

Nature—Reason—Freedom. Thinking about Natural Law in Modern Philosophy¹

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1. Natural Law in the Thinking of Modernity

Natural law is one of the most important themes in modern philosophy of law, especially because of the reliance in many contexts—from legal theory to philosophical, and even mundane, political discussions—upon natural law to establish universal *human rights* (cf. Kriele 1992, 9f.). If human rights are the rights of all men, after all, then the numerous attempts to justify these rights assume at least a common human nature, which gives rise to universal equality, and this means ultimately that something that can be called "natural law" is the ground of positive law. For example, in John Locke's *Second Treatise of Government* we read the following remarks on the *state of nature* as a *state of perfect freedom* and *of equality* (§4). This state has

[a] law of nature to govern it, which obliges everyone: and reason, which is that law, teaches all mankind, who will but consult it, that being all *equal and independent*, no one ought to harm another in his life, health, liberty, or possession (ibid., §6; my emphasis).

The importance of John Locke's reflections on political philosophy and the philosophy of law is manifest, *inter alia*, in the American "Declaration of Independence" of 1776, in which the "self-evidence" of the truth that "all men are created equal," and "that they are endowed by their Creator with certain unalienable Rights" is assumed (on Locke's theory of natural law and its proximity to the classical understanding of natural law cf. Hancey 1976). While the American "Declaration of Independence" (as well as John Locke) justified human rights with reference to a Creator God, this reference is absent in another important document in the history of modern natural law and human rights. The French "Declaration of the Rights of Man and the Citizen" (1789) speaks without reference to a Creator God, but only of the "natural, unalienable and sacred rights of man" (*les droits naturels, inaliénables et sacrés de l'homme*) "in the presence of and under the protection of the supreme Being" (*en présence et sous les auspices de l'être supreme*, Preamble; on the French "Declaration of the Rights of Man and the Citizen" cf. Sandweg 1972).

Especially in the years after the American and French revolutions an intense interest in the question of natural law and human rights grew in Germany. To a certain extent the theme was in the air now pregnant with revolution. Thus the jurist and phi-

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osopher of law Paul Johann Anselm Feuerbach wrote in his *Critique of Natural Law* (1796) following Immanuel Kant's critical philosophy (on Feuerbach, cf. Radbruch 1969):

No science in our age has found such a universal interest, none has been treated with so much zeal as the science of the rights of man. [. . .] While the problems of natural law were usually only debated in the studies of scholars, were resigned to speculative reason and reckoned as only proper in its forum, they [the "rights of man"] are now debated by the people's representatives in the convention halls of a newly created nation and presented as themselves the praxis of theoretical reason (3f).

The fact that thinking about natural law in the late 18th, as well as in the early 19th, century was no longer of a merely theoretical importance indicates a radical change of situation in society. The importance of thinking about natural law is indicative of those situations in which traditional certainties were radically questioned. Again and again, one is able to discern similar connections in the history of thinking about natural law—from the challenge of the sophists, to which Plato and Aristotle reacted with their attempts at thinking about natural law, up to the renaissance of thinking about natural law in the years after the Second World War.

However, anyone involved in the contemporary philosophical discussion will notice that natural law appears to play nothing more than the role that Feuerbach ascribed to it over two hundred years ago in today's juristic and political-philosophical discourse. In the political and philosophical discourse, at least in the German-speaking world, the discussion rarely resorts explicitly to forms of argumentation based on natural law.² Natural law seems to have lost its importance, and this means, most notably, its task of critical justification and scrutiny of positive law. Other models of argumentation and justification in the philosophy of law have taken its place: besides *transcendental-philosophical* models in the tradition of Kant and the post-Kantian idealist or neo-Kantian philosophy, there are also *discourse theoretical*, *positivist* or *hermeneutic* models.

From a historical view, it must be noted that there were already growing signs of a decreasing importance of the classical reflection on natural law in the 19th century. Natural law, so it at first appears, has survived in the late 19th and in the 20th century only in certain contexts—for instance in the context of Marxist philosophy³ or in the context of Christian, especially Catholic theology (on the history of natural law with particular consideration of the Christian understanding of natural law, cf. Hollerbach

² In the English-speaking world the situation looks differently insofar as the place of natural law in the English and American discussions of the philosophy of law plays a not unimportant role. For example, one thinks here of Leo Strauss' *Natural Right and History* or of the works in which the New Natural Law Theory is developed and defended (compare on this footnote 7). Numerous further contributions with partly very different perspectives could be named, for instance the English translation of Jacques Maritain's reflections on natural law and human rights, cf. on this Zaborowski 2010.

