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Travel Literature and Modern Natural Law

Natural law theory has been an integral part of Western legal and political thought since Classical Antiquity.[1] In its long history, there were two particularly dramatic turning points: around 1600 and around 1800. In the decades around 1600, the ancient and medieval conception of the objective lawful order of nature gave way to an entirely new natural law theory based on notions of individual liberty and natural rights. This new natural law theory, usually referred to as modern natural jurisprudence, was elaborated by Hugo Grotius, Thomas Hobbes, and Samuel Pufendorf in the course of the seventeenth century. In the decades around 1800, modern natural jurisprudence gradually lost its appeal and was eclipsed by historical jurisprudence and legal positivism. During the two centuries between 1600 and 1800, natural law theory provided the most important theoretical paradigm for conceiving political and legal order. This paper examines a hitherto unheeded aspect of it, namely its relationship to travel literature. Even a preliminary investigation of this relationship, as will be attempted in the following, yields some rather interesting results:

First, the emergence of modern natural law theory around 1600 owed a great deal to travellers' accounts of the peoples of the New World. Jurists of the sixteenth century were mostly beholden to the doctrines of Thomist scholasticism. In order to make sense of the radically expanded and continuously expanding world, however, scholastic jurists such as Francisco de Vitoria turned to travellers' reports on the newly discovered peoples as well as on the dealings of Europeans with them. In so doing, they brought the legal subject and juristic reasoning into the discourse of natural law, thereby preparing

1 For a concise history of the concept of natural law, see Karl-Heinz Ilting, "Naturrecht", *Geschichtliche Grundbegriffe*, ed. Otto Brunner, Werner Conze, and Reinhart Koselleck , Stuttgart, Klett-Cotta, 1978, vol. 4, p. 245–313.

the way for a new brand of natural law theory that we now characterize as "modern."

Second, travel literature proves to play a constitutive role in the conceptual design of modern natural law theory. At the heart of modern natural law theory is the fiction of the state of nature as the state of disorder. Such a fiction justifies the institution of the civil state as a means of enforcing law and order. Thomas Hobbes and John Locke regarded the fictive state of nature to be exemplified by the so-called savage and barbarous peoples described in travel accounts of the New World. Pufendorf illustrated the system of natural legal norms with copious references to travel reports on various peoples of the world.

Third, in the course of the eighteenth century, the natural law systems developed by Hobbes, Pufendorf and Locke were further elaborated, but also contested. As it turns out, the elaboration and contestation of natural law theory depended, to an even greater extent, on travel literature. The increasing and deepening knowledge of almost all the peoples in the world came to challenge the stark distinction between the state of nature and the civil state. In light of the ethnographic knowledge provided by travel literature, some eighteenth-century thinkers started to conceive of the transition from the state of nature to the civil state in temporal terms, while others entirely replaced the natural law model of political order with a historical one. Natural law metamorphosed into the history of mankind.

Fourth, what enabled the transformation of natural law into history was a narrative imagination that selected certain elements from travel reports and re-combined them into a narrative sequence. By the 1760s and 1770s, this narrative imagination reached such hypertrophic proportions that it became self-reflective. As a result, the union between travel literature and natural law gave rise to something new, something that was about to monopolize the term "literature", i.e. imaginative literature.

Travel Literature and the Emergence of Modern Natural Law Theory

Up to the early seventeenth century, natural law was taught in three of the four faculties of the traditional European university: in the philosophical faculty based on the works of Aristotle and the Stoics, in the faculty of law based on Justinian's *Corpus Juris Civilis*, and in the

theological faculty based on Thomas Aquinas' *Summa Theologiae*, with minimal confessional differences. Together the teachings in these three faculties make up the ancient tradition of natural law. In the ancient tradition, the law of nature is considered as imprinted on the human soul by nature or God. It comes in the form of a variety of commands and prohibitions, which are supposed to be in force in all human societies, and which converge in the idea of an objective, universal order of the world. The ancient tradition of natural law culminated in Thomas Aquinas. Aquinas regarded the natural law as the law of natural reason, which ensures the earthly good, in contrast to the divine law concerned with salvation and eternal bliss. Both the natural law and the divine law, however, are grounded in the Divine Providence or the eternal law. What emerges from such a distinction is a conception of the natural law as the rational pattern of human life, which applies to all men regardless of their faith (because it is not the Divine law) and regardless of their membership in particular communities (because it is not human law), which cannot be changed although "many things for the benefit of human life have been added over and above [it], both by the Divine law and by human laws,"[2] and which are ingrained in the hearts of men even if some of its secondary precepts "can be blotted out from the human heart" by sin and corruption.[3] As to the relationship between the natural and the human laws, Aquinas followed tradition in maintaining that as specific provisions meant for particular communities human laws must be consistent with the universal natural law. Human laws in contradiction with the natural law are nothing more than expressions of tyranny, which deserve resistance rather than obedience.

