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CHAPTER I

Introduction: natural law and its history in the early Enlightenment

SUMMARY

This study broadly aims to investigate the influence exercised by the theories of natural law developed by Grotius, Hobbes and Pufendorf on the early stages of the Enlightenment in Germany. When the notion of ‘influence’ is applied to a long span of time and to a large number of writers it can easily deteriorate into nothing more than the correlation of superficially similar doctrines, unless there also exists a range of contemporary sources which discuss self-consciously the relation of contemporary practice to past achievement.¹ Such sources exist for this topic in the form of a series of ‘histories of morality’, published between approximately 1680 and 1750 in both France and Germany.² These were written either as separate works or as introductions to editions of the works of recent writers on natural law theory. Their stated purpose was to provide an account of how the seventeenth-century achievement in natural law was progressively refined and revised, pre-eminently so by Pufendorf, and to relate that achievement to previous discussion of natural law by Christian and Classical writers. By studying these histories we are able to expose to view the fierce theoretical disagreements

¹ For suggestions as to how the use of the concept of ‘influence’ might be refined see J. M. Dunn, ‘The identity of the history of ideas’, in *Political Obligation in its Historical Context* (Cambridge, 1980), pp. 13–28, and the preface to Q. R. D. Skinner, *The Foundations of Modern Political Thought*, vol. I, (Cambridge, 1978), pp. ix–xv.

² The ‘histories of morality’ (see the appendix to this chapter) may be conveniently listed in their chronological order of publication. Some of these texts duplicate each other or are so close as to offer little scope for separate interpretation. Therefore, not all of them are cited and discussed in the text.

The form and content of these histories has been the subject of analysis in a series of works by Richard Tuck which have provided the impetus and inspiration for the present study, notably ‘The “modern” theory of natural law’, in A. Pagden (ed.), *The Languages of Political Theory in Early Modern Europe* (Cambridge, 1987), pp. 99–119. Other relevant discussions include the final chapter of R. F. Tuck, *Natural Rights Theories: their Origin and Development* (Cambridge, 1979), and his ‘Grotius, Carneades, and Hobbes’, *Grotiana*, new series, 4 (1983), pp. 43–62.

between the exponents of natural law theories in Baroque German culture and thus recover the parameters of the debate contextually in a way that is not possible from the main texts viewed in isolation. This book therefore sets out to describe and analyse this neglected historiographical genre with the aim of using its estimation of the 'modern' natural law tradition to trace with more precision how and why that tradition was valued highly in the early Enlightenment. But over and above their use as an interpretative tool for the Enlightenment, these histories also have some claim to be regarded as the first recognisable histories of political thought, and therefore are deserving of examination and analysis in their own right.

It may be said, therefore, that this study impinges upon three distinct subject areas in roughly equal proportions: it attempts to identify the continuing importance in the eighteenth century of discussion of a natural law centred on human sociability, and constructed by human reason; it aims to delineate the early stages in the development of self-conscious reflection on the history of philosophy in general, and the historiography of moral philosophy in particular; and finally, it indicates ways in which overviews of the German Enlightenment have largely failed to encompass contemporary accounts of what were the important innovations in the moral philosophy of that time. In particular it is urged that the lively debates over the interpretation of Pufendorf's revisions to natural law theory fostered a new methodology in German philosophy – eclecticism – that was used, even by many who acknowledged few other debts to Pufendorf, as a method for unravelling and reconstituting the convoluted and tortuous relationship between German Protestantism and Aristotelianism.

It is also argued that the main fruit of this new approach was the clear disciplinary separation that emerges in the north German Protestant universities in the late seventeenth and early eighteenth centuries between the respective spheres of divine law and human natural law, so that the latter was no longer regarded as an inferior subset of the former. While the majority of writers of all persuasions still conceded that natural law was created in part by God's will, much more controversy revolved around the question of whether the obligation of natural law derived merely from this narrowly voluntarist source or as much from moral values that God and men held in common as a result of the resources of moral insight placed in man through the gift of reason.³

³ On this issue see K. Haakonssen, *Natural Law and Moral Philosophy: from Grotius to the Scottish Enlightenment* (Cambridge, 1996), p. 6.

