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The Doctrine of Natural Law In Philosophy

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I

The general purpose of this essay is to discover what is common to the acceptance of natural law in all epochs of European history, despite diversity of doctrine on other related points. It seems that many agree about natural law, though they disagree about related metaphysical and theological principles. Because of such disagreement, the agreement may not go very deep; yet it is worth examining in order to determine the line which divides those who accept and those who reject natural law.

Most of the writers to be mentioned do not accept what is perhaps the most exhaustive and most analytical treatment of natural law. Many of them do not know, and those who know do not accept, St. Thomas's whole theory of law, especially in its basic presuppositions; but, nevertheless, there are certain minimum points of agreement between Aquinas and these others about natural law.

There are two general approaches to any philosophical controversy. You can ask which men uphold and which men oppose a certain conclusion; and thus you can determine the opposition of mind on the issue. But if you ask of those who stand on one side of the issue, what are their definitions and analyses, their reasons and demonstrations, you will discover those you thought in agreement parting company.

The maximum agreement among philosophers is found when you consider only their conclusions. The maximum disagreement, or at least diversity, appears when you consider their reasoning or anal-

ysis.

Looked at in the second way, none of the great philosophers ever completely agrees with any other on natural law. Aristotle, for example, tends to disagree with St. Thomas in many details. Yet if you look only to the main point, you can place them side by side as exponents of a doctrine which can loosely be called a "doctrine of natural law."

I should like to begin, therefore, with finding the shared truth and by trying to say precisely what that shared truth is, even though it will be manifest, when the truth is analyzed and the reasons for it are examined, that the philosophers who are thus associated in agreement, do not agree throughout or deeply.

Let me list the philosophers who, it seems to me, for one reason or another, affirm natural law. They are Plato and Aristotle, St. Thomas, Locke, Rousseau, Kant, and, with a little hesitation, I would even add Hobbes and Spinoza. This is not an exhaustive list, but it is a list which includes the widest diversity of philosophical opinion. I have listed only the truly great—the capital writers. I have not bothered to name followers and commentators, of which, as in the case of St. Thomas especially, there are so many who add so little.

II

Let me begin, then, by stating what all these minds hold in common concerning natural law. Let me try thus to state the issue between them as naturalists and the positivists on the other side. I shall call a "naturalist" in law the man who thinks there is something other and more than positive law, a "positivist" the man who thinks that there is only positive law and that there are no rational grounds for the criticism of positive law.

What do all those whom I call "naturalists" agree on? What do they affirm? I must point out at once that they do not all use the words "natural law"; nor do they all have the same concept of natural law. But this they do hold in common: *the laws made by a state or government are not the only directions of conduct which apply to men living in society.*

They affirm that, in addition to such rules as each individual may make for himself, and in addition to the rules of conduct the state may lay down, there are rules or principles of conduct which are of even greater universality—applying to *all* men, not merely to *one*

man, and not merely even to *one* society at a given time and place.

They affirm, furthermore, that there are rules of human conduct which no man has *invented—which are not positive in the sense of being posited!* (Subsequently, I shall try to show that the real meaning of positivism involves, as St. Thomas points out, the notion of the arbitrary, an institution of the will as opposed to something natural, discovered by the intellect.)

They agree that man's reason is endowed with the capacity of perceiving these universal laws or principles of conduct, and that, if they are recognized as being laws of reason or rational principles, these laws need no other foundation or authority than the recognition of their truth.

They agree in affirming that these principles are some-how the source of all the more particular rules of conduct, even those which individuals make for themselves or those which governments make in political societies and seek to maintain by force; and they agree that these principles constitute the standard by which all other rules are to be judged good or bad, right or wrong, just or unjust, and in terms of which constitutions and governments are similarly to be judged.

With respect to all these points, I have no hesitation in claiming unanimity on the part of the philosophers named, with the possible exception of Hobbes and Spinoza. The latter stand on the very edge of the line which divides the naturalists from the positivists; or perhaps they can be said to be in a borderline area in which the two doctrines tend to be inconsistently fused and the whole controversy thereby confused.

III

Let us now consider the different ways in which the shared conclusion about natural law is affirmed. I shall not try to make this survey exhaustive. Let us begin with the Greeks.

