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Natural Law and Religion in the Thought of Samuel Pufendorf (1632-1694)

Gerhart von Kap-herr

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Last but not least, this thesis is dedicated to a very special lady, Geraldine, my wife and unwavering supporter over decades, believing in my work and the substance of this thesis she probably will never read.

ABSTRACT

of

Natural Law and Religion in the Thought of Samuel Pufendorf (1632-1694) by Gerhart von Kap-herr.

The emergence of natural law in seventeenth-century Europe was a response to decades of continuous "Warre" inspired by religious differences. The natural jurists of the seventeenth century (Grotius, Hobbes, and Pufendorf) all sought a remedy for the condition of war in independent sovereign states. Pufendorf's concept of a state derived from an assumed natural state of mankind, regulated by a law of nature, a law which obliges all men to be sociable, and agree upon the means of achieving sociability, namely contractual submission to sovereign power.

Pufendorf developed his major work, De Jure Naturae et Gentium, as a synthesis of Grotian and Hobbesian thought, making sociability the foundation of his natural law system. This earned him the criticism, that he had effected a heretical separation of natural law from theology. Pufendorf responded to this accusation with a work on church-state relations and in De habitu religionis christianae ad vitam civilem, he reinforced his view concerning the role of the church as a necessary institution for the moral education of

the citizen, but under the jurisdiction and protection of the civil authority.

Late in his life, Pufendorf admitted that natural law could only provide the mere necessities of sociability, but that for the fulfillment of mankind the observation of religious dictates of a moral theology was necessary. And to know these, in addition to common sense, faith in theology, as revealed in Holy Scriptures is needed. His last work, Jus Feciale Divinum sive de Consensu et Dissensu Protestantium, was concerned with the fundamental articles of faith necessary for Salvation, and the common ground for a Christian morality, as a possible means of uniting all religious denominations.

His legitimate notion of individual state sovereignty, so necessary for his time in defence against the imperialist forces of secular as well as ecclesiastical domination, has now become the very obstacle to the necessary reunification of nations under the dictate of pressing global concerns. However, his theological jurisprudence, inspired by Christian belief, can contribute to the unification of all religious denominations into a single source of humanism. To this end, Pufendorf had made a valiant contribution, hitherto unrecognized, which this thesis attempts to correct.

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INTRODUCTION

Samuel Freiherr von Pufendorf (1632-1694), a seventeenth-century German Protestant man of letters, tutor, professor of natural and international law, royal historiographer, secretary of state under Sweden's King Charles XI, and theologian, is remembered only by an exclusive club of political theorists. scholars of natural law, and historians of the "European Mind" of the early modern period. The memory of Samuel Pufendorf is overshadowed by the great German thinkers, Leibniz and Kant, and the very original writings of Hugo Grotius and Thomas Hobbes, which form the basis to Pufendorf's synthesis of a natural law doctrine. However, the thought of Samuel Pufendorf attracted a post-war revival of interest for the influence it had on the political development of the late seventeenth and early eighteenth century in Europe and the New World.

One should assume that the person, his work, and his influence, is common knowledge by now, and we ought to have arrived at a consensus in the assessment of Samuel Pufendorf. We found Pufendorf on the agenda of conferences, such as in "The Political Thought of the Scottish

Enlightenment in its European Context,"[1] and in "Unsocial Sociability: Modern Natural Law and the eighteenth-century Discourse of Politics, History and Society."[2] He was the centre of attention at the anniversary of his 350th birthday in Ett rättshistoriskt symposium i Lund, January 15-16, 1982 at the University of Lund, a principal place of Pufendorf's activity, where he was honored as its first professor and its most famous member of the faculty of law.

There have been some major works dedicated to Samuel Pufendorf since the war. Early in the 1960's, Leonard Krieger, professor at the University of Chicago, wrote on Pufendorf and the acceptance of natural law, speaking of "his influence that was immense and an ultimate impact that was minimal," for being the type of the mediator, who "pounded, bent, and snipped the radical doctrine of the new natural law [by Grotius and Hobbes]... until they became acceptable and respectable."[3] But Krieger, by his own design, omitted the religious aspect of the Pufendorf thought, as being beyond the scope of his work, and lumped Pufendorf's theology into a

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[1] A symposium convened by the Conference for the Study of Political Thought and hosted by the Institute for Advanced Studies in the Humanities, University of Edinburgh, August 25-28, 1986.

[2] An international workshop at the Max Plank Institute for History, Göttingen June 26-30, 1989.

[3] Leonard Krieger, The Politics of Discretion, Pufendorf and the Acceptance of Natural Law, Chicago, The University of Chicago Press, 1965, p.3.

"rationale of Lutheran doctrine through biblical exegesis."[4]

In Germany, the major post-war work on the development of Pufendorf's thought is the doctoral thesis by Horst Denzer, at the philosophy department of the Ludwig-Maximilian University of Munich, published in July 1972.[5] Horst Denzer, who, modestly, claimed the aim of his dissertation is to rescue Pufendorf from a widespread unfamiliarity, has dedicated a large part of his work to the Pufendorf thought development in German universities, and in the process gave too much attention to the Aristotelian influence at that time and erroneously emphasized it in the natural law corpus of Pufendorf's work.

In current studies, Fiammetta Palladini, University of Rome, concluded that Pufendorf's law of socialitas, which in its utility has an Epicurean and Gassendian origin, is largely Hobbesian: "It is so because of its field of application, in its deductive foundation, in the foundation

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[4] Ibid., pp.12 & 247.

[5] Horst Denzer, Moralphilosophie und Naturrecht bei Samuel Pufendorf, Eine geistes- und wissenschaftsgeschichtliche Untersuchung zur Geburt des Naturrechts aus der Praktischen Philosophie, Munich, C. H. Beck Verlag, 1972.

of obligation to obey it and, ultimately, in its very formulation."[6]

The influence of Pufendorf has been explored in several studies at American universities, such as the influence of European thought on the founding fathers of the United States;[7] or the influence of Pufendorf on Peter the Great of Russia.[8] But all these studies concentrate on the political aspect of Pufendorf's natural law doctrine, and ignore his later period when he was concerned about misinterpretations of his natural jurisprudence. He reacted bitterly to accusations of heresy. He was worried by the prospect of a humanity drifting towards atheism. These concerns prompted him to work towards religious unification and defence of his sincere Lutheran Protestant faith. The latest research

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[6] Fiammetta Palladini, "Is the '_socialitas_' of Pufendorf really anti-Hobbesian?" A paper delivered at the international workshop _Unsocial Sociability: Modern Natural Law and the 18th-Century Discourse of Politics, History and Society_, Göttingen, Max-Planck-Institute für Geschichte, June 26-30, 1989. Palladini's findings is based on extensive research of Pufendorf's correspondence and primary source material at the Duke August Library in Wolfenbüttel. Beside numerous papers her Pufendorf research was first published in the book _Discussioni seicentesche su S. Pufendorf_, Bologna, 1978.

[7] Daniel George Lang, _The Law of Nations and the Balance of Power: The Influence of European Thought on the Founding Fathers (United States)_, 316 pages, Ph.D. Thesis, University of Virginia, 1983.

[8] Rev. Georges Louis Bissonnette, A. A., _Pufendorf and the Church Reforms of Peter the Great_, 337 pages, Ph.D. in Religion, Columbia University, 1962.

reaching us from a scholar close to original source material at the University of Leipzig, Detlef Döring, brings to light some of the misconceptions perpetuated about the Orthodoxy of the University of Leipzig, and the notion that Pufendorf had put theology out of his mind during the times he was engaged in writing his major natural law works.[9]

What is then the purpose of this dissertation? Is it worth travelling over furrowed ground, to re-examine the thought process of Samuel Pufendorf? It is agreed, that he did not have the greatness of a Leibniz or a Kant, but his presence was very relevant to his epoch. In his timely response to a troubled time in Northern Europe, as expressed by an American scholar, Pufendorf "ransacked the novel intellectual movements of his day - the Rationalism of Descartes, the projection of a 'State of Nature' by Hobbes, the redevelopment of a 'Natural Law' by Grotius - in search of a device to free Western intellectual processes from the confining scholastic garment in general and to provide the blueprint to lead an enlightened and diversified Europe into

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[9] Detlef Döring, "Pufendorf's Theology and his Views on the Issue of Uniting the Denominations", a paper presented to the international workshop, Unsocial Sociability, Göttingen, June 26-30, 1989. And "Samuel Pufendorfs Stellung zur Reunion der Konfessionen in der Kritik von G. W. Leibniz", a paper presented at the V. International Leibniz Congress, Leibniz, Tradition und Aktualität, Hannover, November 14-19, 1988. Both papers are based on research of Pufendorf and the Theology of his time, to be published in the near future.

an uncertain future..."[10] In order to establish a separate science for the politics of the new world society that emerged as a result of the Peace of Westphalia (1648), Pufendorf separated the foundation for the legality of independent states from its ecclesiastical moorings, substituting the religious source of Scriptures, the God-given nature of things, and the natural law revealed to the human faculties of rational observation and a will to obey a secular sovereign. What Pufendorf did in his time, using the resources available to him, accepting and synthesizing the great ideas and new scientific method, but also the prodding of friends and enemies, was to respond with a forceful and dynamic architecture of a universal legal and moral jurisprudence that should hold sway over the will of all mankind. His separation of natural law from religion, and his transferring the principle of absolute sovereignty to the autonomous states, has enshrined the principle of the superiority of the state being accountable to no other authority, which today is a major obstacle to world peace and the protection of basic human rights and the environment.

What Pufendorf did in his time was of great service to a Europe exhausted by civil strife and religious warfare. However, there are conflicting opinions as to his "solution"

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[10] Patrick Scarsfield Madigan, The Political Philosophy of Samuel Pufendorf, Ph.D. dissertation, Tulane University, 1972.

concerning the separation of jurisprudence from its traditional religious or metaphysical linkage and his placing it exclusively in the service of society, which provided a socialitas entirely based on utility for a society whose only purpose was self perpetuation. In my thesis I submit that this is not what Pufendorf really did. It is the commentators, the interpreters, and detractors, who ignored the treatment of natural religion within Pufendorf's natural law system.

It is the aim of this thesis to restore to Samuel Pufendorf his dual concern, the religious problematic of his time which was to Pufendorf as important as his jurisprudence, which aided in the reshaping of the map of Europe with his eloquent and influential writings on natural law.

Pufendorf's major writings on natural jurisprudence were completed in 1673, but he lived till 1694. While he was employed as royal historiographer by the king of Sweden, and afterwards by the elector of Brandenburg, he dedicated his personal life and efforts to the religious problems of his time. Discouraged by the Swedish monarch, who used Pufendorf's doctrines to exert his autocratic authority over the Estates, and by the King Louis XIV, who used his secular power for ruthless religious persecution, Pufendorf claimed

that obedience according to natural law was not sufficient to produce an ideal society. He had to defend his Lutheran faith against mounting accusations of being a heretic, and he felt compelled to defend Protestantism. Too late in life, with insufficient energy, he re-emphasized the importance of religion and the divine message. He came to realize that a society based strictly on natural law will not be fulfilling, for it will be a society lacking the demands only revealed to us through faith. What had to be rescued are the religious moral elements, the dictates of our moral fibre to do more than what is right, to be charitable, to love our fellow human being, to hold precious God's creation, all for the love of God. Such faith, such love cannot be obtained through the natural human faculties of reason, but true to his Lutheran Evangelical upbringing, Pufendorf does not consider this possible without divine Revelation and the Grace of God. Thus he tried to reverse himself, to undo the fatal separation of the "Human Forum" from the "Divine Forum", its religious foundation and metaphysical anchorage in Scriptures. But Pufendorf, more concerned with the problems at hand than a visionary concept, turned his attention to the unification of Protestant Churches. He recognized the danger of moral degradation, of atheism on the one hand, and the reassertion of imperial tendencies in the Catholic Church with its Counter-Reformation, on the other hand. He sought the solution in the development of a

"Federal Theology" which would unite Protestant churches on the principles of basic common articles of faith.

Samuel Pufendorf forced himself with remaining energy to tell the world in his Jus feciale (1690-94), "for posterity may see that I had not only thoughts of worldly intrigues, of which I am sick and tired, because it is only vanitas vanitatum."[11]

Taking into consideration these important commentaries, with recent research on the documents and works of Pufendorf, we gain a picture of Pufendorf, including his natural law and religious thought, which may be summarized briefly, as follows:

First. Pufendorf remained steadfast in his separation of theology from philosophy. Theology had to free itself from the encasement of the Aristotelian-Scholasticism and solely base itself on Holy Scriptures.

Second. Such theology based solely on Scriptures had to model its structure according to the mathematical method, ad modum propositionum mathematicorum. For the

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[11] Pufendorf to Adam Rechenberg, December 6, 1690: "damit die nachwelt sehen möchte, daß ich nicht allein an die weltlichen intriguen gedacht, daran ich revera einen eckel bekommen, weil es doch ist vanitas vanitatum." (University Library Leipzig, Ms 0335, Bl. 261r).

realization of such theology Pufendorf proposed a reformed federal theology.

Third. In its content, Pufendorf tried to maintain a theological structure identical to Lutheran Orthodoxy, but with the Theologia moralis in the centre. He saw the importance of having Christian conduct in daily life, to achieve a betterment through piety which would make us true Christians.

Fourth. Although in the distant future, Pufendorf saw the possibility of reunification of Protestant churches, he categorically refuted any negotiations with the Catholic Church. Pufendorf saw the threat of the Catholic hierarchy which never would give up its power and its riches, emolumenia.

Unfortunately, with this conceptualization, Pufendorf fell far short of any universality. The seventeenth century is a threshold, when the European climate of opinion not only broke with tradition, but also developed new concepts of authority and freedom from religious domination. The secularization of jurisprudence which Pufendorf aided with his natural law system, needed a parallel emancipation of religious and moral concepts. For this, religious toleration was needed. Pufendorf had not had

the vision, for his fundamental theology, as developed in the Jus feciale, lacked the philosophical dimension, and as Leibniz said, he is a vir minime philosophus.[12] But in this writer's view, Pufendorf had a far greater impact on the development of the world map and the political structures we have to deal with today. At the end of the most eventful, most creative as well as most destructive, century in human history, we are at a new threshold, and at the dawn of a new century which will lead humanity into a new era, when wars will be eliminated as a viable option to negotiation, when the sovereignty principle will be diminished, and when a bridging of religious forces mired in opposing traditions will be achieved through a natural religion, a course of events which Pufendorf had only indicated.

Samuel Pufendorf is accused of secular utility for his basing natural law on sociability. Pufendorf's socialitas, detached from metaphysics, is a rational recognition of our indigence and weakness in our merely natural condition. Sociability, detached from any metaphysical link, for Sigmund Freud is in principle the human equivalent to the animal herding instinct, such as he described it in the primeval man's first congregation, the human horde; which is lead by the power of the strongest or

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[12] Leibniz to H. E. Kestner, August 21, 1709.

the wisest, and based on the fear of the subjects.[13] With the budding reason in the primitive man, a desire is developed to voluntarily subject himself to a pecking order. What fear demanded with an instinct became now a rational commitment, thus sociability remains purely utilitarian, evolved from the natural instinct. Without any external imposed value, sociability has its end in the social behaviour of social beings purely for the preservation of the self and the perpetuation of the species, with the essence of life to be preserved without any other purpose than life itself.

The critique of Pufendorf induced me to proceed with my own interpretation which was formed more specifically in the course of my studies on natural law, and in it, the meaning of man's dual nature, i.e. the duality of the physical and the moral, a nature which is limited (in the physical aspect) but also creative (by the specific human

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[13] Sigmund Freud, Civilization and its Discontents (1930); reprinted in the Pelican Freud Library, Vol 12, Penguin Books, ed. Albert Dickson, 1985, p.261;
Freud in his Future of an Illusion, describes religion in man in psychological terms "...the system of doctrines and promises which on the one hand explains to him the riddles of this world with enviable completeness, and, on the other, assures him that a careful Providence will watch over his life and will compensate him in a future existence for any frustration he suffers here. The common man cannot imagine this Providence otherwise than in the figure of an enormously exalted father." The father figure which ruled, "to begin with, in a small human horde... with superior muscular strength."("Why War?" p.350).

faculties). According to Pufendorf, the imbecillitas of human nature, has weakness as the starting condition; but with the unfolding of human faculties, and man's quest for perfection, not just by fulfilling his nature's aim (his physical life), not just by his creative nature (cultural being), but by an essence of his fulfilling God's purpose.

In this author's view, God created mankind with a free spirit and a mind, to have a special communication, a bond in grace, to become the perfect mate in God's playground, the universe, for which man is created in God's image. For this purpose, man is placed on this earth, who for generations is in a process to improve himself, to go through stages, with changing obligation for changing levels of advancement, with changing virtues and duties becoming more and more refined. This path, as history shows, is not a linear development from the primitive to the cultured, from the ad hoc to the contractual society, from the savage to the civil, from the self centered to the altruistic, from the wicked fallen man to the redeemed loving person. It cannot be encompassed by the traditional Western system of thinking, linear, logical and rational, but it has had to absorb some of the Eastern System of Thought, intuitive, open, capable of holding contradictory concepts without confusion. Recalling Kant, there has to be room left for Insights.

Concerning the need for Insights, we have to consider another question raised by Martin Schmidt, which concerns the liberation from the mainly Christian-humanistic tradition.[14] Was the legitimation of secular Protestant states the central motive of Pufendorf which would lead to an independence of the humanistic portion of natural law? Did the Christian (i.e. the Scriptural) parts disappear without causing any problem? Does the central question, viz. the dual character of natural law, the one based on the perfect man in a perfect world, contain the other relative, which applies to the fallen man in an imperfect world? We know, and will reiterate, Pufendorf's stand on the state of man in his sinful fallen nature, as well as Christian Thomasius's doubts in his rationality, both under the influence of the German Pietism, ultimately have held steadfast to the need for God's grace to overcome mankind's wickedness, and to fulfill his potential.

From what we could observe, modern natural law developed by Grotius, significantly influenced by Thomas Hobbes, formulated in an acceptable system by Pufendorf, all

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[14] Martin Schmidt (Heidelberg): "The Theological Background of the Natural Law Problem," (Der theologische Hintergrund des Naturrechtsproblems), first lecture at the German conference commemorating the 300th anniversary of the Edict of Potsdam, Berlin, 1985. In the Edict of Potsdam, which followed within three weeks the very crucial repeal of the Edict of Nantes in 1685, the Great Elector Frederick Wilhelm of Brandenburg opened the gates of Berlin to the Huguenot refugees from France.

are rooted and still limited by the theological traditions of their time. The alleged advancement from a Christian dogmatic tradition towards a natural religion, which was considered to be equal to heresy, which did divide the modern tradition of natural law into a Christian natural law trend with various branches, and a secular, or "profane" natural law. By the very character of their proponents, either clinging to the fundamentals of the fallen man, or eliminating altogether any transcendental link to a creation myth, both notions lack the foundation of an universal natural law which would be applicable to humanity as a whole: to all cultures, to Christians, Non-Christians, and irreligious people.

The seventeenth century in Europe is indeed a period with a special interest, as it is to be considered a threshold when the old order became replaced with modern concepts.

The "New World Order" that emerged in 1648 from thirty years of religious warfare not only ended once and for all religion as a cause for war in Europe, but also created the principle of absolute sovereignty for independent states free from religious and imperial domination. Samuel Pufendorf, reacting to religious warfare and the "Monstrosity of

the Holy Roman Empire of German Nation,"[15] shifted his attention from divine (revealed) to natural (rational) law for the foundation and legitimization of the sovereignty of states. He is the founder of a modern natural law system which would become eventually the constitutional basis for emerging nations seeking independence, and in need of their own formal constitution freeing them from imperial and colonial domination. In the shift from the divine to the natural, Pufendorf, although remaining in the tradition of absolutism, reintroduced with his reflection on the nature of man the end-purpose of the state as being the welfare and happiness of its subjects. Pufendorf's natural law system, subsequently incorporated in many law books, includes certain conditions for the sovereign authority in the description of the purpose of the state, which may be achieved by restricting the governing powers, having based the constitution on the principle of the Pflichtenethik, the ethics of commitment to performing one's duty, including the duty of the monarch.

Unfortunately, as a result of the secular interpretation of Pufendorf's natural law system, which largely ignored his theological foundation, his work became extensively used in the formation and legitimization of

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[15] Samuel Pufendorf composed in 1664 a critique of the constitution of the German Empire, and had it published under the pseudonym of Severinus de Monzambano, De statu Imperii Germanici ad Laelium fratrem dominum Trezolani, liber unus (Geneva: Columnesius) 1667.

individual states. It did not provide a perspective of more comprehensive philosophical significance, which could deal with present-day global concerns. Pufendorf's influence, immense in his time, is now undergoing re-examination. His concept of sovereignty still poses a formidable barrier to international efforts to deal with growing present-day problems affecting the environment, endangered by the action of certain states to the peril of all. It also constitutes a shield for traditional state authorities who violate human rights without being challenged from the outside, even though these states often ignore standards internationally recognized as the minimum for the preservation of the dignity of mankind. As such the influence of Samuel Pufendorf has a new meaning in the context of the problematic facing mankind in the next century, but only if we take his total work into account, including the ecclesiastical and theological problematic.

It is my intent in this thesis to present, in English, a body of work on Pufendorf's thought which is either not available in this language or only to a limited degree. Pufendorf is known largely through his natural jurisprudence, and not for his consistent effort towards a moral theology. It is the aim of this thesis to challenge the widely accepted notion of Pufendorf as the great secularizer, and to bring to the attention of the English

reader the very theological foundation on which the system of natural law - the law of sociability - rests.

CHAPTER I.

Historical Background.

In order to have a better understanding of the basic thought of the seventeenth-century natural law advocates, who brought forward their ideas in a period of theological struggle, and in response to the devastation and divisions which these religious wars caused, an outline of the historical background to these ideas will give us the necessary introduction to Samuel Pufendorf's thoughts concerning natural law and religion.

The early Christians rejected the idea of secular felicity: the secular condition was an irrelevant institution for the salvation of man in the eternal after-life. But with the growing popularity of Christianity, and the conversion of the secular princes to the Christian faith, Christianity became closely linked to the secular power. Constantine I, "the Great" (c.280-377), was the first Christian Roman emperor (306-337), who established toleration of Christianity throughout the empire with his edict of Milan (313), and with

the Council of Nicaea (325) paved the way for the Catholic Church to become the official church of the Roman empire.[1]

The Byzantine emperor, Justinian I (483-565) became the head of the Church. But St. Augustine's concept of De civitate Dei, (413-426), became the basis of much political theory. His doctrinal authority was based on his dualism, in which the Civitas Terrena, the earthly city, became subordinated to the spiritual Civitas Dei, the heavenly city.

In the Middle Ages, the conflict between Emperor, Pope, and various kings, became a struggle for superiority in the Holy Roman Empire. St. Thomas Aquinas (1225-1274) defended the spiritual priority of the Church over the secular authority. Pope Boniface VIII (1294-1303) created a Theocracy with the two-sword theory, the secular in the service of the divine, and with his Papal bull, Unam Sanctam (1302) formulated the most demanding assertion of Papal authority over secular rulers.

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[1] A legend developed according to which Constantine I, for the healing from leprosy, gave Pope Sylvester I in addition to the pre-eminence of all the churches, with the donation of the Emperor's Roman palace, the Lateran, the sovereignty over Rome, Italy, and the Middle East provinces. But the De Donatione Constantini Magni, which surfaced as a legal document, the Decretum Gratiani, in the eight century became exposed as a falsification by the Italian humanists Laurentius Valla (1406-1457) and Nicholas Cues in the fifteenth century.

Marsilius (Marsiglio) of Padua (1275-1343) in his Defensor pacis (1324) championed the independence of the state against the secular power of the Pope. He based his argument on Scriptures and the writings of Aristotle; he claimed that the Church had no authority to coerce people in secular matters; because in their daily lives members of the clergy are subject to the power of the secular sovereign. In addition, Marsilius challenged the authority of the Pope within the church, and claimed equal authority for the bishops through apostolic succession.

Wilhelm of Occam (ca.1290-ca.1349), a Franciscan theologian, taught at Oxford. In his political work, De imperatorum et pontificum potestate, he opposed the concept of St. Thomas, claiming that the authority of the Pope does not extend to temporal matters, and in such secular matters the Pope stands under the authority of the Emperor. Occam had also an influence on Martin Luther.

In the Renaissance, with a rebirth of Antiquity, the "Polities" became a political system created by the citizen. The terminology of a state, lo stato, had not been in use prior to the Florentine constitution. The reference to the Greek Polities, and to the Roman Republic, is a distinctly new attribute to the sovereign power of a secular prince, who may exercise his power without being accountable

to a higher authority. The laws are made by the will of the sovereign; unlike laws seen as declaration of customs since immemorial times, such as the English common law; or by tradition as in Germanic feudalism. Henceforth, the laws of the land are made without derivation from any higher law, either from Scriptures or natural law, in an absolute monarchy simply by the commands of the king, in a constitutional monarchy by the commands jointly of king and parliament, or in a democracy by parliament alone, wherever the sovereign power resides.

Absolutism of sovereign power abolished that system of feudalism which was conducive to the perpetuation of a life of leisure for the privileged lords, while the majority lived in poverty. In turn, the Modern Age modified "absolutism", while subsequent forms of government gradually changed imperialism into sovereign statehood, and hereditary monarchy into people's government. However, this changeover was not accomplished without a struggle. First and foremost, it was an ecclesiastical struggle: for the Pope to relinquish his secular power, he had to give up his supremacy, which would not be possible without prolonged wars.

On the Reformation.

In the analysis of the sixteenth century, when

religious reorientation seemed to be the predominant factor in this "amazing diversity and depth of the changes sweeping Europe," religious issues have not received the in-depth treatment in present historical narration. As a result, and perhaps rightfully so, A. G. Dickens paints a Europe seething in savage fashion with political strife and social upheaval, a Europe in which the religious ideologies seemed to be only an excuse for the atrocities committed in this "age when Europe saw the end of a united Christendom."[2]

Since it is Protestant ideology which is of central interest to this thesis, I will insert here the discussion of the three types of Christianity which emerged, as identified by the German theologian Ernst Troeltsch (1865-1923):[3]

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[2] A. G. Dickens, Reformation and Society in Sixteenth Century Europe, London, Thames and Hudson, 1966, p.9.

[3] Ibid., pp.141-143. Ernst Troeltsch, Renaissance und Reformation, in Gesammelte Schriften, in four volumes, Tübingen, 1912-1925. Troeltsch was a professor of systematic theology in Bonn (1892) and Heidelberg (1894), and professor of philosophy in Berlin (1914). As a Lutheran theologian he claimed that Luther and the early Reformation was deeply rooted in the Middle Ages. He was in opposition to the supernatural character of the Church and sought to develop an inner Christian belief without dogmatism in a socio-historical context. He sought to expand the field of theology into a philosophy of theology including religious a priori experiences in his work, Psychologie und Erkenntnistheorie in der Religionswissenschaft, (1905), and historism with the importance of the historical Jesus in the work, Die Bedeutung der Geschichtlichkeit Jesu für den Glauben, (1911). His work, Die Soziallehren der christlichen Kirchen, (1912), was developed in close co-operation with Max Weber.

1. The Church-type:

Whether Protestant or Catholic, the churches work through the clergy, the Scriptures, and the sacraments. To provide spiritual guidance to the population, for its daily life functions and survival, the church was often forced into a considerable degree of compromise with the sovereign state, and even employed sanctions or warfare, tyranny and abuse of private property. Furthermore, a Catholic bishop was often also the prince and secular ruler of a domain, who ruled with a harshness customary at that time (e.g. the Archbishop of Salzburg). In ecclesiastical Protestantism, the leading sect sought to become the official and dominant church in the territory, one sanctioned by the sovereign. The church, a hierarchical, administrative, and structural corporation, provided a service to the people, but also was aiming at self-sustaining power and growth.

2. The Sect-type:

This type stresses Christ's role as law giver, and tries precisely to follow his recorded commands by forming voluntary groups of saints, withdrawn from the rest of society, claiming absolute autonomy with rigorous standards, excluding other people, who remain incapable of such

standards. They are occasionally eccentric and sometimes use violence against the "ungodly" in order to hasten the arrival of the heavenly Kingdom of Christ (e.g. Anabaptists).

3. The Spiritual or Mystical Tradition:

This type recognizes Christ by inward experience; in its subjectivity it feels little interest in ecclesiastical organization or in ceremonies. It is a stance adopted later by some enlightened Christians, like Jean Barbeyrac, the Pufendorf translator, who combined personal piety with tolerance in ecclesiastical matters, in contrast to the rigid Protestant orthodoxy of the seventeenth century.

The difficulty with these categories is, by Troeltsch's own admission, that "among themselves they are strongly and variously interwoven and interconnected."[4] The Reformation started out as a spiritual movement to reform and purify the Church and to correct widespread abuses. But it quickly became a movement for social justice from below, and a political movement from above by the German Princes to gain independence from Papal interference. In between there were the knights, merchants, and other interest groups, all

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[4] Ibid., p.143.

challenging the old order for the advancement of self-interest.

Here we may raise the question: why did the Roman Catholic church survive all kinds of schisms for so long, but then proved unable to contain the Reformation, causing permanent schism in Germany, Switzerland and Scandinavia (England being a different case), retaining Catholicism only in the Austrian Habsburg Empire, in Spain, and France?

It appears, the difference lay in the sufficient fragmentation of Germany and the Swiss Confederation into small Cantons or city-states, which had a tradition of resistance to the imperial forces, whether Habsburg or French. Protestantism, with a political domino effect, gained strength, allowing German Princes to secede from Papal authority, as well as from the Emperor of the Holy Roman Empire of the German Nation.

Luther's initial work of purification turned into Reformation with schism. Once unity had been lost, there occurred no large-scale reversion to Catholicism; and the temporary settlement of conflicts between Catholics and Protestants allowed each state to determine whether Catholicism or Lutheranism should prevail within its

territory. The Peace of Augsburg (1555) became famous for its formula: cujus regio, ejus religio.

Martin Luther (1483-1546) as an Augustinian friar was trained in the Occamist Via Moderna. To the Occamist, God became intelligible not through man's favorite weapon of reason, but through acts of self-revelation; however, salvation depended solely upon acceptance by God, who in his omnipotence would accept even a sinner devoid of merits and good works.[5] Luther departed from Occamism in his rigorous denial of free will and the efficacy of good works.[6]

He found ample examples of the vanity of mere human attempts to please God, which he rejected. Preoccupied with God's almighty initiative and man's powerlessness, claiming absolute passivity of the human will in its reception of the divine Spirit, Luther was not impressed by the mental techniques through which the mystics sought to ascend the ladder of perfection to the higher state.

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[5] Ibid., p.52. In Luther's Sermon on Good Works dedicated to Duke John of Saxony in 1520.

[6] Ibid., p.54. In his Autobiographical Fragment of 1545, Luther explains how in reading St. Augustine's On the Spirit and the Letter he attained the concept of justification by faith alone, the doctrine of justification through the unearned imputation of Christ's merits to the sinner.

Luther's theology had no pantheistic overtones and was altogether Christocentric... The abstract, impersonal, unintellectual optimism of the devotio he replaced by a theologia crucis, involving a profound anguish both for Christ and for each man chosen to follow Him along the way of the Cross.[7] Justification for Luther did not consist of the gradual cleansing of the believer by divine grace, but in an instantaneous act, whereby the believer appropriates the righteousness earned by Christ. It helped Luther to close the terrifying gap between the unutterable majesty of God and the miserable inadequacy, the self-centeredness, the "incurring" of man.

Luther was no fundamentalist, he did not discourage good works; though works availed not a jot towards salvation, works must be done out of love for God and to subdue the flesh. With that he also took away certainty, the comfort of having paid one's dues.

Luther found for this support in the Gospel with the failure of Israel to attain justification - a right relationship with God - with a pharisaic observance-religion, by its own works and human righteousness in general. On the contrary, for Luther, man is justified and saved only by God's grace: "For by grace are ye saved by faith; and that

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[7] Ibid., p.55.

not of your-selves; it is the gift of God: not of works..." By faith he understood no mere intellectual assent... but rather fiducia, the sinner's mental attitude of childlike trust as he reaches for the saving hand of the Redeemer.

In 1525, Luther directed his Bondage of the Will against Erasmus in particular and humanist Christianity in general. His concepts were certainly anti-Aristotelian and anti-humanist, which brought him in conflict with Erasmus, who believed in the basic dignity and goodness of man, and in man's ability by the exercise of free will to contribute towards his own salvation.[8]

Luther's revolt was against the gross abuse of religious rites and priestcraft. He shattered the prevalent, complacent, man-made morality, exploited by the clergy of the Roman Catholic Church, which awards a person credit points in

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[8] Erasmus, Desiderius (Gerhard Gerhards), (1465-1536), Augustinian friar, great humanist, fought against Church abuses, against formalization of religion, and dogmatic compulsion. His ideal was an essential Christian religion with emphasis on ethical-moral conduct. At the beginning he was for the Reformation, but distanced himself from it, when he saw Luther's unbridgeable opposition to the Church. He fought with Hutten (1523), and soon thereafter he had his final difference with Luther on the argument about the free will (1524-26).

heaven for every good deed done, every coin in the box, every Mass attended.[9]

In sixteenth-century Europe there was an obsession with a host of irrational forces, a preoccupation with diabolic agencies, witchcraft, and the Apocalypse. Disease, insecurity, and the shortness of life, not only urged men to thoughts of salvation, but made them listen eagerly to apocalyptic teachings and yearned for changes which would usher in an age of gold.

Luther's cause was aided by two particular developments:

The establishment of a large number of universities reflecting a yearning for learning, and the rapid rise of book production, reflecting a rise in literacy and desire to express and disseminate opinions and newly won knowledge.

Protestant theology, returning to the roots of Christianity, "started from a highly dramatic concept of original sin."[10] The Catholic position started with the

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[9] Ibid., pp.56-57.

[10] Jean Delumeau, Catholicism between Luther and Voltaire: a new view of the Counter-Reformation; transl. by Jeremy Moiser of the French original, Le Catholicism Entre Luther et Voltaire; London, Burns & Oates, Westminster Press, Philadelphia, 1977; p.9.

gift of God. When God created man, he gave him certain pre-natural gifts, including a share in the intimate life of the Trinity. But due to the original sin of Adam, man was suffering with ignorance and physical death, and became subjected to the power of the devil. However, as a baptized Christian man became co-heir again.

The Catholic optimism affirmed against Luther that in Adam the free will was not destroyed but merely diminished and inclined to evil. As a consequence, not all actions of the unbaptized are necessarily sinful, which was the Lutheran and Calvinist thesis.

Luther said in 1518, the "free will after the Fall is nothing but a word," and despite baptism, the Christian remains basically a sinner. The Lutheran pessimism is expressed in the one sentence, "even doing what in him lies, man sins mortally."[11]

By the decade of 1550, a serious internal schism developed between the strict Lutherans and the followers of Melanchton (1497-1560), called Philippists. The latter assigned to the human will a certain role of cooperation with the Holy Spirit in the act of conversion.

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[11] Ibid., p.10.

In addition to doubt concerning the free will, there is the question of redemption, or justification as in the Catholic faith, "the grace of God by which an unjust person becomes just." This brings about the transition from a state of sin, born into or caused, to the state of grace and a spirit of sonship. This is not only a remission of sins, but also the sanctification and renewal of the inner man by the voluntary acceptance of the grace and gifts whereby the unjust man becomes just, the enemy a friend, an heir to eternal life.[12]

Delumeau identifies four basic premises in the Catholic justification:

First. Man is not manipulated by God, because God would then be responsible for evil as well as the good;

Second. God's precognition is no predestination;

Third. therefore, when there is no predestination there can be only acceptance or refusal of justification by God; because the commandments of God are not impossible to observe, not only faith but also good works are counted for salvation; and

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[12] Ibid., p.11 (Tit.3,7).

Fourth. faith being a necessary but not sufficient condition for justification, the faithful are not - contrary to Calvin's idea - beyond all danger of mortal fall, which, however, would not necessarily result in the loss of faith.[13]

Luther asserts that justification is merely "imputed", that is, purely extrinsic; even baptized, man remains a sinner, although God may choose to cloak the sinfulness with his justice. But there is also a place for a justice communicated by the sacraments which "inheres" and which makes up for our imperfections. Melanchton, with Luther's tacit approval, reinforced the latter's pessimism: "In no matter what creature, everything happens by necessity, it is therefore quite clear that God is responsible for everything that happens, evil as well as good. Just as much as Paul's vocation, David's adultery, Saul's cruelties and Judas' betrayal are all his work."[14]

The real power of the church over salvation rests with the position taken on the sacraments which are bestowed by the priests. Because of the position taken on justification by faith, the Catholic church was naturally led to insist on the power and effectiveness of the sacraments.

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[13] Ibid., p.12.

[14] Ibid., pp.13-14.

Grace comes to man effectively through the sacraments so long as man puts no obstacles in its way. The Catholic sacraments are not external rites like those of the Old Testament, but they are substantive, a real presence of the Holy Spirit, and the real transubstantiation of the body of Christ.

For Luther, the sacramental rites were merely a preaching of the word in action, a confirmation of salvation. The function of the sacraments were just to nourish the faith. Luther rejected "transubstantiation" in the eucharist, but he did affirm "consubstantiation", the fact that Christ is in the bread and wine, like fire in the red hot iron.

"Whereas Luther had preliminarily undertaken the task of restoring a Christocentric religion, Zwingli undertook a further phase of the Reformation: the systematic imposition of Christian discipline upon the community."[15] Zwingli, Ulrich [Huldreich], (1484-1531), reformer of German Switzerland, established the first theocracy in Zürich, which Calvin established later in Geneva, in which magistrates and pastors together with strong elements of cultivated bible students, hardened the Reformation into a State Church. While Zwingli had the secular power, Calvin, like Luther, had been compelled to reconcile his social idealism with his need

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[15] Dickens, p.118.

for the support of existing governments, which he then controlled; which was a more perfect alliance than Luther's reliance on "godly" German princes.

Zwingli is considered at the head of that tradition which led on to William the Silent, to Gustavus Adolphus, to Oliver Cromwell, but all three of these statesmen were to command greater forces and adopt more realistic approaches to military and material problems; Zwingli's fate was settled by military incompetence as well as by excessive faith in divine intervention at the battle of Kappel, 1531.[16]

Of the second generation Protestants succeeding Zwingli, Heinrich Bullinger (1504-75) had the intelligence never to repeat the Bible-and-Sword method, and had a most influential correspondence with Protestant rulers and leaders all over Europe. Bullinger united the forces of Zwinglianism and Calvinism into a Reformed religion.[17]

Jean Calvin, (Chauvin) (1509-64), a fugitive from France, attacked problems different from those which had confronted Luther twenty years earlier. Amongst these activist churchmen, Calvin was the greatest, whether judged by his intellectual achievement or by the impact of his

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[16] Ibid., p.122.

[17] Ibid., p.124.

system upon Europe. Calvin regarded Zwingli as a second-rate theologian, despite the debt of his Geneva to the Zürich model. He regarded Luther with an unswerving veneration, but thought to rescue Luther's doctrine from sectarian hands, the esprits phrénétiques.[18]

Calvin, like other humanists, accepted the need for historical and textual criticism. He saw the Bible as the sole reliable authority for our knowledge of God. He also believed in the Holy Spirit within the hearts of those who read the Bible. The authenticating Spirit and the Scriptures are thus two aspects of God's self-revealing process.

This, however, differs greatly from inward authentication as envisaged by the Gnostics.[19] Calvin's intellectual inspiration dissected and reconstituted passages

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[18] Ibid., pp.155-156.

[19] On Gnostics' tendencies consult Sebastian Franck (c.1499-1542) who, in his Chronicle of Turkey (1530), inserted passages declaring his allegiance to a spiritual, invisible, non-sectarian Church:

> There are already in our times three distinct Faiths, which have a large following, the Lutheran, Zwinglian and Anabaptist; and a fourth is well on the way to birth, which will dispense with external preaching, ceremonies, sacraments, ban and office as unnecessary, and which seeks solely to gather among all peoples an invisible, spiritual Church in the unity of the Spirit and of faith, to be governed wholly by the eternal, invisible Word of God, without external means, as the apostolic Church was governed before apostasy, which occurred after the death of the apostles.

of Scripture, and is guilty of going to the Bible to prove positions he had already selected.[20]

With his early training in law, linguistics and classical studies, Calvin developed a superlative gift for exact, lucid, unadorned yet elegant statement both in Latin and in French. Thus Calvinism became better equipped, more readily intelligible and more systematic than those of Lutheran persuasion.[21] Calvinism proved especially seductive to intelligent, industrious, order-loving townsmen and even to the fast multiplying class of landowners. Huguenots and Dutch patriots derived from the Geneva model the basis of their theories of resistance.

However, Calvin "...either swept the unresolved elements under the carpet of mystery or left them lying about the room to trouble us."[22] It is this part of Calvinism, when the Reformer's ideas are first being developed, to be subsequently authenticated with reference to Scriptures, or what does not fit is declared a mystery, which leads later to erroneous interpretation.[23]

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[20] Dickens, p.156.

[21] Ibid., p.165.

[22] Ibid., p.158.

[23] It is the same problem, which haunted Samuel Pufendorf, who developed his natural law theory with the force of his intellect, and provided substantiation with

The Reformation started with Luther as a spiritual Revivalism for a renewal of Christianity which fell into disrepute under Catholic dominance and Papal supremacy. The convenient alliance between the Reformers and the German princes, the little despots, against the absolute despots, Pope and Emperor, resulted in the power struggle that led to the Thirty Year's War and, finally permanent schism. The other alliance, the Swiss model of city States, supported the Reformed concept of a republic, the union of religious and secular communities, to establish law and order conducive to commerce and peaceful coexistence.

As it turned out, the Reformation brought as much religious persecution by the "stiff orthodoxies of Wittenberg and Geneva," as the more notorious Catholic Inquisition. Religious domination, employing secular forces through tradition and legitimation, made theological issues the central issue in politics. However, other forces, such as commercial developments, brought about a decline in religious preoccupation.

From about the middle of the sixteenth century, Europe saw a secularizing of intellectual interests, and this

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references often from secondary source and erroneous quotes. He also ignored the treacherous theological arguments, but based his natural law and natural religion on man in the wretched state after the "Fall", concurring with Lutheran as well as Reformed principles.

not only among the growing host of literate laymen but also among the educated clergy. The national, confessional and sectarian Churches started to loose that grip upon mentality and public opinion which had been attained by the medieval Church. Religious leaders found themselves in a world which had made itself far more independent of Christian controls. From this point we need to appraise intellectual and religious history in terms of public appeal rather than in terms of mortal combat or judicial compulsion.[24]

The roots to these controversies may be the human desire to know the truth, to have an explanation for the fears and ills of mankind, but with this probing there comes the challenge, the skepticism concerning the present order, the existing power, the guardians who insist on legitimate claims to be in the right. The theorists of the Roman Catholic Church resorted to the potestas legibus soluta to support the claims of the medieval Papacy They turned to the office of the law giver, which has the power to command and to prohibit. It all goes back to the Roman Law which became the law of the civilized world. And with it we have a perpetuation of the notion that all law must go back to an ultimate power which expresses and sanctions such laws. The holder of that power is the source of the law. He is therefore above the law - the legibus solutus.

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[24] Ibid., pp.195-197.

The doctrine of sovereignty was a formidable tool in the hands of lawyers and politicians, it was also an object of passionate controversy. It met with enthusiastic support and with unbending resistance. But sovereignty is a comparatively modern expression, and Jean Bodin claimed to be its inventor.[25]

Jean Bodin (1530-1596).

Bodin furnished the idea of a true state, the République, which is properly translated into commonwealth, but he meant what we call a state;[26] he defined it as the territory of a number of families governed by a sovereign power. The family is the economic unit of a household. A state exists only when these households are governed by a common sovereign power.

A household is headed by a citizen, pater familias, who is sovereign of his household. People not belonging to a household are vagrants, drifters, who are taken to work, or

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[25] A. P. d'Entrèves, Natural Law, An Introduction to Legal Philosophy, London, Hutchinson University Library, 1951; second (revised) edition, 1970, pp.66-67.

[26] Jean Bodin, Six livres de la Republique, Paris, 1583. In translation and abridged edition by M. J. Tooley.

are put into work houses and detained there. People are required to stay within their parish.

Bodin formulated his definition of the state in opposition to the Aristotelian concept of the democratic city-state, where politics involves the participation of all citizens. This, in the sixteenth century, with all the religious disputes and civil strife, could not work, and Bodin's definition of the sovereign power included the attributes in four parts: first, the most high; second, the absolute; third, perpetual; and fourth, the greatest to command (supreme commander).

In Bodin's view, there is nobody above the sovereign (neither emperor nor Pope) except God. The sovereign cannot be criticised, or absolved from responsibility to another; if he were, that other body would be sovereign.

Another important point is "perpetual," the continuation of the institution of the sovereign power: the perpetual succession. "The king is dead - long live the king," is not so much the concern of the king moving into heaven, as the notion that with the death of the king the realm keeps on going with the successor, the next king.

The fourth attribute of a sovereign - to command, includes such acts as: (i) to make laws imposed upon the state; (ii) to make judgments which declare what the laws are; (iii) to delegate some of the power to an assembly. The sovereign power may be vested, (a) in a single person, a monarch, (b) in a few, an oligarchy, or (c) in all, a democracy, or (d) in a mixed, constitutional monarchy; the king through parliament.

Bodin's description of a state is not what the French state of affairs looked like in his time - but how he saw it ought to be. He deplored the unstable condition in which the king was opposed by powerful Estates and privileged nobility, the Papal authority prevailed over the French clergy, and the king needed to defend his realm against the German Empire. Bodin observed during the religious wars (1562-1588), in all ten campaigns of roughly one year each starting in 1562 and ending in the loss of privileges by the Huguenots in 1629, how the French political condition had become impossible for a life in happiness and tranquility. He attributed this condition to two basic mistakes:

First. The view that politics was about the institution of religious belief, and that the church's theory of sovereign power was derived solely by divine grace.

Second. The current perpetuated theory of politics, expounded in the universities and endorsed by the church, the politics by Aristotle.

In Bodin's view, Aristotle's concept of political life which required meetings, assemblies (i.e. participatory government), was simply not applicable to modern France, where endless debates generated conflicts and war. The Aristotelian politics of ancient times of the Greek city states was no longer wise in modern Europe of the sixteenth century with its religious strife.

Jean Bodin was the most important of the Politiques, a growing body of moderate thinkers, who saw in the royal power the mainstay of peace and order and who therefore sought to raise the king, as a centre of national unity, above all religious sects and political parties, with the possibility of tolerating several religions within a single state. Thus, Bodin wished to reinforce the secular power of the sovereign, giving it a rational foundation through his definition of power. His legitimation was the best possible form of a peaceful state. Influenced by the devastation of France's civil wars, he eliminated all other solutions which might include a division of powers. The king's authority, as Bodin saw it, was based on political reality and on paternalism.

The primary attribute of sovereignty is the power to give laws to citizens collectively and severally, without the consent of a superior, an equal, or an inferior. Where there is no undivided sovereign power there is no well-ordered state. To Bodin the Aristotelian polis is a social union rather than a state, or république; the latter exists only where the citizens are subject to the rule of a common sovereign. A citizen is a sovereign in his own right as the head of the household, the pater familias, who in turn affords his sovereign the same paternal authority over the citizens. This presumes that all subjects are children and are in need of a father figure. This was later specifically challenged by John Locke, who claimed that the sovereign needs the consent of each adult male citizen, for most have the capacity of judgement in public life. Not so for Bodin, his concern was not with citizens, but with households, with estates, with the country, and with the order and safety of the state whose guarantor should be, the all-powerful, absolute, sovereign monarch.

It was left to Grotius, the founder of a modern theory of natural law, and to Hobbes, to establish natural rights of citizens as individuals. But natural law per se is merely a prescription, it lacks compelling force, and is strictly speaking, in a positive sense, not a law. Without law enforcement which law would receive from the power of a

sovereign there is no law. Natural law is designed by the supreme authority, God the Creator, who created this Universe with the physical law of nature and fitted man with special faculties to conduct himself in accordance with a natural law decreed by the supreme authority, the Creator of all beings.

However, natural law does not proceed from God as a law-giver, for it is not dependent on God's will, nor does God manifest Himself in it as a sovereign (superior), commanding or forbidding.[27] Pufendorf, as a Lutheran Protestant, adhered to the concept of God's will and omnipotence as the source of natural law. But God has given us a common sense to discover it for ourselves, and a free will to follow His dictates of natural law. However, human will having been corrupted by the first man's fall, law enforcement had become necessary, and mankind had agreed for the love of peace to subject itself to mortal rulers, who in turn had the duty to discover and enforce God's will on earth. Thus sovereignty made its way into natural law. The seventeenth-century natural law advocates, all under the influence of chaos, religious and civil, as well as international wars, which were started on the most whimsical pretenses, proposed natural law under the jurisdiction of absolute rulers.

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[27] D'Entréves, Natural Law, p.71.

Alberico Gentili (1552-1608), the Italian jurist, who had to escape for his Protestant belief to Oxford where he taught Roman law from 1587-1608, proclaimed that the "absolute Prince", de postate regia absoluta, is a prince who is above the positive law but under the natural law and the law of nations. Gentili is better known for his De legationibus libri tres (London 1585), and De jure belli libri tres (Leiden 1588-89), and is sometimes considered the founder of modern international law.[28]

It was Grotius who challenged the popular view that law is simply a command or a prohibition, rather than an order already existing in the psychology of man, which was - independently of any law - a constitution determining human relationship, with an innate energy, a social appetite.

Hugo Grotius, Huig de Groot(1583-1645).

By all accounts, it was Grotius who had the greatest impact on political theory of his time, and is rightfully called the founder of international law. Deriving international law from natural law, he contributed to its modern conceptualization to the extent that he is also viewed as the founder of modern natural law. Grotius, called "the

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[28] Der Große Brockhaus, Leipzig, Vol.7, 1930, p.170.

miracle of Holland" by the King of France, started early in life as a practicing lawyer and barrister, and defended in a cause célèbre the Dutch East India Company on the law of prize (1604) at the age of 21. His plea in "defence of the freedom of the sea," later published separately under the title Mare Liberum (1609), was to become Grotius' basic argument on just wars.[29] At the beginning of his career, Grotius found himself in the position to defend aggression and the law of prize, which he expanded into three books. He started out as an ardent advocate rather than an impartial judge, but over the course of time he made the transformation from the argumentative Commentarius to an interest in justice and peace. The commentary was originally composed in the defence of war and of just hostilities; but the treatise eventually became a reasoned protest against war.[30] Grotius complained that the Christian World had a lack of restraint in relation to war. When arms have once been taken

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[29] The Mare Liberum is part of the case documents, written in a booklet De Jure Praedae Commentarius. The Commentarius remained an unknown manuscript until its posthumous publication, edited with a preface by Professor Hamaker of the University of Leyden, Nijhoff, 1868. Grotius wrote in 1612 the historical events which led to the composing of the Commentaries, the Annales et Historiae de Rebus Belgicis ab Obitu Philippi Regis usque ad Inducias Anni 1609, first published 1657. The English translation under the title De Rebus Belgicis: or the Annales and History of the Low-Countrey-Warrs, London, 1665.

[30] James Brown Scott, Introduction to The Law of War and Peace, the English transl. of De Jure Belli ac Pacis Libri Tres by Francis W. Kelsey, Indianapolis, New York, The Bobbs-Merrill Co.Inc., 1925.

up, he argued, there is no longer any respect for law, divine or human. De Jure Belli ac Pacis, the law of war and peace, was the result of the professional labours of a Dutch advocate versed in international law, when he defended a commercial company and its interest before the world at large. He had to justify the action of the company in seizing Portuguese ships and at the same time pacify the Mennonite and Anabaptist members of the company, who were horrified by the prospect of causing war. His task was to prove that war was not opposed to the Christian religion, and that it is a right to punish transgressors. He did this by extending the justifiable private war to the domain of public war, to enshrine the concept of "just war", which may also be waged in order to punish injustice.[31]

The raison d'être for theme and title of Grotius' major work was at first De Jure Belli, to which he added De Jure Gentium, the part of peace, which became an afterthought rather than an integral part of the text. He was concerned with war as a constant threat to conflict resolution, which could be replaced by the organization of an international court, through which disputes could be argued in the absence of international positive law with principles of a modernized natural law. Thus natural law came into

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[31] Ibid.

play, but Grotius always reinforced his arguments by examples drawn from the Holy Scriptures.[32]

Grotius pursued a public career; he went on to become Fiscal Advocate, i.e. Attorney-General in 1607, and eventually an associate of the Grand Pensionary Oldenbarneveldt. In 1615 Grotius was appointed First Magistrate of Rotterdam. It was then that the great quarrel between Arminians, the liberal Calvinists, and the Gomarians, the uncompromising Calvinists, broke into the open, with devastating results.

Jacob Arminius, Hermansz (1560-1609), the founder of Arminianism, was a Reformed preacher in Amsterdam (1588), and became professor of theology at the University of Leyden (1603). He was in opposition to the Calvinist dogma of predestination; he afforded mankind the free will to make choices, and gave the Holy Scriptures precedence over

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[32] Ibid.; The recapitulation advanced by J. B. Scott leaves out the importance of Grotius' theology which had been ignored by twentieth-century commentators, such as Olivecrona. Other works by Grotius:
De imperio summarum potestatum circa sacra, he wrote ca. 1614, published in Paris, 1647;
Annotationes ad vetus testamentum, Paris, 1644;
Annotationes in novum testamentum, Amsterdam, 1641;
Poemata, Leyden 1617, and the best new Christian apology,
De veritate religionis christianae, Leyden 1622;
Dissertatio de origine gentium Americanarum, Paris 1642, a thesis that North America became first discovered and populated by the Vikings.

confessional doctrines. This new liberal interpretation of Calvinism was formulated by the preacher John Uytenbogaert in a treatise Remonstrantia in 1610, comprising five articles of faith: God decided in eternity to give salvation to the faithful; Christ died for all mankind, but his redemption applies only to the faithful; faith is the Holy Ghost acting within man; without God's Grace man can achieve nothing good, however, with God's Grace he is able to do anything; and last not least, man can resist God's Grace.[33]

On the opposing side, Franciscus Gomarus (1563-1641), the Dutch theologian, professor in Leyden since 1593, and in Groningen since 1618, insisted on Predestination. Prior to Adam's Fall, man was already destined to be either blessed or damned, and is responsible for the fall from grace, therefore he is sinful prior to the first man's fall. But Gomarus did not fully succeed with his rigid dogmatism at the Synod of Dort.

The Synod of Dort (November, 13, 1618 - May, 29, 1619) was convened to settle the dispute between the Calvinist Orthodoxy and the Arminians. Delegates from England, Scotland, the Palatinate, Hesse, Nassau, Zürich,

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[33] Jsaak August Dorner (1809-1884), Geschichte der protestantischen Theologie, transl. by Rev. George Robinson, History of Protestant Theology, Edinburgh, T. and J. Clark, 1871, Section III: "The Reformed Church from the Death of Calvin to the Synod of Dort," pp.415-431.

Basel, Bern, Geneva, and the Hanseatic Cities of Bremen and Emden convened, but France and Brandenburg declined. The Remonstrants were called as defendants and appeared under the leadership of Episcopius on 6th of December.[34] The Synod upheld the doctrine of selection to salvation through irresistible Grace of God, i.e. that Christ died only for the elected ones. Arminianism was condemned as heterodoxy. Only English and German Calvinists abstained from the verdict. To placate their sensitivity, the Synod abstained from the doctrine of divine predestination of eternal damnation for the lost individuals.

> The public [in Holland] took the side of the conservatives, accepting unreservedly the doctrine of predestination, and Prince Maurice the Stadholder attached himself to the popular party, finding there a good pretext for getting control of the Government and getting rid of Oldenbarneveldt and his followers... Oldenbarneveldt was brought before a picked commission, condemned to death, and executed on May 13th, 1619. Grotius, then the understudy of the great statesman, was likewise brought before this illegal commission and sentenced to what they were pleased to consider a living death: perpetual detention in the fortress of Loevestein. This took place on May the 18th. Through the intelligence and heroism of his wife, Grotius escaped on March 22, 1621, reached France,

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[34] Ibid., p.426, footnote 1; The Arminians wished only a Provincial Synod of South and North Holland, where they were powerful. But in opposition to them a Netherlandish General Synod was assembled under the name of "Synodus nationalis ecclesarium belgicarum." Not only were the foreign Reformed Churches invited to depute members to it, so that the Arminians might not appeal to their possible agreement with them, but the subscriptions of the foreign deputies were treated as the "chirographa" of their churches.

and there began and finished the composition of the three books On the Law of War and Peace.[35]

In addition to this, 200 Protestant ministers with Arminian leanings were dismissed. Arminians had to disperse, some emigrated to England where they inspired the likes of Samuel Wesley and William Law, others to Pomerania, Prussia, and the free city of Danzig. Of the ones who remained in Holland, the more spiritual Arminians joined the Anabaptists, the remaining Remonstrants made common cause with the rational Socinians and Antitrinitarians.[36] It was this group which provided sanctuary for the English fugitive John Locke.

Grotius was born into a century, and a country in struggle, when war was more common than peace in Europe. The Dutch people succeeded in throwing off the foreign yoke of Spain and organised themselves in a modern way into territorial units, a federation of self-determined provinces. It became the model for the movement of German princes to become

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[35] J. B. Scott, Introduction to The Law of War and Peace, transl. by F. W. Kelsey, p.xxii-xxiii.

[36] Dorner, p.427: The logical sequence of the Arminian tendency lies in Socinianism, which arose indeed already in the sixteenth century, but prematurely for the other confessions, and which first became an operative factor in the history of the Evangelical Church through the mediation of the Arminians. For it was owing to Arminians that Socinianism, which was much hated in Germany even after the seventeenth century, found entrance in the Reformed Church in ever wider circles, and first of all in Holland and England.

sovereign and independent of the Empire in the Thirty Year's War struggle.

In the Netherlands the revolt combined national, religious and international arguments for freedom in a single movement. Grotius provided its eloquent expression in a system of international law. Grotius became influential in an age, "of which the typical statesman was Richelieu with his view of popular poverty as a source of strength to tyranny, and the typical Churchman Bossuet, le grand gendarme, [who] could not see any way but that of force for the promotion of righteousness."(37) In the face of brutal force as the only known way to settle political and religious arguments, the Dutch, in a slow process of rational and legal argumentation, gradually threw off their traditional allegiance, with the assertion that their insurrection was justified by fundamental laws.

Grotius dedicated a large part of his major work to De Jure Belli, but in defence of territorialism versus imperialism. The imperial power and with equal force, the religious power of the Pope, were in opposition to the separation of states, and to any freedom of conscience. They ruled their subjects with the Christian fear of God, and the

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[37] J. N. Figgis, Political Thought from Gerson to Grotius: 1414-1625, New York, Harper & Row, 1960, p.223.

belief in fundamental sinfulness of human beings. The exertion of territorial rights, and the natural right to self-interest, became an ideological struggle to free mankind from these basic assumptions of absolute wretchedness, and the predestination to be condemned. With the change also came the recognition of a forgiving God, and man's basic goodness together with a social appetite, a natural instinct to congregate peacefully.

Grotius, still a man of his time, although basing his system on "those unwritten laws which are laid down in nature," and claiming the source of sovereignty to be the contrat social, reinforced territorial sovereignty as a necessary assumption of state law. And Grotius "goes out of his way to condemn the theory of resistance, to show that by the lex regis popular power is wholly transferred to the prince."[38]

Grotius defended Arminianism in his De veritate religionis christianae, in which he demanded tolerance for all positive religion, but demonstrated an intolerance towards atheists and the ones who did not believe in immortality. However, with their opposition to all divine authority in the Church and tradition, Arminians could only be bound by the Holy Scriptures, by which the exegesis lost

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[38] Ibid., p.242.

its sureness, since the subjectivity set free by the Christian Spirit can easily insert into Scriptures different readings and interpretation.[39] It is against this religious liberalism, which came too early to be acceptable, that in the Netherlands the ideal of religious uniformity triumphed. Prince Maurice seized the opportunity of the verdict of Dort to strengthen his power by making use of the orthodox Calvinist predilection of the populace.

