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Natural Law Theory and its Benefits: Arguments for Adopting New Classical Natural Law Theory Based on a Priority of Persons

The author presents the system of law in light of contemporary theories of natural law shaped by Aquinas, Finnis, and Hervada's thought on natural law. The natural law perspective adopted in the text assumes that the source of both the normativity of law and the subsequent legitimacy of the processes of lawmaking and law application is man understood as a person (personalism), whereby his/her personal character is recognized and not arbitrarily conferred, moreover, it is linked to the time of actual, biological life. The person is thus the source of the normativity of law both because of the individual aspect of the person and because of the general nature of human nature (above all the freedom and rationality of that nature). Recognition of the human as a person implies the need to refer to his or her inherent dignity. The perspective of natural law as a framework for conducting legal research implies that the articulation of axiological assumptions should precede any reflection on criminal, constitutional, civil, and labor law.

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1 Introduction

The two main legal theories are natural law theory and legal positivism. Historically, both theories level charges against each other. According to the theory of natural law, when there is a conflict between natural law and human law, natural law must take precedence. In this sense, natural law dictates that all human-made laws must be in accordance with fundamental principles of natural law, such as Aquinas' notions of doing good, avoiding evil, and promoting the common good. The natural law proponent believes that all law must be morally justified if it is to be legitimately called „law" at all. This is why, historically, legal positivism and natural law theory were rival views about what law is and its relation to justice and morality. What is less well known is that historically both the natural law defenders and the proponents of legal positivism have disagreed as much among themselves as with their opponents. Defenders of natural law have major disagreements about which version of natural law is preferable. Defenders of legal positivism also have major differences with each other. But what is more important, in recent years we can observe their progressive convergence. Natural law theory is moving toward positivism, and legal positivism is becoming more like natural law theory.

Historically, most theories of law have been based on the assumption that a theory of law must refer to its normativity, having a basis in ethics and politics. This assumption stems from the various descriptions of law provided by classical authors such as Plato, Aristotle, Augustine, and Aquinas. These authors begin with a description of practical rationality based on the ultimate goals of human action and then explore the role of the community in promoting human well-being through its commitment to those goals. The law is then understood in terms of its role in enabling community members to lead satisfying lives. This approach to legal theory is now increasingly rare and is sometimes supplanted by positivist conceptions of law that focus on its social origins. However, it persists in the notion of thought known as natural law theory. Natural law theories are united by the methodological claim that a proper theory of law must study not only its social sources but also its function as a rational guide to action. The natural law perspective can thus, as Jonathan Crowe notes, be defined as the view that (1) there are certain forms of life that are intrinsically good for human beings by their nature, and (2) these forms of life play

a fundamental role in explaining the nature and purpose of social, political and legal institutions[1].

Modern legal theory and philosophy focus on the assertion that law is a socially recognized standard of conduct. Legal positivism, the dominant tradition in modern thought on law, seeks to understand the nature of law primarily by analyzing the forms of social recognition of law and its relationship to legal normativity. The publication of H.L.A. Hart's *Concept of Law* (1961) became the starting point for both analytical and linguistic as well as ethical reflections on the theory of law, while the book itself and its author set the directions of the research undertaken for decades to come, especially since his students and colleagues at Oxford included Ronald Dworkin, Neil MacCormick, John Finnis, and Joseph Raz, who themselves contributed to the development of modern philosophy of law by making significant contributions to it. Thanks to the World Congress of Social and Legal Philosophy, the Anglo-Saxon world came into contact with leading lawyers from continental Europe, including Ota Weinberger (Graz) with Robert Alexy (Kiel), Aulis Aarnio (Helsinki) and Alexander Pechenik (Lund) or Chaim Perelman (Brussels) – a pioneer of the „New Rhetoric" and forerunner of modern argumentation theory. This led – according to the theory of convergence developed in the 1960s – to a gradual similarity (disappearance of differences) in the way philosophy of law is practiced in both common law and civil law cultures.

However, in a modern legal discourse dominated by legal positivism and its more or less sophisticated variants[2], the natural law perspective is most often used only when positive law fails and is unable to face what is truly unjust[3]. Hence, there are various attempts in the philosophy of

1 Jonathan Crowe, *Natural Law and the Nature of Law* (Cambridge: Cambridge University Press, 2019), 2.

2 On the ground of the philosophy of law, it is not possible today to speak of a single positivism, but of many types of positivism (refined, inclusive, exclusive). Nevertheless, according to Bartosz Brozek and Jerzy Stelmach: 'Every contemporary positivist will subscribe to at least three theses: 1) the so-called *social sources thesis* (...); 2) the so-called *conventionality thesis*; and 3) the so-called *separability thesis*.' Cf. Jerzy Stelmach, Bartosz Brożek, *Methods of Legal Reasoning* (New York: Springer, 2006), 214.

3 The need to take into account natural law – if only Thomistic *determinatio* – has been noted by contemporary authors in the field of legal post-positivism, such as Neil MacCormick. However, the concepts they present often lack consistency. Cf. Michał Sopiński, „Ewolucja teorii rozumowania prawniczego Neila MacCormicka" *Archiwum Filozofii Prawa i Filozofii Społecznej*, No. 1 (2019): 3–78.

law to „match" axiology with law while retaining (even weakly) the thesis of the separation of law and morality, which is the foundation of legal positivism[4]. These attempts have resulted, for example, in the notion of „statutory lawlessness", that is the so-called Radbruch formula, the minimum content of the law of nature, which defines a certain minimum of morality in law in H.L.A. Hart's view, or the emphasis on the need for special treatment of so-called *hard cases,* consisting of taking into account not so much the letter of the law but its spirit.

