

The Equivocation of Natural Law

From Scholasticism to Modern Jusnaturalism

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Abstract

The expression “natural law” becomes ambiguous when there is no clear distinction between its classical conception — ancient and medieval — and the modern one. In modernity, two approaches confront each other: a secular natural law (of an individualistic, nominalist and rationalist nature) and a “Catholic” theological-religious natural law. The first has been destroyed by positivism, while the second is unable to speak to the secular world; but neither of them is the classical natural law. The article reflects on the origin of the misunderstanding, tracing it back to the different conceptions of theonomy developed between the end of the thirteenth century and the Protestant Reformation. The study aims to show that a recovery of the classical conception of natural law is not only possible, but necessary.

Keywords: Natural law, Thomas Aquinas, Franciscan scholasticism, Nominalism, Luther

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Late medieval and Reformation Europe are not merely the predecessor background from which modern ideologies and institutions emerged, over against which the latter defined themselves and which they have left behind. The ideologies and institutions of modernity are also the tangled continuation, development, and extension of late medieval and early modern innovations that remain influential in the present.

B. S. GREGORY, *The unintended Reformation: how a religious revolution secularized society*, Belknap Press, Cambridge (MA) 2012, pp. 9-10.

One of the reasons for the widespread hostility towards the concept of natural law depends on the fact that it is understood in its modern sense and not in its classical one. Leo Strauss states: “The particular natural right doctrine which was originated by Socrates and developed by Plato, Aristotle, the Stoics, and the Christian thinkers (especially Thomas Aquinas) may be called the classical natural right doctrine. It must be distinguished from the modern natural right doctrine that emerged in the seventeenth century.”¹

The oblivion of this distinction leads to what I understand by the “equivocation” of natural law.²

1 MODERN NATURAL LAW

The birth certificate of modern jusnaturalism can be seen in the establishment of the first chair of *Jus Naturae* in Heidelberg in 1661, entrusted to Samuel Pufendorf. Pufendorf himself, however, pointed to Hugo Grotius as the founder of the new discipline of natural law, which would break with the ancient Aristotelian tradition and thus overcome the darkness of scholasticism, characterized by an unnatural mixture of theological, philosophical, and legal arguments.³ In this sense, Christian Thomasius saw in the theories of natural law before Grotius only “metaphysical junk and nonsense.”⁴

With some chronological forcing, it has become customary to call this modern jusnaturalism “Enlightenment natural law” (which means annexing at least

¹L. STRAUSS, *Natural Right and History*, The University of Chicago Press, Chicago-London 1953, p. 120.

²I take up here some considerations made in A. VENDEMIATI, *Il diritto naturale dalla scolastica francescana alla riforma protestante*, Urbaniana University Press, Rome 2015.

³S. PUFENDORF, *Specimen controversiarum circa jus naturale ipsi nuper motarum*, ex officina D. van der Mylen, Uppsaliae 1678, p. 10.

⁴“Metaphysischen Firlefanzen und Flausen”. C. THOMASIUS, *Paulo plenior historia juris naturalis*, Halae Magdeburgicae 1719, Praefatio, I, 7-9 and 13, p. 2 s. (translations must always be understood as mine, unless otherwise indicated).

three-quarters of the seventeenth century to the Enlightenment, starting with the publication of Grotius' *De jure belli ac pacis*, 1625.)⁵ We would therefore have a “pre-modern” conception of natural law that would reach the end of the sixteenth century and an “enlightened” conception that would be born in the seventeenth century in the Dutch and German Protestant circles.

The characteristics of modern natural law have been summarized by Heinrich Rommen as follows:

The decisive differences between this newer natural law and that of the Scholastics are three in number. The first is the individualistic trait manifesting itself in the predominance of the doctrine of the state of nature as the proper place in which to find the natural law. The second is the nominalist attitude which found expression in the separation of eternal law and natural moral law, of God's essence and existence, of morality and law. The third is the resultant doctrine of the autonomy of human reason which, in conjunction with the rationalism of this school, led straight to an extravagance of syllogistic reasoning, of deductively constructed systems that served to regulate all legal institution down to the minutest detail: the civil law governing debts, property, the family, and inheritances as well as constitutional and international law. And, in contrast with the imperfect historical law, these legal systems possessed the inestimable merit and value of emanating from the pure rational nature of man.⁶

This conception of natural law is contrasted, in Catholic circles, with that of the second scholasticism, which also was born between the end of the sixteenth and the beginning of the seventeenth century, particularly in Spain, characterized by a strong theological imprint. Following Francisco Suárez, natural law is called “natural” because it manifests and indicates the intrinsic rationality of nature, and it is “law” because it is constituted and promulgated by the divine will.⁷ Reason can grasp the rectitude of the order of nature, that really indicates what is good and what is evil, and yet this “indicative” knowledge does not assume “preceptual” force except thanks to the divine command. As Paolo Fornari notes: “In this way, the element of intelligibility contained in the legal provision would have become ancillary to the formal intention of its normativity, connoting at most the moment of rational access to a rule that is neutral in itself, which only a legislative will can make imperative.”⁸ A “natural” law understood in this sense ends up becoming a

⁵This is the choice of the Liberty Fund which, under the direction of Knud Haakonssen, has published a series of over forty volumes, entitled *Natural Law and Enlightenment Classics*, which go back to Grotius (Indianapolis, 2002-ss).

⁶H. ROMMEN, *The Natural Law: A Study in Legal and Social History and Philosophy* (1936), trans. T. R. Hanley, Herder, St. Louis (MO) 1947, pp. 93-94.

⁷Cf. F. SUÁREZ, *De legibus*, I, 5.13.

⁸P. FORNARI, *La natura e il Sovrano. La ricerca dell'ordine nella riflessione morale e politica di Francisco Suárez*, Aracne, Roma 2017, p. 240.

sort of “legal code” inscribed by the supreme Lawgiver in the minds of men.⁹

In the modern era, natural law thus finds itself in the condition of the disputed child who ends up being cut into two halves:¹⁰ a rationalistic secular natural law and a theological-religious one. When the former falls under the blows of historicism, Darwinism, sociology and psychoanalysis, etc., the latter seems to find its own “bubble” of survival, ultimately restricted to the Catholic Church. This is what Guido Fassò wrote back in 1958: “Secular natural law has long since died [...]. What is unique in Italy and abroad, and also and above all in America, is Catholic natural law, or at least with a theological basis.”¹¹

It is not difficult to identify a paradox here: what is *natural* and, therefore, *universal*, is made to depend on a theology founded on a *supernatural* revelation, thus being *confessional* and therefore incapable of speaking to the pluralistic and secularized world.

