

THE NATURAL LAW AND THE RIGHT TO LIBERTY

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THE subject assigned to me for discussion is one of first importance. It is said that Lord Acton spent almost all his adult life preparing for the great task of writing a thesis on Liberty; that he wrote much in preparing for the task, but died before realizing that ambition. I am happy to discuss the subject assigned me and it is not modesty on my part that prompts me to say that my indifferent scholarship will not permit me to speak as a philosopher. Happily, there are those on our program who properly and preeminently can lay claim to that distinction. It is my hope none the less that what I have to say will appeal to the average mind and will be considered sound and reasonable.

My thesis is "The Natural Law and the Right to Liberty." In discussing any subject, it is first necessary to define the terms. Law is an ordinance of reason given by him who has charge of the community and promulgated. Natural Law is also described by St. Thomas Aquinas as "the participation in the eternal law by rational creatures." The average man thinks of Natural Law as that law which is graven on the tablets of the heart. It is moral law, prescribed by our rational nature, independent of the Ten Commandments, independent of the pronouncements, dogmas or teachings of any particular church, and independent of any ruler or government, constitution or statute. It exists in our very nature, so that rationally we know

there is a right and a wrong; an objective good and evil; and that in the exercise of the mind perceiving good and evil, we are impelled to do good and avoid evil.

The Natural Law postulates the existence of a personal God, an *ens a se*, and that we are rational creatures created by God, in His own image and likeness, with free will and a yearning for happiness which we believe will only be satisfied by a return to God Who is infinitely perfect. That is the only rational meaning that can be given to the universe.

It follows then that we are the creatures of God. Every creature has an end, a purpose, and God guides all creatures to their appointed ends by their natures, their principles of operation. This definite plan is the eternal law. It is likewise so in the physical world, where we observe the sublime order of the universe — the succession of the seasons, the movement of the earth, the position of the sun, moon, stars and other planets.

No one denies that such physical natural laws govern the universe in its magnificently precise order. There is no unrestrained freedom. So compelling is the order in the universe through its physical laws that the mind of man, unaided, reverently realizes that there is a Guiding Hand, that there is a First Cause — God.

Man, too, in the plan of his Creator has his end and destiny which must be worked out by his reason and his will. His intellect and will apprehend the true and the good, and by his nature man seeks after what is good. Good is to be done, and the contrary or evil is to be avoided.

The materialists reject the idea of Natural Law as a

pious code of the Christian and other religions. History refutes this attitude. The ancients: Xenophon, Plato, Sophocles, Demosthenes, Cicero, recognized a standard of good and evil antecedent to positive law. In our own country when it emerged from a colonial state into an independent nation, the founding fathers, Washington, Jefferson, Madison, Hamilton, James Wilson, Otis, and the rest, grounded their political philosophy in the Natural Law.

Their primary principle of law and liberty begins with the reverent recognition of God as its source. The second paragraph of the Declaration of Independence is an unequivocal acknowledgment of Natural Law principles:

"We hold these truths to be self evident, that all men are created equal; they are endowed by their Creator with certain unalienable rights; that among these are life, liberty and the pursuit of happiness; that to secure these rights, governments are instituted among men deriving their just powers from the consent of the governed. That whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it and to institute new government, laying its foundations on such principles and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness."

This passage contains the substance of our philosophy of government. In it we are called the children of God, our Creator, who gave us those inalienable rights, among them liberty. It bespeaks our human dignity,

an endowment from our Creator, and it enshrines the whole idea of the freedom of man.

Those rights, while three-fold, are really in union, one with the others, to live and be free, to pursue and attain everlasting happiness.

Within the last few years, the indictments tried at Nuremberg were based on spiritual realities in law beyond any positive law then in existence. The first count of the indictment charged in effect a common plan or conspiracy for a period of years prior to May 8, 1945 and the commission of overt criminal acts against humanity, crimes against peace, carrying out of ruthless wars, deportation of men and women for slave labor, enslavement, inhuman acts, etc. The international agreements then in existence which denounced aggressive war, did no more than state an opinion about these evils. The point is that there was no definite law, i.e. positive statute, as we know it, which made these acts criminal, unless these acts violated the principles of Natural Law. The charge at the Nuremberg trials was really that the defendants violated human rights and the indictment and prosecution proceeded upon the theory that the things done were evil in themselves, and contrary to the laws of humanity and the conscience of mankind.

