

Natural Law Seminar – Edmund Burke Society 7 Feb 2017

Discussion Points

Passages drawn from:

Paul E. Sigmund, *Natural Law in Political Thought*, Chaps 1 & 2

Ian Weeks, *Natural Law*, Deakin University, Chaps 1-3

History of Natural Law

A basic description: The theory of natural law is the assertion that there is an order in the universe, and that right action for us human beings consists in attuning ourselves to that order. Coupled with or implicit in this belief is that all the objects of the universe have a character and a purpose. The integrity of the object is achieved through honouring that character and pursuing that purpose in both the physical and moral world.

Natural law theory is the most influential theory of morality in the history of the human race. It is found among the pre-scientific civilizations: in Greece, in Rome, in India, in China, and among the European peoples up to the last two hundred years . . . , only in the last two hundred years has it ceased to be the generally assumed theory from which moral judgement proceeds. (Grant 1959, p. 28)

The systematic study of politics must take into consideration a dominant theme in political thought from the fifth century B.C. until the end of the eighteenth century. As a philosophy and as an ideology it played a central role in three important historical events—

- the extension of the influence of Roman civilization and law over Western Europe;
- the fusion of Christianity and classical culture in the Middle Ages;
- and the emergence of liberal individualism from the sixteenth to the eighteenth century.

The theory of natural law was used in each of these developments to provide a universal, rational standard to determine the nature and limits of political obligation, the evaluation of competing forms of government, and the relation of law and politics to morals...

The symbolism it uses is an appeal to reason and to an order in the universe and in man. The arguments are rational, even when they appear in a traditional or highly religious context.

While the forms and content attributed to natural law in the last 2,500 years has resulted in considerable confusion about its meaning, there is a key claim in most theories of natural law. This is the belief that there exists in nature and/or human nature a rational order which can provide intelligible value-statements independently of human will, that are:

- universal in application,
- unchangeable in their ultimate content,
- and morally obligatory on mankind.

These statements are expressed as laws or as moral imperatives which provide a basis for the evaluation of legal and political structures. While some forms of the theory have associated natural law with scientific "laws of nature" the two are conceptually distinct. Natural law theories contain norms or prescriptions designed to produce or evaluate human conduct, while the "laws of nature" are expressions of observed regularities in human actions or in the physical universe.

Distinction between natural law prescriptions and norms of custom

The prescriptions of natural law should be distinguished from norms based on custom, tradition, religious authority or revelation, utility (at least in the variety associated with Jeremy Bentham), historical inevitability, racial elitism, emotivism, and the voluntarism of most existentialist writers. Natural law writers have often combined their theories with one or more of the above justifications, but conceptually, natural law forms a distinct approach to the problem of political, moral, and legal obligation.

It is therefore necessary in analyzing these theories, to determine in which sense natural law is being used in a given case. Yet in all its diverse forms, the theory of nature law represents a common affirmation about the possibility of arriving at objective standards, and a common procedure for doing so—looking for a purposive order in nature and man.

The continuing appeal of natural law derives from its claim that:

- freedom and moral choice are not incompatible with the existence of objective values in man and society;
- human existence is meaningful;
- human beings possess equal dignity and rights;
- and that political and legal forms are more than the product of arbitrary will and should be justified in human terms.

For these reasons, natural law theories constitute a powerful and attractive alternative to relativist scepticism and to blind faith in traditionalist, religious, or political authoritarianism.

NATURAL LAW IN GREEK THOUGHT

The search for explanations about the world of men

The argument from nature begins with the early Greek speculations about the principles which govern the physical universe. From the opening book of Aristotle's *Metaphysics* as well as from fragments of their writings which survive, we know that the pre-Socratic philosophers of the sixth century B.C. spoke of a first principle (*arche*) to which all the elements of nature could be reduced...

Nascent moral objectivity in nature

In Sicily, Pythagoras (d. 495 B.C.) explained the universe in terms of mathematical relationships, asserting that a fundamental harmony based on numbers could be found in music, in man, and in the cosmos, and that man should strive to conform his actions to these relationships.

The Greek interest in the study of the universe to determine its basic principles contrasted with the tendency of other societies of the period to attribute the phenomena of the physical world to supernatural causes.

The attempt to discover regularities in the universe and explanations for its processes was not divorced from a concern with moral values. As the example from Pythagoras indicates, number provided not only a description of relationships in the universe but also a basis for conduct, a prescription as to how men should act.