The notion of the rational, natural order of the human world, which underlay the ancient tradition of natural law, was put to the test by the conquest of the American continent. In the face of the events across the Atlantic, the Spanish theologians and jurists trained in the tradition of Thomist scholasticism were initially at quite a loss. Since the law of nature is evident to reason, there should actually be no serious difficulty in assessing the lawfulness of particular actions.

2 Thomas Aquinas, *Summa Theologiae*, IaIIae, q. 94, a.5; English translation by Fathers of the English Dominican Province, Notre Dame/Indiana, Christian Classics, 1981, vol. 2 , p. 1012.

3 *Ibid.*, IaIIae, q. 94, a.6; p. 1013.

One needs to do nothing more than examine whether the particular actions are consistent with or derivable from the general precepts of the natural law. Yet the question arose as to the applicability of the law of nature to Amerindians. To be sure, the law of nature is a universal rational pattern that applies to all human beings. But are the people discovered and vanquished on the new continent rational human beings? Do Spaniards have to deal with them in the same way as they do with other Spaniards or Europeans? Answering such questions requires empirical knowledge of the Amerindians. During the decade from the mid-1520s to the mid-1530s, a host of books were published in rapid succession about the inhabitants, flora and fauna of the Indies, as well as about the Spaniards' encounter with them. Notable titles include Hernán Cortés's *Cartas de relación* (1522), Gonzalo Fernández de Oviedo's *Sumario de la natural historia de las Indias* (1526), Peter Martyr's *De orbe novo* (1530), Francisco Jerez's *Verdadera relación de la conquista del Perú* (1534), and Oviedo's *Historia general y natural de las Indias* (1535).[4] These and other accounts of the new world provided the starting point as well as an empirical measure of some significant innovations in the discourse of natural law.[5] Two of these innovations are especially worth pointing out: the construction of the subject of natural law, and the appreciation of subjective reasoning in the finding of justice. Both dealt a blow to the ancient tradition of natural law and set the stage for modern natural law theory.

Travellers' reports about the peculiarities of the Amerindians brought the applicability of natural law to these peoples to the centre of jurists' attention. In order to resolve this issue, jurists found themselves compelled to tackle yet another, theoretically more challenging, question: what is a human being from the perspective of the natural law? Only after the conceptual clarification of the human was it possible to gauge the human quality of the American natives and to adjudicate the applicability of the natural law to them. Jurists of Spanish scholasticism, especially their most prominent representative Francis-

4 See Henry Harrisse, *Bibliotheca Americana Vetustissima. A Description of Works Relating to America Published Between the Years 1492 and 1551*, New York, Philes, 1866.

5 On the consequences of the empirical knowledge of the New World for legal and political thought in the first half of the sixteenth century, see especially Anthony Pagden, *The Fall of Natural Man: The American Indian and the Origins of Comparative Ethnology*, Cambridge, Cambridge University Press, 1982, pp. 57–108.

co de Vitoria, worked out an elaborate definition of the human by means of which to evaluate the qualification of the natives of the New World for the natural law. In so doing, they constructed the subject of natural law to complement the traditional conception of natural law as the objective rational order of nature.

The definition of the human by Vitoria takes the form of a series of distinctions. The most basic distinction is between the human and all the other beings in the world. In his lecture *De Temperantia* (1537), Vitoria explicates the radical discontinuity between the human being and the rest of the Creation through a discussion of dietary issues. Related to the privileging of man over the rest of the Creation is the distinction between the human and the animal. According to Aquinas, the human differs from the animal in that man is master of his own actions, whereas the animal is not.[6] Interpreting Aquinas, the Spanish scholastics defined the human as a being that is the master of his actions, owns property, and lives in a political community. This is in contradistinction to the animal, which has none of these qualities. The third distinction serving to define the human can be characterized as one between normal and abnormal human beings. In his lecture *De eo, ad quod tenetur homo, cum primum venit ad usum rationis* (1535), Vitoria presents a number of more or less speculative considerations to construct the normal human as a being capable of the use of reason or free judgment, contradistinguished from abnormal humans who are deprived, wholly or partly, of this capability, such as children, madmen, dreamers. A further distinction made by Vitoria, also in the lecture *De eo, ad quod tenetur homo*, is one between the human and the believer. The use of reason as the defining quality of the human, according Vitoria, has no necessary relation to faith. On the one hand, every man can act morally, as soon as he has reached the use of reason, even if he does not know or is not able to know God. On the other hand, not everyone who has reached the use of reason is obliged to turn to God explicitly, distinctly, and formally. What characterizes a rational being is the ability to make free decisions aimed at the good regardless of his faith. Taken together, these distinctions combine to make up a set of criteria by which to assess the human quality, and accordingly the qualification for natural law, of a

6 See *Summa Theologiae*, IaIIae, q.1, a.1.

living being. They construct a rational, normal, secular human being as the subject of natural law.