So far as either word or concept is concerned, there is no doctrine of natural law in the philosophy of Plato and Aristotle. The very phrase "natural law" would be an impossible collocation of words in Greek, because the meaning of the Greek word for law connotes the conventional—the very opposite of the natural. The Greek equivalent for "natural law" is "universal" or "common" law, not "common law" in the sense of our Anglo-American tradition, but common in the sense of belonging to all particular codes of law.

The Greeks perceived that each state or society of the ancient world had its own particular body of *conventions or laws;* yet there was something common to all of them.

The principles or precepts common to all, they regarded as the common or universal law. Aristotle, for example, therefore distinguished between natural and legal (or conventional) *justice—never* between natural and legal *law.*

Let me quote Aristotle. "Of political justice part is natural, part legal—natural, that which everywhere has the same force and does not exist by people's thinking this or that; legal, that which is originally indifferent, but when it has been laid down is not indifferent." If what Aristotle meant by "natural justice" were to be expressed in a set of propositions or principles, practical in character, such propositions would very closely resemble the precepts later called, in the middle ages, the principles of natural law. They might not include what Aquinas treats as the first principle of natural law, but they would probably retain many of the propositions which St. Thomas calls the secondary precepts, such as, *thou shalt not kill, thou shalt not steal,* and *thou shalt not commit adultery.* These principles of natural justice, moreover, function as natural law does. Natural justice for Aristotle measures the justice of constitutions and the justice of laws—the legal justice which corresponds to the justice in positive law.

Natural justice leaves many things undetermined which must be determined by the conventions of political or civil law. These are the things which Aristotle says cease to be indifferent only after the state has enacted them into law. In Aristotle's doctrine of equity, natural or absolute justice calls for the correction of legal or conventional justice, i.e., of the written or positive law, wherein, by reason of its generality, it is unjust in the particular case. This demonstrates the relation between natural and legal *justice,* not natural and positive *law,* although, of course, there is an obvious parallel between the two.

Is there anything lacking in Aristotle's doctrine at this point? It might be said that natural justice, even if it were the equivalent of natural law, is not as extensive, because the sphere of justice is limited to man's relation to other men and to society. It does not cover those problems in human conduct which are not social. Yet, even if natural justice deals only with man's social conduct, Aristotle makes one point which suggests the first principle of natural law. It occurs where Aristotle speaks of the final end as the first principle in ethics, and makes it perfectly clear that all sound, prac-

tical thinking about the means depends on reason's perception of the end. Without any of the language or apparatus of later natural law doctrine, this is not very dissimilar from theories which speak of the first principle of practical reason as a principle directing conduct to its ultimate end. This principle is expressed in the words "Seek the Good."[1]

Let us turn next to the Stoics, and to the philosophy of Marcus Aurelius, for example. Here we have a kind of pantheism, in which an indwelling reason is nature's divinity. Throughout Stoic thought, this indwelling reason is looked upon as the principle or standard of human conduct, which is measured by its conformity to nature or, what is the same, rationality. In the context of these Stoic ideas, there arises in Roman jurisprudence a distinction, not merely between the written and the unwritten law, but between that which is right for all men everywhere because it is based on nature, and that which is right only after it has been legally instituted by particular states or governments.

I am not an etymologist and I know very little about languages, but I feel that if the translation of the word "ius" had always been "right" and not "law," and if the Latin word "lex" had always carried the same meaning as the Greek word "nomos," then much of the controversy about "natural law" would never have taken place. No one would have misunderstood the distinction between a *right by nature* and a *right by political institution*. It is due to the Stoics, I think, that "*ius naturale*" and "*ius civile*" later came to be spoken of, not as two kinds of right, but as two kinds of law—*natural* and *civil law.*

In consequence, we have both distinctions side by side: natural and civil or positive law; natural and positive right. This is a cause of great confusion in all subsequent thinking. In the Stoic philosophy we also find a notion which does not appear in Greek thought, namely, that everything which has a nature is governed by natural law, for in every nature there dwells rationality.

In St. Thomas, we cannot help but perceive a confluence of Greek and Stoic doctrines. I wish to call attention to a few points in St. Thomas's theory of natural law which have a bearing on the major issue. The natural law is not made by man, but discovered by him. If the principles of the natural law are self-evident, and the conclusions which can be drawn from it are strictly deducible, then the natural law can be promulgated by teaching in the same way that

[1] Until men properly conceive their happiness, they have not found the first

geometry is. The natural law is binding in conscience, not by the coercion of external force. It is broader in scope than all of positive law since it is concerned with everything that belongs to man's happiness, not merely with the welfare of the state or society, which is only a part of man's happiness.

