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ARGUMENTS FROM NATURAL LAW REEVALUATED THROUGH A DIALOGUE BETWEEN LEGAL HISTORY AND LEGAL THEORY

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The paper suggests several ways to rediscover the legacy of early modern and classical natural law of the 18th century in contemporary legal thought through the joint efforts of legal history and legal theory with particular reference to the domain of contract law. Additionally, the paper justifies the revival of the research in the domain of natural law in connection with legal argumentation.

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The topic of natural law is not new to the jurisprudence on the Continent and in the world of common law. Some ideas, which appeared in Greco-Roman antiquity, have never completely gone away.

However, conventional legal thinking assigns natural law to the realm of legal philosophy, legal theory, and legal history. The value of natural law in specific branches of law, with the notable exception of constitutional law (more precisely, human rights), is largely unappreciated. Consequently, the rich legacy of natural law is largely neglected by scholars who do not study general jurisprudence.

In this paper we draw attention to the significance of the natural law tradition with particular reference to the domain of contract law. The latter is the principle subject of our personal research interests and at the same time offers substantial evidence in support of the following theses:

- 1) the presence of a natural law legacy in contemporary jurisprudence is not obvious and in most cases it can only be discovered if intentionally looked for;
- 2) the uncovering of this legacy is a 'joint-venture' for legal theory and legal history, where the former provides models of today's multiple legal paradigms and the latter investigates the evolution of legal concepts under the term natural law;
- 3) the main theoretical challenge for the legacy of natural law is to find it an appropriate place in the contemporary world of multiple paradigms as classical natural law developed in opposition to positive law in the Age of Reason (in the 17th to the 18th centuries);
- 4) in contract law classical natural law once envisaged ideal contract rules as a basis for the criticism of positive law while contemporary natural law presents itself as community values, social standards, rational models of behaviour, which are subject to evaluation together with other legal arguments;
- 5) rethinking natural law paves the way to reconnect historical natural law with contemporary jurisprudence and may enrich students' approach to a critical evaluation of law *de lege ferenda*.

1. An inconspicuous legacy of natural law

During the last two or three decades the topic of natural law has caught the attention of legal theoreticians and legal historians both in common law and civil law countries. Just to name a few makes a long list of theoreticians² and legal historians,³ including several notable scholars from Russia.⁴

² Among major theoreticians in the recent two decades are: Herbert Hart (The Concept of Law, 2nd ed. 1994), John Finnis (Natural Law and Natural Rights. 2nd ed. 2011; "Natural Law Theory: Its Past and Its Present," 2011), Robert George (essays

Many of their papers emphasize the importance of natural law in the domain of the general theory of law and legal history of the Western world. However, the validity of natural law in the specific branches of present day law is not obvious and receives less attention.

One exception is constitutional law which in many countries explicitly asserts the values of natural law in relation to human rights. Take for example the preamble of the US Constitution (1787) or the French Declaration of the Rights of Man and of the Citizen (1789) arguing the indisputable existence of inalienable rights. This tradition was revived after World War II, as in the Basic Law for the Federal Republic of Germany (1949, art. 6), or the Constitution for the Russian Federation (1993, art. 17, 18 etc.).

Consequently, constitutional courts came to acknowledge the existence of supra-positive principles governing the Constitution, as was the case in the decision of the Western German Constitutional Court (1953) regarding the separation of powers as a supra-positive principle which could overcome or invalidate other legal rules⁵ or in several recent decisions of the Russian Constitutional Court regarding natural human rights, including the right to life⁶, the right to bring up one's children⁷, the right to freedom of movement⁸.

Apart from the domain of human rights, the concept of natural law notably surfaces in the theoretical study of legal argumentation. This approach is advocated by Robert Alexy (2002),⁹ Eric Engle, (2010) Elias Clarke, (2010) and others.