Vitoria's construction of the subject of natural law added a novel dimension to the natural law discourse without jettisoning the Thomist conception of objective natural law. This important theoretical innovation was predicated on reports about the situation in the New World. The insistence on the radical discontinuity between the human and the rest of the Creation in *De Temperantia* was, for the most part, a reaction to the numerous reports about cannibalism and human sacrifice among American Indians. In his famous lecture *De Indis* (1538–39), Vitoria addresses himself repeatedly to the juridical issues associated with cannibalism, arguing that Christian rulers may, indeed must, wage war against barbarians who eat human flesh and sacrifice humans. The justification for such a war, however, should not be the violation of the law of nature, but should be the infliction of injury on humans. The definition of the human in contrast to the animal, revolving around the concept of dominion as it does, was bound up with the question about property rights and the political self-rule of the Indians and, consequently, with the question about the legitimacy of the Spanish conquest. The construction of the normal human being as distinguished from children, madmen, dreamers, and the like answered to the doubts about the presence and sufficiency of the natives' rational faculty. In *De Indis*, Vitoria dwells, among other things, on the questions of whether the barbarians are sound of mind, and how their appearance of unintelligence could be explained. Finally, the distinction between the human and the believer engaged with the prevalent attempts in early sixteenth-century Spain to justify the conquest on the ground of the barbarians' lack of Christian faith. Insofar as Vitoria's definition of the human was prompted by the need to clarify the status of the American natives, we can speak of the birth of the subject of natural law in the New World.

The reconceptualization of natural law in terms of its subject could not help transforming the ways in which its normative principles were established, because now any discussion of the prescriptive norms of natural law had to take into account the claims of its subjects. Subjective claims to the natural law are natural rights. Vitoria's construction of the subject of natural law went hand in hand with the engagement with, and elaboration of, the late medieval conceptions of subjective right, i.e. conceptions of *ius* as the faculty (*facultas*) or

power (*potestas*) of the individual, and as *dominium*.[7] Consequently, discussions of the juridical predicament in the New World were often couched in the language of rights. In *De Indis*, Vitoria first presents the subjective rights of one party – the Indians – and then those of the other – the Spaniards – in order finally to come up with a model of reconciling them. Once the subject of natural law comes into being and stakes out its claims, the natural law-based juridical discourse has no other choice but to direct its attention to the mediation between subjective rights. The resultant juridical principles move beyond the precepts of natural law immediately evident to reason, constituting another realm of law that is supposedly derivable from, or at least consistent with, the natural law, but that is always admixed with positive elements. After having established the status of Indians as subjects of natural law, Vitoria first concludes that the Spaniards have to deal with them in accordance with principles consonant with the natural law. Those claims of the Spaniards to the Indian land and people, which are based on the divine law or papal decretals, are therefore illegitimate. Only the claims consistent with the natural law are legitimate. But what could these legitimate titles be? Vitoria mentions first the right of the Spaniards to travel, or the so-called *ius peregrinandi*. Human beings are by nature entitled to move around to seek the companionship of fellow humans. So the Spaniards may travel to the new continent and use the ports, roads and other facilities there. They should also be allowed to trade there, occupy unoccupied lands and seize the unused metals buried underground. Next to the right to travel, Vitoria argues that the Spaniards also have the right to preach the gospel, or the so-called *ius praedicandi*. Human beings are by nature entitled to say what they think and believe and make other people listen. If the Indians resist or even violently oppose the Spaniards' travelling and preaching activities, they are actually violating the rights granted by nature, so that Spaniards are allowed, indeed obliged to fight against them. If the Indians lose the just war waged by the Spaniards, they must pay compensation, for instance, by offering their lands. Vitoria's arguments do not sound entirely convincing, because

7 See Annabel Brett, Liberty, *Right and Nature: Individual Rights in Later Scholastic Thought*, Cambridge, Cambridge University Press, 1997, pp. 123–164; Brian Tierney, *The Idea of Natural Rights: Studies in Natural Rights, Natural Law and Church Law 1150–1625*, Atlanta, Scholars Press, 1997, pp. 256– 265.

the legal norms posited by him are not precepts of nature as such, but putatively derived from nature by means of juristic reasoning. Juristic reasoning is subjective, often loaded with historically contingent considerations.[8] Along with the construction of the subject of natural law, legal norms are also subjectivized.

The construction of legal subjectivity and the finding of legal norms through juristic reasoning – two far-reaching discursive innovations carried out by Vitoria with reference to travelers' reports on the conditions in the New World – move decisively beyond the ancient tradition of natural law and herald the beginning of modern natural law theory. Compared to the ancient conception of the objective order of nature, modern natural law theory proceeds from the subjective rights of individuals in the state of nature. Whereas the ancient tradition conceives of the law of nature as consisting of various commands and prohibitions imprinted on the soul of the rational being and immediately valid in human societies, modern natural law theory seeks to deduce legal norms from one given principle by means of reasoning. The rationally deduced norms are not valid in human societies until they are declared to be so and enforced by the sovereign will of the civil state.[9]

Travel Literature in the Conceptual Design of Modern Natural Law Theory

Crucial to modern natural law theory is the fiction of the state of nature. The state of nature, as Pufendorf puts it in his *De Jure Naturae et Gentium*, refers to "the condition for which man is understood to be constituted, by the mere fact of his birth, all inventions and institutions, [...] being disregarded." By "inventions and institutions," Pufendorf continues, "we understand not only the different forms and general culture of the life of man, but especially civil societies, at the

8 Vitoria's juristic reasoning is inextricably intertwined with Spanish imperialism in the New World, as Antony Anghie has pointed out in his *Imperialism, Sovereignty and the Making of International Law*, Cambridge: Cambridge University Press, 2005, chapter 1: "Francisco de Vitoria and the colonial origins of international law."

