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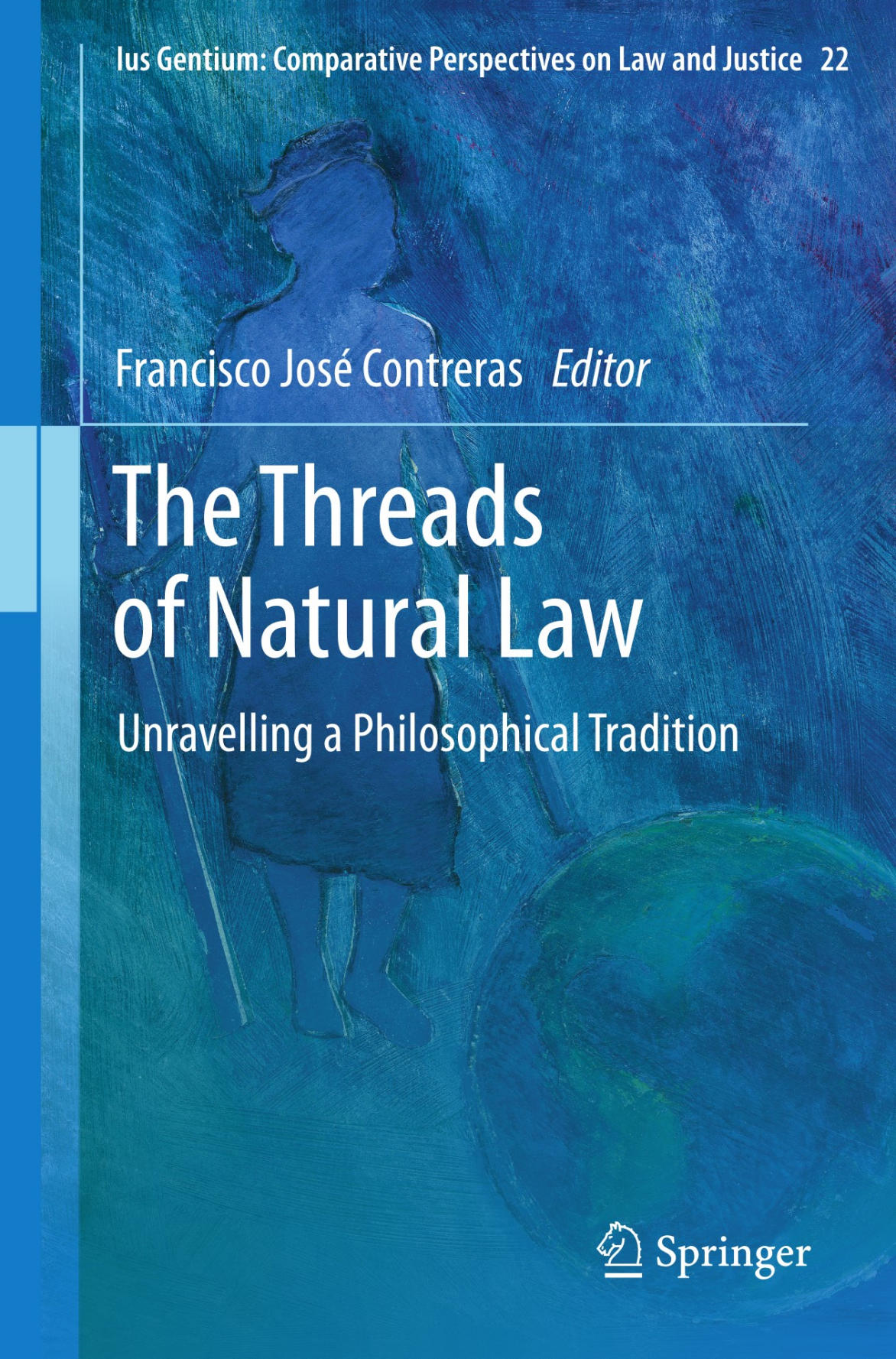
Francisco José Contreras *Editor*

The Threads of Natural Law

Unravelling a Philosophical Tradition



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Foreword

Francisco José Contreras

Yet another work on natural law requires a justification, particularly since many a reader will consider that the "natural law theory vs. legal positivism" tension has lost much of its bite in the last three or four decades. Indeed, some may feel that both sides in that debate have progressively become aware that they were fighting "straw men": the straw man of an "ideological positivism" allegedly willing to sanction any formally valid law as "just" (and, thus, as deserving unconditional compliance); on the other hand, the straw man of a natural law doctrine unrealistically determined to deny the legal character of immoral laws (which would not be law, but "corruption of law"). But the truth is that very few relevant authors – whether natural lawyers or positivists – have defended such theses recently (and it is even doubtful that anybody *ever* defended them). Thomas Aquinas himself conceded – in the famous passage where he claimed that the unjust (positive) law "has the nature, not of law, but of violence" – that immoral positive law "retains the appearance of law" because it is "framed by one who is in power".[1] And then, he admitted that it may be prudent to obey it "in order to avoid scandal or disturbance"[2]: he thus wavers when it comes to extracting the practical conclusions of his theoretical denial of the unjust law's juridicity. At any rate, many exponents of contemporary natural law doctrine[3] accept the idea that the validity of legal rules does not depend on their moral excellence but on their satisfying the conditions of

[1] *Summa Theologica*, 1–2, q. 93, a. 4.

[2] *Summa Theologica*, 1–2, q. 96, a. 4.

[3] "A more reasonable interpretation of statements like "an unjust law is no law at all" is that unjust laws are not laws "in the fullest sense". (…) This is almost certainly the sense in which Aquinas made his remarks, and the probable interpretation for nearly all proponents of the proposition" (Bix 1999, 226).

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validity (of a technical-procedural, rather than material, nature: being passed by Parliament, etc.) defined by what H.L.A. Hart named the "rule(s) of recognition". The Thomist thesis of *corruptio legis* should, therefore, be interpreted as meaning that unjust laws are defective, undesirable laws (laws that had better be rectified, or even disobeyed), but not as meaning that unjust laws are no law at all: John Finnis, for example, has made this point clear.[4]

But, just as natural law theory admitted that unjust laws do exist (that is, they are true laws, albeit deserving criticism and perhaps disobedience), thus watering down the solid connection of law with morality it is usually associated with, legal positivism was revising the conceptual separation of law and morals that had characterized its classical exponents (Austin, Kelsen): a convergence of natural law doctrine and legal positivism upon a certain common ground was underway. Hart explicitly acknowledged that the rule of recognition could include moral criteria as conditions of legal validity (he still considered himself a legal positivist because, when this is the case, moral principles acquire legal relevance, not "in their own right" or *proprio vigore*, but insofar as the rule of recognition has so established, thereby *incorporating* those moral principles into the law). This idea has been further developed by Jules Coleman's and W. J. Waluchow's "inclusive legal positivism".[5] On the other hand, the notion that the legal validity of a rule does not automatically entail the citizen's moral duty to abide by it is widely accepted by mainstream legal positivism: actually, many positivists hold that the neat conceptual separation typical of positivism enables – instead of precluding – an attitude of critical watchfulness vis-à-vis positive law, insofar as it makes clear that what is legally valid does not necessarily coincide with what is morally right (as stated by Austin: "the existence of law is one thing, its merit or demerit is another").[6]

In the meantime, the idea that the original positivist tenet of a strict separation between law and morality simply does not fit the facts of real social life was also dawning on authors who were neither iusnaturalists nor positivists: Lon Fuller argued that any legal system automatically entails – by its mere existence – an "inner morality of law"[7]; H.L.A. Hart had already pointed out in *The Concept of Law* that law must necessarily include a "minimum content of natural law" if it is to fulfill its minimum function (namely, ensuring the survival of human beings)[8]; Ronald Dworkin highlighted the legal relevance of moral principles (whose validity is not mechanically ascertainable by means of a "pedigree test")[9]; Robert Alexy

[4] "Far from "denying legal validity to iniquitous rules" [as Hart claims it does], the [natural law] tradition explicitly (by speaking of "unjust *laws*") accords to iniquitous rules legal validity, whether on the ground and in the sense that these rules are accepted in the courts as guides to judicial decision, or on the ground and in the sense that […] they satisfy the criteria of validity laid down by constitutional or other rules […]" (Finnis 1988, 365).

[5] Waluchow (1994).

[6] Austin (1995), 157.

[7] Fuller (1964).

[8] Hart (1961), 189 ff.

[9] Dworkin (1978).

showed legal regulation to inherently contain a "claim to correctness": law purports to be perceived as legitimate by its subjects[10] (and such a perception plays a crucial role in citizens' abiding by it: legal systems that rest only on sheer coercion have been very rare in history, if they ever existed).

In light of these developments, one might be led to conclude that this convergence of legal positivism and natural law theory renders both redundant (insofar as each of them somehow made sense as a counterweight to the excesses of its counterpart). If – as claimed by many[11] – the historical function of natural law doctrine lay in providing a critical perspective from which positive law could be evaluated (and, depending on circumstances, rejected or resisted), one could conclude that, given the growing acknowledgment – even on the positivist side – of an intrinsic link between law and morals, such a function has become obsolete: the danger of *Gesetz als Gesetz* (famously denounced by Gustav Radbruch after the Nazi period)[12] would have definitely vanished. But, as noted by Neil MacCormick, the legal risk in real society probably has to do less with cynical lawgivers – determined to enforce *Gesetz als Gesetz* or to unscrupulously use law to pursue their self-interest – than with well-intentioned, "idealistic" lawgivers who believe in the continuity of law and morality, and will therefore attempt to have law embody their… *mistaken* moral views. Nazis and Communists were not Kelsenian positivists who rejected the "moral contamination of law": on the contrary, they used law to implement a perverse morality (even if they regarded it as right).[13] Therefore, the iusnaturalist-positivist common ground – namely, the increasing recognition of some conceptual link between law and morals – *does not protect us from much*.[14] The key question is no longer "does law have any connection with morality?" but "*which* morality is law connected to?"

For example, Ronald Dworkin is perhaps the contemporary philosopher who has most contributed to the blurring of the law-morality boundary (with his claim that law does not only consist of rules, but also of "principles" and "policies", his "interpretive approach" to law, etc.). In *Freedom's Law*, Dworkin proposed a "moral reading of the [American] constitution": the Fathers, so it is claimed, wove some general principles into the fabric of the constitution; such principles purportedly need to be actualized and developed by current judges. But this "moral reading" leads Dworkin to the surprising conclusion that, for example, the Constitution grants pregnant women the right to kill their pre-born children: admittedly, the Constitution

[10] Alexy (1989).

[11] Fassò (1966), 6.

[12] Radbruch (1972), 355 ff.

[13] "The problems of the real world do not seem often to arise from people passing legislation which they only pretend to think just, while secretly intending some nefarious purpose. […] They have a great deal more to do with the holding of perverse moral opinions and the legislative implementation of these" (MacCormick 1992, 113).

[14] "The fact that there are certain moral aspirations which are conceptually intrinsic to law (though not conditions of its validity) could never stop perverted opinions about relevant values being transformed into perverted laws" (MacCormick 1992, 114).

does not contain a single mention of abortion, but Dworkin interprets this "right" to be included in the "the right of woman to control her role in procreation", which, in turn, would be implicit in her right to privacy (and this right to privacy would be implicit in the rights to a due process of law and to equal protection of the laws).[15]

The "moralization" of law (blurring of the law-morality divide) thus drives Dworkin to the vindication of abortion (which is viewed by many – and certainly by the author of this foreword – as abhorrent). Opening confidently the gates of law to morality can be very dangerous … when the moral views awaiting legalization are erroneous.[16] This is, precisely, the point where the great natural law tradition can be very helpful. This is not only because the idea of natural law contains an (affirmative) answer to the question "does law have anything to do with morality?" (we have already seen that acknowledging this link is not much of a guarantee). It is also because natural law theory possesses an answer to the further question "*which* morality should inform law?" Natural law doctrine is not just a theory *about* the connection of law and morality: it is also a *moral* theory.

And the essence of natural law doctrine as a moral theory is, obviously, the notion that ethics is somehow grounded in nature. The concept of "nature" is, to be sure, an ambiguous and polisemic one (Christian Thomasius referred to the *difficilis quaestio de natura naturae*). Broadly speaking, the *metaphysical* account of nature (nature as the "program of realization"[17] of a given entity: a set of potentialities whose actualization implies the flourishing, the fulfilment or end [*telos*] of such entity)[18] has prevailed over the *cosmological* one (nature as the total sum of entities). Morally right actions will be those that lead to the full realization of human nature.[19] Most accounts of natural law have understood this accomplishment of human nature to be

[15] Dworkin (1997), 46 ff.

[16] The fact that the early Dworkin insists on moral principles pertaining to law does not necessarily render his work more acceptable for a natural law theorist than, for example, the work of a "soft" positivist like the late H.L.A. Hart or a post-positivist like Neil MacCormick. As Robert P. George rightly remarks: "Some people who are loyal to the tradition of natural law theorizing are tempted to suppose that Professor Dworkin's position […] is the one more faithful to the tradition. This temptation should, however, be resisted" (George 2000, 165). By contrast, a normativist vision like judge Bork's could be closer to natural law theory (while natural law theory maintains that positive law should be based on natural law, it does not maintain that the positivization of natural law must be necessarily undertaken by all-knowing judges, entitled to grasp principles that override rules): "Judge Bork's idea of a body of law that is properly and fully (or almost fully) analyzable in technical terms is fully compatible with classical understandings of natural law theory" (op. cit., p. 165).

[17] "Cuando nos remitimos a la naturaleza de un ser libre, estamos aludiendo a su programa de realización, […] que deberá asumir esenciales exigencias éticas, so pena de condenarse a ser de hecho inhumano" (Ollero 2008, 215).

[18] "Human beings are rational animals and the powers which they need to develop and exercise, if they are to flourish, are both animal and rational. So they have to find a place for a variety of goods in their life. What makes each such good a good is the fact that its achievement conduces to or partly constitutes their flourishing qua human beings" (MacIntyre 2009, 46).

[19] "[L]a posibilidad de distinguir entre el bien y el mal en estos términos reside en advertir que ciertos modos de obrar realmente son convenientes a nuestra naturaleza, mientras que otros no lo son" (González 2010, 158–159).

part of a more grandiose, comprehensive design: for the Stoics, human rationality was a reflection of the Logos that informs the whole cosmos; for Thomas Aquinas, compliance with the natural law was the human form of participation in eternal law (God's rational plan for creation).

The key to the appeal of the natural law doctrine – and to its "eternal return" (Rommen)[20] – is probably the fact that the notion of human nature seems to furnish us with a neutral, objective, solid basis on which a "minimum" morality can be founded, in times when widespread religious and philosophical disagreement precludes a "morality of maximums".[21] Persons – and cultures – that disagree over the existence of the divine, the beginning of all things, the absolute reality, etc., are expected to be able to agree at least on the existence of a common human nature, and on the possibility of deriving certain moral criteria therefrom.[22] The first historical formulation of natural law – the Stoic one – actually emerged in such a context: contacts with other Mediterranean peoples had made the Greeks aware of the historical-cultural variability of morality. This is when the idea of "life according to reason" or "life according to nature" took shape: it purported to be a firm reference that would preclude the lapse into relativism, a universal ethics that would transcend cultural differences. On a similar note, Christianity resorted to the idea of natural law as a kind of "moral Esperanto", a language that would be intelligible also to non-Christians (those who, even if they do not believe in the God of the Bible, have "the [natural] law written in their hearts", Rom. 2, 15).[23] And the idea of natural law thrived once again in the seventeenth century – in the aftermath of the breakdown of Christian unity and the European religious wars – in a new and more explicitly secular version (Hugo Grotius: natural law would hold good "even if God did not exist"). Natural law also experienced a certain revival (Radbruch, Welzel, Maihofer, Ellul, etc.) after the Second World War, when the West was trying to rediscover a firm ethical ground after the totalitarian nightmare.

The present volume includes various studies about prominent historical milestones in the development of natural law doctrine, comprising both mainstream authors and others whose attachment to the natural law tradition might seem more questionable. Such is the case of Aristotle, whose explicit contact with the natural law idea consists just in the well-known part of the *Nicomachean Ethics* where he discusses the distinction between "natural justice" and "legal justice", as well as

[20] Rommen (1947).

[21] "[Natural law] seems to promise a clear moral criterion in a world affected by moral ambiguities and disagreement" (González 2008, 1).

[22] "What the natural law was held to provide was a shared and public standard, by appeal to which the claims of particular systems of positive law to the allegiance could be evaluated" (MacIntyre 2000, 103).

[23] "Unlike other great religions, Christianity has never proposed a revealed law to the State and to society, that is to say a juridical order derived from revelation. Instead, it has pointed to nature and reason as the true sources of law – and to the harmony of objective and subjective reason, which naturally presupposes that both spheres are rooted in the creative reason of God" (Benedict XVI 2011).

another passage where he alludes to a certain "law common to all peoples [*nómos koinós*]". Jesús Vega's essay "Aristotle on Practical Rules, Universality, and Law" propounds an innovative reconstruction of Aristotle's legal thought, wherein a place is found for the idea of natural law (not so much in Aristotle's explicit references to what is "just by nature" as in the universality of the rules of "legal justice": a universality which is paradoxically compatible with the particularity characteristic of conventions).

Fernando Llano examines Cicero's legacy, an eclectic crossroads in the history of legal thought. Cicero inherited and tried to harmonize (in a typically Roman pragmatic spirit) a variety of Platonic, Aristotelian and Stoic influences, their possible objective contradictions notwithstanding. This "irenistic" inspiration is particularly salient in his famous definition of natural law ("right reason in agreement with nature …", etc.), included in *De re publica*. Cicero here blended three conceptions that were actually distinct: the Stoic idea of "life according to nature" as a conscious submission to a pantheistic and inescapable cosmic order; natural law as a commitment to the specifically human nature (hence Cicero's claim that the man who fails to abide by natural law will be "fleeing from himself [*ipse se fugiet*]"); and, finally, natural law as the command of a personal God (as Cicero also asserts that God is "the author of this law, its promulgator, and its enforcing judge").[24]

This eclecticism of the Ciceronian account of natural law proved to be troublesome when the account was inherited by Christian philosophy: there arose disagreements between "voluntarists" who conceived of the precepts of natural law as mere divine commands (which could have had a content different from the one they actually had) and "rationalists" who considered natural law to be rationally derivable from the examination of human nature: in their view, natural law simply enjoins those behaviours that objectively entail the fulfilment of human nature, the accomplishment of the human *telos*. The latter vision assigns natural law a consistency of its own, even vis-à-vis the divine will: once God created man with precisely this (and not another) nature, natural law could not but have the content it actually has. God remains the author of natural law, but not *directly*, qua legislator (who decrees such-and-such, just as he could have decreed something else), but rather, *indirectly*, as the creator of a human nature comprising a variety of inclinations wherefrom the precepts of natural law are rationally derivable. The "rationalist" vision found its most accomplished statement in the work of St. Thomas Aquinas (especially, in the famous quaestio 94, art. 2 of the Prima Secundae of the *Summa Theologica*).

Given the centrality of Aquinas in the history of natural law doctrine, three essays of this volume discuss his thought, from various standpoints. Diego Poole's chapter ("Natural Law: Autonomous or Heteronomous?") presents a number of reflections about the quaestio 94, art. 2 of the *Summa Theologica*. Most importantly, it asks: how are we to proceed from the inclinations (to individual self-preservation, to perpetuation of the species, to social life and the knowledge of God) discernible in human nature (which are *facts*) to the precepts of natural law (which are *norms*)? According to the

[24] Cicero, *De re publica*, III, 22, 33.

interpretation of Aquinas proposed by Poole, natural law does not simply "confirm" the inclinations of human nature; rather, it regulates them rationally, "often supporting them, and other times restraining them", always pursuing the fulfilment of the human *telos*: that man may attain "the fullness of his form".

Anna Taitslin ("The Competing Sources of Aquinas' Natural Law"), instead, understands the quaestio 94 as an attempt to harmonize various conceptions of natural law that are actually very hard to reconcile: natural law as the ability to rationally identify behaviour which is good or bad *per se* (a conception whose precedent was Huguccio da Ferrara, who defined in 1188 natural law as "a natural power of the soul by which the human person distinguishes between good and evil"); natural law as a *conatus* of all beings towards excellence and self-preservation (an account Aquinas is likely to have inherited from Roland of Cremona); natural law as a set of inclinations discernible, not in all beings whatsoever, but in all animals (a conception drawn from Ulpian, whom Aquinas explicitly quoted in quaestio 94); and finally, natural law as a set of precepts regulating the search for truth and social life (the third inclination listed by Aquinas). Anna Taitslin discusses the recurrent hesitations – not just of Aquinas, but of Christian natural law doctrine in general – between those differing versions of the concept, extending her analysis to later figures like Suárez, Maritain and Finnis.

One of the major difficulties Christian natural law doctrine must face lies in those Biblical passages in which God seemingly orders immoral conduct: for example, God orders Abraham to sacrifice his son Isaac (Gen. 22); He orders Oseas to have sexual intercourse with a prostitute (Os. 1, 2); He encourages the Israelites to steal goods they had borrowed from the Egyptians (Ex. 12, 35–36), etc. Matthew Levering's chapter "God and Natural Law" deals with the treatment this problem received in Aquinas' and Duns Scotus' thought. Scotus endorsed a voluntarist conception of natural law (at least, with regard to the precepts pertaining to the "second tablet" of the Decalogue, from the fourth commandment onwards): "divine will is the cause of the good, and therefore a thing is good insofar as God wills it".[25] The good is good because it is enjoined by God: precepts like "you shall not murder" or "you shall not steal" are divine commandments; the God who decreed them can as well suspend them on exceptional occasions (He could not, however, suspend or repeal the two first commandments of the Decalogue – "you shall love God above all things" and "you shall not take the name of the Lord in vain" – for supreme "loveability" and respectability are part of the divine essence, and God could not deny himself). Exceptions of the Abraham-Isaac style are harder to accommodate into a *rationalist* conception of natural law such as that of Aquinas. Yet the Doctor Angelicus met the challenge boldly. Obeying the natural law is, for human beings, the "standard" way to cooperate in the divine plan (that is, to participate in eternal law: "Divine Wisdom, as moving all things to their due end"). In exceptional circumstances, God may propose man other forms of cooperation in his plans: forms which – like in Abraham's case – may even involve the violation of natural law. Such

[25] Duns Scotus, J., *Opus oxoniense*, III, d.19, q.1, nº7.

exceptions deviate from natural law, but not from eternal law (for they are included in God's rational plan for the universe).

Immanuel Kant's relationship with the idea of natural law was ambivalent: his aspiration to produce a purely deontological ethics – *a priori* and "fully cleansed of everything that might be in any way empirical and belong to anthropology"[26] – seems incompatible with the classical natural law perspective, which relies on the possibility of inferring moral instructions from the analysis of human nature. Ana Marta González nevertheless shows in her paper "Natural Right and Coercion" that the notion of natural law plays a role in Kant's work (especially in the *Metaphysics of Morals*), albeit in a sense that departs from the traditional one. In fact, "natural law" seems to represent for Kant an informal pre-state law, one that would already be in force, if precariously, prior to the social contract (even though the social contract is for him "a mere idea of reason", not a historical fact). This implies that positive law cannot have any content whatsoever: the task of positive law consists in reaffirming natural law, ensuring more effectively "the distinction of mine and thine" and securing the possessions of everyone.

Marta Albert devotes her article "Natural Law and the Phenomenological Given" to the discussion of the similarities and differences between legal phenomenology (especially, Adolf Reinach's doctrine) and the natural law tradition. A variety of signs could be interpreted as leading to the conclusion that no bond exists between them: Reinach himself thought his theory had nothing in common with natural law doctrine; moreover, the "a priori legal essences" discovered by conscience by means of the "eidetic reduction" are not normative, but "prenormative", so to speak. Authors like Crosby or Seifert, however, have shown that Reinach's "legal essences" (for example, the idea of a promise) are normative in a peculiar sense. Marta Albert herself suggests a process of "normativization" of legal essences relying on Max Scheler's idea of "functionalization": *a priori* structures are normative in the sense that they set objective limits to any viable human practice. And, actually, legal phenomenology had an impact on Gustav Radbruch's and Hans Welzel's theories of the "nature of things" and the logical-objective structures of law (usually counted among the natural law theories).

Ignacio Sánchez Cámara undertakes a similar task in the chapter "Perspectivism and Natural Law", where he explores the similarities and differences between José Ortega y Gasset's perspectivism (inspired, in its turn, by Max Scheler's and Nicolai Hartmann's "material ethics of values") and natural law doctrine. A common thread between Ortega and Scheler, on the one hand, and iusnaturalism, on the other, is the defence of ethical cognitivism: according to these theories, values are objective properties of entities; man is not the "lord of values", but, rather, their servant and witness. In Ortega's case, this emphasis on the objectivity of values is combined with a vitalist philosophy (human life as *faciendum*) to generate "perspectivism": the realm of values is objective, but also varied (values are manifold), which allows for various perspectives on it, none of which is absolute or exhausts its wealth. Sánchez

[26] Kant (2002), 5.

Cámara suspects that the philosophy of values could provide an answer to one of the apparently intractable problems of natural law theory: that of the "naturalistic fallacy" (how to leap from the "is" of human nature to the "ought" of natural law?).

María Elosegui's contribution focuses on Luis Legaz, one of the leading Spanish legal philosophers of the twentieth century, who evolved towards an innovative approach to natural law, departing from the positivism of his early works (he was a disciple of Kelsen). Elósegui shows, moreover, the fruitful link that has existed for centuries between natural law doctrine and international law: an interaction that dates back to Francisco de Vitoria and Francisco Suárez, and which was further developed in the twentieth century by Alfred Verdross, Antonio Truyol y Serra and Legaz himself, among others. It was by reflecting on the foundation of international law that Legaz – like Verdross – came to explore the idea of natural law. International obligations of states persist irrespective of régime changes: there exists, therefore, at least one international legal rule – the *pacta sunt servanda* principle – that binds states beyond their will. But if the *pacta sunt servanda* principle cannot be understood as state law… then it cannot be but natural law: international law thus turns out to be ultimately founded on natural law.

Vitoria and Suárez pertain to the historical period of Spanish legal thought – the so-called "Spanish School of Natural Law" – that is best known internationally. Various factors – the relative Spanish isolation during Franco's régime, for example – have rendered the contributions of Spanish legal philosophy in the twentieth century less notorious. Antonio E. Pérez Luño offers – in the chapter "Natural Law Theory in Spain and Portugal" – a complete overview of the major streams of natural law thinking in the Iberian Paeninsula in that period.

The last four chapters of this volume deal with contemporary authors. In my contribution ("Is the New Natural Law Theory Actually a Natural Law Theory?") I discuss the renewal of the natural law perspective furnished by the (so-called) "new school of natural law" headed by Germain Grisez and John Finnis. Their innovation consists, basically, in a denial of the possibility of inferring natural law precepts from the observation of human nature; Grisez and Finnis consider, by contrast, that practical reason grasps directly the intrinsic worth of certain goods (knowledge, life, aesthetic experience, etc.): this practical knowledge is not itself derived from prior anthropological knowledge. This explicit denouncement and rejection of a "naturalistic fallacy" prompted the stern criticism of neoscholastic natural law theorists like Russell Hittinger or Henry Veatch: they claimed that, insofar as they dispensed with the possibility of deriving "ought" from "is", Finnis and Grisez were renouncing the very essence of natural law doctrine. But Robert P. George – among others – has responded to this criticism with convincing arguments.

One resolute opponent of the "new natural law theory" is Alasdair MacIntyre, whose gradual approach to natural law has been studied by Rafael Ramis in the chapter "Alasdair MacIntyre on Natural Law". In *After Virtue*, MacIntyre had diagnosed the failure of post-Enlightenment ethics, which he traces back to the abandonment of the Aristotelian-teleological moral scheme. In subsequent works, MacIntyre evolved towards Thomism; his account of natural law is, nonetheless, peculiar and characterised by an anti-intellectualist note that stresses the accessibility

of natural law to "plain people", the indispensability of a communitarian context (and not any sort of community, but one whose dimension does not exceed that of the ancient Greek polis) for moral education, etc.

Ronald Dworkin ranks as the most influential denouncer of legal positivism in the last three decades. Yet, his rejection of legal positivism does not automatically make him a natural law theorist, as noted earlier in this foreword. Lourdes Santos expounds in "Dworkin and the Natural Law Tradition" how Dworkin, in her opinion, has retrieved valuable ideas of the natural law legacy, raising a new debate about the relationship between law and morality in clearer and more rational terms.

Iván Garzón's contribution "Public Reason, Secularism, and Natural Law", finally, analyzes the parallels and differences between natural law doctrine and John Rawls' theory of "public reason". Both have functioned historically as "metaphysically neutral" paradigms: a common ground supposedly accessible to people who hold diverse religious and philosophical beliefs. Both purport to be an "ethics of minimums" whose acceptance does not require metaphysical concordance. However, the differences between them are also undeniable: natural law theory considers the appeal to human nature to be "neutral" and acceptable by everyone, yet the Rawlsian theory of public reason regards belief in human nature as just *one amongst* those comprehensive views that can and should be dispensed with when it comes to arguing in the public space.

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Chapter 1
Aristotle on Practical Rules, Universality, and the Law

Jesús Vega

Decision rests with perception (*Eth.Nic.*II.9.1109b23)
Although you perceive particulars, perception is of universals (*A.Po.*II.19.100a16-b1)

Aristotle's practical philosophy has often been considered as the paradigm of a non-deontological conception—that is, one in which there is not a concept of rule as a criterion universally determining what individuals shall do. Yet this image needs to be severely rectified when we turn our attention to the Aristotelian theory of law, which is to be found—even if merely sketched—in his *Ethics* and his *Politics*. For in the legal sphere, the "technical" necessity for positive rules as stable and institutionalised devices guiding the practice seems more evident. Aristotle's theory of law includes a fundamental thesis about the "rule of laws, not of men" which is indeed based upon the postulate of a system of general, positive rules conceived of as the essential instruments for the public organization of the *polis*. Aristotle thinks of these rules—actually, the rules of "legal justice" (*nomikon dikaion*)—as strictly universal (*katholou*), not merely empirical rules (or "rules of thumb"), their peculiar particularity and variability notwithstanding. It would be erroneous then, if only for this reason, to think (as it is, however, frequently done) that the Aristotelian system is completely unaware of the idea of a "natural *law*". For instance, Aquinas's definition of *lex* as *regula et mensura* is directly taken from the *Nicomachean Ethics*. Nevertheless, this Aristotelian "natural law" is about values and principles and no longer only about rules, and of course it is not "natural" at all in the sense of the

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natural law theories either. Rather these are principles of a moral-political kind, thus immanent to *prāxis* and hence to law as an "architectonic" institution.

This paper explores the philosophical foundations of such a theory of law for which rules play a fundamental role. The main ideas of Aristotle on rules in general are reconstructed as a coherent and systematic theory which is deeply rooted in his own epistemology and particularly in his distinction between theoretical and practical knowledge. On the one hand, the "universality" of practical rules is analysed by means of a reconstructive distinction between "theoretical" and "practical" rules which is ascribed to Aristotle's philosophy (Sect. 1.1). This is presented as a pragmatic conception where a truly central role is given to law (Sect. 1.2). It is indeed considered as the pioneer conception in Western tradition on rules as practices (Sect. 1.3). On the other hand, the moral and political grounds underlying the universality of legal rules are examined (Sect. 1.4), as well as linked to the Aristotelian political vindication of the "rule of law" (Sect. 1.5). Some corollaries of such a pragmatic conception of legal rules must be here drawn, corollaries having mainly to do with the internal connection between legislation and adjudication (Sect. 1.6). Finally, the topic of *epieikeia* or equity is revisited under this light, emphasizing the limits that the practical, justificatory dimension of legal rules poses to their universal character (Sect. 1.7).

1.1 Practical and Theoretical Rules in Aristotle

Among other crucial distinctions in Western philosophical thought, we have inherited from Aristotle what has historically meant the most influential articulation of the conceptual opposition between theory and practice, *theoria* and *prāxis*. Against certain widespread interpretations, there are consistent reasons to think that this is far from a dichotomist distinction. Rather it is the by-product of several, interweaving distinctions of a broader scope, such as the opposition between theoretical knowledge (*epistēmē theōretikē*), practical knowledge (*epistēmē praktikē*) and constructive or productive knowledge (*epistēmē poietikē*), or the opposition between a life of pleasure (*bios apolaustikos*), a political life (*bios politikos*) and a contemplative life (*bios theōrētikos*). The former is a distinction between *sciences* (or even dimensions of science), whereas the latter presupposes the difference between science and *philosophy* (and the differentiation between a practical or theoretical understanding of philosophy as well).[1]

Certainly the Aristotelian epistemological classification of the varieties of human rationality is based on an apparently simple dualist criterion. If immanently referring us to action (*techn*ē, *phronēsis*), it is called practical rationality (technical and moral-political); if immanently referring us to universal and necessary concepts or essences (*nous*, *epistēm*ē, *sophia*), it is theoretical rationality

[1] See Jaeger (1968: 426ff).

(scientific and philosophical).[2] Yet there is no absolute dichotomy between both forms of rationality, but instead a dialectical gradation resulting from reapplying the same conceptual criteria throughout different levels—thus generating apparently dichotomist oppositions. On the one hand, moral-political practices, and not only science or philosophy, in fact possess a theoretical dimension, for they are part of the *noetic* life which is distinctive of human beings (*Eth.Nic.*I.7.1097b25-1098a20). On the other hand, theoretical knowledge can only be obtained within the context of institutionalized practices resulting from constructive transformations of the natural world by human beings. In a nutshell: theoretical knowledge has its origin in a universal *orexis* of men (i.e. in a basically practical drive to know)[3] and moral supreme activity is ultimately identified with an absolute pure *theōrein* (whose metaphysical paradigm is God's *noēsis noēsēos*).[4]

We can therefore assume that according to Aristotle's epistemology, the distinction between theoretical and practical knowledge does not imply that the former lacks practical dimension. Every form of human knowledge consists of systems of practical activities, given that they are always not only purpose-oriented but also good-oriented (*Eth.Nic.*I.1.1094a1ff.; *Pol.*III.9.1280a31ff.). Even *epistēmē* implies a practical, communitarian organization of individuals, not only in the "context of justification" (Barnes 1969: 138ff.) but also in that of "discovery". The substantial function of dialectics in scientific investigation, the consideration of science as a habit (*hexis apodeiktikē*), the close link between *epistēmē-technē*, and the role of teaching in science are but confirmation of that practical anchorage of science (*Top.*I.2; *Eth.Nic.*VI.3.1139b31-32; *Met.*I.1.981a5-7, b7-9).

Thus the opposition between *theoria* and *prāxis* could be better formulated in terms of the distinction between *theoretical rules* and *practical rules*. A distinction, I maintain, that reveals the implicit constructivism that lies beneath the Aristotelian epistemology. If *epistēmē* (and, *a fortiori*, *sophia* presupposing it) is a social-institutional construct, then it requires practical rules in exactly the same way as any other institution does. That is, similar rules to those belonging to the institutions of *prāxis* (morality, politics, economics, law) and *poiesis* (the different crafts and techniques). We can assume that these practical rules are exclusively intended to govern actions involving immediate relations among subjects (Si-Sj) or other actions consisting of handling and producing objects (Si-Oj). Aristotle brings under the genus of *prāxis* ethical and political rules, as well as technical rules. This is so because of their common teleological reference to the production of courses of action: all of those rules focus on the individuals *qua* practical individuals, hence their regulative or normative character (*Eth.Nic.*VI.4.1140a12, 5.1140b.15, 7.1141b13-14, II.3.1104b27-28). Justice, for instance, the ethical-political virtue *par excellence* and the central constituent of his definition of man as *zōon politikon*, emerges out of the mediating operations of individuals involving the good of other individuals (*pros heteron*, *Eth.Nic*.V.1.1130a5).

[2] *Eth.Nic.*VI.2.1139a20ff.

[3] *Metaph.*I.1.980a22.

[4] *Eth.Nic*.X.7–8.

Now, in theoretical institutions, those rules of practical and technical character, which undoubtedly constitute an internal part of *epistēmē*, are pushed to the back row. Here they become epistemologically set aside by the fundamental *telos* of the institution, viz. that of establishing universal and necessary relations between the objects (Oi-Oj) within the specific field of research (biology, physics, geometry, etc.). This end is placed at the superior level of the epistemological hierarchy of the Aristotelian philosophy and because of this, the intellect is the defining criterion for human life *in integrum* and also what makes us "divine" or "immortal".[5] And that is also the reason why we can here speak of *theoretical rules*, since they imply the two above-mentioned dimensions: the practical (since they are rules) and the objective-cognitive (since they are theoretical). As long as it is oriented to objectivity, truth is a theoretical, not a practical value (*Met*.II.1.993b19ff.). This objectivity implies that the individual is only *epistemically* involved in the logical or functional reconstruction of reality. The knowing subject does not itself intervene *ordo essendi* upon the constitution or production of that reality,[6] but only in its conceptualization under an intelligible, essential *form*.[7] This is the very form of the relations of regularity or co-determination, i.e. logical universality (Spaemann 2008: 292). "For all science is either of that which is always or for the most part" (*Met*.VI.2.1027a20-1; see *A.Po*.96a8-19). The theoretical knowledge (*epistēmē*) refers to the universal just because it logically "neutralizes" or "cancels" the empirical individuality, including that connected *a parte subiecti* to the individual scientist. Science requires the practical elaboration of *empeiria* in order to obtain regularities or universal principles by induction as well as the subsequent displaying of conclusions thereof[8]: it is there, then, that the epistemological concepts of causality and explanation are to be found. These activities manifest the permanent presence of a constructive, rule-governed "scientific practice".[9]

In this sense, theoretical knowledge (*epistēmē*) also presupposes syllogisms that are embedded in the course of purpose-guided actions within a cooperative scenario. That is, it presupposes practical syllogisms. But this is so only from the point of view of the individual or scientists. The end of the institution itself—*finis operis*—is rather the production of objective truths or essences that reflect the very real structure of the natural world. This is a *result* of practice: the recursive "elimination" of any subjective components as an outcome of genuine universal or general (*katholou*) representations

[5] *DeAn*.II.3414b18-19; *Metaph*.I.1.980b 27–8; *Eth.Nic*.X.7.1177b2-34. See Burnyeat (2008). (Unless otherwise indicated, all the translations are taken from the revised Oxford edition of Aristotle's works.)

[6] This is the reason that completely prevents us from interpreting the Aristotelian natural teleology as a purposive teleology (i.e., an anthropomorphic or a theological one). See Irwin (1988: 300, 525).

[7] As a result, nature and form identify. *Phys*.II.1.193b14ff.

[8] *An.Post*.II.19.100b. Met.I.1.980b29. See Barnes (1993: 259ff). Logic itself is but an instrument (*organon*) to investigate and formulate such universalities in nature.

[9] See *Met*.I.1.981a5-7, where Aristotle attributes to *technē* the production of the common *logos* that results from the multiple perceptions of particulars after their common content being retained in memory. Another relevant sign is the consideration of science as a *virtue* in the *Ethics*, which is a consideration from the point of view of the *practical* rules involving the construction of knowledge and the excellence of action they tend to achieve.

elaborated by *nous* in terms of types or concepts with propositional content, *logoi*. These are no longer "reason for acting" (thus involving practical ends or goods) but instead "reasons for believing". And even that characteristic is to be understood in the sense of reasons which impose their epistemic validity upon *any* possible knowing individual, whatever her real psychological beliefs are: they are not part of the propositional (and ontological) content that is logically implied by those reasons, which is one and the same for *every* epistemic individual and shows—transcendentally—"that which cannot be otherwise" (*A.Po*.I.2.71bff.). Such "objectivising force" of theoretical knowledge, intrinsically related to truth, reveals to us thus the Aristotelian, notwithstanding its constructivist element, as a true "epistemology without a knowing individual". Truth is the contemplation of the structures that actually articulate the world and through it the knowing individual comes to be identified with the object itself *quoad se* (*Met*.II.1.993b31). Aristotle thinks accordingly of *theoria* as the only autonomous, "free" activity that finds its end in its very self, instead of in further technical or practical utility.[10] Ultimately, *theoria* is a form of *prāxis* too (thus essentially linked to rules), yet still the supreme form: that which produces a type of knowledge proven to be entirely independent of human practices (that is: of human rules, institutions, deliberations, opinions, perceptions…). The supremacy of *theoria* and theoretical science (and of truth as the "dominant end") within Aristotelian epistemology (*Eth.Nic*.X.7.1177b1-4) rests on this criterion.

Unlike technical rules, which Aristotle assimilates to theoretical ones, "pure" practical rules—that is, moral, political and legal—cannot purport the same level of objectivity. Here we are facing the epistemological problem of the "practical science" and therefore the "practical reason" in Aristotle. Only physics (natural science in the broader Aristotelian sense) and mathematics constitute full realizations of the type of theoretical knowledge that *epistēmē* entails (in fact, this very concept is constructed by Aristotle, bearing in mind as paradigms those forms of knowledge). Only there do we find fields of subject-matter that allow for rational reconstruction in terms of universal and necessary connections (forms or essences) that refer to the true ontological structure of the world, thus transcending the pragmatic framework in which their construction takes place. By contrast, in the moral, political and legal domains—i.e. the realm of what Aristotle calls *politikē*, "science of *polis*", which we can consider extensionally equivalent to modern "social science" (Salkever 2005: 28)—the relevant relations between things and phenomena are themselves *ontologically constituted* by and among agents as *practical* individuals (for example, the relations between conducts and virtues, rulers and ruled or legislators and judges). This makes it epistemologically impossible to completely "neutralize" the agents (and with them all of their components: perception, deliberation, intentionality, action, etc.) since they are not only the relevant subject here but also those *causing* the institutional phenomena. In effect, as it has been said, rules that belong to the regions of *prāxis* in the strict sense of this concept refer us formally and teleologically to the performance of actions by other individuals (Si-Sj), hence

[10] *Met*.I.2.982b24-28. That end is truth itself: see II.1.993b20-21.

those regularities that could be found here are only and precisely regularities *of action*. And the consequence of this is that practical knowledge or practical science is necessarily constructed on the same scale as its subject matter: any possible *theoria* that can be reflexively elaborated on moral and political matters is *internally* committed to the values that structure them (Natali 2001: 27ff.). It is this kind of practical internalism which in Aristotle's epistemology critically states limits to the possibility of an *episteme praktikē*. Practical knowledge or *phronēsis* cannot be *epistēmē* just because it is essentially oriented to the deliberative exercise of particular actions in particular circumstances and therefore it is dramatically exposed to the contingency of "things which can be otherwise" (*endechomena*) throughout human *prāxis* (*Eth.Nic.*VI.5.1140a32-1140b4). There is an insurmountable gap between theoretical and practical reason: in the latter, rules cannot be universal and necessary since their "direction of fit" is not the objective world but adjusting the world to practical deliberations and operations from individuals. The function of rules in practical reasoning, the conclusions of which are always *actions* themselves, is to anticipate those states of affairs that do not yet exist—i.e., states of affairs that will come to existence upon the performance of those actions. They are "particularistic" rules in a peculiar way.

1.2 Law and Practical Reason

Practical rules cannot be universal in the same sense as theoretical ones, and this is so, given that the former involve a mediating deliberative agent, while the latter segregate her out of the universal and objective relations underlying them. Rules have nonetheless a central function within the practical realm: they tend to diminish its contingent ontology. The rationalizing role of rules in *prāxis* is the point that Aristotle wants to highlight when he insists on considering practical rules from the epistemological point of view of the theoretical reasoning—the paradigm of rationality. This is evident in ethics, where moral deliberation—as well as the very concept of a "practical syllogism"—is constantly compared to scientific inquiry (*zētēsis*). Let us corroborate how this is also the case for legal rules and the extent to which Aristotle conceives them as universal.

To begin with, Aristotle explicitly uses a logical vocabulary when analysing legal rules or *nomoi*. These, whether formalized or not, for *nomos* covers customary rules too,[11] command or prohibit *types* of action (I.2.1094b5). This requires a universal logical form: the *nomos* "speaks universally" and this is something "necessary", as stated in the passage on *epieikeia* (V.10.1137b13, 20). In the *Rhetoric* we read that "the decision of the lawgiver is not particular but prospective and general [*katholou*]" (I.2.1354b6). Thus the internal link between rules and language: rules may or may not be written, that is, they may or may not consist of canonical, publicly

[11] See Schroeder (2003: 40), Miller (2007: 80).

stated statements (this is "indifferent", says *Eth.Nic*.X.9.1180b1). But they always have a linguistic or verbal formulation since this is what makes it possible to deal with universal quantifiers (referring to individuals, actions and occasions) and to apply them to particular cases or *tokens* by means of individual variables. In conclusion, legal rules are essentially normative universals: "Of things just and lawful [*dikaion kai nomimon*] each is related as the universal to its particulars; for the things that are done are many, but of them each is one, since it is universal" (*Eth. Nic*.V.7.1135a5-8).

Naturally, those logic-linguistic formulations that rules consist of form part—as *logoi*—of chains of complex practical reasoning. Aristotle, following otherwise the Platonic tradition, strongly emphasizes the intellectual activity undertaken by the lawgiver. He refers to the good legislator as a competent *technikos* and as someone who has studied his craft theoretically (*theorētikos*); as Bodéüs (1993: 58) points out, it is "in any case, one who must have attained general knowledge". Aristotle conceives legislating as the implementation of some kind of objective knowledge, thus approximating this activity to a *techn*ē or turning it into a sort of "applied discipline" of a superior *epistēm*ē.[12] "None the less, it will perhaps be agreed that if a man does wish to become master of an art or science he must go to the universal, and come to know it as well as possible; for, as we have said, it is with this that the sciences are concerned" (*Eth.Nic*.X.9.1180b20ff.).

Yet, what kind of *epistēm*ē could this be? At the beginning of the *Nic. Eth.,* Aristotle refers to the "architectonic science" of politics (I.1.1094a14; 2.1094b5), the legislative technique (*nomothetik*ē) being the most important part thereof. Now, as we have stated, the *politik*ē is not an *epistēm*ē at all. Rather it is a form of *prāxis* in the strict sense. Law or "the just things" (*ta dikaia*) is a phenomenon circumscribed to "human things" (*anthropeia*), that is, to human practices. It is now all about the dynamic interrelation of the practices that are carried out by legislators, judges and citizens —whose respective positions and relations legal rules are, otherwise, aimed at governing—in the *polis*. The above-mentioned "internalism" and "particularism" of such rules are now easily understood. Law is the product of human deliberative actions and legal justice (*nomikon dikaion*) exists "by people's thinking this or that" or "depends on a decision whether to accept it or not".[13] Therefore, there is no such thing as "the law", but it is rather about it becoming multiplied and fragmented into the different legal systems really existing: it is particular (*idion*) to each community, which lays it down and applies it to its own members (*Rhet*.I.13.1373b6ff.). It is of these particular sets of rules with a limited scope (that of political units) that the law is formed. The content of these rules cannot be reduced to truly universal and necessary principles of justice: *every* kind of justice is essentially "changeable" (*kineton*) and the *anthropina dikaia*—the legal

[12] *Nomoi* are said to be expressions of intellect or *nous* (*Eth.Nic*.X.9.1180a18). In the *Politics*, legislators are compared to *dēmiourgoi* or craftsmen (such as weavers or shipbuilders) that impose a form (the constitution) upon materials (a given population and territory). See *Pol*.III.3.1276b1-11; IV.1.1288b19-21; VII.4.1326a35-38.

[13] *Eth.Nic*.V.7.1134b20, Ross's and Broadie-Rowe's translations.

rules and decisions posited by human convention—are not "everywhere the same" (*Eth.Nic.*V.7.1134b29, 32; 1135a4).

The legal sphere—i.e., the complex of legal practices—cannot indeed be *qua tale* objectively determined by any kind of "natural necessity" and thus it lacks genuine universality, even if the logical principles themselves are applicable to it. Just as we do not find practical rules in the realm of *physis*, we cannot find universal and necessary rules in a strict epistemological sense in the realm of *prāxis* (to which law and justice belong) (Long 2005: 413, 422). Contrariwise, the legal rules exhibit a parochial generality and, far from being deterministic, they are contingent and indeterminate, for "when the thing is indefinite [*aoristou*], also the rule is indefinite" (*Eth.Nic*.V.10.1137b29-30). The indeterminacy of the law is then a direct consequence of the dependency of legal rules on deliberative actions as products and instruments of practical reasoning. This kind of reasoning is wisdom or *phronēsis*, which Aristotle considers epistemologically irreducible—because of its particularity—to *technē* and a fortiori to *epistēmē*. *Nomos* is explicitly said to be the result of *phronēsis* (*Eth.Nic*.X.9.1180a21-22). The millenary name that the legal domain was given in the Western culture is rooted here: *prudentia iuris* (*Jurisprudenz*, *jurisprudencia*, *giurisprudenza*, *jurisprudence*). The kind of reasoning that Aristotle calls *phronēsis* is identified with the very idea of a "practical reason": i.e. the ethical, political, juridical reason. Aristotle, as we said, philosophically reconstructs its structure by means of a heuristic-epistemological analogy with the syllogistic model of *epistēmē*.

Aristotle's conception of practical syllogism presupposes that *prāxis* always incorporates some kind of *theoria*, i.e. "reasons for acting" which operate as premises or "principles". However, practical principles (among them rules) have their starting point in particular action and recurrently return to it. Practical syllogisms are those performed by particular agents in particular circumstances in which those principles are obtained, balanced and chosen. Moreover, they are inferences that cannot be separated from the accomplishment of their conclusions, for these are not mere statements (*protaseis*) but actions themselves.[14] That is why they have an internalist character, i.e. they only come to existence the moment the agent exercises them from his operative point of view (or from that of an analogous *alter*). The agent's practical deliberations are not only constitutive both of the conclusion and the minor premise (the concrete situation), but also of the major premises (rules themselves). And it is here where the epistemological dialectics of the latter when compared to the theoretical, scientific principles rests: whereas practical principles (rules) are essentially deliberative, the theoretical ones completely eliminate deliberation and are thus somehow "external" to human *prāxis*.[15] The only reason why we can deliberate about practical issues is because they are ontologically dependent on human action and, thus, indeterminate (*Eth.Nic*.III.3.1112a18ff., 1112b8-9). Even when practical

[14] *Eth.Nic*.VII.3.1147a26ff.; *Mot.Anim.*7.701a4-33; *DeAn*.434a16ff. See Michelakis (1961: 63ff.), Nussbaum (1985: 183ff.), Natali (2001: 63ff.)

[15] *Eth.Nic*.III.3.1112a21ff.; VI.5.1140a32. Deliberation is a kind of inquiry, but not all inquiry is deliberative, for instance mathematics (1112b20ff.).

deliberation includes theoretical grounds as premises ("reasons for believing"), these would no longer be determinist and necessary, as they would need to be "technically" translated into the practical scenario of human teleology in terms of particular courses of conduct; thus becoming inevitably susceptible to "be otherwise"—that is, changeable and contingent. In conclusion: "Since it is impossible to deliberate about things that are of necessity, practical wisdom [*phronēsis*] cannot be scientific knowledge nor art" (*Eth.Nic.*VI.5.1140a32-1140b1). It is impossible for legal rules—practical ones—to be the direct result of scientific or technical rationality.

This strong epistemological asymmetry between *theoria* and *prāxis* still has a *pars construens*. The *epistēmē* analogy, once it has radically separated practical reason from theoretical reason, also allows them to be assimilated *secundum quid*. It is here that Aristotle finds the only possible philosophical way (*methodos*) for a rationalist account of human action, intermediating between Sophists' skepticism and Socratic-platonic "science of virtue" (Nussbaum 1985: 166ff.). Though practical rules are always *open*, indeterminate rules, thus not capable of exhausting the practical domain (for instance, that of law) by means of an objective "closure" of principles, as *epistēmē* does, they are nonetheless indispensable, "transcendental" devices for human rationality, as they shape the recurrence of *prāxis,* tending to reduce its radical contingency. This is indeed the essential defining feature of man among other animals: man is the only one whose conduct is rule-governed. Rules are the nuclear components of "human nature". The definition of *zōon politikon* must be understood as comprehensive of the whole set of practical institutions that organize human communities in terms "of the perception of good and evil, just and unjust and the remaining values" (*Pol*.I.2.1253a16-17). These other values (*kai tōn allōn*) can only be the theoretical, epistemic values governing scientific (*epistēmē*) and philosophical (*sophia*) knowledge as well as the crafts (*technai*). Each of these institutions implies the normativization of the practical world of men through linguistic conceptualization (*logos*), since human communities can only be constituted "by sharing rational discussion and thought [*logōn kai dianoias*]" (*Eth.Nic.*IX.9.1170b12.). The power of speech or *logos* is intended to set forth the correct and the incorrect (*Pol*.I.2.1253a14) —that is, to direct human conduct by means of *values* institutionally articulated into practical *rules*. So it develops the construction of universal (*katholou*) representations of a variable extension, ranging from moral-political *prāxis* (local, contingent and *endoxa*-related knowledge) to strict *epistēmē* (truly universal and objective knowledge). Thus the distinction we have introduced between theoretical and practical rules. The function of rules is precisely to connect the subjective behaviours and goals of individuals to the values and goods that internally structure each of those institutions. Aristotle considers those goods as *objective*, not merely apparent (*Eth.Nic*.III.3.1113a28-30), something that means at least two different things: (i) they are rationally founded, i.e. to a greater or lesser extent, they are logically universalizable; (ii) they are, according to the Aristotelian teleology, the main and ultimate ends towards which all human activities tend. A non-metaphysical reading of this teleology would simply conclude that man is the only animal that is capable of carrying out *rational practices* (guided by rules and values within the

framework of those institutions) instead of merely *conducts* (ethological-biological behaviours). This purposive teleology is entirely an *anthropic*, immanent one. For those fundamental goals, *eupraxia* (life according to virtue) or truth (life according to *theoria*), are only attainable in the context of *polis*. Whether "inclusive" or "dominant", the ultimate end of man (*eudaimonia*) is but an end *practically* pursued. Human existence is essentially a practical life consisting not merely of living but of living well (*eu zēn*), under the scope of rules and values, and therefore "a life guided by deliberative choice [*kata prohairesin*]" (*Pol*.III.9.1280a32, 34; see I.1257b40ff.; III.6.1278b24ff.). It is noteworthy that Aristotle identifies man with his specifically *practical* rationality (in the famous *idion ergon* argument of *Eth. Nic.*I.7.1097b25ff.). This is symptomatic of how all varieties of noetic human life, even the more elevated and theoretical ones—and hence all man's possible goals—are inseparable of his action or *prāxis*. The human being is for Aristotle nothing more than a practical substance, a principle of operations that is to be understood in a constructivist way. Such "primacy of practical reason" turns practical philosophy into the true "first philosophy" (Baracchi 2008).

1.3 Two Philosophical Conceptions on Rules' Universality

From what has so far been said concerning Aristotle's ideas on rules, we can hold that there are at least four senses in which a rule can be universal: (i) *logical universality*: a rule always refers to types or classes of action, both extensionally and intensionally considered; (ii) *axiological universality*: rules have underlying values which operate as universal justifications thereof; (iii) *naturalist universality*: rules can have objective, causal-nomological foundations too; and iv) *practical universality*: rules involve internal, regular relations between practices. Senses (i) and (iii) are theoretical, whereas (ii) and (iv) are practical. On the basis of this characterization, we can differentiate between two main philosophical ways to understand the universality of rules, allowing for a classification of the different available conceptions. I call "theoreticist" those kinds of conceptions which reduce all meanings of the universality of rules, even meanings (ii) and (iv), to the logical or nomological meanings. In turn, "pragmatic" conceptions are those reducing these latter meanings to the practical ones, particularly to sense (iv).

I assume that the Aristotelian conception of rules that I have just briefly introduced is the paradigm—and the pioneer as well—of the pragmatic view, which is also to be found, for instance, in last Wittgenstein's rule-following theses. Such a pragmatic account purports rules to consist essentially of systems of social practices. They are then immanent to these practices and can only properly exist inasmuch as they are *practiced* rules (Wittgenstein 1999: §§ 202, 217). A rule is basically a social process, a kind of recursive and complex concatenation of working practices. It is specifically this practical recursivity—the social iteration or generalization of certain conducts—that is the mechanism by means of which those conducts are transformed, as well as

evolve into *institutionally* governed operations.[16] It is definitely not about a merely statistical or empirical regularity, but rather an interpretative one, i.e. one that is structured in terms of values. So the conduct of individuals becomes "polarized" and oriented towards specific directions or courses of action by them being selected, as long as they promote the relevant values (against specific counter-values). This recursive, dialectical social process requires the formulation of general linguistic statements in order for the *same* type of actions to be identified and held.[17]

The distinctive thesis of a pragmatic conception states that the rule's formulation (which is expressed in terms of general statements) is but an internal dimension of the social process of practices which are generalized within the framework of the institutions at stake.[18] So a rule cannot be *totally* identified with its general formulation—instead it consists of the set of interpretive practices through which the formulation itself is *generally followed and enforced* as a justificatory pattern. Thus the value dimension of rules comes to the front row. Only through the practical, hermeneutical process of promotion of the rule's underlying values can it exist as such a "rule".[19] Accordingly, practices are ultimately *constitutive* of rules. A theoreticist conception of rules conceives this connection the other way round. Now the linguistic, abstract dimension of rules is enhanced, whereas the practical process of their implementation is pushed to the back row. Rules are essentially ideal structures that belong to the realm of ought or *Sollen* and their being followed and applied are totally secondary and external to those structures. It is the empirical practice itself that has to become objectively, case-independently regulated and uniformed by the rule as a logical, universal structure. The philosophical origins of this second conception can be located in Kant's philosophy, whose idealism gave a "Copernican turn" to the classical, Aristotelian practical reason. The contemporary "linguistic turn" on philosophy has deeply increased this tendency when applying the analytical tools of formal logic to norms, which as a result of it appear as mere linguistic entities (that is, the *propositional meaning*—whether semantic or pragmatic—of their formulations). Therefore, for this conception rules are constitutive of practices.[20]

We have seen how Aristotle heuristically uses the model of theoretical rules in order to reconstruct the structure of practical rules. This no doubt laid the foundations for Kant's modern *Sollen*-idealism. However, his own conception is ultimately a pragmatic, constructivist one: *prāxis* is the key for *all* kinds of rules, even for theoretical-objective rules. It is the primacy of practice in Aristotle's philosophy that explains the fundamental role that rules and, consequently, values, play in all

[16] Compare, e.g., to Luhmann's notion of "socially-generalized behavioral expectations" (Luhmann 1987: 40ff.) and to Searle's connection between rules and the institutional world (Searle 1995).

[17] On the relationship between rules and identity judgments, see Wittgenstein (1999: §§142–3).

[18] On the internal relations between a rule and its applications, Wittgenstein (1999: §201). Baker/Hacker (1984: 123ff).

[19] Compare to Hart's definition of a "social rule" in terms of a constellation of justificatory practices involving the "acceptance" of a certain standard. This is the "internal aspect" of the rule to which an observer has to refer from the "internal point of view" of the agents (Hart 1994: 55ff.).

[20] On the concept of "constitutive rules" see Searle (1969: 33ff.), Cherry (1973).

human institutions. We can corroborate this by going back to the *politikē* and to the institutions of law and justice lying at its foundations. Justice is at the core of the Aristotelian practical philosophy being its main practical value: "The virtue of justice [*dikaiosynē*] belongs to the *polis*, for justice [*dikē*] is the order of political community [*politikēs koinōnias taxis*] and the virtue of justice is the collection of statements determining that what is just [*dikaiou krisis*]".[21] The universality of both legal rules and the value of justice are central to Aristotle's practical philosophy, as his conception of the "rule of law" or his classification of political regimes indicate. Such universality is reconstructed more *philosophically* than scientifically, since the *praktike epistēmē* cannot be a science. In other words: it will eventually be not a logical-theoretical but a *practical* universality, hence limited. This is why it is a *normative* reconstruction for philosophy is here internally committed to its subject matter, i.e. to its very moral and political values.

1.4 Sources of Universality of Legal Rules

The universality of law is closely connected to its "architectonic" function, which is no other than the implementation and safeguarding of the stability of the internal structure of the whole political community—this being, in its turn, the condition of possibility of any other human institution. So, the foundations of the universality of law are moral and political. The passage from the *Politics* that we have just quoted regards the law not only as "legal justice" or *nomikon dikaoin*—that is, as legal rules and their adjudication (*krisis*) by judges—but also as including material justice, which is an underpinning value of the *politeia*. Law is a regulatory institution oriented to the production of general rules applicable on a global scale, that of the political society. *Nomos* are the instrument for the *generalization* of social habits within the *polis:* this is the primary function of legislators, which are the direct interlocutors to whom Aristotle addresses in the *Nicomachean Ethics.*[22] At the same time, *nomos* is a kind of order (*taxis*) that is imposed upon other pre-existent norms and values. These are the informal, customary norms shaping the different communities (basically, households and villages), the normative layers on which the *polis* itself is built (*Pol*.I.2). Starting from this positive morality, law comes into existence as a second-order system of rules, thus making its way from ethics to politics. Pre-political norms (*thesmos*) need to be reformulated by a political authority in terms of central, legislative rules. As a result of its *totalizing* over all other social norms and values,[23] the law establishes certain standards that are universalized for *all* the members of the community, they being now considered *as citizens*—not longer members of the precursor communities. It is due to such *erga omnes* character that legal rules need to be general or universal.

[21] *Pol*.I.2.1253a37-39, my translation.

[22] *Eth.Nic.*II.1.1103b3-4; X.9.1180a32ff; Bodéüs (1993: 60–1).

[23] See *Eth.Nic.*VI.8.1141b25; X.9.1181b1.

This positivization of *nomoi* sets a turning point that becomes a real defining characteristic of the institutional, normative autonomy of the law. In effect, it is clearly stated in Aristotle's definition of *nomikon dikaion* that law's positivity lies in the practical decisions of legal authorities: legal justice is "what in the beginning makes no difference whether enacted or not, but when enacted *does* make a difference".[24] The content of legal rules cannot be simply "deduced" from the previous practices and norms (let alone from any allegedly pre-existent "natural law"). Instead it has to be attributed to the *constitutive* rule-maker's practical deliberation. This is the idea that legal positivism will take to its very limit. Despite it being a regulatory institution that generates new rules in society, law nonetheless does not entail a sharp cut in relation to first-order norms upon which it is constructed—particularly *moral* norms. It is from here that the dialectical relationship between law and justice, *nomos* and *dike*, emerges.[25] This is the idea that (deontological) natural law theories will take to its very limit. Now, Aristotle's conception of law is neither that of a positivist nor that of a natural lawyer. Rather its significance rests on the fact that it emphasises that the law plays a mediating—architectonic—function between the values of morality and the political construction of the state. It is along these lines that the distinction between "legal justice" and "natural justice" is to be properly interpreted. In short, this is the distinction between the law as a system of rules and those values that *universally* explain and justify its existence. So Aristotle appears to invoke some kind of universality when defining natural justice ("that which everywhere has the same force", *Eth.Nic*.V.7.1134b19). This is, we already know, a *prāxis*-circumscribed universality, not a naturalist-theoretical one ("as fire burning both here and in Persia", says Aristotle critically both to Sophists and Platonists in 1134b26), for natural justice is *internal* to political justice.[26]

So, on the one hand, for Aristotle law's positivity is normatively constitutive, but not self-referred. Legal rules considered as *posited* rules are "just", though only "in a sense" (1129b11, except "with the gods", ironically added in 1134b28), since justice does not only concern legal *form*—authority—but its contents too, and not just any content makes law just. Legal rules have a *justificatory* (not only genetic) connection to substantive moral values. These go beyond the legal conventions that have been created by authority and this is so because they somehow possess a universal and permanent dimension ("everywhere the same force"). That is why "in justice [*that is, legal justice*] all the virtues are contained" (*Eth.Nic.*V.1.1129b30).[27] As a political institution, law does not only tend to achieve the end of the common coexistence but also that of the *good life* or "life according to virtue [*bios ton kat' aretēn*]"

[24] *Eth.Nic*.V.7.1134b20-22, Broadie & Rowe's translation and emphasis.

[25] See Barker (1975: 366), Hamburger (1971: 96).

[26] See Yack (1993: 128ff, 194ff.), Bodéüs (1993: 71ff.), Burns (1998: 155).

[27] "For practically the majority of the acts commanded by the law are those which are prescribed from the point of view of virtue taken as a whole [*hōlen aretē*]; for the law bids us practice every virtue and forbids us to practice any vice. And the things that tend to produce virtue taken as a whole are those of the acts prescribed by the law which have been prescribed with a view to education for the common good" (V.2.1130b18ff.).

(*Pol*.III.9.1281a8; III.13.1284a2; IV.2.1289a30ff.; VII.1.1323a14ff.). Here Aristotle clearly departs from legal formalism and all its voluntaristic, relativist implications.

But, on the other hand, now opposing natural law theories, law is not for Aristotle *exclusively* a matter of morality, as if it were merely a *part* or a *species* of a moral, higher genus (in the sense classically defended by Thomism, still operating today in some post-positivist theories, such as those of Alexy and Dworkin). Law does not relate to morality in terms of static, *logical* relations between the general and the particular, *genus* and *species*, form and matter: viz. *theoretical* relations. Rather their relation is a dynamic, *practical* one. This means that morality *requires* the institutionalization of a legal system in order for the standards of justice to be generally imposed in that new level which comes with the *polis*.[28] In other words, justice needs to be *politically organized* through a positive, *rule-based* legal system. Only by means of rules and the freedom and equality relations they impose in society is political justice possible (6.1134a28ff.). This is justice "according to law and between people naturally subject to law" (1134b13-14). The "naturalness" of this kind of justice is then essentially related to the structural conditions of the constitution and the persistence of a well-ordered political society.[29] The very idea of justice is identified in a sense—its formal one—with the implementation of a system of general legality: justice is that which is "legal and equal [*to nomimon kai to ison*]".[30] Yet this sense is inseparable from the material contents of the values involved in political justice, which are universally valid. Positive constitutions may have different contents since each may incorporate different, even incommensurable, material values, thus "they are not the same everywhere".[31] These political values are nonetheless enforced precisely by means of *universal* legal rules. After all, a universalizable criterion of political justice exists, for "only one is everywhere the best constitution by nature".[32]

1.5 The Rule of Law and the Role of Rules

So, this is how we come to the moral-political foundations of the Aristotelian defence of the "rule of law", which assumes an intrinsic connection between general legal rules and the relations of power and authority in the state. The political sovereignty or the exercise of political control (*kyrioi tes arches*) is for Aristotle coextensive to the production and enforcement of legal rules, both *ad intra* (internal structure or

[28] As Miller (1995: 59) puts it: "[L]egal judgement is indispensable for the habituation and moral development of the citizens. Hence, human beings require a legal and political system in order to acquire ethical virtue".

[29] Nussbaum (1985: 212).

[30] *Eth.Nic.*V.1.1129a34. Gauthier-Jolif's translation.

[31] "The goodness or badness, justice or injustice, of laws varies of necessity with the constitutions of states" (*Pol*.III.11.1282b8-10).

[32] *Eth.Nic.*V.7.1135a5-6, my translation.

form of the state) and *ad extra* (relations between rulers and ruled). This is quite a *descriptive* thesis: it is a universal feature of political systems that the construction of the state (and hence the very carrying out of political activity) requires the existence of a set of general rules which involve a coercive power that is not attributed to the particular individuals but to the community as a whole. So all regimes adhere to some sort of justice and "there where the *nomoi* do not rule there is no *politeia*".[33]

The varieties of political regimes are related to the various ways in which general legal rules can be produced as well as the relations of those rules to rules of a lower degree of generality and particular decisions. The political articulation of the deliberative (assembly), executive (magistracies) and judicial organs is isomorphic to the articulation of the legal system. This is how Aristotle largely anticipates a "juridical theory of the state" (*Rechtstaatslehre*), that is, a conception of the legal system in terms of hierarchy relations among the different normative layers (Verdross's and Kelsen's *Stufenbau der Rechtsordnung*).[34]

Every political regime consists of *nomoi* as general rules: the existence of a rule-based system of law is somehow a universal feature of politics. Yet the role of rules is neither purely formal, nor does it represent a kind of procedural political justice exclusively based on a formal equality. It is rather a kind of justice that is directly related to the material values embodied by the constitution. This is the reason why it ends up in an unavoidable variability of legal-political systems: monarchy, aristocracy and democracy are all of them dependent on different principles of distributive justice. This variability in fact reflects controversies or disagreements about the content of virtue and happiness and, with it, about the constitution and the specific sort of equality that legislative justice introduces in the *polis*.[35] And, of course, for Aristotle, constitutions are not evaluatively equivalent: they are ranged in a certain order from *correct* to *deviate* according to their promoting or not the common good of each and every citizen (*Pol*., III, 9–13). The more extreme forms of deviation from this criterion do not even deserve to be named as "constitution": tyranny, extreme oligarchy and extreme democracy (IV.5.1292b5ff.). It is

[33] *Pol*.III.9.1280a9, IV.4.1292a32, my translation.

[34] Firstly, Aristotle clearly differentiates the constitutional level from that of ordinary legality. The constitution establishes the different political organs and the ways for the citizen to participate in the deliberative, executive and judicial functions (for citizen is "whoever capable of participating in the deliberative or judicial function", *Pol*.III.1275b18-19. Miller (1995: 87ff.) has interpreted this in terms of "political rights"). According to Aristotle, "the laws are, and ought to be, framed with a view to the constitution, and not the constitution to the laws" (IV.1289a13-15). Legislative activity is of an interpretative nature and it is developed within the constitutional framework (II.9.1269a32; see Bodéüs 1993: 74; Miller 1995: 157ff.). Secondly, the level of legality is neatly differentiated from that of particular rules. These are not *nomoi* but "decrees" (*psephismata*) that regulate particular situations (see MacDowell 1993: 43ff.) and must fit to legality since no decree should be universal (*katholou*): "The law ought to be supreme over all, and the magistracies should judge of particulars, and only this should be considered a constitution" (II.4.1292a33ff.; see III.11.1282b2ff; 15.1286a10). Finally, judicial decisions are particular determinations of *nomoi* to singular situations.

