# THE CHURCH AND THE NATURAL LAW

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THE PROBLEM of the natural law, as it is experienced in the christian community today, cannot be resolved unless it is placed in its wide historical context. We have in relatively recent times come to accept that dogmatic theology can and must develop, even while being implicitly contained in the sources of revelation. We have come to accept the experience of the believing community as in some sense controlling the evolution of dogmatic teaching, and we can distinguish between the fallacy of modernism and the view that the ultimate criterion of christian truth is the faith of the Church. But it is important to remember that, while the dogmatic teaching of the Church has been evolving from the earliest times, it is only recently that we have achieved a theology of the Church capable of accounting for the development that can be seen to have taken place.

*The problem of change*

The moral teaching of the Church, too, can be seen to have evolved. But the use of the term 'natural law' to describe at least part of christian moral teaching makes it difficult to account for the developments in that teaching which can be historically demonstrated to have taken place. Natural law seems to be immutable, to admit of no historical evolution. It is, in consequence, difficult to attribute some role to the experience of the believing community in shaping christian moral doctrine, to distinguish in moral teaching between the fallacy of 'situation ethics', which is the analogue of modernism, and the use of the 'sense of the faithful', the analogue of the faith of the Church, as a criterion of orthodoxy. The theological basis for christian moral teaching, unlike that for christian dogma, does not seem to admit of the possibility of an evolution which is none the less historically demonstrable. As a result the whole theory of 'natural law' in the elaboration of christian ethics, to which christians are today committed, has seemed to be in danger of being discredited. The problem is not a

function in the changing of penal norms or in the norms which govern the deciding of civil cases. These functions are reserved to the legislative body. But in fact the Supreme Court in America and the Court of Appeal in England, responding to a changing sense of what is reasonable and equitable, can be seen to exercise in practice a role denied to them in theory. And in the history of the Church, the tension between a moral teaching which has evolved in fact and a moral theology which was incapable of admitting evolution in theory has long been clear.

One might point as an example to the cancerous proliferation of casuistry which, exacerbated by the baroque exuberance of the early seventeenth century, became precisely a device for allowing the law to change in practice while conserving a theoretical description of law which pretended that it could not. We should now be inclined to admit that the economic organization of society turned the charging of interest from what had been in a medieval economy the exploitation of the poor, 'usury', into a legitimate form of commerce. The use of capital had become productive, and there was therefore no longer any moral ground why it should not be paid for. But instead of admitting the legitimacy of the charging of interest consequent on changes in the economic organization of society, the seventeenth century theologians kept the proscription in theory while abolishing it in practice. The use of the notorious 'Mohatra contract' allowed lip-service to be paid to the immutability of the law by adopting the expedient, which we should consider intellectually dishonest, of transforming a loan at interest into a double contract involving the present 'sale' for cash of an object by the borrower and its immediate resale by the lender to the borrower for a higher sum payable at a future date. Providing both values bore some relation to the 'intrinsic' value of the object, this contract was considered legitimate although, of course, 'intrinsic' worth can differ very widely – one thinks of the difference between an 'insurance' and a 'probate' value even today – and although what was sold changed hands only momentarily. The whole expedient was dictated by the way in which the theoretical statement of christian moral teaching seemed to admit of no evolution in the law such as could be occasioned by the changing economic organization of society.

The problem of a theoretical description of christian moral teaching in terms which do not permit recognition of changes that have occurred in practice is therefore not new in the history of

new one, nor even a purely theological one. Neither the english nor the american legal system theoretically allows the judiciary any the Church, and analogous problems exist in the theory of other than ecclesiastical legal systems. The same sort of tension between the doctrinal description of christian ethics and actual moral teaching exists in the Church today, particularly with reference to that area of christian teaching ascribed to natural law. The term has been so frequently used in documents of the *magisterium* that it cannot be abandoned, although its remarkably sparse use in the documents of Vatican II suggest that an alternative basis for these ethical prescriptions is actively being sought. The problem for the theologian here, as so often elsewhere, is to define the true dogmatic content of the phrase in such a way as also to do justice to the historical facts.