9 On the contrast between the ancient tradition of natural law and modern natural law, see especially Merio Scattola, "Models in History of Natural Law," *Ius Commune* 28 (2001), pp. 91–159.

formation of which a suitable order was introduced into mankind's existence."[10] The state of nature is thus a privatively defined concept, referring to a hypothetical condition of man if all of his social attributes were stripped off, if the civil order were obliterated. In such a condition, men would exist as isolated individuals, with liberty and equality as their essential qualities. Natural laws as the laws governing the state of nature are not innate ideas, but must be discovered by reason. Reason proceeds from one single principle. Among modern natural-law theorists, there is no consensus as to what the first principle is. Some see it in fear, some in sociability, others in perfectibility. Yet all of them are convinced that an entire system of natural law can be deduced from a single principle. Because in the state of nature individuals are equal and therefore equally free to pursue whatever suits his needs, modern natural law theory proceeds from the assumption of natural disorder, in contradistinction to the ancient idea of the universal order of nature. Natural disorder makes the institution of the civil state necessary. It is the sovereign authority of the civil state that recognizes, defends, and enforces the laws of nature discovered and deduced by reason.

If we take a closer look at modern natural law theory, we will discover references to travel literature at the most crucial junctures of its conceptual design. In Chapter 13 of *Leviathan* (1651), a chapter concerned with the concept of the state of nature, Hobbes writes:

> It may be peradventure be thought, there was never such a time, nor conditions of warre as this; and I believe it was never generally so, over all the world: but there are many places, where they live so now. For the savage people in many places of *America*, except the government of small Families, the concord whereof dependeth on naturall lust, have no government at all; and live at this day in that brutish manner, as I said before.[11]

Based on unnamed travel reports, Hobbes asserts that the savage people in America live out of the civil state, identifying them with the state of nature. In his *Second Treatise on Government* (1690), John Locke

10 Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo*, II,II,1, English translation by C. H. Oldfather and W. A. Oldfather, Oxford, The Clarendon Press, 1934, p. 154.

11 Thomas Hobbes, *Leviathan*, Cambridge: Cambridge University Press, 1996, p. 89.

makes the same point by quoting one of the many travel accounts that his text draws upon:

> And if *Josephus Acosta's* word may be taken, he tells us, that in many parts of *America* there was no Government at all. *There are great and apparent Conjectures,* says he, *That these Men,* speaking those of *Peru, for a long time had neither Kings nor Common-wealths, but lived in Troops, as they do this day in* Florida, *the* Cheriquanas, *those of Bresil, and many other nations, which have no certain Kings, but as occasion is offered in Peace or War, they choose their Captains as they please.*[12]

As we know, Hobbes and Locke differ on a variety of issues. Hobbes imagines the state of nature as a state of war of all against all, the hideousness of which prompts men to submit themselves, by means of a contract, to the sovereign rule of the civil state. Locke sees the function of the state reside mainly in the protection of private property, which is always at risk in the state of nature. For all their theoretical disagreements, both Locke and Hobbes illustrate the state of nature by references to travellers' accounts of savage peoples. This argumentative strategy draws attention to an important dimension of the natural-law construction of the sovereign state, which neither political theorists nor historians have taken into account. As mentioned above, the state of nature is a negatively defined concept, designating a hypothetical condition, in which man would have found himself if everything that the civil state has introduced into human existence had been taken away. In other words, the state of nature represents the Other of the civil state, that which the civil state excludes, that which the civil state keeps at bay. If the so-called savage peoples as described by various overseas travellers stand as a model for the state of nature, then we can say that the modern state in Europe constitutes itself by excluding and rejecting other forms of human life outside of Europe as savage. Or to put it the other way round, the savage is lodged at the heart of the modern state as that which is excluded. The modern state has savagery as one of its conditions of possibility. This spectral presence of the savage in the modern state has a number of historical as well as theoretical implications:

First, the rise of the sovereign state in early modern Europe proved to be not only the consequence of religious wars, as has usu-

12 John Locke, *The Second Treatise on Government*, chap. 8, §102, online edition at http://constitution.org/jl/2ndtr08.htm.