[35] See *Eth.Nic.*V.3.1131a27-29, *Pol*.III.8.1280a7-22, *Pol*.III.12.1282b18-23.

not the law that rules here, but the will or the desire of an individual or a multitude: a king governing by means of edicts (*epitagma*) or an assembly by means of decrees (*psephismata*). In other words: it is not the rule of law, but that of men.

By contrast, the rule of law is fulfilled to a higher degree in those political systems where citizens partake in public functions by taking turns in ruling and being ruled, i.e. where "all persons alike share in the government to the utmost" (*Pol*.III.6.1279a8ff.; IV.4.1291b24-7). That is: in democracy, where the majority rule governs the deliberative law-making process, hence where the interest of each and every one is taken care of.[36] This is the ultimate reason why no decree can have a universal scope: and that is because from an axiological point of view its universality would not be such (in terms of the common interest or advantage) where the legal rule is reduced to a particular interest or will—it would instead be a mere logical or formal universality. This warning does not only affect monarchy or oligarchy but also democracy, especially "that in which not the law, but the multitude, have the supreme power, and supersede the law by their decrees".[37] It is then about a democracy under the rule of law (i.e., what we nowadays call constitutional democracy, in which normative constraints such as a chart of rights, division of powers and a judicial review system operate).

Only then can we conclude along with Aristotle:

> The rule of the law is preferable to that of any individual. On the same principle, even if it be better for certain individuals to govern, they should be made only guardians and ministers of the law. […] Therefore he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire (*Pol*.III.16.1287a28-33).

1.6 Practical Universality: Rules and the Structure of Legal Prāxis

Aristotle represents a pragmatic conception of rules to the extent that he prioritises practical and axiological universality over logical universality. This is highlighted above all in his theory of law, as it has been claimed along these pages and will be corroborated below. It is worth noting that in his moral theory of virtue, rules already play a central role as internal constituents of ethical practices. Virtues are habits (*hexeis*), that is, *recursive dispositions* of conduct that produce excellence in moral *prāxis*. Thus, virtues "result from often doing just and temperate acts", that is, through constant and regular performance (*askēsis*) of recurrent acts; accordingly,

[36] As long as they are general, the laws reflect the "wisdom of the many" resulting from deliberative democracy: although each of the particular individual may not be a good man (*spoudaios*), when all of them meet together in the *polis* can be better than the few good, for each individual among the many has a part of virtue and wisdom (*Pol*.III.11.1281a42-1281b6; see Waldron 1999: 105ff., 119ff.).

[37] See *Pol*.IV.4.1292a2-38.

virtues are *generally exercised* virtues so that "*without doing these* no one would have even a prospect of becoming good": "It is well said, then, that it is by doing just acts that the just man is produced, and by doing temperate acts the temperate man".[38] From this point of view, virtues would primarily be *ethos* ("custom", repeated practice) and only through this they become ē*thos* ("character").[39] And then, once incorporated as premises for the practical reasoning of the *phronimos*, rules are a substantial part of his becoming a *kanōn kai metron* (Wieland 1990: 132ff.; Joachim 1955: 27–8, 75). As it is remarked by Nussbaum, rules encapsulate the right practical choices of wise men, so that "even the virtuous adult will often have need of universals that are *koinoteroi* than the particulars".[40]

Yet it is indeed in the public sphere where rules are essential in order to arrange common patterns for correctness, thus making the transition from the ethical good to the political good. "This is confirmed by what happens in states—Aristotle adds immediately after having said that "excellences we get by first exercising them" and that "we become just by doing just acts"—; for legislators make the citizens good by forming habits in them, and this is the wish of every legislator; and those who do not effect it miss their mark, and it is in this that a good constitution differs from a bad one" (*Eth.Nic*.V.2.1103b3-1103b6). And again, this is quite a structural or descriptive account of the function of legal rules since Aristotle does not refer directly to the moral-political content of laws but to the fact that they claim to instil certain permanent dispositions of conduct, which may or may not be good ones, in the citizens. Of course, *eunomia* (good law) and therefore *eutaxia* (good order) are the proper goals at which legislators aim, but now it is about the *preference for rules* as specifically *general* norms: it is but "through rules [*dia nomōn*] that we can become good".[41]

As we have seen, the achievement of justice in the political community is no longer just a *moral* matter, but it is also about legal authorities deliberatively articulating plural and divergent ethical conceptions on virtue. Given this dialectical plurality, a legal decision-making institution must be established in order to determine the norms that are to govern the society. These norms, Aristotle reiterates, must be expressed in the form of a general *logos*, that is, in the form of legislation.[42] Reasons justifying the necessity for universality in the law however are not of a logical or theoretical nature: they are moral and political reasons. It is only by way of imposing general standards that it is possible to reach an effective universalization of the substantive values of justice. Logical universality is required as a necessary condition

[38] *Eth.Nic*.II.4.1105b5-10, my emphasis.

[39] *Eth.Nic*.II.1.1103a17; see Gadamer (1999: 54).

[40] "The account of *akrasia* suggests a similar point about moral rules: for Aristotle here seems to believe that if a syllogism of the good, with its universal first principle, is fully active, the agent will not err from passion. Rules in the private sphere, law in the public, are necessities, not desiderata: necessary because we are not always competent agents, not always fully virtuous. We lack information, we reason slowly; the judgments even of good men can be distorted by desire. If we *were* really practically wise all the time, we would seldom require rules" (Nussbaum 1985: 211–2).

[41] *Eth.Nic*.X.9.1180b24-5, my translation.

[42] See *Pol*.III.15.1286a15-16; *Rhet*.I.1.1354a22.

for equality, the essential component of justice. It is not, however, a *sufficient* condition. A practical universality is required here too, i.e. a regularity of practices of application capable of *generally* imposing substantive values involved in them by means of a recurrent practice of uniform application of legal statements.

This is how, in a substantial sense, Aristotle's practical philosophy ends up being a theory of legislation, that is, a theory of the production and recursive application of legal rules, which internally connects ethics with politics, legislation with adjudication. Legislative reasoning, a political-architectonic and prudential one,[43] consists of the anticipation of aggregate consequences resulting from the universalisation of certain values within a society through the institutional application by judges and other public authorities of legal standards. To the extent that law is a practical, regulatory institution, the practice of enacting rules is internally connected within it to the practice of enforcing and adjudicating them. In fact, legal rules themselves connect these two sub-institutional practices as a *continuum*. In other words, they reveal themselves as chains of practical reasoning, and particularly as the *process* of legal statements being persistently applied and instantiated. The reasoning of the lawgiver is a practical one and particularly long deliberations take place in this case (*Rhet*.I.1.1354b2). So its conclusion is not a rule considered as a universal statement, but rather as a complex set of actions along a continued process of application to each and every particular circumstance mentioned in it. To the extent that legal rules are regularly put in practice through concrete and particular acts of application they become and remain such "rules". Each relevant situation has to be identified by a particular judgement as a "case" of the general circumstances the formulation of the rule refers to. Legal rules are, then, essentially deliberative. Their practical character arises from the fact that their moral and political purposes are only to be attained through the prudential action of *other* individuals.

Addressees are of two kinds: citizens and enforcing authorities (basically, judges). The act of rule following by citizens is a matter of ordinary prudence or *phronēsis* in the specific sense (that concerning the interests of the individual: *Eth. Nic.*VI.8.1141b23ff.), and it implies somehow the incorporation of the rule as a premise of their practical reasoning (though not necessarily in order to obey it). By contrast, the function of judges is just to apply and enforce legal rules upon citizens, for their practice, being a sort of "embodiment" of those legal rules, intermediates between the legislator and the citizens (V.4.1132a20-25). It is then a kind of prudence too (*dikastikē*). Aristotle assumes that the legislative rules provide the premises for the deliberations that all those who exercise political activity on all its levels carry out (thus, he calls political prudence *bouleutikē*, for "it is said that those people who deliberate are only the instruments of politics"). Hence political action evolves by way of the creation and the application of legal rules: politicians "are limited to acting as manual labourers do", that is, under the "rule of law", they are always executors of general rules by means of the enactment of new ones.[44]

[43] *Eth.Nic.*I.1.1094a14; 2.1094b5.

[44] *Eth.Nic.*VI.8.1141b28-29, Bodéüs' translation.

Just as much as moral ordinary reasoning is not capable of achieving the good unless it results in actual courses of action in accordance with the reasons expressed in it—since intellect *per se* does not trigger action—, legal reasoning must prevail and be imposed on social practices through specific institutional courses of action (X.9.1179b5-1180a5). It is not though a blind "force" lacking rational deliberation of any sort which supports the law, but a "compulsive power" (*anagkastikēn dynamin*), which is a normative *logos* resulting from *phronēsis* and *nous* (1180a19).

A legal rule, then, does not tantamount to its formulation by the legislator but rather to the practical process that involves the continual sequence of all its particular applications along the series of all its cases (i.e. the cases where the rule is used). Judges and other officials must take a collection of decisions consisting, on the one hand, of the imposition of those courses of action that are congruent with the statements of the rules and, on the other hand, of the exclusion of those that are not. This is the only way for the underlying values to *prevail* in each singular case, hence to become socially widespread. Unlike theoretical rules of a scientific or technical character, legal rules are practical: only through human actions do those values become reality, thus legal rules make them *internal* to human institutions. Accordingly, institutionalized *coercion* must necessarily be attached to the extended process of application of legal rules. This is another piece of evidence to argue for the Aristotelian pragmatic view on legal rules. The order or *taxis* founded by *nomoi* is not a spontaneous—natural—order but an induced, artificial one: it is inculcated by means of singular coercive or compulsive acts. This is the authoritative (*kyrios*) dimension of legal rules (Schroeder 2003: 46ff.). Just as moral ordinary reasoning is not able to achieve the good but when it results in actual courses of action in accordance with the reasons expressed in it—intellect *per se* does not trigger action—, legal reasoning must prevail and be imposed upon social practices through specific institutional courses of action (*Eth.Nic*.X.9.1179b5-1180a5). It is not though a blind "force" lacking rational deliberation of any sort which backs the law, but a "compulsive power" (*anagkastikēn dynamin*), which is a normative *logos* resulting from *phronēsis* and *nous* (*Eth.Nic*.X.9.1180a19).

Finally, if we turn from the legislative practice, which posits rules, to the adjudicative practice enforcing them, we face a different, somehow "inverted", institutional scenario. For the judicial *phronēsis* concerns the decision in *this* case, thus in each and every case that falls under the same abstract type that the legislator has formulated for all the cases. The judge has to individualize the general statement the lawgiver made and she has to do so for every particular situation at stake. It is from this that the epistemological problems of such a practical, prudential reasoning emerge:

> For with statements about actions, those that are universal [*katholou*] have a wider application [*koinoteroi*], but the particular are closer to truth, since actions are about particular cases, and it is these we must accord with
>
> Nor is *phronēsis* concerned with universals only—it must also recognize the particulars; for it is practical, and practice is concerned with particulars.[45]

[45] *Eth.Nic*.II.6.1107a29-32 (my translation; see 2.1104a5ff.); VI.7.1141b15-17.

In effect, judges have to deal with "present and determinate cases" that are brought before them.[46] Once it is assumed that their activity consists of fulfilling their duty to apply legal standards,[47] the problem to confront now is how general rules determine those particular cases and, vice versa, how particular cases determine the meaning and scope of these rules. As it is widely known, this is the problem with which *epieikeia* deals. Aristotle's main thesis here is that logical consistence with the rules is not sufficient: justice requires a coherence of value with the intention of the legislator too.

1.7 Axiological Universality: *Epieikeia* and the Practice of Legal Justice

We have seen how, from a pragmatic view, law is not merely an institution *using* or *containing* rules—something which is a generic feature of any institution (theoretical ones included). The law *consists* instead primarily of rules, for it is the very *prāxis* of *ruling* social behaviour by means of them (that is, the "rule of law"). Significantly, then, we could say that the law is where practical rules typically become *institutionalized* and so made "transparent" in their very epistemological structure, which is that of practical reason.

Legal rules internally connect the legislature and the judiciary in terms of an ongoing, long lasting practical process. First, legislation provides "the positive categorization of those actions which people should perform and those from which they should abstain [*nomothetousēs ti dei prattein kai tinōn apekhesthai*]".[48] And, second, it is required for these formulae to be generally applied and enforced by means of public coercion, this being the central institutional duty of the judiciary. So, rules and their continuing enforcement processes represent the impersonal, supra-individual power of the whole political community as well as its public standards in order to achieve the common good.[49]

The crucial question, of course, is the extent to which, and exactly how, such a "universalization of the good" is to be attained along the recursive application of rules or *nomoi*. What sort of relation connects general legal statements, which determine the judges' applicative reasoning, to each particular situation? The famous Aristotelian answer is that equity or *epieikeia* is necessary for "the correction of law where it is defective owing to its universality" (V.10.1137b26-27). This fundamental concept is directly rooted in Aristotle's general epistemology and specifically in the above-described dialectic between theoretical and practical rules.

In effect, equity shows the extent to which legal rules are constrained by the limits that the structure of practical—prudential—reasoning, unlike the theoretical,

[46] *Rhet*.I.1.1354b7-8, my translation.

[47] See *Rhet*.I.1.1354a29-32, 1354b11-16.

[48] *Eth.Nic*.I.2.1094b5-7, my translation.

[49] "And while people hate men who oppose their impulses, even if they oppose them rightly, the law in its ordaining of what is good is not burdensome" (*Eth.Nic*.X.9.1180a23-24).

imposes on universality. The *epieikeia* focuses our attention on the internal legal "method"—how the law "rules" by means of generalizations intending to guide actions, and specifically by means of governing particular judicial decisions—though just from the comprehensive perspective of the moral-political functions that these rules as a whole are serving; that is, from the perspective of their underlying moral and political values and the developing global process of their materialization. Such values are, firstly, those resulting from substantive conceptions of distributive justice according to every particular constitution; and secondly, the moral values related to the different virtues (as well as customary norms and uses, traditions, etc. that form positive morality).

On this basis, Aristotle establishes a conclusive limit to any formalist or logicist understanding of legal rules—and so of the law itself—as he highlights that they are rules embodying a *practical good*, not a theoretical one. Legal formalism is precisely the expression of a theoreticist conception on rules. This is not only a characteristic of legal positivism, but also of natural law theory, since the latter considers positive legal rules as a deduction or specification from natural law principles somehow. Yet for Aristotle the limits of legal rationality, while (necessarily) based on rules—i.e., on legality or *nomikon dikaion*—are coextensive to those imposed by their underlying *substantive* political and moral values. Hence, these values are practical and directly depend on the political deliberation of positive legislators. Unlike for positivism, the justificatory dimension of law prevails here over its authoritative dimension. However, unlike for natural law theory, the material dimension of justice requires the irreplaceable function that legal rules play when implementing and sustaining those very values in the practice.

According to Aristotle, the political, institutional reasons for imposing general rules in the polis have justificatory force exactly to the extent that these rules are *in fact* spreading and propagating the substantive reasons that underlie them. Otherwise, they must be corrected by means of defeating legal rules and introducing exceptions to them. Legal rules, then, are not merely "entrenched generalizations"[50] but morally and politically *justified* generalizations. This is the only way in which formal universality can be a sound criterion of rationality in the sphere of *prāxis* too. The rule of law through the law of rules is not possible at all without an *axiological continuity* between legislation and adjudication. It is not only the logical generalization but also its axiological backing that sets the practical connection between the legislator and the judge. The deontic meaning of a legal rule goes far beyond the logical-semantic meaning of its formulation and the consistence of its iterated applications: it also consists of an *evaluative coherence* between them. And this is exactly *epieikeia*'s rationale: to remove the possible incoherencies or axiological discontinuities that rules may generate along the process of their application in social practice.

The need to proceed to the "correction of the rule" (*epanorthōma nomou*) is for Aristotle the inevitable consequence of an "error" generated by its logical universality, which makes them "incomplete" or "defective" (*elleipei dia to katholou*, *Eth. Nic*.V.10.1137b26-27). But this is ultimately a *moral-political* error, not a technical

[50] See Schauer (1991).

one—i.e. one where there is no deliberation, as rules have theoretical support.[51] It is about practical, not theoretical values—thus values involving *indeterminate* rules. The rule's incompleteness has a clear epistemological diagnosis and the legislators are aware of it (*hekontōn*), as they "find themselves unable to define things exactly [*dynōtai diorisai*], and [nonetheless] are obliged to legislate universally [*anagkaion katholou eipein*] where matters hold only for the most part" (1137b29-31). In other words, it is impossible for the legislator to transform her practical determination of the rule's statement, and of the logical generalizations it is composed of, into a *theoretical*, objective kind of definition or reasoning (*epistēmē*). Specifically, the logical universality of rules is not able to make from them a type of objective or "mechanical" generalization that will per se absolutely *determine* their applications thus preventing their addressees from any kind of deliberation. This is not possible, since the content of the values involved here is precisely *others-related*. Such values have to be implemented through a regular practice—that of the rule's application.

Hence, the universality of logical principles alone is unable to project not just equality but also *justice* in the practical sphere: "The reason is that all law is universal but about some things it is not possible to make a universal statement which will be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error".[52] No legislator can be absolutely certain that a rule, even if correct (i.e. a correctly deliberated general rule), will determine the correct decision for every single case to which it will be applied as a general criterion. Yet this intrinsic possibility of defectiveness arising in a particular case does not make the universality of the rule, nor the legislative practice defective in absolute terms: "It is none the less correct, for the error is neither in the law nor in the legislator but in the nature of the thing [*physei tou pragmatos*], since the matter of practical affairs [*hē tōn praktōn hyle*] is of this kind from the start". The necessity for the legislator to "speak universally" and "to take the usual case", there "where matters hold *only* for the most part"[53] is not, then, cancelled. Logical or somehow universal criteria are required for the legislative practice to be a rational enterprise. For this is the only way to make equality and justice possible. Now, it is not logical universality that guarantees this: it is axiological universality instead. That is, the congruence of value with the purposes of the legislator: "When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, when the legislator fails us and has erred by over-simplicity, to correct the omission—to say what the legislator himself would have said had he been present, and would have put into his law if he had known" (*Rhet*.I.13.1137b19-24).

In the moral, political and legal domains—the realm of *politikē*—, unlike in the theoretical domain, to refer to "what holds for the most part" is not sufficient for achieving *correctness* (*Eth.Nic*.I.2.1094b20-23; II.2.1104a1). This is so because the

[51] See *Eth.Nic*.III.3.1112a34-b2; *Eth.Eud*.II.10.1226a33-b2.

[52] *Eth.Nic*.V.10.1137b12-16; see 1137b28-9; *Const.Ath*.9.

[53] *Rhet*.I.13.1374a25, my emphasis.

rule of correctness is *itself* a matter of practical value, not a theoretical-objective criterion. In the case of the law, legal rules are the links which communicate their supporting moral-political values to each present particular case in which the legislator intended to enforce them. The judicial *prāxis* consists then of the constant iterated *materialization* of that connection, for the function of judges under the rule of law is to promote these very *same* values. So, even the literal, allegedly "mechanical" and non-deliberative application of rules by judges actually shows itself to be evaluative-dependent too, hence not merely a logical subsumption of cases under rules that are conceived as general formulae. The institutional practice of legal adjudication necessarily presupposes the commitment to value judgments by the applier, both in "easy cases" and especially in those cases in which such rules turn to be over- and under-inclusive (that is, "hard cases").[54] These cases, Aristotle says, emerge "at short notice" (*Rhet*.I.2.1354b3), i.e. unexpectedly, as a consequence of the fact that rules—being themselves the outcome of a practice—are constantly and inevitably superseded by the social practices they intend prospectively to govern.[55]

In other words, rules must be made to treat unequal cases unequally: that is the task for the judge, he who "restores equality" (*Eth.Nic.*V.4.1132a25). Since correct legal decisions are *not* given ex ante by the general formulation that has been enacted by the legislator, but they are rather the result of an ex post practical reasoning, it is then about correcting dialectically the error case by case. Equity requires from us to be indulgent with "human things" (*anthrōpinois*) and then "to look not at the law but at the legislator, not to the written rule [*logon*] but the purpose the legislator gave to it",[56] because he himself *would not* allow that result to be produced. Exceptions to the rule are therefore justifiable as long as they are kept consistently connected to the same values (or balances among them) that the legislator has established, thus they continue and iterate those values in social practices. This is why here exceptions confirm rather than abolish the rule (Leyden 1985: 96–7), for *epieikeia* is just the *universalizable* correction of legal rules. Even equity is an institutional universal principle of every legal system, Aristotle suggests (*Rhet*.I.15.1375a30). Its value-dimension is precisely what makes this sort of justice "better" (*beltion*) and "superior" (*kreitton*) than simply *nomikon dikaion* or rule-based justice, to the extent that it is "the sort of justice which goes beyond the written law [*to para ton gegrammenon nomon dikaion*]" (*Eth.Nic*.V.10.1137b24-25). The deliberative, value-laden character of legal rules, which guarantees their correctness in every single case, makes them somehow behave like the leaden rule used by the Lesbian constructors: "the rule adapts itself to the shape of the stone and is not rigid", for "when the thing is indefinite [*aoriston*] the rule [*kanōn*] also is indefinite".[57] Equity is then the correction of the logical universality of rules in the name of their axiological universality.

[54] On rules' over- and under-inclusiveness, see Schauer (1991).

[55] See the example Aristotle gives in *Rhet*.I.13.1374a32ff.

[56] *Rhet*.I.13.1374b10-13, my translation.

[57] *Eth.Nic.*V.10.1137b29-32, my translation. See III.3.1112b8-9.

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Chapter 2
Cosmopolitanism and Natural Law in Cicero

Fernando Llano Alonso

2.1 Marcus Tullius Cicero: The First Legal Philosopher in History

Marcus Tullius Cicero (106–43 BC) was one of the great names of the Roman Republic's final days. Despite being a *homo novus* and having been born outside the aristocracy, he received as a young man an impressive education at the hands of some of the greatest philosophers, orators, jurists, and public figures of the day.[1] As an intellectual polymath, Cicero perfectly embodied the classical scholar who cultivated all the "humanist" disciplines (*omnium doctrinarum studiosus*). According to this republican intellectual model, the orator could be at the same time a jurist and the philosopher could end up a government man capable of averting any attempt to subvert or threaten Rome's institutions and traditions.[2]

Of the painstaking study of and consecration of his life to these three intricately linked disciplines- law, oratory, and politics- Cicero gave elaborate testimony in some of his most influential works.[3] Thus is it that, from a strictly legal perspective for example, apart from his treatise on laws (*De Legibus,* 51 BC), there are descriptions of a treaty (*De Iure Civile in Artem Redigendo*, c. 55 BC) that did not survive to our day in which Cicero proposed the systematization of a veritable heap of

[1] Of Cicero's teachers, it will suffice to mention such rhetoricians and orators as Apolonius Molon; philosophers as the Skeptic Philo of Larissa, the Epicurean Phaedrus and the Stoics Diodotus and Posidonius; and jurists of such renown as the two Q. Mucius Scaevola (the Augur and the Pontifex).

[2] Bretone (1984), 85. Von Albrecht (2003), 220.

[3] Bretone (1976), 28–40.

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jurisprudence until then to his eye disordered.[4] As for oratory, although Cicero distinguished among diverse forms, he preferred to consider himself above all a legal orator, as he declared in the first book of his treatise *De Oratore* (46 BC). The profession demanded a mastery of public and private law, in addition to eloquence and persuasiveness.[5] In this regard, according to Jill Harries, although Cicero claimed that he knew only as much law as he needed to get by as an orator, "knowledge of law in its most technical and occasionally even pedantic sense was part of his culture."[6] With respect to politics, the works that best reflect his commitment to republican ideals and his calling to serve his country are, without a doubt, *De Re Publica* (51 BC) and *De Officiis* (44 BC). According to the patriotic and republican principles that inform Ciceronian political thought, the scholar who fails to involve himself in public affairs is wasting his wisdom. For this reason, in the first book of his treatise on the commonwealth he claimed that whosoever wished to serve Rome must acquire power and influence, for only from a position of civic responsibility can one aid his country.[7] Finally, as a philosopher Cicero was not an original thinker, but rather an eclectic. Diverse sources of Hellenic philosophy converge in his doctrine, most importantly Platonism, Aristotelianism and Stoicism. Yet, for many historians of Greco-Roman legal thought, this lack of philosophical originality in no way precludes recognizing in Cicero a sincere and impassioned interest in philosophy.[8] More important still, due to his flair for systematization and talent as a writer, Cicero notably advanced the study of philosophy in Rome by first planting questions, opening them up to debate, and then expounding and disseminating the answers of the Greek philosophical greats. This explains why, even though Cicero did not pertain to that lofty category which Karl Jaspers referred to as "*die grossen Philosophen*" (the Great Philosophers) and even though, for that reason, the importance of his philosophical thought be limited (above all if one compares it with that of Aristotle or Plato), his work has nevertheless enjoyed such extraordinary renown in the history of philosophy. On this note, one might highlight from amongst his philosophical treaties *De Finibus Bonorum et Malorum* for its ethical ideas and *Tusculanae Disputationes* (both from 45 BC) for its dialogues on happiness.

[4] According to Alfonso Castro, this treatise of Cicero's served as inspiration to the youngest, most progressive jurists of the day, as for example in the case of his friend Servius Sulpicius Rufus. See Castro-Sáenz (2010), 293.

[5] Cicero's participation in the tribunals owed itself in part to his belief that it was a moral duty as *patronus* to defend his friends and *clientes*,as well as the opportunity that legal oratory presented for social and political mobility. See Pina-Polo (2005), 332. According to this reasoning, Richard A. Bauman has written: "Cicero glorifies oratory at the expense of law". See Bauman (1985), 23. Similarly: Vasaly (2002), 81. Narducci (2009), 310–312.

[6] Harries (2006), 153. Actually, Cicero had learned the Twelve Tables by heart as a boy; at Rome, he was a student of Q. Mucius Scaevola the Augur and of the younger Q. Mucius, the Pontifex (*De Amicitia* 1). For both he retained a lifelong admiration, as seen in his dispute with the young *eques* and legal expert, C. Trebatius Testa (*Ad Familiares*, 7.22).

[7] *De Re Publica*, I, 10.

[8] Fassò (1966a), 133. Shackleton Bailey (1971), 189–190. Long (2006), 285.

The multidisciplinary nature of Cicero's doctrine allows different readings of the same material (specialized or comparative), depending on the approach one uses to analyze his work. The present study aims to examine but one of these multiple dimensions- perhaps one of the least familiar of his extensive bibliography, yet also one of the most suggestive and original from a thematic point of view due to its combining the two disciplines to which Cicero most dedicated himself: Philosophy and Law. Though Cicero was less an original philosopher than a compiler and disseminator of Greek philosophy, and though he was not a lawyer as his teachers the Scaevola or his friends Servius Sulpicius Rufus and Gaius Trebatius Testa (to whom Cicero dedicated a dense legal treatise by the name of *Topica*)[9] were, but rather a consultant (as a young man) and an expert witness or authority on law as an adult (not without reason does the Anglo-Saxon tradition simply consider him a legal advocate) it is clear that, as Guido Fassò suggests, the vast legal experience our author acquired over the course of his career as a forensic orator and professional politician forced him to frequently treat problems of legal philosophy. Hence that, for those historians of legal thought, Cicero should be considered the first true philosopher of Law.[10]

Although jurisprudential questions arise frequently in Cicero's writings, above all those questions surrounding situations which arise in everyday life and which have to do with justice and the law, the works that most interest us from a legal-philosophical point of view are essentially the three treatises *De Officiis*, *De Legibus*, and *De Re Publica*.[11] The following section will focus on one of the more subtle aspects of Ciceronian legal philosophy: his conception of the natural law (*lex naturalis*) as a law born from right reason (*recta ratio*) and not from the edicts of the praetors or the laws of the Twelve Tables. As such, it entails an unwritten and universal law, distinct from positive law (*ius positum*) and whose understanding requires us to probe the very heart of philosophy (*ex intima philosophia*), wherein we learn that the Reason all of humanity holds in common is the source of the natural law. Thus, Cicero concludes that the nature of Law is derived from Human Nature.[12]

2.2 Natural Law as *Ratio Summa, Insita in Natura*

One clearly sees in Cicero's philosophy of natural law the influence of the Stoic belief in a divine *recta ratio* woven into nature that acts as the foundation of Law. Even though Cicero does not explicitly defend his idea of natural law until the third book of his treatise *De Re Publica* and even more so in *De Legibus* (considered by many to be the first work of legal philosophy in the history of human thought), it is

[9] Castro-Sáenz (2010), 375.

[10] Fassò (1966a), 133.

[11] Ibid., 134. The essay *De Inventione* (86 BC) from Cicero's youth as well as the aforementioned *De Finibus Bonorum et Malorum* and *Tusculanae Disputationes* are also of interest despite their indirect connection with legal argument.

[12] *De Legibus*, I, 5, 17.

clear that 30 years before he had already referred to the idea, situating it in the forensic context of the practice of law. Strictly speaking, he treats it as a rhetorical *topos* under the heading of *inventio*. According to Cicero's view, the theory of Natural Law provides the orator with arguments that permit him to amplify the Civil Law and to compare it with non-juridical principles. Therefore, a strategy of argument based on Natural Law is particularly helpful when the speaker wants to persuade his hearers that a given act, although illegal, is nonetheless right.[13]

As a legal orator, Cicero was fully aware that in Republican Rome the *ius civile* was the only law that bound. The Roman civil law did not depend on any standard other than itself for its legitimation. In the same way, he knew that Roman jurisprudence did not differentiate between the two meanings (objective and subjective) that the term *ius* could possess. That is to say, on the one hand understood as law and on the other as right. For the Roman legal experts, whose vision of the *ius* was formalist, something was deemed right in virtue of the fact that it was what the law enjoined. Although the rights derived from Natural Law had no normative bearing on Civil Law, Cicero believed that the orator could invoke Natural Law as an ethical principle, in connection with which he used the terms *aequum* and *ius*, as a means of appealing to the moral sentiments of the court in cases where the Civil Law, applied literally, would disadvantage his cause.[14]

It is clear Cicero was convinced from the start of his career as a forensic orator that the same limitations constraining Positive Law, embodied in the *ius civile*, did not bind Natural Law. Although Positive Law and Natural Law both govern human behavior, they are distinct in that while Positive Law is a human product and thus its written norms transient and particular (the force of the *ius civile* was limited to Rome and her citizens), Natural Law is an unwritten code of laws whose origin is divine and human (given that it proceeds from the *naturae ratio* which is the law of gods and men), of a universal, eternal and immutable nature.[15] For Cicero, Natural Law required no positive formulation or recognition, for it is a reality unto itself, "a supreme law which has its origin ages before any written law existed or any State had been established."[16]

Cicero's theory of Natural Law achieved its fullest extension in two essays representative of his last intellectual phase: *De Re Publica* and *De Legibus*. With respect to the first of these, there is an extremely relevant text transmitted by Lactantius[17] in which Cicero refers to a "true law" that is "right reason" in agreement with nature: ("*est quidem vera lex recta ratio naturae congruens*"). He then characterizes Natural Law in the following way:

> It (Natural Law) summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and t is impossible to abolish it entirely. We cannot be freed

[13] *De Inventione*, II, 22, 65–68; *Topica*, 23.89. I have borrowed this quotation from Marcia L. Colish´s book (1985), 88.

[14] Ibid.

[15] *De Officiis*, III, 5, 23.

[16] *De Legibus*, I, 6, 19.

[17] *De Divinis Institutionibus*, VI, 8, 6–9.

> from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment.[18]

Many a commentator on this fragment, found in Book III of *De Re Publica*, has agreed that Cicero's ideology appears here in a confusing way.[19] In effect, the three possible versions of Natural Law (divine, physical or naturalistic, and rationalist) coincide in the same text. This is because Cicero adheres to the pantheistic tenet of Stoicism according to which God, Nature, and Reason are the same. Nonetheless, in the final chapter of the text lies a clue that greatly aids any attempt to better understand Cicero's conception of Natural Law. The Natural Law flows from the *mens divina*, since God is its supreme legislator and judge, and it is inherent in human nature itself. For this reason, asserts Cicero, the man who fails to respect it renounces his own nature ("cui qui non parebit, ipse se fugiet ac naturam hominis aspernatus"). It follows that the *natura* from which this law is derived is not some objective reality outside of man, but rather inherent to him, forming part of his essential rationality. Upon closer examination, this idea is simply the Greco-Roman conception of Natural Law understood as *recta ratio*. Conversely, when Cicero speaks of "Nature" it is a different nature than his Greek philosophical predecessors (such as Pythagoras or Empedocles) imagined, and different too from that meant by jurists from Imperial Rome (such as Ulpian).[20] In contrast to Cicero, these authors understood Nature as a pre-existing entity; an objective physical order prior to Man whose norms applied equally to him as to the rest of Creation: "*Ius naturale est, quod natura Omnia animalia docuit.*"[21]

Thus, when Cicero asserts in *De Officiis* that the Reason which is in Nature (*naturalis ratio*) is the law of gods and men: ("*ipsa naturae ratio, quae est lex divina et humana*"),[22] what he really means is that in obeying the Natural Law, Man obeys a law which is both human and divine, but which ultimately he gives to himself as an autonomous legislator. Not without reason does Man encounter within himself, that is, in his own nature, the Principle of Law; for Reason forms part of his nature, of his human nature, and as such is not some external metaphysical entity.[23] Only in this semantic context does the definition Cicero gives of Natural Law in *De Legibus* as The Law of Reason achieve its full meaning:

> Law as the highest reason, implanted in Nature, which commands what ought to be done and forbids the opposite. This reason, when firmly fixed and fully developed in the human mind, is Law.[24]

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[18] *De Re Publica*, III, 22, 33.

[19] Vitoria (1939), 144. Fassò (1966a), 137. Pizzorni (1978), 41. Bretone (1987), 329.

[20] *De Re Publica*, III, 11, 19; *De Finibus Bonorum et Malorum*, III, 20, 67.

[21] *Digesta*, 1, 1, 1, 3.

[22] *De Officiis*, III, 5, 23.

[23] See Fassò (1966b), 18; (1966), 139.

[24] *De Legibus*, I, 6, 18.

2.3 Cosmopolitanism and Natural Law: Towards an *Omnium Gentium Consensus*

As we have seen in the preceding section, for Cicero, all law emanates from a primordial Natural Law, universal, eternal, and prior to the creation of any written (positive) law as well as to any city-state. Law was neither founded in nor born from human laws. For this reason, justice and the legitimacy of the *ius* do not depend on their agreement with positive law, but rather on agreement with that *recta ratio divina* which is the Natural Law.[25] The logic of Cicero's Natural Law argument seems unimpeachable. In response to the thesis (to Cicero unacceptable) that justice be identified with the *lex positiva*, Cicero replies:

> But if the principles of Justice were founded on the decrees of peoples, the edicts of princes, or the decisions of judges, then Justice would sanction robbery and adultery and forgery of wills, in case these acts were approved by the votes or decrees of the populace.[26]

For Cicero, Justice is one (in contrast to Carneades' position).[27] Justice binds all human society, and is based on one Law, which is right reason applied to command and prohibition. Whoever knows not this Law, whether it has been recorded in writing anywhere or not, is without Justice. At the same time, justice must not be understood as conformity to written laws and national customs, for were it so, obedience to the law would depend on a simple calculation of utility on the part of those it governs. Basing himself on this observation, our thinker from Arpinum concluded that for there to be true Justice, it must be founded in Nature. Said another way, he who wishes to be in harmony with the general principles of Justice must observe the following two postulates of Natural Reason: first, that no harm be done to anyone; and second, that the common interests be conserved.[28] As such, Natural Law is neither an external law alien to Man, nor constituted by laws foreign to one's autonomy (as is Positive Law), but rather its commands are firmly imprinted in the human mind.[29]

On account of Cicero's faith in human fellowship, owing to the power that the *recta ratio* of nature exercises over it as much in practice as in theory, he is often grouped with Greco-Roman Cosmopolitanism, which originated with Diogenes the Cynic and included such illustrious philosophers as Crates of Thebes, Zeno of Citium (the founder of the Stoic school), Chrysippus (who developed Stoicism into a full philosophical system), Panaetius and Posidonius (masters of the Middle Stoa)

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[25] Ibid., I, 15, 42; II, 4, 10.

[26] Ibid., I, 16, 43.

[27] In accordance with Lactantius' comment in Book III of *De Re Publica*, Carneades differentiates between two classes of Justice: Natural and Civil (the first has more to do with prudence than justice, and the second more to do with justice than prudence). See Lactantius, *De Divinis Institutionibus*, V, 16, 5–13).

[28] *De Officiis*, I, 10, 31.

[29] *De Legibus*, I, 6, 19.

and then Cicero, Seneca, Epictetus and the Emperor Marcus Aurelius, with whose death, in 180, the Late Stoa effectively ended.[30]

Cicero's thought had the unique gift of perfectly combining Natural Law theory with Cosmopolitan Humanism. The firm humanist conviction that inspired his legal philosophy appears time and again throughout his work in texts as eloquent as the following:

> There is only one principle by which men may live with one another, and that this is the same for all, and possessed equally by all; and finally, that all men are bound together by a certain natural feeling of kindliness and good-will, and also by a partnership in Justice.[31]

The *recta ratio* that this underlying law embodies is common to all of humanity (*ratio summa, insita in natura*), though it is neither a product of human ingenuity nor of the will of the people. It is the very spirit of God, His sovereign reason. In this sense, departing from the idea that Right Reason is the closest to divinity existing between Heaven and Earth, some authors have concluded that Cicero shared with his Stoic teachers belief in a tie that binds gods and men at least insofar as laws and rights are concerned.[32] From this universalist perspective one might consider the world one great city in which gods and men coexist with one another. Precisely in this cosmopolitan context, for many more than a little utopian,[33] must one understand Cicero's appeal to a consensus between all people ("*omnium gentium consensus lex naturae putanda est"*) as well as his desire that said accord be elevated to the order of Natural Law.[34]

At this point one would do well to note that between the *ius naturae*, whose universal, eternal, and immutable principles are as seeds we possess innately, having been sown by God in the minds of men; and the *ius civile*, whose written norms are only in force within the particular boundaries of the *civitas* where they were created (*ius propium civitatis*)- that is to say, whose norms apply not to the whole of humanity but rather to the *cives* of a specific state; Cicero interposes the *ius gentium*, understood as that Positive Law which all nations observe on account of its having been introduced to them through the *naturalis ratio*. Still, even though the classification of objective Law into these three categories was widely accepted by jurists both at the time of and well after Cicero,[35] and though Cicero appears to have been the first to employ the phrase *ius gentium*,[36] it is clear that on occasion Cicero contrasts the *ius civile* with the moral order formed jointly by the *ius commune gentium* and the *ius naturale* so strongly that it is extremely difficult to distinguish these latter two. Worse still, there are times when Cicero goes so far as to identify the *ius gentium* with the *ius naturale* (or simply confuse the two), as occurs for instance in one well-known passage of

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[30] See Nussbaum (1997a), 52. Heater (2002), 27. Appiah (2006), XIV.

[31] *De Legibus*, I, 13, 35.

[32] See Truyol y Serra (2004), 191. Peña (2010), 40.

[33] See Utchenko (1977), 301.

[34] *Tusculanae Disputationes*, I, 13, 30.

[35] See Costa (1964), 50–54.

[36] See Navarro Gómez (2009), 39.

De Officiis: "*Neque vero hoc solum natura. Id est iure gentium*": ("But this principle is established not by Nature´s laws alone (that is, by the common rules of equity)."[37]

One should add, for the sake of clarity, that the *ius gentium* is just like the *ius civile* a form of positive law. All that differentiates them is their corresponding areas of influence: the Roman *ius civile* did not take into consideration the other nations of the world while the *ius gentium* did. Nevertheless, as we have seen in the preceding passage of *De Officiis*, when Cicero distinguishes the *ius gentium* from the *ius civile* in the same terms he uses to differentiate *ius naturale* from the *ius civile*, in practice he is establishing an equivalence between *ius gentium* and *ius naturale*.[38] This fusion (or confusion) of the two concepts seems a fruitful one for two reasons: in the first place, because it opens the way to a conception of Natural Law less abstract-intellectual than that of the Stoics and thus closer to people's actual experience of the Law, as Guido Fassò suggested;[39] in the second place, the interaction between the Natural Law and the Law of Nations gives greater internal consistency to the humanist-cosmopolitan project, both ethically and legally. This project, Cicero tells us, consists fundamentally in spreading solidarity and transforming the global political alliance of all with all into a truly universal society.[40]

2.4 Notes on the Influence of Cicero's Philosophy of Law in the History of Philosophy

The present essay began by highlighting the crucial role Cicero played in transmitting the ideas of the great masters of general philosophy (above all Plato and Aristotle) as well as his considerable work regarding the Stoic theory of Natural Law. Had he not first undertaken the compilation, adaptation, and transmission of the classics of Greek thought to Roman culture, their presence in Christian ethics would be inconceivable. As seen in the previous section, it was one of the Fathers of the Church, Lactantius (commonly known as the "Christian Cicero"), who transcribed the text of Book III of *De Re Publica* in which Cicero refers to "one eternal and unchangeable law," valid "for all nations and all times" and whose author is God, that survived to the present day.[41] This same Book III received also the commentary of other Fathers of the Church, such as Augustine of Hippo with respect to Law's empire[42] and Isidore of Seville on the question of just and unjust war (which in the Medieval Ages would be taken up by Thomas Aquinas and which in the Modern Age would be reformulated yet again by such Spanish classics of the Philosophy of Law as Juan de Mariana and Bartolomé de Las Casas).[43]

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[37] *De Officiis*, III, 5, 23.

[38] *De Haruspicum Responso*, XIV, 32.

[39] Fassò (1966), 139.

[40] *De Legibus*, I, 5, 16. *Tusculanae Disputationes*, V, 36, 108: "Patria est ubicumque est bene".

[41] Lactantius, *De divinis institutionibus*, VI, 8, 6–9.

[42] Agustine of Hippo, *De Civitate Dei*, XIV, 23, 2; XIX, 21, 2.

[43] Isidore of Seville, *Etymologiae*, XVIII, 12.

The term *humanitas*, so deeply rooted in the core of the Ciceronian-Stoic philosophy of Natural Law, conjured up throughout the Renaissance the image and work of the illustrious orator, thinker, and politician of Arpinum. Indeed, one of the most important essays on rhetoric and aesthetics of the period, written by as quintessential a humanist as Erasmus bore for a title, *Ciceronianus, sive, De optimo dicendi genere* (1528) and entailed, in reality, a critique of those humanists unjustly calling themselves Ciceronian. One encounters yet another test of the relevance of Cicero's doctrine to this age in the writings most representative of French humanism, specifically the 107 *Essais* of Montaigne, in which quotations of Cicero's dialogues as well as of his major works abound.

The intellectual footprint left for posterity by Cicero is best embodied in the foundational work of the Law of Nations, *De Iure Belli ac Pacis* (1625), written by Hugo Grotius. Here, Cicero's defense of respectful treatment and hospitality toward strangers on account of their being members of the human race had a definite influence on the Just War Theory of the Dutch jurist.[44] Unmistakable elements of Stoic and Ciceronian philosophy appear also in his theory of a rational Natural Law.[45] Finally, as far as the combination of Cosmopolitanism and Natural Law theory that characterized Cicero's final intellectual phase is concerned, one need but mention that it was perhaps Immanuel Kant who best knew how to take advantage of the Stoic belief in a global citizenship and develop it into his cosmopolitan and humanist project in which – as Nussbaum remarks – he mapped out an ambitious program for the containment of global aggression and the promotion of universal respect for human dignity.[46] This humanist project, cosmopolitan and enlightened, whose foundations were laid out in Kant's most important political work, *Zum ewigen Frieden (1795)*, is defended to this day by those champions of the Enlightenment's legacy as well as of the universality of human rights, among whom one might count John Rawls (1921–2002), Martha C. Nussbaum, Jürgen Habermas, and Ulrich Beck, a clear sign that, at least within the humanities, Cicero's philosophy still "enjoys good health."[47]

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[44] See Nussbaum, M.C., *Cultivating Humanity. A Classical Defense of Reform in Liberal Education*, cit., p. 59.

[45] Fassò (1966b), 142–143.

[46] Nussbaum (1997a, b), 27.

[47] Employed here is the famous quotation often mistakenly attributed to the Spanish dramatist José Zorrilla, but which appears to have actually been coined by Juan Ruiz de Alarcón and Pierre Corneille.

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Chapter 3
Natural Law: Autonomous or Heteronomous? The Thomistic Perspective

Diego Poole

3.1 Introduction

The expression *ius naturale*, in its apparent simplicity, evokes the existence of a relationship between law and nature. This connection between the normative and the natural, discussed in many different and not always compatible ways, was a relatively peaceful matter for centuries. Criticism against natural law theory became common in the nineteenth century, when, under the influence of positivism, the conviction spread that natural law doesn't have the capacity to clarify the concept of law, and even less, to project itself onto the concrete practice of law.

As a result of modern rationalism, starting in the seventeenth century, a view of natural law spread that presented it as a rational code which could be formulated with precision, simply from the study of human nature. Man, considered individually, was subject to analytical study under modern rationalism, whose methodology replaced the perspective of man's finality, as a fundamental explanatory criterion, with the hegemony of the material and formal causality. Common of all rationalists was the conviction that reality was best understood by taking apart the internal composition of its elements and analyzing the relationship that they have between them, rather than investigating the "why" of their existence. Basically, the supremacy of the "why" was replaced by the hegemony of the "how." Therefore, the reflection on natural law disassociated itself from any *teleological* connotation: the reference to the end or to the meaning of reality, and of course, to a transcendent final end, was considered an irrelevant point to justify the validity of natural law. As a consequence, this natural law theory paradoxically boosted legal positivism. The first European codes were presented as compendiums of all natural norms that should rule human relations. In this sense, the following sentence, by Cambacérès, when he presented the

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second project of Civil Code for France, is emblematic: "Our laws will not be but the code of Nature, sanctioned by reason and guaranteed by freedom".

This rationalist image of natural law is that which has been principally fought by the positivist authors of the nineteenth and twentieth centuries, presenting it as if it were the *iusnaturalist* doctrine par excellence.[1] This image is not the one we're going to examine here, but the image that Anglo-Saxons currently call the *Natural Law Tradition*, which is the Aristotelian-Thomistic doctrine (developed thanks to the rehabilitation of the study of practical reasoning in dialog with contemporary philosophy).

3.2 What Is Natural Law? Natural Law and Eternal Law

What does the Aristotelian-Thomistic tradition consider natural law to be? First of all it can be **said** that natural law is a type of law, and because of that it´s *an ordinance of reason for the common good*, *made by him who has care of the community*, *and promulgated* (cf. *Summa Theologiae*, I–II, q.90, a.4, s.). In what way are these characteristics expressed in natural law? First, natural law is an *ordinance of reason* with a double meaning: it's an ordinance made by the lawmaker's reason, and an order intended to be impressed in the citizen's reason. Secondly, the fact that it's directed towards the common good means that its regulations transcend individual fulfillment, because the law adequately orders or disposes man towards a *community*. And thirdly, it's possible for man to know it because it's "promulgated" by means of the light of natural reason interacting with the human appetitive dynamism.

All law presupposes community. Law is considered in the Aristotelian-Thomistic tradition as an external help for human actions living in a community. Law is a certain rule or measurement by which man can be integrated in a community, and thereby achieve the fullness of his form. In turn, the community of man is integrated as part of the universal community of Creation, which is ruled by eternal law. All beings, not only man, by virtue of eternal law, tend to act naturally towards their perfection. So, because of their natural dynamism, they provide adequately for themselves and for others. In other words, eternal law adequately disposes each creature towards itself and, just because of that, towards the whole of the community. The *ratio* and ordering force that directs and sustains this universal harmony is eternal law. Then, what is the difference between eternal law and natural law? Eternal law governs a universal community, while natural law is the way eternal law works within man. Eternal law is imprinted within irrational beings as instincts or tendencies; while in man it is *also* imprinted by the natural light of reason interacting with his appetitive dynamism.

But, if man shares his animal nature with irrational beings, does he not also have the law imprinted in his instincts and tendencies, like they do? In which case, what

[1] Cf. Kelsen (1949), 13.

role does freedom play? Thomas Aquinas responds to this question by saying that natural law is present in man in two ways: as in the *regulator and measurer*, and also as in the *regulated and measured*. In the first sense—as in regulator and measurer—man *participates* in the ordinance of everything, first and foremost of himself, towards the final end.[2] In this sense, man is a natural *participant* in a provident superior plan, which, at the same time, constitutes the measure and rule of his own plan. For this reason, Aquinas says that the rational creature finds himself subject to Divine Providence in a more superior way than other creatures, because *he participates in the providence as such*, being the provident for himself and for others.

The human participation in the ordinance of everything towards its final end presupposes a certain natural or imprinted disposition in man in the form of tendencies. In this sense, natural law is present in man as in that which is regulated and measured: by means of his appetites, including the rational appetite or will, man *finds* himself inclined to the fullness of his form.[3]

This considering natural law in two different ways can also be expressed in the following terms: on the one hand, natural law is imprinted in all of man's tendencies (tendencies that, as such, man doesn't choose to have); in this way the law is *passively* in human nature. On the other hand, natural law is present in an *active* way, by means of reason interacting with his own inclinations; so that man *deduces* and *chooses*, by way of *conclusion* and *determination*, conduct criteria that allow him to achieve the fullness of his form. Taking this into account, natural law could be considered as an ordinance imprinted in human reason by means of the inclinations, or as an ordinance made by human reason from these tendencies.[4]

With regards to imprinted ordinance, natural law is an order imprinted in the desires of man, **those** he shares with irrational animals and those that are specifically human, like rational appetite or will (will is in and of itself a tendency by which man *finds himself inclined towards* his own good, and because of its influence, when will isn't corrupt, *all* other tendencies become specifically human). All human inclinations are then a *factum*, something that man doesn't choose to have, but does choose to moderate, often supporting such inclinations, and other times restraining them, so that they act towards achieving the final end, towards which all human inclinations are originally disposed. Natural tendencies are not, therefore, obstacles in the way of full human realization, but necessary elements, a kind of incentive, because without them "purely rational" human life would be inhumane and, at the same time, completely impossible. Therefore, it's not the role of reason to suffocate sensitive appetites: on the contrary, the role of reason with respect to sensitive appetites *is to rely on them*, *to moderate them*, *and to form them*, imposing order, tuning them up and maintaining them "tuned" so that they all harmoniously interact in the achievement of full human realization. With this said, perhaps it's easier to understand why Aquinas said that tendencies are *principles of natural law*, because from the natural

[2] Cf. Catechism of the Catholic Church (1993), n. 306–308.

[3] Cf. Long (2006), 557 ff.

[4] Cf. Aquinas, T., S.T, I–II, q.91, a.2

inclinations the ordering work of reason starts; work that consists in mapping out the most adequate plan to achieve human fulfillment.

With regards to an ordinance made by reason, natural law is the disposition of the necessary means, made by man, to achieve his natural end. In this sense, natural law is the same ordinance made by practical reason, in an analogous way as propositions are a product of speculative reason. In this way we can say that natural law is not exactly an *ordo naturalis* in the metaphysical sense, and even less, a type of law according to modern physics; but it is an *ordinatio rationis:* natural law is a result of reason disposing of the most adequate means for the acquisition of the goods through which all human appetitive dynamism is naturally disposed. Practical human reason is not the executor of a law. It's legislative, in the sense that it constitutes natural law by means of precepts, in order to obtain a natural end. Only at a later moment, at a descriptive-reflexive level, practical reason returns to itself and discovers natural law already constituted. The confusion of these two levels of action of practical reason leads us to misunderstand its function in relation to natural law.[5]

If we review what we've said up to now, we can state that eternal law takes part in creatures in two different ways: as a *mere material tendency* imprinted by nature (an uncharacteristic concept of the law) and as a *formal participation*, because it is a command of created reason towards an end (this is the proper sense of the law and as such only exists in rational creatures). In this second sense, human reason is a regulating and perceptive source, creator of the law, analogous to divine wisdom (better said, *participation* in the divine wisdom). Law, all law, is a dictate of reason; and, in the case of natural law, the matter on which reason dictates takes as a point of reference, firstly, the objective order of human natural tendencies, and secondly the imprinted order on the whole nature. Natural law consists properly in this participation of human reason in the divine reason, in that it manifests itself in such a way that, in like manner to divine reason and cooperating with it, human reason is able to contribute to the ordering of everything—of oneself first of all— towards its end. In this ordering task, man's reason and appetitive power interact together, being perfected by moral virtue. For this reason Aquinas says that man is *provident for himself and for others*.[6] And this is *natural* in man. The problem arises when "the natural" is conceived as that which is submitted to the empire of necessity in contrast with the world of reason and will.

3.3 Natural Inclinations and Natural Law

What function do desires and inclinations carry out in natural law? We have said that all beings tend to act, consciously or unconsciously, towards the fullness of their form. This tendency can neither be chosen nor rejected. This has to do with an

[5] Cf. Rhonheimer (2000), 82 and Rhonheimer (2002), 48.

[6] Cf. Aquinas, *Summa Theologiae*, I–II, q. 91, a.2

indefeasible desire. Even if someone commits suicide, (s)he is looking for happiness, because in this case life itself is considered an obstacle towards happiness. We humans only choose, with greater or lesser success, what we think to be the most adequate means to reaching our fulfillment. This desire of achieving the fullness of one's life, perfection, happiness… presides over all choices that men make. If we didn't have such desire of happiness, we wouldn't choose anything because we'd be completely apathetic.[7] Every animal is a naturally *passionate* being. And, man is the most passionate of all animals because along with his sensitive passions, he has that *desire for fullness* that is the will itself. With each choice, man tries to satisfy that fundamental appetite that drives him to act. The other urges (eating, self-preservation, procreation) have an innate disposition to serve the will. Thanks to these inferior urges, we are able to choose with greater ease the means to our own fulfillment, because without them, we wouldn't know where to begin. To say it in another way, the desire of fulfillment or will is nourished by these urges, because they have a medial or instrumental character; better said they are integrators of one's own will. In fact, free will not only gets stronger with the contemplation of an attractive end, but also by the correct dispositions of the sensitive appetites: in a certain sense they are as the musculature of will. Because of this, appetites as such are not impediments for personal fulfillment: the impediment is the disorder of the appetites, their lack of pacing with the order of reason. A virtuous life consists precisely in keeping one's desires in order and accord; in achieving stability between *right reason* and desires. From this point of view, the virtuous person does not renounce to the best of life (just because virtuous, he lives his life to its fullness). It is the vicious person who renounces to the best of life, because (s)he remains half way between here and there, paralyzed by a partial good that prevents his progress towards the good in the light of which (s)he was created.

Up until now we've been talking about *inclinations*, *principles*, and *precepts;* and now we might ask if these terms are equivalent, and if they are not, what relation do they have to each other? To answer this question we find the most developed and deeply thought out Article 2 of Question 94, I–II, of the *Summa Theologiae*, which is probably the most significant passage from the history of iusnaturalism, along with the previously cited Article 2 of Question 91. In that article Aquinas asks *if natural law is comprised of many precepts or only one*. There he makes it clear that the precept is not the tendency, but the answer that is required of man when faced with a tendency.[8] Irrational beings have inclinations, but they do not have precepts because they do not *choose* the way in which they satisfy their inclinations. Their inclinations act like irresistible forces, which doesn't necessarily mean a lack of control, because animals, instead of having reason, have an instinctive capacity that is much better calibrated than that of man. Man, on the contrary, because he's a free creature, is moved by precepts, because precept is by definition an imperative of one free will to another free will. And human inclinations are like an incipient promulgation

[7] Cf. Levering (2006), 155 ff.

[8] Cf. Grisez (1965), as clarified by Hittinger (1987), 160,

of the natural precepts because by them man discovers towards where he has to go to complete his own nature.[9]

The inclination of rational nature, which Aquinas refers to, is not an egotistical inclination. Aquinas doesn't get tired of repeating in several ways that man alone does not give full account of himself. A human being cannot be understood outside of society, as if its purest form or strictly natural state were pre-social (see Hobbes, Locke, Rousseau, Montesquieu…). Man is a *natural member* of a community of men and part of Creation as a whole. And given that the well-being of something that is a *part* of something consists of being adequately disposed to the whole in which it belongs, man's well-being lies in the way that he is involved in a community. Man has an inclination not only to his own good, but also to seek the good of the whole nature. Therefore we can't judge human fulfillment on an individual basis: it should be considered in the context of the community in which an individual belongs, in the way that (s)he takes part and carries out his/her function in the community.

If all human appetites have an original tendency to be integrated in the construction of human fulfillment by means of reason, then how is it possible that so many times things incompatible with this fulfillment are desired? This is an unnatural disorder, disorder that has been experienced like a wound in nature. This unbalance or internal distortion is not a theory; it's an experienced fact that human reason cannot explain by itself. Aquinas explains that the message of Christian faith clarifies this point with the mystery of the "original sin". Before the original sin, the submission or obedience of the passions to reason were total and perfect, but after the original sin, passions have to be subject to the order of reason by means of repeated effort and with special divine help. After the original sin the appetite for perfection and plenitude remained, but became difficult.[10]

3.4 Universality of Natural Law

From what we've been saying we can deduce why natural law, with regards to the first principles, is the same for all men. If we understand natural law as our natural ordering towards an ultimate end, whose knowledge is facilitated by an innate appetizing dynamism in the form of tendencies, as we share the same nature, then we have the same natural law. And if we understand the principles of natural law as the expression of not only human goods, but also the means necessary to get them, the degree of universality of such principles will be in function of their greater or lesser need towards achieving human fulfillment. Aquinas explains that nature is equipped with what is necessary, so man doesn't usually fail in choosing the most necessary means to his own realization (like food, clothes, procreation and living

[9] Cf. González (2006), 71 ff.

[10] Cf. Aquinas, T., S.T., I–II, q. 91, a.6, s. and. Hittinger (2003), 39 ff.

together…). But, there are certain means to achieve the end of nature that are more adequate than others, means which could be unknown to some men, because of a lack of knowledge of reality, or because of bad character.[11] This difference can also be seen at an institutional or a collective level: there have always been societies with inhumane institutionalized customs, precisely because they make mistakes in the choice of the means to acquire naturally appetizing things, such as human sacrifice to honor God or the practice of abortion for the benefit of a woman's psychological or physical health. The error comes from the minor premise of syllogism, not in the major premise, that it's a legitimate end desired by human nature.[12]

This universality of the natural law, based on the community of nature, is what makes it possible to cohabit peacefully. This peaceful cohabitation is based on the fact that we share the same drive towards our ultimate end, that is a common end, or according to Aquinas, the "common consortium of the life well-lived".[13] Because of this, the closer we get to our ultimate end for which we were created, the closer we get to each other. This reference to community explains the differences between men, and why we are not the result of a "genetic lottery" but a result of divine wisdom that *made us different so that we could live*, *better said we have to live*, *together*.

3.5 Contents of Natural Law and Derivation of the Positive Law

The derivation of the human law from natural law can occur in two ways: by conclusion or by determination. By means of *conclusion* signifies that, through logical syllogisms, from one premise that is an affirmation of a state of affairs, we can achieve a conclusion, which is another affirmation of a state of affairs, previously unknown. For example, the principle that you should not be insulting, because in insulting you are hurting someone, is derived from one of the most general of principles, to protect the life of a fellow man. In this case, the derived principle by means of conclusion is in and of itself natural, while at the same time coming from positive law.

Positive law is derived by *means of determination* when something that could be in many different ways has been *decided*; taking as starting point one premise that is a good that has to be protected. By this decision the law becomes obligatory, even though it could be handled by the lawmaker in other equally legitimate ways. For example, robbery being punishable by 2 years in prison is a positive rule that could easily be another, like imposing a fine. Positive rules derived from natural law by means of determination are arrived at by way of practical reasoning, because it is

[11] Cf. Aquinas, T., *Summa Theologiae*, I–II, q. 94, a.4, s

[12] Cf. Millán Puelles (1994)

[13] Cf. Aquinas, T., S.T., II–II, q.26, a.5

not about *knowing* a way to act correctly whose correction preexists reason, but to *decide* a way to act correctly, to choose between many possible means to reach the same end (an end which is formulated in the major premise of the practical syllogism). So, rules that are derived by means of conclusion are not only positive rules, but also have something of the strength of natural law, while laws that come by means of determination only have the power that a human legislator wants to give them.

The best way to understand this diverse derivation of the precepts by means of determination or by means of conclusion is by going to Article 11 of Question 100, I–II of the *Summa* where Aquinas asks whether it is right to distinguish other moral precepts of the law besides the Decalogue. We are dealing with a question that has been a bit marginalized in iusphilosophic reflection, maybe because it only apparently deals with a question about divine positive law. But this is of fundamental importance for iusnaturalism, because in no passage of the *corpus thomisticum* does it explain with more detail the classification of the principles of natural law and how they are derived from one another. It's true that Aquinas uses the precepts in the Decalogue as a point of reference, but he does it this way because he's convinced that these constitute the best expression of the fundamental principles of natural law. In article 11, Aquinas explains that by starting from the Decalogue, the *judicial* and *ceremonial* precepts are derived by means of determination, and the *moral* precepts are derived by means of conclusion. Ceremonial precepts determine the sense of the moral precepts in relation to God; while judicial determine the sense of the moral precepts in relation to fellow man. The Decalogue Precepts, as well as moral precepts derived from them, are precepts of natural law; and because of that are obligatory even if a positive law doesn't exist. On the other hand, judicial and ceremonial precepts only are obligatory because they only exist *when they are formulated by a legislator.*

3.6 Natural Law in the Social Doctrine of the Church

What we've discussed until now can help us to better interpret the idea of natural law included in Compendium of the Social Doctrine of the Church, which I think confirms all we have written in this article: Natural law *is nothing else but the light of intelligence instilled in us by God. Thanks to that we know what we should do and what we should avoid. This light or this law of God was given to man upon creation and consists of the participation of the eternal law*, *which is identified with God himself.* This law is called "natural," not in reference to the nature of irrational beings, but because reason which decrees it properly belongs to human nature. Natural Law is universal in its precepts and its authority extends to all men. Divine and natural law are exposed in the Decalogue and indicate the primary and essential rules that regulate moral life.[14] Natural Law "hinges upon the desire for God and

[14] Catechism of the Catholic Church (1993), n. 1955

submission to him, who is the source and judge of all that is good, as well as upon the sense that the other is one's equal".[15] Natural law "expresses the dignity of the person and determines the basis for his fundamental rights and duties".[16] And in number 22 of the Compendium it is added: "The ten commandments (…) contain a privileged expression of natural law. (…) They teach us the true humanity of man. They bring to light the essential duties, and therefore, indirectly, the fundamental rights inherent in the nature of the human person". They describe universal human morality. In the Gospel, Jesus reminds the rich young man that the Ten Commandments (cf. *Mt* 19:18) "constitute the indispensable rules of all social life" [John Paul II, *Veritatis splendor*, 97: AAS 85 (1993) 1209]". [17]

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[15] *Ibidem*, n. 1955

[16] *Ibidem*, n. 1956. Cf. *Compendium of the Social Doctrine of the Church* (2005), n.140

[17] Catechism of the Catholic Church (1993), n. 2070

Chapter 4
The Competing Sources of Aquinas' Natural Law: Aristotle, Roman Law and the Early Christian Fathers

Anna Taitslin

4.1 Introduction

No one shaped the modern Natural Law tradition more profoundly than Aquinas. But he hardly left behind himself the unifying doctrine; otherwise, Natural Law would not be a continuous battle-site of competing ideas ever since.

Suárez was, probably, the first to notice the presence of two different visions of Natural Law in Aquinas himself: human power of reason versus natural inclination. Suárez presented convincing arguments against the notion of Natural Law as natural inclination (overviewed in Sect. 4.7). But why then did Aquinas hold these two conflicting visions? Or where did they come from? To answer, one needs to look at 'pre-Aquinas' history of the idea of Natural Law (overviewed in Sect. 4.2). Here one might discover the ingenious early Patristic notion of Natural Law as the original knowledge, reminded by God's Commandments after the Fall. Next step might be to look at Aquinas himself: his version of intellectualism and at his notion of Natural Law as evident knowledge (outlined in Sect. 4.3), as well as at his alternative Aristotelian notion of Natural Law as natural inclination (reviewed in Sect. 4.4) as supported by his concept of good (analysed in Sect. 4.5). But what did make these two visions (one which may be traced back to the Patristics and another going back to Aristotle) incompatible? The answer is the notion of Free Will (indispensible for the Patristic idea of Natural Law) or rather lack of it in Aquinas (as argued in Sect. 4.6).

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4.2 Historical Background of Pre-Aquinas' Natural Law[1]

The original Stoic concept of Natural Law as human reason in tune with *logos* of universal nature was rooted in the Stoic radical materialist rejection of either Platonic or Aristotelian forms. For the early Stoics, only sages could perceive *logos* working through the inevitable chain of corporeal events and, hence, reconcile themselves with their fate. This Natural Law of reason in tune with *logos* of universal nature was the law of the city of Gods and sages. This original vision was somewhat moderated by the middle Stoics (such as Panaetius), who introduced into Stoicism the notion of two competing inclinations of human nature: towards justice (reflecting universal nature) and self-advantage (reflecting particular human nature). But the most radical change was brought about by the rising Christianity which proceeded from the premise of Natural Law "written in the heart" by God – Creator. Patristic Natural Law assimilated the Old Testament perspective of law as God's command with the Stoic vision of Natural Law as human reason. The rooting of Natural Law in God's Commandments allowed for upholding Natural Law, without subscribing either to the Stoic materialistic determinism or to Aristotelian or Platonic forms. Patristics, thus, shared with Stoicism the vision of Natural Law as a law of human reason, but interpreted it as a capability to follow the Commandments.

A new Christian vision of Natural Law as the Commandments emerged hand in hand with a notion of Free Will. Irenaeus was probably the first to plant the seeds of the notion of Free Will, declaring that it was in man's power of free choice to obey or disobey God's Commandments. Irenaeus insisted that man, being indeed rational and in likeness of God, was free in his choice and in his power over himself (*to auteksousion – sua potestas*), he was a cause to himself, being sometimes grain, sometimes chaff (*Against Heretics* 4.4.3).[2] Irenaeus ingeniously explained how, through God's punishment for disobedience and reward for obedience, man perceived that "good was to obey God, to believe in Him, and keep His commandment" (4.39.1–2).[3] For "just as the tongue by means of taste" gained the "experience of sweet and bitter", likewise the mind discovered that disobedience was "evil and bitter" (4.39.1–2).[4] Irenaeus initiated a vision of Natural Law as the original law of human reason, obscured by the Fall, and reminded by God's Commandments.[5] Irenaeus, though, referred to a power of the free choice, rather than to the will.

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[1] For more comprehensive discussion of the early Natural Law tradition see Taitslin (2011), 10–107.

[2] [Massuet collation]: «*homo vero rationabilis, et secundum hoc similis Deo, liber in arbitrio factus et suae potestatis, ipse sibi cause est ut aliquando quidem frumentum aliquando autem palea fiat*» (Lib. 4, Cap VII, in Sancti Irenaei (1857), *Adversus Haereses*, vol 2, 154).

[3] «*Bonum est autem obedire Deo, et credere ei, et custodire ejus praeceptum*» (Lib.IV Cap LXIV, ibid, 298).

[4] «*Quemadmodum enim ligua per gustum accipit experimentum dulcis at amari…sic et mens per utrorumque experimentum … inobedientiam … amarum et malum* est» (ibid).

[5] God gave mankind natural [Law] precepts [*naturalia praecepta*] which were initially infixed [*ab initio inflixa*] (4.13.3). Man was able to perceive God's Commandments (4.39.1–2). But men "turned themselves to make a calf", hence, they were placed in a state of servitude, which did not

Augustine already denoted the will as a site of man's capacity to obey or disobey God's law. He developed a notion of Free Will to combat the Manichean claim of God's complicity in the Fall. In *De libero arbitrio,*[6] he argued that a punishment or reward would be unjust if man had no Free Will, hence, God ought to give man Free Will (2.1.3.5).[7] Hence "just as it is natural for reason to grasp a command, so too, it is the observance of such a command that gains for us the possession of wisdom. What nature does in the way of grasping the command is accomplished by the will in carrying it out" (3.24.72.246).[8] Thus, "the malice of sin consists in man's failure either to accept the command, or to observe it, or to be steadfast in the contemplation of wisdom" (3.24.72.248).[9] In *De gratia et libero arbitrio,*[10] Augustine still contended that men who knew God's commandment had no longer the excuse that they used to have on the ground of ignorance (3.5).[11] Augustine also counselled his brethren to do good not evil by their free will, for this was the law of God prescribed in the sacred Scriptures, both Old and New Testament (10.22).[12]

But to fight Pelagius' claim of the capability to achieve good outside of God's grace, Augustine had to emphasise the utter corruption of human will (by Original Sin). Thus, according to him, "the will is not destroyed by grace, but is changed from bad to a good will, and is aided by grace once it becomes good" (*De gratio* 20.41).[13] Even more damagingly, Augustine insisted that "grace makes us lovers of the Laws, whereas the same Law, without grace, makes of us only prevaricators" (18.38).[14]

This later Augustine's vision, rooted in the Neo-platonic dichotomy between the earthly and eternal life, undermined the whole rationale for Natural Law as a law of natural life outside of grace.

