

1-1-1962

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ON NATURAL LAW AS THE BASIS OF DEMOCRACY

What Professor Robert L. Calhoun wrote concerning democracy and natural law in the 1960 NATURAL LAW FORUM undoubtedly corresponds to an opinion now widely shared. After the experience of Fascist totalitarian regimes and confronted by the threat of other totalitarian regimes, many think that a defense of democracy cannot be assured except through the affirmation of universal and absolute juridical values, values which the legislation of the state can never contradict.

Writing myself in the first volume of this review,¹ I recalled how in Italy — that is, in a country which underwent directly the totalitarian experience and suffered deeply from it — the rebirth of natural law after the war had been intense. The same phenomenon has manifested itself in Germany, the other European country which returned to democracy after a tragic totalitarian period.

But are this opposition of natural law to totalitarianism and this rejoining of democracy to natural law *logically* justified? Is it not a matter of an understandable psychological phenomenon of reaction? I must confess that I have never been convinced of the necessity of natural law to the existence of democracy: at least if by “natural law,” as it is presently understood, is meant a complex of principles or norms not only independently valid in relation to the law of the state but valid absolutely and independent of circumstances of space and time — in sum, an eternal and immutable legislation.

I

In the countries of the West and in particular in Great Britain and the United States one understands by “democracy” essentially a form of political life in which respect for some very important rights of man is assured, and in which exists the guarantee that whoever holds political power will find an impassable limit to his actions, so that in no case can the sphere of liberty of individual members of society or of social groups intervening between the individual and state be violated. If democracy consisted only in this, there would indeed be no logical difficulty in admitting that democracy can find a solid basis in natural law. In fact natural law, considered as a complex of norms which are absolutely valid and cannot be derogated in any circumstance or by any person, may appear an effective instrument for fixing limits to the action of those who possess the power and for preventing arbitrary action. I say “may appear” and not “is” because, as I shall develop, it may happen that natural law can, instead, appear as a basis for political doctrines which deny individual liberties and limits to the action of those who govern.

But does democracy really consist only in the guarantee of the rights of the individuals and the minority groups and in limits placed on the arbitrary action of those who govern? One should remember that literally *demokratia*, as everyone knows, means “power of the people.” In ancient Greece, where it was born,

1. Guido Fassò, *Natural Law in Italy in the Past Ten Years*, 1 NATURAL LAW FORUM 122 (1956).

it really and manifestly wore that aspect of governmental form in which the power is effectively exercised by the people. Certainly also in Greek democracy equality and juridical freedom were essential elements: in the first example of opposition between democracy and the other forms of government which we find in Greek political thought, the very famous *logos tripolitikos* by Herodotus, what was later called *demokratia* is named *isonomia* — i.e., juridical equality — and is called “the finest name of all.”² The equally famous praise of Athenian democracy attributed by Thucydides to Pericles points up the fact that “everyone enjoys equal rights” and that “public life develops freely.”³ In their praise of democracy orators insisted continually on the sovereignty of the law and equality in relation to it. One cannot say therefore that the Greeks were ignorant of or neglected this aspect of democracy. But Greek democracy did not exhaust itself in this: it was not for nothing that popular government, which, as we have seen, Herodotus called an *isonomia*, or juridical equality, soon took on the name of *demokratia*, or power of the people. This latter was in fact also — or rather above all — self-government of the people, the direct and immediate participation of the people in the life of the state and therefore full and total correspondence of this life to the popular will. That often happened in an extreme form, and the state and the law appeared therefore at the mercy of the whim and the passions of the masses. It happened that, even when the people desired harmful things, it was said, “It is monstrous not to allow the people to do what it wants.”⁴ And this is the reason why Greek writers often show scant sympathy for democracy.⁵

One can object that modern democracy, which is what we are discussing now, is different from Greek democracy. That is in large measure true. But we cannot go so far as to contrast modern democracy and ancient democracy as two concepts directly opposed to one another. Certain characteristics of the two will be different, or rather the proportion between certain characteristics will be different. But the essential elements by virtue of which democracy is democracy and not a form of political life to which another name may be given cannot fail to be the same.

