Natural Law in the Story of Comparative Law: Considerations on its Continuing Relevance

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INTRODUCTION

Any account of the role of natural law in the story of comparative law is bound to be complicated, perhaps too complicated to be covered in a single paper on the subject, because there are as many varieties of comparative law as there are of natural law.

Nonetheless, it is probably true that today the majority of comparative law scholars would object to any strong rapprochement between comparative law and natural law. This skeptical attitude towards natural law thinking in comparative law circles is not really a matter of taste. It goes back to the circumstance that comparative law became an academic subject taught at the Universities in the nineteenth century, when natural law as a common ground of legal discourse was vanishing. This was a time in which national States were growing in importance and weight, while empires going back to the modern and pre-modern age were dying. In this sense at least, comparative law and natural law theory were in part diametrically opposed intellectual projects and trajectories. In that age, marked by a growing faith in positivism, comparative law often took the name of comparative *legislation*, and this was *pour cause*, to deny any metaphysical dimension of the subject.

A closer look at our topic reveals that this initial diagnosis captures only a part of the story, however.

Over the centuries, a good deal of comparative law has been inspired by approaches that resonate with natural law thinking of one kind or another, or openly avows its debt to a specific variety of natural law philosophy. This is hardly surprising, of course. For over two millennia, in a variety of historical contexts, the West has paid tribute to the idea of natural law, in religious, philosophical, legal, political, anthropological, sociological, and economical discourses. Legal positivism (and legislation as the main source of law) was a relative late comer on the scene of Western law after the fall of the Roman Empire. Even the enactment of comprehensive legislation in the form of a civil code in the early part of the nineteenth century did not involve a rejection of natural law, but was to an extent, an accomplishment of it. Both the French (1804) and the Austrian Civil Codes (1811) were largely and directly indebted to natural law thinking.

On the other hand, as happens with every intellectual tradition of remote origin, the continuing relevance of natural law to current developments in the field of comparative law is now rather difficult to assess, or even to trace. We can be confident that natural law has left its mark on a certain number of assumptions shared by some scholars belonging to the comparative law community. Nonetheless, much has happened since the time natural law was simply *the* way to reason about law. Furthermore, to be frank, not all that goes under the name of natural law is today easily intelligible by (or accessible to) the average legal scholar or lawyer in the West, whether trained in comparative law, or not. The connection between law and religious or moral theory is no longer taken for granted, as it was in most Western countries during the golden age of natural law thinking. Under the influence of political realism, public discourse based on strong ethical assumptions such as those on which natural law is based has declined, and although the tradition has maintained a certain vitality, it is no longer dominant.[1]

In the following pages I will try to explain why natural law thinking continues to have some influence in the field of comparative law, although it is not the polar star of comparative legal studies. I will also map some of the tensions which are inherent in the idea of natural law, taking as a point of reference the classical natural law tradition.[2] That tradition is not monolithic. It is the outcome of a mix of factors and influences. Greek philosophical thought, philosophical and legal thinking in Ancient Rome, Christian theological, philosophical and legal thought, have all come together to produce it. The influence of Greek thought on Christian theology in the Middle Ages was itself mediated by the works of Islamic translators and commentators of Greek texts. To pick a case in point, the principal exponent of the classical natural law tradition—Thomas Aquinas (c.1225-74)—was influenced by the commentaries on Aristotle (and Plato) written by Ibn Rushd (Averroes) (c. 1126-1198), who before him had worked to reconcile Greek philosophy with the Islamic revelation.[3]

The conclusion I present in the following pages will also help—I hope—to explain why strands of natural law thinking will remain productive components of comparative law exercises in the future. Indeed, the influence that natural law thinking still has in today's world cannot be passed over in silence by comparative lawyers. Documents such as the American Declaration of independence of 1776, the French Declaration of the Rights of Man of 1789, and the various charters that in the contemporary world set out lists of fundamental rights, still speak to us of its influence.

[1] On how this fundamental change happened see Hirschman, AO (1977) *The Passions and the Interests: Political Arguments for Capitalism before its Triumph* Princeton University Press.

[2] By this expression I mean the natural law tradition that relies on the teachings of Thomas Aquinas (1225 -1274), which developed into Thomism and scholasticism. Modern natural law is conventionally established by the works of Samuel Pufendorf (1632-1694). Kantian natural law presents a completely different intellectual framework from pre-Kantian natural law, although it builds upon it. For an illustration of classical natural law, and a concise criticism of Kant's natural law, see Finnis, J 'Natural Law: The Classical Tradition' in Coleman, J and Shapiro, S (eds) *The Oxford Handbook of Jurisprudence* Oxford University Press 1; for a contemporary exposition of Thomistic natural law see: Rhonheimer, M (2010) 'Natural Law as a "Work of Reason": Understanding the Metaphysics of Participated Theonomy' (55) *The American Journal of Jurisprudence* 41 (the author took part in the redaction of the document 'The Search for Universal Ethics: A New Look at Natural Law', presented in 2008 by the International Theological Commission).

