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+ I spoke about this in the eighth Assembly of the Pontifical Academy for Life. My text was published in the Proceedings of that Assembly in 2003. The present text is partly changed out of various reasons. The importance of the problem seemed to justify the repetition of the main parts. For a longer and more involved discussion on the same subject with many parts of this text taken verbatim therefrom and bearing the same title, see Wolfgang Waldstein, *The Capacity of the Human Mind to Know Natural Law*, in Proceedings of the VIII Assembly of the Pontifical Academy for Life (Juan De Dios Vial Correa & Elio Sgreccia eds., 2003) hereinafter Proceedings, available at http://www.academiavita.org/index.php?option=com_content&view=article&id=209%3Aw-waldstein-la-capacita-della-mente-umana-di-conoscere-il-diritto-naturale&catid=53%3Aatti-della-viii-assemblea-della-pav-2002&Itemid=66&lang=en.

Text

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The dominating opinion of science academics today is that the methods of the natural sciences are the only scientific methods. Pope John Paul II calls this scientism in his encyclical *Fides et Ratio*, a "threat to be reckoned with." ¹ He then explains: "This is the philosophical notion which refuses to admit the validity of forms of knowledge other than those of the positive sciences; and it relegates religious, theological, ethical and aesthetic knowledge to the realm of mere fantasy." ² This is equally true of legal science insofar as it does not only deal with positive law, but with questions of justice, human rights, and especially with natural law.

Many recent methodological works have shown that a concept of science limiting its scope to natural sciences is not only insufficient, but inadequate and simply arbitrary. ³ Long ago, Aristotle was able to recognize the reason for errors of former philosophers in the fact "that although they studied the truth about reality, they supposed that reality is confined to sensible things (thus their statements, though plausible, are not true ...)" ⁴

¹ Pope John Paul II, *Fides et Ratio* [Encyclical Letter on the Relationship Between Faith and Reason] P 88 (1998) [hereinafter *Fides et Ratio*].

² *Id.*

³ See, eg., Karl Larenz, *Methodenlehre der Rechtswissenschaft* 117 (2d rev. ed. 1969); Wolfgang Waldstein, *Teoria Generale del Diritto* (2001).

⁴ Aristotle, *Metaphysics*, Bk. IV, Ch. 5 (Hugh Tredennick trans.), reprinted in 1 Aristotle in Twenty-Three Volumes 189 (1980) [hereinafter *Metaphysics*].

[*176] The human capacity of knowing truth has been affirmed by the greatest philosophers, from Socrates to Plato, Aristotle, and the Stoics, in such a way that today one is able to grasp the truth of the relevant findings. Aristotle not only says that "philosophy is rightly called a knowledge of Truth[.]"⁵ but he also shows with compelling logic that skeptical and relativistic ideas are self-contradictory and untenable.⁶ They have many times since been refuted convincingly.⁷

Innumerable philosophers have taken up true findings which are contained in true philosophy. It is naturally impossible to even mention them all. The most famous are St. Augustine and St. Thomas Aquinas. Pope John Paul II mentions in his encyclical *Fides et Ratio* not only these names, but many others, including John Henry Newman, Antonio Rosmini, and Edith Stein.⁸ I would like to add to these names Dietrich von Hildebrand, whose philosophy is very close to the Lublin School promoted by Karol Wojtyła.⁹ Pope John Paul II himself refutes the errors of skepticism, relativism, positivism, scientism, and others, especially in his Encyclicals *Evangelium Vitae*¹⁰ and *Fides et Ratio*.¹¹ In spite of the fact that these theories have been proven to be untenable, they are today widespread and dominant. They form part of the main obstacles for the knowledge of natural law. Therefore, it seems to me necessary first to discuss some of the main arguments against natural law in order to show that they are erroneous and therefore not at all valid arguments.

Second, I will, as far as possible, try to show how natural law has been known since antiquity. It was not only known in a theoretical way, but it was recognized as an existing and knowable reality, which everyone is obliged to know in order to be able to be just.¹² Through **[*177]** the work of Roman jurisprudence, it formed the legal order that governed all of Europe until the so-called codifications of natural law in the eighteenth and nineteenth centuries.¹³ In Austria, this codification from 1811 is still valid though many parts of it were changed for various and partly political reasons. But two paragraphs which refer expressly to natural law are still in force. I will come back to one of them later.

I. Some of the Main Arguments Against Natural Law

A. Skepticism and Agnosticism

Natural law is necessarily denied by every form of skepticism and agnosticism as for instance developed by Christian Thomasius (1655-1728). He started as one of the natural law specialists of the enlightenment, but he wanted to detach the natural law from any theological dependence and to establish it on autonomous human

⁵ Id. Bk. II, Ch. 1, at 87.

⁶ See Waldstein, *supra* note 3, at 31-38.

⁷ See *id.* at 38-45.

⁸ *Fides et Ratio*, *supra* note 1, P 74.

⁹ See generally Alice von Hildebrand, *The Soul of a Lion: Dietrich von Hildebrand* (2000) (a biography of Dietrich von Hildebrand); Pope John Paul II, *Man and Woman He Created Them* (Michael Waldstein trans., Pauline Books & Media 2006).