While incarcerated, Grotius concerned himself with the injustice and the questionable legality of the Stadholder's authority to try and convict the Arminians. The argument was not theological but ecclesiastic-political. He wrote the Introduction to Dutch Jurisprudence, published at the Hague in 1631.[40] After his escape, he wrote his Defence of Lawful Government of Holland, published at Hoom in 1622. Grotius became so involved in reconciliation, and he "was so eager to unite the sects to the Church Universal that even in our days it is disputed whether he was a Protestant

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[39] Dorner: In Arminianism there is not merely the absence of any mysticism, but there is wanting even the inwardness of the religious spirit, and the perception that the highest good lies in fellowship with God and the divine life. With its face towards subjectivity, it sees a security for freedom only in the limitation of the divine influence, or in man being placed in his own hands, though of course under the direction of the divine commands.

[40] The Dutch Jurisprudence was a systematic textbook of Dutch law, and it had the force of law in South Africa from 1859 to 1901 in cases not covered by other existing laws.

or Catholic at heart."[41] He was seriously concerned with the bridging of differences and settling of disputes, but could not hope to accomplish this within the dogmatic rigidity of orthodoxy. His concept of the law of nations is based on the reasonableness of the natural law and the basic human instinct of socialitas. To govern with the authority of sovereignty the tacit consent of the members of a community ruled by a superior is required. This is the consequence of a natural order, with the unwritten laws which are laid down in nature. Grotius "grew sick at heart as he contemplated the ceaseless strife by which Europe was laid waste."[42] The chaotic conditions, the devastation by wars among nations, was for Grotius analogous to the natural state of man, prior to the discovery of natural law, the beginning of civilization.

Grotius returned to Rotterdam in 1631, but was forced to leave never to see his homeland again. He went on to become the ambassador of Sweden at the Court of France in Paris, 1634-1644. And like Pufendorf fifty years later, he became very ill on a voyage from Stockholm to Germany, and died there in 1645.

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41 J. B. Scott, Introduction to The Law of War and Peace, p.xix.

42 Paul Hazard, The European Mind, p.270.

Peace came to Europe shortly thereafter, with the Treaty of Westphalia. His greatest accomplishment was to have inspired negotiated settlements of international disputes:

> The famous treatise of Grotius furnished the intellectual foundation for the developing political structure which achieved definite recognition at the close of the Thirty Years' War in 1648. As Lord Bryce writes: "When by the peace of Westphalia a crowd of petty principalities were recognized as practically independent states, the need of a body of rules to regulate their relations and intercourse became pressing..."[43]

The task on hand is now to examine the thought of Samuel Pufendorf, who followed Grotius and his concept of natural law, which served as a rational foundation for secular states, their constitution, and positive laws. This system was to be conceived separately - but not in opposition - to the divinely revealed, traditional theological foundation. Not Scriptures, but the nature of things, discovered with the God given faculties of reason and a free will, are used as the basis for man's obligation under God's laws, and his accountability for his deeds done with free volition. All living creatures are governed by their physical [instinctual] nature, but due to his special faculties to act willfully, in addition, man is subject to

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[43] Dumbauld, quoting James Bryce, The Holy Roman Empire, 5th edition, p.436.

the demands of another natural law. Both laws comprise the lex fundamentalis which governs in addition to the entia physica, shared by all living beings, the entia moralia, exclusive to mankind.

Pufendorf, limiting his system to the human deeds to govern mankind in the worldly "human forum", was accused by Leibniz and Kant of being not philosophical enough; he was also criticised by Christian Thomasius of not being practical. Even though, Thomasius remained Pufendorf's friend all his life, and incorporated Pufendorf's natural law doctrines in his positive laws, whereby religious persecution was practically and legally abolished, for which Thomasius was named the founder of the German Enlightenment. Furthermore, Pufendorf's fundamentals were incorporated into the reforms of "enlightened absolutism", and were incorporated in the democratic constitutions of the New World. But so complex was the system of Pufendorf that it may be said to have served the good as well as the evil; in the latter regard, it entrenched secular sovereignty which, unincumbered, often ignores the more fundamental human rights principles anchored in the Pufendorf system. It may have supported the perpetuation of tyranny, possibly aiding the development of twentieth-century totalitarianism.

CHAPTER II.

The Formation of Pufendorf's Natural Jurisprudence.

According to Pufendorf, man by his nature is dependent on a communal reciprocal aid system. Man's dependence mainly in his development phase, constitutes an inherent weakness, *imbecillitas*, which renders man subject to an existence in his community, *socialitas*. Whatever comfort man enjoys, he derives from this society in the form of mutual aid. Beside his dependence on God, man is dependent on nothing so much as on his fellow man. Pufendorf states however, man is also accorded a free will: he possesses a propensity towards desires and passions, and he is not uniform in concepts of lifestyle and satisfaction. In consequence, his diverse leanings and characteristics prompt aspirations coupled with aggression, whereby anxieties and conflicts may arise. This potential for animosity, *pravitas animi*, derives from his predisposition towards vice, his *natura corrupta*. It becomes necessary therefore, to introduce into society a framework of laws.

Pufendorf employed the newly found rational (geometric) method, examining human existence in its original, primitive state of nature, deducing from it the natural

emergence of society and authority of the state, and the natural norm of human actions, or natural law of human conduct in relation to his fellow man.

Natural Law, as a God-given directive for man, for not only what he can do but ought to do, could not be understood without its theological source. And the seventeenth-century, early modern, natural law advocates developed natural law with definite theological assumptions, but created a natural jurisprudence separate from scholastic theology. With that they initiated a significantly modern development, a natural law which became "the offspring of a philosophy which rejected the supernatural, the divine, and substituted for the acts and purpose of a personal God, an immanent order of nature."[1] Grotius, in his famous work De Jure belli et pacis, "The Law of War and Peace," claims that "when war is waged, the civil laws are silent, but not those unwritten laws which are laid down in Nature." However, according to Grotius, the laws of nature, which are created and incorporated in nature by God, "would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to

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[1] Paul Hazard, La Crise de la Conscience Européenne, first published in Paris, 1935; transl. by J. Lewis May, The European Mind (1680-1715); Cleveland and New York; The World Publishing Company, Meridian Books, 1963; fifth printing, April 1968, p.269.

Him."[2] Grotius, concerned with the devastation caused by wars among nations, considered their inter-relations as being analogous to the original state of man, prior to the discovery of natural law, which is deemed to govern the conduct of man within a community. Pufendorf, unlike Grotius, was concerned with the individual State, and its overlapping authorities, and divided loyalties between the Church and the secular ruler, and a great desire for the restoration of law and order in a country in which 15,000 villages were destroyed, bringing misery to the people in the course of thirty years of religious strife.

Pufendorf's goal was to discover in natural law a system of law based on the knowledge of nature and human reason and experience, a synthesis of conditions of laws prevalent in different classes and different communities.[3] Pufendorf started with a reflection on human nature, consisting of the physical nature man has in common with mammals, and the moral nature, which man has exclusively and which he cultivates with his free will and reason, giving his physical

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[2] Grotius, De Jure belli, Prolegomena, § 11, p. 13, further on: Hence it follows that we must without ewxception render obedience to God as our Creator, to Whom we owe all that we are and have.

[3] Horst Denzer, "Samuel Pufendorfs Naturrecht im Wissenschaftssystem seiner Zeit," a lecture delivered at the History of Law Symposium: Samuel Pufendorf 1632-1982, University of Lund, Sweden, 15-16 January 1982; printed in Rättshistoriska Studier, Tolfte Bandet, (Stockholm: A.B. Nordiska Bokhandeln, 1st Distribution) 1986, pp.17-30.

existence values concerning his actions in relation with his fellow man. It is this basic concern with human nature and human conduct in relation to our fellow man and the community of man which establishes the "Human Forum," a Pufendorfian expression, which results in the establishment of natural laws, a jurisprudence, setting the norms for duty and rights laws strictly in a social context (and not in the divine). Human nature is determined by the physical law of nature and natural law, the moral law essential for a social existence. With the framing of natural law in the "Human Forum", Pufendorf refused to delve into theological questions, but accepted without challenge, the basic doctrines laid down in Scriptures as the foundation of natural law. Pufendorf assumed some fundamental maxims: the first, that God exists; the second, that God is the founder of the universe; and the third, that God rules over the whole world and over the human race with the law of this world, in which "our Saviour reduced the essence of the law to two heads: Love God and love your neighbor. To these heads can be referred the entire natural law."[4] Why the need for the law of this world? Because man's "nature has been corrupted [through the

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[4] Samuel Pufendorf, De Officio Hominis et Civis Juxta Legem Naturalem, 1673; transl. by Frank Gardner Moore: The Two Books on the Duty of Man and Citizen According to the Natural Law; Cambridge, The House of John Nayes, 1682. For this thesis I have used a reprinted edition with an introduction by Walter Schücking (1925),transl. by Herbert F. Wright; New York: Oceana Publications Inc., and London: Wildy & Sons Ltd., reprinted 1964; p.x (in "Greeting to the Reader").

fault of the first man] and consequently he is an animal bubbling over with many wicked desires."(5)

When we call Pufendorf the German founder of modern natural law, we have to remember that his system rests upon the two pillars provided by Grotius and Thomas Hobbes.

Grotius did not consider society as a mere organization of individuals living together for mere utilitarian purpose. For Grotius, human nature has an ineradicable instinct: a social appetite, appetitus societatis. His concept of the social contract is based on the element of a promise, which contains the fundamental feature of the human sociable nature. Grotius rejected any merely utilitarian justification and derivation of the state as well as of law. Law is not a covenant but a genuine and necessary characteristic of human being. Therefore, the state is not the sum total of power and physical coercion (as held by Hobbes), but it is based on a law before and above the state; all the binding power of civil law, lex civilis, is anchored in this fundamental authority of natural law, lex naturalis.(6)

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[5] Pufendorf, Officio, viii & xi.

[6] On Hobbes and Grotius: Ernst Cassirer, The Philosophy of the Enlightenment, transl. by Fritz C.A.Koelln and James P. Pettegrove, Princeton, N.J., Princeton University Press, 1932, Chapter VI: Law, State, and Society, II. The Contract and Method of the Social Sciences, pp.253-259.

Hobbes in his analytical dissection went back to the parts, to the absolute indivisible units, the individual person - firstly so described and accepted; everything must be dissolved if we are to understand the nature of society, and to derive it from its basic elements. All thinking is computation, and all computation consists of addition and substraction.

Hobbes' analytical examination of causal effects brought him to the logical conclusion that rule and submission are the only forces which can transform politically into one body that which by nature is divided: men. Accordingly, the social contract can be nothing but a recognition of surrender; and, because the natural state of men is to be at war with each other, only through unlimited sovereignty can it be held together, and the natural state transformed into a civil state.

Pufendorf took over from Grotius the concept of the social appetite, which he framed into a dual human nature; the physical nature, entia physica, which is ruled by instincts, and the moral nature, entia moralia, which is ruled by reason. Both natures are involved in the human socialitas [coined by Pufendorf], the social nature of man. Physically, man is the weakest of all species with a helplessness and the longest dependency on parental care, and he

continues to be interdependent all his life. Morally, his sociabilité naturelle [coined by La Boétic] is activated by reason and the human will, which enables man to be bound by law and his acceptance of duty, obligatio. From this basic concept of the law of nature Pufendorf deduced the duty towards fellow man and the community as the primary principle. Rights owed man are only secondary as derived from the duty of fellow man to honour and respect man's right to exist in dignity. Furthermore, Pufendorf as the jurist, does not recognise "potentiality" or "capacity" as the basis for human rights; only with a moral act, the performance of duty, do we establish human rights. Later on, Christian Thomasius and Christian Wolff, would reverse the order of this maxim.

In addition to this end of natural law, which seem to be the preservation of the human dignity in peace with justice, Pufendorf comes very close to having the natural law become the law of culture, as the creative end of man's existence on this earth. With expressions such as cultura animi, and cultus vitae together with socialitas as the two roots of natural law, in which is established the duty of man as a culture creating being.

Leibniz criticized Pufendorf's socialitas as a secularization of the natural law concept. The main objection Leibniz levelled against Pufendorf was his notion

that the end of the science of natural law is limited to the earthly life span. For Pufendorf, the maxims of natural law were applicable only to the "human forum" which does not transcend the earthly existence; this Leibniz considered to be false, because natural reason by itself cannot provide a full demonstration of the immortality of the soul, which cannot be ignored with the human forum in question.

It is this ambivalence, the difference in emphasis, the separation without contradiction of revelation and reason, the attempt to replace Scriptures with science, which makes the seventeenth-century thinkers important. Pufendorf's vital contribution, at this time and place so very essential, was his clear separation of Church and State, and of Revelation and Reason. Pufendorf insisted that nature and the laws of nature are God given, and God's gift to man is that natural law is entirely understandable with observation and reason, and it has no need of further divine revelation. Divine revelation, so inferred by Pufendorf, is exclusively concerned with man's conduct to affect salvation of his immortal soul; natural law is exclusively concerned with man's conduct on this earth without regard to the after life and the im-mortal soul. Pufendorf refused to engage in metaphysical or religious speculation on Scriptures when discussing natural law, as it concerns only the "Human

Forum."[7] However, here it concerns the entire human race, overriding the different cults, with the truth exclusively discovered by sheer reason, to be recognizable by all mankind with natural reason of a common [not necessarily scientific] sense, regardless of myth and cosmogony and different religions or atheism which people may entertain. This maxim is not necessarily arrived at by logical deductions upon insights into nature's principles, but by the observation of natural things and the human existence which nobody in his right mind would deny.[8]

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[7] Pufendorf, De Officio, vii, Greeting to the Reader:
Hence the decrees of the natural law are adapted only to the human forum, which does not extend beyond this life, and they are wrongly applied in many places to the divine forum, which is the special care of theology.
From this also follows that, because the human forum is busied with only external actions of man, while to those which lie concealed within the breast and produce no effect or sign outside it does not penetrate and consequently is not disturbed about them, the natural law likewise is concerned to a great extent with the directing of the external actions of man.

[8] Ibid., Introduction by Walter Schückling:
the rules of conduct which must be followed to be a fit and useful member of human society are the leges naturales. Reason is sufficient to discover these in our hearts. 15a.
Pufendorf: ...at least the common and important provisions of the natural law are so plain and clear that they at once find assent, and grow up in our minds, so that they can never again be destroyed, no matter how the impious man, in order to still the twinges of conscience, may endeavor to blot out the consciousness of those precepts. Chapter III, § 12, 20.

Pufendorf published for the first time, De Officio Hominis et Civis Juxta Legem Naturalem Libri Duo in the year 1673 at Lund in Sweden. It was designed by Pufendorf as epitome of his larger work, De Jure Naturae et Gentium Libri Octo, which had preceded it in 1672.

The preface to this work contains important considerations which are Pufendorf's addition in this compendium for the benefit of students. In the "Benevolent Reader Greeting," Pufendorf laid the foundation to his system with the distinction of natural law from civil law and moral theology as three separate sciences:

First: The Natural Law is common to all nations and is rooted only in man's life on this earth. It is the lex fundamentalis and contains the duties of every man, with reason to be sufficient to discover these in our hearts; but natural law deals only with the external conduct of man.

Second: The Civil Law is only valid in the individual state in which it has been proclaimed; it varies from state to state, according to the national character and its justice.

Third: the Moral Theology deals with the dictates of God which have been given to Christians in the Holy

Scriptures and is rooted in the heavenly city. Moral theology trains the citizen for the eternal life, and considers man on earth only as a sojourner or stranger; it deals in the matters of the heart.

The first distinction is based on the different source: natural law decrees are adapted only to the "Human Forum," busied with only the external actions of man. Reason is sufficient to grasp natural law decrees. Therefore, those decrees which cannot be grasped by reason, the laws revealed by divine intervention, fall outside the natural law, and should be considered in moral theology. In theology, law is concerned with a sort of pact between God and man, and it has annexed a divine promise for salvation. The divine law decrees are considered in the "Divine Forum."

Pufendorf extracted natural law, the part which can be reasonably discovered, from divine law which cannot be discovered by reason alone, but needs revelation by God. It is necessary and important to be aware of the "climate of opinion" under which Pufendorf developed his system, which he started with the prevalent Protestant religious doctrines, gradually leading into the then very uncommon ground of modern natural law theories.

The second most important distinction is in the aim and the end of natural law which applies only to the circuit of this life on earth.

Moral theology molds man into a Christian. It is not the end to have man pass honorably through this life, but to prepare man for "the fruit of piety after this life."

Pufendorf recognized that the mind of man with a glowing desire leans towards immortality and vigorously shrinks from self-destruction. The one is only drawn from the word of God, the other from nature. In Pufendorf's time, man started to think in rational terms, he recognized in the nature of man the reoccurring desire for immortality as the only reasonable end to this life - with or without revelation so to speak - but with the recognition of God's handywork in nature and to belief in it as a non-denominational deist.

Pufendorf did not break with Christianity for the sake of a natural religion. He grounded his natural law system in Christian exegesis in two ways:

First, man's nature had been corrupted by Adam's fall, and is now that of an animal with many wicked desires, a fact we could not be certain of without the "divine literature ... that the rebellion of affections arouse through the

fault of the first man."[9] It is therefore incongruous to deduce natural law from an uncorrupted nature of man. The Decalogue "manifestly presupposes the corrupted nature of man" with the negative commandments. Man is forbidden the wrong he might be doing, because the wrong has been done by the predecessors of the Decalogue. Pufendorf says with conviction: "I think, that there would be a far different aspect of natural law, if anyone wished to presuppose the state of man to be uncorrupted."[10]

Second, Christ, "our Saviour reduced the essence of the law to two heads: love God and love your neighbor. To these heads can be referred the entire natural law." With that, Pufendorf's foundation for natural law, "sociability", "may be properly resolved into love of neighbor."[11]

Walter Schücking, in his introduction to Pufendorf's De Officio outlines the premise: "natural law need not have commanded aid for the poor, assistance of the unfortunate, care for widows and orphans, pardon for wrongs, maintenance of peace, had there not been necessity and death, enmity and discord since the fall from grace."[12] A natural

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[9] Pufendorf, De Officio, p. viii.

[10] Ibid., pp.xi-xx.

[11] Ibid., p. x.

[12] Ibid., p.14a.

law for man in the state of innocence would be an entirely different matter. But here I have to ask this question: does natural law change with the advancement of humanity from the primeval savage to the modern civilized to an advanced perfected state? We do have different rules for the infant, for the adolescent, and for the mature person in command of his faculties. Therefore, shall we not consider humanity as a whole in progression from the early primitive stages through the formation of civilized states, towards a future harmonious world community?

It is only since the Enlightenment, I mean in modern times, after the seventeenth-century, that we examine man's nature without its relation to God. In his early state, i.e. post-lapsarian status naturalis, man's nature is but an exclusive craving for self-preservation guided by the Freudian pleasure principle. As the child matures, so does man advance from the primeval stage, guided by the Freudian reality principle, gradually developing an intellect, to act with experience and reasonableness, going through several stages evolving into a civilized existence, the status civilis. The natural urges and appetites rooted in self-preservation are channeled into a sociability for the common good of society, thus providing preservation of the self in the community, and the necessities for procreation, thus securing the self as well as the species. The guiding

principles towards this emancipation are to be found in natural law, as a dictate of nature. The nature which is the Creation with all its intentions, we can discover with our natural faculties, with our mind and soul.

Natural law as an examination of human relations has taken many turns and developments from its original conception to the reformulation in the modern natural law doctrine of Samuel Pufendorf. The basic and unchangeable maxims in the Pufendorf doctrine are first, that man's faculties, reason and a free will, which separates him from all creatures, are given mankind by his Creator, the Optimus Maximus; and second, that this given nature has been corrupted by the Fall. Man is an animal bubbling over with many wicked desires, and consequently since the natural law does not extend to those things to which reason can not reach it would be incongruous to wish to deduce it from the incorrupt nature of man." Thus Pufendorf remained anchored solidly in the two principles that "Natural Law" is not nature's law, but the law commanded by a superior, and the duty and obligation under the law is a dictate necessitated by man's inclination to sin.

The fascination with natural law theories, and the challenge to the various premises for human institutions, such as the state, being either a natural or a contractual

structure, and the assumed prerequisite of a superior force, to effectively create and keep in force a natural law, have been under dispute to this day. It is done with the search for the origin, from where man has come to be to what he is today; the emancipation from the (with Pufendorf fictitious) status naturalis, the original, either blissfully innocent or savage state, towards the highest goal - a man made harmony with the conquest of man's natura corrupta. In this, seemingly endless, journey of man, we have to examine and re-examine the premise for man's action, and advance the guiding principles of natural law with it; making them adaptable and acceptable and enforceable among nations, correcting contradicting customs and beliefs, to achieve a common ground for humanity to emancipate separately, but simultaneously, towards the common goal, as Pufendorf had laid it down: sociability, "the foundation for natural law, may be properly resolved into love of neighbor."[13]

Natural law, however, is not a prescription; the dictates of reason are not to be "observed perhaps, in view of their utility," like a physician's prescription, but with the force of law.[14] According to Pufendorf, "all the force of a law consists in the declaration of what our superior wishes us to do or not to do, and of the penalty which has

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[13] Pufendorf, De Officio, p. x.

[14] Ibid., p. 19.

been fixed for transgressors of the law."(15) "The nature and disposition of man" is such that the human "race cannot be preserved without the social life", and "the human race owes its origin to God." It follows "that God wills that man use for the conservation of his own nature those special powers ... that man's life be distinguished from the lawless life of the brutes."(16)

In a separate chapter, Pufendorf defended his position on God as the author of natural law, and condemns the position of the atheist. As we will discuss later on, there is a serious challenge to the Pufendorf's very first maxim: any law requires the existence of an author, a superior with the power to set and enforce the law. Therefore, if we accept in the randomness of nature, a law of nature which is guiding our life, we have to presuppose an author of nature and its law.

Man in his physical nature, the entia physica is subject to the same law of nature as all the animals. The guiding force of life in nature is instinct. But man above all brutes, is fitted with reason and a free will, and as such he becomes accountable for his willful actions in his human nature, i.e. a moral nature, the entia moralia. In

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[15] Ibid., p. 14.

[16] Ibid., p.20.

man's condition "there is need for careful regulation and control;" helpless in himself as no other animal, in need of care as an infant, with parental guidance and social assistance for most of his life, "in order to be safe, he must be sociable." Natural laws covering the social life, versus laws of nature, covering the physical life, are those "which teach how a man should conduct himself, to become a good member of human society."[17]

Pufendorf's second maxim concerns the pronouncements of any law. Every perfect law has to have two parts: "one defining what is to be done or not done; the other indicating what punishment is in store for him who neglects what is enjoined and does what is forbidden."[18] In the physical law of nature, this is what we call cause and effect. The guiding principle for the animal world to do the right thing, is the instinct. In human affairs, where man does not rely on his instincts but has to make a conscious decision and act with a free will, the guiding principle is the law which obligates man but does not compel him to act in accordance with the dictates of the law. Man is not only persuaded by penalty to observe the law, but by "the power to oblige, that is, to impose an inward necessity."[19]

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[17] Pufendorf, De Officio, p.19.

[18] Ibid., p.14.

[19] Ibid.

Pufendorf differentiates between the just man, "who delights in doing just deeds, who is devoted to justice," and the unjust man, "who acts justly on account of the penalty annexed to the law, and unjustly from an evil character."(20)

What is here discussed refers to the individual person; but similarly, all of this ought to apply to the community which ought to emancipate from an assembly of wicked men to a society of just people. Pufendorf is silent on this notion. If we advance this concept to an utopian end, in which all of humanity is just, in which we shall engage only in brotherly love, such a situation would render natural law, or the principles of any such law, redundant and obsolete. In a way, a law is a good law if it is never needed to be enforced, a contract never to be looked up while never being broken. This is what we ought to strive for, to fulfill our obligations - which then are obligations no more!

Pufendorf claims that those precepts of natural law which concern the conduct between humans may be derived primarily and directly from sociability, but "the ultimate confirmation of duties toward other men comes from religion and fear of Deity, so that man would not be sociable either, if not imbued with religion."(21) Pufendorf made an ineradi-

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[20] Ibid., p.15.

[21] Ibid., p.21.

cable pronouncement grounded in religious history, that the

> whole human race has been in perpetual possession of that belief [that God exists], and likewise since it has been hitherto believed that the welfare of the human race depends upon that conviction, [it is impossible] that the race is better served by atheism than by retaining a sane cult of the Deity.

Pufendorf may have softened his stance in later years, but remained committed to the stern Lutheran principle, viz. that "the impiety of those [atheists] who venture to attack that belief in any way is detestable and to be most severely punished."[22]

Pufendorf listed some of the advantages which religion contributes to the human life:

> (i) It is in truth the ultimate and strongest bond of society, [and]
>
> (ii) [without the fear of God,] as soon as man has confidence in his own powers, he will at his own caprice undertake anything against the weaker...;
>
> (iii) Remove religion, and the internal stability of states would always be uncertain, and fear of temporal punishment, a promise given to superiors, the glory to be gained by keeping the same, gratitude because men have been rescued from the miseries of the natural state by the help of the government, none of these would suffice to hold citizens to their duty.
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> (iv) Furthermore, citizens would be prone to injure each other. For, as in the civil court judgement is rendered according to acts and things proved,

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[22] Ibid., p.22.

> all crimes and outrages from which profit is likely to be derived, would be regarded as cleverness, to be viewed with complaisance, if they could be done in secret and without witness.
>
> (v) Also no one would do the works of piety and friendship, except with the assurance of fame or emolument.

Pufendorf stated another, a psychological consequence, if religion where removed from civil life:

> ...were the divine punishment removed, individuals would live a life of perpetual anxiety and suspicion, fearing to be deceived or injured by others.
>
> For the rulers, fettered by no bounds of conscience, would treat all offices and Justice herself as venerable, and seek in all things their personal advantage, involving the oppression of the citizens. They would also fear rebellion on the part of the latter, and would accordingly understand their own safety to depend entirely upon weakening them as far as possible.
>
> Conversely, the citizens, fearing oppression from their rulers, would be always casting about for an opportunity to rebel, and yet would be no less mutually distrustful and fearful of each other.[23]

One must question, why statements made so eloquently in the seventeenth century, have been neglected for centuries in Pufendorf commentaries; for they have retained their value, and are applicable, word for word, to conditions in many parts of the world today. Pufendorf stated categorically, "without religion there would be no conscience," which is still considered a requisite for the administration of the

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[23] Pufendorf, De Officio, pp.25-26.

oath, as the only means in a court of law, to seek and to obtain the truth and nothing but the truth.

Pufendorf anticipated the possible scenario of a society without the common fear of God, which is replaced by rationalism at the hands of the Enlightenment, and which shaken by rebellious citizens causing perpetual anxieties, would allow the formation of an atheistic society. Pufendorf was right on both counts, but not necessarily for the right reason, because today people live in fear, not of God, but of the threats imposed by tyrannical superiors, by the power of the mighty states pitted against each other, of the ever present threat of economic depravation, and personal insecurity. However, in spite of those dismal conditions, we bear in mind the progress we have made over time in specific areas of civilization. We have actually governments which function with reasonableness and rely on the individual citizen's conscience, observing the law and sociability, which secular education has imprinted upon the citizen's conscience from early childhood, even without religion.

Furthermore, civilization has developed other safeguards concerning the political leaders, who are reasonably discharging their obligations without needing to fear God's punishment. Modern democracies uphold the principle of free speech and, with the aid of modern communication techno-

logy, allow public condemnation of wrongdoing by rulers and citizens in public offices. It appears that even in the absence of religion, public opinion acts as a deterrent more effectively than the conscience of the many men in position of power, who may fear the public exposure of their schemes more than they fear the force of law.

Finally, the corrupted nature of man has been dismissed with all its repressions and guilt by modern psychology developed by Sigmund Freud.[24] In his view which I share, man is born with an egotistical physical nature which is the norm, and is the equivalent to the animal instinct towards self preservation. This is being corrected towards sociability, in the course of a human life through education and experience in the social environment with the Freudian reality principle. With religion effectively removed from public affairs in Western Civilization, we seem to have achieved in reality a functional atheistic society. However, we have achieved this on the foundation laid by

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[24] My references to Sigmund Freud are based on the pronouncements of the late Freud, of the post-World-War I period, when Freud turns to metapsychological and socio-political thought. The writings of this period is mostly ignored by followers and increasing critics of Freud. In my view, regardless how wrong Freud may have been, how much his work is depreciated as unscientific, the impact of Freud on modern society cannot be denied. Freud, himself a member of a Victorian type society, broke many taboos. He advanced natural law by breaking down traditional, religious determined morality into issues of un-natural and un-healthy behaviour, thus advancing the subject of natural law and also, without intent for being an atheist, natural religion.

Christian philosophers, such as John Locke, who stated in his essay on the Reasonableness of Christianity:

> ...the first knowledge of the truth they have added [the Christian philosophers], are owing to revelation... Every one may observe a great many truths which he receives at first from others, and readily assents to, as consonant to reason, which he would have found it hard, and perhaps, beyond his strength to have discovered himself... Or whatever else was the cause, 'tis plain in fact, that the human reason unassisted, failed men in its great and proper business of morality.[25]

For now we may just say, whatever morality and sociability we recognize in our society, it is inconceivable without its Christian heritage. And the further we develop, emancipate from the Dark Ages of religious domination, we seem to lose some more of the precious ingredient, religion in balance with reason, which seem to produce another Unbehagen in der Kultur, but in a reverse semse to Freud's "Civilization and its Discontents" (1930).

The Hobbesian Influence on Pufendorf.

Samuel Pufendorf may be better understood if we examine the influence the writings of Hobbes had on the young Pufendorf. During his studies in Leipzig, at the beginning

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[25] John Locke, The Reasonableness of Christianity as delivered in the Scriptures, (1695); reprinted in a Library of "Modern Religious Thought" issue, London, Adam & Charles Black, 1958.

consisting mainly of theology, Pufendorf met Erhard Weigel, professor of mathematics and a moral philosopher, first in Leipzig then in Jena, who introduced Pufendorf to the scientific method of deductive reasoning applied to human behaviour, later published in Weigel's work, the Paedagogiae mathematicae ad praxim pietatis fundamenta et principia.(26)

Under Weigel, Pufendorf became fascinated with the subject of moral philosophy separated from religious determination: natural law governing the conduct of men among mankind, and the two principal authors studied were Hobbes and Grotius.

These two authors were Pufendorf's single source committed to memory, when, in 1658, during his first employment as tutor to the son of the Swedish ambassador to

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26 The latest research by Detlef Döring, places Pufendorf in the University of Leipzig for the years from Fall of 1650 to 1656. In the summer of 1656 Pufendorf went for one week to the University of Jena to obtain the degree of magister; he graduated on August 19, 1656, and appeared in Leipzig, definitely attending a gathering of his fraternity, the Collegium Anthologicum, on August 30, 1656, for the first time giving a paper with the magister title attached to his name . According to Pufendorf's own words, he spent the whole year of 1657 in Jena. But he must have returned to Leipzig early in 1658, for he gave a paper at his fraternity on March 27, 1658. According to Döring, Pufendorf's final departure from Leipzig appears to be end of April, for the last letters adressed to his Leipzig residence were dated April 24, 1658. (Döring: "Samuel Pufendorf und die Gelehrtengesellschaften"). In August 1658, shortly after his arrival in Kopenhagen, war broke out between Denmark and Sweden, thus beginning the eight month incarceration of Pufendorf.

Denmark, he was incarcerated for eight months without the aid of any books, he drafted the elements of universal jurisprudence, Elementorum Jurisprudentiae Universalis Libri II, first published in the Hague in 1660.[27]

The Elementa, his first major work, is usually undervalued in Pufendorf's natural law system. Its value may be said to have been, not so much for its contents, but for the influence it had on his subsequent career and the major works he was to undertake on natural law. We must single out four conditions which shaped the Elementa. First, the work was written in isolation, with time on hand but no library to consult, relying on his memory and active mind; e.g. there is no evidence that he had any books with him, such as De Cive by Hobbes, or De jure belli ac pacis by Grotius. Second, he expressed his argumentation, in the method he had just recently acquired during the previous year, when he studied under Weigel in Jena. Third, he was imprisoned by the Danes who were fighting a purely secular war, a war which had no religious significance. Fourth, this manuscript manifested the flaws of its circumstantial conception, with the consequence that, just prior to its publication, Grotius'

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[27] Pufendorf, Elementorum jurisprudentiae universalis libri duo, translated into English by William Abbot Oldfather, Cambridge 1672: "The Two Books of the Elements of Universal Jurisprudence", reprinted in New York, Oceana Publication Inc., 1964.

principal work was being hastily used to make corrections and to include quotations and limited references.

Revealing the geometric method of Weigel, the Elementa is arranged in twentyone definitions, which form the contents of the first book; while Pufendorf established two Axiomata in the second book, he then concluded his work with five observations. The subject of the Elementa is largely the justice or rather injustice of war. At Pufendorf's time there were no international agreements on the justification or conduct of wars. Pufendorf declared war immoral for the purpose of not affecting any vital interests, and the purpose of war may consist solely of the desire to achieve peace.[28] To prevent war, he suggested a great system of international law which must be in keeping with the law of nature.

After he was set free, Pufendorf journeyed with his pupil to Holland and studied at the University of Leiden. He was strongly urged by friends to publish his manuscript which he was editing in the library at the university. He dedicated his work to the Elector Karl Ludwig of the Palatinate (at that time himself a student in Holland), who, in turn, established for Pufendorf a new chair of natural law and international law at the University of Heidelberg in 1661. In Heidelberg, Pufendorf turned from the problems of

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[28] Pufendorf, Elementorum, Observation IV, § 14, § 19.

war between nations, to the constitutional problematic in De statu imperii Germanici, written in 1667.[29] It was more this constitutional critique on the Empire, than the Elementa, which brought Pufendorf to the attention of an influential statesman, which would shape Pufendorf's direction.

In Heidelberg, Pufendorf was approached by Baron von Boineburg, who urged him to dedicate his efforts to the compilation of a methodical body of natural jurisprudence.[30] Pufendorf was willing to be persuaded to undertake such a project, which, as he wrote in a letter to Boineburg, would require "a great penetration of mind; an exquisite judgement, free from all prejudices, a numerous library, great leisure, a settled correspondence with several learned men, who might communicate their thoughts to him: all

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[29] Pufendorf published this work under the pseudonym of a Veronesa gentleman, Severini de Monzambano, freely discussing the constitution and condition of the Roman Empire of the German Nation, with the title: De statu Imperii Germanici ad Laelium fratrem, dominum Trezolani, liber unus, Geneva, Columnesius, 1667.

[30] Johann Christian Freiherr von Boineburg (1622-1672), diplomate in the service of Hessen-Darmstadt, Chancellor of the Elector of Mayence, became a Catholic convert, and was engaged in unification negotiations between the Catholic and the Lutheran churches; he also promoted an alliance of Christian states to fortify Christianity against the threats from the Ottoman empire. With an extensive correspondence he tried to engage in his project, Johann Heinrich Boecler (1611-1672), Hermann Conring (1606-1681), and Samuel Rachel (1628-1691), without success; but he did arouse Pufendorf's interest.

which [are] things I want." Boineburg eventually obliged Boecler and Conring to participate with commentaries in the early stages of the project, thus influencing Pufendorf's methodical procedures in the writing of De Jure. As it turned out, the participation by these two exerted an unfortunate influence on Pufendorf, since Hermann Conring, an ardent member of the Aristotelian school at the Helmstedt University, and Johann Boecler, a brilliant but pedantic antiquarian at the University of Strasbourg, expressed their doubts in Pufendorf's ability if he continued to avoid references to the writings of ancient philosophers and pursued Weigel's geometric method.(31) As a result of these influences, and to placate potential detractors, Pufendorf became persuaded to dedicate more of his research into history and the ancient philosophers.(32) In consequence, we

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31 Timothy Hochstrasser (Downing College, Cambridge), "Pufendorf and the 18th-Century Histories of Moral Philosophy," paper presented at the workshop, Unsocial Sociability: Modern Natural Law and the 18th-Century Discourse of Politics, History and Society, Max Planck Institute für Geschichte, Göttingen, June 26-30, 1989.

32 Jean Barbeyrac in his Prefatory Discourse makes a clear reference to this assumption:

> Mr. Pufendorf sometimes quotes one Author for another, and I have, unexpectedly, and by Chance, met with many Passages, which I sought for in vain... he sometimes read Authors (especially the Ancients) too hastily, and what was worse, rather in Translations, than the Originals... he took them at second Hand; of which I have found incontestable Proofs. He does not always exactly express the Thoughts of the Authors, whose Opinion he gives, and, now and then, intermixes his own Reflections, without distinguishing them.
> He shews too great an Affection of displaying his Reading... The most common and trifling Things, which

should be very circumspect of any linkage of Pufendorf with the Ancients, but especially Aristotle, whom he detested in the Schoolmen.

One of the works on Samuel Pufendorf disregards these important reservations on Aristotelianism in the natural law body of Pufendorf; it is Horst Denzer's thesis focusing on Pufendorf's moral philosophy and natural law system, written in 1971.[33] But Denzer's views are not widely shared, such as to name Pufendorf the father of the modern natural law tradition in Germany, and his overstatement of the Aristotelian influence in Pufendorf.[34] However, he is right in calling Pufendorf's natural law

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every Man is capable of thinking, he ascribes to the ancient Writers, Greek or Latin.
I have suspected this Defect of his, to be occasion'd by his conforming to the Fashion, which then prevail'd among the Scholastic Lawyers, as well as to avoid the Cavils of those envious Critics, who reproach him with want of Erudition.

[33] Horst Denzer, Moralphilosophie und Naturrecht bei Samuel Pufendorf; Eine geistes- und wissenschaftsgeschichtliche Untersuchung zur Geburt des Naturrechtes aus der praktischen Philosophie; Munich, C.H. Beck Verlag, 1972.

[34] Leonard Krieger, Book Review under 'Modern Europe' of Denzer's work in American Historical Review, Vol.78, No.3, 1973, pp.647-676.
Krieger mentions in this review, the "persistent recurrence of interest" in Pufendorf's work which has "worked like an intellectual magnet upon scholars eager to demonstrate the resolvent action of their methods and encouraged to find historical support for all manner of contemporary concern." In this respect, the author of this thesis is no exception.

interpretation of natural law.[35] Hobbes had already dismissed the rationality of a communal reason and was basing his whole natural law concept on the premise of individual man coming to his rational senses. The natural law system would therefore not be a system of duties towards a common good, but would concern itself with the question of individual rights, which in Hobbes's view, is best preserved by the surrender to an absolute sovereign power. However, contrary to Hobbes, the Pufendorf individuum is not independent. With his free will, man is oriented towards the state formation, and is already bound by the duty of moral conduct towards a community with other men. Erik Wolf, therefore, characterized Pufendorf's natural law system as a law of the "community and the corporation," in distinction to the Hobbesian natural law which he described as the law of "society and individuals."[36]

Hobbes had taken a delight in theoretical discourse and in the development of a science of Civil Philosophy. Pufendorf, however, was not a speculative thinker, he ignored metaphysics, nor was he interested in pure logic or in mathematics per se; in consequence, unlike Plato, Aristotle, and Thomas Aquinas, whose works also included the whole field of

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[35] Erik Wolf, Grotius, Pufendorf, Thomasius; Drei Kapitel der Gestaltgeschichte der Rechtswissenschaft, Tübingen, 1927.

[36] Ibid.

philosophy, Pufendorf has not been recognized as a great political thinker. But neither was he a pure pragmatic and scrupulous opportunist. Like Bodin, Hobbes and Grotius, he was fascinated by his research into the human co-existence and its principle causes as it presented itself at the time of their respective lives. In his examination, Pufendorf just like Hobbes, proceeded methodically and with exactness, giving an account of every step in his analysis.[37]

Hobbes substituted for the traditional Aristotelian idea of "Being", the concept of "Motion": a Body in motion caused by other bodies in motion towards or away from each other. Pufendorf also rejected the Aristotelian-Scholastic centrality of "Being", but he was more influenced by the new science of Descartes than by the motion concept of Galileo, so important to Hobbes. He restated the necessity of perception and cognition (Erkenntnis), the correlation between subject and action, as cause and result under certain conditions and circumstances. Pufendorf separated moral philosophy as a practical science from pure speculative philosophy. He disregarded speculative philosophy which is concerned with the essence of Being and the purpose of our existence. Pufendorf's moral philosophy is concerned with human actions in social relations, where mankind is the

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[37] Denzer, Moralphilosophie, p.35.

subject on account of his action, not by necessity, but by a free will.

Hobbes, the radical thinker, made an outrageous breakthrough with his materialistic individualism. It was Hobbes who established mankind as individuals, albeit frightened, selfish, and with an anti-social nature. Pufendorf, in his natural law doctrine, restored some of the respectability of the individualistic notion by binding the individual nature of mankind as a social animal with a willful engagement with fellow man on the basis of a social accord, an agreement or covenant, expressed or inferred.

Since the emphasis of science with the Cartesian cognition, Hobbes went further in the radical denial of any metaphysical link to human reasoning. In the vane of the new science, the individual's recognition of the nature of things provides the only link to reality, the universal truth. The beyond-recognition becomes unreal and irrelevant to one's existence. Thus, metaphysical speculations are nothing but fabrications, i.e. images of the mind, and illusions, the only reality they may have are within the confinment of the individual brain.

For Pufendorf this consequence did not cause any problem in his natural law works but haunted him in the

defence of religion. He separated the metaphysical from the rational, the former became a subject of theology, exclusively dealing with the "Divine Forum," the later became the subject of natural law, the empirical and rational dealing with the facts of life, and the conduct of man, the "Human Forum."

In this separation, Pufendorf did not deny metaphysical linkage; he acknowledged certain assumptions which linked man's existence to the Creation of God, and man's corrupt condition to the Genesis of the first man's fall. Both assumptions formed the prerequisite of the secularized science of moral philosophy. Man's rationality is bound and limited by his nature, the creation of God, who did not create contradictions, but created analogical [in his own image] the human nature and the human capability of reason. In consequence of man's recognition of good and evil, he is preconditioned by creation, to have the free will to make rational, i.e. conscientious, decisions; therefore, he is accountable by the dictates of his nature: it is natural to be good, and contrary to nature to be evil.[38]

For Pufendorf there are no good or evil actions per se. The value judgement only begins in the presence of a will in relation to the law. A natural act per se is indif-

[38] Denzer, Moralphilosophie, p.41.

ferent; only in relation to the law-giver and the law as the norma moralis does the human act become a moral action. Pufendorf is against the "Perseitas Doctrine" of the late Scholastic and the Protestant Orthodoxy as being a full circle: good is what is in accordance with natural law, and what is according to natural law is good - this does not provide a beginning of motion, with an act subject to value judgement.[39] For Pufendorf the good does not exist in itself, it has an originator and a recipient, and it receives its content equally from the will of the originator, as it does by the acknowledgement of the recipient. The order of values is not based on the order of being, but on the order of laws and the evident concern of the will of the legislator with the corresponding action of the law abiding recipient. Morality originates with the will of the legislator, but the law has to be a work of reason-for-manhood to act morally: sed habenda est lex opere maxime rationabili.

However, despite his rejection of a morality which rides entirely on the order of things, as created by God, Pufendorf does not accept morality as a prerogative of the individual or in the State the prerogative of the sovereign. This is contrary to Hobbes, and Pufendorf argues with Cumberland against the Hobbesian arbitrary value judgement: Wert-

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[39] Eris Scandica: Qui autem diversam a nobis sectantur viam, circulari sua demonstratione sibi & aliis illudunt... p.271.

setzung. For Pufendorf there does not exist an order of values separate from the will of God. Every order of values which may be read in the nature of things is an expression of the will of God. Morality follows the will of God, which, in specific cases, may be altered, but in the whole is unchanged.[40]

Pufendorf, the eclectic philosopher, said that he did not want to concern himself with prima philosophia. Therefore, he developed no concept of the differentiation between the natural law as subject of the natural scientist, the Naturgesetz, and the natural law of the moral philosopher and jurist, the Naturrecht. For Pufendorf nature is in general the contingent creation of God. Nature is neither the force, the vis agendi, nor the last cause of all things.[41] Pufendorf distinguishes between natural and moral things; nature is here everything which is not changed through human intervention. In this context, therefore, human nature cannot be determined as a whole. In this sense, nature is only the physical nature of man. In another sense, human nature has its specific capabilities and conditions. This nature of man is not the original nature in paradise, but the corrupt nature of man after the Fall, which is the

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[40] Denzer, Moralphilosophie, pp.51-52.

[41] Pufendorf, Officio, bk.I, ch.4, § 3.

nature we can rationally grasp and empirically discover.[42] Even here we have different meanings of the human nature. Sometimes, Pufendorf understood under "human nature" only natural inclination and natural liberty.[43] In most cases, nature includes reason, therefore, Pufendorf rejected the determinism and materialism of Spinoza.[44]

A further division within human nature is made between that which is by nature, on the one hand, and that which is by human intervention and accord, on the other. This most important differentiation caused Pufendorf to set the state of nature vis-a-vis the state modified by contract.[45] However, even this becomes relative, because the human nature by its reason strives towards fulfillment and culture creation; Pufendorf, therefore, in a specific sense, is able to consider as natural the striving towards the formation of a State, although, the formation of the State is not by nature but by contract.[46]

The following seem to be of great importance, for Pufendorf repeated himself in a round about way. By the

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42 Officio, Praef. & Statu, § 3.

43 Officio, bk.II, ch.5, § 3.

44 De Jure, bk.II, ch.2, §§ 3, 2, 9.

45 De Jure, bk.I, ch.1, § 7 & bk.III, ch.9, § 8 ff.

46 Pufendorf, Statu, § 2.

determination of the nature of man, Pufendorf had unwittingly given man a metaphysical importance, the specificam humanum.[47] We may repeat this point; according to Pufendorf, in God's Creation, His creatio, there is a division in the cosmos; there is on the one hand, the entia physica, the Being and the modus of its existence [organic and inorganic matters], which cannot influence actions consciously; and, on the other hand, there is the entia moralia, i.e., all Being that can decide for itself with a free will, or that which is by an act of will of the Creator added to the physical nature of a Being, whereby the value-legislator established the value of such Being. The freedom of the will, to rationally conduct its actions, is what separates the moral nature from the physical nature of mankind. With the potentia intelligens is something added to the natural substance which now as a whole can be named an entia moralia.[48]

In opposition to Hobbes, Pufendorf stated the human likeness to animals, with which we share instincts and affections; furthermore, humans in principle have no desire to harm one another. It is important for Pufendorf that in man the entia physica, the sphere of pure physical nature, and the entia moralia, his physical and intellectual nature,

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[47] Pufendorf, De Jure, bk.I, ch.1, § 2.

[48] Ibid., bk.I, ch.1, § 3.

have a reciprocal influence on each other, such that man, through his free will, may in an extreme case give up self-preservation or even extend his passion to voluntary acts which lie beyond the dictates of nature. Even though there are several conditions which are not within man's power of accountable action (e.g. aging and dying), through reason and free will man is capable to have within his physical nature morally responsible acts. It is only with this capacity that he realizes his specific nature.[49]

Pufendorf's concept of the ratio refered to the natural human capability to distinguish between right and wrong; to make this distinction, the insight of the inborn intellect - a common sense - is sufficient. It is not necessary to have an extraordinary intelligence to recognize the law of nature, because the human mind is a replica of the higher Light. This, however, is of theological concern and not a factor in Pufendorf's natural law corpus, where he denies any ontological or theological predetermination.

Pufendorf made a distinction in the natural righteousness of the ratio, the conscientia recta, and the conscientia probabilis; the right conscience is in action when the human act is clearly recognized to be conforming with the law; the probable conscience is in action when the

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[49] Denzer, Moralphilosophie, p.74.

act is recognized not to be contravening the law or its principles.

Pufendorf rejected all arguments against free will. This is in direct opposition to Hobbes, who denies the freedom of the will in the Epicurean manner.[50] Denzer raises the question whether Pufendorf with his polemic against Hobbes only meant to hit against circulated opinions of Hobbes at that time, or if he seriously considered Hobbes an opponent of the free will. Hobbes did make the distinction between the freedom of the will, which he denied, and the freedom of decision making, which was understood by his contemporaries to be the freedom of the will. For Hobbes the will is the motor which comes into effect when a decision had been made. Freedom is in the deliberation, the evaluation to act or not to act, to do the one or the other thing; but once sufficiently weighed the final decision, the Entscheidung is demanded, a force is invoked, the Antrieb to either suppress or enact the action, which was either desired or feared, which is called in the true sense the "will." On the other hand, Hobbes confirmed man's liberty when he said, "as long as we deliberate we are really free."[51] This difference in terminology in Hobbes, who called the freedom of decision-

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[50] Pufendorf, De Jure, bk.I, ch.4, § 2.

[51] Hobbes, De Homine, XI,2,p.21;
Pufendorf, De Jure, I,2,5.

making what normally is known as freedom of the will, shall not be dismissed as mere semantics.

Every action originates from the physical nature, so the action of the will. The will is organised within the teleological determination of man. The natural necessity of the will with its orientation towards its end - the felicity and the perfection of the human life, is the foundation of the freedom of the will. There has to be a differentiation between the natural inclination towards felicity and the free decision of the will. The natural inclination towards felicity does not free man from the decision of the will towards good and evil. Because, what felicity consist of, is not predetermined. This also counts in matters of law: the obligation by law influences the will morally but not in fact like a coercion. In fact, the freedom of the will remains untouched by the obligation.

Pufendorf argued against the Reformed predestination doctrine.[52] He acknowledged Grotius's Remonstrant position on the free will in De dogmatibus Reipublicae innoxiis.

However, we have to recognize that the human will is mostly not free when it decides, namely that it is forced

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52 Ibid., De Jure, bk.I, ch.4, § 3.

into a certain direction by the physical condition of the body, the habits, custom and the behaviour of the surrounding world, the Umwelt. The will is also influenced by desire and human appetites. But through none of these is the freedom of the will liquidated. The Will can always decide otherwise, even so, man will follow normally the direction dictated by reason or the physical conditions present.

> ...because there are scarce any Goods or Evils which appear to a Man in their native Colours, and without any suffering any Mixtures, but commonly they are blended and shuffled together; Good is adulterated with Evil, and Evil is sweetened with Good; to which, if we add the strange Inclination which we find to some good Things in particular Persons, and how all Men have not the Ability to distinguish solid and durable Enjoyments, from those which are only painted and transitory; we shall see how there must needs arise hence an infinite Variety in the Wills and Inclinations of Men; and how all pursue what they think their own good, but in different Paths, and by different Means.[53]

In all areas of Pufendorf's natural law system, its main character is the correlation between rights and obligations. Contrary to Hobbes, Pufendorf's thesis is not of the inalienable rights of the individual, but the doctrine of the right order of communal life, which depends on the reciprocal interdependence of men, which by man's nature, is based on the obligation-rights-relation in the moral behaviour of men.

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[53] Pufendorf, De Jure, bk.I, ch.4, § 4, p.36.

The relation of obligation and rights is in force whether it is a complete or incomplete obligation. From a complete obligation comes a complete right, from an incomplete obligation comes a disturbance of the equality of rights and duty, which is the case in the relation between a sovereign and his subjects, master and servants, parent and children, with the superior partner to have a complete right, the inferior partner to have an incomplete right.[54]

In Pufendorf, the relations between reason and law, between obligation and free will, result in a specific relation between obligation and rights. Pufendorf differentiated between obligation, obligatio, and duty, officium. Obligation is the inner force which follows the observation of the law; duty is the action itself which follows this inner force. Furthermore, we ought to observe the difference between the obligation towards nature and herewith towards God the Creator, and the obligation between human beings. The obligation upon God is not reciprocal, because there is no obligation by God or the nature of His Creation. But there is a reciprocal relation between human beings. And only in the sphere of reciprocity exists the correlation between rights and duties. In Pufendorf, natural rights apply only to those who oblige themselves to live by the natural law; in the same way, only those people enjoy commu-

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[54] Denzer, Moralphilosophie, p.88.

nal life and protection, who oblige themselves to obey the rules of society. Pirates and highway robbers are therefore excluded.

Rights cannot be demanded by the mere appeal to natural law; in order to be a right, it has to be "in-the-right" vis-a-vis all other claims of natural law. Here Pufendorf deviated from Hobbes. Hobbes deduced from natural law the claim to equality of all, and the right of everybody to everything. Pufendorf opposed this Hobbesian doctrine on the basis that Hobbes called a natural right what Pufendorf considered a mere natural ability which only through inter-human relationship can be turned into a right. According to Pufendorf, from natural law comes first the obligation towards fellow man, only thereafter is a right created vis-a-vis fellow man.

Richard Tuck explaines the Pufendorf position on human rights clearly as a moral entity, that is, a result of human relationship, as well as an obligation.[55]

> ...not every natural License, or Power of doing a thing, is properly a Right; but such only as includes some moral Effect with regard to others, who are Partners with me in the same Nature...

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[55] Richard Tuck, Natural rights theories, their origin and development, Cambridge, Cambridge University Press, 1979, pp.76-77.

> All men being naturally equal, one cannot fairly exclude the rest from possessing any such Advantage, unless by their Consent, either expressed or presumptive, he has obtain'd the peculiar and sole Disposal or Enjoyment of it. And when this is once done, he may then truly say he has a Right to such a thing.[56]

For Pufendorf any right requires a definite obligation by someone else. Barbeyrac's interpretation of Pufendorf's obligation, strictly speaking, requires the awareness of another's right over us. But Pufendorf's definition is more fundamental than Barbeyrac's interpretation makes it to be. Any idea of anyone having a right or property in themselves, outside the network of social obligations is fundamentally misleading. For the first man, Adam, as the only person living, it was different: he had an indefinite dominion, since there was no limitation, no sharing, no partnership. Propriety could only have come with more than one inhabitant; property denotes the exclusion of others, but also the recognition by others, i.e. a right is the obligation by others. Thus obligation comes first, a necessary prerequisite for the establishment of rights, and the right to transfer aquired rights from one to another. According to Pufendorf, this is only possible within a multitude of men, for "the Property of things flow'd immediatly from the Compact of Men," and "that one Man's seizing on a Thing should be understood to exclude the Right

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[56] Pufendorf, De Jure, bk.III, ch.5, § 3.

of all others to the same Thing, could not proceed but from mutual Agreement."[57]

Pufendorf considered it a nonsense to call the natural ability of man a right. The principle of equality is merely the obligation, which binds everyone, according to natural law, to have equal rights and equal power for the preservation of his own self. In the state of nature where nobody is subject to a superior, one is obliged to use only such means which in the pursuit of self-preservation will not diminish the equal right of one's fellow man seeking his own preservation.[58]

This reciprocity of rights and obligations by Pufendorf is contrary to Hobbes' doctrine of individual rights. Pufendorf's doctrine is one of the proper order of human co-existence which rests on the reciprocal need of mutual support, and functions in the duty-right-combination of moral behaviour.[59]

Pufendorf clearly believed that man cannot fulfill his nature on his own, he has to have an order of superiors and inferiors in the vertical sense, and an order of co-

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[57] Ibid., bk.IV, ch.4, §§ 3 & 4.

[58] Pufendorf, Statu, § I.

[59] Ibid.

existence of people in the horizontal sense. He argued with Thomas Aquinas, that unlimited liberty would be devastating to the human nature. It is essential for the human existence to be bound by laws. This is based, on the one hand, on the rational-free-will nature of man, on the other hand, on his physical nature. This is for Pufendorf not as a result of a philosophical concept of man, but the empirical picture of man. Pufendorf opposed the understanding of man based on the appetites and affections, as it was understood by the Sophists and the Epicureans, and revived in the mechanistic explications of Hobbes and Descartes. Pufendorf also opposed Grotius' concept of an "instinct" of appetitus societatis, which might suffice to have peace and order among men, because "It is not agreeable to the nature of man to live without laws."(60)

The physical-natural component must have its contributing effect on the social-nature of man. Physically, man is determined to live in society due to his helplessness, his imbecillitas.

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60 Pufendorf, De Jure, bk.II, ch.1 heading, § 2: In tracing this Point to its proper Spring, we think it convenient first of all to shew, that an absolute Liberty would be so far from being useful, that indeed it would be destructive to human Nature; and that therefore the binding and restraining it with Laws, is highly conductive to the Good, and to the Safety of Mankind.
(also: Hobbes, De corpore & Descartes, De passionibus).

This is not a new concept. Rather, it is in the philosophical tradition of Plato and Aristotle, who speak of the indigence of man, who requires the institution of a state; and Cicero uses the term imbecillitas to demonstrate the necessity of human cohabitation.[61]

In addition, human liberty is necessarily bound by law, since free will needs the guidance of reason; in consequence, human imbecillitas demands socialitas for human functioning.[62] Pufendorf's method was to use imbecillitas to demonstrate its prerequisite to socialitas; therefore, man by nature is a social being, and his socialitas is the consequence of his humanness.

This viewpoint is essentially new, a unique Pufendorfian concept.

In his brotherly fellowship, man receives his dignity, dignatio nominis humani. Language capability is an example of the essential core of socialitas in human nature.[63]

To make a concession to the doctrines of his time, Pufendorf correlated socialitas to the commandment of Chris-

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61 Pufendorf, De Jure, bk.II, ch.3, § 15.

62 Ibid., De Jure, bk.II, ch.1, § 8.

63 Pufendorf, Eris, II,0.3,2.

tian charity. Sociability is a maxim of natural law which is concerned with the moral conduct among people. As such, natural law is not based exclusively on self-love and the preservation of the self; this statement is in response to the Hobbesian doctrine.[64] Pufendorf stresses that socialitas and self-love are not opposing forces. In the combination of socialitas with human dignity, individual man receives his moral value only within society. Even though man may excel in spirit and in the development of his talents, thus raising his value as a human being, his humanity is only fulfilled as a member of a community. The cultura animi et cura corporis has its higher purpose in the fulfillment of the whole of humanity, and in the process each individual member will be elevated to a higher rank. Pufendorf, in criticizing Hobbes, maintained that nature does not call for such a sociability which would sacrifice the care of the self.[65] However, Pufendorf's socialitas-doctrine was attacked by the Protestant Orthodoxy as being in accord with the heretic Thomas Hobbes, because for the Protestant Orthodoxy only the integre naturae of man, and not the socialitas, was an acceptable basis for natural law.

For Pufendorf there is a close connection between socialitas and cultus vitae. Cultus vitae or cultura vitae

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[64] Ibid., II,0.4,5.

[65] Pufendof, De Jure, bk.II, ch.3, §§ 16 & 18.

is based on the cultura animi. In Pufendorf, culture is the result of human activity, refinement of living, a raising of productivity, and co-operation in society and social order. In the first instance, it is the overcoming of human weakness, and in the second instance, it is a fulfillment of human dignity. Cultura is the result of moral activity of free willed decisions by humans. In Pufendorf there is no clear separation between nature and culture, because human nature goes far beyond the "born-with." According to Pufendorf, the Hobbesian concept of nature is wrong, because it is impossible to claim that everything that is added to the natural attributes of mankind is not natural. This would mean that language is contrary to the human nature, because nobody is born with it.[66]

Humanitas is advanced with the striving of human nature towards perfectio vitae humanae, which is the end of the human nature.[67] However, Pufendorf kept his argument to the "human forum", and there the human nature does not seek salvation and eternal happiness, but, as Pufendorf said, it seeks the fulfillment of the human potential with the aim of a pleasant co-existence with fellow man, the cultivation of social togetherness. Again, within his natural law concept, Pufendorf did not recognize the ontological tradi-

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[66] Hobbes, De cive, I, § 2.

[67] Pufendorf, De Jure, bk.I, ch.3.

tion, to which the fulfillment of things is the end whereby nature comes to be realized. Pufendorf's aim of the human nature towards culture is beyond the praxis of nature, it is creativity, artes inventae.[68]

In this context of culture, which, for Pufendorf, is human creativity towards society, he did not follow Hobbes's historical alternative of the status naturalis versus the status civilis, which in Hobbes is the state of warre versus the commonwealth state, i.e. the chaotic state without covenant versus the contractual state. This hard differentiation caused Hobbes difficulties with the definition of the family, which he sometimes considers a miniature state, and at other times a natural state. The contrast between the state of nature and the civil state is not drawn as sharply in Pufendorf as it was by Hobbes; because the law of nature effectively obliges us to engage in sociability, in Pufendorf's view, but not in Hobbes's. [69]

Pufendorf was strongly critical of Hobbes's natural state concept, in which men are in a constant state of

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[68] Ibid., bk.I, ch.2.

[69] Denzer,in his Moralphilosopie, suggests, in reference to Pufendorf's concept of the natural state being a fictitious state, an inbetween state, a status adventitus, in advance to the contractual status civilis. This, however, contrasts with Pufendorf's insistence that there is no state without obligation. p.99.