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cut them from God, but subjected them to the 'yoke of bondage' [of the ritual Law] (4.39.1–2). God thus gave to Moses the [written] Law, which testified of the sin…: it … made the sin to stand out in relief, but did not destroy it (3.18.7). Natural [Law] precepts, being common to the Jews as well as to the Gentiles, had a beginning in the Old Testament but received their …completion in the New Testament (4.13.4).

[6] Latin text: http://individual.utoronto.ca/pking/resources/augustine/De_libero_arbitrio.txt; English translation: Saint Augustine (1968).

[7] "*…poena iniusta esset et praemium, si homo uoluntatem liberam non haberet….Debuit igitur deus dare homini liberam uoluntatem*".

[8] "*Sicut autem natura rationis praeceptum capit, sic praecepti obseruatio sapientiam. Quod est autem natura ad capiendum praeceptum, hoc est uoluntas ad obseruandum*".

[9] "*Peccatum autem malum est in neglegentia uel ad accipiendum praeceptum uel ad obseruandum uel ad custodiendam contemplationem sapientiae*".

[10] Latin text: http://www.augustinus.it/latino/grazia_libero_arbitrio/grazia_libero_arbitrio.htm. English translation: The Fathers of the Church, vol 59, 243–308.

[11] "*Qui ergo noverunt divina mandata, aufertur eis excusatio, quam solent homines habere de ignorantia*"(The translation here is slightly different from Russell).

[12] "*…debetis quidem per liberum arbitrium non facere mala, et facere bona: hoc enim nobis lex Dei praecipit in Libris sanctis, sive Veteribus, sive Novisi*".

[13] "*…voluntas humana non tollitur [gratia], sed ex mala mutatur in bonam, et cum bona fuerit adiuvatur*".

[14] "*Gratia nos facit legis dilectores, lex vero ipsa sine gratia nonnisi praevaricatores facit*".

Still, the vision of Natural Law as God's Commandments was preserved in Gratian's *Decretum* d. 1. int. c.1 (replicating Isidore of Siville's *Etymology* 5.2), which defined the Law of Nature as containing in the Law and the Gospels (summed up in the commandment not to do others what one does not want done to oneself).[15] Moreover, Augustine's later pessimism with regard to free will was somewhat moderated by the early Scholastics. Thus, Lombard stated in *Sentences* (b.2 d.25 p.1 c.8) that "free will has been lessened (*imminutum*) and/or corrupted through sin" [but was not completely lost].[16] Nevertheless, the whole perspective of early Scholastism was unmistakably of Augustinian voluntarism.[17]

The thirteenth century witnessed the rediscovery of Aristotelianism. The main contributor to this new Aristotelian Scholastism was Thomas Aquinas. Aquinas reasserted the autonomy of natural life, and, thus, of Natural Law, as known by human reason, confining the grace mostly to the matters of eternal salvation. Besides, Aquinas "aristotelianised" the notion of good: Eternal Law, in which rational creatures participated through Natural Law, underpinned the overall purposeness of nature. A by-product of this vision was a diffusion of the notion of Free Will (in either God or man) and of the Patristic vision of Natural Law as God's Commandments.

4.3 Aquinas' Intellectualism

God's knowledge was the necessary first cause of Creation (*Summa Theologica* 1. 14.8, 13).[18] The ruling ideas of things, existing in God's mind, constituted Eternal Law. A law was a rule and measure of actions[19] (1.2. 90.1. ad 1; 91.2). It is therefore for reason to plan for an end (1.2. 90.1. ad 1).[20] Natural Law was rational creatures' participation in Eternal Law (1.2. 91.2. ad 1). No grace was required.

Central to Aquinas' treatment of Natural law in *Summa Theologica* was his discussion of **practical reason**, which governed Natural Law, against a backdrop of **theoretical reason**. In Finnis' view, the distinction between practical reason and theoretical reason "corresponds … with the…distinction which we…indicate by contrasting 'fact' and 'norm' or 'is' and 'ought'".[21] Still Hume's disjunction between "is" and "ought"

[15] http://books.google.com/books?id=kdI36eCs36EC&printsec=frontcover&source=gbs_atb#v=onepage&q&f=false

[16] "… *in quo per peccatum sit imminutum vel corruptum liberum arbitrium* …" http://www.franciscan-archive.org/lombardus/opera/ls2-25.html

[17] Anselm's voluntarism was one such noted manifestation of Augustinian influence.

[18] Latin text & English translation: St Thomas Aquinas, (1964–1975); Latin text: http://www.corpusthomisticum.org/iopera.html#OM, English Translation: http://www.newadvent.org/summa/ The references in the text are to *Summa Teheologica*, unless otherwise indicated.

[19] «*regula est et mensura actuum*».

[20] "*rationis enim est ordinare ad finem*".

[21] Finnis (2011), 36.

was hardly possible for Aquinas.[22] For Aquinas, practical intellect knows truth, just as the speculative one, but it [also] directs the known truth to work (1. 79.11 ad 2).

Aquinas emphasised the link between these two reasons (1.2. 90.1. ad 2). Action of reason, namely to understand and to reason and anything which is set out through such action exists in theoretical (*speculativa*) reason, namely, firstly, a definition, secondly, proposition (*enuntiatio*), thirdly, syllogism or argument. Because practical reason makes use of a sort of syllogism in setting up the course of action (*in operabilibus*), syllogism is to doing (*ad operationes*) in practical reason what a premise (*proposition*) is to the conclusions (*ad conclusiones*) in theoretical reason. Thus, general propositions of practical reason which bear on that which has to be done have the character of law (1.2. 90.1. ad 2).[23]

But how did Aquinas' dichotomy of practical/theoretical reason affect his notion of Natural Law?

In his discussion of Natural Law (1.2. 94.2) Aquinas drew the parallels between the axioms (*principia prima demonstrationum*) for theoretical reason and the precepts of natural law (*praecepta legis naturalis*) for practical reason, both being self-evident (*per se nota*) principles. A proposition is self-evident *in itself* when the predicate exists by the rationale of the subject. But if man is ignorant of the definition of the subject, then the proposition is not self-evident [to his mind]. Thus, to one who does not grasp what man is (*quid sit homo*), the proposition "man is rational" is not self-evident.

In his discussion of the Decalogue Aquinas maintained that the first general precepts of Natural Law are self-evident to everyone.

> The first general precepts of the Law of Nature (*prima praecepta communia legis naturae*) were self-evident to anyone who possessed natural reason, and had no need of promulgation (1.2. 100.4. ad 1). First and general precepts were inscribed in natural reason as self-evident,[24] such as *one should do evil to no one: nulli debet homo male facere* (1.2. 100.3). The precepts of the Decalogue were known straight away from first general principles with little reflection (1.2. 100.3).[25]

Aquinas effectively restored the notion of Natural Law as self-evident knowledge in line with the early Patristic understanding of Natural Law as evident knowledge, contained in God's Commandments (given as a reminder). In contrast to Augustine, for Aquinas, natural reason of man, although diminished, outlived Original Sin, so man could still perceive Natural Law without aid of grace. Sin could not cause man to cease to be rational, since man would not be able to sin then (1.2. 85.2).[26] Aquinas conceded that there was the "wound of ignorance" (*vulnus ignorantiae*), so that the

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[22] "…practical principles… state what ought to be…rather than what is…" (Finnis 1998, 87)

[23] "…*hujusmodi propositiones universals rationis practicae ordinatae ad actiones habent rationem legis*".

[24] "… *scripta in ratione naturali quasi per se nota…*".

[25] "…*praecepta ad decalogum …sunt illa quae statim ex principiis communibus primis cognosci possunt modica consideratione*".

[26] Aquinas' comparison is with a transparent body which has the capacity to receive light due to its diaphanous nature; the capacity or aptitude is lessened by overshadowing clouds, yet remains in the nature of the body (1.2.85.2).

reason, especially with regard to [moral] decision, is blunted, the will becomes hardened against the good (1.2. 85.3).[27] Still sin cancels Natural Law on some specific point, not as to its general principles, unless perhaps with regards to secondary precepts (1.2. 94.6).

4.4 Aquinas' Natural Law as Natural Inclination

Deliberating on the Decalogue (1.2.100), Aquinas saw Natural Law as a self-evident knowledge, but in his discussion of Natural Law (1.2. 94) he defined it as "natural inclination" (conceived by reason naturally as "good").

> Reason naturally apprehends all things towards which man has a natural inclination as good, and therefore to be pursued (*prosequenda*), whereas it apprehends their contraries as bad and to be shunned (*vitanda*) (1.2. 94.2).

But if the precept was known immediately from its terms, was there a point in "bringing-in" any other knowledge, such as one of natural inclinations?[28] Is the notion of Natural Law as natural inclination identical to the notion of Natural Law as "self-evident" knowledge? Is "self-evident" knowledge *per se nota* by natural reason indistinct from *naturaliter apprehensio* by reason of "goods" to which man had "natural inclination"?

For Aquinas, as a reflection of his Aristotelianism, the "order" of the precepts of the Law of Nature (*lex naturae*) corresponded to man's natural inclinations (1.2. 94.2).[29] Moreover, Aquinas' order of Natural Law precepts as corresponding to the order of natural inclinations is placed within the Aristotelian framework of the overall

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[27] "…*per peccatum et ratio hebetatur praecipue in agendis, et voluntas induratur ad bonum*…".

[28] Armstrong argued that natural necessity, implied by Aquinas's concept of *naturalis inclinatio*, should be understood 'analogically' (Armstrong 1966, 44). Hence, natural inclination was indispensable for the knowledge of "the term, not known to everyone, but known in itself" (ibid, 48). For O'Connor, since the natural inclinations were apprehended by reason as being good, there was no inconsistency in Aquinas' defining Natural Law as a law of reason, as well as a law corresponding to the natural inclinations (O'Connor 1968, 72).

Finnis has retracted his early statement that "Aquinas considers that practical reasoning begins… by experiencing one's nature, so to speak, from inside, in the form of one's inclinations. But, again, there is no process of inference" (Finnis 2011, 34), now contending that it is "far from clear that the data on the basis of which the originating practical insights occur must include pre-rational inclinations" (ibid, 440). This observation was elaborated in Finnis' *Aquinas* (I am indebted to John Finnis for pointing out this connection [in private correspondence]). According to Finnis, Aquinas' first principles are "'induction' of principles [Ethics iv.3. n.7 [1148], by which he means insight into data of experience" (Finnis 1998, 87). Finnis' insight (ibid, 91), that Aquinas' notion of Natural Law as self-evident principles was not to be inferred from human nature is, in a sense, in accord with the presented here vision of Natural Law as evident knowledge, which could be traced back to the early Patristics. But for Finnis, as for Aquinas, in no way man could grasp these self-evident principles and, nevertheless, disobey Natural Law; Augustinian Free Will is, essentially, a superfluous concept within this paradigm.

[29] "…*secundum igitur ordinem inclinationum naturalium est ordo praeceptorum legis naturae*…".

purposeness of nature, and not confined to man. According to the "first" order of Natural Law precepts, in common with all substances,[30] there was an inclination towards the good of the thing's nature, as to preserve its own natural being;[31] hence, preservation of human life pertained to Natural Law[32] (1.2. 94.2).

According to the "second" order of Natural Law precepts, there was in man an inclination, which nature taught all animals, such as the union of male and female, bringing up of the young,[33] and so forth (1.2. 94.2). Aquinas' "second" order of the precepts of Natural Law (*lex naturalis/lex naturae*) exactly corresponded to his 'first sense' of Natural Law (*ius naturale*)[34] (2.2. 57.3).[35] Natural Law (*ius naturale*) in the first sense was the one of mating of male with female to generate offspring and of care for their young ones (2.2. 57.3). Incongruously, the "first sense" (or the "second" order) of Natural Law, as common for all animals, was at odds with Aquinas' *intellectualist* definition of Natural Law as pertaining to rational nature only.

The only Natural Law according to his *intellectualist* definition was the "third" order of the precepts of Natural Law (*lex naturalis*). It was already proper to man's rational nature, such as to know the truth about God and about living in society,[36] or that man should shun ignorance, or should not offend others with whom he ought to live in civility (1.2. 94.2). This 'third' order of the precepts of Natural Law essentially coincided with the 'second sense' of Natural Law. Natural Law (*ius naturale*) in the second sense (*alio modo*) also prescribed that which was natural to man according to his natural reason, since to consider something by connecting it with its consequence is proper to reason[37] (2.2.57.3). This sense of Natural Law was effectively Gaius-Ulpian's Law of Nations. Aquinas' innovation was in the reinterpretation of Ulpian's Law of Nations as Natural Law exclusive to mankind (to concur with Gaius' definition of it as a law of reason).

The vision of Natural Law as a part of the overall order of nature might be traced back to the Stoics who saw Natural Law reigning over the city of Gods and sages as a law of human reason in tune with logos of universal nature. Still, the Stoic Natural Law was a law of *human* reason. The middle Stoic Panaetius built upon Chrysippus' account of 'natural' human inclination to self-preservation, while redefining the universal logos of nature as 'rational' inclination to justice. Panaetius (and Anselm and Scotus) saw these opposing *human* inclinations as reflecting a potential conflict of

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[30] "…*in qua communicat cum omnibus substanitiis…*".

[31] "… *quaelibet substantia appetite conservationem sui esse secundum suam naturam…*"

[32] «…*pertinent ad legem naturalem ea per qua vita hominis conservatur…*».

[33] «… *quae natura omnia animalia docuit, ut est commixtio maris et feminae, et education liberorum…*»

[34] «… *ius quod dicitur naturale, secundum primum modum, commune est nobis et aliis animalibus…*»

[35] Aquinas usage of *ius* in Q. 57 corresponded with the Roman Law *ius naturale*.

[36] "… *homo habet naturalem inclinationem ad hoc quod veritatem cognoscat de Deo, et ad hoc quod in societate vivat…*"

[37] «…*considerare autem aliquid, comparando ad id quod ex ipso sequitur, est proprium rationis…*»

human nature and universal nature. Aquinas derived his 'second order' of Natural Law precepts not directly from the Stoics, but from Ulpian, who interpreted natural inclination as the inclination common to all animals. In comparison, Aquinas saw 'generic' inclinations pertained already to the whole nature within Aristotelian framework of all animated and unanimated things aimed at their own ends.

This 'natural inclination' notion of Natural Law, in contrast with 'evident knowledge' vision, need not account for 'is/ought' distinction (or for the obligation to follow Natural Law). But could such notion be reconciled with Aquinas' intellectualism?

4.5 Aquinas' Good

According to Aquinas, the things which enter into our comprehension are ranged in a certain order, so that being (*ens*) appears the first, and the first indemonstrable principle was: *there is no affirming and denying the same simultaneously, based on the very nature of being and non-being*; on this principle all other propositions are based (1.2. 94.2).[38]

But what is the relationship between 'being' discovered by theoretical reason and 'good' fixed by practical reason? As being enters first into comprehension as such,[39] good first enters in practical reason's comprehension when it aims at doing something; every agent acts on account of some end which has the rationale of the good,[40] based on the prime principle that *good is that which all things strive to*: *bonum est quod omnia appetunt* (1.2. 94.2)

But has 'good' any relation to the overall end of man? In his discussion of the Old Law, Aquinas noted that such human conduct (*humani mores*) was called good which conformed to reason (1.2. 100.1). Since the order of reason starts with the end,[41] what is most contrary to reason is for man to be out of order with his end (1.2. 100.6).[42]

According to Aquinas, "since all things are regulated and measured by Eternal Law… it is evident that all somehow share in it, in that their tendencies to their own proper acts and ends are from its impression" (1.2. 91.2).[43] Moreover, "all activity of reason and will springs from us being what we are by nature. All reasoning draws on sources we recognise naturally, and every appetite subordinate to ends is charged

[38] «*…not est simul affirmare et negare… fundatur supra rationem entis et non entis… super hoc principio omnia alia fundantur…*»

[39] «*… sicut autem ens est primum quod cadit in apprehension simpliciter…*»

[40] «*…omne enim agens agit propter finem, qui habet rationem boni…*»

[41] "*…cum rationis ordo a fine incipiat…*"

[42] «*… maxime est contra rationem ut homo inordinate se habeat circa finem…*»

[43] «*Unde cum omnia quae divinae providentae subduntur a lege aeterna regulentur et mensurentur,… manefestum est quod omnia participant aliqualiter legem aeternam, inquantum scilet ex empressione ejus habent inclinations in proper actus et fines*».

with *natural appetite* for our ultimate end. Accordingly, the original directing of our activity to an end should be through Natural Law (*lex naturalis*)" (1.2. 91.2.2).

For Aquinas, all human inclinations of human nature, to whatever part they belong, come back to one primary precept (1.2. 94.2 con. 2).[44] This precept is: *good is to be sought and done, evil to be avoided*: *bonum est faciendum et prosequendum, et malum vitandum*. But if this good is that what all human should be strived to, then this good was to be defined by the three orders of the Natural Law precepts.

Aquinas' Natural Law corresponding to the three orders of natural inclinations [of unanimated, animated and rational nature] fitted rather too well within the Aristotelian vision of self-perfection of nature. In this way Aquinas' Natural Law was interpreted by the later Scholastic tradition from Vitoria to Suárez. According to this interpretation, Natural Law was for Aquinas not just self-evident knowledge of 'good' but the knowledge which had its underpinning in the purposeness of nature. Hence, Aquinas' first principle of practical reason that "goods are to be pursued" (which provided rationale for the particular ends) ought to be derived from natural inclination for man's ultimate end. If reason *naturally* grasped "goods to be pursued' prior to any further deliberation, then natural inclination itself provided for dictates of Natural Law. This view became a matter of the controversy with the later Scholastics.

Nevertheless, this natural inclination vision was revived by Neo-Scholastics. For example, for Maritain, "every kind of being existing in nature…has its own 'natural law', that is the proper way in which, by reason of its specific structure and ends, it 'should' achieve fullness of being in its growth or its behaviour… Natural Law is natural not only insofar as it is the normality of functioning of human nature, but also insofar as it is *naturally known*: that is to say known *through inclination*…not through conceptual knowledge and by way of reasoning". [45]

The Neo-Scholastic meaning of *bonum* was questioned by the 'new Natural Law theory'. In support of Neo-Scholastic view, Veatch argued that "if good simply as *ens*, or the good in general, is but the actual as over against the potential, then obviously the human good specifically has to be understood as simply that full actuality or perfection, or flourishing or fulfilment, to which our specifically human potentialities are ordered".[46] In comparison, Finnis denies that "a natural law theory of morals entails the belief that propositions about man's duties and obligations can be inferred from propositions about his nature, hence the first principles of natural law, which specify the basic forms of good and evil and can be adequately grasped by anyone of the age of reason… are *per se nota* … and indemonstrable".[47] But Finnis' good connotes "intrinsic" good. These goods, such as truth or friendship, are "understood as basic aspects of *human* flourishing … actualizable if chosen intelligently

[44] «*…omnes hujusmodi inclinationes quarumcumque partium naturae humanae reducuntur ad unum primum praeceptum …*»

[45] Maritain (1952), 62–63.

[46] Veatch (1981), 310.

[47] Finnis (2011), 33.

and pursued and acted upon".[48] The relationship is not from 'nature' to 'good' (as in the Aristotelian tradition) but *vice versa*: "to understand the basic aspects of human flourishing is implicitly to understand basic outlines of human nature".[49]

4.6 Aquinas on Free Choice[50]

The Aristotelian vision of Natural Law as natural inclination had obscured the Patristic insight that Natural Law was God's Commandments and, as such, was confined to men (who had Free Will to obey or disobey the Commandments).

Achilles' heel of Thomism was in its ambiguous notion of Free Will, insofar as for Aquinas, the intellect moved the will (1. 83.4 ad 3).[51] Aquinas' 'voluntariness' had a distinctly pre-Augustinian meaning of mere rationality: to have free choice was to be able to deliberate. Voluntary agents just deliberated about the means to the end, while natural agents acted instinctively. Thus, reason moved man to act for human *ends*, set by human "own" inclination, just as natural inclination would move an animal to its *end*.

> Since both intellect and nature act for an end… the natural agent must have the end and the necessary means predetermined for it by some higher intellect; as the end and definite movement is predetermined for the arrow by the archer (1. 19.4).[52]

> …those things which have knowledge of the end are said to move themselves because there is in them a principle by which they not only act but also act for an end. And consequently… the movements of such things are said to be voluntary: for the word 'voluntary' implies that their movements and acts are from their own inclination… Therefore, since man especially knows the end of his work, and moves himself, in his acts especially is the voluntary to be found. (1.2. 6.1).

This ambiguity of the notion of the will in Thomism reflected a more general conundrum of **necessity and contingence**. Free choice was explained by Aquinas through God's willing His creation not necessarily.

> God may will His own good from necessity but other things not truly from necessity… regarding those whom He does not will from necessity He has free choice (1. 19.10).[53]

> …the proximate causes are contingent … because God prepared contingent causes for them (1. 19.8).[54]

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[48] Finnis (2012), 18. For Finnis, these goods are also "perfections" of "flesh-and-blood human beings", but they "are desired as ends for their own sake" (Finnis 1998, 91). But he denied any links of these to Platonic forms (ibid).

[49] Finnis (2012), 18.

[50] i.e. the will: *voluntas et liberum arbitrium … sunt … una* (1. 83.4).

[51] "*…intellectus comparatur ad voluntatem ut movens…*".

[52] "*Cum enim propter finem agat et intellectus et natura… necesse est ut agenti per naturam praedeterminetur finis, et media necessaria ad finem, ab aliquo superiori intellectu; sicut sagittae praedeterminatur finis et certus modus a sagittante*".

[53] "*…Deus ex necessitate suam bonitatem velit, alia vero non ex necessitate…respectu illorum quae non ex necessitate vult, liberum arbitrium habet"*.

[54] "*causae proximae sunt contingents… quia Deus voluit eos contingenter evenire*".

> God wills things apart from Himself insofar as they are ordered to His own goodness as their end. *Now in willing an end we do not necessarily will things that conduce to it, unless they are such that the end cannot be attained without them; as, we will to take food to preserve life, or to take ship in order to cross the sea. But we do not necessarily will things without which the end is attainable, such as a horse for a journey which we can take on foot, for we can make the journey without one.* The same applies to other means (1. 19.3).
>
> … God does not necessarily will some of the things that He wills does not result from defect in the divine will, but from a *defect belonging to the nature of the thing willed*, namely, that the perfect goodness of God can be without it; and such defect accompanies all created good (1. 19.3).
>
> … Since the evil of *sin consists in turning away from the divine goodness* … it is manifestly impossible for Him to will the evil of sin; yet He can make choice of one of two opposites, inasmuch as He can will a thing to be, or not to be. In the same way *we ourselves, without sin, can will to sit down, and not will to sit down* (1. 19.10).[55]
>
> Particular acts are contingent, and therefore in such matters the judgment of reason may follow opposite courses… And forasmuch as man is rational is it necessary that man have free choice (1. 83.1).[56]

For Aquinas, free choice related to contingent causes, as when some 'indifferent' action from two opposites could be taken, as to sit or not, or when the means to the necessary end could be chosen from the available options: to go on foot or on horseback. This seemed to be a case of "instrumental" free choice, which could not lead to a breach of God's Law. Aquinas' contingency was a sort of 'conditional' necessity (1. 19.8 ad 3). In contrast, the early Patristic and Augustinian perspective on Free Will, presupposed a genuine choice between the two opposing ends (rather than between different means to the same end): to act *either* in accord with *or* in breach of God's Commandments.

Hence, Aquinas had to re-construe Augustine's position on Free Will and necessity (to fit within his Aristotelian paradigm).

> But if we define necessity to be that according to which we say that it is necessary that anything be of such or such a nature, or be done in such and such a manner, I know not why we should have any dread of that necessity taking away the freedom of our will…
>
> …when we will, we will by free choice… and do not still subject our wills thereby to a necessity which destroys liberty [Augustine, *De Civ. Dei* v.x].[57] The words of Augustine are

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[55] «*… cum malum culpae dicatur per aversionem a bonitate divina … manifestum est quod impossibile est eum malum culpae velle. Et tamen ad opposita se habet, inquantum velle potest hoc esse vel non esse. Sicut et nos, non peccando, possumus velle sedere, et non velle sedere*».

[56] «*Particularia autem operabilia sunt quaedam contingentia: et ideo circa ea iudicium rationis ad diversa se habet… Et pro tanto necesse est quod homo sit liberi arbitrii, ex hoc ipso quod rationalis* est».

[57] «*Si autem illa definitur esse necessitas, secundum quam dicimus necesse esse ut ita sit aliquid uel ita fiat, nescio cur eam timeamus, ne nobis libertatem auferat uoluntatis …*

cum uolumus, libero uelimus arbitrio … et non ideo ipsum liberum arbitrium necessitati subicimus, quae adimit libertatem» http://www.thelatinlibrary.com/augustine/civ5.shtml (English Translation: http://www.newadvent.org/fathers/120105.htm) .

> to be understood of the necessity of coercion. But natural necessity "does not take away the liberty of the will," as he says himself (*ST* 1. 82.1).[58]

But, in contrast to Aquinas' interpretation, Augustine envisioned Free Will not as just absence of "coercion" but as a capacity to obey or disobey the Commandments in the absence of any external coercion! As to "natural necessity", while the Commandments did not prescribe anything beyond human mortal nature, there was nothing in human nature which would make it is 'naturally' impossible to act contrary to God's commandment. The whole Augustinian Free Will perspective had nothing to do with "natural necessity" (and it was that Augustine meant when he said that it did "not take away the liberty of the will"). Unsurprisingly, Aquinas' notion of sin, again, had pre-Augustinian (Aristotelian) connotation of wrong judgement.

> That to which the will tends by sinning, although in reality it is evil and contrary to the rational nature, nevertheless is apprehended as something good and suitable to nature, in so far as it is suitable to man by reason of some pleasurable sensation or some vicious habit (1.2. 6.4).

Aquinas, thus, imposed the 'classical' interpretation of a wrong act as a result of the faulty reason on the 'post-classical' Christian notion of sin (as a breach of God's Commandments), inseparable from the Patristic idea of Free Will: only because man had Free Will he could sin. In comparison, Aquinas' notion of sin had unmistakably 'classical' connotations of "wound of ignorance".

In sum, Aquinas failed to develop a genuine notion of Free Will: man had "free choice" merely due to 'residual' contingency existing in the world. But if Free Will was merely 'instrumental' free choice (of means to the end) how could one fall away from one's natural end as manifested in one's natural inclination?

4.7 Suárez' Critique

Suárez' celebrated contribution to the history of ideas was to divide opinions on the matter of law into two streams – those who held law being an act of the intellect, and those who considered it to be an act of the will. Suárez distinguished between 'intellectualist' and 'voluntarist' opinions, ultimately opposing each other on the question whether reason itself was sufficient to create obligation.[59]

There was an [intellectualist] opinion of Natural Law as of natural reason [human intellect] being a '*demonstrative*' law indicating what should be done and avoided, and what of its own nature was intrinsically good and evil (*Tractatus de legibus ac deo legislatore* 2.6.3).[60] Suárez conceded that Natural Law was in a sense [rational] illumination (2.5.14).

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[58] «*verbum Augustini est intelligendum de necessario necessitate coactionis. Necessitas autem naturalis non aufert libertatem voluntatis, ut ipsemet in eodem libro dicit*».

[59] Though, Suárez did not use the terms 'voluntarists' and 'intellectualists'.

[60] Suárez (1944). The following references are to *Tractatus*, unless otherwise indicated.

But Suárez noted that there was a difference between a law and a rule of conscience [a broader term] (2.5.15). For intellectualists, "conscience is an exercise of the reason…and conscience bears witness …and reveals the work of law written in the hearts of men … revealing that [the natural dictates of right reason] have the force of law over man" [*ST* 1.2. 91.2] (2.5.10). Hence, a dictate of reason directs and binds, and is a rule of conscience (*regula conscientiae*) which censures or approves what is done (2.5.12).[61] Natural Law must be constituted in the reason as in the immediate and intrinsic rule of human actions (2.5.12).[62]

Suárez outlined the variety of intellectualism itself. The two [intellectualist] opinions dwelled on the different aspects of rational nature. The one [to which Suárez himself was inclined] dwelled on reason as a certain natural power "to discriminate between the actions in harmony with it and those discordant with it" (2.5.9). The other emphasized Nature itself (2.5.2). According to this opinion [among others of Aquinas] Natural Law was inherent in rational nature itself (2.5.2). Rational nature in itself is Natural Law (*lex naturalis*) with respect to all these things which are prescribed or forbidden, approved or permitted by Natural Law (2.5.3). A certain action was evil, being out of harmony with rational nature;[63] hence Nature itself was the standard by which actions were measured (2.5.3).[64] So the precepts of Natural Law [as lying was evil] were conclusions derived as necessary from self-evident principles or their very terms, **prior to a judgement of reason** (2.5.4). Thus, the standard, according to which a thing was good or evil, was the very nature of the thing in question: this standard also dwelt in rational nature; the goodness or turpitude of an act consisted in the harmony or discord between the free act and rational nature itself (2.5.4).

Suárez, thus, noted that the [intellectualist] opinion distinguished two rational natures: a certain power to discriminate between the action in harmony with it and those discordant with it, – natural reason as the very law (*lex*) of nature which lays commands or prohibitions upon human will regarding what must be done as a matter of natural law (*ius*) [Aquinas *ST* 1.2. 94.1&2], *and*, nature itself as (so to speak) the basis of the conformity or non-conformity of human acts with itself (2.5.9).

Suárez objected to the latter concept [of natural inclination] on the grounds that Natural Law as a standard [of rational nature itself] was not properly a law, since *it neither commanded nor showed rectitude or turpitude, neither directed nor illuminated* or produced other proper effects of law (2.5.5).[65] Thus, the essential principle of a standard or foundation for rectitude did not suffice as the equivalent of the essential principle of law (2.5.8).[66] Moreover, Natural Law in this sense was not

[61] "*… quae accusat, vel approbat facta…*".

[62] "*…in ratione est lex naturalis constituenda tanquam in proxima regula intrinsica humanarum actionum…*".

[63] «*… disconueniens naturae rationali…*»

[64] «*…ipsa natura est mensura talis actus, & consequeter est lex naturalis…*»

[65] "*…nec praecipit, nec ostendit honestatem, aut malitiam, nec dirigit, aut illuminat nec alium proprium effectum legis habet*"

[66] "*…illam rationem mensurae vel fundamemtati honestatis non satis esse ad rationem legis…*"

Divine Law since the precepts of Natural Law were characterised by a necessary goodness in rational nature itself (depending upon *God in its actual existence but not for its rational basis*)[67] (2.5.8).

According to Suárez, natural inclinations were not the principles, in accordance with which reason dictated Natural Law, but merely the matter with which Natural Law was concerned (2.8.4). Natural Law as natural inclination was merely a disposition to act in a "natural" way, as an "innate" mode of thinking, implying neither a choice nor comprehension.

Suárez interpreted Plato's idea of Natural Law as appeared in the *Timaeus* and in *Phaedrus* as referred "to every natural inclination implanted in things by their Creator, whereby they severally tend towards the act and ends proper to them" (1.3.7). Suárez found a similar opinion in Aquinas [*ST* 1.2. 91.2] who said that all things ruled by divine providence partook in some fashion of Eternal Law, to the degree that they derived from its efficacy, propensities towards their proper acts and ends (1.3.7). According to Suárez, Aquinas [*ST* 1.2. 94.2] first discriminated among the various inclinations inherent in human nature, in accordance with which inclinations, reason dictated concerning those things which are good or evil for human nature; and Aquinas affected this discrimination in order that he may deduce therefrom the precepts of Natural Law (2.5.1).[68]

In contrast, Suárez argued that Natural Law could not strictly speaking be attributed to insensate things (1.3.8).

> An act of judgement manifesting the truth of the matter in hand[69] …is not in itself necessary to action, nor does it impose an obligation (2.6.1).[70]

Suárez rejected the view that Natural Law was rational nature itself. One of his immediate targets was Vazquez (2.5.2). Vazquez explicitly denied that Natural Law was a judgement of reason.[71] This extreme position might give a clue to the question whether the notion of Natural Law as "evident" knowledge is identical to the notion of Natural Law as natural inclination. While rejecting the latter notion Suárez adopted the former one. Suárez distinguished three types of Natural Law precepts: some were principles of the most universal sort, for example, that one should not do evil, and that one should follow after the good; others were immediate conclusions intrinsically united in an absolute sense with the said principles, examples of this group being the Commandments of the Decalogue; thirdly there were still other

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[67] "…*non pended a Deo in ratione, licet pendeat in existential*…"

[68] «…*distinguit varias inclinationes naturales humanae nature, secundum quas ratio dictat de his, quae sunt bona, vel mala tali naturae ut inde colligat praecepta legis naturalis*…»

[69] "… *iudiciu ostendens veritate rei*…"

[70] Suárez also noted that a judgement showing the nature of given action [*iudiciu indicas natura actionis*]….*points out that obligation should be assumed to exist* [*ostendi illam (obligationem), quae supponi debet*]. Therefore if this judgement is to have the nature of law, it must indicate some sort of authority as the source of such obligation [*ergo iudicium illud, ut habeat rationem legis, debet in decare aliquod imperium, a quo talis obligation manet*] (2.6.6)

[71] Cruz (2008), 55.

precepts, much more remote from the first group, and remote even from the commands of the Decalogue (2.15.2)

Suárez' most crucial contribution was to distinguish between the source of obligation, or its binding force, and the rational comprehension of the content of Natural Law.

> It was one thing to say that Natural Law was from God, as from an efficient primary cause; but it was another thing to say that the same law was derived from Him as from a Lawgiver who Commands and impose obligations[72] (2.6.2)

God's command could not be irrational, so due to his natural reason, man was able to comprehend and abide by the command. Hence Natural Law could not be a law given to the whole creation (as a law of natural inclination) but was given only to men as rational creatures.

Suárez attempted to assimilate the voluntarist notion of law as an act of will with the intellectualist notion of law as an act of intellect: any law was for him "right judgement concerning the things that should be done and an efficacious will impelling the performance of those things" (1.5.20).[73] For him, the intellect was to direct rather than to move, while a binding force dwelt in the will (1.5.15). He deviated from Aquinas by adopting a semi-voluntarist notion of 'right' (and 'wrong') as dependent upon the dictates of God's Law.[74] For Suárez, an act of understanding on the subject's part was an application of the cause that creates obligation, rather than the true cause and basis of obligation (1.5.24). Ultimately, Suárez held the voluntarist position that law as an obligation was created by an act of the will. Thus law, as existing in the law-giver, was "the act of just and upright will, the act whereby a superior wills to bind an inferior to the performance of a particular deed" (1.5.24).

In Finnis' view, while Aquinas "treats obligation as the rational necessity of some means to (or way of realizing) an end or objective (i.e. a good) of particular sort",[75] 'Suárezian' tradition defined "the obligation to act reasonably (i.e. morally) by appealing to a special exercise of the divine will, whereby God commands that good (the reasonable) be done and evil (the unreasonable) be avoided".[76] Finnis' interpretation of obligation in Aquinas as 'rational necessity' corroborates the validity of Suárez' claim that the intellectualist Natural Law *neither commands nor shows rectitude or turpitude.*

According to Finnis, [in Suárezian tradition] "what could moral obligation consist in, if not in the movement of an inferior's will by a superior's?".[77] The

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[72] *…ut a legislatore precipiente, & obligante…*

[73] *… id est iudicium rectu de agendis, & voluntate efficace movedi ad illis…*

[74] Law, in general, was, for Suárez, 'a certain measure of moral acts, in the sense that such acts are characterised by moral rectitude through their conformity to the law, and by perversity, if they are out of harmony with the law' (1.1.5). It was a common, just and stable precept, which had been sufficiently promulgated (1.12.5).

[75] Finnis (2011), 45–6.

[76] Finnis (2011), 342.

[77] Finnis (2011), 342.

suggested answer, however, overlooked the lengthy historical endeavour to develop the notion of Free Will, firstly, by Patristics, regarding man, and, then, by Scholastics, regarding God.

The fourteenth century voluntarists Scotus and Ockham rejected Aquinas' intellectualist assumption of God's Will being under dictate of His intellect. Suárez responded to the voluntarist revolution with his intellectualist-voluntarist synthesis. He accepted that God had Free Will. But he attempted to rescue the intellectualist content of Natural Law. The issue was the matter of controversy within voluntarism itself. Scotus and Ockham disagreed whether God could at will change Natural Law. According to Scotus, God was debtor [to His creatures] out of generosity (*Ordinatio* iv, d. 46).[78] For Ockham, God was debtor to no one (*Quodlibeta* iii. q.3). Suárez ingeniously defended the intellectualist content of Natural Law by the voluntarist argument that God would not deceive (2.2.6). Hence, Natural Law continued to mean rational ordinance.

Suárez' notion of law as a moral command effectively revived the Patristic vision of Natural Law, according to which man had Free Will to obey or disobey Natural Law. Man's obligation to obey indeed came from God, but he was not 'predestined' to obey (otherwise he could not sin). While there remained Free Will and contingency, in no sense, 'Ought' was inferred from 'Is' (or vice versa).

4.8 Conclusion

Aquinas' intellectualism laid the foundation of his notion of Natural Law as evident knowledge (of human reason), thus, rescuing Natural Law from the Augustinian gloomy vision of post – Fall human nature. Aquinas, however, remained a hostage to the Aristotelian vision of the overall purposeness of nature, which led to his notion of Natural Law as natural inclination. This Aquinas' notion of Natural law was ad odds with the early Patristic Natural Law as moral command. The vision of Natural Law as moral command was inseparable from the notion of Free Will. This was the main achievement of Augustinian voluntarism. Aquinas' notion of Natural Law as evident knowledge was a legacy of this Patristic vision of the law given to men exclusively, being endowed with reason and Free Will and, thus, capable of understanding God's command as well as either obeying or disobeying it. Aristotelian world knew nothing of Free Will in this specifically Christian sense, and, instead,

[78] Finnis suggests that the idea of Creation out of 'liberality' (and, thus, the concept of Free Will of God) could also be found in Aquinas (Finnis 1998, 310). But the central issue in the voluntarists-intellectualist debates was whether God's will was under a dictate of His intellect (Taitslin 2011, 126–139, 170–179). On this point Aquinas was unambiguous (*ST* 1. 83.4 ad 3). Only because of the voluntarist contrary premise that God's will was not moved by His intellect, the voluntarists, such as Scotus and Ockham, had to face a question of 'justification' of Creation and Natural Law. This was not an issue for Aquinas.

saw the law working through nature and manifesting itself in the order of natural inclinations, pertained to every particular nature.

The result of Aquinas' Aristotelian 'counter-revolution' was the loss of meaningful conception of Fee Will. The fourteen century voluntarism, in comparison, completed the Augustinian voluntarist revolution by extending the notion of Free Will (and contingency) from man to God and His Creation.

Suárez, the last great Scholiast, attempted to reconcile the Scholastic intellectualism, with its presumption of the content of Natural Law, as derived from reason, to the Scholastic voluntarism, with its presumption of Free Will of God. But Aquinas' notion of Natural Law as natural inclination could not be reconciled with the crucial Patristic vision of Natural Law as moral command (which laid the foundation the Christian Natural Law). Suárez was right to underscore weaknesses not only of the concept of Natural Law as natural inclination as unable either to command or illuminate, but also of the intellectualist notion of law as a demonstrative law of human reason as unable to explain either an obligation to abide by Natural Law or a failure to obey it.

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Chapter 5
God and Natural Law: Reflections on Genesis 22

Matthew Levering

If natural law prohibits killing the innocent, how can God, according to biblical revelation, command Abraham to kill his son Isaac (Genesis 22)? As we would expect from thinkers whose natural law doctrine is not distanced from biblical revelation, the problem of the Aqedah or near-sacrifice of Isaac was a staple of medieval discussion of natural law, and it surfaces in modern discussions as well. It may seem that God's command to Abraham belies the claim to an intelligible natural law rooted in God's providential ordering of all things to their due end. What kind of providential ordering could include the command to kill an innocent child?[1]

Behind the interest in the Aqedah in discussions of moral theology and philosophy lies the question of how one can claim that there exists a God-given natural law, a morally normative order, in the face of all the suffering, death, and disorder that one finds in the world. In response to this question, this essay proceeds in two steps. First, I explore Immanuel Kant's well-known response to the Aqedah and John Thiel's recent effort to account theologically for innocent suffering. Second, seeking the roots of Kant's and Thiel's accounts, I turn to the Aqedah as the point of divergence between Duns Scotus and Thomas Aquinas on the doctrine of natural law. For Scotus and Aquinas, the Aqedah raises the questions of whether the natural law can be changed and what is the content of the natural law. I will suggest that in the divergence of Scotus and Aquinas we find the beginnings of the modern split between anthropocentric and theocentric alternatives for articulating natural law doctrine. At issue is the normative presence, or lack thereof, of God's ordering wisdom (and not merely his power) in human relationships.

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[1] For further theological reflection on the Aqedah, see Levering (2005), chapter 1.

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5.1 God and the Slaying of the Innocent

5.1.1 Immanuel Kant

In *The Conflict of the Faculties*, Immanuel Kant observes that in all likelihood persons who think that they receive commands from God are deluded. As he says in response to the "myth of the sacrifice that Abraham was going to make by butchering and burning his only son at God's command": "Abraham should have replied to this supposedly divine voice: 'That I ought not to kill my good son is quite certain. But that you, this apparition, are God—of that I am not certain, and never can be, not even if this voice rings down to me from visible heaven."[2] Kant reasons that the moral law is certain, at least insofar as not killing one's innocent son is concerned, whereas divine commands are profoundly uncertain. He states therefore that "[i]n some cases man can be sure that the voice he hears is *not* God's; for if the voice commands him to do something contrary to the moral law, then no matter how majestic the apparition may be, and no matter how it may seem to surpass the whole of nature, he must consider it an illusion."[3] Abraham should have followed the natural law and rejected the apparently divine voice.

As Kant suggests, furthermore, how one reads such passages as Genesis 22 influences how one understands the justice or injustice of killing human beings on the grounds of religious disagreement. In *Religion within the Limits of Reason Alone* he gives the example of "an inquisitor, who clings fast to the uniqueness of his statutory faith even to the point of [imposing] martyrdom, and who has to pass judgment upon a so-called heretic (otherwise a good citizen) charged with unbelief."[4] Assuming the inquisitor decides in favor of the stake, can one say, Kant asks, that the inquisitor acted on the basis of conscience? Kant argues that the answer is no, because conscience could never assure an inquisitor that capital punishment in such a case is just. The reason is this: "That it is wrong to deprive a man of his life because of his religious faith is certain, unless (to allow for the most remote possibility) a Divine Will, made known in extraordinary fashion, has ordered it otherwise. But that God has ever uttered this terrible injunction can be asserted only on the basis of historical documents and is never apodictically certain."[5] Neither an exterior nor interior voice, nor the historical documents of Scripture, can demonstrate with sufficient power that one should act in a way which one knows on other grounds, with certainty, to be unjust.

For Kant, the question of the justice of capital punishment for heresy is thus similar to the question of the justice of Abraham killing his son: only the invocation of the divine will could make such actions "just," but one can never know with

[2] Immanuel Kant (1979), 115, cited and discussed in Moberly (2000), 129.

[3] Ibid.

[4] Kant (1960), 174.

[5] Ibid., 175.

certainty whether God has in fact made his will known in this way. One can know with certainty that such actions are, humanly speaking, unjust. To go against this certainty on the basis of a faith that rests on historical grounds, which in Kant's view cannot command firm assent, would be a violation of conscience. Kant concludes, "This is the case with respect to all historical and visionary faith; that is, the *possibility* ever remains that an error may be discovered in it. Hence it is unconscientious to follow such a faith with the possibility that perhaps what it commands or permits may be wrong, *i.e*., with the danger of disobedience to a human duty which is certain in and of itself."[6] In short, contrary to God's praise of Abraham in Genesis 22 for withholding nothing from God but instead receiving everything as a gift, Abraham sinned in obeying "God"—or so Kant thinks.

5.1.2 John Thiel

Without mentioning Abraham's near-sacrifice of his son, the contemporary theologian John Thiel advances similar concerns—but now about whether a God who wills the crucifixion of his beloved Son Jesus can indeed be a just and loving God.[7] He takes Anselm as a typical representative of the position that God does indeed providentially will the death of Jesus, the supremely innocent man. As Thiel notes, "Since Anselm has argued ardently on behalf of the logical necessity of Jesus' sacrifice, there is no way for him to avoid the conclusion that God willed the cross for Jesus. That God wills Jesus' death may sound a dissonant chord in Christian sensibilities. Yet Anselm offers this judgment as a claim about God's love for humanity, even in the guilty depths of its fallenness."[8] Is God's will that Jesus must die, however, truly the epitome of love? Would a just God approve the death of a supremely innocent man? Moreover, would this approval, this affirmation that an innocent man should die, in fact be "the paradigmatic act of divine providence,"[9] in which the righteousness of the Father, Son, and Holy Spirit is fully revealed? For Thiel, the answer is no.

Thiel argues that Anselm's "sacrificial logic" allows believers to make some sense of their own deaths and those of others, but at the cost of maintaining what is, for some at least, an "extraordinary troubling" view that "God wills death," including the deaths of innocent victims. Thiel challenges the "sacrificial logic," furthermore, on the grounds that it places Jesus, who is perfectly innocent, on a different level from other human beings who are to varying degrees disordered by original sin. As Thiel remarks, "Jesus' death is not retributive punishment, while the death of everyone else is….Jesus' death is the undeserved death of an innocent sufferer, while the

[6] Ibid.

[7] I discuss this question in detail in *Sacrifice and Community*, chapter 2.

[8] Thiel (2002), 155.

[9] Ibid.

death of everyone else is deserved and thoroughly guilty."[10] Two problems follow: how can our deserved deaths be truly united with Jesus' undeserved death, and how can one truly mourn the deaths of other innocent victims given that their innocence is marked by a prior and more determinative guilt?

In other words, one might posit that a loving God wills the sacrificial death of one innocent man (Jesus) on behalf of all other guilty human beings, but such a viewpoint assures, in Thiel's view, a twofold outcome: Jesus' dying lacks real solidarity with other human deaths, and God wills that the rest of us be deservedly killed (undergo death) as well. Thiel argues that this outcome distorts our understanding both of God and of the tragedy of death. In both the "providential" and the "sacrificial" accounts of death, God's will gives an improper imprimatur to death (even of the most innocent man). We cannot even mourn properly the deaths that we see and experience because they allegedly belong to God's will. This distortion contrasts with our real experience of the *tragic* deaths of innocent victims, whether from cancer, violence, or other causes. Our hope that these victims find reward in God's providential plan is thwarted by the denial, in the sacrificial logic, that any of the victims (other than Jesus) are in a fundamental sense innocent.

We do not want, says Thiel, to put God on the side of death. As he observes, "we have seen that the popularity of the providential explanation stems from the desire to confirm, through God's actions, the very innocent suffering that the legal explanation denies….[T]his indirect recognition of innocent suffering comes at the extraordinarily high price of God's arranging the particular circumstances of suffering and death that individuals find so grief-laden and tumultuous in their lives."[11] Thiel's goal is therefore to account for suffering and death in a way that reclaims a full concept of innocent human suffering and that denies that God approves or wills any death. Just as Kant holds that it is wrong to kill an innocent human being (e.g., Isaac) even if one think that one has received a divine command to carry out such acts, in a similar fashion Thiel suggests that it would be wrong for God to will the death of an innocent human being (Jesus) and indeed wrong to imagine that God wills, in his providential plan, the deaths of even sinful human beings. As we experientially recognize, many of these deaths are tragic instances of human life being cut off, through no fault of its own, by oppressive forces. The good and wise God is not to blame. *Pace* sacrificial and providential accounts, for Thiel God does not in any sense ever will the tragedy of human death.

5.1.3 Evaluation

Kant deals with Genesis 22 by arguing simply that human beings who think they must obey a divine command that clearly goes against right reason, are profoundly deluded. Thiel's case, by contrast, involves elucidating the complexities of divine

[10] Ibid., 156.

[11] Ibid.

providence and of the order of justice between the rational creature and the Creator. Granting the differences in their argument, Kant and Thiel are united by their concern to deem irrational and unintelligible the death of the innocent, whether Isaac, Jesus, or others. Kant addresses the issue by ruling out Genesis 22 as an example of religious irrationality on the part of Abraham. Thiel argues that accounts of Christ's Cross that imply divine approval or that suggest that God wills to change the human condition through the death of an innocent man are similarly manifestations of religious irrationality.

While I have responded more broadly to anti-sacrificial and anti-providential arguments elsewhere, in what follows I want to explore specifically how similar concerns influenced late-medieval and modern developments in natural law doctrine. Duns Scotus's profound disagreement with Thomas Aquinas on the character of natural law hinges upon these very issues of God's justice and the death of the innocent. Scotus, as we will see, attempts to resolve the difficulty by displacing human-to-human relationships from the natural law. Human-to-human relationships are for Scotus governed solely by divine positive law, which can be changed by God at any time, whereas human-to-God relationships comprise the unchanging natural law.

By separating out human-to-human relationships as a realm ungoverned by an ordering inscribed in creation—and thus by denying an intrinsically ordered "human nature" with its proper requirements for fulfillment (other than obedience to God)—Scotus intends to grant God absolute and arbitrary power over the ordering of human-to-human relationships. Looked at another way, however, Scotus's position opens the door to a thoroughly anthropocentric human-to-human morality. Although Scotus means to intensify the theocentric frame, his positing of a realm of human-to-human relationships that does not intrinsically reflect the ordering pattern of divine *ecstasis* means that God could command, as the moral norm for human-to-human relationships, self-cleaving as easily as self-giving. The human-to-human no longer fully participates in the human-to-God. Thus the path is open to the kinds of anthropocentric solutions that Kant and Thiel propose—or so I will suggest.

5.2 Aquinas and Scotus on the Natural Law: Can the Natural Law Be Changed?

5.2.1 Thomas Aquinas

Can the natural law be changed? Aquinas answers in the affirmative—if what is meant by "changed" is to receive additions. As he points out, while one cannot hold that "whatever is contained in the Law and the Gospel belongs to the natural law," one can affirm that "whatever belongs to the natural law is fully contained" in the Law and the Gospel.[12] God does not intend the natural law to stand on its own; a

[12] I–II, q. 94, a. 4, ad 1.

higher participation in the eternal law (i.e. in God's plan for ordering human action, in his providence, to its fulfillment) is possible through divine law. Divine law, comprising the Mosaic law and the Gospel of Christ, contains "many things that are above nature."[13] It would not do to imagine the natural law as a closed-off system of relatively autonomous morality, since the natural law belongs within the revealed divine law, and has its ultimate intelligibility and value in that context. Emphatically, then, Aquinas affirms that the natural law can be, and is, "changed" in the sense of having other precepts (above the capacity of merely natural powers) added to it.

Yet, the natural law, while "changed" by being integrated into a gratuitous and supernatural human teleology, is internally *unchanged*. In its deepest sense, the natural law cannot be changed, even by God. This is so, says Aquinas, because the natural law is the rational creature's participation in the eternal law, God's wise ordering of creation to its ultimate end. This participation is intensified, not revised, by the gift of a supernatural end. The natural capacities are expanded and enhanced so as to participate in Trinitarian communion, not cut off and redirected in a different direction. In affirming this unchangeability of the natural law, Aquinas appeals to the Church's moral practice as codified in the canon law of his day: "It is said in the Decretals (*Dist*. v): *The natural law dates from the creation of the rational creature. It does not vary according to time, but remains unchangeable*."[14]

Opposed to canon law, however, appears to be the authority of divine revelation in Scripture. Like any reader of the Old Testament, Aquinas is well aware of this rather alarming problem: "Further, the slaying of the innocent, adultery, and theft are against the natural law. But we find these things changed by God: as when God commanded Abraham to slay his innocent son (Gen. xxii. 2); and when he ordered the Jews to borrow and purloin the vessels of the Egyptians (Exod. xii. 35); and when He commanded Osee [Hosea] to take to himself *a wife of fornications* (Osee i. 2)."[15] It would seem that, if the natural law is a pattern of just human action, God himself teaches particular human beings to violate the natural law, to act in an unjust manner. Someone who teaches others to commit injustices would himself be unjust. Aquinas, however, knows that God cannot be unjust—and thus the dilemma which we have already seen in Kant and, in a different way, in Thiel.[16]

In an effort to resolve this dilemma, Aquinas distinguishes human reason as ordered to universal truths (speculative reason) from human reason as ordered to operation or activity (practical reason). While not cut off from speculative reason, law falls into the latter category. For reason in its speculative mode, the principles and conclusions are the same for all people, although the conclusions are not known by all. Similarly, reason in its practical mode relies upon unchangeable first principles that are known by all. But reason in its practical mode leads to diverse conclusions from these general principles, since right reason as regards

[13] Ibid.

[14] I-II, q. 94, a. 5, *sed contra*.

[15] I-II, q. 94, a. 5, obj. 2.

[16] See I, q. 21, a. 1.

action differs depending upon the situation. Aquinas observes, for instance, that from the principles of the natural law one should conclude to the precept that "goods entrusted to another should be restored to their owner," but in fact this conclusion (unlike conclusions of the speculative reason) does not hold in all cases: "it may happen in a particular case that it would be injurious, and therefore unreasonable, to restore goods held in trust; for instance if they are claimed for the purpose of fighting against one's country."[17] The general principles of the natural law are thus unchangeably the same for all people, but the conclusions that follow from these principles admit exceptions in certain circumstances, in order to enable the person to attain the ends recognized in the general principles.

This distinction between general principles and conclusions assists Aquinas in affirming the natural law as regards difficult biblical cases such as the Aqedah (Genesis 22), once the distinction is understood within a fully theocentric framework. In the natural law, God is the lawgiver. As Aquinas says, "properly speaking, none imposes a law on his own actions."[18] Human beings are subject to the law of God, God's wise plan for the right ordering of human action to humankind's ultimate end. In promulgating the law to human beings, God "imprints on man a directive principle of human actions."[19] This imprint of the eternal law, inscribed in the metaphysical constitution of human beings, is present in two ways in accord with the body-soul unity of the human person:

> There are two ways in which a thing is subject to the eternal law…: first, by partaking of the eternal law by way of knowledge; secondly, by way of action and passion, i.e., by partaking of the eternal law by way of an inward motive principle: and in this second way, irrational creatures are subject to the eternal law….But since the rational nature, together with that which it has in common with all creatures, has something proper to itself inasmuch as it is rational, consequently it is subject to the eternal law in both ways; because while each rational creature has some knowledge of the eternal law, as stated above [I-II, q. 93, a. 2], it also has a natural inclination to that which is in harmony with the eternal law; for *we are naturally adapted to be the recipients of virtue* (*Ethic*. ii. 1). Both ways, however, are imperfect, and to a certain extent destroyed, in the wicked.[20]

The key point here is that "natural law" does not place human beings in the role of giving the law to themselves. Aquinas points out earlier, "Human reason is not, of itself, the rule of things: but the principles impressed on it by nature, are general rules and measures of all things relating to human conduct, whereof the natural reason is the rule and measure, although it is not the measure of things that are from nature."[21] Right reason governs human action, but does so not as first receiving "the principles impressed on [human reason] by nature" which contain the "general rules and measures of all things relating to human conduct." The true lawgiver is God,

[17] I–II, q. 94, a. 4.

[18] I–II, q. 93, a. 5.

[19] I–II, q. 93, a. 5, ad 1.

[20] I–II, q. 93, a. 6.

[21] I–II, q. 91, a. 3, ad 2.

and the way that the human being participates in the law (as opposed to participating in the lawgiving, which is the task of human positive law) is the natural law.

Of course, human rational participation is a share in God's providence—as a sharing in God's eternal law—that enables human reason to govern human action and thus to be "provident both for itself and for others."[22] Yet this human practical reason or providence does not *constitute* the principles of the natural law: "the light of natural reason, whereby we discern what is good and what is evil, which is the function of the natural law, is nothing else than an imprint on us of the Divine light."[23] This imprint of God's reason inclines us naturally, in our very rationality, toward what is good for our fulfillment as human beings. Our rational perception of a hierarchical ordering of goods that our metaphysical constitution (body-soul) inclines us to pursue is the working out of the divine imprint.[24] A law, as Aquinas says, is "nothing else than a dictate of reason in the ruler by whom his subjects are governed."[25] As regards the natural law, the "ruler" is God.

If God is the ruler, what about human suffering and death? Aquinas grants that God, as the wise ruler of human beings, may exact just punishment upon human beings who merit such punishment at such a time that God deems befits his plan for human ordering to the ultimate end. Since the punishment of human sin is suffering and death—a punishment intrinsic to the crime, because sin pridefully turns away from the source of life—God can punish sinners by no longer sustaining in being their earthly lives; indeed all sinners undergo this punishment at some time or another in God's providential plan. Aquinas explains, "All men alike, both guilty and innocent, die the death of nature: which death of nature is inflicted by the power of God on account of original sin, according to 1 Kings ii. 6: *The Lord killeth and maketh alive*."[26] Just as the natural law can at times require killing in order to fulfill justice (e.g., in defense of a community under attack), so also God, in his wisdom and goodness, can directly require killing. God is not thereby exacting an unjust penalty. Similarly, God, as the creator and governor of the universe, is the true owner of all things. He can re-allocate things without there being an injustice: one cannot steal from oneself.

Along these lines, Aquinas engages Genesis 22, Exodus 12, and other difficult biblical texts. Because God knows the good end toward which he is moving human creatures, he can justly command the killing of Abraham's child born under the penalty of sin—although by no means does God in fact will Abraham to go through with this sacrifice. Likewise God can justly command the Hebrews in Exodus 12 to take and keep what belongs ultimately not to the Egyptians, but to God. So, too, God has ordained the union of man and woman in marriage, by which the human species endures and flourishes. These ends of the human species, in the plan of God,

[22] I–II, q. 91, a. 2.

[23] Ibid.

[24] See I–II, q. 94, a. 2.

[25] I–II, q. 92, a. 1.

[26] I–II, q. 94, a. 5, ad 2.

may by God's command be achieved outside of the marital bond without the commission of a sin. In other words, marriage, life, and material possessions all belong to God's ordering of human creatures to their proper flourishing. God can accomplish his wise ordering *directly* without overturning the natural law. The general principles of the natural law—principles defined by the goods pertaining to God's ordering of human creatures to union with God—do not change. But "in some particular cases of rare occurrence,"[27] God may, at the level of secondary precepts flowing from the first principles, command that human persons enact directly the good ordering that God wills, in ways that human persons could not justly act on their own behalf.

For Aquinas, therefore, what is at stake in these biblical passages is the status of the natural law as a participation in the eternal law. The natural law does not have an integrity that, as it were, stands on its own. Rather the natural law is human rational *participation* in God's eternal law or wise ordering of all things to their fulfillment. As such, natural law does not exhaust the ways in which God can communicate the eternal law. Aquinas affirms that God cannot change the natural law as regards the goods that befit human happiness and toward which human beings are thus, in a hierarchically ordered fashion, inclined. To *change* these goods—as opposed to adding new goods—would be to destroy human nature. Yet, attaining these goods directly is possible for the creator and lawgiver whose goods they are. God can order things to their ends in a sovereign manner, without overturning justice. What would be theft for a man on his own authority, is not so when commanded by God: God ordains the distribution of material possessions toward the ultimate end of human union with God. What would be murder for a man on his own authority, is not when commanded by God: God ordains the ending of life likewise toward the ultimate end. What would be unjust sexual intercourse for a man on his own authority, as outside licit marriage bonds, is not when commanded by God: God ordains the union of man and woman toward the ultimate end of human union with God.

This account of reality is, of course, radically theocentric. God is sovereign over all the goods toward which the natural law directs the human person. In his eternal law, God wisely orders these goods. God cannot overturn or change these goods, which would be to obliterate human nature, and so the first principles of the natural law are unchangeable. However in rare cases God can change the secondary principles or conclusions that indicate the ways of rightly attaining the goods, without thereby denying the general truth of the secondary principles. God can do this because, as the sovereign giver of all the goods, God can distribute them justly and wisely in ways that human beings could not do on their own authority, since human beings (unlike God) do not have authority over the goods. God has authority, in his goodness and wisdom, over the distribution of human goods: this follows from the doctrine of the eternal law. Natural law participates in, rather than displacing or rivaling, God's authoritative ordering.

[27] Ibid.

5.2.2 *Duns Scotus*

In seeking to work out a doctrine of natural law, Scotus begins by questioning Abraham. Although he finds a certain senselessness to Abraham's near-sacrifice of Isaac, he celebrates this apparent senselessness as divine "sense." Scotus summarizes the problem as he sees it: "My question then is this. Granted that all the circumstances are the same in regard to this act of killing a man except the circumstances of its being prohibited in one case and not prohibited in another, could God cause that act which is circumstantially the same, but performed by different individuals, to be prohibited and illicit in one case and not prohibited but licit in the other?"[28] In Scotus's view, this is exactly what God has done in Abraham's case.

For Abraham in the case of the near-sacrifice of Isaac, God makes licit the killing of the innocent. The apparent senselessness arises from the fact that the same God also commands, in the Decalogue, "You shall not kill" (Exodus 20:13, Deuteronomy 5:17). This apparent senselessness is compounded by Scotus's refusal to appeal to distinctions between "murder" and justified killing, e.g. in self-defense. He notes that the typical manner of "explain[ing] away those texts where God seems to have given a dispensation….is to claim that though a dispensation could be granted to an act that falls under a generic description, it could never be given insofar as it is prohibited according to the intention of the commandment, and hence would not be against the prohibition."[29] In Scotus's view, the problem with such efforts to explain away difficult cases based upon dispensations in certain circumstances is that they cannot account for cases such as Abraham's, which involve God's command to kill the innocent. For Scotus, the case of the Aqedah is no mere isolated incident, but one among "many other instances" in which God commands, as licit, acts of killing that elsewhere, in the same circumstances, God prohibits as illicit.[30]

Aquinas, we recall, argues that all human life belongs to God and deserves the punishment of death; God can righteously carry out this punishment through human instruments without causing them to violate the commandment "You shall not kill," which proscribes unjust killing. For Aquinas, the commandment "You shall not kill" belongs to the unchangeable natural law, because it flows from God's eternal law for the ordering of human action to human fulfillment in union with God. God does not dispense Abraham from the commandment, but instead God, through Abraham, justly requires what is God's own. In contrast, Scotus focuses on Abraham's action. Rather than beginning with God's action and accounting for Abraham's action instrumentally, Scotus begins with Abraham's action—his acceptance of God's command to kill his child Isaac. Scotus does not place Isaac into the context of the relational ordering of creature to Creator, in which ordering Isaac's life is from God and under the penalty of sin. Rather, Scotus asks how Abraham, if God unchangeably commands to all persons "You shall not kill," could justly will to kill his child.

[28] Scotus (1997), 200–201, from Scotus, *Ordinatio* III, suppl., dist. 37.

[29] Ibid., 200.

[30] Ibid., 201.

Abraham, Scotus suggests, could not justly do it even if commanded by God—unless God also dispensed Abraham from the commandment "You shall not kill." No dispensation could be possible if the commandment belongs to the unchangeable natural law.

Scotus therefore reasons that "You shall not kill" does not belong to the unchangeable natural law. The unchangeable natural law, he reasons, commands that which "has a formal goodness whereby it [what is commanded] is essentially ordered to man's ultimate end, so that through it a man is directed towards his end" and prohibits that which "has a formal evil which turns one from one's ultimate end."[31] The first two precepts of the Decalogue, "You shall not have other gods before me" and "You shall not take the name of the Lord, your God, in vain," belong on this account to the unchangeable natural law. These precepts order human beings directly toward their end, God. To disobey these precepts would be, under any terms, to cut oneself off from God. As regards the status of third precept of the Decalogue, "Remember the sabbath day, to keep it holy," Scotus is somewhat in doubt, because he wonders whether being ordered to God as one's end requires worshipping God at this or that particular time, rather than at another time.

The other seven commandments of the Decalogue, Scotus argues, do not possess strict necessity as regards attaining God as one's ultimate end. Having affirmed the first two commandments of the Decalogue (those about God) as necessarily following from the "first practical principles known from their terms"[32] and thereby as unchangeable natural law, Scotus points out that the last seven commandments (known as the "precepts of the second table"[33]) can be dispensed with without necessarily causing the person to fail to attain the ultimate end. Although Scotus does not say, one assumes that only God can issue such a dispensation, because these seven commandments "are exceedingly in harmony with that [natural] law"[34] expressed by the first two commandments. This harmony is such that, "speaking broadly," one can conceive of the entire Decalogue as belonging to the natural law. By means of this broad sense, Scotus is able to avoid disagreeing with canon law that, as Aquinas observed, held that the moral precepts of the Decalogue belong to the unchangeable natural law.

Speaking in a strict sense, however, Scotus holds that the last seven commandments of the Decalogue "contain no goodness such as is necessarily prescribed for attaining the goodness of the ultimate end, nor in what is forbidden is there such malice as would turn one away necessarily from the last end."[35] To take the example of "You shall not kill" (Scotus himself employs other examples), even the killing of the innocent does not necessarily constitute such a malicious deed that it cuts one off from God. One can only be cut off from God by directly turning away from one's

[31] Ibid., 200.

[32] Ibid., 202.

[33] Ibid., 203.

[34] Ibid.

[35] Ibid., 202.

obligations to God. The commands that have to do with other human beings cannot therefore be of the same import as the commands regarding God. As Scotus says about the last seven commandments, "even if the good found in these maxims were not commanded, the last end [of man as union with God] could still be loved and attained, whereas if the evil proscribed by them were not forbidden, it would still be consistent with the acquisition of the ultimate end."[36]

These are strong words, no matter with what qualifications one takes them. Could God really make murder not intrinsically and as such an impediment one's ability to attain to eternal life in union with God? Scotus's argument is premised on the fact that the killing of the innocent has as its object human beings, whereas in contrast the first two commandments of the Decalogue "regard God immediately as object."[37] As an objection to his position, he cites two biblical passages: Romans 13:9, "The commandments, 'You shall not commit adultery, You shall not kill, You shall not steal, You shall not covet,' and any other commandment, are summed up in this sentence, 'You shall love your neighbor as yourself'" and Matthew 22:37–40, "And he [Jesus] said to him, 'You shall love the Lord your God with all your heart, and with all your soul, and with all your mind. This is the great and first commandment. And a second is like it, You shall love your neighbor as yourself. On these two commandments depend all the law and the prophets."[38] It would seem, Scotus remarks, that these biblical passages, the words of the Apostle Paul and of Jesus Christ himself, inseparably unite love of God (the "first table" of the commandments of the Decalogue) and love of neighbor (the "second table"). Were this the case, then Scotus's view that the last seven commandments of the Decalogue are not strictly unchangeable natural law, but rather are dispensable precepts that nonetheless possess a significant harmony with the commandments of the unchangeable natural law (i.e. the first two commandments pertaining to God), would be untenable. If love of God cannot be separated from love of neighbor, then the Decalogue's commandments about how to treat other human beings would belong just as strictly to the natural law as would the Decalogue's commandments about God. The ultimate end (God) would in a strict sense necessarily be lost not only by disobeying the commandments that pertain directly to God, but also by disobeying the commandments that pertain to how to treat human beings.

To this challenge to his position, Scotus offers three replies. First, he proposes that while the prohibition against hating God pertains strictly to the natural law, the command to love God (Matthew 22:37) does not. This is so because "[j]ust when one is required to love God is not clear,"[39] as Scotus had also argued in regard to the commandment about the sabbath. In other words, hating God clearly cuts one off from the ultimate end, but actively loving God need not always be done in order to attain human fulfillment in the ultimate end. On this view, actively loving God is not

[36] Ibid.

[37] Ibid.

[38] See ibid., 204.

[39] Ibid., 205.

commanded by the natural law. Actively loving one's neighbor, then, would not belong strictly to the natural law either. Second, Scotus points out that God may be permitting the damnation of one's neighbor. We would not want to love the neighbor any more than God loves the neighbor. As Scotus puts it, "it is not necessary that I will this good for another, if God does not want to be the good of such, as when he destines one and not the other, wishing to be the good of the former but not of the latter."[40] In other words, the commandment that we love our neighbor in particular ways could not belong strictly to the natural law if God himself, in willing the ultimate end, does not will to include the neighbor in God's love. Loving God does not mean that we have to love someone whom God, by withholding grace, does not love.

These two points possess a certain logical rigor but may not be particularly theologically attractive. It should be pointed out, then, that Scotus's goal is not to demonstrate either of the above two points. Rather he wishes to demonstrate that the Decalogue's commandments about love of neighbor do not strictly pertain to the natural law, because ultimately the natural law consists simply in what brings us to attain our end in God. The natural law is ultimately about God, and God can and does, when he wishes (e.g., Abraham), release human beings from the performance of the other commandments of the Decalogue. Scotus's position thus has two aims: to retain the absolute primacy and priority of God, and to account for the divine contradictions to the last seven commandments of the Decalogue that Scotus finds in the biblical record. Given the primacy of God, for Scotus active love of God need only occur when God wills that it should, and this will can vary; and similarly active love of neighbor need only occur when God himself wills love for the neighbor, and (given the predestination of some) this varies from neighbor to neighbor. The only unvariable element, which thus pertains to the natural law, is that we must not hate God, and must not hate his order of predestination.

Scotus gives a third reply. He argues that one could "want my neighbor to love God as I ought to love him (which would be a kind of necessary conclusion from the practical principles) and still…not will him this or that good pertaining to the second table, since the latter is not a necessary truth."[41] In other words, even were it strictly necessary to love one's neighbor as oneself in order to attain the ultimate end, that necessity would not mean that the last seven commandments of the Decalogue were strictly necessary in the way that the commandments pertaining to God (at least the first two) are. One need not will as regards one's neighbor that he not be killed—one might even will that he be killed—in order to will that one's neighbor should love God properly. On this argument, "corporeal life or conjugal fidelity, and so on" are not the crucial thing.[42] Even should one wish to deny one's neighbor one of these earthly aspects, these earthly aspects are not necessary. The only necessary thing is union with God.