My reflection intends to go back upstream of the separation and show how it had its incubation precisely in the conflict between the different conceptions of theonomy that came to be articulated starting from the last decades of the thirteenth century.¹²

2 THE CRISIS OF THE THIRTEENTH CENTURY

The medieval notion of natural law did not contain univocal indications; nevertheless, on the basis of the widespread philosophical, juridical and theological teaching, there was substantial agreement on the need to keep in mind three needs at the same time:

- the *biological dimension* of natural law: its correspondence to what nature has taught all animals (Ulpian¹³);
- the *rational dimension* of natural law: its expression of what natural reason has constituted in all peoples (Cicero¹⁴, Gaius¹⁵);
- the *theological dimension* of the natural law: its proceeding from God, its being expressed in Sacred Scripture through the Decalogue and the “golden rule” (Gratian¹⁶).

⁹Cf. F. SUÁREZ, *De legibus*, I, 8,10.

¹⁰Cf. 1 Kings 3:16-28

¹¹G. FASSÒ, *Diritto naturale e storicismo*, «Il Mulino», 78 (1958), pp. 239-247: 239.

¹²In this perspective, see also H. GLINKA, *Zur Genese autonomer Moral. Eine Problemgeschichte des Verhältnisses von Naturrecht und Religion in der frühen Neuzeit und der Aufklärung*, Meiner, Hamburg 2012, pp. 8-10.

¹³Cf. *Corpus iuris civilis* (Mommsen-Krüger), 1.1.1, 3.

¹⁴Cf. CICERO, *De legibus*, I, 6, 18-20; I, 7, 23; I, 10, 28; I, 12, 33; II, 5, 11.

¹⁵Cf. *Corpus iuris civilis* (Mommsen-Krüger), 1.1.9.

¹⁶Cf. *Corpus iuris canonici* (Fiedberg), D. 1 B.C. 1.

This presupposes a metaphysical-religious conception that sees in the *kósmos* a rational, intelligible order of divine origin. This fundamental characteristic, in our view, implies that there can be no contradiction between the order of natural justice and that revealed in the biblical commandments. It is precisely on this *theological nature* of the natural law that we will need to focus our attention.

That basic agreement entered into crisis in the thirteenth century, when the Averroist commentaries on Aristotle arrived in the Latin world. Averroes' Aristotle is completely pagan: reading his works one learns that the world is necessarily eternal, that the human individual is a mortal animal like all the others, etc. The Aristotelian universe appears irreconcilable with the Christian conception of the world, of man, of God. The great epoch of scholastic theology and philosophy coincides with the effort of Christian thinkers to channel the Greco-Arab wave or to stem it.

The Averroists opened a way of philosophizing that is completely independent of the demands of the Christian faith and theology. The possibility of an autonomous philosophical research, of a rational knowledge that was not subordinate, gave the work of the masters of the faculty of the arts a new meaning and a new interest. Leonardo Sileo says:

In the hairpin bend between the two centuries, the rich wealth of new philosophical sources, mostly Greco-Arabic, also including suggestive applications in scientific fields hitherto unknown or little practiced by the West, such as mechanics, alchemy, medicine, imposed such a vast opening of the horizon of knowledge as to compromise the possibility of continuing to keep together, in the name of an abstract unitary ideal of truth, two perspectives of observation and interpretation as divergent as that of the *physici* and that of *theologi* had become.¹⁷

Although, as is now clear, it cannot be attributed to Siger of Brabant and his disciples the notorious theory of the double truth, the fact remains that with them a separation is reached between philosophical reason and faith, refractory to any kind of scholastic conciliation. The *artista*e affirm the self-sufficiency of their own methods and knowledge as far as all things included in the natural order and explored by reason are concerned, and the sufficiency of "political virtues" for the attainment of earthly well-being.

The Dominican school, with Albertus Magnus and especially with Thomas Aquinas, saw what an enormous increase in patrimony Greco-Arabic science and philosophy represented for Christian theologians, but it also saw that a work of interpretation and assimilation was required.

Aquinas, in particular, was able to maintain the organic link between theology and philosophy, while highlighting the necessary *autonomy* that philosophy

¹⁷L. SILEO, *Università e teologia*, in G. D'Onofrio (ed.), *Storia della teologia nel Medioevo*, II. *La grande fioritura*, Piemme, Casale Monferrato (AL) 1996, pp. 471-550: 487.

and the sciences had to enjoy in order to be able to apply themselves effectively to their own fields of research. Philosophy and the sciences do not start from Revelation, they do not take their principles from the *sacra doctrina*, and in this autonomy there is no danger to faith, because truth, any truth, as long as it is truth, is from God. The core of St. Thomas' metaphysics lies in having conceived the relationship between God and the world in such a way that *creatures depend totally and actually on the Creator and, at the same time, are intrinsically endowed with the principles of their own autonomy*.¹⁸ This means that the immanent order of nature can be understood and explained in its own terms.

The natural law is *participatio legis aeternae in creature rationali*.¹⁹ the Creator has made a good and orderly world and has impressed on human intelligence the capacity to know and direct behavior in a corresponding way. In the *Scriptum super Sententiis*, Aquinas affirms that the *habitus* of synderesis, which contains the universal principles of natural law, is *quodammodo innatus menti nostrae ex ipso lumine intellectus agentis*;²⁰ however, immediately afterwards he adds that, for the determination of knowledge of the principles of synderesis, we need sense and memory. Therefore, it cannot be said either that the *habitus principiorum* pre-exist in us as already determined and complete, or that they are formed in us thanks to *previous habitus*, as happens with science; when Thomas says that the *habitus* of synderesis is *quodammodo innatus* we must not emphasize the adjective, but rather the adverb, in fact:

The habits of first principles come to be in us from pre-existing sense perception [...]. Together with sense, it is necessary to presuppose a nature of the soul such that it can undergo this — that is, such that it is receptive to universal knowledge, which indeed occurs through the possible intellect; and further, such that it can bring this about through the agent intellect, which makes things actually intelligible by abstracting universals from particulars²¹.