But let us leave ancient democracy out of the discussion, and let us discuss the modern concept. Everyone knows the thesis of Rousseau: the law must be the expression of the general will; just as in the Greek city-state, the people must participate directly in the exercise of power. Even in this political concept, which is always considered typically democratic, the stress is on self-government, on the effective direction of the state by the people — even at the cost of abuses of power and arbitrary actions by the people itself, as happened in Greece and as came about in France when the theories of Rousseau were put into practice.

I mention all of this simply to point up that when one speaks of democracy

2. HERODOTUS, HISTORY, III, 80.

3. THUCYDIDES, THE PELOPONNESIAN WAR, II, 37.

4. XENOPHON, HELLENICÆ, I, 7, 12.

5. I have discussed at length Greek democracy and in particular these aspects of it in my book *LA DEMOCRAZIA IN GRECIA* (1959). In this work I cite texts of all the Greek authors, even the minor ones, who refer to the subject.

one refers not only to the guarantee of the juridical liberty of the individuals and social minorities (subcommunities). One refers also, and perhaps above all, to self-government, to the control of the state by the people, to the continuing consent of the people to the activities of the organs of the state. Liberty indeed is an essential element of democracy, but democratic liberty is not only a limit to the arbitrary action of those who govern, a negative liberty; it is also a positive liberty, the possibility for the people to make their own will, whatever it may be, effectively valid. Ultimately one may add that democracy does not exclude dictatorship if one means a dictatorship of the people, that is, the best way for the people to exercise its own power. That is what the Communists claim: they not only speak of "Soviet democracy" but they maintain that Soviet democracy is a "democracy of the highest type."⁶

It is possible not to value this kind of liberty, and I personally do not value it. Aristotle placed little value on it, as is obvious from his classifying democracy among the degenerate forms of government. Montesquieu likewise placed little value on it, for he wrote that "since in democracies the people appears to do almost what it wants, liberty has been attributed to this type of government, and the power of the people has been confused with the liberty of the people."⁷ It is possible to criticize and refute democracy with Aristotle and Montesquieu. One cannot deny that what is criticized is the democratic concept of liberty, and one cannot deny the title of democracy to forms of political life in which the people holds the effective power.

Without reaching the extremes attained by the Communists who deny the other liberties in order to maintain a certain one of them, it must be admitted that when one speaks of democracy it is impossible to leave out of account the element of popular will. The guarantee of individual liberties, the limiting of the arbitrary actions of those who govern, are certainly fundamental elements, but they are not sufficient to achieve democratic liberty. As formal as the concept of democracy that we maintain may be, we cannot ignore popular sovereignty, the effective and concrete dependence of the life of the state on the will of the people. This is true if one means a democracy and not simply a constitutional state or a legal state.

Now, the will of the people is an element of historical development. It varies in space and time. If it expresses certain values, these cannot be absolute values which transcend history. Calhoun himself writes very justly that "the democratic understanding" is "that society is, by its very nature, perpetually in flux, needing to be guided but never frozen."⁸ The will of this perpetually developing society is itself developing, and it cannot be "frozen" in limits which are extrahistorical, fixed and unchanging. Those principles which a people in a certain historical period feel to be essential to social life and which the people therefore wish to be sanctified by positive legislation may not be felt essential by another people

6. THE LAW OF THE SOVIET STATE 160, ed. by A. J. Vyshinsky (1948).

7. MONTESQUIEU, L'ESPRIT DES LOIS, XI, 2: "comme dans les démocraties le peuple parait à peu près faire ce qu'il veut, on a mis la liberté dans ces sortes de gouvernement, et on a confondu le pouvoir du peuple avec la liberté du peuple."

8. R. L. Calhoun, *Democracy and Natural Law*, 5 NATURAL LAW FORUM 31, 35 (1960).

or even the same people in a different historical period, and may be denied. We may disapprove of this, considering values which *we* feel and know to be essential; but we must admit that if a people wishes to live according to principles different from ours, a *democratic*, and not simply *liberal*, conception of political life requires that this people be allowed to live according to the principles which it freely chooses as best, even if they do not appear good to us. We can conclude, as Plato concluded, that democracy is not a good form of government because in it the state is governed by the will of the mass (the beast hastily developed, incapable of distinguishing the beautiful and the ugly, the good and the bad, the just and the unjust),⁹ and not by the will of the *áristoi*, of the "best" who know the truth and the supreme values. But this is democracy: in it the supreme values are those which the people feel to be supreme. The *áristoi*, or at least those who consider themselves to be so — and in truth who does not consider himself *áristos*? — by imposing their principles of political life on a nonconsenting people would certainly not achieve democracy. And frequently the ideal of a state founded on absolute values disguises the aspiration, nourished even in good faith, to impose on other citizens principles which they do not share. Nevertheless, if it be democracy, the values must not be imposed on fellow citizens from outside or from above: they must be found within men themselves, men as they are historically and not as they are abstractly conceived by philosophers and moralists.