Therefore, in this essay, I separate myself from the issue of *hard cases*[5], drawing attention to their causal, accessory, and incidental nature in relation to the proper practice of law[6]. In my opinion, the natural law perspective, taken as a theoretical construction, is not so much a potential collection of solutions and right answers in difficult cases that the lawyer-practitioner can refer to, but is an important resource to be exploited at every stage of law-making and law application if one wants to ensure its rationality. In my opinion, natural law (*ius*) is not – as Jerzy Zajadło would like it to be – a surplus, but the basis of law, although it would be more precise to indicate here that natural law is nothing more than the

4 An example of such attempts is the reasoning – in my opinion erroneous – of Jerzy Zajadło, „Law in the sense of written law (*lex*) is very often not perfect and we are confronted with the necessity to find some "surplus" (*ius*) enabling us to make a rational and right decision" – Jerzy Zajadło, *Po co prawnikom filozofia prawa?* (Warszawa: Lexis Nexis, 2008), 21.

5 In Hart's positivism, difficult cases are connected with the problem of going beyond the system of law thanks to the so-called open concepts, when the judge is left only with the limitation of his own discretionary legislative power by defined by H.L.A. Hart „the obvious meaning of the rule, regardless of the extent of its openness". Maciej Dybowski, Marcin Romanowski, „Trudne przypadki w antropoarchicznej koncepcji prawa", [w:] Maciej Dybowski, Marcin Romanowski, *O trudnych przypadkach w filozofii prawa. Studia z antropologii prawa* (Warszawa: Wydawnictwo Uniwersytetu Kardynała Stefana Wyszyńskiego, 2015), 12. Cf. Herbert Hart, *The Concept of Law*, London 1961; Michał Sopiński, „Od pozytywizmu do postpozytywizmu: poglądy teoretycznoprawne Neila MacCormicka na tle współczesnej teorii i filozofii prawa" *Zeszyty Naukowe Towarzystwa Doktorantów Uniwersytetu Jagiellońskiego, Nauki Społeczne*, No. 2 (2018): 23–45. DOI: 10.26361/ZNTDSP.09.2018.21.02. https://ruj.uj.edu.pl/xmlui/bitstream/handle/item/57627/sopinski_od_pozytywizmu_do_postpozytywizmu_poglady_teoretycznoprawne_2018.pdf.

6 The historical understanding of hard cases defined them as cases in which the applicable law was wrongly interpreted by the judge in favour of those affected. Thus, hard cases led to wrong decisions (*hard cases make bad law*). A later meaning ascribed to the concept of *hard cases, e.g.*, in relation to Ronald Dworkin's conception, was that it denotes a *case providing occasions to make good law*.

principle of practical reason, an order to act rationally expressed in the sentence, 'One should do good and strive for it, and avoid evil.'[7] It means that the written law (*lex*) enables the authorities applying it to make the right decisions when it is rational, i.e., natural law[8].

2 Legal positivism and its fictions, or what fairy tales teach us

The fact that the system of law built on the basis of Hans Kelsen's normativism, in the form of a closed, logical set of legal norms separated from moral norms, is purely a fiction, a complete invention, can best be seen by returning to the fairy tale *The Emperor's New Clothes* by Hans-Christian Andersen, in which the most important court officials were afraid to draw attention to the obvious fact that the ruler full of pride and arrogance had been cheated by the weavers and was not wearing clothes. When asked by the weavers how he liked the king's clothes, the old, good-hearted minister replied: 'Oh, it is lovely, very lovely! (...) What a design and what colors! Yes, I will tell the emperor that I like the fabric very much'[9]. He was echoed in this admiration by other noble officials, fearing that a genuine opinion would cause them to fall into the Emperor's disfavour: „*Magnifique*, charming, *excellent*! – repeated one after another, and everyone was extremely pleased"[10]. Happy with this flattery, the emperor therefore decided to put on his new robes and take part in the majestic procession, walking under

7 „Thus, the first commandment of the law is this: Good is to be done and pursued, and evil is to be avoided. All the other precepts of the natural law are based on this: namely, that all those other precepts of doing and avoiding which practical reason naturally recognises as good for man belong to the precepts of the natural law". St. Thomas Aquinas, *Theological Summa*, part 1–2, q. 94, article 2.

8 This can be seen in John Finnis' concept of *natural as reasonable*: „It is natural for human beings to be reasonable and to behave reasonably: they have this capacity by their nature in contrast to the nature of a giraffe or a mouse". Cf. Michał Sopiński, „Rozumowanie prawnicze jako rozumowanie praktyczne w świetle nowej teorii prawa naturalnego Johna M. Finnisa" *Archiwum Filozofii Prawa i Filozofii Społecznej*, No. 1 (2020): 84–98. https://doi.org/10.36280/AFPiFS.2020.1.84.

9 Hans Christian Andersen, *The Emperor's New Clothes: an All-Star Retelling of the Classic Fairy Tale* (New York: Starbright Foundation, 1998), 147.

10 Ibidem.

a magnificent canopy. It was only when a small child called out: „Look, he is naked after all!", the subjects, who had praised the emperor's attire earlier, exclaimed in a chorus: „He is naked!"[11].

