

The Way to the Secularisation of the Natural Law¹

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Presentation of the question

The concept of natural law belongs to the most important ethical theories from Antiquity to contemporary philosophy. Interpretations of this theory are often limited to the form that has its origin in the writings of Thomas Aquinas. Such an approach is meaningful partly because his concept of the natural law is highly-developed and holds a significantly eminent place in the field of the history of philosophy and of legal systems.² Aquinas's exposition however is situated in a theological framework, which is a stumbling block for those who do not accept a Christian point of view. Some authors consider these theological roots of natural law theory as necessary,³ but many authors strive to propose a secular form of natural law theory that would be acceptable even for those who are not in agreement with the theological premises. It needs emphasising that Aquinas's natural law theory is not grounded in specifically Christian doctrinal principles. It only presupposes the existence of God who is the intelligent Creator of all reality. However, even this can be a problem for some readers and thus some effort to purge the natural law of all reference to God can be well motivated – not only today, but also in the past.

An interesting example of such secularisation of natural law theory is the early modern clause *etiamsi daremus non esse Deum* (even if God did not exist), which was not used by atheists but very often by Christian theo-

1 This study is a result of the research funded by the Czech Science Foundation as the project GAČR 14-37038C “Between Renaissance and Baroque: Philosophy and Knowledge in the Czech Lands within the Wider European Context”.

2 Cf. Haakonssen, K., *Natural Law and Moral Philosophy*. Cambridge, NY, Cambridge University Press 1996, p. 15: “Earlier natural law is commonly seen as leading up to Aquinas’s paradigmatic version, whereas later natural law is understood as deriving from it.”

3 Richard McCormick understands natural law as inseparable from God’s grace which in reality cancels its natural character. Cf. Bourke, V. J., *Moral Philosophy without Revelation? The Thomist* 40, 1976, p. 557–570.

logians. In the concluding years of the Middle Ages natural law theory had not lost its meaning, but was developed as a response to the new challenges.

An important impulse for the new development of natural law theory was the discovery of the New World and the consequent social problems connected with a just approach to the native people. The second impulse was the new Protestant thinking and its scepticism concerning the human natural powers that were according to Protestants so much affected by original sin that they were not reliable any more.

Among the classic authors during the interlude between the Medieval and Early Modern understanding of the concepts of the natural law can be found the professor of the University of Salamanca, Dominican friar, and defender of the American natives Francisco de Vitoria (1480–1546), the Jesuit professor of the University of Coimbra Francisco Suárez (1548–1617) and the Dutch lawyer Hugo Grotius (1583–1645).⁴ His repeatedly quoted sentence on the validity of the natural law “even if God did not exist” is usually understood as a secularisation of the Scholastic doctrine of the natural law that refers to God.⁵

And indeed, all we have now said would hold, even should we grant what without the greatest wickedness cannot be granted, that there is no God, or that he takes no care of human affairs.⁶

This sentence of Grotius became an inspiration for finding such a way of speaking about God in the twentieth century, and it could be an answer to the contemporary challenges,⁷ as well as to the considerations regarding the existential status of man who must, regardless of his own opinions and state of knowledge, decide whether he acts as if God existed or did not exist.

⁴ Cf. Daryl Charles, J., *Retrieving the Natural Law*. Grand Rapids, Michigan–Cambridge, UK, William B. Eerdmans Publishing Company 2008, p. 94–99.

⁵ It was Samuel Pufendorf (1632–1694) who asserted that Grotius had separated the natural law from theology. However this assertion exaggerates Grotius' role, because Grotius was a person standing in the stream of the gradual process of secularization of the natural law more likely than a revolutionist who brought a fatal break in this theory. Cf. Chroust, A.-H., Hugo Grotius and the Scholastic Natural Law Tradition. *The New Scholasticism* 17, 1943, No. 2, p. 101–133; Carpintero, F., *Justicia y ley natural: Tomás de Aquino, y los otros escolásticos*. Madrid, Servicio de Publicaciones de la Facultad de Derecho de la Universidad Complutense 2004, p. 319.

⁶ Grotius, H., *De iure belli ac pacis*. proleg. 11: “Et haec quidem quae iam diximus, locum aliquem haberent etiamsi daremus, quod sine summo sceleri dari nequit, non esse Deum, aut non curari ab eo negotio humana.” English translation in: Grotius, H., *The Rights of War and Peace. Book I*. Ed. and introd. by R. Tuck. Indianapolis, Liberty Fund 2005, p. 89.

⁷ Cf. Lenihan, K. A., *Etsi deus non daretur: Bonhoeffer's useful misuse of Grotius' maxim and its implications for evangelisation in the world come of age*. *Australasian Journal of Bonhoeffer Studies*, 1, 2013, p. 34–60.

This paper strives to study the Early Modern development of the natural law doctrine “even if God did not exist” and to comment on the reasons for the “secularization clause”.

A hypothesis about the secularization of the natural law

As a first possibility of our quest for our studying of the shift from the theological to the secularized basis we can ask for some other shift in the philosophy of law at that time. If there are two parallel changes, it is possible to suppose either that the first of them is a cause of the second or that both of them are the effects of some common cause, or that they have nothing in common. It is obvious that a shift from the intellectualism to the voluntarism can be considered as such parallel change. That is why the voluntarism is the first possible hypothesis of explanation of the secularization of the natural law.

In his book about the natural law,⁸ Stanislav Sousedík presents another hypothesis supported by several quotations from Molina and Arriaga. The origin of the secularization clause itself is supposed in the writings of Gabriel Vazquez. According to Sousedík the difference between Aquinas's exposition of the natural law and its secularised form stems from the absolute emphasis on the object of the natural law. Not only an imperative proceeds from the object (things are forbidden because they are evil), but also the obligatory character of the natural law. In Aquinas's concept the obligatory character of the natural law flows from God the supreme Lawgiver. In the secularised theory however, the sanction is the mere impossibility of achievement of the object of the natural inclination.

