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A "JURIDICAL ECOLOGY" FOR THE FUTURE OF HUMAN NATURE*

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1. Law and reason. – 2. Law, natural law, morals and post-Auschwitz constitutions. – 3. The need to fling open the windows of the law in action. 4. Juridical ecology, human nature, biolaw and conscience.

1. Law and reason

A new chapter in the history of the relationship between law and natural law was opened in 2011 when Pope Benedict XVI addressed the German parliament. Although this fact cannot be technically considered as a new scientific study on this subject, it, nonetheless, prompted a series of comments and academic analyses[1]. If it can be argued that the context normally gives power and meaning to the words that one pronounces, in this case the context was very meaningful. First of all, the speaker, the theologian Pope, of German origin, residing in Rome, *cunabula iuris* (the *cradle of* the *law*), who had already authored of a number of publications on this subject; secondly, the location; and thirdly, the audience, the German legislative body and political representatives of a country which has been viewed as the "new Rome" in the development of legal science since the Enlightenment period. The development of this more evolved legal science, however, could not prevent the rise of a barbarian and totalitarian regime that led to such extreme evil which resulted from the "banality" of the execution of laws and orders contrary to any respect of

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1 See among others H. Dreier: Benedict XVI. und Hans Kelsen. *JZ,* 2011. 1151 ff.; N. Irti – A. Nicolussi – A. Travi – P. Cappellini: *L'uomo la legge lo Stato*. Dopo Ratzinger al Bundestag, Vita e Pensiero, 2012. 61 ff.; M. Cartabia – A. Simoncini: Benedetto XVI e il pensiero giuridico. In: M. Cartabia – A. Simoncini (edit.): *La legge di re Salomone*. Milano, 2013.; J. H. H. Weiler: *Da Ratisbona a Berlino, Il sacro e la ragione*. In: Cartabia–Simoncini op. cit. 52 ff.; W. Farouq: *Le finestre di Benedetto XVI: ragione, rivelazione e legge*. In: Cartabia–Simoncini op. cit. 177 ff.;

human dignity and thus valid only from the "pure" legalistic perspective: a kind of "euthanasia of law"[2].

Law was evidently a highly meaningful concept for the Pope, who unexpectedly announced his renunciation of the Petrine office in 2013, in his objectives to establish a renewed alliance between faith and reason[3]. In law the dialectics of modern reason[4] is emblematically reflected by the development of the German juridical culture of recent centuries. Indeed, the reduction of reason to the ability only to conduct perfect calculations, which has raised questions about the true principle of reason[5] and in certain extreme positions of legal positivism has in fact led to the collapse of the connecting bridge with ethics[6], has legitimised a regime which paradoxically refused to justify its law making and order executing process[7].

These extremisms are stressed by Benedict XVI, who argues that, according to the theory that proposes the purity of law, law should disengage when confronted by the naturalistic fallacy (or the is-ought problem: «An "ought" can never follow from an "is", because the two are situated on completely different planes». «Nature therefore could only contain norms if a will had put them there»)[8] and build «a

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2 "We have seen how power became divorced from right, how power opposed right and crushed it, so that the State became an instrument for destroying right – a highly organized band of robbers, capable of threatening the whole world and driving it to the edge of the abyss" Benedict XVI: *The Listening Heart*. Reflections on the Foundations of Law. In: www.vatican.va. *Euthanasie der Rechtsphilosophie* is a famous expression of G. Radbruch: *Grundzüge der Rechtsphilosophie*. Leipzig, 1914. 16. quoted also by Dreier op. cit. 1151.

3 Refer to the dialogue J. Ratzinger – J. Habermas: *Vorpolitische Grundlagen eines freiheitlichen Staates*. Katholische Akademie in Bayern, 2004. that I quote from the Italian version edited by M. Nicoletti: *Etica, religione e stato liberale*. Brescia, 2004. See also, N. El Beheiri: Wolfgang Waldstein: Ein wissenschaftliches Porträt im Diskurs mit Kollegen und Dialogpartner. *Pàzmàny Law Review*, 2013. 233.