ally been argued in connection with Hobbes' theoretical construction of the sovereign state. Nor was it merely a response to the emergence of commercial society, which made the protection of private property into a political issue of the highest order, as has often been argued in connection with Locke. The rise of the sovereign state was also inextricably intertwined with the discovery and colonization of the peoples of the New World. In fact, European colonialism and imperialism turned out to be intrinsic to the modern state as constructed by natural law theory. Since the purpose of the civil state is to lead human beings out of the state of nature, to overcome and avert the state of nature forever, and since the savage peoples in other regions of the world are associated with the state of nature, it behooves the modern state to contain, to overpower, in a word, to subjugate these people. This subjugation means, first of all, labelling the savage as the other, excluding it from the legal order that the civil state represents. One form that this act of exclusion takes is to deny savages legal subjectivity, to declare them outlaws. In the modern age, only the sovereign state is recognized as a legal subject in world affairs, whereas savage peoples, by definition stateless, are excluded from the purview of the law.[13] If the savage as that which has been excluded, as that which has been declared outlaw, is brought back into the legal order of the sovereign state, it becomes the colony. The colony is the sovereign state's re-appropriation of what it has declared to be the state of nature. In constructing the sovereign state, modern natural theory also constructs colonialism.

Second, the spectral presence of the savage in the modern state reveals not merely the intrinsic connection between the modern state and colonialism, but also the true nature of international law as the law that governs the relationship between sovereign states. With the transition from the state of nature to the civil state, natural laws are recognized, defended, and enforced by the sovereign authority, while the sovereign authority itself goes about making positive laws. As a result, a legal order is established. However, the state of nature is not overcome once and for all. Instead, it re-emerges in a new space, namely between civil states. Once the civil state is instituted, it faces

13 For one prominent example in this regard, see James Lorimer, *The Institutes of the Law of Nations: A Treatise on the Jural Relations of Separate Political Communities*, Edinburgh and London: William Blackwood and Sons, 1883.

other civil states in a state of nature. The law of nature, when applied to the relation between civil states, is called the law of nations or international law. If the state of nature is associated with savage or barbarian peoples, then international law is really nothing else than the law of savages and barbarians. Immanuel Kant draws this logical conclusion in his treatise *Zum ewigen Frieden* (1795) by pointing out that European states behave to each other in exactly the same way as barbarians of America in that they fight against each other incessantly. In fact, European states are more barbarian than the barbarians, because they cannibalize each other on a much greater scale.

Besides Hobbes and Locke, another founding figure of modern natural law theory was Samuel Pufendorf. Pufendorf was even more interested in travel reports than the two British thinkers. His *De Jure Naturae et Gentium*, first published in 1672, refers to almost all the notable travel literature available at that time, which provides information not only about American Indians, but also about China, Japan, India, certain African countries, indeed the entire known world. Maybe because of this attention to a great variety of customs and life forms in the world, few of which are reducible to savagery, Pufendorf does not link the state of nature to any particular people, as Hobbes and Locke do. In fact, he regards the state of nature as entirely hypothetical, to which no real people could correspond. Compared to Hobbes and Locke, travel literature performs a rather different, though no less crucial, role in his natural law theory. In the state of nature, he maintains, the fundamental law is sociability. From this fundamental law of nature, he believed to be able to deduce all the rights and duties by following the dictates of reason. Indeed, he constructs a whole system of private law on the basis of this principle, in order finally to develop a theory of the civil state as the sovereign authority that defends and enforces such a system. It is in formulating this system of private law that Pufendorf draws extensively on travel reports. For instance, "to illustrate the obligation between those united by ties of blood one may use the law in force in the kingdom of Tonquin, according to which disputes arising between such persons are not decided by a judge but by relatives of both sides acting in the capacity of arbiters, as is reported by Alexandre de Rhodes, *Divers Voyages*, Bk. II, chap. vii."[14] The customs and laws of various peoples

14 Pufendorf, *De Jure Naturae et Gentium*, IV, XI, 14. English translation, p. 637.

as described by world travellers are quoted to illustrate the rationally deduced legal norms regarding persons, things, and obligations, alongside references to classical authors and Roman legal sources. By relating the system of laws constructed by reason to customs of peoples around the world, Pufendorf tacitly maps rational natural law, which is by definition universal, onto mankind in general. In the name of reason, one legal regime takes over the world, turning the multifarious legal orders in the world into either the confirmation of, or deviation from, itself. Pufendorf's use of travel reports, then, represents a symbolic operation that installs the hegemony of one legal regime. This hegemony, still purely theoretical in Pufendorf, was to become a historical reality in later centuries. As we know, rational natural law in the Pufendorfian vein became the basis of codification in the late eighteenth century, notably in Prussia and Austria. Such legal codes instituted in the age of the Enlightenment spread, under various circumstances, to many countries around the world.

Travel Literature, Narrative Imagination, and the Transformation of Natural Law into History

Modern natural law was firmly established in the course of the seventeenth century. In the eighteenth century, it was further elaborated, but also challenged, as well as appropriated for other purposes. Whereas the reference to travel reports plays a constitutive role in the conceptual design of modern natural law theory, as shown above, in the eighteenth century travel reports contributed to the transformation of the discourse of natural law. In light of the ever-growing travel literature, the natural law model of the civil state gradually gave way to a historical one, as Vico, Rousseau, and Scottish Enlightenment attested to.