[3] These are not obscure episodes in the history of the subject, they are a central part of it, to the extent that Dante praises Averroes together with Aristotle and Plato and many other thinkers of the antiquity in his *Divine Comedy*.

COMPARATIVE LAW, COSMOPOLITANISM, POSITIVISM

Comparative law scholars have not all been trained in the same—universally consistent—intellectual tradition. They do not share all the same intellectual premises, nor do they all have the same outlook on what comparative law is, or should be.[4] Given this initial premise, it would then be a caricature to turn every comparativist into a natural law lawyer in disguise, or a would-be natural lawyer, possibly *malgré soi*. Nonetheless, there are comparative law scholars who have worked (or are working) in the shadow of the classical natural law tradition. Furthermore, some comparative law scholars do vindicate, revive, or go back, to methodological claims associated with that ancient philosophical tradition, which is thus receiving a new lease of life, for reasons that are worth considering more in detail.

The history of comparative law shows that this discipline has often been inspired by a certain tendency to cosmopolitanism. The idea of a world law that could bind mankind did not decline in the age of positivism, when comparative law was established as an academic discipline. On the contrary, it flew high, despite the attacks of the romantic age—imbued with historicism—against the rationalistic natural law of the late seventeenth and eighteenth century. After the first decades of the nineteenth century, there was a growing interest in the idea that local laws could be brought under a common denominator, to be found by comparing different systems of law. The coat of arms of the French *Societé de legislation comparé*, established in 1869, speaks clear in this respect: *lex multiplex*, but *ius unum*.

Beyond the variety of national legislation, one was still able to think in terms of the unity of law across the globe. This is the period in which Auguste Comte makes visionary plans for a world government, holding such government as not only feasible, but in the end inevitable.[5] The intuition and the ideology behind this stream of thought was that there could be only one model of rationality, and a single line of evolutionary development for mankind. By the same logic, there could be only one set of values supported by that model, as Condorcet had proclaimed in his critical commentary on Montesquieu's *De l'esprit des lois*.[6] This is the line of thinking against which the German historical school revolted, which was first opposed by Burke in England and by Herder in Germany, and that eventually inspired Maine's *Ancient Law*,[7] although Maine himself, like Herder and many of their contemporaries, continued to believe in a modified form of cultural evolution.[8]

Comparisons, in this age, then, were quite often comparisons made to uphold the validity of a single model, which was proclaimed superior to any other,[9] and which

[4] Although the dimension of the comparison joins all of them. Cp. Reitz, J (1998) 'How To Do Comparative Law' (46) *American Journal of Comparative Law* 617; Maurice, A and Bomhoff, J (eds) (2012) *Practice and Theory in Comparative Law* Cambridge University Press.

[5] See Comte, A (1844) [2009] *A General View of Positivism* Bridges, JH (trans) Trubner and Co 1865 reissued by Cambridge University Press, or. ed. *Discours sur l'Esprit positif* (1844).

[6] Condorcet M-J-A-N. de Caritat 'Observations on the Twenty-ninth Book of the Spirit of Laws, by the Late M. Condorcet' in Destutt de Tracy, ALC (1811) *A Commentary and a Review of Montesquieu's Spirit of Laws* William Duane.

[7] Maine, HS (1861) *Ancient Law, in Connection with the Early History of Society and its Relation to Modern Ideas* John Murray.

[8] See Stein, P (1980) *Legal Evolution: The Story of an Idea* Cambridge University Press.

[9] On the raise of sentiment of superiority in the eighteenth century Europe see Goody, J (2006) *The East in the West* Cambridge University Press.

frequently corresponded to that found operating in a theorist's own nation. Under the veil of cosmopolitan ideas, ethnocentrism ruled.[10] This was the period in which the idea that other civilizations represent lower stages of development became popular among Europeans, and when the notion of primitive man and primitive peoples gained currency in many disciplines, reflecting the unequal power relationships firmly established with the advent of the industrial age and the spread of industrialization.[11]

This dispiriting discovery, namely that, because of untested assumptions, some legal systems were systematically considered to be superior to others was bound to cause some opposition within the Western world itself. There can no comparison worthy of the name if one of the objects to be compared is systematically considered to be inferior to the other. Throughout the nineteenth century this type of comparison was practiced both with respect to the laws of peoples who did not belong to the Western world, and were subjected to colonialism, and among the European nations themselves. Hence, some of the great common law minds of the nineteenth century, namely Oliver Wendell Holmes jr, Albert Venn Dicey, Frederic William Maitland, set out to explain to their colleagues and to European scholars working on the other side of the Channel, or of the Atlantic, why common law countries were not lacking just because they did not adopt written codes to state the law[12] (or a written constitution to guarantee the rights of their citizens[13]), or did not trace the history of their laws back to Roman law.[14]

COMPARATIVE LAW, FUNCTIONALISM AND THE APPEAL OF NATURAL LAW

Once comparative law ceased to be a mere comparison of positive legislation, of codes and written constitutions, of the primitive and of the civilized, the problem of the theoretical or jurisprudential nature of the enterprise became glaring.