For the pre-Socratics the study of nature thus involved not only analysis, description, and prediction...but prescription as well.

It was the Greek tragedian Sophocles that gave impetus to the formal distinction between law based on custom and law as an enduring objective imperative independent of the times. In his now play *Antigone*, we meet the first declaration of the distinction. Ian Weeks in his Deakin University course book *Natural Law*:

In this play the heroine, Antigone, wishes to bury her brother Polyneices, the son of Oedipus, who lies dead on the ground. The new king, Creon, has decreed that Polyneices must not be buried but remain 'a dinner for the birds and dogs' (*Antigone* 1.207) because he employed foreign mercenaries; and that anyone who disobeys the king's edict must die. Antigone defends her duty to bury her brother in a speech that has become famous:

For me it was not Zeus who made that order.
Nor did that Justice who lives with the gods below
mark out such laws to hold among mankind.
Nor did I think your orders so strong
that you, a mortal man, could over-run
the gods' unwritten and unfailing laws.
Not now, nor yesterday's, they always live,
and no one knows their origin in time.
So not through fear of any man's proud spirit
would I be likely to neglect these laws,
draw on myself the gods' sure punishment.
(*Antigone*, II.450-9)

Tragedy is about the conflict of the familial with the political. But there is a deeper conflict. We might describe Antigone's speech as a conflict between the way things are by their nature and the way they are made by human ingenuity. It opens the way to thought about the nature of ethical and political life, and the ideas of natural law....

The early Greek tragedies thus prepared the way for [a] philosophical description of the world by placing the idea of origins (*physis*) into conflict with the human use of things (*nomos*)....

A movement began which tended to separate moral and aesthetic values from their national background, to consider them no longer as part of a heritage which was the prerogative of a few privileged men of Athenian society, but to give them universal significance...

PLATO AND ORIGINS OF NATURAL LAW

Some points:

Plato and Aristotle were at odds with contemporary Greek tradition and culture – division in Aristotle between politics and ethics – division shows deeper issue – focus on the individual that is at the centre of Aristotle's ethics implies the possibility of separating the individual from society and nature – core of Aristotle's thinking is that there cannot be a real conflict between the virtues.

The idea of nature (for which the most appropriate Greek word is *physis*), Leo Strauss argues (in *The Origin of the Idea of Natural Right*), comes about in a contrast with what is ancestral and conventional (the usual Greek word here is *nomos*). Strauss' argument... is that the idea of nature is found in attempts to overthrow or de-stabilise **authority which is based on the claim that what one ought to do is what has always been done**. The authority of convention is identified and contrasted with the authority of nature, and it would be clear, he argues, that nature is the 'older' or primary authority.

Nature now becomes primary for defining what are the best social and political things...

Revolutionary position – it attacks the monopoly of right that might be claimed

- by an aristocracy, if they based their claim on ancestry
- by religion, if that claims to be the truth told by the fathers
- by tribal leaders, elders or parents

Plato mounts a sustained argument, through almost all of his writings, against all views that base ethics upon convention or upon ancestral or traditional religious views (i.e. views that what is good is so because some divine being ruled that or because that is what 'we have always done'). He sets out to show that whatever is good is so because of the way reality is... Opposing him and joining forces in their opposition are various powerful aristocratic individuals and a group of teachers called Sophists. The most virulent of Socrates' opponents in such dialogues as *The Republic* and *Gorgias* are Sophists who assert vigorously that ethics is only conventional.

Strauss argues that conventionalism connects justice or morality with the 'city' or the polis (which is the Greek word translated as city). Today it is more common to argue that conventions are due to 'culture' (which is Rousseau's way of arguing for conventionalism) or to 'society', but the main point is essentially the same.

Note: The argument that diversity of moral ideas does not prove but only confirms the conventionalist position... the argument is not about the fact that there are many different

moralties. Rather, the argument is whether there can be or are correct (meaning true) moral positions on particular issues and, if there are, does such a position rule out others?

To prove that there were objective moral principles for ethics and politics which were not hedonistic, egoistic, or merely conventional, Plato used the same analytical tool that the Sophists had employed—the concept of nature...

Plato's philosophy is presented in dialogues in which his teacher Socrates takes a principal part. It is difficult to distinguish what is Socrates' doctrine from what is Plato's, since Socrates did not leave any written works. Recent scholarship has provided evidence for what is Socrates teaching and what is Plato's.

