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Resumen: March 2012 marked the time of my first of many visits from Argentina to the Notre Dame campus for purposes of teaching a mini-course at the Law School. In those days, Professor John Finnis used to come to South Bend for just a few weeks of the Spring Semester, to teach a one-credit short course on Shakespeare[1]. In 2012, as well as in several subsequent years, I timed my visits so as to overlap with this Spring visit of his. One night, over dinner, he told me that immediately before arriving in America he had been in Italy, where he had delivered a paper on Pope Benedict XVI's speech at the Bundestag, in Berlin. When I was tasked by the Center for Ethics and Culture to comment, all these years later, on that Berlin speech, my mind went straight to the memory of that dinner. I wrote to Finnis and, through his kindness, a few minutes later I had his Milan address in my Inbox[2]. In this contribution I shall put things in my own words as I see the issues, but will from time to time deploy some of the words that Finnis addressed to the Centro di Cultura, in Milan, 9 March 2012, less than six months after Pope Benedict XVI delivered his speech at the Bundestag in Berlin.

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POSITIVISM AND NATURAL LAW REVISITED

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Introduction

March 2012 marked the time of my first of many visits from Argentina to the Notre Dame campus for purposes of teaching a mini-course at the Law School. In those days, Professor John Finnis used to come to South Bend for just a few weeks of the Spring Semester, to teach a one-credit short course on Shakespeare[1]. In 2012, as well as in several subsequent years, I timed my visits so as to overlap with this Spring visit of his. One night, over dinner, he told me that immediately before arriving in America he had been in Italy, where he had delivered a paper on Pope Benedict XVI's speech at the Bundestag, in Berlin. When I was tasked by the Center for Ethics and Culture to comment, all these years later, on that Berlin speech, my mind went straight to the memory of that dinner. I wrote to Finnis and, through his kindness, a few minutes later I had his Milan address in my Inbox[2]. In this contribution I shall put things in my own words as I see the issues, but will from time to time deploy some of the words that Finnis addressed to the Centro di Cultura, in Milan, 9 March 2012, less than six months after Pope Benedict XVI delivered his speech at the Bundestag in Berlin.

I. Positivism (by the Sophists and Kelsen)

The Bundestag speech described "a dramatic situation which affects everyone"[3]. The "dramatic situation" –which has not changed since, I would argue– is the domination of our public mindset by what the Pope called "positivist reason", to the exclusion of all other conceptions of reason, with the consequence that ethics must be assigned to mere subjectivity and "the classical sources of knowledge for ethics and law are excluded"[4]. In the context of Benedict's speech, "positivism"/"positivist reason" mean the thesis or assumption that the methods of natural science are the *only* ways to knowledge–to truth. The use of the term to describe and promote that assumption (held quasi-dogmatically as a certain truth) was made in the early-mid-19th century by Auguste Comte (who had an influence far outside France). An attempt to state and defend it in a somewhat more philosophical idiom (as a special thesis about *meaning*) was famously made in the 1930s, under the name "Logical Positivism"[5]. Even though the special thesis collapsed embarrassingly (because it is incompatible with itself), and the wider thesis is theoretically untenable[6], that wider thesis still holds the Western World in its grip, sometimes under the name "naturalism"[7] or, as critics of it often name it, "scientism"[8].

The acceptance of the objectivity of scientific assertions has been weakened since the period when logical positivism rode high. This is partly because of new scientific findings and partly because of an increasing skepticism regarding the objectivity of science, generally, and of the physical consistency of "matter", in particular. This more modest acceptance of the *relativity* of science did certainly not go hand in hand with a recovery of the acceptance of objective truth in the ethical domain. On the contrary, if anything the same *relativistic* reasons that contributed to the weakening of scientific reason contributed also to a heightened collapse of ethical reason, all of which accounts for the full extent of the "dramatic situation" described by Benedict XVI in his Bundestag speech. Theses that are "scientistic" (as distinct from scientific) –theses which have in common the assumption that outside natural science there are nothing but subjective assertions and beliefs– still prevail generally, in spite of the relativising (as I have put it) of scientific reason[9]. In the fields of ethics, political theory, and philosophy of law one has indeed to expect that most participants in those fields (whether scholars or students) will all or almost all share this skeptical assumption, almost invariably as a position that they picked up from their school-teachers and/or the media and have never considered deeply and critically.