¹⁰ See Pope John Paul II, *Evangelium Vitae* [Encyclical Letter on the Value and Inviolability of Human Life] P 70 (1995) [hereinafter *Evangelium Vitae*].

¹¹ See *Fides et Ratio*, *supra* note 1, PP 22-35. One can say that this encyclical does, against all kinds of modern errors, in its entirety reestablish the human capacity to know truth.

¹² See Cicero, *De Re Publica*, Bk. III, Ch. 33, reprinted in *Cicero on the Republic on the Laws* 12, 186 (C. W. Keyes trans., Jeffrey Henderson ed., Loeb Classical Library 1928); *id.* Bk. V, Ch. 5, at 248 ("Sine quo iustis esse nemo potest ..."); Cicero, *De Legibus*, Bk. I, Ch. 42, reprinted in *Cicero on the Republic on the Laws*, *supra*, at 296, 348 ("Est enim unum ius, quo devincta est hominum societas, et quod lex constituit una; ... quam qui ignorat, is est iniustus, sive est illa scripta usquam sive nusquam.").

¹³ See Franz Wieacker, *Privatrechtsgeschichte der Neuzeit* 322-47 (1967).

reason.¹⁴ As Stefan Buchholz has shown in a masterly analysis, the autonomized human reason ends up in its self-destruction.¹⁵ The fundamental premise: "voluntas semper movet intellectum" (the will always moves the intellect) turns in its consequence the "animal rationale" into a "servus passionum suarum" (slave of one's passions).¹⁶ The human intellect and the liberty of will are denied. As a consequence of this assumption, human knowledge becomes a product of constraint and by that very fact cancels itself. According to Christian Thomasius, passions stamp the will and the will imposes its prejudices on reason ("voluntas praeiudicium facit intellectui").¹⁷ In this way, individual knowledge is absolutely excluded. From this it follows that all men in fact are fools.¹⁸ They can only be guided by positive law ("exinde necessitas iuris positivi"; therefore the necessity of positive law).¹⁹ The subject, who as a fool is held to be "under age," has to accept the command of the law without having criteria to **[*178]** examine the question of the rightness and justness of a law.²⁰ By his submission he serves the unifying goal of the state.²¹

As far as the principle "voluntas praeiudicium facit intellectui" (will imposes its prejudices on reason) is concerned, there can be no doubt that this phenomenon really exists. But there can equally be no doubt that the consequences, which Thomasius draws from this fact, are not the whole truth. The complete denial of human reason and free will is, in view of all human knowledge since antiquity, simply absurd. It is the consequence of a distorted concept of human nature. Thomasius only forgets to explain why and how he himself should be exempt from being a fool. He, on the contrary, feels himself to be entitled to identify all those as fools who contradict him.²²

B. "Is" and "Ought"

A seemingly more scientific argument is founded on the supposed dualism of "is" and "ought" with the consequence that from an "is" no "ought" can follow. According to this argument, every attempt to derive natural law from nature as an "is" was labeled as "naturalistic fallacy."²³ Nature in this argument is presupposed to be only matter which can not contain any norms. And if matter is the only existing "is," then logically from an "is" without a normative content, a normative "ought" cannot be derived. Therefore the supposed deduction of norms from nature as an "is" is argued to be a "naturalistic fallacy." In the historical reality, however, natural law was since the earliest times, as documented since the second millennium B.C., never deduced from a non-normative "is." It was seen to be "evident to reason," as § 16 of the Austrian Civil Code ("ABGB") still affirms.

The argument concerning the "naturalistic fallacy," which originates from David Hume, was developed in the field of legal theory especially by Hans Kelsen in his Pure Theory of Law.²⁴ I will not go into the details of Kelsen's

¹⁴ Stefan Buchholz, *Recht, Religion und Ehe: Orientierungswandel und Gelehrte Kontroversen im Übergang vom 17. zum 18. Jahrhundert* 156-61 (1988).

¹⁵ See *id.* at 159.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 161.

¹⁹ *Id.* at 171.

²⁰ *Id.* at 182.

²¹ *Id.* at 181-82.

²² *Id.* at 161.

²³ See Eduardo Moises Penalver, *Redistributing Property: Natural Law, International Norms, and the Property Reforms of the Cuban Revolution*, 52 Fla. L. Rev. 107, 170 (2000) ("The 'naturalistic fallacy' refers to the idea that no series of factual premises can lead to an evaluative conclusion. It is often phrased in the catchy slogan: no 'ought' from an 'is.'").