Socrates did not have a natural law doctrine as such, but
(1) he posed the problem of potential conflict between moral and civic obligation; and
(2) his belief that the function and structure of a thing determine its essential character and purpose lies at the root of many later natural law theories...

To answer the Sophist theories that justice was either a rationalization of interest or merely a conventional restraint of "natural" impulses, Plato argues that there is a natural harmony both within the individual and between the individual and the community...

For the individual this harmony consists of the rule of the reason, assisted by the emotions in restraining and directing man's lower appetites. For society, it consists in the rule of the wiser over the ignorant, the more rational and moral over those less endowed with these qualities.

In the *Republic* Plato attempts to prove that the Sophist theory leads only to contradiction, unhappiness, and frustration in the individual because the warring impulses can never be satisfied once they have shaken off the restraints of reason...

Yet the basic argument of the *Republic* amounts to an assertion that there is an order in nature and human nature which is universal, objective, and harmonious, in which the soul is the most fundamental principle, possessing a threefold internal structure (reason, spirit, and desire) which is the basis of moral obligation. Conformity to this order brings harmony, virtue, and happiness. Violation of it results in disorder, evil, and unhappiness (cf. *The Laws*, No. 889-90)...

The rules of ethics and politics, like those of logic, are based on the principle of non-contradiction, but in the case of ethics and politics, non-contradiction means avoidance of opposition between impulse and reason (or the groups in which these characteristics predominate) rather than logical inconsistency...

To the extent that Plato believed that there were universal principles inherent in nature which imposed a moral obligation on all men, he was enunciating a natural-law theory. Insofar as he viewed any given law as an inadequate representation of the eternal

principles of justice, he was asserting a theory of natural (i.e., ideal) justice rather than one of natural law.

ARISTOTLE: There is considerable evidence that Aristotle subscribed to a natural law theory...

In all of these sections [of the *Nicomachean Ethics*] it appears that decision-making in ethics and politics is not a matter of deriving abstract principles from nature but of utilizing a certain insight and prudence to determine right action. The ethically correct action differs in each case in a way not unlike that described by the modern advocates of situational ethics...

In Aristotle's *Politics* as well, much of the discussion is concerned with the proper constitution for a given political, economic, and social environment rather than with the ideal or naturally best constitution.

Yet in the midst of his consideration of virtue as the mean in Book II of the *Nicomachean Ethics*, Aristotle observes that some actions are bad in themselves, regardless of their consequences. He cites adultery, theft, and murder as actions which "it is impossible ever to do rightly." Book V of the *Ethics* also contains an important discussion of "natural justice," which is contrasted with "justice by convention," although the passage is confusing, since it asserts the existence of an unchanging natural justice and at the same time maintains that it is changeable among men, "as are all things human" (*Ethics*, No. 1134b). In the *Nicomachean Ethics* Aristotle speaks of natural *justice* rather than natural *law* but in his *Rhetoric* he clearly states a belief in natural law.

Different modes of argument and knowledge

Our discussion will be adequate if it has as much clearness as the subject-matter admits of, for precision is not to be sought for alike in all discussions, any more than in all the products of the crafts. Now fine and just actions, which political science investigates, admit of much variety and fluctuation of opinion, so that they may be thought to exist only by convention, and not by nature. And goods also give rise to a similar fluctuation because they bring harm to many people; for before now men have been undone by reason of their wealth, and others by reason of their courage. We must be content, then, in speaking of such subjects and with such premisses to indicate the truth roughly and in outline, and in speaking about things which are only for the most part true, and with premisses of the same kind, to reach conclusions that are no better. In the same spirit, therefore, should each type of statement be received; for it is the mark of an educated man to look for precision in each class of things just so far as the nature of the subject admits; it is evidently equally foolish to accept probable reasoning from a mathematician and to demand from a rhetorician scientific proofs. (Ethics I.3)

In two different passages of Book I of that work he refers to "a common law according to nature" (chs. 13 and 15), and in chapter 10 he alludes to a common law which is universal and unwritten.