[40] Ibid.

[41] Ibid., 206.

[42] Ibid.

This reply makes particularly clear Scotus's focus upon the primacy and priority of God, who alone is necessary for human fulfillment and who thereby alone is the subject of commandments that strictly belong to the natural law. Once this is established, Scotus is perfectly willing to grant that "one could say to the quotations from Paul and Christ that God has now explained a higher love of neighbor that transcends that which is included in, or follows from, the principles of the law of nature."[43] God can certainly command that we do more than what is strictly necessary, in order to show our love for him. On the basis of natural law, Scotus holds, love of neighbor can only extend to loving the neighbor as God loves him and willing for him what God wills for him (perhaps not much). But if God so commands, as seems for Scotus to be the case in the New Testament, then the love of neighbor can be extended to include "willing him these other goods, or at least not wishing him the opposite evils, such as not wanting him to be deprived unjustly of corporeal life, or conjugal fidelity, or temporal goods, and the like."[44] So long as these goods are not at the same level as God in terms of the natural law, Scotus gladly includes them: "the Lawgiver intended the love of neighbor to be observed according to the precepts of the second table."[45]

The precepts regarding human-to-human relationships, in short, are not natural law, but they are the will of the Lawgiver. This will can change; the Lawgiver can will to dispense with them in particular cases. Scotus compares God's power over these precepts to that of human legislators in relation to positive law: "This is also the way any legislator dispenses unconditionally when he revokes a precept of positive law made by himself. He does not allow the prohibited act or precept to remain as before, but removes the prohibition or makes what was formerly illicit now licit."[46] These precepts, in short, while in general harmony with the natural law precepts regarding God, can be, when God decrees, simply removed. There is nothing intrinsic to the relationship of human beings with God that *requires* human beings not to kill innocent human beings. If God so chooses, killing innocent human beings can be an act that fully accords with worshipping and honoring God (that is, in accord with the proper precepts of the natural law). Scotus is not saying that God wills such dispensations frequently. But because of the radical difference posited by Scotus between the precepts that have to do with God, and those that have to do with other human beings, he concludes that no act toward another human being is absolutely bound up in one's relationship with God.

On this basis he interprets the case of the Aqedah and the other cases cited by Aquinas:

> To kill, to steal, to commit adultery, are against the precepts of the decalogue, as is clear from Exodus [20:13]: 'You shall not kill.' Yet God seems to have dispensed from these. This is clear in regard to homicide from Genesis 22, regarding Abraham and the son he was

[43] Ibid.

[44] Ibid.

[45] Ibid.

[46] Ibid., 201.

> about to sacrifice; or for theft from Exodus 11:[2] and [12:35] where he ordered the sons of Israel to despoil the Egyptians, which despoilment is taking what belongs to another without the owner's consent, which is the definition of theft. As for the third, there is Hosea 1: 'Make children of fornications.'[47]

For Scotus, Genesis 22 involves the planning, at the command of God, of a murder. Murder, while generally illicit, is not in his view strictly illicit. God can make murder licit, because ultimately one's relationship to God does not depend upon how one treats other people, so long as one remains obedient to God. It is worth noting again that Scotus by no means denies that murder is generally illicit, generally disharmonious with the natural law precepts regarding God. They are disharmonious because God wills them so. In this fashion Scotus interprets Romans 7:7, where Paul states that "if it had not been for the law, I should not have known sin. I should not have known what it is to covet if the law had not said, 'You shall not covet.'" Scotus observes on this passage that corrupt minds, ignorant of God and his law, require both God's existence and ethical norms to be revealed. For this reason God reveals to Israel (and thus to Paul) that "such sins of lust are prohibited by the second table."[48]

Although the prohibitions are not for Scotus absolute, since he has unhinged them from the commandments regarding God, nonetheless they are absolute when God wills them, which is almost always. Scotus's concern is to elevate and prioritize God, not to unleash antinomianism in human beings. In this regard, he adds a ringing affirmation that "in every state [from the state of innocence to the state of glory] all the commandments have been observed and should be observed."[49] He also takes pains to minimize the number of divine dispensations from the second table. The despoiling of the Egyptians, for instance, need not be theft. What was taken could be considered as the rightful wages of the enslaved children of Israel, and moreover, as Aquinas likewise argues, "Since God was the higher owner, he could have transferred the ownership of these things, even if the lower 'owners' were unwilling."[50] As we have seen, too, Scotus grants in a broad sense that the commandments of the second table belong to the "natural law," although strictly speaking they do not. In general, people should act as though these commandments do belong to the natural law, because they are God's commandments and they are harmonious with worshipping and honoring God (that is, the natural law strictly speaking). Few dispensations from the commandments regarding other human beings can be found. Yet because of the transcendence of God, worshipping and honoring him are not on the same level as actions pertaining to human beings. God can will that a particular act of murder be morally good, but God cannot will that not worshipping or not honoring him be morally good.

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[47] Ibid., 199.

[48] Ibid., 207.

[49] Ibid.

[50] Ibid.

In Scotus's view, as noted above, the gospel adds something to what is owed in love of neighbor. Beyond loving our neighbor as God loves him (perhaps not much), the gospel adds "willing him these other goods, or at least not wishing him the opposite evils, such as not wanting him to be deprived unjustly of corporeal life, or conjugal fidelity, or temporal goods, and the like."[51] Scotus is thereby able to affirm, with certain limitations, Jesus' statement regarding love of God and love of neighbor fulfilling "all the law and the prophets" (Matthew 22:40). As Scotus puts it, "the whole law—so far as the second table and the prophets are concerned—depends on this commandment: 'Love your neighbor as yourself,' again understanding this not as something that follows of necessity from the first practical principles of the law of nature, but as the Lawgiver intended the love of neighbor to be observed according to the precepts of the second table."[52] The key is the will of the Lawgiver, God. Scotus recognizes that God wills, in general, that the commandments of the Decalogue regarding one's neighbor be observed. He also recognizes that in the gospel God wills that one's neighbor be loved, not only so much as God loves him, but even as one loves oneself. These commands of God are immensely important for Scotus. His insistence on the radical distinction between the "first table" and the "second table" intends to ensure, however, that the commandments of the second table receive obedience as *God's* commandments, rather than as something within human nature that compels God or that is strictly linked with worshipping and honoring God.

5.3 Concluding Reflections

Taking seriously the biblical claim that the just punishment of original sin is death (e.g., Genesis 3:19; Romans 5, 6:23, 8:2; 1 Corinthians 15; 2 Corinthians 1; Hebrews 2), Aquinas observes, "All men alike, both guilty and innocent, die the death of nature: which death of nature is inflicted by the power of God on account of original sin, according to 1 Kings ii. 6: *The Lord killeth and maketh alive*."[53] As we have seen, for Aquinas, since all things are participated and received from God, there is no autonomous possession by creatures of anything. Rather, God primarily possesses all things and can justly redistribute all things. Moreover, God can do so by acting through human causes. Aquinas therefore argues that the Aqedah cannot be read as if God were commanding Abraham to perform a homicide. God's command signals that even Isaac, the child of the promise, the long-awaited heir to the great covenant, is utterly in God's hands; the promise and the covenant do not become autonomous possessions of human beings. This, then, is no murderous command, and Abraham is implicated in no murderous intent. Without turning

[51] Ibid., 206.

[52] Ibid.

[53] I–II, q. 94, a. 5, ad 2.

from the natural law, Abraham obeys the source of the natural law, who commands the due punishment of death—without intending to exact it. God is the primary agent in Genesis 22.

Scotus, too, reads God as the agent in Genesis 22. Yet Scotus holds that God does indeed command a homicide, and that Abraham's actions can only be construed as murderous. Murder does not always, on this view, separate a human being from the God whom he or she worships and reveres. On the contrary, sometimes God wills the murder of human beings, the killing of the innocent. For Scotus, the commandment "You shall not kill" is not intrinsically bound to the commandments regarding God, and so the injunction against murder does not strictly speaking belong to the natural law. The natural law includes only those principles and conclusions of practical reason which are necessarily true,[54] and only those principles and conclusions which pertain directly to worshiping and revering God are necessarily true, because God can and does dispense with precepts that order human beings to each other. Scotus thereby secures the radical difference between God and the created order.

Scotus and Aquinas agree in their accounts of natural law that the main agent is God. They differ as regards whether Abraham and God are implicated in homicidal actions, and they differ as regards whether homicide is strictly and unchangeably against the natural law. Ultimately, of course, the key is that Aquinas views Abraham differently than does Scotus. For Aquinas, God's agency lies at the heart of human moral action, and so God's ordering of Isaac's death toward the just end of punishment suffices to make Abraham's action, as commanded by God with this ordering in mind, not murderous. Scotus, on the other hand, does not try to justify Abraham's actions vis-à-vis Isaac from within a framework of law. Rather, he argues that there is no ordering of human actions vis-à-vis other human beings (no "law") that intrinsically pertains to human ordering to the ultimate end. For Scotus, when God wills murderous action on the part of an agent, such action does not divert the agent from the agent's ultimate end, union with God.

What Scotus has done, in short, is effectively to disjoin God's law (as opposed to God's will) from human action vis-à-vis other human beings. God's law, as expressed in natural law, now pertains solely to human action vis-à-vis God. Once conceived as independent of God's law—an autonomy strictly limited in Scotus by God's will which human beings are required freely to obey—human action vis-à-vis other human beings takes on two central aspects. First, God's intrinsic connection with human moral action is weakened. It becomes difficult to conceive of Abraham as anything but an autonomous agent whose actions, on their own terms, are simply homicidal. Second, the intrinsic meaningfulness of human action vis-à-vis other human beings is called into question.

To return to where we began, I would suggest that one can see the working out of these two problems in later thinkers such as Kant and Thiel. Where Scotus gives to the "second table" autonomy from God's law, though not from God's will, Kant conceives natural law solely as an autonomous human construction by practical

[54] Cf. Duns Scotus (1997), 199.

reason. No other mode can be credible: for Kant God's supposed communication of law by other modes "can be asserted only on the basis of historical documents and is never apodictically certain. After all, the revelation has reached the inquisitor only through men and has been interpreted by men, and even did it appear to have come to him from God himself (like the command delivered to Abraham to slaughter his own son like a sheep) it is at least possible that in this instance a mistake has prevailed."[55] Kant's approach gives to human practical reason the governing role possessed in Aquinas's account by God's eternal law. Correspondingly, Kant cannot conceive that the killing of Isaac, had it happened, could be anything other than homicide, because he lacks Aquinas's understanding of God's authority over the goods of the created order, including the good of covenantal life.

If Kant displays the first problem Scotus's position raises, namely the autonomy from God's law of human actions vis-à-vis other human beings, Thiel particularly exhibits the second problem. For Thiel, the world of human action, marked by suffering and death, has lost its order and intelligibility. God can give meaning to this world only extrinsically, by means of an eschatological promise indicating his will to restore all things at the end of time by means of the general resurrection. On this view natural law takes on an eschatological hue, since God's ordering is entirely bound to his will to resurrect human beings at the end of time. The present life is not marked by a divine order other than the divine promise or will in Jesus Christ to bring about order eschatologically. Kant's Enlightenment confidence in human practical reason's ability to discern a moral ordering disappears in Thiel, for whom both human and divine ordering have been defeated by the chaos of suffering and death. A doctrine of natural law could hardly be possible in such a framework, since there is no efficacious lawgiver (God or man). Thus whereas Kant decries the near-sacrifice of Isaac as utterly and unavoidably senseless, Thiel decries all death as utterly senseless. Like Kant's practical postulate, though in an explicitly Christian mode, Thiel hinges everything upon the world to come.

Kant and Thiel, then, represent two modes of anthropocentric thought regarding the ordering of human action in this world—Kant profoundly confident, Thiel not. By contrast, Aquinas and Scotus offer two modes of theocentric natural law thought. But Scotus is theocentric to a point, at which he stops in order to preserve God's absolute freedom and transcendence. By claiming that human actions vis-à-vis other human beings do not participate in the ordering-to-God expressed by human actions vis-à-vis God, Scotus refuses to allow the theocentric ordering to go "all the way down"; the ordering, as regards human-to-human actions, remains extrinsic. Human-to-God *ecstasis*, on this view, is not mirrored by human-to-human *ecstasis*. Scotus's limited form of theocentric natural law generates a strong sense of an autonomous human realm (however answerable to the divine will), in which human-to-human actions have no intrinsic ordering, and human nature (outside the will) is not intrinsically teleologically ordered to God. Lacking an intrinsic "ecstatic" ordering, human relationships come to be seen as fundamentally based upon power rather than wisdom.

[55] Kant (1960), 175.

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Chapter 6
Natural Right and Coercion

Ana Marta González

6.1 Introduction

The idea of a natural right is usually contrasted with that of a legal right: while the latter is based on human conventions, the former is based on nature. A lot depends, however, on the way we understand this reference to "nature".

In what follows, my aim is to explore to what extent, Kant's account of natural right allows us to include him among natural law theorists. To this end, I will focus on the reasons he offers for the institution of the State, for they show the systematic relevance of natural right in Kant's legal theory. Indeed, Kant's natural right is the ultimate source for legitimating the coercive power of the State. In turn, Kant's own definition of right, insofar as it entails a reference to coercion, opens up the question of the possibility of coercion in absence of a state.

However, in order to contextualize this issue, I will first begin by providing the reader with a short background of the different conceptual approaches to the issue of natural right, as well as of the different implications of those approaches.

Since justice is supposed to regulate human relationships, any reference to natural right is to be understood in terms of the right that naturally emerges from human relationships, previous to or independently of further conventions. Still, in the history of law a basic discrepancy in understanding "what naturally emerges from human relationships" exists and, as a result, two conflicting approaches to natural right have influenced political reflection.

In the first book of the *Republic*, Plato conveys one of those approaches in the voice of Thrasymachus, for whom natural right is ultimately the right of the stronger: this view—which resembles the one defended by Callicles in Plato's *Gorgias*—involved the consideration that all justice was the result of agreements. Antiphon[1]

[1] See "Antiphon", 5, in Ziegler (1964), 398.

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also held this position and it is further present in the account that his disciple, Thucydides, gave of the attitude of the Athenians' attitude in the dialogue with the Melians during the Peloponnesian War: "you know, as well as we know that what is just is arrived at in human arguments only when the necessity on both sides is equal, and that the powerful exact what they can, while the weak yield what they must".[2]

Against this view of natural right, Plato himself considered that the natural thing for humans is to act according to what is rational, not merely in strategic, but also in moral terms. Of course, this approach necessarily involves the view that there is a kind of reason beyond merely strategic reason and that acting on principle is different from acting on consequences. Human beings act according to their rational nature when they are aligned with their moral vocation.

Against these two opposed views of natural right Aristotle's position represents perhaps a middle term. For him, natural right is certainly something belonging to reason. Yet, at the same time, Aristotle places natural right within the context of the polis: "What is politically just divides into the natural and the legal" (NE, V, 7).

For Aristotle, natural right is embedded in political life. Natural right is not something existing before or apart from political life, but rather is something that inspires political life and legal right. This approach, of course, is consistent with Aristotle's characterization of the human being as a political animal. Yet it also suggests that, in order to be *effective*, natural right has to be embedded in a political context. Unless there is a political frame which guarantees equality and freedom, natural justice in human relationships would be very difficult to achieve. Thus, while retaining Plato's basic idea of natural right as something belonging to reason, Aristotle also takes into account the factual conditions for its effectiveness, which are provided by the *polis*.

In his Commentary *to Nicomachean Ethics*, V. 7, for instance, Thomas Aquinas notes the discrepancy between Aristotle's view and that of Roman lawyers on this subject: unlike Aristotle, Roman lawyers took natural right simply in contrast with civil right.

Aquinas himself tried to make sense of those different divisions, by noting that Aristotle took "right" from the perspective of the agent, who is the citizen of a given state, while Roman lawyers took it from the perspective of cause.[3] So, while certain

[2] Thucydides (1965), 159.

[3] "Dicitur ergo primo, quod politicum iustum dividitur in duo: quorum unum est iustum naturale, aliud est iustum legale. Est autem haec eadem division cum divisione quam iuristae ponunt, scilicet quod iuris aliud est nautrale, aliud est positivum. Idem enim nominant ius, quod Aristoteles iustum nominat. Nam et Isidorus dicit in libro Etymologiarum, quod ius dicitur quasi iustum. Videtur autem esse contrarietas quantum ad hoc, quod politicum idem est quod civile; et sic id quod apud Philosophum ponitur ut divisum, apud iuristas videtur poni ut dividens, nam ius civile ponunt partem iuris positive. Sed attendendum est, quod aliter sumitur politicum vel civile hic apud Philosophum et aliter apud iusristas. Nam Philosophus hic nominat politicum iustum vel civile ex usu, quo cives utuntur; iuristae autem nominant ius politicum vel civile ex causa, quod scilicet civitas aliqua sibi constituit. Et ideo hoc convenienter a Philosopho nominator legale, idest lege positivum, quod et illi dicunt positivum. Convenienter autem per haed duo dividitur iustum politicum. Utuntur enim cives et iusto eo quod natura menti humane indidit, et eo quod est positum lege". Aquinas (1964), In L. V, 1., lectio XII, nn. 1016, 1017. See González (2006), chapter 4.

iura have their origin in conventional laws, others have their origin in natural relations. In Aquinas' view, there should not be a real difference between both approaches as long as we take "nature" as human specific nature, that is, as a rational nature, for rational beings are social in ways qualitatively different from animals. From this perspective, Aristotle's natural right would go beyond Roman Lawyers natural right—who often took nature as animal nature—, to include some things which the latter included among *ius gentium*, such as the fulfillment of agreements.[4]

Indeed, in Aristotle's view, human beings are not only social but *political* animals, whereby he did not mean any kind of social organization whatsoever, but rather one marked by self-sufficiency,[5] which goes beyond the satisfaction of daily needs—the task of domestic society—and aims at the development of human potentialities.[6] He actually said that human beings are "more social than bees",[7] as it is proven by the fact that they are endowed not only with voice, but with words, whereby they can talk about what is just or unjust, expedient or disadvantageous to them.[8] While to a certain extent this is also true of the home, it is actually the mark of political life. Unlike economic life—originally the life of the *oikia*—which is in a more significant way ruled by natural needs, political life allows for free opinions and discussion.[9] For sure, political life has to be organized, and can be organized in a variety of ways,

[4] "Est autem considerandum, quod iustum naturale est ad quod hominem natura inclinat. Attenditur autem in homine duplex natura. Una quidem, secundum quod est animal, quae sibi et aliis animalibus est communis. Alia autem natura est hominis, quae est proprie sibe inquantum est homo, prout scilicet secundum rationem discernit turpe et honestum. Iuristae autem illud tantum dicunt ius naturale, quod consequitur inclinationem naturae communis homini et aliis animalibus, sicut coniunctio maris et feminae, education natorum, et alia huiusmodi. Illud autem ius, quod consequitur propriam inclinationem naturae humanae, inquantum scilicet homo est rationale animal, vocant iuristae ius gentium, quia eo omnes gentes utuntur, sicut quod pacta sint servanda, et quod legati apud hostes sint tuti, et alia huiusmodi. Utrumque autem horum compehenditur sub iusto naturali, prout hic a Philosopho accipitur". Aquinas (1964) *In L. V,* lectio 12, n. 1019.

[5] "When we come to the final and perfect association, formed from a number of villages, we have already reached the polis –an association which may be said to have reached the height of full self-sufficiency; or rather (to speak more exactly) we may say that while it grows for the sake of mere life (and is so far, and at that stage, still short of full self-sufficiency), it exists (when once it is fully grown) for the sake of a good life (and is therefore fully self-sufficient). Because it is the completion of associations existing by nature, every polis exists by nature…". Aristotle, *Politics*, I, 2, 1252 b8 (Aristotle 1968).

[6] Aristotle, *Politics*, I, 2, 1252a24-1253a29.

[7] Aristotle, *Politics*, I, 1.

[8] "The reason why man is a being meant for political association, in a higher degree than bees or other gregarious animals can ever associate, is evident. Nature, according to our theory, makes nothing in vain; and man alone of the animals is furnished with the faculty of language. The mere making of sounds serves to indicate pleasure and pain, and is thus a faculty that belongs to animals in general: their nature enables them to attain the point at which they have perceptions of pleasure and pain, and can signify those perceptions to one another. But language serves to declare what is advantageous and what is the reverse, and it therefore serves to declare what is just and what is unjust. It is the peculiarity of man, in comparison with the rest of the animal world, that he alone possesses a perception of good and evil, of the just and the unjust, and of other similar qualities; and it is association in (a common perception of) these things which makes a family and a polis". Aristotle, *Politics*, I, 2, 1253 a 10.

[9] See Arendt (1958), pp. 30ff. See also Riedel (1976), pp. 125–148, p. 130.

according to a variety of regimes. In order to be political, however, it has to make room for a plurality of opinions and guarantee that decisions will be taken according to what is deemed more reasonable and not according to other considerations, such as force.

From this perspective, political institutions are set up to guarantee political life, meaning a life governed by reason, instead of by physical force. It is not that some sort of "force" is absent from political life; indeed, those in charge of government have the power to coerce the fulfilment of the laws, which preserves political life. This is actually a significant difference between the private authority of fathers and the public authority of governors.[10] Yet this power is never only "brute physical force". As a matter of fact, political power is possessed only by those people whose opinions are backed by a sufficient constituency. Surely, in Aristotle's view, the fact that a political regime is backed by a sufficient constituency, even by the majority of people, does not make it necessarily just. In order for a regime to be just, it has to aim at the common good, and not merely to the interest of those who govern—whether they are one, few, or the majority.

If Aristotle holds human beings to be political beings, it is only because, in his view, political life provides the context for human beings to flourish. This flourishing involves going beyond their private individual needs and expanding their reason into something bigger than themselves. And, for this very reason, it is reasonable to say that, for Aristotle, political society is not simply a fact, but has normative connotations. Human beings, who are social by nature, are not merely domestic beings confined to the satisfaction of private needs, but are precisely political beings, committed to the realization of a common good through words and actions. To realize this end, human beings institute political societies; they realize that "common good" insofar as they lead good human lives. And an essential part of those lives is respect for justice.

Taking natural justice as part of political justice is the same as asserting that natural justice is embedded in political life, as a sense for what is due in human relationships, in light of that common good. Surely natural justice cannot be simply derived from any specific notion of the common good which bypasses what is due in particular human relationships. Yet, those very relationships cannot find the right measure unless we see them in the light of a certain notion of a common good. This insurmountable circularity is the realm of natural right: the point of asserting a notion of natural right is to remind us that, even within a political society, what we owe to each other cannot be reduced to what has been stipulated through contracts or what has been stipulated by law.[11] While it may include those things—for, once they have been stipulated for the common good, they also have the force of natural right—it cannot be reduced to those things. Indeed, the fact that laws change is no

[10] Aristotle, NE, X, 10, 1180 a 20 (Aristotle 2002).

[11] "What is politically just divides into the natural and the legal: the natural being what has the same force everywhere, and does not depend on a decision whether to accept it or not, the legal what in the beginning makes no difference whether enacted or not, but when enacted does make a difference…". Aristotle, NE, V, 7, 1134 b 20.

argument against the existence of natural right, as long as they change in the light of a common good. Likewise, the fact that right –natural or legal- is violated does not constitute an argument against its existence.[12]

Accordingly, it is not that natural right lacks force; it does have force that is the same everywhere, but this does not prevent its consideration as part of political justice. The Aristotelian citizen is supposed to fulfil the law but also to retain his natural sense for justice. In fact, it is because of this natural sense for justice that he is ready to fulfil the law—to the extent that it serves the common good—or to criticize it when he believes that the law contradicts the common good or damages elementary relationships of justice.

Indeed, the first thing due to human beings, and hence, the first thing required by natural justice, is that sort of relationship which is at the basis of political life. In Arendt's words, there is a human right to be a citizen of any state—even if there is not a human right to be a citizen of this particular state.[13] And yet, natural right persists within political life as a source of immanent criticism.

As it has often been noted, Aristotle's approach to natural right—as something embedded in political life, even if it cannot be completely identified with any particular historical legislation—is worlds away from that of Hobbes.[14]

For Hobbes,

> the right of nature, which writers commonly call *ius naturale*, is the liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature; that is to say, of his own life; and consequently, of doing any thing, which in his own judgment, and reason, he shall conceive to be the aptest means thereunto[15] (Hobbes, Leviathan, chapter 14, p. 116).

In Hobbes view, then, natural right is an individual property, and entails no reference to the common good. Hobbesian society is the result of a contract, which simultaneously founds the state. Before the contract, there is no society; instead there is a multitude of individuals, each one with a right to everything and, therefore, at permanent risk of war. After the contract, whereby these individuals renounce their rights in favor of the sovereign, who is in charge of preserving social order and peace, those individuals constitute a commonwealth, and retain one natural right,

[12] "Some people think that all legal enactments are of this sort, on the grounds that what is by nature is unchangeable and has the same force everywhere (just as fire burns both here and in Persia), whereas they see things that are just in process of change. But in fact it is not like this, except in a way. Granted, among gods there is presumably no change at all, but among human beings, while there is such a thing as what is by nature, still everything is capable of being changed—and yet, despite this, there is room to apply a distinction between what is by nature and what is not by nature. It is clear enough what sort of arrangement, among those that can also be otherwise than they are, is by nature, and what sort is, rather, legal and the result of agreement, given that both sorts alike are changeable. And the same distinction will fit in the case of other things; for the right hand is superior by nature, and yet it is possible that everyone should become ambidextrous". Aristotle, NE, V, 7, 1134 b 25–1134 b 35.

[13] See Arendt (1951), pp. 290 ss.

[14] See Tuck (1979).

[15] Hobbes (1966), ch. 14, p. 116.

which is their only basis for denouncing the political power, namely, the right to preserve one's life. Thus, the legitimacy for the Hobbesian state is not based on its reference to a generic common good, but only on the state's ability to provide the security and peace desired by its citizens.[16]

David Hume does not speak about natural right in Hobbes' sense, if only because he does not admit the fiction of the state of nature. Nevertheless, he does speak of natural obligations in contrast with civil obligations[17]; interestingly enough, those natural obligations rest upon a certain convention that, in Hume's view, never has the form of a contract, since it is not the result of conscious acts of the will, but rather the natural product of social interaction[18] in the course of which individuals come to realize their reciprocal interest in establishing the rules for securing property as well as the possibility of satisfying their own natural acquisitive desire. Thus, what Hume calls "natural laws"[19] is comprised three basic rules: one establishing property, one that determines the way of it is transferred, and one about the fulfilment of promises.

6.2 Kant on Natural Right

In spite of his lectures on natural right throughout more than two decades,[20] and in spite of his explicit references to natural right in the *Metaphysical First Principles of the Doctrine of Right*,[21] Kant is not usually thought of as a natural right thinker. This may be due to particular doctrines, such as the rejection of a right to revolution,

[16] As Mark Murphy has argued, Hobbes does have a natural law theory, at least in the sense that he requires civil law to be consistent with natural law. However, I would insist that Hobbes' conception of natural law is completely different from that of Aquinas, for reasons in part developed by Murphy himself in his article: "Hobbes's differences with Aquinas with regard to the ultimate explanation for the consistency of the natural and the civil law are due to his rejection of Aquinas's account of goods. For Hobbes there is but one natural good that plays a role in his formulation of the precepts of the natural law, and that is self-preservation". Murphy (1995), p. 866. Now, Hobbes' emphasis on self-preservation as the defining mark of natural law represents a radical individualizing move in his theory of natural law, completely foreign to Aquinas' own conception. This individualist bent is already apparent in the definition of natural right, provided in the text, which involves a departure from the more relational account of natural right implicit in traditional natural right. See Tuck (1979).

[17] See González (2009), pp. 77–116.

[18] See Hume, T. III.2. 2; SBN, 489 (Hume 1978).

[19] Hume, T. III, 2.1; SBN, 484 ; T. III, 2.6; SBN,526

[20] See Ritter (1971); see Sharon Byrd and Hruschka's (2010).

[21] References to the Kant's *Metaphysics of Morals* will be made according the volume and page of the edition of Prussian Academy of the Sciences edition of Kant's works. It will be used the English translation by Mary Gregor, published by Cambridge University Press, 1996, reprinted 2000.

which contrasts not only with the tradition of natural law,[22] but also with some modern natural right theories.

Nevertheless, this view is changing,[23] and with good reason. Kant's view of natural right retains and combines elements of all the approaches sketched so far, and does so in such a way that an original account results, which, while introducing some complications in the very notion of natural right,[24] substantially aligns itself with the natural law tradition.[25]

On the one hand, Kant inherits the tradition of natural law through modern natural lawyers –both the "realist" line represented by Leibniz-Wolff, and the "voluntarist" one represented by Pufendorf—. On the other hand, he inherits some topics of modern political thought, such as the contractualist language or the relevance of property in discussions of right and justice, highlighted both by Hobbes and Rousseau.[26] We can also reasonably suppose that Kant was familiar with the Scottish critique of Hobbes' individualism.[27] Finally, while he does not mention Aristotle, there have also been attempts to view this political thought in continuity with Aristotelian themes and problems.[28] One of these themes is precisely the intrinsic relationship between natural justice and the common good, implicit in Kant's resort to the universal principle of right, according to which,

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[22] Nevertheless, as Tatiana Patrone has underlined, Kant, unlike Hobbes, does allow conceptually for the possibility of the sovereign power being unjust; and he further observes that, while no rebellious action could be taken against sovereign's authority, the citizens retain the right to discuss the justice of existing legislations. See: Patrone (2008), pp. 11–12. For a discussion of Kant's critique of the right to revolution: Spaemann (1976), and Henrich (1976).

[23] See Vigo (2008). See Tonnella (2009).

[24] See Tonnella (2009), p. 12, p. 32.

[25] "In der Fakultätsschriftg erklärt Kant die Philosophen zu den besseren, den ‚wahren' Verkündern des Rechts. Dazu macht sie ihr im Gegensatz zu den Beamten der juristischen Fakultät unabhängiger Umgang mit diesem. Die Philosophen bilden aber auch deshalb die ‚natürlichen Interpreten' des Rechts, weil dieses aus dem natürlichen Recht, dem Rechtsverständnis des ‚gemeinsen Menschenverstandes', hervorgehen muss (…) Der Gedanke des untrennbar mit dem Common Sense verbundenen natürlichen Rechts spielt auch in Kants Rechtslehre eine wichtige Rolle. Als ‚Naturrecht' stehet es für eine Rechtsauffasung, deren Prinzipien sich a priori aus der Vernunft ableiten. Naturrecht ist bei Kant insoferm Vernunftrecht. Sein Bezug zum Common Sense als (all-) gemeinem Menschenverstand besteht darin, dass sich die Prinzipien dieses Rechts ‚jades Menschen Vernunft' darbieten. Sie sind jedem –selbst dem ‚gemeinen Mann'- einsichtig, wenn er sich auf seine Vernunft einlässt, also von den privaten Einflüssen auf sein Urteil absieht…". Nehring (2009), 211.

[26] Sharon Byrd and Joachim Hruschka's highlight the influences of Grotius, Hobbes, Pufendorf, Thomasius, Locke, Hume, Wolff, Montesquieu, Baumgarten, Rousseau, Beccaria, Adam Smith. "As it is true of his use of Achenwall, Kant sometimes simply uses the concepts these authors developed, sometimes takes them and develops them further, and sometimes takes and criticizes them", Byrd and Hruschka (2010), p. 20.

[27] As Manfred Kuehn has argued, it is highly implausible to think that the Scots did not exert any influence in his thought (Kuehn 1987, pp. 170 ss). He recommended Hutcheson and Hume to his students (Kuehn 2001, p. 107).

[28] For instance, M. Riedel sees Kant as providing an answer to the problem Aristotle had left unsolved, namely, the legitimacy of political authority. See Riedel "Herrschaft und Gesellschaft" (1976).

> Any action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law (MM, 6:230).

The whole concern of the *Metaphysics of Morals* is to spell out the implications of the "laws of freedom". While the *Doctrine of Virtue* deals with internal freedom, actions performed not only according to duty but also from duty, that is, out of respect for the moral law, the *Doctrine of Right* deals merely with actions performed in conformity with duty.[29] This is why the *Doctrine of Right* deals with the laws of external freedom, which are nevertheless moral laws[30] that apply to finite corporeal beings. As Vigo notes, "if we consider the fact that demands of morality refer to a universal community of persons, on the one hand, and the aspect that refers to the indispensable exteriorisation that accompanies the effective fulfilment of freedom through action, on the other, the reasons why the objective of the Universal Law of Right is precisely the possible coexistence of freedom, in accordance with a universal law, become immediately evident".[31]

Now, it is precisely this maxim that, in Kant's view, not only justifies coercion, but also makes coercion a necessary complement of right:

> If a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e. wrong), coercion that is opposed to this (as hindering of a hindrance of freedom) is consistent with freedom in accordance with universal laws, that is, it is right. Hence there is connected with right by the principle of contradiction an authorization to coerce someone who infringes upon it (MM, 6: 231).

Having a right analytically entails authorization to coerce respect for that right.[32] Surely, this is nothing new. And yet, the way Kant argues for this position, and more generally for the notion of a natural right, is original enough. The very division he makes of natural right at the Introduction to the *Doctrine of Right* already shows the originality of his approach:

> The highest division of natural right cannot be the division (sometimes made) into natural and social right; it must instead be the division into natural and civil right, the former of

[29] As Toshiro Terada rightly observes, the point of Kant's division between acting from duty (ausspflicht) and acting in conformity with duty (pflichtmässig) is not to mean that all actions are divided into those fulfilled from duty and those in conformity with duty, but that the actions in conformity with duty are divided into those fulfilled from duty and those fulfilled from other incentives, and only the former have moral worth". Terada (1995), pp. 541–547, p. 541.

[30] As Kaulbach notes, herein lies the difference between Kant and Feuerbach: "Feuerbach folgt kantischen Ansätzen insofern, al ser das Modell eines Spannungsverhältnisses zwischen zwei Extremen zugrunde legt, die miteinander vermittelt werden müssen. Das eine Extrem ist das von der reinen Verunft gegebene Prinzip, während das andere der Erfahrung und dem durch Erfarhung bestimmten positiven Recht entspricht. Abe rim Falle des Naturrechts unterscheidet er sich von Kant darin, dass er die apriorischen Prinzipien der Rechtslehre nicht aus dem Moralgesetz als der obersten Instanz über Recht oder Unrecht abgeleitet wissen will. Vielmehr setzt Feuerbach das oberste Rechtsprinzip als gleichwertig und gleich ursprünglich neben das oberste Moralprinzip. Er wendet sich gegen eine Deduktion des Rechtsgesetzes aus dem Moralgesetz". Kaulbach (1976), p. 197–8.

[31] Vigo (2008), p. 128.

[32] See Vigo (2008). See also Patrone, T., o. c., p. 26, pp. 73 ss.

> which is called private right and the latter public right. For a state of nature is not opposed to a social but to a civil condition, since there can certainly be society in a state of nature, but not civil society (which secures what is mine or yours by public laws). This is why right in a state of nature is called private right (MM, 6: 242).

In using the contrast between state of nature and civil state, Kant adopts modern language.[33] Even Hume, who rejected the idea of a state of nature, used this language to convey his thought about justice: in the state of nature there was no justice; justice first appears when human beings, who always were social beings, establish certain conventions about property, that is, about its stability and the way to transfer it. For Hume, those conventions constitute the essence of natural law, antecedent to the establishment of any civil government.[34] Kant's approach to natural right is entirely different: it is not based on any convention whatsoever, but on *a priori* principles, specifically, on the above mentioned universal principle of right:

> As systematic doctrines, rights are divided into natural right, which rests only on a priori principles, and positive (statutory) right, which proceeds from the will of a legislator (MM, 6: 237).

As it becomes apparent later on, Kant notes the difference between "social" and "civil" in contrast with Achenwall,[35] whose work *Prolegomena Iuris Naturalis* was a reference for Kant.[36] However, this point is also valid against the Hobbesian account of the state of nature: against Hobbes, and like Hume, Kant states that man in the state of nature is already a social being. Like Hume, too, Kant thinks that the state of nature never existed, and uses it only as an epistemological tool. Unlike Hume, however, Kant does think that there is a place for property and justice (private justice) in the state of nature, even if in that state, property and that justice are not yet secured. This will be the role of public right, and hence, of the civil condition.

In speaking in terms of a contrast between natural right and the civil condition, it is difficult to avoid an imaginative representation which renders the distinction in temporal terms: natural right would come before civil right. Kant, however, offers us another interpretation of this distinction, in terms of private and public right. According to this division, public right neither cancels nor creates private right, but only secures it.

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[33] As Riedel notes, this language becomes almost inevitable once the Aristotelian approach was abandoned. In his view, this abandonment had conceptually to do with the impossibility of grounding the legitimacy of political authority on Aristotelian grounds: "Die Polis ist notwendig eine Herrschaft von Menschen über Menschen, aber darüber, wie diese Herrschaft verfasst oder rechtmässig abgeleitet sein sollte, kann man von den Aristotelischen Prämissen her überhaupt nichts ausmachen. Es bleibt eine Lücke in der Philosophie des Politischen, die bei Aristoteles in doppelter Weise geschlossen wird: 1. durch die Naturtheorie der Polis als politike koiononia, wonach Herrschaft und Gesellschaft eine gewissrmassen naturwüchsige Einheit bilden, und, 2. durch das historish-empirische Interesse an den positiven Verfassungen, die unter Verzicht auf die sie begründende oder rechtfertigende Theorie von Aristoteles als einer Art Naturgeschichte der Herrschaftsformen abgehandelt werden". Riedel (1976), p. 130.

[34] See González (2008).

[35] See MM, 6:306.

[36] See Sharon Byrd and Hruschka (2010), pp. 15 ss.

Accordingly, the reference to a state of nature serves for Kant as an epistemological device to assert the fundamental tenet of the natural law tradition: that political justice is not identical with civil justice; that the civil condition incorporates the idea of a natural right, which is not the result of human convention, but rather of Reason. For Kant, the idea of a state of nature serves the purpose of differentiating the validity and the efficacy of right.

Indeed, the very fact that Kant takes civil right as *part* of natural right—"the highest division of natural right… must be the division into natural and civil right"—is meant to stress the point made by Aristotle when he included natural right as part of the political right: for in order to become effective, natural right has to be supported by civil right. This explains why the defining mark of right in the state of nature is its provisional character. This provisionality has nothing to do with its lack of validity, but rather, with the lack of *efficacy* and *security,* which follows from the absence of public laws, known by everybody, governing those rights. Hence, the concern for the effectiveness of natural justice is the basic reason for the "transition" to a civil condition.

Nowhere else is this point clearer than in the discussion about property. Thus, he says that property rights are already settled in the private realm, or through private transactions, even if it can only be secured through public laws.[37]

For Kant, only by entering into a civil condition can we secure our possessions, and thus claim a *perfect right* to property. The "perfection" of this right has to do with its being secured by public laws: not only because, backed by these laws, I can coerce anybody to give me back what is mine, but also because those public laws materialize a requirement which is already at work in the state of nature: that my unilateral appropriation of anything is not unilateral at all, but referred to a universal rule which anticipates an ideal community, a collective general will.[38]

Indeed, in Kant's view, when I declare that something external is mine, *I declare* that everybody is obliged to refrain from touching my possessions; according to Kant, however, this obligation is in turn dependent on my own obligation to respect everybody else's possessions. Such reciprocity, however, can only be backed by an ideal resort to a collective general (common) and powerful will. While this common will is to be expressed in *public laws*, which apply simultaneously to everybody, is

[37] Moreover, in the end, property rights that are already acquired in the state of nature become the reason why any particular agent can coerce others and himself to enter into a rightful condition: "If no acquisition were cognized as rightful even in a provisional way prior to entering the civil condition, the civil condition itself would be impossible. For in terms of their form, laws concerning what is mine or yours in the state of nature contain [6:313] the same thing that they prescribe in the civil condition, insofar as the civil condition is thought of by pure rational concepts alone. The difference is only that the civil condition provides the conditions under which these laws are put into effect (in keeping with distributive justice).- So if external objects were not even provisionally mine or yours in the state of nature, there would also be no duties of right with regard to them and therefore no command to leave the state of nature". (MM, 6: 312–313)

[38] See Felipe Schwenberg, doctoral dissertation: "El fundamento de la propiedad en la filosofía del derecho de Kant y Fichte", University of Navarra, November 2011. Presented January 23 2012.

not to be confused with it. Its moral-juridical validity refers to the collective common will, which is already anticipated in the state of nature, even if its efficacy depends on the actual coercion that can only be effected when we have entered into a civil condition.[39]

It is from this perspective that the Kantian resort to a common will can be compared with the Aristotelian resort to the common good, although with a critical turn that Kant owes to Rousseau's resort to the general will. For this reason, whether Kant is viewed as a natural right theorist or, rather as a contractualist thinker, becomes a matter of interpretation.[40] What is clear is that Kant does not advocate just any conventional sort of contractualism because the common will he invokes is not constituted through any empirical contract, but rather represents an *a priori* idea of reason. Indeed, as Patrone notes, Kant's praise of Rousseau had precisely to do with the fact that "the social contract should not be interpreted in empirical terms, as instrumental to the satisfaction of the desires of the parties to it".[41] At the same

[39] "When I declare (by word or deed), I will that something external is to be mine, I thereby declare that everyone else is under obligation to refrain from using that object of my choice, an obligation no one would have were it not for his act of mine to establish a right. This claim involves, however, acknowledging that I in turn am under obligation to every other to refrain from using what is externally his; for the obligation here arises from a universal rule having to do with external rightful relations. I am therefore not under obligation to leave external objects belonging to others untouched *unless everyone else provides me assurance* that he will behave [6:256] in accordance with the same principle with regard to what is mine. *This assurance* does not require a special act to establish a right, but is *already contained in the concept of an obligation corresponding to an external right, since the universality, and with it the reciprocity, of obligation arises from a universal rule*.- Now, a unilateral will cannot serve as a coercive law for everyone with regard to possession that is external and therefore contingent, since that would infringe upon freedom in accordance with universal laws. So it is only a will putting everyone under obligation, hence only a collective general (common) and powerful will, that can provide everyone this assurance.- But the condition of being under a general external (i.e. public) lawgiving accompanied with power is the civil condition. So only in a civil condition can something external be mine or yours" "Corollary: if it must be possible, in terms of rights, to have an external object as one's own, the subject must also be permitted to constrain everyone else with whom he comes into conflict about whether an external object is his or another's to enter along with him into a civil constitution" (&8: it is possible to have something external as one's own only in a rightful condition, under an authority giving laws publicly, that is, in a civil condition)", Kant, MM, 6: 255–6.

[40] Referring back to Rousseau's influence on Kant, Kevin Dodson, for instance, sees Kant as a contractualist: "With the idea of the social contract, Kant reconceptualizes autonomy so as to capture the unavoidable collective dimension of the self-legislative activity of rational agents. So long as persons encounter each other, some framework of law and civil authority must exist to govern their external relations, but such law is only compatible with the autonomy of the moral agent insofar as it is the product of her own legislative activity. Thus, the social contract requires that a law must be capable of commanding the unanimous consent of those to whom it applies; otherwise, it is unjust…". Dodson (1995), pp. 753–760, p. 756.

[41] See Patrone (2008).

time, unlike traditional natural lawyers, and like Rousseau,[42] Kant spells out his notion of natural right in terms of freedom:

> Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man in virtue of his humanity (MM, 6: 237–8).[43]

At any rate: the reference to that common good/will belongs from the very beginning to the notion of natural justice, even if its implementation can only take place in the context of the *polis*; this is why the human being can be considered a political being by nature (Aristotle), or, in Kantian terms, this is why it is a duty to abandon the state of nature—as we will see below.

Indeed: I think that in this point, Kant conveys the same idea as Aristotle, albeit from a different epistemological framework, which at times resembles contractualism without being properly so. For sure, unlike Aristotle, Kant underlines a modern theme: security. Yet, apart from that, Kant is clear that public law cannot work against natural right. Again, this is clear in the way he argues for the right to property:

> When people are under a civil constitution, the statutory laws obtaining in this condition cannot infringe upon natural right, (i.e., that right which can be derived from a priori principles for a civil constitution); and so the rightful principle 'whoever acts on a maxim by which it becomes impossible to have an object of my choice as mine wrongs me,' remains in force. *For a civil constitution is just the rightful condition, by which what belongs to each is only secured, but not actually settled and determined.*- Any guarantee, then, already presupposes what belongs to someone (to whom it secures it). Prior to a civil constitution (or in abstraction from it), external objects that are mine or yours must therefore be assumed to be possible, and with them a right to constrain everyone with whom we could have any dealings to enter with us into a constitution in which external objects can be secured as mine or yours (MM, 6: 256).

6.3 Rightful Condition as Regulative Norm in the State of Nature

Still, one objection could be formulated in terms of how to speak of a right to property in the private realm if we cannot *secure* the necessary reciprocity, which makes up for the very notion of "right".

Indeed, Kant is very clear when he says that "right and authorization to use coercion… Mean one and the same thing" (MM, 6: 232). Now, the only coercion we can

[42] See Ritter (1971), pp. 118 ss.

[43] The text goes on: "This principle of innate freedom already involves the following authorizations, which are not really distinct from it (as if they were members of the division of some higher concept of a right): innate equality, that is, independence from being bound by others to more than one can in turn bind them; hence a human being's quality of being his own master (*sui iuris*), as well as being a human being beyond reproach (*iusti*), since before he performs any act affecting rights he has done no wrong to anyone; and finally, his being authorized to do to others anything that does not in itself diminish what is theirs, so long as they do not want to accept it—such things as merely communicating his thoughts to them, telling or promising them something, whether what he says is true and sincere or untrue and insincere; for it is entirely up to them whether they want to believe him or not".

expect to take place in the state of nature, in absence of public laws which define the rules of coexistence of individual freedoms, is the coercion any individual exerts against another who violates the right of the former. According to Kant, however, the principle which accounts for the *legitimacy* of coercion does not consist so much in the restoration of individual rights thought apart from any human community, as in the "fully reciprocal and equal coercion brought under a universal law and consistent with it"; it is this what "makes the presentation of that concept possible" (MM, 6: 233). Yet precisely this kind of coercion is impossible in the state of nature, that is, in the absence of public laws.

The objection rests upon a mistake. It does not take into account the difference between factual reciprocal coercion and the *possibility* of reciprocal coercion *according to universal laws*. According to Kant it is the latter, not the former, that counts for the definition of strict right. Now, this means that, in order to have strict rights, all we need is to think of certain actions as possible in such a system of reciprocal coercion, which is, at the same time, a system of reciprocal freedom. This explains why Kant holds private rights to be strict rights: because they conceptually admit of reciprocal coercion, even if they are also marked by the feature we mentioned above, namely, provisionality, as long as the system of public laws, which historically implements that idea of reason, is not yet in place. The reason why striving towards a civil constitution—a historical achievement—may become duty is only because it incorporates that idea of reason:

> A civil constitution, though its realization is subjectively contingent, is still objectively necessary, that is, necessary as a duty. With regard to such a constitution and its establishment there is therefore a real law of natural right to which any external acquisition is subject (MM, 6. 264).

Thus, while the development of a civil constitution may depend on many historical contingencies, it still represents an objective necessity—a duty—deriving from the fact that only under a civil condition, the idea of a will of all united *a priori* –which was the reason to justify the very notion of rights already in the state of nature—becomes factually possible:

> The rational title of acquisition can lie only in the idea of a will of all united *a priori* (necessarily to be united), which is here tacitly assumed as a necessary condition (*conditio sine qua non*); for a unilateral will cannot put others under an obligation they would not otherwise have. But the condition in which the will of all is actually united for giving law is the civil condition. Therefore something external can be originally acquired *only in conformity with the idea of a civil condition, that is, with a view to it and to its being brought about, but prior to its realization* (for otherwise acquisition would be derived). Hence original acquisition can be only provisional. Conclusive acquisition takes place only in the civil condition. Still, that provisional acquisition is true acquisition (MM, 6: 264).

Therefore, the reason why provisional acquisition, that is, acquisition in the state of nature, in absence of public laws, is *true* acquisition lies in the reference to the common will, anticipated in any rightful act, also in the state of nature. This anticipation, however, entails the requirement to aspire to the civil condition, in which that common will acquires historical concretion.

> Possession in anticipation of and preparation for the civil condition, which can be based only *on a law of common will,* possession which therefore accords with the possibility of

> such a condition, is provisionally rightful possession, whereas possession found in an actual civil condition would be conclusive possession (MM, 6: 257).

This anticipation, however, is enough to justify the kind of coercion that we can exert in the state of nature:

> For, by the postulate of practical reason with regard to rights, the possibility of acquiring something external in whatever condition people may live together (and so also in a state of nature) is a principle of private right, in accordance with which each is justified in using that coercion which is necessary if people are to leave the state of nature and enter the civil condition, which can alone make any acquisition conclusive (MM, 6: 264).

In other words, the very fact that we operate under the principle of right in the state of nature, even if we lack the power to implement it when violated, accounts for the strict nature of private rights, as well as for the coercion inextricably linked to the notion of strict right. This strictness is not compromised by the fact that those rights are still *provisional*, and only become conclusive when enjoyed in a civil state, that is, in the context of a rightful condition.

6.4 Transition from the State of Nature to a Rightful Condition

> A rightful condition is that relation of human beings among one another that contains the conditions under which alone everyone is able to enjoy his rights, and the formal condition under which this is possible in accordance with the idea of a will giving laws for everyone is called *public justice*…(MM, 6: 305–6).[44]

As Byrd and Hruschka note, this is one of the most significant passages in the *Doctrine of Right*; it contains the culmination of Kant's ideas on private right, and represents a key to understand the whole *Doctrine of Right.*[45] Public justice is presented as the *formal condition of a rightful condition, or a juridical state*,[46] which should govern relationships among individuals, nations, etc.[47] Such public justice provides the context for securing pre-existing rights, the justice of private exchanges,

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[44] MM, 6:305–6

[45] See Sharon Byrd and Hruschka (2010), pp. 23–4.

[46] It depends on the translation. The German expression is "der rechtliche Zustand", probably evolved from the latin *status juridicus*. It is the antecedent of the German "Rechtsstat". See Sharon Byrd and Hruschka (2010), pp. 26–7.

[47] The notion of public right, then, goes beyond that of the right of the state. It also encompasses cosmopolitan right. "The sum of the laws which need to be promulgated generally in order to bring about a rightful condition is public right.—Public right is therefore a system of laws for a people, that is, a multitude of human beings, or for a multitude of peoples, which, because they affect one another, need a rightful condition under a will uniting them, a constitution (*constitutio*), so that they may enjoy what is laid down as right.—This condition of individuals within a people in relation to one another is called a civil condition (*status civilis*), and the whole of individuals in a rightful condition, in relation to its own members is called a state (*civitas*). Because of its form, by which all are united through their common interest in being in a rightful condition, a state is called

and of distributions.[48] In absence of this formal condition, we remain in a state of nature. Along these lines, Kant recalls that,

> What is opposed to a state of nature is not (as Achenwall thinks) a condition that is social and that could be called an artificial condition (*status artificialis*), but rather the *civil condition* (*status civilis*), that of a society subject to distributive justice (6:306).

Kant insists that the state of nature is not opposed to a social state; in noting that the social state is not artificial, he makes clear that sociality is not the result of artifice; human beings are naturally social, and thereby juridical:

> For in the state of nature, too, there can be societies compatible with rights (e.g., conjugal, paternal, domestic societies in general, as well as many others); but no law, 'You ought to enter this condition,' holds *a priori* for these societies, whereas it can be said of a rightful condition that all human beings who could (even involuntarily) come into relations of rights with one another *ought* to enter this condition (MM, 6: 306).

However, the fact that they are social and juridical does not constitute a civil state: the civil state is a requirement of justice in the state of nature, and, as such, it does not take place without moral commitment. Now, the moral commitment required to enter into a rightful condition is of a peculiar kind: it is a duty of right that Kant designates as "lex iustitiae".

Yet, unlike the duties of right exerted in the context of a civil state, this duty of right is not backed by public coercion—for there is not yet such a thing—, but by the "coercion" of nature. Natural necessity—an interest for our own well being furthered by pragmatic reason— coerces us to opt out of the state of nature and enter into a juridical state in which the only coercion we allow is that backed by public laws.

In this way, Kant's moral approach to the institution of right is complemented with his approach to right from the perspective of the philosopher of history.

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a commonwealth (*res publica latius sic dicta*). In relation to other peoples, however, a state is called simply a power (*potentia*) (hence the word potentate). Because the union of the members is (presumed to be) one they inherited, a state is also called a nation (gens). Hence, under the general concept of public right we are led to think not only of the right of the state but also of a right of nations (*ius gentium*). Since the earth's surface is not unlimited but closed, the concepts of the right of a state and of a right of nations lead inevitably to the idea of a right for all nations (*ius gentium*) or cosmopolitan right (*ius cosmopoliticum).* So if the principle of outer freedom limited by law is lacking in any of these three possible forms of rightful condition, the framework of all the others is unavoidably undermined and must finally collapse". (MM, 6: 311; &43). Hruschka notes: "Decisive in this characterization is that public law needs to be promulgated and it is thus public law only if it has in fact been announced to the public. This law is called 'public law' if and because it is open to the public". Sharon Byrd and Hruschka (2010), pp. 29–30.

[48] "With reference to either the possibility or the actuality or the necessity of possession of objects (the manner of choice) in accordance with laws, public justice can be divided into protective justice (*iustitia tutatrix*), justice in men's acquiring form one another *(iustitia commutativa*), and distributive justice (*iustitia distributiva*)". MM, 6:306.

6.4.1 The Postulate of Public Right Proceeds from Private Right

Kant specifically notes that the postulate of public right proceeds from private right in the state of nature:

> From private right in the state of nature there proceeds the postulate of public right: when you cannot avoid living side by side with all others, you ought to leave the state of nature and proceed with them into a rightful condition, that is, a condition of distributive justice (MM, 6:308).

Two ideas are worth noting in this text: first, "the ultimate foundation for public right must be found in the principles of private right and finally in the Universal law of right"[49]; this is true even if the efficacy of private right can only be guaranteed with the introduction of public right. Second, the account Kant gives of public right in this text relates to the "lex iustitiae", which he had previously introduced following Ulpian:

> (if you cannot help associating with others), enter into a society with them in which each can keep what is his (*sum cuique tribue*). If this last formula were translated 'give to each what is his', what it says would be absurd, wince one cannot give anyone something he already has. In order to make sense it would have to read: 'enter a condition in which what belongs to each can be secured to him against everyone else' (MM, 6:237).

While the explanation Kant provides for this reminds us of Hobbes' depiction of the state of nature, we should keep in mind that "state of nature" is not simply a historical or empirical situation[50]—for instance, the situation preceding the institution of the modern state—, but rather a permanent situation, that can be experienced whenever human beings are living side by side and lack any norm and superior authority in charge of resolving the disputes that can follow from their interaction. In those cases, in absence of public right, in absence, therefore, of a "fully reciprocal and equal coercion brought under a universal law and consistent with it", one would have no reason to refrain from invading the possessions of others, for there would be no certainty that the other is not going to invade his:

> —The ground of this postulate can be explicated analytically from the concept of right in external relations, in contrast with violence (*violentia*). No one is bound to refrain from encroaching on what another possesses if the other gives him no equal assurance that he will observe the same restraint towards him (MM, 6:308).

In Kant's view, "it is not necessary to wait for actual hostility; *one is authorized to use coercion against someone who already, by his nature, threatens him with coercion*" (MM, 6:308), for this attitude is not based on "bitter experience of the other's contrary disposition", but rather in the perception one has of his own inclination to

[49] Vigo (2008), p. 132.

[50] "Indem Kant die Konzeption des Naturzustandes von den bei Hobbes noch vorhandenen empirischen Randbedingugen befreit, erteilt er allen Versuchen einer empirischen entwicklungsgeschichtlichen oder anthropologischen Deutung des Naturzustandes eine entschiedene Absage". Hüning (1995), p.763.

lord over others, and the subsequent suspicion that others harbor similar inclination within themselves. For sure, in this situation, the state of nature easily becomes the reign of the strongest. In Kant's view human beings in such a state do not really wrong each other, "for what holds for one holds also in turn for the other as if by mutual consent" (MM, 6:308). And yet, "in general they do wrong in the highest degree by willing to be and to remain in a condition that is not rightful, that is, in which no one is assured of what is his against violence". (MM, 6: 308).

In other words: as long as human beings willingly remain in a state of nature, they do no wrong to each other when they repel force with force. However, the very fact that they willingly remain in such a state represents the *highest* injustice, for it contradicts an *a priori* demand of our reason:

> It is not experience from which we learn of human being's maxim of violence and of their malevolent tendency to attack one another before external legislation endowed with power appears. It is therefore not some fact that makes coercion through public law necessary. On the contrary, *however well disposed and law-abiding men might be, it still lies a priori in the rational idea of such a condition (one that is not rightful) that before a public lawful condition is established individual human beings, peoples, and states can never be secure against violence from one another, since each has its own right to do what seems right and good to it and not to be dependent upon another's opinion about this* (MM, 6:312).

The preceding paragraph is interesting because it establishes the notion of a rightful condition beyond the empirical contingencies derived from human tendencies and character. In taking this approach, Kant places himself in the realm of ethics, which can be only based on *a priori* principles. As Manfred Kuehn notes, "he did not want it to be dependent on anthropological elements, like the claim that human beings are naturally egotistical beings without a shred of sympathy".[51] This is also underlined by Tatiana Patrone in arguing for the rational consistency of Kant's doctrine of right, including what he says about the lack of a right to revolution.[52] We do not need the law only or mainly because human beings are in fact violent or harbor malevolent tendencies; we need law and legal coercion because harmonization of individuals is conceptually and factually impossible in absence of public law.

> So, unless it wants to renounce any concepts of right, the first thing it has to resolve upon is the principle that it must leave the state of nature, in which each follows its own judgment, unite itself with all others (with which it cannot avoid interacting), subject itself to a public lawful external coercion, and so enter into a condition in which what is to be recognized as belonging to it is determined by law and is allotted to it by adequate power (not its own but an external power); that is, it ought above all else to enter into a civil condition (6:312).

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[51] Kuehn (2001), p. 400.

[52] "What such rational moral cognition can uncover is that, first, a positive right to revolution is self-contradictory since it implies that the sovereign power is not in fact the sovereign power. And second, it uncovers that permitting a rebellion also goes against Naturrecht, since it violates the unconditional command of reason to enter and to preserve the civil condition. A revolution, even if its goal is to improve the existing state of affairs, involves suspending all claims of possession (if only for a moment) and such suspension is contrary to right, no matter what purpose it is designed to serve". Patrone (2008), p. 22.

6.4.2 Reason and Nature at the Basis of Law

Kant insists: the state of nature is not thereby a state of injustice, marked by reciprocal violence. Yet, it is certainly a state deprived of secure rights.[53] And, were it not opened to a rightful condition, it would always be marked by indeterminacy as to what should be done in a potentially conflictive situation:

> It is true that the state of nature need not, just because it is natural, be a state of injustice (*iniustus*), of dealing with one another only in terms of the degree of force each has. But it would still be a state devoid of justice (*status iustitia vacuus*), in which when rights are in dispute (*ius controversum*), there would be no judge competent to render a verdict having rightful force. *Hence each may impel the other by force to leave this state and enter into a rightful condition*: for although each can acquire something external by taking control of it or by contract in accordance with its concepts of right, this acquisition is still only provisional as long as it does not yet have the sanction of public law, since it is not determined by public (distributive) justice and secured by an authority putting this right into effect (MM, 6:312).

The potential violence involved in such a state represents a reason for escaping from the state of nature and entering into a civil estate, which only guarantees the reciprocal coexistence of freedoms. As Patrone notes, although the argument seems similar to the one Hobbes deploys to argue for the institution of the state, Kant's argument is in fact very different:

> the constant threat of violence, which Hobbes interpreted quite literally, in Kant is rather a conceptual issue concerning the impossibility of resolving conflicts in the absence of a point of view other than of private reason, or a private right 'to do what seems right and good to (him) and not to be dependent upon another's opinion about this'. Hobbes interprets the original contract quite literally as a *voluntaristic* contract… Unlike Hobbes, Kant interprets the original contract, not only as non-historical, but also as non-voluntaristic. The original contract is valid and binding because in its procedure it reflects the end of the civil union, i.e., the full realization of individual freedom.[54]

Now, the realization of individual freedom in the conditions provided by our existence in a material world is entailed in the universal law of right, which conveys an *a priori* demand of our (moral) reason. It is not based, therefore, on any historical contract,[55] although it certainly anticipates a republican form of

[53] See Tonella (2009), p. 42.

[54] Patrone (2008), pp. 102. 103.

[55] "The fact of the actual consent to abide by a law or to enter into a contract is not the grounds for the justice of the law or for the contract's validity. It is the specific procedure that underlies this consensual agreement that is the grounds for its validity, and in Kant the procedure of this agreement is such that the wills unite into one general will a priori, that is, in accordance with the universal law of freedom. In 'On the Common Saying' (8:297–9), Kant emphasizes that the consent of the people to a law is only a test for the law's justice, and that it is not to be taken literally". Patrone (2008), p. 104.

government as the basic requirement of justice,[56] and ultimately, of political practice.[57]

When we take the perspective of the philosopher of history, however, we discover that this *a priori* reason is also backed by bitter experience of violence. This is why Kant may, at some points, regards war as an engine of progress. This is actually the approach he takes in the *Third Critique*, and other writings of the philosophy of history. In this work, he takes war both as a consequence of "unbridled passions" on the side of the human beings, and as a "deeply hidden but perhaps intentional effort of supreme wisdom" to promote a legal condition.[58] This is also the approach he famously takes in *Perpetual Peace*: "even if a people were not constrained by internal discord to submit to public laws, war would make them do it" (PP, 8:366). From this perspective, the arrival at a rightful condition could be expected from the very mechanism of nature, which activates pragmatic reason. Kant describes this "mechanism" in *Perpetual Peace*:

> The mechanism of nature, in which self-seeking inclinations naturally counteract one another in their external relations, can be used by reason as a means to prepare the way for its own end, the rule of right, as well to promote and secure the nation's internal and external peace (PP, 8: 366).

The obvious objection to this approach is that, in spite of being originally designed to further hope in the realization of the moral ideal, taking it seriously into account may have precisely the opposite effect. This conclusion, however, would overlook Kant's insistence on the self-sufficiency of moral reason, which commands irrespective of motivations and hopes. Apart from that, the fact that nature helps us enter into a rightful condition does not make us moral beings.[59]

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[56] Dodson contrasts his account with Rawls': "Rawls interprets the social contract as a theoretical construction from which we can derive substantive principles of justice. Consequently, these principles are logically posterior to the contractarian construction. But for Kant, the contractarian construction is not a conceptual device for the generation of principles; rather, it is an idea that generates for us a model of civil society that… is to be used as a guide for the transformation of the actual world". Dodson (1995), p. 757.

[57] See Tonella (2009), p. 43.

[58] See Kant, KU, 5: 433. See also González (2011), pp. 192 ss.

[59] See Gonzalez (2010), pp. 291–308. And this latter point relates to the observation Tatiana Patrone makes in discussing Thomas Pogge's interpretation of the passage: "Whereas in 'Toward Perpetual Peace' the problem that Kant discusses is the 'problem of establishing a state' in general, the duty to form a state that he argues for in the 'Doctrine of Right' is not the duty to enter and to promote just any sate. As we already saw, Kant ultimately did believe that a rightful condition is better than the state of nature and so the civil union that a nation of devils would form (no matter how imperfect or unjust it might be) is still better than living without one altogether. However, the "Doctrine of Right" argues for a political ideal and in this it defends a certain kind of state… one in which the will of all is united a priori based on the laws of right". Patrone (2008), p. 39.

6.5 Conclusion

To summarize:

For Kant, the idea of a state of nature serves the purpose of differentiating the validity and the efficacy of right: in order to become effective, natural right has to be supported by civil right. In this way, natural right acquires the status of private right in the civil state. At the same time, in order to be valid, civil right has to ensure that original natural right.

The very fact that we operate under the principle of right in the state of nature, accounts for the strict nature of private rights. This strictness is not compromised by the fact that those rights are still *provisional*, and only become conclusive when enjoyed in a civil state, that is, in the context of a rightful condition. This is shown in Kant's argument about property rights.

There exists a duty of right to abandon the state of nature and enter into a civil state. Kant designates this as "lex iustitiae". Unlike the duties of right exerted in the context of a civil state, this duty of right is not backed by actual public coercion—for there is not yet such a thing—, but we can say it is backed at least by the coercion of nature: natural necessity—an interest for our own well being furthered by pragmatic reason—coerces us to opt out of the state of nature and enter into a juridical state in which the only coercion we will allow is that backed by public laws.

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Chapter 7
Natural Law and the Phenomenological Given

Marta Albert

7.1 Introduction

In which sense can we make reference to a relationship between natural law theory and phenomenology? Would a new phenomenological articulation of the natural law tradition be workable? These and other questions will be the object of this paper, with special regard to Reinach's theory of legal apriori, insofar as it represents, in my opinion, the most relevant phenomenological research on law ever written.

Has Reinach's theory of legal apriori something to do with natural law philosophy? It is well known that Reinach himself denied this possibility. The hypothesis adopted here as a starting point is that no research on the phenomenological given in the sphere of law would have been possible in the scheme of legal positivism, so Reinach's theory seems to be, in some way, connected to natural law doctrine.

As we will see, there are at least two problems in recognizing Reinach's theory as a new formulation of natural law doctrine: the lack of normative meaning of his apriori right, as well as the fact that this apriori does not derive in any way from human nature. In the following pages we will deal with these two questions. They are different, but connected by one main preconception: if legal apriori were a derivate of human nature, their dispositions would have achieved normative meaning.

7.2 Reinach: A Phenomenological Research of Ontology of Law

First of all, I think it would be best to summarize the meaning of realistic phenomenology and the main aspects of Reinach's theory of legal *a priori*.

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As it is well known, Phenomenology is generally understood as a philosophical movement, arising in the twentieth century due to the work of Edmund Husserl, and, before him, of Franz Brentano. As Crowe explained, the starting point for an exposition about Phenomenology is the idea of intentionality. It can be understood "as the insight that consciousness is always consciousness of something". In this sense, Philosophy is "an exploration of the world as it is presented to consciousness".[1] The phenomenological method to achieve this goal is to "bracket" the natural and scientific world views. Problems arise when we face the problem of the meaning of such "epojé". In Husserl's work, the *epojé* is considered "as a path to trascendental knowledge about the conditions of conscious experience, implicitly aligning himself with a Kantian trascendental idealism".[2]

Adolf Reinach, as well as Edith Stein and other scholars from Gottinga's Circle, did not follow Husserl in his "trascendental turn". In fact, Reinach himself is known as the founder of "realistic Phenomenology".[3]

Realistic Phenomenology defines itself as a new way of looking at things. Phenomenologists refused to provide a further definition of Phenomenology.

In his *Concerning Phenomenology,* Reinach claims that:

> to talk about phenomenology is the most useless thing in the world so long as that is lacking which alone can give any talk concrete fullness and intuitiveness: the phenomenological way of seeing and the phenomenological attitude. For the essential point is this, that phenomenology is not a matter of a system of philosophical propositions and truths – a system of propositions in which all who call themselves "Phenomenologists" must believe, and which I could here prove to you – but rather it is a method of philosophizing which is required by the problems of philosophy: one which is very different from the manner of viewing and verifying in life, and which is even more different from the way in which one does and must work in most of the sciences.[4]

Learning to look at things is harder than one could ever think. "How laborious a task is to learn to really see!",[5] Reinach emphasizes. Phenomenology tries to grasp things in themselves, coming back to them, as Husserl pointed out. And despite Husserl's transcendental turn, I believe, as Seifert has argued, that "a rigorous adherence to the maxim 'back to things themselves' demands a return to the interest of the classical philosophical tradition in the causal origins and final ends of things".[6]

Only in this sense can we understand that phenomenology, as research based upon the objects as they are given to the subject, and upon the acts of conscience in which they are given, should have an ontological relevance.[7] Phenomenology is a philosophical attitude that consists in learning to see things in themselves, so it

[1] Crowe (2009), 62.

[2] Ibid., 64.

[3] Of course, Phenomenology can be understood differently, as shown by Crowe. See his exposition of Sartre or Merleau-Ponty in Crowe (2009), 65 ff.

[4] Reinach (1913), 1.

[5] *Ibid.*

[6] Seifert (1987), 32–33.

[7] Crespo (2011), 10.

presupposes that things do exist, and that we are able to acquire reliable knowledge about them.

But we have to keep in mind that we are looking for knowledge about the thing in itself. When we talk about something – for example, about promises, obligations etc. – we are still very far from it, meaning we are far from its "whatness". The goal of phenomenology is to bring to us what is only intended in our judgement. Then we can use language to show the whatness of what is given, taking into account that it has been given beyond language. It is not an obstacle to use language (and also silence) as a pointer that turns our gaze to what we must see.

In this sense, phenomenological research has achieved some relevant results. The most interesting for our purposes are related to the spheres of being and values.