²⁴ See generally Hans Kelsen, *Pure Theory of Law* (Max Knight trans., Univ. of Cal. Press 1967) (1934).

arguments concerning this problem **[*179]** here, but rather show the "wide and damaging impact on Catholic theologians" which these and similar theories caused. ²⁵

One example of this, Josef Fuchs, is especially important because of his teaching at the Pontifical University Gregoriana, which formed a great number of priests and later bishops over thirty years with ideas that simply destroy the basis for understanding natural law. If one only reads his Article "Naturrecht oder naturalistischer Fehlschlubeta?" (Natural law or naturalistic fallacy), ²⁶ it becomes immediately clear that according to him, the entire knowledge of natural law since antiquity, including the whole teaching of the Church up to Vatican II and the Encyclicals *Veritatis Splendor*, *Evangelium Vitae*, and *Caritas in Veritate*, is based on "naturalistic fallacy." ²⁷ This assertion can only be marked as an incredible distortion of the historical and factual reality. ²⁸ Besides, the so-called "naturalistic fallacy" involves a real fallacy, namely the conclusion from sensual realities to the inexistence of spiritual realities. Even Kelsen himself affirms that norms exist. ²⁹ He expressly says: "One cannot deny that law as a norm is a spiritual and not a natural (material) reality." ³⁰

Another example is still more recent. At the eighth Assembly of the Pontifical Academy for Life in 2002, Prof. Saturnino Muratore S.J., professor of philosophy, epistemology, and metaphysics at the Theological Faculty of Naples (Italy), presented a paper, which could not be published in the Proceedings of the Assembly because it went against the teachings of the Church. ³¹ Therefore, I can only quote from the paper which was distributed to all members of the Academy but I think it to be important to know what kind of ideas are taught to future priests. Muratore affirmed that "the modern ideal of science **[*180]** has already substituted the Greek one" and that the development in the twentieth century "led to the overcoming and the discrediting of the classicist interpretation of culture." ³² In this view, everything that was known since antiquity before the end of the seventeenth century, which is identified "as the date of birth of modern science," ³³ would have to be considered as antiquated "classicist," "essentialist," and "fixist" ideas which have long since been superseded by modern science. ³⁴ Muratore even feels himself "led ... to suspect that the Classicist pretention, which remains in scientific knowledge, is still a devious and dreadful danger to our present cultural situation." ³⁵ It is clear that everything which I will have to say in my Article would fall under these verdicts. If they were true, I ought to throw my Article into a wastebasket. Therefore I feel it to be my duty to quote a passage from the Encyclical *Fides et Ratio*. The most important part for my Article of the passage in *Fides et Ratio* reads as follows:

In engaging great cultures for the first time, the Church cannot abandon what she has gained from her inculturation in the world of Greco-Latin thought. To reject this heritage would be to deny the providential plan of God who guides

²⁵ See John Finnis, *Nature and Natural Law in Contemporary Philosophical and Theological Debates*, in *Proceedings*, supra note + , available at <http://www.academivita.org/index.php?view=article&catid=53%3AAatti-della-viii-assemblea-della-pav-2002&id=211%3Aj-fin> nis-natura-e-legge-naturale-nel-dibattito-filosofico-e-teologico-contemporaneo&format=pdf&option=com_content&Itemid=66&lang=en.

²⁶ See generally Josef Fuchs, *Naturrecht oder naturalistischer Fehlschlubeta?*, 29 *Stimmen der Zeit* 407 (1988) (author's translation).

²⁷ Buchholz, supra note 14, at 156-61.

²⁸ See Waldstein, supra note 3, at 69-71.

²⁹ See Kelsen, supra note 24, at 4-10 (discussing norms and norm creation).

³⁰ See Hans Kelsen et al., 2 *Die Wiener rechtstheoretische Schule* 12 (1968) (author's translation).

³¹ See Santurnino Muratore, *The Challenges of Contemporary Cultural Context* (2002) (unpublished paper) (on file with author).

³² *Id.* at 4, 7.

³³ *Id.* at 5.

³⁴ See *id.* at 7, 9-10. These terms are repeated many times by Muratore.

³⁵ *Id.* at 9.

his Church down the paths of time and history. This criterion is valid for the Church in every age, even for the Church of the future³⁶

These statements of the Encyclical are not only true for the Church, but also for any honest scientific endeavor, because every truth that has been discovered at any time remains true forever. As Aristotle formulates in his *Nicomachean Ethics*, "For with a true view all the facts harmonize, but with a false one they soon clash."³⁷ Therefore, the work of discernment between truth and error is doubtlessly the main challenge of our cultural context.

John Finnis has shown how untenable, for instance, the theses of "Lonergan's post-Vatican II work" is.³⁸ In spite of this fact, it "has had its wide and damaging impact on Catholic theologians not so **[*181]** much by his undeveloped and inoperable ideas on ethics, but by his unhistorical thesis that there is a profound distinction between "historical consciousness' and a "classicist world view."³⁹

As Eric Voegelin has shown clearly, this entire development represents a decline of the natural light of human reason.⁴⁰ It led to that "tragic obscuring of the collective conscience," of which Pope John Paul II speaks of in paragraph seventy of *Evangelium Vitae*.⁴¹ Its result is "an attitude of skepticism ... bringing into question even the fundamental principles of the moral law."⁴² This supposedly "modern" scientific thinking has also widely affected practically all sciences in the field of humanities.

