

OPENNESS TO TRANSCENDENCE AS THE FOCAL POINT FOR CREATING A JUST SOCIETY AND AN ETHICAL LEGAL-JUSTICE SYSTEM

George Ndemo

The notions of law will indicate to us that if law is the tool for establishing a just social order by commanding acts that are in themselves just, there obviously must be a transcendent norm of justice to which human law must conform in order that it itself may be just. This higher law has consistently been acknowledged to be the key to classical jurisprudence. The paper will demonstrate that the doctrine of natural law peculiarly synthesizes the whole philosophy of classical politics and jurisprudence.

We all know that law is commonly understood as the set of enforced rules under which society is governed while a state is seen as a special organ whose responsibility is to work out certain representations that hold good for the common good. Law is one of these representations. However, precisely because all governments good or bad, despotic or benevolent, appear to use law, there is a tendency to regard the superficial form of a law as the whole of its reality. Since in this judgment no criteria are applied for determining whether the action that is decreed is truly law, the result is that law in the popular acceptance of the term is invariably considered a restriction of freedom and a subjugation of the individual to a coercive power of the state. As Bentham and Beudant did, laws are then commonly regarded as necessary evils since they necessarily limit freedoms and rights.

If the law is what the courts will enforce, and if the function of the lawyer is, on occasion, that of opening up new meanings and new applications of the law to the court, the question arises whether the courts in rendering such interpretative decisions actually make law or only discover the potential applications latent in the law. According to Paul Woelfl there are two distinct attitudes developed towards the question of what the law is: legal positivism and legal organism. To the legal positivists, law is the effective, unchecked will or command of the sovereign legislator. Since for the positivists there are no philosophical absolutes, the notion of justice plays no part either in the making of law or in the application of its terms to specific situations – law is what the judges say it is and what the courts will do in applying it. Every court decision is the correct one; and the latest decision is presumed to hold only until the next one changes it.

The legal organicism approach assumed that all law is a product of historical evolution - a universal force manifesting itself under various formalities – here as custom, there as legislation, and everywhere as international obligation. And just as positivism placed great emphasis on the distinction between *what law is* and *what law should be*, regarding only the former as having the reality of law; so in a similar way organicism emphasizes a distinction between rudimentary law and formulated law (the latter being merely an uncovering/discovery of the former). The most that a legislature or judiciary can do for law is to discover a rule that will temporarily frame a certain segment of this vast legal perspective in a preservable record, not unlike the capture of an historical event by photography.

However, we need ask ourselves: what is apt subject matter for law? Are there matters that are *ultra vires* and beyond the legitimate scope of authority? St. Thomas explains that “human reason is not, of itself, the rule of things. But the principles impressed on it by nature are the general rules and measures of all things relating to human conduct, of which the natural reason is the rule and measure, although it is not the measure of things that are from nature.” This makes law anything but arbitrary. It makes observance of law a cooperation in the purposes of authority, not a subjection to another’s will power. It alters the notion of law so that it is not a negative restriction placed on liberty, but a positive guide for ordered conduct. And finally, it shifts the obligation of justice from the persons of both the ruler and the ruled to the rule itself. And the yardstick for judging its validity is the rule of reason – the ultimate common good and fixed purpose of all human action, human happiness.

There is no pluralism in the choice of moral principles, but there is a legitimate plurality of temporal options given the variety of strategies available for accomplishing or guaranteeing the same fundamental value, the possibility of different interpretations of the basic principles of political theory, and the technical complexity of many political problems. This aspect of pluralism does not slide into relativism because it is based on the ontological dignity of the human person and not on a non-existent equality among cultural systems of human creation.

Any growing nation must respect and embrace the two fundamental features of Modern society – democracy and human rights. Democracy can never be a self-fulfilling justification for policies that are intrinsically immoral. Democracy is not a self-sufficient moral system. Democracy, if it is to be healthy, requires more than universal suffrage: it requires the presence of a system of common values. On the other hand, it is absurd that human rights are sometimes advanced to support claims to individual autonomy which are morally inappropriate. Not everything said to be a right really is one. There is no right to choose to harm another, for instance. The proliferation of alleged rights can devalue the concept. So can the amplification of rights without equivalent stress on duties, and without some concept of the common good to which all have an obligation to contribute. However, that reservation must not be allowed to destroy the value of the principle itself: individuals have a claim on each other and on society for certain basic minimum conditions without which the value of human life is diminished or even negated. Those rights are inalienable and are therefore in no way dependent for their existence on recognition by the state by way of public legislation. The study of the evolution of the idea of human rights shows that they all flow from the one fundamental right to life. From this derives the right to those conditions which make life more truly human; religious liberty, decent work, housing, health care, freedom of speech, education, and the right to raise and provide for a family. It is the destiny and duty of each human being to become more fully human. A society which observes human rights will be a society in which this true human growth is encouraged. Every member of the community has a duty to the common good in order that the rights of others can be satisfied and their freedoms respected.