

1953

The Natural Law — Its Nature, Scope and Sanction

John E. McAniff

Recommended Citation

John E. McAniff, *The Natural Law — Its Nature, Scope and Sanction*, 22 Fordham L. Rev. 246 (1953).
Available at: <http://ir.lawnet.fordham.edu/flr/vol22/iss3/2>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

THE NATURAL LAW — ITS NATURE, SCOPE AND SANCTION*

JOHN E. McANIFF†

THE effects of the last war have again brought into vivid focus the Natural Law, its origins and its consequences. They have also demonstrated once again that Natural Law is not a mere abstraction without practical consequences but that it can and does have a profound influence on the life and property of every living person.

When we speak of the concept of Natural Law, we are not speaking of something new. It goes so far back that we cannot ascertain its exact beginnings. It can be traced back through the writings of the early American jurists (James Wilson, Works, Vol. 1, Part 1; Chancellor Kent in *Wightman v. Wightman*, 4 Johnson's Ch. 343 (N.Y. 1820)), through the English writers (Blackstone, Commentaries Introd. Sec. 2, p. 40, Edmund Burke on the East India Bill), through the Scholastic writers (St. Thomas Aquinas, 10 Sent. 32-1-1, Suarez, De Legibus), through the Latin writers (Cicero, Laws 1, VI, 18; Pandects Book 1), and back through the Greek writers (Aristotle Rhetoric I, 1373 b; Politics I, a; Sophocles, Antigone). Indeed, Antigone in Sophocles' great play proclaimed the supremacy of the unwritten law and died for it without regret.

When I refer to the history and origin of Natural Law, I do not suggest that those who uphold the Natural Law have held the field alone. On the contrary, there have been and are many who contend that there is no such thing as Natural Law, and that it has no proper place in our Jurisprudence. There have been others who have gravely misunderstood the Natural Law and by misunderstanding it have denied to it its rightful place in our Jurisprudence. We are concerned here today, however, not primarily with refutation, but with a positive approach.

What then is the meaning of Natural Law?

When God created the world, He necessarily intended that everything in it should be directed to its final purpose. This act of God's will, directing everything by a rule of action to its final purpose is the eternal law. In non-living objects the rule of action operates by means of compelling forces. Two parts of hydrogen will unite with one part of oxygen to make water. In living things there are different classifications. Vegetative agents, although they have life, also operate by means of

* Address at Symposium held by Guild of Catholic Lawyers of New York City, December 5, 1953.

† Assistant Professor of Law, Fordham University School of Law.

compelling forces within their natures but without consciousness, such as the absorption of sunlight by plants. Animal agents likewise operate by means of compelling forces within their natures but they do so through the medium of consciousness. When an animal takes food, it is conscious of a desire for food and it is also conscious of the presence of food but it is nonetheless actuated by impulses that cannot be resisted. With man, however, it is different. Man, unlike the rest of created things, has a body and an immortal soul. He has intellect and will. The rule of action by which God is guiding him to his eternal destiny is known to man. He is conscious of it and he is not directed by impulses that are irresistible. The participation by man in the eternal law is what we call the Natural Moral Law. The word moral is used because it applies to man since he has intellect and free will and therefore moral responsibility. We speak of it colloquially as the Natural Law. We can, therefore, state that the Natural Law is a mandatory rule of action, established and promulgated by the Author of Nature, known to man by reason, and imposed upon man by his nature.

We first note that the Natural Law is a rule of action. That means that it acts as a guide to right conduct in the free actions of men.

It is a mandatory rule of action. That means that it is binding on all persons and requires them to obey it.

It is established and promulgated. That means that the rule of action has been determined by God and has been made known to man through the medium of man's own intellect. Thus it is applicable to all men since it is based on man as a creature composed of body and soul with intellect and will.

It is known to man by reason. Revelation is not required to enable man to know that there is a Natural Law. In that concept of Natural Law, we have taken several things for granted. Everything we have taken for granted, however, is established in other branches of philosophy. When I say we have taken them for granted, I do not mean that we have naively assumed that they are so, whether they can or cannot be established. What I do mean is that they have been established in other sciences or branches of philosophy.