³ Compare Ernst Bloch's understanding of natural law: "The concern of natural law was and is the upright as law such that it would be honored in persons and secured in their collective" (1999, 237f.).

1973; Herms 2007). In Catholic theology, questions of natural law are discussed intensely today, even though clear signs of an increasing aversion to the concept of natural law—though perhaps not absolutely to the “subject”—are recognized (cf. Schockenhoff 1996, particularly 11-51). This *context-limitedness of its survival* or of its *contemporary importance*, however, appears to contradict natural law’s *claim of validity and justification*; for this indeed implies not only that natural law may have universal validity, but also that it could be understood by all men, independent of particular religious, philosophical or ideological perspectives (cf. Spaemann 2007). One could now argue that natural law perhaps may require a certain situation in terms of the history of thought or ideas, a certain perspective or the context of a certain life praxis—namely a life praxis which is not necessary for knowledge of natural law in the strict sense, but still inherently facilitates knowledge of the law substantially—whereas other forms of life praxis prove to be more than debilitating. This, however, would mean to take a position which, in certain ways, deprives thinking about natural law of its radicality—not to mention the fact that within these contexts (or the theoretical-practical “contexts of life”) discussions of the validity and justification of natural law, as well as the exact understanding of what is actually meant by natural law, are anything but uncontroversial.

The crisis of thinking about natural law arose even much earlier than in the late 19th century, in fact precisely during the time in which it appeared to experience an efflorescence. For especially in connection to Kant’s critical philosophy, natural law was transformed into a pure *law of reason and freedom*. Kant himself had very seldom spoken of natural law and transformed it via transcendental philosophy; it depends “on pure *a priori* principles”, according to Kant in his critical turn against the enlightenment and rationalist understanding of natural law. This meant that empirical knowledge of nature (and the nature of man) could not be the foundation for natural law, but only a purely transcendental knowledge of its *a priori*, i.e., independent of experience, principles (cf. *Metaphysics of Morals* AB 45; on Kant’s theory of natural law, cf. Hoffmann 2001; on the thinking about natural law in the early Enlightenment, cf. especially Hochstrasser 2006; on the relation of Kant to the thinking about natural law in the early Enlightenment, cf. *ibid.*, 197ff.). For this reason, Kant stands in the tradition of interpretation of natural law as a law of reason (a tradition in which *mutatis mutandis* Thomas Aquinas and Locke, among others, stand, too), but interprets natural law in a way previously unknown—as a law of freedom; for according to Kant, from our freedom “all moral laws, hence all laws as well as duties follow” (*Metaphysics of Morals* AB 48).

This interpretation of natural law as an *a priori* law of reason and freedom is also found in the philosophy of German idealism, which followed from Kant’s critical philosophy: in Fichte’s *Groundwork for Natural Law* (cf. *GA* I 3, 291-260; I 4, 1-165; on this cf. Merle 2001), in Schelling’s *New Deduction of the Natural Law* (1795/96) or in Hegel’s *Concerning the Scientific Treatment of Natural Law, its Place in Practical Philosophy, and its Relation to the Positive Science of Law*, to the so called “Essay on Natural Law” (cf. *GW* IV, 417-485). The impact of this transformation of the role of natural law under the influence of Kant’s critical philosophy is manifest very clearly,

e.g., in Hegel's philosophy. In the *Philosophy of Right*—whose full title (*Elements of the Philosophy of Right. Natural Law and Political Science in Outline*) at least has still preserved the term 'natural law'—one sees to what extent Hegel stands in the tradition of the Kantian transformation of natural law, in whose center stands not only the concept of *nature*, but also the concepts *reason* (or *spirit*) and *freedom*:

The ground of law is, in general, the *spiritual*; and its precise point of origin is the will. The will is free, so that freedom constitutes its substance and purpose, while the system of law is the domain of freedom made actual, the world of spirit brought forth out of itself like a second nature (*GW XIV*, 31).

Natural law is therefore, for Hegel, ultimately the "philosophical law", which is to be distinguished from *positive law*, though it does not conflict with the latter or oppose it.⁴ For philosophy, according to Hegel, should not instruct on "how the world should be" (*ibid.*, 16), but merely state what is real, and that means it should embrace the rational (*cf. ibid.*, 14). Therefore the task of the philosophy of law is "to apprehend and represent the state as what is inherently rational" (*ibid.*, 15). Thinking about natural law can, therefore, no longer assume a *critical function*—perhaps in the sense of an exhortation to what *should* be—if both the real coincides with the rational and natural law is to be understood as a law of reason (or spirit).

