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‘Nature’ as a humanistic principle of universal communication? A European case study regarding natural law

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Abstract: The conference, “Humankind at the Intersection of Nature and Culture”, presented in the Kruger National Park in South Africa, forms part of the project “Humanism in the era of globalisation: An intercultural dialogue on culture, humanity and values”. This project works on the premise that there is a “need for a new kind of humanism, the aim is to create an understanding of humankind in an era of globalisation that encompasses all civilisations while at the same time emphasising their particularity and diversity”.

Among the problems of an intercultural hermeneutics that have been in discussion, and that we should regard as essential to the understanding of humanism demanded here, there belongs the basic intuition that there needs to be universally valid norms and values that are based upon mutual recognition of cultural diversity. In order to establish such basic norms, humanism has to appeal to basic anthropological principles that can make a claim to cross-cultural legitimacy. On the one hand, the justificatory ground discerned in these principles must be unconditional and universalisable. On the other hand, these basic anthropological principles have to be evident and intelligible within each culture’s horizon of understanding. The determining ground of the will, through which each human being can endorse this set of norms, has to be compatible with his, or her, free consent.

Keywords: Norms, values, natural law, Stoa, Spanish scholasticism, Bartolomé de Las Casas, slavery, humanism, intercultural hermeneutics, Aporetics, modern natural law.

The theme of our conference, offered us the opportunity to bring to mind a philosophical and theological theory, in which the questions that I have raised, were contemplated with remarkable perspicacity and clarity. I am referring to natural law theory, which will be the focus of my discussion. In selecting this theme I thus deviate from the

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theme I originally proposed. In taking this course I hope to broaden the spectrum of our discussion and introduce new emphases that, in my opinion, should be absolutely central to a conference on the concept of nature. At the centre of my discussion is a short reminiscence on an early modern conception of natural law. With reference to the position of Bartolomé de Las Casas, I hope to throw light on two exemplary features of natural law theory. On the one hand, natural law ought to be introduced as a fundamental anthropology serving as the basis of a universalistic moral and legal order. I have not selected a representative of Spanish late scholasticism without reason! With recourse to natural law Las Casas attempts to deal with the experiences of globalisation that accompanied the 'discovery' of new worlds and the bloody conquest and suppression of the Indians. On the other hand, I want to explore the foundational logic of ethical and legal norms that is peculiar to modernity. With reference to Spanish late scholasticism I would like to illustrate how the natural law theory, anchored in the Christian idea of creation, can be employed in the service of a universal hermeneutics of recognition that deliberately seeks to break through the religious and cultural limits that have prevailed to date.

1. Introductory remarks on the European natural law tradition

Before turning to Las Casas it will be useful to define the term natural law in at least some short phrases and to delineate in broad strokes its guiding idea of nature.¹ Traditionally the term 'natural law' signifies a system of ethical and legal norms that are binding for all human beings everywhere and at all times. Since the early days of European antiquity we can discern the idea of a moral and legal order that does not appeal to a human authority, but is rather discharged from all decrees and conventions, which is unconditionally binding on every legal and governmental authority, especially the legislator and author of the constitution. Broadly speaking, natural law is understood as the epitome of all those obligations of human praxis that transcend convention, as the basis of positive law. The totality of what is binding for law and the state in this pre-positivist and supra-positivist sense was known by the Greeks as 'that which is right according to nature'.

With a view to Las Casas, it is important to note that the natural law

1 Cf. E. Wolf et al., *Naturrecht: Historisches Wörterbuch der Philosophie*, Darmstadt: Wissenschaftliche Buchgesellschaft vol. 6 (1984), pp. 560-623; K.-H. Ilting, *Naturrecht: Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, Stuttgart: Klett-Cotta vol. 4 (1978), pp. 245-313; O. Höffe et al., *Naturrecht: Staatslexikon. Recht – Wirtschaft – Gesellschaft*, Freiburg et al: Herder-Verlag, vol. 3 (7th edition, 1987), pp. 1296-1318.

of philosophical antiquity has undergone a broad reception by Christianity. Since God, according to the foundational idea, has created nature and endowed it with his unswerving will to salvation, the Christian tradition can identify the natural order with that of creation. Thus, for example the Stoic idea of the equality of all human beings, which is based upon one nature common to all, received the substantiation of a creation theology: equality is rooted in the likeness of all human beings to the image of God.