The last hypothesis that will be considered here is based on a role of the link between the eternal and the natural law. In Aquinas's conception the eternal law is the necessary foundation of the natural law itself. The secularization however does not presuppose any divine law at the root of the natural law. In the following text these three factors will be considered as the possible causes of the secularization of the natural law concept, the first and the third being investigating deeply:

1. voluntarism,
2. a change in the understanding of the sanction,
3. an understanding of the difference between eternal and natural law.

8 Cf. Sousedík, S., *Svoboda a lidská práva*. Praha, Vyšehrad 2010, p. 85–88.

Aquinas's concept of natural law

Aquinas's natural law theory evidently proceeds from the theological perspective.⁹ In the context of Aquinas's understanding of the relationship between the divine and created order the interconnection between the law and intellect is fully consistent. According to Aquinas the law as such is rational and directed at some goal:

Law is a rule and measure of acts, whereby man is induced to act or is restrained from acting: for “lex” [law] is derived from “ligare” [to bind], because it binds one to act. Now the rule and measure of human acts is the reason, which is the first principle of human acts, as is evident from what has been stated above; since it belongs to the reason to direct to the end, which is the first principle in all matters of action, according to the Philosopher.¹⁰

Aquinas distinguishes between eternal,¹¹ natural,¹² human positive,¹³ and divine positive law.¹⁴ Eternal law is the absolute foundation of any other law because the natural law is a participation of the rational creature in the eternal law, and the positive laws at least cannot be in contradiction with the eternal law (and consequently with the natural law). The eternal law is a crucial element of our problem. For Aquinas it is the basis of the law as such. The concept of eternal law does not start with Aquinas,¹⁵ because this idea

⁹ Leo Elders counts Aquinas' derivation of the natural law from the eternal law in Divine mind among most important features of his ethics. Cf. Elders, L. J., *The Ethics of St. Thomas Aquinas*. *Anuario Filosófico* 39, 2006, No. 2, p. 439–463. Some Thomists understood Aquinas' thinking strictly as theological in its essence (Gilson, de Lubac, Chenu), others, however, admitted some autonomy of its philosophical dimension (Tugwell, Elders, Kaczor). Cf. Lisska, A. J., *Human Rights Theory Rooted in the Writings of Thomas Aquinas*. *Diametros* 38, 2013, p. 134–152.

¹⁰ Thomas Aquinas, *Summa Theologiae* (hereinafter referred to as *STh*) I^a–II^a, q. 90, a. 1: “Lex quaedam regula est et mensura actuum, secundum quam inducitur aliquis ad agendum, vel ab agendo retrahitur, dicitur enim lex a ligando, quia obligat ad agendum. Regula autem et mensura humanorum actuum est ratio, quae est primum principium actuum humanorum, ut ex praedictis patet, rationis enim est ordinare ad finem, qui est primum principium in agendis, secundum philosophum.” (*Sancti Thomae Aquinatis Opera omnia iussu impensaque Leonis XIII P. M.*, T. 7, Romae 1892; English translation: *Sancti Thomae Aquinatis Summa Theologiae*, literally translated by Fathers of the English Dominican Province, Second and Revised Edition, 1920.)

¹¹ Cf. Thomas Aquinas, *STh* I^a–II^a, q. 91, a. 1; q. 93.

¹² Cf. Thomas Aquinas, *STh* I^a–II^a, q. 91, a. 2; q. 94.

¹³ Cf. Thomas Aquinas, *STh* I^a–II^a, q. 91, a. 3; q. 95–96.

¹⁴ Cf. Thomas Aquinas, *STh* I^a–II^a, q. 90, a. 4; q. 98–108.

¹⁵ The relationship between the natural and the supernatural law has its origin especially in the Stoic philosophy and was developed by Christian authors such as St. Augustine (e.g. *De civitate Dei* XI, 4; PL 43, 320, where St. Augustine stated: “... nec tamen ideo Deum in eo faciendo

can be found even in the Patristic and the early Scholastic period. In Aquinas, however, it acquires a specific importance:¹⁶ it is the design of God's Providence. God has created and ruled the world with respect to this idea. It is obviously an intellectualist position where it is the intellect and not the will that is the source of the law.

A law is nothing else but a dictate of practical reason emanating from the ruler who governs a perfect community. Now it is evident, granted that the world is ruled by Divine Providence, as was stated in the First Part, that the whole community of the universe is governed by Divine Reason. Wherefore the very Idea of the government of things in God the Ruler of the universe has the nature of a law. And since the Divine Reason's conception of things is not subject to time but is eternal, according to Prov. 8:23, therefore it is that this kind of law must be called eternal.¹⁷

The eternal law is simply the Creator's idea of the divine wisdom that is both a creative pattern and the driving force that leads things to their goals. Aquinas however connects this creative pattern also with art:

Wherefore as the type of the Divine Wisdom, inasmuch as by it all things are created, has the character of art, exemplar or idea; so the type of Divine Wisdom, as moving all things to their due end, bears the character of law. Accordingly the eternal law is nothing else than the type of Divine Wisdom, as directing all actions and movements.¹⁸

The creative idea is the artificial piece of work that reminds us of an old sacral art, where painters used some classic canon models and worked them

aeternum concilium voluntatemque mutase.”). Cf. Rhonheimer, M., *The Perspective of Morality*. Washington, DC, The Catholic University of America Press 2011, p. 261.

16 Cf. Bastit, M., *Naissance de la loi moderne. La pensée de la loi de saint Thomas à Suarez*. Paris, Presses universitaires de France 1990, p. 79.

