

INTRODUCTION

With the present study we want to expose the natural law theory of americans anarcho-capitalist, in particular of their greatest exponent, Murray N. Rothbard; in conjunction with this, we examine the robustness and sustainability of this theory of natural law.

The natural law doctrine is the legal-philosophical school of thought which supports that there is a natural law inscribed in human nature, inherently and universally valid (in every time and place), pre-existent and axiologically superior than any historical form of positive law, which can be found by human reason and thus establish an objective ethics.

The anarcho-capitalist doctrine of natural law has its roots in the classical Thomistic natural law theory and lockean doctrine of individuals natural rights; we will discuss of Thomas Aquinas and John Locke, and also of a very significant exponent libertarian, Ayn Rand, which Rothbard has taken a central ideas of his theory. After discussing the basic concepts of Rothbard's theory, we will also mention to the epistemological and philosophical critical addressed by some authors (Kelsen, Antiseri, Bobbio) to the natural law. In conclusion, taking a cue from the Rothbard thesis, we will propose a reflection on natural law, from which we will derive an assessment of his theory of natural law.

1. THE ROOTS OF ROTHARDIAN NATURAL LAW: THOMAS AQUINAS, JOHN LOCKE, AYN RAND

The two basis concepts of natural law Thomistic are teleological conception of reality and human freedom. In the thomist view of the notion of natural law is closely related to the concepts of *nature* and *reason*: Thomas defines "nature" as an operating principle by which every body, because it has a specific "essence", act in accordance with what is; man is by his nature "rational", the reason is what distinguishes him from other creatures. Thomas distinguishes four types of laws: *lex aeterna*, *lex naturalis* and *lex humana*; this is distinct from *lex divina*, the law revealed by God¹.

John Locke is one of the fathers of classical liberalism and is a supporter of the idea of individual natural rights: they are the right to life, liberty, property and the right to defense of these rights. The state's duty is to protect the natural rights of its citizens, then it must confine itself to administer justice, ensure order, punish those who attack natural rights. For Locke the right to property is the natural right for excellence, which includes all the others.

The political philosophy of Ayn Rand is radically liberal; she bases his thinking on a moral and metaphysical approach: all requirements, ethical and political, are derived from a doctrine defined Objectivism, a naturalistic conception of man, aristotelian, who arrives to a rationalistic egoism². According to Rand is necessary to establish a rational morality, based on a specific metaphysics, Rand's realist and rationalist epistemology has as its natural consequence in an "objectivist" ethics; it follows from that a total opposition to the moral and hermeneutic relativism.

1 The foundation of all law, according to Thomas, is *lex aeterna*, which is the rational plan of God, and it is known only to Him; then there is a part of this *lex aeterna* which man, as a rational creature, is a participant and is *lex naturalis*; it is defined as *participatio legis aeternae in rationali creature*, "the participation of the eternal law in the rational creature." The men, as rational creatures, can decipher and understand it through reason: reason is able to explore human nature, finding the fundamental (natural) inclinations that must be ordered rationally, thus identifying the right purposes. *Lex humana*, that is positive law, is the law made by men and finds its foundation and value in *lex naturalis* and only its derivation from it makes it morally valid; when positive law is in conflict with the principles of the natural moral law we are in the presence of an unjust law and, Thomas says, unjust positive law is no longer a law but a corruption of the same. To lead man to his ultimate goal, the supernatural one, the eternal bliss, is not enough natural law and the human law; it's necessary a supernatural law, and this is *lex divina*, the revealed law, God's positive law that we find in the Gospel and in the Scriptures, which fills in the gaps of human laws and thus leads man to eternal bliss.

2 This selfishness is understood in the sense that every man has the right to cultivate itself without external interference, then according to the objectivist ethics it exists for all a moral obligation to respect human life (the fundamental right), liberty and property of others: thus we find also in Ayn Rand's the statement of these three human rights strongly supported by liberal and libertarian positions. In particular, the right to property is the implementation of the right to life: Rand thinks that between human rights and property rights, there is no difference or contrast, concept later taken up and developed by Rothbard.

2. NATURAL LAW ANARCHO-CAPITALIST

Rothbard argues that the concept of natural law is independent by faith and theology; in fact, the natural law is discovered by reason starting from the basic inclinations of human nature, which are absolute, immutable and universally valid (for every place and every time). Basically, Rothbard copies the natural law theory of Thomas Aquinas; however, as all followers of the modern rationalistic natural law, in agreement with the words of Grotius (according to which the natural law would be valid *etsi Deus non daretur*) separates *lex naturalis* by *lex aeterna*, relativizing the reference to God as the ultimate foundation of the natural law.