1. In the first one, phenomenological research has discovered that the realm of apriori is much broader than Kant thought.[8] The realm of apriori is not only formal, but also material ("the identification of the "a priori" with the "formal" is a fundamental error of Kant's doctrine", as Scheler claims[9]), and it is "incalculably large".[10] For example, all social relationships are interwoven with apriori connections. There is, in fact, a necessity that belongs to the being, an ontological necessity.
2. As far as values are concerned, we may grant that phenomenological research has shown that ethics is objective, because values have their own logos which is not related to human beings. The person is the bearer of values, but not their source.[11] Values are also "tied" by apriori laws. There are apriori interconnections between them: for example, the ones that have to do with their hierarchical order, with their bearers, and so on.[12]

These two characteristics of phenomenology are enough, I believe, to let us maintain the existence of a relationship between phenomenology and natural law tradition.

1. First of all, both are meta-empirical theories.
2. Secondly, in the sphere of being we can find a necessity, a have-to-be-like-that; therefore, *is* and *ought* are not dissociated but linked by apriori interconnections that can be discovered by the phenomenological method.
3. Thirdly, the material content of what is right and wrong is not a matter of taste, nor of agreement. "The values of right and wrong (*Rechten und Unrechten*), objects that are "values" and completely different from "correct" and "incorrect", according to a law, which form the ultimate phenomenal basis of the idea of the objective order of right (*Rechtsordnung*), an order that is independent of the idea of "law", the idea of state, and the idea of life community on which the state rests (and is specially independent of all positive legislation)".[13]

[8] Reinach (1913), 18.

[9] Scheler (1973), 54.

[10] Reinach (1913), 18.

[11] Scheler (1973), 476 ff.

[12] *Ibid.,* 85 ff.

[13] *Ibid.,* 107–108.

I think it is easy to find important similarities in these three theses with some relevant points of natural law tradition. I will emphasize just two of them:

1. The connection between *is* and *ought*, based on the proper nature of things;
2. The assertion of the possibility of a reliable knowledge about right and wrong, its legal relevance and its independence of the content of positive law.

I have no doubt that no phenomenological research about law would have ever taken place within the legal positivist scheme. It is maybe more difficult to determine whether the theory of Reinach is a "real" natural law theory or not. I think that, despite what Reinach himself thought, we can consider it as an atypical one, if we understand natural law theory in a broad sense.

That is my hypothesis: the search for the phenomenological given in the sphere of law is only possible if we adopt an idea of law in terms of natural law tradition. In fact, as we may already see, if Reinach were right, legal positivism would suffer a severe blow.[14]

Let's take a look at Reinach's theory of legal objects, and his construction of a synthetic and apriori Science of Law, taking into account that it falls within the framework of phenomenological research.

Perhaps the first idea to be considered is that Reinach's purpose is not to build a *theory* of legal objects. For example, he does not want to grasp a theory of promises, but the promising itself.

> Strictly speaking we are not proposing any theory of promising. For we are only putting forth the simple thesis that promising as such produces claim and obligation. One can try, and we have in fact tried, to bring out the intelligibility of this thesis by analysis and clarification. To try to explain it would be just like trying to explain the proposition, $1 \times 1 = 1$. It is a fear of what is directly given (*Angst vor der Gegebenheit*), a strange reluctance or incapacity to look the ultimate data in the face and to recognize them as such which has driven unphenomenological philosophies, in this as in so many other more fundamental problems, to untenable and ultimately to extravagant constructions.[15]

Looking at the world of law without any fear of what is simply given, Reinach discovers no less than a new kind of objects, and the rules concerning them. He is "well aware of the widespread prejudices which, especially among jurists, are opposed to this point of view". Reinach would just like to ask the reader to "try to put off the accustomed attitude and to approach the things themselves unburdened with preconceptions".[16]

These things are apriori objects. And Reinach stresses that "this apriori character does not mean anything dark or mystical, it is based on the simple facts which we just mentioned: every state of affairs which is in the sense explained general and necessary is in our terminology apriori".[17] For example, that a claim lapses through being waived is grounded in the essence of a claim as such, and holds therefore necessarily and universally.

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[14] Dubois (2002), 339.

[15] Reinach (1983), 46.

[16] *Ibid*., 5.

[17] *Ibid.*

Also the laws that interconnect the states of affairs that have to do with legal apriori objects are apriori, and synthetic, making possible the building of an authentic science of law. "Together with pure mathematics and pure natural science there is also a pure science of right, which also consists in strictly apriori and synthetic propositions and which serves as the foundation for disciplines which are not apriori, indeed even for such as stand outside the antithesis of apriori and empirical".[18]

As Reinach points out, the dominant philosophy of law of his time has argued that all legal concepts and propositions are a creation of positive law.[19]

By contrast, Reinach argues that many legal entities arise naturally and necessarily from certain legal acts (for example, claims arise from promises), and that such legal truths can be known apriori. But, at the same time, we cannot lose sight of the fact that "there can be no doubt that Reinach's intention was to describe something very different from natural law".[20]

In his *A priori Foundations of Civil Law*, Reinach expounds the existence of a realm of objects, which are:

1. Extra-legal (they have a being, just like houses, numbers and trees, and it is a being absolutely independent of positive law: "the positive law finds the legal concepts which enter into it; in absolutely no way does it produce them"[21]).
2. Not physical, not psychical, but also not ideal (for example, claims and obligations "arise, last a definite length of time, and then disappear again"[22])
3. Related essentially to a social act (for example, promising). In the performance of a social act, some new objects come into being (in promising, obligation and claim).
4. Existing in many different "states of affairs", for example, the dissolving of the claim when I do what I have promised, or the coming into being of my obligation by my promise.
5. Linked by apriori laws, which are valid to a priori "states of affairs" we find in our everyday life; for example, when I make a promise, something new arises in the world: my obligation to do what I have promised, or that a claim to have something done dissolves as soon as the thing is done.[23]

These propositions, which are valid for apriori states of affairs, are not only apriori but also synthetic, that is, they show us something that is not included in the *concept* of the object, but is due to the *essence* of this object.

For example, the dissolving of the claim of having something done as soon as the thing is done, is a synthetic apriori state of affairs. In "the "concept" of claim nothing is "contained" in any possible sense about the fact that the claim dissolves under certain circumstances. The contradictory of this statement would indeed certainly be false, but it would not imply a logical contradiction".[24]

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[18] *Ibid.*, 6.

[19] *Ibid.*, 4.

[20] Dubois (2002), 341.

[21] Reinach (1983), 4.

[22] *Ibid,* 9.

[23] *Ibid.*

[24] *Ibid.*

There is also an apriori science of right (*reine Recthswissenschaft*) that consists in this kind of synthetic apriori propositions. This science is in some way completely independent of legal theory. The synthetic apriori propositions of science of right never enter into positive legal theory as they are in that case only transformed and modified.[25]

But apriori science of right is relevant, anyway, for empirical science of law. The laws grounded in the essence of the legal object, Reinach explains, "play a much greater role within the positive law than one might suspect".[26] In fact, empirical science of law is only possible and intelligible if we adopt the apriori science of right point of view.

In a similar way, we can only understand the institutions of positive law by having in mind the extralegal objects and the social acts in which they come into being. "The structure of the positive law can only become intelligible through the structure of the non-positive sphere of law".[27] These objects exist in a completely independent way from empirical ones. They are discovered, but never created, by positive law.[28]

7.3 A Priori Science of Right and Natural Law Theory

I think this theory I have just summed up is fertile enough to contribute to a renovation of natural law theory. In this sense, I will put forward some ideas which I find specially relevant for these purposes. All of them lie in the discovery of an ontological necessity related to things in themselves, with no primary moral meaning: maybe the basic and most relevant contribution of Reinach's theory to the contemporary discussion on legal philosophy.

The main aspects of this contribution can be summarized as follows:

1. As far as the problem of the relationship between *is* and *ought* is concerned, Reinach's social acts theory, and specially the nature of promising, shows how claims and obligations are brought into being *in* the promising itself, breaking the dualism between *is* and *ought*. This is the meaning of the broad conception of apriori that Reinach upholds.
2. As far as the problem of the possibility of a "science" of Law (*Recht*) is concerned, Reinach's *reine Recthslehre* is, in my opinion, a natural law alternative to Kelsen's *reine Rechtslehre*. In Reinach's work we find an apriori and synthetic science of law, based upon an idea of necessity that is not a mere fiction (something thought "legally"), but a "real" necessity we may learn to find in things in themselves.

[25] *Ibid*, 6.

[26] *Ibid.*, 7.

[27] *Ibid.*

[28] *Ibid.,* 4.

3. As far as the problem of the foundations of illocutionary acts is concerned (that is to say, the problem of the very nature of law, in terms of contemporary philosophy of law), it must be highlighted that his discovery (before Searle and Austin[29]) of speech acts puts Reinach's theory in a privileged place for the start of a dialogue with analytic philosophy of law, from a non-positivistic position. The central point of this dialogue must be again the idea of necessity. For Austin, Searle and also for Hart, the only link between *is* and *ought* is a merely conventional one. On this basis, illocutionary act theory explains almost everything about these acts except the acts themselves. For example, promising remains a complete mystery: what does actually happen when I make a promise? The first complete philosophical approach to speech acts can be found in Reinach's work. Anyway, I find there is no contradiction between Reinach's theory and the theory of constitutives as exposed by Searle. What we can find in Reinach's theory of *Bestimmungen* is an explanation of the kind of propositions we call "constitutives". Both constitutive rules and the rule of recognition (and in a different way also Kelsen's *Grundnorm*) are, in the end, simply postulated: one cannot go beyond the fact of a kind of "original agreement", as Searle mentioned in his speech act theory.[30] Reinach's *Bestimmungen* theory of course recognizes the importance of convention, and allows us to understand conventions, which are discovered as having "on their back" a realm of apriori laws due to which the convening itself becomes intelligible and possible.[31]

But in order to affirm this fertility of Reinach's theory, we have to overcome a serious obstacle: Reinach himself was completely sure that his theory was not a kind of new formulation of natural law theory.

At the end of his *A priori Foundations of Civil Law*, Reinach discusses the relationship between his theory and natural law theory. In my opinion, Reinach is upholding at least four main theses in order to deny the connection between natural law theory and apriori science of law:

1. Natural law theory "believed in the possibility of setting up for all times an ideal law with immutable content and that it did not sufficiently take into account the variable conditions of life on which the validity of such principles depends".[32] The apriori science of right does not: "Although that which holds apriori is at the same time prima facie something which ought to be, the philosophy of right or valid law considers the apriori laws in the context of the concrete community in which they are realized and in which their ought-character can undergo very various modifications".[33]

[29] *See* Burkhardt (1986).

[30] Searle (1969), 190.

[31] As Barry Smith has pointed out: "I believe that, expressed in the fact mode, Searle's account is correct but incomplete; it provides only a first, and almost trivial, part of an account of what social reality is." *See*, Smith and Searle (2003), 286.

[32] Reinach (1983), 136.

[33] *Ibid.*

2. Natural law theory confers nature a normative meaning. Apriori laws have no normative meaning in the context of apriori science of right, so they are not "binding" for positive law; that is, positive law makes its enactments in absolute freedom. In addition to this, we may remember that this apriori has nothing at all to do with human nature, and does not derive from it.

Two consequences arise from this fact:

1. The first one is that natural law theory declares the invalid character of positive law when it contradicts natural law. Despite this, positive laws that deviate from apriori laws are not invalid for this reason (because this apriori has no normative meaning). Apriori law is valid as far as deviated positive law does not enact something different.[34] It is important to bear in mind that Reinach is not talking about *contradictions* between positive and a priori laws. A contradiction requires two propositions of the same kind, with a contradictory content. A priori science of right propositions are propositions of being, they are related to states of affairs, and can be false or true. By contrast, the propositions of positive law are not judgements but enactments (*Bestimmungen*). They are not propositions of being, but of ought to be, and so there is no state of affairs we can refer to these propositions. What really takes place are "deviations" (*Abweichungen*) of positive law from apriori law. But there are (or may be) "legitimate deviations", in the sense that positive law is entirely free to put forward its *Bestimmungen*. They are not *is* propositions, but *ought* propositions. They cannot be true or false.
2. The second one has to do with the fact that natural law theory searches for the right law. Justice is a crucial ingredient of this theory. Apriori laws have nothing to do with ethics or justice, and can even be refused for reasons of fairness. It is due to the fact that apriori does not derive from human nature, and so has nothing to do with claims concerning what is due to a human being because of his/her own nature.

As far as the first point is concerned, I think it shows that when Reinach talks about "natural law theory", he is in fact talking about just one natural law theory: the rationalistic one. The possibility of setting up for all times an ideal and immutable law has nothing to do with the classical theory of natural law (Aristotle's and Aquinas'), which Reinach seems to ignore.[35] Despite this, as Crosby has pointed out, when Reinach distinguishes here the apriori ought-to-be of states of affairs from the ought-to-be posited by enactments, "it becomes clear that he definitely recognizes the reality of which Cicero and Aquinas and the whole natural law tradition speak; that is, he recognizes an objective moral order, which is also relevant to the critique of the positive law".[36]

[34] *Ibid.*, 252.

[35] He takes this conception of natural law theory from Ahrens, in *Hotzendorff Encyclopedia*, as quoted on Reinach (1983), 41.

[36] Crosby (1983), 193.

The point is that he is not talking about this order, nor about its laws. He is talking about how things really are, and not about how they ought to be. But to what extent can we support the isolation of these two spheres?

7.4 The Problems of a Non-normative Apriori Independent of Human Nature

Following on from the second point discussed, we find the main argument against the compatibility of Reinach's theory and the natural law tradition: the lack of normative meaning of the apriori, and its independence from the idea of human nature.

The lack of normativity of legal apriori is not only highlighted by Reinach in terms we already know. Husserl too points it out:

> What is utterly original in this essay of Reinach's, which is in every respect masterful, is the idea that we have to distinguish this apriori, which belongs to the proper nature of any legal order, from the other apriori which is related to positive law as something normative and as a principle of evaluation: for all law can and must be subjected to the idea of "right law"-"right" from the point of view of morality or of some objective purpose. The development of this idea would lead to a completely different apriori discipline, which however does not, just as Reinach's apriori theory of right does not, go in the direction of realizing the fundamentally mistaken idea of a "natural law." For this apriori discipline (of "right law") can only bring out formal norms of right, and from these one can no more extract a positive law than one can get definite truths in the natural sciences out of formal logic.[37]

John Crosby has stressed that when confronted with the pages that Reinach spends trying to explain the relationship between apriori right and natural law, "one wonders, for example, whether Reinach's sphere of right really distinguishes itself, as Reinach thinks, from the natural law in that only the latter has a normative function with respect to the positive law. Is Reinach's apriori sphere of right really so lacking in normative importance for the positive law as he claims?"[38]

It has also been a reason to reject the sense of Reinach's theory. What's the point of learning to see apriori legal objects of a new kind if they have nothing at all to do with real law? Reinach's work would become the solution for an non-existent problem.[39]

Dealing with this problem, Seifert has asked himself: "Is Reinach's *Apriorische Rechtslehre* More Important for Positive Law than Reinach himself Thinks?"[40] His answer was "yes, it is". In his opinion, the apriori sphere is really relevant for positive law.

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[37] Husserl (1983).

[38] Crosby (1983), 178.

[39] Recasens Siches (1929), 231.

[40] Seifert (1983), *Aletheia,* 3.

But for the moment we have only been told that apriori laws are non-normative, and that this does not work as a principle of evaluation of positive law. Now we may ask: what is the meaning of a non-normative apriori?

First of all, it should be noted that Reinach in fact never held that the apriori sphere was irrelevant for empirical law. As Reinach wrote, the apriori "plays a much greater role within the positive law than one may suspect".[41] So 'non- normative' is not at all a synonym of 'irrelevant'.

Secondly, I would like to propose a new interpretation of this non-normative character of apriori. I think Scheler's spiritual power theory would give us a useful framework for understanding this thesis. The point is that spirit, ideas, propositions of the kind we have just talked about, are in some way "powerless": they cannot become real by themselves. At the same time, they nevertheless do have some "power": the power of delimiting the framework of possibilities for the execution of the real.

The key concept to be introduced here is that of "functionalization" (*Funktionalisierung*). This concept provides us with an explanation of how ideas become real. It is a "subliminal process of interaction between spirit and reality".[42] This interaction takes place between ideas, concepts and meanings on the one hand, and reality on the other.

As Manfred Frings has pointed out, functionalization is important because it "plays a significant role in our everyday lives, much as we might remain largely unaware of it".[43] It is necessary to stress here that what is important in our everyday lives must be important for Law. As Pérez Luño has shown, our everyday life is "full" of law.[44] So I think it is a good idea to apply this thesis to the process of realization of Law.

Functionalization is at work when an insight into a state of affairs occurs while making trials, probings, or experiments with things or states of affairs.[45] In *Formalism in Ethics,* we are told that an artist is "controlled" by aesthetic laws without consciously "applying" them.[46] But it is not only in artistic experience that apriori laws play this singular role, but also in every creative experience, such as those of designers, inventors, politicians, economic policy makers, and also jurists.

When do we become aware of these laws and so gain the insight we were talking about? Only when we experience something going astray "in" our artistic, political, designer's or legal execution. In other words, it is when our activity begins to be disturbed and veers from the laws that rule our sphere of action that we first become aware of the existence of such laws.

So ideas, concepts and meanings are not static, but dynamic: their mode of being is becoming, in a process that is immersed in reality. Ideas are sketches (*Entwürfe*), Scheler told us in other works.[47] And they are not *in rebus* or *ante res*: they are *cum rebus.*[48]

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[41] Reinach (1983), 7.

[42] Frings (1997), 60.

[43] *Ibid.*

[44] Pérez Luño (1997).

[45] Here we can find one of the "pragmatic" keys of Scheler's phenomenology.

[46] Scheler (1973), 141.

[47] Scheler (1979), Bd. XI, 119.

[48] Scheler (1976), Bd. IX, 252.

But, in my opinion, it is in *Problems of Religion* that it is explained most clearly how functionalization works, by means of the process of functionalization in moral experience:

> It is only during the experience of mistakes and deviations from laws not present to our mind that it gradually dawns on us that an insight had all along been leading and guiding us, as it is also the case with all stirrings in conscience which object more to what is wrong than they would point by themselves to what is good. Nonetheless, in the background of the stirrings of conscience there is a positive insight into the good and into a positive ideal of both our own individual life and of human life in general.[49]

So, by the way, every "ought" (as in *Bestimmungen*) has its foundations in what ought-not-to-be: whenever a human action runs counter to a moral reality, conscience evokes what ought to be and ought to be done.

That is the way values play a significant role in our everyday life. The content that we grasp, usually without being conscious of it, becomes a form of knowledge and of experience, a form in which we can grasp infinite values. Those activities of our mind in which we achieve insights about things become, in this way, a habit of our spirit, as Vacek has pointed out.[50]

Values, essences and ideas function as the glasses we use to look at the world. Everything we see is seen in their light.

The idea of human worth, for example, can be grasped by different cultures in different ways, or may not be grasped at all. Once it has been grasped, it becomes "form" in which dignity is appreciated, and a form that determines who will be considered a worthy man and who will not, and also the concrete meaning of worth according to this framework of possibilities.

But this insight into human nature only speaks to us when we are about to break the borders of the apriori laws concerning an apriori state of affairs, such as the worth of every person. And it does so in a negative language, telling us what we ought not to do, so that we can design the enactments ruling our lives according to what we ought not to do, in order to forbid it.

In another sphere, when I refer to the non-normative meaning of the apriori of promising, for example, what is to be shown is that this apriori is unable to become real by itself. At the same time, however, no idea, regulation or claim concerning a promise takes place beyond the framework of the structure of promising, even in the case where empirical law represents a deviation of this apriori, which is guiding in some way the process of its realization.

As Reinach himself has noted, it is very difficult for us to be aware of the importance of the apriori in the empirical sphere. I think this interpretation of the non-normative meaning of the apriori could be useful in this sense.

Now we must turn our attention to the second question discussed: Reinach's apriori does not derive from human nature at all.

In order to avoid misunderstandings, I think it is necessary to separate two different problems:

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[49] Scheler (2000), *Gessammelte Werke*, Bd., V., 198. Translation to English by Manfred Frings (1997), 63.

[50] Vacek (1979), 245.

1. On the one hand, the fact that the essential structure of the person, as subject of social acts, is relevant for achieving a correct understanding of this kind of act, as well as of the legal objects given inside them.
2. On the other hand, we may consider that obviously not every law has directly to do with human nature. But an important part of it does, the best example being human rights. In the same way as the legal regime of promises has to do with the apriori structure of promising, human rights have to do with the essence and structure of person.

Both problems seem to be a little confused, in my opinion, in Welzel's work. I'm referring, of course, to his theory of logical-objective structures of law.

Welzel, like all philosophers of law under the influence of Radbruch and his theory about the "nature of things", argues that there are logical-objective structures of law, an example being the structure of the human action. Learning to see these structures demands a superseding of legal positivism, in that they are not a creation of positive law: they are given apriori to the legislation. But these structures bind the legislator only in a relative way. They do not invalidate the positive law.

At this point, Welzel asks if it is possible to find a principle capable of invalidating any positive law in contradiction with it. We will call it a "really normative" principle. He finds it in the "ethical autonomy of the human being".[51]

As we mentioned at the beginning of this chapter, the two problems indicated above are connected by the idea of human nature as the only *is* able to lead us to *ought*, and so the only really normative *is*. Reinach has proved in my opinion that this is not entirely correct.

Let us begin with problem one. A brilliant student of Reinach's, Hewitt Conrad-Martius, was probably thinking of the relevance of the structure of human beings for the apriori of right when she wrote that: "When I promise someone to do something I divest myself of my personal freedom in a certain direction and in a certain sense (…) I abandon myself as person to the other in that definite direction and in that definite sense. It is no wonder that from this act results a claim in the other and an obligation of myself to him. Only a person as person can do this; for only the person has the freedom towards himself to transcend himself!"[52]

The relevance of the structure of the human being for a better understanding of apriori of right does not mean that the idea of person should be necessary in order to provide the apriori of right with a deep basis or foundation. It only means that we can achieve a better understanding of the states of affairs which are given to us in the social relationship sphere if we keep in mind the idea of person.

In order to clarify our second problem (that is, the fact that the apriori of law has nothing to do with human nature), I will begin my explanation with an example proposed by Seifert: "The statement with which a positive code of law may begin -that all men possess the fundamentally same rights regardless of race, sex, etc.- is

[51] Welzel (1962).

[52] Conrad-Martius (1983).

definitely not a mere positive legal enactment like Reinach's "a promise of donation is valid only if made and confirmed by a notary public".[53]

Obviously Reinach was not thinking of the first kind of statement, which has been contained in positive law basically since the end of the Second World War. Anyway, is the first statement in the example able to be true or false? In my opinion, the statement is still an enactment. The point is that it is a grounded enactment: grounded, of course, in the apriori sphere, and containing no deviation at all from it.

It does not mean that we cannot think about this statement as an apriori judgement (if it is the case that there is no deviation at all): "all men possess fundamentally the same rights regardless of race, sex, etc."

Is it a synthetic apriori judgement in Reinach's sense? It will depend on the nature of the state of affairs concerning this judgement and its subsistence. The mainspring of this state of affairs can be formulated as "the being entitled to the same rights of every person".

Does this state of affairs subsist? Does the being entitled to life of the condemned man subsist? In other words: do human rights exist?

If it is the case, then the statement will be true.

As I argued before, just as the legal regime of promise is connected to the essence of promising and its apriori structure, the legal regime of personhood is connected to the essence of the person and its apriori structure.

Let us just consider once again the human being as existing, and having a being, like trees, houses or numbers. There are a lot of states of affairs that do subsist, concerning existing and non-existing persons. Some of them may be apriori, that is to say, they may be interconnected by apriori laws.

So in states of affairs like "the being worthy of the person", is there an apriori, which is moreover in apriori interconnection with other states of affairs, as for example "the being inviolable of worthy life", or the later "being entitled to the same rights of every person".

And, finally, this interconnection is not only apriori but also synthetic: the being entitled to the same rights is not included in the concept of "person", but it is required by the essence of person. Nothing is contained in the concept of "worth" about being entitled to certain rights. It is required by the essence of worth.

It is a kind of knowledge that can be clarified or analyzed, but trying to prove it would have no more sense than trying to prove that $1+1=2$. The contrary may be false, but it wouldn't involve a logical contradiction, as for example the proposition $1+1=3$ does.

We must now take into account that, as we have interpreted the question, this apriori of right regarding human nature works as a framework for the legal regime of human life. So it is possible that positive law deviates from it. Are the deviations in this sphere specially relevant? Are they able to invalidate positive law?

Let's take a few examples: what about the death penalty? Is it invalid? And what about the death penalty at war? What about lives whose death has a legal regime that

[53] Seifert (1983), 213.

excludes homicide or murder -what Agambem has called "homo sacer"? One example is, in most cases, prenatal life.

If we pay attention, we will probably realize that we are dealing with the two main problems of legal philosophy: whether human rights do exist (whether the condemned man has a right to life) and whether the unfair law is still law (whether the enactment that deviates from apriori structure of the person is real law).

In my opinion, Reinach's theory is not developed enough to show the way to solve these problems.[54] Even so, we can try to sketch a position based upon the theory of apriori of law.

Ollero has argued,[55] in an hermeneutical key, that what will be law (a human right not recognized apriori by State, or an unfair law) is something difficult to fix on an aprioristic way. Only at the end of the process of law's creation may we be ready to declare what the right is in each case, what the "law" is. As long as there is just one person determined to fight for his right, the question will remain open. But just for this reason we have to consider that human rights do exist, and that unfair law is (perhaps in a provisional way) a perfectly valid law. And in this process, an unusually relevant role is played by the ideas or preconceptions that each citizen holds about what is due to his dignity.

The importance of the way we grasp the value of human being, and the way this value functionalizes itself in our everyday legal experience must be highlighted: it determines the framework of our creation of a legal regime for human life.

But above all, as philosophers of law, we must feel concerned about the necessity of going back to the thing in itself, that is, not to a theory of the person, but to the person herself. And then we must try to make it clear to ourselves what has been given to us, and use language to share it with others and subject it to criticism or even refutation.

In this sense, Reinach's philosophical ideal remains normative: to attempt to describe things as they are phenomenologically given (that is, given to an unprejudiced mind in everyday experience). In our case, to learn to see law (the social acts in which it is manifest, the person who performs them, the objects that come into being with them…), and to try to describe it, seems to me an appealing alternative in contemporary legal philosophy.[56]

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[54] Reinach was working on a essay about the human person by the time of his death, *See* Schuhmann (1987), 277.

[55] Ollero (2007), 218 ff.

[56] Dubois (2002), 345.

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Chapter 8
Perspectivism and Natural Law

Ignacio Sánchez Cámara

Among the foremost concepts of Greek moral philosophy, the following might perhaps be singled out: the *logos* of Heraclitus, the Platonic Idea of Good, the Aristotelian distinction between the naturally just and the legally just, and the natural law of the Stoics. The latter distinguished the universal or divine law (the order of the Universe), natural law and human laws. The natural law is the derivation of the universal law in each being, and is proper and consubstantial to that being. Man furthermore participates in it through reason. We may therefore conclude that natural law is moral law, and this is how it passed into later thought (for example, St Augustine and St Thomas Aquinas).

Natural law is devalued or negated by moral relativism, which leads eventually to its breakdown. Its origin too lies in Greece, specifically in the ideas of the Sophist Protagoras and his thesis on man as the measure of all things. "Whatever appears to a state to be just and fair, so long as it is regarded as such, is just and fair to it."[1] "And likewise in affairs of state, the honourable and disgraceful, the just and unjust, the holy and unholy, are in truth to each state such as it thinks they are and as it enacts into law for itself."[2]

If relativism were true, there would be no moral laws in the strict sense, since they would be reduced to the condition of social norms or conventions. Plato criticised this ethical relativism in all his work, and devoted much of his dialogue *Theaetetus* to the question. In fact, the debate might easily have been settled by Plato, though this was not to be so. The nineteenth century ended with a predominance of relativism, and with it a radical crisis of philosophy. The Modern Age

[1] Plato, *Theaetetus*, 167b.

[2] Plato, *Theaetetus*, 172ab.

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proved the definitive apex of subjectivism, which appeared to lead necessarily to relativism. Today it remains part of what might be considered the dominant ethical paradigm. Among other things, the philosophy of the twentieth century has consisted in a formidable attempt to retrieve philosophy as a rigorous branch of knowledge and to restore the objectivity of morals.[3] Exemplary in this respect is the phenomenology of Husserl and the phenomenological philosophy of values, whose most distinguished representatives include Max Scheler, Nicolai Hartmann, Dietrich von Hildebrandt and Hans Reiner.

Values are ideal qualities residing in things. They are not the things, but they need them to exist. The material ethics of values, according to Scheler, aims to supersede Kantian ethical formalism. For Scheler, Kantian ethics represents the highest degree of moral reflection, and is "the most *perfect we have in the area of philosophical ethics*."[4] His thesis that the determining factor in moral conduct is attitude or propensity (*Gesinnung*) constitutes for him a definitive truth. This attitude, however, must refer not to a formal duty but to the existence of values. Values are different from the objects which bear values.

Scheler affirms that:

> there are authentic and true value-qualities, and that they constitute a special domain of objectivities, have their own *distinct* relations and correlations, and, as value-qualities, can be, for example, higher or lower. This being the case, there can be among these value-qualities an *order* and an *order of ranks*, both of which are independent of the presence of a realm of goods in which they appear, entirely independent of the movement and changes of these goods in history, and 'a priori' to the experience of this realm of goods.[5]

According to Hartmann, "values are essences". They do not come from things or from subjects, but this does not mean that they exist in another real world, but that they constitute a specific quality of things, relations or persons. Goods are value-things.[6]

The decisive question which would permit values to supply us with the foundation of moral knowledge is that they should themselves be objective. Clarification in this respect is found in Ortega y Gasset's essay *Introducción a una Estimativa. ¿Qué son los valores?* ('Estimative Introduction. What are Values?'), where he refutes the theses of the subjectivity and relativity of value and upholds its objective character. Here he makes the affirmation that "the knowledge of values is absolute and quasi-mathematical."[7]

> One thing is the materiality of a canvas by Velázquez, and another its grace, perfection or nobility.
>
> And here there dawns a realisation of the greatest importance. The perception of the thing as such and the perception of its values are produced quite independently of one another. I mean that sometimes we see a thing very well, and yet we do not "see" its values …

[3] Worth mentioning in this regard is the work of Edmund Husserl, and particularly *Philosophy as a Rigorous Science*.

[4] Scheler (1973), XVIII.

[5] Scheler (1973), 15.

[6] Hartmann (1949), 121.

[7] Ortega y Gasset (2005a), 544. Own translation.

> The terms to which this discovery leads had better be firmly established. Every value, through having the character of a quality, postulates something concrete for the being referred to…
>
> The experience of values is therefore independent of the experience of things. But it is furthermore of a very different kind. Things – realities – are by nature *opaque* to our perception. We have no way of ever seeing an apple in its entirety. We have to turn it, open it, divide it, and we shall never come to perceive it wholly. Our experience of it will be more and more approximate, but it will never be perfect. On the other hand, unreal things – a number, a triangle, a concept, a value – are *transparent* natures. We see them at once in their integrity. Successive meditations will provide us with more minute notions about them, but they have given up their entire structure to us at first glance. All of our subsequent mental labour is brought to bear upon this first vision, or upon another that merely reiterates it. Our experience of the number, of the geometrical body, of value, is thus absolute. Hence mathematics is *apriori* a science of absolute truths. Now, Estimative or Value Science will similarly be a system of evident and invariable truths, of a type analogous to mathematics.
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> This will sound strange to many ears, but it is to be hoped that greater reflection will accustom them to acknowledging such an inevitable thought. The old dictum, '*de gustibus non dispuntandum*', is absolutely mistaken. It supposes that in the world of "tastes", meaning of valuations, there are no evident objectivities to which our disputes may be referred for ultimate settlement. The truth is quite the reverse: every "taste" we have tastes a value (pure things offer no possibilities for either taste or disgust), and every value is an object independent of our whims.[8]

If we abide by the phenomenological definition of the acts of valuing, preferring and disdaining, we shall find that valuation does not go in them from the person to the reality, but from the reality to the person. The person is not the arbitrary lord of value, dispensing it according to whim, but rather the servant and witness of a value that is imposed on him.

In the field of value, there is room for intersubjective contrast. The thesis of the subjectivity of values generally enjoys the benefit of the burden of proof. One would have to start at least from neutrality, and to refuse in principle to take subjectivity for granted (Scheler). In this respect, the question of the fountain or origin of knowledge ceases to be of prime concern.[9] It is necessary to distinguish between genealogy and grounding. The subjectivity of the first should not lead the same to be sustained of the second. In any case, the ethics of values is not assimilable to the systems of natural law which make direct rulings on the morality of actions.

Attention must be paid to the determination of the influence of values on the accomplishment of moral conduct. Highly relevant in this sense is Scheler's distinction between the representation or knowledge of the purpose in itself (*Zweck*) and the objective or goal of the action (*Ziel*).[10] The representation of the purpose does not necessarily occur in every act. On the other hand, the goal (*Ziel*) is already present in every tendency. A goal is given in every purpose and is its undoubted determiner. The purpose is constituted by values. The valuable content is the essential element, since it is possible for the goal not to be known at all, or not clearly, but the valuable

[8] Ortega y Gasset J., *ibid.*, 544–546. Own translation.

[9] Rodríguez Paniagua (1981), 145 ff. Own translation.

[10] Scheler (1973), 40 ff.

component is given in all its clarity. In the meantime, the representative component is always founded on the valuable content. Man tends to realise values, because these are described beforehand as the essential element of the goal of the purpose.[11] Scheler's posture might be invalidated for two reasons: "Either because in fact no tendency exists without a prior representation of an object – that is, it would not be values but the representative component of the goal of the purpose which constituted the essential element of the objective – or else because the purposes which emerged without being determined by the representative component were morally irrelevant."[12] Scheler reacts against intellectualism and has no doubt regarding the existence of purposes without representative content. It is not the representative content but the valuable content which turns out to be essential in purposes. The purpose is founded on the goal.

Scheler lacks a wholly convincing argument in favour of this priority of the purpose over the will, and of the goal over the purpose. Knowledge has for him a character subordinated to the interests of the subject, conditioned by them and consequently by purposes. He defends the moral relevance of natural tendencies and inclinations, which Kant rejected, and has to categorically reject Kant's affirmation that good and bad are *originally* linked to acts of *willing*: "only persons can (originally) be morally good or evil."[13] Good or bad are personal values. In the second place, so too are the directions taken by moral capacity (virtues and vices). Only in the third place are a person's acts, including the acts of willing and accomplishing, depositaries of good and bad. All of them – the person, the directions of comportment and the acts – receive their moral assessment from values.[14] Man is the mediator between values and reality.

Scheler establishes a kind of axiomatics of value. The existence of a positive value is itself a positive value. The non-existence of a positive value is itself a negative value. The existence of a negative value is itself a negative value. The non-existence of a negative value is itself a positive value. In the sphere of willing, a value is good when linked to the realisation of a positive value. In the sphere of willing, a value is bad when it is linked to the realisation of a negative value. In the sphere of willing, a value is good when it is linked to the realisation of a higher (or the highest) value. In the sphere of willing, a value is bad when linked to the realisation of a lower value. In this sphere, the criterion of the "good" (or the "bad") consists of the coincidence (or opposition) of the value whose realisation is being attempted with that which has been given as preferable, or, respectively, in the opposition (or coincidence) with that which has been given as a value to be passed over.[15]

[11] Scheler (1973), 89 ff.

[12] Rodríguez Paniagua (1981), 167. Own translation.

[13] Scheler (1973), 85.

[14] Scheler (1973), 40 ff.

[15] Scheler (1973), 82 ff.

> The moral subject is the representative of that which must be in the world of that which really is.[16] (Hartmann).

The philosophy of values does not entail the assumption of ethical universalism, nor, of course, that of relativism. This is explained by the theory of perspective. The account which follows adheres to the ideas of Scheler and Ortega, and, because of this, other theories of perspective have been left out. Human life is not a *factum* but a *faciendum*. It consists of action, plot and drama. Living consists of deciding what we are going to do, what we are going to be. Life is freedom, but freedom in fatality. Life is not given to us ready-made, but we have to make it in an inexorable circumstance that we have not chosen, but which to a greater or lesser extent we can modify. For that reason, Ortega affirms that "I am I and my circumstance, and if I do not save it, I do not save myself."[17] Every life is the result of a triple reality: vocation, circumstance and chance. This condition of life was illustrated by the Spanish thinker with an expression of Nietzsche's: "the poet is the man who dances in chains".[18] In his classes, he explained this idea by referring to the condition of a person condemned to play music against his will on an instrument not of his choice, but not thereby prevented from being able to execute an almost infinite variety of melodies.[19]

Human life is therefore circumstantial, since it consists of living here and now. This would appear to lead to subjectivism, and with it relativism. If all truth pertains to life and all life is circumstantial, all truth will necessarily be circumstantial. And both Scheler and Ortega in fact reject universalism understood as the possibility of acceding to timeless truths. While the German philosopher criticises the aim of knowing the universally valid, the Spaniard affirms that life escapes from physical

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[16] Hartmann (1949), 171.

[17] "My natural exit route to the universe opens across the passes of the Guadarrama Mountains or the fields of Ontígola. This sector of circumstantial reality forms the other half of my person: only through it can I make myself whole and be fully myself. The most recent biological science studies the living organism as a unity composed of the body and its particular medium, so that the life process consists not only in an adaptation of the body to its medium, but also in the adaptation of the medium to its body. The hand endeavours to mould itself to the material object in order to grasp it well, but at the same time every material object hides a prior affinity with a certain hand. I am I and my circumstance, and if I do not save it, I do not save myself. *Benefac loco illi quo natus es*, we read in the Bible. And in the Platonic school, we are told the enterprise of all culture is: "to save appearances", phenomena. That is, to search for the sense of what lies around us." (Ortega y Gasset (2005b), 756 ff.).

[18] "But this set of enforced circumstances does not affect our life in such a way that it must be governed by an ineluctable and mechanical trajectory, but it always leaves a margin for free choice: so that at every moment our existence is a given fatal circumstance which our will can take in its hands and push in the direction of perfection. There is no life if the given circumstance is not accepted, and there is no good living if our freedom does not concretise it on the road to perfection. This same idea is contained in the beautiful phrase used by the great German thinker Nietzsche, when, referring to the poet, he said he is the man who 'dances in chains' " (Ortega y Gasset (2005c), 228. Own translation.).

[19] On all this, see Marías (1983), especially 379 ff.

and mathematical reason as water slips through a wicker basket. In spite of appearances, however, this has nothing to do with relativism. An example from Scheler, which Ortega takes and makes his own, may allow us to clarify this. Let us think of a field across which, for example, a hunter, a farmer, a painter and a poet pass in succession. Each one of them will "see" a different reality in accordance with their life interests, their vocation, their *ordo amoris*. But reality imposes itself upon each and every one of them. It is not possible for them to manufacture it at will. The farmer might well be blind to everything to do with hunting or pictorial chromatics, but he cannot prevent the agricultural properties from imposing themselves upon him.[20] Truth is not relative. What is subjective, not relative, is personal interest or vocation. The theory of value explains the disparity of valuations as well as their mathematical objectivity. It even explains the phenomenon of blindness to value. Someone can be very perspicacious with regard to the values of justice and blind to those of aesthetics. Far from justifying them as subjective or relative, however, that shows them to be absolute and quasi-mathematical.

Reality is perspective. Truth, then, is perspective. Perspective is personal, but not arbitrary or capricious. Truth and error exist absolutely, but truth and error are such in relation to each life. This does not mean that what is true for one is false for another. Let us recall the example of the field. It is not that what is true for the hunter is false for the farmer, but that one attends to certain aspects of the countryside and the other to different ones. Yet the hunting, farming or pictorial qualities of the field impose themselves, and they are not dependent on human discretion. It is not therefore a question of any form of subjectivism or relativism but quite the opposite, the most rigorous existence of truth and value. Among the antecedents of Ortega's notion of perspective, it is necessary to mention Leibniz, Nietzsche and Teichmüller.[21]

[20] "In any landscape, in any precinct where we open our eyes, the number of visible things is practically infinite, but we can only see a very small number of them at any given moment. The eyesight has to fix itself on a small group of them and veer away from the others, abandoning them. To put it another way, we cannot see one thing without ceasing to see the others, without blinding ourselves to them transitorily. Seeing this implies unseeing that, just as hearing one sound implies unhearing the rest. It is instructive for many purposes to have happened on the paradox that there is normally, necessarily, a certain dose of blindness partaking in sight. To see, it is not enough for the ocular apparatus to exist on the one hand and the visible object on the other, the latter situated among many others which are also visible: it is necessary that we should direct our pupil towards that object and withdraw it from the others. To see, in short, it is necessary to look. But looking is precisely searching for the object beforehand, and is like a pre-seeing before seeing it. Apparently, sight presupposes a foresight, which is the work of neither the pupil nor the object but of a prior faculty with the mission of directing the eyes, of exploring the outline with them. This is attention. Without a minimum of attention, we would see nothing. But attention is nothing but an anticipated preference for certain objects that pre-exists in us. Take a hunter, a painter and a ploughman to the same landscape, and the eyes of each will see different ingredients of the countryside; strictly speaking, three different landscapes. And let it not be said that the hunter prefers his hunting landscape after having seen those of the painter and the ploughman. No, those he has not seen, nor will he strictly speaking ever see them. From the outset, whenever he was in the countryside he would look almost exclusively at the elements of the landscape of relevance to hunting." (Ortega y Gasset (1973), 157. Own translation.).

[21] Marías (1983), 363 ff.

The notion of perspective already appears in *Meditations on Don Quixote*: "When shall we open ourselves to the conviction that the definitive being of the world is neither matter nor soul, nor any determinate thing, but a perspective? God is perspective and hierarchy: the sin of Satan was an error of perspective. Now perspective is perfected by the multiplication of its terms and the exactitude with which we react to each of its ranks."[22]

This situates us a long way from both rationalist universalism and relativist subjectivism.

> Whereas in Nietzsche or Teichmüller perspective is opposed to reality, signifying appearance, convention, illusion that fades when the perspectivist vision is suppressed, *in Ortega perspective is the condition for the real and the possibility of access to its truth*. Falsehood consists in eluding the perspective, being unfaithful to it or making a *particular* viewpoint absolute; that is, *forgetting the perspectival condition of all vision*, or to put it in other words, the need of every perspective to be integrated with others, because perspective means *one among several possibilities*, and a single perspective is a contradiction.[23]

Perspective is the condition of truth. Furthermore, it is truth itself.[24]

Duty is the demand which each day brings with it. And this demand is personal, since it depends on who we are and who we have to be. This does not mean there are no universal duties. It does not prevent the existence of a general duty not to lie, steal or betray. None of that is abolished. It is a matter of a more demanding morality, since those general or common duties are supplemented by others that are personal. All human life, even the most modest acts of day-to-day living, is cloaked in a moral significance. We thus have precisely the absolute contrary of relativist subjectivism. All human life is moral, not only certain decisive or transcendental acts. Nothing illustrates this idea better than Scheler's thesis concerning "the good in itself for me". This formulation contains an apparent contradiction, for if it is in itself, it will not be only for me. But it is not really a contradiction at all. It refers to a comportment that may be absolutely good, but not for everyone, only for me. We all have some common duties, but not all of us have the same personal duties. However, the very idea of duty eliminates any caprice or arbitrariness. The more human, demanding and noble a life is, the less space remains open for arbitrariness and caprice. The privilege of nobility is endeavour and exertion, and it consists of more severe and demanding obligations.

The subjectivity of values does not entail their relativity in general but only their "relativity of existence".[25] All moral value judgements are subjective because they are supported by testimonies of "moral conscience". "Among the reasons which led to the theory of the subjectivity of moral values, the foremost is the fact that it is *more difficult* to know and judge objective values than any other objective contents."[26]

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[22] Ortega y Gasset (2005b), p. 756. Own translation.

[23] Marías (Marías 1983), 372. Own translation.

[24] On all this, see Rodríguez Huéscar (1966).

[25] Scheler (1973), 317.

[26] *Idem*.

This is because "our knowledge of moral values is in more immediate conjunction with our *volitional* life than our theoretical knowledge."[27] The estimative deception is much more widespread than other types of deception. Ethical scepticism is much more widespread than theoretical and logical scepticism. Scheler finds the reason for this phenomenon in the fact that our *conscience* of differences reacts more finely to ethical values than to theoretical differences, and "the reason for this, in turn, is our tendency to *overestimate* in general the consonance of ethical value-judgements. This overestimation stems from our tendency to excuse and justify our actions by saying that "someone else has acted in this way". Even children habitually justify their actions in this fashion. Discrepancies in the area of values, much more than those in the area of theory, make us uneasy, and it is this *uneasiness* that makes such differences in value-judgements *more conspicuous* than those in theoretical judgements. Scepticism is then a consequence of the *disappointment* over our failure to find the expected and sought-for consonance among value-judgements; and this disappontment stems from our weakness, our inability to stand alone when it comes to questions of moral values, which prompts anguished looks in search of someone who might feel or think as we do. Hence we come readily to the proposition: All moral values are '*subjective*'."[28]

Here lies the explanation for the Kantian attempt to search for the criterion of morality in the generalisation of a maxim of the will. According to Scheler, however, in no case can it be made good in itself by its mere aptitude for generalisation.

> Indeed, as we shall see, there is evidence in a strictly objective insight which shows that a certain kind of willing or acting or being is good for only one individual, e.g. for "me", and that it cannot be universalised. Furthermore, we shall see that the more "adequate" (i.e., the "more objective") moral insight into pure and *absolute moral values* of a being and comportment is, it must *necessarily* possess the character of being restricted to individuals.[29]

> The idea of the generally valid cannot originate the insight of good.

> The prevailing opinion concerning the *subjectivity of values* is nowadays hidden behind the *pathos* of a term that in a sense summons all the moral tendencies of modern times as if by the call of a trumpet: this term is *freedom of conscience*.[30]

There is thus a moral insight regarding universally valid norms, and also regarding the good of an individual or a certain group. And both can have the same degree of exactitude and objectivity.

> Conscience in the legitimate sense is this: (I) it represents the *individual form of the economization* of moral insight only insofar as it is directed to the *good as such* "for me" (i. e., only within these bounds). Of course, this individual form of the economization of moral insight can pertain to what is *universally* good and right as well. And this good "for me" can be exhibited not only *by* me but also by another (a friend, an authority, etc.)

[27] *Ibidem*, 317 ff.

[28] *Ibidem*, 318.

[29] *Ibidem*, 319.

[30] *Ibidem*, 320.

> who knows me better than I know myself. But one can speak correctly of "conscience" *only* when it is a matter of the above plus the necessary moral insight which is not and cannot be contained in universal norms, and in which the process of moral cognition is completed – and when *I* come to this insight *by myself*. The issue of my increasing insight into the good (from my own life-experience) – insofar at it is "the good for me" – constitutes the essence of conscience.[31]

The greater the purity of moral conscience, the more it speaks for oneself rather than universally. But neither the idea of a universally valid intuition nor that of something objectively good is abolished along with it. "Freedom of conscience" cannot therefore be held up against the idea of a universally valid, obligatory and objective knowledge, nor can it be opposed to material moral principles.[32]

There are fundamental differences between the Greek concept of nature as the norm and archetype of social order and the Christian concept of ethical law and the Natural Law. In the Christian concept, social norms cannot be understood as laws of nature. The confusion of the natural and social orders is eliminated in the Christian doctrine of Natural Law. In it, the true archetype is found not in nature but in the divine essence, which, insofar as it refers to the government of the world, is called Providence, and rules differently over the realm of nature and that of the social or human. Nature is determinant in the ethical order *qua* reason.

Natural Law has always been a predominantly ethical doctrine. In a strict sense, the expression "Natural Law" should be reserved for ethical doctrines based on nature, and especially on the human. In this sense, the ethics of values would (strictly speaking) be excluded from Natural Law.[33]

A distinction must be made between a strict and a broad concept of Natural Law. "The strict concept will refer solely to the doctrines or conceptions which they see in nature, and especially in human nature, the foundation of the Law."[34]

In this strict concept, the ethics of values will not fit into the doctrines of Natural Law, but they will in its broader sense, understood as a predominantly ethical doctrine.[35] Rodríguez Paniagua poses two fundamental problems. "Our problem can

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[31] *Ibidem*, 324.

[32] "It therefore belongs by right to a moral individual qua *individual* to be protected by this principle from the false claims of merely universal moral laws. But this conscience and the freedom of conscience dissolve neither the idea of an objective good, for which "conscience" is precisely a cognitive organ insofar it is the objective good for an individual, nor the idea or the right of a universally valid insight in regard to value-propositions and norms that are valid for all men. On the contrary, these are quite independent of "conscience" and are accessible through strict insight; and though they possess an *obliging character* that is wholly *independent* of *recognition* by *conscience* on the part of anyone. "Freedom of conscience" in the true sense can therefore never be played off against a strict and objective and obliging cognition of *universally valid* and also *non-formal* moral propositions. It is therefore certainly *not* a "principle of anarchy" in moral questions." (*Ibidem*, 325 ff.).

[33] On the strict concept and the broad concept of Natural Law, see Rodríguez Paniagua (1981), 70–90.

[34] *Ibidem*, 72. Own translation.

[35] *Ibidem*, 79 ff.

be reduced to these terms: 1st, does not the doctrine of the philosophy of values as regards the relations between Ethics and Metaphysics invalidate any attempt at construction under Natural Law based on that philosophy? 2nd, is the procedure of moral conscience, such as it is understood by the philosophy of values, to be regarded as equivalent to the traditional procedure in Christian Natural Law, which is to say primarily to that of reason?"[36]

The separation of Ethics from Metaphysics seems in principle to be characteristic of the philosophy of values, especially in the case of Scheler. A similar affirmation might be made of Hartmann. Attention has also been drawn, however, to the presence of metaphysical and religious elements in Scheler's Ethics.[37]

The philosophy of values proclaims the priority in the methodological and temporal order of ethical questions raised at the phenomenological level.[38] But the Ethics of Scheler is shot through with metaphysical and religious elements. Hartmann affirms that both phenomenological and traditional ethics coincide in extracting their moral doctrines not so much from being and metaphysics as from valuation.

> The opposition between the philosophy of values and the traditional doctrine of Natural Law is not so great as it might appear at first sight, and as certain over-hasty accounts of the philosophy of values might lead us to believe.[39]

The second question was whether the procedure of moral knowledge proposed by the philosophy of values was equivalent to the traditional one. Does it not leave the former bound to subjectivism? Values reveal themselves to us through the intentional feeling. In the phenomenological school, there are various terminologies to designate the acts of apprehension of values, which grant greater or lesser relevance to the emotional aspect. But even in the most emotivist authors, it would be a mistake to consider acts of apprehension of values as simply emotional.[40]

There is a case for distinguishing an immediate knowledge and a scientific knowledge of values. In the latter case, the role of reason is much more prominent.

The first difference we observe between the Scholastic position and that of the phenomenological school with regard to moral knowledge is a divergence in the order of attention, from the very outset. Whilst Scholastics starts from general principles, the phenomenological school starts from the direct and immediate perception of the values which refer to a specific action or object. The difference in the role attributed to reason is not so radical as it might appear to be at first sight.[41]

In any case, the ethics of values entails a critique of legal positivism, at least of its most widespread versions, which ground their positions on the refutation of an objective morality, as Kelsen's Theory of Law does. The ethics of values is opposite to any theory of Law which does not assume the objective existence of values of the just.

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[36] *Ibidem*, 80. Own translation.

[37] Among others, Fries (1949), especially 48 f. and Dupuy (1959).

[38] Rodríguez Paniagua (1981), 81.

[39] *Ibidem*, 84. Own translation.

[40] *Ibidem*, 87.

[41] *Ibidem*, 89.

Nevertheless, it is not possible to elude the difficulty encountered by the ethics of values in indicating contents for comportment and pointing out the actions which are to be regarded as good or bad. This difficulty also affects objectivist ethics, like utilitarianism. The hierarchical criteria of values of Scheler and Hartmann lay down a guideline.[42] So too do the criteria of Reiner: temporary urgency; quantity or extension of the subjects which can participate in the value; probability of success; a greater or lesser probability of need; preference for already realised values over new ones; whether or not the valuable action has already been performed by others; special personal faculties for realising the value (of the various activities we can perform, we should choose those which correspond most closely to our faculties); and an especially intense and irresistible inner call perceived as the voice of a good superior being.[43]

As judicial norms, values leave a great deal to be desired. We miss greater specificity and clarity. Judicial norms include an obligation. In Law, actions move into the foreground. There are other ethical doctrines which talk of strict obligations or duties encompassing the field of the moral. Nevertheless, the ethics of values can provide a foundation for duties (of realising the value). There can also be an abuse of the values which are in fact preferred or dominant.

The ethics of values establishes both a distinction and a connection between Law and Morality. The presuppositions of a legal axiology are the material coincidence of law and morality, and also the differentiation of the two concepts.[44]

Scheler talks of a moral law, and goes so far as to call a penal system in contradiction with this Law a "penal system only in appearance". It is possible in a certain sense to speak here of a doctrine of Natural Law. The root of the differentiation between Law and Morality lies in the social character of Law.

The schism between being and duty is not radical. The critique of the naturalist fallacy is shown to be unjustified if the values are objective.

Positivism, in general, fails when it comes to grounding the Law and determining its (proper) content. Legal positivism is opposed to the grounding of the Law, either because it regards it as outside the legal scope and methods (Kelsen) or because it links such grounding to the authority of the State. The classical version of positivism fails not only in grounding the Law but also in its explanation of reality. If Law is not to be reduced to mere facticity, to nothing but natural reality, it seems unavoidable to connect it with Ethics. The problems of determining content can be resolved by means of the criteria of Scheler, Hartmann and Reiner.

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[42] Scheler establishes the following hierarchical criterion for ordering values, from least to most elevated: (1) Values of the agreeable and disagreeable. (2) Vital values. (3) Spiritual values: values of art, science and right and wrong. (4) Values of holy and unholy (Scheler (1973), 110 ff.). Hartmann accepts this criterion, but complements it with that of urgency or social need for the realisation of the value, which demands priority for the lower or most basic values (Hartmann (1949), 602).

[43] Reiner (1974), 168 ff.; and Reiner (1964), 218.

[44] Rodríguez Paniagua (1981), 174 ff.

Legal positivism, as herein understood, is a (deficient) scientific theory of Law and a (deficient) theory of legal science.

It may be affirmed in conclusion that the ethics of values is far removed from the dogmas of legal positivism.

Kant, in *Perpetual Peace*, writes: "The jurist, not being a moral philosopher, is under the greatest temptation to do this [use the sword to ward off outside influences from the scales of justice], because it is his business only to apply existing laws and not to investigate whether these are not themselves in need of improvement."[45]

But while some doubts may be raised over the compatibility between the philosophy of values and the (broad) concept of natural law, it is of undeniable value in retrieving the ideal of natural law understood as moral law. The ethics of values, and its idea of perspective, points us along a fertile path towards the recovery of the objectivity of moral knowledge, and with it a re-establishment of the idea of natural law.

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[45] Kant (2010), 29.

Chapter 9
Natural Law Theory in Spain and Portugal

Antonio E. Pérez Luño

9.1 Methodology, Scope and Philosophical Criteria

Designing a summary approach to the current scenario of Natural Law theory in Spain and Portugal is no easy task. Traditionally, theologians, philosophers, sociologists and lawyers have displayed a committed interest in this area over the centuries and hence produced abundant literature that renders any synthesis attempt quite a complex enterprise. On the other hand, there is an undeniable plurality of perspectives dealing with Natural Law, which makes it appropriate to adopt the open and flexible rationale mentioned by Enrico Pattaro in his presentation to his *Legal Philosophical Library* (Pattaro 17).

Considering the wide and heterogeneous character of Natural Law theories in Spain and Portugal, to establish sharp and aprioristic distinctions may be useful just for partial research projects, but it stands as an inadequate choice for the general scope adopted in this paper. The aim and extension of this essay also recommend a fundamentally descriptive approach, which does not entail a total discard of personal positioning when this would appear to be unavoidable. Besides, these boundaries imply that scholars, issues and theories are addressed in a necessary non-exhaustive fashion.

One final warning. There are some shared historical and cultural features that enable the joint treatment of both the Spanish and Portuguese Natural Law theories. Yet, it would certainly be a mistake to assume an undifferenced approach to these two traditions, which have their own history and peculiarities. Consequently, a common treatment is provided for the forging era of these traditions, in which the interchange of ideas and approaches was more intense; while a separate presentation is considered more appropriate for twentieth century theories, where differences are more acute.

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9.2 Natural Law in the Spanish and Portuguese Traditions

The Spanish institutionalized study of Natural Law may be considered to coincide with the founding in 1228 of the oldest Spanish University – the University of Salamanca. Ius commune, Civil Law and Canonical Law were studied at this institution prompted by deep theological, philosophical and political concerns. At the same time, many issues that are currently included within the scope of Legal Philosophy were treated in *Philosophia practica* classes, where an Aristotelian model inspired the approach to moral, political, legal and political problems. In contrast, little interest was shown for positive law during a long period. This piece of information did not pass unnoticed for Chaim Perelman, who remarked, in his study on "*La réforme de l'enseignement du droit et la « nouvelle rhétorique« "*, that the famous University of Salamanca library dedicates little space for classical works on Spanish Law, while literature devoted to Theology, Moral philosophy and Natural law is widely abundant (Perelman 5).

From the beginning of the fifteenth century, and especially during the sixteenth and seventeenth centuries, scholars pertaining to the so-called "Escuela de Salamanca" (Salamanca School), also known in a broader manner as "Clásicos españoles del derecho natural" (Spanish Natural Law Classics), produced copious literature gathered under the titles *De Justitia et iure* and *De legibus*, which can inform an understanding of the configuration of modern Natural Law. Even more, the very expression "Natural Law" appears to have been first used by a Spanish scholar, Fernando Vázquez de Menchaca (1512–1569) in his *De vero iure naturali* (circa 1560), and not by Hugo Grotius, as it is sometimes assumed. This era, doubtlessly one of the most brilliant epochs for the Spanish legal-philosophical thinking, did not only see the forging of modern Natural Law, but also the birth of Criminal Law theory thanks to the contributions of Alfonso de Castro (1495–1558) as well as the new conceptions of the Law of the Peoples due to the decisive works of Francisco de Vitoria (1492–1546) and the aforementioned Vázquez de Menchaca. A crucial factor for the vigour of Natural Law thinking in this era was its antidogmatism. Spanish scholars did not limit themselves to a servile reception of scholastic sources. On the contrary, they subjected those sources to a critical revision according to the exigencies of that time. They also showed an independent attitude, sometimes daring to overtly criticize the established power. It was this attitude that led Francisco de Vitoria and Bartolomé de las Casas (1474–1566) to defend a position contrary to the political interests of the Crown, designing the exigencies for an admissible legal status for the recently conquered peoples of the New World. In this cultural atmosphere, Domingo de Soto (1494–1560) and Francisco Suárez (1548–1617) proposed valuable theses in order to identify the democratic grounding of the government, while Jesuit father Juan de Mariana (1536–1624) established a definite characterization of the right of resistance. It comes as no surprise that the Spanish Legal-philosophical thought served in this age as a model for the renovation of Natural Law undertaken by Grotius and for the theoretical justification of popular sovereignty launched by Althusius (Cf. Pérez Luño 1994; Trujillo 1997; Truyol y Serra 1975).

The University of Coimbra in Portugal, playing an analogous role as a spreading focus of philosophical and legal thought within the country, assumed a similar position to that of the University of Salamanca in Spain. In the Renaissance era, cultural relations between these two countries were intense and the theses of the Spanish classics of Natural Law found in Portugal a receptive soil for its diffusion and development.

Manuel Paulo Merêa, the most important figure in Portuguese twentieth century legal historiography, dedicated an interesting book to the study of Spanish Jesuit Francisco Suárez, paying special attention to his time as a professor in Coimbra (Merêa 1917). Another Spanish Jesuit, Luis de Molina (1535–1600) lectured in both Coimbra and Evora Universities, contributing to the forming of a relevant school of scholars devoted to Natural Law in the latter one (Cf. Díez-Alegría 1951). Balancing this flow, some Portuguese intellectuals developed their work in Spain. The most remarkable was Lisboan Serafim de Freitas (1570–1633), who lectured in Valladolid and opposed the theses on freedom of navigation of Fernando Vázquez de Menchaca, while sharing University location in the Castilian city. Menchaca's ideas were furthered by Grotius in his work *De mare liberum.* Freitas contested both scholars with his *"mare clausum"* theory, in which he rejects the idea that the seas may be considered as "common things" (*res communes*) that may not be object of occupation, appropriation or limitation of use. The life of Portuguese Antonio Vieira (1608–1697) may be considered to run parallel to that of the Spanish Dominician Bartolomé de las Casas. Born in Lisbon, he spent most of his life in Brazil, where he contributed to the defence of the dignity and liberty of Amerindians in the name of the ethical, legal and political exigencies he managed to derive from his humanist conception of Natural Law.

The eighteenth century saw the inception of an era of decadence in the study of Natural Law, as a reflection of the profound economical, social and political crisis that was striking Spain at that time. By the middle of the eighteenth century, the academic vices that pervaded the University of Salamanca were not limited to the lecturing and research realms. The very structure of the University showed signs of corruption, made evident through the selling of professorships and degrees. There is certainly quite an abyss between the University of Salamanca that served as a spreading pole for the Spanish classical Natural Law doctrines during the Renaissance and Baroque era and the deteriorated version found at the beginning of the eighteenth century. The crisis did not hit the Portuguese Universities that hard thanks to policies inspired by the European Enlightenment adopted by Marqués de Pombal. By the end of the century, Spain also initiated an Enlightenment movement during the rule of King Carlos III. In this time, Portugal and Spain experienced the penetration of rationalist versions of Natural Law, which encountered special diffusion in the so-called "Escuela Iluminista Salmantina" (Salamanca Illuminist School). The penetration of the spirit of Enlightenment brought fresh air to the Salamanca academic atmosphere, saturated by the practice of corruption and indulgence in fruitless routines. This intellectual renovation was facilitated, in the case of Legal Studies, by the emergence of a committed interest in the study of *Ius Naturae et gentium*, which started to be taught in *Reales Estudios de Madrid* and later in the

universities of Valencia, Granada and Zaragoza. No special chair or professorship was created in Salamanca for this discipline, but it was cultivated as a part of other subjects. The first professor to hold a chair for this specific area in Madrid was Joaquín Marín y Mendoza (1721–1782), author of the work *Historia del derecho natural y de gentes (History of Natural Law and Law of the Peoples),* which played a pioneering role in the penetration of Enlightenment Natural Law theories.

During the nineteenth century, the institutionalization of Natural Law as an academic discipline became one of the main topics within the ideological controversy sustained by liberals and traditionalists in university. At the beginning of that century, liberal ideology promoted the establishment of Chairs of Natural Law in the Law Faculties, with syllabuses inspired by rationalism and contractualism, thus opposing the conservative and traditionalist tendency to defend a merely scholastic study of Natural Law in the Philosophy faculties. The influence and diffusion of German Idealism contributed to renovate Natural Law theories. Some local peculiarity needs to be acknowledged here, since the most studied idealist scholar was Krause, thus leaving aside the great masters of this trend: Kant, Hegel, Fichte… In contrast, the spread of Legal Historicism and Philosophical Positivism led to a gradual decline of Natural Law theories that aggravated by the end of the nineteenth century (Cf. Pérez Luño 2007; Truyol y Serra 2004).

9.3 Twentieth Century Representative Scholars and Tendencies

The twentieth century saw the initiation and development of the main trends and philosophical movements that still currently prevail. A thorough analysis of the works and doctrines of the last century falls quite beyond the reasonable boundaries of this essay. Instead, a sensible summarizing approach will attempt to provide a description of the cultural horizon covering the reflections on Natural Law developed in Spain during the last century. With such an aim, the different theoretical positions and research topics will be grouped in two representative trends: Neo-Scholastic Natural Law doctrines, on the one hand, and those versions characterised by their innovative, vitalist and experiential approach to Natural Law, on the other hand. Through the twentieth century several doctrines developed within Legal Theory and Philosophy that build up the different versions of Natural Law. The majoritarian adscription of philosophers to Natural Law does not entail some sort of uniformity regarding the fashion by which the very concept of Natural Law is understood and defined. In fact, a direct assumption of a high degree of conceptual heterogeneity is found among Spanish twentieth-century Natural Lawyers. The frequently denounced "multivocality and equivocalness" of Natural Law found a firm confirmation through this variety of Natural Law theories, no matter how much diffusion and preponderance one single version may have achieved. Hence, the need to establish some theoretical distinctions when approaching this general philosophical trend.

9.3.1 Neo-Scholastic Natural Law Doctrines

Most of the Neo-Scholastic Natural Law doctrines were developed after the end of the Civil War, a period in which they attained an almost absolute preponderance among the Legal Philosophers of that time. These theories tried to refer to and/or draw upon classic sources, particularly those pertaining to the Spanish School. There were, nonetheless, attempts of assimilation of the main contemporary Catholic Natural Law tendencies, most of them aimed at rendering them compatible with the traditional thought with a higher or lower degree of flexibility.

One of the most significative focuses of Natural Law think was created in the first decades of the twentieth century in the University of Zaragoza, around the figure of professor Luis Mendizábal Martín. Among his disciples we find his own son Alfredo Mendizábal Villalba, as well as Miguel Sancho Izquierdo, Enrique Luño Peña, and, at the beginning of his academic career, Luis Legaz Lacambra.

This group of scholars, which I proposed to call the "Aragonese School of Natural Law" back in the 1970s, though much bounded to Neo-Thomism, were also influenced by the Neo-Kantian Legal Philosophy of Stammler, Radbruch and fundamentally by Giorgio Del Vecchio.

Luis Mendizábal Martín (1859–1931) stands as a linking piece between the nineteenth century treatises and the Natural Law cultivated at the beginning of the twentieth century. The works of Professor Mendizábal Martín, initiated in 1980 with his *Elementos de derecho natural* (*Elements of Natural Law)* and continued through the seven editions of his *Tratado de derecho natural (Treatise of Natural Law)* – the last of which was re-elaborated by his son Alfredo Mendizábal Villalba (1897–1981)- represent at the same time the hindmost example of nineteenth century Natural Law ways and concerns and the opening to the new horizons and problems of the discipline at the beginning of the following century. Mendizábal Martín defines Natural Law as a Law enacted by properly driven reason, based upon facts and founded on the Divine Law. His conception of Natural Law does not fall into inflexibilities, neither it is incapable of taking into account historical circumstances; rather, following a common doctrine of Hispanic Natural Law, Mendizábal conceives Natural Law as a reality in tension with the requirements of daily life.

Mendizábal Martín's disciples, Miguel Sancho Izquierdo (1890–1988) and Enrique Luño Peña (1900–1985), followed the philosophical guidelines established by their Master in the structure of their treatises on Natural Law. They both start from the idea of order, to establish the relationships between the moral order and the legal order. The latter is determined by an aim that works as its regulating principle, which is the notion of common good in its most rigorous Thomist sense. Following the doctrine of the Salamanca School, Luño Peña sustains the need to concrete the primary principles of Natural Law, that is, to project the consequences deduced from Natural Law on to the sphere of practical and historical situations. This deductive method is implemented through necessary conclusion and approximate determination. When addressing the relationship between Morals and Law, he synthesised the Salamanca School theses by proposing a union without unity and a distinction

without separation between these two normative realms of the human conduct (Luño Peña 1968, Mendizábal Martín, Mendizábal Villalba, Sancho Izquierdo 1955).

In the first half of the twentieth century, a mention needs to be made to the works of University of Madrid-based Professor Pérez Bueno, who as a PhD scholar in the Spanish College at Bologna, defended his dissertation titled *Breve esposizione delle dottrine etico-giuridiche di Antonio Rosmini (A Brief Exposition of Antonio Rosmini's Ethical-Legal Doctrines)* in 1902. He was the main diffuser of Rosminian thought in Spain, as it may be noted in his book: *Doctrinas ético-jurídicas de Antonio Rosmini (Rosmini's Ethical-Legal Doctrines).* He professed a Thomism-inspired Natural Law, but he was also open to other tendencies, as his interest in Sociology and the grounding of Human Rights shows. The end of the Civil War surely meant the beginning of a new stage for the evolution of Natural Law in Spain. The variety of theoretical directions prior to the 1936–1939 Civil War, reflecting an ideological pluralism, was substituted by the overwhelming supremacy of "Catholic Natural Law", which reigned during Franco's authoritarian regime. The literature dedicated to Natural Law in Post-War Spain is strongly uniform. Neo-Scholasticism, which had already counted on the highest number of followers in the previous period, becomes followed practically by every Legal Philosopher, as well as by most theoreticians specialising in Public and Private Law from 1939. Even scholars with no Thomist background, such as Luis Legaz, Enrique Gómez Arboleya and Salvador de Lissarrague produced studies in which they showed an interest in Natural Law and, especially, in the Salamanca School. It would clearly be an overstatement to sustain that the political regime established in Spain by Franco after the Civil War pretended to support a "revival" of the Spanish Natural Law Classics. It is obvious that the so-called *Movimiento Nacional* (National Movement) had to address more urgent issues, culture not being among their primary concerns. Nevertheless, peculiar circumstances explain a favourable context for an invocation and manipulation of the Salamanca School as it had never been known before. Several reasons may be adduced in order to explain this situation. The most evident one was the international isolation to which Franco's regime was subjected after the defeat of both Nazi and Fascist totalitarian regimes. Lacking an *external* political legitimacy before their coetaneous democracies, the dictatorship had no choice but to look for an *internal* legitimation rooted in the past. This phenomenon conducted to an exacerbated ideological nationalism, spurred by a distrust and hostility towards anything that could hinder the cultural policies of monolithical unity imposed by the regime. The Salamanca School was therefore chosen as an autochthonous thinking model with which the glories of the lost Empire could be restored.