'Nature' as an anthropological fundamental idea, which is understood in traditional natural law theories, includes a *threefold* meaning:

Firstly nature is considered to be a normative concept, as far as nature is held to be the morally guiding principle of human conduct. It is then assumed that nature is endowed with a teleological end, which the Stoa attributes to logos and the Christian tradition to the will of the creator. At this point it becomes apparent that the idea of nature, on which the natural law is based, is a metaphysical category that ought not to be confused with the modern scientifically defined idea of nature. The traditional interpretation of nature subdues nature to a teleological perspective, because the advocates of natural law have primarily been convinced that nature as such is nothing but the order discernable in natural entities. Normative and reasonable structures are immanent in nature as such.

Secondly the idea of nature claimed upon by natural law functions as a counter concept to the concept of culture, as far as and because it does not indicate that which human beings create, but the given; that what we humans did not create. Thus, the conception of nature entails not only the condition of possibility of human making and dominion, but also their limitation. Consequently in nature, as something being and given from itself, those norms, which are merely deprived of human access, are rooted. They are not in one's dominion by virtue of their very 'naturalness'.

Thirdly the idea of nature claimed by natural law refers to human nature, therefore to that which is common to all human beings. Thus, a concept of nature understood in this way assures the universalisability of the norms anchored in it. Furthermore, the idea of nature functions as a hermeneutical principal. The fact that the human being, on this view, participates in a human nature common to all, guarantees the self-evidence of the moral ought. Because it derives its norms from a nature that is considered to be rational, natural law is accessible for each human being of 'good will'. The rationality claim of the natural law identifies itself as a hermeneutical principle of universal communication: clear and comprehensible for all rational beings!

If one inquires further with regard to the material definition of natural law and thus for what is actually – anthropologically, ethically and

legally – the content of the natural moral and legal order, tradition offers the following answer (I limit myself to a short enumeration without listing the concerned positions of reference separately): Already in the Stoa human nature justifies the equality of all human beings. For the Christian tradition usually the Golden Rule as well as the Decalogue, the Ten Commandments, are rooted in natural law. Beyond this, both in the philosophical and theological traditions, the idea is found that sociality, the dependence of humans on one another, is grounded in human nature. However, occasionally the capacity and disposition of humans to harm each other is mentioned. Rousseau on the other hand mentions the interest in the well-being as well as compassion with all other sensitive beings. The reference of Thomas Aquinas to the ‘natural inclinations’ (*inclinaciones naturales*) of the human being, which predetermine an immutable framework of action for him, is well known. One special and last note is directed at two qualities particular to human nature, which should especially gain importance for the modern transformation of natural law and from here finally for the enlightenment at large: reason and autonomous freedom.

2. Bartolomé de Las Casas as an exemplary position of modern natural law

The reasons, why I allow us a small detour to Bartolomé de Las Casas,² is directly concerned with our movements of search for a new humanism. In the Spanish late scholasticism of the waning 15th and 16th century the traditional doctrine of natural law was actually treated on the methodological level of the contemporary humanism and applied to problems posed by the conquest of the New World and the related political and economical upheaval. Las Casas accepted, like Fransisco de Vitoria, before him, the challenge that emerged from the occupation and conquest of great parts of America by the Spanish crown, which were associated with the ‘discovery of new worlds’, and from the inner European power and faith struggles as a product of the Reformation. Las Casas was born in 1484 in Seville, from where Columbus set off in 1492 for his discovery voyage. Shortly afterwards Las Casas left for America as well, where he initially became a great landowner respectively in Haiti and the Dominican Republic. He also had himself ordained as a priest, became field chaplain during the conquest of Cuba and thereby gained experience with the brutal dark sides of the Conquista-politics of the Spanish Crown. This led to his

2 Cf. E.-W. Böckenförde, *Geschichte der Rechts- und Staatsphilosophie. Antike und Mittelalter*, Tübingen: Mohr Siebeck 2002, 339-351; J. Meier, A. Langenhorst (Ed.), *Bartolomé de Las Casas*, Frankfurt/M.: J. Knecht 1992. Cf. *Werkauswahl – Bartolomé de Las Casas*, ed. by M. Delgado, vol. 1-4, Paderborn/München 1994.