It is only consistent if the concept "nature" loses its normative dimension, too. In the *Encyclopedia of Philosophical Sciences in Outline* (1830) Hegel—in critical confrontation with the tradition in which, among others, Locke and Kant⁵ stand—explicitly rejects every reference to nature in order to establish the equality of all men. "By nature", according to Hegel, "men are only unequal":

But that this equality should exist, that it should be *man* (and not as in Greece, Rome, etc., only *some* men) who is recognized and is considered by law as a person, is so little by *nature* that it is, on the contrary, the product and result of the consciousness of the deepest principle of spirit and of the universality and expansion of this consciousness (§539, *GW XX*, 510).

An *end* of a certain kind is thus manifest in the post-Kantian idealist tradition, one abiding in the central meaning of the concept of nature for the tradition of thinking about natural law—with partial retention of the concept "natural law". This only seems to be ironic if one does not realize that, albeit partially, we are dealing with a *transformation* of natural law in terms of the history of ideas, which essentially preserves important contents of classical thinking about natural law on the basis of a law of reason and freedom understood in the modern context.

⁴ Cf. *ibid.*, §3 (*GW XIV*, 25-26): "Natural law, or the philosophical law, is distinct from positive law. But to pervert their difference into an opposition and a contradiction would be a gross misunderstanding. The relation between them is much more like that between the Institutes and the Pandects."

⁵ Kant talks about a single "innate" law, "which, independent of all legal acts, befits everyone by nature". This law, which is owed "to every human, by virtue of his humanity" (i.e., human nature), is "freedom (autonomy from another's coercing caprice) provided that it can exist together with everyone else's freedom, according to a universal law" (*Metaphysics of Morals*, AB 45).

2. Inquiries into Thinking about the Natural Law

The fact that natural law in the 19th, 20th, and early 21st centuries, at least in certain contexts, finds itself in a *crisis of validity* may astonish only at first glance. Because a second glance shows very clearly that this crisis of validity is well accounted for as a *crisis of justification*: thinking about natural law is anything but uncontroversial. Not only the concept of *nature*, but also the concept of *law* itself are extremely ambiguous and complex concepts: their meaning is not easily determined provided that such a determination not only depends on the prevailing language game in which these concepts find concrete application, but also on the broader (philosophical) horizon within which the prevailing language game is played. The difficulties associated with both these concepts seem to increase if they are combined and if one speaks of “natural law”. So, among other things, the question arises whether a narrow or wider concept of natural law is assumed—in other words, whether one finds in natural law something like a code of concrete universal norms (for example, the so-called moral law) or purely meta-legal norms that help to analyze the legitimacy of positive legal statutes.

That “natural law” no longer plays the role that it once did in the areas of the philosophy of law, political philosophy, and moral philosophy, is thus also connected with the fact that—to a certain extent prior to questions of the “subject” of natural law—the *concept* of natural law itself has proven to be ambiguous and debatable and appears to be less suitable for reflection in moral philosophy. For such a debatable concept hardly seems to be able to generate the kind of *justification* that is necessary. Recourse to human freedom or the consensus of a community of discourse seems to be much more promising for the pressing questions of justification and also to correspond more readily with the demand for democratic legitimization, which has become ever more important in modernity, than the connection to a concept debated since the beginning of thinking about natural law in Greek philosophy.

But if the crisis of thinking about natural law has intensified as a result, then not only the concept, but even the “subject itself” of natural law has become questionable. Not only is the question posed of what could be meant by “natural law” in general, but also the question whether in general something could be designated by “natural law” meaningfully and whether “natural law” is not ultimately illusory. In doing so the following *inquiries* into thinking about natural law from the perspective of philosophy (or the philosophy of law) have been formulated:

(1) *The criticism that thinking about natural law is based on a fallacious inference from is to ought and therefore may claim no validity.* The current objection to classical thinking about natural law—most notably, that it presupposes what G.E. Moore later called a “naturalistic fallacy”—began with David Hume.⁶ Hume assumes that there is no transition from is to ought (cf. *A Treatise of Human Nature*, 455–470). Therefore, assertions about what *is* the case cannot lead to assertions about what *ought* to be the

⁶ Cf. on this J. Müller 2010.

case. A similar position is found in Immanuel Kant's philosophy.⁷ But that is precisely the point of importance for the traditions of natural law: that a reflection on nature—the cosmos or the world as a divine creation, generally speaking, or the human rational nature specifically—leads to normatively relevant assertions; that, therefore, “is” and “ought” cannot be divided from one another and strictly segregated into separate spheres of reality, but rather are relevant to one another to such an extent that a conclusion from is to ought is indeed possible and partly even necessary. On the basis of the modern understanding of nature, Hume's critique of the naturalistic fallacy became an essential factor for the crisis of thinking about natural law in modernity, even though there are attempts to establish natural law *using* David Hume (and Immanuel Kant)—attempts based not on a rejection of the prohibition against the “naturalistic fallacy”, but rather on an appropriation of Hume's basic position.⁸