Back to the meaning of "positivism": an interesting question is whether in the context of the philosophy of law "positivism" (or "legal positivism") means the same as "scientism" or "naturalism" –synonyms, as noted above, of "positivism" in the broader context examined so far. It would seem that the reason behind the Pope's use of the term "positivism" in the legal domain, as a synonym of "scientism" or "naturalism" –all three terms involving the "skeptical assumption" I have been alluding to– is that Benedict chose Hans Kelsen as his main example of "legal positivism" (though it should be noted that the Sophists were, so many centuries before the famous Austrian jurist, his true forerunners)[10]. Kelsen's position (especially in his final years) became more and more an extreme of skepticism and irrationalism[11]. But truth be told, in the legal context, "positivism" (i.e. "legal positivism") has today for the most part (especially in the English-speaking world) a more ambiguous, less settled meaning than the skeptical one evoked by "scientism" and "naturalism"[12].

Nevertheless, if one sticks to the Pope's use of the term "legal positivism" (which itself directs us to Kelsen and the like, as I said) then one ought to keep in mind that that type of positivist mindset, at least in such extreme forms such as Kelsen's, undermines the very idea of any "normativity": guidance: moral and legal; what Finnis once called "oughtness"[13] (which, again, can be moral and legal)[14]. For Kelsen (again: especially in his final years) norms and commands have nothing whatever to do with reason. "Contrary to what he had maintained for decades", says Finnis, "norms were for him now [in his final years], in their content, outside the domain of logic, truth, science and every form of knowledge"[15]. To use norms in reasoning from one norm to another would be to surrender, Kelsen thought in his last phase, to the theory of natural law, the understanding of norms shared, as the Pope reminds us in the Bundestag speech, by the masters of Roman law, and by those Greek philosophers who taught that there is moral truth, and by the great central teachers of Christian doctrine, and by everyone who affirms that there is justice and that it is a matter of, at least, respect for human rights[16].

In my opinion, Kelsen was right about something: his initial, "positivist", skepticism regarding natural law –a scepticism hinted at ambiguously or discreetly in the title of his famous late-career collection of earlier essays of his: *What is Justice*?[17]–, when later extended to legal normativity itself, should be understood as a new, or newly extended version of his original rejection of natural law. For natural law *is* a certain type of normativity[18]: the guidance offered by the first practical principles, principles of the kind called by the tradition "the first principles of natural law"; *and* it is also the more concrete guidance provided by the intermediate moral principles derived from the first principles. Because positive law is a cultural device that offers citizens a new train of practical reason that is, one way or another, *derived*[19] from natural law, the rejection of natural law's normativity should rationally entail the rejection of positive law's normativity...

II. Natural Law (by Aquinas and Finnis)

Let us further delve into the meaning of "natural law". We can get started with an example of one of the first principles of natural law: the principle that truth is a good to be pursued and ignorance and error are to be avoided. As Finnis explained in his 2012 Milan "Bundestag address", that principle "is practical, because it is about what we can choose and do, in practice, in action. It is normative, because it directs us towards some kinds of option and away from others"[20]. Of course this first principle, like the other first principles[21], is abstract, and so is its normativity[22]. The application of that first principle (and of the others) to the various situations of life will be permeated by intermediate moral principles –what Finnis called in his address "structural moral principles", such as for example the principle directing one to "love of neighbour as oneself and [the principle known for short as] the Golden Rule that one should do for others what you would wish them to do for you"[23].