Pope Benedict XVI says in the encyclical *Caritas in Veritate* :

A particularly crucial battleground in today's cultural struggle between the supremacy of technology and human moral responsibility is the field of bioethics, where the very possibility of integral human development is radically called into question... . Scientific discoveries in this field and the possibilities of technological intervention seem so advanced as to force a choice between two types of reasoning: reason open to transcendence or reason closed within immanence. We are presented with a clear either/or. Yet the rationality of a self-centred use of technology proves to be irrational because it implies a decisive rejection of meaning and value.⁴³

The consequences of this are especially disastrous in the field of theology and legal science.

C. No Presupposed Belief in a Deity

What neither Fuchs nor Muratore noticed is the fact that Kelsen himself affirms that norms exist.⁴⁴ Their form of existence is their being in force or having validity.⁴⁵ In the first edition of his *Reine Rechtslehre* [The Pure Theory of Law] he even said: "One cannot **[*182]** deny that law as a norm is a spiritual and not a natural (material) reality."⁴⁶ In 1965 Kelsen still revised remarkably his original view in this respect with his clarification of the relation

³⁶ *Fides et Ratio*, supra note 1, P 72.

³⁷ Aristotle, *Nicomachean Ethics*, Bk. I, Ch. 8 (W.D. Ross trans.), reprinted in 2 *The Complete Works of Aristotle* 1729, 1736 (Jonathan Barnes ed., 1984) [hereinafter *Nicomachean Ethics*].

³⁸ See Finnis, supra note 25, at 16.

³⁹ *Id.*

⁴⁰ See Eric Voegelin, *The New Science of Politics* 13-22 (midway reprinted ed. 1983).

⁴¹ See *Evangelium Vitae*, supra note 10, P 70.

⁴² *Id.*

⁴³ Pope Benedict XVI, *Caritas in Veritate* [Encyclical Letter on Integral Human Development in Charity and Truth] P 74 (2009) [hereinafter *Caritas in Veritate*].

⁴⁴ See Kelsen, supra note 24, at 4-10.

⁴⁵ See *id.*

between law and logic. In this important contribution he made the following statements: "Truth and untruth are attributes of a statement, being in force on the contrary is not an attribute of a norm, but its existence, its specific ideal existence. That a norm is in force means that it is at hand or existent." ⁴⁷ If a norm exists, it undoubtedly is an "is" with normative content and from an "is" with a normative content undoubtedly an "ought" can follow.

This discovery completely destroyed the arguments concerning the "naturalistic fallacy" and Kelsen himself could no longer rely on the argument against natural law, which he earlier had thought to be absolutely irrefutable, namely, that from an "is" no "ought" can follow. If this "is" is a norm, then from this "is" an "ought" can undoubtedly follow. In order to uphold his denial of natural law, he had to have recourse to some other argument. According to Kelsen's theory, positive norms are created by an act of will. ⁴⁸ He then admits that norms need not necessarily be acts of a human will, but there cannot exist norms that are not created by an act of will. ⁴⁹ If norms should exist by nature, they would have to be the meaning of a will which is immanent to nature. ⁵⁰ And then he raises the decisive question, which is grounded on the positivistic concept of nature: "From where can such a will come into a nature which, from the point of view of empirical-rational knowledge, is an aggregate of factual beings linked to one another by cause and effect?" ⁵¹ Kelsen's answer is that this will could only be the will of a just deity, "whose will is not only transcendent to the nature created by him, but also immanent." ⁵² He therefore thinks that natural law can only be accepted on the presupposition of belief in such deity. Because he himself does not believe he is able to accept this presupposition, he also cannot accept the consequence, namely a natural law. He, in **[*183]** addition, thinks that a rational discussion about the question of the truth of this belief is hopeless. ⁵³

It is of course not possible to discuss all the details of Kelsen's arguments here, which follow from his positivistic presuppositions. I can only mention here the clear knowledge which already Aristotle was able to achieve. He says that on such a basis "the pursuit of truth will be, "chasing birds in the air." ⁵⁴ He then continues with the statement which I quoted at the beginning: "Thus their statements, though plausible, are not true" ⁵⁵ He also shows that every contingent being leads by logical necessity to a non-contingent first cause, without which no knowledge would be possible. ⁵⁶

The understanding of natural law especially in Cicero is important for understanding Roman jurists. To illustrate that point, I have to quote a passage from Cicero, and an additional one from a Roman jurist.

The passage from Cicero's *De Re Publica* Book III reads as follows:

⁴⁶ Id. (author's translation).

⁴⁷ See Hans Kelsen et al., *supra* note 30.

⁴⁸ Id. at 1473.

⁴⁹ Id. at 1474.

⁵⁰ Id.

⁵¹ Id.

⁵² Hans Kelsen, *Die Grundlage der Naturrechtslehre*, reprinted in *Das Naturrecht in der politischen Theorie 1* (Franz-Martin Schmoz ed., 1963) (author's translation).

⁵³ Id.

⁵⁴ *Metaphysics*, *supra* note 4, Bk. IV, Ch. 5, at 189.

⁵⁵ Id.

⁵⁶ See *id.* Bk. II, Ch. 2, at 93.