For this reason, in the text of the *Scriptum* to which we refer, the *habitus principiorum* is called “innate” *ex ipso lumine intellectus agentis*. The origin of synderesis is clearly in the intellectual power of the soul; if it can be considered innate with the same acting intellect, this is not to be understood in the sense of a set of innate ideas. It presupposes experience, reception by the possible intellect and the operation of the acting intellect. In *De Veritate*, St. Thomas reaffirms this

¹⁸Cf. THOMAS DE AQUINO, *Summa contra Gentiles*, III, 69.

¹⁹Id., *Summa Theologiae*, I-II, q. 91, a. 2, c.

²⁰Id., *In II Sententiarum*, d. 24, q. 2, a. 3, c.

²¹“Habitūs principiorum fiunt in nobis a sensu praeeistente [...]. Simul cum sensu oportet praesupponere talem naturam animae, quae possit pati hoc, idest quae sit susceptiva cognitionis universalis, quod quidem fit per intellectum possibilem; et iterum quae possit agere hoc secundum intellectum agentem, qui facit intelligibilem in actu per abstractionem universalium a singularibus” (Id., *In Posteriora Analytica*, L. II, lect. 20, nn. 11-12).

doctrine, specifying that the first principles, both speculative and operational, are notified to us precisely thanks to the light of the acting intellect, inherent in the nature of the soul.²² The principles of the natural law are contained in nature and therefore reason formulates its principles by spontaneous acts, on the basis of the fundamental inclinations of human nature.²³ In the *Summa Theologiae*, Aquinas finally presents the natural law as an act of reason, which operates on the basis of the fundamental inclinations of human nature read by synderesis.²⁴

The *praecepta legis naturae* constitute an *ordo*, that is, an organic system of ethical-legal norms, because “these norms are based on (*secundum*) an analogous system of objective relationships called *ordo inclinationum*, which condition precisely the normative system itself; so that there is no natural law that does not presuppose corresponding objective connections at the base.”²⁵ From the multiplicity of inclinations many precepts follow, but from the unity of the substantial form of man (the rational soul) all these precepts are founded on a single root:²⁶ the first precept: *bonum est faciendum et prosequendum, malum vitandum*.²⁷ The first and fundamental inclination, in fact, is that of the *bonum in communi* and especially to the ultimate end.²⁸ The multiple values, which Aquinas calls *bona humana*, are thus reduced to the one *bonum hominis*.

The world of nature is valued in its religious significance, but with direct attention to the structures, constitution and autonomy of physical reality, which can be grasped in itself as meaningful. Therefore, Aquinas “did not find it opposed, but rather in conformity with the content of faith, to attribute to creatures the efficiency of their own operations and therefore to recognize them as endowed with principles and faculties capable of producing them.”²⁹

The Franciscan school is on the opposite line, starting with the teaching of St. Bonaventure. He sees in Aristotelianism a naturalistic and rationalistic position that heralds a dangerous paganism. The “fatal necessity of the Arabs”³⁰ leads us to think of a world that is withdrawn from God’s freedom.³¹ Thus, he

²²Id., *De Veritate*, q. 16, a. 3, c.

²³Cf. L. J. ELDERS, *The Ethics of St. Thomas Aquinas: Happiness, Natural Law and the Virtues*, Peter Lang, Frankfurt am Main, 2005, p. 209.

²⁴Cf. THOMAS DE AQUINO, *Summa Theologiae*, I-II, q. 94, a. 1.

²⁵D. COMPOSTA, *Le inclinaciones naturales e il diritto naturale in s. Tommaso d’Aquino*, in A. Piolanti (ed.), *San Tommaso e la filosofia del diritto oggi*, LEV, Rome 1974, pp. 40-53: 41.

²⁶“Et secundum hoc, sunt multa praecepta legis naturae in seipsis, quae tamen communicant in una radice” (THOMAS DE AQUINO, *Summa Theologiae*, I-II, q. 94, a. 2, c.).

²⁷“Omnia ista praecepta legis naturae, in quantum referuntur ad unum primum praeceptum, habent rationis unius legis naturae” (*ibidem*, I-II, q. 94, a. 2, ad 1^{um}).

²⁸Cf. Id., *De Malo*, q. 6, a. one; *Summa Theologiae*, I-II, q. 9, a. 1; q. 10, a. 1.

²⁹C. FABRO, *La nozione metafisica di partecipazione secondo S. Tommaso d’Aquino* (1939, 1963), EDIVI, Segni (RM) 2005, p. 272.

³⁰Cfr. E. GILSON, *La philosophie au Moyen Âge*, Payot, Paris 1944, pp. 408-410.

³¹Cf. BONAVENTURA, *Collationes de septem donis Spiritus Sancti*, VII, nn. 16-19, in *Doctoris*

directly condemns the claims to elaborate a philosophy separate from faith.³² For Bonaventure, the true metaphysician is only the one who knows the Trinity, consequently only those who know Christ have the true “general ethics.”³³ Christ is therefore the principal source not only of divine and canon law, but also of natural and civil law.³⁴

Natural law, for Bonaventure, is the order established by God; but it takes place in history in three distinct phases: one thing is the order of the *natura instituta* or *condita*, another thing that of *natura lapsa*, and yet another thing that of *natura restaurata* or *restituta*.³⁵ Man, in the state of undamaged nature, had the possibility of knowing the dictates of natural law, by virtue of a *lumen naturale innatum*; but in the present state he is incapable of making proper use of it without the intervention of the *lumen increatum*.³⁶

The properly practical, appetitive dimension of the natural law, according to Aquinas, is rooted in natural inclinations understood as ontological structures dependent on the substantial form of man; according to Bonaventure, on the other hand, is the content of a *habitus* of the will which, in his terminology, coincides with synderesis.

