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SURVEY OF NATURAL LAW: A MODERN DOCTRINE OF ANCIENT ORIGIN

By

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Insofar as its popularity is concerned, the doctrine of the law of nature has had a cyclical history. At its peaks, the doctrine has formed the basis of many laws, even governments; at its depths it has been accused of being but fiction. Commencing in ancient times, its last great wave of popular devotion and acceptance was during the American and French Revolutions. Since then, apparently because there was no new great cause (such as the overthrowing of a tyrannical government) to inspire a need for explaining man's actions by the law of reason, the doctrine has again been neglected. But today, when all peoples are seeking to find a formula for world peace, we may expect a revival of interest in the doctrine. The United Nations are seeking a basis for world understanding, and it is not unlikely that such a basis will be found in natural law for it creates a sense of right common to all mankind without which no international organization can long survive.

Ever since the time of the Stoics natural law has stood for an expression of the unity of mankind and the ability of men to determine by reason what is just. This kind of thinking led to the Declaration of Independence with its premise that all men, by virtue of their humanity alone, were entitled to life, liberty and the pursuit of happiness. And it is this kind of thinking that is the crystallization of belief in a power for good which can transcend the barriers of race or nationality.

Because we seek world peace, and because it is just possible that a formula for peace will be found by reawakening and applying anew the law of nature, it is urgent that we understand that doctrine's meaning. To do this we had best examine the origin and historical development of that ancient law, and that is what this paper purports to do. Although of necessity it treats but superficially a subject of tremendous scope, it is hoped that the essentials have been presented from which men who would govern the world of today can derive values of real significance.


The views expressed herein are personal and are not to be construed as official or as reflecting the views of the Ordnance Corps or of the Department of the Army.
Philosophers, political scientists, lawyers, churchmen—all of our great thinkers who have dwelled upon the existence and order of things in the universe—have generally agreed that there are superior principles of right, or higher laws to which the ordinary civil rules made by man must conform and which necessarily place limits on the operation of such rules. The best known and most influential form of the higher law doctrines centers around the term "natural law" or "law of nature." Although this doctrine has been for centuries the subject of contention and criticism, it is important to note that it has survived and in many forms exists today as the basis of law of many governments and even world society. For this reason, then, the investigation of the origin and development of natural law doctrines should prove profoundly interesting to students of present-day law and government, and it is primarily to them that this brief analysis is directed.

Graeco-Roman Concepts of Natural Law

The Greeks were among the first to formulate ideas of natural law. Aristotle, in discussing justice, described it as being either natural, as in accordance with nature, and hence universal, or local and conventional, as applicable to a particular place. The higher law, as Aristotle visualized it, was unwritten, universal, eternal and immutable, and in accordance with nature. He divided law into that which is common, being in accordance with nature and in force everywhere, and that which is peculiar to each separate community.

Although the Greeks may have fathered natural law concepts, it was the Stoics who are responsible for its distinctive form. Their concern spread over a greater area than the city-state, encompassing the different nations in the Alexandrian empire. They tried to formulate a connecting link between their general conception of nature, as governed by reason, and the mind of man. In short:

"The fundamental principle of Stoic ethics and politics is existence of a universal and world-wide law, which is one with reason both in nature and human nature and which accordingly knits together in a common social bond every being which possesses reason, whether god or man."

From the Stoics, the ideal of natural law descended to the Romans who made more use of the theories and put their views into more enduring forms. The Romans, in order to regulate commercial dealings with aliens, developed a law common to all nations, or jus gentium, which tended to displace the rigor

1 Nichomachean Ethics, 7; E. Burle, Essai historique sur le developpement de la nation de droit naturel dans l'antiquite grecque (Trevoux, 1908) chap. 14.
2 Haines, the Revival of Natural Law Concepts (Cambridge, Mass; 1930) 6.
4 Cicero, On the Commonwealth (trans. by Sabine and Smith, Ohio, 1929) 22.
of the *jus civile*.\(^5\)Natural law, or *jus naturale*, was at this time more than an object of contemplation for the philosopher; it actually was the standard with which actual laws in the hands of the judge and practical administrator had to conform in order to merit the name of justice.