17 Thomas Aquinas, *STh I^a–II^{ae}*, q. 91, a. 1: “Nihil est aliud lex quam quoddam dictamen practiceae rationis in principe qui gubernat aliquam communitatem perfectam. Manifestum est autem, supposito quod mundus divina providentia regatur, ut in primo habitum est, quod tota communitas universi gubernatur ratione divina. Et ideo ipsa ratio gubernationis rerum in Deo sicut in principe universitatis existens, legis habet rationem. Et quia divina ratio nihil concipit ex tempore, sed habet aeternum conceptum, ut dicitur Prov. VIII; inde est quod huiusmodi legem oportet dicere aeternam.”

18 Thomas Aquinas, *STh I^a–II^{ae}*, q. 93, a. 1: “Ita ratio divinae sapientiae moventis omnia ad debitum finem, obtinet rationem legis. Et secundum hoc, lex aeterna nihil aliud est quam ratio divinae sapientiae, secundum quod est directiva omnium actuum et motionum.”

out in a specific and unique way. That is why the order of creation is not a mere serial production of imitations, but it is the work of art that does not deny its origin and artificially creates individual creatures as the real originals.¹⁹ From such eternal law the natural law is derived. Aquinas describes the natural law as a participation of the rational creature in the eternal law. Between the eternal and the natural law there is participatory dependence and not identity:

Now among all others, the rational creature is subject to Divine providence in the most excellent way, in so far as it partakes of a share of providence, by being provident both for itself, and for others. Wherefore it has a share of the Eternal Reason whereby it has a natural inclination to its proper act and end. And this participation of the eternal law in the rational creature is called the natural law.²⁰

This participation is based on the human mind comprising both intellectual activity and free will. The intellection however is a foundation of a subsequent act of will. Human being understands this divine law but does not grasp it in its whole scope. The eternal law present in God's mind is not accessible to creatures in its entirety. The natural law however is present in the human mind and in comparison with the eternal law it is extensionally limited to the area that concerns him. Because of this fact the obligatory character of the natural law is based on the eternal law.

It is important to note that, for Aquinas, natural law is not something separate from eternal law. Rather, for Aquinas, the natural law is the eternal law itself, but regarded under the aspect of its being in us (rational beings) in this unique, twofold way: it is as in created beings that are ruled, measured, and directed by means of it, but also in us as in created (rational) beings that rule, measure, and direct (both ourselves and other things) by means of it.²¹

19 Cf. Westerman, P. C., *The Disintegration of Natural Law Theory. Aquinas to Finnis*. Leiden, Brill 1998, p. 27.

20 Thomas Aquinas, *STh I^a–II^ae*, q. 91, a. 2: “Inter cetera autem rationalis creatura excellentiori quodam modo divinae providentiae subiacet, in quantum et ipsa fit providentiae particeps, sibi ipsis et aliis providens. Unde et in ipsa participatur ratio aeterna, per quam habet naturalem inclinationem ad debitum actum et finem. Et talis participatio legis aeternae in rationali creatura lex naturalis dicitur.”

21 Baur, M., *Law and Natural Law*. In: Davies, B. – Stump, E. (eds.), *The Oxford Handbook of Aquinas*. Oxford, Oxford University Press, p. 246.

This means that in Aquinas there is an intellectualist understanding of the law as such and a clear distinction between the eternal and the natural law, which logically leads us to the obligation of the natural law coming from God.

Dominican followers of Aquinas

Aquinas's early modern followers were primarily Dominicans and Jesuits. Where Dominicans were loyal to the doctrine of their religious friar Thomas, Jesuits also adhered to it. Beyond this, however, they were developing it somewhat independently. The very important Dominican thinkers who in this time developed the concept of the natural law and the natural rights were Francisco de Vitoria (1483–1546) and Domingo de Soto (1494–1560).

Let us start, however, with famous commentator upon Aquinas's Summa, Renaissance Italian philosopher and theologian Tommaso de Vio or Cardinal Caietan (1469–1534). He carefully distinguished the eternal and the natural law in his commentary describing the eternal law as the concept of the divine government and the natural law as the principles that are naturally known as such.²² Apart from the differentiation of the eternal and the natural law his position is undoubtedly intellectualist and theocentric.

Francisco de Vitoria is well-known as a defender of the native inhabitants of the New World.²³ His most celebrated writing is in defence of them, using the concept of natural right. In reaction to Ockham's voluntarism Vitoria holds a contradictory position, i.e. intellectualism.²⁴ His development of natural law theory did not affect the proper core of the doctrine, but rather of the conditions it reacted to. In the basic principles of natural law theory he remained faithful to Aquinas' doctrine, which was quite common among Dominicans.²⁵ However Vitoria treats the concept of the natural law especially in the context of its practical development and does not consider a theoretical dimension of the topic very much.

Vitoria's disciple Bartolomeo a Medina (1527–1580), Spanish theologian from the school of Salamanca, repeated and confirmed Aquinas's teaching

22 Cf. *Prima secundae Partis Summae S. Theologie D. Thomae Aquinatis cum commentariis R. D. D. Thomae De Vio Caietani*. Bergomi, Typis Cornini Venturae 1590, p. 603: „In articulis primo, se- cundo et tertio eiusdem quaestione collige quod homo tribus legibus eget ad sui rectitudinem moralem, seclusa rectitudine requisita pro caelesti patria. Nam eget lege aeterna, naturali et humana: quae nihil aliud sunt quam ratio divinae gubernationis in Deo, principia practica natu- raliter per se nota, et conclusiones eorum per discursum rationis adinventae.“

23 Cf. Vitoria, F., *Relectiones theologicae*. Matrixi 1765, p. 183–245.

24 Cf. Specht, R., Materialien zum Naturrechtsbegriff der Scholastik. *Archiv für Begriffsgeschichte* 21, 1977, p. 86–113.