10...*Let injustice, then, be defined as voluntarily causing injury contrary to the law. Now, the law is particular or general [lit.: common]. By particular, I mean the written law in accordance with which a state is administered; by general, the unwritten regulations which appear to be universally recognised...*

13. *Let us now classify just and unjust actions generally, starting from what follows. Justice and injustice have been defined in reference to laws and persons in two ways. Now there are two kinds of laws, particular and general. By particular laws I mean those established by each people in reference to themselves, which again are divided into written and unwritten; by general laws I mean those based upon nature. In fact, there is a general idea of just and unjust in accordance with nature, as all men in a manner divine, even if there is neither communication nor agreement between them. This is what Antigone in Sophocles evidently means, when she declares that it is just, though forbidden, to bury Polynices, as being naturally just: "For neither to-day nor yesterday, but from all eternity, these statutes live and no man knoweth whence they came..."*

In his argument in chapter 15 he seems to suggest that an appeal to universal law is appropriate if the law of the city-state is contrary to the position which the rhetorician is arguing, but in chapter 13 there is a plain assertion that such a law actually exists and can be known by all men. In both cases Aristotle refers to the lines in Sophocles' *Antigone* in which Antigone cites the "eternal and unwritten law" (although the actual issue—the burial of a brother—involved a religious and ceremonial law rather than an appeal to nature).

15...*For it is evident that, if the written law is counter to our case, we must have recourse to the general law and equity, as more in accordance with justice and we must argue that, when the dicast [an ancient Athenian performing the functions of both judge and juror at a trial] takes an oath to decide to the best of his judgment, he means that he will not abide rigorously by the written laws; that equity is ever constant and never changes, even as the general law, which is based on nature, whereas the written laws often vary (this is why Antigone in Sophocles justifies herself for having buried Polynices contrary to the law of Creon, but not contrary to the unwritten law: "For this law is not of now nor yesterday, but is eternal . . . this I was not likely [to infringe through fear of the pride] of any man"); and further, that justice is real and expedient, but not that which only appears just; nor the written law either, because it does not do the work of the law; that the judge is like an assayer of silver, whose duty is to distinguish spurious from genuine justice; that it is the part of a better man to make use of and abide by the unwritten rather than the written law.*

From all of these cases it seems clear that Aristotle believed in the existence of some common legal principles which are universal and based on nature. However, aside from the references to the *Antigone*, his work contains no attempt to spell out the details of this universal natural law nor to use it to invalidate existing laws. For later interpreters, however, and perhaps for Aristotle himself, the first book of the *Politics* provides a method for determining what nature intends and it gives several specific examples of norms derived from nature.

For Aristotle the essential nature of a thing can be discovered by determining its purpose or end. This in turn can be derived from its structure or normal functioning. *Physis* (nature) is related to *telos* (end); thus, the teleological method can be used to discover nature's purposes and derive values from them. Aristotle uses this teleological analysis to demonstrate that man is naturally social and that government responds to needs which man has by nature (No. 1253).

Aristotle, like many other theorists after him, understood nature in two different senses. When he says that virtue is not a product of nature he is speaking of physical determinism; but when he justifies political life, slavery, and the rule of the wise and good, he appeals to nature as containing immanent norms or goals. The application of these norms to given situations requires a special talent, practical wisdom, and one cannot achieve the theoretical certainty of the physical scientist or mathematician in applying these norms; but nature provides guidance for the citizen, the statesman, and the moral man. The description and evaluation of what is natural and unnatural in social, economic, and political life is not carried out in terms of a systematic law of nature, and Aristotle never specifically links up these discussions with the "natural justice" and "common law according to nature" of the *Ethics* and *Rhetoric*. When the law of nature later became an important concept in political theory, this connection between natural law and teleology was made, but this only took place long after Aristotle wrote. Yet for him as for all Greek political theorists the concept of nature as a source of norms had a central position, and the interpretation which he gave to it—relating it to ends or purposes—became one of the principal varieties of natural-law theory.

Using concepts first developed by Greek science and responding to the challenge of the Sophist criticism of conventional morality and law, Plato and Aristotle laid the foundations of a theory of natural law. Nature was viewed as harmonious and purposive, and human nature was believed to exhibit an intelligible order from which ethical norms could be derived. For Plato function and structure gave evidence of an ideal order, and the soul in its inherent order was most "natural" of all—a source of ethical values which were ultimately related to the source of all value, the Form of the Good. For Aristotle, nature's structural tendencies or goals could be a guide to politics and ethics, and a conception of a fundamental natural law or natural justice was present in his writings although it was not developed or integrated with the rest of his thought. Neither writer brought these conceptions together in a formal natural-law theory as such. This remained for the Stoics and the political theorists of Rome.

NATURAL LAW IN ROMAN THOUGHT

The earliest statement of a comprehensive theory of natural law appears in the writings of Cicero (106-43 B.C.), the Roman statesman and politician. His statements on the subject are heavily influenced by earlier writings along similar lines by the philosophers of the Stoic school in Athens, of which only fragments survive. Stoicism originated in Greece around 300 B.C. in the teaching of Zeno of Citium...

