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The Question of Restitution in Philosophy of Law: Early Modern Context

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The question of restitution was initially considered far from the philosophical and legal context. I focus on the legal context of the controversial and complex process of restitution. My main thesis is that such a dimension finds articulation in the philosophical studies of scholastics of the early Modern time. There is no sense to deny that their legacy observed partly in formulations, analogies and a vocabulary used is reflected in the current-existing charter of International Relations, since the issue of restitution is still relevant as a part of ius post bellum, when the war is over and it is time to restore the damage brought during the war. Thus, the purpose of my paper is to identify the legal role and function of restitution in the early Modern time and later.

To begin with, as we know "re-stitutio" means a process of restoring something, getting parts of something together again that usually means the situation when the property or rights are returned to the lawful possessor. The most famous doctrine of restitution is developed in the system of a medieval theologian Thomas Aquinas and is considered in ethical sense. Thus, the paramount meaning of restitution is characterized as standing outside the context of the return of property. That actually meant the act of commutative justice (actus iustitiae commutativae) [4, P. 605-609] which extended to the interaction between Christians and God. I. e. "restitution" is surrounded by a powerful ethical connotation, since Aquinas considers it in the "justice" section. Traditionally after Aquinas restitution was seen as an act necessary for the salvation of the Christian soul.

Due to the consideration of military plots and plots requiring discussion of property rights, the focus in the analysis of restitution was changing. The scholastics of the 16th century dealt mainly with issues of economics and jurisdiction, in connection with which they began to consider the Aquinas' restitution Quaestio in a legal way [3, P. 473]. The scholastics of the Salamanca school and other theologians analyzed the nature of property, askingn: who is the rightful owner (possessor)? Restitution, therefore, becomes the restoration of what was taken from its rightful possessor unlawfully, i.e. in an injust way. Then, any violation of offender is interpreted as injustice (iniuria illata), which is corrected not only by responding to the offense, but also by bringing funds to replace the damage of the injured party. Thus, in 16-17cc. restitution is interpreted as restoring the owner in his rights, as well as retribution for the caused injustice. Since the brought injustice violates the balance restitution expressed in the material retribution of stolen things, captured fortresses, prisoners of war, as well as different restoration work, serves as a way to re-store the order, i.e., to bring justice to the world again.

Among theologians such as Domingo de Soto, Domingo Banjes and Francisco Suarez, the dominican Francisco de Vitoria was one of the first to formulate the problem of restitution as the legal issue of property-recovery. The most important property issue for him was its legality, that is why he commented on the passages of Aquinas [2, P. 127]. So Vitoria concludes on the legal basis of ownership, according to which it is possible to assess the need for restoration of someone in the property. Indeed, Vitoria concludes, there is no obligation to return possession to a person if he did not have the right to own it, i.e. philosophically justice, restitution and

ownership are deeply corresponded. Vitoria problematized the restitution question precisely in connection with the right to demand some kind of justice in relation to the owner of such a right [5, pp. 317-320]. From that moment, the concept is transferred to the question of Just War Theory: Francisco de Vitoria calls the Indians the lawful possessors, still the right to wage just war against them is articulated in correspondence to this Common land theory. Due to every land is common by its nature (such as revers, seas and lands which are near them to have a possibility to trade and socialize) it is an iniuria to prohibit Spaniards to act on the Indian Lands. That is why Vitoria takes another legal and philosophical step, analyzing the interference and land-taking as a form of restitution to keep the balance after iniuria illata (injustice inflicted to Spaniards). Thus, restitution as a legal concept goes into the field of philosophy of Law and takes on various forms at the civil, international and cultural levels. Let us consider them.

In connection with the said, in International Law it is traditional to consider restitution as an element of reparation process, which guarantees the restoration of all property of the victim of aggression by the state, as well as bringing funds to restore the justice. In the field of Civil Law, restitution refers to the means to guarantee that a transaction will be completed. If the terms of the transaction between privates are not fulfilled, there is a mutual restoration of rights and damages. The value of effort and damage is measured directly during the transaction [1, P. 122]. We see how in the question of restitution the general rhetoric of the early Modern time is still active. We turn to the well-known plots of the offender and the victim, as well as to appeal to the lost justice, the balance of which must be restored. So in the legal aspect of restitution, the appeal to justice as a value category is still powerful.

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