4 T. W. Adorno – M. Horckheimer: *Dialectic of Enlightenment*. Stanford, 2002.

5 M. Heidegger: *The Principle of Reason*. Bloomington, 1991.

6 H. Kelsen: *Introduction to the Problems of Legal Theory*. Oxford, 1992. 17., who defines justice as "an object that is at bottom alien to logic". The development of Kelsens's point of view after Second World War is not discussed here. Often the separation between law and ethics is referred to Kant , although the German thinker was not actually a legal positivist (see C. Castronovo – L. Mengoni: Profili della secolarizzazione nel diritto private. In: L. Lombardi Vallauri – G. Dilcher [edit.]: *Cristianesimo secolarizzazione diritto moderno*, Milano–Baden Baden, 1981. 1192). According to H. Welzel: *Gesetz und Gewissen*, *Hundert Jahre Deutsches Rechtsleben*. Karlsruhe 1960. 390 ff. Kant's concept of autonomy was or is misunderstood by those authors who derived or still derive the foundation of separation between law and ethics from Kant. Recently the issue was analysed by G. Prauss: *Moral und Recht im Staat nach Kant und Hegel*. Freiburg–München, 2008.

7 This fact gave rise to the famous criticism of Radbruch to legal positivism. See G.. Radbruch: *Die Erneuerung des Rechts*, *Die Wandlung*. 2, Heidelberg, 1947. 8–16.; G.. Radbruch: Gesetzliches Unrecht und Übergesetzliches Recht I. *Süddeutsche Juristen Zeitung*, 1946. 105–108.

8 Often naturalistic fallacy and the so called Hume's Law are identified, as in the text above. Actually the naturalistic fallacy is a thought defended by G.. E. Moore: *Principia etica*. 1903. Chapter II http://fair-use.org/g-e-moore/principia-ethica. Connection between Kelsen and Hume's analysis of causality emerges in H. Kelsen: *The Emergence of the Causal Law from the Principle of Retribution*

concrete bunker with no windows, in which we ourselves provide lighting and atmospheric conditions»[9]: a bunker built on nothing, that is an empty *Grundnorm*, as much theoretically necessary as poor in substance. The result is a law without values or, as could be argued, corresponds only to a framework in which choices made by the competent authority are arbitrary and not based on a set of moral values.

Certainly, on the one hand "it would indeed be wrong to think that we can easily read these eternal laws of reason in the soul, as the Praetor's edict can be read on his notice-board, without effort or inquiry"[10] while on the other hand, totalitarianism can be considered as a tyranny of values. However, this tyranny can be justified, above all, on the basis of radical positivism, which reduces juridical norms to a mere product of a will (political, economic, technocratic, religious), rather than that which is autonomous and distinct from ethics, though not necessarily unconnected. Only by taking seriously the requirement of law to be open, and being aware of the limits of law constructed only by its internal logic and knowing that law cannot renounce its ethical aspect, can the post Auschwitz-Constitutions transplant a "listening heart" into law and therefore extend the process of legitimizing juridical norms. The laws are no longer valid just because they are an expression of the will of the majority[11], but also because they are justified on the basis of the values institutionalized in the Constitution and embedded in the *Grundnorm* of human dignity.

This constitutionalization of the Law has his roots in Rome[12], Athens and Jerusalem and has evolved throughout history, and through Christianity and the Enlightenment, delivered us an inter-subjective reason that founded the cornerstones and established the principles of an ethical cognitivism or at least a moderate ethical cognitivism to which the law can refer without necessitating a revelation (*Et haec quidem quae iam diximus locum <aliquem> haberent etiamsi daremus, quod sine summo scelere dari*

(1st pub. 1939), trans. P. Heath. In: *Kelsen Essays in Legal and Moral Philosophy*. Dordrecht, 1973. 165–215, at 196–200.

9 Benedict XVI, *The Listening Heart*, Reflections on the Foundations of Law. The Pope's imagery evokes Kelsen's words "Given an absolutely good social order emerging from nature, reason, or divine will, the activity of the legislators would be as foolish as artificial illumination in the brightest sunlight" (*Introduction to the Problems of Legal Theory*, 17).

10 The entire quotation in French is: "*Il est vray qu'il ne faut point s'imaginer, qu'on puisse lire dans l'ame ces éternelles loix de la raison à livre ouvert, comme l'Edit du Preteur se lit sur son album, sans peine et sans recherche; mais c'est assez qu'on les puisse decouvrir en nous à force d'attention; à quoy les occasions sont fournies par les sens, et le succés des experiences sert encore de confirmation à la raison, à peu prés comme les épreuves servent dans l'arithmetique pour mieux éviter l'erreur du calcul quand le raisonnement est long*." (Leibniz: *Nouveaux essais*. Preface. A VI, 6, 50.; RB, 50.