(2) *The objection that contrary to its own claim of justification, thinking about natural law has achieved anything but consensus on central questions both of justification and application of natural law; and that there is not only a plurality, but even a conflict of different theories.* Critics of thinking about natural law point out that there is a pluralism of different “natural laws”: one must not only carefully distinguish between ancient, medieval, and modern natural law, but entirely different ways of understanding natural law are found even within the various periods of the history of philosophy. Thus, a Stoic conception of natural law stands alongside a (internally-conflicted) Platonic-Aristotelian one, a Thomistic conception alongside an Augustinian one, a post-critical (i.e., a post-Kantian modern conception of natural law) alongside a pre-critical one. And this is not to mention the question whether we are sometimes dealing with a form of thinking about natural law wherein one does not speak of nature or natural law explicitly (just as it seems we are no longer dealing with natural law in the traditional sense, even in cases where one speaks of natural law explicitly). This insight primarily is of an *intellectual-historical* nature. But it seems to have an impact on natural law's claim to validity. For, if there is such a pluralism of conceptions of natural law, then inevitably the question is raised whether natural law ultimately is not simply an expression of a specific historically contingent tradition or convention. With that said, the claim of natural law to embody a universal foundation of positive law and of moral philosophy independent of definite historical contexts would be put in question. Therefore, it is apparently an open question whether it is meaningful to speak any longer of natural law—or whether this concept is rather evidence of a definite, though no longer

⁷ Cf. concerning this, for example, I. Kant, Critique of Pure Reason, B575f./A547f. “No matter how many natural grounds or how many sensuous impulses may impel me to will, they can never give rise to the ought, but only to a willing which, while very far from being necessary, is always conditioned; and the ought pronounced by reason confronts such willing with a limit and an end—nay more, forbids or authorizes it.”

⁸ For example, one calls to mind the so-called New Natural Law Theory of G. Grisez, J. Finnis and J.M. Boyle. In Natural Law and Natural Rights Finnis explicitly grapples with David Hume's position and assumes that it is not necessary to infer an ought from an is (cf. 1980, 33f.). This certainly constitutes one of the most controversial aspects of Finnis' theory (cf. on this George 1999).

current, phase of the history of spirit—with the result that the claim to universality for a normative “ordering” prior to all positive laws either must be abandoned or established differently.

(3) *The question whether natural law might not merely be justified circularly and therefore could not be established in philosophically satisfying ways.* A much more important objection to natural law points out the uncontroversial thesis (at least from the perspective of the history of philosophy) that one can only speak of natural law on the condition of a certain understanding of nature and law. This means that whoever speaks of natural law would already assume certain (and themselves not uncontroversial) concepts of nature and law. This is particularly true of the *concept of nature*: In general, can natural law’s claim to validity be retained if it depends on a certain concept of nature and, hence, possibly on metaphysical assumptions that are not shared by all citizens in a liberal society?⁹ One can formulate a similar question with respect to natural law understood as a pure law of reason. Even if one could defend theoretically a circular justification of natural law, the question arises whether this simply occurs on the basis of metaphysical assumptions, which depend on certain, albeit not universal and not universally mediating assumptions.

(4) *The criticism of concrete manifestations of natural law.* The criticism of concrete manifestations of natural law often indicates the abuse, or what one can call an “overworking”, of natural law, pointing out, for instance, that the conception of natural law from a historical perspective was used to justify what was, from today’s perspective, a clearly unjust situation of positive law. Moreover a dimension that is resistant to progress seems to be immanent in natural law: it appears to stipulate not only the existing political status quo, but also that of science and technology, without this always appearing consistent or reasonable in hindsight. This is in certain ways the weakest question concerning thinking about natural law. For one could point out over against this inquiry (1) the fact that there is a politically progressive (e.g., Marxist) tradition of thinking about natural law existing alongside that of the conservative or restorative one, and that revolutions often require a justification by natural law—one need only think of the example of the French Revolution and the French “Declaration of the Rights of Man and the Citizen”¹⁰; but also (2) the fact—much more important in this context, since one can critically confront the revolutionary and Marxist tradition of natural law—that the misunderstanding or abuse of natural law in no way precludes a correct understanding of natural law.