25 Cf. Leger, J. S., *The “etiamsi daremus” of Hugo Grotius. A Study in the Origins of International Law*. Romae, Pontificium Athenaeum Internationale “Angelicum” 1962, p. 93.

on the relationship between the eternal and the natural law. In his commentary he presented only a brief summary and review of the teaching of the Angelic Doctor. His *expositio articuli to Prima Secundae* q. 91, a. 1 and 2 uses almost the same words as Aquinas in his Summa.²⁶

Neither did Vitoria's religious friar Domingo de Soto depart from this course. He understands a law in the same way as Aquinas, in the context of an intellect with respect to the intellectual virtue of prudence through which it proceeds into our action:

Law is nothing else than a rule and a commandment of the prudence, that is a mean for government and administer Republic for those, who take care of it. However, the principal sovereign above all rulers is God from whom all the power is derived.²⁷

As for the status of the eternal law Soto is also in perfect harmony with the Dominican intellectual tradition following Aquinas. The natural law is understood as a human participation in the eternal law. This relation of the natural and the eternal law is clearly distinguished in his writings:

Even though we are governed by the eternal law, we are governed through the natural law that is a participation in it.²⁸

²⁶ Bartolomaeo a Medina, *Expositio in Primam Secundae*. Venetiis, Apud Petrum Dehuchinum 1580, p. 483: "Quoniam Lex nihil aliud est quam dictamen practicae rationis in Principe qui gubernat aliquam communatem perfectam, mundus autem iste divina gubernat providentia; unde ratio gubernationis in Deo, sicut in quodam universitatis principe, legis rationem habet. Quoniam vero divina ratio nihil ex tempore concipit, sed ab aeterno omnium habet conceptum, lex illa aeterna est.

Cum lex sit regula vel mensura, duobus modis in aliquo esse potest: Uno modo tanquam in regulante, & mensurante. Alio modo, ut in regulato, & mensurato: regulatur enim unumquodque secundum rationem mensurae quam participat. Cum igitur omnia, quae divinae providentiae subduntur, a lege aeterna mensurentur, ac regulentur, omnia illa participabunt aliqua ratione ipsam aeternam legem, quatenus scilicet ex illius impressione habent inclinationes in proprios actus, & fines. Sed tamen quoniam inter caeteras; creatura rationalis excellenter quodam modo talis impressionis participum habet, sibi enim & aliis provideret ad debitum actum & finem; ideo participation aeternae legis in rationalibus creaturis lex naturalis appellatur."

²⁷ Soto, D., *De iustitia, & iure, libri decem*. I, q. 3, a. 1. Venetiis 1594, p. 18: "Quatuor sunt legis species, quae in titulo quaestionis praeponuntur. Lex nihil aliud est quam regula & praeceptio prudentiae, per quam qui curam gerit Reipublicae illam gubernat & administrat: gubernatorum autem primus supremus est Deus, unde omnis potestas derivatur."

²⁸ Soto, D., *De iustitia, & iure, libri decem*. I, q. 4, a. 1, op. cit., p. 24: "Etsi aeterna lege gubernemur, id tamen fit per naturalem, quae participatio illius est."

The law and the right

A somewhat different approach can be found in the writing of another Dominican Domingo Báñez, who does not literally speak about the eternal and the natural law, because in his *Decisiones* he does not comment on Aquinas's *Summa* itself, but develops his own original treatise that is focused not on the law (*lex*), but on the right (*ius*). In this context he distinguishes the divine right and the human right, the first being subdivided between the right belonging to the order of nature and the order of grace.²⁹ Nevertheless they are not equivalents of the natural and the eternal law, but represent the Ten Commandments and the commandments of the divine charity respectively. We can conclude that Báñez in his treatise on right and justice speaks about the natural right, but not about the eternal law. The reason for this fact is obviously not a denial of the eternal law, but that the perspective of right (*ius*) is closely connected from the concept of law, but is not the same. While the natural law and the natural right are usually treated together, it has no real meaning to speak about the eternal right. Even Aquinas understands a right without a strict relation to an eternal right because "the *right* or the *just* is a work that is adjusted to another person according to some kind of equality."³⁰ That's why it belongs to the relation of God and humans (*divine right*) or the relation of one human being to another (*human right*). The eternal law, however, represents a creative idea in God's mind.

As was demonstrated above, Cajetan, Vitoria, Medina and Soto followed Aquinas in his intellectualist approach to the natural law and distinguished the natural law from its source that is the eternal law. Báñez does not focus on law but on right which means he does not pay attention to this distinction. It must be said that he does not deny it, but concentration only on right and not on law could exaggerate a tendency to underestimate the source of the natural law. We can state then that most important Renaissance and early modern Thomists – Dominicans firmly held a course of thinking reaching back to Aquinas. They are intellectualists and clearly distinguish between the eternal law and the natural law that is derived from the eternal.

Among other Jesuit authors of that time the strict link of the natural law to the eternal law seems to be disappearing. Let us start with one

²⁹ Báñez, D., *De Iure & Iustitia Decisiones*. q. 57, a. 2. Apud Ioannem & Andream Renaut 1594, p. 7: "Ius itaque in tota sua latitudine primum omnium dividatur in ius divinum, cuius Deus est auctor, & in humanum, cuius homo est conditor. Rursus ius divinum dividitur in divinum pertinens ad naturae ordinem, & in divinum pertinens ad ordinem gratiae."