The sponsors of natural law in the seventeenth and eighteenth centuries were able theoretically to establish democracies, since their theory included the idea of the social contract. It is not without reason that Rousseau, the only true *democratic* theoretician of those days, concentrated his attention on this point. The social contract made the state rest on the will and the consent of the citizens, and thus it satisfied the purely democratic requirement, and not only the liberal requirement which was satisfied by natural law with the limit that it placed on the power of the ruler. But it is evident that in order to satisfy this requirement fully the social contract cannot be conceived as a fact which occurred one time only, which remains outside of history; this is the way the natural law jurists who preceded Rousseau conceived it. The contract must be considered immanent in history itself as a constant requirement that political institutions should be at all times concretely in conformity with the will of the citizens, even though this will may change and with time will fatally change.

The consensual character of democracy may appear to be an element of instability and weakness for the state and for democracy itself. It may be that states built on principles accepted as unshakable and unquestionable may appear more solid. Certainly the critical spirit, discussion, divergence of opinions may be causes for uncertainty of action and can seem to be the cause of organic inefficiency. But where these are lacking do you have democracy or is there not rather a dogmatic absolutism? I need merely mention that Thucydides, so little tender to Athenian democracy, is willing to have Pericles say that "discussion is not harmful to action but rather the lack of preparation through discussion

9. PLATO, *RESPUBLICA* 493 a-c.

before proceeding to action is harmful.”¹⁰ Even in recent times the great political military force of the democratic states has been nothing more than an aspect of that moral force directly founded on popular consent which was the result of criticism, of discussion, of active participation of the people in the life of the state, even though this participation was fickle and discordant. It was the dictators who scoffed at democracies for their presumed instability and for their presumed weakness caused by subjection to the volatile popular will. At the proper time it was clear how strong were the institutions founded on “the capricious” consent of the masses.

I note in this connection that Calhoun contrasts the persistence of political and social institutions of the Hebrews founded on the absolutely valid law of divine origin with the “brief and tragic career” of the Athenian democracy, which did not possess “a sense of the overriding claim of the common good” without which “no democratic society can last.”¹¹ Ancient Hebrew society undoubtedly had many good qualities, but certainly not that of being democratic. Nor was Athenian society of the period following the death of Pericles at all like that depicted by Calhoun, based on the testimony of antidemocratic Greek writers.¹² The Athenian democracy was in reality so stable that the attempts of the oligarchy to overturn it failed precisely because of the spontaneous resistance of the people; that is, because of the foundation that it had in their moral and political conscience: and this is the essence of democracy. This happened both in 411 B.C. and in the time of the Thirty Tyrants, when the antidemocrats were protected by the victorious armies of Sparta. And after the re-establishment of the democratic government in 403 B.C., the Athenian democracy lived and developed in a continually more democratic direction for more than eighty years. In 322 B.C. it fell, it is true, but not through the internal weakness of its institutions, but because Athens was crushed by the military power of Macedonia. In similar fashion the political and social institutions of the Hebrews, and even Hebrew society itself, were destroyed by Roman arms. The institutions of Sparta, which had furnished the model for the ideal republic of Plato, fell in similar fashion. One should observe, however, that Sparta, faithful to the intangible *kosmos* of its legislation of divine origin, has left nothing to us except the historical example of a state in which none of us would want to live; whereas Athens, where “individualism and popular caprice were rampant, in disregard of both the Constitution and the common good, not to men-