‘conversion’, which eventually motivated him to plead for the rights and the freedom of the Indians.

He attained the theoretical approach to his political fight by adopting the ancient and medieval doctrine of natural law. From the beginnings of the Stoa the one nature common to all avouches the equality of all human beings and moreover establishes the unity of mankind. Furthermore, a legal system is derived from nature, which functions as a normative condition for a *societas generis humana*. Las Casas links in with this tradition. Thereby it becomes apparent that the freedom and reasoning capacity of humans are for him those inalienable qualities of human nature, on which his doctrine of natural law rests. Beyond this natural law foundation they are grounded in the likeness of all human beings to the image of God. Both – the natural law as well as the divine order of creation – again are valid for all humans. I quote:

All nations of the world consist of human beings, and for all humans and each individual there is only one definition, and this is, that they are reasonable beings; all have their own rationality and freedom of decision, because they have been created in the image of God ...³

Before I descend to the consequences with regards to content, which Las Casas associates with this statement, I would like to call attention to an epistemological problem that Las Casas is compelled to discuss. If the natural law is based on the Christian God, immediately the question arises, if a natural law substantiated in this way is also binding for pagans and infidels. Is, in other words, the obligation of the natural law attached to the antecedent recognition of the God grounding it? Is thereby the embedding of humans into a concrete, correctly speaking: a particular religious-cultural horizon of understanding the *a priori*, which the legality and validity of the natural law depends upon? Is the natural moral order recognisable only for those who believe in this God? These questions raised sound nowadays less spectacular than at time of Las Casas, when they enjoyed actual political relevance. In the background is the subject position of the people living in the ‘West Indies’, the Indians, who did not belong to the *orbis christianus*. On which basis are the Indians bestowed with rights? At question is the idea of right that refers to the individual as a bearer of rights and as a subject. The revolution in the philosophy of law, which takes place in the Spanish updating of natural law, consists in the fact that natural law even regardless of its objective validity has a subjective character, which includes a subjective right of consumption to which every single human being can lay claim.

3 B. de Las Casas, *Principia quaedam, Tertium principium: id.*, Obras completas, Edición dirigida por Paulino Castañeda Delgado, vol. 10, Madrid: Alianza, D.L. 1992, p. 562 (translated by the author).

Admittedly, the problem remains that also in Las Casas' works natural right is substantiated theonomically. He demolishes the therein-implicit limits by the following argument: creation is the release of the human being into an autonomy, which is unconditionally recognized by God. God has entrusted it to the free will of each human being, if he wants to adopt the Christian faith or not. For the freedom is the most precious and highest good of all temporal goods. What is astonishing about this structure of substantiation is the fact that Las Casas on one hand does not deviate from the traditional embedding of natural law into creation theology.

On the other however, he is able to derive from it maxims aiming at universal recognition, which leave all exclusivity behind. The recourse to natural law breaches the singular validity of the Christian moral and legal system. The participation of the Indians in the *orbis christianum* does not belong to the antecedent conditions for granting them human rights.

Concerning the statements with regards to content on political order and the law of nations, which Las Casas wants to derive from the natural law doctrine, a few hints should suffice. We have seen that natural law is aggravated with an anthropological intention to the reasoning and autonomy capacity of the human. From this starting point it is self-evident for him that:

Firstly 'slaves by nature' cannot exist, because this would be inconsistent with the natural equality of all humans and would be in contradiction with the initial freedom of all human beings.

Secondly by virtue of nature every nation is a free nation from the very beginning. Even so-called 'infidels' – meaning the Indians – have a right to autocracy and independence due to natural law. *Qua* natural law the Indians hold their principalities and kingdoms, their ranks, titles, their jurisdictions and sovereignties.⁴ A community of states is a natural community of commerce and trade over certain goods that are common to all nations due to natural law. Efforts to achieve a trans-national legal system are derived from this.

