Natural Law and Legal Positivism*

ANTON-HERMANN C. CHROUST**

A frequently heard complaint among present day lawyers and jurists is that they can no longer look to real legal authority. We have just been told by Julius Stone that even the slender traditional authority of the common law, the "jurisprudence of stare decisis," is at best a wishful thought![1] Our learned judges, speaking from the highest tribunal, are bluntly informing us that their decisions are valid for one day and that day only. How, then, can we resort to authority, if we are surrounded by what might be called an anti-authoritarian experimental jurisprudence, already degenerating into a purely experimental "method of social engineering."

The advocates of this social experimentation admit that if there is at all such a strange thing as law or justice, it is at best a crudely pragmatic hit and miss affair. We might even use reason as an instrument to find out something about the law. But, again, we have been told by philosophers now in fashion that reason is an instrument to be used sparingly and then only as a means of clarifying what comes to us by experience. And experience—the positive law—itself has become a tenuous term which today is more elusive than ever.

It is suggested here that we should define natural law above all as a "knowledge situation" or "truth situation" which renders the term law in a broader sense than the legal positivist or realist would probably concede.

In other words, law is interpreted here to include a type of understanding which to some extent is outside the narrow limits drawn by the legal positivist, without thereby becoming "illegal" or "irrational." We shall attempt to indicate that natural law is a form of eminently valid legal knowledge; that like all other forms of valid knowledge it consists of critical judgments organized in a coherent body of supersensorial data; and that these judgments are based on reason and fact as well as the rational awareness and acceptance of the existence of objective values, standards, or norms of proper conduct. At the same time natural law constitutes a form of legal knowledge which cannot be restricted by legal empiricism to judgments confirmed by what courts, legislators, or administrative agencies actually do or have done

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** Associate Professor of Law, University of Notre Dame, College of Law.

[1] *Cf.* Julius Stone, *Fallacies of the logical form in English law: A study of stare decisis in legal flux,* in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES, ESSAYS IN HONOR OF ROSCOE POUND 696-735 (Paul Sayre ed. 1947).

in a given situation. This knowledge which stands for natural law is tantamount to the apprehension of certain decent propositions as well as their rationally cogent implications. Hence we shall conclude that natural law is above all not so much the establishment of a particular and limited legal datum or the description of such an isolated datum, but rather the fuller realization of all relevant legal data and their ultimate overall significance. Being able to point out the profounder meaning of the many and at times confusingly complex legal facts by showing us their inner structure, natural law can also tell us what the presuppositions are which enable us to deal with all these facts in an intelligent manner.

Properly understood, natural law will not ignore or discriminate against the present status of social, sociological, or legal theories concerning the derivation and validation of certain ethico-practical judgments or facts. Neither does it depreciate an empirical explanation of the multifarious experiences that comprise legal controversy, legal adjudication and law-making.

Natural law, by conforming to the dispassionate process of intelligent argument, claims truth for the judicious assertion that the world as a whole no less than our total legal experience furnished actual support for the significance of values and objective standards. In this, natural law contributes decisively to the translation of mere hopes or dreams into the actual realization of what is good, true, and just. It is also declaratory of an eminently decent and intelligent attitude which continuously asserts that the standards of right and wrong, good and evil are real and as such are truly effective in the lives of men. It implies, finally, that any legal knowledge situation which fails to take account of these standards and their practical effectiveness, is incomplete and as such no true legal knowledge situation at all.

Although natural law at times lacks the detailedness and particularization of the positive law, like every form of rational knowledge, it presupposes participation in fundamental relationships which are reasonable. In this it signifies also a well grounded understanding of a basic situation expressed in rational judgments. In addition, natural law stands for what we may call a basic loyalty to something eminently intelligent in the domain of human conduct and human relations. Hence it is also a body of convictions as well as rational conclusions declaratory of the appropriateness of certain intelligent and voluntarist commitments. It might even be called a devotion to perfection.

Such commitments, to be sure, cannot always be verified empirically, particularly not by the positivist or realist who insists on limiting the meaning of law to whatever is done officially by the courts, the legislators, or the administrative agencies. But even the most adamant realist would not really deny that natural law, which he probably would call a "belief," leads to a kind of assurance which cannot be

considered more arbitrary than the positivist or realist position itself.

The positive law, which is a purely experimental knowledge situation, also claims to be true—a claim which must still be submitted to the approved tests of truth. Obviously, the positive law cannot test itself as regards this particular claim. For what sincere legal positivist or realist could really tell us which of two decisions is "the correct one," and which is "the false one." And still he is somehow aware that one of these two decisions is the "correct one" or at least the one he "likes better," unless he would concede, in a spirit of cynical resignation, that "correct" is whatever the last and hence technically unimpeachable court of appeals has said in its latest decision. But such a dispirited surrender to mere "legal do-ism" cannot satisfy and never has satisfied the more ambitious mind.

