NATURAL LAW, NATURAL RIGHTS AND POLITICS*

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1 What is Natural Law?

The concept of natural law is a philosophical concept which has extensively concerned the most varied orientations of ethical thought throughout history. It is true it is also present in the principal religions of the world, and is very important in the Catholic religion. However, this does not make of natural law a confessional issue, either because the notion is originally philosophical or because the Catholic religion sees it as an instrument of dialogue with all people, which should permit of a convergence around common values that the contemporary global dimension of ethical problems makes particularly necessary. That is to say, common problems call for universally shared solutions.

Understood in its most basic ethical meaning, natural law is the fundamental orientation toward the good inscribed in the deepest part of our being, by virtue of which we have the capacity to distinguish right from wrong, and

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to direct our own lives–with freedom and personal responsibility–in ways congruent with the human good. St. Thomas Aquinas considers it an inseparable aspect from the creation of free and intelligent beings, and thus, he understands it as the participation of the creative wisdom of God in the rational creature.[1] This law, says St. Thomas, "is nothing other than the light of understanding infused in us by God; whereby we know what must be done and what should be avoided."[2] With these words, he wants to affirm that human intelligence has the capacity to achieve moral truth, and that when this capacity is exercised directly and reaches the truth, our intelligence partakes of divine Intelligence, which is the intrinsic criterion of all intelligence and of all that is intelligible, and–in the ethical plane–of all that is reasonable. By virtue of this participated presence, our moral intelligence has real normative power and, thus, it is called law.

To fully understand natural law one should not forget that the notion of law is analogous. Laws as they are most known to us are political laws issued by the State, and thus, there exists a danger of understanding natural law as the expression of a power that is imposed upon us, or as an immutable code of laws that are already made deductible speculatively from a conception of the human nature, as rationalism attempted to do in ages past.[3]

In my view, it is important to fully understand the significance of practical reason in the constitution of natural law. Natural law is not a kind of universal civil code. Actually, it is nothing other than the incontestable fact that man is a moral being and that human intelligence is, in itself, also a practical intelligence, a moral reason, capable of ordering its conduct in view of the human good. In other words, natural moral law means that the moral authority is born immediately and spontaneously within man, and finds in him a structure that nourishes and sustains it, without which ethical requirements would be oppressive and even unintelligible.

Natural moral law is formed primarily by the principles which practical rea-

[1] Cf. *Summa Theologiae*, I-II, q. 91, a. 2.

[2] St. Thomas Aquinas, *In duo praecepta caritatis et in decem legis praecepta. Prologus*: Opuscula Theologica II, (Turin: Marietti, 1954), no. 1129, our translation.

[3] On the idea of natural law in voluntarism and rationalism, see: Commissione Teologica Internazionale, *Alla ricerca di un'etica universale: nuovo sguardo sulla legge naturale*, (Vatican City: Libreria Editrice Vaticana, 2009), nos. 29-33.

son possesses and knows on its own, i.e., by virtue of its own nature. Natural law is the law of practical reason, of the fundamental structure of the operation of practical reason, of all its self-eviden truths, and of all its reasoning. However, it must be added immediately that practical reason differs from speculative reason in that practical reason departs not from speculative premises but from the desire for ends, which sets the reason into motion to seek the right mode of realizing them. Thus, practical reason is shifted to the ambit of natural inclinations, of the tendencies proper to human nature (such as, for example, sociability, creativity and work, knowledge, desire for freedom, sexuality, desire to love and to be loved, the tendency toward self-preservation and safety, etc.)

Natural moral law is called 'natural' because both the reason that formulates it and the tendencies or inclinations to which the practical reason has reference are essential parts of human nature, that is., they are possessed because they belong to what man is, and not to a contingent decision that an individual or a political power can make or not. Hence comes what is called the 'universality' of the natural moral law. The universality of natural law should not be viewed as if it were a kind of political law that applies to all peoples at all times. It simply means that the reason of each and every human being, considered in its most profound and structural aspects, is substantially identical. Universality affirms the substantial identity of the practical reason. If practical reason were not unified in its basic principles, dialogue between different cultures would be impossible, as would the recognition of universal human rights or international rights. This universality coexists with the diversity of practical applications by different peoples throughout history– diversity which increases as the issues in question move farther away from the basic principles.

If we would like to add some considerations from the Christian standpoint, we should say that natural moral law is objectively insufficient and fragmentary. Natural law is insufficient for the ordering of social coexistence, and therefore, it must be completed by civil law; and, in practice, it is also insufficient to guarantee the attainment of the personal good: although, as a matter of principle, it indicates all the requirements of the human good, it does not possess the force necessary to avoid obscuring the perception of ethical requirements, due to the disorder introduced into man by sin. On

the other hand, considering the totality of the salvific design of God, it is obvious that the supernatural good of man, i.e., the achievement of union with Christ through faith, hope, and charity, is completely beyond the scope of the natural moral law.