11 Kelsen op. cit. 18.: "all ideology has its roots in will, not in cognition […] Again and again cognition rends the veils that the will, through ideology, draws over things".

12 H. Grotius: *De Iure Belli ac Pacis*. Proleg. 11., 10. Particularly, Benedict XVI, quoting W. Waldstein: *Ins Herz geschrieben. Das Naturrecht als Fundament einer menschlichen Gesellschaft*. Augsburg, 2010. 11 ff., 31–61., underlines the fact that in Rome in the first half of the second century B.C., social natural law developed by the Stoic philosophers came into contact with leading teachers of Roman Law.

nequit, non esse Deum aut non curari ad eo negotia humana)[13]. In fact, from the point of view of the believer the Grotian principle could be interpreted as an application of the subsidiarity principle in a theological sense[14]. That God, as superior authority, considers the human being able to rationally acknowledge moral values, He therefore lets the inferior authority pursue the task on its own.

While, though, the Grotian principle is the progeny of an European culture influenced, in spite of the bloody religious fractures, by the *imago Dei* and human dignity as a consequence of it, a certain type of relativism in the second half of the 20th century evolved into a dogma (absolute relativism)[15]. And this endangered the very idea that it is possible to reason about justice without having to appeal to a divine revelation. Indeed, if human reason excludes any possibility of recognizing absolute truths – even in the form of provisional truths (verisimilitude), in consideration of our limited and historically conditioned point of view, but not simply depending on historical contingency – how can we recognize the absolute value (dignity) of every man, as did the Constitutions, drafted after the experience of the "Banality of Evil" of the second world war[16]? Only if reason opens itself to an external realm, that is to the being, avoiding proudly fencing itself in, can the essence of law be equated to the human person[17].

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13 According to Castronovo–Mengoni op. cit. 1197., the constitutional reference to moral values can be described as a soft de-securalization in the sense that the legal system accepts being submitted to verification by extra-systematic values, renounces self-sufficiency and therefore presents itself as a system open to criteria of substantive justice.

14 See R. Brague: *Il Dio dei Cristiani, L'unico Dio?* Milano, 2009. Italian transl. from *Du Dieu des Chrétiens et d'un ou deux autres*. Paris, 2008. 108–109 ff. deriving from John of the Cross.

15 The expression "absolute relativism" was used by L. Strauss: *Diritto naturale e storia*. Introduzione. Geneva, 2009. 33, who quoted *Ernst Troelsch on Natural Law and Humanit*. In: O. Gierke: *Natural Law and the Theory of Society* (ed. E. Barker), I, Cambridge, 1934. 201–222. As is well known, the papacy of Benedict XVI had been characterised by the denunciation of a fundamentalist relativism which sustains that any value should be rendered subjective. See also C. Castronovo: *Autodeterminazione e diritto private*. Europa dir. privato, 2010. 1064.

16 "*Letzlich konnte ich dann doch sehen, wenn wir von dem Begriff der Wahrheit abgehen, dann gehen wir gerade von den Grundlagen ab*". J. Ratzinger: *Gott und die Welt. Glauben und Leben in unerer Zeit. Ein Gespräch mit Peter Seewald.* Stuttgart–München, 2000. 225. This point seems to me missed by M. Luciani: *Sulla dottrina della democrazia in Benedetto XVI*, *La legge di Salomone, Ragione e diritto nei discorsi di Benedetto XVI* (edited by M. Cartabia – A. Simoncini). Milano, 2013. 115 fn 66, who – criticising my remarks in *Un'ecologia giuridica per il futuro*, Vita e pensiero, 2012. 67 – doesn't take into consideration the relationship between truth and freedom (or will). This author, moreover, calls into question the absolute value of man in the constitution, saying that each constitutional value is subjected to balancing. This can be true regarding the different values of man (right to live, right to health, freedom of speech, freedom of circulation, etc.) not for the value of the man itself, who is the constitutional cornerstone and who is the point of reference for all of these values.