In fact, the natural law can be understood in two ways. In the first way we mean a *habitus* of the soul; In this sense, since by the natural law we are instructed and rightly ordered, it indicates a *habitus* which includes the intellect and the affect, and therefore includes synderesis and conscience. In the second way, the collection of the precepts of natural law is called natural law; in this sense it indicates the object of synderesis and conscience: of the former as it dictates, of the latter as it inclines. In fact, conscience dictates and synderesis desires or avoids. And in both ways the natural law is found in different places; however, in the second way it is understood in a more proper way. And so, to speak properly, synderesis indicates affective power, inasmuch as it is naturally capable of the good and tends to the good; conscience indicates the *habitus* of the practical intellect; the natural law says the object of both.³⁷

Seraphici S. Bonaventurae S.R.E. episcopi cardinalis opera omnia, studio et cura PP. Collegii a S. Bonaventura, ex Typographia Collegii S. Bonaventurae, Ad Claras Aquas (Quaracchi), Florence 1891 [= OB], t. v, pp. 495-496.

³²Cf. Id., *Collationes in Hexaëmeron*, OB, t. v, pp. 327-454.

³³Cf. Id., *In Nativitate Domini Sermo II*, OB, t. ix, p. 107.

³⁴Cf. Id., *Opusculum XI: Apologia pauperum contra calumniatorem* c. xi, n. 11, OB, t. viii, p. 314.

³⁵Cf., e.g. Id., *In II Sententiarum*, d. 44, a. 2, q. 2, ad 4, OB, t. ii, p. 1009; cf. *De perfectione evangelica*, q. iv, a. 1, OB, t. v, pp. 179-183.

³⁶Cf. Id., *Itinerarium mentis in Deum* II, 9, OB, t. v, pp. 301-302.

³⁷“Nam lex naturalis dupliciter accipi potest: uno modo, prout dicit habitum in anima; et sic quia per legem naturalem instruimur et per legem naturalem recte ordinamur, dicit habitum, qui comprehendit intellectum et affectum, et ita comprehendit synderesim et conscientiam. Alio modo lex naturalis vocatur collectio praeceptorum iuris naturalis; et sic nominat obiectum synderesis et conscientiae, unius sicut dictantis, et alterius sicut inclinantis. Nam conscientia dictat, et syn-

This conception of natural law as *habitus* is then shared by many theologians; In general, the Augustinian school, insisting on the innateness of the natural law, tends to consider it as “a set of precepts, scrupulously preserved in the chest of our heart and to be extracted from time to time, depending on the case, almost as magical labels resolving every ethical question.”³⁸ But this is dangerous: restricting the natural law within synderesis and conscience leads the subject to close in on himself in order to seek divine enlightenment: he no longer needs to confront reality in order to know the law and claims to draw the laws of his conduct from the depths of his “enlightened” thought.

On the other hand, the placing of synderesis in the will rather than in the intellect makes the emphasis placed by the Seraphic on the three phases of nature (*instituta*, *lapsa* and *restituta*) particularly disruptive; in fact, it is precisely the will that is most wounded by original sin. Therefore, the whole appetitive order on which natural law is based becomes equivocal.

The great condemnation of Aristotelianism by the bishop of Paris, Stephen Tempier, on March 7, 1277³⁹ imposed a model of theology in which reason ceases to be competent in its own sphere (natural truths) if it does not keep its gaze on truths for which it is no longer competent (supernatural truths.) Philosophy is thus reduced to a purely instrumental role; its autonomy is taken away. As a result, the “ancillary” philosophy of theologians will move further and further away from secular philosophy — that is, from philosophy itself. The latter will develop its own “secular” natural law, while the former will have to renounce the entire apparatus of natural philosophy — and therefore the finalism and dynamics of inclinations — in order to construct a *lex naturalis* that will have as its criterion of discernment the will of the divine Lawgiver.

deresis appetit vel refugit. Et utroque istorum modorum invenitur lex naturalis in diversis locis; hoc tamen ultimo modo acceptur magis proprie. Et sic, ut proprie loquamur, synderesis dicit potentiam affectivam, in quantum naturaliter habilis est ad iustum et ad bonum et ad bonum tendit; conscientia vero dicit habitum intellectus practici; lex vero naturalis dicit obiectum utriusque” (Id., *In II Sententiarum*, d. 39, a. 2, q. 1, ad 4, OB, t. II, p. 911).

³⁸G. GESTORI, *La legge naturale in S. Bonaventura e il suo influsso su Duns Scoto*, in A. Pompei (ed.), *San Bonaventura maestro di vita francescana e di sapienza cristiana*, vol. III, Pontificia Facoltà Teologica San Bonaventura, Roma 1976, pp. 245, 252. This line appears, for example, in J. F. QUINN, *Saint Bonaventure’s Fundamental Conception of Natural Law*, in *S. Bonaventura: 1274-1974*, vol. III, Collegio S. Bonaventura, Grottaferrata 1973, pp. 571-588.

³⁹Q. Piché (ed.), *La condamnation parisienne de 1277. Nouvelle édition du texte latin, traduction, introduction et commentaire*, J. Vrin, Paris 1999. Cf. F. J. RUBIO HÍPOLA, *Los efectos de las condenas de París de 1277 en la relación entre la Facultad de Artes y la Facultad de Teología en la Universidad*, «Cuadernos Salmantinos de Filosofía», 49 (2022), pp. 539-559.

3 FRANCISCAN DEVELOPMENTS

With John Duns Scotus, the relationship between the will of God the legislator and the dynamics of creation becomes markedly extrinsic. Scotus excludes the connection between natural inclinations and moral law, since — in his formulation — the sphere of morality is that of freedom, while the sphere of nature is that of necessity.⁴⁰ While the natural inclination is determined by the attraction to well-being (*affectio commodi*) the rectitude of the will, on the other hand, depends on the attraction to justice (*affectio iustitiae*) which is independent of the order of nature.⁴¹ There is, therefore, a natural inclination of the will towards justice, but it requires independence from all extrinsic causes, since it must be a moderation of the inclination to well-being. In order to exercise its moderating function, the *affectio iustitiae* it requires a criterion that allows us to establish what the rectitude of an appetite consists of: this criterion is the divine will,⁴² which constitutes the binding law.