The classics described "natural law" as "the whole set of moral norms of ethics and social life, familial, marital, economic, civic, and political"[24] prior (but not chronologically prior) to any positive, human arrangement –even though the classics also used the term "natural law" (or synonyms for it) to refer to the more abstract, "pre-moral"[25] first principles "of natural law". In the twenty-first century (and for a long time before now)[26] that set of norms is probably more efficiently referred to (at least in some secular contexts) as "critical morality" or "objective morality". In the words of Cristóbal Orrego, one of the participants at our South Bend Benedict XVI's Conference, "the distinction between merely conventional morality and critical morality also captures the basic idea that some things may be morally good, and just, regardless of social conventions to the contrary"[27].

Terminological differences aside, the normativity of the structural principles of natural law maybe properly called "moral" because "they relate to the bearing of possible *options and actions* on each of the basic aspects of human wellbeing"[28] (or "basic goods"[29]) to which the first (abstract) principles direct us[30]. These goods are instantiated in possible options for action and as such function as intelligible objects of rational acts of will, primarily the basic, intrinsic goods of life, knowledge, friendship, marriage, accomplishment in work and play, and harmony with the transcendent cause of all these opportunities[31]. The first principles of practical reason having identified and directed us in a practical but orientative and as yet only incipiently moral way to the basic human goods, *moral*normativity (or natural law) directs us, within reason, to the realization of those goods, those aspects of human flourishing, in our lives[32].

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How do we know the principles of natural law?[33] Aquinas has held that the most general principles of natural law are known to all: self-evident (*per se nota*) universally. But, as observed by a contemporary, secular constitutional scholar, "[t]o say that [something] is self-evident does not imply that it is necessarily uncontroversial. People may, for various reasons, not understand an idea that is self-evident, or may dispute what they know to be true"[34]. Furthermore, the first principles don't mark the end or even the main part of moral inquiry but only its inception: moral reasoning always entails non-self-evident truths: in the course of deriving more specific moral precepts from these first moral principles, Aquinas grants that even "where there is the same rectitude in matters of detail, [what is right] is not equally known to all"[35]. This accounts for the possibility (and reality) of mistakes in moral reasoning –errors in the discernment of natural law. Indeed one can concede that there are many difficult moral questions regarding which rational understanding, devoid of religious tools (as natural law reasoning, by definition, is)[36], certainly proves difficult; and, therefore, one can also concede that in those types of questions rational argument and persuasion are often doomed to failure in practice –in the practice of conversations between friends and, even more so, among the members of a legislature or court. But these concessions –which I am happy to make– are fully compatible with the claim that there are many other moral questions whose right answer is readily accessible to everyone, as simple moral experience attests.

Because the normativity of positive law entails, in the preeminent case in which positive law serves its moral purpose (the common good), a degree of moral guidance, it is correct to argue –as I have laid some foundations for doing in this paper– that the normativity of positive law (in those preeminent, and not unusual cases of "just laws") is, or includes, *moral* normativity just insofar as specific principles and rules of a jurisdiction's positive law have been posited with fidelity to practical reason (including accuracy in the assessment of the circumstances and likely outcomes). Therefore, it would seem, as I indicated earlier, that Kelsen's dead-end was a foreseeable one: If you start by denying natural law's normativity, you should (and will if you are honest) end up questioning the very normativity of positive law, because (just) positive law… is a "derivation" of natural law[37].

Conclusion

The "dramatic situation" described by the Bundestag speech is indeed dramatic. The version of positivism targeted by Pope Benedict XVI in his speech renders conversations about what really matters in the practical domain impossible. Yet without the recognition of the ability to start from objective, clear premises dialogue in ethical matters is futile. This is precisely why it is so important to go back to basics and work hard for the rehabilitation of natural law theory. Pope Benedict was certainly one of the champions of this venture in the twenty-first century and the Conference in which this paper was delivered is a clear testimony to that truth.

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Notas

[1] Finnis also came regularly to the Notre Dame Law School each Fall Semester, to teach a semester-long two-credit course/class on the moral, political, and legal thought of Thomas Aquinas.

[2] John Finnis, “Benedict XVI’s Address to the Bundestag and the Sources of Knowledge for Ethics and Law”, address to the Centro di Cultura, Milan, 9 March 2012, unpublished manuscript on file with the author. All references to Finnis are to this source unless otherwise noted.

