Indians are as perfect societies truly sovereign. They have their own laws and constitutions, their courts and administrative offices. Any attempt of the Emperor to enforce his specious overlordship would grant the pagan states a cause for a just war of defense.

What of the pagan barbarism, the idolatry, the "unnatural" vices of the Indians as causes for conquest? In this matter it is again interesting to observe that, if a right of intervention is at all acknowledged, this right is based rather on the Natural Law and on the Law of Nations than on the Canon Law. Some of the Masters make here a distinction between the Natural Moral Law and the Natural Juridical Law. Idolatry, for instance, is a violation of the first, not of the second. The temporal state does also not prohibit by its law all vices and sins, but — rightly — only those which directly intervene in the protected sphere of another person and those which endanger the proper end of the State, the common good. Similarly there exists no cause for the intervention of Christian States or for the Church on the basis of Natural Law in the cases of idolatry and similar violations of the moral law. But if the pagan rulers oppress their subjects who have been converted and if their emigration is not feasible on account of their great number or they are forcefully

hindered from doing so, or if the pagan priests perform human sacrifices, then, under due consideration of all circumstances the Christian princes would have an indubitable right to intervene by reason of the defense of Innocents, even by warfare. This right of intervention is based on the Natural Law and on the nature of the community of nations, which must demand of its members a minimum standard of civilized morality; and it is significant that Molina expressly states that the Natural Law exclusively and not any papal authorization gives this right of intervention. Yet it is interesting that this right of intervention for the defense of Innocents was considered by some missionaries and by the great Dominican Theologian Domingo de Soto as infeasible, because it would make the spread of the Faith more difficult or the ensuing war would cause much more suffering, *i.e.* the use of the right of intervention would be unjust. In connection with this discussion, the Masters of the second flowering of Scholasticism have developed also their theory of the just war which in some directions is an advancement over the medieval doctrine. Since their doctrine is known generally, let us only state that it is based again on the Natural Law and was the basis of Hugo Grotius's doctrine of the just war.

## VI

A most instructive application of the Natural Law may be found in the criticism by the Masters of the Divine Right theory. This theory, formulated in Byzantium, and espoused later by the partisans of the mediaeval emperors, became essential for the justification and the

definite securing of absolute monarchy as against the theretofore unquestioned doctrine of the Divine Right of the Pope. In accord with the religious spirit of the era of the Reformation and its theological irrationalism (inimical to the idea of Natural Law), it seemed that only by a divine call could the rule of the princes be firmly established. Political authority, whether it were the monarchy of which Luther spoke, or the aristocracy of the virtuous predestined *viri egregii*, after the example of the men described in the Book of Judges, as Calvin taught, by reason of the decomposition of the Natural Law by the reformist theology, had to be based on a divine act of institution. Furthermore, the Protestant prince had to become also the *Summus Episcopus*; he had to unite in his hands the supreme temporal and spiritual authority. The democratic ideas of ecclesiastical constitution which were to characterize the non-conformists were not yet developed.

The Divine Right theory served two ends: first, it gave the prince an originary power independent of and unlimited by any covenant with the estates representing the people; second, it established the prince as the sovereign spiritual authority as against the national Hierarchy and, particularly, the Pope. *Dei gratia* meant "neither by the people's, nor by the Pope's, grace." These ideas, in a somewhat attenuated form, were prevalent in the Catholic monarchies. Nevertheless, it was also affirmed that the office of the prince is immediately instituted by God — like the office of the Pope; although to the Pope, concurrently with ecumenical councils, belongs the supreme doctrinal authority, to the prince belongs



the jurisdictional and administrative authority in the Church of the Realm. The prince has exclusively the constituent power in his realm, and any participation by the estates, or by the people, is thinkable only by an arbitrarily revocable grant of the prince. This implies that there is no room for an active or a passive right to resistance based on Natural Law. Only meek obedience is the duty of the citizens, at least as long as the prince does not openly act against the Scriptures — that is, as long as he does not become a “heretic.” Against the heretical prince the orthodox must, of course, rise in arms. (In connection with this it is interesting to compare the Thomistic doctrine that the theological heresy of the prince as such does not destroy the mutual rights and duties of authority and citizens based on Natural Law, at least as long as the concrete political common-good is not directly affected by the heresy of the prince.) If the Natural Law is to be considered of any value, then the prince is to be considered the sole and sovereign interpreter of it because his authority is of directly divine institution. As Hobbes expressed it: a law of the prince may be iniquitous, but “it is not unjust,” because the Natural Law, in Hobbes’ view, is actually wholly immersed in the positive law of the Leviathan, and, therefore, it becomes a meaningless term. Among the consequences of this were the nefarious principle of “*Cujus regio, ejus religio*,” the theoretical impossibility of any form of civil tolerance; the identification of political and ecclesiastical religious loyalty, which issued in the ruthless oppression of religious non-conformists because politically they committed treason by their religious heterodoxy.

