

# IS AN AXIOLOGY FREE LAW POSSIBLE?

NR DOI: [HTTPS://DOI.ORG/10.37873/LEGAL.2019.2.1.37](https://doi.org/10.37873/LEGAL.2019.2.1.37)

**I**t is significant to recall at the beginning of this study some verses of the Supreme Poet. They are, indeed, very well known, and they highlight something contemporary, so close to our own time, that perhaps has not yet been properly highlighted:

*Ciascun confusamente un bene apprende / nel qual si queti l'animo, e disira: / per che di giugner lui ciascun contende. [Each has a nebulous notion of the good / On which his mind may rest, and longs for it; / And so each struggles to achieve that end.] (Purgatory, XVII, 127-129)*

Here are indicated the two terms, initial and final, of man's life: on the one hand a confused memory of the supreme good, a sign of God's creative act, and on the other the striving towards this good in which man is sure that he will find total peace and happiness. The whole of man's life – we could summarize – is under the sign of love: from the initial sign, which is a sign that God engraves in him at the moment He creates him – and this presence of a love, the divine one, remains in man a confused sensation (not a real memory, which would bring Dante to a kind of Platonism) – to that which is placed in him as a tension, a desire to reach it, to conquer it and in it to be satisfied and happy. As also Aquinas stated, “man's life consists of the affection that mainly sustains him and in which he finds his greatest satisfaction”<sup>1</sup>. This is, however, a classical reading of this passage.

If on the one hand it is clear what the Supreme Poet wants to communicate to the reader, as a modern reader I cannot but dwell on that Italian adverb that says how this good is learned by man: *confusamente* [confusedly].

<sup>1</sup> Aquinas, *Summa Theologiae*, IIa, IIae, q.179, a.1.

And here begins my argument, that is, two paths open up – to remain with Thomistic terminology, proper to the experience of men and women of the 21st century.

## 1.

The first way – typical of the subject of a secularized society, proper to all of us (or almost all of us) today – is that which, considered confusedly, coincides with what I call “nebulosity” (in the English translation of Dante’s verse in which “nebulous notion” appears [Each has a nebulous notion of the good / On which his mind may rest, and longs for it; / And so each struggles to achieve that end], it should be pointed out that it is not the notion that is nebulous but the way it is learned). That is, we learn a good immersed in a society that is characterized as nebulous, with a Heaven that is difficult to see because it is dominated by a great thick fog. This is the era that the well-known French philosopher Rémi Brague calls that of the crazy truths. I quote here his recent volume *Curing Mad Truths. Medieval Wisdom for the Modern Age*. The philosopher defines, in a curious way, a mood in which freedom could be understood today. He writes: “In my country, and in other ones, too, like Spain, when a cab is for hire and looking for a customer, it has a flag of sorts on which is written “free”. This means that it is empty, that it doesn’t go to any particular place, and can be hired by anybody who can pay”<sup>2</sup>. Progress has produced too much smog, and the sky is now clouded over. This nebulosity has become the horizon; it is faster to look for stars than to install apps. The sky is no longer studied; it is read as a reflection of what is produced by man. Consequently, the truth is no longer provided by the heavens but by the product of man. Man no longer makes use of God, but in what we jokingly can afford to call “Godle” [Google--> Goodle--> Godle]. Godle – which here passes through what humanity considers “good”(-le) and sometimes even essential for existence – seems to orient our lives. We refer to Godle to orient ourselves and – continuing the metaphor – to “navigate”; we have fun with Godle; we turn to “It” to pass the time. In short: “It” is the compass of our era. It is a storytelling that gives us the shivers. Here I just want to add that the world nonetheless continues to be full of real sailors, that the sails of boats continue to be raised. Thanks to God, there are those who teach how to be a sailor, how to go out to sea, where it is possible to contemplate the sunrise and sunset on an infinite horizon, which seems to be even more fascinating than the computer screen, at least for the emotions it generates.

Byung-Chul Han has recently documented the digital revolution. A South Korean philosopher who has moved to the West, he is the author of some brilliant texts such as *The Transparency Society and In*

<sup>2</sup> R Brague, *Curing Mad Truths. Medieval Wisdom for the Modern Age* (University of Notre Dame 2019) 59.

3 Byung-Chul Han, *The Transparency Society* (Stanford University Press 2015); Byung-Chul Han, *In the Swarm: Digital Prospects* (The MIT Press 2017).