*Natural law*

The history of the term natural law is well known.[1] It enters christian tradition when the compilers of Justinian's *Digest* in the early sixth century take it to mean that the law should correspond to an immutable standard of nature, equity and justice. After the rediscovery of roman law in the eleventh century, the natural law is extensively used by the medieval canonists in the sense of a universal, rational norm which supersedes positive legislation. For St Thomas in the thirteenth century, it has become the participation by rational creatures in the eternal law, which itself is the rational guidance of created things by God. St Thomas is exploiting the term in the interests of theological explanation for a more optimistic view of the cosmos than that which St Augustine had left as a legacy to the western world.

Natural law again features prominently in the work of post-renaissance theologians, often excessively influenced by the re-importation of what they took to be the original stoic implications of the term in the late sixteenth century. In 1635 Grotius can systematically use the natural law in his *De Iure Belli ac Pacis* to construct a rational ethic without recourse to the divine will. Grotius, by secularizing a view held by theologians for over a century, makes recourse to God superfluous in the elaboration of an ethical system much as, at about the same time, recourse to

[1] It can be found succinctly expounded, for instance, in d'Entrèves A.P., *Natural Law. An introduction to Legal Philosophy* (London, 1951).

divine causality was becoming superfluous in philosophical accounts of the workings of the universe. The seventeenth and eighteenth centuries exploited the idea of natural law chiefly in the context of contractual theories of the state and of the idea of the natural rights of man which underlies both the american Declaration of Independence and the french Declaration of the Rights of Man. Hobbes had pointed out that natural law and natural rights were different things, but the terms are correlative in the sense that natural rights were considered to derive from the association of men in society which was itself governed by natural law. When, in the nineteenth century, the popes began extensively to use a natural law terminology they spoke of natural rights as often as of natural law, and they made it perfectly clear that they regarded natural law as the basis for natural rights.[1]

*The evolution of values*

But it is difficult to resist the view that the 'natural rights' of man have in fact evolved. We would today regard slavery as always immoral, but this is on account of a modern hierarchy of values which regards personal freedom as more important than economic security. Not only is this objectively superior, because more humane, hierarchy of values a demonstrably modern development in western society, but there is very little evidence to suggest that it was incorporated into christian moral teaching much before it became generally accepted in western society. Is it not possible that slavery was not always necessarily immoral in late antiquity, that it *became* immoral with an improvement in our hierarchy of values which occurred during the course of a possibly protracted portion of relatively recent history? And, if we cannot accept this hypothesis, how do we account for the Church's failure to preach the immorality of slavery on natural law grounds much earlier and more forcefully than was the case?

However we may answer these questions, one must insist on the fact that the hierarchy of values of western society and, increasingly, of human society, is evolving according to a predictable pattern. Whatever one's politics, it is clear that the rejection of paternalism in Africa has to do with the emergence of the view among africans that political independence is to be valued more

[1] For a brief account of the recourse to natural law and natural rights in pontifical documents of the nineteenth century, see, for instance, the brief conspectus in Fuchs J., S.J., *Natural Law. A Theological Approach* (Dublin, 1965), pp 4–6.

highly than economic welfare. Most of us must find that democratic procedures are less efficient than totalitarian ones. But efficiency in government seems to us increasingly of less relative importance than the necessity of safeguarding our right to determine how we shall be governed. We are moving towards a higher appreciation of the integrity and the independence of the individual, and of the malice of violence. No western democracy allows the mass of its members to lack necessary medical attention, however costly, and however the insurance may be organized. Few of us would today contest that society has the duty to provide for its members the opportunity of attaining a reasonable standard of living, irrespective of whether or not it is capable of offering them work. We might well fail to understand the development of the modern world, and we may well be alarmed at it. But it seems incontestable that the mutations in our hierarchy of values are part of a continuous and possibly accelerating humanizing process. There may be little cause for alarm.