Rothbard marries the aristotelian-thomistic idea of man as a rational animal: it is the possession of reason which distinguishes him from other animals and allows him to objectively determine the purpose of their own and act accordingly to achieve them. Like every living being, man has a nature and a law that regulates it: we can therefore speak about a *natural law*³. This law, according to Rothbard, explains what purposes are in conformity with human nature and therefore better for the man; it is a "science of happiness", which states that the good and the bad (so, happiness and unhappiness) consists in the achievement or in impediment of what is best for human nature. It also determines the ethical standards always valid, which should inspire positive legislation of the States⁴.

According to Rothbard, the great defect of the classical theory of natural law, from Plato and Aristotle to the thomists, until Leo Strauss and his followers today, is to be always been statist rather than individualist. In the modern era the Levellers and John Locke turn the classical natural law theory in a theory based in particular on the idea of individual natural rights and methodological and political individualism. For Rothbard individualism of modern natural law is a development and enrichment of the concept of natural law, he argues that between the two doctrines there is continuity, that the individual natural rights are derived from thomist natural law; he points out the scholastic, christian and thomist roots of Locke's natural law theory, who is seen as a worthy heir to the classical tradition of natural law. Rothbard also says that it was the lockean individualist tradition that influenced the american revolutionaries and the libertarian political thought in the United States; he considers himself as a natural continuation and development of this individualistic and libertarian tradition of natural rights.

Rothbard argues a rational foundation of ethics, which is necessary to protect and affirm the value (absolute, natural) of human freedom, so libertarianism should always be based over values absolutism and deny relativism. On this aspect there is a rift inside the Austrian School of economics, between the two main currents: between those who support relativism and the idea of limited and fallible knowledge, an evolutionary conception of law and institutions (Hayek, Mises, Menger) and those who argues the ability of reason to understand the natural law (the americans and many of the followers of the libertarian school, including Rothbard)⁵.

The ultimate goal of Rothbard's philosophy is the freedom of every individual man, this is the ultimate political good to be protected. The defense of freedom is founded on human nature, by a

3 One of the charges of opponents to the natural law is that the natural law theory must be abandoned because its supporters are not in agreement in defining it; Rothbard says that also the economy and other sciences such as physics and chemistry are the subject of debate and controversy, but "very few would argue that for this reason the economics should be abandoned," because "a difference of opinion is not reason enough to reject the entire dispute" and "the existence of human reason does not mean it can not go wrong" (M.N. Rothbard, *L'etica della libertà*, Liberilibri, Macerata 1996, p. 24).

4 For this Rothbard is convinced that natural law has a potentially radical and revolutionary force in respect of any *status quo*; the latter may violate the natural law, but natural law ethics submit it to the judgment of reason, and therefore to the possibility of change in depth.

5 For Rothbard Mises' utilitarian and relativist approach, as well as the hayekian foundation of freedom on human ignorance and fallibility, are not sufficient to support the cause of freedom, which requires a rational and objective basis, which can only be provided by an absolutist ethic, an ethic of freedom, based on the natural law.

reasoning aimed at highlighting how freedom is the most important natural right of man. The attempt Rothbard, therefore, is to establish a new conception of freedom on the natural law; from this vision derive the cornerstones of libertarian society: self-ownership, axiom of non-aggression, ownership of material goods⁶. Main enemy of human freedom, however, is the state and as such should be eliminated in order to build a free society, in which both abolished state coercion and everything is left in private hands⁷.

6 Rothbard, like Locke, extends the concept of property to that on which a person has worked with his work: it is through it that man transforms what it is not of anyone in a well of personal property. One of the consequences of this doctrine so radically libertarian is the absolute equivalence between human rights and property rights, as the former are included in the latter; Rothbard takes this concept from Ayn Rand.

7 Rothbard, in fact, does not just want to privatize the services of the welfare state (social security, health, education) but it requires the total elimination of the state and the transition to private and competitive management of goods and services considered to be the basic functions of state: justice, law and order, defense. Abolition of the state is the proposition what distinguishes libertarianism's anarcho-capitalist current from the others, in particular from the minarchist (anarcho-capitalism and minarchism are the two libertarianism's main currents), which instead argues for the existence of the state, even though in the sense of "minimal state", a state whose functions are very limited and that leaves the market each activity, except for order, justice, security.

3. CRITICISM OF THE NATURAL LAW

Kelsen, the leading exponent of modern legal positivism, attempts to build a "pure theory of law", which consists in a scientific approach to law as such⁸. The law is neither true nor false, neither just nor unjust: it is only formally valid or invalid⁹. In this view, you can not give any right that it is right in itself and measured by natural law, so all law is *positive law*, which is fixed by the State in accordance with the procedures established by Constitution and other laws.

