

THE ROLE OF LEGAL ETHICS AND JURISPRUDENCE IN NATION BUILDING

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The Call for Papers for this conference stated that "Jurisprudence, understood as the philosophy of law, tells us that the legal profession contributes to the common good by achieving justice in society." The first requirement, of course, is to define justice. Immediately we encounter the epistemological problem: can we really *know* what justice is? If the answer is "yes," it raises the possibility that the enacted law will be subject to that knowable standard of justice. This is the epistemological basis of every natural law theory of jurisprudence. If, on the other hand, we cannot know what justice is, then the enacted law cannot be criticized as unjust. A law enacted by prescribed procedures will be valid regardless of its content. This is the epistemological basis of every theory of legal positivism.

The jurisprudence of Hans Kelsen illustrates this point. He espoused "philosophical relativism," which "advocates the empirical doctrine that reality exists only within human knowledge, and that, as the object of knowledge, reality is relative to the knowing subject. The absolute, the thing in itself, is beyond human experience; it is inaccessible to human knowledge and therefore unknowable." He rejected the metaphysical view that there is an absolute reality – a reality that exists independently of human knowledge. Kelsen believed that philosophical absolutism leads to political absolutism, while philosophical relativism leads to political relativism, i.e., democracy: Kelsen went on to explain why he regarded the believer in "the absolute good" as a threat to democratic governance: "[This belief irresistibly leads – and has always led – to a situation in which the one who assumes to possess the secret of the absolute good claims to have the right to impose his opinion as well as his will upon the others who are in error. And to be in error is, according to this view, to be wrong, and hence punishable. If, however, it is recognized that only relative values are accessible to human knowledge and human will, then it is justifiable to enforce a social order against reluctant individuals only if this order is in harmony with the greatest possible number of equal individuals, that is to say, with the will of the majority. It may be that the opinion of the minority, and not the opinion of the majority, is correct. Solely because of this possibility, which only philosophical relativism can admit – that what is right today may be wrong tomorrow – the minority must have a chance to express freely their opinion and must have full opportunity of becoming the majority. Only if it is not possible to decide in an absolute way what is right and what is wrong is it advisable to discuss the issue and, after discussion, to submit to a compromise. This is the true meaning of the political system which we call democracy, and which we may oppose to political absolutism only because it is political relativism."

Kelsen regarded Aquinas' *Summa Theologica* as one of "the classical examples of...coincidence of philosophical and political absolutism." Kelsen, however, misread Aquinas. St. Thomas rejected absolutist government and cautioned that the law should not try to prescribe every virtue or forbid every vice. The purpose of the human law, he said, is to promote the "common good" and that law should "lead men to virtue, not suddenly but gradually." Otherwise, the law would be unenforceable and the law itself would be "despised" and "greater evils" would result.

Law, according to Kelsen, is a system of coercive rules called “legal norms.” Those rules are prescribed by the legislator in accord with the “basic norm” or constitution of the community. That basic norm may or may not be in a written constitution. The legislator may be a court, an executive or administrator, or a legislature. The legislator decides what the basic norm is and whether any particular law is in accord with it. Nor is there any restriction on the content of legal rules. “Any content whatsoever can be legal; there is no human behavior which could not function as the content of a legal norm.” The only requirement for a law to be valid and binding is that “it has been constituted in a particular fashion, born of a definite procedure and a definite rule.” The legislator decides what law will be useful and in accord with the basic norm as determined by himself. Once a law is enacted and in force, it is obligatory. There is no knowable higher law of nature or of God, and the ultimate criterion is the enforced will of the legislator. The positive law cannot be criticized as unjust. Kelsen’s “philosophical relativism” can offer no basis for objecting, on grounds of justice, to decisions made through the political process. Kelsen acknowledged that the laws of the Nazi and other totalitarian regimes, regardless of their content, were valid because they were duly enacted: “The legal order of totalitarian states authorizes their governments to confine in concentration camps persons whose opinions, religion, or race they do not like; to force them to perform any kind of labor, even to kill them. Such measures may be morally or violently condemned; but they cannot be considered as taking place outside the legal order of those states.”¹ Thus, “from the point of view of the science of law, the law under the Nazi-government was law. We may regret it but we cannot deny that it was law.”² (50 Q. 93-94)