Historically speaking, and at least until the eighteenth century, the Church has been reticent about the right to private property. Many of the Fathers spoke openly against it, and where it was defended, this was considered to be a concession to the imperfections of sinful human society. It was Locke who, reacting against Stuart taxation policy and responding to the new social situation, held in the 1689 *Treatise of Civil Government* that man had a natural law right to the fruit of his labour. The first scholastic theologian to adopt this view seems incredibly to have been Taparelli d'Azeglio writing as late as 1840.[1] It has not been contested since. But as we have progressed from an artisan society into a technological one, where the fruit of one's labour is merged with that of thousands of others, have we not come to speak of the right to a proper standard of living without reference to the availability of work? Our values have become more humane. Are we on that account obliged to say that the Church neglected to teach that the right to private property derives from the natural law for eighteen and a half centuries?

The right to acquire private property, like the right to lend money at interest or, as we should say, to invest it, might be thought to have emerged as a result of the changes in the purely economic organization of society. It might even be argued that the illegitimacy

[1] On the natural law rights to private property, see the article by de Sousberghe L., 'Propriété "de droit naturel", thèse néo-scolastique et tradition scolastique' in the *Nouvelle Revue Théologique* (Louvain, 1950), pp 580–607.

of slavery is not merely dependent on the humanizing of our moral values at a particular point in history. But the evidence for such a humanizing process is massive, whatever theological gloss we may give it, and wherever it may be leading us. We have only to look at the increasing reluctance of our society to inflict the death penalty or, indeed, any form of physical punishment. We are more conscious of the need to offer more help, and with fewer strings, to the underprivileged in all categories, the poor, the aged, the lonely, the handicapped. This increasing sensitivity can be illustrated in a thousand ways, from the very real improvement in our treatment of children, of the insane, of the very old, over, say, the last hundred years, to the changes in name of what was once known as the dole and has recently become social assistance. This is not the place to attempt a sociological analysis of our society, or to comment on the considerable dangers of totalitarian techniques as well as on the humanizing of values. The point is simply to indicate that our sensitivity to the needs of other people, our compassion, has, by and large, improved. What used to be considered fair, fitting and equitable is now often no longer thought to be so. Does this mean that the natural law itself is capable of evolution?

If one looks at the history of the doctrine of a just war, or at the treatment of heretics in the late middle ages, it can be seen that christian moral values, too, have evolved, have been humanized. If anything, and whatever the rôle of the Church should have been, official christian moral teaching has tended to embody a hierarchy of moral values which lags conservatively behind those of secular society. Ecclesiastical procedures of denunciation, condemnation and proscription were until quite recently of such a sort as to affront what secular society already considered the ordinary rights of individuals. Christian moral theologians, usually thinking in terms of the minimal disposition for absolution, have sometimes confined matters of obligation in the paying of taxes or in making restitution after theft to much closer limits than our society itself would consider honest, just as prominent ecclesiastics have been concerned to vindicate the principle of vindictive justice for criminals at a time when secular society was progressing beyond it. Until recently the procedure for dealing with priests who attempted marriage and, however wrongly, actually contracted obligations to wives and families, simply refused to recognize the existence of such obligations. Even today, the Church is prepared to waive the rights of injured parties if a baptized person who does not marry

in church subsequently deserts his wife and wishes to marry a baptized christian in accordance with the canonical prescriptions. This attitude, like christian moral teaching on lies and gluttony, betrays a lower moral sensitivity than that which generally obtains in our society.

*Towards a solution*

There seems to be no reason why one should not suppose that it is quite normal for 'natural rights', at least, to evolve with this humanizing process, and for christian moral teaching about what actually constitutes supernatural fulfilment to be dependent on this evolution. This is what has historically occurred, although the theoretical elaboration of christian moral teachings has not generally allowed it to be recognized. And since the natural rights of men have as their consequence natural law obligations on the part of individuals and of society as such to respect those rights, we should have to say that the content of natural prescriptions must also be capable of evolution. To be able to say this, we should have simply to take natural in the sense of pertaining to human nature as it is in the concrete, redeemed and, without necessarily knowing it, aspiring to a perfection which is in fact in the supernatural order. The natural law would, on this hypothesis, become simply correlative to the universal and authentic moral values which have merged at any particular stage in the course of human history. The term natural law might then happily cease to be used, but we should have safeguarded its content and its meaningfulness.