The most important point in Antiseri's critical to the natural law is *Hume's law*, which is the philosophical principle according to which it is logically impossible to derive *ought* from *is*: from descriptive propositions can be derived logically only descriptive propositions and not prescriptive statements, and by the facts we can't obtain values or imperatives; in other words, it is not legitimate to infer a value's judgment from a fact's judgment, because do that would constitute an unwarranted logic's leap. Also Kelsen and Bobbio support this theory, nature is a set of facts devoid of meaning (joined together as causes and effects), it does not command, it does not contain imperatives and thus the transition from the natural to the regulatory level, operated by the natural law, it would be unlawful.

Hume's law, for Antiseri, is the basis of relativism: it tells us that it is not possible to find a *fundamentum inconcussum rationale* in ethics, that it is not possible to establish a rational system of ethical or moral norms or any supreme value; in this view, the reason is *weak*. Relativism, along with tolerance and freedom, for Kelsen and Antiseri is the basis of democracy and open society¹⁰.

Bobbio doesn't deny historical function of natural law¹¹, nor deny the existence or content of superior moral values to positive laws, but he argues that this doesn't have a rational justification. As for the notion of "nature", Bobbio argues that it is very ambiguous and therefore can not be a valid standard for distinguishing between human tendencies¹².

8 The lawyer has to deal with just the real and possible right, not "right" law; then the law must be investigated and treated as a "pure" science and must be separated from elements that are alien to him as nature, morality, ethics, sociology and politics. Law has a descriptive and non-judgmental character, it has to be divided by the value judgments which are subjective, emotional, irrational, and therefore do not have any scientific validity. Only possible object of a "pure" science is the positive law, which is a set of rules; the state is an organized system of these rules, then there is a total identification between state and law.

9 The word "justice" expresses an absolute value, it is a subjective, relative, emotional and irrational ideal, a concept scientifically worthless, which can not be determined from the "pure" theory of law; therefore the law can contain any rule, if it's formally valid. Validity of the rule is defined by a purely formal point of view and is therefore independent of a political or ethical value.

10 Kelsen gives the example of the behavior of Pontius Pilate in the trial of Jesus: Pilate, that does not know what the truth is, he behaves like a perfect democrat, leaving the majority of the people to decide what is right or wrong.

11 Considering unsustainable natural law theory as a theory of morality, what matters to Bobbio is its historical function; in fact, just as ethics objectivist theory, it has argued that state power should be limited because there are higher standards that not even the king can transgress. For this reason, the natural law is served by the foundation of any theory in favor of the limits of state power and then, ultimately, as a philosophical basis of the liberal state and law.

12 In fact, they have been regarded as natural rights that are diametrically opposed, as well as they were different opinions on what is man's natural instinct or the characteristics of state of nature. For this, according to Bobbio, human rights are a class variable, which is changed with the changing historical conditions, needs and interests; their birth and development is due in particular to the new individualistic conception of society diffused by modern natural law theory; however, he is convinced that in today's world the problem is not to justify rights, but how to protect them.

CONCLUSION

With our research we wanted to illustrate anarcho-capitalist doctrine of natural law, with particular regard to the thought of Murray N. Rothbard. To do so, we have initially described the philosophical roots of the rothbardian system, which we traced to the natural law theory of Thomas Aquinas, the individual natural rights drawn from John Locke and the libertarianism of Ayn Rand. In this way we were able to highlight the connections, similarities and differences between the ideas of Rothbard and those of the authors who have influenced his thinking.

Compared to Thomas, we can find in the Rothbard's theory relevant similarities and big differences¹³. Rothbard retrieves aristotelian-thomist metaphysics for the foundation of the natural law and the subsequent anchoring of subjective natural rights; for the elaboration of these rights, he draws especially the individualist tradition born with the lockean natural law and where may also be inserted Ayn Rand. We can conclude that, if it is true that in some respects (not secondary) Rothbard is closer to the modern natural law theory, the linchpin of his natural law theory is Thomas. Another important issue that we have faced is constituted by the dialectic between Rothbard and other important members of the Austrian school of economics (Hayek and Mises); between these two fronts has emerged a deep and irreconcilable difference as regards the theoretical foundations of a free society.

In the third chapter we have illustrated philosophical and epistemological criticism of natural law made by Kelsen, Antiseri and Bobbio. As for the accusation of excessive ambiguity of the concept of "nature" and the observation that the proponents of natural law were never agreed how to define it, hits the mark Rothbard's replication: many disciplines and theories are the subject of debate and controversy, but this does not mean that they should be abandoned or that there isn't a truth which it is possible to move progressively through discussion and debate.