This does not mean that the Subtle Doctor falls into a positivism of revealed divine law. He affirms the existence of a natural law of reason, which persists in man despite sin. Scotus calls it “natural” not because it refers to cosmological or anthropological structures, but only in an epistemological sense: it is known by virtue of the *ratio naturalis*, on the basis of arguments logically derived from necessary and self-evident premises.⁴³ The teleological dynamics of human nature are put out of play.

In all philosophies that draw inspiration from Aristotle’s *Politics*, law is based on the social and political nature of man. Scotus directly contests this approach because, in his opinion, Aristotle would confuse the actual nature (*lapsa*) with the *natura instituta*.⁴⁴ Legality is therefore not rooted in nature, but in history. In the state of *natura instituta* all men were equal and free, all goods were common, and the only authority was that of the father; as a result of sin, that order was replaced by positive ordinances which include slavery, private property, and the government of princes. They may also be unjust, and yet they must be observed.⁴⁵ Positive law surpasses natural law by virtue of an even stronger natural right, that of God, of which the authority of the prince is the guarantor.

⁴⁰Cf. O. BULNOIS, *La volonté selon Duns Scotus. Indétermination, illimitation et infinité*, «Quaestio», 22 (2022), pp. 451-471.

⁴¹Cf. IOANNIS DUNS SCOTUS, *Ordinatio* II, d. 6, q. 2, 8, in *Ioannis Duns Scoti Opera Omnia*, vol. VIII, Typis Polyglottis Vaticanis, Civitas Vaticana 1963 [= OO], p. 49, n. 49.

⁴²Cf. ID., *Reportata Parisiensia*, II, d. 6, q. 2, n. 10, in *Opera omnia. Editio minor*, vol. II/2, ed. by G. Lauriola, A.G.A., Alberobello 1998, (= EM), p. 629.

⁴³ID., *Reportata Parisiensia* II, d. 39, q. 2, EM, vol. II/2, pp. 896-898.

⁴⁴*Ibidem*, III, d. 33, q. un., n. 25, p. 1215.

⁴⁵“Multae obligationes sunt iniustae ex parte illorum quibus fiunt, et tamen postquam factae fuerint, servandae sunt” (ID., *Ordinatio* IV, d. 36, q. 1, n. 4, OO, vol. XIII, p. 470, n. 26).

Scotus' theology constitutes a serious step towards the oblivion of classical natural law: «Rather than within traditional thinking, Scotus perhaps is at the crossroad between the medieval world and the modern world».⁴⁶ Lost the metaphysical notion of participation and the consequent *analogia entis*,⁴⁷ the speculative relationship of man to God is thought according to logical-formal criteria applied to the creature and the creator, in a substantial equivocation; the ethical relationship takes the form of submission of the human will to the divine will. It is no longer possible to interpret natural law as *participatio legis aeternae in creatura rationali*.

Ethics is no longer the art of living well, developed from the perspective of the acting subject (“in the first person”)⁴⁸, and becomes a science of right and wrong elaborated from the perspective of the legislator or the judge (“in the third person”), which no longer has relevance for integral human development;⁴⁹ the reference to the natural inclinations and goodness of the subject is lost, finalism is lost, to focus on the correctness of the act; freedom ceases to be a positive human quality, continually threatened by sin and defended by virtue, and becomes a mere indifference between good and evil.⁵⁰ With this, the premises for the modern dissolution of classical natural law are practically laid.⁵¹

The intricate events of the dispute over poverty contribute to losing the unity of the *corpus legum*, based on the analogy of intrinsic attribution.⁵² The gap between natural law and positive law is thus deepened. One of the most active authors on the Franciscan side, Bonagratia of Bergamo,⁵³ maintains that natural and divine law prescribes communion of the use of all things, while private property was introduced by positive law *ex cupiditate et iniquitate gentium*. Against

⁴⁶O. TODISCO, *Giovanni Duns Scoto filosofo della libertà*, EMP, Padova 1996, p. 49.

⁴⁷Despite what the Author had argued in his *Quaestiones subtilissimae super Metaphysicam*, IV, q. 1. Cf. L. CAPPELLETTI, *Duns Scoto e l'analogia entis*, «Annali del Dipartimento di Filosofia (Università di Firenze)», 9/10 (2003/2004), pp. 19-32; G. PINI, *Scoto e l'analogia. Logica e metafisica nei commenti aristotelici*, Scuola Normale Superiore, Pisa 2002.

⁴⁸Cf. A. VENDEMIATI, *An Outline of General Ethics*, Urbaniana University Press, Rome 2020, particularly pp. 59-61.

⁴⁹Cf. T. WILLIAMS, *How Scotus Separates Morality from Happiness*, «American Catholic Philosophical Quarterly», 69 (1995), pp. 425-445.

⁵⁰Cf. A. VOS, *The Philosophy of John Duns Scotus*, EUP, Edimburgh 2006, p. 440; what in my opinion is a loss, Vos he considers a gain.

⁵¹According to F. Bottin, the “heart of the originality” of Scotian moral thought consists in this: “To the purely natural datum we can trace only our essential yearning for the Creator, all the rest is the fruit of the free activity of the individual subjects who constitute values, social aggregations and the very way of conceiving freedom.” (F. BOTTIN, *Giovanni Duns Scoto e l'origine della proprietà*, «Rivista di storia della filosofia», 52 [1997], pp. 47-59: 58).

⁵²Cf. A. VENDEMIATI, *Analogia della legge. Uno studio su S. Tommaso d'Aquino*, «Rivista di Filosofia Neo-Scolastica», 86 (1994), pp. 468-490.

⁵³Cf. L. OLGHER, *Fr. Bonagratia de Bergamo et eius “Tractatus de Christi et Apostolorum paupertate”*, «Archivum Franciscanum Historicum», 22 (1929), pp. 192-225, 487-511.

this, natural law (*iura divina providentia consistuta*) guarantees to men as well as to animals the mere *de facto* use of goods, not accompanied by any real juridical position. It would seem that this is a radical positivism, but the solution of Bona-gratia is different: the coming of the Redeemer restored, at least potentially, the state of innocence, thus creating the possibility for the believing community to give itself a juridical status different from that in force in worldly regimes.