Some opponents of the natural law might point out here that it has not as its primary object theoretical truth, at least not according to their pragmatic or realist conception of truth; that it has not the detached impartiality which is considered by the scientific realist, positivist, or semanticist an indispensable part of the truth seeker's attitude. But what does he actually mean by truth? Truth to him is perhaps contained in the following formula: Any assertion which is not an assertion of fact is not a true assertion; any assertion of fact which is not based on sense experience is not a true assertion of fact; any sense experience which cannot be verified by scientific experiment is not a true sense experience; and any scientific experiment which does not lend itself to quantitative measurement is not a true scientific experiment. But what bearing has all this on the problem of law? How can this formula be transposed into the domain of legal science? Let me suggest the following answer: in the light of such a naturalistic view, and in keeping with the now so prominent faith in "scientific realism," psychologism, or plain statistical method, the truth meaning of law would have to be reduced to a quantitative analysis of glandular secretions, appetitive droolings, and reflex, random, or artificial responses to stimuli. Obviously, the truth situation connected with natural law does not meet these particular truth requirements.

But if we are willing to concede that the methods with which we seek truth are so complex and often so different from one another that different forms of approach to truth at times become necessary, then we may discuss natural law as a truth situation. Hence the argument in favor of natural law will rest on the assumption that the approach to natural law requires a different and less restricted method than a purely realistic treatment of the law, often referred to as "legal scientism." If, in other words, we should admit that there exists a type of truth which we affirm even through its complete verification by sense data, sense observation, and quantitative experimentation alone is beyond our reach, then a more fruitful approach to the larger

legal truth situation may be established. Perhaps the most eloquent defense of this broader view on the legal truth situation is stated by William James in a letter addressed to Professor Leuba: "I find it preposterous," James claims, "that if there be a feeling of unseen reality shared by large numbers of men in their best moments, responded to by other men in their deepest moments, good to live by, strength-giving—I find it preposterous, I say, to suppose that the goodness of that feeling for living purpose should be held to carry no objective significance, and especially preposterous if it combines harmoniously with our otherwise grounded philosophy of objective truth."[2]

In a general way the legal positivist or realist starts out with the ambitious but never realized claim that he would establish once and for all the foundation of legal truth. Putting the emphasis on certainty and clarity at the expense of its range and profundity, he has gradually and progressively restricted the area to which the term "law" can be applied. No one, to be sure, will quarrel with a procedure which, if applied to a limited field of human understanding and human inquiry, assists us in distinguishing what from the standpoint of purely experimental knowledge is clearly known, and what is less clearly known. But this method certainly goes too far when, as a by-product of this procedure, the domain of the less clearly known—less clearly known according to the truth criteria of the positivist or realist—suddenly becomes the unknowable or not-know or, as in the case of natural law, the "non-sensical." Issues and problems which are at best but dimly perceived by the positivist or realist, and which do not lend themselves to quantitative analysis or statistical experimentation, are thus banished in a rather arbitrary manner from the area of the total truth situation and simply declared the equivalent of matters which are not known at all.

Many jurists have looked to legal positivism or realism for a scientific solution to the many complex questions posed by the law. They hoped that this positivism would offer some intelligent answer to the many vexing problems connected with the law. But they were sorely disappointed. For the only real answer which legal positivism or realism can offer to the problem of law is in fact the denial of the significance of the problem itself. What the legal positivist can actually supply is nothing other than a factual description or recitation of decisions, statutes, procedural rules, or perhaps congressional debates in terms of naive observations or manipulations. But what might be fully adequate for the descriptive sciences, could be and probably is, somewhat inadequate for the solution or understanding of the many

2 Quoted in 2 RALPH B. PERRY, THE THOUGHT AND CHARACTER OF WILLIAM JAMES 350.

problems arising from the practically significant conduct of man. Hence we might ask here the question whether this kind of scientific simplicity in the province of experimental knowledge is not won at the dire expense of adequacy in our treatment of the problem of legal knowledge in general, in that we lose at the outset every chance of expanding the domain of truth and the area of the knowable. Because in doing this we refuse at the very outset to admit the possibility of such an extension beyond mere sensate experience and experiment.