Those who deny the Natural Law usually proceed on the theory that morality and legality are the same. That which is legal is moral. This doctrine is open to grave objections. If morality and legality be one and the same, then that which is considered evil in itself, murder or any heinous crime, *could* be made lawful by statute. Murder does not cease to be murder just be-

cause it has the approval of a dictator or a totalitarian state. Reason revolts at the idea of murder being virtuous and approved, or love and respect for parents being evil and forbidden. If it be said that no such absurd laws will come into being — we may ask, why should they not, unless they are at variance with the universal conviction of mankind about right and wrong?

It is not my purpose to include in this paper proof of the Natural Law. That has been ably done in previous years. This is the fourth Meeting of the Natural Law Institute at Notre Dame and these conferences have resulted in a most remarkable revival of interest in the study and consideration of Natural Law and its implications in recent years. It has brought to your academic halls many outstanding scholars and legal philosophers. In this great movement Notre Dame has taken the lead. The work published in these proceedings was of the high calibre one has grown to expect of Notre Dame.

To continue with our thesis: Liberty, according to the scholastics, means the absence of internal necessity toward one course of action; that the power and exercise of choice is left to the free will to act in one way or to act in another, when all the elements for proper determination are present. This is human liberty. It does not and cannot mean absence of obligation to others. Right and obligation are obviously correlative. Natural Law imposes obligations that are moral, and civil authority by positive law imposes civil obligations. In both fields man is free physically to reject them. He may defy God, violate the moral law, just as he may disobey the laws and ordinances of the community and the State. Under an alleged liberty, men have recourse

to license, i.e., the absence of all restraint, which claims the right to do anything and everything one desires. This, of course, is not freedom but chaos or even slavery. Bossuet describes it thus "Where everybody does what he likes, nobody does what he likes; where there is no master, everybody is master; where everyone is master, then everyone is a slave."

The right of liberty is a natural right and it resides in the person, because he is a person. It is his self-determination with regard to fulfilling his natural final goal without interference. The purpose and end of man indispensably require that man be free and that freedom arises from his right to work out his destiny. That is the heart of the matter. His importance as a person is dominant. As a person he possesses intelligence and a free will to fulfill his destiny. These make up the spiritual side of his nature — his soul. It follows then that for the fulfillment of his destiny, man must be free and it is the duty of the State to secure and protect that freedom to enable the person to achieve his destiny. Liberty is not an end but a means to an end — a return to God. For man is not only mere flesh, blood and bone but spirit or soul, and the soul is immortal.

Any civilization worthy of the name rests in God, the immortal soul, liberty and conscience. The State is constructed to secure these natural rights, man's human liberty, freedom of religion, freedom of conscience, freedom from regulation except that imposed by the law of God or the law of the State grounded in the law of God.

Law, in the juridical sense, is a binding rule of conduct. The Natural Law binds in the moral sense. But

such submission to the Natural Law or higher law is enslavement according to the materialist, while its rejection is liberty. On the contrary it is manifest that out of the Natural Law man is conscious of his own right to liberty—to fulfill his end unhindered by society or the State. Further, if he has no such natural rights but only those prescribed by the State, then indeed is he slave to the State or the ruling majority.

Is there a conflict between law and freedom? Where does the Legislature derive its power to bind the members of the community? Liberty is positive in itself because man must be free to work out the ends of his existence and the right so to do must be his, anterior to the will of the State of any group or individual. Since he must respect the same right equally in others his right of liberty must not be abused or unrestrained.

What then is the relationship of the State to our right of liberty? We all believe, indeed we know, that man is a social and political animal. He is a person, an individual, but he is a social being as well. It is natural that we live in society, be it village, town or city. To place man in "a state of nature" as do Hobbes and Rousseau, in disregard of man's natural desire to live in civil society, is to close our eyes to reason, history and man's inclination. Man develops with his fellows in a civil society regulated by law for the common good. Man, always and everywhere, lives in a society. This is an imperative of his nature. It was necessarily so, beginning with the family. He is naturally fit for society through intelligence and speech and inclination—solitude is abhorrent to him. The State is a natural society. Law is necessary to an ordered society. The end of the

State is the common good of the people. The State arises from the act and the consent of the people. Someone must preside over this society, drawing its endeavors towards the common good and this authority, like society itself, has its source in nature and God is its author.

To state it another way: man, as such, singly has no right to make a regulation for another man, since both are equal. But man's nature impels him to live in society and as a social being to prevent as far as possible the conflict of wills among the members of society. To accomplish this, laws and government are required. Without law and government such society would be a mere aggregation of persons. The very living together in a community implies, presupposes regulations controlling the actions of the members of the community and this, of course, is Law and Government. It follows that man is not only a social being by nature but a political being as well. Civil Society is impossible without law and government. It follows that civil authority is natural to man. It is manifest that since God is the Creator and since man by his nature is social and political, then civil society and civil authority are natural institutions. The "form" of government requires the consent of the members of the community or state — as does the selection of those who shall administer its affairs and exercise the powers of government. The members of the community may change the form of government. But this must be done in a lawful manner. Man is not free to resort to anarchy, which means the destruction of society. For since man is by nature social, that which would destroy society is contrary to the

Natural Law, which ordains order and obedience to lawful civil authority.