The title of the first edition of Giambattista Vico's magnum opus, published in 1725, outlines an ambitious intellectual program: *Principles of a New Science concerning the Nature of the Nations, by which are found the Principles of another System of the Natural Law of the Gentes.* Vico acknowledges Hobbes and other seventeenth-century natural law theorists as his predecessors in creating a science of human society. Yet he seeks to develop "another system of natural law," because in his eyes the natural law theorists "err together [...] by beginning in the middle; that is, with the latest times of the civilized nations, [...]

from which the philosophers emerged and rose to meditation on a perfect idea of justice."[15] As mentioned earlier, modern natural law theory takes the civil state as its starting point, and then postulates a fictive state of nature by subtracting all that the civil state has introduced into human existence, in order to deduce all the rights and duties by philosophical reason, and to explain the foundation of the civil state. Vico, by contrast, proposes to begin at the beginning, i.e. from the condition of savagery, in order to bring to light the natural law of humankind. Such a project involves philological studies of the ancient peoples, but it also involves travel reports on present-day peoples from all parts of the world. For instance, with regard to burial rites, Vico asserts a consensus among ancient peoples, and continues:

> That such was the consensus of the ancient barbarous nations may be inferred from what are told of the [present] peoples of Guinea by Hugo van Linschooten; of those of Peru and Mexico, by Acosta in his *Natural and Moral History of the Indies*; of the inhabitants of Virginia, by Thomas Harriot; of those of New England, by Richard Whitbourne; of those of the kingdom of Siam, by Joost Schouten.[16]

The reference to travel reports performs at least two important functions. First, it demonstrates that all peoples, however remote from each other in time and space, share some basic customs. Besides the burial of the dead, Vico argued that all peoples have some religion, and all contract solemn marriage. By identifying religion, marriage, and burial as the three eternal and universal customs, Vico breaks decisively with modern natural law theory, returning to the ancient tradition of natural law and more specifically to Roman jurisprudence. Roman jurists distinguished three branches in private law: *jus naturale*, i.e. the law that nature has taught all living beings, including both animals and human beings; *jus gentium*, i.e. the law common to all peoples, but not to animals, and finally *jus civile*, i.e. the law that each civil state makes for itself. Vico's alternative to modern natural law theory is a combination of *jus naturale* and *jus gentium* in the Roman sense, which he calls the "natural law of the nations." Vico's reference to travel reports has yet another important function and implication. If descriptions of various barbarous peoples by world travelers indicate

15 Giambattista Vico, *The New Science*, Ithaca/New York, Cornell University Press, 1948, p. 111 (§ 394).

16 *Ibid.*, p. 87–88 (§ 337).

that all peoples share the same universal customs, what shall we make of the obvious differences among ancient as well as present-day peoples in all parts of the world? Vico's answer to this question is history. He maintains that all peoples undergo a similar course of transformation in time. Peoples take on different forms of life in different stages of their historical development. In Vico's *New Science*, the challenge to modern natural law theory goes hand in hand with the turn to history in understanding human societies.

Jean-Jacques Rousseau's engagement with natural law is, to an even greater degree, mediated by the reading of travel literature. In his *Discours sur l'origine et les fondements de l'inégalité parmi les hommes*, written in 1754 in response to the prize question posed by the Academy of Dijon as to whether inequality is authorized by the natural law, Rousseau follows the basic conceptual design of modern natural law theory by proceeding from the concept of the state of nature, and by associating the fictive state of nature with the savage people known from travel literature. But he disagrees with the seventeenth-century natural law theorists and their eighteenth-century successors on an important point: whereas those thinkers conceive of individual men in the state of nature as quintessentially rational beings, beings capable of recognizing natural laws by means of reason, Rousseau considers the natural man as a sentient being without rational knowledge. As a sentient being, the natural man is hardly distinguishable from an animal. One quality, however, sets him apart from the animal, namely freedom. In modern natural law theory, freedom figures as the first and foremost characteristic of man in the state of nature. In a decisive departure from Hobbes' conception of freedom as the lack of impediments to physical movement, but in line with Pufendorf's conception of liberty as "an internal faculty to do or to avoid whatever anyone wishes,"[17] Rousseau conceives of freedom in terms of the power of willing, i.e. the capacity for choosing to do something or not to do something. It is this freedom to go along or to resist, combined with propitious circumstances, that leads man out of the state of nature, in which the animal is forever trapped. Because of freedom

17 Pufendorf, *De Jure Naturae et Gentium*, II, I, 2, English translation, p. 145; On Rousseau's relation to Pufendorf, see Robert Wokler, "Rousseau's Pufendorf: Natural Law and the Foundations of Commercial Society," *History of Political Thought* 15 (1994), pp. 373–402.