Kelsen’s “pure theory of law” is instructive because it is the most clear-cut form of legal positivism. All positivist systems, however, are characterized, in greater or lesser degree, by the denial of the capacity of human reason to know what is right and wrong. They are concerned only with what the law is, not with what it ought to be. For Oliver Wendell Holmes, the leading figure in American Legal Realism, “law” is not an ordinance of reason, but merely “a statement of the circumstances in which the public force will be brought to bear upon men through the courts: that is the prophecy in general terms. Of course the prophecy becomes more specific to define a right.”³ For Holmes, “the sacredness of human life is a purely municipal ideal of no validity outside the jurisdiction. I believe that force, mitigated so far as may be by good manners, is the ultima ratio, and between two groups that want to make inconsistent kinds of world I see no remedy except force.”⁴ Holmes, perhaps the leading figure of American jurisprudence, defined truth as “the majority vote of the nation that could lick all others.”⁵ “I see no reason for attributing to man,” he wrote, “a significance different in kind from that which belongs to a baboon or a grain of sand.”⁶

¹Hans Kelsen, *Pure Theory of Law* (1967), 40; see R.S. Clark, "Hans Kelsen's Pure Theory of Law," 22 *J. of Leg. Ed.* 170, 182 (1969).

² Hans Kelsen, *Das Naturrecht in der politischen Theorie* (F.M. Schmoetz, ed., 1963), 148, quoted in translation in F.A. Hayek, *Law, Legislation and Liberty* (Vol. 2, *The Mirage of Social Justice*) (1976), 56.

³2 Holmes-Pollock Letters (1941), 212.

⁴2 Holmes-Pollock Letters (1942), 36; See Oliver Wendell Holmes, “The Natural Law,” 32 *Harv. L. Rev.* 40, (1918).

⁵Oliver Wendell Holmes, *The Natural Law: Collected Legal Papers* (1920), 310.

⁶2 Holmes-Pollock Letters (1942), 252; see discussion in William Kenealy, S.J., “The Majesty of the Law,” 5 *Loyola Law Rev.* 101, 107-08; Charles E. Rice, *Beyond Abortion: The Theory and Practice of the Secular State* (1979), chs. 2 and 6.

In 1942, Francis E. Lucey, S.J., described the contrast between the natural law and the postivist Legal Realism espoused by Holmes and his successors under various labels:

Non-natural law systems of Jurisprudence rest on a view of man's nature that makes man independent of his creator and hence the helpless prey of his fellow men. For Holmes and the Realist he is a sort of superior animal. For Scholastic Natural Law, man is a being with a mind and a soul, and hence, superior to animals. He derives his dignity not from other men, but from God his creator. This question of God and morals in law is the real basic difference between Natural Law and other philosophies of law. If there is no God, man is only an animal. He has no innate dignity and no *de jure* independence. He is bound by no norm. Morals have no place in law. Man is subject to the law for animals, physical force. This much must be said for Realism. If man is only an animal, Realism is correct, Holmes was correct, Hitler is correct.⁷

Whether utilitarian, social contract, realist or any other, all systems of legal positivism rest upon an epistemological agnosticism that precludes the measurement of enacted law by any standard of objective justice. Thus Jeremy Bentham described assertions of “an eternal and immutable Rule of Right” as “sentiments.”⁸ John Stuart Mill concluded that “the non-existence of an acknowledged first principle has made ethics not so much a guide as a consecration of men's actual sentiments.”⁹ John Locke, who regarded the purpose of the state, formed by the social contract, as the protection of rights, subjected the content of law, including the definition of rights, to majority rule: “And thus every man, by consenting with others to make one body politic under one government, puts himself under an obligation to every one of that society to submit to the determination of the majority, and to be concluded by it.”¹⁰

To serve a coherent role in “nation building,” a system of jurisprudence ought to provide an objective guide for determining the content of general terms in the constitution and laws. And it ought to provide a reasoned basis in objective justice for critical evaluation of enactments enforcing those general terms. The Constitution of Kenya contains numerous provisions which raise these issues.¹¹

⁷Francis E. Lucey, S.J., “Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society,” 30 Georgetown L. J. 493, 531 (1942). See also, Charles E. Rice, *Beyond Abortion: The Theory and Practice of the Secular State* (1979), 7-15.