³⁰ Thomas Aquinas, *STh* II^a–II^{ae}, q. 57, a. 2: "ius, sive iustum, est aliquid opus adaequatum alteri secundum aliquem aequalitatis modum."

of the great Jesuit thinkers at the end of the 16th century Luis de Molina (1535–1600) who distinguishes the divine right only with the natural and positive:

We mustn't omit that there are two kinds of divine right: the natural right and the positive one.³¹

Natural right here is directly divine right without distinction between the divine and human mind. Jesuit thinker Leonard Lessius (1554 – 1623) treats the problem of natural law similarly.³² It is the same context as we saw above in the concept of Domingo Báñez. He concentrates on the natural right, so that he does not consider the source of natural law in God. As was observed above, it is the perspective corresponding to Aquinas's *Secunda Secundae* where the virtue of justice is treated, and not his *Prima Secundae* where he focuses on law as such.

Molina's concept however seems to go a little further, because the divine origin of the natural right does not mean that it is an absolutely transcendent reality. As soon as the world is created, it is in a sense autonomous, so that it is not possible to refer to God in consideration of the natural law. The author of the natural law is God, but it is only the condition of things that obliges us. Molina asserts that an obligation of the natural law doesn't flow from God's will, as Suárez believed, but directly from the thing as such:

Obligation of the natural right proceeds from the nature of the object and flows further to the precept. That is why it is often said that things pertinent to the natural law are forbidden because they are evil, and not that they are evil, because they are forbidden.³³

Molina however does not deny the eternal law itself. In the last part of his treatise he considers the eternal law as a source from which all other laws are derived.

³¹ Molina, L., *De justitia et jure*. tr. 1, d. 3, n. 3. Coloniae Allobrogum, Michael Bousquet 1733, p. 5: “Illud vero non est omittendum, jus divinum duplex esse, naturale videlicet, & positivum.”

³² Lessius, L., *De iustitia et iure ceterisque virtutibus cardinalibus Libri quatuor*. Lib. 2, cap. 2, dub. 2. Parisiis, Rolini Theodorici 1618, p. 20.

³³ Molina, L., *De justitia et jure*. tr. 1, disp. 4, n. 3, op. cit., p. 6: “Quod obligatio juris naturalis oritur a natura obiecti, indeque se diffundit in praeceptum. Ea vero de causa dici consuevit, ea, quae sunt juris naturalis, prohibita esse, quia mala & non ideo mala esse, quia prohibita.”

God's eternal and immutable law has the first place among various laws and other laws are derived from it.³⁴

He speaks here on *derivation* instead of Aquinas's term *participation* but the meaning seems to be the same. The eternal law is the divine providence and government of all things towards their ends.

Suárez's via media between intellectualism and voluntarism

Even though Jesuit authors of modern times followed Aquinas's position, they revised him more or less. One of the most important thinkers of the second Scholasticism, Jesuit philosopher and theologian Francisco Suárez developed Aquinas's concept of the natural law, but according to many authors he made some fundamental changes. According to Germain Grisez the important mistake made by Suárez is his interpretation of Aquinas's theory where practical knowledge is a sum of theoretical knowledge and the decision of the will.³⁵ Pauline Westerman agrees with Grisez, but she does not understand Suárez's concept as a mere misinterpretation, but as a new theory striving to save all acceptable elements of Aquinas's doctrine. The basic differences between Aquinas and Suárez showing the impossibility of accepting Aquinas's natural law theory without any change are different understandings of creation, law and the theological character of nature.³⁶ The underlying reasons for Suárez's deviation from Aquinas's teaching are not important here. Rather, we will emphasise here primarily the parts that are important for the modern secularization of the natural law.

Suárez accepts Aquinas's distinction between the eternal, the natural, and the positive (both divine and human) law.³⁷ He emphasises however the will of the lawgiver more than Aquinas. The eternal law has a specific role because it is an expression of the creative God's will, but it binds creatures only in the form of the natural or positive law. Hence it is a law in relation to the lower laws that are laws in the proper meaning.³⁸

34 Molina, L., *De justitia et jure*. tr. 5, disp. 46, n. 20, p. 150. Cf. also Brett, A., Louis de Molina on Law and Power. In: Kaufmann, M. – Aichele , A. (eds.), *A Companion to Louis de Molina*. Leiden – Boston, Brill 2014, p. 155–181.

35 Cf. Grisez, G., *The First Principle of Practical Reason: A Commentary on the Summa Theologiae I, II, qu. 94, art. 2*. In: Kenny, A. (ed.), *Aquinas: A Collection of Critical Essays*. Notra Dame In, University of Notre Dame Press 1976, p. 340–382.

36 Cf. Westerman, P. C., *The Disintegration of Natural Law Theory*. Aquinas to Finnis, op. cit., p. 78–79.

37 Cf. Suárez, F., *Opera omnia* t. 5 (*De legibus* I, c. 3, 5–7). Parisiis, Vivès 1856, p. 8–9.

38 Cf. Haakonssen, K., *Natural Law and Moral Philosophy*, op. cit., p. 16–17.

In the tension between intellectualism and voluntarism Suárez holds the middle course and criticises both of the named extremes. He speaks about the natural law “even if God did not exist” in connection with the intellectualism. In Suárez’s interpretation it is an attitude that does not interpret natural law as preceptive but as indicative, i.e. as a dictate of reason that shows what is intrinsically good and evil. In this context Suárez makes reference to Gregory of Rimini (1300–1358) who understands the natural law as independent of God.³⁹ But Suárez is inaccurate in this reference to Gregory⁴⁰ because in his writing the natural law was not secularised. Gregory only said that sin would exist even without God.⁴¹ The purpose of Gregory’s effort was a rejection of voluntarism.⁴²

Regardless of the question of the interpretation of Gregory’s text, Suárez understands the secularisation of the natural law as a consequence of strict intellectualism. As stated above, he tried to hold a balance between intellectualism and voluntarism. The natural law is then both indicative and preceptive.⁴³ It is an expression of the divine mind that presents both an intellectual judgement about good and evil, and the will commanding action. It is not situated in the human will as in the case of other laws,⁴⁴ but in the human intellect. Our intellectual judgement concerning what is in harmony or disharmony with human nature however is not merely indicative, but it becomes also preceptive and obligatory due to the will of God that is the only source of lawfulness.⁴⁵ It clearly shows that Suárez is a voluntarist, albeit a moderate one. According to him the natural law is the judgement of the human intellect, but it becomes a law because of God’s will that is contained in this judgment. Suárez firmly avoids radical voluntarism just as he avoids a secularisation of the natural law, which is according to him an effect of radical intellectualism.