– this cardinal characteristic of man, which Rousseau also refers to as perfectibility – man moves, naturally, away from the state of nature, comes into contact with other men, forms society in various forms, and finally founds the civil state. In the process, inequality emerges, going through three stages: first "l'établissement de la loi et du droit de propriété," second "l'institution de la magistrature," and third "le changement du pouvoir légitime en pouvoir arbitraire," "jusqu'à ce que de nouvelles révolutions dissolvent tout à fait le gouvernement, ou le rapprochent de l'institution légitime."[18] In Rousseau, the natural law construction of the state becomes a historical narrative of the transition from the state of nature to a legitimate civil order. Such a historical narrative, admittedly speculative and conjectural, is made possible by travel reports. Not only does Rousseau paint a picture of the state of nature by using travel reports about Caribbean savages. He also seeks to base the entire narrative of man's development with its many stages on travelers' observations and descriptions of different peoples in the world. In one of the notes to the *Discours*, he fantasizes about a universal travel report:

> Supposons un Montesquieu, un Buffon, un Diderot, un Duclos, un d'Alembert, un Condillac, ou des hommes de cette trempe, voyageant pour instruire leurs compatriotes, observant et décrivant comme ils savent faire, la Turquie, l'Égypte, la Barbarie, l'empire de Maroc, la Guinée, le pays des Cafres, l'intérieur de l'Afrique et ses côtes orientales, les Malabares, le Mogol, les rives du Gange, les royaumes de Siam, de Pegu et d'Ava, la Chine, la Tartarie, et surtout le Japon ; puis dans l'autre hémisphère le Mexique, le Pérou, le Chili, les Terres magellaniques, sans oublier les Patagons vrais ou faux, le Tucuman, le Paraguay s'il était possible, le Brésil, enfin les Caraïbes, la Floride et toutes les contrées sauvages, voyage le plus important de tous et celui qu'il faudrait faire avec le plus de soin.[19]

Rousseau's grand narrative starts with the state of nature and ends with the legitimate body politic that realizes natural freedom and equality, i.e. the republican civil order. If the successive phases of this narrative are supposed to correspond to the constitutions of all these peoples around the globe, then Rousseau's republic, theoretically

18 Jean-Jacques Rousseau, *Discours sur l'origine et les fondements de l'inégalité parmi les hommes. Œuvres Complètes*, Tome Premier, Paris: Hachette, 1870, p. 122.

19 *Ibid.*, p. 144.

mapped out in *Du contrat social* (1762), is not merely made of the citizens of the tiny Geneva, but contains within itself the entire world.

Besides Vico and Rousseau, the Scottish Enlightenment further illustrates the ways in which travel literature helps transform natural law theory into historical narratives. In works such as Adam Ferguson's *An Essay on the History of Civil Society* (1767), John Millar's *The Origin of the Distinction of Ranks* (1771), and Henry Home's *Sketches of the History of Man* (1774), Pufendorf's rational deduction of private law turns into a narrative of progress that starts with savagery and barbarism and ends with the complex civil society taking shape in eighteenth-century Europe.[20] Material for such a narrative is taken mostly from overseas travel accounts. With modern European society posited as the end of world history, it assumes the right and the duty towards other peoples, which were to take on the name of civilizing mission in nineteenth-century imperialism.

The Narrative Imagination Unbound: From Natural Law to Literature

In Rousseau and the Scottish Enlightenment, elements of modern natural law theory and travel literature enter a productive union. The birth of historical narratives from such a union, however, requires still a creative power, namely the narrative imagination. Rousseau, for instance, brings our attention to the narrative imagination at work by the frequent use of imperatives such as "let us suppose" on almost every page of the *Discours*. Once the narrative imagination comes to the fore, thematizing itself, reflecting on itself, and thereby taking on a life of its own, both natural law theory and travel literature are relegated to subordinate positions, turning into mere material for a new symbolic practice which since the late eighteenth century has monopolized the name of "literature." We can characterize this symbolic practice more precisely as "imaginative literature." Christoph Martin Wieland's writings illustrate the ways in which the liaison between

20 Cf. Istvan Hont, "The language of sociability and commerce: Samuel Pufendorf and the theoretical foundations of the 'Four-Stages Theory'", *The Languages of Political Theory in Early-Modern Europe*, edited by Anthony Pagden, Cambridge: Cambridge University Press, 1987, pp. 253–276.

travel literature and natural law theory gave rise to imaginative literature in the second half of the eighteenth century.