"Warre". For Pufendorf, the war of all against all is the animal state of predators, the status bestialis. Only one who could imagine mankind without language and without reason could entertain such a wicked concept, which has no relation whatsoever with the dignity of mankind, even with the corrupt nature he has had since the fall. With this natura pravitate infecta, man has still a unique status humanitatis. There is, of course, the status nascendi, the helpless state of the human infant, who, deprived in his imbecillitas could not survive as a human being without the care of other humans. Such a state of the lonely infant can only be assumed in ficto, because such state was overcome by early man with God's grace.[70] For Pufendorf, the assumption that man arrived in this world totally deprived of any assistance, is a reductio ad absurdum invented by Hobbes's godless rationality.

However, Pufendorf did not escape the ambiguity of his definition of the natural versus the contractual (i.e. civil) state, when it comes to describe the status of the early family formation. Families, in the original state, were in the natural state towards each others, because they were without a superior; but within, the family had from the beginning a paternalistic order, the father is recognized as

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[70] Pufendorf, Statu, § 5.

the superior in a tacit agreement, which constitutes an advanced state beyond the natural state.

We have to be reminded that, in Pufendorf, nature embraced the tendency towards culture, because only with this tendency may man reach his appropriate natural development. In the original state of liberty and independence there did not exist any sovereignty, but man lived in the company of other men; however, he is not under the order of any superior man, nor does he recognise anyone as superior. This is the status naturalis in ordine ad alios homines, which extends to the period in which already families, clans, and households had been formed, and when, in the strictest sense, only the heads of these units lived among each other in the natural state. In a contradiction, the subjects of these units live in the natural state as well.

This lack of precision was criticized by the Protestant Orthodoxy in the Index novitatum, (Article 30), to which Pufendorf defended his state of nature as being ficticious. Pufendorf's understanding of the state of nature became clearer when he made the distinction not only according to the sovereignty principle, when men in the natural state were without a sovereign and members of families recognized in their father a superior, but when he

introduced the distinction between the natural man and the citizen, the burgher.[71]

Pufendorf's thesis of the natural state contrasted with the civil state, the Bürgerzustand, a distinctive modern thought. It has its origin in the problematic position the Modern Age afforded the individual. In the politics of Aristotle and Thomas Aquinas, the city or community is the whole with the single person only a part of it. The whole is stated before the parts, the city or community is the organism. In Pufendorf, however, the primary being is the individual, who of free volition is the creator of the state. The state is not considered an organism which developed on its own, but is based on a social contract between free, decision-making men. This makes the natural state so important. With the idea of individual men being able to decide to remain in their natural state or, with a free choice, to join in a civil society, man was understood to have been endowed with a special dignity and with specific rights. This condition is not diminished by the fact that the contrat social is only in an imaginary form and the community of people based on a contract is only a thought, while in reality society is a natural development. But only the thought, viz. that of free men were the creators of a

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[71] Pufendorf, Eris Scandica, in the Apologia, § 35, p. 51 & p. 200; also in Statu, § 7.

state, attributes significant value to the individual person - which was recognised only in the Modern Age.

No one prior to Hobbes made the definition of a person so crystal clear. In Hobbes, the individual person is the last judge and the standard Maßstab for social action. Self-preservation is the final goal of human endeavour, and each individual is the last judge of the means, necessary and useful, to achieve that end. The laws of nature are nothing else than laws of the individual reason applied to the preservation of the self. No one developed this concept as radically as Hobbes, who dissected society into its, indivisible, constituent parts: the individual person. Bodin's basic unit was the head of a household in his patriarchism. Althusius' basic unit was the estate, the various guilds, i.e. the basic components of a state.[72]

Pufendorf's individualism is not based on the autonomous individual. Pufendorf departs from the subjective ratio of Hobbes and returns to a common, an allgemeingültig, conscientious reasoning. In the individual person already rests the socialitas which is also ordered by natural law. The creation of a State by individuals in a common accord is only a thought-structure; the State is analogous to the human body which consists of several organs;, these are compared to

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[72] Denzer, Moralphilosophie, p.108.

small communities with their origin in marriage and family formation.[73]

But Hobbes sacrificed individuality when man surrenders his natural liberties to an absolute sovereign, and he becomes a common part of the organism, feeding and growing on its subjects to become the all powerful Leviathan.

A much stronger individualism is found in Christian Thomasius, where the individual person seeks less the company of fellow man than his individual felicity.

The very important element which signifies the modern individualism, is the fact, that man is a rational being. The ability to think, to deliberate and to decide rationally for himself, that is the modern Cartesian discovery: cogito, ergo sum.

Pufendorf talked of a common ratio and a common behaviour resulting from this rational sociability which leads to a conscientious similarity of all human beings. He opposed Hobbes on the subjective ratio, which exists exclusively for the defence and the survival of the individual human being in competition with all others. Pufendorf declared such ratio as unreasonable and it leads to the

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[73] Ibid.

destruction of everyone by everyone; it demonstrates the very absence of reason, when man takes leave of all senses; but reasonableness leads to an understanding among humans, which is essential to being a human. For Pufendorf, therefore, the natural state is a state of peace through reason, albeit a precarious one for the corrupt nature of man and his capability to harm others; but that communal reason in man demands that each person develop his talents and exist in the company of others.[74] Furthermore, the human ratio in the natural state can also oppose man's desires and instincts: this Pufendorf claims against Spinoza's determinism.[75]

With the description of barbarism Pufendorf made clear that the Hobbesian "state of Warre" is not the natural state but an aberration of it. Hobbes's state of warre is not the beginning but the destruction of a potential peaceful co-existence which is destroyed by the first act of violence. The first state of nature in the abundance of space and necessities and very few humans, enabled people to roam freely and without want; it must have been that state of peaceful co-existence, and in the discovery of the pleasure of the company of fellow man, he may have also experienced

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[74] Pufendorf, De Jure, bk.II, ch.2, § 4.

[75] Ibid., bk.II, ch.2, § 3.

loneliness which caused the desire for companionship.[76] And with the recognition of the similarity of nature in fellow man, he may have assumed the same tenderness in others.[77]

We cannot but be cautious in the acceptance of either thesis by Hobbes or Pufendorf. Hobbes by his own admission was frightened of the chaos created by civil war, and in fear of his liberty and life, had a very skeptical outlook on men, who cannot be trusted to keep the peace, unless they surrender their brutish liberty to an orderly body of absolute power. Pufendorf has a more optimistic view of mankind, albeit corrupted by the first man's fall; man is bestowed with wicked desires; nevertheless, he has rational faculties, which, admittedly flawed, necessitated law and order. Although by his nature man is inclined to sociability, Pufendorf is in full accord with Hobbes on the necessity of an absolute sovereign power, to make laws to be

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[76] We find this line of reasoning much stronger and later in Jean-Jacques Rousseau (1712-1778), who called it the "Hobbesian inferno" which bore no sort of resemblance to the behaviour to be expected of primitive men in the absence of organized society. Men in his primitive condition, he argued, far from being natural enemies, could have had hardly anything to quarrel about.
Jean-Jacques Rousseau, The Social Contract and Discourses, transl. by G.D.H. Cole, (1913), revised by J.H. Brumfitt and John C. Hall, London, Godwit Paperback, reset 1986. Introduction xii & xiii.

[77] Pufendorf, De Jure, bk.II, ch.2, § 9.

obeyed; if one does not, one has to expect to be severely punished.

Hobbes and Spinoza are of the opinion that he who acts according to nature, acts already in his full rights, because man is determined by nature.[78] Pufendorf, in opposition to this, accepted a right only in the presence of a law, and claimed that the human act is not determined by instinct.[79] When the instinct in man deviates from his rationality, his impulsive action is not according to law, but only according to nature.[80]

In the state of nature only the natural law is in

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[78] De Jure, bk.II, ch.2, § 3.

[79] Reference is made to Bruno Bettelheim, Freud and Man's Soul, New York, Vintage Books, A Division of Random House, 1984.
Freud used in German the word Instinkt when it seem appropriate to him - to refer to the inborn instincts of animals, and he shunned it when he was speaking of human beings, using more often the German word Trieb. Bettelheim quotes Webster, calling for the exact translation of Trieb into "drive", which as a noun means, "the power or energy to get things done; with enthusiastic or aggressive vigour," and as a verb, "any of the basic biological impulses or urges, such as self-preservation, hunger, sex, etc." - exactly what Freud meant by Trieb. Bettelheim, in opposition to the medicalization of Freud in the English translation, offers "impulse as a better rendering than "instinct" for Trieb. In the French edition of Freud's work, Trieb is translated into impulsion. "Impulse" as defined by Webster is an impelling force, a sudden inclination to act, without conscientious thought.

[80] Pufendorf, De Jure, bk.II, ch.2, § 3.

force, and it alone regulates the orderly co-existence of mankind. Man does not have a natural liberty which would free him from the dictates of the law of nature or divine commandments. However, the liberty not to accept any human commandments is thoroughly natural. This is the specificity of the state of nature that there exist only an obligation towards the dictates of nature, but none towards any other man. For Pufendorf, in the state of nature there does not exist a right as in Hobbes, because rights - in the narrow sense - are only established by a governing legislator.[81]

The law of nature is intrinsic to the nature of man. Therefore, according to logic and experience, the state of nature cannot be war of everyone against everyone. The status naturalis is a lawful condition, because human liberty can only develop within the bounds of natural law. On the other hand, the rightful and peaceful natural state is always endangered, because the fulfillment of the natural dictates - due to the weakness of mankind - is not guaranteed, and in the ability to misdirect the power of the free will, man may contravene the dictates of natural law.[82]

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[81] Pufendorf, Statu, § 17.

[82] Pufendorf, Officio, bk.II, ch.1, § 2; Statu, § 18; De Jure, bk.II, ch.12, & bk.VII, ch.1, §§ 8-11.

In both Hobbes and Pufendorf, the natural state of man is only considered as a pre-state condition to the civil state of their times. The chaos of civil strife in England caused in Hobbes to think the pre-state condition of man to be a constant state of Warre, therefore the absence of a social contract, which would force man to the dictates of an absolute state authority in whatever form it may be agreed upon in the contrat social.

For Pufendorf, the pre-state status is historically not available to our experience, and we only have the present nature of mankind for our evaluation. In his view, the origin of the human race is immaterial because it is impossible to reconstruct the human conditions and come to a rational decision in the examination of the present nature of things, on how things did exist in reality at the beginning of man. However with the present state of things, Pufendorf could not follow Hobbes. It was a time of reconstruction and yearning for peaceful solutions to the devastation of a thirty year religious war in Germany. Therefore, Pufendorf's development of the civil state did not rest only on the Hobbesian human creation of a free social contract, but also on human nature, which is contrary to Hobbes's conception, in that it is imbued with a natural socialitas.[83]

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[83] Denzer, Moralphilosophie, pp.116-117.

The status naturalis in Hobbes is based on the mechanically understood behaviour of the individual; the natural state is constructed from the egoism of each person. The experience of the individual, the fear of death and the desire for a good life, are the logical starting points for a State, which is the surrender of individual liberty, in exchange for the absolute order of the State, which at the same time secures the individual.[84]

In the observation of reason as a function in the transformation of man from a pre-state status to the conception of a civil status, we have to consider its consequence. If reason is to produce a clear and decisive knowledge, then we have to accept the status naturalis, an image of the mind, rather than a historical state; because in a fictitious concept of the mind the natural state has a logically necessary character for the conception of a State.

The thesis that the individual cannot fulfill itself without the State seems to favour the fictitious concept of a natural state of man. The logic-deductive method which science had made into a causal system, results in the distance between natural state and statehood state. With an increasingly individualistic view of the pre-statehood man, and the more we emphasize his natural

[84] Ibid., p.119.

inability to exist alone, the more compelling becomes the institution of a State. However, the more we emphasize the rational nature of man, the more we treasure his independence, and to be in control of himself, the more we experience a growing desire to be free from the stifling omnipotence of the State. As such, the new scientific method - which promised to bring the thinking man closer to the truth, did not so far produce a decision in the introduction of the natural state between the nature of man and the natural law, on the one hand, and the civil status, on the other; because the specificity of the status naturalis can be modified to favour or to resist the evolution into the civil status.[85]

Hobbes, in his systematic use of the geometric method in aiming to establish the causal effect in the law of the human nature and its social behaviour, deduced the law of nature as a commandment of God. With that he introduces a metaphysical and normative element which is in contradiction with his scientific method. Hobbes saw in God not only the prima causa, as the original mover, but also the law-maker, as the norm-dictating institution for a world in motion. Concurrently, in his preamble, Pufendorf had established the theological link, i.e. the metaphysical connection of all

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[85] Denzer, Moralphilosophie, p.123-24.

things with God the Creator, whose Creation is, to the knowledge of man, both nature and commandments.[86]

Pufendorf recognized very well the many meanings of the term "right", and he does not succeed in the reduction to a single understanding of it either. Grotius was the first to give ius a modern meaning, contrary to the Roman law perpetuated by St. Thomas, where ius is an objective condition determined by law. Ius is by Grotius seen as something which a person has, a legal right called facultas, and "the task of law was to make the proper exercise of rights effective for all by preventing the improper interference by some." What Hobbes did with this proposition was to suggest that the pursuit of individual rights leads to civil war, and the task of law consequently is to restrict our rights.[87] Pufendorf, on the other hand, tended to

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[86] Ibid., p.128.

[87] Knud Haakonssen, "Hugo Grotius and the History of Political Thought," a paper presented to the Australian Society of Legal Philosophy's conference, 1983. The reference is made to De iure belli ac pacis, in the transl. by Francis W. Kelsey, Bk.I, Chap.I: What is War? What is Law? Sect.IV: A body of rights in respect to quality is divided into faculties and aptitudes; § 1: There is another meaning of law viewed as a body of rights, different from one just defined but growing out of it, which has reference to the person. In this sense a right becomes a moral quality of a person, making it possible to have or to do something lawfully.

Such a right attaches to a person, even if sometimes it may follow a thing, as in the case of servitudes over lands, which are called real rights, in contrast with other rights purely personal; not because such rights do not attach to a person, but because they do not attach to any other person

circumscribe "right" with its separation from other aspects of right related terms. At first, like Grotius, Pufendorf called right an active moral faculty of a person, to receive what belongs to him that is held by another person. In this sense, the right is a claim to what belongs to a person. Second, this right concept is located in the liberty of the individual and has the same starting point in both, Hobbes and Spinoza. Following the concept of Hobbes, Pufendorf defined right as the liberty which everyone has, in accordance with his faculty to use his reason. In this sense, right is what is not forbidden by law.[88]

Denzer gives a summary definition of the Pufendorf concept: "the entia physica is everything that belongs to the inorganic, vegetative, and animal nature; entia moralia is everything that relates to the sphere of mankind and his free fixation of values, of Wertsetzung.[89] What is missing in this definition, is the reciprocal factor. While one may reject the determinism, there is no denying the bondage of man's existence being an inhabitant of the physical nature and its environment. The physical nature of man has

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than the one who is entitled to a certain thing.
When the moral quality is perfect we call it facultas; when it is not perfect, aptitudo. To the former, in the range of natural things, 'act' corresponds; to the latter 'potency'.

88 Pufendorf, Eris, I,8,1; De Jure, I,6,3.

89 Denzer, Moralphilosophie, pp.67-68.

instincts just like the animals, but the moral nature of man has to a certain extend control over the physical functions of his nature. With his mental capacity and his will man may stimulate, arouse or subdue physical urges, and can control himself, if he applies himself with mind and will, to gather powers to change and improve his physical condition. As such, his weakness, which in any animal would have been compensated by camouflage or an armour, is protected by the creations of his mind, such as shoes for his feet, and clothing to replace a fur rescinded in evolution. Under this condition of man, who puts himself into a man-shaped and cultured environment, he also brings about changes to his physical nature, which lengthen his life expectancy, and expand his mobility with technology, and could preserve himself in a then unknown but imaginable duration of more than a century, a life which once would have been considered close to immor-tality. The reciprocity between the physical nature and the moral nature is especially important for the disparity in culture, and the status in the community. If there is physical want and oppressive poverty, the human mind cannot function in any other way than to seek relief from physical discomfort and possible starvation. The search for improve-ment of the plight is in the hope of the aid by fellow men, who seem to be above the situation, and in a position to render a solution. If such is not forthcoming, fellow man has failed to come to the aid of the deprived, and

failed in the use of his talents, the abundance of creative power and will to improve himself by improving all of mankind.

Aristotelianism in Pufendorf.

In the interpretation of Pufendorf's works, we have to inquire into the particular aspect of natural law: the human nature. Bearing in mind, Denzer's overestimation of Aristotle's influence on Pufendorf, we must proceed to follow-up on the many references Pufendorf made in his writings to Aristotle.

We are faced with two problems, the difference in interpretation of "natural life", entia physica, and of "social life", entia moralia, which concerns the relation between man and his fellow man. This difference becomes even more evident in the discussion of the law which governs this relationship, which not only includes the normative concept, but also the power to enforce it, the superior force, the concept of sovereignty. It is in this area of superior power that we find the clashes of opinion, for which reason the concepts of sovereignty must be re-examined in the context of its time and reality.

Aristotle had the unique opportunity to examine and to document a variety of not less than 160 constitutions. Nienteen centuries later, Pufendorf, following the Thirty Year War, sought to establish a legitimate structure of state, one independent of both the Roman Empire of the German Nation and the Papal supremacy, one based on natural law, albeit by recognizing the princes he served, and by according to the monarchy the distinction of being the most desirable form of State.

In undertaking the assessment of Aristotelianism in Pufendorf, we must note that we first have to answer a significant question: did Pufendorf read Aristotle in the original Greek or in a Latin translation? In his early years, his education in a German Protestant high school, called a Gymnasium,

> was standard for such Lutheran establishments. Grammar, rhetoric, logic, and many hours of Bible study... Pufendorf used this time to immerse himself in the classics... of his six years in Leipzig, Pufendorf did without an organized plan or unifying goal of education: with the signal exception of theology (and medicine) he spread himself into the study of every field offered by the university... Pufendorf's two brief years at the university of Jena were to prove decisive for his development, since he came away not only with his academic degree but with a chosen field for his endeavors and a central principle for organizing knowledge around this field. This field was what

> Pufendorf called ethics, and the principle was the concept of natural law.[90]

From this description of his education at that time, we may rightly assume Pufendorf had been familiar with the Ancient Greek language. Furthermore, many of the volumes listed in the late Pufendorf's library, making direct reference to Aristotle in the title, seem to be in both languages, Greek and Latin.[91] However, since Pufendorf's writings where mostly in Latin, [some in German, none in Greek], we

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[90] Krieger, Leonard: The Politics of Discretion, Pufendorf and the Acceptance of Natural Law; Chicago & London, The University Press of Chicago, 1965; pp.14-15. It maybe noted here that Pufendorf spent only one year at the university in Jena.

[91] Samuel Pufendorf's CATALOGUS LIBRORUM BERLIONI.
IN DUODECIMO:
234. Problemata Aristotelis Galuce, Rov.1606.
In Octavo:
60. Ejusd. Discours von den Mängeln der Aristotelischen Ethic.
83.84. Aristotelis Opera Onmia Graec & Lat. ap. Laemarium, 1597.
345. Ph. Scherbii, Discursus Politici in libros Aristotelis de Republica. Ef. 1516.
473. Aristotelis de arte Rhetorica cum Coment Fr. Porti Graec. & Lat. Spir. 1598.
513. Piccarti Comment. in Libros Politicos Aristotelis, Jen. 1659.
552. Aristotelis Ethica Graec. & Lat. cum not. Riccoboni, Ff.1596.
Ejusd. Rhetorica Graec. & Lat., Hanov. 1596.
In QUARTO:
12. Lexicon capulae Greco-Latinum, Bas. 1614.
175. Aristotelis Organon cum Notis Pacii, Ff.
178-(3). Launoy de varia Aristotelis fortuna in Academia Parisiensi, Hag. 1656.
200. Diogenes Laértius de Philosophorum & Philostratus de Sophistarum vitis, Paris 1516. it. Aristotelis Libri Politici.
264. Aristotelis Libri Politici cum Paraphrasi Dan. Heinsii, Jen. 1660.

may assume that his commentary on Aristotle for the benefit of his readers at Protestant universities were made with reference to Latin texts of the Roman as well as the Greek thinkers.

This view may be of significance for Pufendorf's definition of sovereignty, which seems t `e based on the Aristotelian concept but in its Latin translation and evolution. For example, Ernest Barker, in his vocabulary-comments to his translation of The Politics of Aristotle,[92] compares the Aristotelian Greek term arché and the term kyrios - which deserves investigation:

> The term arché is the general term for rule or government, as the term archòn is the general term for a ruler, governor, or magistrate. The word originally signifies "beginning" or "initiative"; and we may imagine that the reason why it was extended, by an easy transference, to mean authority or rule was that the Greek regarded those in authority as beginning, or starting, or initiating a course of political action. If the essence of authority is thus initiative, the question will naturally arise whether the initiative needs confirmation, or some process of validation.[93]
>
> The term kyrios is a term familiar in the Christian liturgy in the sense of "Lord"; but the essential sense of the Greek root from which it comes is confirmation, ratification, and the general process of giving validity. The word kyrios often occurs in the Politics, sometimes as a neuter noun and in the form of to kyrion, and sometimes as an

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92 Barker, Ernest: The Politics of Aristotle, translated with an introduction, notes and appendixes; London, Oxford, New York, Oxford University Press, 1946; first paperback issue, 1958.

93 Ibid., p.lxvii.

> adjective. It is most readily translated (but, as we shall see, imperfectly translated) by the word "sovereign". ... Kyrion is the deliberative body which is the validity-giving organ, or sovereign, in any constitution... To kyrion is to exercise what we call sovereignty, but only an immediate sovereignty, subject to the ultimate law.[94]

These are the terms of the Greek Polis, and these apply equally to the early Roman Republic, the civitas. "But the Roman Republic passed into the Empire; and the Latin terminology acquired an imperial tincture. Government became a matter of principatus of 'the first place' or 'pre-eminence' rather than 'initiative'."[95] What we consider today, in the ordinary daily life, as leadership quality in a person, is the quality of a self-starter, a person who takes the initiative, while what we call 'the boss', is a status position, the status of a superior authority.

> ...the idea of majestas - of a "superiority' ... changed, during the late Middle Ages, but more specifically during the sixteenth century, into the cognate word "sovereignty", which was derived, through the popular Latin superanus, from the Latin preposition super. We thus enter upon the days of a high and transcendent "sovereignty", naturally allied with an idea of the "state" by virtue of which "state" was regarded as the "standing" or position of the person (or persons) in the enjoyment of superior authority.[96]

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94 Ibid., p.lxviii.

95 Ibid.

96 Ibid.

Considering Barker's reflections, we observe that it is not surprising, that we do not at all have a clear picture of the Aristotelian influence on seventeenth-century thought in German Protestant universities.

Krieger in his book review states:

> Denzer's primary achievement undoubtedly consists in his persuasive argument for the continuing role of the Aristotelian tradition in the social content of Pufendorfian natural law through the coupling of research in general academic history with the textual analysis of the specific academic writing that was the format of Pufendorf's thinking about natural law...[but] Denzer makes inappropriate applications of the academic tradition to Pufendorf on two levels, he overextends the academic natural law format within the corpus of Pufendorf's total work, and he overextends the Aristotelian component within Pufendorf's natural law.[97]

Denzer claims that Aristotle figures rather prominently in Pufendorf's work, but not necessarily favourably. But he admits to the outspoken criticism of Pufendorf on Aristotle:

> Basically, Pufendorf criticises in Aristotle what applies equally to Plato, that he developed his moral philosophy from politics, a politic which is modelled on the Greek democracy, with the result that the Ethics is only particular, directed specifically towards the civitatis, and not to what Pufendorf is looking for in an ethica universalis.[98]

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[97] Krieger, Leonard: "Review of Books; Modern Europe; Horst Denzer. In American Historical Review, Vol.78, No.3, 1973, pp.647-676.

[98] Denzer, Moralphilosophie, p.260.

In the Aristotelian-Thomistic tradition the decisive criterion for general knowledge, and therefore for science, was said to have been the cognition of the essence of Being. The subject of science could only be what always or mostly is, and not an accidental, or a zufällig being, ens per accidens. Pufendorf in his natural law work replaced all metaphysical and "revealed" grounding of natural law with the evidence and logical deductions empirically available to human recognition, and the observation of the "nature of things" and human beings. "For Aristotle and St. Thomas, goodness was grounded in the order of being, an order per se of an unwavering cosmos. Ethical values according to St. Thomas are equal in Being and Obligation, Sein und Sollen, because Being has the end of its fulfillment within it. For Pufendorf the beginning of goodness requires a will within the boundaries of a law. The merely human action is indifferent, and only in relation to the will of the sovereign, the giver of the law, with the law as norma moralis, become human actions moral actions and therefore containing goodness. The reasoning of the Scholastic was therefore circular: goodness is what corresponds with natural law, and natural law corresponds with what is in itself goodness. However, goodness in itself does not exist for Pufendorf, it has both a creator and a recipient, it receives its content from both, from the will of the creator as well

as from the recognition by the recipient. Only man can act virtuously with goodness, as well as act wickedly with evil. Pufendorf proclaimed the self-evidence of the unity of God's creation with its lawfulness and this evidence being recognizable by human common sense. There is no further need to delve into the metaphysical self-evidence of an order of values; for Pufendorf the lawful order of goodness, which can be comprehended with reason from the nature of mankind and things, is ultimately a postulate of God's will.

Pufendorf acknowledged man's corrupt nature, and for Pufendorf it was "a fact we could not be certain of without the divine literature...that the rebellion of affections arouse through the fault of the first man."[99]

With that position, of accepting the genesis of the first man's fall, Pufendorf claimed the right of a moral science, a scientific way to determine goodness within the human forum, within society which has to cope with this "rebellion of the affection" without further reference to the divine forum.

The fact, viz. that Aristotle as well as Plato spoke of the indigence of mankind and Cicero used the word imbecillitas to establish the necessity of communal life, is

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[99] Pufendorf, De Officio, p.xi.

of such common acceptance that it does not specifically constitute an Aristotelianism in Pufendorf, not even when he claimed that no other species but man is dependent for such a long period on parental care and that, even as a mature person and alone, man would be a miserable creature. The human frailty and man's weakness, its weakness in his developing years, Pufendorf called *imbecillitas*; a predicament which, as in Aristotle's view, can only be overcome by the care of a state:

> Whatever advantages now attend human life have flowed entirely from the mutual help of men. It follows that, after God, there is nothing in this world from which greater advantage can come to man than from man himself.[100]

Since Plato and Aristotle the *natura socialis* is widely accepted as a significant part of human nature. But Pufendorf's concept of *socialitas* in relation to the human *imbecillitas* is a new concept; it is separate from the mere biological need to congregate like animals in a herd, and also separate from the Aristotelian concept of association. Pufendorf's *socialitas* is grounded not only in natural instinct, but also in reason and the moral concept of man as well.

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[100] Pufendorf, *Officio*, bk.I, Ch.3, § 3. (transl. F. G. Moore).

Another aspect of human nature results from the modern separation of the natural status of man from man as a citizen. In my view, we recognise today man's free choice to either remain in his natural state, or to join others in a citizen status, whereby the individual person is afforded the dignity and fundamental human rights, independently of his joining a civic unity with ruler[s] and ruled. In Aristotle we do not find the pre-political nature of man because in his philosophy, man is inseparable from his political being, the actualization of his political nature comes to be realized in the Polis. Man becomes man only in the community, i.e. in association with fellow man. For Pufendorf, in reality, there did not exist a natural state of man, for it is a fictitious concept; this is so because, even in the very first family, there existed the division between the paternal ruler and the ruled. His status naturalis is in essence the absence of a civic sovereign, a life of natural freedom, prior to any contractual arrangements, a condition without civic authority and obligations towards any fellow man. Such status naturalis is the condition between sovereign states, which do not recognize an overriding sovereignty. Owing to that negative definition, the natural state became for Pufendorf everything which did not constitute the status civilis: man at his birth, the status of the primitive man, and man in the natural state of natural freedom prior to the formation of families and clans.

According to Pufendorf and contrary to Aristotle, there is the basic law of equality by man's nature. This law constitutes the dignity of man for every one will have to respect the integrity and dignity of man in every other person. However, this equal status of all people does not imply a natural equality in strength or talents, and there is an objectively recognizable difference in mental capacity. There is no such thing as the equalitas facultatum animi. The equality consists in the equality recognized by law. The duty which derives from the equality principle before the law is expressed in the proverb: "What you do not want done to you, do not do to others, quod tibi non vis fieri, alteri ne feceris".

According to Pufendorf, the equality concept of natural law is of importance for the formulation of contracts. Nobody has the right to something or over somebody without the consent of the concerned person. The natural equality before the law is a prerequisite for the social contract. Furthermore, from this natural equality follows the law according to which by nature neither slave nor master does exist. All inequalities start with contracts and man-made positive laws. The freedom of the individual to rule over his natural (human) rights ends with the civic status, with the establishment of superior rulers. The

sovereignty of the state disposes official positions and privileges, and thus establishes differentiations and inequality among people. When Pufendorf saw the original cause of inequality, he preempted a fundamental thought of Rousseau. Furthermore, Pufendorf recognized an exception to the fundamental equality, that is when a person, or a group of men deliberately put themselves outside the law, such as pirates, an example borrowed from Grotius' maritime law.

Pufendorf did not rescind the status of slaves. Here he is much closer to Aristotle than to Rousseau. While admitting the slaves' "disadvantage", because free men have more opportunity "to look after their own welfare," he differs from Aristotle, who claims slavery to be a natural condition, while Pufendorf vindicated it as a contractural institution. We may add here Krieger's interpretation, who says that Pufendorf is

> going beyond the familiar conqueror-captive relationship to include master and servant who have traded for a permanent labour service. Pufendorf's purpose in the expansion of the disadvantaged institution is evidently to emphasize its origin in a contract; an origin obviously obscured in the martial forms of the institution. Consequently, he made these forms a later development patterned on the master-servant relation. "Therefore, the origin of slavery was due to willing consent and not to war, although war was the occasion for a great increase in the number of slaves and made their lot a harder one."(101)

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101 Krieger, The Politics of Discretion, p.111.

What is particularly incorrect is Denzer's claim that Pufendorf acknowledged Aristotle on the subject of the natural differentiation between master and servants. The master-servant relationship has been developed in the theory of the household. With the setting of a household-management, the family became a sort of state. The only criterion for the difference of a state-form from that of a family is the number of its members. This view by Hobbes was disputed by Pufendorf, who distinguished the family from the state for having a different purpose.[102] Family results from marriage, the first and very original human form of association; it originates with a natural instinct, instinctus naturalis, and with an intellectual recognition it becomes an agreement, a pactum.[103] The aim of the marriage is the preservation of the species, the raising of children, the orderly development of relationships in family and clan, and the guarantee of a better life. The limitation put upon individual freedom, the reluctance to grant a divorce, even if it could be effected by mutual consent, is due to the disruption it may cause to the established principles of order in the community.

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[102] Hobbes, De Cive, VI, 15, p.141.

[103] Pufendorf distinguished commercial contracts, contractus, from all other agreements, pactum, which are made between humans, of equal status or sovereign-subjects relations.

The extension to the family formation is the household formation, which includes beside the family members, servants and possibly slaves. Pufendorf considered the parental authority, potestas patri, a natural law principle, but not so the power of the household master, potestas herilis. He agreed with Aristotle that the first of the two elementary associations [the other being the village formation], the "households are always monarchically governed by the eldest of the kin," likewise, the state becomes a state with the establishment of monarchical sovereignty.[104] Furthermore, Pufendorf agreed with Aristotle on the natural inequality of human talents and mental capacity which makes it natural that some become masters, and others become servants. But this natural unequal distribution of faculties does not naturally constitute a right of the better endowed person to rule over the lesser endowed people. Because, to be a master, one must acquire an additional attribute, facultas moralis, which means, the master must have the servant's consent to exercise sovereignty. The household sovereignty is based on agreement, on a pactum. For a prisoner-of-war who became a servant, the law of the war has ended, and with the gift to have his life spared, the servant [or slave] pledges loyal service to his master. The master's rights over the servant are limited by certain duties. The first, is to treat the servant as a human being, and not as a

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[104] Aristotle, The Politics, Bk.I, Ch.2, § 6.

property, or animal, and to let the servant retain his dignity given by nature. The second, the servant retains the freedom of his will which cannot be transferred, it can only be restrained by the power of the master. The theory advanced by Hobbes, that no wrong can be done to a servant, because he transferred his will to the master, was rejected by Pufendorf. Only with the limitation of rights by said duties is the management of the household lawful, otherwise it is tyranny.

Pufendorf's difference with Aristotle seems to be in the original content of the human nature, with the statement, that "there are species in which distinction is already marked immediately at birth between those of its members who are intended for being ruled and those who are intended to rule...,"[105] For Pufendorf, this is insufficient for the making of a ruler. Pufendorf's postulate of a ruler rests on what he acquired in action, with a demonstration of the moral qualities, facultas moralis, which develop in the relationship with the ruled, for having acquired the allegiance which can only be achieved in the context of a state.

For Pufendorf, the state is the most complete community, perfectissima societas, between humans. All pre-

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[105] Aristotle, The Politics, Bk.I, Ch.5, § 2.

state associations are only fractions, modeled on the image of the state corpus. On the other hand, the state is also the most artificial form of association. The problematic here for Pufendorf is to square the nature of man, who has the natural instinct towards individual self preservation, with a tendency towards personal advantage, with the natural instinct towards communal life.[106]

To look at human nature at birth would suggest that man is unfit for a state community. How then is the state based on the human nature? Pufendorf interpreted Aristotle's maxim, "it is evident that the Polis belongs to the class of things that exist by nature, and that man is by nature an animal intended to live in a Polis,"[107] with his own potentiality, man is to be nurtured and disciplined into a completeness, which nature had intended, or at least being natural and not un-natural.[108]

For Aristotle, the Polis is the ideal community in which the individual self sufficiency reaches its goal and comes to its end. However, Pufendorf, arrived at the same endpoint, but only with the added intervention of discipline and sacrifices, and a persuasive force exerted upon the

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[106] De Jure, bk.VII, ch.I, § 2.

[107] Aristotle, The Politics, bk.I, ch.5, § 9.

[108] De Jure, bk.VII, ch.I, § 3.

citizen. Therefore, the fulfillment of nature rests largely on the ruling authority, which, if necessary, must apply the force of the sovereign to lead citizen to their happiness. This is in contrast to Aristotle, where the Polis is the community of citizen in freedom.[109]

In another point, Pufendorf did not recognize the possibility of deterioration of sovereignty from monarchy to tyranny, from aristocracy to oligarchy, and from democracy to ochlocracy. Such degenerations are for Pufendorf either defective laws, or human deficiency in the exercise of sovereignty. But those do not constitute a new form of state, because the nature of sovereignty has not changed, even if the monarch turns into a tyrant. The difference is recognizable by the adherence or transgression of natural law, and a new form of constitution would change nothing in the nature of the sovereign or his subjects.

For Aristotle, the state is a direct outcome of the human nature, it started with human life, and exists for the good life of its citizens. For Pufendorf, the state is created with the aim of security, defence, and human satisfaction, rather than fulfillment of the human nature. The difference is in Aristotle, where the Polis is the end, the

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[109] Denzer, Moralphilosophie, p.164.

fulfillment of the human nature; for Pufendorf, the state is the means to the end.

Pufendorf, in his support of the monarchy as the "regular" form of state, saw the sovereignty to be retained undivided by the [absolute] monarch. The various magistrates under the monarch are not sovereign, they are only representatives. Pufendorf claimed not to be in opposition to Aristotle, but concurred with his definition of a "mixed" constitution, because Aristotle did not proclaim the division of sovereignty, of which he was falsely accused of by some.

With Aristotle the natural law is not in opposition to the positive law, it is incorporated in the practical Polis. Pufendorf's natural law system is being criticised for both extremes: on the one hand by Christian Thomasius, for being absolute and insufficiently relevant to the historical reality, on the other hand by Leibniz, for being not grounded in absolute norms with its leaning towards sociological realities, therefore, his natural law has become a positive law. However, Denzer claims, Pufendorf is more like Aristotle, who developed the natural law with the experience of the historical man, whereby it becomes wrought into the practical situation of human communal life. Natural law is therefore not the law of absolute norms, but the law demanded by the practical situation of the conditio humana.

With that, natural law is immanent with positive law and not easily separable.

The Aristotelian system of science, upon which the Middle Ages had grafted theology, became gradually replaced by modern, natural-science oriented, systems of science with mathematics as the leader in the scientific corpus. The birth of modern natural law is unthinkable without this fundamental change. The new method started with the critique of the thought process, and the search for the truth became an analogy to the mathematical process more geometrico. Equally important is the change in philosophy, which ceased to begin with transcendental units, but was now concerned with world immanent diversities; with that, natural law got divorced from its metaphysical grounds and became a development of practical philosophy. Pufendorf struggled with this situation, where the ancient philosophica moralis in the preceding centuries became overshadowed by the theologica moralis. In his defence of his natural jurisprudence, and to emphasize the separation from theology, Pufendorf used sometimes interchangeably the term jus naturale with that of philosophia moralis.

The dilemma of Samuel Pufendorf was to be found in the need to distance himself from the Aristotelian-Thomistic tradition with all its theological orthodoxy, as well as to

draw the line between his secularized but still Christian grounded theory, and Hobbesian Epicureanism, and to reconcile both with his own personal stand in Lutheran Evangelical Pietism.

CHAPTER III.

Pufendorf and his Contemporaries: Sociability, and Natural Theology.

The revival and modern scientific treatment of natural law by the early seventeenth-century natural law advocates, Grotius, Hobbes, and Pufendorf, spawned considerable natural law literature. In this chapter, I propose to examine Pufendorf's idea of sociability, the central concept in his natural jurisprudence. I will also consider the ideas of Pufendorf's contemporaries (Cumberland, Leibniz, Carmichael, Thomasius) on the same concept and the theological implications which they drew from it.

The central problem of modern natural jurisprudence and moral philosophy in the seventeenth century revolved around the concept of sociability (Geselligkeit). The philosophic clarification of this concept was linked to the history of human nature, while the anthropological one was thought to have had its roots in the human state of nature. In the contemporary search for the philosophical and historical background of natural rights, we are confronted with a discussion of the moral foundation of natural rights

in which it was supposed that human beings are naturally sociable.[1]

In Pufendorf's time, the idea of sociability was not new. Aristotle based the concept of law on the function to preserve society: natural society is grounded in the natural striving of mankind towards society. But Aristotle did not start with the psychological inclination towards sociability in mankind; for him society was the natural goal, the product and the correlation of such inclination.

The Aristotelian principle of law was not the nature of humans but the nature of society: the polis; in consequence, man was not only an animal sociale, but also an animal civile. In Aristotle, the highest form of natural society is the state. Juxtaposing this view, the modern principles of law are grounded in the principle of basic human rights and apply to all of humanity, well beyond the confinement of Aristotelian city states, and include a supra-state with international principles of law. This new deducing of law from sociability, die Geselligkeit, from Grotius's appetitus societatis, aims at man as a human being, and not at man as a citizen, (or a head of a household as in

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[1] James W. Moore and Michael Silverthorne, "Natural Sociability and Natural Rights in the Moral Philosophy of Gerschom Carmichael," in Philosophers of the Scottish Enlightenment, ed. V. Hope, Edinburgh, University Press, 1984.

Aristotle and Bodin), which he becomes only after the realization of a civil society. While Grotius based his socialitas on the human instinct towards society, Pufendorf, influenced by Hobbes, emphasized the human inclination towards self preservation, and, as a logical consequence, to the human frailty, the imbecillitas: man is in need of human companionship and develops the activity which leads to the formation of society as a voluntary utilitarian contract between men. However, there is a correlation between the physical instinct for self-preservation, and the rational nature of mankind, which discovers the socialitas as a necessary corrective prerequi-site for the security of the self, which man cherishes above all.

Pufendorf made it clear that Grotius's appetitus societatis is not an inclination to form a state; for that, according to Pufendorf, man requires a human act, and such act is a contract among men, which will be enforced by a superior power, which is above the law, creating the law and enforcing it by his will. Christian Thomasius argues differently; the state cannot evolve from an original and natural instinct, because in the natural state, for Thomasius a status integritatis, there does not exist a superior power [for there was no need of a superior power and for law], therefore, any instinct towards the congregation of men lacks the rational inclination towards an orderly society; in the

status integritatis, the state prior to the fall, there was no need to desire orderliness in the condition of paradise.

Grotius started his natural law deliberations with a dispute in maritime law, De jure praedae (1604), while Pufendorf had war as the main theme in his first published work, Elementorum Jurisprudentiae Universalis, (1660), as was the case with most authors of that period, the period which then became the age of natural law, whence natural law became die Philosophie der Zeit, to use Erik Wolf's description.[2] What Grotius started became radicalized with Hobbes's political philosophy and brought forth an endless outpouring of literature full of refutations and apologies on the subject of natural law. Towards the end of the seventeenth and the beginning of the eighteenth century, natural law became a fashionable exercise in intellectual discourse, practically replacing moral philosophy and moral theology as the foundation of positive law in secular states. In Germany, with the immense influence of Pufendorf, with his leaning on Grotius even though strongly influenced by Hobbes, natural law was eventually recognized by most German princes, who, after the Reformation, needed a new foundation for their absolute sovereignty because they could no longer claim legitimacy by the grace of God. And with Christian Thomasius

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[2] Erik Wolf, Große Rechtsdenker der deutschen Rechtsgeschichte, (1939), 4th edition, Tübingen, 1963; pp. 253, 313.

natural law found its practical application. Through this evolution, modern natural law reached a culmination in Protestant Germany, it became absorbed by the civic law of the Landesgesetz of Brandenburg and eventually adopted by other German states.

Modern natural law developed with the tendency to separate jurisprudence from theology. This was accomplished by the limitation of natural law doctrines to the external human act in a social context, whereby the internal human thought or conscience as a moral issue was excluded from natural jurisprudence but considered a matter of theology, the science of morality. This separation of law and morality was not really a new situation, but a revival of the justitia legalis of the Scholastics, in which the different treatment of the just act from that of a just person implies a difference between the act and the conscience. Furthermore, we find already in St. Thomas the difference between the enforceable positive law, a debitum legale, and the unenforceable debitum morale concerning the human caritas. Modern natural law, however, is the separation of natural law from theology, the latter being concerned only with the divine forum, while the former will henceforth be limited to the human forum.

This separation of jurisprudence from theology, however, did not happen without considerable opposition. This dissent often went hand in hand with the polemic against Hobbes, which started in the middle of the seventeenth century with a commentary critical of Grotius by the biggest gun, Johann Heinrich Boecler, the Strasbourg historian and philologian, with his Hugonis Grotii jus belli et pacis commentatio, (1663); who was for many a year also a thorn in Pufendorf's side. Pufendorf, in response to the need for legitimation of secular absolutistic states, shifted his accent from the law of nations to the law of the state. While Grotius, living in Holland and France, kept up his interest on the law which binds Christianity and nations together, Pufendorf in Germany was persuaded to develop natural law which would serve the evolving enlightened absolutism of German territorial princes.

Fiametta Palladini presents a very inspiring case for the fundamental problems Pufendorf created for himself, when he accepted the very foundation of the Hobbesian natural law doctrine, the conservatio vitae which makes self-preservation the deductive foundation of natural law.[3]

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[3] Fiametta Palladini, "Is the Socialitas of Pufendorf really anti-Hobbesian?"; essay presented to the conference Unsocial Sociability: Modern Natural Law and the 18th-Century Discourse of Politics, History and Society, an international workshop in Göttingen, Max-Plank-Institute für Geschichte, June 26-30, 1989.

Most recent studies on Pufendorf are trying to make the case for a Pufendorf Epicureanism on the one hand, and the uninterrupted commitment to Lutheran Protestantism on the other hand. Palladini, substantiating the former, starts with the questions of what did Pufendorf understand with the assertion that the nature of man always tends towards sociability as determined by the Creator, and what is the significance of making that nature the regula et fundamentum of natural law?

The nature of man is being analyzed on the one hand as a species in comparison with the animals and, on the other hand, in his evolution from a natural to a civil state. At first, the analysis is in comparison with the physical nature of animals which God created to live by instinct, that is without a choice, and therefore they did not need a separate law beside the physical law of their nature. God conceded to animals licentia ex lege which God did not concede to man. God created man with faculties and liberties to use and create a changed world, a culture of his own. Thus, compared with other animals, man is endowed with superior intellect and a free will to act. It goes without saying, God having created the Universe in his own will, designed it without contradiction. We may presume, in addition to the laws of the physical nature, of matter-energy to remain undiminished, of life supporting substance by which each and every organism

is determined, and a human existence transcending these physical limitations. The animal lives by instinct. Man, in addition to his physical nature (which is the weakest under the animal kingdom), has special faculties and the liberty to live and create, to improve himself and make use of the environment, all in accordance with God's design especially bestowed upon mankind. For man to fulfill his role in God's creation a divine law is to be presumed, governing the choices man may make in order to achieve, and not to fail his purpose of being. But the laws under which mankind is to live are twofold:

(a) man as an organism is subject to God's law of nature determining the physical matter and the organic existence;

(b) outfitted with special faculties and liberty to extend his actions beyond the dictates of nature, man received powers to create, to shape his life and his environment, which powers were supposed to be channeled into the direction for which these faculties had been given to man, with the liberty either to excel or to reject and destroy.

It is this power to create and to destroy, to rebuild and to eradicate, to prosper peacefully or to conquer by war, which is the basic premise why human actions are subject to a guidance system. The question for the purpose

of man's existence Pufendorf left for theology to examine, while the guiding principle to be developed from the insight into the purpose of mankind is left to moral philosophy; but the norms for the conduct of people among themselves he formulated into laws based on the nature of mankind for the preservation of mankind, to exercise their lives in a peaceful and orderly manner, permitting felicity for all (who conduct themselves according to the law). These laws, called natural law, are viewed as universally applicable and based on a natural religion governing the moral obligation of humanity. They are not subject to the traditional specifics of a positive law which govern a specific society; nor are they seen as an extension to a specific religion or cult.

Pufendorf, in limiting his natural law doctrine to the human forum while excluding the metaphysical link in order to extract natural law from theological polemic, had to base his natural law on human nature. For this endeavour he found in Hobbes the formidable ground and method, upon which he would build his system. For Hobbes, the untamed nature of man is the nature of a savage beast; not unlike Hobbes, Pufendorf, the Lutheran, believed in the fallen man with wicked desires, which need stern laws enforced by a superior authority. The second analysis, is to compare the human nature as it is today in a civil state with an original state, the natural - <u>status naturalis</u>. Michael Seidler

probably made the most thorough examination of Pufendorf's definition of the various human states. He counted fourteen variations, none of which are the perfect state, status integritatis, which does not fit anywhere in Pufendorf's natural jurisprudence.[4]

In the Statu, Pufendorf proposed the study of man by the deductive method. In placing man prior to civil society, a state stripped of all human inventions and customs, seemly and useful, must be assumed in the "natural state", which is the human state before it was artfully and socially modified. Pufendorf asserted that any theory which does not determine the human nature to be corrupted, "must be considered gravely defective."[5] He dismisses the comparison of a natural versus a legal state in civil society proposed by the Leipzig professor Jacob Thomasius [his teacher and father of Christian Thomasius], who presupposed a kind of civil state wherein mankind "is without any fault and wickedness, when in fact states are a sort of remedy for human imperfection."

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[4] Michael Seidler, Samuel Pufendorf's On The Natural State Of Men, The 1678 Latin Edition and English Translation, translated, annotated and introduced, written at the Western Kentucky University, October 6, 1988, published in Lewiston, New York, by the Edwin Mellen Press, 1990.

[5] Ibid.

Pufendorf, in a Hobbesian method, started with the observation of the mankind of his day, and went back in time to trace man's inclinations in history, but disregarded the question of whether or not man was originally different. He presupposed the human condition always to be tinged with depravity. He made that very strongly clear in his defence against the accusations of Beckmann and Schwartz. If you imagine, Pufendorf stated, man thrown solitary into an uncultured world, even if he is assumed to be fully grown and of strength, when he begins to live in such a way, his state must be most miserable. Taking this condition a step further - consider man how feeble he was, how lacking of things - man could not have acquired the knowledge of how to preserve himself without Divine Intervention. The Deity intervened for the earliest stock of men to the extent that they learned to provide for their necessities by use and reflection and cooperation with each other.

> Who can doubt that God would have taught man the nature of seeds, the times of sowing, how and with what tools to prepare the earth for sowing the seeds. He certainly couldn't bring a knowledge of these things out of Paradise with him, where the garden produced everything necessary for sustenance, and if man has had at length to learn this by his own reflection and experience, he would have died of hunger long since.[6]

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[6] Pufendorf, Eris Scandica, quae adversus libros de jure naturae et gentium objecta diluuntur, Frankfort/M., 1687, translated by Michael Silverthorn, Montreal, University of McGill, draft 1989.

Pufendorf had three very specific reasons to reject any prelapsian speculations for consideration in natural law. First, we couldn't have any knowledge by reason and observation or logical deductions, about what the condition of man had been prior to a state of society, that is of mankind in multitudes. The original natural state of Pufendorf is not a state of origin of mankind, the Urzustand of the Homo sapiens, or Homo primigentius, but the primitive state of men among men, the origin of society and not of the human being per se.

Second, any knowledge we may have today concerning the first man's state we have only through Divine Scriptures, the state from which he was ejected because of his own sin. And any traces of that original state in ethical writings appear to be remnants of some tradition temporarily preserved among the earliest mortals until it was forgotten in one place through the lapse of time and, elsewhere, it degenerated into incredible fictions.[7] In a much stronger statement in Eris Scandica, he describes the error made with the state of integrity, because such a fictitious state is not applicable to natural law, which is not bound by any specific religious myth, but by the universal force of natural reason alone. Pufendorf had said in the Statu:

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[7] Statu, transl. Seidler, p.121.

> Nor, to be honest, is it clear just how useful it might be in the science of the state to imagine men situated in that primeval integrity, and to erect their situation as a model to which civil laws and customs must be conformed and adapted. For whether we suppose that states were formed for dispelling want or for securing men against the evils threatened by their fellows, neither claim requires us to presuppose humankind living initially in supreme abundance, undisturbed by any perverse desire to harm one another. For that happy situation is inconsistent with the ends for which our current states have been established.[8]

Third, Pufendorf does not provide any scientific explanation; instead he applies his Lutheran conviction concerning the sinful state of man. Natural law is not only a result of the human imbecillitas which requires man to live in society, but because he is a sinful and wicked creature which is inclined to do harm, he has to have a sovereign to create the law with sanctions, not to curb and correct human errors, in "correctional" institutions, but to penalise the sinful act in "penitentiary" institutions. It appears that God has delegated to man his own policing during man's temporal existence in the "Human Forum", after man was evicted from the condition in Paradise. Initially, God had helped mankind to adapt to this hostile world, but then expected mankind to fend for itself and to mend its way. In so doing, mankind was supposed to observe the rules which were made observable by human faculties, to comprehend, to deliberate, and to act in accordance with the natural law, a

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[8] Ibid.

law created on account of the special nature of man, comprising his entia moralia in addition to man's imbecillitas, and the sinfulness of man, with the condition of entia corrupta.

This very narrow definition for what belongs to the science of jurisprudence, will accept only what is reasonable; therefore, that which cannot be grasped by pure reason has to be obtained by revelation, its only authority being the Divine Scriptures. In my view, over and beyond these two alternatives, there is the one named by Kant, who in his sharp rationality felt the need to leave room for "insight". In Pufendorf's view, man is deprived of any recognition by vision, and any man deprived of the knowledge of the Holy Scriptures lives completely in the dark concerning his eternal end: any doctrine, any assumption or cosmogony arrived at without the true aid and application of the Holy Scriptures is wrong. Pufendorf in his natural law system is not talking about God's intervention, and whether God is still active in each and every man who has faith; something he denied Catholics, because their church had lost the Spirit of Christ some time ago.[9]

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[9] Pufendorf had to exclude religion and revelation for being exclusive to certain people from his natural law doctrine; he had to insist, for the preservation of his argument to achieve a universal natural law, on the maxim that the only way the dictates of natural law can be grasped universally, is by pure reason, the only human faculty common to all men.

The difference of opinion, at what point in time or state of evolution, mankind was still in a "natural state" rather than a civil state, is still under debate, and will be for some time occupy man's mind. However, what the seventeenth-century natural law advocates all had in common was to argue the natural state of man as a multitude of men, a human society. And the conduct of a "natural man" is to be understood only in this context, in the reaction to other men, and the conduct within a multitude of men. The first men were assumed to roam around the Earth frightened, primitive and lonely, and the first and elemental rule the simple minded man could discover for himself, was to deduce from his weak condition the need to pay attention to self-preservation, and the early recognition of his dependence on the conduct of other men, since men would react to man in how he behaved. It became the first rule of primitive but social men, that "every man, so far as in him lies, should cultivate and preserve toward others a sociable attitude, which is peaceful and agreeable at all times to the nature and end of the human race."(10) That principle was applied to the individual first, it was then extended to the familial and to the civil, and on to the state and inter-state relationship.

But, we may propose here, that sociability, as a faculty exclusive to mankind, can in no way be logically

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[10] Pufendorf, De Jure, Bk.II,Chap.3, § 15.

deduced from the conditions and specialities of man. In my view, the imbecillitas is not more than the fragility of a newborn ape clinging to its mother which in turn is protected by the herd. The herd with its pecking order, affording the strongest and cleverest ape the leadership, is for no other purpose than to protect the survival of the species. To this we have to add that the need of a sovereign to establish law and order also has no logical ground in the nature of man, unless we consider man an animal, an Abart of the apes. Again what we can see here is a law laid down for the status naturalis, for children, for the primitive horde, or an uncivilized society. These laws are for the protection of the immature, and are relaxed, modified or changed, for the active and mature, the civil and cultured person.

We may follow the argument of Palladini to better understand the concept of sociability. Pufendorf developed the norm to which human actions are to be subjected ex conditione naturae humanae. Pufendorf lists first, the dignitas et praestantia, which is identified with the possession of an immortal soul.[11] Secondly, he names pravitas the greater wickedness of man compared to the animals.[12] Thirdly, varietas ingeniorum the great variety of desires and inclinations which characterise man compared

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[11] De Jure, bk.II, ch.1, § 5.

[12] Ibid., bk.II, ch.1, § 6.

to the animals.[13] And forth and last, man's imbecillitas which is far greater at birth [and throughout man's life] than of any other living being.[14]

These conditions of the human nature appear to make it necessary to have an enforceable law as the indispensable instrument for the creation of an orderly and tranquil society among men."[15] But when we look at these four conditions, none indicate a natural sociability among the characteristics of the human nature.

The first, dignitas et praestantia, is giving man the superior position in God's Creation with extra ordinary faculties. The second, pravitas, is only a negative description with the assumption of man with a natura corrupta, which - in a positive sense - is the very ingenious mind of man to find ways and means to compensate for his physical weakness, the imbecillitas. The third, the varietas ingeniorum, is the very quality which makes man the culture creating species, to ever improve and perfect his living conditions at whatever stage of civilization. Only the fourth, imbecillitas, is a condition of a true weakness, which is a lack of physical strength, a vulnerability, a

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[13] Ibid., bk.II, ch.1, § 7.

[14] Ibid., bk.II, ch.1, § 8.

[15] Palladini, p.2.

timidness, and the seat of human fears. It is also the seat of the human dependence not only on extended parental nurturing, but the need for protection and companionship of the fellow man throughout his earthly existence.

It is this imbecillitas which brings us back to the discovery of the societas hominum in the examination of the human conditio et inclinationes. The extraordinary characteristics of mankind make man far more powerful than any other animal; and this far more so if he teams up with fellow human beings. The imbecillitas, rather than a weakness, is the naturally built-in incentive for man to co-operate, because, as a consequence of man needing the help of other men, the capacity of man to benefit from each other is cultivated.

However, that very same capacity mixed with human pravitas produces man's disposition to harm one another. This extraordinary power of mankind to make a wrong choice, by error as well as with an evil inclination, or out of fear or desire, can turn this power into a destructive force. To prevent that, or at least to limit the damage, a natural law has to be in place.

Such natural law is different from the physical law of nature by which every creature is bound, it is the law

which obliges mankind. It is the obligation of the fundamentalis lex naturae that each man must, as far as he can, cultivate and preserve towards others a pacifica socialitas congruent with the character and scope of human kind.[16] According to this passage, it is not that man is naturally sociable, but it is the condition of man which makes socialitas a moral imperative.

Man ought to be sociable but for what? For his own good, it is "the ideal towards which man must strive, not the natural disposition from which they start."[17]

What we can conclude from this interpretation are the two maxims; first, "God has assigned to man a social nature... which means, that human nature is made in such a way that man cannot do without the help of others: he is sociable in the sense that he needs socialitas." Second, the law of socialitas is not based on man's inclination towards society, but as a result of man as a "potentially malicious animal led by amor sui to defend his own life and, by the superior qualities which he has been given, to make it culta, and who cannot achieve these results without the help of his own kind, therefore, without entering into society with them

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[16] De Jure, bk.II, ch.3, § 15.

[17] Palladini, p.7.

and behaving in a manner which maintains this society."[18] As Pufendorf said: "...be sociable, or behave in such a way as not to alienate your neighbor from yourself but to conciliate him with yourself."[19] Pufendorf wanted to say, that the human nature is not actually sociable, but has the capacity for sociability, and cannot do without the societas with his fellow beings in order to live and to be happy.

Pufendorf's law of nature is an inter-human relation law; it does not refer to the individual person for happiness but for the happiness in company with other men: with this view, Pufendorf became known to be a Socialist. This is, as Palladini says, "dangerously similar to Hobbes", and "does nothing more than repeat in different words, Hobbes' first law of nature." This is not entirely true, because the first fundamental law in Hobbes dictates the preservation and furtherance of the individual self, as a dictate by nature, and as a right to exist in the company of men, as a logical deduction. The obligation in Hobbes' fundamental law of nature is first, every man ought to endeavour peace - if need be by fighting for it; and second, it is a duty towards one's own given nature, to defend it for self-preservation. Where both concur, is "to cultivate and preserve, in as much as one can, a peaceful sociability with

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[18] Ibid.

[19] De Jure, bk.II, ch.3, § 6.

others." Which is nothing other than to say in a different way, that to "look for peace if it can be had, if it cannot be had, to look for one's own defence."[20] Pufendorf, in fact, in sustaining the right of violent [unrestricted] self-defence, explicitly affirmed that the laws of nature are those which aim at establishing or preserving peace, thus saying leges naturae and leges pacis is the same thing, and that insociabilis is tantamount to acting contra leges pacis. With this, Palladini claims, is Pufendorf's law of nature largely Hobbesian not only in its formulation and field of application (restricted by both writers to this life, to external actions and to those actions which concern inter-human relationships) but also in the two fundamental aspects: that is, the principle of deduction and the source of obligation.[21]

In regards the second maxim, i.e. the source of obligation, it appears that both writers concur in the law to be a decree of a superior and therefore the law of nature is in the real sense a law only as it is commanded by that superior, the Creator of the Universe and its laws. As regards the first, the principle of deduction becomes apparent with the law enforcement. Since God has set the obligation but largely leaves it to mankind to follow His

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[20] Hobbes, De Cive, title of book II,chap.2.

[21] Palladini, pp.9-10.

commandment and restricts His ultimate sanctions to judgement day in the divine forum, the sanctions for the enforcement of peace and order in the human forum rest with the human authority, the sovereign of the state. With this view, Hobbes, followed by Pufendorf, has severed natural law from any obligation towards God, except as a dictate by the secular sovereign, at whose command worship of God becomes a civic duty to be exercised within the sanctioned church.

Pufendorf, under the pressure to defend himself against the accusation of moral indifference and atheism, distanced himself from Hobbes, not by renouncing his natural law doctrine but by attacking atheism; and with a clarification of his position towards the church, as a different matter which was not to be confused with jurisprudence. In his defence made in the Apologia (1674) against the accusations of heterodoxy as expressed by the authors of the Index novitatum, Pufendorf questions why Hobbes had to be labelled a heretic if his only fault was to have made socialitas the foundation of the law of nature?[22]

In reality, the Hobbesian social contract, the surrender of the individual liberty to the absolute sovereign and governing authority, is to establish law and order where there is chaos, a perpetual "Warre" among people. This

[22] Pufendorf, Eris Scandica, ed. 1743, p.45.

status is similar to that in the animal kingdom, a natural order to protect the individual lives for the preservation of the species. For the human beings, in addition to the natural order of the physical nature, there has to be the lawful order to curb man's extraordinary faculties and the liberty to use them in a destructive manner, to guide human behaviour and prevent men from destroying each other, for the sole purpose of providing the norm for the most peaceful and prosperous existence on this earth - a purely utilitarian concept.