(5) *The inquiries from other Academic disciplines such as Christian theology, whether it is still meaningful to speak of natural law.* Even from the perspective of Academic disciplines other than philosophy (of law) thinking about natural law has been criticized. For example, in the framework of theological discussions about natural

⁹ Habermas 1992 answers this question in the negative and tries another form of justification for positive law.

¹⁰ Revolutionary features of thinking about natural law are already manifest before the late-scholastic justification of the people’s rights; cf. concerning this Hollerbach 1973, 21.

law it will be pointed out that a problematic understanding of *nature* and *grace* (and their relation to one another) was used as a base, especially for the important Neo-Scholastic thinking about natural law in the 19th and 20th centuries. It may also be pointed out that natural law has been a certain *historically-contingent* manifestation of the “dialogue” of philosophical reason and biblical-Christian faith in place of which, now, another dialogue has stepped—hence the dialogue with the modern philosophy of the subject, the philosophy of intersubjectivity mediated through the philosophy of language, or postmodern deconstruction. Alternatively there are, in addition to these, attempts at rediscovery of natural law traditions and sources—such as the biblical theology of law or Augustine’s or Thomas Aquinas’s conceptions of natural law¹¹; these rediscoveries can avoid the problems of the often rationalistically constricted Neo-Scholastic conceptions of natural law, and natural law itself (as well as reason) is classified in the framework of a theological understanding of reality.

3. Critical Resistance and the Renaissance of Natural Law

Whoever is concerned with the history and contemporary state of thinking about natural law will discover a persistent resistance of natural law toward attempts to criticize it alongside clear indications of criticism of natural law (with often very good reasons). Despite its repeated dismissal, natural law appears to cling to life with a certain tenacity. Thus in the 1930s, Heinrich Rommen (1936) spoke of an “eternal return of natural law”. The historical context, as it has already been shown, is not unimportant: precisely at the time of a crisis or perversion of positive law (such as the period of, and after, National Socialism) the question urgently arises whether there is something like a law of nature that takes the liberty of ascertaining the injustice of a positive legal system. It is, then, no surprise that there was a renaissance of natural law in the years after National Socialism (cf. including Conig 1947; Manser 1947; Thieme 1947; Mittels 1948; Küchenhoff 1948; Stadtmüller 1948; Kipp 1950; Messner 1950; Schrey 1951; Welzel 1951; Wolf 1955; on the “return” of natural law critically cf. Beyer 1947). Even among today’s authors natural law does not appear to be “exhausted”. On the contrary, there is something like an enduring “necessity of natural law” due precisely to the importance possessed by human rights and the notion that all men have their own human dignity based on their human nature (on the “inexhaustible” character of natural law cf. for instance Brieskorn 2007, 114).

Furthermore, natural law, as has already been suggested, seems to be alive even where the discussion is not expressly about “natural law”. The transformation of natural law into a law of reason is not *eo ipso* equated with a dissolution of natural law, but can indeed be read as a reinterpretation of natural law in the context of other philosophical paradigms. It thus seems important from a historical view to emphasize that the history

¹¹ Cf. on Augustine’s understanding of natural law the still important study by Demmer 1961. On the difference between the classical/pre-Christian and the Augustinian understanding of natural law cf. also Giradet 1995. On Thomas cf. Bormann 1999.

of thinking about natural law in modernity involves moments of continuity and development, and not only the moment of a break.¹² The intellectual-historical process of a transformation of natural law—with all its problems—can be understood as the occurrence of an appropriation and consolidation. Just as Augustine and Thomas Aquinas appropriated important elements of the pre-Christian tradition of natural law, a similar reinterpretation of natural law occurred under the terms of the modern turn to the subject in Kant's philosophy and German idealism, or under the terms of the turns to language and intersubjectivity, observable in 20th century discourse ethics, as it has unfolded for instance with Karl-Otto Apel and Jürgen Habermas. However, the fact will remain unaffected that definite processes of transformation at least *in the long run* lead, or can lead, to an erosion of natural law, since assumptions, which are made implicitly at first, can fade into obscurity at a later point in time and, as a result, can lead to an abbreviated understanding of certain theories or elements of theories.¹³

These reflections point out an important element in thinking about natural law, namely its *historicity*. Thinking about natural law, like all thinking, stands in a close connection to historicity—and not only to the historicity of thinking on the philosophy of law or juristics, but also to the historicity of the human itself. Therefore, there is a historicity peculiar to natural law (often not considered adequately or disavowed) which, among other things, is traced back to the fact that natural law cannot be observed empirically or explained scientifically, but rather is depended on a “*hermeneutic*” *understanding of the natural*. This hermeneutic of the natural is contingent on a certain “vagueness” with the result that thinking about natural law both in its justification and in its application always requires the ever-new historic update in the context of a definite historical situation. In thinking about natural law one thinks at the same time of the ever-concrete political, societal, religious, and ideological situation, but also of the current level of knowledge in the social and natural sciences.¹⁴