On this background Las Casas can – *thirdly* – turn to the question to which extent the Spanish rule in America is an injustice in violation of natural law. Since the jurisdiction of the rulers is tied to natural law, natural law leads to a critical limitation of worldly claims to power. Amongst other conclusions it follows that Christian rulers have no claim to the subjugation of non-Christian nations; a missionary intention is not a reason for war.

Fourthly Las Casas can reject papal-churchly claims for universality

4 Cf Böckenförde, *Geschichte*, 343-348 (s. footnote 2).

with reference to natural law. This concretely aims against the famous bulla of Pope Alexander VI.,⁵ *Inter cetera*, with which he authorized the Spanish Crown to subjugate the inhabitants of America and to convert them to the Catholic faith.⁶ This entrusting is nullified by Las Casas.

The last two aspects, the natural law dismissal of worldly as well as of papal claims to sovereignty over the 'New World', deserves special attention. The reference to natural law breaks with the Christian salvational-historical idea of *ordo*. It is supposed to be replaced by the foundation of a community based on the law of nations as a community of independent, coequal politically constituted nations.

5. Conclusive reflections on the Aporetics of the idea of nature together with a prospect

It might not be of minor importance to emphasize that I am naturally not a representative of whatever type of doctrine of natural law. Due to reasons that I am going to mention immediately, it cannot be restored nowadays. I was rather concerned with a historical case study, which had a fundamental importance for the modern period of the formation of European humanism. In the framework of the deliberations at the conference I would like to remind you about a concept of nature, with which European thinking on natural law is associated. In particular attention needs to be given to certain epistemological and hermeneutical achievements. The recourse to nature served the derivation of fundamental anthropological statements about the world and the human being. On this basis a normative moral and legal order was established, which was independent of any human authority.

The concept of nature was supposed to establish a universalistic ethics, which is not tied to religious and cultural particularity. In turn the participation of all humans in nature guarantees the trans-cultural self-evidence and by that the obligation of the set of norms founded in it as well. The example of Las Casas stands for an appeal to the universalisable demands of natural law, with which religious ideas of values are transcended anthropologically and liberated culturally.

We can summarize the main argument as follows. The criteria, if an action and accordingly its maxim is also allowed, is its universalisability and thereby the capacity to regulate the co-existence of free and equal, responsibly acting persons in a normative system. The universalisability

5 I was surprised by the fact that this document seems to be not published in one of the source-books of the roman-catholic creeds.

6 Cf. Böckenförde, *Geschichte*, 349-350 (s. footnote 2).

is determined by the fact that the relevant fundamental norms can be derived from nature. The participation of all humans in one nature, common to all avouches, their equality and establishes the unity of mankind. Thereby nature functions as a principle of unlimited communication, which is supposed to enable a comprehensive core asset. With that the recourse to nature allows the formulation of anthropological fundamental theorems, which standardise cultural assumptions and religious claims to truth.

Concluding now some rather general remarks on the *aporetics* of natural law, which are mainly concerned with the incisive transformations in the concept of nature.⁷

My *first* remark serves the aim to prevent a wrong idealisation of natural law thinking. A reference to human nature could definitely take place with an ideological intention. For example for Aristotle existed 'slaves by nature'. In general the reference to nature had to serve as a justification of inequality: between races and nations and between male and female. The argumentative figure 'forbidden, because unnatural' was and is drawn on to discriminate against homosexuals. The Roman-Catholic church refers to this maxim for its ban of so-called artificial contraception. Obviously the reference to 'nature' can serve emancipatory as well as restorative ends.

My *second* remark is aimed at calling attention to the fact that the reference to nature for the justification of moral judgements is encumbered with intricate epistemological and logical problems.⁸ At first it stands out that nature is by no means consistently considered as a morally guiding principle for human conduct. Not everybody was as consistent as Epictetus,⁹ who praises the male beard growth like the mane of the lion as a distinguishing feature between man and woman and derives a ban to shave from the fact that man grows a beard naturally.¹⁰

But also women are not spared, at least in the work of the Father of the Church Tertullian,¹¹ who makes reference to the order of nature and creation in order to curse against the use of cosmetics. These women 'dislike the image of God'; they 'rebuke the creator of all things'.