We have taken for granted the existence of God, a personal God who created the universe and everything in it for a purpose, including man composed of body and soul, a spiritual immortal soul with the functions of intellect and will, an intellect that can know objective truth and a will which is free. Those are the foundations on which Natural Law is based.

We have said that the Natural Law is known to every human being by reason. Does that mean that everybody will necessarily reach the

same conclusions regarding the morality of all actions under all circumstances? By no means, and the reason must be clear. The Natural Law contains a number of precepts. Some of these precepts are known clearly and without difficulty. Other precepts are known only with more or less difficulty and there may be reasonable ground for difference of opinion about them.

For example, the primary precept of the Natural Law is "do good and avoid evil." That principle is known by every human being who has the use of reason. It is known to him by his intellect as soon as he is able to recognize the difference between right and wrong. It is the most universal of the precepts of the Natural Law and all the other precepts of the Natural Law flow from it.

Knowledge of the terms "good" and "evil" will be acquired and enlarged by education, training and experience. Good is something that befits and perfects human nature. Evil is something that does not befit human nature and which disrupts it. That is why the proper concept of human nature is so essential for an accurate understanding of the Natural Law.

Then there are the secondary precepts of the Natural Law. The secondary precepts are easily derived conclusions from the first precept. They are generally recognized by all who have the use of reason. Examples of these secondary precepts would be the following: Blasphemy is forbidden. Murder is wrong. These secondary precepts are generally contained and summarized in the Ten Commandments, but that does not mean that they are known to us by Revelation. They are known by reason and the Ten Commandments are simply a revealed codification of the secondary precepts.

Finally, there are the other precepts. They are not as clear as the principles contained in the primary and secondary precepts and are not as easily known. To the ordinary person they would not be clearly evident and in fact it would often be necessary for some persons to be guided by the positive law on the subject, or, in the absence of positive law, to seek the advice of persons more skilled in such matters.

It thus becomes evident that Natural Law demands that it be implemented by positive human law. Those precepts of the Natural Law which can be known with certainty are comparatively few and consist, in large part of general principles. They are not sufficiently numerous or particularized to act as moral guides in the conduct of everyday affairs. They leave a large field of affairs not specifically or expressly covered by the Natural Law. They must be supplemented by human positive law. There is no conflict between the side-by-side existence of Natural Law and human positive law. In fact, Natural Law demands

human positive law. There cannot, however, be any contradiction between the content of Natural Law and of human positive law. The Natural Law is the foundation on which human positive law must be built. Human positive law is law only insofar as it conforms to the Natural Law. If it is in conflict with the prohibitive precepts of the Natural Law, it is not law. Such, for example, would be a positive law which commanded one to do something which was intrinsically wrong. If a law were enacted permitting murder or perjury, the law would not be binding and indeed it would be a grave wrong for anybody to obey the law. That is because it would be directly contrary to the prohibitive precepts of the Natural Law. It does not follow, however, that every law in conflict with the Natural Law is not a law and may be ignored or disobeyed. A tax law, for example, may distribute the burden of taxation inequitably but it does not clearly violate the prohibitive norms of the Natural Law. For that reason the law should be obeyed though every legal means may be employed to obtain its repeal or to secure the passage of a law that is in accord with the principles of justice.

But all other positive laws which do not violate the precepts of the Natural Law are binding. Positive laws are based on the Natural Law; they are guided by it; they specify it; they apply it in practice; they are required by it. It is only in a few of the evident precepts of the Natural Law that we can have certainty. As we draw deductions from them and as we apply them to the practical situations of everyday life, the certainty of our knowledge decreases. There would be grave disorder if each person were allowed to conduct his own everyday affairs by applying the Natural Law. For the sake of public order, human positive laws are imperative but also for the sake of public order and the general welfare all positive laws must be based upon it.

We have spoken of natural rights which are based on the Natural Law. What are some of the natural rights which man possesses and which are thus derived from the Natural Law? The following are some of them (*The American Philosophy of Law*, LeBuffe and Hayes; 1947, Crusader Press):

First is the right to life. Man was created by God and has the duty to use his life and to attain the end which God has destined for him. That end is the complete knowledge and love of supreme truth and supreme goodness. Man is not the master of his own life. He must conserve his life and use it in accordance with God's purpose.