17 A. Rosmini: *Filosofia del diritto*. (edit. R. Orecchia). Padova, 1967–69. 191.: «"la persona dell'uomo è il diritto umano sussistente": quindi anco l'essenza del diritto».

2. Law, natural law, morals and post-Auschwitz constitutions

The fact that law has been opened to the concept of morals, to the ethical values of man, recalls the Pope's invitation to "fling open again the windows" and not remain closed in an artificial world ("we must see the wide world, the sky and the earth once more and learn to make proper use of all this"); an invitation consistent with the very shape of a new *Reichstag* where the legislators can see through the transparency of the glass walls. Unfortunately, a certain legal culture at the beginning of the second half of the 20th century was not able to understand this turning point of the concept of law in a "postpositivist" sense after which the positive principle (law is language dependent and its reasoning bound[18]) is not rejected but joined by reference to moral values which implicitly become of a dual nature, both moral and legal[19]. This dated culture continued to propose a duplication of the concept of law, in which positive law is contrasted to the «blunt tool» of natural law[20], which – so intended – obliges the positive law to be of a more radical positivist nature. Therefore, every reference to natural law is required to be updated within the framework of contemporary history and must take into consideration the development of the current concept of law. Consequently, stressing the "concept of nature" in the Pope's words cannot (or should not) be intended to deny the achievements of Constitutionalism, but rather to show how they might be lost if we follow the path of absolute relativism which claims that values are mere artificial products of man, who has no duty to recognize them in the "nature of things"[21].

Inserting law in a relationship with the idea of nature means, first of all, making a distinction between production and acknowledging and accepting the existence of limits of human law making and therefore an objective dimension on which the debate can based. Certainly, law needs words and thoughts in touch with the current culture when the legal experience becomes transformed into reality. However, this does not necessarily exclude reference to models of justice that, although conditioned by the historical point of view, do not reduce it to history. "Attributing to history an ontological foundation of values, that is an understanding of history as the unique

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18 See L. Mengoni: *Metodo e teoria giuridica* (edit. C. Castronovo – A. Albanese – A. Nicolussi). Milano, 2011. 23 ff, 31 ff., 149 ff., 179 ff., 223 ff.

19 Cfr. R. Alexy: *Begriff und Geltung des Rechts* 2. Freiburg – München, 1994. 121 ff. spec. at 125, 129; L. Mengoni: *Ermeneutica e dogmatica giuridica*. Milano, 1996. 119, test and footnote 10 where quotations.

20 Natural law was qualified "blunt tool" by J. Ratzinger,: *Etica, religione e Stato liberale*. Brescia, 2004. 50.

21 The weakening of contemporary thought seems to be the reason for concern about foundation on constitutional values expressed by E.W. Böckenförde: *Stato, costituzione, democrazia*. Studi di teoria della costituzione e di diritto costituzionale (Ital. trans. edit. by M. Nicoletti and O. Brino of *Staat, Verfassung, Demokratie*. Studien zur Verfassungstheorie und zum Verfassungsrecht. Frankfurt am Main 1991), Milano, 2006. 59 f. Obviously "the nature of things" evokes the famous G. Radbruch: *Die Natur der Sache als juristische Denkform*, *Gesamtausgabe*, III, *Rechtsphilosophie* III, Heidelberg, 1990. 229 ff., whose incipit is: "*der Begriff 'Natur der Sache' gehört der allgemaneinen Geistesgeschichte an*".

constitutive factor of values, is different from recognizing the historical dimension as modus existendi of the knowledge of values. If history is thought of as the real precondition of truth, it will cease to evoke the ghost of historical relativism'"[22]. If nature is not oppressed by history, it can arouse curiosity about that which is not mere historical contingency, encouraging us to overcome that attitude called «provincialism, not of space, but of time»[23]. It is common to refer to models of justice that do not seem to belong only to the present time or to a predefined time. These standards correspond to the ideas of value that come into existence in the human spirit and can be conceived as the object of judgements of verisimilitude; these judgements should be recognised as knowledge, because they possess, on their level (which is that of verisimilitude, not of apodictic certainty), the aspect of evidence which characterizes knowledge in its strict sense[24] .