7 Cf. F.P. Hager et al., *Natur: Historisches Wörterbuch der Philosophie*, Darmstadt: Wissenschaftliche Buchgesellschaft vol. 6 (1984), pp. 421-478; H. Schippers, *Natur: Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*, Stuttgart: Klett-Cotta vol. 4 (1978), 215-244.

8 Cf. B. Schüller, *Die Begründung sittlicher Urteile. Typen ethischer Argumentation in der Moralthologie*, Düsseldorf: Patmos 21980, 216-235.

9 Cf. Schüller, *Begründung*, 216 (s. footnote 7).

10 Schüller refers to Epictetus and Tertullian without mentioning the sources.

11 Cf. Schüller, *Begründung*, 217 (s. footnote 7).

Already in such amusing cases it becomes apparent that tradition obviously only makes reference to nature, when it is convinced in an antecedently¹² of the existential importance of the matter at stake. One example of this is the donation of organs. Opponents and supporters occasionally argue about the natural purpose of two kidneys. Obviously the reference to nature takes place within a hermeneutical circle. Thereby it becomes completely evident that an antecedent normative criterion has to be named, on which a possible reference to nature depends. In addition, we have no other access to the alleged purpose of nature but the teleological interpretation of the actuality of nature. If this interpretation is changed, we also have to change our assumptions about the 'intentions of nature'.

A *third* note is to call attention to a far-reaching transformation of the idea of nature. We have noted that the normativity of the doctrine of natural law is based upon the metaphysical assumption that nature is structured intrinsically teleological. Already within nominalism the possibility of a theoretical cognition of such teleology was philosophically questioned. The rise of our modern understanding of science led to a groundbreaking new understanding of the idea of nature. From antiquity until the beginnings of modernity scientific knowledge of nature was informed by the conviction that there is an immutable, inherently determined nature. It was the task of science to comprehend the structure immanent to nature, but this is its essence. In contrast with this, modern science refrains from being an interpretation of the being of 'nature as a whole'. The question of the essence becomes indifferent. Its place takes the methodologically directed appeal to empiricism, which admittedly does not undertake to explain the sensuously given in its naked presence. The empiricism is driven by the scientific interest to explore nature as a field of experiences that are not isolated, and that can be controlled in a lawful and causally structured way.

Consequently modern science conceives itself in a new way as research: it does not consider its field of exploration to be an inherently existing (that is: a pre-given) reality anymore. Science first and foremost creates its own object of exploration, which is constituted as a dialectical unity of objective things and the knowledge of these things. Thus, the cognition of nature is always already mediated by the knowledge, which science has offered and can provide. For example by dissolving the conception of a world as a given totality Kant declares the world to be an infinite field of exploration.¹³ However, thereby the idea

12 I used this word in the meaning of 'earlier' or 'before' (timely spoken); in German: 'vorangehend' or 'vorausgehend'.

13 Cf. I. Kant, *Kritik der reinen Vernunft: id., Werke in sechs Bänden*, ed. By W. Weischedel, vol. 2, Darmstadt: Wissenschaftliche Buchgesellschaft 1998, pp. 399-419.

of a 'pre-giveness' of nature becomes questionable and with it every theological or metaphysical foundation of science by a recourse to 'God' or 'nature'.

In other words: The processes of a natural scientific-technical mastery of nature, initiated particularly by Francis Bacon¹⁴, makes the recourse to the idea of nature formerly claimed to by the traditional doctrine of natural law impossible. As is well known Bacon propagated a natural science, which makes nature 'submissive to it and enslaves it'. Since, according to him, there is no room for the mysterious and holy in nature, it can completely be explored. And since nature is no longer the objectively given, but the objectively feasible, an experimental approach to nature is legitimate. Therefore, an intervention with nature is appropriate, which forces it to answer the questions that the researcher raises. Permitted is the exploration and exploitation of nature in order to – 'knowledge is power' – use the resources of nature for practical ends.

This instrumental approach to nature was supposed to have far-reaching consequences for the modern conception of nature. The scientific-technical development in general and specifically in the field of medicine was essentially driven from its very beginnings by the fight against 'externally' caused dangers, for example child mortality, diseases, epidemics and so forth.