Why do I refer to Andersen's well-known tale? Well, in my opinion, this proud emperor is the modern positivist system of law, which, in its programmatic pursuit of axiological neutrality, has voluntarily deprived itself of content and became naked. However, this fact is masked by the lawyers themselves – these noble officials – by arguing that positive law is purely conventional and that law and morality have nothing to do with each other. The natural law perspective, on the other hand, is the equivalent of the voice of a child demanding the truth and asking what is behind the law, if these are not the values. Unfortunately, this voice is nowadays very quiet and difficult to grasp in academic discussions, as neither legislators, judges, nor lawyers of various professions, accustomed to living in a comfortable positivist fiction, want to hear it: „The emperor became confused, because it seemed to him that his subordinates were right, but he thought to himself: »I must bear it until the end of the procession«. And he straightened up even more proudly, and the courtiers followed him, carrying a train that was not there at all"[12].

3 Legal positivism and the pandemic – or, the reality says „check"

The correctness of Heinrich Rommen's thesis of an eternal return to natural law is expressed in the fact that natural law makes it possible to link law and morality in a coherent and logically ordered manner, which is becoming a practical necessity today and which cannot be done on the basis of legal positivism. This peculiar inadequacy of the contemporary variants of legal positivism – based on the thesis of separation in a more or less radical form – has at the same time its actual source in the programmatic departure of the positivists from the understanding of law as the art of

11 Ibidem.
12 Ibidem.

what is good and right[13]. Indeed, this departure has accompanied legal theory from legal positivism and its soft, inclusive, sophisticated versions right up to the contemporary trend that should be referred to as post-positivism. The longer we live in positivist fiction, the harder reality cracks. This is well illustrated by the recent pandemic which not only affected global geopolitics but also forced a paradigm shift in contemporary law. Indeed, it has made it clear to everyone – lawyers and citizens alike – that the most serious institutional threat facing value-free positive law is its total instrumentalization in the spirit of post-Schmitt political decision-making by rulers, which can be motivated as much by current political gains as by social engineering[14].

The outbreak of the pandemic resulted in various measures taken on a global scale to counter the spread of the disease, including travel restrictions, border closures or restrictions on border traffic and restrictions on people traveling to other countries, stopped or restricted air traffic, quarantines, and curfews and the postponement or cancelation of several sporting, religious, and cultural events. Furthermore, schools and universities were closed, as were many businesses providing all kinds of services. At the same time, the hitherto positivist paradigm assuming that the legitimacy of the application of particular special measures by nation states to prevent and counteract the spread of disease (consisting, inter alia, of profound interference with human rights and freedoms) does not have to be based on the need to ensure social order in the form of the eradication of epidemics, but can be determined solely by the fact that these measures remain within the limits arising from positive law (including those set

13 This move away from conceiving of law as the art of what is good and right stems from the utilitarian adoption in the 19th century by Jeremy Bentham, and later by his disciple John Austin, of the thesis of the separation of law and morality: „The existence of law is one thing; its merit or demerit is another". Cf. John Austin, *The Province of Jurisprudence Determined* (London: Weidenfeld & Nicolson, 1954), 184.

14 The dangerous links between Carl Schmitt's decisionism and Hans Kelsen's normativism have been described, for example, by Krzysztof Kaleta and Krzysztof Koźmiński, cf. Krzysztof Kaleta, Krzysztof Koźmiński, „Charakter władzy suwerennej w koncepcjach ładu konstytucyjnego Hansa Kelsena i Carla Schmitta" *Filozofia Publiczna i Edukacja Demokratyczna*, No. 2 (2013): 154–168. DOI: 10.14746/fped.2013.2.2.20, https://pressto.amu.edu.pl/index.php/fped/article/view/12938/12708. Giorgio Agamben writes more extensively on the dangers faced by value-free positive law during the pandemic in *Where Are We Now? The Epidemic as Politics*. Cf. Giorgio Agamben, *Where Are We Now? The Epidemic as Politics* (London: Rowman & Littlefield Publishers, 2021).

out in legal acts regulating the rights and freedoms of an individual), has proven to be completely irrational from the point of view of the inherent purpose of law, which is justice and the protection of human life.

During the pandemic, the positivist vision of law devoid of axiology and separated from morality did not respond to the needs and challenges faced by nation states. With its application, state institutions, when introducing restrictions into the sphere of human rights and freedoms during the global pandemic, would not be able to effectively confront the problems because, without recourse to axiology, they could not rationally justify the necessity of their introduction. The possibility of state interference with man's most precious goods required a justification that was as durable and deeply convincing as possible from an axiological point of view, in other words, immune to the current and labile fluctuations in perceptions, often superficial and hence populist, of the social assessment of state action. An equally important factor justifying the search for moral references in an emergency situation such as an epidemic state is the consideration of the desirable capacity of natural law to intentionally and effectively affect the addressees of its norms and therefore a capacity determined by an appropriate internalization of the norms in question – the internalization undoubtedly more likely in the application of *leges sine moribus vanae,* i.e., a principle expressing the fragility of law without moral values, i.e., displaying a close connection with components of axiological origin.

It has thus become apparent that in an emergency situation such as a threat to human health and life, perceiving the legal system solely in terms of legal positivism or its individual variants does not make sense, as it is then not the human being understood as a human being who is protected, but only the formal system of protection of his or her rights. Thus, since the positivist legal world based on the utilitarian-liberal model of the rule of law did not pass the test in an emergency situation, a sharp turn (as yet unnamed) to evaluation in law (including values derived from morality) could be observed worldwide, consisting in perceiving man as a person (and human life as a value to be protected above all, even at the expense of an economic crisis) and society in terms of a community based on bonds of solidarity. Indeed, the natural law approach allows all elements of the legal system, in particular legal regulations, to be judged according to the criterion of conformity with the personal objectives of persons and communities pursuing the common welfare, defined on the basis of complementarity rather than collision with the welfare of their members. However, the challenge remains to use this momentary turn to change the entire paradigm of thinking about law.