Ideas of Rothbard and Thomas on the relationship between natural law and positive law are very important and shareable: the first must be the model and the basis for validity and legitimacy of the second. As well, the majority principle, expressed by legal positivism, can not be sufficient to legitimize and put everything right. The fundamental issues of law, in which human dignity is involved, this principle is not enough: there are values that are not available to the changing majorities and that the state should only recognize and promote, without being able either to create or modify. It is not possible to base democracy on relativism; the example of an innocent condemned by the majority (the trial of Jesus, which Kelsen refers to) is not an argument against democracy, but it certainly is a powerful argument against a democracy without values and truth. The rejection of relativism does not imply in any way the rejection of democracy, but the knowledge that genuine democracy is possible only on the basis of a correct conception of the human person and his fundamental rights. The natural law expresses the dignity of the human person and it is the basis of his fundamental rights and duties. These can not be understood without presupposing that man is the bearer of norms and values inherent in his being. The same "historical function" performed by the natural law, recognized it from Bobbio, it would have been possible if the natural rights they had not had for many a solid foundation and a rational evidence?

Hume's law is "only" a theory, linked to a certain view of reality, with precise metaphysical,

13 For both, human nature and reason (in relationship of harmony and synergy) are the sources of ethics and law. By Aquinas, Rothbard takes the central role attributed to the reason, which for both is capable to explore human nature, finding the fundamental (natural) inclinations that must be ordered rationally, thus identifying the right purposes. For both the natural law is the criterion by which you can judge the goodness and legitimacy of positive law. One big difference between the two is that if Thomas places the natural law in a metaphysical and theological framework, defining *lex naturalis* as *participatio legis aeternae in rationali creatura*, Rothbard, following Grotius, argues that natural law would be valid *etsi Deus non daretur*, thus basing it solely on human reason. Another aspect that differentiates Rothbard by Tommaso is located in the radically individualistic conception of the first: it is not possible to reconcile the anarcho-capitalist ideas with *lex humana* theorized by Thomas and the aristotelian-thomistic conception of the state as a natural human need.

logical and epistemological basis, which may be challenged and refuted, thus rejecting the consequences that you want to derive from this *law*. In particular, it is the positivist conception of nature and reason that characterized the questionable philosophical vision at the basis of *Hume's law*¹⁴; first of all we can observe that the application of this law must be clearly defined: it prohibits the *logical* derivability of prescriptions from descriptions, but does not preclude that there may be other types of connections. Consider, then, that is the rationalism of the modern natural law to fall under the blows of *Hume's law*, not the classical natural law, which has a teleological concept of nature: in fact, it is well possible to overcome *Hume's law* if, beyond nature as empirical fact, we rediscover her metaphysical structure, if we conceive human nature in function of its essence, as teleologically oriented, so that *ought* is already inscribed in *is*¹⁵. In addition, we can reject the limitation of rationality to the empirically verifiable, to return to enlarge the reason's horizons, to reopen it to the big questions of meaning, truth and goodness in order to produce a non-reductionist but integral concept of man¹⁶. It is necessary to abandon the idea of *weak reason*, not to return to rationalist abuse of reason, but to expand its borders again, to regain an healthy confidence in its potential: it is an *open reason* what we need, open to the reality of being and truth, which does not preclude the dialogue around the true and the good and the possibility to define common and objective values.

Thus, through the re-establishment of a correct conception of nature and reason, we will again be able to draw on them as sources of ethics and law, supporting in this sense theories such as Rothbard's one, ahistorical and highly questionable in terms of theory social and economic, but certainly valid and current from the philosophical basic setting point of view. In fact, today is urgent and necessary rediscover the fruitfulness of classical doctrine of natural law, on which we can base a social, legal and political order fairer and more appropriate to the dignity of human person.

14 The concept of nature to the basis of *Hume's law* is that of a purely mechanical, factual, a set of physical data completely devoid of sense and indications of value. A mechanistic conception widespread at the time of Hume, derived from Newton's physics and from mechanistic metaphysics of Descartes and Spinoza. With an arbitrary and abstractive choice, the being is "neutralized", considered as a mere empirical fact and considered a-evaluative, so by this very kind of *is* we can not derive an *ought*. In addition, if rationality is limited only to that which is experienced and measured; if the reason becomes *weak*, unable to transcend the empirical level and learn something ultimate and foundational; then it is evident that the ethics and all questions of meaning must be moved within the subjective and fall out of the field of reason in the strict sense.

15 We can not deduce with a strictly logical rigor (*more geometrico*) values from facts and, indeed, neither Rothbard nor Aquinas did this; therefore, the charge of *naturalistic fallacy* is valid only against a six-eighteenth-century rationalism (which has influenced the natural law of the time), who had a mechanistic view of nature, and which claimed to show morals and ethics with the mathematical-deductive method.

16 We must overcome the absolutism of science and reason positivist, the idea that scientific knowledge is the only form of authentic knowledge, because there isn't only scientific rationality, but there is also a philosophical reason, which can be developed in different ways and forms. It a different kind of knowledge, that is problematic, dialectical, with a particular method and different from that of the particular sciences, but it is still a form of genuine knowledge, of rationality.