Against this Divine Right theory arose the great Doctors of the sixteenth and seventeenth centuries to develop more fully the Thomistic Natural Law theory of the State and of political authority. The State, they taught, is an institution of the Natural Law. Man is by nature a political being. The State as the natural "perfect society" is in its institution and jurisdiction independent of Grace and Supernature. Furthermore, though founded in human nature and therefore necessary for its most perfect realization, the concrete State comes into existence not without the intervention of free human acts. That is, the concrete State is to be thought to come into existence by a consent, by a covenant, by a social contract of the "family-fathers" who *instigante natura* see the necessity to form a more perfect union. The juridical figure of a pact, a true *status* contract, will signify not so much that an historically documented solemn covenant has been formally concluded, but that free human acts have produced the State, not a divine interventive act. Furthermore, with the initial formation of the however-rudimentary body politic, political authority, ultimately deriving from God as the Creator of human political nature, rests immediately with the body politic, which is, therefore, an immediate democracy. Any other form of government, such as representative democracy or monarchy, must consequently be considered as produced by a distinct act of the body politic; *i.e.*, of the people in the political sense — by an act of transfer of political authority. There is no intrinsic reason why this or that person should have by nature a right to political authority since all the partners in the original covenant are free and equal. This

does not invalidate the duty of the covenantors to give up the immediate democracy and to institute a different form of government, a monarchy, for instance, by consent in the interest of the more perfect and more efficient realization of the common good.

But it is clear that all forms of government are derived from an original constituent power of the people. Even though it is indisputable that political authority is ultimately derived from God, *immediately* it is derived from the people. Consequently, all political forms of government — and absolute monarchy, too — are merely creatures of positive, man-made law: not of the Natural Law — and even less of positive, divine law, as the Divine Right theory taught. Demonstration of the validity of the Divine Right theory would require a revealed act of God, of which there is no historical record. Even the rule of Saul and David, so often cited as examples by the Divine Right theorists, is not acceptable to St. Robert Bellarmine as being instituted directly by God.

Since all constitutions, all forms of government, are of positive man-made law only, they are all “limited” by the Natural Law. Every consensual act of transfer of political authority to a person or to a group of persons contains as an unconditional clause: *salvo jure naturale* — and, consequently, *salvis juribus naturalibus*. The legitimacy of political power rests, in the last analysis, upon its service to the common good, because the right to the realization of the common good is also an inalienable right of the people. From this it follows that the people have by Natural Law the right to active and passive resistance, first, against the *usurpator*, and, second, against

the *tyrannus secundum regimen*; i.e., the initially legitimate ruler who gravely violates the common good.

The twin concepts of the limitation of political authority and the right of the people to resist tyranny form, by the way, the content of mediaeval constitutionalism, which rested on three principles: first, the Law is supreme, rather than the king or the estates of the realm separately acting — this is the theory of the supremacy of the Law, *Legem servare hoc est regnare* . . . ; second, the principle that the Law issues from a kind of co-operation between the royal authority and the estates, the former having the right of legislative initiative and the latter, by their consent, limiting the initiative of the king through the public sense of justice that animates the people; third, the principle that the people or the estates have a right to resist an act of the king violating the Law as a “pactum,” a “covenant,” a “*constitutio*,” contracted by the king and the people and binding, therefore, each of them equally. If the king acted against the *pactum*, then the legitimacy of the act (and even of the authority of the king) was destroyed. This pattern of thinking was especially valid if the act of the king was against the Natural Law. That meant also that the king could not infringe upon the solemnly established and agreed upon Liberties and Immunities of the estates, the cities and the towns, the guilds, and other communities from which were then derived the rights of the individual according to the community spirit of the Middle Ages.

Thus it is significant that against the theory of the *Rex legibus solutus*, against the Divine Right theory, which made of the king a “*Pro-Deus*” (Bacon), a “*Deus mor-*

*talis*” (Hobbes), and made consequently an appeal against an act of the king impossible, since there is no appeal against a divinely instituted authority, the Masters established, besides the existing positive constitutional law, the Natural Law as the basis of an appeal against the tyrannical ruler. *Seditio*, i.e., unlawful rebellion against legitimate (in the formal *and* in the material sense) government was clearly distinguished from the right to active as well as passive resistance, that is, lawful revolution. The similarity of the arguments of the Masters of the second flowering of Scholasticism to the arguments of the Declaration of Independence is so evident that it need not be elaborated on.