The turn to functional comparative law in the second half of the twentieth century was a response to the all too narrow approach to comparative studies which had preceded it.[15] This turn was accompanied, once more, by universalistic disciplinary aspirations. For those who held that comparative law was to be a form of science, not confined within the national boundaries, one point was clear. As any other science, comparative law must have looked for universals. But contrary to what the prevailing view had until then suggested,

[10] For this reflection, in general terms, Todorov, T (1989) [1993] *On Human Diversity: Nationalism, Racism, and Exoticism in French Thought* Porter C Harvard University Press 1993.

[11] This ideology—primitivism—has just been interred: Kurasawa, F (2002) 'A Requiem for the Primitive' (15) *History of the Human Sciences* 1. It dominated ethnology and anthropology for a long tract of their history, until Boas and Durkheim attacked it. To understand this mind-set, one should also consider that until the twentieth century knowledge of unwritten languages of many peoples was not pursued systematically and was generally very poor even among ethnographers and anthropologists. Interestingly, even today some learned histories of comparative law do not touch upon the problems raised for the comparison by the penetration of European powers in other continents, see, eg Donahue, C (2002) 'Comparative Law before the Code Napoléon' in Zimmermann, R and Reimann, M (eds) *The Oxford Handbook of Jurisprudence* Oxford University Press 3.

[12] Holmes, OW jr. (1870) 'Codes, and the. Arrangement of the Law' (5) *American Law Review* 1.

[13] Dicey, AV (1885) *Lectures Introductory to the Study of the Law of the Constitution* MacMillan.

[14] For more on this see Graziadei, M (1993) 'Changing Images of the Law in XIX Century English Legal Thought (The Continental Impulse)' in Reimann, M (ed) *The Reception of Continental Ideas in the Common Law World* Dunker & Humblot 115.

[15] Compare Graziadei, M (2003) 'The Functionalist Heritage' in Legrand, P and Munday, R (eds) *Comparative Legal Studies: Traditions and Transitions* Cambridge University Press 100.

those universals were constituted by a certain set of legal problems, managed through the application of different legal norms adopted across the globe. As Ralf Michaels notes, in its mature form this approach involved the following stance: 'Comparatists viewed the solutions in different legal systems as responses to common problems, contingent in their form but none the less required by the nature of the problem.'[16] This view of comparative law was compatible with both a teleological image of the world, in the footsteps of the Aristotelian and the Thomistic tradition of natural law, which is now being revived in particular by James Gordley,[17] but also with a nonteleological variety of functionalism. The latter owes little to classical natural law, and much more to a value-free sociological science, that separates functions from origins, and considers functions as relations between, not qualities of, the elements to be compared, to put it as Michaels aptly did.[18] This trend therefore does not intend deal with the goals of individuals, which are contingent, unsuitable objects of scientific endeavor, but rather with objective social functions. They are the only proper subject of enquiry for a science of society, in the footsteps of a tradition of research inaugurated by Durkheim in the late nineteenth century.[19] Such trend is less familiar to the average lawyer than the first, especially in continental Europe, and yet in the history of contemporary socio-legal thought is very important, being at the origins of all forms of sociological and realist jurisprudence, as well as of structuralist approaches to law. In this context, I only have to deal with the first methodological stance mentioned above; the second is a story for another day, although the effort to discover social regularities across different societies, and to uncover their structures, is a most enlightening exercise.

UNIVERSAL PRINCIPLES LEADING TO THE ADOPTION OF DIFFERENT RULES

To understand why classical natural law may be considered by some scholars an appealing way to approach the comparative study of law we first have to consider its place in the intellectual history of Western legal thought from the middle ages up until the late eighteenth century. This is a long story, but perhaps I can be excused for singling out only some of its key points, given that others have brilliantly illustrated the full picture.[20]

I have already mentioned a preliminary point, namely that the classical natural law tradition is an imposing edifice made of many different bricks. The relationship of medieval interpreters with the rich intellectual legacy transmitted by texts produced by the ancient world was highly complex and subtle, and the process of adaptation and reception of that legacy in the middle ages is fascinating in itself.

Two features of that tradition stand out from a contemporary perspective.

Classical natural law, along with natural law in general, tries to distinguish between universal and contingent normative phenomena. This involves a comparative exercise

[16] Michaels, R (2006) 'The Functional Method of Comparative Law' in Reimann, M and Zimmermann, R (eds) *The Oxford Handbook of Comparative Law* Oxford University Press 339 at 346.

[17] See, eg Gordley, J (2006) *Foundations of Private Law* Oxford University Press.

[18] Michaels, R 'The Functional Method of Comparative Law' supra note 16 at 346-347.

[19] Durkheim, E (1982) [1895] *The Rules of the Sociological Method* Hall, WD (trans) The Free Press.