Law thus becomes an equivocal concept. “Natural law” loses its juridical nature and can regain it only in the order of redemption. At this point the rupture between the secular and theological spheres of law is now prepared: the opposition between the temporal kingdom and the spiritual kingdom is looming on the horizon, between a community of believers in which the Gospel is in force and a secular world in which the absolute right of princes and emperors is in force.

The paradoxical alliance between Franciscan spiritualism and Averroism, recognizable in Marsilio of Padua,⁵⁴ effectively sanctioned the birth of a “modern” approach that would assert itself with the Protestant Reformation: in spiritual things the rational knowledge of nature is useless, in temporal things criteria and norms no longer have anything to do with salvation. It is not by chance that in the *Sachsenhausen Appeal* (20 May 1324), Louis the Bavarian refers to Bona-gratia’s opposition between natural-divine law and human law, in a context that aims to refute ecclesiastical claims on temporal realities and to establish the absolute autonomy of imperial law.⁵⁵

William of Ockham’s nominalism takes to the extreme consequences the Franciscan repugnance towards a nature structured with its own laws: each individual being stands alone before its Creator, in a purely factual order, which God can freely upset whenever he wants.⁵⁶

In his political works, Ockham preserves the notion of natural law. In particular, in the *Dialogus*⁵⁷ he distinguishes three senses of this notion:

- Natural law is that which is in conformity with right reason, as, for example, the prohibition of adultery, lying, etc. Understood in this sense, natural law never fails and knows no exceptions, unless God himself intervenes directly with a dispensation.
- Natural law is that which corresponds to the state of nature, before positive

⁵⁴MARSILIUS PAT., *Defensor Pacis*, I, x, 4 (ed. Scholz, p. 50); II, XII, 7-8 (pp. 268-29). Cf. C. DOLCI, *Il pensiero politico*, in A. Flich, V. Martin (eds.), *Storia della Chiesa*, vol. XI: *La crisi del Trecento e il papato avignonese*, San Paolo, Cinisello Balsamo 1994, pp. 411-446: 438-ff.

⁵⁵In *Monumenta Germaniae Historica, Constitutiones*, vol. v, Hannover-Leipzig 1909-1913, no. 824, pp. 722-744: 734.

⁵⁶Cf. GUILIELMUS DE OCKHAM, *Quodlibet* I, q. 16, in *Opera Theologica*, vol. IX, Editiones Instituti Franciscani Universitatis S. Bonaventurae, St. Bonaventure (NY) 1970, pp. 87-89.

⁵⁷H. S. OFFLER, *The Three Modes of Natural Law in Ockham: A Revision of the Text*, «Franciscan Studies», 15 (1977), pp. 207-218.

legal systems intervene, such as the community of goods. It would always be valid, if men lived according to reason; but, since this is not the case, substantial changes can take place, provided that they are supported by reasonable grounds.

- Natural law is that which is established by consensus in the law of nations or in positive law, such as the return of deposits, legitimate defense, etc. These things do not belong to the first sense because they admit of exceptions, nor to the second because there would be no need for them if men lived according to reason. It is therefore “natural” *ex suppositione*, because it presupposes the will of all interested parties to sanction these principles.

In the final analysis, the “naturalness” of natural law is reduced to conformity to the *recta ratio*: the mediation of natural structures and their teleology is totally excluded. Moreover, its condition of “right” depends on the divine command that makes it subsist.⁵⁸

4 PROTESTANT DEVELOPMENTS

The Bonaventurian and Scotist concern to affirm divine freedom against “the fatal necessity of the Arabs” is transformed in Luther into “an unceasing anxiety to reaffirm the absolute dependence of all creation — and above all of man — upon the divine omnipotence.”⁵⁹ Based on the nominalist conception of the world’s contingency, for Luther it is not reason that can establish a relationship with God, but the will; yet this will is not arbitrary. Precisely here arises the space for understanding those passages in which the Reformer speaks positively of natural law, insofar as it expresses the divine will.⁶⁰

Luther also refers to it as the “law of nature,” “divine law,” “the law of the heart,” “the teaching of conscience,” and “the inner law.” In this he does not differ from traditional formulations,⁶¹ yet behind these expressions lies a doctrine that is markedly distant from Thomism. For him, nature is incapable of knowing and willing the good: it “has neither right judgment nor good will.”⁶² By natural

⁵⁸ GUILLELMUS DE OCKHAM, *Dialogus*, 216; cf. T. M. OSBORNE, *Ockham as a Divine-Command Theorist*, «Religious Studies», 41 (2005), pp. 1-22.

⁵⁹ G. COTTA, *La nascita dell’individualismo politico. Lutero e la politica nella modernità*, Il Mulino, Bologna 2002, p. 12.

⁶⁰ L. HAIKOLA, *Luther und das Naturrecht*, in *Vierundfünfzig Jahre Lutherische Reformation 1517-1967*, Festschrift für Franz Lau zum 60. Geburtstag, Vandenhoeck & Ruprecht, Göttingen 1967, pp. 126-134.

⁶¹ Cf. J. WITTE, *Law and Protestantism. The Legal Teachings of the Lutheran Reformation*, Cambridge University Press, Cambridge 2002, p. 113.

⁶² “Breviter, Nec rectum dictamen habet natura nec bona voluntatem”. M. LUTHER, *Disputatio contra scholasticam theologiam* (1517), in *D. Martin Luthers Werke. Kritische Gesamtausgabe*, H. Böhlau, Weimar 1883-ss (=WA) 1, p. 225.

law — following the Scotist and nominalist tradition — he means nothing other than the contents of the Decalogue written in the human heart, which revelation pedagogically reiterates to aid in their knowledge.⁶³

“The Decalogue is not the law of Moses [...] but the Decalogue of the whole world, inscribed and engraved in the minds of all men since the foundation of the world.” Even the pagans — according to Pauline teaching (cf. Rom. 2:15) — possess this fundamental instruction: it “lives and shines in every human mind, and if only people would pay attention to it, what need would they have for books, teachers, or law? For they carry within them, in the recesses of the heart, a living book that would teach them more than sufficiently what they must do, judge, accept, and reject.”⁶⁴

Melanchthon observes that this law, because it proceeds from the divine will, cannot be deduced by human reason through its own resources on the basis of experience. It has therefore been communicated directly by God at three points in history: first, as an innate natural law imprinted on the human mind; then — given the ignorance introduced by sin — it was reiterated in the Decalogue, and finally in the Gospel. For this reason, it can be read with certainty in the Decalogue, the Beatitudes, and the Golden Rule. Nevertheless, it is also found in certain classical and extra-biblical sources, particularly in Greek philosophy and Roman law; the convergence of these teachings testifies to the universality of natural norms.