## VII

Still another characteristic feature of the development of Natural Law doctrine during the second flowering of Scholasticism — and this in a certain consonance with the spirit of the Christian Renaissance and with eighteenth-century theories of human rights — is the elaboration of the concepts of the *Jura Naturalia*, especially those of liberty and property. What was contained implicitly in the thought of St. Thomas was made explicit in the writings of this period. It is true that such a nominalist as Occam in his day stressed the fact that the *Jura Naturalia* were subjective rights existing in consequence of the objective norm. The term *Jus* for St. Thomas, meant primarily the objective *Justum*, the Law, and very seldom did he mean by it the subjective right as it was known to the Roman Law. But for Occam *Jus* becomes “*Potentia licita actum aliquem exercendi*”; and,

significantly, Occam singles out Liberty as such a *Potestas*, natural to man as a person. This natural right of Liberty may not be taken away from man without "guilt" or reasonable cause against his will, though man may voluntarily give up his Liberty. Occam, thus, has quite clearly the idea of Natural Rights; and this is easily understood if we are aware that the most positive among the many negative features of Nominalism was its interest in the individual generally and in the human personal will as a creative cause of human political and cultural life.

The theory of the Natural Rights of the person and of the State finds its full "explication" in the century from Vittoria to Bellarmine. Vittoria points out — in his defense of the Indians against the theses of Sepulveda, who espoused a rather ruthless colonial imperialism, that the Indians, as persons and as citizens of independent states, are not by nature slaves or subjects of civilized Christian nations. When Sepulveda cites the famous Aristotelean thesis that some are by nature slaves, Vittoria tries to excuse Aristotle by pointing out that Aristotle only means that those who by virtue of high intellectual gifts are capable of ruling themselves are shown thereby to be *capable* of ruling those of "brawny bodies." But Aristotle does not mean, according to Vittoria, that what Jefferson was later to call "the natural aristocracy" has a natural right to rule as masters those of weaker minds and lower civilization, who by nature are destined to slavery. Slavery was not conceived by Vittoria as an institution allowed by Natural Law, not even of a secondary Natural Law (as taught by the Stoics and the Mediaeval Scholastics, who held that slavery was immoral in the *status*

*naturae purae* — that is according to primary Natural Law — but excusable as a consequence of sin — according to the secondary Natural Law). For Vittoria slavery as a hereditary status of servitude is exclusively *Jure Humano*; it is not even an institution of the *Jus Gentium* — that somewhat vague medium between the *Jus Naturale* and the *Jus Civile*. When Vittoria discusses monarchy, which he prefers to other forms of government in accordance with the scholastic tradition (though we should be quite clear that monarchy does not mean to him the hereditary absolute monarchy of the seventeenth century), he stresses that Liberty is as well, nay, better, protected under monarchy, the clearly circumscribed and stable rule of one, than under the rule of the few or the many. This idea of Liberty as a right to be best protected under monarchy is new. Before Vittoria, the argument for monarchy was taken from the idea of the objective order requiring an objective authority of one will to protect its own stability; with Vittoria, the argument for monarchy flows from his concept that under monarchy the Liberty of the subjects is best protected.

From Vittoria on, the theory of Liberty as a natural right of persons and of the State is developed further concomitantly with the argument against servitude. The distinction between the primary Natural Law and the secondary is abandoned: the Fall of Man is no longer considered to have any influence upon the core of Natural Law. The *Jus Gentium* becomes, on the one hand, a positive general Law of civilized nations, an “*allgemeines Kulturrecht*”; and, on the other hand, it becomes a *Jus inter Gentes*, the positive part of the Law of Nations. If,

thus, Liberty is a right based on the Natural Law, then all forms of servitude are products of merely human law with its imperfections. Aristotle's argument about slavery as an hereditary status of servitude is declared unacceptable and absurd. Suarez, for instance, stresses that personal Liberty belongs *positively* to Natural Law, that it is a natural *right*, because man as a rational, free being has a natural *dominium* over his Liberty. Liberty can be lost only by free and voluntary surrender or "*ex justa causa*"; i.e., as a punishment for crimes (and it is significant that Suarez continues — just as the State may take away the life of a criminal according to just criminal law). As the life of an innocent man is sacred, so also is his Liberty. For like life, so is Liberty given to each man by the Creator Himself; and by nature all are free and equal. These ideas are applied also to the State as a *persona moralis*. The State is by nature a Free State, with the right of self-determination. The constituent members establish by the social pact, *primateva institutione*, an immediate democracy: this original democracy ought ordinarily transform itself, by constitutional positive act, into a monarchy, absolute or limited; into an aristocracy; or into an indirect representative democracy. All forms of government are, consequently, of positive historical law. There is no Divine Right of Kings; or of Democratic Majorities.

Similarly, States have a natural right to Liberty and independence from one another under Natural and International Law. Therefore, the great Doctors of this period reject all the arguments of the defenders of colonial imperialism with the counter-argument that the pagan



States of the Indians are by Natural Law free and independent, and that all claims of the Spanish must be based only on the International Law of the community of nations.