The right to personal liberty is a natural right. Man has the faculties of intellect and will, and his will is free. If he did not have personal liberty, his free will could never be exercised. It would be thwarted

and a faculty which is part of his nature would be rendered purposeless and useless.

The right to freedom of speech is a natural right. Man by nature has the faculty of knowing truth and of communicating it to others by means of speech or other medium of expression.

The right to liberty of conscience is a natural right. Every man having been created by God, he is required by nature to worship God and to observe the law of God.

The right to private property is a natural right because private property is the only satisfactory means by which man can satisfy his natural requirements. He must have property to provide for the everyday requirements of himself and his family and to provide for their future requirements as well.

The right to marry is a natural right. Marriage is the natural means for the procreation and education of human beings. The right to marry as a natural right was recently affirmed by the courts (*Rubin v. Irving Trust Co. et al.*, 305 N.Y. 288, 113 N.E. 2d 424 (1953)). In the same case, however, it was said that "the power of testamentation is 'not a natural or inherent right, but one which the state can grant or withhold in its discretion'." That statement, while it represents the great weight of authority in the law, is subject to serious question. I mention it merely in passing, however, to illustrate the point that, while the primary and secondary precepts of the Natural Law are clearly known, the other principles to be deduced are not so easily known and that such deductions can and sometimes do result in reasonable differences of opinion.

The right to a just wage is a natural right. Man has a natural right to the material things necessary to provide for himself and his family. Under our present economic system most men can obtain these material requirements only through the money which they receive in return for their labor or other personal services.

The right to strike is a natural right. Since man has a natural right to obtain the material things required for himself and his family, he also has a natural right to use proper means to obtain those material things. Among those means and among the other natural rights of man is the right to form a union by means of which they can obtain collectively what they could not obtain individually. If they are not able to obtain their legitimate objectives by other means, then they may strike and in doing so they are exercising a natural right.

The last two (the right to a just wage and the right to strike) are powerful examples of the application of the Natural Law to new conditions. The question of a just wage and the right to strike have arisen only under the stress of modern economic conditions. Yet the

Natural Law contained the principles applicable to those conditions in order to ascertain the rights of men. Thus we see that, although the primary and secondary precepts of the Natural Law are immutable, the application of those principles can change in accordance with changing conditions.

Having observed what Natural Law is, we can now see what it is not. Indeed, a proper knowledge of what it is not, is almost as important as knowledge of what it is. Many of the attacks which have been made on Natural Law have been directed not against Natural Law as it really is but against gross misconceptions and misunderstandings of it.

Natural Law is not a mere abstraction without any basis in reality, and without any practical value or application. In the first place, it is not a valid objection to say that an idea or a principle or a judgment is an abstraction. That objection usually means that the so-called abstraction is general in nature and has not been applied to particular circumstances. Those abstractions, however, sometimes change the face of the world. Such abstractions as Justice, Order, Mercy and Reality have done more than their part to help the progress of mankind. In the second place, Natural Law contains a number of general precepts. Some of them can be applied immediately to certain circumstances by individual persons. For example, murder is wrong. Other general principles may be difficult of application to a set of particular circumstances and it is necessary then to enact laws for the guidance of the individual. The objection then that the Natural Law is a mere abstraction is the same objection that is leveled against any principle that must be applied to particular and varying situations.

Natural Law is not a Divinely revealed code of ordinances. It is known to man by reason and the precepts thus known to him by reason are applied by reason to particular circumstances, or supplemented by human positive laws so that they can be applied with greater accuracy and uniformity. We must not, however, discount the influence of religion. To a person who has firm faith in a personal God, the Creator of man, and has given man a dignity which he has not received from his fellow-man or from the State or by man-made agreement, and who believes that man's destiny is to be re-united with God, the Natural Law will have a vitality and a meaning that it will not have to other men.

Natural Law is not an irresistible force which compels men to obey it. Man has intellect and free will and while there is every incentive for him to carry out the precepts of the Natural Law, he can refuse to do so precisely because he has freedom of choice.

Natural Law is not a subjective feeling of right or wrong which varies with different persons. It is objective. It is truth. Being objective truth,

it is a standard which must be followed by all men and to which the laws of all men must conform. In its ultimate principles it is not subject to change.