An emphasis on the revival of natural law or its legacy in other fields of legal study has been less articulated in comparison with the domain of legal philosophy and general legal theory where it serves mainly to explore the very nature of law and its correlation with positive laws

"On Natural Law", 2003), Joseph Raz ("Ethics in the Public Domain", "Between Authority and Interpretation: On the Theory of Law & Practical Reason), Nigel Simmonds ("Law as a Moral Idea" 2007), Kenneth Himma ("Positivism, Naturalism, and the Obligation to Obey Law" 1999), Eric Engle ("Lex Naturalis, Ius Naturalis: Law as Positive Reasoning and Natural Rationality", 2010), Robert George and Christopher Wolfe ("Natural law and public reason", 2000), Nigel Biggar and Rufus Black {"The revival of natural law: philosophical, theological, and ethical responses to the Finnis-Grisez School", 2000), Eberhard Schockenhoff ("Naturrecht und Menschenwürde" 1996), Martin Rhonheimer ("Praktische Vernunft und das von Natur aus Vernünftige" 2000), Blandine Barret-Kriegel ("Droit naturel et droits de l'homme", 1989), Patrick Simon ("Le Droit naturel, ses amis et ses ennemis", 2006), Norberto Bobbio ("Il giusnaturalismo moderno", 2009; "Giusnaturalismo e positivismo giuridico", 2011).

³ Recent historical research in natural law features the names of Lorraine Daston and Michael Stolleis ("Natural Law and The Laws of Nature in Early Modern Europe: Jurisprudence Theology Moral and Natural Philosophy", 2009), Raoul Muhm ("Germania: La rinascita del diritto naturale e i crimini contro l'umanità, 2004), Merio Scattola ("Das Naturrecht vor dem Naturrecht. Zur Geschichte des ius naturae im 16. Jahrhundert. 1999), Elisabeth Dufourcq ("L'Invention de la loi naturelle", 2012), Florence Gauthier ("Triomphe et mort du droit naturel en révolution, 1789-1795-1802", (1992), Yves Byzeul ("Le droit naturel dans la tradition protestante", 1999).

⁴ In Russian legal thought the topic of natural law in modern and contemporary jurisprudence was studied by Vladik Nersesyants ("The Philosophy of Law" 1997), Vladimir Chetvernin ("The Modern Theories of Natural Law", 1988), Vladimir Gafsky ("History of Legal Thought", 2005), Igor Kozlikhin ("Positivism and Natural Law", 2000), Georgy Bernatsky ("Development of Natural Law Theories in the History of Legal Thought", Doctoral thesis, 2001) and others. All papers cited in this footnote are in Russian.

⁵ BVerfG, 18.12.1953 - 1 BvL 106/53 (available online: <http://opiniojuris.de/entscheidung/809>).

⁶ The decision of the Constitutional Court of the Russian Federation dated 19.11.2009 No. 1344-O-R (this and the following decisions are available in the law assistance system Consultant Plus).

⁷ The decision of the Constitutional Court of the Russian Federation dated 15.05.2006 No. 5-P.

⁸ The decision of the Constitutional Court of the Russian Federation dated 09.06.2005 No. 248-O.

⁹ Robert Alexy, *The Argument from Injustice: A Reply to Legal Positivism*. Oxford. 2002.

through various approaches.¹⁰ We would argue that natural law can be found in other branches of law, although not necessarily called 'natural law', if it is sought using a more sophisticated methodology.

2. A 'joint-venture' enterprise for legal theory and legal history

It is a text-book truth in Russia, that legal history and other legal disciplines, provides legal theory with empirical data, subject to its theoretical conceptualization. However, the potential of this principle is disregarded in matters of natural law and its legacy in the Western world. It is yet to become as a 'joint-venture' enterprise for legal theory and legal history.

In general terms, the role of legal history in the search for natural law should be threefold:

- 1) to make historical data accessible to general jurisprudence;
- 2) to reveal the evolution of natural law theories;
- 3) to identify different functions of natural law.

Let us elaborate on these points in succession.

1) Obviously, older documents are less accessible and understandable for lawyers, they call for translation and historical explanation; scholars of general history have the background for supporting this task.

In Russia the problem was stated by Maxim Kovalevsky in 1880¹¹. The discussion went on in the Soviet times among legal historians.¹² After the demise of the Soviet Union this methodological discussion lost much of its intensity in Russia.