2 Natural Moral Law and Erroneous Moral Perceptions

The existence of the natural moral law is consistent with the existence and the spread of erroneous moral perceptions. This is a complex issue on which I will only propose two considerations.

The first is that natural moral law is 'natural' in much the same way as oral and written language are natural to man: the irrational animals will never achieve speech, while man has the natural ability to do so. However, the effective exercise of that capacity requires a long learning period. Furthermore, as the quality of the oral and written language of each individual depends on the quality of his or her education, so varying moral and human education will depend largely on the value of truth in the moral judgments that each person makes. This does not really constitute a valid objection to the existence of the natural law. What could be an objection would be the existence of completely amoral people who are without practical reason, and who do not assume–in the face of their own lives or the lives of others–an attitude of valuation and judgment; but this is not the case: even if one may encounter badly warped moral behavior, the behavior is never entirely amoral. From the fact that a natural capacity can be under-developed or defectively exercised, it is not right to conclude that such a capacity does not exist. It is true, however, that the proper exercise of that capacity is a great personal and collective responsibility.

The second relevant consideration is that not all elements of the natural law have the same evidentness. Viewed in its innermost structure, natural law consists of the regulating principles of the dispositions (use, possession, desire) toward different human goods (time, money, health, friendship, sexuality, etc.), which are the virtues. However, placing ourselves at the level

of reflection concerning the regulatory activity of the practical reason, many of the requirements of the virtues can be formulated as precepts, and so, one can speak of precepts of natural law. Not all these precepts have the same evidentness. In this sense, St. Thomas distinguishes three orders of precepts:[4]

1. The first and most common principles, which enjoy maximum evidentness and which are applicable to different fields of action (the golden rule, for example);

2. The secondary precepts which are very close to the precepts of the first order and which refer to specific types of action (interpersonal relationships, sexuality, commerce, etc.), and can be reached from the first order through simple reasoning which is available to everyone. On this level is found the Decalogue;

3. The secondary precepts most distant from the first precepts, which can be known from those of the second order through difficult reasoning, which are not then within the reach of all. St. Thomas says that the majority of people who arrive at knowledge of precepts of the third order do so through the teachings of sages.[5] For example, I think the absolute indissolubility of marriage is in this third order of precepts.

In my view, much of the current phenomena which are the object of debate, and which cause more than a little pain, demonstrate a dimming–on the individual and social levels–of moral precepts of considerable importance, but for the most part belong to what we called earlier precepts of the third order, although in some cases this dimming unfortunately reaches well above this.

There is no doubt that individuals and peoples may err in the way they plan their lives. History and experience demonstrate this. However, history also demonstrates that individuals and peoples do not lose the capacity to correct themselves, and in fact, they managed to correct completely or in

[4] The terminology of Aquinas is somewhat wavering. See *Summa Theologiae*, I-II, q. 94, a. 6; q. 100, a. 3; y II-II, q. 122, a. 1.

[5] Cf. *Summa Theologiae*, I-II, q. 100, a. 3.

part important errors such as slavery, racial discrimination, the allocation to women of a subordinate role in the family and social life, the absolutist conception of political power, etc. Natural law is certainly the rule by which all believers and non-believers will be judged, but at the operational level it should be seen not as an argument of authority to condemn others, but as a treasure that is in our hands and which involves a task: to contribute through dialogue and intelligent action for the development of individuals and peoples so that there may always be true progress.

For the sake of this positive contribution, it is fitting to reflect on the causes of the obscuring of some ethical issues which in the past seemed indisputably evident. We certainly deal here with complex causes. Among them is–very importantly, by my judgment–an imprecise way of conceiving the relationship between ethical and ethical-political questions.

It has always been known that the pursuit of personal moral maturity is not independent of communication and culture, i.e., of the immanent and objectified logic in the *ethos* of the social group; an *ethos* that presupposes the sharing of certain goals and models, and which is expressed in law, customs, history, the celebration of events and figures that fit the moral identity of the group. For this reason it is considered reasonable to reinforce through different forms of familial, social, and political pressure, ethical demands of a personal or social nature. In various countries, and throughout history, an appropriate balance has often been achieved between protecting the social *ethos* and protecting personal freedom, but on many other occasions there were created situations of fact and law which were insufficiently respectful of personal autonomy and of the distinction that exists, and should exist, between the public and private spheres. The question is difficult, and we cannot dwell on it here. The truth is that certain historical situations made it so that today the critique directed at certain moral norms in the name of liberty has become credible in the eyes of many and, above all, that it has become acceptable for many people to grant legal hyper-protection to undeserving harmful behaviors, for the simple fact that in the past they may have had to suffer a constraint that did not always achieve a balanced respect for the ambit of private personal autonomy. The case of homosexual behavior may serve as an example.