A natural law to cover human kind, to reduce that species to the same existence of animal life: the preservation of the species? What for? Life for life's sake? To set no goal higher than the nature of things would deny the human species its specialty, its aspiration, the desire to improve itself. The human desire is to develop the self to the fullest of it's talents and liberties - an evolution towards fulfillment which comes only when faculties and liberties are employed according to the design and the intent given to it by its Maker.

Other natural law advocates, Pufendorf's contemporaries, were pondering the same range of questions and considering their theological implications.

Richard Cumberland, Doctor of Divinity, later Bishop, refuted the "abominable ideas" put forth by Hobbes in his work De legibus naturae disquisitio philosophica, which went into print in the same year as Pufendorf's De jure naturae et gentium in 1672. Pufendorf rethought his own position in the history of ethics, putting himself on the side of the Stoics, of Grotius and of Cumberland, against Epicurus and Hobbes.[23] However, Cumberland did not comment on Pufendorf but on the Hobbesian corpus of natural law; the whole design of his work is to refute Hobbes, and through him, all of Epicureanism. Cumberland did accept "the Baconian separation of knowledge and faith, science and theology." His development of a science of morals firmly excluded revelation. While accepting the Judeo-Christian concept of original sin, he suggested "that its effect was not morally devastating", and he allowed "cautiously a balancing effect by leaving room for special grace."[24]

Like the other seventeenth-century natural law advocates, Cumberland accepted the empirical investigation of the human nature as found in the history sufficient to grasp

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[23] Palladini, p.11.

[24] Knud Haakonssen, "The Character and Obligation of Natural Law according to Richard Cumberland"; a paper given at the international workshop on Unsocial Sociability: Modern Natural Law and the 18th-Century discourse of Politics, History, and Society, Göttingen, Max-Plank-Institute für Geschichte, 26-30 June, 1989, p.8.

the law of nature and man's moral obligations. Accepting man as a free agent with a complexity and ever changing human motivation, it was not possible in Cumberland's mind, to reduce human motives to mere self-interest, let alone a concern just with self-preservation. With people finding a wide range of unspecifiable needs, and a range of things valuable, such value-pluralism in itself leads effectively to the denial of Hobbesian egoism. However, man has a natural predisposition to recognize the good things in life, in his own or that in others; and something is of moral value when it is recognized as the same in everyone and everywhere.[25] So Cumberland said:

> In my Opinion, "The Common Good" (under which I comprehend the Honour of God, and the greatest Happiness of Mankind) is pleasanter than even Life itself, and, alwaies, to be preferr'd before it; and, therefore, those Evils, which either detract from the Honour of God, or endanger the greatest Perfection of Human Minds, are to be esteem'd a greater Evil, than the loss of any one's Life.[26]

The moral obligation of self-preservation is reciprocally and impartially linked with those of others; for "every man to endeavour his own preservation, he will perceive something that dictates self-preservation to others as well as himself, and that will hinder him from opposing

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[25] Ibid., p. 9 - paraphrased.

[26] Ibid., footnote 15, quoting Cumberland, De legibus naturae, V., xxiv.

any others in the same pursuit."[27] Cumberland referred also to the common good proper, which is the happiness and moral perfection which God wills eternally. "This general will is what we are to approach in our moral reasoning towards particular acts of willing. The way to will a particular good, whether in ourselves or in others, is thus to will it generally." This leads to the core of Cumberland's moral philosophy, that there is no individual self[ish] good, it cannot be and will not be unless it is of the common good. The participation in that common good is through proper moral love. Through love of humanity which is "not a sophisticated self-love or a love of having or getting something; but unconditional, it is called disinterested love [a term not easily comprehensible in today's common English] of God through love of humanity in ourselves as well as others."[28] The moral knowledge, i. e. the knowledge of obligation in natural law, takes its beginning from ordinary experience of goodness for individuals and for communities, ascending to an understanding of the common good for the whole of humanity.[29]

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[27] Ibid., Haakonssen quoting De legibus naturae, V., xvii., p.10.

[28] Ibid., Haakonssen quoting De legibus naturea, V., ix., p. 12.

[29] Ibid., Haakonssen is making Cumberland's connection with "the Cartesian notion of the fullness of the physical world;" and quotes Descartes' distinction between "l'amour de concupiscence et de bienvillance" in Les passions de l'ame, art.81-83; pp. 11-12 & footnote 21.

"True happiness lies only in one's perfection and perfection only in intentionally contributing to the common good, that is in making God's will one's own, thus taking part in God's happiness - which can only be understood analogically."[30]

With Cumberland we have to understand the analogical process, the participation of the imperfect human being in the perfect Creator God, God's will, God's love, God's happiness. We are led to God through experience, make progress, come to realize as beings with a free will, that at whatever stage of awareness, we have the possibility to realize eventually and inevitably the connection between the individual good with the common good, lead by ordinary reasoning, in fact, prescriptions for how to behave. "They are, in other words, laws which God has laid into the fabric of nature by arranging His creation in such a way that these laws must be followed if the individual or any society, including the society of humanity, is to be perfected."[31]

Cumberland's natural law starts with the identification of God the creator, and with God the legislator. There is no problem in calling God the creator

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[30] Ibid., Haakonssen quoting Cumberland, De legibus naturae, V., ix.

[31] Ibid., Haakonssen quoting De legibus naturae, V., xixff.

of natural law, its first and principal cause, which is the will and counsel of God promoting common good; but there is a difference in his concept of the binding power of natural law. Cumberland's natural law is not a Pufendorfian concept of commandments by a sovereign, but one which carries only a moral obligation imposed by the author, followed by rewards and punishments [in this or the after life] to assure the proper conduct of humans. The controversy of Cumberland's ground of obligation versus the motive for obligation is a case of law enforcement. God having created mankind with a free will to act according to the "prescription", discoverable by common sense, will reward mankind with the inheritance of the common good, which will fulfill itself by man's voluntary observance of moral obligations. The sanctions, which God has built into His design of the law of nature, is simply the denial of the common good. It is the law of cause and effect which plays upon man, who needs to create the right causes to achieve the right effects. The natural law dictates how mankind ought to behave, according to Pufendorf it needs the analogous secular authority, who enforces the law by demanding obedience where there is chaos; and according to Hobbes, where men behave like wolves, their liberty to fend for themselves has to be surrendered, and secular punishment will fall upon the offenders. Pufendorf, did not concern himself with moral obligations, but with law and the force of law. A law with law enforcement very like

the positive public law, which requires the present power of a sovereign legislator and law enforcer.

Against these utilitarian tendencies evolved a series of theories which were aimed at the preservation of some traditional natural law doctrines with the aim of a strong theological foundation, therefore called "Christian Natural Law."

In Germany, the most famous proponent of a "Christian Natural Law," i.e. a metaphysically connected natural law versus the Pufendorf's secular, "profane", natural law, was Gottfried Wilhelm Leibniz.

But prior to the Leibniz critique of Pufendorf's voluntarism and natural law limitation to the external and enforceable human act, Samuel von Cocceji, in his De principio juris naturalis, (1699), had dismissed the natural law of socialitas, as well as the Hobbesian contract doctrine, and, in continuation of Heinrich von Cocceji (1644-1719), persued his father's doctrine of the will of God, elevated the causa obligationis to the principium juris naturalis. At the same time, he made the most fundamental distinction between law and morality, between jus and virtus. Furthermore, he made the distinction between commandment and permission, so that there is no mistaken identity between the

law and permission, or the commandment with the moral prescription. But the permissible goes far more than the commanded, it provides a rewardable virtue. To the law belongs the punishment, but in virtue there is no punishment or obligation of restoration. On the one hand, justitia corresponding to the jus is not rewarded, on the other hand, virtue calls for rewards. Cocceji distinguished between the just person, which is a virtue, and the just act, which is not a virtue. Justitia as a purely legal act is not a species of virtus universalis, therefore, justitia universalis is not synonym with the virtue universalis.

Gottfried Wilhelm Leibniz (1646-1716) was born in Leipzig, the son of a notary and professor of ethics. He studied there, but left Leipzig when the jurists at the university denied him a doctorate for being too young at the age of twenty. He also studied, like Samuel Pufendorf, under Erhard Weigel in Jena; however, he earned his doctorate in jurisprudence in Altdorf (Nuremberg) in 1667. Refusing the offer of a professorship, he entered instead into the advisory service of the Elector of Mayence, and then for forty years that of the House of Hanover. Leibniz's restless genius made him an authority in several fields: he was a philosopher, mathematician, physicist and technician, jurist and political scientist, historian and philologist.

"By the time I wake up, I have already so many ideas that the day isn't long enough to write it all down."[32] Leibniz had no patience to develop his gifted thought into a structural system: he only published one work during his lifetime,[33] although his thoughts are expressed in numerous letters and scribbled on over 75,000 tearsheets.

Leibniz's legacy is so large and diverse that a team of experts in each field he had dealt with, is working in East Berlin, Münster, and Hanover, and is collecting and compiling Leibniz's work. It is estimated that the Leibniz collection will fill 70 volumes, and will not be completed before the middle of the next century. Leibniz is considered the greatest logician since Aristotle. He claimed that all mistakes are those of language in the translation from the mind into speech. The mind operates by the same laws as nature does - it works like a calculus with logic - it is like a mathematical equation: either right or wrong.

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[32] Some of the information on Leibniz is taken from Paul-Heinz Koesters' Deutschland deine Denker, published by the German "Stern-Magazine", 3rd edition, 1980. Koesters is a journalist and editor, not a scholar; however, with the vast resources of the powerful German "Stern-Magazine" he gathered unpublished details.

[33] Amsterdam, 1710: Essais de théodicées sur la bonté de Dieu,la liberté de l'homme et l'origine du mal. Other important philosophical and physio-theoretical essays mostly published in journals: Dissertatio de arte combinatoria, 1666; Theoria motus abstracti, and Hypothesis physica nova, 1671; Meditationes de cognitione, veritate et ideis, 1684; Specimen dynamicum and Système nouveau de la nature, 1695.

In Mayence, Baron Johann Christian von Boineburg, the very same statesman who persuaded Pufendorf to write about his natural law system, introduced Leibniz to political thought, and encouraged him to work on a comprehensive law reform project, which he never finished. Leibniz had little prospect of having a political career, and he had no specific political convictions, but only a philosophical optimism. In his novel Candide ou l'optimisme (1759), Voltaire dismissed as naive Leibniz's notion that this is the best of all possible worlds.

In his Monadology Leibniz claimed that creatures receive their perfection from God, but their imperfections are due to their own nature, which is incapable of being limitless. In the Theodicy he insisted that God could not have given men "all" without making them divi- ; in a way, we can judge by observation a posteriori that "permission" [the free will] was a requisite and sin [with God's consent] made its way into the world. God was unable to prevent sin without detriment to his perfection, [he would have contradicted his intent for mankind], and God did this, therefore He did it well. Furthermore, without sin neither grace nor Christ would be possible.(34)

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34 In reference to Patrick Riley, The Political Writings of Leibniz, Cambridge, 1972.

Leibniz's philosophy, like that of Descartes, Malebranche, and Spinoza before his, and by Pufendorf, Barbeyrac and Thomasius, his contemporaries, was deeply rooted in theological thinking. Theodicy, the justification of God, went through a transformation from scriptural interpretation to psychological, to a scientific, logical explanation. In the seventeenth century there was no solution to the problem of truth independently of God. Divine Being constituted the highest principle of knowledge which was handed down to the eighteenth century by the great philosophical systems of the seventeenth century.

We may question Patrick Riley's reference to Leibniz as one "who was only a political thinker by fits and starts", but he is right in stating that he never wrote a large scale treatise "as able as De Jure Naturae et Gentium"[35]; he is wrong, however, in considering Leibniz as having been "infatuated with medieval institutions" on account of his efforts in the unification of religious faiths, one of the major issues of the modern world. Riley claims that this tendency lessened in the older Leibniz, who placed more emphasis on international positive law with his Codex juris Gentium (1693). Leibniz, unlike Pufendorf,

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[35] Patrick Riley: Book review of Horst Denzer in The American Political Science Review, Vol. 67, No. 4, 1973, pp. 1353-1355.

supported the Empire in the face of Louis XIV's expansionism.[36]

Leibniz, although he opposed the atheist Hobbes, found some truth in Hobbes's view of perpetual war among people; it is "not that each nation has a right to destroy the others, but that prudence obliges every nation to be perpetually on guard against the others" (Codex, chapter I). In today's global concerns we speak of the "cold war" syndrome, which we should overcome with détente: "il y a une sorte de détente dans les esprits", a sort of inducing of the mind to relax its vigilance.

Leibniz was concerned with justice:

> Justice is... that which is useful to the community, and the public good is the supreme law of a community, however, let it be recalled, not of a few, not of a particular nation, but of all those who are part of the City of God and, so to speak, of the State of the Universe. Initium Institutionem Iuris Perpetui.[37]

Leibniz's criticism of Pufendorf is said to be based on a certain jealousy of his elder's success and

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[36] Patrick Riley, in The Political Writings of Leibniz, quoted Leibniz on the occasion of the French seizure of Strasbourg in Mars Christianissimus: "the king [Louis XIV] needed it for the security of his kingdom; that is to say, to better maintain what he had stolen from the Empire, he had to steal more. A beautiful reason! ... the appetite grows while eating." p.36.

[37] Ibid.

position of esteem in the world. Leibniz's opposition to Pufendorf is mainly known through his letter written for the enlightenment of Molanus, Abbot of Loccum (1633-1722), who requested his "opinion on the Principles of Pufendorf", and on the suitability of De Officio Hominis et Civis juxta legem Naturalem as a topic for the instruction of the young.[38]

Leibniz, in his attack on Pufendorf, was in fact aiming at Hobbes, who had "lain down truly wicked principles"; he considered Grotius the "incomparable profound genius, [however] distracted by many other concerns". John Selden [1584-1654], according to Leibniz, would have been the best person to write a system of natural law, had he applied himself with more zeal. In short, Leibniz considered natural law in his time more celebrated by words than applied to affairs.[39]

Leibniz held that Pufendorf's first principles were basically unsound on account of three basic mistakes: the first was Pufendorf's insistence that the study of natural law should be confined to this life without consideration of its effect on the afterlife. The second was Pufendorf's limitation of the natural law to the external manifestation of human conduct and this to be only in inter-human relation

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[38] Ibid., pp.64-75.

[39] Patrick Riley, pp.65-68.

with insufficient consideration of motives, intentions and the spirit in which men were to act. Thirdly, Pufendorf had an unsatisfactory notion of the efficient cause of natural law, of what obliges us to obey the law of nature. Leibniz appeared to have detected in Pufendorf the fear of God as the sole basis of our obligation, as if "we be subjected to God just as we would obey a tyrant." What appeared to be missing in Pufendorf, so Leibniz claims, is the obedience to God not just out of "fear because of His greatness, but also love because of His goodness..."[40] This is a very important point to be made, as it leads to the very basic alternatives of obedience: to be forced by fear, or to have obedience willed by love.[41] With the separation of natural law from theology, Pufendorf effectively separated natural law from moral consideration other than the utility principle of sociability. Although Pufendorf, in the "Greeting to the Reader" of De Officio, clearly deduced natural law from the existence, the perfection, and the providence of the deity: so that the manifest bond between moral knowledge and natural

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[40] Ibid., in the chapter of "Opinion on the Principles of Pufendorf", p.72.

[41] Corresponding to the two alternatives of obedience, we have two fundamental forms of government, monarchical and republican. The first represents the fearful autocratic principle of authority which, in a paternalistic manner, is perpetuated excessively in despotism, absolutism, and modern totalitarianism. The second form is democratic and represents the human desire for social intercourse, the common interest which is being served by the willing consent of the citizens.

theology might be clearly exhibited;[42] subsequent interpretations ignore the preamble but concentrate on the main body of the work, where secularization is in clear evidence. Pufendorf, aiming at universality felt the need to reject any linkage of natural jurisprudence to particularity, be it historical, cultural, or ideological in either a theological or an ethical senses.

> In his manifesto like program for natural jurisprudence, entitled De origine et progressu disciplinae iuris naturalis [published as first chapter in Eris Scandica (1686), but first published in 1680 in the polemical pamphlet Spicilegium controversarium], Pufendorf stated that it was Grotius who first clearly understood that the science of jurisprudence could be valid only if it was 'of use for the whole human race'. Pufendorf made the same argument against the Roman lawyers, Plato, Aristotle, Cicero and the rest as did [Adam] Smith. Theirs were all systems which had the problems and specific features of this or that state formation, this or that nation, or historical period in sight. Pufendorf levelled the same charge against purely Christian natural law as well. Christianity was not the religion of the whole human race. It was not the proper basis for natural jurisprudence.[43]

Pufendorf, in deliberately down-playing the necessary link with God in natural law, earned the wrath of

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[42] De Officio, p.xvi.

[43] Istvan Hont, "The Idea of Natural Jurisprudence and Adam Smith's Two Versions of the Four Stage Theory: From Property to Politics and Back", paper prepared for the international workshop on Unsocial Sociability: Modern Natural Law and the 18th-Century Discourse of Politics, History and Society, Göttingen, Max-Plank-Institute of History, June 26-30, 1989. p.51.

the theologians, but also of philosophers, such as Leibniz and Kant, who considered Pufendorf not philosophical enough; while Thomasius felt he was not practical enough.

There is a need to further enlighten the source of obligation, the foundation of it before the advent of civil society, the obligation to God as the source of all obligations. "The object of a science of natural jurisprudence was to understand how we come to be obliged to acknowledge and do what is right."[44] James Moore characterized the doctrinal difference in the Reformed churches between the Orthodox and Remonstrant positions taken in the redefinition of man's position in the universe, and how these two traditions might be combined without sacrifice of the fundamental principles of one or the other mode of doctrine.

In the dogmatic theology of Reformed churches the mind of God was thought to be characterized by attributes both communicable and incommunicable to nature. Government

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[44] James W. Moore & Michael Silverthorne, "Natural Law and Fallen Human Nature: The Reformed Jurisprudence of Ulrich Huber and Gershom Carmichael", a paper presented at the international workshop on Unsocial Sociability: Modern Natural Law and the 18th-Century Discourses of Politics, History and Society, Göttingen, Max-Plank-Institute für Geschichte, 26-30 June, 1989.
In addition from the same authors: "Natural Sociability and Natural Rights in the Moral Philosophy of Gershom Carmichael," in Philosophers of the Scottish Enlightenment, edited by V. Hope, Edinburgh, University Press, 1984.

in the minds of the Reformed was instituted to enforce conformity with the revealed word of God as established by consensus of the faithful.

In the natural jurisprudence tradition, the mind of God was supposed to be supremely rational, one that governed a universe by a rational law of nature. Government in the thought of natural jurists was established to secure the rights of individuals; this was often taken to include the rights of individual consciences.

With these two opposing views, left out was a very essential method God may communicate with humans personally by the power of insights. What cannot be penetrated by the limitation of reason maybe achieved by the expanse of faith. With the act of meditation, an inward concentration of mind and soul, the creative faculties of man become inspired in a gnostic way. This may be a spiritual, a mystic, or an enthusiastic opening of the mind to receive divine inspiration which neither Scriptures, nor reason could provide. There is a law governing the use of the powers of insights, obligations which are placed upon the reception of those energies, to be used and dispensed in a virtuous manner to be defined. But those are not considered by the rationality of natural law advocates, nor by the theologians

concerned with the preservation of the institutionalized religion.

The principal obligation men were under before they engaged in civil society is treated differently by jurists and theologians in formulating the nature of obligation. Hobbes found its cause in the irresistible power of God. But Pufendorf considered it necessary to add something to this irresistible power, and he found it in the benefits we derive from God which constitute the source of our obligation to Him. Among the Orthodox Reformed there was the belief that we are obliged to God by virtue of His eminence and superiority over all created things. But with this definition there was missing the compelling nature of obligation. In Hobbes, of course, fear of the irresistible power was sufficient ground. In Pufendorf there was that additional motive of gratitude towards God; and in the Reformed position God's eminence inspired a profound veneration. James Moore explains the other ground of obligation which is to owe something for the fallen condition in which the human race finds itself after the first man's fall from grace of God. It was the idea of indebtedness and release from obligation through the satisfaction of full payment of a debt which the Ulrich Huber (1636-1694)

developed in his De Jure Civitatis, Libri Tres, at the University of Franeker.[45]

Indebted to both Huber and Pufendorf, Gershom Carmichael (1672-1729), the first Professor of Moral Philosophy at the University of Glasgow, subscribed to an understanding of the human condition as a fallen or sinful condition, and derived from this perception notions of obligation and of rights which pertained to every aspect of human and civic relation.

Huber's doctrine is based on the assumption of the prevalence of sin; debts have to be paid and sin has to be punished; governments are instituted for the punishment of sin. And there is no orderly way by which this can be done than by an agreement to establish a civil society, civitatis, ruled by a sovereign power, summum imperium, who has the power to punish sinful subjects.[46] Pufendorf's doctrine is based on the assumption of the corrupt state of man's nature, the status naturae corruptae.

> Natural law is by no means repugnant to the dogmas of true theology, but only abstracts from some of its dogmas which cannot be investigated by reason alone... if the divine literature did not light the way, no one could now be certain that the rebellion

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45 Ibid.

46 Moore quoting Huber, De Jure Civitatis, I,II,I.

> of affections arose through the fault of the first man. And consequently since the natural law does not extend to those things to which reason cannot reach it would be incongruous to wish to deduce it from the uncorrupted nature of man.[47]

Pufendorf's conception of natural depravity was part of his generalized description of man's poverty in relation to his needs, his weakness in face of natural scarcity.[48] For Pufendorf man's depravity was nothing but a causal effect of the first man's fall which is made known by revelation and not by reason; as such it is not subject to natural law, and does not constitute a debt to be repaid, but a fact to be taken into consideration in natural jurisprudence.

According to Moore, what Carmichael understood by "the evil which accompanies the birth of every man was the Christian belief that every man stands in need of redemption.[49] This redemption was in deed secured by Christ, and with it the possibility of communication between God and man restored. What could never be fulfilled in the imperfect condition of the human race without the aid of a divine moral law was the prospect of beatitude or lasting fulfillment in the union with God. This is the foundation of

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47 Pufendorf, De Officio, Greeting to the Reader, viii.

48 Moore, p.12.

49 Ibid.

Carmichael's divine moral law which he considered the source of all obligations, including the obligations which follow from the nature of things or natural law.[50] While Carmichael did not accept Huber's requirement of debts to be repaid, he also did not accept Pufendorf's definition of the law of nature which was an admirable attempt to find a single rule for moral life, because his formulation failed notably to account for the duty to worship God, the most important of all of our duties.[51] Carmichael was able to introduce a very substantive reorientation of Pufendorf's natural jurisprudence with the introduction of the psychological "yearning for beatitude", and man's possibility to signify his most profound desire for beatitude in signs of veneration and reverence for the deity. That "Reverence" for the deity in the daily life is communicated into respect for the aspirations of others, for their longing for lasting happiness. It is the very same "Reverence for Life" which Albert Schweitzer was to formulate as the obligation of humanity in the early twentieth century.

While that reverence lacked the compelling force of obligation, which Huber and Pufendorf considered necessary, Carmichael, nevertheless, restated Pufendorf's theory of natural sociability with an obligation to be sociable in

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[50] Ibid., p.13.

[51] Moore, Moral Philosophy of G.C., p.3.

terms of a duty to respect the natural rights of others. And it was his contention in the origin of government, which are the heads of households, to anchor their obligation with their respect for those who are dependent on them. These heads of household held a form of power, imperium, which was later communicated to the sovereign power, summum imperium, transferring not only the power but also the duty of respect. It was this duty, the moral obligation of the sovereign, which gave Carmichael contrary to Pufendorf the notion of the right to resist, when the citizens determined that the government of the sovereign no longer enjoys moral force. In the case of tyrannies it is not practical to await the decision of an assembly or a public debate, but it was rather a judgement based upon clear signs that the ruler[s] had lost the moral right to conduct the government. That is exactly what happened in Eastern Europe in the fall of 1989, when the citizens had exhausted their docile obedience, and could not bear any longer the cruelty and mismanagement of a government which had lost its moral rights, and the population lost its fear, [the Hobbesian foundation of totalitarianism: ruled by fear].

The great contribution of Carmichael was to have based natural law not upon the obligation to a superior but upon the intuitively apprehended longing of the soul. As Moore said: "His theory of natural rights underlined the

absurdity of supposing that human rights must be surrendered or alienated or transferred to a superior power in order to enjoy the benefits of social life."[52] Grotius, Hobbes, and Pufendorf, still deep in the theological concept of the omnipotence of God, to which the Pope declared himself to be the vicar on this earth, accepted the concept of a sovereign ruler as the superior power, promulgated not by divine revelation, (as the Pope claimed), but by reason of God's natural law, appropriated by the secular rulers. Thus, in essence, nothing changed but the challenge to the authority of the church for the establishment of superiority and undivided sovereignty of the secular rulers. It is for this reason that Rousseau, and rightly so, called all three despots. But to this day, the sovereignty concept of the individual state, so eloquently argued by the seventeenth-century natural jurists, is still held in high esteem overriding concerns of humanism and environment. Professor Jan Tinbergen, the Nobel prize-winning economist, deplores the division of the world into over 150 independent states as an example of bad management. He is concerned with the economical aspect of the consequences of seventeenth-century natural law ideology. The areas in which Tinbergen concentrates most of his work, "security, income

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[52] Moore, Moral Philosophy of G.C., p.7.

distribution, the environment and natural resources, require a supranational decision-making process."[53]

In seventeenth-century Europe the priority appeared to be finding a peaceful and orderly solution to the devastation of perpetual religious wars and civil strife. In the case of Grotius, it was peace between nations, in the case of Hobbes, it was the end to civil war in England, in the case of Pufendorf, it was the legitimacy of secular rulers independently from the foreign clutches of the Roman Catholic Church and Papal authority. Natural law provided the moral underpinning for secular states which had to fight dual loyalties of Catholic citizens, and the threat of Papal excommunication, in those times still a formidable force to be reckoned with.

Thus natural jurisprudence became conceived as the secularization movement towards Enlightenment. As such Grotius, Hobbes, and Pufendorf were opposed as heretics, atheists, Socinians, Arminians etc., all denominations given to Antichrists against which Pufendorf had to battle all his life.

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53 Terri James Kester, "Nobel Thinker," interview published in Holland Herald, Amsterdam, Volume 24, No. 11, November 1989.

Leibniz supported both religious unification under a tolerant Roman Catholic Church and the subordination of the German princes to the Emperor of the Holy Roman Empire of the German Nation. Pufendorf and Thomasius were concerned with the affairs of the state; both were strongly opposed to Papal interference, and defended the sovereign of the state against the Empire. With that they laid the groundwork for the Kleindeutsche solution, Bismarck's unification of Germany with the exclusion of the Habsburg Empire.

Christian Thomasius, (1655-1728), jurist and philosopher, was the first to announce his lectures in Leipzig in the German language (1687), and published a German language science news letter (1688). The Leipzig theologians cancelled his right to lecture in 1690, and he had to escape to Berlin, where the Elector Frederick III gave him permission to lecture at the Academy in Halle on the Saale, where Thomasius became the founder of the University in 1694 with the assistance of the leading Pietists, and advanced to rector of the university in 1710.

Thomasius remained committed to Pufendorf's concept of the state: he agreed with absolutism. In his natural law concept, Thomasius acknowledged two authorities: divine sovereignty as the highest authority which reigns above all, monarch and subjects; and a human (but not divinely inspired)

authority of the highest human power, combining all powers and wills in the persona moralis of the state's sovereign. The monarch stays above the law, has a moral duty to comply with natural natural. In practice, the Prussian king considered himself the first servant of the realm, and demanded from his subjects the same compliance, which became the citizen's duty of loyalty, diligence and obedience.[54]

As Hinrich Rüping explained, Thomasius provided the theoretical foundation for the education of civil servants at the university in Halle. Like Pufendorf, he left the theological controversies behind him, and his natural law theory did not remain an academic discourse. He established the relevance of natural law for civic practices. Thomasius vitally humanized the penal system and fought successfully for its secularization by achieving the abolition of heresy and witchcraft, the crimen magiae. Frederick the Great said that Thomasius freed the female population of the fears to be burned as a witch when old. He was way ahead of his time in Europe, where it was not universally accepted, that it belongs to the essence of mankind, for his humanitas, to tolerate heretics:

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[54] Hinrich Rüping (Bonn), Thomasius und seine Schühler im brandenburgischen Staat, Berlin, Symposium on the anniversary of the Edict of Potsdam, third lecture, 1985, pp.76-89.

"Hereticus quicumque homo tamen est."(55)

For Thomasius it became more urgent to establish the theoretical foundation for new human attitudes than to engage in temporal polemic. He revised the function of punishment. Under the Pietist influence, penalty shall have the influence and prevent others from following such passions, with the positive law providing the rules and enforcement. Furthermore, the prospect of penalty shall motivate and pressure the ignorant into compliance with enforceable duties, whereas the knowledgeable, learned citizen accepts duties as an inner commitment to natural law. Positive law becomes the foundation of the penal system which serves the state and not the church for the common good. Witchcraft, according to Thomasius, is a contract with a theory. While he does not deny the existence of the devil, he calls the hairy, horned manifestation of the devil a purum inventum by the Papal curia. Tolerance is realized in

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55 Christian Thomasius, De jure principiis circa haereticos, Halle, 1722, p.25.

Today we are facing the same problem, where with modern global communication systems, a death sentence upon Salman Rushdie for blasphemy was pronounced by the Ayatollah Khomeini, ordering all Muslims to execute the author and all aiding the publication, wherever and whenever found, virtually depriving many of civil liberty and life enjoyment, and giving licence to fanatics to commit crimes. (By now two translators of the book have been assassinated).

Khomeini's fatwa, the religious ruling broadcast on Teheran radio: "I inform the proud Muslim people of the world that the author of The Satanic Verses book which is against Islam, the Prophet and the Koran, and all involved in its publication, are sentenced to death." Feb. 14, 1989.

Thomasius by the actual abolition of heresy as a punishable crime. It is the basis for a new relation between church and state. Henceforth, the secular power to enforce with law and punishment matters of faith is taken away from the church along with its power to force the state to execute punishments, unless the state considers it necessary for the preservation of public peace and order. Thus the individual's faith and freedom of choice has become protected by law for the first time. Thomasius did not succeed in his effort to abolish torture, which remained a lawful mean to extract confessions until the end of the eighteenth century. But his effort to humanize the penal system is his most outstanding contribution to the Enlightenment in Germany. The realization in "praxis" under the influence of Pietism became a spiritual revolt radiating from Halle. His humanitas, based on love and friendship, is the cultivation of a natural affinity to one's fellow-man. Natural law becomes the road towards a spiritual emancipation, to a sensus communis which embraces within the community of citizens: the religious man, the heretic, the free thinker, and the atheist. Thomasius, in his effort to weld the community into a secular state, promoted the German mother tongue to reduce class distinction. He encouraged the learned to replace Latin with the common language, and he opposed the use of French in court circles and by the nobility. Thomasius laid the groundwork for and anticipated

Fichte's concept of the German Volk. In order to promote harmony he pleaded for unity. A process in excess would lead to nationalism and fragmentation of humanity which is still groping for global harmony today. But Thomasius was one of the most modern thinkers of his time. He considered the worst offenders to be fanatics, particularly Christian fanatics, who urged rulers to introduce and maintain Christianity by legislation. All utopianism and perfectionism are the curse of politics as a science of policy.[56]

F. M. Barnard elaborated on the practical philosophy of Thomasius, who described the royal road to man's summum bonum which ultimately consists of an inner tranquility, which is advanced by the well-being of those we love, by the practical expression of reasonable love distinct from non-reasonable animal love. To realise the ultimate goal, Thomasius divided the summum bonum not into three different components, but into stages, into steps to be climbed. The bonum iustum is the lowest bonum, justice, which concerns the external actions of mankind, the law to prevent the disturbance of the peace. The bonum decorum is the elevated ground also concerning the external action or expression of mankind, to live up to a moral and proper conduct pleasing to the fellow man, but not necessarily

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[56] F. M. Barnard: "The Practical Philosophy of Christian Thomasius", in Journal of the History of Ideas, Vol. 32, 1971.

promoting the inner satisfaction. The highest bonum is the bonum honestum, the honorableness of man, for which no external expressions are required, but the internal regulative principle of a conscientious human being. To achieve the highest grade of an elevated life, we have to start with the lowest step. The rules to lead us on are the laws necessary for a communal life. The intermediate step, with its own different levels, may not contain immediately necessary rules, but etiquettes and customs observed which make life pleasant but do not provide the level of honorableness. Honestum is based on the preservation of the external as well as inner peace, "do to yourself, what you wish others would do for themselves."[57]

The Justum demands "what you do not want to have done to you, do not do to others."[58] The one basic law expressed in negative terms, being prohibitive with the warning, do not disturb the peace, and the promise of punishment if opposed.

The Decorum is a recommendation, "what you want others do to you, do in kind to others."[59] Without being an enforceable law, without being punishable, it is still a

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57 Thomasius, Fundamenta, bk.I, ch.6, § 40.

58 Ibid., bk.I, ch.6, § 42.

59 Ibid., bk.I, ch.6, § 41.

rule derived from brotherly love, humanitas, which commends to give up some of your basic rights in aid of the principle of mutual aid and friendship, i.e. to give in to avoid vexation, or positively expressed, to gain friends.(60)

According to Rüping, Thomasius added to these three norms an independent but useful bonum prudentia. This was in reaction to the usually easily swayed people who are taken in by the cunning clerics, and the traditional Scholastic which is silent on such matters. Since the uneducated people are useful neitner to the church nor the state, the thesis of prudentia becomes one of utility. To be informed and educated, and to develop wisdom, sapientia, is a vital prerequisite for a person to develop honestum. The ultimate form, which is only within God, consists of a state without passion; but the lesser form, available to mankind, is the compassionate struggle of the good against the evil.(61)

Barnard claims, Thomasius's Decorum is the link between the Honestum, which only the good citizen possesses, and the Iustum which compels the wicked citizen by fear of punishment. Decorum is the only alternative to the unattainable perfect society with exclusively good citizens,

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60 Hinrich Rüping, Die Naturrechtslehre des Christian Thomasius und ihre Fortbildung in der Thomasius-Schule, Bonn, Ludwig Röhrscheid Verlag, 1968, pp.49-50.

61 Rüping, Die Naturrechtslehre, p.54.

on the one hand, and the police state which assumes all citizens to be potential criminals, on the other hand. Decorum is the code of civility and good manners. If all citizens were reasonable, without necessarily being good in any absolute or moral sense, Decorum would suffice as a basis for social and political stability within the state.[62] Decorum is the core of Thomasius's humanism: for purely humanitarian reasons one should be kind, considerate, and conciliatory by relinquishing some of one's rights for the sake of the common good or the less fortunate. This political Decorum, however, changes with different cultures, and while it is desirable to have it observed by all cultures, and all human beings, it may not be applied equally.

Thomasius's Humanitas grows out of brotherly love and friendship; it realizes the social affinity to fellow-man, even in case of different religions. For Thomasius it was a fight against church Orthodoxy for the sake of secularized sensus communis. Here Thomasius became the representative of natural law as the potential for spiritual emancipation in pre-Enlightened Germany. In a dedication to the Elector Frederick III Thomasius wrote:

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[62] Barnard, Thomasius, p.238.

"It is the unbound freedom...which gives the spirit life, and without it, the human mind would be as though dead and would seem to be without a soul."[63]

Werner Schneiders, in his extensive research into the Liebesethic of Thomasius, claims that he divided his attention between practical solutions and a viable theoretical foundation for his moral philosophy. This, and his personal crisis in his faith, is a subject which cannot be dealt with in this thesis. However, we may take notice of the Thomasius thought on the natural law principle of socialitas. For Thomasius, socialitas was not the end, but the preform of a not yet conceptualized, peaceful and rational love-ethics, a Liebesethik for all mankind. In his various writings we can detect a gravitation towards a peaceful and rational relationship between humans for the sake of internal as well as external peace. Peace, the most precious earthly fate, is the goal of mankind. The realization of peace is the fulfillment of the human essence, especially if it is addressed to fellow-man. The aim to bring peace to the fellow human being is the essence of Thomasius's moral philosophy. But what are the natural conditions to enable man with his own power to accomplish such Sittlichkeit, such moral conduct? How can we define in practical terms the rational conduct towards one self to be

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[63] Rüping, Die Naturrechtslehre, p.87.

of equal benefit to others? The daring answer: Man possesses a natural affinity towards rational love. However, as a result of the separation of law from morality, which is limited to un-enforceable rules, the idea of a natural caritas sapientis became an unrealistic demand.[64]

The seventeenth-century natural law advocates provided the grounds for the development of modern political thought. Only through their efforts have we a wealth of political theories, which had spawned the Enlightenment, and gave rise to other than traditional "old order" concepts. However, it was a response to a war-torn Europe, each to his peculiar situation and viewpoint. For Hobbes without obedience there could be no government, therefore there could be no virtue. He supported the state against the unruly people, regarding the churchmen as the primary disturbers of the peace; he considered men to be wolves, who could only be made to agree by a dictator, with their total submission. Grotius believed in the natural goodness of man. For Leibniz, men were neither very bad nor very good, and he agreed with Machiavelli that the two extremes are equally rare, with the result that great actions are also rare. Leibniz shared Shaftsbury's optimism in the attempt to bring

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64 Werner Schneiders, Naturrecht und Liebesethik, Zur Geschichte der praktischen Philosophie im Hinblick auf Christian Thomasius, Hildesheim & New York, Georg Olms Verlag, 1971, p.294.

men of their times to humanize themselves, and to make things more cheerful. He was against raillery, for "raillery contains a little contempt". He wanted to change the French tradition of skepticism as the main principle of discourse, in order "that joy, rather than irritation, appear in our conversation."[65]

In the devastation and chaotic conditions following the exhausting Thirty Years' War, Pufendorf may have overemphasized the need for a strong monarch, and a secular one, independent of any religious influence. Leibniz could not see this as being a good message to youth, "restricting duty to that which is prescribed by law". Leibniz claims "that in a universal society governed by God every virtue is comprehended among the obligations of universal justice; and not only external acts, but also all of our sentiments are regulated by a certain rule of law". This is necessary not only for the concord of men, the humanae tranquilitatis, but also for a "friendship with God, the possession of which assures us of an enduring felicity".[66] So the way leads from the jurisprudentia naturalis to the jurisprudentia universalis, from the order of law to the order of love. Leibniz made that walk with the certainty that right and love

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[65] Ibid., pp.195-196.

[66] Ibid., p.73.

in God forms a unity, and - as whatever they may appear - both equally find their source in God.[67]

Late in life both Pufendorf and Thomasius came to recognize this in their embrace of Pietism.

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[67] Hans-Peter Schneider, Leibniz, p.485.

CHAPTER IV.

On Profane Natural Law: An Exposition and Critique of Karl Olivecrona's Interpretation of Pufendorf's Theory of Natural Law.

Natural law is being resurrected whenever mankind has come to an irreconcilable impasse, and a historical intervention is required to bring mankind down from the mountain of built-up traditions, prejudices, doctrines or concepts, which separate and divide people; to search and to find the principles of peaceful cooperation which will be acceptable to all. Natural law is called upon whenever a common ground is being sought, and "a doctrine of natural law is inevitable as a basis for cooperation between Christians and non-Christians."[1]

The conception of modern natural law in the seventeenth century was such a resurrection of natural law to find the principles of peaceful co-operation for a divided Christianity. A natural law which God supposedly had created at the beginning with his intention and purpose of Creation including mankind. This natural law is in no way contradicted by God's subsequent revelations. And if Scriptures reveal a separate covenant between God and the House of Israel, than this applies in particular to a

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[1] W. Horton, Natural Law and International Order.

specific people at a specific time. But Christ came to teach all of mankind brotherly love, to the believers and non-believers, since the God who gives grace is also the God of love who loves all his creatures, and who wants to save them all, and therefore calls them to love one another.[2] The rejection by Protestant Orthodoxy of natural law is based on the assumption that its design is to permit man to escape from the "radical necessity of receiving revelation in order to know what is goodness and what is truth."

Jacques Ellul, the French authority on the Protestant view of law, in his oeuvre The Theological Foundation of Law, denies the validity of natural law as a basic concept of human society. He does accept the law of nature, i.e. the physical nature which is common to all men. However, he rejects natural law as a doctrine, or as a valid philosophy of law, but let it stand as a historical phase in the evolution of law.

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[2] Jacques Ellul, The Theological Foundation of Law, first published in French in 1946, under the title Le Fondement Theologique Du Droit, transl. by Marguerite Wieser, New York, The Seabury Press, 1969.

Ellul acknowledges the futility of natural law, but in his rejection eloquently describes natural law as this "tremendous effort at reconciliation beyond grace. It is just one aspect of this effort, along with natural theology and Gnosticism, natural morality, and the absolute value of reason... Man must be allowed to know of himself what is a proper regulation of society. Christians and non-Christians must come to an understanding on the lines of sound social and political order, based on capacities common to all men. They must be able to work together on this foundation and built the best human society." p.11.

In the author's opinion, law in its origin is a religious phenomenon. Man in his attempt to appease the unknown forces of nature, in his mind personified into gods the feared phenomena. The rules and magical rituals conveyed and formulated by priests became laws conceived as the expression of the will of a god. In later stages, laws are established by customs and become enshrined independently of religious powers. It is the custom which evolved from the early rules of the primitive human hordes, which has its roots in the physical nature of animals with a herding instinct. We may say here, that law has but two roots, the natural, evolved from instinct of the physical nature of mankind, obeying rules evolved by customs, and the spiritual evolved from man's fear of the unknown forces, obeying commandments of religious authority. But both are in consequence of the very nature of humankind as created by God, which necessitates the evolving of law given mankind in either of the three ways, conceived by the prophets through God's revelation formulated in Scriptures, or as a product of the God given human faculties, his rational capacity to develop a natural theology and corresponding natural law, or finally, as an insight, a product inscribed in the hearts and the conscience of man, which supports the notion of sociability and love of humanity.

Ellul rejects these notions of law "as inherent in the nature of man, created by God, or as part of the order of creation," because the inevitable fact for Christians is being bound by "the decisive intervention of God becoming man and radically changing all relationships."[3] He claims that in the natural law concept God is regarded only as creator, and it is "the desire to be able to come to an understanding beyond the tragic separation created by the revelation and grace." As a Reformed Protestant, Ellul says, "we are called upon to confront the fact of natural law with the teaching of Scriptures, the rule of our faith"; and "the desire to create a universally binding law on the basis of the law of God or even in the basis of the Gospel is undeniably heretic. Such an attempt presupposes the possibility, for non-Christians, of accepting the will of God or of living a Christian life."[4]

But it was this very failure to know from Scriptures with certainty the God-given laws which caused the endless religious strife between the various churches each claiming to be the sole source of the truth. To escape this impasse, human thought was forced by necessity to develop a modern natural law separate from these religious squabbles. It is for this historical reason - a natural law conceived in

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[3] Ibid., p.11.

[4] Ibid., p.13.

opposition to religious controversy - that the modern natural law became shorn of its vital element, natural religion, and became but a limited conception of the purpose of Creation, and a guiding principle without an ultimate goal. Sociability is no more than the utility of preserving human societies, today, at best at the beginning of its fulfillment, but still aimlessly groping for its destiny.

It is this author's intention to examine the cause and effect of the natural law system developed by Samuel Pufendorf as a rational response to the irrationality of opposing doctrines of institutionalized divine authority. But to extricate from religious institutions - which resulted in a secularization - the laws for human conduct to be universally applicable, natural law lost its necessary link with the divine design, and became limited to the "Human Forum", a regrettable limitation later recognized by Pufendorf in his religious thought. The modern natural law of the seventeenth century was a particular response to a political and historical crisis of humanity in Western Europe. It did not address global concerns, neither women's issues, nor animal rights or ecological problems which are on the forefront today. To address these issues a renewal of natural law with the inclusion of thoughts of the divine design of creation is in this author's view a necessity, which had inspired this research into a specific area of the

studies of humanity, i.e. the natural law and religious thought of Samuel Pufendorf.

Today's debates on natural law leave us with the impression, not of the denial of a natural law, but that it is a field which is either too narrowly defined or too all-embracing to be of practical value. The renewal of debates on natural law usually reoccurred in response to new historical situations, which have required fundamental rethinking such as the religious strife in Europe following the Reformation with seemingly no end to the wars. The Second World War, another historical catastrophe, spawned a renewal of natural law debates to find a new rational and moral basis to prevent the reoccurrence of belligerent totalitarianism.

The climate of jurisprudence in the post-World-War II era, especially in Germany, has focused on an inner critique of legal thinking, as well as on the development of a new legal ideology, one based on natural law.

What facilitated the re-entry of natural jurisprudence into post-World-War II Germany, was this desire to bring positive law back to its foundation, viz. to the law of elementary moral standards as it had existed prior to the corruption of the law by the tyrannical and totalitarian regime of Adolf Hitler. The search for such a philosophy of

law was also a search for the right order of civilization, which would be equally applicable to all human beings and nations, with an immediate insight into the constancy of human existence, an order would be presumed to remain unchanged whatever changes may occur in positive human institutions.[5]

The source of Neo-Modern natural law could be derived either from Christian theology, rooted in Catholic Scholastic Aristotelianism and in Protestant Augustinianism, or from secular natural law writings of Hugo Grotius, Thomas Hobbes, and Samuel Pufendorf. While the seventeenth-century natural law advocates had to substantiate their doctrines with theological assumptions, subsequent generations have deviated in emphasis and attitude from the metaphysical link of natural law.

Today, natural law is detached from positive jurisprudence and is seen principally as a basic standard of moral conduct, and depending on the aim of its formulation, it is either elemental natural law or practical natural law. The former relies, on the one hand, on the Scriptures, for the insight into fundamental principles, or, on the other hand,

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[5] Thomas Würtenberger, "Neue Stimmen zum Naturrecht in Deutschland (1948-1951)", Archiv für Rechts- und Socialphilosophie, ARSP, Wiesbaden, Vol. 1952/53, pp.576-597.

on mankind's common sense, qualified by experience and rational deductions. The latter varies from the elemental because of differences in customs, cultural traditions, social and political conditions of the respective community or nation.

After World War II the positive law, which during the Hitler regime was based on a profane natural law which was harnessed into an illegitimate service on behalf of the Third Reich and its Herrenrasse, had to be rewritten and reset on a new foundation. This has been the criterion of the intensive post-war natural law discourse in Germany. The post-war legal philosophy had aimed at a philosophical recreation of a Christian Natural Law with emphasis on the divine, the spiritual, and the ethical law structure based on Scriptures and Thomism, and which is thought to distance itself from the discredited, "profane" view of natural law, which is based on the allegedly unreliable sense of right and wrong of human natural faculties.

In post-war Germany we witness two schools of natural jurisprudence. One tries to rebuilt moral standards based on Christian theology, as proposed by Erik Wolf,[6] the

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[6] Erik Wolf started with a thesis on the development of a rights concept in pure natural law (1924); then he moved into the legal philosophy of crime and punishment. From a human rights philosophy he developed a rights theology. Natural law provided for Wolf the legitimate basis, the

other tries to built on purely rational grounds by linking with Hugo Grotius's empirical route to discover basic ethical

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Rechtfertigungsgrund, of all positive laws, as well as regulative and normative standards, the normierende Richtmaß, for all historic-empirical laws.

Erik Wolf identified four kinds of basic natural law questions, the ontological, logical, metaphysical, and ethical, which he encased in a problem structure of an anthropology of law, a Rechtsanthropologie. In his legal philosophy he refused a binding solution because of skepticism about all previous doctrines to which he applied a dialectic. In leading the fight for church rights against the Nazi regime, he claimed the fight for rights and justice is a continuous one, "it has to be fought over and over again, and in dangerous situations must proof itself." In the search for the absolute in law, Erik Wolf [not unlike Pufendorf] arrived at the living word of God and to the obligation of God's commandments. In his pamphlet Rechtsgedanken und biblische Weisung (1948), he noted that obedience of the legal and moral directives, the Richtschnuren of the Bible, provides mankind with the essence of his being, and with the grace of God he becomes justified. These biblical directives provide mankind with the base, the limitation, and the end of all human rights and obligations. The ten commandments are the summation of all legal directives. In the pamphlet Recht des Nächsten (1958), he developed the dialectic between divine law and the human-to-human law, the Nächstenrecht. The socio-theological foundation of the Nächstenrecht is, on the one hand, "personality" in which we are accountable to God, it is the original law from which all basic human rights develop; on the other hand, "solidarity" is the obligation of mankind towards his fellow man in a Christocratic brotherhood. The synthesis of divine law and brotherhood law reveals itself in the order of love, the real key problem of theological jurisprudence. To develop the order of this brotherhood law is the primary objective of Rechtstheologie. Wolf revealed in the transcendence of church law its dialectic and paradox. The paradox of the Church law reveals itself in being divinely inspired, yet natural, historical, conditioned, and created largely as jus humanum. In the textbook, Ordnung der Kirche (1961), he developed the Evangelical Protestant Church law in comparison with the Catholic canon law in an ecumenical spirit of tolerance and humanism.

For reference: Thomas Würtenberger, "Rechtsphilosophie und Rechtstheologie, Zum Tode von Erik Wolf", in Archiv für Rechts- und Sozialphilosophie, Wiesbaden, Franz Steiner Verlag, 1978, Vol. LXIV/4, pp.535-546.

norms in the field of law; Grotius who set the tone for a "secularized natural law" in the seventeenth century with his now famous postulate on the existence of a natural order, ordre naturel:

> What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are no concern to Him.[7]

The subject of this chapter is the discourse of the secular versus the divine level of natural law to which Karl Olivecrona made his rather shocking but refreshing contribution in his lecture at the University in Munich, in the Catholic Metropolis of Bavaria.[8] He dissects the problematic of the natural law doctrines advanced by Grotius and Pufendorf, and names his deliberation "The Two Levels in Natural Law Thinking". But in essence, he is concerned only with the one level, which consists in the "profane" part of natural law and which he strips of its divine relevance and theological assumptions, as if they were only trappings,

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[7] Hugo Grotius, The Law of War and Peace, transl. from the Latin, De Jure Belli ac Pacis Libri Tres, by Francis W. Kelsey, ed. by James Brown Scott; Indianapolis * New York, Bobbs-Merrill Publisher, 1925; Prolegomena 11., p.13.

[8] Karl Olivecrona, Das Meinige nach der Naturrechtslehre and Die zwei Schichten im naturrechtlichen Denken; published in Wiesbaden, West Germany, in the Archiv für Rechts- und Sozialphilosophie. The first essay is a reprint of the lecture given at the University of Munich on the 28th of June, 1972; ARSP, Vol.1973, pp.197-205; the second essay is an extension to the previous publication; ARSP, Vol. 1977, pp.79-103.

which may have been used as precautionary measures, by both Grotius and Pufendorf, whose writings incurred the wrath not only of the Reformed and Lutheran Protestant Orthodoxy, but also of the Catholic Inquisition.[9]

In Germany, the renaissance of natural-law-thinking in the 1950s "was born by the conviction, that the legal thought of National-Socialism was indeed a legal positivism."[10] Baratta said in 1966 with an apology for legal positivism, that one has to distinguish between a good-law and a bad-law positivism, in the same way one has to distinguish between good and bad natural law doctrines.

In the course of the post-war years, we observe a hyperactive use of natural law theories for all sorts of moral and social questions which have very little to do with natural law. Hans Reiner attributes this overextensive application, the Uebersteigerung der Ansprüche, of natural

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[9] Today, with the shifting of meanings of words, we should call the basic natural law advanced by Grotius and Pufendorf, "secular" rather than "profane." Nevertheless, in French as well as German, profane has still the connotation of something not connected with things sacred or biblical. But it also means blasphemous, or at least irreverent or disrespectful; this was no doubt, the verdict of many of their contemporaries, who more often than not called Grotius and Pufendorf heretics.

[10] Alessandro Baratta, Rome: "Rechtspositivismus und Gesetzespositivismus," Thought to a natural law apology of law positivism; Archiv Für Rechts- und Sozialphilosophie (ARSP), Wiesbaden, Vol. 1968, pp.325-350.

law to the insufficient understanding of the essential basis for the fundamental norms of natural law.[11]

Olivecrona cut right through this overextensive application of natural law thinking, and concluded his lecture with the claim that there did exist - independently of any divine or human laws - a lawful order among humans. In this order it became apparent what belonged to a person, and what constitutes lawfulness and unlawfulness in the human conduct, and what are the results of a committed wrong.

Furthermore, he claimed, contrary to the principle of law that it requires a sovereign lawmaker, that lawful order did not happen through commandments, but through the condition provided by nature in the human capacity of reason and the human act of will.

Olivecrona emphasizes that such lawful order is something entirely different from the legal system in the sense of imperatives by a superior power, a sovereign authority. But in so dissecting Grotius's natural law concept, he loses entirely the concept of sociability which is the foundation of Grotius's theory accepted by Pufendorf.

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[11] Hans Reiner, "Die Hauptgrundlagen der fundamentalsten Normen des Naturrechts," a paper presented to the Internationale Vereinigung für Rechts- und Sozialphilosophie - IVR World Congress, Basel, 1979, published in ARSP Vol. No. 1983, pp.1-12.

And in liquidating the sovereignty principle in Pufendorf with its source in God, he ignores these two dimensions of Pufendorf's natural jurisprudence. Indeed he is concerned explicitly with the denial of the relevance of God and of a divinely imposed set of obligations and rights in natural law and in Pufendorf. He regards this divine imposition as a "level" of judicial analysis which can be excised or separated from Pufendorf's argument without damage to his line of reasoning.[12]

Olivecrona's line of reasoning appears to be divorced from the exegetical argument, put forward in 1676 by Valentin Alberti, a leading professor of theology at Leipzig, and former student-fraternity brother of Pufendorf. Alberti had published an alternative to the argument in De Jure with his Compendium Juris Naturae Orthodoxae Theologiae Conformatum. Alberti offered a powerful restatement of the orthodox Lutheran and Aristotelian synthesis on the divinely imposed nature and origin of natural law, with the introduction of a concept of status integritatis at the pre-lapsarian state, in direct opposition to Pufendorf's

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[12] Olivecrona in his essay addressed the natural law maxims of Grotius and quoted Pufendorf only to confirm it; therefore, this outline and translation appears to be on Grotius rather than on the natural law system of Pufendorf. However, stripped of the theoretical differences, the practical level, for Olivecrona the hard core of modern natural law, is the same in Grotius and Pufendorf, and to an extent in Thomas Hobbes.

contention of a human status corrupta as the essential basis for natural law. Alberti claimed that man's moral nature was not entirely depraved through the Fall, therefore, it could be argued, that the uncorrupted remains of that divinely created nature had persisted in a post-lapsarian world as natural law. Thus the link with God would remain intact. This was said to preserve the Lutheran Orthodoxy of later day divine intervention which Pufendorf seemed to have denied with the contention that divine imposition applied only in a pre-lapsarian existence.[13]

Olivecrona ignores the problematic of sin, his interpretation is purely anthropological. It is considered a fact, that nature is so designed that each species has to fend for itself with the fittest offspring to succeed in survival and procreation to guarantee the perpetuation of the species. The physical human nature is the weakest among all species, and according to Pufendorf, humankind could not survive without the other special human faculties, and the human bonding in sociability. But with the human faculties, its tenacity and wits, mankind not only survived but

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[13] Timothy Hochstrasser, "The Foundation of the History of Morality: Samuel von Pufendorf and the Invention of a Tradition," a paper presented at the international workshop Unsocial Sociability, Göttingen, June 26-30, 1989. We may say here, that peace was eventually achieved between Pufendorf and his former friend Alberti, with the good intervention by Rechenberg, which is hardly known; however, reconciliation having taken place, we may suggest that the difference could not have been all that insurmountable.

dominates most of the world. Since the primitive antedeluvians roamed the Earth, mankind has come a far way, and with the combined human nature, the physical and the mental, it has become a society creating culture with no end to its further development. This surely suggests that the purpose of man's existence cannot be limited to self-interest, to procreation, and the survival of the species as the end of this creature, which is fitted with improbable powers to overcome all odds, to create and to destroy, to reshape the world, coming close to annihilating all species and itself. But these questions are not touched by the profane natural law with its basic principles so eloquently defined by Olivecrona.

In his final paragraph of his deliberation on the two levels of natural law thought, Olivecrona raised the spectre of law without an author of law, with the hypothetical question of what would be changed in this "lawful order", if someone would in his mind exclude the natural law [based on sovereign authority] from the system of the natural law advocates? He concluded: "Very little." All statements on the <u>suum</u>, on the method of obtaining property, on the expression of will, as well as the facts of <u>injuria</u> and its consequence, would still remain intact as the fundamental norms comprising Natural Law.

In his day, Pufendorf was attacked for the liquidation of the divine link in his natural law system and for his separation of the human from the divine forum. Olivecrona steps into the other direction, lauding Pufendorf for providing us with a natural jurisprudence acceptable to both Christians and Non-Christians, and even to atheists. We wish to examine this interpretation before we are going on to delve into Pufendorf's thoughts concerning religion.

To Each his Own according to Natural Law.

In Olivecrona's view, the principle of justice "to each his own," as formulated by Cicero in his suum cuique, became the most important principle for the natural law advocates of the seventeenth century. This maxim can be understood in two ways: first, to "give each his own" which, according to Kant, has the problem that one cannot be given what he already has; and second, to "leave each his own."

However, the modern natural law advocates interpreted this maxim only in the second sense, viz. that everyone has to let the other have what belongs to him. They converted this principle into a pure negative sense of a prohibition. Accordingly, Grotius said that justitia consists in the avoidance of an infringement into the

belongings of others. Such an intervention or attack on the property of others constitutes injustice, which is defined as injuria.[14]

The order of the law of nature addressed man in the state of nature. The command not to interfere with another's sphere assumed the existence of several spheres; but its extent was not determined by the law of nature. The real content of natural law could only be known with the clear definition of the personal sphere and its borderline with another's sphere. Only with this definition was it possible to discover what constituted a lawful or an unlawful act.

For this principle to come into effect, there had to be assumed as a prerequisite a sphere belonging to each person, which was called "his own", das Seinige, suum, or

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[14] Grotius, Prolegomena 44., wrote in opposition to Aristotle's tendency to unite distinct virtues and to the co-ordination of passions with justice, or injustice, when he said:

> [that] it does not matter whether injustice arises from avarice, from lust, from anger, or from ill-advised compassion: ...justice, the essence of which lies in abstaining from that which belongs to another (iustitia tota in alieni abstinentia posita est) ...injustice has no other essential quality than the unlawful seizure of that which belongs to another (iniustitia non aliam naturam habet quam alieni usurpationem). P.25.

meum or tuum. According to Olivecrona, this is the basic concept of natural law thinking by Grotius and Pufendorf.[15]

Contrary to the civil status, man in the state of nature is subject to no one, because by nature all men are equal, and each one could freely rule over his own. Within his sphere man was sovereign. This was without question clear to the natural law advocates, therefore, it was of the utmost importance to define the suum and its extension.

I would like to insert here Olivecrona's opinion, expressed later in his deliberation, that the natural law advocates could not logically define the suum, the personal sphere, or what the basic concept of "his own" really is. The suum is not conceptually defined by the law advocates, but they report its composition and provide a catalogue of its elements; with that the doctrine received its firm content.

It is to be noted, that the theory of the suum is not related to private property. In the state of nature private property did not exist, it only came into being with the introduction of a covenant, Uebereinkunft. However, independently of any covenant the individual person had

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[15] Grotius, bk.I, ch.2, sect.1, § 5.
Pufendorf: De iure naturae et gentium, transl. by Basil Kennet with all the large notes by Jean Barbeyrac, London 1749, Bk. III, ch.I, § 1.

something that belongs to it; this is primarily what belongs to us by nature, and secondarily what became ours, appropriated by the human will.

