THE LEGAL PHILOSOPHIES OF LASK, RADBRUCH, AND DABIN

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GENERAL THEORY OF LAW
By JEAN DABIN
1944

CAMBRIDGE · MASSACHUSETTS
HARVARD UNIVERSITY PRESS
1950

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GENERAL THEORY OF LAW

PART THREE

NATURAL LAW, JUSTICE, AND THE LEGAL RULE

INTRODUCTION

199. Statement of the Problem. Truth to tell, the question of the relationships between natural law and justice, on the one hand, and the law, on the other, has already repeatedly been touched upon. At the outset of our exposition, we have encountered the thesis that the study of the concept of law should begin with the idea of justice rather than with the idea of the rule, a method that anticipates the solution in affirming the fundamental identity in content of law and of justice. Later on, in dealing with the problem of the “given” and the “construed” in the law, we have been led to contradict the conception of a natural legal “given,” or natural law, defined as the objectively just, which would represent the substantial element of the legal regulation. Finally, treating of the method of elaboration of the law, we have evoked and analyzed the concept of the public good which, while altogether distinct from natural law and justice, cannot fail to have close ties to these latter concepts: Can one conceive of the public good turning its back on natural law and justice? But these ties, evident a priori, are now to be examined more closely. The problem arises as follows: What place do the concepts of natural law and justice occupy within the “complex” of the law? If they are located neither at the starting point nor at the center of the system, how and on what ground do they figure therein? What is their rôle as factors in the elaboration of the law in the previously defined sense of a rule laid down by the civil society?

200. Objective Value of the Ideas of Natural Law and Justice. It is useless to discuss these problems unless one begins by recognizing a meaning in the concepts of natural law and justice as norms of reason, endowed with objective value. True, some claim that men — individuals and collectivities — in their behavior would not let themselves be guided by any ideal principle detached from their passions and their self-interest. Especially in their relationships with others they would obey

only the “law of the jungle”: *Homo homini lupus.* The statutes and customs making up the positive law would indeed be but the product of the physical or economical superiority of the actual holders of power or, at least, the expression of the balancing of antagonistic forces in a determinate moment of history. To others, natural law and justice do indeed exist as either idea-forces driving humanity, or as an ultimate aid against the established law; but that ideal would be only a “myth” or at least a gratuitous hypothesis. Now, if that is so, everything comes tumbling down at once: Natural law and justice, undoubtedly, and also the norm of a public good prevailing over the individual interest, and the very principle of a subjection of the law that is called positive to a rational method of elaboration. The established law is what it is, nothing more; it is valid by itself, by the power of those who have laid it down. The despotism of the legislator rules and replaces the despotism of the individual.

The vast majority of men, however, ignorant or thoughtless, are communicants of the cult of natural law and justice, and they believe therein as a reality of the philosophical and moral, if not of the peculiarly scientific, order. Unfortunately, save for a unanimity in principle as to the ethical character of the two concepts, disagreement prevails among specialists as to the exact definition of each. That is why a comparative study as broached here must logically begin with an attempt to point up the paralleled concepts. These concepts are also so important in the sphere of the moral sciences that the jurist should not regret the time devoted to their analysis, even independently of their rôle on the properly legal plane.

CHAPTER I

THE CONCEPT OF NATURAL LAW

SECTION I. THE TRADITIONAL CONCEPTION

201. Natural Law as a Norm of Human Conduct. According to the most generally accepted use of the term in our time, the noun “law” in

* [Man is a wolf to his fellow man.]

* [See supra, no. 109.]

* In this sense, see among others the two pamphlets by H. de Page, L’idée de droit naturel (Bruxelles, 1938) and Droit naturel et positivisme juridique (Bruxelles, 1939).
the expression "natural law" is taken in the sense of a certain rule of
conduct with man as its subject and imposed in a categorical fashion
upon his activities, and not of a scientific law or a technical rule. That
is why we exclude at once the idea of a natural law constituted by eco-
nomic laws, which are scientific laws and are also capable of technical
utilization; and we exclude also the idea of a natural law common to men
and animals (inasmuch as man is an animal) or common to all crea-
tures, both animate and inanimate.8

However, the subject matter of the rule of human conduct which
constitutes natural law is not specified a priori: Jus naturae and jus naturale,
on the one hand, and lex naturae and lex naturalis, on the other, are
interchangeable terms.

It is true that sometimes the terms "natural law" and "natural right,"
on the model of the plain words "law" and "right," are taken to mean
the naturally just. Thus, St. Thomas Aquinas, in dealing with the virtue
of justice, defines justice as the virtue which has as its object the lawful
right of another (jugum),5 which lawful right may be natural (jugum
naturale) or positive (jugum positivum).6 "Lawful" there signifies what the
[Continental] jurists call the subjectively lawful or legal right, as op-
posed to the objectively lawful, objective law or norm of law.7 How-
ever, at the end of the same article, St. Thomas evokes a jus divinum which,
similar to the jus humanum, decrees precepts concerned with morally
good things (bona) and prohibitions concerned with morally bad things
(mala), wherefrom it follows that the jus divinum in question is nothing
else than the lex divina (this term is also found there).7 In the following
article, trying to classify the jus gentium, St. Thomas considers hy-

1See, in this sense, E. LAMBELOT, Un PARiage DE I'USINE DE COMPARE (Paris, 1938) — or even Gény's definition paraphrased above, no. 110, which is
concerned with a "fund of moral and economic virtues," though "principally"

moral ones.