At this point these reflections concerning the relation of natural law and history, as well as the relation of thinking about natural law to the social and natural sciences,

¹² Hollerbach 1973, 23 and 28, therefore points out that the law of reason found in Grotius, Pufendorf, Thomasius and Wolff has its roots in the high scholasticism of the medieval period. Many earlier works on the history of thinking on natural law since high scholasticism not only show this very clearly, but also that the later Neo-Scholastic thinking is dependent on Wolff. Schockenhoff 1996, 296, proceeds from a continuing presence of the “matter” of natural law where it does not speak expressly of natural law.

¹³ This applies, among other things, to the philosophies of Kant and German idealism: both Kant's philosophy, on the one hand, and Fichte's, Schelling's, and Hegel's philosophies, on the other hand, are in their arguments often dependent on tacit assumptions with the result that their arguments can no longer be understood adequately once these assumptions stand not only in the background, but are forgotten.

¹⁴ For example, one may not discount the contribution of modern biology—especially genetics and evolutionary biology—for the justification and the deeper understanding of the sameness of all humans. The necessity of a dialogue (decisive in its possibilities and limitations) between representatives of thinking about natural law and the social and natural sciences is increasingly evident. But, at the same time, one not only thinks of biology, but also of psychology or the political and social sciences.

cannot be continued. With this, we touch on the most highly complex (as well as controversially discussed) issues and must confine ourselves here to indicating the complexity, only being able to do justice to its rudiments in the scope of this essay. What still can and should be achieved in what remains, from a *systematic* philosophical view, is to develop arguments for the continuing significance of thinking about natural law. The aspiration does not lie in achieving a comprehensive justification natural law that may claim validity under the conditions of the early 21st century. On the contrary, it is concerned to reveal, on the first degree of reflection, *elements of a possible foundation for thinking about natural law* on which natural law can then be built—namely in a dialogue with the tradition of natural law thinking as well as with other traditions of understanding and the justification of positive law.

4. Fundamental Reflections on the Possibility, Significance, and Justification of Thinking about Natural Law

Even though there are several attempts to build on the tradition of thinking about natural law with (and not against) David Hume and Immanuel Kant, with every attempt at a new appropriation of thinking about natural law the question initially arises whether the thesis—that one can in no way conclude ought from is and must decide radically between the *domain of nature* and the *domain of freedom*—is plausible. For important rudiments in the tradition of thinking about natural law are dependent on a conclusion of that kind. An initial response to this question can be developed on the foundation of our everyday self-understanding and the understanding of reality. For this points out that there does not seem to be—as Hume and many other critics of the “naturalistic fallacy” following him have stated—an insurmountable rift between, on the one hand, what factually is the case and, on the other hand, what should be the case. Two examples may be named which illustrate this: namely, (1) the experience of the givenness of “beings in general” and their metaphysical interpretation and (2) the experience of the negativity of pain. In conjunction with both of these examples we will discuss further arguments that are of central importance for contemplation on the conditions and possibilities of thinking about natural law, namely, on the one hand, (3) a natural-philosophical argument and, on the other hand, (4) an argument from moral philosophy and the philosophy of law.

(1) *The experience of the givenness of “beings in general” and their metaphysical interpretation.* The “fact”—considered by Leibniz, Schelling, or Heidegger as the peculiar wonder of philosophy—that in general there is something rather than nothing, is not simply the assessment of a normatively neutral “datum”. One must not link this question to Leibniz’s thoughts about the “best of all possible worlds” in order to judge that it is better that in general there is something rather than “nothing”. We cannot react to the fact that in general there is something other than to affirm it, and that means: to call it good, unless we are ready to place our own existence radically in question. The wonder that in general there is something rather than nothing is, therefore, accompanied by the recognition that this should be the case. This is not only a purely theoretical consid-

eration, but also is accompanied by the practical experience of an obligation toward Being: “Being, as it testifies to itself,” according to Hans Jonas in his attempt to bridge the “nastily broad rift” between is and ought, between ontology and ethics “gives tidings not only of what it is, but also of what we owe to it” (Jonas 1992, 130). As humans, therefore, we do not stand in a relation of master and lord of being to nature, but rather in a relation of *obligation* and consequently, as Jonas supposes, of *responsibility*—and this concerns not only the relation that we have to one another as human, but also, as the ecological crisis shows, the increasingly endangered relation of human to non-human nature.¹⁵