According to Grotius, to man belongs by nature primarily life, body, and limbs - vita, corpus, membra. Secondarily, liberty, reputation, honour - libertas, fama, and honor. There belong to him in addition also the acts of his will - actiones propriae. Pufendorf gave a similar catalogue, adding pudicitia, a man's chastity, whereby he thought of the sexual integrity.[16] Indeed, Grotius also counted chastity in the suum, although it found no room in his catalogue, but in a theological discussion he said that "the divine law puts chastity on a plane with life."[17]

According to both Grotius and Pufendorf, it is a natural condition for each person to have a sphere of his own. The natural suum is a mental ego which is in the possession of life, body, liberty etc. The suum sphere is the space of this intelligent and spiritual, the geistige personality. It penetrates the physical person and controls

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[16] Grotius, bk.I, ch.2, sect.1, § 5, and bk.II, ch.17, sect.2, § 1. And Pufendorf, bk.III, ch.I, § 3, and bk.II, ch.V, § 11, p.212.

[17] Grotius, bk.I, ch.2, sect.5, § 7, p.54, and bk.II, ch.1, sect.7, p.175.

its actions. It is the bearer of liberty, reputation, and honor.[18]

With the suum, the essence of an injustice became self evident. An Injustice is an attack on the personality of another. To live a just life means to have avoided any attack on any other personality.

The original, naturally determined suum could be extended with the human will. This, however Olivecrona argues, could only be achieved by accord or an act of law. Since the authority of a legislator originates from the social contract, it ultimately depends on an accord what could be added to the original sphere of one's own.

The Extension of the Suum.

Olivecrona doubts the claim by others, that the whole suum sphere can be determined with an interpretation of natural law.[19] In his view, it seems that the definition

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[18] Pufendorf emphasizes on several places, e.g. bk.IV, ch.IV, § 5, that animals have no suum. In his mind, the personal sphere exists only in humans as rational beings.

[19] Horst Denzer, in his Moralphilosophie und Naturrecht bei Samuel Pufendorf, Munich, Verlag C.H. Beck, 1972, p.147, claims that in Pufendorf, man is not only untouchable in his pure physical nature, but also in his respective acquired status as a person in his social and lawful standing. Because

of the suum cannot be achieved with the maxims of natural law, but that the definition requires the assistance of the catalogue. Accordingly, through the description [catalogue] of the content of the suum sphere, the rule not to harm others, received a concrete meaning, independently and prior to covenants and positive law.

However, the horizon of the suum sphere could be extended through the human will. In the natural state of man, this extension of the individual sphere could be achieved basically in two ways:

(a) partly through the acquisition of personal rights and rights to property, and (b) partly through the acquisition of rights over other people in the way of a promise by such people.

The difficult task thus became the explanation of an acquisition. This had to be done in a way compatible with the original maxim of the liberty and equality of all humans.

In an opinion according to Grotius and accepted by Pufendorf, at the beginning everything was common property. In time, as the population grew, this became inconvenient,

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man is a being which strives to perfect himself, therefore, all that what constitutes a rightful acquisition to improve himself, falls under the rules of natural law. (III,I,III).

and it was agreed among people to divide certain available properties, in which manner the concept of private property made its way into society. Common property that could not be divided - with the exception of the Air and the Seas - could be acquired by occupation, the principal manner in which actual private property was obtained.

However, between Creation and the introduction of private property there passed a long time. For this period Grotius developed a special theory.[20] He said, at that time everyone was permitted to acquire what he wanted and needed. It seems that this permission was limited to the necessities of life. It was not based on an accord, it was based on a general custom.

Grotius did not stop there, he added something important: Whatever one acquired, became part of his own, the suum. Nobody could take it away without committing an injustice.[21]

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[20] Grotius, bk.II, ch.2, sect.2, § 1, and bk.I, ch.2, sect.1, § 5.

[21] Grotius, bk.I, ch.2, sect.1, § 5, and bk.II, ch.2, sect.2, § 1.

The Right and the Wrong.

By Grotius,[22] the rightful action, the *justum* (sometimes called *justitia*), is determined in a negative manner. Right is what is not wrong. In order to know what is right, what a *justum* is, one has to know when a wrong, an *injuria*, has been committed. This is clearly established: a wrong is being committed when someone steals something from another which belongs to him [meaning it is part of his *suum*], this is an *alienatio alieni*.

Grotius's concept of the Right and the Wrong arises from these two principal maxims in his natural law:

> 1. *alieni abstinentia*.
>
> To this sphere of law belongs the abstaining from that which is another's, the restoration to another of anything of his which we may have, together with any gain which we may have received from it.

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[22] *Ibid.*, Prol.44,1:
...the act cannot be at variance with justice, the essence of which lies in abstaining from what belongs to another.
Prol.44,2: ...injustice has no other essential quality than the unlawful seizure of that which belongs to another... For to disparage such incitements, which the sole purpose in view that human society may not receive injury, is in truth the concern of justice.

2. promissorum implemendorum.

This maxim is the obligation to fulfill promises, the making good of a loss incurred through our fault, and the inflicting of penalties upon men according to their deserts.[23]

To this apply three rules which are concerned with the transgression, Uebertretung, of the first maxim:

First. He, who is in the possession of something that belongs to another person, is obliged to return it.

Second. He, who had benefits, Nutzung, received [from the possession] has to pay compensation, Ersatz.

Third. And compensation shall be made eo ipso if one is guilty of a harmful action, damni culpa dati reparatio.

In addition to these, Grotius considered as a natural law the right to punish, poenae inter homines meritum. However, this is neither a command nor a

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[23] Ibid., Prol.8, p.12-13.

prohibition, merely a statement of permissibility, of nicht verboten sein, of a human punishment if justified.

While Pufendorf agreed with the concept of the alienatio alieni, he differed from Grotius with his assumption of a fundamental order imposed by the natural law, a fundamentalis lex naturae.

His formulation reads:

> This then will appear a fundamental Law of Nature, every man ought, as far as in him lies, to promote and preserve a peaceful Sociableness with others, agreeable to the main End and Disposition of human Race in general.... But by this Term of Sociableness, we would imply such a Disposition of one Man towards all others, as shall suppose him united to them by Benevolence, by Peace, by Charity; and so, as it were, by a silent and a secret Obligation.[24]

In another context, Pufendorf listed some specific rules, Gebote, of natural law:

> ...From all which we conclude, that the natural State of Men, altho' they be consider'd as not united in Commonwealth, is not War, but Peace. And this Peace chiefly depends on the following Laws and Conditions; that no Man hurt another, who doth not assault and provoke him (alterum non laedere); that every one allow others to enjoy their own Goods and Possessions (alieni abstinentia; that he faithfully perform whatever shall be covenanted for, and voluntarily promote the Interest and

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[24] Pufendorf: Book II, Chap.III: Of the Law of Nature in General, Sect.XV: The fundamental Law of Nature, p.134.

Happiness of others, in all Cases where a stricter Obligation does not interfere.[25]

When the natural law advocates refer to the maxim, "not to harm another," we have to be aware of that term damnum, Schaden, which is extended in its meaning. To harm another means to take something away, something that belongs to the other person; or to diminish it or to make it worse. Neminem laedere means the same thing as alieni abstinentia.[26]

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25 Pufendorf: Book II, Chap.II: Of the Natural State of Man; p.98. And Sect.IX: Reason is not to be denied its use in the State of Nature; p.110.

26 Grotius on Damage. The Latin word, damnum, was perhaps derived from the word meaning to take away, demere. In Greek it means "the being less", that is, when any one has less than belongs to him, whether by the right that accrues to him from the law of nature alone, or is reinforced by the addition of a human act, as by ownership, contract, or legal enactment.
In the Footnote: So Varro, Book V: Damnum (damage) is derived from demptio (a taking away); when the recognized value has been made less by the act.
On Damages caused through Injury, and the Obligation arising therefrom. That damage is understood to be that which conflicts with one's right taken in a strict sense. (Book 2, Chap.17, § 2, p.430).

Pufendorf on Damage: The Word Damage which seems properly to refer only to Goods and Possessions, we here use in an extended Sense, so as to make it take in, likewise, all manner of Harm that may be offer'd to a Man's Body, his Chastity, or his good Name. In this Latitude, then, it implies all Hurt, Spoil, or Diminution of whatsoever is already actually our own; all Interception of what, by a perfect and absolute Right, we ought to receive, whether such Right be the original Gift of Nature, or whether it be allowe'd us by human Institution and Law. And, lastly, all Omission or Denial of any Duty, or Performance, which others, by a perfect Obligation, stand bound to pay us. (Book III; Chap.I, Sect.I, p.212).

To this we may add Denzer's comment on what Pufendorf called Damnum:

> That term cannot be translated with the word "damage", Schaden, because today's judicial praxis has narrowed that term to property damage. The term damnum corresponds with the broad rule of ut nemo ledaturae. Pufendorf understood with it any kind of harm, laesio, of another, be it his body, his honour, or his reputation; in addition to the laesio, the spoilage, corruptio, the reduction, diminutio, and the seizure, sublatio, inflicted upon our property, and the seizure of what belongs to us in a perfect right.[27]

Although Olivecrona added the following comments only as a footnote, they are too important not to give them full space:

The principle neminem laedere comes from the juris praecepta of Stoic origin by the Roman jurists. However, it is remarkable that the natural law advocates only rarely mention the suum cuique tribuere which belongs to the Roman praecepta juris. The cause of this , however, was not the rejection of this principle, it was rather self-explanatory. E.g., Pufendorf mentioned [in a dispute over Hobbes]: "Nor therefore can I believe there was ever any Prince heard of, so far depriv'd of Reason, as to have commanded what the general laws of nature forbad, or forbid what they

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[27] Denzer, p.147.

commanded."[28] In another place, Pufendorf mentioned why he did not consider it appropriate to deal with this principle in the natural law doctrine. The Roman jurists define justitia as the perpetual will to let others have what is theirs, constans et perpetua voluntas, suum cuique tribuendi). This definition refers to the righteousness of a person, which is of little concern to the natural law doctrine. Its main body is the justness of actions: Cum jurisprudentia maxim circa justitiam actionum sit occupata; justitiae personarum non nisi obiter, et paucis in materiis rationem habet.

> Hence it appears that the Definition of Justice so much in vogue with the Roman Lawyers, in which they call it, A constant and perpetual inclination to give every one their Due, belongs to the Justice of Persons, not to that of Actions. And this we take to be very inconvenient: Inasmuch as the Science of Law is chiefly employ'd about the Justice of Actions, and toucheth on the Justice of Persons only by the bye, and in some few Particulars.[29]

Acquisition of property.

The main body of natural law as perceived by both Grotius and Pufendorf is the same, and it is concerned with human actions. On the one hand, in matters belonging to

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28 Pufendorf, Book VIII, Chap.I: Of the Power of the Sovereign in determining the Value of Subjects; Sect.V, p.749.

29 Ibid., Book I, Chap.VII: Of the Quality of moral Actions; Sect.6, p.77.

another person, any interference should be avoided; on the other hand, promises should be fulfilled. This leads to the question of how the human action governed by natural law may extend, transfer, or acquire something which may then belong to one or another person.

With the Creation God gave man the Earth to live in, to multiply, to be fruitful. The purpose of His design we may discover with His greatest gift to mankind, the common sense, which is all that is needed to discover His natural law. At the beginning, the Earth was the common property of all. There was no private property. However, man was permitted to change the original order and to introduce partitioning into private property. This happened with an understanding among men, an Uebereinkunft, which preceded the formation of society.

Grotius said, "this happened not by a mere act of will; for one could not know what things another wished to have, in order to abstain from them - and besides several might desire the same thing - but rather by a kind of agreement, either expressed, as by a division, or implied, as by occupation. In fact, as soon as community ownership was abandoned, and as yet no division had been made, it is to be supposed that all agreed, that whatever each one had taken

possession of should be his property."[30] Prior to the introduction of private property, according to Grotius, every man had a right to everything necessary for his own use according to his nature, he needed to consume.[31] But for Pufendorf a contract was absolutely necessary.[32]

With the original order considered not workable, when the use of property by many became subject to the desire of some to use it more often or even exclusively to satisfy one's need, partitioning evolved by common sense as the natural thing to do.

The question that now arises is how to explain that a thing may become part of the personal sphere of a human being. According to Olivecrona, in the writings of the natural law advocates we cannot expect to find a specific and complete explanation. But certain conclusions may be drawn from their deliberations.

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30 Grotius, Bk. II, 2, 2: The origin and development of the right of private ownership; § 5, p.189.
This rather speculative thesis, taken from the Talmud and Koran which Seldon has quoted on this subject in his Mare Clausum, of the early state of mankind and the evolvement of property prior to the formation of society, is a human state of which we have no historical knowledge, therefore Pufendorf calls it a fictitious state assumed to have existed at time immemorial.

31 Ibid., bk.I, ch.2, sect.1, § 5, and bk.II, ch.2, sect.2, § 1.

32 Pufendorf, bk.IV, ch.IV.

Division and Occupation.

According to Grotius, the original community became dissolved basically through division.[33] In this division each member received private property by an original acquisition.[34] It is easy to understand how this could happen. Every member acquired by drawing lots, whereby he gave up all claims to his part of the common property which went to others, that way the common property became divided into separate properties.

Grotius mentioned, that only in the first instance did such a division constitute the original way of acquisition. After that, only another mode of acquisition existed, namely occupation:

> From the viewpoint of individual right a thing becomes our own through acquisition, either original or derivative. Formerly, when the human race could assemble, primary acquisition could take place also through division, as we have said; now it takes place through occupation only.... It is, then, occupation - which since those primitive times has been, and remains, the only natural and primary mode of acquisition - with which we are concerned.[35]

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[33] Grotius, bk.II, ch.2, sect.2, § 5.

[34] Ibid., bk.I, ch.3, sect.1.

[35] Grotius, Bk.II, ch.3, sect.1, and bk.II, ch.3, sect.4, § 1, p.206.

The natural law advocates drew a very important conclusion from this proposition. The property which had not been distributed remained common property. With the agreement for division, people gave up completely their claim to the common property. What was not distributed became res nullius. Only with a res nullius could occupation [as a mode of acquisition] occur.

However Grotius claimed that properties which became derelictio or on other grounds ownerless, revert to the original state; and he says that such properties become res communis. According to Olivecrona, this cannot be right; if Grotius had meant it that way, he would be inconsistent. He says without doubt: Those things, therefore, which were common to all men, and were not divided in the first division, no longer pass into private ownership through division, but through occupation. And they are not divided until after they have become subject to private ownership.[36]

On the subject Pufendorf said:

> ...after Men came to a resolution of quitting the primitive Communion, upon the Strength of a previous Contract, they assigned to each Person his Share of the general Stock, either by the Authority of Parents, or by universal Consent, or by Lot, or sometimes by the free Choice and Option of the Party receiving. Now it was at the same time agreed, that whatever did not come under this grand

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[36] Ibid., bk.II, ch.2, sect.3, § 3.

> Division, should pass to the first Occupant, that is, to him who, before others, took bodily Possession of it, with intention to keep it as his own.[37]

An obstacle to the acquisition of private property through occupation had been removed with the common act of disclaiming communal right to such property. However, another question was how the occupation was to be executed, and how it became substantiated? Grotius rejected the notion that occupation was introduced by a general agreement; on the contrary, he emphasized occupation, without a doubt, as a natural mode of acquisition, haud dubie naturalis modus acquirendi.[38]

Since it was presupposed, that man by his nature possesses the capability to acquire things by occupation, it had to be brought in correlation to the principle of the moral capacity of man to own things rightfully, qualitas moralis ad liquid iuste habendum.[39] Furthermore, deducible from the above, man also has the moral capacity to act in a rightful way, qualitas moralis ad agendum; whereby the human

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37 Pufendorf, bk.IV, ch.VI, § II, p.368.

38 Grotius, bk.II, ch.8, sect.1, § 2, and bk.II, ch.3, sect.4, § 1.

39 Ibid., bk.I, ch.1, sect.4.

will became the propelling force which, however, had to be reasonable, rationalis.[40]

When a property became res nullius (and no obstacle existed) occupation could take place as a natural mode of acquisition. Grotius wrote on how the possession of things lacking an owner may be acquired:

> In the same manner as wild animals, other "things without a master", as the Greeks say, that ownerless objects are acquired.... The beginning of possession is the connexion of body with body; such connexion, in the case of movable things, is made with the hands; and in the case of land, with the feet. To know where the thing is, is not the same as to find it. Possessionis initium est corporis ad corpus adiunctio, qualis circa res mobiles maxim fit manibus, circa res soli pedibus.[41]

Two conditions were essential: first, the will of the occupant to have the property as his own, and second, to give an exterior sign to demonstrate the will of occupation. Grotius explained in what way such possessions may be taken, and how long it will last: "An act of the mind is not sufficient, but that there must be an outward act from which the taking of possession may be understood, nec animi actum sufficere, sed actu externo esse opus, unde occupatio possit intelligi."[42] The result of all this was the incorporation

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40 Ibid., bk.II, ch.6, sect.1, § 2.

41 Grotius, bk.II, ch.8, sect.6.

42 Grotius, bk.II, ch.3, sect.11.

of the property into the suum sphere of the occupants, which meant a fusion with his personality.

Grotius tended to justify private property by the nature of man to use and to consume what is needed for his personal survival, as a kind of acquired right by custom; but Pufendorf, considered the assumption or declaration of a private property essentially an act of the human will. It is not predetermined by natural law although the matter of ownership right is incorporated in the suum, which does exist by the law of the human nature.

Olivecrona develops this concept:

In Grotius the theory evolved from that long period of common ownership which through customs made that which was needed for individual necessities into personal belongings. One may question why Grotius did consider gathering of "common" fruits to be transferred into "personal" fruits? The reasoning is first of all that one cannot consume a common property, this would not be legal. Fruits, to be eaten, had first to belong to the person who does consume it. Second, one may gather fruits for future consumption. For that a moral protection is needed. If such gathered fruits would not be incorporated in the suum of the one, everyone could take them without committing a wrong.

Olivecrona detected a subtle difference Grotius seemed to have made. Obviously, the fruits gathered belong to the one who gathered them; however, with that he had not acquired ownership right. Why not?

The answer lies in the natural law concept of an individual right which exists only in the ability to oblige others to an act, or the keeping of a promise. Such obligation constitutes a limitation of one's sovereignty, and this can only be possible through a willful act to accept such obligation. Therefore, it became impossible to assume an ownership right without the prior consent of others.

Grotius based his theory on the often cited example by Cicero concerning the seats in a theatre. Although the theatre belongs to all, one may with right insist that the seat he occupies is "his." In the same way, the fruits in Grotius's example, in the state of nature, were all property is common, but the fruits gathered by one became the belonging of the one. With the introduction of ownership right a change took place. Things could be occupied, but also could be transferred. Acquired goods were incorporated into the suum. But parts of the suum could be transferred or promised to another person. The acquisition of a property therefore expanded the personality of the acquisitor. In the same way, the surrender of some of one's rights [e.g. to a sovereign]

diminishes or limits the personal act. In society which later evolved, people surrendered the liberty to avenge personally an inflicted wrong; this was transferred to the courts to decide on the appropriate measures. Otherwise everything remained the same.

Olivecrona raises the question: can there be an inclusion in the suum of such things as physical properties? Can an external thing be embraced by a personality?

This is in reality our custom, we extend the meum and the tuum to all kinds of feelings of belonging, such as to one's country, or in a more or less possessive way to members of family. Grotius's theory of property right is based on the principle of personality expansion. This, no doubt, is of utmost importance for the life of the individual person, and for the relation between people.

Belonging and Property Right.

The theme of the property acquisition deals with belongings: how through original acquisition a res nullius becomes fused with the suum of a person, and how through derivative acquisition a thing may be transferred from one suum to another one. Beside the "belonging" there exists

another component in the property right. This is the moral capacity, the facultas moralis, to demand the receipt of a thing in the case it had fallen without consent of the owner into the hands of others. When the rightful owner calls for the return of his property, the holder or occupant has to relinquish the thing. This facultas moralis originated with the convention through which the property right became introduced.[43] This moral faculty rests always with the person who is the owner of a thing, and has nothing to do with the principle of acquisition.[44]

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[43] Grotius, bk,II, ch.10, sect.1, § 2, p.320: ...so after the introduction of property ownership a kind of mutual arrangement was entered into between owners, that one who had another's property in his possession should restore it to the owner.

Pufendorf concurred, bk.IV, ch.XIII, § III, p.451-452: ...That he who chanced to be in possession of another's Goods, after he knew it to be another's, should cause it to return to its Owner.

Olivecrona comments in his footnote 24: Actually, an expressed demand by the owner should be necessary; however, if one could insist upon this principle, the force of the property right, the vis dominii, would have become too weak and uncertain. (E.g., it could happen that the owner did not know who is in possession of his [missing] property). Therefore, the convention included the duty of the occupant to hand over the property.

Pufendorf to this, bk.IV, ch.XIII, § III, p.452: For the Power and Virtue of Property would be too weak, and the Keeping of Things would require too much Expense, as well as too much Care and Trouble, if these stray'd Goods were only then to be restor'd, when the Owner made a formal Challenge of them; because he must very frequently be ignorant which way they are gone, or where they are lodg'd.

[44] Grotius, bk.II, ch.3, sect.6:

Since small children and the insane have no rational will, it is impossible for them, according to natural law, to acquire property rights. In regard to the common good, says Grotius, it is through the jus gentium determined that the whole of humanity are to represent the individuality of

Pufendorf made it quite clear, that when one assumes a personal right over another by reciprocal understanding with a pactum, this constitutes a power received over the action of the other person. The [transferred] power naturally belongs to the suum of the acquisitor. His theory of personal property is based on the principle of the personality expansion.(45)

Pufendorf differed from Grotius by not accepting a mere gathering of fruits as constituting a right.(46) There existed but one possibility, an agreement had to be assumed. This became the oldest form of an agreement. Pufendorf said, e.g. that by the acquisition of an ownership right the will of the acquisitor had to be in force; only with an act of will by the acquisitor did that right become part of his personality.(47) Since there was no ownership right without the consent by others, according to Pufendorf, the law of

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children and insane. Through that acquisition of property became possible.
Bk.II, ch.3, sect.6, p.208:
But in the common interest the law of nations introduced the provision, that both infants and insane persons should be able to acquire and retain ownership the human race, as it were, meanwhile representing them.
Pufendorf detailed this theme in book IV,IV,XV, p.377-378.

45 Pufendorf, bk.III, ch.I, § I.

46 Ibid., bk.IV, ch.IV, § IV.

47 Ibid., bk.IV, ch.IX, § II.

alieni abstinentia of natural law could only be extended to properties, when such became defined by agreement.[48]

This thought became significant for the famous theory of property by John Locke, who, like Grotius and Pufendorf, held steadfast to the doctrine that at the time of Creation the Earth was held in common by man.[49]

Locke admired Pufendorf, and must have met him, according to the Cranston Biography of John Locke (1957, p.244,428). However, Locke did not accept Pufendorf's idea of the oldest agreement. Since it is inconceivable to assume the prerequisite of an agreement among all people. "If such a consent as that was necessary, Man had starved, notwithstanding the Plenty God had given him."[50] Locke drew a conclusion to which it must be possible, to own physical things without prior agreement.

The question really is what private property constitutes: a right to own, and a right to give it away. C. B. MacPherson said in his critical position on property:

> The meaning of property is not constant.... A system of property rights is an instrument by which a society seeks to realize the purpose of its

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48 Ibid., bk.IV, ch.X, § XIV.

49 John Locke, Two Treatises of Government, II; Chap.5.

50 Ibid., II,28.

> members, or some of the purposes of some of its members. But any system of property rights is apt to change by its own momentum, bringing about effects other than were intended.... No doubt, the right to things needed to maintain life is in one sense the most basic: without a property in one's daily bread no other kind of property would be of any use;
>
> and as to the nature of property, he says:
>
> first, that property is a right in the sense of an enforceable claim; second, that while its enforceability is what makes it a legal right, the enforceability itself depends on a society's belief that it is a moral right. Property is not thought to be a right because it is an enforceable claim: it is an enforceable claim because it is thought to be a human right."(51)

Before we go to the interpretation of enforceability, and the right to use unlimited might, as described by the seventeenth-century law advocates, we will show what Olivecrona has to say to the second natural law maxim of Grotius, the promissorum implemendorum, the duty to keep a promise.

The Promise.

The binding force of a promise could have been simply based on the natural law that a promise is to be kept. However the natural law advocates did not proceed that way. They argued in an entirely different method when it came to

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51 C. B. MacPherson, Property, Mainstream and Critical Positions; Toronto-Buffalo, University of Toronto Press, 1978, pp.1, 11, 12, 13.

explaining the legal consequences of a promise. The above mentioned principle is not even mentioned.

This posture is connected with the thesis that according to natural law a new specific right for the recipient of a promise is created. The great problem of the natural law theory was the question, how could an individuum acquire a right against another sovereign person? It is presupposed that a right is a power of one over another. But how could such a right be created? This could only happen through the action of the participating parties.

The natural law theory distinguishes two kinds of promises. On the one hand, there is the promise to relinquish a thing, (a) promissio dandi; on the other hand, a promise to perform something, (b) promissio faciendi. In both cases, the promissio is considered the transfer of a right.

At the first glance this seem to be peculiar. We find it strange, to consider a promise as the transfer of an already existing right. In the natural law doctrine this interpretation is of fundamental importance. Grotius expressed the promise as an analogy to the ownership transfer.(52)

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52 Grotius, bk.II, ch.11, sect.1, § 3.

According to Pufendorf, a promise has the character of the transfer of a right.[53] This doctrine is based on the thought that the single person is unable to create a new right. He is only able to give up a right he already had. This is the basis to the statement of Grotius, that a promise receives its force from the rights of the person who makes a promise, vim accepit ex jure promittentis. "In order that a promise may be valid, that which is promised ought to be within the power of the promisor.... In order that a promise may be valid, the subject of it ought to be either actually or potentially under control of the promisor."[54]

The same thought is found in Pufendorf. The power of a promise originates with the transfer of rights, quaevis promissio vim accepit ex potestate promittentis;[55]

He proposes that:

> A Man then acquires an Original Right over Things, when all others, either expressly or tacitly, renounce their Liberty of using such a Thing, which before they enjoy'd in common with him. This original Right being once establish'd, by virtue of which primitive Community of Things was taken off, the transferring of Right is nothing else but the passing it away from me to another, who before was not Master of it."[56]

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53 Pufendorf, bk.III, ch.V, § II.

54 Grotius, bk.II, ch.11, sect.8, § 1.

55 Pufendorf, bk.III, ch.VII, § VI, p.298.

56 Ibid., bk.III, ch.V, § IV, p.268.

A. Promissio faciendi.

The analogy between a promissio faciendi and the transfer of property rights is based on the personal action belonging to one's suum. As a part belonging to the suum, these acts become coordinated with the property rights. The power one has over his own actions, potestas in se, is according to Grotius a right (jus), and this right is similar to property rights. As already said, the ability to transfer belongs to the character of property rights.

After the introduction of ownership it is the law of nature that men, who are the owners of property, should have the right to transfer the ownership, either in whole or in part. For this right is present in the nature of ownership, at least of full ownership... inest hoc in ipsa dominii natura.[57]

Ex analogia, it becomes possible to deduce the transfer right of a future action. At the beginning of the chapter on promises, Grotius stated that man could bind himself through his own will. He continuous:

> There is the further fact that ownership of property can be transferred by an act of will which is sufficiently manifest, as we have said above. Why then, since we have equal right over our actions and over our property, may there not be

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[57] Grotius, bk.II, ch.6, sect.1, § 1.

> transferred to a person also the right to transfer ownership (this right is less than ownership itself) or the right to do something?"[58]

To explain how such a transfer of rights actually happens, Grotius distinguished three kinds of personal intentions:

(1) one can express merely the personal intent which is without flaw as long as it is true.[59] But with this intent one does not bind himself: one has the right to change his mind.

(2) One can announce an intent with a firm commitment which makes it necessary to follow through; this is a pollicitatio, to which - according to natural law - one becomes bound. But the one to whom the pollicitatio is addressed does not herewith receive a right against the promisor. Grotius added, that cases exist in which someone is bound without someone also receiving a right by it. [E.g.] the duty to compassion or to be thankful is comparable to the duties of steadfastness and loyalty.[60]

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[58] Ibid., bk.II, ch.11, sect.1, § 3.

[59] Ibid., bk.II, ch.11, sect.2.

[60] Ibid., bk.II, ch.11, sect.3.

(3) One can express the will to give the recipient truly a right; then a perfect promise is being made, a perfecta promissio.[61]

What was to be transferred was the power over a future action. The transfer was executed in an analogous fashion to the transfer of property rights. What the promise could accomplish was the segregation of the action from one's own suum and the handing it over to the recipient. With that, the extraction of a part of one's liberty took place, the alienatio particulae libertatis. But in the same way as for property rights the acceptance became necessary.[62] The promisor could not incorporate his action into the recipient's suum; only with the added acceptance by the recipient have we a complete transfer of rights.

In both parties the driving force is the will itself. However, since according to general principles one cannot declare an inner will a lawful act, the will has to be demonstrated with an external sign.[63]

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61 Grotius, bk.II, ch.11, sect.4, § 1.

62 Ibid., bk.II, ch.11, sect.14.

63 Ibid., bk.II, ch.11, sect.11; compare bk.II, ch.4, sect.3, and bk.II, ch.6, sect.1.

Pufendorf followed Grotius closely in these points.[64] [The following is not the quote referred to by Olivecrona, but is of special interest in this context]:

> The foundation of Justice is Faith, that is to say, a Firmness and Truth in our Words, Promises and Contracts. Hence some will have the word Fides to be called Quia fit quod dictum est, because that which was said is done.... It is a nice remark of Mr. Hobbes (De Cive, ch.2. sect.6, § c. & Leviath. Engl.Part I, ch.14) and worthy our Notice, That, in relinquishing or transferring Right, if we make use of no signs except Words, those Words ought to be of the Time present or past. For he, for Instance, who shall say in the future, Tomorrow will I give, plainly shews that he has not given already...[65]

Thus it became the promissory mechanism of the natural law doctrine, that the sovereign individual person was afforded the capacity to consent with his own will, and as a free man in a certain way could become subordinated to another. This was enacted with a promise to remove the right to an act or a thing, whereby with the acceptance by the recipient these became incorporated into his suum. Herewith the recipient received the power over the act, and determined the execution of such acts.[66]

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64 Pufendorf, bk.III, ch.V, § IX, p.270.

65 Ibid., bk.III, ch.V, § VIII, p.269.

66 Grotius (bk.2, ch.17, sect.2, § 1), after he named the natural components of the suum, he proceeded (bk.2, ch.6, sect.1): Thus Aristotle says "The definition of ownership is to have within one's power the right of alienation."
And Pufendorf (bk.I, ch.VII, § XI, p.80).

The promisor does not relinquish the factual power to decide whether the promised act shall be executed or not. Clearly in a factual sense, he could refuse to follow through with his promise. But what he had lost is the moral liberty or power to decide over the promised act. This moral power falls into the hands of the recipient, who is in the possession of the facultas moralis to demand fulfillment of the promise. Once the recipient of a promise demands fulfillment, the promisor is bound to make good on his promise. So Pufendorf said, the acquired power consists in the recipient's ability to order the promisor what he has to do, to suffer or to avoid, and such a demand has a binding power.[67]

B. Promissio dandi.

The promise to transfer in future the property right to a thing, is not described as a transfer of a part of the liberty. Rather, the natural law advocates claim that such a promise is the beginning of the transfer of a property right itself.

According to Grotius, a perfect promise has an effect similar to alienation of ownership. It is, in fact,

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[67] Pufendorf, bk.III, ch.V, § IV, and ch.VI, § V.

an introduction either to the alienation of a thing or to the alienation of some portion of our freedom of action. To the former category belong promises to give; to the latter, promises to perform.[68]

Pufendorf agreed: "When we engage to give away a particular Thing, or to perform a particular Service, the former is a kind of Alienation of our Goods, or at least somewhat in order to it; the latter is an Alienation of some Part of our natural Liberty."[69]

This differentiation between promissio faciendi and promissio dandi had been criticised as "illogical and to serve misunderstanding."[70] Olivecrona claims, that despite the appearance, this criticism is not valid. As mentioned above, the natural law advocates consider the property right and the right to personal action as coordinated parts of the suum. In the property right was included the right to transfer it. The subject of such transfers in the promissio dandi was precisely that right to transfer ownership rights. The promissio faciendi and the promissio dandi deal in the transfer of different rights. Who had given a promissio dandi, lost indeed the moral liberty, to decide in a future

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68 Grotius, bk.II, ch.11, sect.4, § 1, p.331.

69 Pufendorf, bk.III, ch.V, § VII, p.269.

70 Olivecrona makes a reference to Hägerström, p.73.

transfer of ownership right, but this was only the consequence of the alienation of the right to transfer, which is contained in the ownership right, which he gave up. Now this right belongs to the recipient of the promise. For that reason, it is in the hands of the recipient to order the transfer to be executed.[71]

C. The broken Promise.

With a promise of either kind, the promised matter became incorporated into the suum of the recipient. This created a very important consequence. The non-performance of a promise enclosed an alienatio alieni. Something was taken from the recipient what belonged to him. The broken promise was considered an injuria.[72]

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[71] Olivecrona, footnote 35:
Since the object in a permissio dandi is the transfer right contained in the owner-ship right, and a valid promise is presumed, it is assumed that the promisor did possess ownership rights. If that was not the case, then the promise must be viewed as conditional upon the promisor's acquisition of said ownership right.

See Grotius bk.2, ch.11, sect.8, § 2, p.335:
...if the thing is not at present within the power of the promisor, but may be at some future time, the validity of the promise will be in suspense; under such circumstances the promise ought to be thought of as made on the condition that the thing should come into the power of the promisor.

[72] This is expressed quite clearly by Pufendorf, e.g. in bk.III, ch.I, § III, and in bk.I, ch.VII, § VII, as per Olivecrona; however, in both sections one cannot really find the injuria in reference to a non-performance of a promise.

Under such circumstances, the commandment of keeping a promise loses its independent significance. This rule says nothing new beside the universal rule of not to harm another. The natural law is being reduced to this and only this principal commandment.

The Consequences of Injustice.

The suum sphere was sacred, as Pufendorf said,

> ...those Things, which we receive from the immediate Hand of Nature, as our Life, our Bodies, our Members, our Chastity, our Reputation, and our Liberty; engaging Men to keep them sacred and inviolable.[73]

But I may quote here the passages in reference to justice (bk.I, ch.VII, § VII, p.77-78):

> The Justice of Persons differs from their Goodness chiefly in this, that Goodness barely denotes a Conformity to the Law, but Justice farther includes a Respect to those Persons towards whom the Action is Performed.

To this I may add Barbeyrac's footnote:

> There is not, properly, any Difference between Goodness and Justice: for, as our Author [Pufendorf] himself shews us above, the Idea of a good Action contains in it the Notion of an Object agreeable. We may better distinguish good Actions, according to the threefold Object which they may have, viz. God, other Men, and ourselves. Those that have God for their Object, are comprised under the general Name of Piety. Those that have other Men for their Object, are contained in the Term of Justice. And those that directly regard ourselves, may be reduced to Temperance, or Moderation. This Division, which is the most common, seems to be the plainest, and most natural.

Pufendorf, in the same section further on, says:

> It is usual with Latin Authors, to express perfect Right by the Help of the Word Suus, as when they say a Man claims such a Thing, suo jure, by his own Right.

[73] Pufendorf, bk.III, ch.I, § I, p.212.

With that the individual person afforded, so to speak, a spiritual protection.[74]

Olivecrona claimed that the intrusion into the personal sphere of another was a transgression against the divine law, not to harm others. The consequence of that was unquestionably a divine punishment. These punishments, however, are not part of the natural law doctrine. The subject matter of natural law are the consequences of injustice among humans. In this regard, the natural law contained the definition of retribution and restoration of ownership. But an injuria had also different consequences. The suum could be defended with force. To this the natural law is silent, Olivecrona said. The significant doctrine of the lawfulness of force [the just war concept] was developed independently from natural law.

In the state of nature, as per Grotius, everyone had the right to defend his suum with violence. With the formation of society a transformation took place. People gave up the basic right to fend for themselves with force. The protection of the suum was handed to the courts. However, the original order remained intact where the courts

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[74] According to Olivecrona, Brandt called very appropriately the suum a "tabu;" p.11.

were unable to act, e.g. by attacks in territories where no potestas civilis existed.[75]

The nations, respectively the sovereigns, were not subordinated to any terrestrial power, and they never relinquished the original right of self-defence. In relation to each other, they lived in the natural state, the status naturalis. Therefore, they had the right according to their own consideration to defend their rights with might. This happened with open warfare, a bellum publicum, which is the equivalent to the private use of force, a bellum privatum, as exercised in the state of nature.

The Justification of Force.

This doctrine of the justification of force encountered some difficulties. When the person attacked assails the aggressor with might, he obviously must reduce the aggressor's suum. As it appears, the person attacked must inflict an injuria upon the assailant.

This problem was specifically addressed by Pufendorf, who reported that there are people who have scruples to hurt or kill an assailant,

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[75] Grotius, bk.I, ch.1, sect.10, § 7.

> inasmuch as by putting it in Practice, we hurt and destroy a Man like ourselves, with whom we are oblig'd to live in a social manner, and whose Death seems to be as great a Loss to Mankind as our own. And besides, because a forcible Repulse of an Aggressor may cause more disturbances and Outrage in human Society, than if we should either decline the Mischief by flight, or patiently yield our Body to it, when Escape is impossible.[76]

Pufendorf dismissed this pacific idea. In viewing the history of his life, we know that Pufendorf did not shy away from a quarrel. In him we have a jurist who loved to fight for what he considered right.

Dictates of reason, he said, and common sense to both learned and layman, allow the violent defence [aggressive versus passive] where there is no alternative. Although humans are created to live in peace with each other, and the natural law - which is concerned with human relationship - is there to promote peace; nevertheless, nature permits natura indulget the recourse to violence when no other defence is sufficient.

The natural laws are equally binding for all. By nature no one has the privilege to transgress these laws and to harm another; instead he is bound to maintain peace.

> If somebody plans an attack on me which aims at my destruction, it would be the highest presumption to

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[76] Pufendorf, bk.II, ch.V, § I, p.180.

> expect me to continue to respect his sacredness, sacrosanctum habeam, which would mean that I give up my safety to allow his wickedness to prevail unpunished. On the contrary, I have to be concerned with my own salvation, and he has to blame himself for what I am forced to inflict upon the aggressor. Everything, whatever we receive from nature or acquire through diligence would be useless, if we would not be permitted to defend it with force.[77]

The Measure of Force.

The other question was, how far one may go to apply force caused by an injuria, and if hereby a distinction should be made between a major or a minor attack. This problem was discussed extensively.

Grotius started with the case of a life threatening attack. If there was no other way to prevent the danger, war is permissible, even though it involves the slaying of the assailant.[78] This applied equally for other reasons, e.g. Insanity, where guilt was not established. According to the pure natural law (therefore discounting Scriptures) it was also permitted, whereby "innocent persons can be cut down cr trampled upon when by getting in the way they hinder the defence or flight by which alone death can be averted,"

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[77] Ibid.

[78] Grotius, bk.II, ch.1, sect.3, p.172.

provided naturally, that there was no other way; "and certainly, if we look to nature alone, in nature there is much less regard for society than concern for the preservation of the individual."[79]

Furthermore, pudicitia, or preservation of chastity became equal to life considerations: "That the same right to kill should be conceded also in defence of chastity is hardly open to question; not only in the general opinion of men, but also the divine law puts chastity on a plane of life."[80] Pufendorf concurred: The Defence of Chastity is, in almost all Nations, esteem'd equal to the Defence of Life, and doth, in the same manner, excuse the Slaughter of those who attempt it.[81]

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[79] Ibid., bk.II, ch.1, sect.4, § 1, p.173. What Olivecrona repeatedly ignores, or discounts, are Grotius's references to the Scriptures for reinforcement of the theological side of the problematic. In the same paragraph Grotius states:

But the law of love, especially as set forth in the Gospel, which puts consideration for others on the same level with consideration for ourselves,clearly does not permit the injury of the innocent even under such conditions.

[80] Grotius, bk.II, ch.1, sect.7, p.175. And in his footnote quoting Augustine, De Libero Arbitrio, I [I.v.ii]:

The law gives the right to the traveller to kill a robber, in order that he may not be killed by him, and to any man or woman, to slay an assailant attempting rape, or even after the rape has been committed, if this is possible.

[81] Pufendorf, bk.II, ch.V, § XI, p.189.

The question was raised, whether only appropriately measured force shall be permitted in the case of a threatening harm of a minor nature. Grotius denied this. According to the pure natural law, there did not apply any such limitation.

As an example, Grotius used the case, when one is at the immediate peril to receive a slap in the face, eine Ohrfeige. In accordance with natural law - if this cannot be otherwise prevented - one is entitled to kill the aggressor. Death and a slap are not comparable. However, anyone who is about to injure me, so Grotius said, gives me the unlimited right to apply force. The aggressor had lost his ideological protection, and when this happens, the reaction of the injured could in no way include an injuria.[82] What this seem to say, is that love of fellow man, or charity, caritas,

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[82] Grotius, bk.II, ch.1, sect.10, § 1, p.178, the heading of this section reads:

It is not permissible for Christians to kill in order to ward off a blow, or to avoid any indignity of like sorts, or to prevent any escape.

Following is the first paragraph:

There are some who think that, if a man is in imminent danger of receiving a blow or a similar injury, he has the right to prevent it by killing his enemy. For my part, if expletive justice only be considered, I raise no objection. For although death and a blow are not at the same level, yet the man who makes ready to injure me by that very act confers on me a right, a sort of actual and unlimited moral right against him,...

In a footnote, Grotius reminds us, that Hercules, as he was accused of murder, pleaded in court for having only received a blow, "by which any person is declared innocent if he has harmed a man who has previously used force against him."

does not force us to pardon an aggressor. Only the Gospel prevents us from repaying an aggressor with force.

The same principle applies in the defence of our property. If it appears necessary, according to natural law, we are permitted to kill a robber. Had the latter succeeded in obtaining some of our belongings, he may be killed while in flight, otherwise the recovery of the property may be in doubt. "From this it follows, that if we have in view this right only, a thief fleeing with stolen property can be felled with a missile, if the property cannot otherwise be recovered." However, Grotius made an exception in a case when "the stolen property is of extremely slight value and consequently worthy of no consideration."[83]

In principle, Pufendorf followed Grotius in this deliberation. He repeats several times the sentence, that an aggressor hands himself us an unlimited right against him. Usually, Pufendorf replaced in this context the word jus with licentia.

For Licentia is the exact expression. The injured did not obtain a right against the aggressor in the sense, that with punitive consequences he is able to address a claim. All that he has obtained is to apply force without committing an injury. As Grotius pointed out, the

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[83] Grotius, bk.II, ch.1, sect.11, p.179.

possibility to act with impunity constitutes only in an inappropriate sense a right: "agendi impunitas impropriae jus digitur."[84]

Pufendorf said on that subject: "...such an Attempt [to maim] declares a Man my open Enemy; and, consequently, gives me a License in infinitum of acting against him."[85] "'Tis another famous Question, Whether the Danger of receiving a Box on the Ear, or some such ignomious, though slight Injury, will excuse the killing of a Man in our Defence... For our Parts, we have already shewn, that, in a natural state, a Man cannot be requir'd to bear even a slight Injury, (especially if it be continued) without endeavouring, even by the utmost violence, to keep it off."

Pufendorf also rejected the opinion which calls for an equivalence between attack and reaction. Nobody has more right to execute a mild attack than a severe one. Only in the sentencing of punishments - which happened exclusively in society - applies the principle of equivalence.[86]

The famous question, celebris illa questio, of the slap in the face [in the old English translated as "a box on

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84 Ibid., bk.II, ch.5, sect.28.

85 Pufendorf, bk.II, ch.V, § XII, p.196 fol.

86 Ibid., also bk.VIII, ch.VI, § VII, pp.840-842.

the Ear"], is extensively deliberated, and Pufendorf was of the same opinion as Grotius. In the state of nature, it is impossible to ask someone to suffer any kind of injuria, even if it is of insignificant nature.

Pufendorf, for an example told, "that the most holy king David, sanctissimus rex, for an Affront put upon his Ambassadors, rais'd a War, to almost the utter Ruin of a Nation;" it was the war against the Amonites, who cut off half of the beards and clothing of David's ambassadors (2. Sam. 10).[87]

With a conviction, the natural law advocates developed the importance of the principle of unlimited license for self-defence in the natural state. Pufendorf raised the case of a troublesome neighbor:

> ...if a Neighbor were continuously [to] infest me with Incursions and Ravages upon my Lands and Possessions, whilst I could not lawfully kill him, in my Attempts to beat him off? For, since the chief Aim of human sociableness is the Safety of every Person, we ought not to fancy in it any such Laws, as would make every good and modest Man of necessity miserable, as often as any wicked Varlet should please to violate the Law of Nature against him. And it would be highly absurd to establish Society amongst Men on so destructive a Bottom as a Necessity of enduring Wrongs...
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> But farther, Persons in a natural State may not only repel a present Danger that threatens them,

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[87] Ibid., bk.II, ch.V, § I, p.196.

> but, having got rid of that Fear, may pursue their Success against the Assailant, till such time as, upon sufficient Caution given, they shall think themselves secure of him for the future.[88]

The question, how far the injured person may be permitted to go with the application of force (violence), was mainly discussed with regard to self-defence and the recovery of stolen property. But there were other cases where an injuria caused a violent reaction by the injured.[89] For instance, when a contract obligation was not fulfilled, an injuria was the result, and the creditor had the right to demand settlement of the obligation.[90]

Pufendorf said on obligation:

> We shall choose to divide Justice chiefly with Regard to the Matter which is owing, or which bears a Relation to another by way of Debt or Due. ...We

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[88] Ibid., bk.II, ch.V, § III, p.184.

[89] The German word Gewalt has several meanings depending on the context:
1. Force, violence, to do violence, with a vengeance etc.
2. Gewalt as Macht, power with the same roots as "might." Gewalt geht vor Recht, "might before right."
3. The Gewaltakt is an act of violence.
4. In the sense of power or strength, might with all his strength.
5. Gewalt in the sense of superior power, position, authority, paternal, royal, supreme.

[90] Grotius, bk.II, ch.1, sect.2, § 2, p.171:
Authorities generally assign to wars three justifiable causes, defence, recovery of property, and punishment... In harmony with this is a sentence of Seneca: "Perfectly fair, and in complete accord with the law of nations, is the maxim, 'Pay what you owe'."

> must take Notice that some Things are due to us perfectly, other imperfectly. Those Things which are due to us in the former Manner, if voluntary Payment be not made, we may constrain the Debtor to discharge, if we live in a natural State, by Arms and main Strength; if we are Members of the same civil Society, by preferring an Action against him in Courts of Justice. But what is due to us in the latter Way, we ought neither to claim by Methods of Hostility, nor to extort by legal Process. It is usual with Latin Authors, to express perfect Right by the help of the word suus, as when they say a Man claims such a Thing, suo jure, by his own Right, Now that some Things should be thus due to us perfectly, and others imperfectly, the Reason amongst those who live in a State of natural Liberty is, the great Diversity of Precepts in Nature's Laws, of which some conduce to the very Being, others only to the well being of Society: And therefore, since there is less Necessity of performing these latter than the former, Reason shews that the former may be requir'd and executed by more severe Courses and Means; whereas, in regard to the latter, it is mere Folly to apply a Remedy more grievous than the Disease."[91]

Equally so, retribution could be demanded as a damage claim. Furthermore, Pufendorf requested assurance of future security:

> The Causes of just War may be reduced to these three Heads: First, to defend ourselves and Properties against others who design to do us Harm, either by assaulting our Persons, or taking away or ruining our Estates. Secondly, To assert our Rights when others, who are justly obliged, refuse to pay them to us. And lastly, To recover Satisfaction for Damages we have injuriously sustained, and to force the Person who did the injury, to give Security for his good Behaviour for the future. And hence ariseth the Division of just Wars into offensive and defensive.[92]

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91 Pufendorf, bk.I, ch.VII, § VII, pp.77-78.

92 Ibid., bk.VIII, ch.VI, § III, pp.837-838.

In all these cases a principle of unlimited force, of violence, applies [for the recovery or forceful compliance with rightful demands]. In the state of nature, the individual reaction became a bellum privatum. But in an all out war, everything was permissible what served the goal.[93]

Of an aggressor Pufendorf said:

> The Law of Nature obligeth Men to mutual Exercise of the Offices and Duties of Peace; and the Person who first violates them to my Prejudice, releases me, as far as lies in his Power, from paying any of those Offices to himself: And, in Consequence, as long as he professes himself my Enemy, he gives me a Liberty to use Violence against him in infinitum, or as far as I please. Especially since, if I am not allow'd this Liberty, but am necessarily obliged to confine my Violence within certain Bounds, and in no Case to proceed to Extremities, the proper End of War, whether offensive or defensive, can never be obtain'd. And therefore every open publick War seems to have something in it like such sort of Compact as this: Try your Strength, and I will try mine.

But, in the same paragraph, Pufendorf refuted this view, "The Evils, which are the Effects of a Right of War, are properly Punishment, because they are not inflicted by a Superior as such..." to which Jean Barbeyrac adds his own

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[93] Grotius, bk.III, ch.1, sect.2, § 1, p.599:
The first rule: In war things which are necessary to attain the end in view are permissible. First, as we have previously said on several occasions, in a moral question things which lead to an end receive their intrinsic value from the end itself. In consequence we are understood to have a right to those things which are necessary for the purpose of securing a right.... By right I mean that which is strictly so called, denoting the power of acting in respect to society only.

ncte, "Our Author always goes upon this false Principle, That there is no War which we can undertake only on Account of Punishment."[94]

Grotius also named punishment, punitio, as a goal of war: "Authorities generally assign to wars three justifiable causes, defence, recovery of property, and punishment."[95] In his case, the inflicted punishment shall not exceed the measure of injuria caused by the aggressor. Pufendorf, however, had a different opinion, because in the state of nature there did not exist a punishment, because it is essential to the term of a punishment that it be handed down by a superior authority.

Despite all these [principles of unlimited violence] there was the recommendation of moderation.

With Pufendorf's qualification, the definition of Punishment in general reads as follows:

> It is an Evil of suffering, inflicted for an Evil of doing; Or, it is some uneasy Evil inflicted by Authority, in a compulsive Way, upon View of antecedent Transgression.[96]

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94 Pufendorf, bk.VIII, ch.VI, § II, pp.840-841, and Barbeyrac, in reference to the preceding section, note 3, pp.837,839.

95 Grotius, bk.II, ch.1, sect.2, § 2, p.171.

96 Pufendorf, bk.VIII, ch.III, § IV, p.762.

The Right of Self Defense.

Grotius made an interesting comment on the origin of the right of self defence. In his mind, this right does not originate in unlawfulness or in the sin of the aggressor. It is directly born within what the nature of man recommends and permits.

This right of self defence, it should be observed, has its origin directly, and chiefly, in the fact that nature commits to each his own protection, not in the injustice or crime of the aggressor.[97] And on another place: Hence, if otherwise I cannot save my life, I may use any degree of violence to ward off him who assails it, even if he should happen to be free from wrong, as we have pointed out elsewhere. The reason is that this right does not properly arise from another's wrong, but from the right which nature grants me on my own behalf.[98] The general maxim is expressed in the following: "Indeed nature herself is deemed to give the right to everything without which that cannot be obtained which she demands."[99] From the actual instinct of self-preservation develops the right to self defence. In another place, Grotius claimed that by the nature of things

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97 Grotius, bk.II, ch.1, sect.3, p.172.

98 Ibid., bk.III, ch.1, sect.2, § 1, p.599.

99 Ibid., bk.II, ch.5, sect.5, p.233.

everybody is himself the defender of his rights: "For that reason did we receive our hands. Meanwhile we shall hold to this principle, that by nature every one is the defender of his own rights; that is the reason why hands were given to us."[100] Nature therefore, did not only provide us with an inclination towards self defence, but also the capability to exercise it. With that, our right to self defence became confirmed.

In Pufendorf we find a similar train of thought. In case someone has the intent to harm me, Pufendorf said, the care of my well being provides me with the right to self-defence; even so, I may injure the aggressor. Furthermore, nature had provided us with movable hands and the strength of body, whereby we are not forced to suffer injury without retaliation.[101] With the readiness for, and capability of self defence, nature also gave us the right to self defence.

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100 Ibid., bk.I, ch.5, sect.1, p.164.

101 Pufendorf, bk.VIII, ch.VI, § II, pp.836-837:
...But notwithstanding, it is very lawful, and may sometimes be necessary for Man himself to make War; for Example, when he finds that another Person hath maliciously designed to do him Harm, or denies him his Right. For, in such Cases, the Care he is supposed to have of his own Safety, giveth him Power to defend himself, and assert his Right what Ways he thinks best, though it be with the Hurt of the injurious person; or to recover the Right by Force, when he cannot obtain it by easier Means. For Nature has not only given Man a quick Sense of Injuries, that he might not suffer himself to be oppressed and insulted; but she has, also, armed him with Strength and Agility of Body, that he should not be forced tamely to submit.

From these interpretations by Olivecrona, limiting his observation to the lower sphere of natural law, we get a clear picture of the psychological background of this thesis of the consequences of injuria. The human inclination to react against insults, a Kränkung, is not limited to severe cases. Everything we feel as an insult or an offence can trigger the tendency towards retaliation, Vergeltung. It does not lie in the human nature, in the defence against an aggression, to timidly observe carefully that the act of defence measures comparable to the act of aggression; and the lust for revenge is not limited to the equivalent of the harm inflicted by the aggressor. It is therefore understandable, that the natural law advocates see in their reasoning on the natural consequences of a wrong, an Unrecht, the loss of sacredness in the aggressor [the loss of his moral immunity being stripped of his human dignity], which in principle permits the reaction to be unlimited. And, without consideration of the upper sphere, the divine origin of natural law, the alleged loss of human dignity, permits savagery, the slaughter of human beings like brutes. That is the consequence of a profane natural law interpretation we have witnessed in modern totalitarian regimes.

The Reciprocity Maxim.

According to Pufendorf, there was a rule of reciprocity in the natural state of man. The sacredness of the person was bound by the law - not to harm, injuria, another person. That person would die if his sanctity were lost. Therefore, the injured commits no crime when he turns to the counter attack. Grotius presupposed the same reciprocity principle. Indeed, without this maxim the thesis of the suum would collapse. What would be the sense of a suum when someone, whose suum becomes injured, had no privileged position vis-a-vis the aggressor? This privileged position had to be established through the loss of the aggressor's sanctity. There was no superior power in existence which could protect the injured. The injured person had to react for himself. But such reaction without [causing another] injuria was only possible due to the fact that the ideological barrier surrounding the aggressor had fallen.

The argumentation by Pufendorf is based on the case where the aggressor is aiming at the life of another. However, the reciprocity principle was extended to all cases of injuria. Grotius said, what justifies a war is always the presence of an injuria.

Grotius said: Causa justa bella suscipiendi nulla alia esse potest nisi injuria. No other just cause for undertaking war can there be excepting injury received.(102)

Herewith he also means that every injuria is a justification, a justa causa belli with which a war is made justifiable. There is no difference being made between bigger and smaller injuries. For that reason, Grotius could say: "It is evident that the sources from which wars arise are as numerous as those from which lawsuits spring; for where judicial settlements fail, war begins. Actions, furthermore, lie either for wrongs not yet committed, or for wrongs already done."(103)

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102 Grotius, bk.II, ch.1, sect.1, § 4.

103 Ibid., bk.II, ch.1, sect.2, § 1, p.172; even an anticipated injuria, an injuria nondum facta, could be the basis of a legal claim. (So in the Roman law; Grotius refers to the interdict). Therefore, Grotius is treating the injuria mondum facta as a cause for war. In the same section, § 3, p.172, quoting Aristotle in his Analytic, Book II, chapter 2:

> It is customary to make war on those who were the first to inflict injury.

The expressed opinion by Dunning in his A History of Political Theory, II, 1928, p.176, is based on a misinterpretation of Grotius, who did not seem to have condemned the preventive war. Grotius said, contrary to Gentili, that one is not in the right to revert to war, only because another prince or another state is stronger, and therefore could do harm to us. The assurance [of that danger] has to be present; to make the moral question possible at all, there has to exist a will to harm us.

Bk.II, ch.1, sect.17, p.185:

> That this consideration does enter into deliberations regarding war, I admit, but only on grounds of expediency, not of justice.

And in bk.II, ch.1, sect.5, § 1, p.173:

> I admit, to be sure, that if the assailant seizes

Summary and Conclusion.

Olivecrona restates in his summary: The so called natural law was a law in the sense of a decree [law established as a Gesetz], an ordinance consisting of commandments and prohibitions by a superior authority. But an already existing order was presumed. This natural order of things was not a law in the above mentioned sense. Its character was mainly constituted in the human psychology which was - independently of any law - a constitution determining human relationship. With that the original order of things was established. However, the human will could evoke changes in tnat order of things.

Fundamental was the thought that humans, regardless of their physical and psychological differences, were basically free and equal. Naturally in fact, a person could be forced to do something for another. However, that liberty belongs to the field of morality. It meant, that nobody could claim a moral power upon another person; nobody could demand from another person an act which would bind him to a specific behaviour. On the other hand, every person could

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weapons in such a way that his intent to kill is manifest the crime can be forestalled; for in morals as in material things a point is not to be found which does not have a certain breadth. But those who accept fear of any sort as justifying anticipatory slaying are themselves greatly deceived, and deceive others.

claim a psychological protection, a Schutz, against an actual coercion, a Zwang from another. The defense against coercion consisted in the fact that the human personality is sacred. Therefore any aggression against a person constituted a wrong and the consequence of an injuria was that the aggressor lost his sacredness [his moral immunity].

So established the natural law doctrine its concept of right and wrong, of justum and injustum. Justum is defined as all that is not injustum, and injustum consists in a violation of another person.

However, it has to be more specific stated under what circumstances a violation of another person is being committed. For this purpose, the doctrine of the suum was created, i.e. the doctrine of what belongs to the human personality. By nature, this was not only life and body, but also liberty, reputation, honour (including chastity, pundicitia) and the own behaviour. Therefore, an injuria was committed not only when one's life was taken, or bodily harmed, but also when liberty, reputation, etc. was violated.

A person also had the power over himself, a potestas in se, i.e. the power over the own person and over what belongs to it. For that reason, a person could also give up a part of his suum; equally so, the sphere of the

suum could be extended. In both cases, the will of the person is the driving force. Every human being which has the use of reason has a moral capacity, to have and hold property as his own and to act in a lawful manner. Through an act of will in connection with a touch [laying of hands or occupation], any man could become an owner of ownerless property. The transfer of a property could be initiated by the owner, whereby the willful acknowledgement of the recipient concluded the transfer. This meant that the property so transferred became incorporated into the suum of the recipient.

Furthermore, one could give up the power over specific actions, and transfer such power to another. In that way was a promise considered, the promissio as a legal transfer. When the recipient accepted, that power became part of his suum, and he received a moral power over the promisor, the Promittent. With the raising of the demand, the promisor became obliged to fulfil the promised act.

So there did exist - independently of any divine or human laws - a lawful order among people. From this order became apparent what belonged to a person; what constitutes lawfulness and un-lawfulness in human conduct; and what are the effects of a wrong; and how people through occupation and contracts extended or reduced their rightful spheres.

This did not happen through commandments and prohibitions of a legislator, but through the condition given by nature of the human capability and the human acts of will.

With this Olivecrona gave us a profound insight, and a daring interpretation of the fundamental thought of the natural law advocates which are known to us with a strong leaning towards absolutism, and the necessity of a sovereign power to make law and to rule the state with the power to punish whoever transgresses the law and order of the realm.

If we can detect a "lawful order" by the nature of the human species, fitted with the exclusive faculties of reason and free will, in the state of nature, then we also know humans to be different from any other species which are ruled by instinct alone, to self defend and to procreate for the survival of the species. Because man is equipped with more, having an extra edge with his additional faculties to make choices and to apply his energies not only to the preservation of the self and the species, but to improve himself, with the faculties of a culture-creating nature.

In other words, this is the design of man's nature, to create tools to construct, but these tools may also be used as weapons to destruct. It is therefore necessary for man to be in control of these extra faculties and to have a

moral order to direct his choices to the culture creating end: to improve himself. Instead of adapting himself to the hostile conditions of life, to reshape the environment to suit his life in an advanced and cultivated state of nature, and to overcome his physical weakness, the imbecillitas, unique with mankind's physical nature, to fortify himself against the elements, and against the belligerence of beasts and enemies.