Among the most representative Natural Lawyers of the Franco era we find Professor Francisco Elías de Tejada (1917–1978). He proposed a Catholic Existentialism based upon the idea that God assumes a decisive role and that this belief renders it possible to find acceptable reasons for an objective-values-based human agency. Elías de Tejada's disciple, Francisco Puy, coordinated and authored *El Derecho Natural Hispánico (Hispanic Natural Law)*, whose title may be equivocal, since not all the scholars there referred were Spanish and neither could they be considered followers of the Salamanca School *strictu sensu*. It is, albeit, true

that some of the most relevant contemporary Spanish Neo-Scholastic Natural Law trends were there contained. Puy summarizes the aim of Legal Philosophy, conceived in strict Neo-Scholastic terms, in the double function of guiding Law and Politics according to a transcendental and therefore transcending (God, the absolute goodness) goal, i.e. Natural Law, an idea that may synthesize the whole conception of this School (Puy). Eustaquio Galán (1910–1999) also advocated for a strictly Neo-Scholastic Natural Law. Natural Law would imply, as Galán defends in his *Ius naturae*, the belief in a *iustum* given by God or Nature, and hence, pre-positive and more valuable than positive Law; the latter having therefore to conform to the former, which functions as a paradigm or canon (Galán 1954).

Another relevant figure in contemporary Spanish Neo-Scholastic Natural Law is José Corts Grau (1905–1995) who held the position of vice-chancellor in the University of Valencia for a long period. His thought stands as a radical denial of one the nuclear dogmas of Legal Positivism: the separation between Law and Morals. He defended in his *Curso de derecho natural (Natural Law Course*) that the legal and moral orders may not be either metaphysically or psychologically separated. Such a divorce would mean a failure to acknowledge the universal order, or a breakdown in both the divine unity and the human unity, a denial of our own nature. Moral subjects and legal subjects are the same and their ends, far from excluding each other, complement and help each other. That is why many scholars consider morality as an end and Law as a means to fulfil its realization. Defending a divorce between the moral and the legal orders entails – according to Corts – an attack on legal dignity, since Law is rooted in a moral act and not only originates from morality but also returns irremediably to its bosom. José Corts Grau undertook the intellectual challenge of introducing new contemporary trends in the heart of Neo-Scholastic Natural Law. With such an aim, he devoted himself to the study of the contributions made by legal institutionalism or existentialism, paying special attention to Martin Heidegger (Corts).

Natural Law pertaining to the *classical tradition*, either in its Neo-Scholastic version or in some other conceptions linked to Christian philosophy, still holds importance for a considerable group of lecturers and scholars in contemporary Spain. The direct references to Neo-Scholastic Natural Law made in some John XXIII Encyclicals, particularly *Mater et Magistra* and *Pacem in Terris*, as well as the social and political implications of some Vatican II Constitutions, which bear an unquestionable humanist and democratic character, prepared the path for the rehabilitation of Christian Natural Law making it compatible and conversant with contemporary culture. Later pontifical and pastoral activities have obtained an ambivalent signification: some actions and documents have followed the aforementioned humanist trend, while some other contexts have seen openly involutive positions that reveal an unfortunate misunderstanding of modern values. These two tendencies have influenced the most recent Spanish Catholic Natural Law, directed towards positions of *aggiornamento*, so to say, of Natural Law in some occasions, while also adopting clearly pre-conciliar approaches in other instances. A wide group of Legal Philosophy lecturers from different Spanish universities have resorted to traditional Catholic Natural Law in order to claim for the necessary

moral grounding of positive Law, advocating a moral objectivism before ethical relativism and making use of these theses to address diverse contemporary moral and political concerns. Issues related to marriage, divorce, abortion, euthanasia, reverse gender discrimination, secularization and laicism have been treated in a dense literature by scholars like Jesús Ballesteros, Francisco Carpintero, Francisco Contreras Peláez, Francisco José Lorca Navarrete, Alberto Montoro Ballesteros, Andrés Ollero and Ernesto Vidal, among others.

9.3.2 Innovative Natural Law Trends

In the last decades of the last century some theoretical attitudes representing innovative points of view come into scene. They sometimes even represent a critical position before the so far dominating Neo-Scholastic Natural Law. It is true that the main exponents of what I have called "Aragonese School of Natural Law", as well as some other Neo-Scholastic Natural Lawyers like José Corts Grau, showed an open and receptive attitude towards some twentieth century philosophical, legal and sociological trends, such as existentialism, institutionalism, or solidarism, but for the following scholars the innovative and/or critical will was central to their understanding of Natural Law. It is, albeit, important to notice that these innovative and critical formulations were not proposed against Natural Law, but designed within Natural Law itself as an attempt to clarify their meaning and adapt their theses to new contexts and concerns.

When trying to understand contemporary Spanish Legal Philosophy, no diligent scholar should overlook the fact that two of our most international Legal Philosophers, Luis Legaz Lacambra and Luis Recaséns Siches shared two basic particularities: the influence of Ortega y Gasset's ratio-vitalism in their formative years and their interest in legal experience showed in some of their latest most influential works. If Ruiz-Giménez proposed an approximation between institutionalism and ratio-vitalism, Legaz and Recaséns have the merit of having noticed the similarities between some ratio-vitalist premises and the philosophy of legal experience.

Luis Legaz Lacambra (1906–1980) elaborated in his early years a concept of Law that shows the imprint of two opposing influences: Kelsenean formalism and Ortega's ratio-vitalism. In his foreword to the second edition of his *Filosofía del derecho (Philosophy of Law)*, published in 1961, Legaz asserts his aim of characterising his conception using a clearer notion of Natural Law than the one usually used, thus conceding Natural Law a central role in his legal theory. Natural Law would then be responsible for the concretization of the scope of a "point of view on justice" that constitutes the valorative dimension of Law. This dimension had a merely formal character in Legaz's early years. Law – Legaz would point in his second stage – is always a "point of view on justice" and accordingly Natural Law must be the best possible point of view on justice – justice in its purest programmatic form (Legaz Lacambra 1961).

Luis Recaséns Siches (1903–1977) deems the axiological dimension of Law the object of Natural Law, which he called for a long time "*estimativa jurídica*" (legal estimative). Later on, he preferred to return to the traditional label to avoid the logomachy implied in using two names for the same object. For Recaséns, Natural Law is built upon ideal objective values from which necessarily valid guidelines are derived. These values belong to the human existence and, particularly, to specific situations experienced through life. Natural Law must therefore be understood as an enunciative expression of facts, since in the realm of being there are good and bad phenomena, fair and unfair facts, virtues and vices, health and illness, convenience and inconvenience. Natural Law must therefore be understood as a compound of normative principles and not enunciations of realities: it does not express a being, but an ought-to-be conceived as an identification of estimative criteria (Recaséns 1961, 1983).

One of the most solid and stimulating innovative attempts within contemporary Spanish Natural Law may be found in the works of Professor Antonio Truyol y Serra (1913–2003), who elaborated a systematic and historical summary of Natural Law thinking during the 1950s. There, he proposed an interrelation between law and morals, conceived as different normative realms. This conceptual distinction does not entail the sort of separation alleged by Legal Positivism. The intertwining of both orders reaches its most important expression, according to Truyol, in social morality, that is, that part of morality that determines one's duties as a member of society (Truyol 1950).

An innovative character may also be appreciated in the thought and works of Joaquín Ruiz Giménez, who held the Legal Philosophy Chair at the Complutense University of Madrid. His doctoral dissertation, published later, became a pioneering research within Spanish Legal Institutionalism. An effort to renovate Natural Law may also be noticed in the theses of Professor Mariano Hurtado and Professor José Mª Rodríguez Paniagua. The latter is responsible for a suggestive Natural Law conception based upon Legal Axiology. It is widely recognized that Professor Jose Delgado occupies a leading role in the critical review of Natural Law topics. There are three basic aspects that articulate his innovative attitude. Firstly, his prospective reading of the Salamanca School; secondly, his interest in facing one the greatest challenges that contemporary culture posseses before classical Natural Law: the problem of historicity in legal categories; and finally, his aim of overcoming the secular tension between Natural Law and Legal Positivism. That is why he interprets some of the most solid legal-philosophical constructions of our time (Hart, Rawls, Dworkin, Alexy…) as theoretical attempts aiming at showing the crisis experienced by Legal Positivism, but without formally taking sides with traditional Natural Law.

Reference needs also to be made to my own intellectual experience, which has involved a long-term engagement with these innovations in Natural Law. Having studied the scholars pertaining to the Salamanca School through the teachings of my uncle Professor Enrique Luño Peña, I never abandoned my interest towards their doctrinal legacy. I have, consequently, had the chance to produce different papers as well as a comprehensive general book in which, celebrating the fifth centenary of

the discovery of the New World, I tried to renovate the *spanische Naturrechtslehre Forschung* in a threefold fashion: addressing those thinkers or topics that had been neglected or insufficiently studied; performing a "meta-theoretical sieve" on those doctrinal studies so far developed in order to test their critical liability; proposing prospective analyses to explore the contemporary projections of this theoretical legacy (Pérez Luño 1994). The teachings and stimuli received from other Legal philosophers had a similar importance in my attempts to renovate Natural Law. My PhD dissertation, written in University of Bologna under the direction of Guido Fassò, was defended in 1969. It analysed the tensions between Natural Law theories and Legal Positivism in contemporary Italy. Its Spanish version was published 2 years later, counting with a foreword by Professor Fassò himself (Pérez Luño 1971). I then transferred to University of Freiburg where I had the chance to receive the teachings of Professor Eric Wolf. In the following years, my contact and scientific relations with different Spanish and foreign colleagues allowed me to settle my ideas and innovative intentions regarding Natural Law. Bearing such an aim in mind, I have always found it appropriate to distinguish between an *ontological, dogmatic or radical* Natural Law, which defends a metaphysically objectivistic order from which absolute and atemporal values may be deduced; and a *deontological, critical or moderate* Natural Law, which does not deny legal character to unfair Positive Law, but establishes certain criteria in order to assess such a regulation and therefore set grounds for its criticism and substitution by a just system. Regarding the first version, I deem it incompatible with important values and exigencies of our contemporary humanist culture, so I consequently endorse a rationalist, deontological and critical Natural Law. Some have argued that it is possible to admit the existence of values prior to Positive Law with no alignment with Natural Law whatsoever as long as they are kept in a moral or social, but not legal, realm. I cannot share this position, because it seems quite paradoxical that legal scholars from both past and present times would sustain that the criteria used to identify proper or correct Law are not legal. This attitude finds no match within epistemology, where no one argues the logical character of the criteria that enable one to tell truth from falsity; just as no one questions the aesthetical character of the criteria that tell beauty from ugliness and there is no controversy on the moral nature of the postulates that tell good from evil (Pérez Luño 2006).

9.4 Natural Law and Human Rights

Legal thinking cannot exist or be intelligible if it is regarded aside from the political, cultural and social circumstances that delimit its spatial-temporal context. Theories and works belonging to one determinate historical stage of Natural Law cannot be comprehended regardless of a determinate system of collective experiences. One cannot understand the peculiarities of the topics and perspectives that characterise Spanish Natural Law in the last years without an account of the new circumstances that contextualise its development. The political changes taken place

in our country by the end of the 1970s meant a substitution of an authoritarian regime by a democratic State fully respectful of the rule of law. This fact has directly and decisively influenced the research and activities undertaken by current Legal Philosophers. In my opinion the most important event having a decisive impact on Spanish Natural Law has been the enactment of the 1978 Constitution. The civic and intellectual mobilisation that the Spanish Constitution brought about also implied a commitment, a challenge and a renovated scientific enterprise. The Constitution has represented for many legal philosophers and theoreticians of my generation a true milestone that has shaken both our condition of citizens and our intellectual career. The enactment of the Constitution meant the beginning of a still on-going research venture for the Spanish legal culture.

The leading role played by fundamental rights in the 1978 Constitution has made them a crucial aspect of our legal culture. In fact, fundamental rights are assigned the task of guiding the performance of public powers and articulating the implementation of the active subjective status of citizens. According to certain viewpoints assumed by a version of critical Natural Law version that lays close to the ideas of the Frankfurt School, the rights and liberties granted in our current Constitution have been considered as institutionalised vindictive channels for the great aspirations and needs of the Spanish society and, in fact, it cannot be denied that that this has actually been the case. From other perspectives, linked to the liberal Natural Law tradition, the meaning of these rights and liberties have been specified as an explicitation of the superior values that ground our *Rechtsstaat* (art. 1.1 Spanish Constitution). There is no doubt that fundamental rights contain an undeniable axiological character and that they evoke this condition with their very name as it may clearly be noticed in the Spanish Constitution wording, where "los derechos fundamentales" (…) "son fundamento del orden político y la paz social" ("fundamental rights" (….) "are the foundation of political order and social peace") (art. 10.1 Spanish Constitution). Other theses, inspired by versions of Natural Law versions that show a more sensitive attitude to History, have insisted on the idea that liberties have a "proteic" character and they necessarily adequate to the cultural, social and economical mutations that have prompted recent Spanish politics.

Some Legal Philosophers, like Javier Antuátegui, Rafael de Asís, Gregorio Peces-Barba, Luis Prieto Sanchís, Gregorio Robles, among others, have attempted a positivist grounding of what the revolutionary French agreed to call "droits de l'homme". Yet, a grounding based upon Natural Law allows a better explanation of the legal vocation of these rights. This may be shown by drawing on Romanic languages, where the same root explains the words Law (*derecho, diritto, direito, droit*) and rights (*derechos, diritti, direitos, droits*), alluding to a both normative (legal) and moral (right) reality. Thus, it is much harder and less convincing to explain the scope of the term "derechos" (rights) in the expression "derechos humanos" (human rights) from positivist premises than from a Natural Law background. This is due to the fact that Positivism is a *monist* theory and therefore it only attributes legal character to positive Law. From this perspective, talking about any natural, human, moral or pre-normative right, as something different from positive law constitutes a *contradictio in terminis*. Natural Law theory, as a dualist legal theory, distinguishes

two different normative systems: a Natural Law conformed by a compound of values prior to positive law that must ground, guide and critically limit every legal regulation; and positive law, established or imposed by the binding force of those holding the power in society. They are "rights" with a diverse deontic status but with no independence, because every natural right tends to be positivised and every positive right, as long as it pretends to be fair, must follow Natural Law. Natural Law has had the persistent historical function of establishing limits to power. Pervading the civic conscience with the idea that there are values inherent to the human being that no political authority may breach, modern Natural Lawyers offered an explanation of the very rationale of rights that cannot be discarded without weakening the grounding of human rights at the same time. The historical attempts to offer a positivist alternative to the Natural Law conception of human rights inevitably lead to compromising their political efficacy. Suffice it to think about the relevance acquired in the nineteenth century by the category of *subjective public rights*, coined by the German Public Law School as an effort of substituting the idea of natural rights as liberties enjoyed by citizens before their government through the introduction of some subjective status that depend upon the government's self-limitation. We should recall, following Antonio Truyol y Serra, that this fashion of understanding rights was connected to the idea of denouncing the legal character of an International Law exclusively built upon the "will of the States" and conceived more as a set of moral or courtesy rules followed by nations (*comitas gentium*) than as true Law (Truyol 1968; Ballesteros 1992; De Castro Cid 1982; Fernández 1984; Pérez Luño 2005; Vidal 2002).

Natural Law has also shown a topical and relevant interest in the consequences that Biomedicine, Bioethics and Biotechnology have on human rights. It is a research area closely related to the socio-legal repercussions of New Technologies, quality of life standing as peculiar element that counts with its own significance. Hence the interdisciplinarity of this field. Human dignity, identity and privacy are values and rights that, from a Natural Law perspective, must be protected before certain biotechnological investigations. The notion of "human nature", a core aspect within the Natural Law tradition, gains new topicality and urgency concerning present bioethical issues (Cf. Ballesteros 2007; Marcos del Cano 2004).

9.5 Natural Law Theories in Twentieth-Century Portugal

The beginning of the twentieth century meant a continuation and strengthening of the positivist trend within the Portuguese legal culture that had already been manifested in the last part of the nineteenth century, as we had the chance to mention earlier. The diffusion of a positivist and scientificist mentality contributed to lead Natural Law to a crisis and the study of this discipline became relegated to Seminaries and Theology Faculties. Among the most relevant circumstances that explain this situation we may refer the following ones:

1. The creation of the Law Faculty of Lisbon in 1913. This academic centre appeared from its origins as a lay and republican alternative before the conservative and

traditional old Coimbra Faculty of Law. The new Lisbon Faculty had no place to keep the Natural Law tradition, which was considered a reminiscence of the past incompatible with the open and progressive mentality that was expected to guide the education of jurists. The innovative character of this new Faculty soon also helped to stimulate the renovation of the old Coimbra Faculty of Law, whose lecturers were unwilling to stay away from the requirements of modernisation.

2. The diffusion of a legal methodology based upon the commentary and elaboration of legal rules in the Lisbon Faculty of Law and, slightly later, in Coimbra. The main feature of this methodology was the assumption of the exegetical French method. Some other versions of Legal Positivism, such as German Legal Dogmatics and General Legal Theory or British Analytical Jurisprudence, had a much lower impact. Some scholars showed an interest in utilitarianism, as well as in some evolutionist versions of positivism. All this determined a progressive abandonment of methods linked to Neo-Scholastic or Idealist-Krausist Natural Law theories that had reached a wide popularity by the beginning of the nineteenth century.
3. The adherence of some lecturers, researchers and students from the Coimbra and Lisbon Law Faculties to progressive, reformist or even revolutionary political ideologies. In the first years of the twentieth century some lecturers pertaining to these two Portuguese Law Faculties were inspired by different forms of the so-called "Chair Socialism", as well as Marxism and Anarchism in their approaches to the concept, meaning and social function of Law (Cf. Cabral de Moncada 1960; Lacasta Zabalza 1988; Merêa 1955).

A clear theoretical example of the attitudes of legal scholars opposing Natural Law is found in the first works of Public Law Professor Domingos Fézàs Vital (1888–1953). Much influenced by the legal sociologism of French Legal theoretician Leon Duguit, Fézàs Vital rejected the notion of subjective right. He considered this concept to be a continuation of the sort of metaphysical ideas defended within Natural Law, since it assumes the existence of legal faculties belonging to people even before the recognition by positive rules emanating from the State. His later positions are representative of the turning point that determines the crisis of Positivism and the beginning of what has been called "the eternal return of Natural Law" (Rommen). Certainly, in the mid 1920s professor Vital abandons his positivism and legal sociologism to join Legal Institutionalism under the influence of Maurice Hauriou and Georges Renard, whose doctrines he helped to spread in Portugal. From that point on, he attempted to elaborate a Neo-Thomist Institutional theory that would set the grounding of legal institutions in Christian Natural Law. This attitude would make him one of the ideologues of the New State, personified by Antonio Oliveira Salazar's political authoritarianism and he would even become of the inspirers of the 1933 Portuguese Constitution, key legal text within that legal-political system (Fézàs Vital 1929).

The restored Portuguese interest in Natural Law had Professor and Dean of the Coimbra Law Faculty Luis Cabral de Moncada (1888–1974) as its most representative figure. He may be considered as the most prestigious twentieth century Legal Philosopher in Portugal. From the end of the 1920s he committed to the criticism of

positivism and its consequences on legal education. Accordingly, he promoted the inclusion of Philosophy of Law as a compulsory subject in the Law Faculties' syllabus. This intellectual attitude, always favouring Natural Law, evolved from Neo-Scholastic premises towards approaches closer to Phenomenology, Neo-Kantianism and Existentialism. Being deeply knowledgeable in German legal doctrine, he was influenced by Radbruch's and Stammler's theses and he critically studied the thought of Kelsen. His reputation became internationally acknowledged thanks to a honoris causa doctorate conferred by the University of Heidelberg (Cf. Jayme). His Natural Law conception, open to the influence of Existentialism, finds concretion in his characterisation of the main mid-twentieth-century European beliefs: (1) the notion that social and political life must be built from inside out, as a projection of a deeper dimension than individual life itself and as a type of existence centred around the religious idea of salvation; (2) the conviction that State and Law are not ends in themselves or sheer instruments to achieve economic goals, but "tasks" of the human vocation of culture and, therefore, means to spiritual ends; (3) the belief that in order to fulfil those ends, it is necessary to appeal to objective, superior and non-historical values so that a superior axiological cosmos, alien to whims and fantasies, is reached. According to Cabral de Moncada, the problem of Natural Law is no longer metaphysical, but an ontological and axiological issue. This is so because, within the phenomenology of conscience and historicity, the autonomous sphere of the spiritual being has revealed itself as a new Logos, which is dependent, intertwined and conditioned by other vital circumstances, but still counting on its own laws, sense and aims. It is current Natural Lawyers' task to figure out the structure of those values that we call spiritual and identify the laws that are to be followed accordingly. Justice and the common good within human societies would deserve the highest position in the scheme. This Natural Law only requires a belief in the reality of the spirit, but does not need to depend upon any metaphysical or religious conception, although the *in limine* legitimacy of these conceptions is not altogether excluded. On the contrary, only these last versions comply fully with the aims of Natural Law, which does not only present a theoretical mental problem, but also a practical problem directed towards action. Intelligence is not required on its own, but is also demands the concurrence of human will. Man will never be a man if he is not able to find, in the depth of his convictions and beliefs, a perspective of the absolute, as a last resort where he may assert the final reason and sense of all his deeds and needs as an spiritual being in this world (Cabral de Moncada 1945, 1966).

The teachings and works of Cabral de Moncada had a significant influence on the thought of the most remarkable Portuguese legal philosophers from the second half of the twentieth century: Castanheira Neves, De Brito and Machado. Joâo Baptista Machado (1917–1991) lectured International Law and Legal Philosophy in the new Oporto Law Faculty. In his first academic years, Machado paid special attention to Hans Kelsen, some of whose works he had the chance to translate into Portuguese, thus contributing to the diffusion of his thought within the Portuguese legal culture. In his mature years he intended to overcome two basic premises of Kelsen's theory: normativist positivism within legal theory and axiological relativism

within legal legitimacy. With such an aim, he elaborated a Natural Law theory that out forward the actualisation and revision of its traditional Neo-Scholastic version. Existentialism, in which Cabral de Moncada's influence may be noticed, Hermeneutics and justice, in which he shows his knowledge of contemporary thinkers like Habermas, Luhmann and Rawls, served as theoretical sources for his ambitious project to renovate Natural Law (Cf. Ferreira da Cunha 2006). Antonio Castanheira Neves, born in 1929, lectured Legal Philosophy in the University of Coimbra. He is also quite critical regarding Legal Positivism and Natural Law. His criticism of legal positivism articulates upon his opposition towards a legal reasoning based upon subsumptions and syllogisms. He also rejects the ideal and abstract character that pervades many Natural Law conceptions. Before these notions, he opposes a real, concrete and historical Law that finds concretion in empirical legal cases. The solution to such cases constitutes the content of Law in an on-going process. That is why courts' sentences are but the determination of what must be considered as legally correct within every legal system (Castanheira Neves 1993). Some analysts of the works of Castanheira Neves have detected some analogies with hermeneutical theories or even with Dworkin's integration theory. In one of his last works, Castanheira Neves nuances the possible coincidence with those theses and makes clear that his position is quite different, since it implies a higher emphasis on the experiential dimension of Law and entails, all in all, a necessary connection between theoretical reflection and real praxis within the legal sphere (Castanheira Neves 2003).

9.6 Conclusion: Premises for an Assessment

As a summarial assessment, it may be pointed out that Natural Law theory stays currently at a crossroads in both Spain and Portugal. New influences, profound changes and worrying uncertainties seem to characterise this scene. In our legal culture, the last years have passed under a syndrome of exhaustion and crisis of the paradigms that have traditionally articulated Natural Law and Legal Positivism. Just like the famous Pirandello's characters, many of the youngest Spanish and Portuguese legal philosophers and theoreticians are "in search of an author". During the last years, the wish to overcome the doctrinal background inherited from the recent past has served as an incentive for the urgent adoption of the imported theoretical models that are deemed more appropriate according to the circumstances. The new versions of Legal Positivism, under the ambiguous label of "Post-Positivism", different tendencies linked to Analytical philosophy, Neo-Constitutionalism, Multiculturalist topics, Feminism, Ecologism, criticism of global society… are some of the heterogeneous study programmes and/or theories which are object of scholarly attention. This renovating attitude is fully legitimate in terms of intellectual concern and anti-conformism and only the future will enable an adequate assessment of their results, since it is not possible to draw definitive conclusions from a panorama that still stays *in fieri,* to use a legal aphorism.

As a synthetic reflection, I understand that the biggest danger currently underlying the most innovative movements within Iberian legal theory and philosophy would be their eagerness to make a clean sweep of the past Natural law era, thus indiscriminatingly condemning tendencies that due to their secular history and plurality of meanings present a compound of implications and nuances that are hardly integrated in a simplifying criticism. Natural Law has enabled an engaged attitude thanks to the penetration of moral values into Law throughout different times and legal cultures. This aspect of the historical function of Natural Law urgently needs to be clarified and taken into account. Otherwise, Spain and Portugal would paradoxically experience the rise and strengthening of attitudes opposed to Natural Law that at the same time appeal to rationally-grounded objective (even though in a historical-sociological sense) values and defend the need to recognise basic human rights and values as legitimising ends or guidelines for every legal system, thus claiming a connection between law and morals. These positions, therefore, implicitly admit well-known Natural Law premises. The opening up to human values and rights, as well as to a historical conscience, typical of the renovating Natural Law theses; the will of some critical legal theories to rescue to most vivid aspects of humanist Natural Law defending the notion of human dignity (Ernst Bloch); and the tendencies that try to rehabilitate practical reason as well as those that attempt to address the problems of our contemporary globalised and technological society from a renovated theory of justice, they all show the persistence of the big questions linked to the historical development of Natural Law doctrines. Because, in any case, as Karl Jaspers indicated in his 1949 *Vom Ursprung und Ziel der Geschichte*, the general image of history and the conscience of the present situation are both mutually interdependent: the more profound the conscience of the past, the more authentic the participation in the present moment.

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Chapter 10
International Law and the Natural Law Tradition: The Influence of Verdross and Kelsen on Legaz Lacambra

María Elósegui

10.1 Introduction[1]

We will analyse Legaz' ideas comparing them with the key figures of German legal thought, Hans Kelsen and Alfred Verdross, and their influence on the Spanish philosopher of law, concentrating particularly on the inter-war period. Both of these internationalist philosophers of law were German-speaking Austrians. Meanwhile, we know that Professor Legaz Lacambra studied directly under both, and he wrote his doctoral thesis on Kelsen and, more widely on the Vienna Circle, which of course included Alfred Verdross,[2] after a research visit to the Austrian capital under the auspices of both scholars.[3]

Alfred Verdross' thinking evolved to a position on International Law that was, by his own admission, based on the ideas of Francisco de Vitoria and Suárez. In his

[1] I am grateful to Yolanda Gamarra, director of the research project "*El pensamiento 'ius' internacionalista español en el siglo XX. Historia del derecho internacional en España, Europa y América, 1914–1953*", Ministry of Science and Innovation DER 2010-16350, for her invitation to take part. Meanwhile, Professor Gil Cremades has helped me through his ever-pertinent suggestions to focus on the historical context, an area in which he is an expert, and has provided me with certain essential clues to understanding Legaz Lacambra, whom Professor Gil came to know well when he directed his thesis. Cf. Gil Cremades (2004, pp. 469–473).

[2] Verdross (1923, 1931, 1973).

[3] Some key works by Prof. Legaz Lacambra dealing with issues in International Law are: Legaz Lacambra (1928, 1931, 1933a, 1934a 1935a).

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prologue to the Spanish edition of his manual of *International Public Law*,[4] Verdross would directly affirm, "It is with great satisfaction that I view the publication of this translation of my book into the language of a country to which I owe so much, insofar as its philosophical foundations are in turn rooted in the Spanish doctrine of the 'law of nations' developed in the 16th and 17th centuries, which has come to have a universal influence."

Legaz was himself well versed in the thought of Francisco de Vitoria and Suárez.[5] As Martii Koskenniemi[6] notes, it was at the end of the nineteenth century that the Belgian historian of law, Ernest Nys, drew attention to the *renewal* of natural law in the Spanish *Siglo de Oro*, pointing to the thought of Vitoria and some of his successors, in particular the Jesuit Francisco Suárez (1548–1617).[7] Sometime later the Spanish Krausists (and especially the internationalists) would draw upon Suárez's thought. Meanwhile, the yearbook of the *Asociación Francisco de Vitoria* also appeared in Madrid in the period with which we are concerned. It was first published in 1928[8] with the collaboration of certain Dominican friars, who would later prepare a Spanish-language edition of Vitoria's works for the first time.[9]

According to Gil Cremades, "It could fairly be said that Legaz's intellectual character was formed in this period. His Catholic axiology coexisted in a tense relationship with the 'philosophy of values', the perspectivism of Ortega y Gasset and the 'sociology of knowledge'. The climate, meanwhile, was different from the stable Thomist *ius naturale*. Moreover, Legaz became convinced under Kelsen's influence that the law is first and foremost, although not only, a series of norms, which is to

[4] Verdross (Verdross 1955b, 1937); 3rd edition, 1955 (Spanish translation, *Derecho internacional público*, with additional notes and bibliography by A. Truyol, Madrid, 1955); 4th edition, 1963 (Verdross (1963). *Derecho Internacional Público*, Madrid, Aguilar, 4th German edition in collaboration with Karl Zemanek 1963. Direct translation with additional notes and bibliography by Antonio Truyol y Serra, based on the revised 4th edition in which Verdross shortened some of the earlier texts); 5th edition, revised in collaboration with S. Verosta and K. Zemanek, 1964 (new Spanish translation by Truyol and revision in collaboration with M. Medina Ortega, Madrid, 1976).

[5] Legaz Lacambra (1934c, p. 273; 1948, pp. 11–44). This article was published again 1 year later in Legaz Lacambra (1935a, pp. 1–13).

[6] Koskenniemi, Martti (2010, pp. 43–63).

[7] Koskenniemi, Martti, op.cit., p. 43.

[8] Truyol cites this journal in Truyol y Serra (1977), p. 263. This legacy is now kept at the Instituto de Estudios Internacionales y Europeos Francisco de Vitoria belonging to the Universidad Carlos III de Madrid.

[9] De Vitoria (1933–1935, 3 vol.; 1960). Fernández De Marcos Morales (2009, p. 258). Another Dominican, Vicente Beltrán Heredia, has also recently brought together a part of the master's manuscripts (located in the Vatican Library in Rome, the Library of the University of Salamanca, the Library of the University of Valencia, etc.), most of them copied by his pupils and disciples, some of whom were themselves outstanding scholars, such as Martín Ledesma, who as professor in Coimbra, would publish a part of the lessons and teachings of F. de Vitoria in 'Secudae quartae' in 1560. Legaz Lacambra (1943, 1951).

say neutral forms around which a diversity of material contents may fit. Drawing on Ortega, but supported by Kelsen, he would define law as "social life in form". He studied this social dimension following the arguments proposed by Gurvitch, which were already present in the work of Luño. It was within these coordinates that the young Legaz placed his work, producing numerous papers and lecturing on natural Law, pure theory and, under the noxious influence of Carl Schmitt, on the legal philosophy of National Socialism."[10]

Though all of the group's members accepted natural Law as useful and a point of reference for their legal philosophy, this concept, while remaining Thomist, had acquired numerous different formulations, ranging from the robust position of Sancho Izquierdo to the young Legaz's much cooler expression.[11]

This article has two parts. The first describes the historical evidence for the influence of German legal thinking on Spanish jurists in the inter-war period. The second examines the ideas about International Law that Legaz Lacambra imbibed as a pupil and critic of the two Austrians, Kelsen and Verdross. Specifically, we argue that Legaz was an adherent of the moderate monism Verdross proposed to explain the place of international Law in the hierarchy of the State's internal norms. He also followed Verdross in his conception of International Law and its role in the creation of an increasing number of international bodies, such as the League of Nations. Verdross set out his thinking on this matter with utmost clarity in his manual of International Public Law.[12] Finally, I shall rely on existing published sources, in particular the work of Professor Juan José Gil Cremades[13] and Benjamín Rivaya,[14] for historical data and to trace the contacts between the Austrian thinkers and their Spanish adepts.

Despite the recent fashion for Anglo-Saxon Philosophy of Law among the younger generation of scholars, the influence of German legal thinking remains strong in Spain. Moreover, it is no accident that Professor Gil Cremades wrote his own doctoral thesis on Spanish Krausism[15] under the direction of Legaz Lacambra.

For reasons of space, the essential content of this paper is confined to the place of International Law in relation to the internal law of states, a highly specific issue that nonetheless holds the key to numerous other topics, and more precisely to Legaz Lacambra's own position and the influences upon him. This will lead us to a discussion of what is an evergreen topic in the teachings of both philosophers of law and internationalists with a bearing on the key issue of the foundations of Human

[10] Gil Cremades (2002, p. 49).

[11] Also according to Gil Cremades (2002, p 50).

[12] Verdross (1937).

[13] See Gil Cremades (2002), passim.

[14] Rivaya (1998, 2010).

[15] Gil Cremades (1969). I, in turn, wrote my own thesis under Professor Gil Cremades, and to complete the chain I followed in his footsteps as a Humboldt scholar when I went to study under the philosopher and jurist, Robert Alexy at the Faculty of Law in Kiel, where Radbruch and Larenz also taught.

Rights, a matter which to this day arouses lively debate and is still addressed in practically the same way as it was decades ago by the three scholars with whom we are concerned. It is, indeed, striking that the works of all three remain *vade mecums* in Spanish law faculties, retaining an untarnished currency.[16]

Spain's neutrality in the inter-war period meant intellectuals like Rafael Altamira, who became a Judge at the Permanent Court of International Justice between 1921 and 1939, were able to play a key role in the League of Nations.[17] Though the League of Nations would end in failure, the idea on which it was founded was in turn based on the notion of *Societas Internationalis* conceived by Francisco de Vitoria as a *ius inter gentes*. This was egalitarian and ecumenical between nations, unlike the conception underlying the UN, which is constituted under oligarchic principles that grant pride of place and the right of veto (despite some minimal evolution) to the permanent members of the Security Council.[18]

10.2 The Influence of Kelsen and Verdross on Legaz Lacambra

Gil Cremades has amply documented the relationship between Legaz Lacambra and Kelsen and Verdross. In his inaugural lecture for the 2002 academic year at the University of Zaragoza, he gives the following account: "The work of Luis Legaz Lacambra, who was born in Zaragoza in 1906, would have a great impact from the start. He graduated in 1928 having studied under Sancho Izquierdo, but on commencing his doctoral studies in Madrid the following year he met Don Luis… In Madrid, he was friendly rather with Luis' son Alfredo and Recaséns, a follower of Ortega, however, and we may surmise that the latter[19] had more influence over his choice of the Pure Theory of Law as a topic for his thesis than Legaz's Aragonese teachers. However, he addressed the topic from the standpoint of a renewed Catholicism"[20]… In 1930, when his thesis was already well advanced, a grant from the *Junta de Ampliación de Estudios* enabled him to visit the University of Vienna for the first time, where he would attend courses and seminars given by Hans Kelsen, the Catholic Alfred Verdross, Fritz Schreir and Felix Kaufmann. He finally earned his doctorate in 1931, when another grant awarded in Zaragoza financed a second visit to Vienna before the publication of his monograph.[21] This was followed by his

[16] López Medel (1981).

[17] For a study of Rafael Altamira, see Coronas González (2002).

[18] This thesis is originally attributable to Gil Cremades.

[19] In the prologue to Legaz's doctoral thesis, Recaséns Siches expressly says, "I suggested this study to him some years ago, which he has now so brilliantly and splendidly completed." Cf., Legaz (1933b), p. 11.

[20] Legaz Lacambra (1932a).

[21] Legaz Lacambra (1932b).

book on Kelsen, published in 1933 with a prologue by Recaséns[22]… Legaz was also an early translator of some of Hans Kelsen's works,[23] following in the footsteps of Recaséns, who had translated one of the Austrian's books in 1927.[24]

Having shown the direct contacts that existed between Legaz Lacambra and Kelsen and Verdross, let us now go on to explain his view of International Law, and the extent to which he shared the thinking of the two Austrians. To this end, we shall concentrate on the analysis contained in his doctoral thesis, which displays a striking intellectual maturity for what is, logically, an early work,[25] and for its currency today, as it still remains a very useful work in the Philosophy of Law. Meanwhile, Legaz maintained his theory of moderate monism in International Law throughout his life, stressing the primacy of the *derecho de gentes* or "law of nations" over national law.[26]

Nevertheless, Legaz Lacambra did more than merely repeat and compile the thinking of the Vienna Circle but took a position delineating his own ideas, which he would attempt to combine with these fundamental issues of legal theory, despite falling prey to some logical incongruities when he underwent his own political transformation during the years of the Franco dictatorship and his approach to the thought of Carl Schmitt.[27]

In any event, his doctoral thesis is key to understanding Legaz's philosophy of law in this early stage, which lasted until the outbreak of the Spanish Civil War. A contrast with his ideas is to be found in the prologue to the 1940 Spanish translation of Karl Larenz (first published in 1933 and reissued in 1935). Legaz had already become acquainted with Larenz's thinking while working on his own thesis, and both Larenz's and Legaz's monographs were published in 1933. In 1934, meanwhile, Legaz wrote an article examining the philosophical roots of National Socialism.[28]

At this time, the conception of International Law defended by Legaz was incompatible with the thesis advanced by Larenz. Curiously, however, he would agree in 1942 to write the prologue to Larenz's work.[29] Larenz sought to justify the III Reich by denying the possibility that international law could construed as a supranational jurisdiction, reducing or identifying law to the law of sovereign states, or rather the

[22] Legaz Lacambra (1933b).

[23] Luis Legaz Lacambra translated the following of Kelsen's works: Kelsen (1933, 1934a, b). Also Kelsen (1935).

[24] Recaséns and De Azcárate (1930). In his doctoral thesis, Legaz dates the translation as having been made in 1927.

[25] Rivaya (2010, p. 86. and p. 88).

[26] Legaz (1977).

[27] See Rivaya (2010, p. 127).

[28] Legaz (1934a).

[29] Larenz (1942).It is the Spanish translation of the German edition with an introduction by E. Galán Gutiérrez and A. Truyol y Serra, and a prologue by Legaz Lacambra. It was reissued by Reus in 2008 with a foreword by Miguel Grande Yáñez. Other translations by Legaz include Sauer (1933) and Mayer (1937).

law of a specific community, and denying that any jurisdiction could be accepted above and beyond the racial and historic community. Legaz felt unable to criticize Larenz's position in his 1942 prologue to the monograph, although he did not defend it. Rather, he confined himself to noting the importance to the Philosophy of Law of understanding the influence of Hegelianism on jurists such as Larenz. However, he had nothing to say about Larenz's racist arguments and justification of National Socialism.[30]

The thesis we shall attempt to prove, then, is that Legaz held a conception of international law that would have made him a follower of Verdross in the stage at which he split from Kelsen's positivist monism to construct his own moderate monism. The other keys to this question lie in the explicit references made to Vitoria and Suárez[31] as a starting point for a monist construction of international law based on the supposed superiority of the law of nations. Legaz asserts that Kunz[32] and Verdross recognised these roots.[33]

Meanwhile, Legaz accepted Kelsen's formal monism (as did Recaséns), but he sharply criticized his positivism, stressing the importance of a reference to values. As Legaz would put it, the legislator must desire what is right and just. This introduces a reference to values in which we may clearly observe the influence of Max Scheler's axiology on Legaz, and the personalism of French authors like Mounier.[34]

10.3 The Austrian Internationalist Jurist and Philosopher of Law, Alfred Verdross

Alfred Verdross-Drossberg was born in Innsbruck, Tyrol, on 22 February 1980. He was awarded his doctorate in Law at the University of Vienna in 1913, and after being recruited by the Austrian Foreign Ministry he was posted to Berlin. In 1922 he began teaching at the Consular Academy, and he then went on to teach International Public Law, Philosophy of Law and International Private Law at the

[30] For a discussion of his subsequent transformation, which is not dealt with in this article, see Rivaya (2010, pp. 117–118). According to Rivaya, Hegel had scant influence in the Spain of the interwar period, and Legaz's transformation was more closely associated with the restored Neo-Hegelianism of German and Italian Fascism, and with Legaz's own intellectual development during the war and post-war years. See op. cit., p. 97. See also Gil Cremades (1978), pp. 55–103.

[31] Suárez (1970–1971, 1981). Groot, Hugo de (1993).

[32] The discussion of KUNZ provided by Truyol in his *Fundamentos de Derecho Internacional Público* is enlightening, because it explains why Legaz came to follow him. Cf. Truyol (1977, p. 70).

[33] Legaz (1933b p. 330).

[34] Legaz (1933b, p. 293).

University of Vienna between 1924 and 1960.[35] In 1957 he became a member of the Hague Tribunal. He was a Judge of the European Court of Human Rights in Strasbourg between 1958 and 1977. He was also a member of the United Nations International Law Commission and of the Institute of International Law. He chaired the 1961 Vienna Conference on Diplomatic Relations which gave rise to the Vienna Convention on Diplomatic Relations.

Together with Adolf Julius Merkl, he was a disciple of Hans Kelsen in the Vienna School. He created his own theory of the relationship between International Law and the internal law of states, diverging from Kelsen's dualism and evolving towards a moderate monism. Verdross travelled a long intellectual road from Kelsenian legal positivism to his discovery of the natural law of the Salamanca School,[36] whose ideas he would revitalise and apply in an original way to the new functions ascribed to International Law in the scenario created after the First and Second World Wars.

Legaz wrote his theories on Verdross in 1933. At this time, Verdross had already propounded his own Kelsenian theses, but was increasingly distancing himself from them. Verdross drew attention to the fact that the Salamanca School (Francisco de Vitoria and Francisco Suárez) had influenced Hugo Grotius[37] and the thinking of the Protestant Natural Law School of the seventeenth and eighteenth centuries (Johannes Althusius, Samuel Pufendorf and Christian Wolff). In more recent times, this influence has been widely investigated and described by specialists like Alexander Broadie of the University of Glasgow[38] and Knud Haakonssen,[39] both experts in the field of Scottish philosophy in the sixteenth, seventeenth and eighteenth centuries.

Verdross was not only a Philosopher of Law but also possessed extensive knowledge of prevailing positive Law, allowing him to combine his formal training with practice as a Magistrate of the European Court of Human Rights (ECHR), where he intervened in numerous decisions on practical matters of international politics.

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[35] The brief summary printed on the dust jacket of Truyol's Spanish translation of Verdross' Manual corroborates these details: "Professor Verdross is a professor of International Law. He is also a Philosopher of Law, however, and as such grounds International Law philosophically and juridically in a way that is unusual in manuals of this kind. He has also had direct experience as a judge in international courts, which enriches his theories with a profound knowledge of international jurisprudence and his own professional practice in the international courts. He is not only a university professor but has also taught at the international Academy in The Hague."

[36] Verdross (1971/1972, pp. 57–76). In Verdross' festschrift, Truyol submitted a paper on the Spanish law of nations in the sixteenth century entitled *Völkerrecht und rechtliches Weltbild, Festschrift für A. Verdross*, Viena, 1960. The original Spanish version of this work, entitled *Razón de Estado y derecho de gentes en tiempos de Carlos V* had appeared in the collective work *Karl V., der Kaiser und Seine Zeit*, edited by P. Rassow and F. Schalk, Cologne-Graz, pp. 189–210.

[37] Fernández De Marcos Morales (2009, p. 259): "Grotius cites Vitoria over fifty times in his famous treatise *De iure belli ac pacis*, where he expounds the fundamental ideas of the Dominican's doctrine. As Brown notes, moreover, the Dutchman's own doctrine barely differs in the essentials of its method and content from that of the Dominican, because if Grotius built the 'edifice', he did so using 'materials' taken largely from Vitoria."

[38] Broadie (1990, 2003).

[39] Haakonssen (1996, 2010).

First the League of Nations and then the United Nations Organisation created after World War II were to a great extent founded on the values of the natural Law of nations, especially the idea of shared common rights and, in turn, the development of Fundamental Rights and the duty of States to respect them. Verdross extended and expanded the classical concept of *bonum commune,* the common good, to that of *bonum commune humanitatis,* the common good of the world or of humanity.[40] It was his express wish that his successor in the Vienna Chair should be versed in both International Law and the Philosophy of Law.[41]

10.4 Legaz's Defence of Moderate Monism

Let us now follow step by step how Legaz constructed his own position, which would lead him to defend a moderate monism in his doctoral thesis. Analysing the role of International Law in national Law, Legaz clearly describes and distinguishes the positions of both Kelsen and Verdross, remarking the points where he is in disagreement with them and where he concurs. I rely on Legaz's summary of Kelsen's views. It is not the goal of the article to go deeply in analysing if Legaz´s interpretation of Kelsen was enough accurate. We are exposing Legaz´s ideas in 1934, when he was still very young.

As Antonio Truyol explains in *Fundamentos de Derecho Internacional Público,* the problem of the relationship between international and national Law from the standpoint of doctrinal solutions is "one of the most difficult in the theory of international law."[42] It was first raised by the German jurist H. Triepel in 1899, in his book *Völkerrecht und Landesrecht*. For the purposes of the present discussion, it will be sufficient to note, without simplifying what is a highly complex issue, that the consensus reduces doctrinal postures to two major categories: dualist or pluralist theories, and monist theories. Legaz also argues within this framework, following Verdross' explanations.[43]

In Truyol's words, "The former treat international and national law as two independent systems, while the latter both form part of the same normative system, so that first one and then the other may prevail. However, this general framework can

[40] Verdross' original works in German and successive reprints may be consulted in the *Katalog der Deutschen Nationalbibliothek:* https://portal.dnb.de/opac.htm?query=Woe%3D11862654X&method=simpleSearch

[41] Seidl-Hohenveldern (1994, p. 101).

[42] Truyol (1977, p. 109). The first edition was published by Seix Barral in Barcelona in 1960.

[43] Truyol agrees with Legaz's criticisms of this kind of monism, tending towards a moderate monism or reconciling theory. he considers himself a disciple of Verdross, although he never actually heard him lecture. Cf. Pérez Luño (1991, pp. 344–345). For further information on Verdross' disciple, Karl Zemanek, who helped Truyol translate one of the editions of Verdross' manual, see Verdross (1955a, pp. 116–117).

be further qualified, insofar as that it is possible, on the one hand, to reconcile a dualist position with *partial dependence* of one of the two legal systems, and on the other to argue from a monist stance for a certain *coordination* between international and internal law."[44] The latter was the position at which Kelsen eventually arrived under Verdross' influence, and it was taken up by Legaz. Meanwhile, we should not forget that Truyol was the heir to Verdross' thesis in Spain, establishing the influence of the Austrian internationalist among Spanish scholars of International Law.

Kelsen endeavours to resolve the compatibility of the sovereignty of states employing the idea that states' independence includes the idea of legal coordination, and this inevitably leads entails "acceptance of an authority that is above all states and to which they all submit, limiting the sphere of each and therefore conditioning all states."[45]

The dominant doctrine asserts that the state is superior only with respect to its subjects, and that it is independent of other states but not superior to them. Rather, they are "coordinated" and the power of an individual state thus does not extend beyond "its own sphere". Legaz held that this concealed a contradiction. Following Kelsen, he argued, it is not sufficient to refer to independence and it is also necessary to refer to some kind of coordination. Legaz thus shares Kelsen's idea that some kind of authority is needed over and above states to which all submit, and which limits the spheres and therefore coordinates each of them.[46] The fundamental idea justifying the need for International Law is, then, the need for an overarching common order.

Kelsen based his monism on the argument that validity of sovereign states' law requires them to refer to the validity of a single foundation on which the unity of the normative system is based.[47]

Legaz thus considers that the formal aspects of the creation of Kelsenian international law remain correct (a thesis he would always hold), insofar as the creation of international norms must inexorably comply with certain formal procedures if such norms are to be valid. In this regard, both Legaz and Recaséns realised that the system constructed by Kelsen was a keystone of future law-governed states, regardless whether their ultimate foundation was accepted or not. On this point, both scholars also understood the importance of creating some kind of international court or tribunal, even if they finally opted for Verdross' thesis with regard to its ultimate foundations, a position that fitted perfectly with both Legaz's and Recaséns' intellectual training moreover. This synthesis is not eclecticism but consists of the adoption of a moderate monism as an intermediate stance between monism and the dualism present in the formation of the League of Nations.

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[44] Truyol (1977, p. 109).

[45] Legaz (1933b, p, 69). With reference to Kelsen (1928, p. 40). We may recall here that Truyol himself translated this work, and he would therefore have been well acquainted with Verdross' work.

[46] Legaz (1933b, pp. 68–69).

[47] Legaz (1933b, pp. 70–71), citing the Kelsen Compendium, p. 55 ff.

10.5 Strict Monism and Legaz's Moderate Monism

As explained by Legaz, the monist construction of International Law can be maintained from two different standpoints. The first would be the defence of the primacy of the legal order of the state. This thesis excludes the idea of International Law as superior to the state. The second position would defend the primacy of the international legal order.

According to Legaz, the monist construction of International Law is above all the work of Verdross, who made his first defence of this position in the Vienna School in 1914.[48] Verdross's position evolved towards the moderate monism he upheld in 1933 when Legaz wrote his thesis. The problem of strict monism was that it required sacrificing either the sovereign will of the State or the sovereignty of International Law. Verdross always maintained a monism that was in line with Kelsen's ideas and favoured the sovereignty of International Law, but he did not wish to sacrifice the soveriegnty of states either. This led him to seek a balance, which was translated in real terms into the Austrian Constitution and was finally accepted by Kelsen himself.

Legaz shared Verdross' position, although he enriched it with ideas drawn from other European authors such as Léon Duguit (1859–1928). This French jurist sought to reconcile the sovereignty of the State with freedom,[49] affirming that the all-embracing concept of sovereignty needed to be overcome and replaced in the first place with the duty not to disturb the peace, respecting the national and territorial autonomy of other nations.[50]

Legaz appears to support the doctrine of integration, which aspires to surmount the ethical and sociological antithesis of the individual and the community.[51] It is possible to reconstruct his stance from his criticisms of Kelsen and those other authors whom Legaz considers to be on the right track. In Legaz's view, the identification of Law and State leads to numerous confusions, the most significant in the case of Kelsen's theory being that it results in a deification of the Law. Legaz thus attributes a certain pantheism to Kelsen. The intellectual context in which the Viennese scholar developed his theories was of course deeply imbued with Hegelian influences. As is well known, neither Hegel's theory nor Marxism could have been formulated without a thorough grounding in theology. Kelsen was little influenced by Husserl's phenomenology, as the thinkers inspiring the Vienna School were rather Kaufmann and Schreier.

Meanwhile, Legaz shows himself closer to Max Scheler and personalist ethics in his own theory,[52] which is an important fact in his career remarked upon by Rivaya, who comments on the curious way he would later distance himself, moved by political

[48] Legaz (1933b, p. 151), where the author refers to Verdross (1914, p. 329 ff).

[49] Duguit (1920–1921).

[50] Legaz (1933b, p 173).

[51] Legaz (1933b, p. 194, see the footnote to page 257).

[52] Legaz (1933b, p. 195).

circumstances.[53] Another of Legaz's criticisms of Kelsen is that there cannot be an equality of values between two hypotheses such as the proposition, "International Law persists through revolutions" and the proposition, "Revolution is inexplicable if the primacy of the state is accepted." Kelsen believed both propositions have the same juridical value, and that a choice could be made between the two only on subjective grounds. Legaz, in contrast, holds that the two hypotheses are not of equal value.[54]

In contrast to Kelsen, Verdross held that the fundamental hypothetical rule is not a hypothesis but an axiom, the reality of which must be proved in some other way.[55]

In his criticism of Kelsen's notion of sovereignty, Legaz maintains that "the ethical and legal rule, *pacta sunt servanda*, not only obliges States to abide by any pacts they may make, but also to delegate in making them. The State, then, is a member of the international legal community and creates its Law by delegation. Even so, the State is still sovereign, as the difference between the State and a Municipality is not removed if the primacy of the international legal order is accepted but subsists in at least the following two points, as Verdross argues: a) the State receives its competence directly from International Law, but local entities do so from the State; b) the competence granted by International Law to States is wider than that granted by States to local entities."[56]

10.6 Legaz's Criticism of the Total Identification of State and Legal System in Kelsen's Strict Monism

On this point, Legaz also criticizes the rigid identity defended by Kelsen, an area in which Kelsen himself is not particularly consistent. According to Legaz, "There is something that escapes from the total identification of the State and the legal system, and there is room for some differentiation."[57] Furthermore, it was Verdross, he says, who remarked on this point, distancing himself from Kelsen, "… as he not only separates Law and State, but also breaks with the identification of the Law and the Law of the State. Verdross refers to the Law of the legal community, which he understands to comprise not only the State but also the international legal community, which is evidently not the State, and the Church, which is also not a State but is unquestionably a legal community."[58]

[53] Rivaya (2010, pp. 122–124).

[54] Legaz (1933b, p. 241).

[55] Legaz (1933b, p. 243, see note 324).

[56] Legaz (1933b, p. 252).

[57] Legaz (1933b, p. 275).

[58] Legaz (1933b, pp. 275–276).

Legaz also draws on ideas from other authors like Hauriou,[59] appealing to the idea of the State *qua* institution. Referring to Smend, he affirms that "… the State is thus a part of a spiritual reality. It is a cultural activity which, like all realities of spiritual life, is a vital movement requiring constant renewal and reconstruction,"[60] which appears to distance him from excessive Kelsenian formalism. Legaz thus contributes the idea that the law is a part of culture, a notion that is very much in tune with Ortega y Gasset's rational vitalism, a philosophy that had an immense influence on contemporary Spanish intellectuals, as did the ideas of *élan vital* propounded by the French philosopher, Henri Bergson. It is also known that Legaz was influenced by Bergson via his fellow countryman, Jacques Chevalier.[61]

The reasoning employed by Legaz to show that politics and law are related would also be applicable to International Law. On one hand, there is a reference to values in the State[62]: "It is sharing in certain values that keeps men united and not the coercive apparatus of the legal system."[63] On the other, Legaz asserts that "… a State without legal order is not possible, but not any legal order implies the existence of a State."[64]

He also drew on Del Vecchio to argue the primacy of the international legal system[65] according to the perspective adopted. On one hand, the law of the state is the law of a legal community (Stammler), "(…) but the legal theorist must rise to the standpoint of the primacy of the international legal system. The legal validity of state Law derives its position from the sovereign social will, but this social will must be conceived legally as delegated by the international 'constitution', which converts it into a member of the international legal community".[66]

In support of his position Legaz cites Recaséns, according to whom the "complete and absolute identification of the State and the legal system must, then, be extirpated."[67] In the philosophy of the State and the Law, not only logical but also meta-juridical problems must be addressed, which is to say the foundations on which strict juridical science rests. In a highly pertinent criticism of Kelsen's positivism, Legaz concludes on this point that a pure theory of Law cannot provide the basis for a theory of the State, because a Theory of the State is a prior requisite for a legal study of the law-governed State.[68] Legaz also criticizes Kelsen's positivism

[59] Hauriou (1928).

[60] Legaz (1933b, p. 279).

[61] Gil Cremades (2002, p. 49).

[62] Cf., Legaz (1933b, p. 279).

[63] Legaz (1933b, pp. 279–280).

[64] Legaz (1933b, p. 282).

[65] The Italian jurist indubitably influenced contemporary Spanish scholars, especially Recaséns Siches, who in turn oriented Legaz's work although he did not direct his thesis. For a discussion of Del Vecchio's influence in Spain, see Rivaya (2010, p. 51).

[66] Legaz (1933b, p. 283).

[67] Legaz (1933b, p. 283)

[68] Legaz (1933b, p. 285).

by including the relationship of legal norms with values and the relationship between ethics and law, arguing that the legislator indeed takes value-based positions and must seek the right and the just. Legaz turns to Suárez in support of his arguments, citing Recaséns' thesis with regard to this author.[69] According to Legaz "The value of norms is an ethically necessary feature, as any act establishing a position in Law points to (positive or negative) values, which lend it meaning. Meanwhile, the intention of the legislator is "ethically good" precisely because it points to a positive value. The Law realises values of different kinds… The fact that the legislator wants something is not a sufficient ground to recognise that something as ethically valid and obey, but rather the fact that the outcome the legislator seeks is itself right and just…".[70] On this point, then, he follows the arguments of Thomas Aquinas, Cayetano, Soto and Suárez, something is not good because God wants it to be good (voluntarism), but rather God wants only what is good and necessary.[71]

Kelsen distinguishes clearly throughout his work between legal validity and moral validity. He argues in his earlier work that there can be no clashes between law and morality from the legal point of view, but this is not the same as conflating legal and moral validity.[72] But Legaz wants to scape from Kelsen's positivism supporting the existence of possible conflicts between legal and ethical validity, in order to clarify that the valid law could be not ethically valid. In this way for Legaz can be clashes between law and morality from a legal point of view. Law must try to be just nad morality is a reference for Law. For this reason Legaz distinguishes the Theory of Law from the Philosophy of Law. In this case, the example he uses refers precisely to International Law.

The following quotation is highly illustrative for the purposes of our discussion:

> "In pure legal theory and in the Philosophy of Law we must be aware that it is necessary to accept a minimum in Metaphysics (which is the translation of the principle of transcendence in each problem) as objectively valid and anthologically existent. For example, the international community and the correlative principle, *pacta sunt servanda*, is the indispensable metaphysical minimum required to make the unity of the legal image of the world possible, but it is not an empty logical construction that is divorced from the realities of life, because the international community must recognise itself as a metaphysical reality. This metaphysical remainder not only makes it possible to construct legal theory, but also to draw the attention of the Philosophy of Law to the need to eschew any warlike temperament, in place of which it is necessary to cultivate the urge to Justice and the cultural community of peoples."[73]

Legaz's criticisms of Kelsen are far-seeing. Legaz follows Kelsen in stressing the importance of the validity of legal norms. Moreover, the ethical validity demanded by natural Law also held a key position for Legaz, that of value, the reason for being

[69] Recaséns Siches (1927).

[70] Legaz (1933b, p. 293).

[71] Legaz (1933b, p. 293).

[72] I would like to thank Jonathan Crowe, author of the monography´s referees for this clarification, in order to distinguish Kelsen thought from Legaz's summary of Kelsen's views.

[73] Legaz (1933b, pp. 316–317).

of the Law. As he sees it, the key to the difference between the Pure Theory of Law, which relates to legal validity, and the Philosophy of Law, which is concerned with ethical validity, and it is the latter that provides the superstructure for the whole of the legal system. Legaz brings in the notion of justice as a point of reference for any legal norm, an idea that he would also apply to International Law. According to Legaz, legal norms are not imperatives that must be obeyed unconditionally, even though they are unjust. The Law and ethics should not be conceived as two separate worlds. Their reason for being is not merely a formal 'ought' but refers to values, and this allows Legaz, in my opinion, to establish the relationship between International Law and Justice, rejecting the foundation of International Law as merely the sovereign power of States and their use of force.

Legaz appealed to Max Scheler to defend this position.[74] However, Legaz does not defend a simple, classical idea of natural law which affirms that an unjust norm is not law, but brilliantly distinguishes that juridical propositions must be applied even where they are unjust if they are legal, which is to say the oblige the State even where their content is unjust. However, valid but unjust norms do not oblige individual people, because the individual can refuse to comply with a juridical proposition that he considers unjust.

Furthermore, Legaz does not follow a strict positivism in his thesis, because he sees legal reason as based on a minimum value, such as the fact that legal certainty is a value. In contrast to a certain excessively classical approach to natural law, meanwhile, unjust law does not lose its juridical validity for Legaz. Thus, the metaphysical minimum allows him to resolve apparent contradictions and make the Theory of Law compatible with the Philosophy of Law without reducing the two to the same thing. In other words, he combines "both the equal rightness of both points of view and their mastery as exclusively valid points of view."[75]

10.7 The Incompatibility Between the Validity of the Legal Image of the World and the Validity of International Law

In a few brief pages, Legaz departs from Kelsenian monism in his view of International Law, abandoning Kelsen's skeptical relativism and clearly expressing himself in favour of Verdross' truly ontological objectivism, at the same time adopting the moderate monism defended by the latter.[76] Legaz in fact considers that Kelsen himself had overcome his anti-vital formalism by accepting some of Verdross' arguments.

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[74] On Scheler, see Legaz (1933b, pp. 293–295).

[75] Legaz (1933b, p. 321 and p. 323).

[76] Legaz (1933b, p. 324). He does not state this explicitly, but initially only points to the evolution of the Vienna School. Legaz (1931, 1977). He recognises here that he has since maintained a position in line with that of Verdross (see, p. 1).
Recaséns Siches (1932).

Following his usual method of contrasting apparently irreconcilable theories, he expounds the dualist position, which gives pride of place to State laws, to that of the monists, who defend a world legal unity implying the superiority of International over State law.

Legaz grounds the universalist note in International Law.[77] In doing so, he lists the scholars he has followed, citing Spann and Luis Mendizábal among others.[78] This chain of connections allows Legaz to link up with the Natural Law group in Zaragoza and its leader, Professor Luis Mendizabal,[79] the father of Alfredo Mendizabal.

Legaz refers to the early works of a still strictly monist Verdross, explaining how he substituted the "Kelsenian hypothesis" for an ethical principle that was rooted in values in his later theories beginning in 1933. It is to this position that Legaz himself adheres.[80] In one of his works, Verdross himself asserts that:

> … the jurisdiction of the international community is legally unlimited, because it holds the jurisdiction over jurisdiction. However, this is not an absolute sovereignty, if the term is to be understood as denoting an arbitrary power, because the international community is itself entrusted with a social mission. Thus, the International Community, as the supreme jurisdiction in the pyramid of temporal authorities, is indeed legally unlimited, but it is subject at least to the rules of humanity and justice.[81]

According to Legaz, the individual and the social group exist at one and the same time. Hence, States exist and at the same time the International Community. He endeavours here to show that universalism and individualism do not conflict. Furthermore, the individual may not be dissolved in the social group.[82] Legaz argues that communities are needed to support the existence of an international community above the state, in the same way that the nation, *qua* community, is above the individual and something more than merely the sum of its individual citizens. His reasoning consists of showing that the international community existed as an ethical community before its constitution as a legal international community.[83]

Taking a step further, Legaz ties universalist thinking to the traditional doctrine of Thomas Aquinas, Vitoria and Suárez, adding that the merits of these scholars were recognised by the Vienna School, and in particular by Kunz[84] and Verdross.

The basic argument for the purposes of this paper is that Legaz adopts the classical Spanish thinkers as the starting point for a monist construction that gives pride of place to the system of international law. Indeed, Verdross' thinking would develop

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[77] Legaz (1933b, p. 325), note 404. In this case he is explicit, using the plural to affirm "Our universalist theory…."

[78] On p. 325, note 404 Legaz refers to Mendizabal, L. *Derecho Natural*, cap. VI.

[79] See Gil Cremades (2002, p. 40).

[80] Legaz Lacambra (1933b, p. 325, note 404). Verdross (1923).

[81] Verdross (1927). The original is in French. The translation is ours.

[82] This argument contrasts with certain positions taken by the later Legaz, such as the foreword to Larenz.

[83] Legaz (1933b, p. 330).

[84] Kunz (1962. pp. 77–86). Spanish translation by Antonio Pastor Ridruejo.

increasingly along these lines, as we may observe in the successive editions of his famous handbook of International Public Law. Yet Verdross had already shaped his moderate monism in the years when Legaz worked with him, as the Viennese scholar considered that the international constitution was created via the intervention of States in making treaties and by custom. This international constitution delegates the determination of the bodies through which it is realised in the constitutions of States.[85]

Legaz's interpretation of Verdross' development coincides with the position that the internationalist Truyol would expound years later in his *Fundamentos de Derecho Internacional Público.* In a brief digest, Truyol describes the evolution of Verdross' position in very similar terms to those already employed by Legaz. Indeed, we would even go so far as to assert that Legaz already sensed, or perhaps even influenced, the future direction the Viennese jurist would take, which would end years later with his adoption of the classical Spanish theory of natural law.

As explained above, Verdross started out as a positivist internationalist. In a paper published in 1914 on the "construction of natural law",[86] he maintained a monist stance and the primacy of national law, seeking to combine a certain dualism with Kelsen's monist thesis. However, he changed his position after this paper, adopting a moderate monism that gave primacy to international law and diverging from Kelsen. One of the reasons that led him to this shift was precisely that the *pacta sunt servanda* rule had to be drawn from the will of States.[87]

10.8 The Principle of *Pacta Sunt Servanda* in Legaz

In short, Legaz flatly rejected Kelsen's monism, according to which International Law would be above State constitutions in exclusivist terms, arguing rather that "Neither International Law is subject to National Law, nor all National Law is subject to International Law." What is above States is only the international constitution: the rest of International Law arises from procedures that may depend exclusively on national constitutions.[88]

Having arrived at this point, we must now answer the question of what Legaz understood by the International Constitution. This basic norm to which all States must submit to create international law is the principle of *pacta sunt servanda.* In contrast to Kelsen, however, Legaz did not see this as merely a formal principle, but refers to an ethical imperative that imposes the duty to respect it. The obligation to keep agreements thus has a meta-juridical basis. It is not sufficient for Pacts to be

[85] Legaz (1933b, p. 331 quotes Verdross, in *Einhei*t, p. 126).

[86] Verdross (1914).

[87] Truyol (1977, p. 74).

[88] Legaz (1933b, p. 331).

respected but their contents lead to international peace, cooperation and mutual comprehension between States, "… and it is not merely required that pacts be kept, but these pacts must respond to and realise the idea of Law, being a 'just' international Law."[89] Once again on this point, the Pure Theory of Law must be filled out by the Philosophy of Law. "None can deny that a superior jurisdiction exists above States, although this may be only an idea (in its entirety), but at the same time it is an absolute imperative that demands realisation."[90]

Truyol agrees with Legaz, including Kelsen's theory as expressed in *Law and Peace in International Relations* in his classification of positive doctrines of International Law. According to this thesis the *pacta sunt servanda* principle stands at the top of the pyramid of norms as a positive legal precept.[91] Although *Law and Peace in International Relations* dates from 1942[92] (it contains lectures given between 1940 and 1942) and is therefore much later than the formalist Kelsenian conception of the principle found in the inter-war period, Legaz had precociously perceived this very early on. Truyol also sees this position as begging the question, or a vicious circle, because the *pacta sunt servanda* rule on which conventional international law is based is itself founded on custom, which is the fruit of an intent, the mandatory nature of which must also be grounded.[93]

In his consideration of the *pacta sunt servanda* rule, Legaz appears once again to ally himself with Verdross' position. Indeed, his analysis of the principle "led Verdross increasingly towards an objectivist position" as Truyol sees it.[94] Verdross had in fact already begun to shift towards the philosophy of values. "The *pacta sunt servanda* rule is subsumed in the sphere of absolute values. If it is a legal norm, insofar as it has been incorporated into positive sources, it is also an ethical rule, which is to say an *evident* value, or one that can be logically deduced from an absolute rule, such as the *suum cuique* principle. Verdross, then, professes a philosophy of values which reconciles the absolute nature of values with their relative perception by man, as a result of which positive law will express them more or less perfectly. Positive law is, of course, a *relative* value, which varies depending on the development of civilization, but it is nevertheless based on the absolute value of the idea of justice. From this position to the classical doctrine of natural law, there was but a short step, which Verdross took in his manual of International Public Law."[95]

In the 1930s, Verdross still held a position similar to that of Josef L. Kunz, who was also followed by Legaz. In an article translated by Pastor Ridruejo and published in the Zaragoza journal *Temis* (once again a chain of connections), Kunz

[89] Legaz (1933b, p. 333).

[90] Legaz (1933b, p. 333).

[91] Truyol (1977, p. 63).

[92] Kelsen (1942). The contents consist of the 'renowned Oliver Wendell Holmes Lectures published'. Lectures delivered between 1941 and 1942.

[93] Truyol (1977, p. 63).

[94] Truyol (1977, p. 74).

[95] Truyol (1977, p. 74).

argued that natural law is not law but ethics, as the true natural law is not a system of legal norms but a system of overarching principles.[96] This article was published in 1955, and it is therefore striking that the young Legaz should have seen in Kunz a defender of the need for the reference to ethics in International Law in the course of his stay in Vienna more than 20 years earlier.

By 1955, when the paper was published, historical circumstances were very different to what they had been in the inter-war period, and the United Nations Organisation had been created to replace the League of Nations, yet the questions Kunz raises with regard to the utility of natural Law in international public Law already appear in Legaz's thesis.[97]

10.9 Verdross' Shift Towards the Classical Spanish School of International Law

Verdross made a return to a realist epistemology but with an admixture of law as culture,[98] which affected his understanding of international law and led him to employ the concept of 'nature'. This is in fact a return to metaphysics, to which Legaz explicitly refers in his thesis, noting that it had been sidelined by scientific and legal positivism.[99] In all of this, we may observe a drive to develop beyond the Kantian thought in which Kelsen was steeped.

Verdross' development is accurately summed up by Truyol:

> On the classical Spanish school, Verdross affirms that law can only be understood if it is considered from a universal standpoint presided over by a teleological principle. Only those who perceive that the universe constitutes a meaningful order within which law plays a certain role will therefore be able to penetrate the meaning of law. To the objection that an 'ought' cannot be drawn from the nature of things, from what is, Verdross replies that nature as contemplated in a teleological conception is not the nature of the natural sciences, which is subject to the principle of causation, but the totality of the real, which is also called nature. And this nature contemplated in a teleological conception is not the nature of the natural sciences subject to the principle of causation, but the totality of the real, which is also called nature. This nature in the wide sense embraces not only the nature of the natural sciences, but also the sphere of culture, which is structured in partial domains including law. In this way, Verdross arrives at the idea of natural law, which is neither more nor less than the set of principles that necessarily arise from the idea or nature of human groups. In order to determine the content of natural law, then, it is necessary to begin with the natural sociability

[96] Cited by Truyol (1977, p. 70), referring to Kunz (1962, pp. 77–86). Truyol cites pp. 84, 85 and 86.

