Natural Law and Kelsenism*

REGINALD PARKER**

It is the purpose of this brief paper to demonstrate that natural law is neither natural nor law, nor useful as an ethicopolitical concept. This will be done against the background of the theories of Hans Kelsen, my great teacher to whom the world owes so much in clarity of legal thinking.

I. NOT "NATURAL"

Natural law by its very nature claims universality. It is, to quote Father Murray, a recent authority on the subject, immanent in the nature of man.[1] It is the law, somehow, that every man ought to follow or would follow if he would let himself be guided by his inborn reason.

Yet in actual fact there exists no such norm. As every anthropologist knows and as some lawyers know — I am particularly thinking of Max Radin's great last paper[2] — there is very little law that is universally recognized. Take for instance the Decalogue, which is often mentioned in support of the proposition of the existence of a basic, universal law. Yet even a superficial inspection reveals it to be a mere outline of a code of law strongly tied to the civilization of the time and the place in which it was promulgated. It commands devotion to father and mother, but it says nothing of the — to us at least equally "natural" — duty of the parents toward their children. It forbids adultery, but not polygamy. It proclaims monotheism which can hardly be said to have ever been universally accepted. And what is more important for our discussion, those of its commands which by their wording appear to be universal norms are mere programmatical pronouncements rather than norms at all. "Thou shalt not kill" cannot be and never was taken literally. What the Fifth Commandment, analyzed against the totality of its context, amounts to is a mere "Thou shalt not *unlawfully* kill." For killing was by no

* This paper was presented at a round-table meeting on jurisprudence during the annual convention of the Association of American Law Schools on December 28, 1951.

** Assistant Editor-in-Chief, NACCA Law Journal. Formerly, Professor of Law, University of Arkansas. Author, "Administrative Law: A Text" (Bobbs-Merrill 1952).

1 Murray, *The Natural Law* in GREAT EXPRESSION OF HUMAN RIGHTS 69, 89-91 (MacIver ed. 1950.)

2 Radin, *Natural Law and Natural Rights,* 59 YALE L.J. 214 (1950).

means unlawful per se in the Hebrew or any other civilization. The soldier must kill the enemy. The criminal suffered death penalty whenever the hard law so provided, as in the case of adultery, perjury or theft. Self-defense was and is recognized as an excuse. Now, to say that it is a universally accepted, hence natural law that no man shall kill another man except where the legal order so commands, justifies, or excuses him is of course nothing but another way of saying that the question of whether a killer is guilty of a crime depends on the positive law and therefore not on natural law.

Phrases like "To each his own" — the *suum cuique* of the Romans — or the postulate that justice be done and injustice be avoided are even more devoid of any universality. Every time, every nation, every class, and nearly every man within nation and class, has a different concept of what is just or unjust in a given case or of what should be distributed to whom and upon what grounds. No two writers on the subject of social or individual justice have ever agreed — how can we then expect to solve controversial legal problems by a reference to principles that defy being classified as universal or natural? In other words, as my fellow-speaker, Professor Chroust once aptly phrased it, the natural law idea is both "a-historic supreme" and "characterized by the rather naive belief based upon a thoroughly rationalized and systematized interpretation of human history."[3]

Cahn asserts, perhaps rightly, that there is a sense of injustice (and hence also of justice) in every man. However, he rather misunderstands Kelsen whom he quotes as calling the concept of justice "irrational" and therefore "not subject to cognition."[4] Even a perfunctory reading, however, of Kelsen's works[5] makes it clear that what Kelsen calls irrational is not the — perhaps innate — *sense* of injustice in every human being, but the actual object, the contents as it were, of this sense. Granted that every person has some sense of injustice, there can be no natural law, that is, a universal system of norms, unless their sense of injustice would be in mutual agreement on some points. This, unfortunately, is not the case. And I may add that Cahn's illustration to his argument that even a baby resists acts of aggression, such as the taking away of a thing from him, is anything but convincing as far as justice is concerned. It merely shows that man likes to keep what he has, not what "rightly" belongs to him.

Neo-naturalists can at times be heard asserting that while there

---

3 Chroust, *On the Nature of Natural Law* in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 70, 77, 79 (Sayre ed. 1947).