True law is right [order]⁵⁷ in agreement with nature; it is of universal application, unchanging and everlasting... . It is a sin to try to to [sic] alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people... . 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,⁵⁸ over us all, for he is the author of this law, its promulgator, and its enforcing judge. Whoever is disobedient [to him,]⁵⁹ 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.⁶⁰

[*184] The passage from the Institutes of Justinian Book I, Title 2, § 11, which according to recent research originates from the classical Roman jurisprudence, says simply: "The law of nature, which is observed uniformly by all peoples, is sanctioned by divine providence and lasts forever, strong and unchangeable."⁶¹

From both texts it becomes clear that natural law is not understood to be something derived from a non-normative factual nature, as Kelsen or Fuchs understand it, but in fact is seen to be introduced by God himself or by divine providence. That was the understanding in the entire Roman jurisprudence. To some extent Kelsen is right, that natural law can only be understood as the meaning of "the will of a just deity,"⁶² but he is not right in the affirmation that this could "only be accepted on the presupposition of belief in such deity."⁶³

D. Irrational Arguments About the Existence of God

Furthermore, it also is not true that to argue rationally about the existence of God would be "hopeless," as Kelsen suggests.⁶⁴ Since antiquity, there have been many rationally well-founded answers concerning this question. I need not demonstrate that here in detail. I would only like to quote one passage from Cicero's work *On Laws*. After he had affirmed "that divine mind is the supreme Law,"⁶⁵ he goes on to say:

Indeed, what is more true than that no one ought to be so foolishly [arrogant]⁶⁶ as to think that, though reason and intellect exist in himself, they do not exist in the heavens and the universe, or that those things which can hardly be understood by the highest reasoning powers of the human intellect are guided by no reason at all?⁶⁷

If this assertion is true as innumerable others about the existence of God over millennia, then the last argument of Kelsen against natural **[*185]** law, namely that it can "only be accepted on the presupposition of belief " in God,⁶⁸

⁵⁷ Cicero, *De Re Publica*, Bk. III, Ch. 12, reprinted in 16 Cicero in Twenty-Eight Volumes 211 (Clinton Walker Keyes trans., Harvard Univ. Press 1928) [hereinafter *De Re Publica*]. Ratio is translated to "reason." Id. In this context, as in many others, it evidently means "order." Later on, it is, as at the beginning, rendered by *lex*.

⁵⁸ Id. Here, the Latin text says here *deus* in the singular.

⁵⁹ Id. (omitting *cui* in the translation).

⁶⁰ Id.

⁶¹ J. Inst. 1.2.11 (Peter Birks & Grant McLeod trans., Cornell Univ. Press 1987).

⁶² See Kelsen, *supra* note 52, at 1 (author's translation).

⁶³ See *id.* (author's translation).

⁶⁴ See *id.*

⁶⁵ See Cicero, *De Legibus*, Bk. II, Ch. 5, reprinted in 16 Cicero in Twenty-Eight Volumes, *supra* note 57, at 383.

⁶⁶ See *id.* Bk. II, Ch. 8, at 389 (using *adrogantem* in the Latin text).

⁶⁷ Id.

⁶⁸ Kelsen, *supra* note 52, at 1.

can, according to the law of non-contradiction, not be true. God as well as natural law were and are knowable as realities independent of any presupposition of faith.⁶⁹

II. How was Natural Law in Fact Known Since Antiquity?

For demonstrating the capacity of the human mind to know natural law, I will have to concentrate on the question how it in fact was known. I have discussed this question more in detail in my book on *Teoria generale del diritto* (General Theory of Law).⁷⁰ Here I can only give a short summary of what I was able to show there.

A. The Human Mind is Capable of Knowing Truth

In spite of being surrounded by skeptical and relativistic theories, all great philosophers agree on the fact that the human mind is capable of knowing truth. Aristotle shows right at the beginning of his *Nicomachean Ethics* that there are different methods of knowing different realities.⁷¹ In addition he warns that the same exactness must not be expected in all departments of philosophy alike.⁷² He says a little later: "for it is the mark of an educated [mind] to [expect that amount of exactness] in each class of things just so far as the nature of the subject admits" ⁷³ Concerning the different methods of knowing (for those who are "students of truth") he mentions in the *Nicomachean Ethics*, as the English translation renders the text, the following: "Now of first principles we see some by induction, [***186**] some by perception, some by a certain habituation, and others too in other ways." ⁷⁴

Here now begin the difficulties with the translation of the *Nicomachean Ethics*. For "studied" the Greek text has *theorontai*. *Theoreo* means in Greek, among other things, to look at a spiritual reality spiritually.⁷⁵ *Theorema* is something that one has seen. For "perception," the Greek text has *aisthesei*. *Aisthesis* is translated in the German translation by Dirlmeier, in English "intuition," ⁷⁶ which in the original Latin meaning from *intueor* means an immediate spiritual seeing of a spiritual reality. This becomes still much clearer when Aristotle parallels *aisthesis* with *nous*.⁷⁷ In the *Metaphysics* he shows that for instance the law of non-contradiction can only be grasped by immediate perception or intelligence.⁷⁸ And he then continues saying: "Some, indeed, demand to have the law

⁶⁹ See Second Vatican Council, *Dei Verbum* [Dogmatic Constitution on Divine Revelation] P 6 (1965), reprinted in *The Sixteen Documents of Vatican II* 373, 377-78 (Nat'l Catholic Welfare Conference trans., 1967).