Olivecrona had a vision, that among nations - as among humans in a natural state - exists a desire for longevity and sociability in accordance with a natural lawful order commonly understood. And this does happen without commandments and prohibitions by a superior legislator, but through the condition given by the nature of things. With common sense, and with the human voluntary acts, which control these nations, mankind will develop common language for peaceful coexistence in which ideas transferred into the mode of a common language will turn into facts of behaviour. According to Olivecrona, a climate will develop, with improvements in the condition of human beings, which is conducive to world peace without the need of commandments and prohibitions dictated by a superior power and overriding sovereignty. States will seek beyond self-preservation an improvement of their own condition by friendly relations with other states in the community of nations.

Olivecrona has given a profane vision of the basic level of natural law. He did this with the elimination of the other level, the theological assumptions manifested in Pufendorf as a concept of duty. But with this Olivecrona had lost the moral imperative, essential to the Pufendorfian natural law system. Olivecrona claims that natural law, which is in his mind a mere lawful order, is something different than the legal system of commandments and obligations derived from a superior authority. This clearly contradicts the Pufendorfian concept of man's debt and obligations towards his architect - God, who has created nature with its physical laws, and man with special faculties for him to shape his life with a will of his own. But it was man who used his God-given faculties to develop wicked desires, arrogance, and a belligerence. It was man who had his nature corrupted by the first man's fall, and ever since runs afoul with the natural order. Natural law can only be understood as commandments imposed by the authority of its maker, to enable man to conquer his natura corrupta, to have restored his state of grace, the status integritatis, - in the fulfillment of a divine covenant, and a social contract for sociability of not merely utility but of brotherly love, and the love of God.

Pufendorf separated the three fonts of duty, the light of reason, the civil law, and the particular revelation from divine authority. He separated the human forum, concerning the external conduct of man in "the circuit of this life", from the divine forum, concerning "the internal preparation for the fruit of piety after this life".[104] The separation of natural law from moral theology is only a separation for the sake of science, to have a clear distinction of knowledge obtained with reason, versus the knowledge beyond reason, derived from divine revelation with the faculty of faith. To leave out, or to ignore the necessary part of divine revelation concerning the corrupt nature of mankind in Pufendorf's concept of natural law, thus linked with moral theology, is to repeat the errors of the early Pufendorf detractors.[105] Olivecrona does not do justice to Pufendorf by reducing natural law to a utility, a system facilitating sociability. He ignores, and liquidates the underlying spirit of natural law, a concept of divinely inspired duties.

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[104] These and the following quotes are from De Officio, "To the Benevolent Reader, Greeting!", pp. v-xi.

[105] Ibid.: "I think there would be a far different aspect of natural law, if anyone wished to presuppose the state of man to be uncorrupted." (p.xi) And, "this is manifestly evident to those who have carefully examined the precepts and virtues inculcated therein, although, while those Christian virtues dispose the minds of men as much as possible to sociability, moral theology likewise promotes in a most efficacious manner honesty of civil life." (p.viii).

CHAPTER V.

Pufendorf's Religious Thought.

A. Natural Law and Theology in Pufendorf's Thought.

It has sometimes been seen as a failure of the seventeenth-century natural law advocates in general, and Samuel Pufendorf in particular, that they were not able to bring peace to religious division by providing natural law as a rational foundation for civil order and morality to guide the conduct of mankind with universally applicable rules. Because with rationalization also came about secularization.[1]

Pufendorf's work is judged for its usefulness to the legitimation and underpinning of secular sovereignties with natural jurisprudence. His contemporaries criticised Pufendorf's natural law works, on the one hard, for its abstract, mathematical method, lacking historical authorization, on the other hand, for its separation from

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[1] Alasdair C. MacIntyre, After Virtue, a Study in Moral Theory, Notre Dame, Indiana, University of Notre Dame Press, 1981, pp.57-58: ...the secularization of morality by the Enlightenment had put in question the status of moral judgments as ostensible reports of divine law... those who lived through this change in our predecessor culture saw it as a deliverance both from the burdens of traditional theism and the confusion of teleological modes of thought.

theological foundation. Pufendorf responded to such criticism with additional works. Historiographically, seeking empirical confirmation of his findings in the studies of the history of man from near natural primitive societies to the noblest states of Europe. Theologically, to comment on the rightful separation and necessary co-operation of church and state, and to seek re-unification of Christian churches by providing the common ground in a theology of undisputable fundamental articles of faith and relegating non-essential dogmas to a secondary, disputable, irrelevance.

What has not been appreciated, and perpetually ignored by early and latest commentators, is Pufendorf's deep seated concern with religion with a Pietist morality. What is wrong with previous interpretation of Pufendorf as a secularizer is the neglect of Pufendorf's theology. Pufendorf, appreciated for his natural jurisprudence, was judged to have no head for theology. "Already during his studies, Pufendorf found theology too abstract," and, "he did not concern himself with theology in his old age, but limited his theological works to questions of human coexistence: the relation of church and state, the coexistence of sects, tolerance and freedom of conscience."[2] Not only was Pufendorf to have theology put out of his mind, but his very vital theological assumptions for the basis to his natural

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[2] Denzer, Moralphilosophie, p. 7.

law system, was declared irrelevant to his level of natural law.[3]

In this chapter we attempt to demonstrate that Pufendorf's theological writings was not limited to ecclesiastical conflict, but it also addressed the essential relation of man with his maker. Pufendorf's natural law is based on the anthropology of man's dual nature, which is the seat of man's moral faculty to make promises and to voluntarily engage in contractual commitments, and to subordinate man's weak and wicked physical nature to his free will and resolve to fulfill the obligations of the covenant with God, and the social contract, man's sociability, for the love of God.

In current historical studies, there is a perpetuation of an opinion that Pufendorf had "alienated himself from theology during his studies in Leipzig, and that he struggled against the theological tutelage of Lutheran Orthodoxy." Furthermore, "that he had promoted enlightenment by secularization of natural law, and that he relegated

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[3] Olivecrona, Die Zwei Schichten im naturrechtlichen Denken: In ihrer Naturrechtslehre beschäftigen sich Grotius und Pufendorf nur zum geringeren Teil mit dem Naturgesetz im Sinne der göttlichen Befehle. p. 102, Zusammenfassung.

religious belief to private life."[4] These assumptions date back to the biographical notes by Peter Dahlmann, who embellished without historical foundation a Pufendorf biography, annexed to the second German translation of Servinus de Monzambano with comments suggesting that the University of Leipzig "smelled" of pedantry, which he suggests was the cause of Pufendorf's resentment of the Leipzig study programme. Furthermore, Dahlmann made some vague references to private studies which Pufendorf attended after having turned away from theology.[5] These references were picked up by Breslau,[6] as well as by Treitschke, who described Pufendorf as a radical opponent of the stuffy university, the Dürftigkeit des Leipziger Studienbetriebes, which Pufendorf supposedly instantly detested. Treitschke then overemphasized Pufendorf's Jena period by depreciating the six-and-a-half years in Leipzig, in which, according to

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[4] This position is disputed by Detlef Döring, in "Samuel Pufendorf's Position to the Question of Uniting the Confessions in Connection with the Theological Point of View", paper presented at the Max-Plank-Institute für Geschichte in Göttingen, to the Conference, Unsocial Sociability, Modern Natural Law and the 18th-Century Discourse of Politics, History and Society, June 26-30, 1989.

[5] Peter Dahlmann, (Pseudonym for: Petronius Hartwegius Adlemansthal), in the second German translation of De statu Imperii Germanici, as appendix to Kurzer, doch gründlicher Bericht von dem Zustand des Heiligen Römischen Reiches Teutscher Nation, Leipzig, 1710, p.650f.

[6] Harry Breslau, Introduction to his translation of Servinus von Monzambano, in Historisch-politische Bibliothek, Vol.VII, Berlin, 1870, p.8.

Treitschke, Pufendorf had acquired a hatred for Lutheran Orthodoxy and the Protestant Neo-Scholastics.[7]

All subsequent biographers of Pufendorf repeated these Treitschke lines. So did Meyer, who said that Pufendorf turned his back on all theological studies, detracted by the geriatric belief in authority, the verknöcherten Autoritätsglauben, and the wild polemic of the Leipzig theologians.[8] Malmström, in his book on Pufendorf the historian, adopts the Treitschke picture of Leipzig University as an institute with a rigid spiritual climate which was tightly closed against any innovation.[9] Erik Wolf reformulated the same conception of Pufendorf, to which he added "under the impression of the studies as well as the professors, [Pufendorf] broke finally the bondage of parental tradition, and dropped theology and studied Roman law, history, and political science."[10]

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[7] Heinrich von Treitschke, "Samuel Pufendorf," in Preußische Jahrbücher; Vol.35, pp.614-655; and Vol.36, pp.61-109, 1870; also in Historische und politische Aufsätze, Leipzig, Vol.4, pp.202-303, 1897.

[8] Paul Meyer, "Samuel Pufendorf. Ein Beitrag zur Geschichte seines Lebens"; in Jahresbericht der Fürsten- und Landesschule zu Grimma 1894/95; Grimma, 1895.

[9] Oscar Malmström, Samuel Pufendorf och hans arbeten i Sveriges historia, Lund, 1899.

[10] Erik Wolf, "Pufendorf, Thomasius", three chapters in Gestaltgeschichte der Rechtswissenschaft; Volume 11, Tübingen, 1927.

Leonard Krieger repeated this version in his book: "...but it took only a brief contact with the Leipzig style of theology to convince him that this discipline could provide no organizing principle for an active mind or for all the knowledge it had to operate upon," therefore, Pufendorf "repelled by the sterility of this theology" was supposed to have "pushed theology into a corner of his mind and proceeded to ignore it."[11]

These remarks did not only belittle the theological corpus in Pufendorf's work, but also did injustice to the University of Leipzig. Such remarks, not based on solid research into the history of the University of Leipzig in the seventeenth century, ignore the fact that this institute was the most frequented German university at that time, and was attended by the most famous representatives of the early German Enlightenment - Weigel, Pufendorf, Leibniz, Thomasius, Wolff.[12]

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[11] Leonard Krieger, The Politics of Discretion; p.14. However, Krieger did not deny Pufendorf's continuous interest in religious conflict: "This earely focus on religious institutions reveales the crucial role which religion was to play for Pufendorf, first in politics and then in history: it provided linkage between particular acts and general norms which could be guaranteed in no other way." P.196.

[12] Döring, "Samuel Pufendorf (1632-1694) und die Leipziger Gelehrtengesellschaften in der Mitte des 17. Jahrhunderts"; published in LIAS, Sources and Documents relating to the early Modern History of Ideas, Maarssen, Holland, Vol.XV, 1988, pp.13-48.

Pufendorf, still anchored in traditional structures and Protestant Lutheran belief, was aiming at a universal natural law system, and felt the need to exclude everything which was not universal but particular to specific segments of the human race. Pufendorf based his natural law doctrine on the assumption of the sinful condition of mankind, which, he claimed, we only could be certain of by Divine Revelation recorded in the Bible; also "that natural law is by no means repugnant to the dogmas of true theology, but only abstracts from some of its dogmas which can not be investigated by reason alone."[13] The fact, that Pufendorf had to assume for everyone to know, not by reason but by faith the human natura corrupta, he unwittingly limited the application of natural law to those people, who accept with their faith the authority of the Holy Bible. When Pufendorf became attacked on account of his exclusion of theology from the main body of his natural law system, he fortified his following works with the unquestionable authority of Holy Scriptures in the Lutheran Evangelical interpretation with a moral application of Pietist persuasion.

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[13] De Officio, Greeting to the Reader, p.viii.

B.Pufendorf's Theological Activity as a Student.

In his study of the first student fraternities, the Leipziger Gelehrtengesellschaften, in Leipzig, Döring named as the first fraternity the Collegium Gellianum (founded 28th of November, 1641, dissolved in 1673) of which Esaias Pufendorf was a founding member. Samuel Pufendorf became an early member of the second fraternity, the Collegium Anthologicum (founded 2nd of July, 1655); although not substantiated, C.E. Sicul and Peter Meyer named Samuel Pufendorf a founding member of this fraternity.[13] These fraternities, with membership limited to nine, had scheduled meetings of scientific disputations with papers submitted by the members. They engaged in sing-songs and preparations for the annual Christmas party and anniversary of the fraternity. In the selection of the topics, the most frequently chosen were biblical and antique subjects. In theological subjects, the problems of Catholicism and Calvinism was given much airing. Historical and cultural topics were exclusively selected from the Greek-Roman and Judaic ancient history. To a lesser degree, philosophical subjects dealt mainly with questions of epistemology and logic. Completely absent were subjects of natural and mathematical sciences.

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[13] Christoph Ernst Sicul, Supplement zu des neu-angehenden Leipziger Jahr-Buchs, Erste Probe auf das Jahr 1715; Leipzig, 1715, p.189f.

Samuel Pufendorf's membership in the fraternity began with his first paper in the fourth meeting of the Collegium Anthologicum, on the 14th of July, 1655. There are 48 of Pufendorf's student papers preserved, and the topics consists mainly of historical questions, and, to a lesser degree, exegetical examinations of Old and New Testaments. In the historical essays, Pufendorf did not limit his deliberation to the historical facts, but already showed signs of interest in legal philosophy. Of special interest is an essay delivered on the 4th of August, 1655, on a topic which was very strongly debated at that time: the origin of the state.

Pufendorf starts with three propositions. First, in the ancient world, there was the thesis of Horace and Cicero, who claimed that poets and rhetoricians had a leading role in the formation of human society; this was rejected by Pufendorf, because it is based on false premises. The first humans did not have an isolated existence, neither were they poetry-inclined literate, but were already socializing in family formations. The other two propositions of state formation advanced by Pufendorf are remarkable: man had been implanted by the "highest Being" with the faculty to subordinate himself to the sovereignty of another: Alij pro naturae inclinatione, spontaneatque hominum subjectione pugnant. This is the foundation of the authority of the

father, the husband, the master over his servants and slaves. The other is the desire for company. Pufendorf follows along the line of Grotius' appetitus societatis without naming Grotius.

With the indication that a divine will, numen, implanted in man the will to subordinate himself to others, Pufendorf made a revealing statement. Döring translates numen with the "highest Being", das höchste Wesen, obviously avoiding the reference to God which would be in contrast to East German ideology, (but within Hitler's notion of a supernatural force, which he called the Vorsehung, the predestination which supposedly gave Hitler the leadership of the German people). This kind of supernatural authorization of a secular ruler, with a natural inclination to subordination by the rest of the people is neither Lutheran nor Christian per se, but it is Teutonic. This ought to be remembered whenever we examine the sovereignty principle within the natural law corpus of Pufendorf's work.(14)

To substantiate the other cause for the formation of a society, Pufendorf names the pitiful state, the indigentia, of the human nature which is in need of fellow

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14 Samuel Pufendorf, Imperia unde primo extiterunt, non una autorum est opinio; Manuscript No.2622, Leipzig, University Library, Bl.55v-57v; "On the Origin of the State Power", Collegium Anthologicum, Leipzig, 4.8.1655.

humans, and, with the growing numbers of people, there is the growing common wickedness, the malitia, which makes it necessary to transfer the power to rule to those, who achieve excellence, virtus, and are meritorious, meritia. The so organised state provides the protection of the individual, and prevents forces from inhibiting common welfare.

In these early manuscripts, then, Pufendorf's budding thought already contained the basic principles of his natural law system prior to his move to the university in Jena and his study under Weigel which included his introduction to the works of Thomas Hobbes. Although there is still the appetitus societatis by Grotius prevalent in Pufendorf's mind, however, we can detect a substantial modification, the recognition of the malitia of human nature, which allowed Pufendorf to combine both principles in imbecillitas which served as the grounding of a social contract. In the same paper, Pufendorf mentions Jean Bodin, but reject the Bodin république as the origin of a state. Because Bodin makes an absolute sovereign power essential to the formation of a state; and without that, only social congregation but not state formation takes place. Pufendorf argues for the voluntary contract predating the sovereign power issue.

Of the 48 preserved manuscripts of Pufendorf's fraternity papers, only nine contain theological topics. But these are indicative of a conscientious theological concern in Pufendorf.

The other source to substantiate Pufendorf's continuous interest in theology is his extensive correspondence. While in a letter to his brother Esaias, dated 24th of February 1681, Samuel's idea of a theological system and the question of ecclesiastical reunion, are related to the confessional problems of the churches, and not really touching on the matter of faith, other letters do give us some insight into Pufendorf's theological concerns. The correspondence referred to here is with the Rostock theologian Justus Christoph Schomer, and a letter dated 6th of October 1690, concerns Schomer's essay, Specimen theologiae moralis.[15] Pufendorf mentions the plan he had to abandon to write a Theologia moralis, and of great importance is his statement, that human society may be led to a possible perfect condition only by Christian virtue about which we know only through revelation. In Pufendorf's correspondence with Adam Rechenberg, and later in his friendship with Philipp Jacob Spener, Pufendorf's concern with theology became pronounced. But Pufendorf was always

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[15] Pufendorf's letter to J. Chr. Schomer is published in the latter's posthumous edition of the Theologia moralis, Rostock and Leipzig, 1707.

concerned about the role of religion in human life. His later turn to Pietism, and his friendship with Spener, was not a radical break from his past. He was always an evangelical (not scholastic) Lutheran; insisting, with Luther on the separation of the kingdom of God from the kingdom of man or (in Pufendorf's terms) the divine forum from the human forum. It was the failure of many churches and many secular rulers to keep these realms separate or distinct that brought about confusion and disorders in the world. This had been the problem of "Popedom" and Catholic Europe. It was also one of the central sources of discontent and disunity in the German Empire.

C. The Problem of Religion in the German Empire.

In his student days, Pufendorf engaged in some writings on religious controversy, but the first public position on this subject he took, [albeit with the precaution of a pseudonym, Severini de Monzambano], in his De statu Imperii Germanici ad Laelium fratrem, dominum Trezolani, liber unus, (1667).[16] Here he assumed the mask of a Veronesian citizen to talk about the German constitution as it would have been the custom among Romans. In this work, Pufendorf was deploring the monstrosity of the Empire, whereby he laid the ground work for his later writings on the relationship between state and church. The German Empire, in the early decades, following the peace of Westphalia (1648) was a

> "bulky and formidable Body, which is thus united in the common Appellation of the German Empire, and if it were reduced under the Laws of a regular Monarchy, would be formidable to all Europe, is yet, by reason of its own Internal Diseases and Convulsions, so weakened, that it is scarce able to defend it self. [Nay, it is certain, if it were not powerfully assisted by its Neighbours, it is not able to defend it self against the French.] The principal Cause of this Impuissance and Weakness is its irregular and ill-compacted Constitution or Frame of Government.[17]

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16 The following quotes are from: Samuel Pufendorf, The Present State of Germany, Written in Latin under the Name of Severinus de Monzabano Veronesis, transl. by Edmund Bohun, London, Richard Chiswell at the Rose and Crown in St.Paul's Church-Yard, 1696.

17 Monzabano, Ch. II, § 7, p. 175.

What was the essence of Pufendorf's views on the constitutional problematic of his time? Pufendorf, like Bodin and Hobbes, was a strong believer in monarchy as the best possible form of government. The security of Germany was endangered by the weakness of the House of Austria, for the Emperor of Germany had no son; and Pufendorf expressed his concern, for "a well composed Kingdom or Monarchy is certainly the most perfect Union." The weakness of the German Empire was its fragmentation into small principalities and separate cities, ruled under different systems, temporal or ecclesiastical. In Pufendorf's opinion, the strength of a system of states consists in "the associated cities or states [to] have the same form of government, and be not overmuch disproportioned in their strength, and that the same or equal advantages may from the union arise to every one of them."[18] The state of Germany was deplorable because of all the diseases of an "ill-formed kingdom, and an ill digested system of states": the reason for "the principal calamity of Germany, [was] that it is neither a Kingdom nor a system of states."[19] Pufendorf narrowed the ills to the main causes, which are the distrust between the princes and the Emperor, the states being embroiled with each other, and the differences of religion which caused great disturbances and disquiet. Furthermore, "the princes of Germany enter

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[18] Ibid., p. 176.

[19] Ibid., § 8, p. 177.

into leagues, not only one with another, but with foreign princes too, ...which not only divides the princes of Germany into factions, but gives those strangers an opportunity to mold Germany to their own particular interest and wills."[20]

In order to make his point, Pufendorf first listed the six rules of Hippolithus a Lapide, prescribed to the princes of Germany for the cure of the German calamities:

> 1. To study the waies and means of Concord, and to avoid Factions.
>
> 2. Not to suffer the Imperial Dignity to continue long in any one Family, lest by the long use of these Pomps and Images, a desire of acquiring a solid and real Soveraignty should grow up in them.
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> 3. Though the Power of directing and moderating the Offices of all the Parts to the Common Good is conferr'd upon a Prince or Single Person, for the greater union of the Commonwealth; yet the nobility ought alwaies to keep the Stern of the State in their own hands, and the Power of directing and ordering the things of great moment, to be exersiced in the Diet, which ought to convene frequently; or at least they ought to appoint some Senate or Counsel, which shall be perpetual; which kind of Regiment was in use in the beginning of the last Age before this.
>
> 4. That nothing but the Ensigns of Royalty be left to the Prince, but that the Regal Jurisdiction and Power be reserved entire to the Commonwealth.
>
> 5. That neither the Life, Fortunes, or Fames of any of the Princes be trusted to the single Justice or Discretion of the Emperor.

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[20] Ibid., § 9, p.182.

6. That neither the Army, Militia, or Forts, be under his single Jurisdiction or Government.[21]

He then proceeded with his rejection of these six remedies, on the following grounds:

First, the study of concord, a general pardon, and the removal of all grievances by which a mutual hatred are kept alive and are nourished can only happen "till all the nobility of that nation happen to be wise and good, and to govern the motions of their minds by rules of philosophy."

Second, opposing the notion of "not to suffer the Imperial Dignity," Pufendorf rejected the liquidation of the Empire, as the "advise of a hangman, and not a physician: ...the tyrannical law, who will dare to lay the ax to the root of a tree, which has spread its branches over so many provinces," will destroy the good with the bad, and once the damage is done, Pufendorf pointed out the near impossibility to restore power and dignity to a central government.

Third, Pufendorf criticised the other Hippolithan rules, in which he "would have a mutual confidence restored amongst the states and princes, and all distrust eradicated;

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[21] Hippolithus a Lapide, is the pseudonym of the historian Bogislaw Philipp von Chemnitz (1605-1678), who attacked the House of Habsburg in his Dissertatio de ratione status in imperio nostro Romano-Germanico (1640). Quoted in Monzabano, Ch. VIII, § 2, pp. 187-188.

...and he thinks the greatest part of these jealousies have risen from the different religions professed in the Empire."

Pufendorf then went on to express himself on the last three remedies by replying with the following primary maxim, that the depraved state of Germany cannot be restored to a regular monarchy "without the utter ruin of the nation and government, but [instead] a system of several independent states united by a leage or confederacy," would be the safest course to take. For that to take place according to Pufendorf, first, each society has to limit its design to the preservation of their own, without thinking to take something from their neighbors; second, to provide the greatest care to asure peace at home;

> and to that end it is absolutely necessary to preserve every one in the Possession of his own Rights, and not to suffer any of the stronger Princes to oppress any of the weaker, that so, though they are, as to other things, not equal, yet in the point of Liberty they may be all equal each to other, and alike secured; that all old out-dated Pretenses should be buried in eternal forgetfulness, and everey one for the future be suffered quietly to enjoy what he now possesseth. That all new Controversies which may happen to arise, should be referr'd to the Arbitrement of the other Alies in the League, who are neither byassed by Love nor Hatred; and those that refused to submit to their Judgement should be compell'd to do it by all the rest of the Confederates."[22]

Third, for the preservation of the Empire, Pufendorf opposed a transfer of sovereignty from the house of

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[22] Ibid., § 4, p. 193.

Austria to any other authority on grounds, that such authority may not be bound by the traditional division of power, and may cause upheavals, destroy the unity, and "like gangrene, creep into the bowels of the empire."

And last but not least, Pufendorf addressed in this work, using the voice of a retired Nuncio of the Holy See at Cologne, the important concern of religion. After having dispensed with the secular diseases of the Empire, he elaborates on the "differences of religion," considered by many as the principle cause of the distraction and division in the Empire. This was not an enquiry into theological questions, but a "discourse of the nature and temper of mankind."

At the base, claimed Pufendorf, "that two things above all others exasperate and enrage the Minds of Men, Contempt and Loss." Under contempt, Pufendorf understood the distemper of men, who find it hateful to find another disposed not only to contradict, but even to disagree with them in any way, for it insinuates that they are fools.

> An equal, nay, a greater Fury has taken possession of the Churchmen. For whilst every Sect of them believes it has God on their side, if any man differeth from them in any thing, besides the affront offered to their Authority, they are for accusing him forthwith of Impiety, Contempt of the

> Heavenly Truth, Obstinacy, and Unwillingness to be brought over by another from a manifest Error.[23]

Not explaining the effect of a "Loss," as a self evident truth, Pufendorf explicated the causes of dissention with a close scrutiny of "the Tempers of the three Religions." Again, Pufendorf refrained from any theological discussion, but he spoke of the Lutherans in the first place, because they first deserted the Holy Roman Catholic Church.

> The People are taught by them [Lutherans] to reverence their Magistrates and Princes, as the Ministers of God, and that all the good works expected from them, is to do the Duties of Good men: ...the very Rusticity and Simplicity that appears in the Professors of that Religion, and which is so much blamed by some, is to me a sign and a testimony of their Sincerity and Uprightness: So that as it is not possible to imagine a Religion that can be more serviceable and useful to the Princes of Germany, than that of the Lutherans, we may from hence conclude, that this is the best for a Monarchy of any in the World.[24]

In Pufendorf's description of the temper of the Calvinists, or Presbyterians, as he called them, he admitted that they have much in common with the Lutherans, but

> That the Genius of this Religion is purely Democratick, and adapted to Popular Liberty and a Commonwealth: For when the People once are admitted to a share in the Government and Discipline of the Church, it will presently seem very unreasonable to them, that one Prince should without them govern the great Affairs of the State. These two Religions having spread themselves over a great

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[23] Ibid., Ch. VIII, § 6, p. 199.

[24] Ibid., § 7, p. 201.

> part of Germany, by their mutual Enmity each to other, gave Opportunities to the Roman Catholicks to destroy them both.[25]

Pufendorf blamed the obstinacy of the ministers of both Protestant religions to be responsible for the divisiveness and unruliness of the major part of the population, who would think "this fickle inconstancy in Religion, an Argument of the uncertainty of it, and without ever enquiring which were the best, reject both, and sit down in Atheism."[26]

For the third religion, Pufendorf attended to the temper of the Roman Catholic Religion which he considered extremely different from the Protestant religions. Pufendorf criticised the Roman Catholic clergy for their claim to power and wealth, trying to control secular governments, to stand between God and the ordinary citizen, to frighten people with the "Fire of Purgatory," and to please with the invocation of saints, and the increase in splendour and pomp of their religion, with the multitude and variety of their religious orders, all adding up to a formidable system:

> The Hierarchy or Ecclesiastick Commonwealth or Government, as they have ordered it, is a wonderful artificial Contrivance, so compacted, so knit, closed, and fixed together, that I think I may truly say, since the Creation of the World, there never was any Politick Body so well formed and

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[25] Ibid., § 7, p. 203.

[26] Ibid., pp. 204-205.

> disposed, and which had such strong Foundations as this has; for it is form'd into a most exact Monarchy; and the King of the Priests has an Authority given him equal to that of God. This Vicar of God cannot err; and administreth the Function of a Turnkey to the Gates of Heaven and Hell, with an Authority above controul, and from which there lies no Appeal."[27]

With to much of their time spent paying attention to this political body, Pufendorf claimed, that the "great care of the Roman Catholic priests is spent enlarging their own wealth, power, and authority, and not in forming the minds of the people committed to their care to piety and honesty." The Catholic church, after the great defection in the Reformation, collected the remains of its broken forces with "all the industry and care that was possible." Pufendorf stressed the one addition to this, the Jesuit Order, and said:

> ..that holy Society was invented, to the great good of the Church, which at first with great Art supported this fallen Fabrick, by undertaking the Instruction of Youth, Confession of Pentinents, and a cunning Scrutiny into the Secrets of all men."[28]

At last, Pufendorf objected to ecclesiastical sovereigns, which are princes of the Empire as well as Bishops. If they are sovereign princes and take their share in the care of the state with the other princes, Pufendorf said:

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[27] Ibid., § 8, p. 209.

[28] Ibid., p. 210.

> ...let them abstain from the Sacred Title of Bishops, because that holy Office is inconsistent with the vast burthen of secular business, which is necessarily attending on the Office of a Secular Prince; let them lay by the first; and flick wholly to the last Title; ...but then there is no apparent cause [which] can be given why he should have a Bishop s See assigned to him, when the other Princes of the Empire, who have as great zeal for the welfare of their Country as he [the ecclesiastical Prince], have been contented to take none but Temporal Titles.[29]

In short, ecclesiastics should avoid political offices and pursuits; their concern should be the divine, not the human forum. In his early work, Pufendorf attacked the worldliness of the Christian religion, as it was practised in Germany by Roman Catholics and by too many ministers of the Reformed and Lutheran religions.

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[29] Ibid., § 9, p. 216.

C. Relations between Church and State.

In his Basilii Hyperetae, (1679),[30] Pufendorf reinforces his position taken in the Monzambano work. With the most gloomy description of medieval Popedom and post-Trident Catholicism, he developed the thought he never relinquished, that the infallibility of the Pope and secular interests of the Roman Catholic Church prevented a unification between Catholicism and Protestantism.

Pufendorf proposed in this work a policy of gradual reduction of reciprocal confessional prejudices which he could not bring to realization; and he remained skeptical of mutual toleration of differences which could only lead to religious indifference. Gradually he moved towards the only solution, the construction of a strictly logical theological system comprising the fundamental articles of Christianity, which could lead to a confessional reconciliation. In the Einleitungen zu der Historie der vornehmsten Reiche und Staaten, so itziger Zeit in Europa sich befinden, (1682), he

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[30] Basilii Hyperetae, 1679, included in the Einleitungen zu der Historie der vornehmsten Reiche und Staaten, so itziger Zeit in Europa sich befinden. 1682, and translated in an excerpt, The History of Popedom, London, 1691. This chapter on papal history concerning the historical argument on behalf of political sovereignty of secular princes was given prior and separate publication to An Introduction to the History of the Principal Kingdoms and States of Europe. See Krieger, pp. 196-197, note 62.

proposed to start with the points which are common to both parties, and to construe a complete systema theologiae, to form a chain which links from beginning to end the grounds and methods necessary to obtain the salvation of man. Should there remain some difference in opinion, these would be insufficient to prevent a unification of churches.[31]

The worldly and oppressive character of the Roman Catholic Church manifested itself with devastating effect in 1685, when the king of France, acting on the advise of Catholoc courtiers (Bossuet and the Jesuits) revoced the toleration that had been extended to Protestants in Fance since 1598. It was an action which also revealed a basic misunderstanding of the proper relation between chruch and state. In De habitu religionis christianae ad vitam civilem, (1687), Pufendorf re-emphasised the difference between the government of a church, and the government of a state or commonwealth:

> For it is certain, that the Word Church is in the Scriptures attributed to the whole Body of the Believers wheresoever dispersed throughout the

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[31] Pufendorf, Einleitung, p.869: man solle versuchen, ob man aus den Puncten, darinnen beyde Partheyen einig sind, ein vollkommen Systema Theologiae, so von Anfang biß zum Ende ad formam justae artis, und wie eine Kette zusammen hienge, formieren könte. Stünde ein solches zu wege zu bringen, und blieben gleich einige unterschiedene Meinungen übrig, wenn diese nur gemeldte Kette nicht abrisse, sondern ausser derselben fielen; so wäre man versichert, daß man im Grund, und in den Mitteln der Seligkeit zu erlangen überein käme; und wäre der übrige Unterschied nicht mehr erheblich genug, warum man nicht könte in eine Kirche sich vereinigen.

> World; yet so, that there is not the least appearance (if a due regard be had to our Saviour's Intention) of a Design to erect a State... Here is no mentioned made of any Persons, who would be the supream Governours over the rest (as is usual, and absolutely necessary in a State)...[32]

In mentioning the "Tyes" which bind believers together, Pufendorf calls them the "Establishment and Union of a mystical Body," which nature is not altered when it is adopted as the sole religious doctrine of a state:

> ...the Church does thereby not receive any other Alteration, as to her natural Constitution, but that, whereas she was formerly to be considered only as a private Society or College, yet such a one as being subordinated to the Law, ...being put under the particular Protection of her Sovereigns, enjoys a greater share of Security... Notwithstanding this, the Church is thereby not exalted from a College to a State, since, by receiving of the Christian Religion, the civil Government does not undergo any Alteration or Diminution.[33]

Pufendorf goes on emphatically to speak out against the contradiction of a double Sovereignty, and the implication that "with two different sorts of Obligations in the Subject should be lodged in one and the same Commonwealth." For Pufendorf the church remains a collegia, with an undisputed aequalitas of the church members, sort of a divine basic right in the forum of the jus divinum. This principal equality stems from the Lutheran Evangelical

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[32] De habitu, § 34.

[33] Ibid., § 41.

doctrine, that the will of the faithful cannot be subjected to the will of the priests or the church doctors. There is but one sovereignty, in the "divine forum" it is God alone, in the "human forum" it is the secular sovereign, the mortal god.

Pufendorf rejected the notion of a state which has as an end, along with the restoration of sociability, the restoration of God's covenant of grace.[34] For Pufendorf the state was equally not founded for the sake of the church, as the church was not founded for the sake of the state.[35]

However, despite this sharp and definite separation, church and state do not function in a manner that is irrelevant to one another. Since the covenant of a state is based on the God given natural law, it is equally in the interest of the state, to fulfill its obligation towards God. It therefore is prudent, a raison d'état, to preserve and further religion, because religion provides the firmissimum vinculum societatis. And faithful to his end, Pufendorf gave

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[34] De concordia, § 1: ...ita nobis certum habetur, veram politicam, ex genuinis suis principiis deductam et legitime adplicatam, nequaquam repugnare Religioni christianae.

[35] De habitu, § 5: Civil Governments were not erected for Religions sake; or that Man did not enter into Civil Societies, that they might with more conveniency establish, and exercise their Religion. For, since Religious Exercises could be performed as well by a few, as by a great Number; and in a small Congregation as well as in a great one, it was unnecessary to erect several great Societies on that account.

the Christian religion priority over any other religion. Pufendorf claimed that the Christian religion ought to be supported by the state for its usefulness in the preservation of state peace.

> For since, without religion, there would also be no conscience, it would be difficult to detect such crimes, as these are usually disclosed through a restless conscience, and the terror which is revealed in external signs. Hence it is clear how much it is to the advantage of the human race to block all the ways of atheism, that it may not grow strong; also how great madness pursues those who assert that it is of service in winning a reputation for civic wisdom, if they appear inclined to impiety.[36]

In the chapter of De Officio entitled "On the Duty of Man toward God, or Natural Religion," Pufendorf tolerates the existence of more than one religious belief, as long as one holds true that God exists:

> since it has been hitherto believed that the welfare of the human race depends upon that conviction, the man would have further to show that the race is better served by atheism than by retaining a sane cult of Deity. This being impossible, the impiety of those who venture to attack that belief in any way is detestable and to be most severely punished.[37]

This intolerance is limited to external action, the public expression of atheism or unbeliefs, if and when it is offensive and disturbing to the public peace. The sphere of

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[36] De Officio, Bk. I, Cap. 4, § 9.

[37] Ibid., Bk. I, Cap. IV, § 2.

the naturalis libertas is preserved for the religious conscience, and the state has no authority over the people's soul, this is a private matter. It is very persuasive to claim, that Pufendorf - at least in his natural law work - had with the secularization of the state, liquidated the public sphere of religion, and had privatized religion. However, Pufendorf stressed the need for religion as essential to the dignity of man, and for the public peace in a commonwealth.

For the interpretation of Pufendorf's concept of relationship between church and state we may list the following important elements:

First. The sovereignty principle, claimed by the Pope is emphatically denied. Only a state is ruled by a lawfully absolute sovereign. The sovereign of the state is willed by God in the nature of things, that men be ruled on earth by their own sovereign authority. The church is a congregation of believers. The sovereign of their beliefs is God, and God's kingdom is not of this world. It is the Lutheran principle which denies the role of the intermediary of a vicar, the Pope, as a necessary link between man and God. The church remains a collegium of individuals, for it serves the salvation of individuals, not a commonwealth. The state, on the other hand, is a commonwealth, where the whole

comes before its parts. The duty of man and his obligation comes before his rights, the rights are only as a result of observation of duty by others observing the law of the sovereign of the state.

Second. With the natural law interpretation, both, church and state are not a divine institution, but a human contractual assembly. The difference is, the church remains a corpus morale, its laws governing faith are not enforced on this Earth, the duties of religion are imperfect obligations, i. e. prescribed but not enforceable. The state is a lawful institution, summum imperium, with its members under perfect obligation, i. e. a vis obligationis, an enforceable law and not just a prescription.

Third. The church is primarily a religiously based unity, the Regnum Christi, the Lutheran theological "invisible Church". Pufendorf accepts the Christian Religion as the best possible of all religions for two reasons, viz. it is universally the best applicable to all nations and humanity as a whole, furthermore, it reinforces the political virtues of citizens in an exemplary way. Therefore, it becomes the duty of a state not only to further the Christian religion, but to assume the protection and administration,

the externum direction of the Landeskirche, the state church. The title to such an authority is the Jus circa sacra.[38]

Forth. The foremost and exclusive jurisdiction of the state over the church can only be determined by the usefulness to the preservation of the state. The aim of the state is the security of the social life, and as such its jurisdiction over the church shall be limited to the preservation of the commonwealth.[39] However, for the preservation of public peace, the state must prevent violent religious disputes, curb the canonical demand for obedience when it threatens the state, also prosecute heresy which damages principles of natural religion.[40]

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[38] Pufendorf, Einleitung, § 40: Der Papst will gern das Haupt der Christenheit sein; die protestierenden Staaten aber wollen das Jus circa sacra als ein köstlich Stück ihrer Souveränität behalten.

[39] De habitu, § 6 ...Commonwealths were not erected for Religions sake, it is easier to be understood, that the ancient Fathers of Families, when they first submitted themselves under a Civil Government, were thereby, not obliged to surrender at the same time, their Religion in the same manner, as they did their Lives and Fortunes to their Sovereigns, for the obtaining the End of Civil Society, which was their common Security.

[40] Ibid., § 7: Sovereigns are nevertheless, not excluded from having a certain Power and Disposal in Ecclesiastical Affairs, as they are the Supream Heads and Governours of the Commonwealth; ...it is one of the Principal parts of Paternal Duty, to implant Piety into their Children; so Sovereigns ought to take care, that Publick Discipline (of which the Reverence due to God Almighty, is one main Point) to be maintained among their Subjects. ...It is therefore a Duty incumbent upon Sovereigns, to take not only effectual Care, that Natural Religion be maintain'd, and cultivated among their Subjects.

Pufendorf, starting out as a natural law jurist, emphasised the natural law postulate that beside the state, the summum imperium, no other sovereign power can exist. The church, an assembly of the faithful, exists within the jurisdiction of the state per modum collegii. In Pufendorf, this is occasionally severed by accepting the higher principium of the church independence as the corpus Christi mysticum being the Regnum Christi. Therefore, the church, as ecclesia spiritualis, engaged in salvation, cannot be subjected to the authority of the state, and a state's prohibition of a Christian sermon is eo ipso illegitim.

In Pufendorf's religious thought we have to distinguish thought based on natural law limited to the "human forum", the earthly existence of humans in the company of humans, the socialitas, and the thought based on revelation, which is assumed not to be in contradiction to the natural rational deductions, but reaches into the "divine forum" which is not available to the human faculties of reason, but only through faith in divine revelation. In the natural law view, the church is viewed as a congregation engaged in religious activities, but legally is not different from any association acceptable within the jurisdiction of a state. However, since religion, according to Pufendorf, is principally a subject concerning only individuals, and bears no social intention, but is exclusively concerned with the

contractus feudalis, the covenant of grace, exclusively between God and the individual believer, it falls into the realm of the jus divinum, which is beyond the jurisdiction of the state, and of natural law.

Pufendorf removed natural law from the divine revelation, but he did not contradict it; on the contrary, he accepts basic assumptions which we could not be certain of without divine revelations.[41] With the acceptance of the corrupted reason through the first man's Fall, Pufendorf, remains under the theological reservation of natural law.

What we have to understand, and carefully consider is the context in which Pufendorf operated, and developed his ideas. In the same way that he separated natural law from theology, he separated theology from philosophy. He was a systems man, he created a system, a jurisprudence for the secular state, and he wanted to create a system, a federal theology for the unified Protestant churches. In both cases, he tried to serve the most important institutions of his

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[41] De Officio, pp. v-vi, Reader Greeting: ...men derive the knowledge of their duty and what in this life they must do, as being morally good, and what not to do, as being morally bad: namely the light of reason, the civil laws and particular revelation of the divine authority. ...the same essence of the law is unfolded through different, though not contrary, precepts, according as the man by whom the law must be observed exists in a different manner. Our Saviour reduced the essence of the law to two heads: Love God and love your neighbor. To these heads can be referred the entire natural law.

time. Instead of developing a universal moral theology he got drawn into the ecumenical debate, the ever so elusive unification of Christian churches. The unification of various religious institutions is really not an ideological question, or a fundamental dogmatic problem, but it is of a man made infatuation with institutions, and the power derived from it.

Although Pufendorf is known to have rejected, out of hand, any attempt to reunify Protestant churches with the Catholic Church, he did not exclude Catholic faith, and he considered it even possible for a Catholic theologian to work out the basics for reunification. And he did indeed seek out an acquaintance with Huet through his brother Essaia, who was stationed in Paris.[42]

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[42] Esaias, in the early 1680th mailed to his brother Huet's Demonstratio, which Samuel acknowledged with great enthusiasm, praising Huet for his exact structured defence of Holy Scriptures, which inspired Pufendorf to undertake a work on the reconciliation of Christian confessions. In this letter, dated February 24th, 1681, Pufendorf asked his brother to transmit his outline to Huet, since Esaias lived for many years as a diplomat in Paris and had connections in the intellectual circles of France. Huet seem to be sufficiently impressed by Pufendorf's proposal, so that he added it to the fifth edition of his Demonstratio, (Leipzig, 1703).

Pufendorf, at one point in time, overcame his aversion to Catholicism and actually sought the higher authority of the Roman Catholic Church as the guarantor for his intended theology, and even put his hopes in Louis XIV. This was found by Döring from an only handwritten letter dated February 17th, 1681, to which Leibniz referred when he was seeking a dialogue with representatives of various confessions (Niedersächsische Landesbibliothek, LBr. 67, Bl. 54 v).

Pufendorf placed great stock in the Catholic theologian Pierre Daniel Huet (1630-1721), whose work, Demonstratio evangelica, (Paris 1679), impressed Pufendorf for its truthful demonstration of Christianity and the authority of holy Scriptures successfully defended against Jews and atheists; not through an old fashioned polemic to serve the advantage of the priests, but in the construction of a solid system of strictly logical interconnected demonstrations.[43] Pufendorf entertained the thought that Huet may have the calling to undertake that major project to reunite all Christian confessions.

According to Pufendorf, the confessional ruptures are not created by a genio veritatis divinae, but are caused by a malitia humani ingenii, which, beside others, is the result of doubtful and sloppy theological thinking. Behind this lubrico ac dissoluto modo of theology is hidden an empty philosophy (ex inani philosophia) or the greed of the clergy. It would be a blessing for the whole of Christianity, if

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[43] Pierre Daniel Huetius, (1630 - 1721), was educated by the Jesuits, and became tutor of the Dauphin under Louis XIV. Together with Bossuet he published the famous In usum Delphini. He became abbot of Aulney (1678), bishop of Soisson (1685), later bishop of Avranches, since 1671 retired to exclusive studies. Huet is a skeptic on the subject of philosophical knowledge; he fought against Cartesianism and Spinozism. Only religious faith can overcome doubt. Other works: Censura philosophiae Cartesianae (Paris 1689); Alnetanae quaestiones de concordantia rationis et fidei (1690); Nouveaux mémoires pour servir à l'histoire du Cartésianisme (anonymous, Paris 1692); Traité philosophique de la fabiblesse de l'esprit humain Amsterdam 1723).

unification of all Christian confessions could be achieved. Such goal could be achieved if only theology would be conducted in formam justae artis, which means for Pufendorf in a scientific method, ad modum propositionum mathematicum, with holy Scriptures the exclusive source, and the application of common sense (a communibus super sciendi modo rationibus). With this, one would gain principal axioms from which articles of faith could be deduced in a convincing manner. The decisive prerequisite for this project is a thorough knowledge of the Bible, a true knowledge of the history of the religious schisms and comprehension of their cause.[44]

Pufendorf remained strictly on the ground of the Lutheranism of his time. His relation to the Calvinists remained strained, because they did not give up the doctrine of the absolute decree. Furthermore, we are mistaken to believe that Pufendorf had relegated religion to a private affair. Although religion is not an affair of the state, he recognized that religion was one of the main causes of war. Pufendorf, forced by the logic of his natural law project, eliminated theology, and with it morality, from the main body of his natural law system. But on the other hand, Pufendorf, a faithful Protestant Lutheran, recognized that such an arrangement dictated by natural law for the sole purpose of a

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[44] Basilii Hyperetae, 1679.

harmonious human forum could not be the end, the fulfillment of mankind. In his view, only Christianity may elevate human society to a level of possible perfection, since by following natural law it will only reach a tolerable condition. The level of perfection will be attained not earlier than men will follow Christ's moral doctrine for being another, of higher quality than the rules of natural law.

A secularized church was guilty not only of specific "abuses", but became also the target of specific grievances, not all of them of its own making. As a result, the Reformation was not only a spiritual revival movement, but also a political revolution, ending in schism, redistributing the secular power, all after the most bloody and devastating wars in the history of pre-modern Europe. A halt to this insanity was achieved in 1648 with the Peace of Westphalia. But notwithstanding his diminishing power, for another century, the Pope reigned with the horrors of the Inquisition, until heresy ceased to be a public crime.

It cannot be denied, that the Reformation which brought about an intensification of Christian faith, had also profoundly challenged the authority of faith and secular power. It was the end of a monopoly on the truth, the infallibility of Papal authority and kings' divine power. The challenge became Skepticism, and the justification for

resistance to a tyrannical monarch, which was aided by the Jesuit proposal to resist heretical rulers. "The political conditions fostered by the theological divisions of the sixteenth century were not conductive to peace, order or good government."[45]

The Roman Catholic Church, battered by the loss of many lands, in its Counter-Reformation went to work to restore its image. Priests became educated in special seminaries, and what was lost in influence was restored in a magnificent opulent Vatican City, to demonstrate with architecture the political power once held. For both embattled camps,

> the truth is that the two Reformations, which believed themselves - and gladly - to be in opposition, and whose similarities we are only now beginning to appreciate, drew on a common past. This past was certainly one of troubles and "abuses" of every conceivable kind, but there were not wanting attempts to renew Christian piety by making it more personal for the élite and more alive for the people.[46]

The Catholic Counter-Reformation failed to restore church unity, and the use of force became replaced by

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[45] James W. Moore: Religion and Politics: The Skeptical Perspective of David Hume; lecture at Liberal Arts College, Concordia University, February 26th, 1981.

[46] Jean Delumeau: Catholicism between Luther and Voltaire; a new view of the Counter-Reformation; transl. by Jeremy Moiser; Burns & Oates, Westminster Press, London, 1977, p. 1.

intensive negotiations. In Germany, in the second half of the seventeenth century, peace became endangered by intensified confessional disputes. Pufendorf, already in Sweden, became involved as an advisor to the crown in theological and confessional problems, developed a real concern with a renewed Catholic encroachment on the one hand, and the spread of atheism on the other hand. In the period in which Pufendorf was busy writing the biography of the Elector of Brandenburg, he made an extra effort (since 1690) to write the Jus feciale, so that posterity, the Nachwelt, may know that he did not concern himself exclusively with worldly intrigues, which disgusted him as the highest vanity among men.[47]

As stated above, the duties which were made known by divine revelation require, not the faculty of reason, but God's gift of faith, and therefore apply only to the faithful; hence the notion of the "elect" ones in the Reformed Church. The duties made known by God to man through his natural faculties are of natural religion, which applies universally to all mankind, whereby natural religion serves as a social bond.

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[47] Detlef Döring, "Samuel von Pufendorfs Stellung zur Reunion der Konfessionen in der Kritik von G. W. Leibniz", paper given at the fifth international Leibniz Congress, Hannover, 14-15 Nov. 1988, reprinted in Leibniz, Tradition und Aktualität, pp. 197-204.

Natural religion is universal, but it pertains to this life only; it is the religion of socialitas, whereby Pufendorf almost identified natural religion with civil authority. The sovereignty of God is revealed through the word of God and concerns the spiritual common good, the greater glory of God and the salvation of God's children, which is the spiritual domain of the church. The sovereignty of God in the nature of things bestows His authority on earth to the civil authority, thus "civil authority is from God, insofar as sociability and natural law derived from God." Clearly, therefore, all this talk about spiritual goals being pursued by temporal rulers is as foreign as anything can be to the thought of Samuel Pufendorf.[48]

However, on closer look, transcendental religion, which is meant not to apply to the "human forum", does have an indirect, incidental, impact on social life and civil authority: the generation of the concept of the "fear of God", which becomes especially apparent in the application of an oath. To tell the truth, and nothing but the truth "so help me God", may mean the ability of fallen man to be moral and to tell the truth, i. e. dependent upon divine help or grace; but it also indicates the consequences, which is to call down upon the liar the divine punishment: damnation. With the appeal to the divinity an oath is distinguished from

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[48] Rev. Bissonnette., p.23.

a simple promise. But an oath is also a registered promise in a court of the civil magistrate, and a dictate of natural law as well, which gives the power to the magistrate to punish on earth the perpetrator of both, having betrayed God and betrayed society. The churchman may get God's forgiveness, but not for the debt to be paid to society. The churchman may also call upon God's damnation for heterodox or blasphemous expressions, but may not apply the death sentence or any temporal punishment which is under the jurisdiction of civil authority.

Where, then, lies the Kongruenz der Zwecke von Kirche und Staat, the congruence of the purpose of both church and state:

> in Pufendorf the sovereign has the patriotic duty to care for the religion of the citizen. Who undermines religion must be punished by the state. The church is for the sovereign an institution of moral discipline, an Institute der Sittenzucht, this is the interest congruity, the Interessen Kongruenz, between State and Church.[49]

Protestantism - after having proclaimed the right to freedom of religion from Papal authority - called on the state for the protection of the Protestant Church. This claim is based on the tradition in the Old Testament, in which the state of Israel had the duty to defend the true religion and could not stay aloof in matters of moral

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[49] Horst Denzer, Moralphilosophie, p. 213.

education and could not tolerate the subversive effects of idolatry and wrong teachings, the Abgötterei und Irrlehre. The Protestant concept of the sovereign state gave courage to the German princes to mold the people of the realm into a Protestant Volk with a Protestant cultural identity. On the other hand, the Anabaptists failed to succeed in Germany, for being considered subversive: yet, in the Netherlands they have contributed considerably to tolerance, which remained for a long time unique to the Provinces. The Dutch model of the state praxis of religious tolerance, which inspired John Locke, did not succeed in Germany.

D. The Question of Toleration.

Lezius in his analysis of the Toleranzbegriff, identified the difference between Pufendorf and John Locke in their concept of religion. According to Lezius, Pufendorf viewed religion as a personal matter, subjective and independent of the church concept.[50] Lezius's view is contrary to our finding that Pufendorf believed in a moral theology which found its expression in piety and morality. For Pufendorf, the connection between church and state was in the outward expression, i.e. the action within the "human forum"; whereas the inward conscience is only subject to man's relation with God, is within the "divine forum", and, as such, lies within the realm of religion, in Pufendorf's view a "private matter". For Locke, religion was a communion of people, a church. To be tolerant of religion, any religion, is to be tolerant towards a church or any sect. A

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[50] Friedrich Lezius, Der Toleranzbegriff Lockes und Pufendorfs, Aalen, Scientia Verlag, 1971. First published, Leipzig 1900; new edition edited by von N. Bonwetsch and R. Seeberg in Studien zur Geschichte der Theologie und der Kirche, 10 volumes, 31 parts; Friedrich Lezius' essay with the subtitle Ein Beitrag zur Geschichte der Gewissensfreiheit (freedom of conscience), Volume VI, Part 1, Scientia Verlag, Aalen, 1971, p.58.

We follow here Lezius's line of thinking, which is shared by many, including Denzer, viz., that Pufendorf proposed faith to be a private matter, even though this is not true. The foundation of religion in Pufendorf is "fear of God" in man as an essential ingredient for man to be sociable. This, psychologically, is very close to Hobbes's "fear of man" which forces man to seek peace in the social contract. For sociability to work, fear seems to be an important motive.

church is a religious service congregation, a voluntary, freely chosen association. Nobody is a member by birth, not by nature, but by the free will to join one becomes a member. If members are not satisfied with the church, they shall have the right to leave. The Lockean Church - like any commercial enterprise or recreational club - requires by-laws and member's discipline to comply with those laws. No church depends on apostolic succession, the congregation is the law-maker; this is in opposition to Papal authority, and also anti-Episcopalian.

According to Lezius, Locke's error in toleration comes with the congregation right of expulsion of individuals; the excommunication of members who do not obey the laws of the church. It is argued by Lezius that excommunication in the early primitive church was not a punishment of the transgressor, but expulsion of corrupt members was a need of self-preservation of a besieged community in the middle of a pagan crude and immoral society. In the modern church, tolerance is the acceptance of heterogeneous elements, without expulsion. Lessing would consider Locke's spiritual authority of the church intolerant if applied and executed for the singling out of heretics.(51) It was Christian Thomasius who got the essence of tolerance right, when he declared heterodoxy an error of the mind for

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51 Lezius, p.10.

which no one should be prosecuted, because to err in one's mind is no offence. Locke reasoned, a church which permits people within it who persistently disobey its laws, will disintegrate. Excommunication, however, should not diminish the civil right of the citizen.[52] From Locke's writing we can clearly deduce that his concern for tolerance was not between church and man, but between church and state. Locke called for the tolerance of sects who want to separate and form their own congregation regardless of being right or wrong. Without secular authority or power, these churches fight for the truth words and thus remain in spiritual discourse only. The primitive church at the beginning, in the Urzeit, was persecuted, as were the dissenting churches of Locke's time, even though the secular power had no right, as per the New Testament, to persecute Christians. Latitudinarianism was an attempt to comprehend differences in religious beliefs within an established church whose doctrines were simple, few and allembracing. Locke supported the Latitudinarianism of Archbishop Tillotson which would have permitted Christians like himself a place in the church. But his own theory of toleration pointed in a different direction, to the toleration of a variety of churches.

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[52] Lockii epistola de tolerantia, (1689), with references made to the edition in ten volumes of The Works of John Locke, Vol. VI, London, 1823. Lezius p.11 (VI, 16 fin.).

In our view, the tolerance which Locke demanded from the state amounted to an abdication of the state's duty; and according to Pufendorf, who saw in the church a civilized, culture creating, institution; and which is responsible for education and moral upbringing of the citizens of the state.

In England, Locke was the advocate of freedom of church-communities from the interference of the State Church. In Germany, Pufendorf was the advocate of freedom of the State Church from the Roman Catholic Church domination: but he was also for the strengthening of the sovereignty of the state in order to fight off tendencies towards religious [and moral] anarchy.

Under the influence of the Revocation of the Edict of Nantes by Louis XIV (1685), Pufendorf expressed, in several statements, his concerns over the right relationship between the secular state and the church. His concept was based on moral theology and the contrat social. Pufendorf emphasized the following five points:

First. The formation of the state was not a religious act. Religion was the domain of the master of the household. The Contrat social, the Gesellschaftsvertrag, did

not include the transfer of religious authority with the transfer of power to the sovereign of the state.

Second. The freedom of religion is retained by the head of the household which is weighted against the hierarchical structure superimposed on the natural order by the Roman Catholic Church.

Third. Coercion in matters of faith, called Glaubenszwang, is contrary to natural law. Coercion is a transgression of power by the sovereign. However, it is a human duty to be religious. But worship is something individualistic. Any coercion applied to religious worship does not penetrate to the individuals "inner" relation with God: all that can be achieved are hypocrites. It is a human right to resist religious coercion, when it is contrary to the individual's conscience.

Forth. Natural religion, Religiosität, may be translated as religiosity, is the foundation of the order of the state. Natural religion is the strongest bond between the sovereign and his subjects. The citizen's loyalty is based on their faith in God: oath and contracts depend on the common belief. The state's authority would disintegrate without religion. Therefore, it is of interest to the state

to protect and further natural religion and belief in God on the part of its citizens.

Fifth. It is the duty of the sovereign to see to it that citizens observe natural religion, and he has the right to punish those who undermine religion through open atheism, demonism, idolatry, or pacts with the devil.

For Locke, religion is totally a communal matter, the sovereign has only the right to make propaganda for the faith of his choice.

In concurrence with Lezius we emphasize that Pufendorf is a state-church advocate with state control to maintain the code of ethics and moral standards. Contrary to that position, Locke is a free church advocate with community life free from state intervention. While Pufendorf feared the danger of the Roman Catholic Church upon the sovereignty of the German principalities, Locke had no fear of a Roman Catholic Church intervention - that battle had been won in England. But Locke's concern was with the Anglican State Church which should not become a power as the Roman Catholic Church had been in England and still was on the Continent. Locke had no worries about the weakness of the state, but worried about the spiritual freedom of the separate communities. Pufendorf worried about the security of the

monarchy and was promoting the state-church, die Landeskirche, which should act in support of the interest of the sovereignty of the state. He had no use for any free-church ideas.[53]

For both Locke and Pufendorf, the church was a collegium, a democratic assembly. According to Locke, men had the right to form a free church which had to be accepted by the state, regardless of the sovereign being a Pagan or a Christian. Pufendorf, on the other hand, deplored the toleration of free churches; he saw in the concept of free-for-all churches an abdication of the duty of the secular authority.[54]

As associations, being a collegia, these ancient communities, called ecclesia, obtained the natural right of taking collections to finance its ministers and buildings

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[53] Ibid., pp. 58-60. Lezius criticised Treitschke for stating that Locke's prime concern was the personal freedom of conscience. Lezius thought the primary aim of Locke was to achieve full freedom of community formation in the form of the free Church. But, of course, this involved the free choice and the freedom of conscience of individuals. (Treitschke: Historische und politische Aufsätze, Leipzig, 1897, Bd.IV, S. 283).

[54] Ibid., p.69.

with these contributions; the right to collect taxes of course remained with the state.[55]

Associations and churches had the right to set by-laws which must be obeyed by their members. Those who transgress may be punished but not with the force of a state authority.[56] The strict church discipline of the ancient Christian church, according to Pufendorf, was due to the corrupt state of the Pagan people. These Christians did not

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[55] Pufendorf, De habitu religionis, § 39, pp.105-106: The Church, like all other Colledges, have power to collect Stipends for their Ministers, and to make Collections for the Use of the Poor; but in a different degree from that which belongs to Civil Magistrates or Sovereigns, who levy Taxes, and have the Power to force their Subjects to a compliance with their Commands; But, in the Church this Power is found upon the meer Liberality and free Consent of all the Believers in general... It properly belongs to all Colledges as well as Churches, to have a Power to make, with joint Consent of their Members, such Statutes, as may conduce towards the obtaining the Ends of their Society, provided they do not interfere with the legal Right of their Sovereign.