It is significant that property and the natural right to property are treated similarly to Liberty. True, the Masters of that time did not need to treat of these problems as widely and profoundly as they required to be treated in the nineteenth century under the impact of Marxist Socialism. Yet the question arose in connection, again, with the rights of the Indians. These have, so the Doctors said, a true *dominium* of their properties, real and movable; to take away their properties would be a violation of Natural Law. Suarez also criticized the doctrine of some jurists who asserted that the temporal king could, by reason of his absolute power, arbitrarily transfer the property of one man to another, or confiscate it. This, declared Suarez, is "*absurdissima*" and also against the natural right that everybody has to his legitimate property. Suarez and others also taught that the division of goods (*i.e.*, private property as a legal institution) is not a consequence of sin, but is convenient to nature and might have been introduced even in the *status naturae purae*. Under the influence of natural reason, private property was introduced among all civilized nations, and everyone has now the natural right to his property as he has the right to the fruits of his labor.

An interesting sidelight on this positive evaluation of Liberty is afforded by a short discussion of the ideas on economic liberty and monopoly held by these Masters of the Scholasticism's second flowering. The main problem

has always been: under what conditions will the prices of goods and services be just? Under what conditions will they be what they should be, according to Natural Law? Will prices have the best chance to be justly established under conditions of a free market and under the rules of ordered free competition? Or is it necessary that the Government regulate the prices and exchanges in order to assure just prices? And how far are monopolies, private and public, permissible, which by their own economic power can control prices?

Among the many theologians who have treated of these problems from the points of view of ethics and the Natural Law, Molina stands out particularly. In his remarkable book, *De Justitia et de Jure*, he demands, first, that economic exchanges must follow the rules of commutative justice — the equality of value and price; and, secondly, that the just price is not influenced by the economic status of persons as exchangers, but is determined absolutely through such factors as costs, supply and demand, which altogether represent the “natural price” under due consideration of the changes in the “value” of money. Molina held that the natural (*i.e.*, the just) price has the greatest chance to be the actual market price under conditions of a free exchange market and stability of money. Regulated prices have much less chance to be just prices, because Government regulation cannot meet the frequent changes that take place among the determining factors of the natural price. He condemns private monopolies as usurpations and enslavements of the free market in contradiction to the Natural Law. He accepts regulation of prices only in emergency situations and rejects

them as ordinary means of directing economic life by the State. State monopolies are accepted on the condition that they serve the common good, because they may be considered as a source of public revenue; but they must never serve private interests in the form of privileges. If the King therefore grants, for reasons of the common good, certain merchants' associations or craftsmen's guilds, *e.g.* printers, monopoly privileges, then the prices must be regulated in harmony with the Natural Law principle of the just price. Molina's views thus show, in accordance with the general tendency, a highly positive evaluation of Liberty in the economic exchanges in a free market, as a natural condition for the realization of the just price. This positive attitude toward ordered Liberty in economic life is further accentuated by his strong criticism of unfair monopolistic practices and by his diffidence toward Government controlled markets and prices.

## VIII

After this survey, which by its very nature is sketchy and cannot be considered at all comprehensive, it is easy to understand why so eminent a jurist and scholar as Joseph Kohler, professor at the University in Berlin, who, recognizing the insufficiency of legal positivism, consequently had delved into the Natural Law Tradition, could write in 1916 that a revival of Natural Law must return to the thought of the Masters of the second flowering of Scholasticism, and not to Hugo Grotius and the Rationalists. It is the tragedy of the rationalist Natural Law as it developed on the European continent that it

ultimately served only as political ideology and propaganda able to attack the *Ancien Régime* and to produce the Revolution and the *Declaration des Droits de l'Homme et du Citoyen* and then be drowned in the Terror-Regime of the Jacobines, or to be forgotten by rising nationalism and the general positivism which got control of the universities and of the courts. The Common Law countries have been luckier, at least to a degree. In its tradition and under the influence of the clerics of the Chancery, the idea of a Natural Law was better preserved than on the European continent. This tradition was protected by the judges who mostly felt that they were intrusted with the Law and the administration of justice; they held in the majority that Law is reason, right reason, that is, positive law must be in agreement with the Natural Law and with natural Justice and Equity. Though there are not absent dark pages in the history of the Common Law, it remains true that all through the centuries, the tradition of Natural Law never was fully abandoned in the history of the Common Law. It was the judges who, animated by the Natural Law, took on the guardianship of the Law as a Rule of Reason and for reasonable free citizens, against absolutist kings and the thread of tyrannical majorities in the legislatures. Jurists and Judges who are philosophically mere pragmatists and positivists cannot be the guardians of the Natural Rights because they have abandoned the sources from which these rights and their dignity are simultaneously derived: the Natural Law.