If we should advocate a radical skepticism or a radical nihilism, then we will not be able to understand this kind of reasoning. But even these positions themselves point out that there is another possibility, which is deemed “better”, namely the unthinkable possibility that there is “nothing”, which then should be “the case”—and that there is something in general is then conversely something that should *not* be. Hume’s thesis would be correct only under the condition that there are not even the alternatives considered as purely mental possibilities by Leibniz, Schelling, and Heidegger, i.e., it would be correct only under the condition that “Being in general” admits no alternative, that is, under the condition of the alternative-less “facticity” of beings. This thesis, however, stands under the assumption of a definite metaphysical interpretation of “Being in general” that is anything but unbiased, namely an interpretation which precludes from the start the possibility (purely philosophically considered) of a world-transcendent creator. From this perspective the dispute over the naturalistic fallacy then is no dispute over the figures of justification in moral philosophy or the philosophy of law, but a dispute over a metaphysical or ontological basic assumption concerning the character of reality and the possibility of a concept of radical contingency, i.e., the possibility that on the contrary nothing could be.

If, however, we follow the metaphysical assumption that precludes a conclusion from is to ought, there is not only no longer the possibility of inferring an ought from what is, but it also collapses the possibility of an ought in general since this is no longer secured through a postulated theism (as happened with Kant). For in a world of mere positivity there is no ought, but only what is the case. The only ethics that could be developed on this foundation would be an ethics of *amor fati*—but even this only at the price of performative contradiction.

These considerations are only plausible on the basis of certain metaphysical assumptions. Those for whom these assumptions appear too speculative at first can find clues for them on a concrete plane in the fact that we do not proceed from an unbridgeable cleft between is and ought in our everyday self-understanding.

(2) *The experience of the negativity of pain.* Again and again we have the experience of something that is, but should not be, namely in the example of pain (cf. con-

¹⁵ That means that precisely in light of the ecological crisis thinking about natural law should experience a renewed significance.

cerning this Spaemann 1996, 55f.). Thus the absence of pain—which can be called “health”—appears to us as something that should be. Only if abstracted from lived experience and if this experience is considered secondary, if not illusionary, is an understanding of pain or health possible which has absolutely no normative dimensions. Pain is then a phenomenon described purely neuro-physiologically, and health describes simply a scientifically determined, statistical normal condition—for instance, blood levels that range within a certain scope. But even here the question arises whether this view of things is in fact as unprejudiced as it at first appears; for it indeed stands under certain metaphysical assumptions which concern the relation of our pre-scientific self-understanding to the scientific understanding of ourselves.

(3) *A natural-philosophical argument.* Even from a natural-philosophical view inquiries arise about the critique of thinking about natural law. As meditation on what nature actually means shows, one need not share the thesis that there is no transition from is to ought. For one need not share the basic assumption of this view—namely the construction of an insurmountable dualism of *nature* and *freedom* on the basis of a non-teleological understanding of nature. One can, rather, start from the fact that a teleological understanding of nature, by which we always already understand not only nature but also ourselves, is essentially more legitimate than a non-teleological understanding that makes possible the mathematicization of nature and thereby the scientific-technical mastery over nature. The latter view pays the price of an abstract concept of nature in consequence of which it appears that we can no longer understand even ourselves. If, however, nature is understood teleologically, then the relation of nature to human freedom is understood differently than in the tradition of the modern non-teleological concept of nature. Nature is, then, not opposed dualistically as the “other” of freedom, but rather the assumption of every performance of freedom. For human freedom is never without nature, but always a way of “self-conduct” toward nature, which must be thought of as the condition of the possibility of performances of freedom. It is precisely this insight on which the thinking about natural law viewed historically has been built and, further, can be built.

(4) *An argument from moral philosophy and the philosophy of law.* But not only these metaphysical, phenomenological, or natural-philosophical considerations point to the possibility of rejecting the radical separation of is and ought, and retaining at least the important elements of the tradition of thinking about natural law. Even the discourse of moral philosophy, and the philosophy of law more specifically, points to this possibility. We must confine ourselves also here to a few brief remarks. If one assumes that there are universal ethical norms, the question is immediately raised how they can be understood and justified. One could interpret these norms as being the result of a certain tradition of law or (closely associated with it) as being the outcome of a certain discourse in moral philosophy. Justified purely theoretically, however, a universal claim to validity is not warranted in such a way: for one must have posited as absolute either a certain historically-contingent tradition or the result of a certain (but likewise historically-contingent) discourse, but this would be evident even for the one who stands outside the tradition or the respective discourse at issue. Precisely in view of this

question of justification, thinking about natural law in modernity—as natural law, narrowly considered, or as a law of reason—has indeed been able to develop its sustained reality up to today. For, *independent of certain traditions* mediated through a reflection on nature (or the rational nature of the human), it takes the liberty of justifying a universal claim and thereby, among other things, satisfying even modern thinking on human rights. For declarations of human rights are always declarations that concern all men and not only those who live in a certain culture or historical and social situation.