3. The need to fling open the windows of the law in action

Moreover, the reference to nature shows that the requirement of human will to produce autonomous legal rules is limited, because human cannot foresee everything and therefore absolutizing it would be naive. The real law in action proves the need for values as points of reference in order to justify the judge's choice of the various possible interpretations of a particular case, especially considering the complexity of societies and their continuous change at the current time when the words of law cannot be considered unequivocal.

From this perspective the defence of the separation between law and morals pursued by Hart seems to lead rather to a confirmation of the existence of a relationship between law and morals than a counter-argument. In fact, it is not sufficient to sustain that «instead of saying that the recurrence of penumbral questions shows us that legal rules are essentially incomplete, and that, when they fail to determine decisions, judges must legislate and so exercise a creative choice between alternatives, we shall say that the social policies which guide the judges' choice are in a sense there for them to discover; the judges are only "drawing out" of the rule what, if it is properly understood, is "latent" within it»[25]. Firstly, the problem is to discern exactly what «properly understood» means, secondly, the issue about analogy and gap in law remains unsolved. Moreover, when Hart points out that a judge's judgement must be

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[22] Mengoni op. cit. 81 inc. the quotation of Gadamer: *Ermeneutica*, *Enciclopedia del Novecento*, II. Roma, 1977. 735.

[23] Mengoni op. cit. 79, footnotes 27, 28, 29 where reference to Leibniz, Husserl, Ricoer, Schiedermacher regarding enlargement of logics to verisimilitude.

[24] Hart (1958) op. cit. 612.

[25] A. D'Entreves: *Natural Law. An Introduction to legal philosophy.* London, 1952[2]. 116. Actually at least the influence of morality on law is not denied by H. L. A. Hart: *The Concept of Law.* Oxford, 1961[2]. 203 ff., who sustains: "no "positivist" could deny that these are facts, or that the stability of legal systems depends in part upon such types of correspondence with morals. If this is what is meant by the necessary connection of law and morals, its existence should be conceded".

«the opposite of a decision [26] reached blindly in the formalist or literalist manner», that is «a decision intelligently reached by reference to some conception of what ought to be»[27], he seems to adhere to the thesis of the existence of a relationship between law and morals. This thesis does not necessarily imply the "fusion" of law and morals, but only an "intersection between law and morals"[28]. Finally, proposing like Hart «that here if anywhere we live among uncertainties between which we have to choose, and that the existing law imposes only limits on our choice and not the choice itself»[29] means that ultimately the judge's choice is not purely positivist, thus law cannot be described as an *hortus conclusus*[30].

In addition, the requirement for judgement, which characterises the experience of law, and its "controversial nature"[31], implies a third dimension, that supposes a communicable rationality. Thus the experience of law is contradictory to the idea of a disunity of humanity into individual parts as a sum of *Wertsetzer* or "moral strangers"[32], who tend to become "moral enemies", people incapable of

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26 Hart (1958) op. cit. 629.

27 This is recognized by Hart (1961[2]) op. cit. 205, where, however, he points out that "if these facts are tendered as evidence of the necessary connection of law and morals, we need to remember that the same principles have been honoured nearly as much in the breach as in the observance". L. L. Fuller: *La moralità del diritto*. Milano, 1986. 288 (Ital. transl. of *The Morality of Law*. Yale, 1964) observes that Hart, like positivists in general, shows a certain embarrassment in dealing with the problem of interpretation, as demonstrated by the fact that the word interpretation was omitted by him in the index of *The Concept of Law*. Anyway, Hart dedicates a specific paragraph to interpretation, starting with this words (pg. 204): "Laws require interpretation if they are to be applied to concrete cases, and once the myths which obscure the nature of judicial process are dispelled by realistic study, it is patent, as we have shown in Chapter VI, that the open texture of law leaves a vast field for creative activity which some call legislative".

28 See G. Capograssi: *Il problema della scienza del diritto*. Milano, 1962. 150 ff.

29 According to H. T. Engelhart: *The Foundations of Bioethics*. New York, 1996[2]. 7.: "Moral strangers are persons who do not share sufficient moral premises or rules of evidence and inference to resolve moral controversies by sound rational argument, or who do not have a common commitment to individuals or institutions in authority to resolve moral controversies. However, "moral strangers need not be alien to each other (…). "A different ranking of fundamental values will render individuals moral strangers, but not incomprehensible to each other.".

