

KEEPING PACE WITH THE MARCH OF PROGRESS: THE RELEVANCE OF NATURAL LAW FROM THE VICTORIAN ERA TO TODAY

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I INTRODUCTION

Before the 19th Century, natural law was the prevalent theory of jurisprudence. In short, natural law proposes that certain universal moral principles transcend man-made laws. From a Judo-Christian perspective such principles might be perceived as ‘laws set by God to men.’¹ Natural law theorists, from St Thomas Aquinas onward, believe that ‘...a human law which conflicts with [natural law] is no law, but a corruption of law’²

As major developments in science, industrialisation and enlightenment profoundly impacted economics, politics and society itself; the application of neo-scientific, empirical methods to address social issues became popular amongst academics. Numerous competing legal theories arose, which despite not sharing a common conception of jurisprudence, discredited natural law.

¹ John Austin, *The Province of Jurisprudence Determined* (Burt Franklin, 2nd ed, 1970) 1.

² Thomas Aquinas, 1-11, q 95 a 2, quoted in JM Kelly *A Short History of Western Legal Theory* (Oxford University Press, 1992) 144.

However, as the Allied forces sought to justify the prosecution of senior Nazi commanders at the conclusion of the Second World War, natural law theory was alluded to in order to overcome the defendants insistence that they were bound to obey domestic laws without questioning their validity. Natural law was later invoked during civil rights movements and was revived as a discussion topic amongst academics.

This essay shall summarize how major upheavals of the Victorian era and early twentieth century necessitated a reevaluation of natural law precepts, and how they were later revived to condemn discriminatory laws and totalitarian rule.

II BENTHAM AND AUSTIN: SOCIAL REFORM IN THE VICTORIAN ERA

During this period of social transformation, many competing theories emerged discrediting the principles of natural law. Characterizing natural law as ‘nonsense on stilts’, social reformer Jeremy Bentham believed that jurisprudence based on religious dogma had contributed to an inconsistent legal system.³ Bentham’s concerns are best understood when one considers the barbaric nature of the criminal justice system he sought to reform, where public executions and torture were routine, and which favoured those of rank and wealth.⁴

³ Rob White and Fiona Haines, *Crime and Criminology* (Oxford University Press, 4th ed, 2008) 26.

⁴ *Ibid* 25.

In place of natural law, Bentham developed a utilitarian approach, where appropriate responses could be determined by quantitatively weighing the anticipated pleasure or pain of an outcome. Protection from serious crimes was not justified by abstract ‘...natural rights to life, liberty and property’, but because a lawful society would be one of greater ‘security’ and ‘happiness.’⁵

As empirical natural sciences gained credibility in the Victorian era, a changeover from natural law to positivism occurred.⁶ Positivists contest that any law which in procedural terms can be properly enacted by the state must not be rendered invalid on account of its intrinsic injustice or immorality.⁷ John Austin distinguished between laws created by authoritative figures that ordinary citizens were compelled to obey and legal theory based on subjective interpretations of the Scriptures. As Kelly explains, Austin conceived the legal system as a structure of positive laws which retain their validity regardless of their moral worth.⁸

Whilst Bentham and Austin did not share a common ideology, they were, according to HLA Hart, ‘...the vanguard of a movement which labored with passionate intensity and much success to bring about a better society

⁵JM Kelly, *A Short History of Western Legal Theory* (Oxford University Press, 1992) 287.

⁶Hans Kelsen, *Pure Theory of Law* (Max Knight trans, Berkeley, 2nd ed, 1967) 50.

⁷Robert Hughes, ‘Australian Legal Institutions Principles Structure and Organisation’ (2003) cited in Augusto Zimmermann. ‘Legislating Evil: The Philosophical Foundations of the Nazi Legal System’ (2010) 13 *International Trade and Business Law Review* 221.

⁸JM Kelly *A Short History of Western Legal Theory* (Oxford University Press, 1992) 315.

and better laws'⁹, a goal they strove for by introducing new rhetoric to supersede natural law principles.

III KANT, DARWINISM, REALISM AND HISTORICISM: THE PROGRESSIVE EROSION OF NATURAL LAW

Immanuel Kant, whilst seeking to expose weaknesses in the doctrines championed by Bentham, Austin and other British positivists such as Hume, struck at one of the presumptive pillars of natural law, by substituting divine or God-given wisdom with the categorical imperative; a universal¹⁰, objective moral standard which does not require the input of a deity. Whilst this subjective, maxim based philosophy may be viewed as a methodical step in a concept of morality, rather than a concept of legality;¹¹ it made possible a philosophical model of man without natural rights.