4 CAHN, THE SENSE OF INJUSTICE 11 (1949).

5 Notably: GENERAL THEORY OF LAW AND STATE (1945); *Law, State and Justice in the Pure Theory of Law*, 57 YALE L.J. 377 (1948); *The Natural-Law Doctrine Before the Tribunal of Science*, 2 WESTERN POL. REV. 481 (1949); *Science and Politics* 45 AM. POL. SCI. REV. 641 (1951); and many other writings.

exists no universal natural law, still there is one for each civilization. Every epoch within a given culture, according to their argument, in the main represented by Stammler, Gény, and del Vecchio, has a law that is "natural" for that particular time and place. Has it? Or is this theory merely a somewhat complex phraseology for the postulate that there *ought* to be law of such and such a kind in such and such a civilization rather than that there is one?[6] If we assume that there is a natural law for, say, modern Western civilization — is it to be socialistic or individualistic or perchance bolshevistic? Between Hayek, Renner, and Lenin each system has its protagonists and to say that one or the other is "invalid" (rather than merely undesirable) destroys of course the even limited concept of this natural law idea, because its validity must depend on some authority that is to decide which system of norms is to be the "right," *i. e.*, valid one, in other words, on a positive lawmaker rather than on natural and self-evident law.

II. Not "Law"

It is indeed the absence of a natural lawmaker that precludes natural law from being law. Law must emanate from some source. There must be a lawgiver, be he the tyrant or a parliament, the king and his ministers, or the people themselves. Or the source of law may be the deity. If we believe the proem to the Codex Hammurabi, then the sun-god Shamash from whom Hammurabi derived his set of laws is the supreme source of law. But the same is equally true (or false) of the Mosaic law, of the Gospel, or the Koran. They all claim divine origin. Perhaps one of them is. In the absence, however, of a supreme tribunal of conflicts between different systems of religion we cannot scientifically assert that one of them is the right one to the exclusion of the others. So far, the validity of any one of them depends on an act of faith.

Nor can we ascribe scientific accuracy to the typical eighteenth century claim that natural law is based on reason — that it is self- evident. As long as my reason differs from yours, "reason" as such cannot be the *a priori* source of any legal system, natural or otherwise. Reason will continue to guide, we hope at least, the positive lawmaker's acts. But it will not dispense with the lawmaker.

Natural law by its alleged very nature cannot be law for an additional, perhaps even more categorical reason whose discovery we owe in the main to Hans Kelsen more than to anybody else. Natural law, being in the clouds, so to speak, stands at the top of the legal hierarchy. But, unlike a positive legal constitution, it has no organs

[6] "The yearning for a legal ideal." Friedmann, Legal Theory 63 (1949).

to apply it on the lower levels of the hierarchy. Let us assume that a given system of law, such as the Decalogue or our Constitution, be by some miracle at last recognized as universally binding — as "natural" in that sense of the phrase. Now, even if our interstate commerce clause and the Bill of Rights guaranteeing the right of property are considered natural law, they must obviously be applied ("enforced") to be "law." When is a transaction "commerce"? What is and what is not "interstate"? Is every right, such as the right to contract away one's "freedom" to work sixty hours a week, "property"? These and a thousand other questions present themselves. It needs some governmental agency to answer them, *e. g.*, the Congress or the courts. Congress then enacts laws in execution of the supreme — as we assume, "natural" — law declaring that certain labor relations may fall under the regulation of interstate commerce while others do not. Is this still natural law? Obviously not. And if it were — are the decisions of the National Labor Relations Board that further apply the constitutional clause by applying the statute enacted under it natural law? Or the court decisions enforcing the Board decisions and again adding something to the law? To use another example, even if natural law may be assumed as saying that every man shall pay his just debts, inasmuch as it fails to execute this norm, its application must be left to human beings other than the natural lawmaker. The general, so-called natural, law is a mere empty shell, a commonplace generality, as long as it cannot be applied.[7] And as long as it is not applied by natural lawmakers, there can be no natural law at all.