I repeat, the question is difficult. I have dealt with it in a few publications dedicated to the study of ethical-social relativism.[6] In any case, the legacy of the past explains that whoever is opposed to those elements which, with inadmissible flippancy, sacrifice the truth on the altar of freedom, has to do it in ways that do not even give the impression that he or she is willing to sacrifice freedom on the altar of truth, an attitude which would not be acceptable either, because freedom is a fundamental human good and no doubt forms a part of the common good. In any case, I think that certain considerations concerning the relationship between the natural law, natural rights, and politics may be of some interest.

3 Natural Rights and Politics

The term "natural rights" is given to a particular ambit of natural law: the ambit of justice. Natural rights are therefore more restricted than natural law. This refers primarily to the relationship between people, between institutions, or between individuals and institutions, and therefore is the basis of social order.

Natural rights are not a body of law different from that which we call today, "the legal system" or the body of laws of the State. Aristotle understood this in a different way. In the law and in political laws, he says in Nicomachean Ethics[7] that there are two components: one natural and another legal. Natural is "that which everywhere has the same force and does not exist by people's thinking this or that"; legal is "that which is originally indifferent, but when it has been laid down is not indifferent."[8] Natural rights are a part of what is commonly called the law, the part that is naturally just and therefore should always be so. If we consider, for example, Spanish and English traffic law, why in Spain cars drive on the right side of the road and in England they drive on the left, something natural is distinguished

[6] Cf. A. Rodríguez Luño, *Cultura política y conciencia cristiana. Ensayos de ética política*, (Madrid: Rialp, 2007), 179-196.

[7] Cf. *Nicomachean Ethics*, V, 7: 1134 b 19ff. Translation accessed at http://classics.mit.edu/Aristotle/nicomachaen.5.v.html

[8] *Ibid.*: 1134 b 19-22.

from something conventional: it is naturally fair and reasonable that, given the impenetrability of the material so long as this lasts, cars that are going in two different directions cannot drive on the same side of the road; it is conventional that cars drive either on the right or on the left. People may choose whatever they like best, but once a decision has been made, we all have to accept it. Respect for natural justice ensures a primary adjustment of social life to the real world and the good of individuals and people. If one person insists on organizing social life as if the world were square, so to speak, then that person would crash and, if we followed him or her, then we all would crash. The respect of what is just is, by its nature, an essential part of a fundamental characteristic of all law: it is reasonable.

Those who work in the legal field, particularly those who govern and legislate, often feel some discomfort with the concept of natural rights because it seems that they can become an excuse which every citizen can appeal to as support for disobeying–for reasons of conscience–the laws of the State. Natural rights could be converted into a destabilizing instrument in the hands of a capricious will or subjective interests, and this is a principle of disorder–the enemy of the certainty of law. This is a discomfort similar to that aroused in government officials by the idea of conscientious objection and, in general, anything that might justify disobedience of the law.

Undoubtedly, there may be some truth to these fears, and on occasion there certainly will be. However, if we go straight to the heart of the matter, we must recognize with Karl Popper that the 'open society', democratic and secular, is founded on the fundamental dualism between 'factual data' and 'criteria of value'. One thing is factual data (specific laws and institutions), and another is true and just ethical criteria, which are independent and superior to the political process that produces factual data. Factual data may conform to rational criteria of justice, and they generally do so conform, but not necessarily. As Popper points out, to want to deny this dualism amounts sustaining identification between power and right; it is, quite simply, an expression of a totalitarian spirit. [9] Totalitarianism is a monism; it is to put everything in the same set of hands, to identify the source of political power

[9] On this point, see M. Rhonheimer, *Cristianismo y laicidad. Historia y actualidad de una relación compleja*, Rialp, Madrid 2009, pp. 127-131. In these pages the author refers to the work of Karl Popper, *The Open Society and its Enemies*.

with that of moral value and of rationality. Political institutions certainly enjoy political and legal autonomy, but this does not in any way imply a denial of the significance of value judgments regarding facts and political arrangements. Whoever denies this duality takes a step toward "converting the facts themselves–specific majorities, legislative measures, etc.–to political values that are supremely and morally unacceptable."[10]

Notwithstanding the above, the legislature is politically and legally autonomous, indeed, as it should be. However, the autonomy of the legislature is not the only principle of our social system. The autonomy of the legislature fits into a long process that has taken place in modern political theory, which was proposed with the objective of ensuring some basic elements of natural rights, such as human rights and other requirements of justice through a system of legal guarantees and institutions.