The point we make is that civil authority derives from God; that in a legitimate civil society man has civil liberty which he enjoys as his very own by the exercise of human liberty; that man enters the social political order under the dictates of the Natural Law. It is not by a social contract as Rousseau would have it — which may or may not be entered into by man — or by conventional agreement to live in civil society by the device of having all individuals pool their rights by assigning or alienating them to the community that juridical society results. No one can in any lawful sense alienate all his rights, else he would no longer be answerable for his acts. Manifestly, it would not be possible for man to discharge his duties to God or his fellow man if his rights were turned over to civil society or the State. Civil society as such being natural to man, his formation of political society is lasting, not revocable at his whim. If it were otherwise, there would be no permanency or real stability to civil society. Since no man or group of men, without more, has control over another man as a matter of right — consequently the power of the State to govern the persons making up the community must come from the Creator, Himself. Otherwise, whence would come the power or punishment for violation of law? If the individual or the group, as such, does not have the right, how then can it be bestowed by them on what they call the State? For as we have seen, the State does not assemble a multitude of men in a given place and thenceforth rule over them. Rather is it “an organic and organizing

unity" of people who have the right to be heard on the duties imposed upon them by the political society which they by consent have constructed for the common good.

Regardless of the many reasons that man has for banding together in a community to live harmoniously under a ruling power, it had to be based on a consent to a lawful and social bond. If men were to have their liberty regulated or curtailed for the common welfare, it had to be for a moral reason — for the free acts of the individual are moral. It is only by consent of this kind that the power of sovereignty juridically arises.

From the early days of our republic this concept of the State was clearly recognized. Justice Wilson in *Chisholm v. Georgia*, expressed it thus:

"By a state I mean, a complete body of free persons united together for their common benefit, to enjoy peaceably what is their own, and to do justice to others. It is an artificial person. It has its affairs and its interests: It has its rules: It has its rights: And it has its obligations. It may acquire property distinct from that of its members: It may be bound by contracts; and for damages arising from the breach of those contracts. In all our contemplations, however, concerning this feigned and artificial person, we should never forget, that, in truth and nature, those who think and speak, and act, are *men*."

Man cannot develop, as he is impelled to do, in family life, as such. He realizes that in civil society his desire for the opportunity of development economically and socially, with safety for his family and himself can

be satisfied and that in society, he has obligations as well as rights and these arise out of the civic bond. Thus by consent men are bound together in a social union which we call the State. Thus bound there is conceded to that legal entity or juridical person all the power necessary to accomplish the common welfare. That which had been a multitude of people has become a juridical body with jurisdiction to arrange a form of government which when accomplished is juridically the state, and the people select the governing body with power to administer the affairs of the community for the common good. In our student days, it was summed up as follows:

“Civil society is necessary to human nature; civil power is necessary to civil society; civil power is nothing without civil obedience; civil obedience is necessary to human nature; God commands whatever is necessary to human nature; God commands obedience to civil power; God commissions the civil power to rule.”¹

Hence it follows that all public powers and authority must proceed from God.

The enumeration in the Declaration of our rights to life, liberty and happiness; that we are endowed by our Creator with these rights, and that they are inalienable, is a reiteration of a philosophy based on the Natural Law which gave impetus to Western civilization.

At the dawn of the Christian era we have a graphic and appalling illustration of the conflict between the totalitarian state and the individual who asserted his

¹ Joseph Rickaby, S.J., *Moral Philosophy*, page 318.

right of freedom. In the first three centuries historians tell us that more than eleven million people were put to death for refusing to forswear Christianity and worship the gods as prescribed by the emperors of Rome. They were put to death in truly barbaric fashion because they asserted their right to worship God according to the dictates of their own conscience.

In the passing centuries resistance on the principle that all men are created in the image of their Maker advanced the idea of democracy and as Western civilization developed, the dignity and freedom of the human person was emphasized more and more in civil government; that by his very nature, man had the right to be respected; that as a child of God, he has the right to accomplish and fulfill his destiny and therefore he must have all those things which are necessary to its fulfillment. They must be his by his very nature.

It follows that the State must recognize this right to freedom in the person and protect it and insure it to him and this by the nature of the person which is God-given. This is the highest duty and function of the State, to safeguard and forever defend the person's natural right to liberty.