At this point we should also inquire whether the positivist or realist position itself is not confronted with serious difficulties of its own: the positivist must assume without proof the accessibility of the past through memory; the communication or communicability of ideas, concepts, or symbols through identical meaning; the consonance of other experiences with his own; the acceptability of his hypothetical purpose; the dependability of induction; and the validity of his insight into logical relations as well as into the connection between initial hypothesis and final verification. All these "postulates," on which he bases his whole method, his procedures, and, hence, his whole claim to truth, are nothing but "gratuitous dogmas." The exclusive reliance on actual pronouncements of the courts, the dicta of legislators, or the acts of administrative agencies, in itself always implies and presupposes the assumption of, and reliance on, something more than these pronouncements. And finally, we should also point out that by his reliance on actual pronouncements, he is forced to assume the existence of other minds—an assumption which he himself cannot verify satisfactorily by his own scientific method. But he must nevertheless make this unscientific and, as a matter of fact, totally unwarranted assumption—unwarranted from his own point of view—in order to justify his own use of intersubjective language and symbols.

In sum, the legal positivist or realist always assumes or presupposes certain "unscientific" beliefs which, in the final analysis, turn out well for him. These beliefs actually do not belong in the province of verifiable sense-experience, but are outside the particular truth situation which he so jealously tries to establish and defend. The legal positivist or realist openly scoffs at such "bed-time stories" as the "moral dignity of man" or the "natural rights of man." But from experience we know that in practice there is hardly a more eloquent claimant of these rights than the legal positivist or realist who spends most of his time disproving "scientifically" the very existence or truth of these rights. Since natural law frequently fulfills the latent purposes even of those who rebel against it, it seems to provide also for those who are totally blind to its existence. Hence the question arises whether we are actually improving the total legal knowledge situation by following the positivist position in refusing to permit the term knowledge or truth to be applied to insights which are the result of

analysis of a body of given facts. The intelligent person, it appears, is always suspicious of those efforts to establish truth which limit themselves to mere sense perception and sense data. He consistently denies the existence of a purely experimental knowledge or truth situation. At the same time, in one way or another, he emphatically disclaims that all super-sensual assertions are meaningless. He insists that, if certain assertions made by positivist philosophers are provisionally accepted as true, then we should also investigate the assertions made by non-positivist philosophers.

Whenever we are dealing incompetently with a type of knowledge such as natural law, we are apt to tread on perilous ground. It appears that the perils of natural law arise from several sources. One peril stems from a shocking misunderstanding or misconception of natural law. Another proceeds from the unwillingness of some men to face its demands whenever these demands are opposed to their prejudices, traditions, interests, or aspirations. These men, at least outwardly, "accept" natural law by professing to be its supporters. But actually, in the application of its principles to social problems they succeed in undermining it in the eyes of its adherents and the sceptic. A third peril arises from the failure to re-apply the principles of natural law to changing conditions and changing needs. This peril becomes particularly serious in times of crisis or rapid socio-economic change. We may, for instance, falsely identify natural law with an established economic, political, or social system, or, on the other hand, we may be so convinced of the desirability of a new economic or political order that we are inclined to abandon the principles of natural law altogether in order to bring about this new economic, social, or political system. We may even be so misguided about the meaning of natural law that we claim thereby to be setting up a new and allegedly superior kind of natural law.

Hence there seem to be five major difficulties with natural law which we have often experienced from the manner in which it is being treated by certain questionable experts on the natural law. The first difficulty is caused by a misunderstanding which proceeds from the methods applied by some of the defenders of natural law. This particular defense overlooks four important factors: First, it is made in behalf of all manner of conflicting notions as to what constitutes natural law; secondly, the rather crude but frequently encountered efforts to identify natural law exclusively with property rights at the expense of human rights at times have actually turned it into the handmaid of unrestrained greed and economic domination; thirdly, there is always a glaring incongruity between the notion of a natural law which gives special favors to one, while at the same time denying the other the prerequisites of a minimum of decent human existence —and the idea of the universal validity of the natural law advanced by

the defenders or authors of such a "preferential natural law"; fourthly, the manner in which this type of preferential natural law is woven into the general fabric of legal ideas and the concept of universal justice approved by ordinary standards arising from common and healthy experiences, has never been satisfactorily explained.

The second difficulty about natural law arises from the frequently reiterated claim that some men possess what I would call a mystical experience of natural law—an immediate and personal conviction which supposedly reveals to some select people the "mystery of natural law." In essence, this particular attitude towards natural law is merely another form of "special revelation" frequently claimed by such clairvoyants as Hitler or Stalin.

The third difficulty about natural law seems to be related to the question as to how its principles could be applied to an existing, that is to say, historically developed socio-economic situation. This acute and perhaps even crucial problem is often disposed of in a most perfunctory, not to say callous and irresponsible manner. The historical complexities of the many economic, social, political, and moral issues to total human existence thus remain wholly unrelated to the natural law principles professed. Such an attitude towards natural law is clearly one of shallow generalization bordering on meaningless or platitudinous equivocations.