However, the discussion over the methods of legal historical studies is still a matter of debate for western scholars. Recently it became the subject of a conference of the European Society of Legal Historians, hosted by the VU University Amsterdam in July 2012 with more than one hundred participants.¹³ In the keynote address "Challenges of Comparative Legal History" professor David Ibbetson alluded to the origins of the discussion in the beginning of the 20th century (in the papers of English legal historian Frederick Maitland).

Legal history in the New World appears to struggle with similar problems, as we may conclude from the paper of Jenni Parrish or William Blatt.¹⁴

¹⁰ The exact number of such approaches is debatable. For example, professor of Higher School of Economics Vladimir Chetvernin in "The Contemporary Concepts of Natural Law" (cit. pp. 35-100) singled out five natural law schools of thought: 1) theological (neo-Thomistic, neo-Protestant), 2) objectivistic (neo-Hegelian, phenomenological), 3) neo-Kantian, 4) existentialist or phenomenological, 5) psycho-irrational (intuitive, anthropological).

¹¹ Maxim Kovalevsky. Historical and comparative method in jurisprudence and approaches to study legal history. St. Petersburg, 1880 (in Russian).

¹² See, for example, the collected essays "Methodology of historical and legal research" edited by Vladimir Guliyev (1980) and Mikhail Barg "Concepts and methods of general history" (1984).

¹³ More information at: <http://esclh.blogspot.ru/2012/07/notice-esclh-second-biennial-conference.html>

¹⁴ Jenni Parrish, A Guide to American Legal History Methodology with an Example of Research in Progress, in: Law Library Journal (86) 1994, pp. 105-127; William Blatt, The History of Statutory Interpretation: a Study in Form and Substance, in: Cardozo Law Review 6 (1985), pp. 799-845.

2) The 'historization' of natural law goes back to the mid 20th century. This process represents a shift from 'eternal' to 'historical' natural law, as it was aptly termed by Arthur Kaufmann in 1957, and further discussed by Lon Fuller, Helmut Coing, Vladimir Chetvernin.¹⁵

Rudolf Weigand paved the way for the historical contextualization of natural law with his doctoral thesis on medieval legal theories.¹⁶ On a wider scale he was followed by Michael Stolleis and Lorraine Daston.¹⁷

The study of the evolution of the idea of natural law through the ages does not seem likely to end soon and it is even studied by believers in absolute standards (see Lon Fuller, 1968). This study proved to be indispensable for comprehensive analysis of the multiple twists and turns of this legal concept.

3) Identifying different functions of natural law is one of the tasks linked with the 'historization' of natural law as was mentioned above. We argue that during its long period of existence natural law has served, *inter alia*, as:

- an instrument to transform old positive law in Rome and in the last centuries of *Ancien Régime*;¹⁸
- a political argument in the clash between the Papacy and the Empire in the Middle Ages, or in the struggle against absolutism in the Age of Reformation;¹⁹
- a source of international legal theory since Hugo Grotius's "De iure belli" (1625);
- an argument against restrictions of economic freedom in the age of laissez-faire capitalism.

History gives many examples of recourse to the ideas of natural law. However, it is for legal theory to determine the variations of this concept which could be valid for the contemporary world. It seems to be an indisputable matter among scholars of civil law to charge legal theory with the paramount task of working out the general methodology for all legal disciplines. The origins of this convention can be traced back to the German historical school and the pandectists of the 19th century. Franz Wieacker and Helmut Coing credited their 19th century predecessors with laying the foundations of the theory of law as a distinct discipline

¹⁵ Arthur Kaufmann, *Naturrecht und Geschichtlichkeit*. Tübingen: Mohr, 1957, Lon Fuller, *Anatomy of the Law*. New York: F. A. Praeger, 1968, Helmut Coing, *Grundzüge der Rechtsphilosophie*. Berlin, New York: De Gruyter, 1969; Vladimir Chetvernin, *The Contemporary concepts of natural law*. Moscow, 1988 (in Russian).

¹⁶ Rudolf Weigand, *Die Naturrechtslehre der Legisten und Dekretisten*. München: Max Heuber, 1967.