39 Cf. Suárez, F., *Opera omnia* t. 5 (*De legibus* II, c. 6, 3), op. cit., p. 105: “Imo ait Gregorius quem caeteri secuti sunt, licet Deus non esset, vel non uteretur ratione, vel non recte de rebus judicaret, si in homine esset idem dictamen rectae rationis dictantis, verbi gratia, malum esse mentiri, illud habiturum eamdem rationem legis, quam nonc habet, quia esset lex ostensive malitiae, quae in objecto ab intrinseco existit.”

40 Cf. Gregorius de Armino *In Secundo Sententiarum*. d. 34, q. 1, a. 2. Venice 1503.

41 Cf. Haakonssen, K., *Natural Law and Moral Philosophy*, op. cit., p. 20.

42 Cf. Specht, R., *Materialien zum Naturrechtsbegriff der Scholastik*, op. cit., p. 86–113.

43 Suárez, F., *Opera omnia* t. 5 (*De legibus* II, c. 6, 5), op. cit., p. 105: “Lex naturalis non tantum est indicative mali et boni, sed etiam continent propriam prohibitionem mali, et praeceptionem boni.”

44 The concept of law is not analogical but equivocal for Suárez.

45 Cf. May, W. E., *Natural Law Doctrine of Suarez*. *The New Scholasticism* 54, 1984, No. 4, p. 409–423.

Although the obligation that is added by the natural law as it is really preceptive has its origin in the divine will, this will presupposes a judgement about e.g. war, falsehood etc. From the power of mere judgement, however, does not proceed any proper prohibition or obligation of a commandment, because it cannot be understood without will. That is why the will adds the prohibition of such things because they are evil. Therefore the natural law as it is in us does not only indicate evil, but it also obliges us to avoid it. It represents not only natural discord of such an act or object with rational nature, but it is also a sign of divine will that forbids it.⁴⁶

The middle course between intellectualism and voluntarism has a consequence in the concept of the sanction for a violation of natural law precepts. A punishment follows from an obligation stated by the divine free will, so that it is not a part of the natural law according to Suárez.⁴⁷ That is why the sanction is incomprehensible by the human intellect and it is only a matter of faith. A question remains: how do people who do not know this sanction because of their lack of faith cope? Suárez answers that it is not necessary for a sinner to know the due punishment for his sin. It suffices when he deserves such a punishment for his evil acts.⁴⁸

The preceptive force of the natural law follows from the indicative force so that there is a natural obligation (*obligatio naturalis*).⁴⁹ Hence Suárez on the one hand understands the sanction in direct connection with God, and on the other side opens up the possibility of an autonomous understanding of the natural law where the human being obliges himself on the grounds of an indicative of his nature. This is a starting point for the secularisation of the natural law. Nevertheless, Suárez's attitude with respect to the sanction as such does refer to God.

46 Suárez, F., *Opera omnia* t. 5 (*De legibus* II, c. 6, 13), op. cit., p. 109: "Quamvis ergo obligatio illa quam addit lex naturalis, ut proprie praecceptiva est, sit ex voluntate divina, tamen illa voluntas supponit judicium de militia, verbi gratia, mendacii et similia: tamen, quia ex vi solius judicii non inducitur propria prohibitio, vel obligatio praecippi, quia hoc sine voluntate intelligi non potest, ideo adjungitur voluntas prohibendi illud, quia malum est. Unde tandem fit legem naturalem, prout in nobis est, non tantum esse indicantem malum, sed etiam obligantem ad cavendum illud, ac subinde non solum repraesentare naturalem disconvenientiam talis actus, vel objecti cum rationali natura: sed etiam esse signum divinaria voluntatis vetantis illud."

47 Cf. Courtine, J.-F., *Nature et empire de la loi. Études suárezienヌs*. Paris, Vrin 1999, p. 145.

48 Cf. Suárez, F., *Opera omnia* t. 5 (*De legibus* II, c. 9, 3), op. cit., p. 119: "Ad incurrendum reatum alicujus poenae, non est necessarium ut ipse subditus et transgressor legis cognoscat poenam debitam suae transgressioni; sed satis est ut faciat actum dignum talis poena."