4 Priority of persons: the human being asthe source of the normativity of law

In the context of the ethical foundations of law, it is worth considering, first, the achievements of an Australian professor teaching at Oxford, John Finnis, who is a representative of the „new natural law theory". In the Anglo-Saxon tradition, the new theory of natural law has been developed for several decades and has been a very significant contribution to the most recent considerations of the study of the question of practical reason. The reading of the texts of St. Thomas Aquinas proposed by the representatives of the new theory of natural law should be regarded not so much as a reconstruction of Aquinas's thinking carried out in a Thomistic spirit, but as an attempt to formulate a completely contemporary theory of law on its basis. Therefore, it will be correct to say that the coauthors of this theory of natural law are both St. Thomas, G. Grisez, J. Finnis, and their continuators. At present, the Australian philosopher J. Finnis is regarded as the most famous representative of this current, which is due to the fact that, as an Oxford-born disciple of H.L.A. Hart, the father of sophisticated legal positivism, he presented a complete theory of natural law that combined the Thomistic tradition with the tradition of British analytical jurisprudence[15]. A full overview of John Finnis's thought was included by him in his work *Natural Law and Natural Rights*, which is the most important book in his oeuvre[16]. As originally intended and in principle, the „new natural law theory" is a continuation and development of St. Thomas Aquinas's concept of natural law[17]. Thus, the main representatives of the new theory of natural law

15 Michał Sopiński, „Rozumowanie prawnicze jako rozumowanie praktyczne w świetle nowej teorii prawa naturalnego Johna M. Finnisa" *Archiwum Filozofii Prawa i Filozofii Społecznej*, No. 1 (2020): 85.

16 In turn, John Finnis' important works include John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford Univeristy Press, 1980); idem, *Fundamentals of Ethics* (Oxford: Oxford Univeristy Press, 1983); idem, *Moral Absolutes: Tradition, Revision and Truth* (Washington: Catholic University of America Press, 1991); idem, *Aquinas: Moral, Political, and Legal Theory* (Oxford: Oxford Univeristy Press, 1998); Germain Grisez, Joseph Boyle, *„Practical Principles, Moral Truth and Ultimate Ends" American Journal of Jurisprudence*, Vol. xxxii (1987); Germain Grisez, Joseph Boyle, John Finnis, *Nuclear Deterrence. Morality and Realism* (Oxford: Oxford University Press, 1987).

17 The foundations of the new natural law theory dates back to 1965, when Germain Grisez published a text entitled *The First Principle of Practical Reason:*

include: Germain Grisez, John Finnis, Joseph M. Boyle, Robert P. George, and Gerard V. Bradley[18]. On the other hand, among the most influential representatives of natural law in modern legal thought, especially in the Spanish-speaking world, is Javier Hervada[19]. The Spanish professor, within the framework of his philosophical and legal search, which he calls, according to the legal-naturalist tradition, „classical legal realism", has set himself the goal of creating a dynamic and adapted to modern times theory of natural law, which is an element of any legal system, providing both the science of law and lawyers themselves not only an objective parameter of law evaluations, but also the practical tools necessary to discern, in each specific case, the right of each person. These two approaches to natural law, by John Finnis and Javier Hervada, have much in common. They are united by the person of St. Thomas Aquinas and the primacy of persons, that is, the recognition of the person as the basis of law.

A Commentary on the Summa Theologiae 1–2, q. 94, a. 2 in the journal „Natural Law Forum" (later transformed into the American Journal of Jurisprudence) published at the University of Notre Dame in the United States. Germain Grisez, „The First Principle of Practical Reason: A Commmentary on the Summa Theologiae, 1–2, q. 94 a. 2" *Natural Law Forum*, No. 10 (1965).

18 Cf. Joseph Boyle, „Free Choice, Incomparably Valuable Options, and Incommensurable Categories of Good" *The American Journal of Jurisprudence*, vol. 47 (2002); Joseph Boyle, Germain Grisez, John Finnis, „Incoherence and Consequentialism (or Proportionalism) – A Rejoinder" *The American Catholic Philosophical Quarterly*, No. 2 (1990): Gerard V. Bradley, Robert P. George, „The New Natural Law Theory: A Reply to Jean Porter" *The American Journal of Jurisprudence*, Vol. 39 (1994); John Finnis, Joseph Boyle, Germain Grisez, *Nuclear Deterrence, Morality and Realism* (Oxford: Oxford Univeristy Press, 1987). Robert P. George, *Making Men Moral. Civil Liberties and Public Morality* (Oxford: Oxford Univeristy Press, 2002); Robert P. George, „Natural Law" *American Journal of Jurisprudence*, Vol. 52 (2007); Robert P. George, „Natural Law" *Harvard Journal of Law and Public Policy*, No. 1 (2008). Robert P. George, *Conscience and Its Enemies* (Wilmington: ISI Books, 2013). Robert P. George, „Natural Law and Positive Law", [w:] *The Autonomy of Law. Essays on Legal Poitivisms*, ed. Robert P. George (Oxford: Oxford Univeristy Press, 2005).

19 Javier Hervada's major publications in Spanish include such works as *Introducción crítica al Derecho Natural*, 10ª edición (Pamplona: Universidad de Navarra, 2007); idem, *Lecciones propedéuticas de Filosofía del Derecho*, 4ª ed. (Pamplona: Universidad de Navarra, 2007); idem, *Cuatro lecciones de Derecho Natural*, 4ª ed. (Pamplona: Universidad de Navarra, 1998); idem, *¿Qué es el derecho? La moderna respuesta del realismo jurídico* (Pamplona: Universidad de Navarra, 2002); idem, *Historia de la Ciencia del Derecho Natural* (Pamplona: Universidad de Navarra, 1987); idem, *Escritos de Derecho Natural* (Pamplona: Universidad de Navarra, 1986; idem, *Diálogos sobre el amor y el matrimonio* (Pamplona: Universidad de Navarra, 1974).

