

HANS Kelsen AND THE ROLE OF RELIGION IN NATURAL LAW DOCTRINE

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I INTRODUCTION

Kelsen, one of the leading European legal theorists of the Twentieth Century is said to have outlined and strongly criticised the tradition of natural law theorising.¹ However, in his work ‘The Natural-Law Doctrine Before the Tribunal of Science’, we find him arguing as follows:

[a]t a higher stage of religious evolution, when animism is replaced by monotheism, nature is conceived of as having been created by God and is therefore regarded as a revelation of his all powerful and just will. If the natural-law doctrine is consistent, it must assume a religious character. It can deduce from nature just rules of human behavior only because and so far as nature is conceived of as a revelation of God’s will, so that examining nature amounts to exploring God’s will. As a matter of fact, there is no natural-law doctrine of any importance which has not a more or less religious character.²

According to other followers of the natural-law doctrine natural law is the eternal law by which God providentially governs the created order. In this

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¹ Robert George, *Kelsen and Aquinas on the Natural-Law Doctrine*, Thomas International Project <http://www.thomasinternational.org/projects/step/essays/george_000.htm#_ftnref1>.

² Hans Kelsen, ‘The Natural-Law Doctrine Before the Tribunal of Science’ (1949) 2(4) *The Western Political Quarterly* 138.

sense the natural-law doctrine can be conceived as having a ‘religious character’.

This essay examines Kelsen’s statement by drawing on references from a number of philosophical and scholarly thoughts to address the extent to which the natural-law doctrine has in essence a religious character.

The International Encyclopedia of the Social Sciences defines natural law (Latin: *lex naturalis*) as a system of law which is determined by nature and thus universal. Further to its universal application natural law has also been described as:

[t]he natural law, or law of nature, given to Adam, ... concentered with him, written on his heart, ... in the hearts of all men, and even of the Gentiles; ... which if not by some means lulled asleep, ... excuses men from blame when they do well, and accuses them, and charges them with guilt when they do ill.³

Natural law theories have profoundly influenced the laws of many nations as well as the development of English common law.⁴ In fact:

Christianity has played an enormously important role in the origins and development of modern constitutionalism. Indeed, Christian principles are enshrined in the most significant documents in Western legal history,

³ John Gill, *A Complete Body of Doctrinal and Practical Divinity* (The Baptist Standard Bearer, 1989) 312.

⁴ Sir William Blackstone, *Commentaries on the Laws of England in Four Books* (Lippincott Co, 1893) vol 1, Online Library of Liberty <http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=2140&Itemid=27>.

including the English Bill of Rights (1689) and the American Declaration of Independence (1776).⁵

Empathically, this essay argues that natural law and in particular its religious character, is the governing force of all human laws. Consequently, its importance has been recognised and embraced by governments and legislators throughout the centuries, both in the pre and post Anno Domini periods.

As a moral law, engraved in the mind and conscience of man, ‘the natural-law [doctrine is] the status of all the fundamental principles of right and justice’.⁶ Thus, it is not surprising that ‘[a]s a matter of fact, there is no natural-law doctrine of any importance which has not a more or less religious character’.⁷

II NATURAL LAW DOCTRINE, ITS IMPORTANCE AND ITS RELIGIOUS CHARACTER (BACKGROUND)

The origins of natural law doctrine lie in Ancient Greece.⁸ Many Greek philosophers embraced the idea of natural law to the point where it played an important role in forming many aspects of the Greek government. This idea was subsequently used by philosophers such as St Thomas Aquinas,

⁵ Augusto Zimmermann, ‘God, Locke and Montesquieu: Some Thoughts Concerning the Religious Foundations of Modern Constitutionalism’ (2010) 1 *Western Australian Jurist* 1.

⁶ William H Halverson, *A Concise Introduction to Philosophy* (Random House, 1981) 357.

⁷ Kelsen, above n 2.

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

Thomas Hobbes, Hugo Grotius and John Locke in the development of natural law theory treatises of their own.

These philosophers used natural law as a basis for criticising and reforming positive laws (man-made laws), arguing that positive laws, which are unjust under the standards of natural law are legally inferior.

III NATURAL LAW DOCTRINE, ITS IMPORTANCE AND ITS RELIGIOUS CHARACTER (5TH CENTURY BC - 13TH CENTURY AD)

Eternal laws of supernatural origin are mentioned in the famous verses of Sophocles' *Antigone* (449-460). In this literature the king forbids the burial of a man fallen in the attack of Thebes. However, Antigone, the sister of the fallen man 'is impelled by piety to disobey; she puts earth on the body lying exposed on the plain, and is arrested'.⁹

When asked why she disobeyed Antigone reasoned that the immutable unwritten laws of heaven override the laws of mortal man. This literature reveals the idea that the Greeks believed in something that transcends man-made laws; something that might be classified as natural law.