[97] Idem, cited by Truyol (1977, p. 70).

[98] The notion of law as culture also appears clearly in Legaz. This distinction between natural sciences and cultural sciences is very typical of the debate in German intellectual circles. See Truyol (1977, p. 74), and in Legaz's thesis, he expressly asserts, "Law is rather a cultural product".

[99] Verdross cites Legaz y Lacambra. Cf., Verdross, p. 63 of his manual of International Law, Legaz Lacambra (1947, pp. 9–28).

> of mankind. The supreme source of natural law in each group is the idea or nature of the group. The respective principles, meanwhile, are reflected in the legal consciousness and sentiment of the group's members. Thus, the precepts that spring from this consciousness or sentiment generally display features that differ depending on the people, the time and the place. On this basis, positive law can finally be deployed, either resulting from custom or as expressly established.[100]

Both Legaz and Truyol follow the framework proposed by Verdross, according to which different positions can be summed up as dualist and pluralist, or as monist theories, the former starting from national law and the latter from International Law. There are two variants of monist theory, namely *radical* monism and *moderate* monism.

Verdross refers to Triepel and Anzilotti as the founders of dualism. The basic argument in these theories is that International Law and national law are two completely separate legal systems with different foundations in terms of validity and subjects. When the two legal systems are separated in this way, the conclusion must be that "national laws that conflict with International Law must legally be obeyed".[101] In a footnote, Verdross asserts that Kelsen has adopted the theory that he himself goes on to explain, according to which national laws that are contrary to international law are valid. In his phase of strict monism, however, Kelsen claimed that such laws were void as they contradicted a superior hierarchical norm, which was International Law.

Verdross clearly argues that dualism makes no sense, but its weaknesses cannot be resolved from a position of radical monism.[102] He also adds that the requirement to exhaust domestic process before turning to the international courts proves that the latter jurisdiction is above the former. This leads Verdross to his final position of moderate monism, which he defines as follows, "For all of these reasons, only a theory that recognises the possibility of conflict between International Law and national law but observes that such conflicts are not definitive but find their solution in the unity of the legal system can account for legal reality. I call this theory *moderate monism* based on the primacy of International Law, because it maintains the distinction between international and national Law but at the same time underlines that they are connected within a unitary legal system based on the constitution of the international legal community."[103]

It is, then, abundantly clear that Legaz followed Verdross, who also explained why it is wrong to talk of the delegation of International Law in domestic law, and why one should rather refer to a transformation of international into national law, since any international legal norm must be implemented by a law or regulation to be applied by the national courts and authorities.[104]

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[100] Truyol (1977, p. 74).

[101] Verdross (1955a, p. 64).

[102] Verdross (1955a, p. 64).

[103] Verdross (1955a, p. 65).

[104] Cf. Verdross (1955a, p. 68).

The first constitution to make provision in this respect was that of the Weimar Republic in 1919, article 4 of which established that all universally recognised norms of International Law formed a mandatory part of German Law. The wording included in the Government's Bill for the Constitution was misunderstood, however, and on the first reading the commission amended it as follows: "International treaties and agreements, and the universally recognised rules of International Law shall govern the relations of the German Reich with foreign States, as well as the provisions of the Treaty governing the League of Nations, if the Reich joins that organisation". Precisely because this formulation could also give rise to misunderstandings, Verdross[105] observed that the wording only took the international validity of International Law into account, but not its domestic validity, and he wrote an article[106] which persuaded the commission to review its initial agreement along the lines of the initial wording proposed by Prof. Preuss on the advice of the Austrian internationalist.

Briefly, Verdross' interpretation of article 4 of the Weimar Constitution is that International Public Law would simultaneously circulate both inwards and outwards. This formulation was also included in article 9 of the Austrian Federal Constitution, which was inspired by its German forerunner. Both constitutions in fact only enshrined in writing what was already common practice in the independent courts: the national courts could directly apply ordinary International Law or the law of nations without the need to wait for implementation in a law enacted by the State (Judge Blackstone's formula).[107] This "ought" means that internal legal norms must be interpreted in light of International Public Law. However, if a clear contradiction were found between International Public Law and a State norm, the courts should apply the latter. This is because the principal under which International Public Law forms an integral part of a country's national law means that its norms are equivalent to those of the national law, but they be rendered void by subsequent national legislation. The principle that the latest law repeals any earlier law thus also holds in this case.

Verdross then went on to examine the different ways in which countries structure the acceptance of International Public Law in their own internal law in order to show that these processes cannot be explained by dualist theories. In general, all of the mechanisms established in European constitutions promulgated after World War I confirm the theory of moderate monism, "… as the possibility of conflicts between national law and International Public Law remains, but they may also be resolved through an international legal procedure."[108]

[105] Seidl-Hohenveldern (1994, pp. 98–102). On p. 98 Seidl-Hohenveldern recounts how proud Verdross had been that his 1919 article had influenced the Weimar Constitution.

[106] Verdross (1919, p. 281).

[107] Cf. Verdross (1955a, pp. 68–69).

[108] Verdross (1955a, p. 71).

Nevertheless, Verdross recognised that the absence of a mandatory jurisdiction was a key weakness of International Public Law, as the relevant courts and tribunals are competent only where the parties recognise their competence.[109] He contrasts these objections with the fact that International Public Law precedes national law, although he has to admit that its effect depends on States' submitting to the jurisdiction of international courts.[110]

10.10 Verdross and the Law of Nations in the Spanish School

Verdross explains how the Spanish School employed the concept of the natural sociability of mankind and the constitution of a universal community. The community of States does not require a declaration of intent for its constitution but rests on the principles of *natural law*.

Francisco de Vitoria (1480–1546) substituted the time-honoured expression *ius Gentium* for that of *ius inter Gentium*. *"Quod naturalis ratio inter omnes gentes constituit, vocatur jus Pentium"*. The difference is that the phrase now embraces the whole of humanity and not just the West. The natural law provides the basic principles governing human behaviour, but it must be made explicit via a positive international Law based on custom (*consuetudo*) and agreement (*pactum*). "However, positive International Law according to Vitoria does not hold only between the parties but has the force of law, because the whole world constitutes a community with the capacity to issue norms that are universally to be obeyed. It is in this way that Vitoria arrives at the concept of a common International Law that obliges everybody, anticipating the transformation of European *universal* International Law".[111]

According to Suárez, the *ius naturale* foundations of International Law, and indeed International Law itself, are part of natural Law, even where this is positive law. "The law of nations, which does not derive from a central legislator but from the consent of mankind, or at least the majority of mankind, is so close to natural law that it is easily confused with it."[112] It was, in fact, established by the force of rational nature. This international law pursues the common good of humanity. Suárez was the first to describe the possibility of organising the international community. States are free to eschew war and can create a supranational jurisdiction with coercive power.

Verdross' could hardly be more ringing in his endorsement of Suárez's thought. "These words are so clear and convincing that they require no further comment. This text of Suárez is held to be the best formulation of the fundamental problem of

[109] Verdross (1955a, p. 71).

[110] Cf. Verdross (1955a, p. 72).

[111] Verdross (1955a, p. 50). The idea of universality, to which Legaz also refers, is clear here.

[112] Verdross (1955a, p. 51).

International Law, and it reveals the clarity, realism and fruitfulness of his natural law method, which is in turn rooted in Aristotle's social philosophy. In the end, we see from these words that the natural law method is not in any way based on aprioristic constructions, as claimed by philosophical legal positivism, but rests on the consideration of the social reality and its values."[113]

Following Vitoria and Suárez, Verdross again refers the international community as ultimately founded on the common values of order and peace in the concluding remarks to his manual. It is also based on the principle of *bona fide* or good faith. Hence, the ultimate effectiveness of International Law does not depend on sanctions but on States' own respect for and ethical recognition of the law.

Meanwhile, the organisation of the international community in turn produces new values such as good neighborliness and tolerance, and goodwill in the pursuit of a common goal consisting of the good of all humanity. Once again, this is an idea that can be traced back to Suárez. However, organisation must be coupled with "the conviction that all men are brothers as all are the children of a great family, brought together by God and in God."[114] Verdross continues, "Hence we see that the new International Law is rooted in universal human values. Consequently, its progressive realisation depends on the peoples and its institutions are imbued with the spirit of fraternity. Some institutions of the international community are already working in the service of this noble end, and (in contrast to the States) they have no special interests to pursue."[115]

These values should not be ignored by relativists, who deny the universal validity of the moral law, as even they may recognise that positive International Law presupposes certain values. "It is strictly impossible to separate positive International Law from its axiological foundation."[116] The merit of this assertion is that it is by no means naïve but was made by a man who had lived through two world wars and had taken part as a judge in international conflicts.

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[113] Verdross (1955a. p. 52).

[114] Verdross (1955a. p. 570).

[115] Verdross (1955a, p. 570).

[116] Verdross (1955a, p. 570), referring to Verdross (1953, p. 129).

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Chapter 11
Is the "New Natural Law Theory" Actually a Natural Law Theory?

Francisco José Contreras

11.1 The "New Natural Law Theory"

The exponents of the so-called "new theory of natural law" (John Finnis, Germain Grisez, Joseph Boyle and Robert P. George being its best known expounders) seek to restore the original (Aristotelian-Thomist) inspiration of the natural law tradition, which they now purport to update by means of conceptual instruments borrowed from modern philosophy and the selective internalization of certain contributions of legal positivism.[1] In Finnis' view, most natural law theories between the seventeenth and the twentieth centuries drew on Gabriel Vázquez's (sixteenth century) and Francisco Suárez's (seventeenth century) reelaborations, rather than on the genuine Aristotelian-Thomist source.[2] And Suarezian natural law theory – Finnis holds[3] – is ratio-voluntarist. On the one hand, reason identifies certain kinds of behaviour as being consistent with man's rational nature (and *therefore*[4] morally right) or as being inconsistent with it (and therefore morally wrong): this would be the *rationalist* ingredient. On the other hand, God commands man to do what is morally right

[1] "[The "New Natural Law Theory"] is a restatement which claims to incorporate and reevaluate the general insights of modern so-called legal positivism, but to transcend them, and to reinstate them within a properly elaborated theory of natural law" (MacCORMICK, Neil, "Natural Law Reconsidered", *Natural Law*, vol. I, p. 227).

[2] "It is Grisez's [and, therefore, Finnis's] contention that a caricature of Thomistic natural law has been accepted as good money for a long time, that this caricature owes far more to Vázquez and Suárez than it does to Thomas [Aquinas], and that this caricature is open to a number of devastating criticisms which are ineffective against the view of Thomas Aquinas properly understood" (Mcinerny 1980, 6).

[3] Cf. Finnis (1988), 45–46.

[4] This "therefore" is, of course, contentious, as it involves, in Finnis' view, naturalistic fallacy.

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(that is, what promotes the full development of human nature) and to abstain from doing what is morally wrong: this would be the *voluntarist* element.

To Finnis' and Grisez's mind, Suarezian natural law doctrine is unsatisfactory for two reasons. Firstly, because it lapses into a "naturalistic fallacy"[5]: it unjustifiably transforms "is" (consistency of behaviour with "man's rational nature") into "ought" (moral rightness).[6] Secondly, because it represents a distortion of Aquinas' genuine natural law theory[7]: according to Finnis, Aquinas' reasoning proceeds mostly in terms of intrinsically desirable "goods" or "ends", not in terms of consistency (of behaviour) with human nature.[8]

Finnis thus sought to leap over the misleading interlude represented by Suárez and most modern natural law theorists, and to "rediscover" the original source of a Thomist natural law theory which, in his view, does *not* commit a naturalistic fallacy. According to Finnis' *Natural Law and Natural Rights* (1988), it is not the case that reason explores human nature first and then asserts the moral correctness of those acts which are in conformity with such nature (or, to put it in "dynamic" terms, those which promote its full realization). Rather, practical reason directly grasps the intrinsic desirability of certain goods (Finnis propounded a list of seven: knowledge, life, friendship, play, etc.).[9]

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[5] "The scholastic natural law theory [Suárez] must be rejected […] [because] it moves by a logically illicit step –from human nature as a given reality, to what ought and ought not to be chosen" (Grisez 1983, 105).

[6] Finnis, thus, takes seriously Hume's and Moore's criticism of the "naturalistic fallacy" (the impossibility of deriving "ought" from "is"). In his opinion, the "materials" for building a natural law theory that does not lapse into naturalistic fallacy are to be found in Aquinas' work. However, Finnis acknowledges that Aquinas did not entirely develop this theory; Finnis purports to accomplish, then, what Aquinas left unfinished: "The reason for making the attempt [to "complete" what Aquinas left undone] is that a theory of practical reasonableness, of forms of human good, and of practical principles, such as the theory Aquinas adumbrated but left insufficiently elaborated, is untouched by the objections which Hume (and after him the whole Enlightenment and the post-Enlightenment current of ethics) was able to raise against the tradition of rationalism eked out by voluntarism. That tradition presented itself as the classical or central tradition of natural law theorizing, but in truth it was peculiar to late scholasticism [Vázquez-Suárez]" (Finnis 1988, 46–47). "The most popular image of natural law has to be abandoned. The corresponding and most popular objection to all theories of natural law [namely, that it suffers from "naturalistic fallacy"] has to be abandoned too" (Finnis 1988, 33).

[7] "Grisez and Finnis claim to have recovered Aquinas's natural law theory in a way that avoids the standard objections which have beset such a theory since the Enlightenment" (Hittinger 1987, 5). McInerny, though, claims it is dubious if Grisez and Finnis are trying to restore the genuine Thomism or, rather, to overcome it: "On the matter of starting-points, it is not always clear whether Grisez considers what he is offering as a version of what Thomas taught, as an improvement of it, or as a replacement of it" (Mcinerny 2000, 54).

[8] "Aquinas's treatment of all these issues is saturated with the interrelated notions, "end" and "good"; the terms "obligation", "superior", and "inferior" scarcely appear, and the notion of conformity to nature is virtually absent. In Suárez and Vázquez the terms "end" and "good" are almost entirely gone, replaced by "right" and "wrong" and cognate notions" (Finnis 1988, 46).

[9] Vid. Finnis (1988), 81–97.

The first principles of natural law, therefore, "are not inferred from metaphysical propositions about human nature, […] or about "the function of a human being", nor are they inferred from a teleological conception of nature, or any other conception of nature. They are not inferred or derived from anything".[10]

Finnis was thus vindicating the autonomy of practical reason with regard to theoretical reason[11]: "when discerning what is good, to be pursued (*prosequendum*), intelligence is operating in a different way, yielding a different logic, from when it is discerning what is the case (historically, scientifically, or metaphysically)".[12] If practical reason proceeded merely by following theoretical reason (that is, by deriving moral consequences from the anthropological and metaphysical facts discovered by theoretical reason), then David Hume's and George Edward Moore's criticism would make sense. In Finnis' opinion, Hume and Moore are right that reason cannot infer motives for action from the examination of certain facts: reason cannot derive prescription from description.[13] Reasons for action can be derived only from still more fundamental reasons for action.[14] Tracking that chain backwards, practical reason finally attains certain non-instrumental, ultimate goods: goods that are worthwhile for their own sakes. Their inherent desirability (their goodness) is grasped directly by the human mind, through a sort of insight.

In Finnis' and Grisez's understanding, the first principles of natural law are, therefore, self-evident or *per se nota*.[15] It is impossible to prove them. For example, it is impossible to demonstrate that knowledge is a good worthwhile for its own sake.

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[10] Finnis (1988), 33–34.

[11] Hittinger comments (about Grisez's and Finnis' conception of practical reason): "[P]ractical reason is not [for Grisez and Finnis] theoretical reason caught up in what might be termed a practical moment. […] [W]hat is under consideration is not so much the given, but the mind charting what is to be. It is foundational in its own right" (Hittinger 1987, 31).

[12] Finnis (1988, 34). "In contrast to theoretical reason's function of pursuing knowledge in relation to prior realities, Grisez emphasises that the function of practical reason is actually to bring realities into being. It is the form of reason that we use to make choices about what we should do. These choices will range from the commitments that structure our lives, such as "What career should I pursue?", to very daily decisions like "What should I eat for dinner?"" (Black 2000, 4). "Practical propositions are not true by conforming to anything" (Grisez et al. 1987, 116).

[13] "The moral *ought* cannot be derived from the *is* of theoretical truth – for example, of metaphysics and/or philosophical anthropology" (Grisez et al. 1987, 102).

[14] "From a set of theoretical premises, one cannot logically derive any practical truth, since sound reasoning does not include what is not in the premises. […] The principles we are concerned with are motives of human action. As principles, they will be basic motives, irreducible to any prior motives of the same sort" (Grisez et al. 1987, 102).

[15] Their being "self-evident" does not imply their being actually recognized by everybody. The objective value of a good does not depend on its "popularity": "The good of knowledge is self-evident, obvious. It cannot be demonstrated, but equally it needs no demonstration. This is not to say that everyone actually does recognize the value of knowledge […]" (Finnis 1988, 65). On the other hand, even if it were obvious that "all men seek knowledge", this would not automatically prove that knowledge is a good: "No value can be deduced or otherwise inferred from a fact or set of facts. Nor can one validly infer the value of knowledge from the fact (if fact it be) that "all men desire to know". The universality of a desire is not a sufficient basis for inferring that the object of that desire is really desirable, objectively good" (op. cit., p. 66).

The principle that declares knowledge to be an intrinsically desirable good can be *defended* (for example, by showing that whoever asserts the opposite is producing a self-defeating proposition),[16] but not *demonstrated*.

11.2 The Neoscholastic Critique

The "new natural law theory" has been the target of stern criticism by numerous natural law theorists of Thomist persuasion. Russell Hittinger, for example, argued that natural law theory includes, by definition, the idea of the "normativity of nature": the natural law credentials of Finnis's theory would thus be in serious doubt (for, in Hittinger's opinion, "a systematic interrelation between practical reason and the philosophy of nature" is lacking in such theory).[17]

Henry Veatch provided a particularly sharp criticism of the "new natural law theory". Veatch denies the independence of practical reason with regard to theoretical reason. Basic goods certainly do exist, but their goodness is but their ability to drive human nature to its full realization. We call "good" whatever favors the complete fulfillment of human nature. Hence, practical reason is but theoretical reason itself, insofar as it grasps what human nature is like and which behaviour is adequate to that nature.

Goodness, then, is not a queer[18] suprafactual dimension dwelling in some heaven of values or "kingdom of ends", parallel to empirical reality. In Veatch's view, the goodness of certain acts and behaviours can only be – from a truly natural law perspective – the objective fit of such behaviours with what is required by (the full development of) human nature. That is, goodness is a *fact* (identifiable, like all other facts, by theoretical reason), not a mysterious metaempirical quality that only practical reason would supposedly capture: "The very essence of any natural-law ethics is that there should be a veritable natural end, or natural perfection, or natural *telos*, of human life, discernible empirically and directly in the facts of nature. Given such a natural end, it should then be possible to determine what relevant natural laws a human being must observe, if he is ever to attain his natural end".[19]

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[16] Whoever asserts that "knowledge is not desirable" considers his statement to be true. He is trying to convey a philosophical truth. That is, he considers truth, knowledge, to be worthwhile. Therefore, his statement is self-defeating.

[17] Hittinger (1987), 8.

[18] On the ontological "queerness" of entities such as "duties", "intrinsic goods", "values", etc., see Mackie (1977), 38–42.

[19] Veatch (1985, 56). In a similar sense: "[T]he […] element of a telos or end or purpose would seem indissociable from any notion of law as a rule of action. How otherwise could one possibly make sense of the idea of a law's being a norm or standard of the way something ought to be done, save by reference to the end to be accomplished by the action? […] What other ground could there be for someone's specifying a rule to be followed […] than in terms of the end to be accomplished by the action?" (Veatch 1985, 59).

In Veatch's view, Finnis and Grisez should thus be ranked as paradoxical philosophers who – their self-appointed allegiance to natural law tradition notwithstanding – agree with Hume that it is impossible to derive "ought" from "is". The newness of the new natural law theory would amount, therefore, to the dissolution of the very essence of natural law theory: "One might suppose that anybody who insisted that "the norms referred to in any theory of natural law" must not be taken to be "based on judgments about nature (human and/or otherwise)" – that such a one must surely be an opponent of natural law doctrines in ethics, not their defender!".[20] And yet, Finnis and Grisez insist that they are natural law theorists.

In Veatch's opinion, it is impossible to uphold the idea of natural law if one does not break free from the spell of the "naturalistic fallacy" (which is no fallacy at all, to his mind): "either figure out a way to get from facts to norms, or just give up trying to be a natural law philosopher altogether".[21] Veatch thinks that one can defend natural law nowadays only by boldly swimming against all fashionable philosophical currents: "one must be prepared to break not only with ancient sophistry, but with Hobbesian contractarianism, with Kantian deontologism, with the so-called naturalism of modern science and […] with everything that is up to date in Oxbridge [Oxford-Cambridge] philosophy!".[22] Finnis would allegedly price his own academic respectability too much, and would not have dared to embrace the sheer heterodoxy associated to the rejection of the idea of "naturalistic fallacy": "Remember, Finnis is an Oxford don; and in Oxford, no doubt, if anyone who would so much as dare to say that maybe moral norms do have a basis in fact, or that perhaps an "ought" can be derived from an "is" – of such a one […] the entire English philosophical establishment would exclaim, "Let him be anathema!"". In Veatch's opinion, "Finnis will have to make up his mind: either he is going to be a natural law philosopher and discard his Oxbridge superstitions about the wall of separation dividing "is" from "ought", and facts from values, etc.; or he will have to break with Oxbridge entirely".[23]

11.3 The Response of the New Natural Law Theorists

John Finnis, Germain Grisez and Robert P. George responded in an interesting way to the neoscholastic critique (that we have exemplified here in Henry Veatch's contribution). On the one hand, they claim that Veatch's attacks largely target a "straw man",[24] as they have always held that "basic goods" are good because they

[20] Veatch (1990), 294.

[21] Veatch (1990), 295.

[22] Veatch (1990), 297–298.

[23] Veatch (1990), 295.

[24] "Henry Veatch's "sharp questions" are directed to those who deny that morals have any basis in nature or the facts of nature; to those who believe in a wall of separation dividing "is" from "ought" and facts from values […]. Veatch's objections, therefore, are not properly directed to either Germain Grisez or to myself. […] Neither of us has published anything which might reasonably be interpreted, in its context, as involving any such view" (Finnis 1981, 266).

constitute modes of "human flourishing", that is, fulfillment of human nature.[25] For example, Finnis had stated in *Natural Law and Natural Rights* that "were man's nature different, so would be his duties: the basic forms of good grasped by practical understanding are what is good for human beings *with the nature they have*".[26] In another passage, he had pointed out that "someone who lives up to the requirements of practical reason is also Aristotle's *spoudaios* (mature man), his life is *eu zen* (well-living) and, unless circumstances are quite against him, we can say that he has Aristotle's *eudaimonia* (the inclusive all-round flourishing or well-being – not safely translated as "happiness")".[27]

It may well be asked: if Finnis asserts that "basic goods are such because they entail the fulfillment of human nature", isn't he contradicting his claim that [moral] propositions about human goods cannot be inferred from [metaphysical] propositions about human nature? And the answer is: not necessarily, for, when we state that basic goods fulfill human nature, we are in the ontological domain (the reality of things), and when we assert that "ought" propositions about basic goods cannot be inferred from propositions about human nature, we are in the *epistemological* domain (the order in which things may come to be known).[28] I think this could be the key to the whole issue. Robert P. George explained it with adamant clarity: "Neo-scholastic critics of the position Finnis defends […] seem to have assumed, gratuitously, that anyone who maintains that our knowledge of human goods is not derived from our prior knowledge of human nature must hold that human goods are not grounded in nature. This assumption, however, is unsound. There is not the slightest inconsistency in holding both that (1) our knowledge of the intrinsic value of certain ends or purposes is acquired in non-inferential acts of understanding wherein we grasp self-evident truths, and (2) those ends or purposes are intrinsically valuable […] because they are intrinsically perfective of human beings".[29]

Finnis' claim about the non-derivability of statements about basic goods from statements about human nature or any other facts would thus be a merely epistemological thesis; it entails, simply, that first we grasp "directly" the goodness of the basic goods, and only then – in a subsequent theoretical rationalization – do we (some of us) understand that the goods are such because they are perfective of human nature. In underlining the precedence of metaphysics with regard to ethics, the neoscholastic critique seemingly demands the inversion of this sequence: only those who have examined human nature in depth can, subsequently, derive moral truths from this theoretical knowledge. Which, as stated by Grisez, easily leads to a "caricature" of natural law theory: "Man consults his nature to see what is good and

[25] "[B]eing aspects of the fulfillment or persons, these goods correspond to the inherent complexities of human nature" (Grisez et al. 1987, 107).

[26] Finnis (1988), 34.

[27] Finnis (1988), 102–103.

[28] "[F]or bad philosophical reasons, we confuse a principle's lack of derivation with a lack of justification or a lack of objectivity […]" (Finnis 1988, 70).

[29] George (1992), 35.

what is evil. He examines each action in comparison with his essence to see whether the action fits human nature or does not fit it. If the action fits it, it is seen to be good; if it does not fit it, it is seen to be bad".[30]

This account of natural law theory is a caricature because it does not reflect the actual moral experience of most human beings.[31] Most people need not study dense volumes of metaphysics or anthropology in order to know the basic moral truths: "even rustics can understand natural law", Aquinas wrote. The goodness of the basic goods is directly comprehensible, and does not require any theoretical or metaphysical propedeutics.[32] Only then, in a subsequent stage, will the reflection on such self-evident moral truths maybe lead to certain metaphysical conclusions (for example: if human life is intrinsically valuable, the human species must surely be something more than an accident of carbon chemics in an ultimately absurd universe).

If we interpret it in these terms – as a controversy, not about the reality of things (both Veatch and Finnis agree that ethics is based on metaphysics), but about the order in which things can be known (does ethical knowledge precede metaphysical knowledge, or the other way around?) – the dispute between neoscholastics and "new natural law theorists" probably loses much of its sting. Finnis actually wrote that it is simply a matter of "pedagogical order of priorities".[33] The claim that the "new natural law theory" has yielded to relativism and capitulated to intellectual fashion would be baseless.

11.4 A Metaphysics Based on Ethics?

Finnis' and Grisez's approach – whereby ethical knowledge precedes metaphysical knowledge – presents some aspects that are philosophically very inspiring. On this approach, moral experience provides a privileged path for the knowledge of human

[30] Grisez (1965). "The forms of natural law theory which Grisez describes as "scholastic" are those that direct people in the manner of "Here you are – here is your nature – now be what you are"" (Black 2000, 2).

[31] "[T]here is no process of inference. One does not judge that "I have [or everybody has] an inclination to find out about things" and then infer that therefore "knowledge is a good to be pursued". Rather, by a simple act of non-inferential understanding one grasps that the object of the inclination which one experiences is an instance of a general form of good, for oneself (and others like one)" (Finnis 1988, 34).

[32] "Those who claim that theoretical knowledge of human nature is methodologically prior to basic practical knowledge have things […] exactly backwards" (George 1992, 39). "[T]he basic principles of natural law can all be intelligently grasped without adverting to metaphysical principles concerning the universal relationship between being and good, or about human nature in its relation to divine and cosmic natures" (Finnis 1981, 276).

[33] "[W]e [Grisez, Finnis, Boyle, George] have pressed our readers to acknowledge their own grasp of *principia naturaliter nota* which Aquinas says they have, even though they lack metaphysical or anthropological theories. Only after we have achieved that acknowledgement, and explored its moral implications, do we endeavor to explain how the goods thus acknowledged are aspects of a being which participates in the four orders of created being. This pedagogical order of priorities seems to be more faithful to the content of Aristotle's and Aquinas' theories of ethical knowledge" (Finnis 1981, 277).

nature, knowledge of the place of man in the cosmos. Knowledge of what man *is* can only ensue from knowledge of how man *ought to* live. Moral experience would provide keys to human identity that are inaccessible to theoretical reason: the moral dimension keeps the secret of *who we really are*. Finnis is perhaps pointing in this direction when he says that, for Aquinas, "practical reason begins not by understanding this nature from the outside, as it were, by way of psychological, anthropological, or metaphysical observations and judgments defining human nature, but by *experiencing* one's nature so to speak *from the inside* […]".[34]

In my opinion, Finnis' and Grisez's thesis about the precedence of ethics with regard to metaphysics might bear some resemblance to Immanuel Kant's line of reasoning in the last chapters of his *Critique of Practical Reason* (those in which he theorizes the "postulates of practical reason"[35]: freedom, immortality of the soul, God) and to what the Spanish philosopher José Luis López Aranguren called "openness of ethics to religion".[36] In Kant's view, practical reason is entitled to hope that something is possible, simply because it *must* be (because it is indispensable for the moral endeavor of man, that pursues that thing unflinchingly). Kant ends up extracting from the *factum rationis* of moral experience such important metaphysical claims (he insists that they are "just practical", though)[37] as the freedom of the will, the immortality of the soul and the existence of God: all three are indemonstrable by theoretical reason (as Kant had previously concluded in the *Critique of Pure Reason*), but they are "rescued" (in the *Critique of Practical Reason*) as indispensable requirements of practical reason: if we were not free, moral imperatives would be meaningless[38]; if we were not immortal, our duty to attain "sanctity" (Kant calls "sanctity" the perfect accordance of the will with the moral imperative) would be unrealizable (because sanctity is never attained in this world)[39]; if God did not exist, the compatibilization of moral virtue and happiness ("supreme good") would be

[34] Finnis (1988), 34.

[35] Sobre la doctrina kantiana de los postulados, cf. Schaeffler (1979, 1981, 244–258), Gómez Caffarena (1983) and Contreras Peláez (2007, 276 ff).

[36] "Kant does not take Revelation – not even religion – to be the starting point of his investigation. His standpoint is ethical: he purports to ground religion in morality, not the opposite. […] [His will be] A theology based on moral conviction, not on logic or metaphysics" (Aranguren 1986, 112) [my translation]. On the "openness of ethics to religion", see p. 122 ff.

[37] "These postulates are not theoretical dogmas, but presuppositions in a necessarily practical sense [*Voraussetzungen in nothwendig praktischer Rücksicht*]" (Kant 1968a, 132). But, as argued by Gómez Caffarena, we should not lapse into a "fictionalist" interpretation of the postulates of practical reason. Kant does not mean: man should act as if – the famous *als ob* – God, the free will and immortality existed (although they don't actually exist). Rather, Kant is saying: we cannot be theoretically certain about God, the free will and immortality, but we can reach a *practical* certainty, i.e., we can *hope* that they are real (which is possible, as speculative reason neither affirms nor denies in these matters), and *act* according to this hope. It is not self-deception: the "assumption of reality" certainly "occurs in favor of hopeful moral behaviour. But it is an assumption … of reality!" (Gómez Caffarena 1983, 130) [my translation].

[38] Kant (1968a), 29.

[39] Kant (1968a), 122.

unattainable (because the moral imperative demands that good actions be practised "only out of duty", not because their being practised will make the person happy).[40] After having demolished metaphysics in the first *Critique*, Kant reconstructs a "metaphysics according to ethics" in the second.[41]

The emphatical commitment by Veatch and other neoscholastics to a teleological ethics of Aristotelian inspiration precisely *precludes* this possible openness of ethics to metaphysics (and, after all, to religion). Aristotelian ethics presupposes an exclusively immanent framework (the idea of God certainly shows up in Aristotle's thinking, but it is a God man can nurture no friendship with). Aristotelian ethics comes to terms with human finitude: the point of ethics lies just in attempting to realize the potentialities characteristic of human nature as fully as possible during our short earthly journey. This "unambitious" (so to speak) conception of ethics poses some intractable questions: if the point of ethics is just "leading a sensible life", how could the moral greatness of abnegation – taken to the point of self-sacrifice – be rationally justified? Wouldn't Maximilian Kolbe appear as an idiot, to Aristotle's eyes?

Furthermore, as noted by Finnis in the concluding chapter of *Natural Law and Natural Rights*, one cannot elude the question: is *that* (living reasonably for a few decades) all ethics is about?: the participation of each individual person "in the various forms of good is, even at best, extremely limited. Our health fails, our stock of knowledge fades from recall, […] our friendships are ended by distance and time […]; and death appears to end our opportunities for authenticity, integrity, practical reasonableness, if despair or decay have not already done so. […] And the question arises whether my good […] has any further point, i.e., whether it relates to any more comprehensive human participation in good".[42] As for those who try to soothe the tragedy of individual finitude by contending that even if the individual perishes, he somehow survives in the "contributions made to his community", Finnis asks them: "In what sense are we to take it to be necessary to favour that common good, which after all will end, sooner or later, in the death of all persons and the dissolution of all communities?".[43]

These would be the starting questions of a "metaphysics based on ethics"; a metaphysics that is workable only if we admit the self-evidence of certain moral truths and the autonomy of practical reason (as the "new theory of natural law" does). A metaphysics based on the assumption that ethics is much more than an array of prudential counsels or a leaflet of "use instructions" for the human goods. A "metaphysics according to ethics" assigns the moral "ought" no less than the capacity to shape reality ("ought" shapes "is", not the other way around): "what reason commands ought to happen, it must be possible that it should happen", Kant

[40] Kant (1968a), 125.

[41] See Carnois (1973), 74–75.

[42] Finnis (1988, 372).

[43] Finnis (1988), 406–407.

wrote.[44] A "metaphysics according to ethics" outlines the kind of world human beings deserve in virtue of their moral struggle: the kind of reality the good man is worthy of.

Admittedly, a "metaphysics according to ethics" thrives in the realm of insight and hope, rather than in that of demonstrative reasoning. Art is particularly appropriate to convey such insights. Finnis devoted an article to Shakespeare's little known sonet "Phoenix and turtle".[45] In that poem, Shakespeare praised the "constant love beyond death" (Quevedo) of two English spouses (a real case): their life in common was brief; he had to flee for reasons or religious persecution, and died abroad; she continued to love him, though, remained faithful to his memory, and was finally executed (also due to religious intolerance). Finnis stresses the fact that Shakespeare uses the terms "truths" and "true" to describe this example of marital loyalty. A loyalty that might perhaps seem unsound from the reasonable (too reasonable!) Aristotelian ethics of the "fair middle" (wouldn't it have been more sensible of the young widow to start a new life with someone else?), but which, in its "unsoundness", is maybe revealing the truth of the human essence in a deeper way. Let philosophy undertake the task of thinking a reality big enough to accommodate the love of the English spouses:

> Love hath Reason, Reason none
> If what parts can so remain.

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[44] Kant (1968b), 524.

[45] Finnis and Martin (2003). Cf. Finnis, J., "Foundations of Practical Reason Revisited", cit., pp. 127–128.

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Chapter 12
Alasdair MacIntyre on Natural Law

Rafael Ramis-Barceló

In this paper I will try to examine the conception of natural law in the works of Alasdair MacIntyre. The way proposed is a reconstruction of his thought from the 1950s to the present, examining the problem of the reasons for action and its relationship to natural law. To sum up, I claim that MacIntyre understands that the reasons for action were forgotten by liberalism and, as a consequence, positivism emerged. MacIntyre defends the importance of the reasons for action as a basis of natural law, founded on anthropological inclinations and practices of human beings.

12.1 Reasons for Action and Liberalism

In the 1950s and 1960s, MacIntyre was interested in the divorce between theoretical and practical reason.[1] This gap is especially problematic in articulating "reasons for action". His position was very close to Aristotle and the later Wittgenstein and his followers (Anscombe, Von Wright and Hart).[2] Wittgenstein distinguishes between causes and reasons, and MacIntyre, following him and his disciple Anscombe, believes a deliberative process is necessary to explain action. The phenomenological conception helps to overcome the dualism of the positivist scientists that separates the action of the story from the belief that science is limited to observation and description. MacIntyre, by contrast, following Wittgenstein, believes action is performed (and described) by a subject, and that actions are also socially constituted practices which cannot be separated from the context in which they occur.

[1] See Blackledge and Davidson (2008).

[2] See Perreau-Saussine (2005).

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MacIntyre, in his book *A Short History of Ethics,* deems that the problem of the reasons for action requires a historical and linguistic analysis.[3] He seeks to study the language of Ethics through different periods and his analysis shows that there is a gap between Ancients and Moderns.[4] At this moment, MacIntyre recognizes that there is a historical difference in the language of Ethics, but an adequate theory is lacking to fully explain this difference. The contrast between Ancients and Moderns shows the lack of context of the modern lexicon, and that duty and action are separated from History.[5] Language analysis reveals that ethical and political liberalism dissociates the reasons for action from their context. Following the works of Hobbes and Kant, moral and political fragmentation of the individual causes a loss of sense of community.[6]

The loss of linguistic context in a community leads MacIntyre to defend a historical-hermeneutic interpretation based on the concept of tradition. He believes that to understand the actions of individuals it is necessary to start with the analysis of the belief system which the shared language reflects. Reasons for action become meaningful only under a set of moral references that are not "ethical reasons" for universal application, but of particular use.

For MacIntyre, reasons for action began first as desires and intentions of the agent (which can be explained only in the context of shared beliefs) and then from the application of Aristotle's practical syllogism. These types of reasoning conclude that man must act in a particular way. MacIntyre tries to link the ideas of Wittgenstein (social rules) with the phenomenology and the practical reason of Aristotle. MacIntyre believes that liberalism is wrong in considering man to be essentially autonomous and his action to be separate from his knowledge. Science -in the conceptual framework of liberalism- should be limited to describe the actions and seek the causes by examining their effects.[7]

In contrast to this view, in the 1970s MacIntyre believed that he had provided a new method, following the late Wittgenstein. At that time, he considered that reasons for acting were not mechanical, but rather that agents act rationally if they can explain their own deliberations.[8] The explanation makes sense only in the context within which a group of speakers can be understood. Contrariwise, the liberal-bureaucratic ideology is allied with science to dehumanize social and

[3] MacIntyre (1966, 1–12). See also Perreau-Saussine (2005, 39–40).

[4] MacIntyre (1966, 199).

[5] *Ibidem*, 86. "Consider now how modern post-Kantian ethics emphasizes the contrast between duty and inclination. If what I do is made intelligible in terms of the pursuit of my desires, if my desires are cited as affording me reasons for doing what I do, it cannot be that in doing what I do I am doing my duty. Hence when I am doing my duty what I do cannot be exhibited as a human action, intelligible in the way that ordinary human actions are. So the pursuit of duty becomes a realm of its own, unconnected with anything else in human life".

[6] MacIntyre (1976a, 180).

[7] MacIntyre (1972).

[8] MacIntyre (1971).

historical explanations.[9] Liberalism, connected with the reductionism of modern science, allows any obligations to be taken as simple imperatives.[10]

MacIntyre proposes a view of reasons for action in accordance with Greek Ethics, linking actions with their intent and purpose so that history and context are also linked. He argues that the reason in Greece was what allows a causal explanation of the story: Aristotelian teleology in nature is capable of giving meaning and explanation to the story, including also the changes and revolutions within the same tradition.

Only through falsifiable and narrative rationality can Man explain the reasons for action as part of a community that gives importance to attempt, desire or deliberation. In the absence of a rational narrative, according to MacIntyre, there are only imperatives, selfish actions and a proliferation of legal rules without moral support. Stories have to be evaluated by others and, to this end, they must be explained and shared as part of a rational process (as Popper and Kuhn required).

If we add to *A Short History of Ethics* some considerations regarding the language of liberalism, the phenomenological perception of tradition and narrative, as well as the epistemological justification of the methodology of science, MacIntyre has all the elements to articulate reasons for action. Organizing the above mentioned ideas, MacIntyre concludes his historical account of the lack of reasons for action in our time arguing that we live in a morally fragmented society and its members have little in common with others. On the contrary, society is based on a fragile agreement of wills (which are political and not moral). Therefore, there is a real proliferation of laws and lawsuits, as the liberal doctrine has led to a fragmentation of society, which without a continual reference to law, cannot articulate its coexistence.[11]

In modern times, according to the rise of liberalism, there is a transition from a moral understanding of law (which allowed the presence of a person's natural rights) to a political understanding of law (used to protect institutions, political freedoms and property). For MacIntyre, the end of the eighteenth century saw a transition from an Anthropology based on the person of flesh and blood to a transcendental Anthropology, based on the transcendental subject. Both models (political and anthropological) involved the lack of a moral and natural Anthropology in the political framework, and these changes manifest themselves in legal positivism.

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[9] MacIntyre (1967).

[10] MacIntyre (1976b).

[11] MacIntyre (1980, 32). "Thus it is precisely when the law is least needed, when it is least invoked, that it is in the best working order. When by contrast there is continuous resort to the law, it is generally a sign that moral relations have to some large degree broken down. It is a sign that the motives which make us invoke the law are those of fear and self-interest. And when fear and self-interest have to be brought into play, law itself tends to be morally discredited. This is what has happened in our own society. It has happened because the law has too often been made the instrument of partisan, self-interested purposes. The conversion of law to the service of such purposes perhaps started in the last century with the use of the courts by the large capitalists to aggrandize by transforming the law of property in an individualistic direction. But it was continued in the strategy of reformers and liberals who then tried to make the courts instruments for their purposes".

The subordination of the law to politics allowed the rise of positivism, which seeks justice only in a formal sense. Liberalism, in short, does not understand justice as an ethical virtue, but as a political standard.[12] The works of Rawls and Dworkin show the political nature of justice, but only in a purely formal sense. The law depends on technical criteria, based on political interests.

For MacIntyre, liberalism focuses on a formal vision of law, which guarantees only formal freedoms, ideals and abstractions. It is capable of resolving moral disagreements because it enters their substance. This is the result of the proliferation of irresolvable moral disagreements.[13] For MacIntyre, the solution lies in the study of Anthropology and moral inclinations. Thus, following Aristotle and Aquinas,[14] it is necessary to restore natural virtues to resolve dilemmas and moral disagreements.

12.2 The Way of Natural Law

MacIntyre, in the late 1970s and early 1980s, believed he had solved the problem of the reasons for action by means of understanding certain historical conceptions. For him, Aristotle is the only philosopher able to overcome Nietzsche's critique of Western Ethics. Aristotle's work serves to unite right and action through deliberation. In his book *After Virtue*, MacIntyre shows that Modernity has lost virtue Ethics and has instead cultivated liberal formalism, leaving aside the objectivity of morality. MacIntyre proposes a return to Aristotle due to the wrong turn that Modernity has taken.[15]

For MacIntyre, moral disagreements exist because there is no basis that can explain the substance of morality itself. Liberal Modernity denies its own capacity to enter the debate on the material content and objective morality. Aristotle, however, gives a full explanation of reality, based on Anthropology, Biology, Psychology and Sociology of human beings. While Aristotle builds his Ethics on the basis of natural inclinations, needs, desires and impulses, Modernity advocates for a sophisticated doctrine contrary to these impulses.

However, for MacIntyre, Aristotle's account has a weakness: it provides no strong foundation for duty and rules; what's more, it lacks a link between the virtue of justice and the imperative of law. For Aristotle, Man's happiness is the goal for himself and for humanity, but there is no external source that forces an individual to perform virtuous action, or that connects that individual with the duty of virtue. Justice and the imperative are merely based on teleological Anthropology and Sociology. The lack of an external source of imperativeness does not grant virtue: teleology only shows the tendency toward an end, but not a (deontic) obligation to comply.

[12] MacIntyre (1980, 32).

[13] MacIntyre (1981, 86).

[14] Aquinas, *Quaestio Disp. De Veritate* – q.1. c. 17 art. 4.

[15] MacIntyre (1981, 118). See D'Andrea (2006, 259–280).

MacIntyre further understands that Aquinas improves on the work of Aristotle with a stronger concept of God as a guarantor of virtue, goodness and truth. He ensures that virtue has to be practised and that knowledge of the virtue of justice cannot be separated from the enforcement of law, which is consistent with virtue and goodness.

The Christian God, as Aquinas defends, does not do anything against the natural inclinations (sociological and anthropological) of Aristotle, but He perfects them.[16] God guarantees that there are a number of goods and rights that cannot be negotiated. Unlike the "Human Rights[17]" that MacIntyre understood as fiction, there are "natural rights", rooted in human nature. Only God can ensure the inclination to the truth and can absolutely prohibit certain attitudes in order to protect property and rights. A "human right" cannot so thoroughly prohibit slavery, for example, as "natural law" can.

MacIntyre puts forward a two-pronged approach: first, he discusses contemporary ethical and legal doctrines and second, he explains the ethical and legal origins of liberalism and the Enlightenment. The first branch is of somewhat greater importance because the author ends his discussion with Nozick, Rawls, Dworkin or Gewirth in the late 1980s. *Whose Justice? Which Rationality?* and *Three Rival Versions of Moral Enquiry* offer a historical explanation more than a systematic discussion. MacIntyre tries to show how a sharp cut-off arose in moral and legal philosophy in the age of Enlightenment: the Aristotelian tradition (based on naturalistic Anthropology) declines, and a strong liberal explanation emerges, of which Rawls and Dworkin are the latest proponents.

MacIntyre historicizes the transition from the Aristotelian view toward liberalism in the decade between 1780 and 1790, a time in which philosophers stopped thinking in anthropologically realistic terms and began to think in terms of the ideal or transcendental subject.[18] This analysis overlaps with Foucault's, who considered Kant to be the inventor of a subject that had never existed. This is the shift from natural philosophy (based on the Biology and Psychology of Aristotle) to transcendental philosophy. Kant is, in this sense, an ally of liberalism and his philosophy is strictly formal.

Since the late eighteenth century reasons for action ceased to exist, insofar as bases that had provided a teleological continuity between knowledge and action disappeared. Thus, the Socratic (and Aristotelian) idea of being naturally inclined towards knowledge and then to virtuous practice vanished. Starting from Kant and the liberal tradition, the subject was not rooted in a biological basis, but it was an artificial construction.

[16] MacIntyre (1986, 364ss).

[17] MacIntyre (1990a, 76).

[18] MacIntyre (1982, 295). See also MacIntyre (1988, 327–335).

12.3 From Wittgenstein to Hart

For MacIntyre, every society has its own rules and practices and, ultimately, all of these are limited by the natural inclinations of human beings. All have a convergence between the customs and usages of each place and the needs of the person as a "dependent rational animal.[19]" This convergence, which seeks to unite philosophers from Aristotle to Wittgenstein, is the basis of their moral and legal thinking. MacIntyre begins a natural theory of customary law which was defended in his "Theories of Natural Law in the Culture of Advanced Modernity[20]" and in *Dependent Rational Animals*. This theory primarily aims to find the Hartian "minimum content of natural law" from the rules governing the practices and customs in each place within the context of natural inclinations.

One can argue that the starting point of MacIntyre's legal philosophy is the work of his friend Hart. Perhaps the most important contribution MacIntyre was able to make to understanding Hart's philosophy was to show the contradiction between, on the one hand, the need for a "minimum content of natural law" and, on the other, the vindication of positivism. Indeed, the admission of practices and social rules had forced Hart – a convinced positivist – to admit that the social rules had a minimum content of natural law, making this concept one of the least clearly developed concepts in his works. In his paper "Are There Any Natural Rights?", Hart mentions the existence of natural law, specifically that all people hold the same aspiration for freedom,[21] an idea that had not been developed in *The Concept of Law*. MacIntyre does not further elaborate on Hart's omission, but argues that natural law is manifested in inclinations and habits.

Customs are not universal, while inclinations are common to all. For that reason, like Freedom vindicated by Hart, there are other trends and tendencies that humans are struggling to obtain. Therein lays the basis of natural rights. In the article "Are There Any Natural Rights?" (entitled, not coincidentally, like that of Hart) MacIntyre argues that the prohibition of slavery must be natural law, due to the equal right of everyone to freedom.[22]

In this regard, MacIntyre shows how a theory like Hart's would require a larger content of natural law and, if it follows the biological and psychological inclinations of human beings, it can be used to mend the relationship between morality and law.[23] Similarly, the notions of justice and rights may be more closely associated

[19] MacIntyre (1999).

[20] MacIntyre (2000).

[21] Hart (1955, 175).

[22] MacIntyre (1983).

[23] MacIntyre (2000, 97–98). "There is an important parallel between Hart's argument concerning natural rights and Hart's arguments for his particular conception of natural law. In both cases the only premises from which he believes we can argue soundly are such as to deny us any substantive moral content in our conclusions. Just as we are provided with no grounds for believing that there actually are any natural rights so the function of legal systems, according to Hart's account of natural law, could be adequately discharged by fundamentally unjust legal systems. All that is required

with anthropological reality if they are understood *a priori* as usual and *a posteriori* as part of the inclinations of human beings.

12.4 Building the Natural Law

The conception of natural law is constructed formally by MacIntyre based upon ideas of Aquinas. Despite his openness to the problems of Modernity, MacIntyre makes reference to the psychological and biological works of Aristotle and revises them in the light of Aquinas's ideas and of current studies in Biology and Anthropology. MacIntyre's natural law is based on biological and psychological inclinations of human beings seen as rational and dependent animals. This dependence makes learning from others and living in accordance with the rules and social customs possible. MacIntyre follows Maritain in considering practices that humans develop in a community for customary activities as the basis of natural rights.[24] This practical learning is characterized by rules established by human Biology, showing human vulnerability and the need for cooperation with others within a community.[25] These biological needs require not only the practices and virtues of Aristotle, but others such as generosity and compassion that Aristotle emphasizes and Aquinas completes.

For MacIntyre, Aquinas and Aristotle explain (better than anyone) the characteristics and limitations of humans, as they relate to flesh and blood people. Understood as rational animals, people understand their limitations and view their lives as a set of cooperative activities with others. For MacIntyre, the decisions made *a priori*, independently of society, and social practices are a mere abstraction. Thus, natural law is not only a set of cooperative relationships in extreme cases (as argued by Hart), but a group of practices that configure human beings in their daily lives, reflecting their biological and psychological inclinations.[26] The transition from natural law must be based on Anthropology.

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for adequate discharge of function is that some human group should have met its needs for the preservation of life, for security, and for stability in the distribution of property by instituting a system of law. Such a group could allow its laws to sanction the persecution of minorities or the protection of slavery without those laws failing in any way to discharge their proper function for that particular group. So Hart's theory of the natural function and core content of law does not provide a standard for evaluating legal systems except in terms of their effectiveness or ineffectiveness in certain limited ways".

[24] MacIntyre (2000, 108–109).

[25] MacIntyre (1999, 10).

[26] *Ibidem*, 111, "The precepts of the natural law are those precepts promulgated by God through reason without conformity to which human beings cannot achieve their common good. The precepts of the natural law however include much more than rules. For among the precepts which enjoin us to do whatever the virtues require of us. We are enjoined to do whatever it is that courage or justice or temperatness demand on this or that occasion and always, in so acting, to act prudently. Notice that the level of practice we need no reason for some particular action over and above that it is in this situation what one or more of the virtues requires. The acts required by the virtues are each of them worth performing for their own sake".

MacIntyre agrees with Arnhart in claiming that Aristotle and Aquinas are closer than many modern authors to the Darwinian paradigm.[27] He also believes that Aquinas allows a much broader conception of justice than Aristotle himself, expanding the catalogue of virtues and reflecting more adequately the psychological and biological inclinations of the person (compassion, generosity, etc.). Justice, unlike liberal thought, is not linked only to merit, but also to all the virtues of Dependent Rational Animals.[28]

MacIntyre follows Jacques Maritain by arguing that the practice of justice and natural law is forged every day as a normal exercise of human nature.[29] Faced with intellectualist interpretations (which understand natural law as an intellectual apprehension), MacIntyre is interested in the "plain person" learning process of natural law.[30] In the 1990s, MacIntyre was diametrically opposed to the ideas of some authors, such as Finnis and Grisez, who wanted to open Thomism to Modernity, as well as to those who also have a cognitivist view of natural law, such as Michael S. Moore, because they ignore the learning process of "plain persons".[31]

For MacIntyre the close relationship between rules and virtues explains how authentic reasons for action are not formal rules, but rather material ones. By following these rules in everyday practice and in the acquisition of internal goods[32] (which also result in the benefit of the community), people can eventually achieve substantive justice. "Plain persons" have accepted for centuries the existence of natural law and justice, but if the anthropological model is not the person of flesh and blood but the transcendental subject, their expectations of justice are broken and these can only be purely formal.

For MacIntyre, if humans do not recognize animal and rational nature, with its limitations, they cannot accept the idea of God. The modern liberal tradition emphasizes and almost deifies Man. In other words, this tradition sees man as capable of going beyond his own natural condition. People do not act naturally, and because of this there are moral dilemmas and disagreements. The lack of naturalness in relation to others and the practical learning needed makes people start breaking the rules of nature and thus disagreements arise. And these disagreements cannot be solved only through an increase in legislation or litigation. However, for MacIntyre, natural law is the basis of the rules of coexistence in accordance with the inclinations of human

[27] Arnhart (1998, 258–266).

[28] MacIntyre (1999, 121–125).

[29] MacIntyre (2000, 108–109).

[30] MacIntyre (1992, 10).

[31] MacIntyre (2000, 102–106).

[32] MacIntyre (1981, 188–189).

beings.[33] This model has political ramifications: it is the complete opposite to the liberal Nation-State.

In short, MacIntyre opens up the philosophy of Aristotle and Aquinas to current thinking, while criticizing the intellectualist interpretation of their doctrines. He believes that natural law can be captured as a set of rules that are built through daily practice. Following the rules in these practices, it is possible to achieve the resolution of moral disagreements.

12.5 Rethinking Natural Law

Confronted with the supremacy of politics over ethics (typical of the modern era), MacIntyre defends the supremacy of ethics over politics.[34] In this way of thinking, communities are primarily a group of people that guide their practices seeking the common good from the practice of public virtues (which are not only excellence, but also charity, mercy, compassion, etc.). This is what makes us animals and what makes us human, as shown in biological-anthropological feelings.

However, Aristotle and Aquinas defended the practice of virtues in small communities, not as part of the great Nation-States that emerged later on. MacIntyre argues that only in communities that are similar in size to the *civitas* or the *polis* is it possible to have practical learning that follows these natural inclinations. The Nation-State dissolved these learning habits, making them something merely impersonal, formal and abstract.[35]

If communities are governed by natural inclinations and learning practices, this will lead to solid habits and customs. According to Aquinas, the first principles of natural law are immutable (not to steal, kill, lie, etc.) and other secondary principles

[33] MacIntyre (2000, 113–114). "What these people will have deprived themselves of is the only account of natural law that not only is able to explain its own rejection, but also justifies plain persons in regarding themselves as already having within themselves the resources afforded by a knowledge of fundamental law, resources by means of which judge the claims to jurisdiction over them of any system of positive law. *In the United States today, we inhabit* a society in which a system of positive law with two salient characteristics has been developed. At a variety of points, it invades the lives of plain persons, and its tangled complexities are such that it often leaves those plain persons no alternative but to put themselves into the hand of lawyers".

[34] See Perreau-Saussine (2005, 162).

[35] MacIntyre (1994a, 303). "The modern nation-state, in whatever guise, is a dangerous and unmanageable institution, presenting itself on the one hand as a bureaucratic supplier of goods and services, which is always about to, but never actually does, give its clients value for money, and on the other as a repository of sacred values, which from time to time invites one to lay down one's life on its behalf. (…) It is like being asked to die for the telephone company".

can be adapted to certain customs of the place, even if they may seem somewhat strange or even deviant to some.[36] In any case, natural law is subversive and often opposed to deviant abuse.[37] For example, Las Casas argued – on the grounds of the first principles of natural law – that the American Indians' "deviant" habits did not allow Spaniards to act against them.[38]

MacIntyre believes that "plain persons" can become familiar with natural law by searching for the good in all daily practices at home, even if these practices seem strange at first glance. The idea is that "plain persons" cannot grasp natural law and cannot solve problems requiring an operation of abstraction. They can only learn through social practices and customs. This anti-intellectual vision implies, as we shall see, serious problems within a Thomistic philosophy. MacIntyre, despite maintaining an anti-modern attitude, tried to show in later years the superiority of Thomism through a series of specific agreements with the work of Kant or Mill.[39] Although MacIntyre adopts an anti-modern outlook throughout his work, in his later work, he attempts to forge a convergence with the Kantian conception of moral law.

Thus, MacIntyre's contribution may be the discovery of natural law principles within the framework of a rational dialogue quite similar to Kantian and, above all, neo-Kantian ideals. The difference is that MacIntyre thinks it possible to respond materially to moral disagreements, while thinkers inspired by Kant give only formal solutions. For MacIntyre, if a community universally requires all its members to tell the truth without exception, to abandon the use of violence and to respect reasoning as a means to resolve moral disagreements, these rules will thus configure the first principles of natural law.[40] If people follow these rules in their practices, moral disagreements may disappear.[41]

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[36] MacIntyre (2009a, 89). See Aquinas, *Summa Theologica*, Iª-IIae q. 94 a. 4 co.

[37] MacIntyre (1996a, 41–63).

[38] MacIntyre (2009a, 108).

[39] MacIntyre (2006a, 51). "And we should note that in the long-standing and ongoing debates between utilitarians, Kantians, and contractarians no arguments have emerged that have convinced the most open-minded adherents of any of those contending parties of the rational superiority of the views of their opponents. Since what utilitarians, Kantians, and contractarians share by way of assumptions and presuppositions is much greater than what any of them share with Thomistic Aristotelians, it would be surprising if they were open to admitting the force of Thomistic Aristotelian arguments".

[40] MacIntyre (2009a, 91). "They would have to be rules prohibiting the taking of innocent life and the use of violence against the property and liberty of others and enjoining truthfulness and candor in deliberation. They would have to include rules prohibiting one from making commitments to others that one does not expect to fulfill and that bind one to keep whatever promises one might have made. Since they are to be rules without which genuinely rational deliberation would be impossible, they would have to be rules that would inform one's social relationships with anyone with whom one might at some time have to enter into shared deliberation, that is, with anyone whatsoever. But this set of precepts turns out to be identical with the precepts that Aquinas identifies as the precepts of natural law, so that as rational agents we are, just as Aquinas concluded, committed to conformity to the precepts of the natural law. But these are not the only commitments that we must make in order to engage in rational deliberation".

[41] MacIntyre (2006b, 64–82).

The idea that "plain persons" can learn the principles of natural law from the pursuit of internal goods is problematic. MacIntyre believes that people can find the natural law without any intellectual grasp. "Plain persons" are not capable of an act of comprehension, but MacIntyre understands that they are able to follow or maintain a rational debate and may find the principles of natural law if both parties follow the internal goods of their practices. MacIntyre aims to show that his theory of natural law is able to overcome the doctrine of utilitarianism and moral consequentialism. Some consequentialists have irresolvable debates and, according to MacIntyre, only the precepts of natural law can solve the problem.

MacIntyre articulates a synthesis of Aristotelian-Thomistic Ethics and Wittgenstein's theory of action. For Anscombe, practical philosophy demonstrates that there are objective reasons for action.[42] If in the early writings MacIntyre asks about the lack of reasons for action, in his later work he is able to resolve this issue by integrating Aquinas' first principle of practical reason (do good and avoid evil) with Wittgenstein's practices.[43]

Thus, for MacIntyre practical reasoning, based on doing good and avoiding evil, means the first reason to act. For him, human beings need to look for the good internal to each practice as a reason to act. The reasons for action depend on the practices of some good deeds, practices to which human beings are inclined. The first principle of practical reason is directed towards the effective realization of the good through knowledge and practice of the first principles of natural law. The actions, as Anscombe indicated, should be evaluated in the context in which agents communicate their own intentions. In the exercise of practical virtues humans are agents that help individual flourishing according to the common good.[44]

The fact that natural law is a guide to action and practice in accordance with the natural inclinations allows solving the problem of learning MacIntyre's natural rights. According to cognoscitivist authors (who claim natural law is a process of intellectual apprehension, such as Grisez, Finnis and Villey), the uptake of natural law is an abstract operation. MacIntyre believes that "plain persons" cannot grasp the precepts. In contrast, he believes that people can learn the rules of natural justice in communitarian practices. Thus, humans can teach each other, and in a rational debate they can find the precepts of natural law.[45]

Classical Thomists tend to defend the primacy of Theology in the understanding of natural law, and have an anti-modern approach, contrary to the subjectivism of

[42] MacIntyre (2009a, 161).

[43] MacIntyre (2009a, 90). "Those who in their everyday practice presuppose one of these mistaken views of the human good will also and consequently misunderstand the precepts of natural law. That this is so and that therefore there are bound to be disagreements about what the precepts of the natural law are and how they are to be applied Aquinas was certainly aware. He recognized that there were cultures, such as that of the ancient Germans, whose moral code was in some respects at variance with natural law. But he did not know about and could not have known about the wide range of striking moral disagreements of which our modern knowledge of other cultures and their various histories has made us aware".

[44] MacIntyre (2009a, 162).

[45] MacIntyre (2009b, 4–8).

Kant and opposed to the idea of human rights.[46] Neoclassical thinkers understand that natural law is apprehended by reason and is independent of Theology. They maintain an open attitude to Modernity and human rights, accept the existence of the naturalistic fallacy (the prohibition of deriving practical imperatives from assertions of theoretical reason) and seek a connection between Kant and Aquinas.

MacIntyre shares the Anti-Modernity sentiments of "Classical Thomists" as well as their rejection of human rights. However, like "neoclassical" thinkers,[47] he maintains the independence of Philosophy from Theology and -despite his Thomism- seeks an approximation to Kant and Mill to show that they have some ideas that can be recovered. Despite his condition as a Thomist philosopher, he believes the study of natural law is an issue in which Philosophy does not need the interference of Theology. Theological ideas may support and lend credibility to the ideas that Philosophy reaches by itself. Unlike Jean Porter and other theologians, MacIntyre vindicates the independent ability of Philosophy to know natural law.[48]

In short, the work of MacIntyre is above all a significant contribution in three areas: first, it offers an explanation of how to grasp natural law; second, it shows how natural law understood as a practice can play a prominent role in resolving moral disagreements; and finally it frames the current proliferation of legislation as an absence of ethical virtues and a lack of commitment to the practice of natural law.

12.6 The Development of Several Lines

In my view, MacIntyre has two lines in his vision of law. One is the Aristotle-Maritain-Wittgenstein-Hart connection and the other is the Aristotle-Socrates-Kant-Aquinas-Anscombe-Maritain line. Both lines are the attempt to join Aristotle with some different traditions. *Dependent Rational Animals* is an expression of the first line, while "Intractable Moral Disagreements" shows the convergence with the second. There are two *ad extra* versions of Thomism in MacIntyre. At the same time, he also has an *ad intra* vision, expressed in his book *God, Philosophy, Universities*.[49]

One wonders if the above views are compatible. I think they are only partly so. On the one hand, the Anthropology of the flesh and blood person is consistent with the anthropological background from the Greeks to Hume, but not with the anthropological conception and Kant's moral law. The rationalism of Aquinas is

[46] MacIntyre (1996b, 96).

[47] Lisska (1996, 2–5).

[48] MacIntyre (2009c, 315). "I am committed to holding that, if the requirements of practical reason are rightly understood, then practical rationality provides everything that is required for the moral life, independently of any theological ethics. Practical reason not only provides us with a good reason to act in accordance with the precepts of the natural law, but also guides us in how to apply it".

[49] MacIntyre (2009a ch. 10).

not compatible with Wittgenstein's later conception, although it is compatible with the moral law in Kant. Thomism requires that decisions must be rational according to the Anthropology of the person, in which passion is controlled by reason. MacIntyre seems to suggest that rationality is based on social rules and that there is a link to the passion and rationality of animals, but otherwise seems to vindicate the classical rationalism of the Thomist view.

Two questions arise: (1) what is the role of feelings in learning? and (2) why should they be the same rules for everyone? Following Wittgenstein, MacIntyre should admit that rules have to be different in each social context, but according to the rational universalism that is required by Thomism (and Kant), it seems that the rules of each community are not valid. For Aquinas the first precepts of natural law are linked to the first principle of practical reason (to do good and avoid evil) while the other principles (secondary) have a more mutable nature.[50]

MacIntyre seems to reverse the pattern of Aquinas. From the outset, there are a number of rules and customary practices in each community that may be more or less rational. However, MacIntyre believes that all of them, if they examine the good internal to practices, tend to find the "principles of natural law". These principles are ultimately similar for all. People – despite using different rules and practices in different places – if they seek the internal good, can find the precepts of natural law.[51]

This approach has several problems. First, for a Thomist it is not compatible to determine at the same time direct knowledge of the precepts of natural law (which can be known by analogy) and a sociologist and inductive view which holds that, despite the many differences in the practices and rules of each society, if everybody follows the internal good, they will find the precepts of natural law. Thomism gives great importance to reason and the rational grasp of the precepts of natural law, while MacIntyre focuses on learning and practices.

Second, there is an epistemological difficulty. If natural law is found in practice and the resolution of conflicts must be made on the basis of rational debate, can the "plain person" find natural law and reach a solution using a rational process? To what extent is this practical rationality and intellectual grasp required? This vision aims to continue along Wittgenstein's line of thinking, but it seems much closer to Socratic maieutics,[52] which provide a link to a progressive approximation

[50] Aquinas, *Summa Theologica*, Iª-IIae q. 94 a. 6 co.

[51] MacIntyre (1994c, 179). "We cannot adequately characterize -adequately, that is, for practical life, let alone for theory- that good towards the achievement of which we are directed by our natures and by providence, except in terms which already presuppose the binding character of the exceptionless negative precepts of the natural law. And correspondingly we cannot characterize adequately that in our natures which alone makes us apt for and directed towards the achievement of that good except in the same terms. Unless our passions, habits, motives, intentions, and purposes are ordered by the negative as well as the positive precepts of the natural law, they will not be ordered towards our own good and the good of others. For the negative precepts structure or fail to structure our relationships with others as well as our characters".

[52] Irwin (2007, ch. 2).

to the truth.[53] And, of course, Wittgenstein's conventionalist path does not refer in practice to the approximation to the truth, while the Thomistic tradition, and Kant, do indeed seek the truth.

Third, is it compatible with a conventional-customary approach (based on the customary rules and practices) with an act of intellectual comprehension by analogy? Is knowledge of natural law possible without, in the end, this inductive process that leads to the truth? MacIntyre believes that God guarantees the inductive processes based on practices. Nevertheless, it seems that MacIntyre tries to accommodate many different ideas into his own doctrine. To overcome these difficulties, he raises a number of options:

(a) If we take social practices as a starting point, it is possible to argue that people have many natural inclinations and can search internal goods in these practices, although they are not subordinate to the truth. This would be a theory-free "practical reason", based on a non-intellectual naturalism. In this case, this would not seek a universal good, but one based on the customary rules of each society, based on the biological, psychological inclinations and social aspects of human community and in its search of internal goods into its practices.

    But consider, for example, positive eugenics in a group that aims to prioritize a particular race. It could be considered a natural practice (there are tribal societies that do this "naturally") because these people have abnormalities that prevent their full participation in group activities. Deformed people can contribute very little to the group, but instead they consume resources and they cannot get any internal good for the community. This could be a (consequentialist) reason for the practice of these people that MacIntyre flatly rejects.

(b) If we take the natural inclinations as a good for the human person, they can have value for anthropological or personal life, but not necessarily a universal value. Following natural inclinations (whether they are biological or psychological) or customary practices, a person may not necessarily get any kind of truth, but following these inclinations serves to show a trend in the adaptation of human action practices. Following human inclinations is not a guaranteed way to access the truth. In any case, they could be considered a set of customs based on the biological nature of human beings.

    Consider, for example, the case of war, which is clearly an animal instinct and not necessarily a universal practice. It can be argued that war is something that can be good for a community and is only a human custom (or convention), in accordance with the animal and biological instincts that humans have. Another example would be hunting, another animal instinct, which

[53] MacIntyre (1994b, 47). "The Aristotelian case for the Aristotelian premises in moral and political philosophy is first that for those systematically engaged in the practices of rational local community their truth always must turn out in the end to be insecapable and secondly that in parallel fashion modern claims about utility and rights, in the context of such practice, cannot in the end be recognized as other than arbitrary. But everything then depends upon what is to be accounted rational local community"

forms part of the habits of many communities. The practice of hunting can be understood as an asset for a community seeking their survival and food, while in other communities could be understood as an act against nature.

(c) If the good can be known and is consistent with the truth, practices are not conventional or customary, but they must be subordinated to the knowledge of good, and that good can only be found in the truth. In this sense one could say that there are several practices that can be corrected by invoking a concept of the good consistent with the truth, or practices can be directed simultaneously to several "goods" and "truths" incompatible amongst themselves. Put another way, there is no one and only *summum bonum* and no one and only truth.

(d) However, MacIntyre, despite proclaiming his Thomism, simply just fully defends any of the above theses. His starting point is the thesis that the plain person cannot even grasp the first principle of practical reason which is not equivalent to the precepts of natural law. Instead, plain persons can "learn" in conventional and customary practices that people gain knowledge in their communities through the teachings they receive from others. Each of these practices should be based on human inclinations and on the search of the internal good.

As Maritain argues, the search of good is a rational activity that takes place when a person is "functioning" normally. This dialectical learning confirms the rules of natural justice and the law contains a value of truth because the person experiences a progression, and a gradual enrichment confirms the value of each practice as truth. However, Maritain's foundation is far from being merely customary; it is based on a progressive and communitarian learning of the virtue. For Maritain, natural law is based on freedom and the special dignity of the subject, something which is not specifically developed in MacIntyre.