From the point of view of natural law theories, it is the human being, understood as a person, who is the source of the normativity of law. In other words, it is the person who is the material source of law. According to John Finnis, Roman legal thought was superior to modern theories of law because of its explicit emphasis on the fact that persons are part of the law[20]. At the same time, as the Australian professor notes according to French philosopher Michel Villey, the ancient Romans had no concept of human rights. Written by John Finnis, the famous essay *The Priority of Persons* showed that Hans Kelsen's normativism as a theory of law has no place at all for the human being understood as a person. Also according to Rafael Domingo – the author of *The New Global Law* – the concept of person should be recovered for the science of law, for Anglo-Saxon analytical jurisprudence has taken away the due importance of this concept. This happened because Jeremy Bentham, the father of modern international law, greatly influenced the protoplast of Anglo-American legal positivism – John Austin in his utilitarian approach to law, and this positivism later influenced Hans Kelsen.

According to Hans Kelsen's normativism, the natural person should not be considered in its entirety, that is, as a biological and physical unity with all its functions, but rather insofar as human behavior is regulated by a set of constitutive norms of rights and duties. Thus, the person is not actually a natural reality, but a legal construct created by the science of law. In this vein, Hans Kelsen states that the so-called natural person is a legal person, as is the state. On the other hand, according to Hans Kelsen's concept, contrary to the basic assumptions of Hans Kelsen's *Eine Reine Rechtslehre*, the science of law can never lose sight of the fact that it was created by human persons and for human persons, so person as a concept precedes the science of law and legal discourse itself.

Conceiving of man as a subject in the universal human rights paradigm means describing him by reference to his personal dignity. Dignity is the source of human rights in this paradigm and is characterized as innate and inalienable, universal, radically equal, and inviolable. The person is the basis of law, and legal norms are created by the human community and have their purpose in effectively coordinating its functioning and building the common good, which consists of the well-being of individual members of the community. Personal dignity is understood as the source and basis

20 John M. Finnis, „The Priority of Persons Revisited" *American Journal of Jurisprudence*, No. 58 (2013): 45.

of law, according to the principle of ex persona ius oritur. This means that all elements of the legal system, especially legal regulations, are evaluated according to the criterion of compatibility with the personal goals of persons and communities pursuing the common good, defined on the basis of complementarity and not collision with the good of their members. In this sense, all laws have their material source in the human person.

5 The natural law perspective as a set of assertions that determine a common place

In operationalizing the natural law perspective, several claims can be made that reflect the core anthropological and methodological assumptions, based on the findings of contemporary authors from the natural law community.

Despite the peculiar heterogeneity of contemporary concepts of natural law (*common law* culture vs. *civil law* culture) and their internal diversity, I believe that it is possible to identify their lowest common denominator assumptions as the so-called *commonplaces* (Gr. *topoi*). Such an approach to natural law presupposes thinking of it not in terms of axioms, as is necessary if one takes Hans Kelsen's normativism or so-called hard legal positivism as a starting point, but in the form of the lowest common denominator, a common point, and a *topos*. However, the aim is to show that the specified commonplaces can form a synthesis in the form of the basic assumptions of the natural law perspective in the studies on law (see: N. MacCormick, Ch. Perelman)[21].

I understand commonplaces (Latin: *loci communes*) – a concept used by Aristotle and developed by Chaim Perelman – as a set of natural law input statements. They do not constitute a ready-made, internally coherent and systematized theory of natural law since such a theory could only be accepted in its entirety or rejected in its entirety, but they are persuasive in nature, presenting certain points of view, certain values, which are worth taking into account when conducting the study of law and which lead to the

21 See, among others, Chaïm Perelman, *L'Empire rhétorique; rhétorique et argumentation* (Paris: Librairie Philosophique J. Vrin, 1977); Neil MacCormick, *Rhetoric and the Rule of Law* (Oxford: Oxford University Press, 2005).

justification or formulation of a legal rule in the system of law. As Chaim Perelman correctly observes, that „*Loci communes* stand in such a relation to non-specialized reflection as the *loci specifici* of law, while statements of the most general nature (...) provide the starting principles for non-specialized reflection"[22]. Explicating this sentence for the purposes of the present essay, I believe that a set of natural law starting claims provides the theoretical ground for reflection conducted at the level of criminal law, civil law, constitutional law, and so on. I therefore agree with Chaim Perelman that commonplaces reveal a role analogous to axioms in the formal system, whereas what distinguishes them from axioms is that the approval given to them is not based solely on their obviousness, but on the possibility of justifying them differently in the philosophical sphere. According to the principle of the lowest common denominator, these commonplaces of natural law reflection – the *loci communes of* natural law – include, in my view, certain rudimentary claims that are present both within the *common law* culture, e.g., in the *new natural law theory,* as well as in the civil law culture, e.g., in Javier Hervada's theory of natural law[23]; they are present, for example, in the anthropoarchic concept of law formulated on the basis of Rafael Domingo's vision of global law[24]. According to the latter

22 Chaïm Perelman, *Logika prawnicza. Nowa retoryka*, trans. Tomasz Pajor (Warszawa: PWN, 1983), 169.

23 Javier Hervada's theory of natural law assumes that the science of natural law is not part of the philosophy of law, but is a separate specialisation within the science of law that contributes to the improvement of the science of law as a whole and of its individual branches, since all branches of law should know, combine and adapt natural and positive aspects to each other. According to Javier Hervada, the main subject of the science of natural law is the presentation of the natural law system, that is, the totality of what is just by nature; from this point of view, the basic core of this discipline is the specific part of natural law consisting of the description of this system. Therefore, the specific part of natural law should be preceded by the general part of natural law, which makes it possible to reduce to the legal level and thus to the technical-legal level (specific to natural law) what the philosophy of natural law proclaims at the philosophical level.