One of those guarantees is the separation of powers. Legislative power also has to be autonomous in relation to the executive, whereby, especially as regards disputed or ethically sensitive issues, the party platform cannot stifle the right of every member of Parliament to vote not to approve what he or she conscientiously considers to be a great evil for his or her own country: each parliamentarian usually belongs to a political party, but each one is not a robot. The judiciary must also be autonomous in the exercise of its function of equitably applying the law, and this requires independence and impartiality both on the part of the judges and on the part of those who instruct and accuse. Neither can be seen as subordinate officials of the executive power (that would not be autonomous) nor of the political parties (who, in turn, would not be impartial).

Another means of protecting human rights and other content of natural rights is the Constitution. The Constitution of a country is, by definition, a limitation of the power to legislate, and therefore, its interpretation cannot be subjected to games of the majority and political agreements that determine the options of the ordinary legislator. To make this a reality, the organism responsible for controlling the constitutionality of laws has to be truly autonomous and impartial, and its activity will have as its one and only benchmark the values on which Western constitutionalism has crystalized.

[10] M. Rhonheimer, *Cristianismo y laicidad*, cit., p. 127, our translation.

The appointment and the term of the mandate of the constitutional judges should answer to proceedings that are–and that appear to be–free from any suspicion. A State is only truly constitutional when there is a guarantee that certain things cannot be done either by a citizen, by a political party, or even by all citizens together. Examples of things that nobody can do may include the following: violations of human rights, leaving them without protection and empty of content in practice; limiting fundamental liberties if not for a very serious reason and for a short time; stifling the pluralism in various ambits of social life (education, information, politics, religion, etc.); deforming the fundamental institutions of the political and social systems; extending the action of the state apparatus to fields which belong to the private autonomy of the citizens or families. Interference may also take the form of hyper-protection. These issues, and others that could be mentioned, are clear demands of natural rights, which aim to ensure in social life an order that guarantees life, liberty, and justice.[11]

Political leaders might object that, if things were so, power would escape their hands and they could not put into practice their electoral plans. It is true that in modern politics the executive has the right to carry out the program approved by the electors, but this right is not unlimited. There are the institutional boundaries that we are mentioning, and it certainly does not give the power to tread on the institutional guarantees of liberty and of justice.

For anyone who knows the history of the modern Western political tradition it is evident that freedom is not an abstract value. Freedom is defined as the true form of human life. To live as men is to live free. Initially, modern European politics set out to defend the value of life. Therefore, Norberto Bobbio wished to recall, when abortion law was being discussed in Italy, "that the first great political writer who formulated social contract theory, Thomas Hobbes, maintained that the only right which the contracting parties had not given up upon entering society was the right to life."[12] On another occasion,

[11] The rooting of the modern State in ethical-political values of life, security, freedom, and justice had been vigorously emphasized by M. Kriele, *Einführung in die Staatslehre. Die geschichtlichen Legitimitätsgrundlagen des demokratischen Verfassungsstaates*, 4ª ed., (Opladen: Westdeutscher Verlag, 1990).

[12] Interview published in *La Stampa*, 15-V-1981, our translation.

but in the same context, he added, "It amazes me that non-believers give up the privilege and honor of saying that one should not kill."[13] The warning of the limits that the absolutism of Hobbes brought with it made subsequent political writers understand that a life without freedom and without justice is not a human life, and so Western political ideology became organized not only around the value of life, but also around freedom and justice. However, freedom continued to be the highest form of life–free human life–, so it was inconceivable that freedom could rise up to pit itself against life. For this reason, life is actually the first value protected by the modern Western constitutional tradition.

There exist other substantial values belonging to natural rights, which it is not currently possible for us to discuss. Here, I wanted to dedicate more attention to the structural and procedural guarantees of natural rights, and I have done so deliberately for two reasons: to show their ethical value, in that they are guarantees of freedom and justice, and because nobody has a monopoly on reason. The reasonable forms of social life are a historical conquest of the people who sincerely and collectively seek the truth in a climate of dialogue, of reciprocal respect, and of sincere love of the freedom of others. Without respect that is convinced of the rules and guarantees of which I have spoken, without the will to achieve political synthesis that takes on any truth in the position of the adversaries, and without desire to cultivate a language which is an instrument of thought and of a dialogue capable of nuances and convergences, it is very difficult for reason to prevail as a channel through which the exercise of political power flows. Natural rights entail that the exercise of power and the political dialectic allow themselves to inspire a deep trust in the method of dialogue and belief in the power of reason.

[13] Interview published in the *Corriere della Sera*, 6-IV-1981, our translation.