¹⁷ Lorraine Daston, Michael Stolleis, *Natural Law and The Laws of Nature in Early Modern Europe: Jurisprudence, Theology, Moral and Natural Philosophy*. Farnham: Ashgate, 2008.

¹⁸ On the correlation between natural law, Roman law and the notion of 'written reason' (*ratio scripta*), especially in Jean Domat's "Les lois civiles dans leur ordre naturel" (1689), see the study of Alejandro Guzmán Brito "Ratio scripta" (Frankfurt am Main, 1981).

¹⁹ See our paper "Reformation of Jurisprudence and Contract Law Theories in the 16th century Western Europe", in: *Legal institutions in their historical development. Collected essays in honour of prof. Vladimir Tomsinov's 60th anniversary*. Ed. T.E. Novitskaya (Moscow, 2012), pp. 281-300 (in Russian).

aimed at creating a comprehensive system of legal notions through its theory of legal methods (*Methodenlehre*).²⁰

This tradition is still alive in Germany²¹ and it was successfully exported abroad, including to Russia where the leading contemporary methodologists make similar claims about the leading role of the general theory of law among all legal disciplines.²²

The framework to analyse historical data should include the following:

- the incorporation of the bulk of historical data into current legal thinking;
- a comparison of its functionality;
- the identification of legal and supra-legal content in the idea of natural law.

3. Confronting classical and contemporary ideas of natural law

Perhaps, the most difficult task for the duo of legal theory and legal history regarding natural law is to find new meaning in the world of multiple paradigms. Natural law reached its maturity in contrast with positive law. This binary legal paradigm of the Age of Reason is a thing of the past.

There are many patterns of contemporary jurisprudence, including legal positivism or legal formalism, legal realism, sociological jurisprudence, critical legal studies, and the economic analysis of law. In addition to the patterns identified by the American scholar Neil Duxbury in "Patterns of American jurisprudence" (1995) some theoreticians call for an integrative approach to legal studies²³, others struggle to redefine the patterns of law around the broadest cultural layout or 'cultural patterns of law', such as professional law (the Western tradition), political law (Law in Transition), and traditional law (the Oriental View).²⁴

It is for legal theory and legal history together to show and reason that in the contemporary world natural law is no longer the alternative but rather an alternative to positive law. Even the very essence of natural law became the subject of discussions in the second half of the 20th century. The classical view of natural law as an emanation of the physical world can no longer be sustained.

4. Natural law in contemporary contract law

In the face of the plurality of contemporary legal thought it is not easy to make well-founded claims about the law as a whole. That brings us to branch-study as a necessary expedient to generalized claims.

²⁰ Franz Wieacker, *A History of Private Law in Europe with Particular Reference to Germany*. Oxford; Clarendon Press, 1995, pp. 341-370.

²¹ See, for example, the influential Karl Larenz's "Methodenlehre der Rechtswissenschaft" (6th ed. Springer, 1991).

²² See, for example, Dzhangir Kerimov, *Methodology of Law: Subject, Functions, Problems of Legal Philosophy* (2 ed. Moscow, 2001) and Vladimir Syrykh, *The logical foundations of the general theory of Law* (vol. 2, Moscow, 2001).

²³ See, for example, E.J. Conry, C.L. Beck- Dudley, *Meta- Jurisprudence: a Paradigm for Legal Studies*, in: *American Business Law*, 1996, vol. 33, issue 4, pp. 691–755.

²⁴ See Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, in *The American Journal of Comparative Law*, Vol.45, No.1 (Winter, 1997), pp. 5-44.

The traces of the legacy of natural law can be found in various branches of law. Let us take the law of contracts as the sphere of our scientific interests and, more importantly, one of the significant and well established fields in the Western legal tradition. We argue the presence of the legacy of natural law in the contemporary contract law in two important ways:

- 1) through the adoption of classical natural law into positive law during the age of codification in Western Europe (from the second half of the 18th century to beginning of the 19th century), and
- 2) by acknowledging references to rational, reasonable, or moral standards in positive law and judicial practice after the first wave of codifications in Europe.

Legal history and legal theory respectively explain these two ways.