Charles Darwin's theory of natural selection inspired progressive reformers to petition for change. Darwin's findings implied the non-existence of God and consequently of God-given law and rights.¹² Even in the United States, a nation founded on natural law principles,¹³ Darwin influenced many leading jurists, notably the school of legal analysts, which separated law

⁹ HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 596. Cited in Brian Z. Tamanaha, 'The Contemporary Relevance of Legal Positivism' (2007) 32 *Australian Journal of Legal Philosophy* 1, 8.

¹⁰ The true universality of this standard may be questioned, as in line with the typical European beliefs of racial superiority of his era, Kant prophesied that aside from Caucasians, '... all races will be extinguished' by virtue of their innate inferiority (Immanuel Kant *Reflexionen zur Anthropologie* (de Gruyter, 1968) 878, cited in John Roth (ed) *Genocide and Human Rights* (Palgrave Macmillan, 2005) 142).

¹¹ Geoffrey C Hazard Jr, 'Humanity and the Law' *Yale Journal of Law & the Humanities* (2004) 16(1) 79, 79.

¹² Augusto Zimmermann, 'Evolutionary Legal Theories: The Impact of Darwinism on Western Conceptions of Law' (2010) 24(2) *Journal of Creation* 103, 105.

¹³ *Ibid*, 106.

from morality and dismissed any metaphysical considerations.¹⁴ The esteemed jurist Oliver Wendell Holmes proposed that law is a ‘...science of coercion’, whereby ‘[l]aws are flexible and responsive to changing social and economic climates.’¹⁵ He viewed natural rights as a ‘conceptual mistake.’¹⁶

Opposing the analytical school were the American legal historicists, who interpreted law in terms of an evolutionary process that manifests itself through the customs of a people,¹⁷ ‘...tracing the history of legal doctrines’ and ‘...inferring legal principles that lay behind them.’¹⁸ Both factions repudiated natural law.

Holmes’ view that the nature of law is not fixed but amendable according to the social and political environment, was developed by influential positivist Hans Kelsen, who claimed that ‘no law was assumed to contain absolute or universal value.’¹⁹ As a positivist, he determined that all laws are a temporally and spatially conditioned phenomenon subject to historical change,²⁰ a belief antithetical to the immutable character of natural law.

¹⁴ Ibid.

¹⁵ Lisa Baker, *The Justice from Beacon Hill: The Life and Times of Oliver Wendell Holmes* (1991), cited in Augusto Zimmermann, ‘Evolutionary Legal Theories: The Impact of Darwinism on Western Conceptions of Law’ (2010) 24(2) *Journal of Creation* 103, 107.

¹⁶ Augusto Zimmermann, ‘Evolutionary Legal Theories: The Impact of Darwinism on Western Conceptions of Law’ (2010) 24(2) *Journal of Creation* 103, 107.

¹⁷ Ibid, 106.

¹⁸ Ibid.

¹⁹ Hans Kelsen, *Pure Theory of Law* (Max Knight trans, Berkeley, 2nd ed, 1967) 517.

²⁰ Ibid.

IV MARXISM AND COMMUNISM

Karl Marx savaged not only natural law, but law itself, denouncing it as a ‘bourgeois prejudice.’²¹ He portrayed the law as an ‘...ideological mechanism through which [the bourgeois] is able to eventually justify its grip on the means of production and the sources of wealth.’²² He was critical of human rights, expressing that they were ‘...nothing but the rights of egoistic man’, conceived to enforce the values of capitalism.²³

Communist states, founded on Marx’s ideology, retained his contempt for law, perceiving it merely as a ‘theoretically inconvenient fact.’²⁴ Christian conceptions of law and morality would be extinguished when the Communist revolution reached its final stage according to theorist Evgeny Pashukanis.²⁵

In the West, the marginalisation of natural law was such that even as the natural rights of Soviet citizens and German Jews were erased, no politician or academic publicly spoke or wrote in defence of international human rights, a phenomenon Geoffrey Robertson attributes to Marx and

²¹ Karl Marx and Friedrich Engels, *The Communist Manifesto*, Marxists Internet Archive <<http://www.marxists.org/archive/marx/works/1848/communist-manifesto/>>.

²² Augusto Zimmermann, 'Marxism, Law and Evolution: Marxist Law in both Theory and Practice' (2009) 23(3) *Journal of Creation* 90, 92.

²³ Karl Marx. *On the Jewish Question* (1844), cited in Augusto Zimmermann, 'Marxism, Law and Evolution: Marxist Law in both Theory and Practice' (2009) 23(3) *Journal of Creation* 90, 94.

²⁴ Igor Grazin, 'The Role of Ideas in Political Change' in Suri Ratnapala and GA Moens (eds) *Jurisprudence of Liberty* (Butterworths, 1996) 247, 249.

²⁵ Evgeny Pashukanis, *Law and Marxism* (1924), cited in JM Kelly, *A Short History of Western Legal Theory* (Oxford University Press, 1992) 357.