49 Cf. Suárez, F., *Opera omnia* t. 5 (*De legibus* II, c. 9, 4), op. cit., p. 119.

His theory opened the door to the secularization of the natural law because of an inversion of the relationship between God and human nature. Aquinas starts with God and the eternal law as a creative idea in God's mind. Suárez starts with human nature. If God created human beings as rational, then God established some laws that can be understood and followed by human beings.⁵⁰ Thus the natural law is a consequence of the shape of human nature. The starting point here is not God but man.⁵¹

We must say that the problem as such for Suárez is Aquinas's definition of law, because it is too wide for him.⁵² The medieval Scholastic professor understands law as *regula et mensura*, i.e. the ordering principle that commands and counsels which brings some possibility of a creative approach. The Jesuit Scholastic professor however purposefully narrows this law to the principle commanding a morally good life. It means that in Aquinas the law concerns all creatures (in different ways), but in Suárez it is restricted only to rational creatures. For Aquinas the eternal law is a description of the way in which God orders the Universe, while Suárez cannot understand the eternal law as really eternal, because if it had been valid from eternity it would have been valid before creation, when there was nothing but God. But no law can bind God so that the eternal law is rather the law for lower laws (natural law and both positive laws).⁵³

But there is a problem in Suárez's concept here. If the natural law is both indicative and preceptive and its preceptive power is a consequence of the indicative, then God evidently has to want what he knows as good.⁵⁴ It means God binds himself, which is impossible for Suárez because someone can be bound by a command only from a superior authority. According to Haakonssen this enables a removing of the difference between eternal and natural law⁵⁵ which results in the secularisation of the natural law:

In one sense God is totally free – free, for example, to create or not to create the known world. If we could conceive of his choice between creating this or another world, or no world at all, as a moral choice, a choice between alternative constellations of

50 Cf. May, W. E., *Natural Law Doctrine of Suarez*, op. cit.

51 Cf. Westerman, P. C., *The Disintegration of Natural Law Theory. Aquinas to Finnis*, op. cit., p. 102.

52 Cf. Courtine, J.-F., *Nature et empire de la loi. Études suaréziennes*, op. cit., p. 143; May, W. E., *Natural Law Doctrine of Suarez*, op. cit.; Courtine, J.-F., Vitoria, Suárez et la naissance du droit naturel moderne. In: Renaud, A. (ed.), *Histoire de la philosophie politique II: Naissances de la modernité*. París, Calmann-Lévy 1999, p. 127–181.

53 Cf. Westerman, P. C., *The Disintegration of Natural Law Theory. Aquinas to Finnis*, op. cit., p. 81–86.

54 Cf. Haakonssen, K., *Natural Law and Moral Philosophy*, op. cit., p. 22.

55 Suárez explicitly asserts that the eternal law and the natural law are different. Cf. *Opera omnia* t. 5 (*De legibus* II, c. 5, 8), op. cit., p. 101–102.

goods and evils, then we could see him as imposing upon himself certain duties as a consequence of realizing one or another set of values. This rather commonsensical view is probably what Suárez intends. The problem is that it amounts to suggesting that human beings can understand the eternal law by which God himself operates, not just its adaptation in the natural law promulgated to humans. If human beings could have this kind of insight, it is not clear why God the legislator should be necessary as the ground of all human morality.⁵⁶

I consider this reflection to be compelling only in its understanding of God's free decision as rational and consequently intelligible. But it is always hidden for the human being, because human reason is not able to reach the complexity of all alternatives in their fullness. It means that the dependence of the natural law with the eternal law as a participation of the rational creature in the law that is principally inaccessible for mankind (it is intelligible as such but not for human beings) is still in play.

Vázquez – direct predecessor of Grotius?

Among the most important Jesuit philosophers and theologians it was Gabriel Vázquez (1549–1604) who held the most extreme position. Many authors consider both his strong intellectualism and his close affinity to Grotius.⁵⁷

It seems that without distinguishing between eternal and natural law two consequences appear. First, it is a radically transcendentalist view that refers only to God. It takes the form of clear voluntarism, which means that the natural law is transformed into some kind of divine positive law, because it depends only on the will of God who is Lawgiver. Second, it is Molina's concept of natural law that emphasises the nature of good and evil that is in the thing itself. It is a secularised concept, because the origin and obligatory character of natural law have not referred to God any more, and remains valid even if God does not exist.

Quite an obvious form of such an attitude can be found in Gabriel Vázquez, who explicitly articulates thoughts that are only indicated in Molina. According to him the natural law exists independently and there-

56 Haakonssen, K., *Natural Law and Moral Philosophy*, op. cit., p. 22

57 Cf. Westerman, P. C., *The Disintegration of Natural Law Theory. Aquinas to Finnis*, op., cit., p. 146

"It seems to me that if there is a connection between Vázquez and Grotius at all, Grotius radicalizes Vázquez's view." Cf. also Leger, J. S., The "etiamsi daremus" of Hugo Grotius. A Study in the Origins of International Law, op. cit. p. 45–57.

fore it results in action without being explicitly commanded.⁵⁸ It means that the necessity and objectivity of natural law cannot be changed even by God.⁵⁹

Since the law or the right is a rule to which our acts must be adequate to be just, the natural law or natural right is the natural rule that is not based on the will but on the proper nature. It also confirms that such is a law or right, which is not established by will, not a divine one.⁶⁰

What about Vázquez's opinion regarding the above mentioned questions that are important for the formulation of secularized theory of natural law or natural right? First it must be said that Vázquez is a strong intellectualist. He understands law as an act of the intellect and not of the will.⁶¹

The law is the act of the intellect and not of the will. It is the act of the intellect as the command that presupposes the act of the will. It is a proposition that is called by Scholastics an intimation of the will of the superior.⁶²

Vázquez clearly differs from Suárez in this point and with his intellectualism and secularised concept of natural law he seems to confirm Suárez's reservation about the pure intellectualism that leads only to this radicalism. However, what makes Vázquez the proponent of the secularised form of natural law is not the intellectualism itself. The Thomist authors mentioned above were also intellectualists but they did not arrive at the secularisation of natural law. According to my opinion the key is the blending of eternal and natural law or – more exactly – the dropping of the concept of eternal law from the concept of natural law. Vázquez, like his Jesuit friars, consid-

58 Vázquez, G., *In Primam Secundae Sancti Thomae*. Tom. 2, d. 150, c. 3, n. 23. Compluti, Ex Officina Iusti Sanchez Crespo, 1605, p. 10: "ante omnem voluntatem Dei et imperium, imo etiam ante omne iudicium."