10. THUCYDIDES, THE PELOPONNESIAN WAR, II, 40.

11. Calhoun, *op. cit. supra* note 8, at 68.

12. On the subject of the historians who disprove the testimony of antidemocratic Greek writers, see GAETANO DE SANCTIS, 2 STORIA DEI GRECI, 278-279 (Florence, 1954); PAUL CLOCHÉ, LA DÉMOCRATIE ATHÉNIENNE 151 (Paris, 1951); A.H.M. JONES, ATHENIAN DEMOCRACY (Oxford, 1957), particularly Ch. III, *The Athenian Democracy and its Critics*. The conclusion of Mr. Jones is the following: “My readers can judge whether the ‘extreme democracy’ in which the people was sovereign, and vulgar persons who worked with their hands enjoyed full political rights, including access to all offices, and owing to their greater number preponderated in the assembly, was indeed so pernicious a form of government as Athenian philosophers and historians represent.” (p. 72) See also J. B. BURY, 1 A HISTORY OF GREECE TO THE DEATH OF ALEXANDER THE GREAT 454-455 (London, 1902).

tion plain human decency,"¹³ gave us in those very years the basis for that civilization which makes us prefer democracy to absolutism.

II

What I have said up to now is valid indeed for democracy understood in a proper and strict sense. I have already observed, on the other hand, that many persons, particularly in the Anglo-Saxon countries, call "democracy" the *liberal* form of government. By this is meant the form in which the liberties of individuals and of social groups (subcommunities) are guaranteed, and in which the sphere of action of the organs of the state are strictly limited, although the full self-government of the people is not necessarily achieved. There is a historical explanation for this: in Anglo-Saxon countries liberalism and democracy developed simultaneously and harmoniously, thanks to the wisdom of the citizens and to fortunate historical circumstances. For this reason it is difficult for the English and the Americans to distinguish the two components of the form of political life which they enjoy.

When Calhoun discusses the democratic legitimacy of the Athenian democracy after the death of Pericles¹⁴ and declares apropos of Rousseau that Locke seems to him "to fill better the role of 'prophet and theorist of modern democracy,' not only through priority in time but through clearer recognition of what is 'true democracy,'" ¹⁵ it seems evident to me that by the word "democracy" he means precisely liberalism. Locke is, after all, a liberal thinker, not a democratic one. This liberalism is a form of political life which has in view liberty, of course, but a liberty conceived differently from the liberty of the believers in democracy.¹⁶

Let me not, however, make it a question of words. As the term "democracy" is used by many persons in the sense of "liberalism," and since Professor Calhoun obviously uses it in this sense, let us see now how the rapport between natural law and democracy in this sense is to be understood.

Natural law may be posited as the basis of a form of political life in which individual and private liberties are assured only if it is thought by all that these liberties must exist by natural law. If, on the other hand, there is someone who thinks that by natural law the best must command, or the strongest, those who belong to some superior race, to some *Herrenvolk*, or those who have the privilege of being the custodians of the Truth, the representatives of God on earth, or else those to whom God has directly or indirectly given power, etc., then the absolute validity and undeniability of natural law may become the most solid basis for absolutism.

Modern liberalism doubtless developed on bases founded in natural law; natural law offered to Milton, Sidney, Locke and all the English and American liberals of the seventeenth and eighteenth centuries, a formidable instrument

13. Calhoun, *op. cit. supra* note 8, at 68.

14. *Ibid.*

15. *Id.* at 36, n. 6.

16. Benjamin Constant, *De la Liberté des anciens comparée à celle des modernes*, in 4 COURS DE POLITIQUE CONSTITUTIONNELLE 254-255 (1820).

of warfare against absolutism. Their testimony is more than sufficient to allow one to affirm that natural law can be placed at the foundation of the defense of liberty against despotism, as the basis and guarantee of the rights of man. Still, it is equally true that in other periods or in other lands, or in the hands of other writers, the opposite has happened. This allows one to state that the natural law can be invoked by the defenders of despotism against liberty. In the Anglo-Saxon world, where one has seen the realization of the first case, it appears scarcely admissible that natural law can be the basis of absolutism. Yet Calhoun himself admits that "defenders of despotism may of course appeal (as in fact they have done more than once) to some sort of natural sanction — divine right of kings, natural right of the stronger . . ." He seems not to give much importance to the matter, because, he says, "they need not do so."¹⁷ But the trouble is that, whether they need to or not, they often do. On the other hand, as we shall see, the defenders of liberty and of democracy do not *need* natural law, and they can happily use other bases. There are probably more cases in which natural law or analogous metaphysical values have been put to use as bases of absolutism than there are cases in which they have been used as bases of liberty.

