

1-1-1959

Postwar Natural Law Revival and Its Outcome, The;Note

Johannes Messner

Follow this and additional works at: http://scholarship.law.nd.edu/nd_naturallaw_forum



Part of the [Law Commons](#)

Recommended Citation

Messner, Johannes, "Postwar Natural Law Revival and Its Outcome, The;Note" (1959). *Natural Law Forum*. Paper 41.
http://scholarship.law.nd.edu/nd_naturallaw_forum/41

This Note is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Natural Law Forum by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

NOTES

THE POSTWAR NATURAL LAW REVIVAL AND ITS OUTCOME

For the past two years or so the discussion of natural law has been losing greatly in momentum. After World War II the number of books and essays in periodicals, particularly in Germany and Austria, concerned with this discussion was immense. At present not a few opponents to any natural law idea, positivists, think the hour is at hand for striking back. It seems, therefore, opportune to review the various lines of development in this discussion. To do so by referring to the many authors taking part in it and the details of their arguments would fill a large volume. The present writer hopes to deal with the whole discussion in the not too distant future in connection with his *Social Ethics*. Only a few general lines on which the discussion developed and which point to fields of further investigation for the natural law student, may here be briefly reviewed.

It would be a grave mistake to assume that the traditional natural law doctrine emerged without any need to re-examine its positions and, in consequence, to restate its fundamentals. For undoubtedly some progress of the human mind in coming to grips with the problems involved must have ensued from such a long and exacting discussion. Incidentally, St. Thomas (I-II, q. 97, art. 1 and 2) is very definite in his suggestion that, in general, progress of such a kind is "natural" to the human mind. Of course, when traditional natural law doctrine is mentioned in this essay, it is the doctrine rooted in Plato, Aristotle, Augustine, Thomas, Suarez, Vitoria.

Let us, however, first follow up the lines of thinking which have developed outside traditional natural law doctrine, either in concurrence with some essential features of it or in radical disagreement. The main points of view to be mentioned are the ethical, psychological, ontological, historical, sociological, theological.

A very large proportion of juristic thinking, which is prepared to accept natural law in principle, tends to restrict it to the ethical sphere. All law, according to this theory, rests ultimately on a moral basis; moral principles, including those linked with religious beliefs, are in no way to be separated from law; yet natural law and its principles of justice belong only to the realm of morality (the *ethicizing* of natural law) and not to that of law (*ius*) itself. With the traditional natural law doctrine, however, the ethical side of natural law and the metaphysical side which is linked with man's essential nature, are inseparably connected: the law of nature is to be understood as moral reason, but not to be restricted to its moral and jural principles. It consists of an order of conduct determined ontologically by human nature as a whole and thus not only by subjective insight but equally by objective fact.

On the other hand, there are attempts to derive from the ontological order

in human nature a kind of system of norms (the *ontologizing* of natural law). The argument moves from exactly the opposite point of view to that of the rationalist natural law theory which sought to derive a normative system from pure reason. In contradistinction to one-sided ontological arguing, the jurist is no doubt right when he thinks of natural law first and foremost in terms of norms of law, or general principles of law, and when he asks about their kind and source, as well as about the nature and form of their authority. He wants to know about the formation of law (lawgiver) as well as its administration (judge). Indeed, he is then largely in line with those exponents of traditional natural law theory who proceeded from the self-evident general principles or norms of the human conscience (*synderesis* as the core of *lex naturalis*) and referred to the *sum cuique* as the supreme principle in natural law (*ius naturale*).

Other thinkers, in reconsidering the natural law idea, look for points of support in the philosophy of value. Directly evident values, principles of value, ideals of value are used to establish standards for judging the existing law and goals for the further development of existing law. As a matter of fact, so far as general value principles are in question, they are akin to, if not identical with, the self-evident, intuitively grasped moral and legal principles of which traditional natural law theory speaks. But when value philosophy and value ethics exclude reason from the comprehension of values and of the order of values and ascribe it to feeling (the *psychologizing* of natural law), no link can be seen between value (*bonum, justum*) and being (*esse*). What, then, is the objective criterion for determining which values are the true values — values either in terms of a general value theory or in the light of a particular social or historical reality? No wonder that some authors come to the conclusion that the values found in the value pattern of natural law doctrine are only those valid in Western society.