According to Melanchthon, their origin is innate (*notitiae nobiscum nascentes*) by the work of God: a “light from above,” a “natural light,” “rays of divine wisdom poured into us.” Without this illumination, we could not find our bearings in the temporal realm.⁶⁵ It is essential to stress that these are *notitiae* and not instincts, for instincts are of an animal nature, and if human behavior were governed solely by them, all our actions would be “natural” and we would lack the capacity to distinguish good from evil.⁶⁶ In this connection, Melanchthon explicitly considers whether natural law comprises only knowledge, or also those natural inclinations that humans share with other creatures, and concludes in favor of the former: natural law consists solely in the knowledge of specific moral precepts, not in the affections directed toward objects.⁶⁷ His reasoning is significant: although certain good natural affections — such as love for one’s children

⁶³Cf. ID., *Wieder die himmlischen Propheten von den Bilden und Sakrament* (1525), WA 18,80,18-20.28-81.3.

⁶⁴ID., *Fastenpostille* (1525), WA 17/2, 102, 10-13.

⁶⁵PH. MELANCHTHON, *Declamatio de Legum Fontibus et Causis*, in *Corpus Reformatorum*, ed. C. G. Bretschneider, apud C. A. Schwetckhe et Filium, Halis Saxonum 1834-1860, (= CR) 11, 920-921; *Liber de anima*, CR 13, 150; *Loci theologici* III, CR 21, 711-716.

⁶⁶Cf. M. SCATTOLA, *Models in History of Natural Law*, «Ius commune. Zeitschrift für Europäische Rechtsgeschichte», 28 (2001), pp. 91-159.

⁶⁷Cf. A. RAUNIO, *Divine and Natural Law in Luther and Melanchthon*, in V. Mäkinen (ed.),

and a measure of beneficence — accord with sound inclinations, the impulses of inclination are so often contradictory that they cannot be regarded as natural law.⁶⁸

Natural law continues to operate after the fall into sin, providing the foundation for all positive laws and for public morality in the temporal realm, defining the fundamental obligations toward God, one's neighbor, and oneself. But since sinners do not heed it, God has instituted the authorities of the temporal kingdom: all Christians must communicate this natural law of God through both words and deeds; preachers must instruct their congregations in it; magistrates must incorporate it into positive laws and public policies.⁶⁹ Politics, on the other hand, no longer has anything to do with the natural inclination toward social life: it now pursues solely "the technical-operative end of effectively maintaining order, so as to prevent 'the earth from being made like a desert'."⁷⁰

The most significant novelty with respect to the entire preceding tradition lies in the fact that the relationship between natural law and civil law is situated within the doctrine of the two kingdoms.⁷¹ In continuity with tradition, Luther holds that natural law must be the foundation of civil law; the former constitutes a higher ethical-legal standard than the latter, such that it would be preferable to violate civil law rather than natural law. However, this is a "positivized" natural law that concerns the outward aspect of human life — the realm of the flesh. "As such, it will be applicable in all its pragmatic concreteness, largely at the discretion of the authority, to ordinances valid within their historical factuality."⁷² This leads to that full secularization of law that will take shape in the following century in the *jusnaturalism* properly said.

5 CONCLUSION

Natural law becomes equivocal when, in the Protestant context, certain tendencies rooted first in medieval Augustinianism and later in Ockhamist nominalism

Lutheran Reformation and the Law, Brill, Leiden-Boston 2006, pp. 21-61: 54.

⁶⁸Estque eruditus legem intelligere notitiam a Deo istam, quam affectum, ut cum alii dicunt, ius naturae esse communes inclinationes cum bestiis, nimis late vagatur haec descriptio. Sunt enim affectorum diversa genera in hominibus, alii boni, alii mali. Et quanquam aliquae bonae storgai. congruunt cum inclinationibus belluarum, ut amor erga sobolem, sensus beneficii: tamen in tanta discordia affectuum eruditus est, legem naturae ad notitias revocare. Notitiae sunt regulae, non affectus" (PH. MELANCHTHON, *Enarratio libri V. Ethicorum Aristotelis*, CR XVI, 385).

⁶⁹M. LUTHER, *Tischreden*, 3911 (7 Juli 1538), WA 4, 5.

⁷⁰G. COTTA, *La nascita dell'individualismo moderno*, cit., p. 128.

⁷¹See, e.g., M. LUTHER, *Ein Sendbrief von dem harten Büchlein wider die Bauern* (1525), WA 18, 389; cf. D. VANDRUNEN, *Natural Law and the Two Kingdoms. A Study on the Development of Reformed Social Thought*, Eerdmans, Grand Rapids (MI) 2010, pp. 64-65.

⁷²G. COTTA, *La nascita dell'individualismo moderno*, cit., pp. 157-158.

are radicalized. These tendencies entail (a) the elimination of the biological dimension of natural law, (b) the modification of its rational dimension, and (c) the undermining of its theological dimension.