Plato argues that there is a natural order of virtues which become the standard for man-made laws. Aristotle, in his *Rhetoric*, speaks of 'the law according to nature' as being an unchangeable law common to all men. Stoicism identifies natural law with God. It believes that, if rational beings comply with it, it will govern their conduct. Stoicism's natural law teaching subsequently affected Roman law.

⁹ Ibid 20.

Cicero, in *De Legibus*, states that justice and law derive their origin from the Gods. Accordingly, natural law obliges us to contribute to the general good of the society and that man-made statutes may be ‘wicked and unjust’.¹⁰ He further states that:

[t]here is in fact a true law ... which ... applies to all men and is unchangeable and eternal ... To invalidate this law by human legislation is never morally right, ... It will not lay down one rule at Rome and another at Athens ... But there will be one law ... binding at all times upon all peoples; and there will be, as it were, one common master and ruler of men, namely God, who is the author of this law, its interpreter and its sponsor.¹¹

Aquinas believes that ‘the natural law is nothing else than the rational creature's participation in the eternal law’.¹² This eternal law is said to be God’s wisdom, and as such, it is the directive norm of all movement and action.

When God resolved to give existence to His creatures He resolved to ordain and direct them to an end.¹³ It is God who leads men towards what is good, instructs them by law and, assists them by His grace. Thus, human laws that are in conflict with the natural law do not have the force of law.

Accordingly, a human law is valid only insofar as its content conforms to the content of the natural law: ‘every human law ... if in any point it

¹⁰ Francis Barham, *The Political Works of Marcus Tullius Cicero: Comprising his Treatise on the Commonwealth; and his Treatise on the Laws* (Edmund Spettigue, 1841) vol 2, Online Library of Liberty <http://oll.libertyfund.org/index.php?option=com_content&task=view&id=747&Itemid=284>.

¹¹ Francis W Coker, *Readings in Political Philosophy* (The Macmillan Company, 1938) 151.

¹² Thomas Aquinas, *Summa Theologica*, Question 91, Article 2, New Advent <<http://www.newadvent.org/summa/2091.htm>>.

¹³ Blackstone, above n 4.

deflects from the law of nature, it is no longer a law but a perversion of law'.¹⁴ Clearly then the natural law, and in particular its religious character, played an important role in the development of man-made laws throughout this period.

IV NATURAL LAW DOCTRINE, ITS IMPORTANCE AND ITS RELIGIOUS CHARACTER (13TH TO 18TH CENTURY AD)

Fortescue believes that the supreme importance of the law of God and of nature 'profoundly influenced the course of legal development in the following centuries'.¹⁵ Sandoz in commenting on Fortescue's statement notes that 'the historically ancient and the ontologically higher law - eternal, divine, natural - are woven together to compose a single harmonious texture in Fortescue's account of English law'.¹⁶

Coke's discussion of natural law appears in his report of the Calvin's Case (1608). In this case the judges found that the allegiance of the subject is due unto the King by the law of nature; the law of nature is part of the law of England; the law of nature was before any judicial or municipal law; and the law of nature is immutable.¹⁷

¹⁴ William P Baumgarth and Richard J Regan, *Aquinas On Law, Morality and Politics* (Hackett Publishing Company, 2nd ed, 2002).

¹⁵ Harold Dexter Hazeltine, 'General Preface: The Age of Littleton and Fortescue' in Sir John Fortescue (ed), *De Laudibus Legum Anglie* (Cambridge University Press, 1949) 1, 28.

¹⁶ Ellis Sandoz (ed), *The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of Rule of Law* (University of Missouri Press, 1993) 7.

¹⁷ Steve Sheppard (ed), *The Selected Writings and Speeches of Sir Edward Coke* (Liberty Fund, 2003) vol 1, 19597.

Grotius, in his influential work on international law *The Law of War and Peace* states that '[n]atural law is the dictate of right reason ... natural law is universal, unchangeable, and supreme'.¹⁸ Grotius, in fact, believes that '[t]he law of nature is so immutable that it cannot be changed even by God himself'.¹⁹ Hobbes, in the *Leviathan* writes: '[a] law of nature, *lex naturalis*, is a precept or general rule, found out by reason ...'.²⁰ Thus, the law of nature is a 'dictate of reason'.²¹ Locke concurs and states that those who transgress the law of nature have renounced 'reason, the common rule and measure God hath given to mankind'.²² Moreover, the law given to Adam to govern his actions and those of his descendants, was 'the law of reason'.²³

Blackstone agrees and says that:

[t]his law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.²⁴

Simonton concurs and states that 'proceedings in our Courts are founded upon the law of England, and that law is founded upon the law of nature

¹⁸ Francis William Coker, *Readings in Political Philosophy* (University Press of the Pacific, 2002) 411.