John Locke, through the benefit of Hooker's influence upon him, writes in the tradition of Aquinas. For him, natural right is the standard for judging all civil laws and the basis for rebelling against or disobeying those state regulations which violate natural law. Locke gives no analysis of the primary and secondary precepts of natural law. But though he may differ very radically from Aristotle and Aquinas on basic philosophical questions, Locke affirms a standard for positive law comparable to Aristotle's natural justice, and he conceives the natural law as the law of reason. Much the same kind of thing can be said about Rousseau in relation to the tradition.

On the other hand, Kant speaks a different language. He speaks of innate as opposed to acquired right, and of private as contrasted with public right, and he talks in terms of rules of conduct which belong to the pure practical reason. Yet he is fundamentally affirming what others mean by natural law, for he is here treating those principles of conduct which are discovered by reason quite apart from convention or experience—rules not made by the state, rules which are the measure of right in all the laws of the state.

If, however, we turn from Kant to Hobbes, we find that the latter flatly denies there is any justice or injustice apart from the constituted commonwealth. He denies, therefore, that there is any standard of law prior to the existence of a sovereign power. Until the sovereign makes laws, no man can say what is just and unjust. That being so, no one can say that the sovereign is just or unjust because the laws he makes are the standard of justice. This appears to be legal positivism.

Nevertheless, Hobbes affirms natural law to be the law of reason. This natural law directs men to quit the state of nature for their good and security and to form a commonwealth. It requires them to keep the covenants they make. Yet when Hobbes talks about this law of nature, which is the law of reason, he makes the point that it is not law but counsel or advice.

IV

Omitting the borderline case of Hobbes, I have tried to show that a

certain degree of agreement exists concerning natural law. I would now like to show what that agreement comes to in its most general terms.

It consists in the affirmation that there exist moral and political truths which men can discover by their reason. These truths have the status of knowledge rather than mere opinion. They are either self-evident or they can be demonstrated. In short, whether or not a writer uses the phrase "natural law," whether he has one or another theory of it, he stands against positivism if he affirms that human conduct, and moral decisions in the sphere of private or public action, can be based on knowledge of right and wrong, good and evil, or on a knowledge of what end should be sought by all men (the first principle) and what means are necessarily indispensable (the secondary precepts). Accordingly it is easy to summarize the view taken on the other side of the issue. It consists in the denial of such practical truths or knowledge. It consists positively in saying that all moral judgments are matters of opinion, that there is nothing in human nature or reason which determines what men should seek or how to seek it. The only resolution of political disputes is by appeal to force, the force of numbers or of arms.

One other point to be learned from our brief survey of the agreement about natural law is the cause of confusion in the discussion of natural law.

Hobbes is the man who illustrates this point best. Why does he deny that what he calls "natural law" is really law in the strict sense? The answer is, of course, that he has a definition of law which necessarily excludes "natural law." Is he wrong in this? No, I do not think he is at all wrong—certainly not *as a philosopher.*

If, for example, he were a positivist in the complete sense of the skeptic who says that there are no moral or political truths, then he would be wrong. But that he does not say. Hobbes may be wrong in his political theory. He may be wrong in his metaphysics. But he is not wrong if he thinks that *natural and civil laws are not laws in the same sense,* and if he denies that the same definition can be applied to both.

Why is this point worth mentioning? One reason is that there are two sorts of opponents of natural law: the skeptics who deny universal validity to any moral or political principle; and those who are not skeptical, who admit that there are such truths, but find a stumbling block in the use of the phrase "natural law." Many good lawyers belong to this latter group. Many of our law schools face

this difficulty with natural *law* because they fail to recognize that the word "law" when used in the phrases "natural law" and "positive law" is being used equivocally, not univocally.

I shall devote the remainder of this address to amplifying the last point made with reference to Hobbes. I shall try to substantiate it by reference to St. Thomas's analysis of natural law. If we examine St. Thomas's discussion of the definition of law, we shall find that it applies only to positive law, and that natural law is law only in the manner of speaking.

V

Let us begin with St. Thomas's definition of law as an ordinance of reason, for the common good, promulgated by him who has charge of the community. Obviously, these words need explanation, and where St. Thomas answers objections to the parts of the definition, such explanation is given.

He says that all law proceeds from *both* the reason *and* the will of the lawgiver.