*the Swarm: Digital Prospects*<sup>3</sup>. Godle, to use the expression I just coined, would be the false master of humanity. Byung-Chul Han says that in the present age information about reality is within everyone's reach, because everyone can be transparent thanks to the technology at their disposal. In reality, this transparency, which is granted to individual citizens, would only weaken them. Information within everyone's reach, offered with the hat of transparency, is thus jealously guarded by those who in turn can create information. Transparency, therefore, seems to be a fertile social ground. In reality, it is nothing more than a trap, a network that generates control over the masses until it reaches the singularity of each individual citizen. The consequence is that privacy disappears. Just think of the recent scandals regarding "Big Data" thefts or the discussions about privacy linked to mobile phone applications. The other side of the coin is psyche. Pseudo-transparency in fact generates an anxiogenic climate. Consider the immediate use of technology to solve every problem, or even to monitor social trends as well as the individual activities of citizens. The South Korean philosopher warns about social transformation highlighting the limits of homo digitalis. Ultimately, Byung-Chul Han's perspective is that we are going through a critical transition, a real digital revolution. It has led to the expression "digital swarm", which unlike the crowd does not have a soul, a spirit, but is composed of isolated individuals.

A further curiosity of this author is his reflection in reference to the "speed of history" in his study *The Scent of Time: A Philosophical Essay on the Art of Linger*ing, where he affirms, "Modern technology moves the human being away from the Earth. Aeroplanes and spaceships pull the human being away from the Earth's gravitational field. The further one moves away from the Earth, the smaller it gets. And the faster one moves on the Earth, the more it shrinks. Every removal of distance on the Earth brings with it an increasing distancing of the human being from the Earth, thus estranging the human being from it. The internet and electronic mail let geography, even the Earth itself, disappear. Electronic mail carries no mark indicting the place from which it was sent; it is without a space. Modern technology *de-terrestrializes* human life. Heidegger's philosophy of 'autochthony' [*Bodenständigkeit*] is an attempt at *re-terrestrializing* and *re-factualizing the human being*"<sup>4</sup>. Far from investigating the final warning of recovery of the Heideggerian perspective, it is interesting here to observe that the God of heaven to whom *homo digitalis* is oriented is becoming more and more the worst interpreter of his essence. He is re-emerging in a space where humanity is becoming more and more alien to itself.

Returning now to the cab gone mad, it is useful to recall that it is no coincidence that two philosophers, Arthur Schopenhauer and Ludwig Feuerbach, who are as much loved by modern publishing houses as by young people, are once again extremely topical. For

4 Byung-Chul Han, *The Scent of Time: A Philosophical Essay on the Art of Linger*ing (Wiley 2017).

Schopenhauer, who later influenced Friedrich Wilhelm Nietzsche, the logos of this nebulosity can be found in an irrational and timeless blind will. The history of man is nothing more than a concatenation of non-sense. In this perspective, the law is placed outside of time, it is axiologically independent as it is outside of time, atemporal. Every story “makes” (it is the will that “makes”) itself.

It is a terrifyingly immanent vision because what is called will has its own motion but – in essence – is devoid of explanation. Returning to the image of the cab: we are faced with full cabs whose direction is a bluff. Schopenhauer also makes himself incredibly contemporary in theorizing that only music is able to express every nuance of the will, compared, for example, to a sculpture (think of the “Laocoon and his children” – kept in the Vatican Museums – which does not shout.) In such a choice, however, one can also find a great paradox. Schopenhauer chooses music to tell of the need for a “human cry” as full artistic expression. He denies that in the will there is a rationality, a self-awareness, and then he seeks in music the human cry, as if to say that it is impossible to censor it. Today music has lost its transcendent horizon and has become the maximum expression of the above mentioned nebulosity; in fact, echoes of the shop windows are sung: “*soldi, soldi*” [This is the title of the song of Mahmood, winner of Sanremo Festival 2019].

The same false horizon can also be found in Feuerbach’s humanism, the objective of which is to transform men from friends of God into friends of men (that I like), from men who believe into men who think, from men who pray into men who work, from candidates for the afterlife into scholars of the earthly life. And it is just in *Das Wesen des Christentums* that we read, “As man thinks, as his understanding of things, so is his God; so much worth as a man has, so much and no more has his God”<sup>5</sup>. In this passage the theistic thesis is overturned: man transposes his qualities into God, thus creating a God in his own image and likeness. With Feuerbach, the name of God is no longer important, but the attributes of the divine being, such as love, wisdom and justice, count. “God is the mirror of man”; to know God means to know the essence of man, namely his needs and desires. This means eliminating the God of Heaven to make room for a new humanism, formulating a concept to which to give the name of God. In the face of this reversal, Benedict XVI in *Herder Korrespondenz* recently complained precisely of “the seriousness of the situation in which the word ‘God’ often appears to be on the margins, even in theology”<sup>6</sup>.