Let us consider the case of the most resolute and meaningful champion of absolute and transcendent metaphysical values of history who ever lived: Plato. His political conclusions are the most perfect example of the theory of the totalitarian state in all the history of thought. John Wild has written a remarkable book to defend Plato from one accusation among many, that of having been an enemy of democracy.¹⁸ But I have been unable to find in this book any proof that what Plato maintains about family or education, besides government, is democratic. Still, these aspects of Platonic political doctrine, which even in their details recall the politico-educational concepts of Hitler or of Mao Tse-Tung, are the logical consequences of the absolute metaphysical assumptions to which this doctrine is related. It is perfectly logical to think that the one who governs, knowing the Truth, the Absolute Good, the Supreme Values, has not only the right but the duty to impose their realization on the state for which he is responsible. Whoever knows Absolute Truth cannot admit freedom to err: tolerance is for him a fault.

We must admit finding the same attitude often in Catholic political thought, which starts from the premise of possession of Absolute Truth. Wild says that "another charge now widely urged against the theory of natural law is that it is fundamentally a conservative or reactionary conception."¹⁹ But he objects that "one reason for the prevalence of this idea is the association of natural law in the popular mind with the medieval Church, and with certain policies of the Roman Catholic Church in recent times." He also states that "this, of course, is a historic accident." Wild may have been speaking of a conservative or reactionary attitude in a social sense. But I refer not to social problems but solely to the political question. I am not discussing, therefore, whether the Catholic theory of natural law has impeded or is impeding reforms

17. Calhoun, *op. cit. supra* note 8, at 54.

18. JOHN WILD, *PLATO'S MODERN ENEMIES AND THE THEORY OF NATURAL LAW* (1953).

19. *Id.* at 93.

of a social nature; I inquire rather whether this theory has more often favored political liberalism or has been invoked in defense of absolutism.

Wild himself admits that medieval juridico-political thought, even though based on natural law, can certainly not call itself liberal or democratic. This remark is valid not only for the scholastic philosophers but also for the lay jurists. The lay jurists of Bologna, who accept the theory of the Stoic-Christian natural law, are precisely the ones who uphold the rights of the Empire against the Communes, the small democratic city-states of northern and central Italy.²⁰ On the contrary, the first democratic political writer who appears at the close of the Middle Ages, Marsilius of Padua, makes merely a brief mention of natural law, and defines it in a positivistic manner as "*statutum legislatoris*," a decree of the legislator, "*in quo, tamquam honesto et observando quasi omnes conveniunt*."²¹ When he declares that the law must be the expression of the will of the people, and that the prince must be subject to it, he does not plan at all that it be founded on natural law.

Let us move to another historical period. The Jesuits, in particular the Spaniards, in the time of the Counter-Reformation, are certainly among the most significant theoreticians of natural law. Their case would seem to support Calhoun, since they too appear to be defenders of popular sovereignty and many historians include them among the antiroyalists. But in reality they combatted the *absolutism* of kings, and to combat it used as a weapon the rights of the people and throughout acted with the aim of removing the major obstacle to the absolute power of the Church.

I shall cite one example. Luis de Molina, one of the leading espousers of natural law in the sixteenth century, says that because of natural law the *respublica* can make resistance to the power of the king. By *respublica* he means the people, from whom stems *directly*, he says, some form of *suprema civilis potestas*. This resistance can occur if the king "does something unjustly against the people and exceeds the limits of power conceded to him."²² Further on he explains: "it does not belong to the Supreme Pontiff to create kings and other lay powers, nor to depose them, but this is the business of the people, who as they constitute monarchs, may also depose them if right reason demands it and a just and urgent cause occurs."²³ In sum, natural law bestows on the people, and on them alone, the power of selecting the form of government preferred. Even more important is the power of rebelling against the government and of changing it. These are clearly democratic assertions. But Molina adds reservations to these assertions which cancel them completely. "When there can be a suspicion of some doubt" or "when not the whole of the people, but a greater part of it, consents" (which means, in practice, always), it is "the best opinion" that the pope be consulted "so that by the intervention of his authority there may be greater justification for what is done." If the spiritual welfare of the

20. These jurists were the "Four Doctors," who had been Irnerius's disciples in Bologna: Bulgarus, Martinus, Hugo, Jacobus. They assisted as legal advisers to Frederick I at Roncaglia in 1158, when the German emperor declared his sovereignty over the Italian "Communes."