30 See J. Derrida: *Il monolinguismo dell'altro o la protesi d'origine*. Milano, 2006. (Ital. transl. of *Le monolinguisme de l'autre*. Paris, 1996.), and J. Derrida: Force of Law: the "Mystical foundation of Authority". *Cardozo Law Review* 11, 1990. 919 ff. specifically about law and justice from a deconstructive perspective. Refer to the response of L. Mengoni: *Le aporie decostruttive del diritto secondo Jacques Derrida*. Metodo e teoria giuridica, 31 ff.

31 Kelsen (1992) op. cit. 17.

32 J. Ratzinger: *Wendezeit für Europa? Diagnosen und Prognosen zur Lage von Kirche und Welt*. Einsiedeln–Freiburg, 1991. 59 and 71 quoted a phrase from the heading of chapter 13 of Feyerabend's *Against Method*; 2002. 125. This quotation gave rise to criticism, which is not discussed here. The quotation seems to be a pertinent example of Ratzinger's proposal regarding the necessity to relativize the scientific approach, that means to circumscribe its proper scope and boundaries, instead of considering it as the unique point of reference for human knowledge, which would imply denying the possibility of a rational knowledge, although provisional, about ethics.

understanding "each other's language"[33]: this hypothetical condition of humanity would be insensitive to the words and reason of law. Although external light entering through the windows of law cannot reveal perfect juridical solutions because reality is inherently a multiplicity of points of view and even conflicts of value, law cannot renounce moderate cognitivism which that light makes possible, allowing the resolution of conflicts with reasonableness and with respect for the boundaries of law. That does not mean "to fix the essence of the Platonic idea or the thing-in-itself"[34] which implies again – in the Kelsen style - a rigid separation between form and substance, denying the human experience of values in real life. The provisional nature of human truths that Ratzinger remarked upon in the past quoting Feyerabend[35] advised *iuris-prudentia* (*prudentia* as in the Latin meaning of cautiousness and sense of limitations), but this doesn't necessarily mean neither that formulas like "to each his own" are "completely empty"[36] nor that in general the attempt to search for right and wrong in the experience of law is vain[37].

4. Juridical ecology, human nature, biolaw and conscience

When law – *iurisprudentia* – is sensitive to the reality of human beings as a whole it ceases to be a creontic law (only "male" law), closed in its own autarchic legalism; it shares the point of view of Antigone(so to to say a "female" point of view), acquiring a new dimension which is describable in terms of «juridical ecology».

The word ecology, as we know, is linked with the value of respecting the natural environment, a sort of self-restraint that people should endorse in industrialised societies, where the artificial threatens the natural, in order to save a harmonious

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33 Kelsen (1992) op. cit. 17, qualifies "to each his own", among other formulas, as completely empty. Recently E. Severino: *Giustizia e verità. Ars interpretandi*. 2013. 30) criticises the idea that "to each his own" is a vicious cycle.

34 In a certain sense, the possibility of distinguishing right from wrong requires an open reason which, quoting Benedict XVI, can be metaphorically described as the requirement for King Salomon of «a listening heart so that he may govern God's people, and discern between good and evil (cf. *1 Kg* 3:9)». From a thomistic perspective see also O. De Bertolis: *L'ellisse giuridica. Un percorso nella filosofia del diritto tra classico e modern*. Padova, 2011. 143 ff.

35 According to D. Birnbacher: *Bioethik zwischen Natur und Interesse*. Frankfurt am Main, 2006. 101 also the classic utilitarian philosophers, like Jeremy Bentham, John Stuart Mill and Henry Sidgwick were not insensitive to the ecological issue. We may say, in other words, that this value can be presented as a common value, not only the consequence of certain ethical perspectives.

36 Art. 32 of the Italian Constitution provides: The Republic safeguards health as fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent. No one shall be obliged to undergo particular "health" treatment (trattamento sanitario) except under the provisions of the law. The law cannot under any circumstances violate the limits imposed by *respect for the human person*.