As a sacred synod has affirmed, God, the beginning and end of all things, can be known with certainty from created reality by the light of human reason; but teaches that it is through His revelation that those religious truths which are by their nature accessible to human reason can be known by all men with ease, with solid certitude and with no trace of error, even in this present state of the human race.

Id. (internal citation omitted).

⁷⁰ See Waldstein, *supra* note 3, at 31-52.

⁷¹ See *Nicomachean Ethics*, *supra* note 37, Bk. I, Ch. 3, at 1730 (translated as, "Now fine and just actions, which political science investigates, exhibit much variety and fluctuation").

⁷² See *id.* (translated as, "for precision is not to be sought for alike in all discussions").

⁷³ *Id.*

⁷⁴ *Id.* Bk. I, Ch. 7, at 1736.

⁷⁵ Henry George Liddell & Robert Scott, *Greek-English Lexicon* 796 (1859).

⁷⁶ Compare Aristoteles, *Nikomachische Ethik*, Bk. I, Ch. 7 (Franz Dirlmeier trans., 1967) (translated as "intuition"), with *Nicomachean Ethics*, *supra* note 37, Bk. I, Ch. 7, at 1736 (translated as "perception").

⁷⁷ See *Nicomachean Ethics*, *supra* note 37, Bk. VI, Ch. 12, at 1806-07.

⁷⁸ See *Metaphysics*, *supra* note 4, Bk. IV, Ch. 3, at 163.

proved, but this is because they lack education; for it shows lack of education not to know of what we should require proof, and of what we should not." ⁷⁹ This statement is extremely important because nowadays it is often argued that only what can be proven by means of logic can be accepted as scientifically known. ⁸⁰ Therefore, concerning the general capacity of knowing, I have to mention as the last point that Aristotle also has shown that the laws of logic themselves cannot be proven by logical deduction - how should they before one knows them! - but can be grasped only by intelligence (nous). ⁸¹

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B. Natural Law - Known Since Antiquity

Based on this background, we now have to examine how natural law has in fact been known since antiquity. From innumerable sources it could be shown that natural law has from the earliest times, as far as we have written sources, been obviously "evident to reason," as § 16 of the ABGB still affirms. ⁸² This fact was especially important for the development of ancient Roman law and for the subsequent development of the European legal culture up to our own times. Roman jurisprudence did not theorize about natural law, but the jurists applied it to the solution of practical legal cases. ⁸³ Therefore, one can see from the sources, by which method they achieved knowledge of this law.

One of the most outstanding scholars of ancient Roman law, Max Kaser, had dedicated an inquiry into the method of the Roman findings of law. ⁸⁴ On the basis of his lifelong intense studies of the sources of Roman law, he was able to formulate the following result:

Examining the ways by which the Roman jurists, in their casuistic manner, found their law, ... one does not find in the first place the rational methods of induction or deduction. According to the impressions which the juridical tradition offers reliably, we find in the first place intuition, i.e., finding the right decision by immediate perception. ⁸⁵

At the beginning of his magisterial work on Roman private law, Kaser asserts that "the Roman jurists find the way to the right knowledge of law with their ingenious intuition, thanks to their sure philosophy of life." ⁸⁶ Therefore, one of the greatest Roman jurists, Ulpian, can assert in the first fragment of the Digest that the jurists in their endeavor to realize justice strive for the true philosophy and not for a simulated one (veram nisi fallor philosophiam, non simulatam affectantes). ⁸⁷

Clearly it is impossible for the same man to suppose at the same time that the same thing is and is not; for the man who made this error would entertain two contrary opinions at the same time. Hence all men who are demonstrating anything refer back to this as an ultimate belief; for it is by nature the starting-point of all the other axioms as well.

Id.

⁷⁹ Id. In the continuation of the text he says: "For it is quite impossible that everything should have a proof; the process would go on to infinity, so that even so there would be no proof." Id.

⁸⁰ See, e.g., Franz Horak, *Rationes Decidendi* 20 (1969).

⁸¹ See Aristotle, *Posterior Analytics*, Bk. II, Ch. 19 (W.D. Ross trans.), reprinted in 2 *The Complete Works of Aristotle* 114, 165 (Jonathan Barnes ed., 1984); see also Waldstein, *supra* note 3, at 132-33, 199.

⁸² *Allgemeines bürgerliches Gesetzbuch [ABGB] [Civil Code] § 16* (Austria).

⁸³ See Max Kaser, *Zur Methode der römischen Rechtsfindung*, in *Nachrichten der Akademie der Wissenschaften in Göttingen* 49 (1962).

⁸⁴ See *id.*

⁸⁵ *Id.* at 54 (author's translation); see also Waldstein, *supra* note 3, at 45-52.

⁸⁶ Max Kaser, *Das römische Privatrecht* 3 (1971) (author's translation).

⁸⁷ *Dig. 1.1.1 (Ulpian, Institutes 1)* (Alan Watson trans., rev. English ed. 1998).