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Much depended on this issue, as Leibniz above all perceived, because the fragile synthesis between Protestantism and Aristotelianism that had been put in place by Melancthon in the sixteenth century (and since then maintained) relied for its coherence upon man being made in the image of God.⁴ Protestant Aristotelianism had never fully separated itself from its scholastic roots; indeed, it retained them in a modified form down to the time of Christian Wolff and beyond, continuing to provide an important counterpoise to the work of Pufendorf and his followers that became stronger as the implications of the separation of ethics from moral theology emerged. Unenviable alternatives presented themselves: on the one hand, without reliance on revealed religion as a guide to God's law (from which man had departed at the Fall) theological voluntarism loomed as the sole basis of natural law. But the retention of such key scholastic notions in moral epistemology came to seem equally unappealing as well as philosophically threadbare once the achievements of Descartes and Hobbes had percolated into Protestant university life, and the continuing tensions between neo-scholastic ethics, and the notions of faith and grace that had in any case always been central to the salvific mission of German Lutheranism, were further perpetuated.

It was the achievement above all of Samuel Pufendorf (1632–94) and his most distinguished follower, Christian Thomasius (1655–1728), to have evolved a tortuous path through this intellectual minefield towards what they believed was a true science of natural law, that used Stoic ethics to reconcile the voluntarism of Hobbes with a diminished but nevertheless real role for divine positive law. This self-evaluation, recorded and recovered for us in the contemporaneous 'histories of morality', was challenged at every point not only by clerical opponents but more importantly by the neo-scholastic political theories of Leibniz

⁴ See *ibid.*, pp. 35–7. The best brief introductions to the German debate and Pufendorf's formative contribution to it are contained in the introductory material to S. Pufendorf, *On the Duty of Man and Citizen According to Natural Law*, ed. J. Tully, trans. M. Silverthorne (Cambridge, 1991) and S. Pufendorf, *On the Natural State of Man*, ed. M. Seidler (Lewiston, N.Y., 1990). A detailed survey of natural law debates in Germany is available in G. Hartung, *Die Naturrechtsdebatte. Geschichte der Obligatio vom 17. Bis 20. Jahrhundert* (Freiburg/Breisgau and Munich, 1998). An important general assessment of Pufendorf's position in the history of philosophy is J. B. Schneewind, 'Pufendorf's place in the history of ethics', *Synthese*, 72 (1987), pp. 123–55. A full account of recent developments in scholarship on the European reception and influence of Pufendorf's writings is collectively provided in the essays contained in F. Palladini and G. Hartung (eds.), *Samuel Pufendorf und die europäische Frühaufklärung. Werk und Einfluss eines deutschen Bürgers der Gelehrtenrepublik nach 300 Jahren (1694–1994)* (Berlin, 1996), if read in association with the useful review article by S. Zurbuchen, 'Samuel Pufendorf and the foundation of modern natural law: an account of the state of research and editions', *Central European History*, 31 (1998), pp. 413–28.

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and Wolff, and the ‘histories of morality’ are still the best record we have of that intellectual journey. To recover these debates, partial though the accounts are (in both senses of the term), is simultaneously to come close to a sense of the key issues of the early German Enlightenment, of which these short histories are in a real sense a self-image.