¹⁹ *Ibid* 412.

²⁰ Edwin A Burt, *The English Philosophers from Bacon to Mill* (Random House, 1939) 163.

²¹ *Ibid* 173–4.

²² John Locke, *The Second Treatise on Civil Government* (The Classics Club, 1947) 79–80.

²³ *Ibid* 101.

²⁴ Blackstone, above n 4, 41.

and the revealed law of God. If the right sought to be enforced is inconsistent with either of these, the English municipal courts cannot recognise it'.²⁵

According to Dworkin, when deciding difficult cases, judges resort to moral principles that do not derive their legal authority from man-made laws.²⁶ In *Riggs v Palmer*²⁷ neither statutes nor case law governing wills expressly prohibited a murderer from taking his victim's will. The court, however, declined to award the defendant his gift under the will simply because it would be wrong to allow him to profit from such a grievous wrong. Hence, Dworkin argues that the legal authority of standards in cases like *Riggs* cannot be acquired from positive laws, but rather, a justification can only come from the natural law.²⁸

Consequently, natural law served as authority for legal claims and rights in many judicial decisions, legislative acts, and legal pronouncements.²⁹ In fact, Clinton argues that the U.S. Constitution rests on a common law foundation and that the common law in turn, rests on a classical natural law foundation.³⁰ Thus, the natural law and in particular its religious character, played an important role in the development of man-made laws throughout this period.

²⁵ John W Simonton, 'On the Origin and Nature of Law' (1902) 11(4) *Yale Law Journal* 203.

²⁶ Ronald M Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) 40.

²⁷ (1889) 115 NY 506.

²⁸ Dworkin, above n 26.

²⁹ John Phillip Reid, *Constitutional History of the American Revolution: The Authority of Rights* (University of Wisconsin Press, 1986) 90–1.

³⁰ Robert Lowry Clinton, *God and Man in the Law: The Foundations of Anglo-American Constitutionalism* (University Press of Kansas, 1997).

V THE FUTURE OF NATURAL LAW

Natural law jurisprudence is currently undergoing a period of reformulation. Even so natural law became the bedrock for the English common law system and the U.S. Constitution. Without doubt it will continue to play a vital role in the development of governance principles of many societies. According to Singh 'natural law ... continue[s] to play a key role in the development of international law'.³¹

Natural law and its religious and ethical considerations will continue to play a vital role in governing the morality of man and, in the process, resume directing the development of future man-made laws. Simonton eloquently states that '[e]thical considerations can no more be excluded from the administration of justice, which is the end and purpose of all civil laws, than one can exclude the vital air from his room and live'.³²

VI CONCLUSION

This essay demonstrates that the religious character of natural law has guided the development of human laws in many aspects. One such example is the English common law system - the bedrock of Western jurisprudence. The following account of Zimmermann's own assessment of the importance of natural law doctrines in the development of man-made laws provides a compelling evidence of this: '[i]n the earlier stages of its historical development, from the 13th century to the 18th century, the English common law rested almost entirely upon a religious conception

³¹ Prabhakar Singh, 'From Narcissistic Positive International Law to Universal Natural International Law: The Dialectics of Absentee Colonialism' (2008) 16(1) *African Journal of International and Comparative Law* 5682.

³² Simonton, above n 25, 207.

that looked to a higher law as the basis for judicial decisions'.³³ Moreover, Ratnapala and Moens state that '[e]very modern charter of rights has been derived directly or indirectly from natural law ... doctrines. Many constitutions, including the American, owe great debts to natural law'.³⁴

As a moral law, engraved in the mind and conscience of man, 'the natural-law [doctrine is] the status of all the fundamental principles of right and justice'.³⁵ Thus, it is not surprising that 'there is no natural-law doctrine of any importance which has not a more or less religious character'.³⁶

³³ Augusto Zimmermann, 'The Law of Liberty: Natural Law Roots of Western Constitutionalism' (2011) 15 *International Trade and Business Law Review* 432, 441.

³⁴ Suri Ratnapala and Gabriel A Moens, *Jurisprudence of Liberty* (LexisNexis, 2nd ed, 2011) 7.

³⁵ Halverson, above n 6.

³⁶ Kelsen, above n 2.