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C. Roman Jurists Perceived Natural Law

It is an undeniable fact that in their endeavor to find just solutions for given cases, Roman jurists also perceived natural law. Here, I quote a passage written by Fritz Schulz in 1936. After having described various matters of Roman private law he says:

In all these matters it may be observed that legal writers are not satisfied with describing the positive Roman law in force at the time, but that they are at pains to evolve a law of Nature. This is the determining cause for the peculiar manner in which legal science is presented; it does not actually prove the rules stated, but derives them direct from the ... ratio iuris.⁸⁸

It is not possible here to discuss the question of what Schulz means by ratio iuris (spirit of the law), but it is clear that it refers ultimately to natural law. For instance Cicero calls the natural law *recta ratio* (the right reason).⁸⁹

To show how natural law worked in practice, I can give only one example taken from the immense material. Ulpian reports in Book XII, Title 4, Fragment 3, Paragraph 7 of the Digest that a slave had been freed in a last will under the condition that he pays ten to the heir.⁹⁰ In an amendment to the last will, he had been freed without this condition.⁹¹ Not knowing that, he paid the ten⁹² to the heir by error.⁹³ After the error was detected, the question arose, whether he could reclaim the ten.⁹⁴ The father of the famous P. Iuventius Celsus filius still denied the possibility to reclaim the ten according to the [*189] strict law.⁹⁵ About the decision of his son, Ulpian says that Celsus himself decided on the basis of natural equity that he could reclaim the ten (*sed ipse Celsus naturali aequitate motus putat repeti posse*).⁹⁶ And Ulpian adds to that: "this is the better opinion" (*quae sententia was correct I verior est*),⁹⁷ meaning that it is more in accordance with natural equity. Here we can see clearly that Celsus filius, who had defined law as *ars boni et aequi* - the science of the good and the just - does not look at the strict civil law, but at natural equity which means at natural law, and according to that decides the case.⁹⁸ This is the natural law of which the Roman jurist Paulus says in the Digest is always *aequum ac bonum* (just and good).⁹⁹ It corresponds perfectly to the definition of law by Celsus as the science of the good and the just. Cicero says: "And

⁸⁸ Fritz Schulz, *Principles of Roman Law* 35-36 (Marguerite Wolff trans., 1936).

⁸⁹ See *De Re Publica*, supra note 57, Bk. III, Ch. 22, at 210.

⁹⁰ Dig. 12.4.3.7 (Ulpian, Edict 26) (Alan Watson trans., rev. English ed. 1998). Dig. is the usual abbreviation for the quotation of the Digest of the Roman emperor Justinian, which was published in 529 A.D. The Digest contains fragments of the works of Roman jurists from the second century B.C. until the fourth century A.D. This work, which is the main part of the so-called *Corpus Iuris Civilis*, is the main source for our knowledge of the work of Roman jurists. The work is divided into fifty books, then divided into titles, which contain the fragments of the works of various jurists. Longer fragments are subdivided into paragraphs. Accordingly, the quotation of the text of Ulpian as Dig. 12.4.3.7 means Digest Book XII, Title 4, Fragment 3, Paragraph 7.

⁹¹ Id.

⁹² Ulpian does not mention the currency. Normally speaking of ten without mentioning the currency would mean aurei, that is gold coins.

⁹³ Id.

⁹⁴ Id.

⁹⁵ Id.

⁹⁶ Id.

⁹⁷ Id.

⁹⁸ Id.; Waldstein, supra note 3, at 17, 249.

⁹⁹ Dig. 1.1.11 (Paul, Sabinus 14) (Alan Watson trans., rev. English ed. 1998).

therefore Nature's law itself ... protects and conserves human interests" (*Utilitatem hominum* in the Latin text does not simply mean "interests," but the real good of man).¹⁰⁰ The civil law itself was seen by Ulpian as grounded on natural law, but modified in specific cases.¹⁰¹ These modifications in the old and strict *ius civile* (the strict ancient civil law of the Roman state) were, as in the quoted example, largely felt to be unjust and therefore corrected by the Roman jurisprudence in order to arrive at just decisions.

This work of the Roman jurists was developed continuously through almost five centuries. The result of this work was codified in 530-533 by the emperor Justinian in the Digest.¹⁰² In the introductory constitution to the Digest, Justinian calls the compilation a *iustitiae Romanae templum* (a temple of Roman justice).¹⁰³ The rediscovery of this compilation in the Middle Ages and its study at the original school of arts in Bologna first changed the character of this school of arts into the first University of Europe and then gave way to the entire **[*190]** development of the European legal culture.¹⁰⁴ On this basis, the ABGB can affirm in its § 16: "Every man has inborn rights, evident to reason."¹⁰⁵ The American Declaration of Independence written in 1776 says: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights."¹⁰⁶ Thus, knowing natural law is not a question of some more or less reliable philosophical theories, but a reality in the legal culture not only of Europe, but of the entire world. It is only on this basis that human rights declarations and conventions can have any substantial meaning.