NATURAL LAW AND HISTORY

Natural law theories before the seventeenth century were dominated by a principle of theistic origins – that God was the source of all laws perceived as natural by human reason. There was a rival Stoic account, but it did not occupy the high ground of debate. After Grotius, the question of origins had become more problematic; for if the seat of natural law was seen unambiguously as the reason of man (irrespective of God’s role in shaping the scope of reason’s penetration), and this was also coupled to the assertion that all human positive law should be derivable from natural law, then it seemed difficult to escape from the subjectivism with which Hobbes had characterised the state of nature. There were no objective criteria available by which one man’s judgement of the law of nature could be preferred to another’s. The point was encapsulated powerfully by Bentham:

What one expects to find in a principle is something that points out some external consideration, as a means of warranting and guiding the internal sentiments of approbation and disapprobation: this expectation is but ill-fulfilled by a proposition, which does neither more nor less than hold up each of those sentiments as a ground and standard of itself.⁵

As we shall see, much of the discussion within eighteenth-century natural jurisprudence took the form of a search for such an appropriate ‘external consideration’. If the imposition of divine will or the instantiation of divine reason were no longer fully credible and self-explanatory options, then the alternatives were to be located either in a variety of forms of positivism (such as the propensity of man to create common moral categories, or the role of the sovereign) or in appeal to such allegedly cross-cultural moral uniformities as the insights of the ‘impar-

⁵ J. Bentham, *An Introduction to the Principles of Morals and Legislation*, ed. J. H. Burns and H. L. A. Hart (London, 1970), p. 25. While Bentham went on to develop a careful distinction between the beneficial fictions of legal rights and the damaging fictions of natural rights, he never perceived the extent to which debates over natural rights in the period 1650–1750 had an ideological force and power that reached far beyond the acknowledged artifice of their narrow conceptual development. For a study of Bentham’s critique see J. Waldron, *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man* (London, 1987).

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tial spectator'. Nevertheless, throughout the eighteenth century the thesis of divine moral origins was to be restated by many eminent philosophers (for instance in Leibniz and Wolff) within an increasingly intricate framework of comparisons (above all in Leibniz' theory of monadology) between the rational truths accessible to man and what was alleged could be known of the mind of God. This was an index of the obvious difficulties encountered by the newer theories in overcoming the voluntarist objections to their identification of natural law with human capacities.

But there were larger problems within 'modern' natural law theories, too. It has, for example, often been shown that they tended to endorse an absolutist view of property rights (of which Rousseau's critique in the *Contrat Social* is only the best-known example). But these difficulties were inherent in their basic contention that men held subjective rights by *dominium* which could hardly be regulated by any identifiable objective moral standard of justice. Any such claim of objectivity was undermined by Grotius' own original emphasis on the diversity of observed human moral practice, and by Pufendorf's concession that the will as much as the faculty of reason or understanding exercised a decisive role in the creation of laws. By the end of the eighteenth century the options open to those wishing to finesse the 'modern' natural law tradition had narrowed: the incongruities and contradictions of the writers associated with both Leibniz and Pufendorf – despite their differences – led eventually either to a hard-nosed legal positivism (as embodied by Bentham) or to the Kantian transcendence of the whole debate.

This is not to say that with the 'invention of autonomy' in the decade of the 1790s natural law theories disappeared from sight.⁶ Rather the redescription of natural law as subjective natural rights brought with it a change of focus from the metaphysical understanding of the world to the anthropological understanding of the individual, removing at a stroke any need for consideration of the 'state of nature' as the foundation of humanity, and downgrading the intellectual significance of epistemological discussions of the source of moral knowledge in God or

⁶ For an understanding of how and why Kant's 'invention of autonomy' transformed moral and political thought, see above all the magisterial study by J. B. Schneewind, *The Invention of Autonomy: a History of Modern Moral Philosophy* (Cambridge, 1998). The later development of natural law theories into the nineteenth century is the subject of illuminating commentary in K. Haakonssen, 'German natural law and its European Context', in M. Goldie and R. Wokler (eds.), *The Cambridge History of Eighteenth-Century Political Thought* (Cambridge, forthcoming). See also D. Klippel, *Naturrecht im 19. Jahrhundert. Kontinuität, Inhalt, Funktion, Wirkung* (Goldbach, 1997).

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man. The combined achievement of the Kantian and French revolutions in thought produced natural rights that instead of being human attributes surrendered at the creation of civil society became the definition of current moral and political claims in society. The world of natural jurisprudence was not abolished but shifted its axis from delineating a vocabulary of duty to exercising an agenda of rights.