Instead, MacIntyre seems entirely Socratic in his approach to truth, but he opposes the intellectual grasp of natural law. The anthropological model which built on Maritain natural law, which is the human being understood as a rational creature that owns special dignity, thus leads to the defence of freedom. For MacIntyre, the human being is a "Dependent Rational Animal" characterized by his fragility; this human being finds a natural right in its daily practices, guided by the community in which all the rules and customs are acquired. MacIntyre's vision seems very optimistic: his hypothesis seems to hold that the practices and customs of social groups, in the end, converge with the deliberations of persons who follow their natural inclinations.

Indeed, this argument (d) presents some questionable points. First, the fact that social practices are not contrary to the nature of people is a very doubtful hypothesis and indeed runs into many counter-examples. The example given by MacIntyre on slavery is problematic. For the person of today, human dignity directly prohibits slavery but for many philosophers of Greece and Rome slavery was not understood as infringing on any natural rights.

This idea shows that natural law is not very static but rather a changing concept according to the practices, customs and conventions of human beings. There are very few cases in which almost all societies of different eras are convinced of the

existence of a certain natural law. Therefore, the assumption of MacIntyre that natural law can be found in practice leads to the existence of many natural rights and practices, something that is contrary to the truth, unless one accepts the existence of multiple truths and several "natural rights", something that MacIntyre disapproves of.

Second, just as the acceptance of Maritain's idea, in which natural law is a kind of *synderesis* or ability to function in accordance with common sense,[54] certainly prevents the idea of intellectual grasp, it greatly attenuates the grasp of natural law required by Aquinas and the need for the existence of truth as a guide for action. For MacIntyre, the contrast of a practice with the truth can be examined if it breaks dramatically with customs and practices.[55] This hypothesis seems implausible, since different societies have many drastically suppressed customs which today seem contrary to natural law, precisely because they violate the *status quo* (see for example, the revolutions of the eighteenth century).

This idea of natural law found in the learning of the practices is interesting, but to articulate it, MacIntyre -in my opinion- attempts to combine too many lines that are problematic and difficult to harmonize. To reconcile them, he must turn to God, a philosophically very problematic element. Through a (more Thomistic) God that attracts bodies toward each other, MacIntyre posits that the deity is a guarantor of all practices, however different they may be, if they pursue the internal good through which natural law principles can be found.

So God is the guarantor of the truth that Socrates, as well as Aquinas and Kant, demand in their conceptions. For this reason, MacIntyre turns to God to ensure that any practice that seeks to find the internal good will find natural law principles, guaranteed by God, because he is the *summum bonum* and the guarantor of truth. Obviously, this theodicy, established for the sake of truth and as support for a problematic intellectual edifice, raises again many difficulties that are clear to the reader.

12.7 Conclusions

For MacIntyre, liberalism and the Enlightenment represent the violation of natural Anthropology defended from Greece to Kant. Starting from Kant, Anthropology based on biological and psychological traits of human beings disappeared and was replaced by a transcendental epistemology based on the transcendental subject.

Also, while natural law in the Aristotelian-Thomistic tradition was seen as a product of justice and other ethical virtues, liberalism divorced law from ethics by means of a political reading of circumstances. When naturalistic ethics and natural law failed, intractable moral and legal disagreements began to appear that liberalism

[54] Maritain (1943, 20).

[55] Macintyre (1990b, 2).

could not solve. This would be the MacIntyrian reconstruction of the fall of natural justice and the rule of law today.

The lack of reasons to act happens because there is currently an Anthropology based on the transcendental subject, which neglects the biological and psychological inclinations of human beings. When theoretical reason is separate from the practical reason, the imperatives of practical reason and practices are not a given context. When Ethics based on Biology and Anthropology disappears, also the natural learning of virtue and goodness goes away. This is replaced by a proliferation of legislation and there are disagreements and moral dilemmas that have legal consequences.

To overcome this, MacIntyre proposes a theory of natural law based on the anthropological inclinations and practices of human beings. He is indebted to Wittgenstein, Anscombe and Hart, because these authors find the way to articulate an intellectual theory of natural law. And like Aristotelian and Thomistic ways of thinking, MacIntyre has to accept a number of requirements, such as the equivalence between good and truth, and its rational grasp.

His proposal has an internal tension between an understanding based on practices and rules (of customary law) and another based on universal values. This position can be understood as a reformulation which combines Hart's ideas with Aristotelian or Thomistic (quasi-Maritain) requirements. If truth is not a requirement, there may be a way for a natural-customary theory, linking Aristotle with Wittgenstein. MacIntyre, however, is a Thomist, and the unity of goodness and truth is a universal requirement for the study of natural law. In *Intractable disputes about the Natural Law*, MacIntyre explains that natural law appears in the resolution of moral disagreements if people pursue the goods internal to practices and adopt an attitude of rational debate in which persons seek the truth.

MacIntyre's argument has some problems, including the consideration of deliberation as an activity that cannot be conducted at the highest level by "plain persons". His vision, which combines influences of Aristotle, Wittgenstein, Hart, Socrates and Aquinas, and also shares certain similarities with Kant, contains several troublesome areas. I find it difficult to give an answer to this problem and I confess I cannot do so.

When placed in the position of seeking a mandatory solution to this problem, I think perhaps that MacIntyre should decide on any one of the lines I have found in his writings of the last decades and which I have explained before. If he advocates Aquinas as a model, he should not make some concessions to Wittgenstein's theory and the Aquinas's vision would be almost incompatible with some ideas of Hart. If MacIntyre finally holds a theory according to vision-based learning practices and habits, the theory would be incompatible with some theological or metaphysical elements. I do not see how a MacIntyrian "theory of law" can continue to operate without giving up one of two main lines.

Of course, the new model is more innovative and allows him to integrate Wittgenstein and Maritain, in a biologist, sociological and anthropological choice, in which Hart's "minimum content of natural law" could be explored in depth. This concept would be understood as an individual right to freedom, which uses

Maritain as a basis for its philosophy. In any case, it may be that MacIntyre's final solution may not ever clearly emerge.

In short, MacIntyre is a leading theorist and historian of the ethical problems of our society, and his explanations of current legislative issues and moral disagreements have great appeal. His doctrine of natural law contains many interesting suggestions and criticisms, even though -as I have tried to show in this paper- there are certain issues that are unsubstantiated and some difficulties that remain unresolved. However, MacIntyre can be considered one of the most original thinkers in the philosophical debate of our days, and his ideas can help to rebuild a theory of natural law for the twenty-first century.

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Chapter 13
Dworkin and the Natural Law Tradition

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In order to analyze the relationship between Dworkin's thought and the Natural Law Tradition, I will analyze one of his theses, which, although appearing explicitly formulated in his later works,[1] is already traceable from his early writings, owing to his holistic ambitions.[2] I am referring to his conception of law as "a branch of morality". In particular, to understand its meaning, I will investigate two implications of this thesis. The first has to do with the concept of law. Synthetically, Dworkin's position is that, in his analysis, moral considerations are necessarily involved. The second implication has to do with the concept of human rights. Synthetically, his position is that human rights are a part of the content of morality. At first glance, this thesis, thus stated, would seem to place Dworkin inside the tradition of Natural Law. As I will try to show in these pages, he is actually recovering certain premises associated with this school of thought, reorganizing the academic debate on the relationship between law and morality in a much more illuminating and rigorous sense, away from false trivializations.

1. Dworkin articulates his thesis according to which moral considerations are necessarily involved in the analysis of the concept of law on the basis of the following arguments. Firstly, he emphasizes that there are different concepts of law. Secondly, Dworkin argues that, although there are different concepts, the discussions that are generated about them have in common the fact that they involve moral manifestations or, in other words, raise questions about the relationship between law and justice. Now, according to his thesis, (this could be the third argument), because these manifestations are diverse, the discussions will take various courses.

[1] See Dworkin (2008, 2011).

[2] See Santos Pérez (2003).

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Put another way, Dworkin's position is that, although discussions about the concept of law involve moral considerations, the consequences of the lack of consensus on the issue of the relationship between law and justice are not uniform.

More specifically, Dworkin begins by stressing the importance of distinguishing the various concepts that are used to talk about law. Namely: "the doctrinal concept", "the sociological concept", "the taxonomic concept" and "the aspirational concept". The first one is used in stating what the law of a jurisdiction requires or forbids (so, for example, when someone says that "ignorance is no defense under the law", he would be mobilizing a concept of this kind). The second one is used when we want to describe a particular form of social organization (e.g., "the Romans developed a complex and sophisticated form of law"). The third one we use to classify a particular rule or principle as a legal principle rather than as a standard of another type (if we say "Although the rule that *seven and five makes twelve* figures in some legal arguments, it is not in itself a legal rule", we would be appealing to a concept of this nature). The aspirational concept is used when we want to describe a specific political virtue (for example, we say "the Nuremberg tribunal was preoccupied with the nature of legality").[3]

Now, although they are diverse concepts, they are indeed closely related, since all of them raise questions about the relationship between law and justice. In the first case, the question is whether morality plays some role in determining what our legal obligations are, or to put it more formally, whether moral tests are among the truth conditions of propositions of law. In relation to the second concept, the discussion is about whether moral standards are needed to identify what type of social structure counts as a legal system. In contrast, when we use the taxonomic concept, we are asking whether certain moral principles are also principles of law. When we refer to an aspirational concept, we disagree about what is the best statement of the ideal of legality or the rule of law, about which is desirable.

However, Dworkin introduces the following clarifications. First, he claims that, although in all cases in which the word law is used there is a common discussion about the relationship between law and justice, the discussion is not always the same, or put another way, the questions which we are asking when we speak of law are not one but many different questions. As a result of this (and this is the second clarification), the answers will also be diverse and, therefore, their related meaning and scope.

Some examples will serve to illustrate these considerations. We can ask when law first appeared in primitive societies and in particular whether it is necessary to use some moral test to identify the law in this sociological sense. However, the fact that we do not manage to provide a precise definition of what kind of social structure can be considered a legal system, mostly because we do not agree on whether we need some moral standard for identification, does not endanger the concept of law. Usually we do not need a better definition than our rudimentary understanding about what law is. As Dworkin illustrates, we would almost all make certain assumptions

[3] Dworkin (2008, 223).

if astrozoologists reported that a group of non-human animals they had discovered on a distant planet had a kind of legal system. But we would think it silly to argue about whether they "really" had a legal system when we discovered that they had no distinct enforcement institutions, or that retroactive legislation was the norm rather than a rare exception. Beyond this concept, providing a more precise definition could be useful for anthropologists and sociologists in achieving either research or classificatory efficiency. Expressing it in Dworkin's own words: "We can say, for example, without conceptual or semantic error, either that the Nazis did or did not have law so long as we make plain what sociological or moral point we are making in saying what we do".[4]

In turn, we could ask whether certain moral principles, which are relevant in deciding a judicial case, are also principles of law. Here, Dworkin's thesis is that the "taxonomic" discussion is actually a red herring: the important question is whether and how morality is relevant to deciding which propositions of law are true, not how we label whatever moral principles we do take to be relevant. Extending this concept a little further, the idea of a legal system as a set of discrete standards, which we might in principle individuate and count, seems a scholastic fiction. "The principles of arithmetic plainly appear among the truth conditions of some propositions of law – the proposition that Cohen has a legal obligation to pay Cosgrove exactly $11,422, including interest, for example – but it would be at least odd to say that mathematical rules are also legal principles".

Finally, the debate involves an aspirational concept of law. When we ask what is the best statement of that ideal of legality, we are connecting to the problem of identifying what claims are valid about the law (and therefore the discussion is one which involves the doctrinal concept of law). If we agree that legality is satisfied when the officials act solely in the manner permitted by the established standards, we ask what standards these are, and the right answer will depend on how to decide which particular claims of law are true.

So, according to Dworkin, a great deal turns on what we take to be the correct conception of the doctrinal concept. This is so not only in light of the considerations above, but also given the special responsibility of judges, who in political communities like our own are sometime forced to override decisions taken by a majority in the name of the law.

To advance the understanding of the doctrinal concept of law, Dworkin intends to go beyond the ways of arguing about the law that lawyers use in the practice of their profession, leading reflection to a more general and abstract level, also more reflective, through the articulation of a general theory of law. Now, what that theory should be like and how we should construct it is neither clear nor uncontroversial.

In order to elucidate these extremes, he emphasizes the need to clarify what role this concept plays in the reasoning and the discourse of those who share and use them (what Dworkin calls "the semantic stage" of the general theory of law): "Concepts can be put to very different kinds of uses, and our theory of any of the

[4] Dworkin (2008, 4–5).

concepts of law must be sensitive to the role we are supposing it to play. The key question is this: What assumptions and practices must people share to make it sensible to say that they share the doctrinal concept so that they can intelligibly agree and disagree about its application?".[5] In order to answer this question, Dworkin proposes the following distinctions. Some concepts characteristically function as "criterial concepts", others as "natural kind concepts", and, finally, others as "interpretive concepts".

The first ones presuppose a consensus about the criteria for their application: for example, people share the concept of bachelorhood only when they know that a bachelor is an unmarried male and, therefore, a useful analysis of the concept might be a statement of the correct criteria used to identify examples of singles.

The second ones are based on the thesis according to which objects have an intrinsic nature, although we can ignore it. For example, the concept of tigerhood would work this way: a member of a primitive society, who believes that tigers are manifestations of evil spirits, and zoologists, who study their genetic history, can agree about how many tigers there are in a room, at the same time that they disagree about how tigers came to exist. So, a pertinent analysis of the concept might consist of a description of its essential nature.

Finally, interpretative concepts encourage us to reflect on and ascertain what some practice we have constructed requires. For example, people in the boxing world share the concept of winning a round, even though they often disagree about who has won a particular round and what concrete criteria should be used in deciding this question. Each of them understands that the answers to these questions revolve around the best interpretation of the rules and conventions of boxing and how all these are best brought to bear in making that decision on a particular occasion.[6] Expressed more abstractly, interpretative concepts do not require any underlying agreement on either criteria or instance; rather, it is enough that the people who use them treat concepts as interpretative concepts: "So a useful theory of an interpretive concept – a theory of winning a round – cannot simply report the criteria people use to identify instances or simply excavate the deep structure of what people mainly agree are instances. A useful theory of an interpretive concept must itself be an interpretation, which is very likely to be controversial, of the practice in which the concept figures".[7]

For Dworkin, the doctrinal concept of law would function as an interpretive concept: "We share that concept as actors in complex political practices that require us to interpret these practices in order to decide how best to continue them, and we use the doctrinal concept of law to state our conclusions. We elaborate the concept by assigning value and purpose to the practice, and we form views about the truth conditions of the particular claims that people make within the practice in the light

[5] Dworkin (2008, 9).

[6] Dworkin (2008, 10–11).

[7] Dworkin (2008, 12).

of the purposes and values that we assign".[8] The choice which is practiced at this first level will determine typologies of general theories of law, in particular the place in which morality will be included. It is important to stress this point: "The difference is not between theories that include and theories that exclude morality, but between theories that introduce morality at different stages of analysis with different consequences for the final political judgment in which a complete legal theory terminates".[9]

In addition to the semantic stage, any general theory of law, according to Dworkin, tries to develop an explanation of the doctrinal concept of law from a stage called "jurisprudential". Depending on the answer given at the first stage to the question of what kind of concept the doctrinal concept of law is, theorists will propose one kind of theory or another. If someone answered that the doctrinal concept of law is a concept like singlehood or tigerhood, then his explanation does not require taking a stand on topics of political morality, but only to implement some kind of descriptive task: either to state the correct criteria for the use of the concept or to describe its essential nature. In fact, only admitting an argumentative strategy of this nature (one whereby the concept of law functions as a criterial concept), would Dworkin's thesis, according to which what makes the difference between the theories is the place where morality is included, break down. However, the counterargument he has offered for some time and which is known as the "semantic sting" is able to neutralize this threat. Briefly, he says that it is nonsense to interpret disagreements between lawyers as pseudo disagreements and not as genuine disagreements, based on the false assumption that an analysis of the concept of law must fit (and only fit) what lawyers mainly agree law is.[10]

Now, if the doctrinal concept of law is an interpretive concept, then at "the jurisprudential stage" the theorist tries to interpret the practices in which the concept figures. In this sense, it seems beyond doubt that there exists a close association between this concept and the value of legality, with the result that "the project is inevitably one in which morality figures, because any theory about how best to understand an explicitly political value like the aspirational value of law must be an exercise in political morality".[11] In this context, Dworkin suggests an interpretation of legal practice based on the ideal of integrity as opposed to other interpretative accounts in which the political and social value of the legal order lies, for example, in efficiency. Certainly, the interpretative conception of "law as integrity", for those who are familiar with the thinking of this author, is at the core of his book *Law's Empire*.[12] Summarily, with integrity, the law is justified on the basis that officials, to the extent of their possibilities, are trying to govern through a coherent set of political principles whose benefits extend to all citizens.

[8] Dworkin (2008, 12).

[9] Dworkin (2008, 21).

[10] See Dworkin (1986, 2008).

[11] Dworkin (2008, 13).

[12] See Dworkin (1986).

Now that the doctrinal concept of law has been explained at this stage, we move to a third, or "doctrinal stage", at which the goal is to construct an account of the truth conditions of propositions of law in light of the value or values identified at the jurisprudential stage. If we had defended an interpretative conception of law as integrity, morality would be involved *also* at this level, but not so if we defended another alternative. This point is clear if we look at an imaginary example.[13]

Let us imagine that a woman, Mrs. Sorenson, has taken medication whose generic name is Inventum for some time, but it was manufactured under different proprietary names. Inventum caused grave heart damage to Mrs. Sorenson. Mrs. Sorenson´s lawyers have sued together all the drug companies that made Inventum; they argue that law should be understood to make each of them liable to her for a share of her damages in proportion to their market share of Inventum sales. The drug companies' lawyers reply that the law can hold none of the companies liable for any damages at all unless she can prove that that company is responsible for her injuries.

Up to here, the facts. Now, if the lawyers of the companies were interpreting legal practices in light of the value of personal and collective efficiency, they could argue that the best way to serve that value is by enforcing a doctrinal theory that makes the truth of particular propositions of law depend exclusively on what designated legal officials have declared in the past. In that way, they could support their doctrinal claim that morality is not relevant to judging the truth of Mrs. Sorenson's claim. On the other hand, Dworkin supports an interpretive reading of legal practice based on integrity, so the best way to enforce it is by adopting truth conditions at the doctrinal stage that make the question of what the law is on any issue itself an interpretive question. In particular, the Sorenson case, the question of whether the law entitles Mrs. Sorenson to market-share damages from all the drug companies, is to be settled by asking whether the best justification of negligence law as a whole contains a moral principle that would require that result. With no time to pursue the topic, Dworkin underlines the complexity of interpretive judgments, a complexity which exposes the difficulties of the moral judgments involved.[14]

There would, finally, be a fourth level in the analysis of the doctrinal concept of law: "the adjudicative stage". Here, the question is whether judges, who are generally expected to enforce the law, should actually do so in particular cases. As Dworkin notes, this is a moral question: "It is not a question about how morality figures in identifying law but a question about when, if ever, morality requires judges to act independently of or even contrary to law".[15] Again, what a legal theory

[13] See Dworkin (2008).

[14] In particular, Dworkin refers to two dimensions under which we can measure the success of a proposed justification: a dimension of fit (i.e. the proposal must be minimally compatible with that which is justified) and a dimension of substance (i.e. the proposal must serve some important value). He also notes that the legal interpretations are also complex because they seek to justify not only the substantive claims about rights and obligations, but also institutional claims. This is a thesis that he had already developed at some length in Law's Empire (see Dworkin 1986) and has taken up again more recently (see Dworkin 2008, 2011).

[15] Dworkin (2008, 18).

provides at the adjudicative level depends on decisions taken at the previous stages. Suppose, for example, that Mrs. Sorenson's lawyers articulate their defense so that morality is introduced at two stages of the theory: at the jurisprudential level and at the adjudicative level. In the first one, when they insist that the law should be understood to serve the value of efficiency; in the second one, when they conclude that there is a "gap" in the law (no proposition of law dictates a result either way), so that, consequently, judges should do justice to Mrs. Sorenson by forcing the drug companies to pay her damages according to market shares. If we argue that we should attribute to legal practice the value of integrity, then morality would be involved at different levels; namely, at the doctrinal stage and at adjudicative stage: "The value of integrity that we should attribute to legal practice flows through the doctrinal stage into the adjudicative stage because, I argue, integrity requires judges to look to morality to decide both what law is and how to honor their responsibilities as judges".[16]

2. Dworkin provides a characterization of human rights as some very abstract interests which operate as political trumps and which act as a guide to political activity, demanding of Governments an attitude of respect towards people for the simple fact of their humankind. Although this is too summary a characterization, it is possible to develop it.

To begin, he emphasizes their status as "political trumps". In order to understand his thesis, we must begin by introducing some conceptual distinctions. The first is the one between "rights" and "goals". According to his explanations, individual rights and collective goals represent two distinct classes of political aims that any developed political theory should articulate. A political theory takes a certain state of affairs as a political aim if "for that theory, it counts in favor of any political decision that the decision is likely to advance, or to protect, that state of affairs, and counts against the decision that it will retard or endanger it".[17] A political right is an individuated political aim – that is, a state of affairs whose promotion encourages all and each of the individuals who enter into the corresponding category – while a goal is a nonindividuated political aim – that is, a state of affairs "whose specification does not in this way call for any particular opportunity or resource or liberty for particular individuals".[18]

However, the distinction between rights and goals is a formal distinction; the determination of a state of affairs as a "right", or alternatively, as "goal", is contingent, in the sense that it depends on the place and role assigned to it within the political theory concerned: "the same phrase might describe a right within one theory and a goal within another".[19] A second distinction, closely related to the first one, is that between "principles" and "policies": policies define collective goals,

[16] Dworkin (2008, 21).

[17] Dworkin (1981[3], 91).

[18] Dworkin (1981[3], 91).

[19] Dworkin (1981[3], 92).

principles determine rights. Indeed, both provide arguments to justify political decisions: arguments of policy "justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole"[20]; arguments of principle, on the contrary, "justify a political decision by showing that the decision respects or secures some individual or group right".[21]

So, if rights are trumps, this means that a political aim will not be considered a right unless it has a certain threshold weight against collective goals in general: "Rights may also be less than absolute; one principle might have to yield to another, or even to an urgent policy with which it competes on particular facts. We may define the weight of a right, assuming it is not absolute, as its power to withstand such competition. It follows from the definition of a right that it cannot be outweighed by all social goals. We might, for simplicity, stipulate not to call any political aim a right unless it has certain threshold weight against collective goals in general; unless, for example, it cannot be defeated by appeal to any of the ordinary routine goals of political administration, but only by a goal of especial urgency. Suppose for example, some man says he recognizes the right to free speech, but adds that free speech must yield whenever its exercise would inconvenience the public. He means, I take it, that he recognizes the pervasive goal of collective welfare, and only such distribution of liberty of speech as that collective goal recommends in particular circumstances. His political position is exhausted by the collective goal; the putative right adds nothing and there is no point to recognizing it as a right at all".[22]

Another way of explaining this thesis is to pay attention to what Dworkin calls "a strong sense of right".[23] The word "right" has different force in different contexts. In most cases, when we say that someone has a "right" to do something, we imply that it is the "right" thing for him to do, or that he does no "wrong" in doing it. For example, if an army captures an enemy soldier, we might say that the right thing for the soldier to do is to try to escape, but it would not follow that it is wrong for us to try to stop him. In other cases, however, when we say that someone has a right to do something, we imply that it would be wrong to interfere with his doing it, "or at least that some special grounds are needed for justifying any interference".[24] For example, if we say that someone has right to spend his money gambling, it means that it would be wrong for anyone to interfere with him even though he proposes to spend his money in a way that we think is wrong. It is this use of the word right that Dworkin calls "strong".

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[20] Dworkin (1981[3], 82).

[21] Dworkin (1981[3], 92).

[22] Also: "What he cannot do is to say that the Government is justified in overriding a right on the minimal grounds that would be sufficient if no such right existed. He cannot say that the Government is entitled to act on no more than a judgment that its act is likely to produce, overall, a benefit to the community. That admission would make his claim of a right pointless, and would show him to be using some sense of "right" other than the strong sense necessary to give his claim the political importance it is normally taken to have". Cfr. Dworkin (1981[3], 191–192).

[23] Dworkin (1981[3], 188).

[24] Dworkin (1981[3], 188).

So that someone may have the right to do something that is the wrong thing for him to do – for example, gambling – and vice versa: something may be the right thing for him to do and yet he may have no right to do it, in the sense that it would not be wrong for someone to interfere with his trying. Dworkin states explicitly that if citizens are supposed to have certain fundamental rights against their Government, then these rights must be rights in the strong sense: "The claim that citizens have a right to free speech must imply that it would be wrong for the Government to stop them from speaking, even when the Government believes that what they will say will cause more harm than good. The claim cannot mean, on the prisoner-of-war analogy, only that citizens do no wrong in speaking their minds, though the Government reserves the right to prevent them from doing so".[25]

It should be noted, however, that, as he points out, human rights denote a trump in a "more important and fundamental" sense than the rest of political rights.[26] To understand this point (which, incidentally, allows us to link up with the other elements involved in the characterization), we must recover a new terminological distinction: the one proposed between legal rights and political rights. From this perspective, the first would be rights which are subject to change by means of ordinary legislation, while the second ones are not. In addition, Dworkin argues that rights against the government must comprehend constitutional rights specifically and, within these, only the so-called fundamental rights. On the basis of these considerations, he concludes that political practice, which exists largely to argue about what rights are or should be incorporated in the Constitution and other normative instruments, presupposes and reflects the assumption by the Government of a certain "attitude" towards individuals, which focuses on the right to be treated as human beings whose dignity fundamentally matters.[27]

Consequently, that which enables a government to qualify as a legitimate government is not so much its "accuracy" in the declaration and protection of specific interests which are interpreted as trumps, as the recognition that "there are" interests which operate as trumps and, at the same time, they would be expressing an attitude of equal concern and respect for those in its power. "The distinction between human rights and other political rights is of great practical importance and theoretical significance. It is the distinction between mistake and contempt".[28] So, a Government will be legitimate, even when it fails to achieve a correct understanding of more concrete political rights, if it respects the dignity of those in its power.

In fact, at this point, the question of the *concept* of human rights ends up intersecting with the question of their *foundations*. If the fundamental rights included in constitutions and other declarations of rights are nothing more than attempts to codify basic moral requirements in written legal texts; if any legal decision can be affected by various contingencies (for example, some degree of compromise

[25] Dworkin (1981[3], 190–191).

[26] Dworkin (2011, 332).

[27] Dworkin (2011, 335).

[28] Dworkin (2011, 335).

between different interests and communities whose consent is necessary for its adoption), then, the question is not so much to identify the rights which have been enacted in such documents, as rather in knowing what rights we all have *in principle* as people.

For this purpose, Dworkin invokes a particular ethical conception, which is articulated on the basis of two principles: "a principle of self-respect" and "a principle of authenticity". The first one could be formulated as follows: "Each person must take his own life seriously: he must accept that it is a matter of importance that this life be a successful performance rather than a wasted opportunity" .[29] And the second one: "Each person has a special, personal responsibility for identifying what counts as success in his own life, he has a personal responsibility to create that life through a coherent narrative or style that he himself endorses".[30] Together the two principles offer a conception of human dignity – "dignity requires self-respect and authenticity"[31] – which would function as an interpretive test. It is satisfied only when a government's overall behavior is defensible under an intelligible conception of what the two principles of dignity require. Although occasionally it is doubtful whether a certain act would meet such a requirement, some political practices will be obvious. In particular, genocide, torture, censorship, persecution for religious or ideological reasons, and gender discrimination are acts which constitute an insult to human dignity, and therefore involve a violation of human rights.[32]

This proposal for a foundation of human rights is compatible with the idea of a divine moral authority, in the following sense. According to Dworkin, this idea presupposes the independent and logically prior existence of human rights. In his view, the arguments for a god's moral authority should focus on the general conditions of moral authority. Thus, if we claim that a god has moral authority over all peoples, then we must suppose an equal divine concern and respect for all peoples. As a result of this, if we do not want to fall into circularity, we must accept that no god is the source of our convictions about human rights. Nevertheless, we may treat our god as a moral legislator on less fundamental issues. "My argument does not denigrate religion, which has been a remarkable force for good as well as evil over human history. […] My aim has rather been to place the case for human rights on a different plane. We need not rely on our own religion, leaving those of other faiths behind, when we argue for the innate rights of all human beings. We can argue not from what divides us but from what unites us. We all, Muslim, Jew, or Christian, atheist or zealot, face the same inescapable challenge of a life to lead, death to face, and dignity to redeem".[33]

3. As seen above, the question of whether law is a moral issue, and the question of what human rights we actually have is also a moral issue. In this sense, I want to emphasize that, for Dworkin, both topics are framed in a broader discussion which

[29] Dworkin (2011, 203).

[30] Dworkin (2011, 204).

[31] Dworkin (2011, 204).

[32] Dworkin (2011, 336–337).

[33] Dworkin (2011, 344).

has as its central topic the nature of moral argumentation. To state his position on this point very synthetically, he argues that in order to assert the truth of our moral statements (the truth of a theory of the concept of law and the truth of a theory of human rights) it is not necessary to presuppose the existence of an independent foundation or to invoke some kind of intersubjective consensus. He labels his position as a version of "internal realism", as opposed to skeptical positions and external realistic or "Archimedean" positions. According to Dworkin, the truth or objectivity of any moral judgment does not refer to a world of objective facts or to a contextual practice, but is an inevitable "internal" claim: interpreting moral convictions as genuine constitutes a presupposition of moral discourse.[34]

Dworkin's theory on moral argumentation presupposes a holistic and coherent theory about the interpretative nature of political and moral values. Briefly, this means that the foundation of our moral judgments and principles (for example, the foundation of human rights or the foundation of the concept of law) requires an "expansive" movement beyond the area of political and moral concepts towards a conception of the good life. Ultimately, Dworkin makes the foundation of law and of human rights depend on ethics.[35] Indeed, all his work seems to be headed by a methodological holism or an ambition of continuity. In Dworkin's thinking, theory of law, theory of justice and ethics form a continuum which represents a challenge to the traditional boundaries of each discipline. Our author defends "the unity of value", which is "a large and old philosophical thesis" that Isaiah Berlin made famous. Berlin proposes a classification of philosophers as "hedgehogs" or alternatively as "foxes": whereas the foxes would be the kind of philosopher who has a fragmented view of reality, the hedgehogs seek to be able to articulate a coherent worldview from a guiding principle or a coherent set of principles. Without hesitation, Dworkin is a hedgehog.

4. In view of the above considerations, we must come to the conclusion that the relation between Dworkin's thought and the Natural Law Tradition or, if one prefers it, the question of whether Dworkin advocates or not such a school of thought, does not allow for a straightforward, simple answer.

First, Dworkin is reluctant to formulate his ideas in terms of the – traditionally-conventional framework for discussion. This is particularly clear in his approach to competing theories: Dworkin largely formulates his hypothesis by criticizing opposing theses while tailoring his own opponents according to his argumentative needs, thus making it rather difficult to identify them in the historical-philosophical scene. Moreover, it so happens that Dworkin places the discussion at the deepest level of the underlying assumptions, where the fundamental questions of legal, moral and political theory meet. Therefore he dissolves conventional disciplinary limits traditionally used as coordinates for the discussion.

Most particularly, the idea that the author does not adopt any orthodox position is clearly apparent in his approach both to the old issue of the relations between Law and Morality and to the concept of Human Rights.

[34] See Dworkin (2011).

[35] See Dworkin (2011).

With regard to the first question, according to Dworkin, there is a claim to correction embedded in legal practice which cannot be fulfilled by resorting to mere conventions; still, he notes, the specific formulation of such a claim may, all things considered, prove to be erroneous. Thus, Law being internally connected to morality does not imply the former in its turn not being subjected to moral criticism.

It is at this stage in his argumentation, that is, when the difference between Law and Morality is clearly stated (notwithstanding the necessary connection between the two) that his conception of human rights comes into play. Even if for Dworkin people have rights which preexist any legislation or convention whatsoever, this does not imply their being grounded in an independent objective moral order. His thesis is rather that their grounding is to be found in the underlying assumptions of an embedded moral discourse, the reason for which is otherwise to be found in the legal practice's inner claim to truth-searching.

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Chapter 14
Public Reason, Secularism, and Natural Law

Iván Garzón Vallejo

Reading Aquinas' Summa Contra Gentiles, I am struck by the complexity, the sheer degree of differentiations, the gravity, and the stringency of a dialogically constructed argument. I am an admirer of Aquinas.

Jürgen Habermas

14.1 Introduction

John Rawls' and Jürgen Habermas' theoretical proposals constitute the most outstanding contemporary attempts to establish some discursive and procedural guidelines that may make possible an agreement among the citizens of modern democratic and pluralistic societies. A fair society is the ideal of the former, while social cohesion in post-secular society constitutes the *telos* of the latter. Given that I have studied said proposals elsewhere, particularly regarding the visibility and

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public admissibility that arguments of a philosophical or religious nature[1] have in each of them, in this text I intend to deal with the question of their similarities and differences with respect to the classic theory of natural law.

The justification for this is found in the fact that, like the conception of public reason[2] in Rawls and Habermas, natural law also purports to be a sort of "universal language", or a point of convergence regarding the question of good, and of the most significant aspects of civilized co-existence.[3] The aforementioned is summarized, according to Berlin, in the consideration that human ideals are the same everywhere and at all times: *quod ubique, quod semper, quod ab omnibus*, i.e., what has always been accepted by all men in all places.[4] Hence, "natural law is nothing other than a doctrine of public reasons, i.e., of reasons that would demand a universal consensus under ideal conditions of discourse and while they are at the disposition of, and may be accepted by, anyone willing and able to give the fair and adequate attention to them".[5] From this, it may be deduced that "the objective norms governing a just action are accessible to reason, dispensing with the content of revelation".[6]

Although the discussion about natural law is very broad, in this paper I assume as its concept the same definition as that given by Thomas Aquinas, according to which it is man's "natural participation of the eternal law".[7] Here, law is understood as a mandate of reason that orients human action,[8] the purpose of which is to "make those to whom it is given, good".[9] Commenting on Aquinas, John Finnis highlights that the first principles of natural law, those that specify the basic forms of good and evil and that can be properly grasped by anyone possessing the use of reason (and not only by metaphysicians), are *per se nota*, i.e., evident and indemonstrable. That is to say, "they are not inferred from speculative principles. They are not inferred from facts. They are not inferred from metaphysical propositions about human nature, or about the nature of good and evil, or about the "function of a human being"; nor are they inferred from a teleological conception of nature or any other conception of nature.

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[1] See Garzón Vallejo (2010, 2012).

[2] Although in the strict sense, said concept is only used by John Rawls, I will use it here to encompass Habermas' concepts of public use of reason, discursive ethics, and deliberative politics, since they share a family resemblance. For a panorama of the different versions of public reason, one may see Tollefsen (2007).

[3] In 1952, Jacques Maritain also proposed a coincidence regarding the essential nucleus of human rights among the different philosophical and religious traditions, regardless of the foundations invoked by each one of them. He denominated this convergence "temporary or secular faith", and it contained the practical convictions that reason may try to justify. See Maritain (1997), 127–133. For a comparative analysis of Maritain's and Rawls' proposals, see Migliore (2002), 194–196 and 199, footnote 205.

[4] See Berlin (2010).

[5] George (2009), 148.

[6] Benedict XVI (2010).

[7] Aquinas (1948), *II*, part I-I, q. 91, a. 3.

[8] See ibíd., q. 90, a. 1, 704.

[9] Ibíd., q. 92, a. 1, 718.

They are not inferred or derived from anything", the professor clarifies,[10] as he deals with the common critique of incurring in the "naturalistic fallacy" or Hume's Law,[11] which, in synthesis, consists of the undue transition from is to ought.[12] In this sense, as professor Massini-Correas explains, "[…] the "transition" from the ontological dignity of the human being to the deontic plane of the enforceability of rights, is produced by means of intelligence; indeed, it is practical understanding that, by means of evidence and discourse, grasps real deontic relations and presents them to the will as ethical demands. Through evidence, the understanding apprehends the first practical principles that found basic human rights and through reasoning, it determines those principles substantiating them in ever more determined precepts".[13] Of course, the basic forms of good grasped by practical understanding manifest what is good for human beings with the nature they possess.[14] To put it another way: with a different nature, basic human goods would also be different.

At this point one can begin to see some similarities and differences between the concept of natural law and public reason. Hence, the question that precedes this work appears not only as significant, but also as relevant: Does public reason in Rawls and Habermas constitute a secular reformulation of the theory of natural law?

From the start, I recognize an obstacle in the posing of the problem, and it is that, in the case of John Rawls, he explicitly denies that his political conception of justice is an instance of a doctrine of natural law.[15] On the other hand, Jürgen Habermas has also warned of something similar.[16] Consequently, I clarify that, beyond what these two authors acknowledge, I believe that there are sufficient motives to pose the comparison, since the quest that both Rawls and Habermas undertake in order to identify moral and political principles that may be reasonably affirmed without having to appeal to theological statements or any religious authority, is precisely a relatively correct description of what is known as the theory of natural law.[17] In this sense, "a theory of natural law claims to be able to identify conditions and principles of practical right-mindedness, of a good and proper order among persons, and in individual conduct".[18]

In order to tackle this problem, I will pursue the following itinerary: first, I will briefly outline the notion of public reason in Rawls and Habermas; secondly, I will indicate the points in common and the points of divergence between this concept and the theory of natural law.

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[10] Finnis (2011), 33–34. In the same sense, one may also see George (1994), 34.

[11] See Finnis (2011), op. cit., 36–42.

[12] A synthetic exposition of the naturalistic fallacy may be read in Massini-Correas (comp.) (1996), 199–201.

[13] Massini-Correas (1996), 214.

[14] See ibíd., 67.

[15] See Habermas and Rawls (1998), 113.

[16] See Habermas (2008b), 64–65.

[17] See George (2009), 123.

[18] Finnis (2011), 18.

14.2 Public Reason in Rawls and Habermas

14.2.1 Public Reason in Rawls

The problem that John Rawls' liberal theory faces is: how to explain the possibility of the existence of a stable and fair society of free and equal citizens that is at the same time deeply divided by religious, philosophical and moral doctrines, which are, in turn, both reasonable and incompatible with each other?[19]

With the aim of finding these constitutional and political justice principles upon which all citizens may agree, Rawls suggests assuming a constructivist conception, philosophically skeptical, political, and not metaphysical. For this purpose, he resorts to the elusive method, which consists of avoiding in-depth exploration of metaphysical problems that refer only to political matters. In this way, the conception of justice does not advocate any specific doctrine of a metaphysical, anthropological, or epistemological nature, beyond those which are implicit in the political conception itself.[20]

The political agreement Rawls intends to arrive at is denominated *overlapping consensus*. It deals with the essential constitutional and basic justice elements needed to achieve democratic stability.[21] For that purpose, he does not attempt to confront religious and non-religious doctrines with a general liberal doctrine. Neither does he pretend to discover a balance or a happy medium between the known general doctrines, nor does he seek to reach a compromise among a sufficient number of the doctrines existing in society, thus designing a political conception that fits them all. On the contrary, overlapping consensus seeks to formulate a liberal political conception that non-liberal doctrines will be able to accept, suggesting a conception that supports itself through its own political and moral ideal, and which is can be explained to others.[22]

But now, this conception of justice has to be discussed politically, and decided in its concrete form in accordance with *public reason*. This summarizes the conditions of public justification which any discourse aiming to have political validity must contain. Its function is neither to determine nor to settle the disputes regarding controversial questions about law or politics, but rather, to specify the public reasons in terms of which such questions are to be *discussed* and *decided* politically.[23] Therefore, it should not be conceived of as a specific idea of public institutions or policies, but rather as a procedural conception regarding how they are to be explained and justified before the citizenry that deals with the question by means of the vote.

[19] See Rawls (2006), 13.

[20] See ibíd., 35.

[21] See Rawls (2009), 32–33.

[22] See Rawls (2004), 23, 99.

[23] See ibíd., 103.

In Rawls' conception, it is expected that citizens adhere to public reason from the very interior of their own reasonable doctrines, and not as a mere *modus vivendi*.[24] In this context, as reasonable and rational beings, and knowing that they profess a diversity of reasonable doctrines, whether they be moral, religious or philosophical, the citizens must be able to explain to each other the foundations of their acts in terms that each one reasonably expects others may subscribe to as well, as long as they are consistent with their freedom and equality in the eyes of the law.[25] This is what Rawls calls the *criterion of reciprocity*.

Citizens must adhere to the guidelines of public rationality mainly when they vote on the basic questions of justice and constitutional principles. However, citizens are not the only ones who must proceed politically in conformity with public reason. Actually, those upon whom said imperative mainly falls are the principal protagonists of the public political forum: high government officials and those who publicly aspire to elected office, i.e., judges, especially the Justices of the Supreme Court; public officials, high-ranking officials of the executive and legislative branches, as candidates for public office and their campaign directors.[26]

Public reason is above all a procedural proposal of public discussion, therefore, general reasonable doctrines, either religious or non-religious, may be introduced in public debate at any time, as long as appropriate political reasons are offered – and not just reasons derived from doctrines – in order to support what they propose.[27] Rawls calls this requirement *stipulation*. This concept suggests that there are no restrictions or substantive requirements for the expression of religious or secular doctrines, but it imposes on them the epistemic condition of being presented as politically valid reasons, and said validity depends on their potential for achieving social consensus. Stipulation generates in citizens the epistemic duty of *translating* the elements of their comprehensive doctrines into arguments of a political nature. Nevertheless, if on the basis of the comprehensive doctrines it is not possible to establish compatibility between their content and the overlapping consensus, the citizen must be guided by constitutional guidelines, in the understanding that these principles guarantee certain basic rights and political liberties, and establish democratic procedures to moderate political rivals, as well as to determine questions of social policy. Now, even if Rawls seems to be willing to remove any obstacle that may hinder the advent of overlapping consensus, he does not raise any doubt that stipulation is not a procedure within reach for those who only have a single language – such as the moral or ethical one, the metaphysical or the religious one – to intervene in the public political forum. His normative proposal entails quite a few dilemmas which will not be examined here.[28]

[24] See ibíd., 104.

[25] See ibíd., 110, footnote 23.

[26] See Rawls (2001), 158.

[27] Ibíd., 177.

[28] See Garzón Vallejo (2010), 39–63.

14.2.2 Deliberative Politics or the Possible Understanding Among Believers and Agnostics

Jürgen Habermas is a "post-enlightenment" or "end-of-enlightenment" author, for he firmly believes in the possibility of restoring the fundamental nature in individual and social life to human reason. His philosophical task has consisted in the *reconstruction* of the theory of modern rationality, with the aim of saving the best of the enlightened proposal,[29] and taking it to its ultimate consequences. From the rational dynamics he accentuates, above all, its communicational nature, i.e., the possibilities it offers for inter-subjective understanding, and with it, its potential for consensus.

Deliberative politics is a new modality of participatory democracy that links the rational resolution of political conflicts to argumentative or discursive practices in different public spaces: the political system, the public sphere and civil society, i.e., in the fora of political communication.[30] Said conception poses a profound revision of modern democracy, for it proposes going beyond the traditional ambits of deliberation and decision, thus putting democracy within the reach of all citizens. This happens, furthermore, at different moments, and not just in those established by institutional entities. This model is based on a belief in the catalyzing nature of the effect that public deliberation and rationalization have on political decisions. Thus, rational debates would function somewhat like "washing machines" that filter what is rationally acceptable for everyone, separating questioned and invalid beliefs from those that obtain license to recover the status of non-problematic knowledge.[31]

Deliberative politics represents a sort of relocation of the theory of communicative action to the political ambit, and in this sense, the discursive emphasis constitutes the most important element of Habermas' conception of politics and law. While the model maintains significant differences with respect to the liberal tradition, it conserves an evident kinship with the republican tradition and, more than a conception of politics, it is a proposal that refers to the democratic form of government. Hence, I conceive of it as being *semi-republican*.

Similarly to John Rawls, Jürgen Habermas also intends to propose both a secular and non-secularist reading of the politico-religious context at the core of the democratic constitutional state, and consequently, of the relations between believers and agnostics in post-secular society. Within this framework, the function of secularization is not that of a filter that eliminates the contents of tradition, but rather that of a "a transformer which redirects the flow of tradition".[32] From this perspective, and as a consequence of the modern division of labor between politics and metaphysics, there

[29] See Suárez Molano (2006), 66–67.

[30] See Habermas (2009a), 158–166.

[31] See Habermas (2003), 84.

[32] Habermas (2010), 18.

is a complementary relation between public agnosticism and privatized confession, i.e., between the neutral power of a state that remains blind to confessional colorings and the enlightening force of worldviews that compete for truth.[33] With this, Habermas disassociates himself from a secularist conception of modern rationality, suggesting a secular hermeneutics for it, which has its origin in the dialectical (and not disjunctive) relation that has historically existed between it and religious reason, or between philosophy and theology.[34] Within this framework the transit from the liberal state to the constitutional state is insinuated and, in spite of their irreducible differences, the author proposes that both believers and agnostics conceive of secularization as a mutual and complementary learning process.[35] If one takes into account the dominant theoretical context, said proposal is audacious, albeit not novel in its development, since deliberative politics contains within itself the purpose of inter-subjective learning.

The mutual learning process starts from the cognitive standpoint, and some practical demands for the state, for believers, and for agnostics are supported on those grounds. In the face of political debate, the main consequence is that believers and agnostics mutually take each other's contributions seriously on controversial public subjects. Habermas' openness towards the influx of religious traditions is due to several motives. Some of them are:

(a) The "motivational deficit" that citizens experience, or the fragility of legal bonds to mobilize a sense of community identity.
(b) Solidarity is the ruling principle of deliberative politics.
(c) The constitutional state cannot seek to content itself with a mere *modus vivendi* between believers and agnostics.
(d) Religious traditions are reserve sources of identity, meaning, solidarity and cohesion among citizens.
(e) Although the constitutional state maintains strict neutrality in the face of the diverse beliefs that inhabit society, it cannot fail to acknowledge the normative and cohesive potential that religious traditions contribute. This entails a certain functionalistic – albeit non-instrumentalizing- conception of religion.
(f) In disputes about legalization of abortion, euthanasia, bioethical problems of reproductive medicine, or about issues such as the protection of animals and environmental change, among other things, the arguments are so controversial that in no way it may be considered beforehand *that one of the parties possesses the most convincing moral intuitions*.[36]

According to Habermas, philosophy has not yet exploited the whole semantic and communicative potential of religious doctrines. Said potential has not yet been translated into the language of public reasons, i.e., of the reasons that are potentially

[33] See Habermas and Rawls (1998), 159.

[34] See Habermas (2001), 187.

[35] See Habermas and Ratzinger (2006), 43–44; See Habermas (2009b), 227–228.

[36] See Habermas (2008a), 8. (The highlighting in italics is mine.).

convincing for everyone to the same degree.[37] Therefore, his main proposal consists in the fact that believers must *translate* their religious doctrines in such a way that they may be understood by those who do not share them.[38] In this order of ideas, I distinguish two types of translation:

(a) Translation *inwards*, i.e., in the believer's own heart and intellect. This basically entails recognizing that the state does not take a position regarding religious conceptions and holds an ideological neutrality that materializes, in legal terms, in equal rights and guarantees for all citizens. Translation "inwards" consists of putting said secularized context into religious, ethical, and spiritual terms and categories, as that which has resulted from a long historical process, and which is presented as the most convenient for all citizens.
(b) Translation *outwards*, which intends to give greater effectiveness, i.e., greater public visibility and significance to said arguments in public discourse, since in this way, they will more readily be taken into account.[39] Consequently, in the public sphere and in civil society, the translation of philosophical and religious arguments does not constitute an admissibility requirement of said arguments. The same does not occur in the political system (courts, parliament, institutional ambits of the executive branch, etc.), where translation is a *sine qua non requisite* for the admissibility of philosophical and religious arguments in debates in which the political and legal institutional ambits constitute the epicenter.[40] Thus, believers must make an argumentative effort to present their beliefs and convictions of a philosophical or religious nature in such a way that, without renouncing their truth or their essential contents, they express them in a manner in which they may be understood, and perhaps even appropriated, by those who do not share the same religious, philosophical, or epistemological assumptions. The fact that translation seeks to have greater possibilities of public impact and persuasion among those it addresses explains the inclusion of "strategic translations", i.e., those translations that are addressed to a specific sector of culture and public opinion.[41]

14.2.3 Public Reason and Natural Law: Convergences and Divergences

The following table summarizes the main differences and similarities between public reason – specifically from the approach that John Rawls and Jürgen Habermas take regarding it –, and the doctrine of natural law, assuming 11 comparison criteria. I

[37] See Habermas (2001), 201.
[38] Habermas (2009a), 79; (2009b), 56–57; Habermas and Ratzinger (2006), 46–47.
[39] See Habermas (2006), 140.
[40] See Habermas (2009a), 79.
[41] See Habermas (2001), 99.

am aware of the difficulty that such a synthesis entails, and that a comparative table cannot express the different nuances that the different authors have given to the subject, and from which the relevance of subsequent explanation and analysis derives.

Comparison criteria	Public reason	Natural law theory
Representatives	Immanuel Kant, Thomas Hobbes, Jean Jacques Rousseau, John Rawls, Jürgen Habermas	Thomas Aquinas, Classic and Modern Iusnaturalists, Catholic Church Magisterium, Catholic Intellectuals
Type of rationality	Practical reason	Practical reason
Methodological plane	Normative	Normative
Epistemological focus	Procedural	Substantive
Contents	Political, legal and ethical	Anthropological, ethico–moral and legal
Foundations	Language and factical pluralism	Human nature and practical reasonability
Attitude toward whatever appears	Skepticism and constructivism	Realism and Objectivism
Aim or objective	Political consensus, dialogue and coexistence	Truth, dialogue and coexistence
Scope	Western world	Universal
Central topic	Justice – Correction	Good
Position regarding transcendence	Immanentism	Openness

14.2.4 Convergences

Convergences or points in common between the two proposals are basically synthesized in:

14.2.4.1 The Value of Practical Rationality

Both public reason and the theory of natural law place their focus on practical reason and not on speculative rationality. At the same time, both proposals attempt to exercise rationality so as to allow it to be a vehicle of access to the principles that are proposed in the public ambit. Thus, both Rawls and Habermas coincide in proposing that believers undertake a "translation" of their philosophical and religious arguments, which resembles the natural law imperative of grasping and expressing objective moral principles in a strictly rational way. But at the same time, as rational, they expect them to be subscribed to for their intellectual merits (and not for other motives). Although Habermas considers that it is only for agnostics that reason determines in its own right what counts as a valid or invalid argument in each

case,[42] theorists of natural law sustain that one of its essential aspects is the possibility of being understood through the natural light of reason – indeed, its "natural" character is due to the fact that the reason promulgating it is proper to human nature.[43] In other words, they do not argue against abortion, against euthanasia, or in favor of family – to cite just a few cases that are symbolic nowadays, although in a strict sense, these issues are not specifically religious[44] – from faith, but from reason.[45] Thus, the ideas of natural law, secular liberalism or democratic republicanism, "should stand or fall on their own merits", and whoever asks whether they are logical or illogical should carefully and dispassionately consider the arguments supporting them and the counterarguments that their critics point out.[46]

14.2.4.2 The Normative-Methodological Aspect

The normative dimension of said ideas derives from their practical nature, i.e., both public reason and the theory of natural law aim to indicate conduct guidelines or standards of behavior that take a concrete form in the social realm. In this sense, both of them are situated on a normative methodological plane or one of "what ought to be". This being the state of things, in the case of the first principles of natural law, they are *practical* principles that prescribe that each person *participate* in the basic forms of good, through *practically* intelligent decisions and through free *actions* that make each one the person he or she is and *should be*. Such principles dictate the fundamental notions of everything one could reasonably *want to do*, *have* and *be*.[47] Hence, thanks to natural law, human beings know what ought to be done and what ought to be avoided.[48]

In the same sense, Habermas points out a series of practical burdens for the state,[49] the believers,[50] and the agnostics[51] that derive from public reason. John Rawls does the same when signaling the *duty of public civility*[52] as well as the *stipulation* or *translation* of reasonable moral, philosophical, and religious doctrines into political debate on the part of those who support them.[53]

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[42] See Habermas (2008a), 14.

[43] See John Paul II (1993), n. 42.

[44] See Cortina (2011), 29.

[45] See Contreras (2010), 141.

[46] See George (2009), 20–21 (my translation).

[47] See Finnis (2011), 97.

[48] See John Paul II (1993), n. 40.

[49] See Habermas (2006), 137 and 310.

[50] See Habermas (2009a), 79.

[51] See Habermas (2006), 147 and 313.

[52] See Rawls (2006), 13.

[53] See Rawls (2001), 169 and 170, 177–178.

14.2.4.3 The Common Purpose of Suggesting Some Guidelines for Dialogue and Harmonious Coexistence in Modern Societies

Public reason and natural law theory aim to propose some guidelines for dialogue among the citizens of modern societies, which are fragmented or composed of a series of ethical, philosophical, and religious doctrines. In both Rawls and Habermas said guidelines are basically procedural,[54] while the natural law theory is centered on substantive ethical aspects, for which reason, said guidelines are nothing other than the common elements that permit an understanding of citizens among themselves.[55] The consequence of dialogue is harmonious coexistence, for said common elements make it possible to overcome radical differences and to achieve internal cohesion in society around principles which, due to their very nature, everyone would desire. Thus, the goal of both is "to identify principles and norms that can be reasonably accepted both by believers and non-believers, and publicly affirmed by them whatever their convictions may be regarding "religious" questions that have to do with human nature, dignity and destiny".[56] Now, beyond the convergence on this aspect, it is convenient to note a paradox regarding the theory of natural law, and it is that, in the current context of discussion, the notion of natural law seems to fall far from being able to achieve the consensus to which it aspires, in virtue of its own pretension of universality. The paradox to which Alejandro Vigo adverted becomes notorious: a notion that seeks to account for the very fact of the existence of a shared moral patrimony, by means of reference to the formative features of the nature common to all men, does not seem to be able at present to lead to the type of universal consensus, the very possibility of which it aims to establish.[57]

14.2.4.4 Coincidence in an Ethical Proposal as Background

John Rawls is very emphatic in pointing out that his political liberalism does not constitute any sort of comprehensive liberalism *à la Kant or à la Mill*, i.e., that it does not have a cosmovisional scope. Neither has Habermas sought to propose an

[54] Some, like professor George, doubt that issues of such profound moral significance can be satisfactorily resolved through merely procedural solutions, since neither one of the two parties in dispute (believers and agnostics) are willing to accept a procedure that does not guarantee the triumph of the substantive policies that each one of them supports. And they do not do it out of obstination, the Princeton professor clarifies, but rather because it has to do with long-matured judgments in which fundamental questions of justice are at stake, and which, therefore, are not negotiable. See George (2009), 121–122. In a similar sense, Dworkin proposes changing the rules of election to the Supreme Court, for he foresees that, judging by its recomposition, its decisions will not favor his liberal position. See Dworkin (2008), 197–198.

[55] See International Theological Commission (2010), 85.

[56] See George (2009), 123 (my translation).

[57] See Vigo (2010), 106.

ethical conception or one of individual good, in the idea (in which he coincides with the modern liberal tradition) that such an enterprise is the concern of each individual and is, furthermore, proper to philosophical perfectionism.[58] Given this state of things, public reason in Rawls and Habermas makes manifest a discontinuity between personal ethical convictions and the political conception of justice.[59]

Nevertheless, some elements of an ethical nature underlie both Rawls' political conception of justice and Habermas' discursive proposal, since rational dialogue, communication, consensus, pluralism, the deliberation of political questions and questions of justice, and the consolidation of democratic regimes, among other things, are considered both reasonable and advisable. These ideas, and others that are implicit, make it possible to get a glimpse of an ethical or moral proposal. It is certainly not one of the good life or of human perfection as is proposed from the perspective of natural law theory, but definitely one of "good citizenship", or even of "civic or political virtue".[60] In this sense, in both public reason and in natural law theory there would be a convergence with respect to an underlying ethics or moral values.

14.2.5 Divergences

Just as convergences have some non-substantial nuances and differences, it must be noted that the divergences may be supported by radical and irreconcilable differences, or differences of nuance and focus. Thus, public reason and natural law theory are differentiated from each other in terms of the following:

14.2.5.1 Epistemological Focus

While the proposal of both Rawls and Habermas basically constitutes a procedural theory in which the guidelines regarding how public matters should be discussed publicly, natural law theory lacks said focus and seeks, on the contrary, to indicate a nucleus of substantive contents, of practical principles that are to be realized and put to work, and which may be discovered by each person through his or her own reason and conscience. This does not imply, as has quite frequently been interpreted, that said nucleus of contents is predetermined or that there is an innate content[61] from which even the most minute details derive. This idea, commonplace in the rationalistic iusnaturalist tradition, has propitiated the image of natural law theory as a catalogue of good-doing similar to the innate ideas supported by some

[58] See Massini Correas (1998), 92–93.

[59] See Dworkin (1993), 59–63.

[60] It is interesting to highlight the fact that Habermas suggests that the practice of tolerance in the constitutional state requires assuming it as a political virtue. See Habermas (2009c), 191.

[61] See Finnis (2011), 34–35.

modern philosophers. For this reason, even if according to natural law there is a nucleus of underived contents that are nothing other than *the first principles of doing*, the role that synderesis and prudence play in their concrete determination cannot be ignored.

14.2.5.2 The Content

While the proposal of Rawls and Habermas has an evident political and legal emphasis, natural law theory has traditionally had a predominantly anthropological and ethical focus. In my opinion, this is not a radical divergence, but simply one of nuance, since, as I pointed out earlier, one aspect in which the two proposals meet is in their ethical background, in which, although it is more patent in natural law, there is still a concern for the social, political and legal ambit, even though it is less extensively and explicitly postulated. Perhaps one reason for this difference is that public reason has been developed by political and legal philosophers, while it has been mainly theologians and philosophers, experts in ethics and morality, that have dealt with natural law theory.

Others, however, consider this divergence as to the content to be transcendental. For example, for Francisco José Contreras, public reason or the doctrine of "public reasons" entails a subtle form of discrimination against Catholics since it excludes the possibility that believers can make the arguments supported by their religious convictions be heard in legal and political debates.[62] And, in fact, "a true debate does not substitute for personal moral convictions, but it presupposes and enriches them".[63] Nonetheless, the same author recognizes that one of the available options for believers is to show that their arguments are public reasons that can be understood by everyone, and not merely religious reasons,[64] i.e., accepting combat on the common ground of natural practical reason, showing that they possess more powerful arguments and rejecting the imputations of mere confessionality.[65] In this sense, there is a certain contradiction in public reason between the determination of the content and the nature of practical reasonability, for, as Robert P. George notes: "practical reason consists of reasoning as much about what is "right" as about what is "good", and both of them are connected".[66]

[62] See Contreras (2010), 138.

[63] International Theological Commission (2010), 29.

[64] See Contreras (2010), 140–143. According to the Universidad de Sevilla professor, the other option is to reject the neutrality of the state and to show that the state always needs to accept some background metaphysical doctrine, and that laws and political decisions are based on a specific conception of the world. In my opinion, this alternative does not exclude the former.

[65] See ibíd., 145.

[66] George (2009), 22 (my translation).

14.2.5.3 The Attitude to Whatever Appears, and the Foundations

Is it possible to reach social and political consensuses without basing them on a common conception of a metaphysical nature or, simply, of good? Both Rawls and Habermas are not only convinced that it is possible, but their theoretical proposals are set forth in decidedly anti-metaphysical terms. Consequently, the former establishes the "fact of pluralism" as the foundation of his liberal proposal, while the German author places language and dialogue as the cornerstone of his. In this way, public reason is framed within a skeptical and constructivist philosophical tradition.

Meanwhile, natural law theorists have developed a philosophically realistic conception with pretensions of objectivity[67] and knowledge of truth. In this aspect, there are two differentiated tendencies in the natural law tradition, although they are both inscribed within a realist philosophical perspective. The first bases its conception of natural law on human nature, understood in metaphysical terms. According to this interpretation, "only by taking into account the metaphysical dimension of reality can we give natural law its full and complete philosophical justification".[68] In his description of the ways to provide a foundation for legal reasoning, Mora Restrepo denominates this the "ontological way", and argues that this may prove difficult for the contemporary mentality to digest, given that the study of metaphysics demands a high level of abstraction since the study of being is undertaken from the perspective of its universal causes and principles, i.e., of the phenomena that are farthest removed from the senses. However, it may turn out to be more necessary, as it allows a better or greater comprehension of the demands that arise in virtue of the first principles.[69]

For the second, justification of natural law is situated in practical reasonability. Does this mean that it is possible to talk about natural law without resorting to – or departing from- metaphysical premises? According to this second tradition, the answer is yes, it is possible, although without denying it but, rather, simply obviating it, methodologically considering it "a speculative appendage added by way of a metaphysical reflection, *not* a counter with which to advance either to or from the practical *prima principia per se nota*".[70] That is to say, situating the foundation of natural law elsewhere, in practical reasonability. A well-known example of this is that of John Finnis, who, along with other academics,[71] defends his endeavor on the basis of an interpretation of Aquinas because, according to the Oxford scholar, "for Aquinas, the way to discover what is morally right (virtue) and wrong (vice) is to ask, not what is in accordance with human nature, but *what is reasonable*".[72] However, he clarifies, "the proposition that our knowledge of basic human goods

[67] See International Theological Commission (2010), 85.

[68] Ibíd., 62. The same document is recurrent in pointing to human nature, understood in a metaphysical and divine creation sense, as the foundation of natural law.

[69] See Mora Restrepo (2009), 337 and 342–344.

[70] See Finnis (2011), 36 (The highlighting in italics is mine).

[71] Germain Grisez, Joseph Boyle, William May, Patrick Lee and Robert P. George may be cited here.

[72] Finnis (2011), 36 (The highlighting in italics is mine).

and moral norms is not derived from prior knowledge of human nature does not entail the proposition that morality has no grounding in human nature".[73]

Despite the differences pointed out between these two interpretations, it is worthwhile to specify that recognition of the philosophical or theological foundations of natural law does not condition spontaneous adherence to common values. In this sense, "the moral subject can put into practice the orientations of natural law without being capable, by reason of particular intellectual conditions, of explicitly comprehending them and their ultimate theoretical foundations".[74] In other words, although the two tendencies emphasize different aspects, they are nonetheless *complementary ways*, because they both converge in the same rational demand for respect for human dignity, in the promotion of their fundamental goods and in the greater realization or plenitude of the individual person. That explains why the supporters of one and the other response do not deny their opposite perspective.[75]

14.2.5.4 The Scope

Public reason is conceived of within and for the context of the modern technified and post-industrialized societies of the West and in order to succeed it requires a certain type of citizen: free and equal, but also informed, interested in participating in the public debate, and able to unfold or translate their most valued beliefs into a rational language that is universally accessible to everyone. Meanwhile, the natural law theory has pretentions of universality, given that it can be discovered by any human being, regardless of condition, race, sex, age or religion. In other words, natural law does not aim to be a normative parameter for western societies only. In fact, there are countess similarities between natural law and other intellectual and religious traditions that have been brought up by the Magisterium of the Catholic Church.[76] In summary, natural law, grounded in reason, which is common to all human beings, is the basis for collaboration among all men of good will, beyond or regardless of their religious, ethical, philosophical and cultural convictions.[77]

14.2.5.5 The Central Issue

While public reason arises from the prevalence of the topic of justice and political issues, it correlatively relegates the question of good and the ways of living to the individual ambit. This endeavor has little possibilities of success,[78] among

[73] George (1994), 35.

[74] International Theological Commission (2010), op. cit., 61.

[75] See Mora Restrepo (2009) op. cit., 346.

[76] See John Paul II (1998), n. 1; International Theological Commission (2010), 33–39.

[77] International Theological Commission (2010), cit., 29–30.

[78] See Garzón Vallejo (2010), 45–50; 53–63.

other reasons because, as Jeremy Waldron points out, because it is not possible to disassociate a conception of good from its corresponding conception of justice, adhesion to justice as impartiality is, in the best of cases, a mere *modus vivendi*.[79] In the same sense, Joseph Raz argues that recommending a theory of justice for our societies is equivalent to recommending it as the most just, truthful, reasonable or valid theory of justice. Therefore, there "can be no justice without truth",[80] and consequently, no sufficient reason has been given "for political philosophy to abandon its traditional goals of understanding the moral presuppositions of existing institutions and criticizing them and advocating better ones – in the full light of reason and truth".[81]

On the contrary, the doctrine of natural law vindicates the question of good, happiness and the plenitude of human beings, understood as common purposes.[82] In this sense, the document "The Search for Universal Ethics. A New Look at Natural Law" formulates in the very first line the following question: "Are there objective moral values capable of bringing people together and securing peace and happiness for them?".[83] In synthesis, if public reason gravitates over politics and law, the theory of natural law does so, in turn, over ethics and morality.

14.2.5.6 The Position Regarding Transcendence

The majority of natural law theorists are theists, although not all of them are.[84] The reason why is that there exists a set of moral rules, including rules regarding justice and human rights, that can be known through mere rational questioning, understanding and judgment, independently of any divine revelation.[85] In this sense, for some natural law theorists there are *further* practical questions such as, for example, whether human good has an further meaning or whether it is related to any more comprehensive participation of good. To avoid such inquiry is not reasonable, but above all, to pose the question implies the possibility of opening the way to a *more complete* explanation.[86] However, in the face of an understanding of natural law, this step in neither necessary nor indispensable.

The theoretical tendency that emphasizes that the foundation of natural law is human nature understood metaphysically also indicates that full compliance with it or its full realization is divine.[87] For this reason, "even if the natural law is an expression

[79] See Waldron (2005), 193–193.

[80] See Raz (1994), 70.

[81] Ibíd., 84.

[82] See Benedict XVI (2009), n. 59.

[83] International Theological Commission (2010), 25.

[84] See George (2009), 15.

[85] See ibíd., 18.

[86] See Finnis (2011), 371 and 405.

[87] See John Paul II (1993), n. 44 and 45.

of reason common to all men and can be presented in a coherent and true manner on the philosophical level, it is not external to the order of grace. Its claims are present and operating in the different theological states through which our one humanity has passed in the history of salvation". In this way, thanks to natural law, "men are able to examine the intelligible order of the universe in order to discover the expression of the wisdom, beauty and goodness of the Creator".[88]

The position regarding transcendence is one of the aspects that generates the greatest division between public reason and natural law because, although in the works of Rawls and Habermas there are no references to God, nor to the theological or transcendent dimension of the human being, they both seek to propose a secular,[89] *but not secularist,* conception of public rationality, i.e., a conception understood on the basis of assumptions that do not appeal to any theological principle or religious authority,[90] but which do not reject *de iure* any influence of this type either.

Thus, given that this a theoretically important divergence, since natural law theory does not point to belief in God or acceptance of revelation as a requisite for its discovery, it is possible to conclude that this difference does not impede exchanges and other similarities between said theory and public reason. Furthermore, this is possible despite the fact that there is something deeply alien to the philosophy of natural law in separating the search for moral and political principles from matters relative to human nature, dignity and destiny.[91]

14.2.6 Realistic Ethics and Openness to Transcendence: What Is Reformulated in Public Reason

Public reason can be considered a secular or agnostic reformulation of natural law, but one that is also philosophically skeptical. I call attention to the terms used: "reformulation" does not mean that there is a "new version" of natural law, since evidently the similarities between them are not sufficiently significant to group them within the same philosophical family. However, given that public reason basically seeks the same ends as natural reason, i.e., a more or less generalized agreement about fundamental ethical and political principles, we are in fact facing a reformulation of natural law. It is a skeptical reformulation not only because it rejects metaphysics, the foundation of an important version of natural law, but also because it rejects a basic common aspect of the two versions of natural law: a realistic ethical conception.

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[88] International Theological Commission (2010, 79–80); See Benedict XVI (2009), n. 59.

[89] On this concept, its modern genesis, and its relation to the religious dimension, see Taylor (2004), 116–123.

[90] See George (2009), 123.

[91] See ibídem.

Why is public reason a secular, lay, or agnostic reformulation? For two reasons. The first is that, because it does not rely on a realistic ethics, it closes the door to the possibility of formulating the ultimate questions about human existence, limiting its developments to the here and now. The second is that, because it retrieves the secularized character of contemporary societies as a datum and normative fact, and from there – and *only from there*, i.e., without any perspective of overcoming this situation – it develops its propositions, which positioning public reason as a historicist perspective.[92]

In synthesis, public reason is located on an immanentist plane or contrary to realistic ethics, and of non-openness to transcendence. These two aspects are central since all the other differences derive from them, i.e., the scope, the epistemological focus, and the main topics that are tackled. In other words, the skepticism and the agnostic character explain why public reason is posed as a procedural and non-substantive conception. They also explain why it deals with justice and democracy rather than with the good and realization of human beings and why its scope is strictly limited to developed, secularized and technified Western societies, rather than universal. Finally, it explains why its contents are basically political and legal, only secondarily ethical, and not, on the contrary, anthropological.

We cannot ignore the fact that, given the current disrepute of political philosophy due to the prevalence of a style of public debate featuring derogatory adjectives, insults and prejudices, public reason makes a strong contemporary sensitivity to questions of justice and discursive democracy evident. Given the hegemony of methodological positivism and the hard sciences, public reason involves a revaloration of practical rationality and the normative character of practical philosophy. Furthermore, in the face of a highly fragmented and de-politicized society, it realigns concern for agreement and consensus around political and democratic principles that will make a better life possible. This is not enough for some, but I do not think it should be underestimated. In fact, I believe it is encouraging.

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[92] See Grueso (2009), 29–30.

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