On this basis, Pope John Paul II was able to affirm in his encyclical *Evangelium Vitae*:

Even in the midst of difficulties and uncertainties, every person sincerely open to truth and goodness can, by the light of reason and the hidden action of grace, come to recognize in the natural law written in the heart the sacred value of human life from its very beginning until its end, and can affirm the right of every human being to have this primary good respected to the highest degree. Upon the recognition of this right, every human community and the political community itself are founded.¹⁰⁷

Conclusion

Since antiquity, man has been seen as capable of knowing natural law. With this capability, a legal culture was developed, which for more than 2,000 years formed Europe and was even important for the entire world; it made possible things like the General Declaration of Human Rights in 1948 and many other things. The fact that this capability is being contested progressively under the influence of skeptical, relativistic, positivistic, and scientific theories, does not have any influence over the existence of natural law as such, nor does it in principle cancel the capability of the human mind to know it. If in spite of all these patent facts, a modern scientist was able to make the statement "that we have never had a knowledge, but only, the **[*191]** illusion of a knowledge of natural law,"¹⁰⁸ then this reveals, on the pretext of scientific knowledge, the total ignorance of the reality of legal development. But it must be regarded as a real tragedy that arguments of that kind could succeed in entering Catholic moral theology. This is a tragic example of what Thomasius affirms: "the will imposes its prejudices on the reason" (*voluntas*

¹⁰⁰ Cicero, *De Officiis*, Bk. III, Ch. 31 (Walter Miller trans., 1913); see also Waldstein, *supra* note 3, at 88.

¹⁰¹ Dig. 1.1.6 (Ulpian, *Institutes* 1) (Alan Watson trans., rev. English ed. 1998).

¹⁰² See Alan Watson, *Preface to 1 The Digest of Justinian* (Alan Watson trans., rev. English ed. 1998).

¹⁰³ Justinian, *The Confirmation of the Digest*, reprinted in *1 The Digest of Justinian*, *supra* note 102, at lx, P 20.

¹⁰⁴ See generally Paul Koschaker, *Europa und das Römische Recht* (4th ed. 1966) (discussing the development of the European legal culture).

¹⁰⁵ *Allgemeines bürgerliches Gesetzbuch [ABGB] [Civil Code] § 16* (Austria) (author's translation).

¹⁰⁶ *The Declaration of Independence* para. 2 (U.S. 1776).

¹⁰⁷ *Evangelium Vitae*, *supra* note 10, P 2 (internal citation omitted).

¹⁰⁸ See Adolph Leinweber, *Gibt es ein Naturrecht?* 285 (1970) (author's translation).

praeiudicium facit intellectui).¹⁰⁹ If man honestly tries to keep himself free from all kinds of prejudices, especially those of the will, then his capacity to know natural law will also today allow him to really know natural law.

With great gratitude, I may add that Pope John Paul II in his address on February 27, 2002 to the participants in the eighth General Assembly of the Pontifical Academy for Life encouraged "a conscious effort that returns ... to the anthropological and ethical meaning of natural law and of the related concept of natural right."¹¹⁰ The Pope then said: The "natural moral law" is known by "the light of understanding infused in us by God."¹¹¹ As history since antiquity shows, this "light of understanding" was already present in those who did not yet have the light of Christian revelation. Therefore, we who enjoy the light of Christian revelation, can, in spite of all skeptical criticism of our times, make a conscious effort to turn to natural law, to which we are encouraged to turn by Pope Benedict XVI in the encyclical *Caritas in Veritate*.¹¹² And we do not have to look for it somewhere in the air. We have, since antiquity, all that was known about it to assist us. Therefore, the teaching of natural law is really possible, if one goes back to the reality and does not think that the controversial theories are all that one can know. The conclusions of an international symposium, *Evangelium Vitae and Law*, held in the Vatican State, May 23-25, 1996, contain the following statements:

The participants in the symposium declare themselves to be convinced that without the teaching of natural law there does not exist any possibility for adequate formation of jurists... . If one understands with the expression natural law the consciousness that positive law - as indispensable it be - is not sufficient by itself, because the justice of its norms does not come from the mere will of [*192] the legislator, but from their being grounded on the truth itself of man and of the social coexistence, one cannot but consider the fact to be deplorable that in many juridical faculties the teaching of natural law is not provided and that therefore an adequate foundation for human rights is lacking.¹¹³

It is therefore clear that a really humane future of mankind on the basis of true human rights will only be possible if natural law will regain a conscience-forming power and really be respected by legislators.

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¹⁰⁹ See Buchholz, *supra* note 14, at 156-61.

¹¹⁰ Pope John Paul II, Address to the Participants in the General Assembly of the Pontifical Academy for Life (Feb. 27, 2002).

¹¹¹ *Id.* (quoting St. Thomas Aquinas).

¹¹² *Caritas in Veritate*, *supra* note 43, PP 68, 75.

¹¹³ A. Lopez Trujillo et al., *Evangelium Vitae e Diritto*, Acta Symposii Internationalis, in *Civitate Vaticana Celebratii* 619 (May 23-25, 1996) (Liberia Editrice Vaticana 1997) (author's translation).