On the other hand, it seems understandable that juristic thinking is today focused especially on the historical legal reality. In the light of our present historical knowledge of the varieties of legal systems and legal customs jurists view with reserve the notion of invariable legal norms. And not a few try to establish theories according to which all law represents merely a product of evolution (the *historicizing* of natural law). For some jurists the underlying idea of an evolutionary process includes the assumption that human reason is in itself only a product of evolution of the animal mind.

Others attempt to understand the natural law idea merely as an expression of social forces, and at the same time as an ideological motive factor in the evolution of social systems (the *sociologizing* of natural law). Supporters of this purely sociological interpretation of natural law are confronted with the question of the basic assumption from which to reconcile its two contradictory hypotheses: first, that the idea of natural justice is supposed to be an invention of ruling groups to support the legal order favorable to their interests; second, that it is supposed to be an invention of oppressed groups in society in the process of their efforts to secure a social order in accordance with their own interests.

The reducing of all law to historical and sociological elements could not but result in the endeavor to explain law exclusively in terms of power or expediency and to eliminate the idea of the suprahuman lawgiver (the *secularizing* of

natural law). All secularized natural law theory finds itself fraught with the difficulty of explaining the moral-jural conscience. For it is today commonly held among jurists that positive law is not as a rule obeyed out of fear of punishment but that the mainspring of obedience is man's conscience. No ethical skepticism has as yet succeeded in showing that the moral conscience with its knowledge of original human rights, rooted in man's moral responsibilities, is merely a self-deception of the human mind.

The jurist who shares the Christian outlook will unreservedly recognize the divine lawgiver as the ultimate source and sanctioning power of natural law. On the other hand, the approach to natural law is made more difficult to those who are remote from Christian belief if natural law is interpreted in terms of revealed truth (the *theologizing* of natural law) instead of natural reason, especially as the jurist is accustomed to seeing reason at work in an exemplary fashion in the great legal system which to a great extent has undeniably helped to form our legal systems and legal thinking up to the present day, namely, the Roman. There is certainly no real objection to a "theology" of natural law which lays open a rich fund of problems of an anthropological, metaphysical, epistemological, and methodological character. But it seems indisputable that less today than ever before the "philosophical" investigation into, and establishing of, natural law should be questioned as the central task of natural law theory. It is certainly not by chance that Thomas Aquinas, having the best of the Middle Ages with him, in spite of the prevailing uniform Christian outlook, treated natural law theory *philosophically*, and that he does so in his *Summa Theologiae*.

During the years of new approaches to its subject matter, traditional natural law doctrine, to be sure, has been able to hold its own, at least as far as its fundamental positions are in question. At the same time it cannot be denied that, as a result of points raised in the course of these efforts, it is now faced with a widespread array of problems.

First of all, there is the *anthropological question*. Of course, the anthropology centering on the idea of the "animal rationale" still stands. But the schools of biological, evolutionary, historical, sociological, psychological, ethnological anthropology have broken so much new ground that natural law doctrine will have to show in much greater detail how its metaphysical anthropology fits in with indisputable empirical facts. Comparatively, the medieval natural law school had knowledge only of a very narrow range of empirical facts. Since then we have learned that mankind has existed at least half a million years, that the very highly developed ancient civilizations never approached scientifically the problem of natural law, that innumerable peoples and tribes are guided by codes of law or rules of custom which, *prima facie*, seem very difficult to fit into the medieval natural law doctrine. (One such highly developed civilization with a very old tradition faced me with this problem when I had to write a foreword to the Japanese edition of *Social Ethics*.) The student of natural law with the present-day knowledge of facts will feel it is inconsistent simply to say "the barbarians do not use rational laws" (I-II, q. 97, art. 1) when the fundamental principles of the good and the right are thought to belong to the *lumen naturale* and this to man as *animal rationale*.

This and a number of other problems raised by the discussion in question seem to call for a further probing into the epistemological *problem of knowledge* with regard to natural law principles. The task will be twofold. It concerns the individual's knowledge and scientific knowledge. With regard to the first: How far does the general maxim apply, *omnis cognitio incipit a sensibus*, and how far will it have to be used in ascertaining the concrete contents of the self-evident principles? With regard to the second: What is the logical nature of these principles — are they purely analytical in character? Both these questions are the more urgent today as analytical philosophy and linguistic analysis try to show that those principles are either empty tautologies, propositions without any concrete contents, or value judgments about which any discussions in terms of scientific language is impossible.