In explaining the phrase "for the common good," St. Thomas admits that two quite distinct meanings are intended—happiness or beatitude, and the good of the body politic. Both are ends, but the latter is not an end *simpliciter.* Both are common goods, but they are not *common* in the same sense.

St. Thomas also says that "without coercive power, a rule is only advice or counsel," and not law. He adds that coercive power is vested either in the whole people or in some public personage.

If you combine the note of coercion with the notion that only the whole people or their vicegerent have the authority to make laws, it immediately indicates which meaning of the common good is involved in the definition of law, *viz.,* the political common good, the good of the community, not happiness or beatitude.

Furthermore, ask yourself these questions. Why should not any man be competent to make law? Why should not any man's ordinance of reason have the authority of law? If law is simply an ordinance of reason, one man's reason, if sound, is as good as another's; and one man's reason, if sound, is much better than the reason of the whole people, if that reason should be unsound. Why does the source of law have to be the whole community, if law is nothing but an ordinance of reason? No answer can be given to these

questions, unless we remember the factor of will which enters into the definition of law as well as the factor of reason.

How does the law proceed from the will of the lawgiver? The answer is that in the kind of law which is made by the whole community or its vicegerent—namely, positive law—the making of law consists in a *voluntary* choice among diverse ordinances proposed by reason. The ordinances of positive law are derivable from the principles of practical reason. They are, as St. Thomas says, determinations of, not deductions from, these principles. Each determination involves that which, prior to legal determination, was indifferent—neither naturally just nor unjust. The lawmaker, therefore, can freely choose between alternative formulations of a rule of law—the alternatives being in most cases equally just though perhaps not equally expedient.

Rules of positive law are strictly *opinion.* I am using the word "opinion," in the strict sense, as applied to propositions to which the intellect assents only when it is moved to assent by the will. Rules of law or positive laws are, as opinion, *arbitrary,* that is, voluntarily adopted. If rules of positive law were not arbitrary, you would have no choice between this or that rule of law. If reason could prove that this particular rule was the only possible rule consistent with the principles of natural law, then there would be no need for a duly constituted legislature to give that rule the authority of law. Any competent philosopher or jurist, even though a private citizen, would have all the competence needed for the making of laws.

St. Thomas says that "a thing is called positive when it proceeds from the human will." Hence if law proceeds in any way from the human will, it is positive law; and if natural law does not proceed in any way from the human will, as it does not, then it is not law according to St. Thomas, if we take seriously his remark that law must proceed *both* from the will *and* the reason.

Natural law is law only if we look to God as its maker, because, as St. Thomas says, it proceeds from the will as well as from the reason of God. But if you consider natural law purely on the human level, whereon it is simply discovered by reason, with no aid from the will, then, being entirely a work of man's reason, natural law does not meet St. Thomas's definition of law.

The difference between natural law and positive law is tremendous. For instance, how is anything promulgated on the human level? Obviously by speech or act. Thus customs can promulgate

laws because they are juridically significant actions; but obviously customs cannot promulgate natural laws. How, then, is the natural law promulgated? Is it promulgated in the same way as the positive law?

The natural law, as St. Thomas points out in many passages, is promulgated by teaching. The man who knows the principles of natural law can teach natural law in the same way as the man who knows geometry can. He need have no more authority than any other teacher—no greater authority than he has knowledge.

How does the legislature promulgate positive law? There is nothing less like teaching than the promulgation of law by a legislature. A legislature *declares* the law. In the very best sense of the word, it makes law by *fiat,* which means that the law gets its authority from the official or public authority of its maker, not his knowledge.

How do we learn what the positive law is? If we are interested in the law of Indiana on a certain point, how do we learn it? By teaching in the sense in which the teacher is one who demonstrates conclusions from premises? Hardly. The law of Indiana can only be taught by statement and it can only be learned by memory. This is due to its arbitrary character as positive law. Thus we see how ambiguous the word "promulgation" is when applied to natural and positive law—just as ambiguous as the word "law" is.

St. Thomas says that the man who promulgates the must be a man who has the authority to do so. The authority he here refers to is that of the community or its vicegerent. Hence it cannot be natural law that he is talking about. Such authority is not needed to promulgate natural law. This is confirmed by St. Thomas when he says that a rule of law must have coercive force—that it must compel obedience through fear of punishment, or, failing that, through physical constraint.