24 The adjective „anthropoarchic", which is a neologism, is a compound of the Greek nouns ἄνθρωπος (*ánthrōpos* – „man") and ἀρχή (*archḗ* – „beginning, principle, rule"). The term „anthropoarchic concept", however, does not come from Raphael Domingo, but was coined by Maciej Dybowski and Marcin Romanowski. According to the authors, the anthropoarchic conception of law is characterised by: „a specifically understood anthropocentrism, above all with regard to the treatment of the sources of law in the material sense, deriving from scepticism as to the possibility of a cognitively momentous reflection on universal and equal dignity as the source of human law and the basis of the material legitimacy of law,

concept, I would present the following commonplaces which are the *loci communes* of natural law both within the *common law* culture as well as in the *civil law culture*

- the basis of any law and consequently also of justice is the fact that a human being is a person – *ex persona ius oritur*[25]; it is human being understood as a person who is the source of the normative nature of law[26]:
  - a person's personal character is recognized rather than attributed in an arbitrary way;
  - the personal nature of the human being is linked to the time of actual, biological life;
  - a person is such an intense being that it decides on him-/herself; deciding on oneself is the determinant of personal being and the basis of human dignity;
  - human deciding on him-/herself means, on the other hand, controlling everything that comprises him/her (his/her life, physical integrity, mind, relationship to God, etc.); human's controlling his/her being extends to the discovery of his/her

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without a simultaneous departure towards methodologically ordered rational cognition beyond the limits of the detailed sciences". Thus, in place of the positivist understanding of the sovereignty (will) of the state, man with his innate and equal dignity to others is placed. The anthropological view of man as a person thus provides the basis for understanding legal phenomena and serves to justify what content requirements legal norms (state law) must meet. Cf. Rafael Domingo, *The New Global Law* (New York: Cambridge University Press, 2010); Maciej Dybowski, Marcin Romanowski, „Trudne przypadki w antropoarchicznej koncepcji prawa", [w:] Maciej Dybowski, Marcin Romanowski, *O trudnych przypadkach w filozofii prawa. Studia z antropologii prawa* (Warszawa: Wydawnictwo Uniwersytetu Kardynała Stefana Wyszyńskiego, 2015), 14.

25 „The golden rule of global law is the principle of *ex persona ius oritur*. It is characterised by a specifically anthropocentrism". Cf. Domingo, *The New Global Law*.

26 A synthetic description of cultural factors, intellectual findings, which seem to be decisive for the contemporary shape of the concept of a person, i.e., the origin and historical development of the concept, from Roman law and Greek philosophy, through theology and Christian philosophy to the international system of human rights protection, is made by Marcin Romanowski in one of his works. Cf. Marcin Romanowski, „The Origin and Characteristics of the Concept of a Person", [in:] Maciej Dybowski, Rafael García Pérez, *Globalization of Law. The Role of Human Dignity* (Pamplona: Thomson Reuters Aranzadi, 2018), 49 et seq.

own goals and the strive to accomplish them; this control is manifested in the wealth of man's natural rights, which express his/her being;
    - human's ability to control extends to the circle of things in the universe which, because they are not persons but entities not controlling themselves, are intrinsically subject to the rule of others; man can include things external to him/her in the scope of his/her control;

- law is an intentional human action and as such it is an aspect of the intentionality of human practice:
    - law belongs to the sphere of practice;
    - law is the product of practical reason and legitimizes its rationality in the form of its focus on human goals – fundamental goods[27];
    - actions consistent with the first principle of practical reason, 'the good must be done and pursued', are rational because they aim to achieve human goals (*human flourishing*)[28] ;
    - values are recognizable; the axiology underlying the law can be learned through practical reason (*axiological cognitivism*)[29];

27 The initial list of primary goods included by John Finnis in his work *Natural Law and Natural Entitlement* includes such values as life, knowledge, play, aesthetic experience, friendship, practical reasonableness, and religion. Cf. John Finnis, *Natural law and natural rights* (Oxford: Oxford University Press, 1980).

28 With the formulation „full human flourishing", John Finnis defines possibility or potentiality in the thought of St. Thomas Aquinas. The reason for this understanding of St. Thomas's concept is that philosophers and theologians following Aquinas have tended to overlook his statement that the concept of duty derives from the necessity of the existence of a natural human end or the means to achieve it, replacing it with the idea that duty arises through some higher will and thus calling upon people to submit to it. John Finnis, „Aquinas and Natural Law Jurisprudence", [in:] *Cambridge Companion to Natural Law Jurisprudence*, ed. John Tasioulas (Cambridge: Cambridge University Press, 2017), 21.

29 The conception of natural law as a requirement of practical reasonableness can be linked to analytical currents analysing law in linguistic terms. This is because the Greek term logos encompassed in content both speech and language, as well as mindfulness and reason. According to Aristotle, the possession of logos constitutes the possibility for man to know values and to distinguish in language between good and evil, truth and falsehood. Cf. Aristotle, *Politics*, book I, 1253a, 11 (Warszawa: PWN, 2004).