59 Cf. Carpintero, F., *Justicia y ley natural: Tomás de Aquino, y los otros escolásticos*, op. cit., p. 320.

60 Vázquez, G., *In Primam Secundae Sancti Thomae*. Tom. 1. Ingolstadii, Hertsroy 1606, d. 150, c. 3, n. 21. Ingolstadii, Hertsroy, 1606, p. 7: "Cum enim lex, aut ius sit regula, cui aequari debent actiones, ut iustae sint; naturalis lex, aut naturale ius erit regula naturalis, quae nulla voluntate, sed suapte natura constat. Porro talem esse aliquam legem, aut ius, quod nulla voluntate, etiam Dei, constitutum sit, illud maxime confirmat".

61 Cf. Specht, R., *Materialien zum Naturechtsbegriff der Scholastik*, op. cit., p. 86–113.

62 Vázquez, G., *In Primam Secundae Sancti Thomae*. Tom. 2, d. 150, c. 2, n. 16, op. cit., p. 8: "Lex opus est intellectus, non voluntatis, est autem opus intellectus, sicut imperium supponens actum voluntatis, nempe est propositio, quam Scholastici intimationem vocant voluntatis superioris."

ered natural law as independent and self-sufficient so that he did not derive it from eternal law.⁶³

The natural law in the rational creature is the nature itself in so much as it is rational, because it is the first rule of good and evil.⁶⁴

In the end we can mention another distinctive Jesuit thinker Rodrigo de Arriaga (1592 – 1667) who followed Vázquez, but did not hold such a radical position. Arriaga speaks about the natural or the eternal law (*lex naturalis seu aeterna*) that is in the proper sense an act of the intellect,⁶⁵ so that he seems to identify both laws then. According to Arriaga even God has the eternal and natural law, which is a position that does not match up with Aquinas's understanding of the natural law as a participation of the rational creature in the eternal law in the divine mind.⁶⁶ Arriaga seems to treat the nature of God and the man the same way in this context which brings him closer to Vázquez.

Conclusion

Let us come back to the question at the beginning of this paper. What exactly were the circumstances of the secularisation of the natural law that was made famous by Grotius? It was not a radical turn in the doctrine as stated by Pufendorf who believed that it was only the Stoics who held the true theory of natural law before Grotius while Aristotelians, including the Scholastics, clouded the concept.⁶⁷ On the contrary, it was Grotius who came into the field prepared by some Scholastic scholars of early modern times.

It is not voluntarism that makes them Grotius's predecessors in the field of the secularization of the natural law. On the contrary, voluntarism as such is rather a defence against this secularization, as is evident in Suárez: he was a moderate voluntarist but together with that he did not accept the secu-

63 Cf. Courtine, J.-F., *Nature et empire de la loi. Études suaréziennes*, op. cit., p. 63. Cf. Vázquez, G., *In Primam Secundae Sancti Thomae*. Tom. 1, d. 151, a. 1, explic. op. cit., p. 17)

64 Vázquez, G., *In I-II*, d. 150, c. 3, n. 21 (Vázquez, G., *In Primam Secundae Sancti Thomae*. Tom. 1, op. cit., p. 8): "Lex naturalis in creatura rationali est ipsam natura, quatenus rationalis, quia haec est prima regula boni & mali."

65 Cf. Arriaga, R., *Disputationes theologicae in Primam secundae seu Universi cursus theologici*. Tom. 4, disp. 1, sect. 2, subsect. 1. Antverpiae, Balthasar Moreti 1644, p. 3.

66 Cf. Ibid., p. 4: "Respondeo ... Deum etiam habere legem aeternam & naturalem, non quidem ab aliquo sibi Superiori, sed a iudicio suo proprio & intrinseco, seu a sua propria natura et essentia."

67 Cf. Chroust, A.-H., *Hugo Grotius and the Scholastic Natural Law Tradition*, op. cit.

larised theory of natural law that was caused by radical intellectualism, according to him. Neither is intellectualism itself the cause of secularization of the natural law, because we find intellectualism in authors of the Dominican school that did not adhere to the secularization thesis at all.

According to my opinion the turning point to the secularization of the natural law, besides the change in the understanding of the sanction described by Sousedík, is the weakening of the concept of eternal law. If natural law in the human mind is not derived as a participation in the eternal law in the mind of God, we must look for its reason either in pure voluntarism or in that which is as such without any respect to God. Pure voluntarism can resist the secularisation but it simultaneously leads to resigning the intelligibility of the natural law. The reason for obligatory character and sanction can only be only God's decision and nothing else. From the intellectualist point of view that distinguishes between the eternal and the natural law, and the intelligibility of the natural law remains untouched. It also refers to God with respect to obligation and sanction but it understands Him as intelligent and not wilful. If an intellectualist denies a difference between the eternal and the natural law, he must look for obligation and sanction in the thing itself. Any reference to the cause of the thing is superfluous for the concept of natural law then.

SUMMARY

The concept of natural law in Thomas Aquinas's writings is based on the concept of the eternal law, which is a creative idea in God's mind. The natural law is a participation of the rational being in this eternal law. Some thinkers of the second Scholasticism understood the natural law more and more independently on this theological ground. According to Grotius it is independent even of God. This paper presents Aquinas's view and investigates the writings of some Dominican and Jesuit authors with respect to the question on the development of the Grotian secularisation of the natural law. It concentrates especially on the tension between the intellectualism and the voluntarism and on the weakening of the importance of the dependency of the natural law on the eternal law.

Keywords: Aquinas, natural law, Scholasticism, Suárez