[20] The full story is set out in Miller, FD jr, in association with Biondi, C-A (eds)(2007) *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics* in Pattaro, E (gen ed) *A Treatise of Legal Philosophy and General Jurisprudence* vol. 6 Springer; Canale, D; Grossi, P and Hofmann H (eds) (2009) *A History of the Philosophy of Law in the Civil Law World, 1600-1900* in the same *Treatise,* vol. 9.

that positivists do not necessarily have to undertake. Furthermore, by making appeal to reason, that tradition introduces an interpretative element in what is required to human agents acting under the law.[21] Classical natural law, in other words, contrary to some other conceptions of natural law, tries to capture the perspective of the human subject to whom norms are addressed. At the same time, it does not make concession to a subjectivist notion of law, by positing a finalistic view of human being. To put it in the clearest terms, classical natural law layers hold that, although the law is objective, its message is nonetheless addressed to agents who have interpret it coherently in order to fulfill it, and this is an essential feature of it.[22]

The appeal to reason thus marks an essential distinction between the classical tradition of natural law, and an alternative account of natural law, by which natural law is simply: '*quod natura omnia animalia docuit*'.[23] This alternative natural law tradition, which does not put an accent on reason, and even less on right reason, deserves separate examination because it does not really align with the classical natural law. It is actually a challenge to it, because it portrays natural law as an unbending force, unconnected to free decision.

In order to consider what elements sets the two currents of natural law just mentioned apart, let us first take a closer look at some of the central features of the classical natural law tradition associated with the Aristotelian and Thomistic tradition.

One of the strengths of the classical natural law vis à vis later natural law thinking is the rejection of the notion that ethics is a matter of deductive logic. James Gordley rightly notes that natural law scholars belonging to the classical tradition recognized that people are different, just like the circumstances in which they operate, and that there are as many ways to pursue a distinctively human life as there are good lives to live. According to this legal philosophy, the same principles applied in different epochs or in different places can therefore lead to different solutions of specific problems, as well as to different choices. All these differences do not necessarily reflect beliefs in alternative principles, however. As Gordley nicely put it, according to that tradition, it is simply not true that 'people must believe in different things because they adopt different rules.'[24] On the contrary, they may believe in the same things, although they are following different rules. This variability of concrete outcomes under the umbrella of identical principles is explained by holding that the relationship between principle and rule is teleological, as the Aristotelian and Thomistic philosophical tradition predicates, rather than based on deductive logic, as the rationalistic natural law lawyers of the late seventeenth and eighteenth centuries maintained, while developing a strictly axiomatic and systematic treatment of natural law.[25]

[21] The point is made most clearly by Finnis, op.cit.

[22] One needs not to be a classical natural law lawyer to make the same point, of course: Dworkin, R (1982) ' "Natural" Law Revisited' (34) *University of Florida Law Review* 165. Note that, from the point of view of an external observer, all Continental lawyers, even today, share a posture that could be traced back to the same type of methodological stance: Kennedy, D (1997) *A Critique of Adjudication (fin de siècle)* Harvard University Press 36-37 ('in this respect, Dworkin is a Continental').

[23] D. 1.1.1.3 (Ulp. 1 inst.); Inst. 1,2 pr. For more on this, see below.

[24] Gordley, J (2006) *Foundations of Private Law* Oxford University Press at 42.

[25] On the general features of late seventeenth century and eighteenth century rational natural law see Scattola, M (2009) '*Scientia Iuris* and *Ius Naturae*: The Jurisprudence of the Holy Roman Empire in the Seventeenth and Eighteenth Century' in Canale, D, Grossi; P and Hofmann, H (eds) *A Treatise of Legal Philosophy and General Jurisprudence* Volume 9, supra note 20 at 1.

Even apparently large differences among legal systems may therefore be counted as variations that are compatible with the acceptance of the same underlying principles. Since one would often look in vain for a single right answer to the question of what it is to conduct a 'distinctively human life', variations across legal systems may occur even though the same principles are applied to the same circumstances.

Classical natural law—I am inclined to think—was bound to accept these teleological premises almost most by necessity, given the need to adapt an original ethnic religion to a universalistic vision of salvation, to be embraced by all humanity. That tradition was based on a reworking of classical materials that were read in the light of new purposes, such as those that the fathers of the church had in mind when they set out to explain certain parts of the old testament. Accommodation was the key to seize how those different materials could all be made relevant to the pursuit of new purposes.

Augustine of Hippo (354-430), who provided some of the building blocks of that tradition, gives some good examples of this stance. In his letters he discusses why the old sacrifices to God practiced by the Jewish must give way to the new sacrifice upon which the Church is established. Was then the old sacrifice not pleasing to God? Had His mind changed? Augustine answers this challenging question posed by the pagan senator Volusianus through the imperial officer Marcellinus by arguing that God makes his plans by accommodating them to what mankind is in each epoch. New historical circumstances require a new kind of sacrifice.[26] He makes the same argument to explain why what is sinful under certain circumstances is not a sin under other circumstances:

> Keeping company with a harlot, for example, is one thing when it is the result of abandoned manners, another thing when done in the course of his prophecy by the prophet Hosea. Because it is a shamefully wicked thing to strip the body naked at a banquet among the drunken and licentious, it does not follow that it is a sin to be naked in the baths.[27]