Roman jurists like Gaius, Ulpian, and compilers of the Institutes of Justinian took the law of nature as a basic premise, but they did not contribute materially to its theoretical development. The most that the latter group did was to attempt to discriminate between the rules and instincts common to animals—the *jus naturale*; rules common to all mankind—the *jus gentium*; and the particular rules of a community—*jus civile*, and this classification was adopted by certain medieval jurists.\(^6\)

**Medieval Theories of Natural Law**

From the Romans the idea of natural law was adopted by the Church Fathers and later was enshrined in canon law. The process by which the identification of the law of God with the principles of secular law took place during the first centuries of the Christian era is most important. It represents the distinguishing feature of the medieval philosophy of law, and was the more significant since civilians, as well as the Fathers and the canonists, were prone to yield to the authority of the *jus dei jus naturale*. According to this teaching everyone was under the law and responsible to God.\(^7\)

Isidore of Seville and Gratian re-echoed the Roman jurists' tripartite classification of law with this difference: that *jus naturale* was the common law of nations without any reference to animal instincts. Natural law was identified with divine law and human law with custom; the *jus gentium* and the *jus civile* were included under the latter.\(^8\) Thomas Aquinas made the further distinction that eternal and divine laws form a part of the universe and emanate from God, from natural laws which were the result of the participation of man as a rational creature in applying to human affairs the eternal law by which he distinguished between good and evil. Unlike earlier Roman thinkers, Aquinas held that the particular rules of natural law were not immutable but, since they were rational laws designed for human ends, they were subject to change as human conditions varied.\(^9\)

Medieval churchmen invariably identified nature and reason with a personal God and law and rights emanated from His will. Following Aquinas, their divisions of law were: divine, natural and positive. Medieval jurists usually accepted the Roman division of law into natural law, law of nations and civil law. In this age, it is important to note, there was little legislation in the modern sense. Enactments usually were designed to affirm existing rules or customs or to

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\(^7\)Id at I, 106-110.
\(^8\)Id at II, 105.
\(^9\)Summa Theologic, 1, 2, et seq.
remedy abuses in administration. Civilians thought of law, not as the creation of human will, but as the application of principles or customs.

We have seen that with the early Greeks natural law was law in accordance with nature in the physical sense. To the Church Fathers natural law was divine in origin and either comprised rules given to man by God or his representatives or consisted of divine law from which principles of right and justice might be deduced by man's reason. There were still other types of natural law conceived of by medieval thinkers. Primarily amongst them was that which was comprised of rules or principles of law and justice substantially divorced from divine origins, a form from which grew international law and parts of developing public law in later centuries. From natural law, too, there arose concepts of natural rights—such as rights of equality and freedom. These rights, as we shall see, became the basis for civil government as was later developed by the English, French and American philosophers.

English Contribution to Natural Law Theories

It has for a long time been assumed that the ancient and medieval concepts of natural law had never been accepted as principles of English law, since the English did not draw heavily for their law from the Roman or canonical codes. Recent investigations, however, demonstrate that the doctrines of the law of nature or law of reason were actually important links between the two legal systems.

From the dominant idea of medieval thinkers that law should be supreme, and superior to the state itself, English judges evolved the peculiar English doctrine of the supremacy of the law which bound even the king. Some jurists of the time, notably Coke, maintained that the supreme law limited Parliament too, and that it reflected a common reason and superior principles of justice of which the common law courts were the ultimate interpretors. Others argued that there was no case on record in which the wills of the King and of Parliament were thwarted by the courts. However, there were undoubtedly many cases in which the courts changed the meaning of statutes by interpreting the common law through application of the basic principles of reason.

Due to an understandable aversion to Continental ideas and to the influence of church and of Roman law, it became the English practice to speak of reason in preference to the medieval concept of the law of nature. Natural justice or reason, which the common law recognizes and applies, does not differ from the

10 McIlwain, The High Court of Parliament and Its Supremacy (New Haven, 1910) 42, 46.
11 Ibid; also Holdsworth, A History of English Law, II, 133 ff.
   See also Mullett, Fundamental Law and the American Revolution, (New York 1933) 44-47.
14 Plunknett, Statutes and Their Interpretation in the Fourteenth Century, Part II.
law of nature which the Romans identified with *jus gentium* and which the medieval jurists accepted as being divine law revealed chiefly through man's natural reason. As one writer sums up the English thinking:

"The Common Law is pictured invested with a halo of dignity, peculiar to the embodiment of the deepest principles and to the highest expression of human reason and of the law of nature implanted by God in the heart of man. Common Law is the perfect ideal law; for it is natural reason developed and expounded by the collective wisdom of many generations."\(^{15}\)

The growth of the common law has taken place in an inductive, experimental and pragmatic manner. This growth has been conditioned by the famous rule of reason which prevented the rigid and archaic procedure and rules of the English legal system from remaining long in force when they were not in accord with social and economic conditions. The repeated appearance of the rule of reason in English law bears witness to the fact that natural law doctrines have not been discarded from the English jurisprudence.