- law (*ius*) is only possible if the other exists (*ius ad alium*):
  - law emerges as part of the social relations inherent in human beings due to the fact that they are beings endowed with reason; against the background of these relations there is the phenomenon of attribution, whereby something belongs – is attributed – to someone not as a result of the application of force but as a result of the possession of a right, in other words, as a possession that gives rise to a debt to others; the thing attributed and therefore owed is called a right (in the real sense), it arises on the basis of a title and has its measure;

- law (*ius*) means what is just, what is justly due to someone[30]; the virtue of continually acting in this way becomes justice (*iustitia*):
  - since justice is about guaranteeing everyone what is due to them, it requires the presence of two or more actors, the title holder and the debtor;
  - act of justice consists in guaranteeing to everyone what is due to him/her, in guaranteeing his/her right to him/her (*ius suum cuique tribuere*)[31].

Adopting the concept of the human person in the concept of natural law makes it possible to solve the fundamental problem of modern democratic systems based on constitutionalism and the concept of the rule of law, namely, the anthropological problem. That is, in place of the positivist understanding of the sovereignty (will) of the state, the human being is placed with his innate and equal dignity to others. Thus, the anthropological view of man as a person provides the basis for understanding legal phenomena and serves to justify what content requirements legal norms (state law) must meet.

Within the framework of this model typical of modern democracies, it is obvious that the measure and ultimate goal of all law is so-called human rights, for there is widespread agreement in the societies that create them

30 Cf. Javier Hervada, *Prawo naturalne. Wprowadzenie*, trans. Anna Dorabialska (Kraków: Wydawnictwo Petrus, 2011), 34.

31 Cf. Ibidem.

about their special importance. Human rights also play a key role for lawyers in this system of governance, since they are an inexhaustible resource of appropriate answers to the most difficult legal issues. At the same time, while in a democracy there is some consensus on the existence of a catalog of human rights, this is an agreement at the level of words, in principle purely terminological, for as to the basis and content of individual human rights, there is a great difference of opinion. Therefore, it is not enough to agree on the meaning and importance of human rights, it is also necessary to say who owns them and why. Here, the possible answer may vary – the dividing line is resolved by the conflict between philosophical „constructivism" and „metaphysical realism", that is, between Immanuel Kant and Aristotle. According to Immanuel Kant, the status of a person is a concept constructed in the intellect of the cognitive subject on the basis of sensations to be ordered; thus, instead of knowing things, it is proposed that we think them. From this vision, it is only a step to the concept that the quality of personality is not innate to the individual, but comes to him from outside. In this constructivist approach, a person's status is not an objective element of reality, but is attributed to the individual on the basis of those functions or qualities that he or she decides about in any way. The problem, therefore, is not only about human rights, but primarily about who is the holder of these rights. Thus, one can try to construct the holder of these rights according to Immanuel Kant's conception (accepting then the risk that not every member of the human species is one, or is not one to the same degree), or grant the status of a person to everyone who possesses human nature[32]. Recognizing man as the source of the normativity of law presupposes that a norm will be valid only if it is consistent with rationality, human nature, and human goals. The problem of naturalistic error is countered by stating that the duty to be is inscribed in man just as natural law underlies positive law.

32 Cf. Tatiana Chauvin, „Osoba fizyczna czy człowiek? Kilka refleksji na temat podmiotu prawa" *Principia*, Vol. LXI-LXII (2015): 133.

6 Summary – or benefits of adopting new classical natural law theory based on a priority of persons

The legal system is a certain entirety; its institutions regulate different areas of life but are based on a common foundation. A natural law perspective does not mean acting outside the legal system, because natural law is its foundation and justification. The basis of legal norms is made up of moral norms, the source of which is natural law. Thus, law and justice are equal, and justice consists of giving back what someone is lawfully entitled to. People, on the other hand, are entitled to things or rights because they are human beings. For example, the wording of Article 1 of the Universal Declaration of Human Rights shows the transition defining what a human being is like (the personal character of a human being) and determining how he or she should act (being a person): „All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood".[33] Therefore, to speak of man as a person is not tautology. Indeed, it is possible to distinguish between the concept of man, which is general since it refers to his/her nature, which is general as it equally defines all those belonging to the human species (homo sapiens), and the concept of a person, which refers to a specific human being (entity) existing in his/her individual subsistence. Therefore, the concept of man (human nature) should not be confused with the concept of a person (human personality)[34]. For these reasons, we all have to agree that natural dignity is the source of human freedom and rights. Its legal-natural roots should be considered one of the paradigms of European legal culture, based on three traditional pillars:

33 *Universal Declaration of Human Rights*, Paris 10.12.1948.

34 „In conceptual terms, when characterising a person, one cannot speak of the qualities of human nature, nor, when characterising nature, describe the qualities of a person; when speaking of a person, one must distinguish between what is said because of the nature of the person and what is stated because of the person existing individually. Obviously, human nature does not exist apart from the person, therefore, when speaking about the existing reality of a person as the basis of law, we also speak about his nature, e.g.: the rational nature". Maciej Dybowski, Marcin Romanowski, „Trudne przypadki w antropoarchicznej koncepcji prawa", [w:] Maciej Dybowski, Marcin Romanowski, *O trudnych przypadkach w filozofii prawa. Studia z antropologii prawa* (Warszawa: Wydawnictwo Uniwersytetu Kardynała Stefana Wyszyńskiego, 2015), 19.

Greek philosophy, Christian religion, and Roman law. Freedom is counted among the oldest individual rights, both in terms of conceptualization and normativization.