Augustine is thus maintaining that what counts is the perspective by which rules and behaviour are approached:

> We must, therefore, consider carefully what is suitable to times and places and persons, and not rashly charge men with sins. For it is possible that a wise man may use the daintiest food without any sin of epicurism or gluttony, while a fool will crave for the vilest food with a most disgusting eagerness of appetite. […] For in all matters of this kind it is not the nature of the things we use, but our reason for using them, and our manner of seeking them, that make what we do either praiseworthy or blamable.[28]

[26] Epistula CXXXVIII, Augustine to Marcellinus (AD 411-412). For a modern English translation see Letter 138: Atkins, EM and Dodaro, RJ (2001) *Augustine: Political Writings* Cambridge University Press at 30, See Funkenstein, A (1986) *Theology and the Scientific Imagination* Princeton University Press; Ginzburg, C 'Distance and Perspective: Two Metaphors' in Id (2001) [1998] *Wooden Eyes: Nine Reflections on Distance*, Ryle, M and Soper, K (trans) Columbia University Press 139 ff., and on the general theme: Benin, SD (1993) *The Footprints of God: Divine Accommodation in Jewish and Christian Thought* State University of New York Press 93 ff.

[27] Augustine of Hippo (1873) [397- 426] *De Doctrina Christiana* Shaw JF (trans) T&T Clarck (*On Christian Doctrine*), Bk. III, ch. 12.

[28] Ibid. This way of reasoning accounts for the acceptance of polygamy in the old Testament: '[…] on account of the necessity for a numerous offspring, the custom of one man having several wives was at that time blameless: and for the same reason it was not proper for one woman to have several husbands, because a woman does

However, Augustine also rejects the conclusion that there is no absolute right or wrong beyond the endless variety of customs:

> But when men unacquainted with other modes of life than their own meet with the record of such actions, unless they are restrained by authority, they look upon them as sins, and do not consider that their own customs either in regard to marriage, or feasts, or dress, or the other necessities and adornments of human life, appear sinful to the people of other nations and other times. And, distracted by this endless variety of customs […] have thought that there is no such thing as absolute right, but that every nation took its own custom for right; and that, since every nation has a different custom, and right must remain unchangeable, it becomes manifest that there is no such thing as right at all. Such men did not perceive, to take only one example, that the precept, "Whatsoever ye would that men should do to you, do ye even so to them," cannot be altered by any diversity of national customs. And this precept, when it is referred to the love of God, destroys all vices when to the love of one's neighbor, puts an end to all crimes.

This approach reflects how Aristotle conceptualized the relationship between natural law and human laws, and anticipates what Aquinas set out in more detail and elaborated in his *Summa Theologica*.

Aristotle's doctrines on natural law and natural justice are controversial, and this is at least in part due to the evolution of his thought after the rejection of Plato's views on natural law and justice,[29] but they are central to the elaboration of classical natural law by Aquinas and the late Scholastics. According to Aristotle's *Rhetoric*, the law is both particular (*idios*) and common (*koinos*).[30] The law which is common consists of things agreed by all persons, and it is law according to nature. This implicitly reflects natural justice, and is eternal and never changing. Particular law, on the other hand, is conventional, it is the law by which people govern themselves, and in reference to themselves. In the *Nichomachean Ethics*, however, Aristotle introduces the idea of change with the natural law as well. Even though in the sphere of God there may be no change, change is possible in the sphere of natural things, as well as in human societies. Just things in the human sphere can therefore undergo change, so that it would be wrong to deny, as the sophists did, the existence of natural justice simply because human societies experience change over time.[31] To reinforce this point, Aristotle draws attention to the fact that, although the idea of measure is the same everywhere, there are different measuring units for the retail trade and for large scale trade. He also notes that, although most people are by nature right-handed, some are not, and some can become ambidextrous through practice.[32]

not in that way become more fruitful, but, on the contrary, it is base harlotry to seek either gain or offspring by promiscuous intercourse. In regard to matters of this sort, whatever the holy men of those times did without lust, Scripture passes over without blame, although they did things which could not be done at the present time, except through lust.'

[29] On the evolution of Aristotle's thinking about natural law: Miller, FD jr (2008) 'Aristotle's Philosophy of Law' Miller, FD jr, in association with Biondi, C-A (eds) *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics* supra note 20 at 94 ff.,

[30] Aristotle, *Rhetoric*, I, 10.1368b7, 13.1373b4.

[31] Aristotle, *Nichomachean Ethics*, 1134b27-30, but contrast: X.8.1178b1012. See on this point Miller, op. cit., 96.

[32] Id, 1134b30-5.