Put in these schematic terms it would appear that eighteenth-century natural jurisprudence never identified that ‘external consideration’, that touchstone of generalisable verification, which might have allowed it to resolve the inherent conflict between voluntarism and rationalism, human capabilities and divine donations, that ran through its course. But in fact its proponents and defenders believed that a solution had been found – in history, and the history of thought in particular – that offered a methodological passage out of the impasse, enabling these viewpoints to be transcended and placed in a proper perspective. This solution was eclecticism, and it was advanced above all by the voluntarists (pre-eminently Pufendorf and Thomasius and their followers) to promote their own philosophical standpoint. It was not, however, embraced by the school of Leibniz and Wolff, for whom history could be no real ally in their attempt to claim a sustained and sustaining unity between the mind of God and the rational capacities of man.

Of course, this is not the relationship between history and natural law with which anglophone scholarship is familiar, where history is seen to play a rather different role in the story. Famously, Leo Strauss, in his *Natural Right and History* (1953) argued that seventeenth- and eighteenth-century natural law writers were largely responsible for the *damnosa hereditas* of nineteenth-century historicism that sought to reduce all philosophy to political philosophy, culminating in a vapid and trivialising relativism.⁷ In a manner that would have done credit to the Wolfians, Strauss attributed the responsibility for this above all to ‘that imprudent, impish and iconoclastic extremist’, Thomas Hobbes, who had destroyed what he believed to be philosophy’s perennial role as ‘the humanizing quest for the eternal order’ and turned it into no more than ‘a weapon, and hence an instrument’.⁸ The eventual result of this historicism was a disastrous narrowing of the range of significance of natural jurisprudence. On the one hand, for historians of philosophy, discussions of natural law were reduced to the history of the emergence of notions of contract both social and political (classically exemplified in

⁷ See L. Strauss, *Natural Right and History* (Chicago, 1953), and esp. ch. 2.

⁸ *Ibid.*, pp. 34 and 166.

the work of Otto Gierke); and on the other, sociologists, such as Max Weber, were encouraged to draw the conclusion that the sheer variety of human historical and cultural diversity precluded any kind of objective value judgement between different kinds of ethical norms.⁹

Whatever the merits or otherwise of the Straussian analysis, it correctly highlights the conventional assumption that an atemporal timeless natural jurisprudence must always be in conflict with an historical approach to ethics and law, and that ultimately natural law is an unstable category of thought which must collapse back into the study of either divine positive law or man-made positive law embodying voluntarist actions. It was precisely this apocalyptic choice which the German natural lawyers who followed Pufendorf sought to deny, and in so doing they also argued for a much less fraught relationship between history and natural law than has subsequently been assumed. But they were not alone in that, and before we examine their presuppositions in further detail it is worth looking at an example from the Catholic Neapolitan Enlightenment – that of Giambattista Vico – to demonstrate how a happy coexistence between the evidence of human history and a natural law theory based on a combination of both divine donation and human will was both possible and stable outside the confines of German Protestant university culture.

Despite Vico's determination to demonstrate the validity of divine providence in his *The New Science*, he always argued that the history of civilisation could only be investigated if the appropriate principle could be located for discovering the cause of human rational growth and cultural maturation. The foundation of this process lies not in divine providence, but in his so-called *Verum-Factum* principle most famously stated in *The New Science*:

But in the thick darkness enveloping the earliest antiquity, so remote from ourselves, there shines the eternal and never failing light of a truth beyond all question: that the world of civil society has certainly been made by men, and that its principles are therefore to be found within the modifications of our own human mind.¹⁰

⁹ For his reference to German historicism see *ibid.*, p. 1 and his discussion of Weber, pp. 36–78. Strauss' critique of German historicism's impact on the study of natural law still deserves consideration. One example that confirms its relevance is provided by the undeniably present-centred priorities of Gierke's model of contract theory, which unduly favoured those thinkers such as Althusius and Pufendorf who considered a *Herrschaftsvertrag* as fundamental to any lasting contract: see the excellent commentary in H. Höpfl and M. P. Thompson, 'The history of contract as a motif in political thought', *American Historical Review*, 84 (1979), pp. 919–44.