[56] Ibid., pp.109-110: ...some Statutes were, at the very beginning, introduced into the Primitive Church, which were thought most convenient to correct all manners of Licentiousness,... It is worth our Observation, that the Punishment inflicted by vertue of these Statutes, were of such a nature, as might be put in execution without the least prejudice of the Civil Government; such were private Admonitions, publick Reprimands, and Church Penants, the extreme Remedy was Excommunication, by vertue of which, a Member of the Church was either for a time deprived from enjoying the benefit of the Publick Worship, or entirely excluded from being a Member of the Church. This being the utmost unto which any Colledge can pretend, viz. entirely to exclude a Member of their Society. This Exclusion, tho' in it felt considered of the greatest moment, (since thereby a Christian was deprived of the whole Communion with the Church) Nevertheless did not alter the Civil State or Condition of a Subject.

sit down to dinner, as Pufendorf put it, with "unclean" pagan adulterers, drunkards and idolaters. The church regimentation was not initiated for the self-preservation of the church but as a means for the moral education and raising of the standard of decency; but such censura morum could only be maintained by poenae de habitu religionis.[57]

Lutherans, and Pufendorf in particular, make a point to emphazise the role of the ancient Christian church which had assumed the task neglected by the Pagan state, of educating the people in morality, which should have been the state's duty according to natural religion. On the one hand, Pufendorf acknowledged with satisfaction that the ancient church had little state interference nor a Papal regimentation; on the other hand, he deplored that there was no imperial decree which would have secured the position of the ancient church prior to Constantine I (c.280-337), which, in Pufendorf's mind, had devastating consequences: the development of a rival sovereignty, the Papal authority beside the natural authority of secular rulers.

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[57] De habitu religionis, § 39, p.107: ...because many Vices were at the time of the first publishing of the Gospel in vogue among the Heathens, which were not punishable by the Pagan Laws, they being more encouraged to the observance of Moral Duty by the prospect of Honours than by any civil Commands; And, the Christians believing it more peculiar belonging to themselves to recommend and adorn their Profession by a holy Life, and, by an innocent Conversation, to excell the Heathens.

Pufendorf differentiated between the ministerium ecclesiae, which is the domain of the church concerning education, preaching and administering of sacraments, and the external direction, which Pufendorf considered the duty of the secular authority. It was due to the neglect of the (Pagan) Roman Emperors before Constantine, that the ancient church had to direct its secular affairs, which led to the spreading of the Catholic Hierarchy, as a state within a state: a duo status in una civitate considered absurd by Pufendorf, an anomaly, comparable with the painful experience of the later Catholic Church, in its dealings with the, at times unruly, order of Jesuits.

The separation between church and state for Pufendorf takes place in the "internal" affairs of the church based on Christ's teachings. Christ did not challenge the secular authority of Pagan sovereigns. He was concerned exclusively with the preparation of the people for the kingdom of God: the "Heavenly City." The convergence, where the interest of church and state meet, is in the obedience and the morality of the citizen; both are strengthened by the Christian religion, but both may be weakened by separate sects. And, contrary to this convergence endangering peace and civic order, are those religious quarrels within one, or between several churches and sects, which may give cause to

civil disobedience and unlawful acts between the fighting parties.[58]

Where tolerance meets intolerance is in the effectiveness of the church to morally influence the people to be good citizens, or when the teachings or sermons from the pulpit may displease the sovereign [when his conduct in office is wanting], or when the clergy is groping for more influence and power over the people, thus potentially undermining the civil authority. Pufendorf had little concern over the princes who may abuse their power, he was far more suspicious of the clerics and the government's

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[58] Jus feciale, § 4: Toleration is of the Nature of a Truce in War, which suspends the Effects of it, and the actual Hostilities, while the State and Cause of the War do remain...

And such Toleration seems to be the readiest Remedy to Cure the Evils, which are wont to proceed from Diversities of Religion, since it is so difficult a Matter for Men to be brought to lay aside inveterate Opinion, and to Unite in a full Reconciliation...

But this Toleration is Twofold, one is what may be call'd Political, the other Ecclesiastical.

§ 5: This Toleration is either Universal or Limited. The Universal one is when all of every Sort have equal Liberty for the publick Exercise of their Religion, and there is no difference made upon the account of Religion, but everyone enjoys all the Rights and Privileges of a Subject in that State. The Limited one is when the greater Part of the Nation indulges to the lesser the Exercise of their Religion, limited by certain Laws...

But when we recommend a Toleration of those that differ in Religion, it must be understood that this is to be granted only where the tolerated Party has no Principles of Religion, which are contrary to the Peace and Safety of the State, nor such as are apt and tending in their own Nature to create Troubles and Commotions in the Commonwealth.

theocratic inspectors who may overstep their authority. Pufendorf denied that the prince obtains any more rights in the order of the church when he becomes a member of that church. But Pufendorf claimed that the prince as a Christian has accepted the duty with his power as the sovereign, to protect and promote Christianity and the church.[59]

However, Pufendorf did not consider it the duty of the prince - as a private person - to finance the affairs of the church, it is the duty of the state to provide for an adequate support - not too generous, but not too stingy - to take care of the appropriate decorum of the ministers and also provide for the adequate maintenance of church buildings and properties.

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[59] De habitu religionis, § 43: ...it is not to be supposed that Sovereigns, by becoming Christians, have aquir'd no peculiar Rights, or have not a more particular Duty laid upon them than before; There being certain Obligations,...that Sovereigns ought to be Defender of the Church...our Saviour has highly recommended Patience and Sufferings as peculiar Vertues belonging to Christians, Princes are nevertheless not debarr'd from their Right of Protecting the Christian Religion by all lawful means...

The next care which belongs to Christian Princes, is, to provide necessary Revenues for the exercise of the Christian Religion...

Princes ought therefore to look upon this as one main part of their Devotion, to settle certain and constant Salaries or Revenues upon the Ministers of the Church, as much as may be, at least sufficient for their Maintenance... Beside this, Princes ought not only to take care of Church-Buildings, but also to erect and maintain Schools, which being the Seminaries both of the Church and State.

Furthermore, the sovereign has the right to be informed about the proceedings of the church council because he has to be assured that nothing subversive might happen which could undermine his sovereignty. In the appointment of church officials, Pufendorf made a distinction between the ministers as servants of Christ, and the ministers of the church. In the ancient church that distinction did not exist, the appointments were made by the assembly of the faithful without interference by the Roman Emperors. However, with the prince's joining of the church, the sovereign participates in the right to vote for the church minister's appointment. Pufendorf had no doubt that the prince joined the church not only as a private Christian but also as the sovereign statesman, and as such he retains the status of the primus inter pares.

What prevents the prince, the sovereign of the state, from claiming the same sovereign power in the church over doctrine and rituals, is due to common sense and Staatsräson, for a secular prince does not have the expertise in theological matters, and it is therefore a moral duty of the sovereign not to interfere with internal church matters. Pufendorf was optimistic about the goodness of absolutism and did not consider misuse of power by the sovereign princes a problem, but had ample misgivings about the misuse of power

by the clerics and by the inspectors, the "religious Canaille".

Locke considered theological differences to be natural, and necessary that the secular authorities do not interfere. For Pufendorf disputes among jurists was considered useful, but theological disputes had to be suppressed, because they affected peace and tranquility of the citizens. Therefore, neutrality could not be the position of civil authority, it had to come down on the side considered to be the common good, that is, in the interest of the state. The sovereign is not only interested as membra ecclesiae but also as capita reipublicae, so that religious passions may not disturb the public peace.[60]

Locke left religious rites entirely to the church to decide. Pufendorf, on the contrary, considered external rites a concern of the state authority. The state is responsible for order and decency, and may insist on uniformity of religious rites among the churches. The unity of cult is the old orthodox viewpoint which Pufendorf supports, and Locke very much opposes. However, Pufendorf is no fanatic, and warned the princes of the danger of outright destroying strange cults without closer examination of possible merits. Pufendorf's formula of the state-church

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[60] Lezius, p.84.

relationship was really not conducive to freedom of religious expression. Pufendorf just did not believe in safeguarding the independence of religion. In his time - in the wake of the chaos left by the Thirty Year's War, his main concern was to legitimise and strengthen the sovereignty of the princes against the common enemy, the Empire under the Papal tutelage.[61]

Pufendorf's Protestantism came to the forefront in the jus reformandi, when the errors made by the Catholic clergy is not properly purged, the state is in his right - ex libertate naturali - to restore the purity of the church.[62]

It is Pufendorf's conviction, that the Reformers were no rebels, because the Empire of the Pope was morally without justification and the Protestants remained in the Catholic, i.e. the common church.[63] Catholic in this

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61 Ibid., p.88.

62 De habitu religionis, § 53, p. 146: ...We are of Opinion, that when any Abuses crept into the Church, which are prejudicial to the Commonwealth, or the Authority of Sovereigns, these, by vertue of their Sovereign Right and Prerogative, have a Power to abolish and reform all such matters as interfere with the Publick Good and Civil Authority.

63 Ibid., § 53, p. 148: ...it is evident that the Roman Church is not to be taken for the Universal Church; and that a Christian may be a Member of the true Catholick Church, in a right sense, notwithstanding that he never was in the Communion of the Roman Church, or, upon better Consideration, has freed himself from its Abuses and Errors. But the Popish Religion, considered as a particular Church, as it ought to

context means "according to Scriptures." This is the contention of Protestant ideology, that it inherited the legitimate church, while the Pope with his secularized hierarchical power-structure has essentially lost the spiritual church, the true Christ church; this seems to be the foundation to the Protestant claim which sees in the Pope the enemy of Christ, the Anti-Christ.

Locke excluded the Roman Catholic Church from his tolerance not for its dogmatic errors but for being an enemy of the state, in consequence, he approved of its persecution.

Pufendorf, on the other hand, proved to be less intolerant in this matter, because nowhere did he make it a duty of the German princes to suppress the Catholic Church. This, however, does not prove Pufendorf to be more tolerant, but he respected the basis of the German Evangelical defense against Romanism: that it is persecuted and calls for tolerance, therefore it is not inclined to become a persecutor. Pufendorf, in consequence of his concept of the sovereignty of the state, did emphasise that the state could not tolerate a church or sect which includes beside religious

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be, (tho', if we unravel the bottom of its modern Constitution, it will easily appear, that the whole frame of that Church is not so much adapted to the Rules of a Christian Congregation, as to Temporal State; where, under a Religious pretext, the chief aim is to extend its Sovereignty over the greatest part of Europe).

doctrines ideas or practices which infringe on the sovereignty of the state. And in Pufendorf's view, there was no church congregation which negated more the sovereignty of the state than the Roman Catholic Church. Did Pufendorf ever attempted an accommodation with Catholics? We may say yes, but have to say no when it comes to the acceptance of the Roman Catholic Church. Pufendorf had come a long way since his early position stated in Monzabano, where, on the one hand, he described the Catholic Hierarchy as the most exact monarchy, and, on the other hand, the Lutheran religion the best <u>for</u> a monarchy of any in the world.

Pufendorf lived in a Germany which was decimated by religious wars and fragmented into small and weak principalities, which was described as a <u>kleinstaatliche Misere</u>. We wish to submit the speculation in which Pufendorf would have been a citizen (like Locke) of a powerful state, united with national pride (like England), he would have come hard upon the Catholic Church as an intruder into the sovereignty of the state. But in Germany of his time, confessional peace became of urgent priority, for which Pufendorf declared himself, late in life, in his <u>jus feciale divinum</u>:

> I <u>believe</u> no one can doubt but it becomes all good Men to wish that this last Source of Calamities among Christians might be stopp'd up; and that every one is bound to contribute all that they have in their Power to do towards it, in as much as so

doing they would be then number'd among the Peacemakers, whom our Saviour pronounces Blessed... But if any Man thinks fit to bestow his Pains in this Design of reconciling Differences in Religion, he must, above all Things, take Care that he does nothing that may be prejudice the Truth: For 'tis better to retain a Saving Truth, even amidst Contentions and Contradictions, than to enjoy a profound Quiet by a Falsehood. (§ III., pp. 6-7).

And he called upon the good will of all men, for

yet we must not think it an Arbitrary thing, or what depends upon the Will of Man, that a Question be declar'd Problematic and Indifferent: But every thing must be tried to the Foundation, that it may manifestly appear whether it does necessarily belong to the Essence of the Faith or not. (§ VII., p. 19).

E. Moral Theology: The Divine Feudal Law.

We have to be reminded, once again, that Pufendorf's theology must be understood within the historical context of seventeenth-century Germany. Germany was not a traditionally cemented unit with Protestant tendencies such as England; on the contrary, Germany was an un-coordinated bundle of pastoral and secular territories. The emperor and the majority of the princes were Catholics, the Protestants an endangered party, who had to be very much concerned for its security. Any religious schism was to be considered a threat to the security of the state. While such religious differences could not derail the English constitutional monarchy, in Germany it could wipe out any one principality.

During Pufendorf's years in Heidelberg and Sweden, his theology was mainly concerned with the defence of his natural law concepts. But from his correspondence with Justus Christoph Schomer we can deduce that Pufendorf wrestled with plans to write a Theologia moralia as early as 1670. But then, the demands of his professorship in Lund, the debates following the publication of his major works, in which all other forms of law have a single source, and are comprehended only as derivatives of natural law. Thus, Pufendorf got embroiled not only with constitutional lawyers

but also with Protestant theologians.[64] His career brought further distractions as a royal historiographer and secretary of state of Sweden, and his last employment in the service of the Great Elector, Frederick William of Prussia. With his return to Germany, residing in Berlin, his growing familiarity with the Pietist movement, the inner development of a religious, conciliatory Pufendorf, marked a change in his writings, from natural law, to human history, Pufendorf sought to reconnect with theology and the morality of human existence.

The last work of Pufendorf was Jus feciale divinum sive de consensu et dissensu protestantium, which he left for post-humeous publication with his friend and confessor minister, Jacop Philipp Spener, who undertook this unchanged and without commentary. Its first rendering in English was undertaken by Theophilus Dorrington in his 1703 publication, entitled The Divine Feudal Law in which he translated Pufendorf's feciale as "feudal", a translation which Professor James Moore viewed as "certainly curious and misleading."[65]

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64 Pufendorf's defensive pieces against accusation of impiety and proposing constitutional anarchy, became later published as the Scandinavian Polemics, Eris Scandica, quae adversus de jure naturae et gentium objecta diluuntur, Frankford/M., 1686.

65 In Professor Moore's view, at the surface, there is nothing in Pufendorf's exposition of the covenants between God and man (the covenant of works, the covenant of grace,

etc.) which in any way reflected or recalled feudal law. It was not a relationship of lordship and vassalage which Pufendorf was expounding. He was concerned rather to provide an interpretation of domestic Christian theology which could accommodate differences among Protestants, at least among the principal Protestant Churches, which could adhere to orthodox Christian teaching on the dogmas of Trinity, the Incarnation, etc. This necessary was directed especially to Lutherans' variations from Calvinists, or the Reformed Churches. His explanation was agreeable to Church of England men, particularly those of Latitudinarian and ecumenical disposition; hence the translation by a Church of England rector.

Should jus feciale divinum be translated Divine Fecial Law? There was an English usage of the terms "fecial" and "fetial"; they were simply taken over from the Latin fetialis or feciatis: and these terms represented the Roman law of war and peace, and to the college of priests who performed the rites and ceremonies restating the declarations of war and conclusions of treaties of peace. The classical allusion to the priest's role in war and peace is certainly consistent with Pufendorf's perception that modern war and peace depends to a large extent on the ability or inability of ministers and priests to agree among themselves on the fundamental dogmas of the Christian religion. He thought that Protestants (or most Protestants at least) might reach agreements on these fundamental questions; agreements with Catholics, on the other hand, were likely to prove impossible.

Furtheremore, the better term, in English, to describe Pufendorf's project, is the term "federal"; on both theological and political grounds. The term federal refers to agreements, covenants, and treaties. And federal theology is the study of these covenants entered into by God with Adam (the covenant of works) and with Christ (the covenant of grace). This is perceived the subject of Pufendorf's book. The term federal has also of course a political meaning, referring to governments in which several states or provinces unite under one government while retaining independence in their internal affairs. Again, this seems consistent with Pufendorf's thinking on the subject of church government or ecclesiology.

Although Leonard Krieger names Pufendorf's Jus feciale divinum "The Divine Law of the Covenant" , I concure with James Moore's interpretation to which it is best translated into English as "Divine Federal Law." However, if

Leonard Krieger, in his book on Pufendorf made reference only to the original Latin text, Jus feciale, which he identified as Pufendorf's work on theology, which he called The Divine Law of the Covenant. The only reference Krieger made to the English translation is in the note No. 72 to page 29, in which he said: "The latter is usually known by the literal and misleading translation, Divine Feudal Law."[66] Otherwise he did not mention either the term "federal" or "feudal" in reference to Pufendorf's last work.

Horst Denzer, who limited his work on Pufendorf to Pufendorf's moral philosophy and natural law writings (1971), made no reference to Jus feciale, nor even mentioned the German word Föderaltheologie, which was extensively applied to Pufendorf's Jus feciale by Horst Rabe.

Horst Rabe had his doctoral thesis published with the title Naturrecht und Kirche bei Samuel von Pufendorf,

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so, two questions remain to be answered. First, why did the Rev. Theo Dorrington not translate feciale as "federal"? It appears that he was simply mistaken in this matter. Second, why did Pufendorf not employ the Latin term foederatio? He may have thought it would be confused with another Latin adjective foedus, which has a different meaning entirely: namely, foul, horrible, abominable. On this last point, some biographical evidence would be helpful, possibly a letter to Spener seeking to explain Pufendorf's choice of title.

For the time being, we propose that the appropriate English term should be "federal".

[66] Krieger, Discretion, p. 276.

Tübingen, 1958. In the Introduction, Professor Ernst Wolf stated: contrary to the opinions, that for Pufendorf the association character of the church was decisive, Rabe stated clearly, that Pufendorf's church concept was far more connected with the idea of a covenant of grace, the contractus feudalis, as a revealed reality.[67]

Rabe, throughout his work, uses the word Föderaltheologie in reference to Pufendorf's Jus feciale. But he states clearly:

> Pufendorf does not want to offer in this work [Jus feciale] a complete theological system in the stile of Gerhard, Quenstedt or Calov. He limits himself to the demonstration of so called Fundamentalartikeln, [fundamental articles].[68]

Such as stated by Pufendorf in his final work:

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[67] Pufendorf used the term contractus feudalis to indicate the unequal partnership between God and man, in contrast to a normal contract between men.

Jus feciale, § 54, p.171: BUT altho' the Covenant establish'd in Christ comes in the Place of the Primitive Covenant which was broken by the first Parents of Mankind; ...(p.176) Neither has this Covenant the Nature of a Contract of buying and selling, or of letting out and hiring, or of any unnam'd Contract, as when I give that you may'st do, or I do that thou may'st do, in which Case there is requir'd an Equality between the Things perform'd on both sides: But it has some Agreement with a Feudal Contract wherein one Party does out of Favour confer something upon the other; but what is perform'd on the other Part has not the Nature or Quality of Retribution, but only of Acknowledgement and of a Testimony and Proof of a grateful, faithful, and devoted, Mind, Rom.II:35. And that the rather, because the one side here might require the Performance of the other Party in this Covenant by meer Command.

[68] Horst Rabe, p.48.

> Since the Questions concerning the External Government of the Church do not touch the Foundation of the Faith, nor does it concern the Doctrine of the Covenant, whether a Man believes the Ministers of the Church to be equal among themselves, or Subordinate some to others: certainly it were not fitting to contend with so much Fervour about Episcopal, or Presbyterian Government.[69]

From this passage we may deduce, that the doctrina foederalis is clearly translated as the "Doctrine of the Covenant." And, as Rabe claims, that for Pufendorf, the articles which belong to the fundamentum fidei are only those which are necessary for salvation. Therefore, "the foundation of the faith" is only touched by those articles which belong to the doctrina foederalis: the whole of the fundamental articles essential for salvation - which are the core of Pufendorf's Föderaltheologie, i. e. federal theology.[70]

The Pufendorf doctrina foederalis is rather an unusual position for a Lutheran. Pufendorf herewith steps into a Reformed tradition and deliberately so. With a

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[69] Jus feciale, § 69: Denique cum quaestiones super externo Ecclesiae regimine fundamentum fidei non tangant ac ad doctrinam foederalem nil intersit, utrum quis credat, ministros Ecclesiae inter se aequales aut subordinatos esse: Sane haut par errat, tanto fervore super regimine Episcopali ait Presbyterali certari.

[70] Rabe, p.49.

theology formulated as a federal theology, Pufendorf intended to uproot the Calvinist doctrine of the absolute decret.[71]

Pufendorf started with the covenant in Paradise, but deliberately, he did not use the then usual terms for this covenant foedus operum or foedus naturae. This covenant is called Bundesschluß by Rabe, the contract between God and the first man Adam. This pactum had a double stipulatio, the duty of man to honour God and to love his fellow man, for which, reciprocally, God promised immortality and a continuation of the condition of Paradise.[72] God did not

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[71] Letter to Rechenberg, January 31, 1691: ...mein Skopus ist eigentlich den Calvinismum funditus zu heben, weil ich glaube, daß dieses eine invicta thesis ist: Si salus nostra est ex foedere, non est ex absoluto decreto.

Jus feciale, § 85, pp.328-330: ...neither does any thing appear in that Covenant, which may argue that certain Men are excluded from it by any Absolute Decree. Further, as the Covenant is Free, and made without any Respect to Merit on the Part of Man, so also God has yielded himself ready, and prone to give Power to embrace it all; for as much as without this that Covenant must have been still unprofitable to Men fallen into Misery. But yet that the Covenant might retain the true Nature of such a thing, and that neither the Salvation of Men, nor their Perdition should come to pass like the Operation of an Engine, or by the Laws of Natural Motion, there must be left to Man at least a Faculty of refusing this Covenant... And this is that which we suppose to be the most simple Order of the Divine Decrees about Salvation and Predestination of Men, and most agreeing with right Reason, and the sacred Writings.

[72] Jus feciale, § 24. pp. 99-100: But the Heads of that Covenant in the greatest part of them may be reduced to these Two Things; That there was reqir'd on Man's Part an Engagement to pay to God a Supream Reverence and Love, and that he would in general love his Neighbor: Tho' the former of these might result from the Contemplation of the Divine Benefits bestow'd on Man, the other from his social Nature. ...

have to make that promise, since the duties which oblige mankind are already laid down in the natural law. However, Gods promise, out of his Grace, is a special assistance for mankind not to fall e primaevo statu. This covenant of works is not deducible from natural law, or from a natural religion, and therefore is not discoverable with the mere human faculties of reason, but requires revelation.[73]

The first covenant was destroyed through the first man's Fall. With that, man broke the bond and lost Gods grace, but he did not free himself from his obligations towards God. The covenant duties of man where natural, already anchored in the lex naturalis, and therefore not reduced by the Fall, because they are perpetuae obligationis.[74]

Again, there was promised on the Part of God to Man, upon his observing the Laws of this Covenant, the Continuance of his present most happy State, and a Freedom from Death, or the Destruction of the Body, join'd with Pain, and also Eternal Life.

[73] Jus feciale, § 22, p.95: ...And therefore what we now know of God and his Attributes by natural Light, and of the Way in which it is fit we should acknowledge and worship him, was far more perfectly understood by the first Man: Yet the Things belonging to a Federal Religion, or covenanted Worship, or what is pleas'd God to add to natural Religion, 'this most certain Adam himself must have deriv'd the Knowledge of, not by the Light of Reason, but from Divine Revelation: Otherwise there had been no Place at all for false Reasonings of Satan, in order to seduce him from his Duty.

[74] Jus feciale., § 25, pp. 103-104: But tho' by Man's Violation of that Covenant it was thus far broken, that he

But what was being reduced was man's ability to fulfill his natural law obligations. With the Fall, man inherited a natura currupta, a loss of his perfection of his rectitudo and his will. With that, man also lost his ability to fulfill the lex naturalis, for which he did not lose his common sense, but its perfection. Man and his works under the fallen condition displeased God, and caused Gods rightful wrath. Within orthodox tradition, Pufendorf continued to argue, that God is not only just but also charitable. To temper his righteousness, God offered sinful man a hand in a second covenant. This covenant was already pronounced to Adam, and, so that the knowledge of this may not get lost, God made some special covenants with Noah, Abraham and his family, and lastly with the whole house of Israel.[75]

But the original covenant became renewed in full

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forfeited all those Benefits which otherwise he might have expected from it, and fell under the Evils and Inconveniences which are contrary to them; yet was not Man discharg'd from all Obligation to Almighty God, but still he remained bound to observe exactly the Natural Law of God; forasmuch as the Obligation of this Law folow'd from the natural Condition of Man, and from the Right of Dominion over him, which God had by creating him. Which Obligation, tho' God might have requir'd him to have answere'd without the Promise of a Reward to it, and with the Threatening of a Punishment if he neglect to do it, yet he was pleas'd to insert it as a Condition in the first Covenant, and that it should be reckon'd a Worship of him, and be followed with a Reward.

[75] Jus feciale., §§ 31 & 32, pp. 120-123.

force with the arrival of Christ, and the special covenants with Abraham and Moses became obsolete.[76]

The covenant with Christ, the redeemer, was of such necessity because of the severity of mans fall, that it only could be accomplished with God's Son.[77] With this chain of events, Pufendorf developed his foundation of the Trinity and Christology as a prerequisite for the second covenant. Both are for Pufendorf of utmost importance, without these, nothing will remain in Christian religion but an accurata quadam Philosophia moralis. This would be for mankind something very useful, but would cause the foundation of the Christian religion to collapse:

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[76] Ibid., § 35, pp. 127-128: And when at length they would set no Bounds, or put an End, to their Idolatry, he suffer'd them to be carried captive to Babylon, and to be detain'd so for many Years, that so at length their Inclination to strange Religions might be cured. And the Jews were so corrected by that Chastisement, that we never read of their falling again into Idolatry after their return from Captivity to the promised Land. Afterwards that Covenant being fulfill'd or compleated by the coming of the Messiahs, died of it self.

[77] Jus feciale, § 37, p. 129: But the Covenant, as we have intimated above, consists of a double agreement; the one of God the Father with the Son, the other of the Son, as Mediator, and Saviour with Men. By the former Agreement the Son interpos'd himself, as Mediator for Mankind, and substituted himself by the Father's Consent into the Place and Person of Mankind, to satisfie the Divine Justice for their Guilt contracted by the Fall, and all the sins which spring from thence, and to extricate that, and procure to us the Favour of God, a Righteousness approv'd by him, and eternal Salvation. Also he undertook to establish this Benefit to Mankind, and to join them to himself by a particular Bond, who would embrace it; and that he would exercise a Dominion over them to the end of the World.

> Because in this Article of Three Persons in One Divine Essence lyes the Foundation of Genuine Christian Religion; which being taken away this falls to the Ground, and nothing will remain, but somewhat of an exact, moral, Philosophy.[78]

The Offer of God's grace is not restricted to a certain nation, such as the covenant with Moses, but is extended to the whole of mankind; but with a stipulation:

> For here we must observe, that in this Covenant Mankind were not consider'd as a Society so gather'd and join'd, as that there could be no proceeding in it but by the consent of them all, or of the greatest Part, or so as that the Whole were to be reckon'd to stand for One, or One to stand for all the Rest: But they are considere'd as particulars, who have every one of them right by himself, and without any respect to others, or what they do to enter into this Covenant.[79]

When God with the Redeemer offered the covenant of grace, this constituted an obligation of man to accept that offer. However, man retained the power to reject that offer of the foedus gratiae. God could have forced man to accept the covenant of grace and the ensuing salvation; however, He did not want to liquidate the free will and the morality of

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[78] Jus feciale, § 52: In hoc quippe articulo de tribus personis in una divina essentia residet fundamentum religionis christianae, quo subruto et haec collabitur et nihil remanet nisi accurata quaedam philosophia moralis.

[79] Jus feciale, § 27: in isthoc pacto genus humanum non considerari tenquam societatem aliquam... sed homines heic considerantur ut singuli, quorum quilibet integrum sit, pro se citra respectum ad alios id foedus suscipere.

man, and therefore man retained the facultas rejiciendi.[80] Only through this retention of the human faculties to make choices and to act willfully, does the covenant of grace become a pactum, a duarum voluntatum unio. Therefore, the Calvin doctrine of the absolute decret is absolute incompatible with the idea of the foedus gratiae.

With the covenant of grace, God gave man a new light of reason, and a new righteousness of his will. Man received a Regeneration, a renewed impetus towards God, the bondage of sinfulness was destroyed with the works of Christ. Man became born again.

> And this new Man is call'd the inner Man, as having its Seat in the very Soul; ...But this must be observed concerning Regeneration strictly taken: That this, is also Justification, is done, as it were, in an instant, and is not done Day after Day, ...If any Man calls himself a Christian, and yet is govern'd by another Impulse and Guidance than that of his Carnal Concupiscence, or his natural Reason, such as is found in Heathens, and has for the Scope and Aim of his Actions nothing but what is pleasant, or profitable, or becoming in the Sight of the World, such an one either never was

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[80] Jus feciale, § 51: Ea fides conditio foederis dicitur, ...quia foedus as divina beneficia per eandum acceptantur, cum invites et reluctantibus ista impingere nolit Deus, neque id citra axtinctionem moralitatis fieri possit. p.160: That Faith is call'd the Condition of the Covenant, ...because the Covenant and the Divine Benefits are thereby embraced, inasmuch as it is not the Pleasure of God to impose these upon those who are reluctant and unwilling to receive them: Neither can this be done without the utter Destruction of Morality.

regenerated, or is fallen from his Regeneration again.[81]

However, even if man does not reach fulfillment in this life, he still may please God for the sake of Christ. In baptism, man became a part of the corpus Christi mysticum, through which he achieved the jus civitatis christianae, and became a member of the kingdom of Christ. And in this world, the Regnum Christi is nothing else than the church.[82]

Had Pufendorf held out his hand to the non-believers, Atheists and Socinians or Unitarians, but with a condition? While professing that God speaks to all of mankind, providing everyone with the faculty of faith, Pufendorf returns to the necessity of the covenant of grace, i. e. the coming of Christ as Redeemer, and the participation in Christ's body - the church. With that, the theology of fundamental articles of faith, is made specific into a theology of "The Divine Law of the Covenant," irretrievably linked to the corpus Christy, limiting it to Christians-losing universality.

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[81] Jus feciale, § 53, pp. 168, 171.

[82] Jus feciale, § 52: ...Ex parte Dei per baptismum confertur jus civitatis Christianae, seu ut quis de beneficiis per Christum adquisitis, participet;
Ibid., § 59: Universitas eorum, qui huic foederi accedunt, Regnum Christi constituunt... Huius regni, quod et Ecclesiae nomine venit, qui genuinus civis est, onmium a Christo partorum beneficiorum est particeps.

Not necessarily. For Pufendorf, the constitutional significance of the church is its theological contract, the contractus feudalis, in which the church is treated as an impersonal, objectivised individuum. It is Pufendorf's natural law concept, where the human anthropology, as a dictate of man's naturalis libertas, requires a willful consent by man to engage into a divine covenant. As such, man brings his natural faculties of free will and moral self-determination undiminished into the covenant of grace, and also into the church. The theology of such covenants is a federal theology. The theology of mankind prior to and not privy to Revelation is a fundamental theology, defining natural religion, or theologia moralis.

We may now turn to the most recent examination of Pufendorf's theology by Detlef Döring, who called Pufendorf's Jus feciale a Fundamentaltheologie, which puts the emphasis on the chain of fundamental articles of faith, which are the specifics of the divine covenants.[83] In Döring's view, Pufendorf engaged himself in the development of a new structured, updated theology. His tools for that undertaking are defined:

1. Exclusive source: The Bible;
2. Examined by a good common sense;

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[83] Pufendorf-Studien, p.64.

3. With the aid of cartesian method;

4. Exclusion of Aristotelian Scholastic;

5. Limited to fundamental articles of Faith.

With these guidelines, Pufendorf wanted to disarm the vexing orthodox theological disputes, and give more space to a fundamental moral theology. In a letter to Adam Rechenberg, on June 9, 1688, Pufendorf requested some Bible commentaries by Sebastian Schmidt, and few days later, he wrote to Christian Thomasius, that if only the Alberini's [the Leipzig theologians] would leave Pufendorf in peace, he would dedicate his work to a reasonable divine service, which would contradict the atheists as well as the quarreling Protestants.[84] Döring disputes the assumption that Pufendorf wrote the Jus feciale to alleviate the suspicion of anti-religious tendencies and to regain the favours of the Lutheran theologians, an opinion which seem, to have originated with Jean Le Clerc, and to have been perpetuated by Bruckner, and Buddeus. Döring deplores that Pufendorf's theological works are to be viewed as being written in a

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[84] Pufendorf-Studien, p.77, quoting Pufendorf an Thomasius, June 19, 1688 (Forschungsbibliothek Gotha, Chart. B 670, Bl. 70v, Varrentrapp No.9): Wenn mich die Alberini ungevexieret wolten laßen, hette ich vor horas subcisivas auf eine meditation zulegen, von dem vernünftigen Gottes-Dienst der Christen, der so wohl wider die atheisterey gienge, als wider das unnütze gezäncke der protestierenden unter einander, damit der welt weisen könte, das ich so viel sorge gehabt pro vera pietate, als die schwartzmäntel.

climate of extensive multifactual debates within the Protestant confessions.[85]

To put some light on the Pufendorf studies, Döring draws attention to a list of the books in Pufendorf's library concerning theology. Although, the catalogue was issued for the auction of Pufendorf's library, it does contain an indication of Pufendorf's source material of approx. 200 volumes in theology including church history. The concentration of theological source books consisted of:

1. The Bible, represented with 16 complete volumes or section thereof;
2. Bible Exegeses: Gronovius, Hottinger, S. Schmidt, J. Buxdorf, Th. Kackspan, M. Geier, Leusdenius, A. Hulsius, Chr. Viweg, E. Leigh, E. Tersa;
3. Church History of the sixteenth and seventeenth century: Blondel, Beza, F. Spanheim, Casaubonus, Grotius, Jurieu, Burnet, Claude;
4. Catholic Controversy: beside numerous strong critics, the library contained several Catholic publications touching confessional questions. Bossuet, Huet, Molina, Bellarmin, Steno;

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[85] Ibid., p.199, note 230.

5. Pietism: a strong representation of Pietist publications, A.H. Franke (3 titles), Spener (10 titles).

Considering the 200 volumes, there is very little on patristic (Ambrosius, Lactanz, Chrysostemos, Athanagoras, Epiphanius, Symachus, and Photius from the Byzantine age). The medieval theology is totally absent, except for a pseudo-Albertus Magnus. Very little is from the Renaissance. Luther is represented only with De servo arbitrio, besides a Swedish Cathecism. Calvin's Institutiones and the Harmonia Evangelistarum were in Pufendorf's library. Of the Lutheran Orthodoxy the big guns are missing, however, there were Pufendorf's Leipzig professor Johannes Hülsemann (4 titles), Strasbourg theologian Dannhauer (2 volumes), and Pufendorf's opponent, Valentin Alberti (2 titles). There is also an indication of Pufendorf's interest in atheism: Theophil Spitzel, Scrutinum Atheismi, and A. Pfeiffer's Lectiones Anti-Atheisticae. The best indication of Pufendorf's interest in a fundamental theology is the presence of the Helmstädter theologian Georg Calixt's six volumes.[37]

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[37] Döring: Pufendorf-Studien, p. 73.; Privatbibliothek, p. 110. Dörner claims, that Pufendorf distanced himself from the Georg Calixt professed Syncretism, and rejected the unification proposal based on teachings of the early Christian church.

We may infer that the preponderance of Bible issues, were of great importance to Pufendorf's Jus feciale, in which he quoted extensively from the Bible without ever mentioning representatives of the Lutheran Orthodoxy, barely mentioned the Sozinians or similar sects, and sharply criticised Roman Catholicism. Pufendorf's departure from the field of natural law, and his excursion into the field of theology, seem to have caused mixed reactions. It seems that Spener, Seckendorf, and also Christian Thomasius, did not really know what to do with Pufendorf's early federal theological outline. Also we may deduce from the sparsely remaining correspondence, that Pufendorf had dedicated himself to write the Jus feciale without further mentioning it to anyone.

In my view, Pufendorf may have excluded theology from his natural law writings, and religion and his Lutheran faith treated as private matter at times. But once he committed himself to express his views on faith and moral theology, he definitely was no Indifferentist; he said, he who fought for the truth cannot see in all religions the same, because it would mean to honour none. For the unification of churches, he proposed a middle road: agree on the very basic articles of faith, which can be reasonably obtained from Scriptures, and what is not reasonably clear let remain a theological problematic. However, the decision

over this division shall not be left to the theologians, but made by people of the other two factions concerned with religion, honorable and pious presbyters and state inspectors.

The unification of Catholics and Protestants, however, could only be possible if one would give up the essence of their worship. The Papists, who essentially worship in ceremonies only would crush the pure church (i.e. the spiritual Protestants) in a true unity.[87]

Socinians, Anabaptists etc. were considered by Pufendorf incompatible with the Lutheran Church.[88] For Pufendorf, the Socinians turn the Christian religion into a nice philosophiam moralem which was naturally very popular.[89] From other sources[90] we know that Pufendorf

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[87] Pufendorf-Studien, § 11,12 & 13.

[88] History of Popedom, § 41.

[89] Jus feliciale, § 14: But among those whom merely difference in Principles does divide, without the Intervention of any Emolument, some dissent in the whole System of their Divinity, and notoriously deny even Fundamental Articles of the Faith. Others again dissent in some Points of Faith, but so that the Divinity of both may be deducted from the same Principles, and brought into one and the same System; to the former Rank we refer the Socinians, and those who come nearest to them : And the most of the Tribes of Anabaptists, the Quakers, and those that deserve the Name of Phanaticks.

with his natural law writings and emphasis on natural religion, drew the accusation of Socinianism. Pufendorf's mild mannered rebuff of Socinianism was limited to their interpretation of the divinity of Christ, this controversy Pufendorf did not enter but left to Spener for clarification.[91]

In Pufendorf's mind, the Quakers and other "fanatics", deny or twist these articles which are considered by the Protestants the most noble ones. Their Systema theologiae is totally different from the Protestant system, and they retain only what is known through natural reason, or what belongs to the rules of life.

To unite all sects, an agreement based on the Apostolicum would not suffice for the establishment of religious peace. In a concordance formula for all sects very little of Christian religion would remain.[92]

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[90] Siglinde C. Othmer: Berlin und die Verbreitung des Naturrechts in Europa, Kultur- und sozialgeschichtliche Studien zu Jean Barbeyracs Pufendorf-Uebersetzungen und eine Analyse seiner Leserschaft; Berlin, 1970.

[91] Johannes Wallmann: Pietismus und Sozinianismus, zu Philipp Jakob Speners Antisozinianischen Schriften; Warsaw, 1983.

[92] Jus feciale, § 14, p. 78: For if a Form of Concord or Agreement should be compos'd so loosely, as that it might please every one of the Sects mention'd it would produce a Divinity very jejune and maim'd, and which would retain little of true and solid Christianity, all Things being plainly thrown out of it which do contain in them any thing

There seemed to be a better chance for unification between the Lutherans and Calvinists. It was Pufendorf's contention that the two churches could be united if the two systems could single out the basic accord, and not maintain a difference in all details.

Assessing Pufendorf's treatment, we are left with the Question whether there realy are fundamental articles of faith in accordance with both churches? Pufendorf thought there were, although he knew that the Lutherans would deny it, while the Reformed would affirm it.[93] Pufendorf saw the main difference between Lutherans and Calvinists in the Reformed doctrine of predestination. The absolutum decretum of the Reformed is incompatible with a true Systema theologicae, and it is impossible for the Lutherans to make this concession to the Calvinists, because it would turn the disciplina moralis into a disciplina physica.[94]

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of Mystery.

[93] Ibid., § 16, p. 82: Upon which the Decision of that grand Question seems to depend, namely, whether they agree in the Foundation of the Faith, or in the fundamental Articles or not. Which hitherto the most of the Lutherans have denied, and on the contrary the Reform'd have affirmed.

[94] Jus feciale, §§ 63,64,67: ...it must be known, that they derived their Origin from the Disputations of Augustine against the Pelagians. For when the Pelagians would needs attribute more than was just to the Powers of Human Nature, and of the Free-will in Men: He, as is wont to happen in the Heat of Dispute, and from the Desire of Victory, inclin'd to another Extream; and that he might the more depress the

We are also left with the dispute concerning Transubstantiation. Pufendorf approached this problematic in a natural law manner which reflected his views on the question of the presence or non-presence of Christ in the Lord's supper which amounted to a superfluous inquisitiveness, since it was sufficient to be in agreement about the substance, the endresult, and the ritual of the sacrament. However, as a good Lutheran, Pufendorf emphasised the substance of the sacrament to derive from Christ and not from the recipient. Man does not receive what he imagines, but what is presented to him; that applies to all meals, therefore it also applies to the Lord's supper. Reformed or Lutherans, both receive the same substance, even if the persuasion of the recipient of the fruit of the sacrament is not immaterial. Pufendorf suggested that both churches should admit that the question of transubstantiation exceeds the limits of human understanding, whereby peace becomes a possibility.[95]

Powers of Human Nature, and extenuate them, did exalt the Grace of God so far, that he referr'd all things to the absolute Will and Pleasure of God.

[95] Jus feciale, § 63, pp. 206-207: ... And so in this Supper there is not more receiv'd among the Lutherans than among the Reform'd; nor is there less receiv'd among these than among the former. So that there is no need to dispute so fiercely concerning this Article under which is included in the Opinion of all Antiquity an awful Mistery, which cannot be perceiv'd by our Senses, and which ought to be consider'd and handled with a sort of Sacred Honour. As for the differing Opinions about this, 'tis certain, that the

We find that in his theology, as revealed in his Jus feciale, Pufendorf proved to be very rigid, "he rejected any process of compromise, comprehension, or toleration in the affirmation of the dogmas necessary to salvation...in the identification of the 'fundamental' as opposed to the 'indifferent' articles of Christian faith." What Pufendorf sought in religious faith, the German Pietist Philipp Spener provided with the basis for an absolute and positive ground for morality, in the Lutheran combination of the decisive role of divine grace with the God given free will, for man to embrace or to reject it.

Leonard Krieger saw in Pufendorf's theology "the pattern of thought derived from his natural law theory for the purpose of making the particular, positive, and inward truth of revelation relevant to the general, logical, external canons of human behaviour."[96] Without revelation, and such dogmas, nothing would remain but a correct moral philosophy. But for Pufendorf, the divine revelation, with an articulated positive faith, was an important independent

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Lutherans, no less than the Reform'd abhor the monstrous Transubstantiation of the Papists, and the Consequences which are deduced hence: For as much as hardly any thing more absur'd and horrid, then that Opinion be invented either in Divinity or Philosophy. For what can be more monstrous, then the Body of the Saviour which is Partaker of Divine Adoration, should be produced from a bit of Bread at the pronouncing a certain Form of Words by the Priest?

[96] Krieger, p.249-250.

support, such as a metaphysical linkage, of his natural law theory.

In Krieger's analysis, Pufendorf

> applied to theology the method which he had worked up for deriving general natural laws... in a system of deductive logic... Having guaranteed the relevance of religion to nature through the medium of an identical rational method... to channel the faith that was necessary for salvation into the action that was necessary for the moral and social order - that is to dovetail religion and morality...(thus Pufendorf) applied the same instrumentality to assure the continuity of religious faith as a component of obedience to moral law.[97]

For Pufendorf the problematic derives from the need to correlate man in politics, as a social being, to man in religion, as an individual being. For Man, after the Fall and loss of Paradise, to achieve salvation, he has to obey the law of his condition, individually, as an "observance of natural law toward God and other men...a moral conjunction by which many coalesce in one moral body and participate in certain rights and benefit from this coalition." This is to be achieved with the free will of the citizen, because it is necessary not to be moved by "the compulsion of the law," but from "the free spirit," and a free willed love, "if there is ever to be a better condition of human life, it is to be

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[97] Ibid., pp.250-251.

expected from nothing but the earnest and universal cultivation of Christian piety."[98]

In Pufendorf's opinion, according to Döring's view, there are two forms of religion: religio solida and religio superficaria, and true to Lutheranism, the Roman Catholic Church was branded the superficial type. But while the priority was laid on holding down the confessional conflict, he remained strictly on the grounds of the Lutheranism of his time. He did not tolerate the doctrines which could not be understood by common sense. But contrary to the opinion, which was repeatedly expressed by most twenty-century Pufendorf commentators, such as Lezius, Denzer and Krieger, he did not claim religion to be a private affair. Furthermore, Pufendorf claimed that only Christianity may elevate human society to a level of possible perfection, since with natural law it will at best get into a sociably tolerable condition. The level of perfection will be attained not earlier than men will follow Christ's moral doctrine being of another, higher quality than the rules of natural law.[99]

Is jus feciale, his final work, only a description? It is not even a prescription, less a formulation of divine

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98 Jus feciale.

99 Döring, Pufendorf's...theological point of view.

law. It is only a circumscription and a proposition for a science of fundamental theology, to work out, in some distant future, a universal divine law. It is a manifest, but only a fragment, and as Jean Le Clerc railed against it - a falling back into detestable Lutheranism. Never the less, jus feciale is enough of an attempt, to give notice to the world, that the heights and sights of man have to be raised above the mere rational, to achieve more than mere sociability, faith has to have it's say.

However, neither the Nachwelt, nor Pufendorf's contemporaries appreciated his honest effort as peacemaker. The wide ranging influence and appeal of his natural law works did not extend to his theological writings; and this is largely due to his own, uncompromising, adherence to Lutheranism.

Jean Le Clerc (165?-1736), journalist and professor and Remonstrant, known for unorthodox bible interpretations, had a great influence on the development of the German Enlightenment, due to his connection with the Huguenot colony in Berlin. Father-in-law of Jean Barbeyrac, the Pufendorf translator, Le Clerc was very familiar with Pufendorf's writings which he gave best reviews. However, jus feciale,

he destroyed with his pen.[100] We may bring the essential highlights of Le Clerc's review:

> This is the last book which the illustrious Mr. Pufendorf wrote, and which he left to his heirs, with orders to publish it. As soon as it was published, I read it with much interest, in the hope of finding in it the same spirit of equity and peace which one finds in this excellent writer's other works. The beginning seemed to match the idea I had of it. But I was surprised later to find a man having all the prejudices of some Lutheran theologians, who learned their religion rather in its systems than in the Holy Writings, and a man who basically is very far from the Christian peace which we have desired unsuccessfully for so long; because he so strongly favours one side that he only considers that side, and he wishes to force all others to submit to his opinions, even if they don't believe them to be true. He forgets nothing, to save the Lutheran system, and to condemn that of other Christians. If he had undertaken to agree with the Swedish theologians, with whom he had disagreements in the past, he could not have done better.

After having reviewed Pufendorf's opinion on disagreements and tolerance in political and ecclesiastical matters, which are according to Pufendorf, some kind of truce, in which one can live in peace, even if there are differing positions, Le Clerc then discusses Pufendorf's position on the three main Christian religions:

> After having shown that we cannot expect an accord with the Roman Church, he comes to those who broke away from it. First, he says that there are people who have an entirely different system, like the

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[100] Jean Le Clerc, in the Bibliotheque Choisie, Tom. VII, 1695, Article XI, pp.391-401: SAMUELIS Lib. Bar. de PUFENDORF, Jus Feciale Divinum, sive de Consensu & Dissensu Protestantium, Exercitatio Postuma; Lubecæ, pagg. 384, 1695.

> Socinians, most Anabaptists, the Tremblers, etc. if they are compared with the Reformers and the Lutherans. Their systems are in fact very different, but if we except a few fanatics, who have no principles, they have more in common than Mr. Pufendorf believes. "The Theological System", he says, "which these people have formed, is completely different from ours, and we do not agree with them except in the things which are known by natural light, or which regards the conduct of morals." It must be that Mr. Pufendorf had no knowledge of these people except through a few sermons which he had heard made against them, or through some system of their adversaries; as it is ridiculous to say that people who have received the Holy Writings and the symbol of the Apostles, only agree with Protestants "in the things which are known by natural light." A man who has read the Catechism of the Unitarians and who would say such things would be considered insane or a calumniator.

Le Clerc, an Arminian, tears into Pufendorf's Lutheranism:

> Mr. Pufendorf then deals with the controversies between Lutherans and the Reformers, concerning the ubiquity of the human nature of Jesus Christ, concerning the presence in the Eucharist, concerning Predestination and Grace, and a few other controversies of lesser importance. In all this, he does not seek what is true; but he attempts to establish the Lutheran dogmas, by softening them as much as possible... He argues strongly against absolute Predestination, but even though he is right, this is more likely to embitter people than to soften them.
>
> It shows that Mr. Pufendorf is not by any means disposed to peace, unless the Reformers become Lutherans.
>
> I admit that I was unhappy to see another intelligent man, such as was the late Mr. Pufendorf, follow so blindly the Systems doctrine, from which he draws his entire theology, without having reflected on the Holy Writings, which must be at the basis of all theological studies. Those who read his book carefully will find, like me,

that he is more likely to foster division than to promote peace.

Le Clerc is neither truthfully nor fair to Pufendorf's last work. But, even Pufendorf's close associates, the Pietists, had no praise but remained rather silent on the assessment of Jus feciale. It appears, that the controversy, to which Pufendorf wanted to contribute his share as a peacemaker, was not sufficiently advanced to receive positively the Pufendorf remedies to bring into harmony the system of theology, with its dual source of revelation and natural light, and Christian morality which serves both, sociability in the human commonwealth, and individual salvation in eternity. The Enlightenment, in the late seventeenth century, was insufficiently advanced, to accept a rational and universal reformulation of religion, and neither was Pufendorf up to the task, for he was still to narrowly confined in his religious tradition.

F. Pietism: Philipp Jacob Spener and Pufendorf.

We do have very little knowledge of Pufendorf's religious practice and development in his early years. However, we may assume that the religion in Pufendorf not expressed in his historical and natural law expositions was nurtured silently in his non-academic affairs. Pufendorf attested to his sincerity in religion in a very telling letter to Gottfried Klinger, written on January 10th, 1676; in which Pufendorf claimed that to this day in all the towns in which he had lived, he had entertained a friendship with the local parish pastors; specifically in Leipzig, Jena, Leiden, and Heidelberg.

We cannot tell when and under what circumstances Pufendorf came under the influence of the Pietist movement which had a greater effect on Pufendorf than can be deduced from Pufendorf's commentators. The influence had a dual effect on Pufendorf who became interested in a peacemaker role; first, he toned down his coarse belligerent raillery against his detractor as expressed in Eris Scandica, and second, he dedicated his energy to the morality of mankind, with helping to defuse the religious differences in Christianity, by a decomposition of dogmatic obstacles with the promotion of unity through the articulation of common

fundamentals of Christian faith. Pufendorf's theological aim was to develop a moral theology relevant to salvation of the individual human being as well as to public peace, achieved through the reduction of religious controversies responsible for so many wars.

To achieve the necessary insight into the inner workings of Pufendorf, a further study of his correspondence would be required. Of Pufendorf's entire correspondence, in addition to the extensive exchanges with Christian Thomasius, the one most noted is that with Adam Rechenberg, which concerned mainly theological and confessional problems. The significance of this part of Pufendorf's correspondence is seen in two major factors: first, through Rechenberg, Pufendorf became more intimately acquainted with Philipp Jacob Spener; second, under Rechenberg's influence, and as mentioned in the Pufendorf eulogy, Pufendorf became more conciliatory. It is for these factors, that we may give Rechenberg more space in this thesis than his relevance in the Pufendorf theology would warrant.

Similar to Pufendorf's correspondence with Erhard Weigel, this connection with Rechenberg was maintained over several decades. However, none of the early letters, and only some of the letters between 1684-1694 are known to have

been preserved.[101] Rechenberg had a very significant mediating role in negotiating peace among the Orthodoxies, the Pietists, and the Rationalists of the early Enlightenment.[102] Rechenberg for years had to support Pietists in their defence against accusations of heterodoxy and Sektiererei. In answer to a written accusation by Samuel Schelwig, who called Rechenberg a Pietist of the worst kind, a grausamer Sectirer, a cruel sectarian, Rechenberg replied, "I never boasted to have a new piety, however, I consider it necessary for him, myself, and all Christians to show more of the fruits of a truthful and honest piety."[103] On the other hand, Rechenberg had to distance himself from the radical Pietists, and criticised the "Petersen Chiliasm and

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101 Döring, note 10: 24 letters are in the original form preserved in the Rechenberg-Archives in the university library of Leipzig (MSS 0335-0336); one copy of a letter is in the Altenburg branch of the Weimar Staats-Archiv in the Seckendorf-Collection (Nr.1062, Bl.154r-155r).

102 Rechenberg's correspondence at the University Library in Leipzig contains 1700 letters, including 1100 to and from Philipp Jacob Spener, his Father-in-Law. His extraordinary skill in conflict resolution permitted him to remain on good terms with all the factions of the theological disputes. He defended Pietism without having aligned himself with all of its principles. The Orthodox Protestants "call myself not really a sworn Pietist, but a favorite of them, which is true, as long as their alleged heterodoxy is not proven. I love the rightly devout with reverence, but I hate the godless ...when nomen Pietistae a nomen studij means, I will let myself be so named, but if it means a nomen sectae or even an Enthusiast, I am no friend of such people." Adam Rechenberg, letter to Christian Franz Paullini, Oct. 5. 1692. (Univ. Library Jena, Ms Bud. f. 348, Bl. 279r -279v).

103 Döring, note 16: dated 6th of May, 1691; A.H. Franke Archives, 17.2, Staatsbibliothek Preußischer Kulturbesitz, Berlin.

the Revelations of Mademoiselle von Assenburg," which could not be attributed to Pietism, especially since Revelations after the Apostles were considered impossible and unnecessary. And he expressed his relief when the Raserei, the madness in Halberstadt found its end, and that the unruly people had their Schwermery unmasked as illusions.

As rector of the University of Leipzig (1689/90), he delayed the inquisition into Pietism ordered by the Saxon government in Dresden. Only in the year 1699 became Rechenberg professor of theology in Leipzig, despite the opposition by the Orthodoxy which opposed him as a true Pietist. Even Leibniz uttered his reservations about Rechenberg's intended attendance at a theological conference in 1699, which considered the problems of reunification of Protestant churches; because his presence would be seen by the Orthodoxy and Anti-Pietists as a plot by Mr. Spener.[104]

As regards the history of Pietismus, (from the Latin pietas, means in German, Frömmigkeit, i.e. piety), it started in the seventeenth century as a Protestant religious movement which thought to introduce piety into the stark formality of the church, and to gather those Christians out

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[104] Leibniz to Daniel Jablonski, Nov. 28. 1699 J. E. Kapp: Sammlung einiger vertrauten Briefe, welche zwischen... G.W. Leibniz und...D.E. Jablonski...gewechselt worden sind; Leipzig 1745, p.82 ff.

of the baptized masses, who are longing for a more personalized religious life as a truly "born-again". This gathering meant a Neo-Reformation within the official church, on the one hand, and a sectarian schism on the other hand. Originally, in a derogatory sense, their members were called Pietists.

The branch which remained in the church grew out of Reformed Calvinist as well as Lutheran soil. Th. Undereyk (died in 1693) transmitted the Dutch (Calvinism) influence to the German Rhine states (Mühlheim-Ruhr) and Bremen. Philipp Spener, with his Pia desideria (1675), gave to the Lutheran realm a programmatic expression of Pietism, already in demand in the first half of the seventeenth century. However, he received stiff resistance from the Wittenberg Orthodoxy, which feared, despite the Pietist's conformity to the dogma, the introduction of another spirit with the emphasis on personal piety contrary to the pure doctrine. While Spener was forced into a lengthy defence, the Pietism of the University of Halle (founded 1694) with A.H. Francke and his associates went on the attack against Orthodoxy (in the fight with Ernst Löscher), and the Enlightenment (in the expulsion of Christian Wolff). From here on, Pietism developed with charitable love-projects in a Francke Trust, foreign missions, and bible distributions, but also overstepped its bounds: in a depreciation of science, the Pietists demanded

uniformity of the devotees, and a renunciation of all worldly pleasures (non-spiritual literature, theatre, dance, walking for pleasure, youthful happiness, etc.).

North of the river Main, Pietism succeeded mainly with the Nobility, whose impoverished condition became injected with a new sense in life by Pietism. In the south, in Württenberg, burghers and peasants became the main carriers of the movement.

The radical or separatist branch of Pietism, was represented by the couple Johann Wilhelm and Eleonore Petersen, Eva von Buttlar, E. Eller, et al. Here came to life particles of Catholic, Baptist, Theosophic tendencies with apocalyptic and ascetic aberrations. Between these two types of Pietism stood G. Tersteegen, the Count Zinzendorf, whose Brethren became a separate sect, and Gottfried Arnold, who returned to the service of the church.

The cultural significance of Pietism consists in the return of a personal life against the rigid and empty etiquette of society and the formality of the church. Pietism paved the way for a more sentimental expression in letters, poetry and a more emotional life style. The church became enriched with hymns, but also caused the neglect of liturgy, and church service became a secondary event in

religious practices. However, it effected a heightening of the religious-moral conduct of the Protestant clergy. The gain for science was minimal, the only exceptional personality the earlier Pietism brought about, was the church-historian Gottfried Arnold. With the loss of the University of Halle to the Enlightenment, Pietism flourished only in the South-West, and the lower Rhine region. To the end of the eighteenth century, Pietism found a revival in Jung-Stilling, Collenbusch, and Baron Kottwitz beside others. A unification of the scattered Pietists was attempted by Joh. Aug. Urlsperger, about 1780, with the Deutsche Christentum Gesellschaft, with its seat in Basel. From this movement evolved the Mission and Bible societies at the beginning of the nineteenth century, which remain in existence to this day. From the nineteenth century on, Pietism lived in peace with the church orthodoxy.

At this point we must reveal some information on P. J. Spener and the various comments concerning this rather quiet Pietist and his efforts to reform Protestants, in supporting the spiritual side of the strongly institutional Protestant Church in Germany. This issue is important for the understanding of Pufendorf, first, because his religious attitudes have had some changes during his lifetime, and second, to clarify the distinction he made between the

institutional church, which stays under the sovereignty of the state and is part of the "human forum", and the spiritual church which is concerned with the salvation of the soul, a personal concern of the individual and excluded from the jurisdiction of the sovereign. Even though he considered the later a private matter, people's striving towards the status of grace and salvation was of deep concern to him.

Spener's influence on Pufendorf we need to examine in more ways than one. First of all, Spener's Pietism was the antidote to the rigid orthodox Protestantism, involving the Laity, with a personal religious involvement for the purpose of shaping man into a morally responsible citizen, as well as preparing for the heavenly city. Secondly, Pufendorf gravitated towards the study of the history of man: as the empirical underpinning of his natural law principles; and as an official court historian and keeper of the archives in Berlin, he must have had an interest in common with Spener, who was also renowned as a genealogist and heraldist.

R.A. Knox calls Philip Spener, "the founder of the German Pietism". However, the Leipzig historians consider Spener only the Hauptvertreter, the principal representative.[105] Born in Rappoltsweiler (Upper Alsace, now a

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105 R. A. Knox, Enthusiasm, A Chapter in the History of Religion, Oxford, Clarendon Press, 1950. Also in Der Grosse Brockhaus, Leipzig, F.A. Brockhaus, Vol.17, pp.661-662, 1934.

border province in France), on January 13th, 1635, and deceased in Berlin, February 5th, 1705. He became an independent preacher at the Cathedral in Strasbourg in 1663. Then he advanced to Pastor and Senior in Frankfort/Main in 1666. He moved to Dresden following the appointment in 1686 to select preacher and court chaplain. Finally, in 1696, he became Probst on the Nikolai Church and Konsistorialrat, a member of the Higher Consistory, in Berlin.

His far-ranging activity encompassed the caring for religious school instruction, the education of (theological) candidates, especially in Berlin, and also involved a voluminous religious correspondence. He was influential in the founding of the University of Halle, 1694.

Spener was a prosaic and hesitant and quietist man; for a would-be reformer, he lacked the elan and the force of personal projection. But Spener did publish his program in the Pamphlet Pia desideria, "or the hearty desire for God pleasing improvement of the true Protestant Church", and did contribute considerably to the already existing movement of Pietism. He demanded the following: a better knowledge of the Scriptures not only in the church service but also in the home; pastoral duties of the laymen, active Christianity, reform of the one-sided dogmatic theological education, and

replacement of the pompous rhetoric from the pulpit with a moral-religious useful one.

Spener established in his pastor's home in Frankfort the so called Collegia pietatis, to promote the exchange of religious ideas between pietist laymen, and revitalized the religious education of the youth, and introduced the Confirmation sacrament in rural parishes. He established orphanages and workhouses for the poor.

But in the orthodox and socially backward circles of Dresden, he found no fertile ground for his progressive ideas. Gradually he was forced more and more into a continuous literary defence of his and other pietists ideas. The faculty of Wittenberg, with an attack by Prof. Deutschmann in 1695, counted 284 errors committed by Spener, who had to defend himself, claiming to be in Honest Concordance with the Augsburg Confession. Deutschmann countered on 1200 pages entitled a Forced Reply.