The place of 'exceptions to the rule' in Aristotle's thought is significant also with respect to legislation. Being framed in universal terms, legislation cannot always reflect all the circumstances to which it must be applied.[33] This is why equity intervenes to correct the generality of legislative statements, which may be defective due to its generality[34]. Nonetheless, Aristotle held that the framing of positive laws was indispensable to avoid the dominance of instincts and passions. Passions and instincts transform man without practical rationality and virtue in the most unholy and savage animal. In this sense although there is such a thing as natural justice: 'justice is political; for the administration of justice (*dik*ê) is [the] order (*taxis*) of the political community, and the administration of justice is a judgment regarding what is just.'[35] What is just in this respect is to be determined through the exercise of reason, prudence and virtue, although wise legislators must also be knowledgeable about human nature. Nonetheless, in the *Rhetoric* he recognized that positive laws may conflict with the natural law, citing Sophocles' *Antigone*.[36] This last point is the starting point of the seminal medieval and modern doctrine—which I will consider below—restraining the absolute power of rulers by making an appeal to natural law and to the natural rights of their subjects.

After the diffusion of Thomism, in the epoch of the second scholastic, one of the best examples of the application of the teleological analysis of law and of human actions shared by the classical natural law is provided by Bartolomé de las Casas's *Apologia* in defence of the Indians in the famous controversy of Valladolid (1550-1551) over the treatment by the Spanish of the natives in the New World, and then in his *Apologética historia sumaria*[37].

In order to counter the thesis that they could be subject to slavery by the Spanish, because, among other things, they were barbarians practicing human sacrifices, as his opponent Juan Ginés de Sepúlveda argued, Las Casas applied himself to developing the perspectivist stance just described above. He thus invoked the authority of Aristotle, Augustine and Aquinas, among others, to rescue the autochthonous populations from the charge of being uncivilized.[38] Although not condoning human sacrifices in any way whatsoever, Las Casas highlighted the fact that sacrifices are due to God as a matter of natural law, being offered by many peoples in antiquity as well. Hence, the Indians could not be considered barbarians just because they offered to God what is of utmost value, namely human life. Not being illuminated by grace, this was what natural reason suggested to them. This sacrifice showed only that they ardently believed in God. Indeed, Las Casas compared their religiosity to that of the early martyrs, who were willing to sacrifice their life in the name of the Christian faith. In the eyes of Las Casas, their religion

[33] Id, V.10.1137b13-14.

[34] Id, V.10.1137b34-1138; Id, *Rhethoric*, I.13.1364a33-b1.

[35] Aristotle, *Politics*, 1253a29-39.

[36] Aristotle, *Rhetoric,* I.15.1375a25-b25.

[37] These texts circulated only in manuscript, and remained unpublished for a long time, but the synthesis of debates held at Valladolid prepared by Domingo de Soto was published by Las Casas in 1552. For a critical introduction: Di Lisio, FS (ed) (2006) Bartolomé de Las Casas, Juan Ginés de Sepúlveda, *La controversia sugli indios* Edizioni di pagina.

[38] Pagden, A (1982) *The Fall of Natural Man: the American Indian and the Origins of Comparative Ethnology* Cambridge University Press at 121, notes that Las Casas took an original stance because he intended to prove that 'between the glaring cultural differences between the races of men there existed the same set of moral and social imperatives.' See also Todorov, T (1999) [1982] *The Conquest of America: The Question of the Other* Adams, R (trans) University of Oklahoma Press 186 ff.

was no more distant from Christianity than the religion of the Romans, or of the Greeks, who became good Christians in the course of time.[39]

Historians of a later period may notice, incidentally, that the discursive technique of accommodation, which was brilliantly deployed in this way, could be used just as effectively by an ideology intended to combat all religious faiths. Thus, communist leaders sometimes resorted to the same type of discourse when they had to clarify how to interpret Marxist doctrine, to show how it maintained its validity in all circumstances.[40] This type of discourse was employed, for example, to justify how socialism can exist within a single country, although orthodox Marxist doctrine denied this possibility.

WHAT NATURE TEACHES TO ALL ANIMALS

The legal philosophy emerging out of the Aristotelian and Thomistic tradition was the dominant school of thought in continental Europe until the development of a secular version of natural law, alongside rationalism, in the late seventeenth and eighteenth centuries. These currents revived—to a certain extent—a different concept of natural law that could also be traced back to antiquity, which gained ground only when the classical natural law began to be abandoned.

As mentioned above, in a certain sense this second notion of natural law contrasts with the teaching of the classical natural lawyers. According to this second perspective, natural law is simply what *natura omia animalia docuit*, namely what nature teaches to all animals (including man).[41] Commenting upon this conception of the natural law, Tony Honoré rightly notes that it foreshadows contemporary approaches that rely on the findings of genetics to explore what is common among all living organisms.[42]. This naturalistic doctrine of natural law avoids the sacralisation of such law, and does not involve a plan of God putting man at the centre of the universe. Instead, it relates certain human institutions, including marriage, to what is common to all living creatures. The opening of Justinan's Digest and Institutes, reproducing a well known fragment by Ulpian on the natural law, pays homage to this concept. Ulpian attributes to the law common to all animals: 'the union of male and female which we call marriage, the procreation of children and their education. For we see that other animals, including wild animals, are taken to have experience of this law'. This earthly notion of natural law is surely hard to reconcile with accounts of the natural law that extol reason and prudence. As Claude

[39] Bartolomé de Las Casas, *Apologetica Historia* supra note 37. On human sacrifice Las Casas cites both Aquinas, *Summa Theologiae*, I-II, q. 85 al. 1, and Augustine' comments on sacrifice in his *Civitate Dei*.