Bentham's demolition of natural rights.²⁶ Global events and radical social paradigms had consigned natural law theory into a state of hibernation.

V NAZI JURISPRUDENCE

Basing his rhetoric on Darwin's theory of natural selection, and echoing Greek philosopher Thrasymachus' view that 'justice is the advantage of the stronger',²⁷ Adolf Hitler declared that individuals and entire races' 'right to exist' would be determined through survival of the fittest.²⁸ Hitler was supported by a sycophantic judiciary, whose eager legal activism facilitated his fascist policies. Senior law professors '...denied the existence of any individual rights against the absolute 'right' of the totalitarian state.'²⁹

In place of the metaphysical authority championed by natural law theorists, the Nazis promoted Hitler. Nazi leader Hans Frank stated that, '[t]he basis of interpretation of all legal sources is the National Socialist ideology, particularly as expressed in the party programme and the *Fuhrer's* statements'³⁰, an ideology embodied in the concept of *Fuhrerprinzip*,

²⁶ Geoffrey Robertson, *Crimes Against Humanity* (Penguin, 1999) 21-22.

²⁷ Arlene W Saxonhouse, 'The Moral Sense: Ancient and Modern' (1994) 13(2) *Criminal Justice Ethics* 39, 39.

²⁸ Adolf Hitler, *Hitler's Table Talk 1941-1944* (1988), cited in Augusto Zimmermann, 'Legislating Evil: The Philosophical Foundations of the Nazi Legal System' (2010) 13 *International Trade and Business Law Review* 221, 225.

²⁹ Martin Broszat, *The Hitler State* (1981), cited in Augusto Zimmermann, 'Legislating Evil: The Philosophical Foundations of the Nazi Legal System' (2010) 13 *International Trade and Business Law Review* 221, 231.

³⁰ Hans Frank, *Reichsgesetzblan* (1933), cited in Augusto Zimmermann, 'Legislating Evil: The Philosophical Foundations of the Nazi Legal System' (2010) 13 *International Trade and Business Law Review* 221, 239.

which stipulated that judges must adhere to the *Führer's* principles and programs.³¹

VI THE NUREMBERG TRIALS

At trial of the major war criminals in Nuremberg, accused Nazi leaders relied on the doctrine of superior orders; that they were merely following laws they were compelled to obey.³² In response, Chief prosecutor Robert H. Jackson revived the precepts of natural law, submitting that the 'natural moral law' was adequate justification to try the Nazi leaders.³³ The tribunal rejected the doctrine of superior orders, both as a defence and as mitigation of punishment, reasoning that '...crimes so shocking and extensive had been committed consciously, ruthlessly and without military excuse or justification.'³⁴ This inferred a concept of universal jurisdiction, whereby some crimes are so heinous that '...the accused could be tried anywhere without any jurisdictional connection between the trial court and situs of the crime because they were crimes against all humanity'.³⁵ This implied view that individuals have '...a duty to disobey laws which are clearly

³¹ Matthew Lippman, 'White Rose, Judges and Justice in the Third Reich' (2000) 15(1-2) *Connecticut Journal of International Law* 95, 114.

³² Stuart E Hendin, 'Command Responsibility and Superior Orders in the Twentieth Century – A Century of Evolution' *Murdoch University Electronic Journal of Law* <<http://www.murdoch.edu.au/elaw/issues/v10n1/hendin101.html>> 11.

³³ Kurt Kauffmann, 'Translation the Nuremberg Trials in Retrospect' (1987) 9(3) *Whitter Law Review* 537, 552.

³⁴ Stuart E Hendin, 'Command Responsibility and Superior Orders in the Twentieth Century – A Century of Evolution' *Murdoch University Electronic Journal of Law* <<http://www.murdoch.edu.au/elaw/issues/v10n1/hendin101.html>> 12.

³⁵ Henry T King Jr, 'Without Nuremberg – What?' (2007) 6(3) *Washington University Global Studies Law Review* 653, 658.

recognisable as violating higher moral principles',³⁶ upholds the precepts of natural law.

Following the Second World War, Gustav Radbruch argued from a natural law perspective, that Nazi laws were not law of any kind as they '...contravened the basic principles of morality.'³⁷ The tragedy of the Holocaust inspired him to write '...the people owe them no obedience, and lawyers too, must find the courage to deny them the character of the law.'³⁸

VII THE POST-WAR DEBATE

Hart contended this synthesis of law and morality. He sought to avoid the 'muddle' inherent in conflating law with a '...transcendent standard of rightness, implanted in human nature by God, and accessible to man through his reason.'³⁹ Envisaging a separation between law and morality, he nonetheless found that laws must be submitted to 'moral scrutiny.'⁴⁰ In his view, there was nothing to be gained by '...allowing our moral repugnance to subvert our analytic perception.'⁴¹ Hart proposed that natural law was not a universal standard, but merely an explanation as to why one

³⁶ Gabriël A Moens, 'The German Border Guard Cases: Natural Law and the Duty to Disobey Immoral Laws' in Suri Ratnapala and GA Moens (eds) *Jurisprudence of Liberty* (Butterworths, 2nd ed, 2011) 271, 271.