¹⁰ G. Vico, *The New Science of Giambattista Vico*, trans. and ed. T. Bergin and M. Fisch (Cornell, 1948), based on 1744 edn, §331.

Nowhere is this principle more self-evident than in the origins of the phenomenon of language, which is entirely the creation of man, whether in the ideogrammatic form associated with the Age of the Gods, the system of symbolic images that operated in the Age of Heroes, or the conventional alphabets developed in the Ages of Men. In each case truth and certainty in the world of social fact follow on from the knowledge that they have been made by men: what is known to be constructed is at least indubitably *known*. This certainly appears to be the case with formal linguistic conventions, which, because they are ‘uniform originating among entire peoples unknown to each other, must have a ground of truth’.¹¹ From here it follows that language emerges through the intervention of human will upon the natural onomatopoeic relationships between signifier and signified in a process of increasing abstraction which must be the fundamental kind of man-made social truth, the primal ‘modification of our own human mind’.¹² In fact, Vico’s linguistic theory and the theory of human cultural progress and development that stems from it bear striking similarities to the theory of language and social development we shall observe in the writings of Pufendorf and Thomasius; and if one accepts that Vico’s theory of progressive historical development within cultures is derived principally from his theory of the development of languages, then there appear to be close similarities with the theory of the growth of civilisation encountered in Pufendorf and Thomasius.¹³

Vico also shared their belief that all social phenomena are simultaneously products of human will (*auctoritas*) and reflections of patterns of human thought that run as constants throughout human history: human social and political imposition upon the world has an internal consistent logic to it just as language has a comprehensive logical structure behind the apparently arbitrary application of individual linguistic conventions. To establish the scientific status (*constantia*) of empirical social fact (philology), its congruence with the principles that governed the operation of the human mind, became Vico’s avowed task in *The New Science*:

philosophy undertakes to examine philology (that is, the doctrine of everything that depends on the human will; for example, all histories of the languages,

¹¹ *Ibid.*, §144.

¹² *Ibid.*

¹³ On this issue see chapters 3 and 4. Of course, this parallel does not diminish the distance between Vico and the mainstream natural law writers on other issues, notably Vico’s criticism of their assumption that it was possible to analyse the content of the human mind in the state of nature as if it were fully formed and civilised (see P. Burke, *Vico* (Oxford, 1985), pp. 34–5).

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customs and deeds of peoples in war and peace), of which, because of the deplorable obscurity of causes and almost infinite variety of effects, philosophy has had almost a horror of treating; and reduces it to the form of a science by discovering in it that design of an ideal eternal history traversed in time by the histories of all nations; so that on account of this, its second principal aspect, our Science may be considered a philosophy of authority.¹⁴

It was for his work in reconciling reason and authority that Vico admired Grotius so highly. The latter's achievement in natural law was of this order, because he had produced a persistent structural feature of human existence – sociability – as his principle, and then demonstrated its presence in positive law over the centuries: his natural law must be *verum et certum* because clearly *factum*. This represented the combination of 'philosophy' with 'philology' that Vico was seeking in his own writing, and was marred only by Grotius' refusal to admit a role in historical causation for divine providence, and his insistence that human reason was fully formed at the earliest stages of human experience.¹⁵ From the evidence that survives in the *The New Science* as published, it thus appears that what impressed Vico in Grotius' natural law theory was its combination of inductive and deductive thinking: a 'universal system' was presented derived from rationally valid principles (in this case the principle of sociability) supported by empirical historical evidence drawn from many nations of long-standing historical pedigree. Although it grew to encompass a variety of intellectual aims, initially *The New Science* originated as an attempt to complete the theory of Grotius by making human cultural development more obviously dependent upon divine providence and specifying the historical stages (the three ages) through which natural law had passed.¹⁶

¹⁴ Vico, *The New Science*, p. 6, §7.