[40] Stalin, JV (1950) *Marxism and the Problems of Linguistics* Foreign Languages Publishing House (letter to comrade A. Kholopov, July 28, 1950) available online at: <http://www.marxists.org/reference/archive/stalin/works/1950/jun/20.htm>.

[41] D. 1.1.1.3 (Ulp. 1 inst.). This is the full quotation: 'Ius naturale est, quod natura omnia animalia docuit: nam ius istud non humani generis proprium, sed omnium animalium, quae in terra, quae in mari nascuntur, avium quoque commune est. Hinc descendit maris atque feminae coniunctio, quam nos matrimonium appellamus, hinc liberorum procreatio, hinc educatio: videmus etenim cetera quoque animalia, feras etiam istius iuris peritia censeri'. This also reproduced, with minor variations in Inst. 1,2 pr. The roots of this notion can be traced back to different strands of Greek philosophy, which I will not cover here. The question whether it was right to sacrifice animals to the goods may have spurred a reflection on what law was common to all, as it has been rightly noted.

[42] Honoré, T (2010) 'Ulpian, Natural law and Stoic influence' (78) *The Legal History Review* 210: 'Stoicism was unusual in the ancient world in discerning common elements in different types of living creature. In this it was closer than other schools of thought to the understanding we derive from modern genetics.'.

Lévi-Strauss noted, this is, however, the conception that is found in all the societies that agree in making man a recipient of creation, and not its master, and it is in this sense far from being exceptional.[43] The Roman jurists never oppose natural law to positive law, or argue that natural law limits the validity of positive law. In the light of this fact, the Roman lawyers who translated the Greek expression *dikaion phusis* into the Latin expression *ius naturale* possibly altered the meaning of the original expression. According to the Greeks, this expression denoted something which was just in itself, an uncodified principle for the regulation of the human condition, against which to measure positive legislation. Later natural law thinking in the Middle Ages reinforced this high idea of the natural law by underscoring the relationship between natural law and divine will. Natural law, being an expression of divine will, was bound to have precedence over positive law. For the Roman jurists, in contrast, *ius* was the legal norm, and *ius naturale* was probably simply the legal norm conforming to nature. In line with a formalistic attitude to what the law is they never considered natural law as a force capable of clashing with the legal order.

NATURAL LAW AND ENTRENCHED LEGAL RIGHTS

The approach to natural law that evokes the idea of a higher law, sanctioned by divine will, is at the roots of the medieval doctrines advancing the concept of natural law as a means to control and limit the power of princes. It is well known that in England natural law thinking inspired the idea that legislation violating such law was void according to the common law, being against common right and reason.[44] Yet, that chapter of English constitutional history remained closed after the age of Sir Edward Coke.

Research in comparative constitutional history shows that such old attempts to subject ruling powers to rationality checks were not confined to Europe, however. The maxim *iura naturalia sunt immutabilia,* which was alien to the Roman jurists, although adumbrated by passages of Cicero's *De Republica,*[45] neatly encapsulates the contribution of medieval legal thought on this point.[46] Quite interestingly, the same maxim was by no means unknown in modern England: it was cited in court by Edward Coke in *Calvin's case,*[47] the precedent that in the US played a seminal role in establishing citizenship by birthright, under the *jus soli*.[48]

The theory of vested rights protected by a higher law was bound to attract much criticism with the onset of legal positivism. Natural law theories of rights used as trumps to undermine legislative acts were then increasingly treated with suspicion. If natural law lacked a divine foundation, how could it prevail over legislation? Being invoked to sanctify rights that the legislature intended to regulate natural law theories fell into disrepute.[49]

[43] Levy-Strauss, C (1992) [1983] *The View from Afar* Chicago University Press 283-284. He clearly implies that the idea of putting man at the centre of the universe is exceptional.

[44] *Dr Bonham's Case* (1610) 8 Co. Rep.114.

[45] Cicero, *De Republica*, III, XII, 33.

[46] Compare Post, G (1964) *Studies in Medieval Legal Thought: Public Law and the State 1100-1322*, The Law Book Exchange at 360, Gorla, G (1991) `Iura naturalia sunt immutabilia'. Limits to the Power of the `Princeps' (as Sovereign) in Legal Literature and Case Law between XVI and XVIII Centuries in Pizzorusso (ed) *Italian Studies in Law* 45; Pennington, K 'Politics in Western Jurisprudence' in Padovani, A and Stein, PG (eds) *The Jurists' Philosophy of Law from Rome to the Seventeenth Century* in Pattaro, E (Gen. ed) *A Treatise*, supra note 20 vol. 7, 157 ff.

[47] *Calvin's Case* (1572) 7 Co. Rep. 1a, 77 E.R. 377.