The first, calls for a historical study of the remarkable continuity in the Western legal tradition in terminology, issues discussed, institutions and basic principles. This is especially true for the tradition of *ius commune* developed in Continental Europe from the end of the 11th century up to the Age of Reason. Yet, breaking away from the old scholastic *ius commune* in the classical natural law of the Age of Reason appears to be more declarative than substantial.

One good example is the latent influence of the late medieval doctrines of contract law on the teaching of the followers of the new rational law. Such prominent Protestant thinkers of the classical natural law as Hugo Grotius, Samuel Pufendorf, Christian Thomasius, and Christian Wolff²⁵ declared their emancipation from late Catholic scholasticism and the *ius commune* of the Spanish Jesuits Francisco Suarez, Louis Molina, or their Belgian colleague Leonard Lessius, all three set out their legal theories in the treatises "De iustitia et iure" in the late 16th and early 17th centuries.

Nonetheless, Protestant thinkers adopted several Jesuit ideas, primarily through the legacy of Hugo Grotius. Hans Thieme was probably the first among legal scholars to call attention to the influence of the late Spanish Scholastics on the Protestant writers.²⁶ He was followed by Malte Diesselhorst who uncovered the foundations of Hugo Grotius's general theory of promise in the late Scholastic views on the promise to donate.²⁷ Franz Wieacker laid down a solid foundation for the concept of the general influence of the late medieval Catholic moral theologians on contractual theories developed by the leading Dutch and German natural law thinkers of the 17th and 18th centuries.²⁸ The second half of the 20th century saw more studies

²⁵ Hugo Grotius, *De iure belli ac pacis libri tres* (1625), Samuel Pufendorf, *Elementorum iurisprudentiae universalis* (1660), Christian Thomasius, *Institutionum iurisprudentiae divinae libri tres* (1702), Christian Wolff, *Jus naturae and Jus Gentium* (1749).

²⁶ See Hans Thieme. *Natürliches Privatrecht und Spätscholastik* (1953) in: *Ideengeschichte und Rechtsgeschichte*. Gesammelte Schriften. Ed. H. Thieme. Bd. 2. Köln, Wien, 1986, pp. 871–908.

²⁷ Malte Diesselhorst. *Die Lehre des Hugo Grotius vom Versprechen*. Köln: Böhlau, 1959.

²⁸ Franz Wieacker, *Die vertragliche Obligation bei den Klassikern des Vernunftrechts*, in: *Festschrift für H. Welzel zum 70. Geburtstag*. Berlin: de Gruyter, 1974, pp. 14–15.

focusing on the issues of impossibility and *clausula rebus sic stantibus* (by Robert Feenstra)²⁹ or on the general notion of contract (by Klaus-Peter Nanz and James Gordley),³⁰ on contractual consensus and private autonomy (by Alessandro Somma),³¹ on mistake (by Martin Schermaier),³² on freedom of contract (by Wim Decock).³³

Additionally we could argue that the legacy of Catholic natural law was methodologically important for attempts to subdivide contract law into types and to group the specific rules of contract law into general institutes of law.

Through the great thinkers of the Age of Reason the legacy of *ius commune* became part of the codified civil law and even influenced the contractual theories in 19th century England.³⁴

Apart from adopting the solutions of classical natural law to positive law, the idea of natural law is present, in a new form, in contemporary contract law, in the form of social standards of rational behaviour, legally protected community values, and social solidarity, or the balance between public and private interests. These ideas find parallels in such legal concepts as public policy, public order, a reasonable period of time or reasonable actions, abuse of rights, and good faith known to civil codes, statutes and judges both in civil law and in common law countries. These and similar concepts are used to adjust black-letter positive law to be in line with higher ideals which in the 18th century would have been called natural law.

In practical terms this means there are supra-legal arguments regarding such issues as:

- justice or fairness as the backbone idea of contract relationships;
- requirement of a just cause of contract;
- equality in exchange and just price of goods and services;
- grounds for public intervention into private affairs;
- obligatory force vs. mistake as a vice of consent (*error in substantia, in persona*);
- obligatory force vs. substantially changed circumstances (*clausula rebus sic stantibus*);
- interpretation of contracts by court (as a means of protecting private or public interests).