St. Thomas further points out that the notion of law contains two things: first, that it is a rule of human action, and second, that it has coercive force. He goes on to say that "a private person cannot lead another to virtue efficaciously, for he can only advise and if his advice be not taken he has no coercive power such as the law should have. … But this coercive power is vested in the whole people or in some public personage to whom it belongs to inflict penalties."

Does the natural law bind in conscience only or does it also bind by its coercive power, by the fear of the penalties that follow from

disobedience? Hobbes argues that natural law involves natural punishment, i.e., there is a natural penalty attached to natural law. But such is not the full meaning of coercion. You are not constrained to obey the natural law. Even if you consider the matter theologically, and refer the natural law to God as its maker, it still does not exercise *coercive power to compel obedience.* Compulsion here means the exercise of force to exact obedience to the positive law. Compulsion in this sense never enforces the natural law.

VI

Let me summarize this and draw one conclusion. I want to show you that natural and positive law cannot be given the same definition, that no definition framed in words can ever define *both* natural and positive law, *for they do not have the same essence.* The following enumeration of properties, found in positive law but absent in natural law, should make this clear.

(1) Positive law compels obedience, not merely through fear of punishment, which also operates in the case of natural law, but through actual compulsion by an exertion of external force. There is nothing like this in the sphere of natural law.

(2) Positive law is promulgated through *extrinsic* and official promulgation, and then only through dogmatic statement, not through rational proof. In the sphere of natural law, the private individual can discover the natural law for himself by rational inquiry; and he can promulgate it to others by rational instruction.

(3) The positive law involves a free choice of the will. It is the will which institutes one ordinance of reason rather than another, and this element of choice is totally absent from the natural law. As you have no choice between this and that conclusion in geometry, or between this and that axiom, so you have no choice between this or that principle or conclusion of natural law.

(4) Positive law, moreover, obliges only those who fall within the power of the community wherein it is instituted; whereas natural law binds everyone without any regard to his political associations.

(5) The rules of positive law can be repealed from time to time while natural law is, in a strict sense, immutable.

(6) The rules of positive law can be judged to be more or less just *relative to the constitution of the community* in which they are made, whereas there is no such relativity in the case of natural law.

With respect to each of the foregoing properties, the natural law is either negative or contrary. Let me add one more question which should provide another point of differentiation. Is there any sense at all in talking about a bad, an unjust, or a wrong natural law? Obviously not. Yet we can say with very good sense, as we sometimes do, that this is a just or unjust law. Of course, we mean a rule of positive law.

These difficulties are not easily met. If one is going to carry on the discussion of natural law in our law schools, it may be necessary to do so entirely on the philosophical level, not the theological. If this is to be done, the issue between the naturalists and the positivists can be more clearly put if the naturalists admit that natural law is not law in the same sense—having the same definition and with the same properties—as positive law. To defend his position, the naturalist has only to demonstrate that positive rules are founded on rational principles, and that positive rules can be criticized only by reference to universal standards. He should try to prevent the main issue from becoming confused or obfuscated by his own ambiguous use of the word "law."

I think it is almost hopeless to ask those who have become accustomed to it to give up the phrase "natural law. But if that cannot be done, then we must at every point make clear that we understand the tremendous difference in the meaning of the word "law" when we say "natural law" and "positive law."

VII

The more we understand the difference between natural and positive law, the less likely, I think, we are to make the mistake which was certainly made all through the nineteenth century and, I regret to say, is still being made in the world today—the mistake of appealing to international law as the source of world peace. Because he wanted peace above all else, Hobbes is concerned to show that you had to have civil law, the law of a commonwealth, to keep the peace. The law of nature was not sufficient. On this point I think Hobbes is much sounder than Locke. Hobbes properly says that "the state of nature is a state of war," even though men living in a state of nature live under natural law.

Positive law without a foundation in natural law is purely arbitrary. It needs the natural law to make it rational. But natural law without positive law is ineffective for the purposes of enforcing justice and keeping peace.

Nations, like individuals, who live together under natural law alone, are in a state of war, whether or not actual shooting is going on. The world is as much in a state of war today as it was five years ago. However sound *morall*y the precepts of international law may be, as conclusions deduced from natural law, they lack the coercive force of positive law. International law is not the kind of law which can keep peace. World peace requires world government and the world-wide reign of positive law. It is not sufficient to ask for a world-wide reign of law. It must be a positive law.

The doctrine of natural law does the human race a great disservice if it in any way obscures this fundamental truth by empty eloquence concerning international law as the foundation of international peace. .

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