The importance of thinking on natural law is clear precisely where the concrete law does not agree with what is just “by nature”. We can say “That is not fair!” even in connection to concrete laws or works of law. The *idea of justice* is not simply only a result, but always an assumption and a standard of concrete positive law and concrete legislation so that it is possible in certain cases to speak meaningfully of unjust laws—namely where this ineluctable assumption of the practice of law is not born in mind. To suppose, like Jürgen Habermas, that legitimacy is generated from legality misconstrues the fact that even the “autonomous grounding of constitutional principles that claims to be rationally acceptable to all citizens” (2005, 109) does not generate justice discursively. For justice is always already implicitly assumed and explicitly discovered in the framework of procedural processes. Otherwise there would be no possibility of a comparison of diverse systems of law with one another; even the concept of legitimacy is put in question thereby and ultimately reduced to legality. For if there is no pre-positive “natural” standard of law, then a comparison of various systems of law is either impossible or only possible if the standard preserved in thinking about natural law is replaced by an equivalent one—thus by the approval of the citizens or by the accordance of a certain system of law with a certain positive divine law. However, such a standard cannot necessarily stipulate what is expressed in the idea of justice. The majority of citizens can resolve or endorse thoroughly unjust laws consensually. In a similar way the accordance of a certain system of law with the understanding of law of a certain positive religion (as in Christianity or Islam) cannot be the evaluative criterion for the justice of a concrete system of law as long as one adheres to the modern insight into the significance of an autonomous establishment of law—and not an establishment of law dependent on a certain religion.

Precisely when one adheres to the thought of the autonomy of law and maintains that the insights of the modern liberal tradition of law should not be abandoned, one will remain dependent on forms of thinking about natural law. Theological or religious motives may have played an important role for the establishment of law in certain historical connections—for instance, the reference to the fact that the equality of all men lies in the intention of the divine will of creation. John Locke (like the American “Declaration of Independence” that followed him) can still consider this as an element of the establishment of the natural law because at least he could still assume a fundamental accordance of the subjects of law on the belief in creation. In today’s context of a globalized late modernity which distinguishes itself not only through the plurality of various religions, but also through the privatization of religion and a propagated atheism or agnosticism in certain parts of the world, one will have to forego as far as possi-

ble religious-theological elements in the justification of natural law. However, this is not to say that the consideration of this element could not admit a deeper understanding of the “law of nature” or that it is necessary to translate this element into the language of a universally accepted discourse—like a philosophical theology in a rigorous sense. The latter is a task at which the history of thinking about natural law (from a historical view) has proven to be fruitful.

However, one will not be able to forego certain metaphysical assumptions about what is denoted by “nature” and “law” as well as (closely associated with these) about the nature, reason, and freedom of the human being more specifically. Human reason and freedom continue to point to nature. As humans, we cannot dispense with this “assumption” of freedom without bargaining against ourselves. And precisely because we, when it concerns ourselves, *cannot* think of *freedom without nature* and *nature without freedom* and never live in isolation, but always in community, it is understandable why there is (1) a metaphysical natural-philosophical, (2) a freedom- and reason-focused, and (3) a discursive approach to the question concerning the establishment of what was called “natural law” in the tradition of thinking about natural law. Although their complex relation cannot be discussed any further here, these various approaches to what is indicated by the concept “natural law” can be crowned with success wherever they avoid the danger of a naturalistic contraction of the concept of nature as well as a subjectivist contraction of the concepts of reason or freedom (as they conversely inevitably fail if they lose sight of the complementary relation of nature and freedom). In doing so, an appropriation of natural law probably continues to depend on the concept of nature, but not necessarily on the concept of natural law—there are, as we have already seen, various ways of reformulating natural law.¹⁶ For the “subject” of natural law is of central importance—if nothing else, it is of importance in view of the political and social questions, which are posed at the beginning of the 21st century in many sciences in addition to philosophy, and which especially concern the universal dignity of man and universal human rights.

5. Literature

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¹⁶ In this connection, one thinks of the philosophy of H. Jonas, who can be read as a reformulation of certain motives of thinking about natural law, without Jonas himself drawing on the concept of natural law. Cf. on this Nusser 2010.

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