From a historical perspective some of these issues have been studied by Robert Feenstra, Klaus Luig, Italo Birocchi, James Gordley, Bruno Schmidlin, Larry DiMatteo, Martin

²⁹ Robert Feenstra, *Impossibilitas and clausula rebus sic stantibus*. Some aspects of frustration of contract in continental legal history up to Grotius, in: Daube noster. Essays in legal history for David Daube. Ed. A. Watson. Edinburgh, London, 1974, pp. 77–104.

³⁰ Klaus-Peter Nanz, *Die Entstehung des allgemeinen Vertragsbegriffs im 16. bis 18. Jahrhundert*. München, 1985, pp. 135–148; James Gordley, *Natural law origins of the common law of contract*, in: *Towards a general law of contract*. Ed. J. Barton. Berlin, 1990, pp. 367–465.

³¹ Alessandro Somma, *Autonomia privata e struttura del consenso contrattuale, aspetti storico-comparativi di una vicenda concettuale*. Milano, 2000, pp. 71–73,

³² Martin Schermaier, *Die Bestimmung des wesentlichen Irrtums von den Glossatoren bis zum BGB*. Wien, 2000, pp. 124–143.

³³ Wim Decock, *The jesuit freedom of contract*, in: *Tijdschrift voor Rechtsgeschiedenis*, No. 77 (2009) (3-4), pp. 423- 458.

³⁴ A.W.B. Simpson *The Innovation in Nineteenth Century Contract Law*, in: *Law quarterly review*. № 91 (1975), pp. 247-278. Regarding the Continental matters see Franz Wieacker, cit. n. 20, chapter 19.

Schermaier, Wim Decock, Francisco Santos and others. Even more scholars study civil law in action and criticize it *de lege ferenda* benefiting from 'supra-positive' arguments.

Yet, the potential of the legacy of natural law in this respect does not seem to be fully appreciated and exploited, which leads us to the final thesis of this paper.

5. Reintroducing natural law to legal reasoning

The 'rediscovery' of elements of natural law in contemporary contract law is not an end in itself but rather a powerful argument in support of reintroducing the historical and theoretical study of the legacy of natural law on the agenda of research and teaching at law schools.

One possible application, in our opinion, is legal reasoning. The rational nature of law has been widely accepted as the key feature of the western legal tradition from the period of its formation. Speaking about the Continent, Franz Wieacker described the development of private law as the process of its rationalisation and scientification.³⁵ In England judges claimed that the law had been reason rather than sheer will since the 14th century.³⁶

In the legal thought of the 20th century the suggested application of natural law arguments was backed up by theoreticians who identified its corrective function in relation to positive law.³⁷ The ethico-political function of natural law makes it a measure of justice or injustice of positive law. In the words of the Russian legal philosopher Vladik Nersesyants (in "Philosophy of Law", 1997), natural law "adjusts the logic of legalism".

In our opinion, this is a necessary step towards a more comprehensive study of legal reasoning. As we have argued elsewhere,³⁸ in many circumstances legal argumentation is not only about positive law but about national consciousness, moral standards, and a critical stand towards the rigid norms.

In teaching at law schools the suggested rethinking of natural law is also highly desirable. The curriculum of law schools could be greatly enriched through a reconnection with the legal tradition of the pre-industrial and the modern legacy. There is no need to ignore the long-standing arguments against the rigours of positive law, and its critique *de lege ferenda*.

³⁵ Franz Wieacker, cit. n. 20, p. 95. On rationality of the Western law see also Harold J. Berman's "Law and Revolution" (Harvard, 1983).

³⁶ John Dawson, The Oracles of Law. Michigan, 1968, p. 57.

³⁷ Most notably, in Hans Kelsen's influential "The Pure Theory of Law" (1 ed., 1934).

³⁸ See our report entitled "Judicial Reasoning in a Codified System: Letter of Law vs. Legal Consciousness?" for the Congress of International Academy of Comparative Law (Taiwan, 2012) at http://www.law.ntu.edu.tw/iacl/Poldnikov_report_2012.pdf.

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