Some primitive societies have indeed solved this problem by letting not only the supreme law be made by "natural," *i. e.*, divine, authority but also applied by a class of priests whose quasi-divine status is strictly maintained.[8] In this case the problem of delegation is solved: on every level of the legal hierarchy there is the natural lawmaker who through his priest — to say it with Kelsen — makes (natural) law by applying (natural) law. This means in the last analysis again that natural law is based on faith. If I do not chose to believe in the divine character of either the supreme lawmaker or of his priests, then to me the law thus made and applied is quite the

7 Gray's idea, however, that all law is judge-made law is equally fallacious as Austin's definition of the law as the sovereign's command. As KELSEN, GENERAL THEORY OF LAW AND STATE, especially at 150-52 (1945), shows, law is both made *and* applied on every step of the hierarchy.

8 Up to Tiberius Coruncanius (250 B.C.), the first plebian *pontifex maximus*, Roman law (at least procedure) was a secret, sacred art, carefully guarded by patrician priests. See Parker, *The Criteria of the Civil Law*, 7 THE JURIST 153 (1947). Christianity has not chosen to endow its ministers with divine character. Consequently, its precepts have been subjected to many conflicting interpretations among the various sects.

opposite of natural law. It is man-made. Thus even those primitive societies cannot truly be said to live under natural law. All we can say is that their inhabitants *believe* that their law is "natural."

Some writers on this point have tried to leave to natural law at least the function of filling legal gaps. While the positive lawmaker (Austin's "sovereign") makes the law, the judge through pure reason, hence supposedly on a natural-law basis, fills the *legis lacunae* which the lawmaker has left. This has been strongly argued recently by Lord Wright.[9] Ironically, however, he quotes for illustration the well-known Article 1 of the Swiss Civil Code, which confers upon Swiss judges the right (or rather, the authority) to fill legal gaps. In other words, Lord Wright adduces positive law as an argument in support of what is called a power deriving from natural law! It cannot really be doubted that the power of courts and other lawmaking and applying agencies to amend law by fictitiously asserting the existence of a gap is nothing but the application of a rather fundamental norm of the positive law, which may be paraphrased as follows: A judge in applying existing law may in his discretion, whenever he finds the law unsatisfactory and contrary to what he believes to be a principle of justice, alter the law by granting new causes of action or new defenses, as the case may be. This authority derives from the positive (customary) law as much as any other lawmaker's authority, like that of Congress from the Constitution.[10]

Another argument perhaps more appealing to practical-minded lawyers is the insoluble conflict of natural law with recognized positive law. Only one system can be valid, yet somehow they are asserted to coexist with one another. Let us assume for a moment that natural law proclaims that every man is born free and that consequently slavery is not in harmony with natural law. As we know, despite thousands of years of human slavery, there were certain natural lawyers who did so hold. Very well, then — were the slavery laws of Virginia, Great Britain, ancient Rome, Greece, or Babylonia non-law? Can it be said that every transaction, decision, or regulation made pursuant to those laws throughout the millenniums was null and void as being in violation of The Law, the supreme, "natural" law whence all other law must derive its validity? Very few natural lawyers have ever seriously drawn this ultimate consequence from their own theory.[11] Such a consequence would not have suited the political purpose of most of its protagonists, who were conservatives and whose ideas were propounded in support of throne and altar;

9 Wright, *Natural Law and International Law* in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 794 (Sayre ed. 1947).

10 Kelsen, *supra* note 7.

11 See Kelsen, *The Natural Law Doctrine Before the Tribunal of Science*, 2 WESTERN POL. REV. 481, 485-94 (1949).

but even the radical minority, who used natural law as an argument in opposition of the existing order, indulging in slogans such as Property Is Theft, have not usually dared to say more than that the positive law is "bad" law rather than non-law, as it of course would be if natural law were law.