Wieland's *Beyträge zur Geheimen Geschichte des menschlichen Verstandes und Herzens*, published in 1770, stages, in his launichte Manier or "capricious manner," the procedures by which categories of natural law theory and material provided by travel literature join hands to generate narratives of the making of human society. These procedures involve, first, the selection of certain elements of travel reports in accordance with categories of natural law theory such as the state of nature. In this regard, the narrator speaks of the manufacturing of savage men, or "unsere Fabrick von Caraiben, Californiern oder Patagonen." In the second step, the elements selected from travel reports as well as other sources are combined into a narrative sequence. The narrator characterizes this step in terms of the implementation of an experiment:

> Gesetzt nun, unsere Fabrick von Caraiben, Californiern oder Patagonen – wie ihr wollt – wäre im Stande; (wiewohl so etwas im Project freylich schneller geht als in der Ausführung) und gesetzt, die erforderliche Anzahl von Kindern wäre fertig, – alle so gut, sauber, und auf die Dauer gearbeitet, als der Gebrauch erfordert, den wir von ihnen machen wollen; – so fragt sich nun: wo finden wir einen bequemen Ort, unsere Versuche mit ihnen anzustellen?[21]

Wieland's analogy between the construction of narrative sequences with carrying out an experiment refers back to Rousseau who asks in the preface to the *Discours*: "*Quelles expériences seraient nécessaires pour parvenir à connaître l'homme naturel ; et quels sont les moyens de faire ces expériences au sein de la société?*"[22] Following selection and combination, the third step is to present the narrative sequence so constructed as if it were a representation of the unfolding of human history. Once these procedures are brought to light and recognized as such, it turns out that a narrative of the development from the state of nature to the civil state is first and foremost the product of the narrative imagination. Authentic or factual travel reports are actually not necessary, since what matters is really the act of selecting certain elements. For the purpose of constructing a narrative, one can use this or that travel re-

21 Christoph Martin Wieland, *Werke, historisch-kritische Ausgabe*, Band 9.1, Berlin, Walter de Gruyter, 2008, p. 191.

22 Rousseau, *Discours*, Préface, 4.

port or no travel report at all. At the same time, the selected elements can be combined in many different ways, so that any number of narrative sequences can be constructed to illustrate any theoretical argument. The story of Koxkox and Kikequetzal, which Wieland tells in *Beyträge zur Geheimen Geschichte des menschlichen Verstandes und Herzens*, plays ironically with both travel reports and natural law theory, turning Rousseau's speculative historical narrative into a purely imaginative tale. If what is at stake in the narrative of mankind's progress from the state of nature into the civil state is purely the narrative imagination, it should be possible to make up such a narrative without reference to specific travel reports at all. This possibility is realized by Wieland's *Geschichte des Agathon*, first published in 1766/1767. In the third book of the novel, the sophist Hippias puts forward a theoretical discourse that employs the key concepts of natural law theory such as the state of nature and the state of society:

> Wie also im Stande der Natur einem jeden Menschen alles recht ist, was ihm nützlich ist; so erklärt im Stande der Gesellschaft das Gesetz alles für unrecht und strafwürdig, was der Gesellschaft schädlich ist. [...] Das Klima, die Lage, die Regierungsform, die Religion, das eigene Temperament und der National-Charakter eines jeden Volks, seine Lebensart, seine Stärke oder Schwäche, seine Armut oder sein Reichtum, bestimmen seine Begriffe von dem, was ihm gut oder schädlich ist; daher diese unendliche Verschiedenheit des Rechts oder Unrechts unter den policierten Nationen.[23]

Told against the background of this natural law theoretical discourse, the story of Agathon's life is meant to a narrative of the genesis of social order. But it is one that does without reference to travel literature. In the eighteenth century, travel literature was instrumental to transforming the Hobbesian and Pufendorfian natural law construction of the civil state into a historical narrative of the genesis of the civil state and social order. Once the pattern of such a narrative was established, travel literature was made invisible again. What emerged from the entry of travel literature into the discourse of natural law and its subsequent disappearance was imaginative literature as epitomized by *Geschichte des Agathon*.

23 Christoph Martin Wieland, *Geschichte des Agathon*, Werke, Frankfurt am Main, Deutscher Klassiker Verlag, 1986, vol. 3, pp. 100–101.

To conclude, by tracing the presence of travel literature in the discourse of natural law, we come to see the transition from the ancient tradition of natural law to modern natural jurisprudence in a new light, reach a new understanding of the conceptual design of modern natural jurisprudence, and gain a glimpse of the discursive constellation of natural law, historical thinking, and imaginative literature in the eighteenth century. Insofar as natural law furnishes the theoretical foundation for the modern state, our investigation helps us rethink a number of historical processes that involve the modern state such as colonialism, international order, the legal regime, and above all, the self-understanding of modern Europe in the world.

Abstract

Dieser Aufsatz zeichnet in drei Schritten die Verflechtung europäischer Reisebeschreibungen überseeischer Völker mit dem modernen Naturrecht nach: erstens die Bedeutung der Reiseliteratur für den Übergang vom alteuropäischen zum modernen Naturrecht im 16. Jahrhundert, zweitens die konstitutive Rolle der Reiseliteratur für die Theoriebildung des modernen Naturrechts im 17. Jahrhundert, und drittens den Beitrag der Reiseliteratur zur Transformation des Naturrechts in die Menschheitsgeschichte im 18. Jahrhundert. Abschliessend wird angedeutet, auf welche Weise die Reiseliteratur eine besondere diskursive Konstellation im 18. Jahrhundert, nämlich diejenige von Naturrecht, Geschichtsphilosophie und imaginativer Literatur, ermöglicht hat.