37 Welzel (1981) op. cit. 399: "*Ein Staat, dem es um Schutz des Gewissens ernst ist, darf nicht die Intoleranz tolerieren!*". Actually the Pope refers to "resistance" and to "resistance movements against the Nazi regime and other totalitarian regimes, thereby doing a great service to justice and to humanity as a whole". Conscientious objections and resistance are different concepts.

relationship with the natural environment. When using the expression juridical ecology we mean firstly, that law absorbs values, that the windows to allow morals to enter are open and thus it avoids rendering "reason of law" purely artificial. Juridical ecology can be thought of, therefore, as a framework that contains other values, as the very principle of respect for the natural environment, which thus leads to the idea that the world must be protected from an arbitrary and unlimited manipulation. Respect is a word stemming from *respicere* (look back, relationship, regard) and means that one should not act as if alone and irresponsible to that which surrounds one, but should refrain from injuring persons or damaging things. From this perspective, law embodies the value of respect and care for "sora nostra matre terra" (our Sister Mother Earth, according to Francis of Assisi), for the *humus* in which the *homo humilis* (the humble human being) is incarnate. "We are not angels, for we have a body", stressed Teresa of Avila. The spirituality of current technique-dominated times reveals itself in the opposition to the idea of a complete manipulation of nature according to the artificial separation between nature and culture, biology and biography, mind and body[38].

From that premise we can discern an important guide line useful in dealing with difficult issues of bioethics and biolaw. In fact we need to apply a level of reasonableness, distinguishing among "hard cases" cases of "grey areas" (an issue or a situation lacking clearly defined characteristics because it raises between two extremes and has mixed characteristics of both. Falling somewhere in between two extremes, it is hard to determine which side the issue mostly agrees with) and "borderline cases" (the general rule can be applied to this kind of cases although on the borderline, otherwise the very border would be shifted), and protect the wellbeing of the whole of humanity, with its polar opposites so that the new *can do* doesn't eliminate the *can do not*. This dimension of "juridical ecology" can be called human (juridical) ecology, because it traces a line to the concept of treating the body of man in any way whatsoever. This view, different from any form of religion of nature (biolatry), could be described as a form of man's self-respect[39].

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[38] This problem was highlighted not only by Karl Marx, but also by liberal authors like B. Russell: *Authority and the Individual. Conflict of Technique and the Human Nature*. London, 1985. 59.: "Among the things which are in danger of being unnecessarily sacrificed to democratic equality perhaps the most important is self-respect. By self-respect I mean the good half of pride—what is called 'proper pride'. The bad half is a sense of superiority. Self-respect will keep a man from being abject when he is in the power of enemies, and will enable him to feel that he may be in the right when the world is against him. If a man has not this quality, he will feel that majority opinion, or governmental opinion is to be treated as infallible, and such a way of feeling, if it is general, makes both moral and intellectual progress impossible. The old load of poverty and suffering and cruelty, from which mankind has suffered since history began, is no longer necessary to the existence of civilisation; it can be removed by the help of modern science and modem technique, provided these are used in a humane spirit and with an understanding of the springs of happiness and life. Without such understanding, we may inadvertently create a new prison just, perhaps, since none will be outside it, but dreary and joyless and spiritually dead. How such a disaster is so be averted, I shall consider in my two last lectures."

[39] See *Conscientious Objection and Bioethics*, Opinion of Italian National Bioethics Committee, http://

Human (juridical) ecology, in other words, is not an anachronistic refusal to technological advancement we experience in current times, but rather an antidote to its reductionism. In fact, the dualistic temptation of the contemporary biotechnological approach seems to reduce man to an abstract "will to power", to a ghost, who threatens, through unlimited biological manipulation, the future of human nature. The paradox, in a nutshell, is exactly the expectation to reach the infinite by manipulating the finite, which leads man into a desperate dead end.

Finally, human (juridical) ecology should suggest a principle of respect of conscience at least when legal duties regard the fundamental rights of man. If law is based on the human being, it cannot reduce man to just one dimension, dividing the conscience into two parts, one loyal to the state and another denied the right to be loyal to his inner self, when the conscience calls for those very values on which the law is based. Law, therefore, must take into account the conscience of the people[40]. This is particularly important nowadays in the context of biojuridical issues where in some cases professionals are obliged by the law to perform a specific job-related task which might be perceived by them as being contrary to the ends of medicine. The problem of loss of respect for oneself which characterises industrial society in the "age of technique" and in capitalistic economics tends to extend from workers to professionals[41]. Conscientious objection is thus manifested as a means of safeguarding the very value of self-respect of people involved in these matters preventing them from being transformed into tools of the system. This doesn't mean empowering them to boycott the law, whose validity must be guaranteed in addition to the exercise of those rights provided therein[42]. In this perspective, conscientious objection not only protects the freedom of the individual conscience[43], but it is also