[48] Price, PJ (1997) 'Natural Law and Birthright Citizenship in Calvin's Case (1608)' (9) *Yale Journal of Law and the Humanities* 74.

[49] Whether that reputation is well deserved is another question. The economic doctrines of classical legal

Although written constitutions entrenching bills of rights seem to replicate the function played in this respect by the idea of natural law, which put beyond the reach of those in power many of those rights that today are usually termed 'fundamental rights', or 'human rights', the presence of a constitutional *text* adopted to govern the life of a certain polity marks out a significant difference. Thus, by the end of the nineteenth century, although natural rights discourse was still extremely important in the US for the structure of legal argumentation 'by suggesting starting points, background assumptions, presumptions or first principles of law', by then it was unthinkable to nullify or avoid a law simply because it conflicted with judicial notions of natural right or morality, or abstract justice.[50]

Those who are inclined to think that these rights must be respected only insofar they are written in a text hold that there can be no greater heresy than to speak of a constitutional penumbra projecting on the contemporary scene rights not expressly entrenched by the written text. The alternative view is that guidance about the number and the content of those rights obtained by consulting that text is important, but that the text itself is largely a reflection of a higher law, and that such higher law cannot be entirely reduced to positive law.[51] We meet once more here an approach that appears to be couched in metaphysical language—a language that would not survive the acid test of realism, nor an originalist reading of the constitutional document. But is this metaphysics, or rather a (still legitimate) form of democratic politics by other means?

In any case, supporters of the idea that constitutional law is a higher form of law, which can only in part be reduced to positive law, are generally more inclined to leave the door open to constitutional comparison, than those who think that the constitution is solely an act in exercise of sovereign power.[52]

CONCLUSIONS

My concluding remarks summarise what the intellectual tradition labelled 'natural law' which has been discussed in the previous pages handed down to comparative law research in general. I would draw attention in particular to the following points.

First of all, the idea of natural law raises the question of what is natural, and in this sense universal, and what is conventional and artificial in the law, and therefore, quite often, local. In the same vein, the idea of natural law was put to work to separate what is contingent and contextual from what is, or tends to be, permanent in the law. This is still a productive question, as well as a productive kind of enquiry, not only for comparative law studies, but more generally. Today the effort to unveil a universal moral grammar shared by mankind, or the rules of behaviour that are common across the species is carried out by an array of scientific disciplines. They use empirical and experimental methods that where unknown in the previous centuries. The law is just beginning to grapple with the contributions produced in these fields, and the comparative law community is beginning

natural law, as developed by the authors of the second scholastic, were by no means unsophisticated.

[50] In these terms, citing late nineteenth century authors, Horwitz, MJ (1992) *The Transformation of American Law, 1870-1960* Oxford University Press at 158-159.

[51] *Griswowold v. Connecticut* 381 U.S. 479 (1965).

[52] Compare Minow, M (2010) 'The Controversial Status of International and Comparative Law in the United States' (52) *Harvard International Law Journal Online* 1 available at: <http://www.harvardilj.org/2010/08/online_52_minow/>.

to discuss—rather timidly—the implications of some of these findings for the discipline.[53] Yet those methods are applied to general problems that the classical law lawyers in their own ways raised. Today, quite often what is contingent and contextual is classified by comparative lawyers under the term 'culture'. For example, different readings of the same text in force in several countries are often explained by assuming that 'culture' works differently here and there. In the past, this mutable and relative component of the law was translated into the language of 'custom'. Each people, each locality, had its own customs. The idea of a non-arbitrary source of law, beyond custom and legislative will—natural law—was invoked to provide an objective foundation of legal orders. Today, many are trying to locate elements of natural law in multiple legal orders across the world to unveil such foundation. Public international law, of course, relied on natural law as a basic source of norms to meet the same demand. This is why there is no lack of literature discussing the topic of natural law with respect to the various legal systems of the world and the relationship between international law and natural law. But what is perhaps even more important for the comparative lawyer, is that such an idea was a means to think across customs and cultures. This is how natural law thinking enlarged the boundaries of the moral community to include in it the entire world. For all the insistence of twentieth century comparative law on the objective functions of certain institutions or rules, to understand what meanings they have for those who uphold them and live by them, is still a central task of comparative law. This communicative and interpretative dimension of the quest for law and justice, symbolized by the appeal of classical natural law to 'reason', has not died out among comparativists. Having said this, one can still maintain that this intellectual construction failed on too many counts. One should, however, perhaps concede at least that it was the failure of a wonderfully instructive dream, which inspired fundamental texts such as the Universal Declaration of Human Rights, and comes back in every discourse over the morality of the law.

[53] See Caterina, R (2004) 'Comparative Law and the Cognitive Revolution'' (78) *Tulane Law Review* 1501, de Coninck, J (2010) 'The Functional Method of Comparative Law: Quo Vadis?' *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 318; Michaels, R 'Explanation and Interpretation in Functionalist Comparative Law—a Response to Julie de Coninck', in the same periodical, 351ff.