¹⁵ Vico appears to use the term 'philology' as a broad label for all empirical evidence, rather than in a narrow linguistic sense: 'Philology is the study of speech and it treats of words and their history, then shows their origin and progress, and so determines the ages of languages, thus revealing their properties, changes, and conventions. But since the ideas of things are represented by words, philology must first treat the history of things, whence it appears that philologists study human governments, customs, laws, institutions, intellectual disciplines, and the mechanical arts.' G. Vico, *Diritto Universale*, in *Opere*, ed. B. Croce and F. Nicolini, vol. II (Bari, 1936), p. 308 (trans. D. R. Kelley in 'Vico's road: from philology to jurisprudence and back', in G. Tagliacozzo and D. P. Verene (eds.), *G. B. Vico's Science of Humanity* (Baltimore and London, 1976), p. 19).

¹⁶ The natural law tradition was an important, if often unnoticed, influence upon Vico's intellectual development. He had first read Grotius' *De Jure Belli* in 1716 when preparing his life of Antonio Carafa, and the impact had been sufficient to cause him to add Grotius to Plato, Tacitus and Bacon as one of his 'Four Authors' (see G. Vico, *Autobiography*, trans. T. Bergin and M. Fisch (Cornell, 1944), p. 155). He is known to have written a series of annotations upon the edition of the *De Jure Belli* published by Gronovius in 1719, but unfortunately the manuscript has not

The example of Vico's work, developed quite independently of the writers who constitute the main focus of this study, demonstrates two separate truths. First, it shows that language and its origins were to be a key *principium cognoscendi* for the eighteenth-century analysis of how human rational growth and cultural complexity emerged historically.¹⁷ And secondly, it was now apparent that once philosophers began to seek explanations for the patterns of human cultural development which were no longer exclusively reliant upon divine providence, then arguments and evidence from history would inevitably bulk large as a necessary part of those explanations. If social phenomena were now to be considered as man made to a greater extent than before, then the study of the record of that human creation, including literary and intellectual history, became increasingly important not simply as evidence but a part of the explanation of the history of civilisation itself. The incorporation of these historical arguments into German natural law theory became fraught and controversial, however, because the synthesis effected in the sixteenth century between Protestantism and Aristotelian natural law was too delicate and complex to withstand further reconstitution within the existing framework. And yet despite the controversy and continued opposition from the orthodox the importance of history could not be denied or excluded: if ethics itself was to be seen as – in whatever degree – partly a human science, it became essential for the historiography of that subject to be developed as well. It was evident above all to Thomasius, in his role as a reformer of syllabi at Protestant universities, that a new, more sophisticated genre of intellectual history to complement the newly defined study of the

survived. It is also unfortunate that Vico destroyed the first version of *The New Science* which was ready for publication in 1724 under the title 'The New Science in Negative Form'. This version revealed Vico's sources and antagonists more clearly than the later versions and, indeed, its first section was given over to an appraisal of the accounts offered of the origins of civilisation in Grotius, Pufendorf and Selden. For the details of what is known of these lost works see D. Faucci, 'Vico and Grotius: juriconsults of mankind', in G. Tagliacozzo and H. V. White (eds.), *Giambattista Vico: an International Symposium* (Baltimore, 1969), pp. 63 and 68.

¹⁷ Passages from *The New Science* concerning the origins of language compare interestingly with the accounts provided by Pufendorf and Thomasius which are analysed later in this volume:

In children memory is most vigorous and imagination is therefore excessively vivid, for imagination is nothing but extended or compounded memory. This axiom is the explanation of the vividness of the poetic images the world had to form in its first childhood. (*Ibid.*, §§211–12)

Last of all the authors of the languages formed the verbs, as we observe children expressing nouns and particles but leaving the verbs to be understood . . . Our assertion may be supported by a medical observation. There is a good man living among us who after a severe apopleptic stroke, utters nouns but has completely forgotten verbs. (*Ibid.*, §453)