⁸Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, (Oxford, Clarendon Press, 1907), Chap. II, no. 14, p.17.

⁹John Stuart Mill, *Utilitarianism, Government*, (London, J.M. Dent & Sons, Ltd.), Chap. I, p.3.

¹⁰John Locke, *Two Treatises of Civil Government* (London, J.M. Dent & Sons, Ltd.), Book II, Chap. VIII, p.165.

¹¹ The Constitution of Kenya guarantees to “every person in Kenya the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin or residence or other local connexion, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely—

- (a) life, liberty, security of the person and the protection of the law;
- (b) freedom of conscience, of expression and of assembly and association; and
- (c) protection for the privacy of his home and other property and from deprivation of property without compensation. Sec. 70.

No constitutional guarantees of rights and freedoms can be foolproof against misinterpretation or abuse. But a jurisprudence of epistemological agnosticism can offer no principled basis for setting moral boundaries to the interpretation of constitutional texts.

The interpretation of constitutional guarantees will promote the common good and safeguard liberty only if the interpreters recognize in their work an intellectually knowable, objective content to the terms in which constitutional guarantees are phrased. The identification of such objective content is not a sectarian religious enterprise. It rather involves an explication of principles rooted in natural law as well as culture.

The natural law performs a “constructive” and a “protective” function with respect to human law. In its constructive role, natural law provides a guide for the enactment of laws to promote the common good. While the human law, as Aquinas emphasized, should not attempt to prohibit every vice or enforce every virtue,¹² the natural law can serve as a guide to the way things ought to work according to reason and nature. Natural law principles of morality and social justice ought to inform the public discussion of issues such as the family, the economy, the prevention of racial discrimination, etc. This is not to claim that natural law “pretends to be some sort of magic formula that furnishes handy answers for whatever practical legal questions may arise.”¹³ In its constructive role, it offers not a cookbook of legal and social recipes, but a guide to general reasonable principles and objectives.

In its second, or protective role, the natural law provides a basis for criticism of the enacted law as unjust. In this role it can be protective of the rights of the people. It provides a basis for us to draw the line and to criticize an act of the state as unjust and void. Without the natural law, the people have no basis other than the pragmatic and utilitarian on which to respond to unjust laws. The ability, provided only by natural law, to challenge the very validity of an unjust law is an important safeguard against the enactment and enforcement of such laws. This protective function is also constructive in that the recognition that there is a protective line beyond which the state may not go may serve to encourage the enactment of laws that are truly just.¹⁴

The Constitution also provides that: “No person shall be subject to torture or to inhuman or degrading punishment or other treatment.” Sec. 74(1).

“Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section that freedom includes freedom of thought and of religion, freedom to change his religion or belief, and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.” Sec. 78(1).

“(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class of personal and freedom from interference with his correspondence.

“(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—
(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health. Sec. 79 (1)(2).

¹² See Questions 13 and 14, below.

¹³ Thomas E. Davitt, S.J., “St. Thomas Aquinas and the Natural Law,” in *Origins of the Natural Law Tradition* (1954), 45.

¹⁴ See discussion in Charles E. Rice, “Some Reasons for a Restoration of Natural Law Jurisprudence,” 24 *Wake Forest L. Rev.* 539, 566-67 (1989).