## 2.

The second way is that of contradiction. Returning to the verses of the Supreme Poet, the good is learned confusedly. The contradiction, however, is not alien to the horizon in which the subject moves

<sup>5</sup> L. Feuerbach, *The Essence of Christianity* (Z. Hanfi tr, Doubleday & Company-Anchor Book 1972) 30f.

<sup>6</sup> Benedict XVI, ‘Antwort auf Birgid Aschmann’ (2019) 9 *Herder Korrespondenz* 51.

and understands the good, as far as he can, but is clarified by God. Because otherwise, if the contradiction were not clarified by God, that is, in the one who creates a free subject, there would remain only a logos constituted by the Schopenhauerian insane will, that is, one would fall back into the first way. I want to recall these verses now, it is precisely Aquinas who says, *“La provedenza, che governa il mondo / con quel consiglio nel quale ogni aspetto / creato è vinto pria che vada al fondo, // però che andasse ver’ lo suo diletto / la sposa di colui ch’ad alte grida / disposò lei col sangue benedetto, // in sé sicura e anche a lui più fida, / due principi ordinò in suo favore, / che quinci e quindi le fosser per guida. // L’un fu tutto serafico in ardore; / l’altro per sapienza in terra fue / di cherubica luce uno splendore”*. [The Providence, with which that counsel rules / the world, whereby, before it reaches the bottom, / every created aspect is overcome, / in order that the Bride of Him, who cried / aloud, and spoused her with His blessed blood, / might go toward her Delight, safe in herself, / and unto Him more faithful, too, ordained / in her behalf two Princes who should serve / as guides to her on this side and on that] (Paradise, XI, 28-39). The Saint explains that God, who acts according to a plan that men cannot grasp, placed two excellent and different men at the service of the Church, so that they might guide it: St. Francis (1182-1226) for charity and St. Dominic (1170-1221) for wisdom. Now it is important to underline here that what the Supreme Poet says is that God’s plan cannot be grasped by men. The contradiction is part of this design, that is to say, the learning of a confused good from men. Contradiction is not something to be nullified, to be excluded, but that is part of man, because of his corrupted nature. Man does not know the meaning of contradiction; he just happens to live it.

The premise, therefore, concerns the object in question, i.e., the nature of man, originally lacking in the memory of his being. A nature that if recognized in its fragility and precariousness leads to a system of laws; if otherwise alienated, it leads to another system of laws. And the history of natural law shows us this. It was Cicero who defined natural law as the law given by God to all men: “True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the

author of this law, its promulgator, and its enforcing judge. Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment”<sup>7</sup>.

7 Cicero, *De re publica*, III, XXII.

Aristotle, on the other hand, will call to mind the concept of “just by nature”, without, however, devoting much attention to it. Rather, he will insist on the just by law, the *politikòn dikaion*, that is to say, the just in society and in the state, going so far as to declare that slavery is just by nature.

With Zeno and then with Seneca, men are equal in being men. Seneca writes in his *Letters to Lucilius*, “We have all had the same number of forefathers; there is no man whose first beginning does not transcend memory. Plato says, ‘Every king springs from a race of slaves, and every slave has had kings among his ancestors’. The flight of time, with its vicissitudes, has jumbled all such things together, and Fortune has turned them upside down. Then who is well-born? He who is by nature well fitted for virtue. That is the one point to be considered; otherwise, if you hark back to antiquity, every one traces back to a date before which there is nothing. From the earliest beginnings of the cosmos to the present time, we have been led forward out of origins that were alternately illustrious and ignoble. A hall full of smoke-begrimed busts does not make the nobleman. No past life has been lived to lend us glory, and that which has existed before us is not ours; the soul alone renders us noble, and it may rise superior to Fortune out of any earlier condition, no matter what that condition has been”<sup>8</sup>.

8 Seneca, *Letters to Lucilius*, XLIV, 4-5.

It will be Seneca himself who will say, “I am glad to learn, through those who come from you, that you live on friendly terms with your slaves. This befits a sensible and well-educated man like yourself. *They are slaves*, people declare. Nay, rather they are men. *Slaves!* No, comrades. *Slaves!* No, they are unpretentious friends. *Slaves!* No, they are our fellow-slaves, if one reflects that Fortune has equal rights over slaves and free men alike. That is why I smile at those who think it degrading for a man to dine with his slave. But why should they think it degrading? It is only because purse-proud etiquette surrounds a householder at his dinner with a mob of standing slaves”<sup>9</sup>.