[3] Benedict XVI, Bundestag Speech at.

[4] Benedict XVI, Bundestag Speech at. Sometimes the exclusion referred to by the Pope is produced via the assimilation of ethical reason to religion. MacIntyre explains, along those lines, that for the modern mind natural law is akin to theological superstition. Alasdair MacIntyre, After Virtue 34 (Notre Dame Press, 2007).

[5] As Finnis puts it, logical positivism presupposes “the assumption that the methods of science –Baconian, experimental, and mathematicized natural science– are the only human ways to truth and knowledge, the only truly objective ways of thinking”. Finnis, 1.

[6] Finnis, 1-2.

[7] Benedict XVI, Bundestag Speech at.

[8] Finnis remarks: “Since this embarrassing collapse [of logical positivism], few philosophers in the English-speaking world have wished to think of themselves as positivists, and today we speak more often of scientism –of theses or assumptions that are scientistic (as distinct from scientific) because they assume that outside natural science there are nothing but subjective assertions and beliefs, corresponding to nothing objective ‘in the universe’. The Roman Law scholar whose book the Bundestag address cites several times uses the term ‘scientistic’, in the cited pages, as equivalent to ‘positivist’. But people who hold these sceptical assumptions or theses do not, of course, describe their own position as scientistic or scientism; more commonly, they would today call it naturalism”. Finnis, 2, emphasis added.

[9] Finnis, 2.

[10] On the relativism and skepticism of most sophists, see generally, R.E. Allen, The Dialogues of Plato (New Haven: Yale University Press, 1984) and Stanford Encyclopedia of Philosophy, s.v. “The Sophists”, in https://plato.stanford.edu/entries/sophists/

[11] Finnis, 4.

[12] In the context of the philosophy of law “positivism” often means something different from what Pope Benedict XVI means in his speech. See e.g. Timothy Endicott, “Raz on Gaps – the Surprising Part”, in Rights, Culture, and the Law. Themes from the Legal and Political Philosophy of Joseph Raz, L. H. Meyer, S. L. Paulson y T.W. Pogge (eds.) (Oxford University Press: Oxford, 2003), 100 (stating that he does not know what legal positivism currently means and posing the rhetorical question whether legal positivism does even exist). In the same book featuring Endicott’s piece, Raz (in whose honor the book was published) expresses his agreement, and repents of having on occasion adopted the label “[legal] positivist”. Similarly, Finnis wrote in the same year in which Raz’s festschrift came out that “it is a mistake to talk about positivism at all. I have been trying for decades not to do this sort of thing, and I repent for having done it. [...] Better to think: there’s no such thing as [legal] positivism”. John Finnis, Law and What I Truly Should Decide, 48 Am. J. Juris. 107 (2003), 127.

[13] Finnis, 3.

[14] Guidance and “oughtness” can also flow (and flow) from religious norms and standards. For examples, see Santiago Legarre, A New Natural Law Reading of the Constitution, 78 La. L. Rev. 877, 881-883 (2018).

[15] Finnis, 4.

[16] Finnis, 4-5. Finnis shows in his Milan address that Kelsen had already held this skeptical view about natural law in his early work but also that this trend got worse (and got extended to positive normativity) in the late production of his final years. See especially, Hans Kelsen, General Theory of Norms (1979).

[17] Kelsen’s essay collection What is Justice?, was originally published in California in 1957

[18] Unsurprisingly given their relativism and skepticism, the Sophists too rejected the normativity of natural law. They were famously refuted by Socrates. As Finnis explains, “Socrates/Plato transforms the Calliclean opposition between nature (physis) and law/convention (nomos) into the recognition of a natural law –the set of propositions which pick out (i) the goods (such as knowledge and friendship) to be pursued and (ii) the principles of reasonableness in realizing goods in the life of oneself and one’s fellows– the principles of justice and the other virtues”. John Finnis, Natural Law and the Ethics of Discourse, 43 Am. J. Juris. 53, 62, footnote omitted.