In fact, if one considers natural to mean anything else than pertaining to human nature as it actually exists and possibly evolves, the term natural law cannot properly be made meaningful in such a way as to do justice to what can be shown to have happened. If, for instance, on the best alternative suggestion, one were to take 'nature' as a metaphysical component of man, 'realized' within him in any theological state in which 'man' could exist, one would reduce nature to the abstract term of a metaphysical analysis. The 'natural law' which resulted would have in consequence to be purely formal, containing statements of the form 'moral actions are actions in accordance with the natural end of man'. One could not give precise content to the natural law if one's concept of nature were abstract rather than concrete, because actual obligations imposed by natural law can result only from an analysis of nature as it exists historically, or from revelation. But the whole point of

natural law is its independence of revealed norms, and there seem anyway to be no revealed or defined statements about what obligations are imposed by nature in the sense of an abstraction, said to be 'realized' in man, but which is in fact merely a component of man resulting from a metaphysical analysis. The pontifical pronouncements about natural law and natural rights *can* certainly be taken in the sense of rights and obligations deriving from redeemed human nature as it exists historically, and which may therefore be capable of evolution.

This view of natural law has some important implications. It would enable us, for instance, to see how the primitive morality of, say, the story of Esau and Jacob could shock later inspired Old Testament authors, and why the revelation of Jesus had to wait until a particular moment in time when the human race, or some part of it, had attained sufficient moral maturity to understand the sermon on the mount. It would enable us perhaps, too, to understand the developments of the Church's sexual ethic which disturbs so many fervent christians today. Whatever foreshadowings medieval literature might have contained, the emergence of love as a deep-seated and universal emotion seems to be of relatively recent origin in western society. It is arguable that the renaissance, which saw the beginning of the change in the status of women in society, was constituted by a particularly marked evolution in the hierarchy of humane values of european society, and that, had the Church responded more generally and speedily to this evolution, the schism, if it had occurred, would have been merely another episode in the succession of medieval heresies and schisms. But it seems certain that the ordinary structure of marriage in the late fifteenth or early sixteenth centuries made it a stable society for the procreation of children, and that this structure has changed subsequently, in fairly easily demonstrable stages, until now we accept it as normal that a successful marriage includes a mutually perfective emotional union between husband and wife which, while it is sustained by the sexual union, can also survive independently of it. The emotional union mediates the spiritual fulfilment which the married partners attain by loving one another.

But once this mutually perfective emotional union of the partners be allowed to emerge as an equal 'end' of the sacrament, as most theologians now admit it to be, the whole question of the morality of artificial contraceptives, for instance, needs reconsidering. For on the one hand the emotional union normally requires the support

of the physical union, even when grave reasons of health or of economic necessity preclude the possibility of procreation. There are cases in which the use of the sterile period, forty years ago allowed concessively by the Church, but now actively encouraged, provides an unsatisfactory basis of physical experience for the fostering of a mutually perfective emotional union between the partners. It seems therefore possible that, in such cases, and where procreation has to be excluded for serious reasons, the use of some other form of artificial contraceptive may be allowed by the natural law.

And on the other hand, this view explains that the Church is not denying its own former teaching. It is quite possible that the use of artificial contraceptives *was* generally wrong in the sixteenth century and that the natural law arguments were, at that date, cogent. The Church, if it were to admit the legitimacy of artificial contraceptives in certain circumstances, would merely be acknowledging the changed structure of human moral experience, and any delay in this recognition is the result, as so often in the past, of the failure to elaborate a theoretical description of christian natural law ethics which admits of historical changes in the moral experience of the believing community.