The fourth difficulty about natural law comes from an uncritical definition of natural law, coined and employed by people who have tried to manipulate natural law and its meaning in order to advance selfish interests or to defend, on an allegedly super-natural basis, what nature and natural reason have unmasked as being indefensible. In their hands it has become a more or less systematic effort to justify strange practices of somewhat objectionable men trying to use and abuse some of the loftiest aspirations of mankind for their own crude purposes. By its very motives and results this type of natural law stands condemned in the eyes of all intelligent and decent men.

The fifth and perhaps most serious difficulty about natural law must be recognized in the fact that natural law has been invoked, though falsely, by certain questionable experts on the natural law in order to justify, and even glory in, their anti-intellectual, anti-progressive, and anti-humanitarian bias. This irresponsible and immoral policy, parading under the name of natural law, has done almost irreparable damage to the cause of natural law. It has, in many instances, alienated from the natural law many people who, under more favorable circumstances, would have become its most persuasive adherents and spokesmen.

Some people seem to be ready to take natural law for granted—to regard it as something self-explanatory. There are indeed those who sing its praises, as there are those who denounce it. But there are

only a very few who genuinely study and properly interpret it. Whenever we think that natural law, being something allegedly self-explanatory, needs no explanation or special understanding, we are particularly apt to misunderstand it completely. It is most deplorable that this thing called natural law frequently is not deemed to need or deserve the patient and faithful exercise of the intelligence we apply to so many things which matter to us much less. Here as elsewhere we fail to see the importance of things we simply take for granted. But this alleged familiarity with natural law may in fact breed misunderstanding and even contempt. Many advocates of the natural law, aside from clinging to antique expressions, outmoded conceptions, or outworn phrases of the past, also make the serious if not fatal mistake of limiting both its meaning and content to thunderous and often ill-advised tirades against legal positivism, legal pragmatism, and legal realism. Such a purely negative attitude, aside from being totally devoid of any constructive or positive elements, is not apt to clarify what natural law actually means and for what it stands.

Natural law, by its very definition, reflects the true dignity of individual man as a person and as a social being. By giving expression to elementary human interests and aspirations, it endows man with the power to assert himself within proper limits and to work out his own happiness. But these powers or rights of every human individual do not presume his independence of other individuals. They do not separate his affairs or interests from the affairs or interests of other men. They do not permit him to conduct his affairs without concern for the effects which his actions may have upon other men. Natural law, by succeeding in making man aware of fundamental rights or powers to act, assures him a moral equality in the exercise of these rights. Under natural law one man's rights are another man's obligations. No man can claim rights the exercise of which is demonstrably injurious to another man. And no man has a right to exploitation. For natural law, properly understood, will never condone man's inhumanity to man. It does not merely establish the liberties and rights of individual man, but also the liberties, rights, and obligations of social man. It sustains man's claim as a person; it affirms his quality as an individual human being. At the same time it confronts man with serious social obligations. Hence natural law is not merely a body of rights, often loosely referred to as "the liberties of the individual." Such a generalization is both thoughtless and dangerous in that it connotes "rights in detachment," that is, rights apart from the human community and rights unrelated or even antagonistic to the common good and the common welfare. It is dangerous in that it conceives of the individual as existing in a social vacuum; and in that it completely ignores the question, so basic to natural law, how far can one's liberty or one's rights co-exist or conflict with the liberties and rights of others,

and how far certain liberties and rights of some individuals can be adverse to certain liberties or rights cherished by others, or even to the elementary needs of life itself. Natural law by its very nature is the great and eternal restraint imposed on all men by virtue of their humanity. Because of the failure to perceive this, a gross and vulgar individualism or naturalism has frequently paraded itself as natural law or natural rights.

There exists also an alarming confusion concerning the relation of natural law and human equality. Natural law, by assuring all men of certain fundamental rights, also assures them of a moral equality in the exercise of these rights. Now it is claimed that men cannot exercise their natural rights effectively unless they are equal in all other aspects as well. This claim is justified to a degree, and then only if the problem of limitation is clearly understood. For beyond certain limits equality and liberty may become opposed to one another in that the passion for equality can destroy liberty. Any attempt to achieve absolute equality would most surely result in regimentation or totalitarianism in one form or another. The kind of equality which is most clearly in harmony with natural law is the equality of opportunity in order that all men may develop their natural gifts and talents to their own advantage and the service of the common good. This equality of opportunity, proclaimed by the natural law, is based on the realization that man has his irreplaceable worth and irrepressible dignity. By conferring as well as declaring the equal dignity of all men, natural law actually combines opportunity with dignity—the opportunity to realize one's own moral nature and thus live in accord with one's own dignity.