[19] Thomas Aquinas, Summa Theologiae I-II, 95, 2 c. See generally Santiago Legarre, Derivation of Positive from Natural Law Revisited, 57 Am. J. Juris. 103-110 (2012) (discussing the different connections between natural and positive law).

[20] Finnis, 5.

[21] See Thomas Aquinas, Summa Theologiae I-II, 94, 2 c.

[22] We should add that each of the first principles of natural law comes under an even more general and abstract principle: “[...] the absolutely first principle of practical reason: Good is to be [ought to be] pursued and done (and evil avoided)”. Finnis, 9; and see Thomas Aquinas, Summa Theologiae I-II, 94, 2 c.

[23] Finnis, 5.

[24] Finnis, 6.

[25] “Pre-moral”: Finnis’s word back in 1980: John Finnis, Natural Law and Natural Rights (Oxford Univ. Press, 2011), 86; 101 (1980).

[26] Chapter II of Finnis’s Natural Law and Natural Rights is tellingly titled “Images and Objections”. See id.

[27] Cristóbal Orrego, The Relevance of the Central Natural Law Tradition for Cross-Cultural Comparison, 8 J. COMP. L. 26, 32 (2014). Along similar lines, MacIntyre tellingly described natural law as the acceptance of “the objective value of human reason and the objectivity of what is good or evil regarding at least certain things that are basic human goods for all persons, regardless of time or culture”. Alasdair MacIntyre, After Virtue 34 (Notre Dame Press, 2007).

[28] Finnis, 6.

[29] For some years Finnis too had called them “basic values”. John Finnis, Natural Law and Natural Rights, cit., 59.

[30] The first principles only become fully moral “when we take into account the fact that we have to choose between this intrinsic good (and different possible instances of it) and different intrinsic goods”. Finnis, 5. The same is true of the other “first principles”, alluded to by Thomas Aquinas, Summa Theologiae I-II, 94, 2 c. And see John Finnis, Aquinas: Moral, Political, and Legal Theory (Oxford Univ. Press, 1998), 86-90.

[31] John Finnis, Natural Law and Natural Rights, cit., Chapters III-IV. Neil Gorsuch refers to the basic goods as follows: "[...] there are certain irreducible and categorical moral goods and evils. The existence of such moral absolutes has been suggested by Aristotle, argued by Aquinas, and defended by contemporary natural law thinkers". Neil M. Gorsuch, "The Right to Assisted Suicide and Euthanasia", 23 Harv. J.L. & Pub. Pol'y 599, 697-698 (2000) (footnotes omitted). This wording is much less precise than Finnis's (as is perhaps to be expected), and runs together what Finnis keeps distinct; but given that its author is now a Justice of the Supreme Court of the United States it is worth recalling his words for the record, given their commendable general drift.

[32] Finnis, 9.

[33] In his 2012 address, Finnis reminds us of the Thomistic teaching that "these first principles do not follow from any other truth; they are all [...] per se nota, and indemonstrabilia. They are each understood, without inference from any other proposition, by an act of original insight into data, the data which we are aware of as possibilities in which we have an interest". Finnis, 9.

[34] Christopher L. M. Eisgruber, Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism, 55 U. Chi. L. Rev. 319, n. 114 (1988).

[35] Thomas Aquinas, Summa Theologiae I-II, q. 94, 4 c. This happens either as a result of simple error in the reasoning process from general principles to specific precepts or due to one's own vices. Thomas Aquinas, Summa Theologiae I-II, q. 94, 4 c; q. 94, 6 c.

[36] To stress the notion that natural law does not require faith, when I teach Jurisprudence I tell my students that natural law is "the religion of the atheist" –an idea quite in line with Saint Paul's words to the Roman pagans: even though they did not have the revealed religion, they "still through their own innate sense [that is, natural law] behave as the [Jewish] Law commands [...] They can demonstrate the effect of the [natural] Law engraved on their hearts, to which their own conscience bears witness". Romans 2,14-15 (New Jerusalem Bible).

[37] Thomas Aquinas, Summa Theologiae I-II, 95, 2 c. See generally Santiago Legarre, Derivation of Positive from Natural Law Revisited, cit.

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