9 *ibid* XLVII, 1-2.

And then you will see stoic naturalism peep through Cicero and then Lactantius—and Saint Paul peep through Christian thought. With Thomas Aquinas, the participation of the rational creature in the eternal law is called natural law: *the lex naturalis* is an object of human reason. However, Thomistic ethical rationalism did not find a consensus during the Middle Ages. One who did not share it, for example, will be the previously mentioned Dante: “Cotanto è giusto quanto a lei consona / That much is just, which is therewith accordant”<sup>10</sup>. Next to Dante we also find Roger Bacon, Duns Scotus, up to the extreme voluntarist position of William of Ockham. This conception was later to be overturned

10 Dante, *Paradise*, XIX, 88. That is what is in accordance with the divine will.

11 N Bobbio, *Giusnaturalismo e positivismo giuridico* (Laterza 2014).

during modernity. Between the fourteenth and sixteenth centuries an impressive sociopolitical transformation took place in Europe: medieval universalism was overturned. Nation states, kingdoms, principalities, and free cities recognized the empire in name only. The Church will be inundated by the Reformation, and Europe in the sixteenth and seventeenth centuries will be torn apart by wars on religion. In this context, the need will emerge for a right to wage war that, accepted by all the belligerent peoples, sets precise limits to the waging of war. There is a growing need for a right that is valid regardless of nationality and religion, an intrinsically valid right, the formulation of which will be delegated to Hugo Grotius. In his *De iure belli ac pacis*, he will affirm the existence of universally valid principles. For Grotius, the nature of man is social and rational, and natural law is inherent in the nature of man. However, the conclusion he will come to will be rather merciless, as if this nature were exempt in its existence from its creator. “Natural law would continue to exist”, he says, “even if God did not exist or if He did not take care of humanity”. And if with Grotius modern natural law begins, this will find its end – as Norberto Bobbio recalls<sup>11</sup> – with G.W.F. Hegel’s essay *On the Scientific Ways of Treating Natural Law*.

Natural law is centred on the principle of the limitation of the powers of the State, at the foundation of which has been a conquest of the modern world, namely, the rule of law. It also stands as a doctrine that is antithetical to “legal positivism,” according to which only that which is set by the State is law, and its validity is independent of any legal reference. Within the history of the West, there is a succession of narratives that have been busy trying to arrive at a definition of universality in the field of rights. It remains an observation that nature itself is the common denominator of the human species, while the states with their laws belong to this generation.

So if the human being is considered for all features, laws can certainly be made starting only from an *ordo naturalis*: it is important to highlight the specificity of the anthropological structure, as missing, defectible; otherwise, we would fall back into extreme justicialism or into a communist mentality falsely guarding human equality.

Now, if we were to take a hundred steps back to Aristotle, we would have to acknowledge that man is a rational animal, a living thing that belongs in the order of nature. Without mentioning the Creator, it is enough here to recognize that nature is perceived by man himself as imperfect, incomplete, and mortal. And every mortal nature – and here the contribution of modernity has been no small thing – deserves respect regardless of its creed, race, religion, political orientation, or culture. Contemporaneity has then taken a leap forward, continuing in an ever increasing specificity of the rights of individual citizens, even going so far as to invent them – but this remains a completely different story. And it was Hans Kelsen who pointed out that



relativism is in fact precisely that conception of the world that the democratic idea supposes, while also stating that democracy is the daughter ofgnoseological fallibilism.

The religious man, on the other hand, can only perceive this imperfection from his own transience, from sin. And paradoxically, it is the sense of sin that makes a law axiologically independent. It is the sense of man's lack of respect for God. This is what Benedict XVI himself forcefully recalled: "It seems to me that Kelsen is right when he says that deriving a duty from being is reasonable only if Someone has deposited a duty in being. This thesis, however, is not worthy of discussion for him. It therefore seems to me that, in the end everything rests on the concept of God. If there is God, if there is a Creator, then the being can also speak of him and indicate a duty to man. Otherwise, the ethos ultimately boils down to pragmatism. That is why in my preaching and in my writings, I have always affirmed the centrality of the question of God. It seems to me that this is where the vision of his book and my thinking fundamentally converge. The idea of human rights ultimately retains its solidity only if it is anchored in faith in God the Creator. It is from here that it receives the definition of its limit and at the same time its justification"<sup>12</sup>.

Not so far from the Socratic concept of evil – although badly expressed, because the famous paradox should be reformulated perhaps by stating that, "the will for good is always defectible", that is, it can be a preamble to a total good but remains little, precarious – we can now try in conclusion to answer the question, "Is an axiology free law possible?" And we can do this only by asking ourselves what this good is, sometimes made the criterion of acting because we know what it consists of, or because we are looking for something.