Closely connected with the problem of knowledge is the problem of the *actuality of natural law*, now not considered as a rule of reason but as a factor in the legal and social systems, notwithstanding the grave aberrations to be found in them. Some schools of Protestant social ethics have an easy solution: there is *post lapsum* no such thing as an order of society recognizable as preordained in human nature and, in consequence, no reality of natural law in operation; we are, this school insists, exclusively dependent on theological anthropology and on theological ethics, which in turn are dependent solely on revelation; hence, the conclusion runs, the reality of natural law is no real problem at all.

There is the further problem, how far, if at all, natural law can be made inoperative in *positive law*. It is of significance in view of the present-day totalitarian states with populations of 200 to 600 millions, the latter number referring to China with its civilization going back beyond the first millennium B.C. It is particularly important, however, to realize that natural law in operation will have to be studied with a view to the long-standing antagonism between the natural law school and the positive law school in Western societies, in order to turn it into a mutually fruitful discussion in the search for truth. Such endeavors seem further necessary in order to meet the schools of legal thinking which try to establish the idea of a multitude and variety of patterns of original natural law which are operative, they suggest, in the national systems of law or customs.

Only one more problem may be mentioned, that of *demonstrating* natural law. Three ways seem to be open. First, the empirical-historical way. It was attempted by Viktor von Cathrein in his three volumes (1910), *The Unity of Moral Consciousness in Mankind*. Since then an enormous amount of fresh material has been collected in ethnology and empirical anthropology, but the effort of Cathrein has as yet found no continuation. The second way is metaphysical-theological. Of course, natural theology is meant. It will have to be much more elaborate than it appears to be in the textbooks. If one thinks of the prolonged exposition of *lex naturalis* and *ius naturale* in Suarez, and of the various endeavors of St. Augustine to demonstrate philosophically the *lex aeterna*, which is today simply referred to as a standing idea, then there seems no doubt that a good deal will have to be done by the traditional natural law doctrine to catch up with the endeavors of those two great exponents, as well as to deal with the implications

of the two ideas of *lex naturalis* and *ius naturale*, in the perspectives in which they present themselves to the modern mind.

Particularly the concept of "natural law" (*lex naturalis*) has for modern science a very definite meaning, one that was altogether alien to medieval thinking. In medieval thinking the idea of natural law was restricted to the moral world. The modern concept refers, roughly speaking, to forces immanent in the nature of beings and operative in a constant manner. This, then, could be called the third way of demonstrating natural law. St. Thomas would have been the first to inquire into the necessity of adapting the traditional natural law idea to the modern concept. Indeed, there are features in his exposition of *lex naturalis* which seem to invite such adaptation. This would, I think, mean laying more emphasis on the forces and impulses in human nature, urging to the attainment of fully human existence and operating first of all through the family. Man is in the first place neither a political (related to the state) nor an individual being but a family being. For man the family is by far the most important, indeed absolutely indispensable group, if he is to grow into true human existence. Thus the present-day problems apparently point to a central idea of natural law doctrine, though one of a more modern origin (Leo XIII), namely, to the idea that the family is the cell of society, biologically, psychologically, morally, economically, culturally, and not less ontologically and metaphysically. The concept of man as ready-made *animal rationale* may well prove to be too much of a simplification. Too often he lives as such in the textbooks fundamentally as an individual, who also has social obligations; whereas man is by nature, i.e., ontologically and metaphysically, as much a social being as he is an individual being. Even the *lumen naturale*, and especially moral insight, are not inborn, but are dispositions of *nature* to be developed by *nurture* into the faculties by which the *animal rationale* can do what he is ordained to do.

The postwar natural law discussion has been focused on the fundamental natural law *principles*, their logical and epistemological character, their psychological and historical origin, their ontological and metaphysical foundation, their political and social validity, and all this in very general terms. Thus it has been occupied with problems which St. Thomas thought should not be so much in vogue, since the fundamentals of natural law, namely, its general principles, were, he thought, established and were familiar to the human mind. He was thinking in a period of development of the human mind when he was fully entitled to such assumptions. In a secularized world the situation is different. On the other hand, what he thought to be the chief task will still have to be the main pursuit of the traditional natural law doctrine: the *application* of the natural law principles to the changing world in the political, social, economic, cultural field. The fact that the postwar interest in the fundamentals or in mere generalities is abating indicates, it seems, that Thomas was right in thinking that natural law doctrine is above all a practical, not a speculative science. Accordingly it would not seem to comply with his idea of natural law doctrine if now, after the postwar discussion, it fell back to a one-sided occupation with general principles.