The world is sick today, almost unto death, and for the reason that during the Nineteenth Century and earlier in many places the liberty of man has been whittled away and the dignity and inviolability of the person have been outraged. This is a result of pragmatic, materialistic, atheistic philosophy that started in Central Europe and spread to the East. Totalitarianism is its legitimate offspring. Do not believe that totalitarianism is a regime — it is a doctrine, a false philosophy, a dia-

bolical religion. The world has taken to itself the things that are God's and in many places has deprived man of liberty. Rulers have made the world the "city of man" and rejected the "City of God." This is secular religion, a worship of the State by communism, fascism and nazism, in turn. They are all secular in essence. They all rest on the supremacy of the State and a rejection of the inviolability and freedom of the person. As we have seen, man was not made for the State. The dictators have made this world their kingdom; the dignity, right and freedom of man are liquidated; he has neither soul nor mind; no freedom, because his behaviour is deterministic; and of course, no God. This philosophy enshrines these ideas. The doctrine is terroristic and despotic, without morality or justice; destructive of all ideas of dignity and freedom and the inviolability of human personality; blasphemous and atheistic; the despair of that civilization which came to us from Athens, Rome and Jerusalem — which, today, is face to face with an appalling crisis.

We, in America, are part of that European or Western civilization and we are not immune as we know too well from the disease that is eating into the vitals of nations in Europe and in the Far East. The basis of our democracy is the dignity of the person and his inalienable right to liberty. Our government was established for the express purpose of protecting these rights, and our Constitution and Bill of Rights give eloquent demonstration of that fact. In a word, the Declaration of the Founding Fathers and our Constitution and Bill of Rights established a jurisprudence in this Country based on Natural Law.

The Magna Charta wrested from King John in England early in the Thirteenth Century, was hailed as a great bill of rights. Yet it *bestowed* nothing on the English people — it merely *recognized* their rights, chiefly the freedom of the free men. And yet as late as the Seventeenth Century, men were executed in England for challenging the “divine right of kings.”

The very purpose of democracy is the protection of the personal liberty of the citizen and this is its chief merit and it will hold its life only so long as the people believe in the moral point of view, for the doctrine of human liberty is a moral doctrine, a natural law doctrine, and freedom begins and ends with God, Himself.

Today, in our own country, many reject the philosophy of the Founding Fathers that liberty inheres in man by his very nature. With them a contrary philosophy prevails; that law and morals are and should be entirely separated. This view is supported by certain professors in our law schools and by some judges in our courts. They adopt and defend the doctrine of expediency, which is the pragmatist view; or that of the so-called realist, based on the theory of force or domination as the basis for law. With this premise it follows that rights and duties are a matter of prescription at the hands of the State and accepted because of fear or a threat of force; that government may control the lives of its citizens from the cradle to the grave, and if need be, “prevent the continuance of the unfit,” as a very eminent jurist once put it.² Nazi-Germany adopted that view and millions of innocent persons, a minority group of men, women and

² Shriver, *Holmes Book Notices*, uncollected letters and papers (1938) 181.

children were murdered because they were not useful to the State — to the complete horror of mankind. Euthanasia — a nice term to describe cold-blooded murder — is advocated in many quarters by persons whom we have no reason to believe are other than sincere, and defendants have been put on their trial, not so long ago, for practicing it. Not since the earliest centuries as we now reckon time has the world been more callous of the rights of fellow human beings, more cruel in its treatment of weaker nations and minority groups than it has been in this Twentieth Century.

Thus in modern legal thought, there are two schools, diametrically opposite one to the other. One recognizes moral or Natural Law as the basis of our jurisprudence. The other has complete contempt for the moral or Natural Law concept. It is in complete accord with the materialistic and pragmatic view, that there is no such thing as objective right or wrong; that there is no moral "ought" in law, only physical force; that man has no inalienable right, only the right given him by the State or dominant group. Of course, it takes little reflection to perceive that there is no such thing as a "right" if it is bestowed by the State. If it is "given," it may be taken away. A "right" natural to man, such as liberty, is our very own, God-given, which we may assert and defend against anyone, even the government itself. The bill of rights in our Constitution does not *grant* these rights, but recognizes them as ours, protects them and enjoins the lawmaking power from infringing or violating them.

More than ever today the present problem is the choice between these two philosophies. I reduce them to two in the conviction that while the Natural Law doctrine is

based in the spiritual and the moral; the other school whether it be of the Realist, the Sociological or Positivist order is fundamentally materialistic. Under the former, man is free, *de jure*; under the latter, he is not *de jure* free and independent but subject to become the prey of force.