Inevitably, however, an affirmation of natural law must identify its author. Anytime anyone tells you that some proposed action is “against the law,” the instinctive response should be – and is – to ask, “Whose law?” The natural law can be explored coherently only if we can identify the Lawgiver of that natural law. The Author of the natural law has to be the Author of nature, i.e., God. Thus, the Declaration of Independence of the United States affirmed its reliance on “the Laws of Nature and of Nature’s God.” The Declaration stated “that all men are created equal, that they are endowed by their Creator with certain unalienable rights.” If there is no God and therefore no ultimate Lawgiver higher than the state, what basis can there be for affirming a transcendent dignity of the human person over against the State? And what limits, other than the political, can there be to what the state can do to manipulate and otherwise oppress human beings?

As you read these lines, a child is being born in Nairobi or elsewhere in Kenya. That child’s life began about nine months previously. That child’s soul, his life principle, is spiritual. We know this because the human person has the natural faculty to perform the activities of abstraction and reflection, which are activities that only a spiritual entity can perform. That child’s soul, of its nature, is immortal because, as a spiritual entity, it has no parts. Since the death of an entity is its breaking into its component parts, the nature of the spiritual soul is to live forever and not to die. We know from Revelation that the immortal human person was created by God to share eternally in the perfect happiness of the life of the Trinity.¹⁵ Someday there will be no Nairobi, no Kenya, no Rome, New York, China, etc. It will all be gone. But that child will still be alive. This is the only basis for a coherent assertion of transcendent, inviolable rights against the state. Every state that has ever existed, or that ever will exist, has gone out of business or will go out of business someday. But every human being who has ever existed, or ever will exist, will live forever. That is why the state exists for the person and not *vice versa*.

For the past three centuries and more the philosophers and politicians of the Enlightenment have attempted to build society as if God did not exist. “Religion had to be purged from public life because, with the enshrinement of ‘reason’ as the guide of men, the experiences which inspired religious symbolisms were deemed unscientific.”¹⁶ Measured by its own utilitarian criteria, the Enlightenment project has not worked. The twentieth century produced more declarations of human rights than any previous century. Yet it produced also an unprecedented denial of rights on a massive scale, including the systematic extermination of target groups. Nor was that century notable for the maintenance of high ethical standards by individuals in the conduct of government and business, as seen in examples from the United States as well as other nations.

It is time to reassess the epistemological assumptions of Enlightenment jurisprudence, especially as it relates to “nation building.” An underappreciated resource in this reassessment is the work of the Polish Pope, John Paul II. He is, of course, a religious leader. But his writings, including especially *Centesimus Annus*, *Evangelium Vitae*, *Veritatis Splendor* and *Fides et Ratio*, among others, establish him, in this writer’s opinion, as the foremost contemporary writer of jurisprudence as that term is defined in the Call for Papers of this Conference. John Paul’s teachings are normative for Catholics but they can be considered with profit by all persons who seek to integrate the law with reason and liberty.

This essay does not pretend to offer a systematic analysis of positions taken by the Pope. Rather, the purpose is to suggest that his analysis of principles and events ought to be taken

15 See discussion in Charles E. Rice, “50 Questions on the Natural Law” (2d ed., 1999), 125-71.

16 William Smith, “The First Amendment and Progress,” *Humanities* (Summer, 1987), 1, 6.

seriously by any who are involved in the process of nation building. That purpose will best be served if we simply allow John Paul to speak for himself.

John Paul II challenges the jurisprudence of the Enlightenment on its basic premises of secularism, relativism and individualism. His position directly confronts Hans Kelsen's concern that what Kelsen called "philosophical absolutism" would lead to tyranny. "To believe it possible to know a universally valid truth," said John Paul, "is in no way to encourage intolerance; on the contrary, it is the essential condition for sincere and authentic dialogue between persons."¹⁷ If reason cannot know any ultimate, objective truth, how can people reason about goals and policies except in pragmatic, instrumentalist terms reducible to the enforcement of interests without moral limits?