Natural Law is not a complete set of rules governing every human action. Nor is it a set of rules so nearly complete that, by making deductions from them, people can be led to conclusions which will properly govern all their actions. Natural Law contains precepts, some known certainly, others with more or less certainty. Large areas of the practical everyday affairs of life are left uncovered by the Natural Law to be filled in by human positive laws based on the precepts of Natural Law.

Natural Law is not an all-embracing fixed set of rules which would prevent any change in the law. The primary and secondary principles of the Natural Law are immutable, but the applications of those principles to particular circumstances can result in error, and in their applications to varying circumstances, to change. The positive law may be changed when a new statute is passed, or an existing statute amended or repealed. The law may also be changed when a precedent is distinguished or overruled, and a new rule announced in its place. There is no conflict between those legal changes and the Natural Law. Such changes are applicable to the areas which are not directly affected by the primary or secondary precepts of the Natural Law. Whether consideration should be required for a contract, whether contributory negligence should bar the remedy of an injured person, whether an automobile should be driven to the right or to the left—these are matters which have not been directly covered by the Natural Law and are properly left to human positive laws, which may be changed, if necessary, to obtain more equal justice. The immutability of the Natural Law does not in any sense involve unchangeableness or even rigidity in human positive law.

What sanctions are attached to the Natural Law? What are the penalties for those who disregard it? Every law must have a sanction and the Natural Law is no exception. The sanction supplies a much-needed motive for observance of the law. The Natural Law was promulgated by God and He cannot be indifferent to its violation or observance. Ordinarily, therefore, the observance of the Natural Law will bring with it many rewards in this life—the satisfaction of integrity, the deep quiet of a peaceful conscience, the joy of a life ordered in accordance with God's will. The violation of the Natural Law, on the other hand, will ordinarily take its toll in the form of a disturbed conscience and dissatisfaction with ill-gotten gains. But that is not always so. Sometimes the pendulum seems to swing only one way and the penalties seem to go to the wrong persons. Consequently, for the

complete and perfect sanction of the Natural Law we cannot confine our vision to this world. We must look to the future. It is the life after death that will furnish the ultimate sanction of the Natural Law in the loss of complete happiness.

But additional sanctions are needed. Even though murder and perjury are wrong in themselves and are forbidden by the Natural Law, we need the added and specific sanctions supplied by human positive laws. These human positive laws will be enacted by legislatures which, like all law-makers, ultimately derive their authority from God. Experience has taught us that the sanctions of the Natural Law which deal with the hereafter are not sufficient. They must be supplemented by the sanctions of the statutes. Those sanctions, of course, are not immutable and will vary with circumstances of time, place and people. In fact, that variation of sanction is another telling refutation of the false theory that the immutability of the Natural Law involves not only fixed principles but also fixed rules applicable to all phases of conduct and fixed penalties for any violations that occur. One of the finest examples of progressive and forward-looking change is to be found in the address made by Pope Pius XII to the Sixth International Congress of Penal Law on October 3, 1953. In that address the Pope proposed the adoption of an International Penal Code to punish such crimes as the making of unjust war, the execution of hostages, mass deportations and slave labor. Nothing could illustrate more graphically the value of having a foundation of immutable precepts from which deductions and applications can be made to new and changing circumstances.

The issue is clear. If there were no Natural Law, man would be the creature of the State. He would have no rights derived from God. He would have no rights based upon his own nature as a rational being possessed of intellect and will. What rights the State might give to him, it could take away from him. "Inalienable" would become another synonym for "expendable." If there were no Natural Law, the State could enact and enforce any laws. Murder, perjury, adultery would no longer be intrinsically wrong. They would be wrong only if the State declared them wrong.

If there were no Natural Law, then any system of government would be permissible and it would be wholly immaterial that the government did not recognize the rights which we regard as beyond the interference of any power. Democracy would mean the same thing as Fascism, Nazism and Communism, and the trials now being held behind the Iron Curtain would be justified. That is the issue. In the solution of that issue we must be guided by a clear understanding of what the Natural Law is, what it has done for us in the past, and what, with God's help, it can do for us in the future.