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www.governo.it/bioetica/eng/opinions.html. Welzel (1981) op. cit. 400. proposes a *Gewisssenklausel* which allows people to substitute the performance of job related tasks contrary to the conscience with another one (*Erstatzpflicht*). Similarly Böckenförde op. cit. 319 sustains the opportunity of "unpleasant alternatives" – quoting N. Luhmann: Die Gewissenfreiheit und das Gewissen. *Aör* 90 (1965), 284 f. – which can be a tool for rendering conscientious objection more serious. From the perspective of the Catholic doctrine on conscientious objection, J. Frivaldszky: L'objection de conscience et la doctrine catholique. *Pàzmàny Law Review,* 2013. 95 ff.

40 Regarding the importance of freedom of conscience and its content see Böckenförde op. cit. 269 ff and footnotes.

41 See *Conscientious Objection and Bioethics*, Opinion of Italian National Bioethics Committee; Dreier op. cit. 1154 footnote 37 contests the possibility of drawing from Kelsen the idea of an absolutism of the majority, but recognizes (1153 footnote 25) that, although in *General Theory of Law and State*, Cambridge (Mass.) 1945/1949 Kelsen did not repeat the qualification as being naïve regarding the statement that describing despotism as a legal system is senseless (*Allgemeine Staatslehre*. Berlin, 1925. 334 f.), he continued to think that despotism is a form of legal system (quoting p. 300 of *General Theory of Law and State*).

42 See N. Irti – E. Severino: *Dialogo su diritto e tecnica*. Bari, 2001. 106.

43 E. Kaufmann: Die Gleichheit vor dem Gesetz im Sinne des Art. 109 Reichsverfassung. In: *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer.* Heft 3, Berlin–Leipzig, 1927. 20 quoted also by L. Nogler: L'itinerario metodologico di Luigi Mengoni. In: L. Nogler – A. Nicolussi (edit.): *Luigi Mengoni o la coscienza del metodo*. Padova, 2007. 284, footnote 123.

a democratic institution which allows people to participate in the important task to keep attention focussed on fundamental values. Indeed, it prevents, in the case of highly controversial matters that are inherent to fundamental values, the majority from overriding the individual conscience and even acknowledging doubt[44]. Destiny of law is not necessarily "juridical nihilism", which, in refusing to assimilate values in the body of law, serves the "will to power" of those who conceive law as a blind means without respecting the ends of the legal system. Protecting the conscience means conserving, at least, the doubt, and this perspective helps in contemplating the implicit reductionism in juridical nihilism[45]: «*der Staat schafft nicht Recht, der Staat schaft Gesetze; und Staat und Gesetz stehen unter dem Recht*»[46].

The everlasting purpose of natural law is to pose the problem of the limits that the state must observe in order to respect the profound dignity of man which we can recognize under every sky, existing through the entire course of history and which we pass on to our children. The safeguarding of the living environment, including psychophysical conditions for the unfolding of life[47], in order to prevent man from ceasing to be man is an issue that law cannot ignore. The task of natural law is, indeed, to question whether positive law has ignored or will ignore this at any step in its historical or future development.

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44 Art. 3 of the Italian Constitution provides that "it is a duty of the Republic to remove those obstacles of an economic and social nature that, by in fact limiting the freedom and equality of citizens, impede the full development of the human person and the effective participation of all workers in the political, economic and social organisation". Art. 2 "guarantees inviolable rights of man, for the individual, and for social groups where personality is unfolded, and demands the fulfilment of the fundamental duties of political, economic, and social solidarity".

45 See N. Irti – E. Severino: *Dialogo su diritto e tecnica.* Bari, 2001. 106.

46 E. Kaufmann: Die Gleichheit vor dem Gesetz im Sinne des Art. 109 Reichsverfassung. In: *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer.* Heft 3, Berlin–Leipzig, 1927. 20 quoted also by L. Nogler: L'itinerario metodologico di Luigi Mengoni. In: L. Nogler – A. Nicolussi (edit.): *Luigi Mengoni o la coscienza del metodo.* Padova, 2007. 284, footnote 123.

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