Spener also excelled in another field, Genealogy and Heraldic, by writing two volumes of his Opus heraldicum, Vol.1, 1680; vol.2, 1690.

Paul Hazard, in his La Crise de la Conscience Européenne, paid tribute to Spener in a more appreciative

manner. Spener called for the "return to lively and active faith, a faith founded on love."[106] Spener became the "moving spirit" of the newly founded University of Halle, 1694, thus created the "Citadel of Pietism." Paul Hazard gave the pietist credit for keeping mysticism alive, and for the revolt against the tendency to institutionalize, and "freeze the current of the inward religious life." The longing for a personal intimate bond in the grace of God found fulfillment in "the infinite sweetness of a more than earthly love, the losing of Self in the Being who knows all things, wills all things, and imparts a foretaste of Eternity."[107] For the Pietist that is the goal: "To do everything in God. But that carries the implication of action, of doing."[108] This is the real difference between Pietism and Quietism, the Quietists ultimately eliminating all action. "The soul of the Quietist has thus been progressively stripped. It has renounced sensible affections; it has renounced acts of the will; it has renounced all preferences in time and eternity."[109]

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106 Paul Hazard, The European Mind (1680-1715), p.423.

107 Ibid., p.424.

108 Ibid.

109 R. A. Knox, Enthusiasm, A Chapter in the History of Religion, Oxford, The Clarendon Press, 1950, pp.273-274. Knox traces Quietism from Michel Molinos to bishop Fénelon, Madame Guyon, and others, in two chapters on Quietism.

Spener's influence and success, even among intellectuals, resulted in the formation of groups of Bible study. "The name 'Pietist', once a term of derision, became an appellation to be proud of."[110] These groups, ecclesiolae, as Spener called them, were "little churches which would not split themselves off from Lutheranism but would live a deeper spiritual life of their own within that body."[111] But it was not Spener, who caused schism in the Lutheran Church, rather it was Count Zinzendorf, a student at the university of Halle, who followed and carried Pietism to excess, and created Moravianism with its own institutionalized sect of the Brethren.

The tendency in the sphere of devotion "shows a background of mystical revolt against institutional religion. Knox puts his finger on the problem: "...the contrast...was not between faith and works, but between the rival claims of the active and the contemplative life."[112] Quietism, as an outcropping of Pietism, "discouraged vocal prayer, holding that mental prayer was necessary to salvation."[113] And this mental prayer dispensed not only with the word, but also

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110 Ibid., p.423.

111 Knox, Enthusiasm, p.206.

112 Ibid., p.237.

113 Ibid., p.241.

with all images, "...they never meditated on the Sacred Humanity or on the Lord's Passion."[114]

Knox stresses the difference between meditation and contemplation which is more than a mere method, it is a difference in direction of spirituality: an anthropocentric versus a theocentric type.[115] In meditation, "we are for ever turning back upon ourselves and examine the state of our own conscience; in contemplative prayer, we open a window outward, upon God, and forget ourselves in the exercise."[116] When we meditate we arouse our sensitive affections, invoke images of our wretchedness, our state of sin, and the need for grace and forgiveness. When we use the prayer of contemplation, "we no longer itemize our motives,... reasoning no longer forms part of our mental prayer... affections are the next faculties to be cut adrift." The Quietist reaches the state of "disinterested love", and in the process, you not only

> get rid of a proprietary interest in your own virtues; you got rid of the virtues themselves, in the sense of letting God act in you, instead of acting yourself. In the last stages of the process you got rid even of conformity to God's will, considered an action of your own; and indeed in a sense got rid of the will itself, passing from

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114 Ibid.

115 Ibid., p.248.

116 Ibid.

conformity with God to transformation into God.[117]

Of course, this is not the Pietism of Spener or Pufendorf, for whom "duty" is the highest in the order of things. Contrary to Knox and Paul Hazard, Spener was neither the founder of nor the one who carried Pietism to its excess. In my view, none of these portray the right picture of the Pietism of Spener or Pufendorf. For Pufendorf, "the format of his theology was a program for the unification of the Protestant churches."[118] But not at first; as Krieger explains: In 1679, "Pufendorf had found such a program of unification 'extravagant'," on the ground that we mortals have no authority to "presume on our own to make any article fundamental or problematic," and the matter is best left to "Divine Providence."[119]

The Revocation of the Edict of Nantes, 1685, and the events of the English Revolution, 1688, "sharpened Pufendorf's susceptibilities to the ambiguities of his position on toleration... The Divine Law of the Covenant, with a reconsideration of the whole problem of 'political' as

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[117] Ibid., p.278.

[118] Leonard Krieger, The Politics of Discretion,Pufendorf and the Acceptance of Natural Law, Chicago, University of Chicago Press, 1965; p. 244.

[119] Pufendorf, History of Popedom, containing the Rise, Progress, and Decay thereof, transl.by J. Chamberlayne, London, 1691, pp.202-24.

well as 'ecclesiastical toleration'." He proposed the enactment of a unifying theology with an assembly which would include representatives of the state, the clergy, and laity, "an arrangement which testified to the persistence of his concern for civil peace even in the formation of Christian doctrine."[20] Pufendorf, with a priority for civil peace, remained a jurist while submitting his theology to the "temporal interests", considering the unity of Protestant churches with the Catholic Church impossible; not because of differences in religious belief, but "where the dissention is about domination and liberty, there cannot on either side be any wish except domination over the other."[21] In 1688, Pufendorf confessed his dream of doing "a meditation on the rational divine worship of Christians," and tackled that theological subject "as a layman," and requested that the manuscript of his "meditation", which was to become post-

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[20] Jus feciale, § 10: But since the Points in Controversie between the Protestants and Papists do chiefly concern the Establishment and Support of the Authority, Power and Revenues, of the Hierarchy or Pontifical Monarchy, it is manifest that it would by utterly in vain, and but ridiculous, to go about the determining of them by Disputation. Indeed, to demonstrate solidly and plainly the Falsehood of the Popish Principles may be of use to establish and confirm those of the Protestant Party, and to keep them from returning again to those Errors.

[21] Jus feciale, § 7: The Controversies of less Importance are about such Things, as that we may affirm either of the opposite Opinion, and neither of them would have any influence upon our necessary Practice, or establish, or overthrow, any necessary Principle.

But among the Principles of less Importance then, you must not include those which are advanced for the procuring of Wealth, or retaining the People under the Yoke of Priests.

humously published as the Jus feciale, be submitted to Spener for his comment, and he promised to proceed in accordance with the Pietist leader's judgement.[22]

It is to be added, that Horst Denzer, in his work mentioned neither Philipp Jacob Spener nor the movement of Pietism. This lends credit to the critique by Leonard Krieger, in which he claims that Denzer

> overextends the academic natural-law format within the corpus of Pufendorf's total work...But the argument for the invariant centrality of natural law in Pufendorf actually proceeds from a petitio principii when the centrality is extended to the test cases represented by Pufendorf's constitutional, historical, and religious writings whose non-natural-law sections are excluded from discussion by definition...The mind of Pufendorf seems little more than a function of his natural-law doctrine, which, once its identity is worked out, is calcified into a constant factor in disregard of the historical truth that even a persistent set of ideas changes meaning with changes in the amount and kind of attention their thinker pays to them.[23]

However, Denzer does address the congruence of the aims of church and state in Pufendorf, De concordia verae politicae cum religionis christianae. In his view, Pufendorf's basis was for God not only to have revealed

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[22] Pufendorf to Rechenberg, December 6th, 1690; Konrad Varentrapp, "Briefe Pufendorfs", Historische Zeitschrift 70 (1893), loc. cit., LXX, 198, n.1.

[23] Leonard Krieger, book review "Modern Europe", in American Historical Review, Vol.78, N3, 1973, pp.647-676.

himself for the salvation of man but also, as the creator of natural law, to have provided the grounds for that peaceful and honorable co-existence on earth with which to achieve these goals. Conceived as the creator and protector of state and religion, firmissimum vinculum societatis, Christianity promotes obedience in the state, and therefore state and church are equally interested in the peaceful co-existence of its citizens. Christianity does not undermine the defensive capacity, the Wehrhaftigkeit of the citizens" in the state, as Machiavelli saw it, although, a Christian shall not seek revenge. Therefore, it is up to the care of the state, in the interest of its own existence, to provide security and peace and the protection of religion, in this case, the Christian Religion and the Protestant Church. Contrary to Locke, in Pufendorf's system the sovereign has his stately duty to assure Religion among his subjects. For Pufendorf, the church is an institution of moral discipline, the Sittenzucht, on which is based the congruence of interest between church and state.[124]

In the duty of man towards God, there are orders of theoretical and practical nature. The theoretical are concerned with the rightful concept of divinity, the practical with the worship of God. The natural religion remains in the earthly realm, "the human forum", it does not

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[124] Ibid., pp.212-13.

serve salvation in another life. Natural religion is the safest bond for human society, it relates to God in the same way as all natural law duties concerning the sociability of man in his community. The social dimension of the care for the self Pufendorf considers not only as the preservation of the being, but also the fulfillment of man. Man who does not condition himself in honorable conduct and who does not make lawful gains through honest work, sins against the natural law. The more man concerns himself with perfecting himself, sui perfectio, the happier he will follow up his duties towards his fellow man. In that man differs from the animal, and it corresponds with the telos of the rational nature of man.[125]

All of these references have been taken from Pufendorf's De jure naturae et gentium, which was first published in 1672, apparently before Pufendorf's encounter with Pietism and his contact with Spener, and definitely before Pufendorf's theological period in his later years. We may reasonably deduce that Pufendorf's concern with moral theology proceeded his contacts with Pietists, and his budding friendship with Spener. Pufendorf's acceptance of Pietism as a moral theological movement prior to seeking contact with Spener through mediation with Rechenberg is a confirmation of Pufendorf's moral theological position which

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[125] Ibid., pp.143-44.

had been close to Pietism without known actual contact with Pietists.

G. Pietism and Socinianism.

Socinianism is a Polish religious movement in opposition not only to the Roman Catholic Church, but also considered a heresy by the orthodox Lutheran and Reformed churches.[126]

Wallmann gives Spener (1635-1705), the German Pietist, credit for recognizing Socinianism as an attempt to transform Christianity into a secular-humanistic Ethic.[127] In the case of Socinianism, Spener claims, there is very little left of Christianity in such a moral philosophy which

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[126] Socinians (also called Racovians) are the followers of the teachings of Laelius Socinus (1525-1562) and his nephew, Faustus Socinus (1539-1604), who established in the city of Rakow, in Poland, a religious movement adhering to the Rakow Catechism (1605), branded as an anti-Trinitarian heresy. Socinians afforded the human ratio a primary position in the interpretation of Scriptures, and concluded that Jesus is not God, but his Messiah and miracle performer, the Wundertäter, elevated to the side of God after his death. Christ is still considered the redeemer, however not through his death on the cross, but through his morally exemplary life. For denying Trinity and proclaiming the unitas of God, they are also called Unitarians. Socinianism, rooted in the Humanist critique of dogma, played a significant role in the preparation of the Enlightenment.

[127] Johannes Wallmann, "Pietismus und Sozinianismus, zu Philipp Jakob Speners Antisozinianischen Schriften," Warsaw, Conference on Socinianism and its role in the seventeenth and eighteenth century, 1983.

could be drawn equally from Seneca, Epictetos and other Heathens.[128]

The Lutheran Orthodox theologian, Abraham Calov (1612-1686), called Socinianism a heretic renewal of Photinianism.[129]

Spener had to defend the Pietists as early as 1677 against denunciations of being Socinians, because there are elements of concurrence, an Uebereinstimmung, between Pietism and Socinianism. Both movements consider themselves as continuation and fulfillment of the Reformation in a drive towards a common Protestant conscience versus the "Babel" of

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[128] Ibid., p.156.

[129] Photinianism is the heresy which is named after Photius (820-ca.891), an Armenian Church Father, Patriarch of Constantinople, who died banned. His dispute with Pope Nicholas I constituted the beginning of separation of the oriental and occidental Church. The high point of the political church-fight between the Byzantine Church and the Primate of Rome are the anti-Papist resolutions of the Synod in the years 879-880. Photius' main work is a commentary on 280 mostly lost Greek texts: Myriobiblion (or Bibliotheca).

Johann Botsack, the uppermost Pastor in Danzig, wrote a Warning against Photinian or Arminian teachings, in Danzig 1632, and in Königsberg 1646.

Wallmann also lists other Lutheran authors of the seventeenth century who fought Photinianism in the German language:

Georg Rostius: Bericht von den neuen Photonianern, Magdeburg, 1624;

Ph.H. Friedlieb: Photinianische Wolfsklauen, Stralsund, 1662.

All this suggests a close relationship, and the interchangeable use of the names given to heresy, such as Sozinianism, Arminianism, and Photinianism.

Roman Catholicism, and against the stifling spirit of the confessional Orthodoxy.[130]

However, the differences, the Unterschiede, are more profound. The Socinians consider the human rationality as the highest authority and best possible way in the interpretation of Scriptures; on the other hand, Pietism recognizes the wretchedness of the ratio in man after the "Fall", which makes it impossible for man without grace to comprehend God's revelation, resulting in the labeling of "religious rationalism" for Socinianism, and "religious fideism" for Pietism.

Spener closed the gap between Lutherans and Calvinists, but widened the gap with the Socinians. Spener proved to be tolerant towards the Huguenot immigrants, but not so towards the Polish Socinian refugees. Spener tried to isolate the Socinians against a united Protestant front, in which he even included Hugo Grotius (who was cited a heretic by A. Calov in his Biblia illustrata). Spener "rescued" the passages in the Old and the New Testament, who attested to Christ's existence during Creation, prior to his earthly birth, for his pre-existence, and for his Godliness, and Christ's infinite existence within the essence of God, Father and Son. Spener recognized the danger in case Socinians

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[130] Wallmann, p.148.

would succeed in disclaiming the godliness of Christ, that Christianity would be reduced to not more than an ethical and moral teaching.[131]

In the late seventeenth century, during the inquisition into Jean Barbeyrac's religious convictions, the city of Berlin made the impression of a heretic hotbed, a Ketzernest.[132] There appeared a very shocking anonymous Tractat of a Socinian author, which Othmer did not name, but Wallmann identified as Samuel Crell (1660-1747), who was educated at the Arminian gymnasium in Amsterdam and then became a Socinian preacher in German cities such as Frankfort on the Oder and Berlin since 1680. Wallmann named two anonymous Tractate to have been penned by S.Crell, the Betrachtungen on Herrn Dr. Philipp Jacob Speners of the eternal Godliness of Christ..., Amsterdam, 1700, and Cogitationes novae de primo et secundo Adamo, also Amsterdam, 1700. Apparently Spener did not know the author of these anonymous Tractate, and neither did the authorities, a significant point, which makes it understandable why Othmer did not find an author's name in the official documents. These anonymous Tractate dared to request that Socinianism not only be tolerated but also

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131 Ibid.

132 Siglinde C. Othmer, Berlin und die Verbreitung des Naturrechtes in Europa, Kultur- und sozialgeschichtliche Studien zu Jean Barbeyracs Pufendorf-Uebersetzungen und eine Analyse seiner Leserschaft, Berlin, Walter de Gruyter & Co., 1970.

embraced by the Reformed Church. The King had all copies confiscated, forbade further distribution, and ordered a judiciary enquiry. In addition, the official court preachers were requested to submit to the king written rebuttals.[133] The minister to the king, Geheimsekretär Paul Freiherr von Fuchs (1640-1704), cancelled the inquisition on the 15th October 1701, after the author could not be identified, and the matter had quieted down. With his document, Scripti de Tolerantia Socianorum, Fuchs did not want to pursue this religious controversy for reason of political prudence, and preferred the matter to sink into oblivion. Fuchs, far from being an orthodox Protestant, was born as the son of a Lutheran Pastor in Stettin, converted to Calvinism, and on his country estate entertained Socinian refugees from Poland.[134]

In his sermons, Spener did not intend a scientific and academic discourse of Socinianism, but addressed himself in the German language to the intellectual population of Berlin.[135] Spener seemed to be not interested in a refutation per universam Theologiam, for which he was criticised by his editor Paul Anton, who would have wanted a

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133 Ibid., p.77.

134 Ibid., p.79.

135 Wallmann, p.153.

precise discussion of the main points of difference between Lutherans and Socinians. Spener wanted mainly to counteract the Unitarian propaganda; to prevent further spreading of Socinian thought in Berlin circles of the government and the nobility; and the acceptance of these ideas on several German Courts. As Wallmann says, Socinianism had lost its historical sectarian force, and became a pre-enlightened Unitarian concept, mixed with Deist influence, all at the time of John Toland's visit to the Court in Berlin, 1701.[136]

Barbeyrac was caught in the three-prong force field of Orthodox-Calvinist theology, the Socinian movement, and the Natural Law doctrine of Samuel Pufendorf; and by events and his personal conduct was forced out of a clerical carrier. He successfully persevered with his French translation of Pufendorf's major work, and extensive commentary on moral principles, and was rewarded with a professorship in natural law in Lausanne and later in Groningen.

Othmer's theory of the relation between Socinianism and Natural Law in the seventeenth century submits that there

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[136] Ibid., p.151. For further details on this subject consult: Wallmann, Philipp Jakob Spener und die Anfänge des Pietismus, Tübingen,1970.

is no substantive connection, no innhaltlicher Zusammenhang, between Socinianism and natural law. However, she admits that both doctrines contain rational elements, with the result that the advocates of both of these movements were looked upon by their opponents as being identical.[137]

Interestingly, the orthodox Reformed Church, which was represented by the Huguenot Consistorium and was very much opposed to the natural law tendency then prevalent in Brandenburg and already accepted by the royal court and the bureaucracy, could not for reason of prudence, attack the natural law doctrine of Pufendorf; instead, they very vehemently attacked the Socinians, for the latter not only did not enjoy royal protection but, with the application of the "Socinian" label to the natural law advocates, they could be made the target in a round-about way.[138] This emphasis of the external similarities as a basis for internal connection between Socinianism and natural law, made them both targets for an embattled Orthodoxy.

I concur with Othmer's view, that the cultural and socio-intellectual problematic of post-Reformation Protestant Orthodoxy was the disintegration of Protestantism into sects which is grounded in its basic character: it originates in

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[137] Othmer, p.56.

[138] Ibid., p.57.

the rebellion of the individual conscience against foreign influences in matters of faith. The individual conscience should remain free, even after the establishment of a new confession. However, a criterium had to be established in order to differentiate the right religion from heresy.(139) What Socinianism accomplished was to provide the fermentation with which rigid religious Orthodoxy decomposed and paved the way for the formation of rationalistic Weltanschauung.

Natural law theories provided a secular rethinking of jurisprudence and the order of the state, shifting from a divine origin towards a natural one. Socinianism endangered the Reformed concept of the world order primarily in theological thinking.(140) Socinians did not refute revelation, but gave critical reasoning a considerable function in the interpretation of Scriptures. They divided dogmas into essential and non-essential doctrines, and called

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139 Ibid.

140 For bibliography and new studies on Socinianism in John Locke, see: James W. Moore, "Theological Politics: A Study of the Reception of Locke's 'Two Treatises of Government' in England and Scotland," a paper presented to the Conference for the Study of Political Thought, Locke und Kant: Historische Rezeption und Gegenwärtige Relevanz, Tübingen, Eberhard-Karls University, 26th-29th October 1989.

Locke denied vehemently that his book was Socinian in inspiration, "there is not one word of Socinianism in it." Why did Locke react so vigorously to the characterization of his work as Socinian? ...English law provided very severe penalties for denial of the Holy Trinity, the penalty of death, until 1697, and, thereafter, loss of one's civil rights and a three-year jail sentence. (pp.3-4)

for tolerance. Such religious rationalism was derogatorily labeled a la mode, a label applied to both Hugo Grotius and Samuel Pufendorf.[141]

Socinianism was a phenomenon of great importance to the rational development in the seventeenth and early eighteenth century in Europe. Barbeyrac, a model of the modern academic scholar of the seventeenth century, was definitely influenced during his days at the University of Frankfort on the Oder, where he was exposed to the Unitarian concept and its rational approach to Scriptures. Later in his life, Barbeyrac became a representative of enlightened Christianity, with a posture of a pieté solide et éclairée.[142]

In his later years Pufendorf manifested grave concerns regarding what is called the "problem of secularization" (which he aided with his natural law works) in the seventeenth century. And when he was stung by the accusation of both Hobbism and atheism, he did not defend his own religious thought; instead he said that he did not

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[141] Othmer provided a list of the name-calling applied to Grotius: ...hominem dubiae, aut variae religionis, also of nullis Religionis,or being of Religionis Prudentum; others considered him to be either just Reformed, or a Syncretist, Papist, Socinian and even Atheist, for the most he appeared to be an Arminian... Grotidae certant, de Religione Socinus, Arrius, Arminius, Calvinus, Roma, Lutherus. (p.55, footnote).

[142] Ibid., p.89.

understand why Hobbes had to be labelled as a heretic if his only fault was to have made socialitas the foundation of the law of nature.[143] But under the pressure to defend himself against the accusation of moral indifference, he moved himself towards the Stoicism of Grotius and of Cumberland, against Epicurus and Hobbes; whereby he put some distance between himself and the anthropological pessimism of Hobbes.[144] Pufendorf reacted in a similar manner when he was called dangerous on both political and theological counts by his Swedish adversaries. However, instead of defending his own religious belief, he attacked atheism and associated non-Christian denominations for their incompatibility with his own Lutheran Protestantism, which he defended against both the Catholic Church and the Reformed Church. His theological discourse became a debate of Denominationalism, as Niebuhr would call such thought process.[145]

From Pufendorf's correspondence with the Rostock professor of theology, Justus Christoph Schomer (1648-1693), we can deduce Pufendorf's fascination with theology, and, as we have already seen, we notice his plan to write a Theologia

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143 Fiammetta Palladini, quoting Pufendorf in Eris Scandica, Apologia, para.28.

144 Palladini, Is the socialitas of Pufendorf really anti-Hobbesian?, pp.12-13.

145 H. Richard Niebuhr, The Social Sources of Denominationalism, (1929) reprinted in New York, Meridian Books Inc., second printing 1958.

moralis already in his mind prior to the 1670s. However, he was prevented from working on it by the war between Denmark and Sweden in which the University of Lund was destroyed.[146]

In his Berlin years, towards the end of his life, there was no closer friend than Jacob Philipp Spener, the Pietist leader. In a letter to Rechenberg, on the 6th of December, 1690, Pufendorf expressed his delight for the appointment of Spener to a position in Berlin, and was looking forward to listen to his sermons, since there was in Germany no one more pious, graceful and intelligent than Dr. Spener.[147] Pufendorf even requested that the manuscript of his meditations, Jus feciale, Abhandlungen über die Reunion der protestantischen Kirchen, be submitted to Spener for his

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146 Detlef Döring, Pufendorf in den theologischen und konfessionellen Auseinandersetzungen der achtziger und neunziger Jahre des 17. Jahrhunderts, essay to be published, Leipzig, 1989.

Although there is little evidence of an extensive correspondence between the two scholars, Schomer submitted to Pufendorf for comments his essay Specimen theologiae moralis (1690), and Pufendorf in a letter to Rechenberg expressed his sorrows when Schomer's life was cut short by an untimely death. It appears, so Schomer's brother claimed, that the theologian was working on a natural law thesis based on religion, a revision of Pufendorf's secular natural law system. Furthermore, like Spener, Schomer, a kindred spirit, was engaged in a polemic against Socinians, Catholics, and Calvinists, but was kindly inclined towards Pietists, although in a reserved observer position.

147 Ibid.

comments, and he promised to proceed in accordance with the Pietist leader' judgement.[148]

Pufendorf reproached Protestant theologians for their neglect of moral theology in favour of dogmatic. He claimed, those theologians go on supporting the Aristotelian doctrine of virtues which was of value only for the Greek polis.

However, what is of interest, is Döring's interpretation of Pufendorf's efforts, who failed in his unification attempt, but may have advanced a "common fundamental theology." Pufendorf claimed, to declare all religions, confessions and different concepts as equal would reduce the Christian religion to a medley of unconnected theorems. Truth can only be one truth, which has to get Christian theology into a determined system. But the connection of theology with philosophy is vehemently refused. Pufendorf had no doubt that the genuine sense of the Bible may be comprehended, if the legitimate resources of interpretation are used, i.e. using one's intellect in the right way. At the end there will be a system of fundamental articles which follow one theologumenon to the other and thus create a chain, a fidei catena, which must not be torn.

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[148] Pufendorf to Rechenberg, 6-12-1690; quoted by both, Leonard Krieger and Detlef Döring.

Pufendorf's thought is not new, what would have been is the realization of a programme called a "Federal Theology" which Pufendorf conceived about 1690 as a possibility to animate what was till then abstract ideas.

The dogmatic church in the seventeenth century did not tolerate other opinions. One was either strictly a conformist, or one was a heretic. Pufendorf and other natural law advocates, in their effort to obtain a universal applicable natural law for the human conduct, had to ignore the specific theological controversies, they simply were irrelevant to the "human forum", the daily conduct of business and government. The Unitarian concept of God as the creator of nature and man, served well in the moral philosophy which provided the grounding of natural law doctrines.

For the Orthodoxy to tolerate deviations, or accept a lesser emphasis of dogma, was considered heretic corruption of the freedom gained from Papal domination, for which people lost their lives in bloody battles or being burnt at the stake. The very essence of the Reformation, to free the spirit from the calcified religious-political domination by the corrupt Catholic clergy, this religious freedom became a casualty during its defence with the same intolerance and cruelty so common in the dark Ages of Christianity.

Socinianism and Pietism, both expressed the yearning for the calm of basic internal religious contemplation of the truth, the one placing greater emphasis on reason, the latter on the inner light. The turmoil in Europe with all the religious wars going on, prepared the ground for peace and order by leaving behind religious controversy. Ancient natural law, revived by Hobbes, Grotius, and Pufendorf, had to be free of the theological discourse concerned mainly with the supernatural, the salvation in another life. The conduct in this world, the "human forum", had to be rationally explored, and to be understood with the God given nature of things. The question of Trinity versus the Unitarian concept of God became an obstacle which Pufendorf at first simply ignored as irrelevant to the determination of the "natural" truth. Nevertheless, Pufendorf, bringing a definite Socinian approach to the order of things, still harbored certain dogmatic tendencies which he defended with his attack on atheism in theological writings in his later years. Barbeyrac, born four decades later, criticised Pufendorf's early works on natural law for the lack of displayed tolerance. However, both maintained a specific adherence to the Scriptures as the revealed foundation of the Law of Nature. But even as such, Pufendorf still falls short of the natural law and human rights position we have to expect from a Modern Natural Law Philosopher.

CONCLUSION.

The separation of natural law from theology and its founding solely on sociability, constituted what some have seen as liberating politics, as an undertaking by which the social conscience was freed from the religious domination of the imperialistic and powerful Catholic hierarchy, and from the disruptive designs of worldly Protestant clerics. However, in this quest, the fundamentals of an evangelical religion and the link provided to the Creator got lost. A "profane" natural law evolved, one which did not sustain that transcendental morality which could have lifted society above the pure utility of self-centered sociability.

The difficulties that have arisen in interpretations of Pufendorf's thought may derive in part from the problem that his scientific search for eternal truth had to be reconected with the pragmatic requirement that he address the temporal problems of that time in a language understood and acceptable to his contemporaries. In his first major work, the Elementa, Pufendorf was still under the direct influence of his former professor of mathematics and mentor, Weigel, and the two main authors in his curriculum, Hugo Grotius and Thomas Hobbes. The result of this work, which was first published in 1660, brought him a professorship, even though it was later described by him as a youthful

attempt that was not to be taken too seriously. At the university in Heidelberg, he was elevated from private tutor to full-time professor of a new discipline and was encouraged by Baron Boineburg to write a systematization of natural law. Boineburg, in consultation with Hermann Conring and Johann Boecler, influenced Pufendorf to study and research ancient authorities. Pufendorf's tendency to spurn citations from antiquity, to rely solely on logical inference and to apply a mathematical scientific method which would eventually replace Scholasticism at the German universities, became reshaped and considerably altered under the influence of this trio, who would establish Pufendorf's methodological procedure for the writing of De Jure.[1] The triumvirate was acting as Pufendorf's advisors, influencing and redirecting him like a team of professors who needed to put their stamp on the dissertation of a junior scholar in their charge. In Pufendorf, the result was a noticeable shift from the original Hobbesian pessimism concerning human society. Although he retained the Judeo-Christian concept of the corrupt nature of man after Adam's fall from God's grace, he compromised with Grotius's sociabilité naturél, by de-emphasising the social being and re-emphasising the social action, which gives mankind his unique and dignified position in the universe.

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[1] Timothy Hochstrasser, pp.16-18.

Although he rejected as irrelevant to natural law any other notion then the "corrupted nature" of mankind, Pufendorf did admit that his terminology inferred the existence of an un-corrupted nature prior to the first man's fall, however, we have no possible knowledge of it, except through Revelation. The original state of the human nature in its Urzustand, must have been the status integritatis which Christian Thomasius so rightly defined as the condition in which there was no need for any law. Therefore, natural law is a response to the disobedience of mankind which made it necessary to invoke a law to call it back to order, and to direct mankind towards civility and an uncorrupted state. In consequence, Man must acknowledge natural law as the guiding system towards an end which is the original state of perfection. In this way, the end was predefined from the beginning, and the history of mankind has been the record of man's attempt to ameliorate his natural condition, his condition after the Fall, in the post-lapsian state with the human faculties flawed but still in tact.

In Pufendorf, the principle of law as a necessary instrument to keep in check what basically tends to be wicked and needs to be controlled, is not a matter of self-discipline or rational accommodation in a contrat social, but requires a superior sovereign power to command and enforce laws. Human beings may agree to behave sociably, but,

because of the corrupt condition of man's nature, men find themselves in need to surrender their natural freedom to the dictates of a superior person with the task to create the laws for all to obey. This is analogous to the omnipotent God, creator of the universe, who has given mankind the faculties to re-establish the order of things by temporal ruler in temporal affairs among humans. This dictate of natural law is not to be questioned and is not to be challenged, since the sovereign is above the law, be it a monarch or an assembly, his only moral obligation being to create laws and govern the state for the common good.

With this challenge and the attacks on him following the publication of De Jure and Officio, Pufendorf realized that the separation of natural law from theology, which was of assistance in liberating jurisprudence and the constitution of secular states from religious interference, could give sovereigns the license to arbitrarily pick and chose indiscriminately religious affiliation and engage in persecutions of other confessions. Stung by the accusation of heresy and atheism, he restated the importance of the role of the church in education and the preparation of good citizens for the state and the common good. The basic need to do more and to be more than the dictates of natural law demanded, consisted in the Christian way of life in general and the Pietist way in particular, which brought Christianity

into one's daily life. Pufendorf found solace in Pietism by returning to the true source, the Holy Scriptures and the Grace of God, the necessary elements for the betterment of mankind.

It is no surprise that this side of Pufendorf, the religious after-thought, has been largely ignored, because it seemed not to fit, or seemed to interfere with his forceful concept of natural law, which reinforced secular authority into an absolute sovereignty. However, Pufendorf has to be judged and re-examined for the whole of his contribution, and not only what he was taken for at his time and in present evaluations.

In my view, Pufendorf, an Evangelical Lutheran jurist, tried to formulate an universally acceptable law based on the human anthropology. He did this at a time of controversy in a post-Reformation, post-thirty-years-war context, when heads of states struggled to free themselves from church interference and Papal authority; and when Protestant orthodoxy became preoccupied with dogmatic disputes; and an embattled Pietist movement tried to restore a moral Christianity for a peaceful harmony after years of infighting and divisions.[2]

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[2] For an authority on seventeenth century Protestant theology I am quoting Jsaak August Dorner, History of Protestant Theology, particularly in Germany viewed according

The problem, as Pufendorf saw it, was a Europe divided by ecclesiastical and theological conflicts, which is caused, so he claimed, by the mixing of theology with philosophy [Scholasticism],[3] and by greediness of men for

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to its Fundamental Movement and in Connection with the Religious, Moral, and Intellectual Life; transl. by Rev. George Robson & Sophia Taylor, New York, AMS Press, 1871 reprinted 1970.

[3] On mixing philosophy with theology, Dorner recounts the "Hoffman Controversy", pp. 110-114 (condensed):

Luther had expressed himself against philosophy and reason, so far as their intervention in spiritualia was concerned, he had yet as decidedly acknowledged reason as God's gift to man, and as queen in her proper province.

When the time arrived for giving the stability of a systematic form to the truths attained at the Reformation, and laying down connected and self-consistent tenets, - for which process the agency of the reasoning powers was indispensible, - the chief concern was to bring evangelical truth into its true and positive relation to general human reason.

Daniel Hoffmann, a camp-follower of the Gnesio-Lutheran band, claimed in a proposito de Deo et Christi tum persona tum officio, 1593, that the Aristotelian philosophy and its categories do not meet the requirements of the science of faith, but that we must learn to speak "with a new tongue in another language." In the interest - as he supposed - of pure Lutheran doctrine, that reason being naturally an enemy of God, is to be regarded as essentially opposed to revelation, and that consequently her opposition to revelation is a sign of its truth... all that is true in philosophy is false in theology.

Bötscher, an opponent of Calixtus, subsequently expressed himself in a similar manner. All knowledge beside that of Holy Scripture leads from God to the world and idolatry... Hoffman proceeds upon the assumption that philosophy will not confine itself to that which is merely formal, but will hold certain notions with regard to things moral and divine, which, by reason of natural corruption, must necessarily be erroneous, and lead to either Pelagianism or Atheism...

Generally speaking, the study of formal philosophy, of course after the medieval fashion, was soon much cultivated in the Lutheran Church... Morecver, not only was the Aristotelian logic embraced, but also the Aristotelian ontology and metaphysics - of course exclusive of the denial

power and property, especially by the clerics. He saw the only road to solving this problem in the development of a new theology with the aid of the Cartesian method based on Holy Scriptures producing with common sense irrefutable articles of faith. The result would be a fundamental theology, i. e. a chain of truths necessary for salvation which are to be believed, while all other articles not contributing to this chain should not be allowed to interfere. Herewith would return an extensive if not complete calm to Europe.[4]

Pufendorf's period, the post-Reformation seventeenth century was an epoch "dedicated to the scholastic fortification of the system of doctrine", and the theological

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of creation, - together with the improvements and additions of the Schoolmen.

Lutheran divinity, undeterred by its doctrine of original sin, gradually took up the position of an advocate of the rights of reason and philosophy, and that not with reference to their merely formal employment. Gerhard...asserted that reason is capable of a certain knowledge of God, though by no means of such a knowledge as to make revelation superfluous.

And this lays down the conditions for that distinctions between the articuli puri et mixti of Lutheran divinity... The articuli puri are known only by the word of God, are merely matters of faith in Holy Scriptures; they contain the mystery of salvation, especially the doctrine of the Holy Trinity. The articuli mixti are such doctrines as are partially known to reason; but the reason being fallible and obscured, we cannot be assured of the truth of what it teaches; hence even those articles which reason knows from its own resources, are only believed in so far as they are confirmed by Divine revelation in Holy Scripture.

[4] Pufendorf: Quin autem ejusmodi opus magnam utilitatem orbi Christiano, saltem per cultiorem Europae partem adferre queat, vix cuipiam dubium esse possit.

science "consisted almost exclusively in dogmatic, while religious life consisted for the most part in the act of assimilating traditional beliefs." Instead of being the centre of Luther's principle of faith in its union with Holy Scriptures, Scholastic orthodoxy, "esteemed itself a scriptural faith, or an objective churchmanship."[5] In this trend, Dorner identified three schools of Protestant orthodoxy. The first school of the strictest orthodoxy located in Wittenberg, supported by Tübingen, and to a lesser degree other universities, promulgated the anti-Calvinism Formula Concordiae (1577), to restore Lutheranism especially his teaching of justification.[6] The strict orthodoxy was

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[5] Dorner, pp.98-99.

[6] Dorner on Reformation principles in the seventeenth century, pp.118-121 (condensed):

...with Luther the word and faith were indissolubly united... to his mind that divine assurance, which is inherent in evangelical faith, is an assurance of the truth of the promises contained in the word of God, and above all, of the justification of the sinner before God through faith, and not chiefly the product of divine testimony to the authority of the canon. The article of justification is regarded by him not merely as a single article among others, but also as the very truth whose generative power produces from itself the entire organism of Christian doctrine and Christian practice.

...justification through faith was not a mere dogma of his theology, but the experimental fact upon which it was founded. This relative independence of faith not merely secured a free interpretation of Scripture by faith, in opposition to ecclesiastical tradition, but left a lawful position to believing criticism.

That aiming after absolute certitude in religious matters, so ineffaceable impressed upon the german mind by the Reformation era, was, in the seventeenth century, still powerful operative... In the place of the Church's testimony, to which its legitimate and subordinate position was allowed, was placed the testimony of Holy Scripture... it was

opposed by the Calixtine school in Helmstädt.[7] They did advocate the necessity of good works for salvation, but they were mainly opposed for their Syncretism. "Unionism in the Calixtine school went so far as to form plans for uniting with Romanists."[8] The middle ground between strict orthodoxy and the Calixtine school was occupied by the theologians of Leipzig and Jena.[9] They entered with "wisdom and moderation, but at the same time with decision, into the various theological phases of the seventeenth century." Especially John Gerhard, through his mildness and moderation gained the esteem both of Catholics and Reformed.[10] However, there were others, who maintained the

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unanimously acknowledged, as at the Reformation, that a firm, a God-produced, certainty concerning the contents of Christianity and their truth is both possible and necessary.

Hence it was necessary to exalt Holy Scripture to a superhuman position, that thus connection therewith might maintain somewhat of that direct fellowship with God which Protestants from the very first demanded.

We must, it is said, if our faith is to rest upon an absolutely secure and infallible foundation, recur to its ultimate, its absolutely supreme principle. This very notion of an ultimate principle forbids us to derive our assurance of it from aught extraneous to itself.

[7] George Calixtus (1586-1656), Hornejus (1619-1641), Titius (1649-1681), and the son of George, Ulrich Calixtus (1657-1701).

[8] Ibid., p.106.

[9] John Gerhard (1562-1637), John Himmel, and John Friedrich Mayer (1650-1712), the "Johannean Triad".

[10] Dorner, p.109; Gerhard's work, Loci Theologici cum pro adstruenda veritate, tum pro destruenda quorumvis contradicentum falsitate per theses nervose, solide, et copiose explicati; novem tomis comprehensum, 1609-1622. Also Confessionis Catholicae in qua doctrina cathol. et evang.

superiority of orthodox Lutheran theology, against which "complaints of the gravest nature began to arise on the part of men of vital piety." Scholastic orthodoxy became opposed by "mystic elements", by the Pietist movement inaugurated by Spener, and the likes of Zinzendorf, "in efforts to obtain either an internal reform of the Church, or to set up a model community beside her."(11)

It was this kind of theology from which Pufendorf turned away and rightly so. But Pufendorf was always concerned with theology, for many a year in privatam pietatis usum, and sought but late in life to liquidate his own separation of natural law from moral theology. Pufendorf tried to formulate a doctrina moralis uniting the duties of man, the citizen, and the Christian in a theology ad formam justae artis which not only formulates the law for salvation but also the law for the effective influence of Christian religion in the human forum.

Pufendorf, in my view, was not a secularizer and he had no tolerance for Atheism. For him, the whole system of law rests on the will of God, who not only created the world, but also man with specific human faculties to recognize with

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quam ecclesiae Aug. Conf. addictae profitentur, Epitome, ed. Joh. Ernst Gerhard, lib. i. ii. in 2 vols., 1661.

[11] Ibid., p.100.

a common sense, and evangelical faith God's laws, natural and revealed.[12] Pufendorf's concept of law rests on some very basic principles anchored in Christian belief.

First. Law is not a prescription but a commandment; although to follow or not to follow doctor's orders, a prescription, may have the same effect, as to disobey a commandment. Second. Law is the rule of conduct between parties. Laws come into force when both parties, the law-maker and the law-recipient voluntarily engage in an agreement, whereby a promise, a commitment, is being made; and when that promise is being broken, a transgression against the agreement is made, and the force of law comes into play. Third. Laws are necessary because God had so willed Creation. It is idle speculation how man conducted himself prior to the first man's fall, but it is the indisputable premises of man that his nature is corrupted, i. e. full of wicked desires, full of weakness, but fitted with

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[12] Dorner claims, on the Lutheran concept of Holy Scriptures in the seventeenth century, "compared with Luther's standpoint, the confirmation, sense and importance of the inspiration of Holy Scripture were essentially altered, and it was presented as fully self-sufficing, self-supporting and self-evidencing." P. 127.

And on the faith in Holy Scriptures: "He who has evangelical faith, fiduciaIiter credit, knows also that he believes, and in this his faith and assurance, which are both conscious, he possesses the divine datum which points to the divinity of its cause, which gives him assurance of the Divine origin of Holy Scriptures." P. 123.

"Thus Holy Scripture became itself revelation, and not merely the record of a revelation previously given." P. 128.

reason to recognize what is good or evil, and a free will to make commitments and to obey laws. Fourth. Breaking the law constitutes an injuria and loss of content of the agreement. Restitution is required. The restoration of the conditions of the agreement, what was lost has to be regained, in natural law it is peace among men, in the divine law, salvation.

For Pufendorf, the principles of law are the same in the human forum as in the divine forum. There is no real difference, except the pronouncements of the laws are in the human forum by a human sovereign in accordance with natural law, and in the divine forum by Holy Scriptures which are the words of God. With this understanding of law, a contractual and voluntary concept based on the human anthropology, there is no room for either dogmatic disputation or the impotence of Predestination. For Pufendorf the question of faith is a matter of faithfulness, the moral conduct of an accountable human being. The human act still matters more than the human thought. The moral human act matters in both forums, to obey God's commandments, to fulfill God's covenant with man, cause man to be charitable in the human forum and to be pious in the divine forum.

However, the primary objective in Pufendorf's early life was the reduction of ecclesiastical powers in the human

forum. But freedom from religious interference also affected religious consciousness, and the sociability concept divorced from any transcendental link became the egotistical force which would spawn nationalism, separatism, independantism, and étatism, a self-centeredness, all under the umbrella of self determination. But, while monarchies became fractured into republics, this secularized freedom contributed to the most spectacular economic development and prosperity, with tremendous productivity and advanced technology, both in productive tools and destructive weaponry. The century which brought us the greatest advancement of human endeavour also brought us the ultimate weapon with which man could destroy everything.

It is hardly conceivable that it all should have started with the thought process of seventeenth-century natural law advocates, who provided the secular ideology which severed religious domination as a necessary requisite to civilize the world and bring to an end the battles in the name of God. The lesson to be taken is to see it as an evolutionary process: In the advancement of mankind, the creation of steps, the Stufenbau, mankind needs to lead from a primitive past to a civilized future in which every previous step becomes history. The nature of things in human affairs change with every step, and the Wandelbarkeit of the priorities, of virtues, has to be taken into account. There

is to be an understanding, viz. that the advancements are not equal in all parts of the world. To be sure, there are some religiously dominated societies which have yet to approach the stage in which Europe had found itself in the seventeenth century. To approach such societies with post-modern western ideologies, is like providing a ladder with most of the rungs missing. You cannot climb that ladder, nor can we expect societies to leapfrog into the twentyfirst century, when we have not ourselves thought through the consequences of a run-away technology without ethical guidelines.

In this thesis I have made the effort to explore the giant step in the humanistic advancement of mankind which was provided by modern natural law. In this author's view, the modern natural law was a response to a humanity divided by war and civil strife, with religious overtones. The then necessary separation of secular government from religious domination should have been only a separation from institutionalized religion, i.e. the church. Unfortunately, to reduce the power of the church in secular matters, the foundation of religion became attacked; in that process the opportunity got lost to establish a universal natural law which includes the principles of natural religion. Samuel Pufendorf, who only late in life discovered that his natural law system in its interpretation became detached from its

metaphysical underpinning, clamoured for the restoration of religion in his attempt to write a "Federal Theology".

Pufendorf applied to theology the same logic he had used for his natural law concept. He saw in the nature of things the dictates, i. e. the law of nature, by which mankind ought to conduct itself. Man has to guide himself with his God-given faculties of liberty and rationality, which inevitably forces man to make conscious choices and commitments to fulfill his nature in sociability: viz. the deliberate, conscientious covenant between men to keep peace and to follow the dictates of authority vested in a sovereign by the tacit consent and the promise of obedience. Herewith, Pufendorf acknowledged the fundamental elements of man, who has in common with the animals a physical nature, but due to man's special design, is fitted with extraordinary faculties exclusive to man, a free will and reason, which constitutes his second nature, his moral nature. This is what makes man accountable for his actions, to have the liberty to obey or to transgress the dictates of the social contract, ruled and judged by natural jurisprudence. The very same moral nature, which permits man to voluntary act, comply or reject his duties commanded by natural law, for the conduct of men in the "human forum", comes into play in man's relation with God, his maker.

The law which governs man's moral nature in the "human forum" is the natural law which reveals itself to human common sense in the nature of things. The law, which governs man's moral nature in the "divine forum", is the divine law which is revealed in Holy Scriptures. God the Creator is the source of both, by having man outfitted with a God-like nature, to act consciously with a free will, i. e. to act voluntarily rather than driven by instinct. To act in a morally responsible way, is to act in accordance with the law, which is a contract, the rule that contracts the unbound liberty into a duty, which is none other than to voluntarily fulfill the demands of the contractor, the sovereign of the state in charge of human terrestrial affairs, and the sovereign of it all, God, concerned with the human spiritual affairs in His divine covenant with His human creation.(13)

God has revealed His intent to man documented in Scriptures. According to Pufendorf, this was the only way we could have knowledge of His intent. God has contracted man

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13 De Officio, Cap.II, § 4: For the fact that man is fitted to undertake an obligation there are two reasons: one, because he has a will which can turn in different directions, and so also conform to the rule; the other, since man is not free from the power of a superior... when the rule has been prescribed by a superior, it does wrong to depart from same. Such is evidently the nature with which man is endowed.

§ 5: Obligation is properly introduced into the mind of a man by a superior... the freedom of our will should be limited at his discretion.

by engaging his liberty to voluntarily enter into a God-pleasing relationship. God in turn, promised the state of Paradise to prevail and the life of man to become eternal. The first man exercised his liberty to break the contract, and ever since, mankind has been in an orbit of wickedness, from which he could not free himself because his moral nature became severely damaged, corrupted. But God, in his infinite charity, aided mankind with subsequent covenants, to allow mankind in the fulfillment of the covenant to regain God's grace: to grant salvation.

For Pufendorf it is an undisputed fact that human nature had been flawed. For man's moral nature was the liberty to participate in a perfect life, but man failed to use his liberty for its original intent, and got corrupted.[14] And, because of our natura corrupta, mankind lost the capacity to see perfection, we only can see the road towards it by the laws revealed to us in the nature of things for sociability, and by the laws revealed to us in Scriptures for salvation. To discover these laws, man has to apply himself with his human faculties. Reason has to be applied to discover the natural law governing human conduct in society, for which natural jurisprudence is being developed.

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[14] De Officio, Greeting to the Reader, p. xi: ...I think, that there would be a far different aspect of natural law, if anyone wished to presuppose the state of man to be uncorrupted.

Faith has to be applied to discover God's covenants governing the human conduct towards his Maker, for which a federal theology is being developed. It is a contractual concept applied to both relationships of mankind.

Laws - nevertheless - are laws, they all have in common a source of authority: the secular sovereign (of a state), and the divine sovereign (of Creation). The laws governing our voluntary conduct are both contracts which are con-tracting man's liberty into obligations. They both reward compliance, such as peace on earth and eternal life in paradise. They both punish transgression, even death in the terrestrial realm, and damnation in eternity. A horrible simplistic, but logical deduction, born in the Lutheran perpetuation of Augustinianism, the contemptus mundi, of a guilt-instilling existence. We suffer a legacy of a Western Guilt Culture, emphasizing crime and punishment, and atonement, which held mankind in Europe for centuries in a grip of "Sin and Fear."(15)

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15 Jean Delumeau, Sin and Fear, The Emergence of a Western Guilt Culture 13th - 18th Centuries, transl. by Eric Nicholson from the French original, Le Péché et La Peur (1983), New York, St. Martins Press, 1990, pp.555-557:

The consequence of the Original Sin, whose dimensions were truly cosmic, was the extraordinary wrath of God who, in His just vengeance, condemned mankind to suffering, death, and damnation... the result was a type of preaching that spoke more of...sin than pardon, of the Judge than of the Father, of Hell than of Paradise.

Pufendorf, true to his upbringing and tradition, could not bring himself to extend his concept of natural religion beyond the dogmatic confinement of Lutheran Protestantism. It is in this context, that this author sees the relevancy of Samuel Pufendorf in his time, and the relevance of his thought for the presence and the future.

Pufendorf who was dominated by his passionate distaste of the imperial forces of the Catholic Church and its Papal power, may inadvertently have contributed to the development of secular totalitarianism, when he proclaimed, as an innocent believer that the absolute sovereignty of state rulers is the best guarantor for the common good of sociability.

Pufendorf's conceptualization of natural law, to serve sociability with the necessary authority of absolute sovereignty of independent states, perpetuated the paternalistic principle which holds man in fear of authority; the fear of God in primitive man was replaced by the fear of the absolute state in the civilized man. Yet, as we have tried to discover in this thesis, fear constitutes a non-eternal non-sustainable force, which gripped man in his primitive state, but which is destined to diminish as humankind emancipates and grows wiser.

But what has not been recognized is that Pufendorf attempted - even though unsuccessfully - to develop the corresponding system of an universal natural religion. Only late in life did he reassert religion as a requisite for the fulfillment of mankind, in his case, a particular brand of Lutheran Protestantism with an exclusive authorization by Holy Scriptures. Pufendorf, a thinker of his time, could not escape the controversy of orthodox theology, longing for piety among men, he had to address the current disputation in his last words. He concluded in 1694:

> ALL these things being weighed, it seems to me that this Dissention cannot be taken away at once, or in the twinkle of an Eye... Lastly, if they [the Protestant Princes] would not contend, or strive which shall overcome the other by disputing, so much as which of them shall with greater endeavour conform their Lives to the Precepts of Christ: So it might be hoped that the Spirit of Peace would heal by degrees the exasperated Minds of Men, so as that casting away what is Vain and Erroneous, they might conspire in the Unity of the Faith.
>
> If any thing in this Work is fallen from me, disagreeing with the Genuine Sense of Holy Scripture, beside my Intention, let it be as not said.[16]

The "Divine Feudal Law", Jus feciale divinum, Das Heilige Religionsrecht, or God's covenants with mankind, was Pufendorf's final attempt to write a theological jurisprudence. The premises remain the same as for natural jurisprudence; viz. the nature of man, created with a free

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[16] Jus feciale, § 94, pp.364-365.

will and a mind of his own. This species is governed by a separate set of laws which commands man's activity among men - called sociability, and is detailed in a natural jurisprudence. This, however, does not cover man's spiritual existence, his faith in God and the aim of his being, [in the Christian tradition called Salvation], and is detailed in the various religions, which to this day, has greatly contributed to the disturbance of peace, and often in the name of God, led to persecution and atrocities. Thus, religious traditions, customs and controversies, have affected the will of people, clouded their judgement, and had people inflamed with belligerence on behalf of their faith, allegedly to defend the truth.

The proof is given to us, in the example of the wide gulf existing between a secular West and a religious Islamic population in the Middle East, who persist in alienation, despite many efforts towards peaceful reconciliation. This suggests, that a universal natural jurisprudence will not suffice to keep the peace among men and to promote civility. Therefore, mankind is also to be governed by a common, universal, religious jurisprudence, to unite all people, of different tradition, culture, and religion. In a common rule governing the actions and the mind, tolerating non-essential differences in behaviour and faith, but binding all of mankind to the fundamental articles

of human rights and duties, with reverence and dignity paying the respect due to the Deity, the Creator of us all, peace on Earth maybe achieved. Pufendorf made his reference to the first maxim of such a universal law early in 1673:

> Our Saviour reduced the essence of the law to two heads: Love God and love your neighbor. To these heads can be referred the entire natural law, in the uncorrupted as well as in the corrupted state of mankind; unless because the uncorrupted state there seems to have been little or no difference between the natural law and moral theology. For the sociability, which we have laid down as the foundation for the natural law, may be properly resolved into love of neighbor.[17]

For the advancement of humanity towards "love of neighbor" for all of humanity, the dictates of a natural jurisprudence are to be followed; for the fulfillment of humanity in the "love of God" by all, the dictates of a common moral theology are to be followed. Pufendorf attempted to define such a moral theology to be universally applicable. Due to his times, and due to his own position within the Lutheran Evangelicalism, and the moral stance of Pietism, Pufendorf did not reach beyond these confinements.

Pufendorf worked to clarify the fundamental articles of faith, exclusively necessary for Salvation, not only for the interconfessional understanding among Christian

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[17] De Officio, Greeting to the Readers, p.x.

churches, but for the necessity of these articles for the human conduct within society, to have the commands of Christ realized in the daily conduct of mankind. Pufendorf aimed at a perfection of human sociability with a renewed moral theology. His most important contribution may be the method of exploring theological problematic with a rational logic based on the specific human nature which was created with a contractarian faculty: the capacity to promise, to keep faith, and bind oneself voluntarily to a conduct and faith, and to engage oneself in a reciprocal covenant with fellow-man, and apply this faculty, as the capacity to engage in a reciprocal covenant with God, for the love of God, to bind oneself in liberty to love: God and His creation, i. e. the self, the next of kin, the whole of mankind, and the universe, all embracing, unconditionally. This reduction to the basics of the divine and natural law, Pufendorf had in his mind, when he attempted with his jus feciale divinum the development of a universal moral-theological jurisprudence.

Philipp Jacob Spener gave us the last testimony on Pufendorf by a close personal acquintance. Spener published his sermons with an eulogy of Pufendorf included in the Eighth Sermon, "On the Faithful Christian's Highest Honour, to have as one's own the Lord Jesus Christ's Consolation and Salvation From Rom. 14 / 7-8". And, "This eulogy to Mister Samuel Freyherr von Puffendorf, Electoral Privy Councillor of

Brandenburg, who passed away in peace in Berlin on the 26th of October 1694, and whose body was laid to rest in Saint Nicolai on the 7th of November, was held in his memory in the same church on the 11th of November, the 23rd Sunday after Trinity".

After a description of Solomon's wisdom, Spener delivered with reverence an eulogy which cannot but aid in the restoration of Pufendorf's image in the history of political and religious thought. I take the liberty to include here in my translation the main part of Spener's eulogy of Samuel Pufendorf:

> ... wisdom is the proper means to an immortal name and eternal memory; however, not only the wisdom which concerns natural things and the other things of the human life, although, each science, the art and learnedness deserves to be remembered, but it is the divine wisdom which exclusively stretches its memory to eternity.
>
> Now, beloved, such an immortal name and eternal memory was left behind by such a person and noble member of our community, to whose memory and our edification we are here assembled; namely for the late, illustrious Mr. Samuel Freiherr von Pufendorf, former Electoral privy councillor of Brandenburg, now blessed; whose faded remains some days ago was put to a final rest in this church.
>
> However, his memory and immortal name which he received as a blessing by his God for the wisdom he had achieved, is to remain with the ones left behind.
>
> In this man we found a great deal of wisdom of the natural and this [earthly] life concerning things God bestowed on him considerable natural talents, a sharp mind and a sound judgement, which he from youth on exercised with great diligence, and through God's grace with great success, that he may with good cause be called among the most learned people of our times, especially what concerns the political

and historical studies , which he saw to be what Syrach c39 / 24 demanded, the one who serves princes and masters, should record the history of famous people to explore their importance and what they teach.

The wisdom he herewith pronounced, not only as a professor at universities to help others to develop wisdom into a tool for the common good, but when he was called upon by great Protestants to state-affairs and to be their historian, who could not - if he had it not in himself- describe history, to which his already published works and the ones readied for publication gave ample proof. Although a descendant of Protestant clergy, he was revered by other learned and excellent people who sought his friendship, but also by high heads, kings and electorates, who bestowed upon him grace and praise, so that those nearly fought for his services. Despite this, when he had to take leave, his reputation was not diminished but rather increased, and as so often the case, the misgivings subsided, and his works were ever so more appreciated.

He was not lacking in wisdom on divine and religious subjects, but he had, as demonstrated in his early years, a considerable knowledge of the whole theology; and in the things which serves to the welfare of the Church he was able to debate and write about with such authority, that I am assured, that Christianity would be much better in all places, if things would be installed as per his demands and according to his insights, which comes from his divine wisdom, goodness and truthfulness. So as he recognised Christianity, not only with mere knowledge and this or that opinion, but foremost with a vigorous and loving faith. Not to mention his private devotion; he attended regularly the congregation mass, and I can name no other of this community who had more often listened to my sermons with greater attentiveness; also for the Salvation, he received the Sacraments with specific devotion. He also worked on himself to improve his temper, while in the right often wrongly accused, he used a harsh pen for which he later had regrets. He really demonstrated his steady faith in his last days on the sickbed, in great pains caused by the prescribed cure, which he took without complaint, in true Christian spirit, after he received from the Lord all that is good, he was willing also to receive the bad (as it usually happens with the pain of the flesh). Although by higher order as well as by the wish of the loved ones, everything was being done to prolong his life, and he himself had the will to live but also with it a heartfelt calmness, giving it into the hands of the Lord, and to be willing to part. Which he than accepted and bid farewell to his own, and other good friends (and myself the evening before), with this he commended his

soul to the hands of the heavenly Father: which then is the highest peak of true certainty, to die knowingly blessed.

Thus he has from the wisdom an immortal name and eternal memory bestowed upon the living, but it is upon us to keep his memory in us in good grace. It should be also a demonstration of our edification in the selection of the text for this Eulogy, that the lesson to be learned, as if he called it from the grave, we more so lovingly and firmly embrace.

The Lord our God may stay with us with his Holy Ghost, and teach us from his word the meaning of our existence, and keep it before our eyes, so that we may order all our deeds accordingly to the glory of His name, the expansion of His Kingdom, and the fulfillment of His Will.[18]

The seventeenth century did bring us the modern realization of the very human faculties of reason, i.e. the capability to observe with deliberation to result in voluntary action in a responsible way. If there is to be a new age, we will have to rediscover the other human faculty, that of religion, i.e. having faith and trust in the goodness of Creation, and that this Creation will fulfill itself with human moral creativity. This means that each and every one of us will need to seek to adopt Albert Schweitzer's concept of "Reverence" as our basic principle, whereby we shall once again become open to the message of a renewed natural law und universal moral theology.

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[18] Translated by this author from the original printing of Spener's Christlicher Leich-Predigten, Frankfurt am Main, In Verlegung Johann David Zunners, Im Jahr Christi 1696, pp. 222-224.

It is the author's conclusion that Pufendorf understood his early and most significant works on natural law to have been insufficient to lead society into a more civilized, peaceful and amicable humanity. For the advancement of mankind two important problems had to be addressed: first, to achieve religious peace between the Christian churches, and second, to have reinforced the moral fibre of humanity with a new prescription of universal principles of a natural religion understood by all and based on the fundamental articles of the Christian faith.

Pufendorf, raised as a son of a Lutheran Pastor, was introduced to both the morality of Lutheran Evangelicalism and the dogmatic controversies of Protestant orthodoxy. The young man Pufendorf developed a yearning for clarity of mind and was drawn to the mathematical structure of politics and natural law advanced by Grotius and Hobbes. The German moral revival movement of Pietism had a decisive effect on Pufendorf, who became inspired to move beyond his natural jurisprudence and its historical underpinning towards a crowning system of moral theology. Pufendorf,for this task, applied a brilliant mathematically schooled mind, a Lutheran Evangelical education, and a firebrand spirit tamed by Pietism. The original Pufendorf fighter learned to control his temper and accepted the Christian morality of making peace with your enemy.

Pufendorf is known today as the architect of a great modern natural jurisprudence. In this thesis I have attempted to show that Pufendorf also spent the greater part of his adult life in religious thought, that he sought to establish Christian morality and to bring religious peace to Christianity. His work as a whole represents a comprehensive attempt to work out the implications of these two spheres of life: the theological and the juridical, the divine and the human. One can only understand and appreciate his thought when one recognizes that the two worlds are complementary and mutually reinforcing; neither can be comprehended in isolation or abstraction from the other.

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