**Natural Law Reaches America**

About the time of the early colonization of America, Grotius, Pufendorf and other writers gave great significance in political and religious matters to the rights and liberties of the individual. Instead of natural law or rules of superior validity, *jus naturale* was translated into a theory of natural rights—qualities inherent in man which it is the duty of the state to protect. Their belief was that there is a source of natural rights in certain inherent qualities belonging to individuals and these rights, which were sanctioned by natural law, might be discovered by human reason.\(^{16}\)

In the process of transplanting fundamental law theories and establishing their own doctrines of public and private law, the colonists relied heavily upon the English common law. But as a rule the law was applied by persons untrained in the technical procedure and rules of the English system. Courts and judges frequently found themselves required to make law for the occasion with naught to guide them except the Bible, the precepts of natural law or natural justice, and the community sentiment of what ought to be right and just. Under such circumstances appeals were frequently made to natural law or to allied concepts.\(^{17}\)

The popularity of the concepts of natural rights and of natural law was greatly enhanced when they were espoused by leaders of the American Revolution. Samuel Adams, John Adams, Thomas Paine, Patrick Henry, and Thomas Jefferson made frequent use of the natural rights doctrine to support the right of rebellion against the arbitrary exercise of governmental powers.

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\(^{15}\) Figgis, the Divine Right of Kings, 228-229.

\(^{16}\) Grotius, *De Jure Belli ac Pacis*, Book I. Chap. I.

This popularity was not to last indefinitely, however, and just as natural law doctrines became discredited in Europe, so were they gradually given less and less credence in the conservative reaction which followed the periods of the Revolution and of the Confederation. The effect in the United States was somewhat to narrow the scope of the law of nature thinking and to give the term a rigidity which tended to support the existing legal order. Nevertheless, under these conditions the courts fostered the gradual acceptance of some natural law principles in the public law of the United States. Primarily, the existence of those principles is to be found in American constitutional law, as it has been developed by the courts to protect vested rights against encroachments by legislative acts or by popular majorities. In so doing, the courts recurred to the doctrine of inalienable rights and to the theory of higher laws in order to change the due process of law clause from merely a check on procedure in criminal matters to a limitation on the general scope of legislative powers.

Conclusions and Observations

We have traced the law of nature from its early origin down to the present day and have shown some of the different doctrines concerning it. In conclusion it may be well to summarize some of its main elements on which most writers have agreed.\(^1\)

First, was the belief that justice is not merely an ideal of man's devising, but is a part of nature. That is, the law of nature is established by God, and has over other forms of law a logical priority.

The second great element of the law of nature is the recognition that justice is intelligible, that it may be rationally apprehended by the human mind. The law of nature is the law of reason. This is perhaps the most powerful article of political belief, and from it stems all other claims to freedom.

Finally, the law of nature is universal. No race, nation or group can claim a proprietary right in that sense of things which by definition transcends the local and the accidental; conversely, no race, nation, or group can be excluded from the natural community of all mankind.

The doctrine of the law of nature has undergone a considerable evolution, and by the nineteenth century was deemed practically to have disappeared from the forefront of our legal thinking. However, we now find that current legal thought increasingly is returning to the concepts of natural law as criteria to measure the justice or validity of civil enactments. Many factors are combining to bring to the fore once more some of the ideas involved in the ancient doctrine of natural law. As Roscoe Pound has said:

\(^{18}\) Stapleton, Justice and World Society (N. Carolina, 1944) 20-22.
\(^{19}\) Harvard L. Rev. XXV (Dec. 1911) 162.
"It is not an accident that something like resurrection of natural law is going on the world over."\textsuperscript{19}

With widely different purposes in view and with varying approaches to the fundamental and permanent principles of the law, legal philosophers and jurists, in applying concrete formulae of written charters, codes or statutes, are wont to turn to modernized versions of the law of nature, or of its counterpart, the law of reason. There are a number of prevailing tendencies in legal thinking which are giving impetus to the revival of higher law theories. As Haines has so aptly summed them up, they are:

\begin{enumerate}
\item The efforts to introduce in a more direct way ethical concepts into law;
\item The attempts to formulate ideal or philosophical standards to measure positive laws;
\item The establishment of criteria for judges and administrators when they act as legislators; and
\item A justification for limits on the sovereignty of states.\textsuperscript{20}
\end{enumerate}

As long as there will be civilization there will be law and order, and these tendencies are bound to make themselves evident in the development thereof—and just so long will there be applications, in one form or another, of natural law.

\textsuperscript{20} Bibliography used as source material but not specifically cited.
Ruddick, On the Contingency of Natural Law (Phila., 1932).
Inge, Liberty and Natural Rights (Oxford, 1934).
Ritchie, Natural Rights (London, 1924).
Pound, Law and Morals (N. Carolina, 1924).