Among the disciples of the non-natural law group are those who are denominated "Liberalists." The average citizen I believe envisions a "liberal" as a generous, big-hearted person — be he judge or philosopher or both — who bends backward to give his fellow man the benefit of every possible doubt. But this is not its significance in a political or philosophical sense. Time was, centuries ago, when "Liberalism" had a meaning from which present day liberals have departed. "Liberalism" in the early days was a tradition which characterized early Western culture. The effort of liberalism then was freedom of man and the inviolability of his personality. That was the root of the matter and it was profoundly moral. The Founding Fathers were true liberals. But the liberalism of the Nineteenth Century may be delineated as the late Thomas F. Woodlock characterized it, as "liberalism that had lost its soul." It degenerated into a humanitarianism unrestrained by anything, and it was a failure.

It stressed the doctrine of progress and human perfectibility but in an earthly and material way. Its only objective truth was the truth of positive science. In a humanitarian way it stressed love of neighbor but not love of God. It was concerned about the temporal welfare of men — nothing more. The rights of man were emphasized, not to raise up the under-privileged, but to brush aside the regulations of the State and the moral

principles of the Natural Law. If the truth of positive science was the basis for its thinking, it is clear that man cannot fulfill his destiny with any aid from science; for science tells nothing about the nature of things that most concern us.

Walter Lippmann, in his essay "The Good Society" (October, 1937) characterized it as the degradation of man. He describes the liberalists as iconoclasts who "were too smart to be wise, too rational to be reasonable, too much enchanted with an immature science to hold fast to tested truths. * * * So, in the high realism of intelligence there prevailed a radical disrespect for men and the human ideals of justice, liberty, equality and fraternity were relegated to the limbo of old superstitions along with God, the soul and the moral law. * * * In the fury to explain men rationally, there was explained away their essence, which is their manhood."

Much mischief has resulted from the doctrine of Liberalism from which there is no escape, except by return to God and the moral law and the realization that man is created in the image of God, and that image is in his soul.

The great tragedy of this Twentieth Century arises from a pragmatic philosophy which is wholly at war with Natural Law principles. Miss Barbara Ward calls this sharply to our attention in her book, "Faith for Freedom"³ pointing out that we of the democratic West in our constant struggle for wealth and power, with scant or no regard for human rights, the inalienable essence, and the well-being of our neighbor, may well have engulfed ourselves. That materialism has crept in and

³ *Atlantic Monthly*, December, 1950.

holds forth in our democratic form of government is undeniable. That concept, however alien it intrinsically is to our democratic form, can flourish within its framework. Our democracy based as it is on Natural Law principles was not intended as a form of government only, but a way of life, idealistic and in harmony with our nature. This idea is admirably expressed by the late Thomas F. Woodlock in his essay on "Democracy":

"Democracy, as a 'way of life' for human society, by its nature is best conducive to the preservation of men's personal liberty and is therefore the most desirable form of government. For its success, however, it demands a high state of civic morality in the people, who must be educated to a relatively high standard of intelligence and, above all, mutual tolerance. In the absence of either it is almost certain to degenerate, and in that process liberty tends to disappear. Forms alone are not sufficient for its preservation; they must be animated by a deep popular faith in principles of liberty itself. These principles, arising as they do from the fact of man's personality, are ultimately religious, for man's personality necessarily implies God, the soul and the moral law."⁴

That such was the philosophy of the Founding Fathers enshrining as it did the liberty of man is indisputably clear from the words of the Farewell Address of our First President:

"This government, the offspring of your own choice, uninfluenced and unawed, adopted upon full inves-

⁴ Thomas F. Woodlock, *Democracy: Definition and Debate*.

tigation and mature deliberation, completely free in its principles, in the distribution of its powers, united security with energy, and containing within itself a provision for its own amendment, has a just claim to your confidence and support. Respect for its authority, compliance with its laws, acquiescence in its measures, are duties enjoined by the fundamental maxims of true liberty. The basis of our political system is the right of the people to make and to alter their constitution of government. But the Constitution which at any time exists, 'till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all. The very idea of the power and right of the people to establish government, presupposes the duty of every individual to obey the established government." ⁵

If we are at the crossroads and must choose between the philosophy of materialism and Natural Law — the choice lies between the materialistic and the spiritual conception of life. If matter is all, then man is the helpless slave of the State or the dominant forces. If the basis of liberty arises from the Natural Law, then God is the Creator of man and the universe, and man has as his very own a human dignity and inviolability which postulate human freedom. This conception compels acceptance on its own intrinsic merits. Liberty demands and requires the Natural Law. Without it, freedom, peace, order and happiness are impossible.

⁵ Washington's Farewell Address.