It seems appropriate in this regard to recall the speech of Benedict XVI published a few months ago in the *Klerusblatt*, when he says, "He could and should leave no doubt about the fact that the morality of the balancing of goods must always uphold an ultimate limit. There are goods that are never subject to trade-offs. There are values which must never be abandoned for a greater value and even surpass the preservation of physical life. There is martyrdom. God is more, including physical survival. A life that would be bought by the denial of God, a life that is based on a final lie, is a non-life"<sup>13</sup>.

Benedict XVI recognizes that it is possible to develop a "resistant" argument starting from and including only the *ordo naturalis* and therefore considers the possibility that the *ordo supernaturalis* is an addition. However, in the end, he reiterates the importance of recognizing the purpose that is contained in life itself. And here I am reconnecting with the second way. Because one can certainly live by accepting contradiction, and the laws of a democratic society take care of the individual, his protection, well-being, and respect. To live well, however, it seems

12 Benedict XVI, *Liberare la libertà. Fede e politica nel Terzo millennio* (Cantagalli 2018) 13-14.

13 See Benedict XVI, 'The Church and the Scandal of sexual abuse' <[https://www.corriere.it/english/19\\_aprile\\_11/benedict-xvi-the-church-and-the-scandal-of-sexual-abuse-8e40d438-5b9c-11e9-ba57-a3df5eacbd16.shtml](https://www.corriere.it/english/19_aprile_11/benedict-xvi-the-church-and-the-scandal-of-sexual-abuse-8e40d438-5b9c-11e9-ba57-a3df5eacbd16.shtml)> accessed 20 October 2020.



that one must find a love that makes contradiction possible, because it overcomes it, wins it, something from the other world in this world.

## BIBLIOGRAPHY

- » Aquinas, *Summa Theologiae*
- » Brague R, *Curing Mad Truths. Medieval Wisdom for the Modern Age* (University of Notre Dame 2019)
- » Benedict XVI, 'Antwort auf Birgid Aschmann' (2019) 9 Herder Korrespondenz 51
- » Benedict XVI, *Liberare la libertà. Fede e politica nel Terzo millennio* (Cantagalli 2018)
- » Benedict XVI, 'The Church and the Scandal of sexual abuse' <[https://www.corriere.it/english/19\\_aprile\\_11/benedict-xvi-the-church-and-the-scandal-of-sexual-abuse-8e40d438-5b9c-11e9-ba57-a3df5eacbd16.shtml](https://www.corriere.it/english/19_aprile_11/benedict-xvi-the-church-and-the-scandal-of-sexual-abuse-8e40d438-5b9c-11e9-ba57-a3df5eacbd16.shtml). Accessed: 20 October 2020
- » Bobbio N, *Giusnaturalismo e positivismo giuridico* (Laterza 2014)
- » Cicero, *De re publica*
- » Dante, *Paradisee*
- » Feuerbach L, *The Essence of Christianity* (Z. Hanfi tr, Doubleday & Company-Anchor Book 1972)
- » Han Byung-ChulCB, *The Transparency Society* (Stanford University Press 2015)
- » Han Byung-ChulCB, *In the Swarm: Digital Prospects* (The MIT Press 2017)
- » Han Byung-ChulCB, *The Scent of Time: A Philosophical Essay on the Art of Lingering* (Wiley 2017)
- » Seneca, *Letters to Lucilius*

## ABSTRACT

In the article the author aims to define what constitutes an axiologically independent law. After presenting the status of a confused humanity, two ways of human experience are proposed. The first one is called the way of nebulosity, the second one - the way of contradiction. Through an argumentation whose premise is precisely the precariousness of human nature, the author comes to reflect on the universality of the good for which human action yearns.

## ABSTRAKT

### Czy możliwe jest prawo wolne od aksjologii?

W artykule autorka zamierza zdefiniować to, co konstytuuje prawo niezależne aksjologicznie. Po przedstawieniu stanu zdezorientowania

ludzkości zaproponowano dwa sposoby przeżywania ludzkiego doświadczenia. Pierwszy z nich została nazwany zamgloną drogą, drugi - drogą sprzeczności. Przez argumentację, której przesłanką jest niepewność ludzkiej natury, autorka zastanawia się nad uniwersalnością dobra, za którym tęskni człowiek.

**KEYWORDS:**

axiology, law, human nature, Dante Aligheri

**SŁOWA KLUCZOWE:**

aksjologia, prawo, natura ludzka, Dante Aligheri