

Aquinas and Modern Juridical Nihilism

(And Four other Figures: Camus, Kelsen, Nietzsche, and Orwell)

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1. Law through the nihilistic lens

The legal world has long been invested by the skeptical position according to which there is no truth, justice and rationality of the law, in which everything comes from will and its intrinsic mobility. There is no natural right (*jus naturale*) which is valid in itself, but everything is revocable and changeable: the fact that there is no natural right means that any law or rule is conventional and therefore arbitrary. According to Leo Strauss, the rejection of today's natural right leads to nihilism, indeed making it one with itself.¹ The present

post-metaphysical turn of so many philosophical schools is a disquieting sign.

Law splinters into a thousand streams, subordinates itself to the technique and formalism of procedures, which as such are blind to the contents and can accommodate everything: law is intended as an empty space that can be filled by any instance. Kelsen's expression that "the law can have any content" is a tragic manifestation of this *juridical nihilism*, for it ultimately entrusts political and legal existence to power and strength, ceding to a formal legality and pushing away justice

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In nihilism, winning powers and strongest facts are passed into law, indifferent to the lives of men and their relationships.

Juridical nihilism is and has been in place for a long time, and it seems necessary to become aware of its nucleus and to clarify the features that make up its face. Those who believe that it constitutes a deviation and a disease will have to open the delicate chapter of therapy. The influx of various modern and postmodern nihilistic legal theories sets an increasing challenge on the formation and content of the real law.

It is necessary to differentiate between *lex naturalis* and *jus naturale* on the one side, and *lex* and *jus* on the other, and additionally, the constant difficulty in settling this problem in the English language, in which 'law' is generally used to express both

lex

'and'

jus

'Inspired by Strauss, who titled his famous book

Natural Right and History,

I have decided also to use the term 'right' to translate

jus naturale

as

natural right

and

diritto/droit/derecho/recht

as

right

. This concept of

right,

intended as something which is by nature due to the person as such (and this is his right), is central in ethics and the philosophy of law, and constitutes a genetic and systematic notion of these sciences.

Human beings are not simply part of a totality, but each human being is a 'whole' or an 'I'. So 'right' as something that is due to the human being as such, which other moral agents are in all conscience obliged to recognize and not deprive him of, is the *suum* that appertains to the person as 'his due'. With this determination of *right* we have shaped the concept of 'right of nature' (*jus naturale*), and opened the door to human rights, which are nothing more than the explication of the

suum

appertaining to the person.

From this concept of *right* springs forth an immediate connection with justice, which is known as giving to each his own (*unicuique suum tribuere*) and since this *suum* is the right of each, the object of justice is right.

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Therefore, there is a 'genetic' antecedence of right in respect to justice, and human rights must be regarded as a fundamental expression of justice.

If law is trapped in juridical nihilism, what use could an appeal to Saint Thomas have? In the days of Aquinas, philosophy and theology could not have been interested in nihilism, as it is a problem which only emerged in nineteenth and twentieth century European thought. It would seem at first glance that an appeal to Aquinas in order to clear the fog of (legal) nihilism would be risky. However, even if Aquinas did not address juridical nihilism we can find in him, and in the tradition of the philosophy of being, lights and criteria on how to approach this issue. Indeed, in the middle Ages law as a topic was developed and repeatedly elaborated by Aquinas, reaching a peak in the famous treatise *De lege* in the *Prima Secundae*. I do not suggest to set out his position once again, but rather to draw inspiration from it in order to address the issue of juridical nihilism. I only wish to recall the very pillar of Aquinas' concept of law, i.e. that law is *aliquid pertinens ad*

rationem (something

pertaining to reason, I-II, q. 90, a. 1): this position is expressed at the very beginning of the entire treatise

De Lege

. To the question

utrum lex sit aliquid rationis

Aquinas answer positively and this will be his omnipresent assumption.

Aquinas offers indispensable keys to understanding and surpassing juridical nihilism: therefore he will be a constant presence in my paper, although often silent and incognito. Along with Aquinas four modern figures will also be present: Nietzsche, Kelsen, Camus and Orwell, as 'witnesses' in favor or against the defendant (juridical nihilism).

The first step is to establish the main concepts and the theoretical framework in which the term 'juridical nihilism' is summarized: a difficult task, for nihilism *tout court* is one of the few major problems discussed in Western philosophy over the last century and a half, following multiple paths.

2. Nietzsche and Orwell

In approaching the subject one of Nietzsche's aphorisms and Orwell's stories provide valuable insights. Aphorisms and stories penetrate reality with precious agility, which at first glance places us in what is essential, if we know how to listen. The reference to Nietzsche seems obvious: he is the anti-Thomas in almost every way. But why Orwell? What does he have to do with it? The fact is that Orwell, as we shall see, is a Thomist, a follower of Aquinas, happily unaware of being so.

According to Nietzsche, when law is not tradition it is imposition or command. ⁴ That law must be imposed by power is his first and last word: when law is not valid according to tradition, it only applies if imposed by force. In juridical nihilism law is violently detached from practical reason, becoming a mere production of will that does not recognize any natural right: only positive law, positum by will, exists.

In 1984, in a dramatic and violent conversation with his jailer O'Brien, Winston Smith represents the last man in Europe to fight the Party and Big Brother, in order to keep a shred of humanity. In this long interrogation Orwell disseminated illuminating considerations that recall dilemmas that are still unavoidable today. I have brought some of them together, leaving the floor to O'Brien who wants to make Winston Smith a totally controlled being:

"You must get rid of those nineteenth-century ideas about the laws of Nature. We make the laws of Nature."

"Reality is not external. Reality exists in the human mind, and nowhere else... Nothing exists except through human consciousness... Outside man there is nothing."

"We control life, Winston, at all its levels. You are imagining that there is something called human nature which will be outraged by what we do and will turn against us. But we create human nature." ⁴

Let us read these sentences carefully, according to their meaning intended for a different purpose and a different context: they convey a representation of others' origins after the more reliable an individual.

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