The path of human rights in Europe and around the world has gone through numerous stages of development. After the conceptualization phase was completed, positivization was carried out – the incorporation of the system of their protection into state law, including constitutional norms. This happened to make the protection of human rights a reality and to create appropriate legal tools. We are now observing the importance of the use of acts of international law of a universal nature, as well as their impact on systems of national protection of the status of the individual. The diversity of human rights guarantees contained in both acts of international law is confirmed by many studies, analyses, and observations.

Contemporary problems in interpreting the content of human rights, especially what in principle should be their universal core of meaning, seem to be tangible signs of the urgent need to turn to the basis of law, and in particular the need to focus on human dignity as the basis of law[35]. For modern law must find an objective parameter that will allow it to survive the crisis of relativism and non-cognitivism, which deprives legal rules of axiological content. The natural law has sometimes been considered such an objective parameter for more than two thousand years. In recent times, among legal theorists and philosophers who have searched for some suprapositive legal parameter, some do not strictly recognize natural law, such as L.L. Fuller, John Rawls, Ronald Dworkin and Robert Alexy, but there are also those who acknowledge it, such as Javier Hervada, Rafael Domingo, Michel Villey, Germain Grisez, John Finnis, and Robert P. George.

Nor is the natural law perspective concerned with borderline cases, where lawyers-practitioners, whether advocates or judges, are forced to go beyond the legal text and look for solutions in other normative systems, such as customs, habits, and morality. On the contrary, when applying natural law thinking, one should look for the axiological foundations of the legal system, i.e., all those places where it stems from normative acts (sometimes from specific provisions, sometimes from the wording of the entire legal act) that it is based on certain values or goods. Axiological justification in the form of natural law is therefore not extraordinary (*vide*: *hard cases*), but obligatory (it applies to the entire system of law, constituting

35 A. Czarnecka, „Nowe pytania, stare problemy: filozofia prawa wobec wyzwań współczesności", „Prawo i Więź", 2019, vol. 8, nr 2, 57–69.

its proper cause). Since the law is formulated in natural language, which is not a closed artificial code, the given system of law created in it cannot be exclusive (consisting only of legal norms) either, but must necessarily take into account the natural law perspective, since every linguistic action is a manifestation of practical reason, as both St. Thomas and John Finnis well demonstrate[36].

For these reasons, I believe that the natural law perspective has value regardless of whether one accepts or rejects the claim of the objective and self-evident character of principles: practical rationality, fundamental goods, and the notion of a person as the basis of law or justice as giving everyone what is due to him/her. This is because reasoning based on these assertions generally leads to reasonable conclusions that could be referred to as „good reasons". Even if one does not recognize the obviousness of these principles or share cognitivist axiology, it is still possible to accept the value of using them in the context of reflections on written law, even if only with the principle of efficiency and effectiveness as a possible justification. Thus, it opens space for an expansion of the scope of application of the natural law perspective in studies on written law. For example, in a nutshell, civil law is based on the assumption of individual rationality, freedom, and responsibility – this is its general thrust, but there are also specific provisions that provide evidence of this. Public international law, on the other hand, requires the assumption of a certain concept of justice, while labor law is based on the conviction that, by the very fact of being human, a certain legal privilege is due to the employee to counterbalance the fact that *de facto*, the privileged party to the employment relationship tends to be the employer.

At the same time, it seems that there are two possible roadmaps for reconstructing the axiological foundations of specific dogmatic sciences, from the foundations of the entire branch through the individual institutions and vice versa. Indeed, it is possible to look for axiological foundations and concepts of justice, morality, and man in the general principles of a branch of law, but it is also possible to find this in the individual institutions of a branch, for example, in constitutional law, one should start from

36 St Thomas' reflections on law begin with the claim that practical reasoning, that is, reasoning about what to do or not to do, has a logical structure that is analogous to that of theoretical reasoning. Saint Thomas, *Summa Theologica,* I–II q. 90 a.1 ad 2. Cf. John Finnis, „Natural Law and Legal Reasoning" *Cleveland State Law Review*, No. 38 (1990): 1.

the assumption of natural law that it is based on the principle of human dignity and its inviolability, and then „prove" this with the provisions of the Constitution or, conversely, analyze individual provisions and come to the conclusion that the constitutional principle of equality, the guarantee of freedom, and the right to education are linked by the conviction that man, as a being to whom dignity is due, requires certain rules to secure it.

The value of adopting a natural law perspective does not, in my opinion, apply only to the creation or application of law, but also to its observance – it extends to any decision-making difficulty in the face of a dispute, providing a possible solution to the axiological conflict for both the lawyer and the citizen. Thus, I believe that it is possible to apply a natural law perspective to the study of the branches of law whenever there is a dispute about who a man is, and to the extent that the consequence of this dispute is to determine what is due and to whom, according to the law, i.e., in practice, always. However, this is not always easy, as the complexity of a human being as a person means that the more human something appears, the more difficult it is.

Personally, I believe that it is important to look at the axiological basis of the legal system entrenched in natural law reflection. Legal education is not only about assimilating the content of the law but also about understanding the meaning of the law as such. I hope that this text will provide a „leaven" for an in-depth study of natural law – both theoretically and practically – which, following this kitchen analogy, will lead to nutritious bread, i.e., the formation of a system of positive law that is not axiologically neutral, but based on universal moral principles. Indeed, just as leaven is formed from a portion of raw dough left over from a previous baking and added to each new loaf, so the contemporary studies of natural law start from the philosophical legacy of Aristotle and St Thomas Aquinas, so that the results of the research do not become an indigestible crock and, moreover, the process is virtually endless.

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