On this note science and technology reacted to the 'given' world of nature, human being and society. In the progressive and – to tell the truth – by all means successful process of the medical-technical combat of evils that are to a certain extent natural, we have nowadays reached a point, where this *elementary* constellation of scientific-technological development has annulled itself. Most of all in the area of intensive and reproductive medicine the possibilities of intervention advance to thresholds, which were effectuated by the achievements of the scientific-medical progress in the first place.

However, this means: We have to evaluate medical possibilities of action ethically, whose historically new quality of limits is based upon their scientific construction. The scientific-technical development has thereby reached a *reflexive* period,¹⁵ in which medicine is confronted with its own resulting problems, products and shortcomings. This imposes – let us for instance look to genetic engineering – the perspective that mankind soon starts to take biological evolution into its

14 F. Bacon, *Neues Organon Vol. 1-2*, ed. and introduced by W. Krohn, Hamburg: Felix-
Meiner-Verlag 2nd ed. 1999

15 Cf. U. Beck, *Risikogesellschaft. Auf dem Weg in eine andere Moderne*, Frankfurt/M.:
Suhrkamp 1986; U. Beck, A. Giddens, S. Lash, *Reflexive Modernisierung. Eine Kon-
troverser*, Frankfurt/M.: Suhrkamp 1996.

own hands. More and more the boundary between the nature, which we *are*, and the physical endowment we *give* ourselves, becomes blurred. In other words: at the thresholds that we have to judge ethically nowadays, we encounter a 'second nature', which is the product of the practice of civilisation.

This leads to questions, which natural law cannot answer anymore: How do we evaluate for example the emerging possibilities of a biotechnical intervention? Does this form of mechanisation of human nature merely continue the up to now familiar tendency of an ongoing putting-at-our-disposal of the natural environment? At least medically speaking the mechanisation of human nature is connected with the expectation of a healthier and longer life!

These developments finally pose theological questions as well, which even appear when the traditional unity of natural and creational order has long been given up. To what extent do the prevalent premises of the extension of the idea of creation and with it the differentiation of world and creator come under pressure at the impression of natural scientific formation of theories about the concepts of world, cosmos and nature? More emphasized: What becomes of our familiar theological idea of createdness, if the human is capable to manipulate predispositions genetically and thereby to intervene with the biological foundations of personal identity? Would this 'new human' be a creature of God as well, although he is altogether the creature of a technically experienced team of reproduction physicians? And since such a team would take the place of God: Does the absolute difference of creator and creature vanish here? What consequences does it have for the long-term cultural consciousness of mankind, if this difference that is preserved in the biblical idea of creation is destroyed?

However, these are questions that I cannot and do not have to answer here and now. In the last remarks I have left the topic of my presentation anyway. Nevertheless, it should by now be evident that the problems mentioned here cannot any longer be discussed in the paradigm of natural law. However, what could take its place?

In the framework of our humanism project it should precisely be rewarding to discuss the possible universalisability of a formal differentiation, which was, after all, elaborated within the horizon of the traditional doctrine of natural law, namely by Samuel Pufendorf¹⁶: actually the difference between the *entia physica* and the *entia moralia*.

Since the metaphysical idea of nature can no longer fulfil the end to assign mankind as a whole a position in the order of being and thereby to bestow the human with an orientation for his action, only the

16 Cf. .Iltting, *Naturrecht*, 286-292 (s. footnote 1).

motive of a moral world order elaborated by Immanuel Kant and Johann Gottlieb Fichte remains, that we humans have to effectuate concretely. Thereby these epistemological and hermeneutical questions¹⁷ certainly return, which I have raised in the beginning. Also a moral world order, orientating and standardising our humanity, needs anthropological fundamental theorems, which can establish the universalisability of such a moral world order. With the tradition of natural law European humanism has always been convinced that at least fundamental anthropological concepts exist, which are cross-culturally universalisable: reason and autonomous freedom.

17 Cf. G. Essen, M. Striet (ed.), *Kant und die Theologie*, Darmstadt: Wissenschaftliche Buchgesellschaft 2005.