I am of course aware that there may be an apparently supreme norm or constitution that does not per se render norms contravening it void or voidable. European constitutional provisions to that effect are not infrequent. In abstract form, such a norm may be restated as follows: This code or constitution shall be the supreme law of the land; but any law contravening it (*e. g.*, a statute duly enacted by the diet and sanctioned by the crown) shall nevertheless be valid until repealed by another statute. Such a clause obviously makes the constitution illusory. Yet natural lawyers of all ages have resorted to the same device. In other words, beside the immutable substantive precepts of the natural law there is supposed to exist also an auxiliary norm according to which law made by duly constituted authority that is contrary to the natural law is valid nevertheless. As a matter of fact, as Kelsen's survey shows, this "auxiliary" part of the natural law — the precept that man must, in any event, obey authority, be it good or bad[12] — is the one that many a natural lawyer liked best.[13] Be this as it may, its introduction immediately reduces natural law to the legally superfluous command that law — *any law* — must be obeyed, coupled with the desire that law ought to be "good." But of course, a desire is not law.

III. Not a Useful Lie

Plato in his Laws thinks that a government must not avoid telling lies to its citizens if they are useful. Thus it ought to tell the people that only the just man can be happy; for if this is a lie, it is a very useful one inasmuch as it stimulates obedience to the law. To this Kelsen adds "that the Natural Law doctrine, as it pretends, is able to determine in an objective manner what is just, is a lie; but those who consider it useful may make use of it as of a useful lie."[14]

Kelsen in his great objectivity calls the dispute over the natural law a never-ending one.[15] Yet he demonstrates clearly how the doctrine has been used — and misused — by virtually every political theory and proposition in order to objectivize its claims. For man is

12 *Id.* at 491-92.

13 Hobbes, Leviathan, Part II/xxvi, proclaims that "obedience to the civil law is part also of the law of nature."

14 Kelsen, *supra*, note 11, at 513.

15 Kelsen, General Theory of Law and State 446 (1945.)

very small. He does not care to say, I consider such and such a form of government or system of private law a desirable one, hence I will work toward its accomplishment by influencing my fellow men. He prefers to say that his idea and his idea only is *the* good and ultimate law which he, fortunately, was able to "find." And if he has power to bind and solve, he still does often not care to say, such will be the law from now on. Rather, he "finds" it by divine inspiration, by knowing the people's true will and wishes, or simply knowing what is best. Thus natural law has been used as a device for rendering the law absolute by lawmakers from Hammurabi, Moses, and Mohammed down to the Fathers as well as Hitler, and by theorists of all kinds.[16] It was used to uphold and to fight slavery, to show that human freedom can, but freedom of property cannot, be taken away by positive law, that property is against nature, that obedience to the law is in itself the supreme law, that tyrannical governments may be overthrown, that the oceans are free, that all navigable waters belong to England, that all men are alike, that certain races or nations are inferior to others, that there exists a natural *Grossraumordnung* for the world, and so on *usque ad infinitum*.[17]

It can be said that in an autocracy or even a monarchy it may be a useful thing to deify the power of the state. Indeed, the fact that a certain, particular individual and no other is the monarch can be conveniently rationalized by invoking divine law[18] (*pro tanto* the same as natural law), beyond which there is no question, no further authority. The political theory of a democracy, however, must of necessity hold otherwise. Instead of pretending to set forth the ruler's idea of justice as the only correct and hence as the absolutely valid one, the democratic theory of state recognizes that in every society there are interests whose conflicts can best be harmonized by letting those that are subject to the law take part in its making. Democracy recognizes, by its very definition, the rule of the majority rather than a preordained rule or ruler. Democracy acknowledges the fact that no law is perfect per se. Nor can we endeavor to have law that pleases everybody. We can do only the second best — make law that pleases at least the majority as constituted from time to time. Thus in a democracy the invocation of natural law is indeed not a useful lie. It is the very antithesis of democracy.

---

16 Apart from vague notions among some Greek philosophers, whose importance is usually exaggerated, the first theoretical foundation was given the natural law idea by Cicero, the statesman and politician, who used his legal training to promote his political views. *Cf.* Parker, *Book Review*, 60 HARV. L. REV. 1371 (1947).

17 For instances in the lighter vein (*e.g.*, a decision declaring prohibition to be an attempt to rob man of his natural right to drink alcohol) see Paulsen, *"Natural Rights" — A Constitutional Doctrine in Indiana*, 25 IND. L. J. 124 (1950).

18 " . . . King by the Grace of God. . . "