(a) In the thought of Bonaventure, the notion of nature had already become equivocal, since we no longer live under the regime of *natura instituta*, but rather that of *natura lapsa*. Luther so strongly emphasizes the *lapsus* of sin that he overturns the moral value of natural inclinations, which are regarded wholesale as tendencies toward evil. Consequently, not only is the Ulpian definition of natural law (*ius naturale est quod natura omnia animalia docuit*) — the definition favored by all civil jurists from Irnerius to Accursius⁷³ — rendered unusable, but so too is the Thomistic framework, in which the aphorism *secundum ordinem inclinationum naturalium est ordo praeceptorum legis naturae*⁷⁴ constitutes the central axiom of the entire doctrine of natural law and of Thomistic anthropology as a whole. For Thomas, “*lex naturalis* presupposes an *ordo naturae*; deontology presupposes an ontology and an axiology”⁷⁵. When the historically and soteriologically motivated pessimism of Franciscan scholastic anthropology is combined with the fragmented ontology typical of nominalism, nature as such loses all ethical significance. In the Reformers’ horizon, deontology now presupposes simply a Legislator to whom obedience is owed.

(b) In the Thomistic view, “natural law is ‘rational’ in that it is the work of human reason participating in God’s own knowledge. It is reason that constitutes natural law by interpreting natural inclinations through *synderesis*”.⁷⁶ But this requires adopting the first-person perspective of ethics, aimed at the good life of the subject, whose freedom is understood qualitatively as the capacity to seek the good without constraint. The Reformers instead adopt the Scotist perspective, which conceives ethics in the “third person,” as the science of what is just and unjust — that is, an ethics elaborated from the standpoint of the “magistrate” (whether legislator or judge). If they manage to avoid falling into pure positivism, it is thanks to the doctrine of innate ideas, itself an inheritance of Franciscan Augustinianism and its conception of illumination. Nevertheless, natural human reason remains passive in relation to precepts — whether innate or intuited *a priori*, it matters little — which require only to be carried out.

(c) On the other hand, a natural law made up of precepts that are difficult for the sinner to discern ends up being of little use to those who have received the biblical revelation of God’s will. The theological dimension of natural law is

⁷³Cf. WEIGAND, *Die Naturrechtslehre der Legisten und Dekretisten von Irnerius bis Accursius und von Gratian bis Johannes Teutonicus*, Max Hueber Verl., München 1967, passim.

⁷⁴THOMAS DE AQUINO, *Summa theologiae*, I-II, q. 94, a. 2, c.

⁷⁵D. COMPOSTA, *Le inclinationes naturales e il diritto naturale in s. Tommaso d’Aquino*, cit., p. 41.

⁷⁶S. T. BONINO, *Prefazione*, in A. Vendemiati, *San Tommaso e la legge naturale*, Urbaniana University Press, Roma 2011, pp. 9-1. 13.

thus split according to the doctrine of the two kingdoms: in the temporal realm it retains all its force as a principle of order and discipline, in the spiritual realm it has a merely *elenctic* and, at best, pedagogical function. All the conditions are thus in place for constructing the image of a spiritual kingdom in which natural law is regarded as an old doctrinal implement, defended only by Catholics but irrelevant for Evangelicals — an Aristotelian legacy swept away first by Luther and definitively by Kant — and of a temporal kingdom in which natural law is conceived in an increasingly autonomous fashion with respect to theology, until, with the Enlightenment, it attains a fully secularized configuration.

We said that secular natural law has been dead for a long time and that Catholic one (meaning this term in the *confessional* sense) is incapable of interacting adequately in the secular and pluralistic world. Yet it is precisely in this world that the conviction is spreading more and more that the things of nature must be recognized as having a specific *finality*, which goes beyond the usefulness that can be derived from them. There is a remarkable recent literary production, from which it is shown that “the anti-naturalism of early twentieth-century ethics with an intuitionist or emotivist or existentialist approach has progressively receded, leaving room for a revival of ethical naturalism”.⁷⁷

The ethical and legal relevance of human nature is required for at least three reasons⁷⁸:

1. *Presupposition*: if the law concerns the well-being and harm of human beings, then the facts concerning human nature are relevant, because they allow us to recognize what is good or harmful;⁷⁹

2. *Originating principle*: the legal dimension is founded in our nature as social animals and must be interpreted on the basis of this origin;⁸⁰

3. *Needs and desires*: Some natural skills or tendencies are normative because they require to be fulfilled or developed as much as possible.⁸¹

The multi-millennial tradition of natural law is able to offer much in this regard, but it must free itself from the equivocality into which it has fallen. Taking

⁷⁷F. BOTTURI, R. MORDACCI, C. VIGNA, *Presentazione*, in *Natura in etica*, a cura di F. Botturi, R. Mordacci, Vita e Pensiero, Milano 2009, pp. VII-IX: VII. The volume also offers a useful — albeit limited — bibliographical review on the subject (*ibidem*, pp. 249-265).

⁷⁸Cf. J. PORTER, *Natural Law and Divine Law. Reclaiming the Tradition for Christian Ethics*, Eerdmans, Grand Rapids (MI) 1999, p. 107.

⁷⁹Cfr. J. KEKES, *Human Nature and Moral Theories*, «Inquiry», 28 (1985), pp. 231-245; B. WILLIAMS, *Ethics and the Limits of Philosophy*, Harvard University Press, Cambridge (MA) 1985.

⁸⁰Cfr. M. MIDGLEY, *Beast and Man: The Roots of Human Nature*, Routledge, New York 1978; EAD., *The Ethical Primate: Humans, Freedom, and Morality*, Routledge, London 1994; O. J. FLANAGAN JR., *Quinian Ethics*, «Ethics», 93 (1982) pp. 56-74; ID., *Varieties of Moral Personality: Ethics and Psychological Realism*, Harvard University Press, Cambridge (MA) 1991.

⁸¹Cfr. T. HURKA, *Perfectionism*, Oxford University Press, New York-Oxford 1993; J. FINNIS, *Natural Law and Natural Rights*, Oxford University Press, New York-Oxford 2011².

up the lesson of Rommen cited above, it is necessary first of all to eliminate the equivocation of *the status naturalis*: human nature is social, the person is an individual in relationship, it is in the social relationship that the good is discovered and the law is configured. The nominalistic tendency must then be overcome: the concept of nature presupposes an order that needs to be considered in order to make human behavior orderly. Finally, we must guard against any rationalistic presumption: the search for the principles and norms of the natural law must be characterized by systematicity, but above all by humility. It is a task that can never be closed once and for all. Every good can take multiple historical forms, and more than one can be legitimate. In the field of practical reason there is no single good solution.

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