[Zeno claimed] that political life was only a relative good, whereas in the ideal state all men would live together as "one herd in accordance with nature."

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The "nature" of which the [Stoics] spoke seems to have been both a material and a moral order. Both man and the universe were believed to be governed by "right reason which pervades all things and is identical with Zeus, lord and ruler of all that is." This reason was expressed in law which, in Chrysippus' words, is "the ruler over all the acts both of gods and men. . . . For all beings that are social by nature, it directs what must be done and forbids what must not be done."

Objections: Carneades (213-129 B.C.) denied the existence of natural justice and described all law and politics as based on individual or national self-interest.

In response Cicero (*De Officiis – Moral Duties*) reproduces the arguments of Panaetius (185-110 BC)...

For Panaetius, all men possess the common capacity to participate in divine reason, and the whole human race shares a fundamental equality and universal brotherhood. This was the version of Stoicism which was imported into Rome in the middle of the second century B.C.

[Cicero's major works, *De Republica*, *De Officiis*, and *De Legibus*] summarized the political and philosophical thinking of Stoicism and transmitted it to the medieval and modern worlds.

The doctrine of natural law received its classic expression in Book III, chapter 22 of Cicero's *The Commonwealth*. "There is a true law, right reason in accord with nature; it is of universal application, unchanging and everlasting. ... It is wrong to abrogate this law and it cannot be annulled. . . . There is one law, eternal and unchangeable, binding at all times upon all peoples; and there will be, as it were, one common master and ruler of men, God, who is the author of this law, its interpreter and its sponsor."

The same linkage of law and reason occurs in *The Laws*, where Cicero says, "Law is the highest reason implanted in nature, which commands what ought to be done and forbids the opposite" (*Laws*, Bk. 1, 6). It is "right reason applied to command and prohibition" (*Laws*, Bk. I, 12) and "the primal and ultimate mind of God whose reason directs all things either by compulsion or restraint" (*Laws*, Bk. II, 4). The "reason" of which Cicero speaks is not only the ability to conceptualize and engage in logical and mathematical manipulations. It is right reason, a moral faculty which enables man to distinguish between good and evil, and to perceive what is in accordance with man's nature. The content of the true natural law is not spelled out, although it is asserted to be eternal and unchangeable. From the discussions in the works of Cicero it [natural law] seems to include, as a minimum, a duty to contribute to society, a concern for justice, and a respect for the life and property of others.

In contrast to the views of Aristotle and Plato, Cicero's natural law also seems to imply moral (although not social and political) equality. Cicero asserts that "no single being is so like another ... as all of us are to one another" and bases this equality on the fact that "reason which alone raises us above the level of beasts ... is certainly common to us all and, though varying in what it learns, at least in the capacity to learn, it is invariable" (*Laws*, Bk. I, 10). Yet, on the other hand, Cicero defends the institution of slavery with an argument similar to that of Book I of Aristotle's *Politics* (*The Commonwealth*, Bk. III, 25), and he condemns democracy as the worst form of government (*Commonwealth*, Bk. III, 33 and 35). It seems that the equality of men consists only in their innate capacity for moral action before "bad habits and false beliefs" (*Laws*, Bk. I, 10) have corrupted them.

Cicero was a conservative in Roman politics, and he appealed to natural law as the moral justification of existing laws rather than as the basis for radical change. While he asserted that "to invalidate this (natural) law by human legislation is never right" (*The Commonwealth*, Bk. III, 22), he did not hint at any possibility of annulling positive law in cases of conflict. His discussion was more concerned with demonstrating that existing Roman laws were in accord with nature than with showing where they violated its provisions.

In his later work, *Moral Duties* (*De Officiis*) Cicero argues that men are naturally social and that we have a duty to be kind to others and to share the goods of nature with them. As in *The Commonwealth*, he attempts to refute the sceptical moral theory that self-interest is to be followed rather than the principles of morality. "To take away wrongfully from another and for one man to advance his own interest by the disadvantage of another man is more contrary to nature than death, than poverty, than pain, than any other evil ..." (*Moral Duties*, Bk. III, 5).

Most commonly...natural law was understood to be a rational ethical ideal which underlay existing legal arrangements and provided a standard by which to judge and interpret them. In this form it became part of the common heritage of the Christian West in the writings of Cicero, the Roman lawyers, and the Fathers of the Church.