2See, e.g., ULMIAN, D. 1, 1, 1, 3. Cf. ST. THOMAS, SUMMA, Ia IIae, qu. 94,
art. 2 ad res., art. 3 ad 2. On the jus naturale common to men and animals, see
F. Senn, De la justicé et du droit 50-73.

3See ST. THOMAS, SUMMA, Ia IIae, qu. 95, art. 2 ad 3. The law being a matter of
reason, only what participates in eternal law in the reasonable creature properly
merits the name of law.

4ST. THOMAS, op. cit., Ia IIae, qu. 57, art. 1.

5ST. THOMAS, op. cit., Ia IIae, qu. 57, art. 1. In the same sense, see also Cicero,
De inventione 2, 53, 156; ... ; also 2, 72, 65.

6See A. COFEN AND CAPTAIN, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS
(9th ed. by Juliot de la Morandière) no. 1, p. 1.

7ST. THOMAS, op. cit., Ia IIae, qu. 57, art. 2 ad 3.

8This is the place to set forth the process of knowing the rule of natural
law, notably the mechanism of the anguish of conscience. Let us note only that,
like reason, it is also "natural" in man; see ST. THOMAS, SUMMA, Ia IIae, qu. 94,
art. 4 ad res. and ad 3.
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from contradicting it. How could the legislator, or at least the human legislator, have the power to rebel against the "given" of human nature?

From the characteristics of human nature flow the characteristics of natural law. As human nature is identical in all men and does not vary, its precepts have universal and immutable validity, notwithstanding the diversity of individual conditions, historical and geographical environments, civilizations and cultures. As, on the other hand, nature cannot deceive itself nor deceive us, its precepts, as much as they are authentic, have a validity that is certain, suffering neither doubt nor discussion.

204. First Principles and Secondary Precepts. As to the extent of the "given" of nature and of what must therefore be referred to natural law, views are divided. The traditional school reserves the name natural, with the characteristics of universality, immutability, and certainty inherent in that quality, to altogether general and necessary "first principles," distinguishing them even from "secondary precepts" or "particular conclusions quite close to the first principles." Other interpretations, of later date, include within natural law not only the first principles, but the more or less close conclusions evolved from the first principles by way of rational argumentation. So there exists, historically at least, a "minimalist" conception of natural law, limited to the strict and direct "given" of the inclinations of nature, and another, "maximalist" one, extending to the solutions that are the proper work of reason in starting from the natural "given," without, however, any

205. Subject Matter of Natural Law: The Totality of the Duties of Man. As regards the subject matter of natural law, or equally of the natural legal rule with which it is synonymous, it embraces all orders of duties imposed by nature, and consequently not only the duty of justice (sum cuique tribuere) or, more broadly, the duties ad alium, but also the duties toward God, the duties toward oneself, the duties deduced from the idea of the family (giving rise to the concept of natural family law), the duties of the political order, incumbent upon subjects as well as upon rulers, at home and abroad (natural political law). Adapting another principle of division, St. Thomas Aquinas classifies "the natural inclinations from which the order of the precepts of natural law flows" as follows: An inclination, common to all substances, toward the conservation of their being according to its proper nature; an inclination, common to men and animals, toward the union of the male and female, the education of the youth, and similar things; an inclination, proper to man, toward the goods conforming to his nature as a rational being, such as the desire to know God and to live in society, which impels him to avoid ignorance, not to do wrong to his neighbor with whom he must maintain relations, and other things of that kind. It is not hard to recognize in that classification the principles corresponding to the totality of the duties of man: Toward himself, toward his family, toward God, toward his neighbor, toward society.

206. Tendency to Emphasise the Duties "Ad Alterm." Contrary to what is sometimes said, even the theorists of the "state of nature"

See, in this sense, notably 2 F. GÉNY, SCIENCE ET TECHNIQUE EN DROIT PRIVÉ POSITIF nos. 159 and 175; also H. CAPITAIN, INTRODUCTION À L'ÉTUDE DU DROIT CIVIL. (4th ed.) no. 9, pp. 35-36.

[To render to each his own.]
guarded against excluding the social duties from their natural law. It did not escape them that human nature is not only individual, that it is also social and political. Under the name of the "state of nature" they merely proposed (on the dialectical level, incidentally) to disregard all positively established economic, social, and legal institutions proceeding from the actual and concrete functioning of the diverse particular societies. More than that, one observes a tendency, precisely in the "law of nature and of nations" school, to put into clear relief, side by side with the "rational nature," the "sociable nature" of man, with the duties ad alterum, both interindividual and properly social, which follow from it. No doubt the natural law, or its rule, continues to extend over all orders of duties, including the duties toward God and toward oneself; but the emphasis is upon the duties which life in society imposes. Are we to see in this insistence (rather uncertain, to be sure) the bait for a deviation from the first idea of natural law, which would slide imperceptibly from the plane of moral and social science, where it had first been installed, to the adjoining plane of specifically legal science?

29 See, in this sense, Puffendorf, LE DROIT DE LA NATURE ET DES GENS [De jure naturalis et gentium] (transl. by Barbeyrac, Basle ed., 1771) [English transl. by C. H. and W. A. Oldfather, in Scott's CLASSICS OF INTERNATIONAL LAW (1934)], bk. II, chaps. II and III, § XXII and n. 1 by Barbeyrac § XXIV. In general, concerning the conception of the "state of nature," see Ph. Meylan, Jean Barbeyrac (Lausanne, 1937) 189 et seq., 202 et seq.