³⁷ Ibid 278.

³⁸ Gustav Radbruch, *Rechtsphilosophie* (4th ed, 1950), cited in Barend van Niekerk, 'Warning Voice from Heidelberg – The Life and Thought of Gustav Radbruch' (1973) 90(3) *South African Law Journal* 234, 248.

³⁹ JM Kelly, *A Short History of Western Legal Theory* (Oxford University Press, 1992) 413.

⁴⁰ Brian Z Tamanaha, 'The Contemporary Relevance of Legal Positivism' (2007) 32 *Australian Journal of Legal Philosophy* 1, 8.

⁴¹ JM Kelly, *A Short History of Western Legal Theory* (Oxford University Press, 1992) 413.

‘...can expect to find certain types of rule in every human society.’⁴² Dismantling Austin’s command theory but advancing the rhetoric of positivism against natural law, he posited that in democratic societies the sovereign can be seen as the citizen who both, to different degrees, dictate and obey the law.⁴³

However, the principles of natural law were embodied in the civil rights movements of the late twentieth century, and used to justify why protesters engaging in non-violent civil disobedience should respect some laws but break others. Martin Luther King advocated non-compliance with ‘unjust law[s]... not rooted in eternal law and natural law.’⁴⁴ He urged that such laws were ‘...no law at all’⁴⁵, and that ‘...one has a moral responsibility to disobey [them].’⁴⁶

Lon L Fuller contended Hart’s position, by proposing a radical variant of natural law. Based on the supposition that law’s authority is derived from ‘...the moral attitudes of the community’, he argued that law and morality cannot be divided.⁴⁷ Other academics such as John Finnis have sought to reaffirm the relevance of natural law by removing religious or moralistic rationale, instead proposing that natural law is a ‘...set of principles of

⁴² Ibid, 414.

⁴³ Ibid, 407.

⁴⁴ Martin Luther King Jr, Letter from a Birmingham Jail, 16 April 1963, cited in Brian Z Tamanaha, ‘The Contemporary Relevance of Legal Positivism’ (2007) 32 *Australian Journal of Legal Philosophy* 1, 9.

⁴⁵ Ibid.

⁴⁶ Brian Z Tamanaha, ‘The Contemporary Relevance of Legal Positivism’ (2007) 32 *Australian Journal of Legal Philosophy* 1, 9.

⁴⁷ Suri Ratnapala, *Jurisprudence* (Cambridge University Press, 2009) 167.

practical reasonableness in ordering human life and the human community.’⁴⁸

However, the post war advance of human rights, and in tandem international recognition of universal moral standards, can be most readily identified with the Universal Declaration of Human Rights, the preamble of which recognises the ‘...inherent dignity and... the equal and inalienable rights of all members of the human family’ as the foundation for, amongst other things, justice.⁴⁹ The cosmopolitan make-up of the drafting committee enabled an inclusively worded document, which could apply to the broader human community. Whilst Eleanor Roosevelt, the chairman of the drafting committee, was renowned as a devout Christian, notable contributions were made by the Chinese delegate Peng-chun Chan who explicitly referred to Confucius.⁵⁰ Accordingly, the Declaration simulates natural law by inferring that ‘...fundamental rights are recognized, not conferred’,⁵¹ or that ‘...rights are not legal constructs’,⁵² but are necessarily intrinsic to the human condition.

⁴⁸ John Finnis, *Natural Law and Natural Rights* (1980), cited in Michael Freeman, *Introduction to Jurisprudence* (Sweet and Maxwell, 8th ed, 2008) 127.

⁴⁹ *Universal Declaration of Human Rights* Preamble para 1.

⁵⁰ Ngaire Naffine *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart Publishing, 2009) 103.

⁵¹ Mary Ann Glendon *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House, 2001) 176, quoted in Ngaire Naffine *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart Publishing, 2009) 104.

⁵² Ngaire Naffine *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart Publishing, 2009) 104.

VIII CONCLUSION

Reappraised and reawakened after a century of denouncement, natural law played a pivotal role in the Nuremberg Trials, American civil rights movement and the foundation of modern human rights through the Universal Declaration of Human Rights. However, natural law no longer dominates jurisprudence as it did before the Victorian era. A pluralistic debate has emerged where no unifying theory can claim consensus amongst jurists and academics.