One reason John Paul believes that "there can be no freedom apart from or in opposition to the truth" is because "only by obedience to universal moral norms does man find full confirmation of his personal uniqueness and the possibility of authentic moral growth... . [T]he foundation of genuine democracy ... can develop only on the basis of the equality of all its members, who possess common rights and duties. *When it is a matter of the moral norms prohibiting intrinsic evil, there are no privileges or exceptions for anyone.* It makes no difference whether one is the master of the world or the 'poorest of the poor' on the face of the earth. Before the demands of morality, we are all absolutely equal."¹⁸

"[I]n the last century," wrote John Paul, "various forms of atheistic humanism...expressed in philosophical terms...regarded faith as alienating and damaging to the development of a full rationality. They did not hesitate to present themselves as new religions serving as a basis for projects which, on the political and social plane, gave rise to totalitarian systems which have been disastrous for humanity."¹⁹

John Paul insists, instead, that "the foundation on which all human rights rest is the dignity of the person."²⁰ That dignity flows from man's creation with an immortal destiny which transcends the state. In his address to the 1986 International Congress on Moral Theology, the Pope said:

That there in fact exists a moral good and evil not reducible to other human goods and evils is the necessary and immediate consequence of the *truth of creation*, which is the ultimate foundation of the *very dignity* of the human person.

Called, as a person, to immediate communion with God; the object, as a person, of an entirely singular Providence, man bears a law written in his heart that he does not give to himself, but which expresses the immutable demands of his personal being created by God, granted a finality by God and in itself endowed with a dignity that is infinitely superior to that of things. This law is not only made up of general guidelines, whose specification is in their respective content conditioned by different and changeable historical situations. There are moral norms that have a precise content which is

17 F.R., no. 92.

18 Veritatis Splendor, no. 96.

19 Faith and Reason, no. 46.

20 Ecclesia in America, no. 57.

immutable and unconditioned... . (WS 307)

“In the political sphere,” John Paul said, “truthfulness...between those governing and those governed, openness in public administration, impartiality [and] the rejection of equivocal or illicit means...all these are principles...rooted in...the transcendent value of the person and the objective moral demands of the functioning of States. When these principles are not observed, the very basis of political coexistence is weakened and the life of society itself is gradually jeopardized...and doomed to decay.”²¹

In *Fides et Ratio*, John Paul noted the “tendency to grant to the individual conscience the prerogative of independently determining the criteria of good and evil and then acting accordingly. Such an outlook is quite congenial to an individualist ethic, wherein each individual is faced with his own truth different from the truth of others.”²² But as John Paul put it, “the roots of the contradiction between the solemn affirmation of human rights and their tragic denial in practice lies in a *notion of freedom* which exalts the isolated individual in an absolute way, and gives no place to solidarity, to openness to others and service of them. [A] completely individualistic concept of freedom, ... ends up by becoming the freedom of ‘the strong’ against the weak who have no choice but to submit... . If the promotion of the self is understood in terms of absolute autonomy, people inevitably reach the point of rejecting one another. Everyone else is considered an enemy from whom one has to defend oneself. Thus society becomes a mass of individuals placed side by side, but without any mutual bonds. Each one wishes to assert himself independently of the other and in fact intends to make his own interests prevail. Still, ...some kind of compromise must be found if one wants a society in which the maximum possible freedom is guaranteed to each individual. In this way, any reference to common values and to a truth absolutely binding on everyone is lost and social life ventures onto the shifting sands of complete relativism. At that point, *everything is negotiable, everything is open to bargaining*; even the first of the fundamental rights, the right to life.”²³

One object of nation building is to guarantee to every person “the fundamental rights and freedoms of the individual.” Constitution of Kenya, Section 70. These brief selections from the writings of John Paul II indicate the relevance of his thought to the task of implementing such a guarantee. Whatever else the twentieth century has taught us, it has shown the futility of the relativistic attempt to guarantee rights without a coherent concept of the human person and his dignity. It is time for another approach. Whether we regard John Paul II as merely a Polish expatriate in Rome or as the Vicar of Christ, we can profit from consideration of his insights on the dignity of the person in the context of nation building.

21 Veritatis Splendor, 101.

22 FR, no. 98, quoting Veritatis Splendor, no. 32.

23 E.V., nos. 19-20.