21. MARSILIO DA PADOVA, DEFENSOR PACIS, II, 12, 7 and 8.

22. LOUIS DE MOLINA, DE IUSTITIA ET IURE, I, Tract. II, disp. 26, 4-6.

23. *Ibid.*, disp. 29, 16.

people is at stake, "it belongs to the Supreme Pontiff to interpose his authority and to aid the common good by censures and in other ways suppressing those who attempt to impede what the common spiritual good and spiritual welfare of the people demands."²⁴ Finally "if the supernatural goal requires it, the Supreme Pontiff can depose a king and deprive him of his kingdom."²⁵

On the basis of natural law an absolutism is being fought here, but only for the purpose of affirming another. The sovereignty of the people is declared only to make more solid that of the pope. Much worse can be found among the Catholic writers on natural law in the nineteenth century; however, they do not want to entertain the idea of the sovereignty of the people even on these bases.²⁶

24. *Ibid.*

25. *Id.* at 23.

26. The Italian Guglielmo Audisio, in his work *Iuris naturae et gentium privati et publici fundamenta* (1853), reaches a discussion of democracy ("*imperium populare*," Book III, Ch. VII) only after having made an analysis of natural law and after having stated (Ch. V of Book I) that "*lex naturalis, in hominum societate, fons est aequitatis, fundamentum libertatis*." The judgment he pronounces on democracy is the following: "*Est enim quaedam nova criminum aristocrata, paucorum tyrannide conclusa, quod verbis populare dicitur imperium*." (p. 280) His final conclusion is this: "*Ergo summum populi ius, etsi menti arrideat speculanti, nunquam practice extitit, nunquam in hoc naturae statu existere poterit, quin libertas concidat popularis: libertatis propterea populi amore repellendum*." (p. 281)

It will be objected that this concerns democracy in the ancient sense, or according to Rousseau. But this theoretician of natural law does not hold in any higher esteem the liberal constitutional state, the modern democracy ("*regimen repraesentativus*"): in fact, he says, "*summa huius regiminis vitia, intrinseca atque insanabilia sunt defectus unitatis et sinceritatis, sapientiae ac fortitudinis, verae responsabilitatis, honestatis veraeque libertatis, expeditae atque oeconomicae simplicitatis: adeo ut forma haec regiminis . . . practice omnium vitia collegerit, maxima usura, nec minima populorum infelicitate*." (pp. 283-284) And so on, until he recommends preventive censoring (p. 289), condemns the autonomy of the state in relation to the Church (pp. 309-310), denies freedom of worship (pp. 327-332), and inveighs against republicanism. (pp. 344-347)

Nor is this an isolated case. Another Italian writer on natural law in the nineteenth century, Matteo Liberatore, in his *Ethicae et juris naturae elementa* (1846), when faced with the problem of the best form of government, declares first of all "*omnium deterimam et perniciosissimam esse democratiam*" (p. 237); and although he recognizes that it is impossible to establish one form of government equally good for all countries ("*quis vel concipere mente posset populum Statuum-Unitorum Americae sub gubernio monarchicae formae?*") (p. 246) he declares the absolute monarchy to be preferable to all others. (p. 241)

Let us turn from the Italian writers. Tancredè Rothe admits in his *Traité de droit naturel* (1885) a principle which is certainly neither democratic nor liberal, in the field of international law, when he says "the legitimate belligerent can . . . force prisoners to work, until they have repaid the cost of the war." (p. 233) At the same time he acknowledges that "the condition of a man who can be forced by an individual or several others to work for them is that of temporary or perpetual slavery." (p. 234) This means that he recognizes in substance the compatibility of slavery, even if perpetual slavery, with natural law. Similarly I do not believe that one can call democratic or liberal the writings on slavery of an even more recent advocate of natural law, Viktor Cathrein. He states that a form of "mild" slavery, in which the slave "must work really all his life for his owner, with no other payment than necessary support, but with the essential human rights" is not "contrary to the natural law" and is not "truly unjust." II MORALPHILOSOPHIE 455 (1911). I pass over the fact that Cathrein takes up once more the mediæval theocratic thesis which denies that the state is founded on the will of the people because political power is derived immediately from God, without the intermediary of human will.

Are all these statements "historic accidents"? Naturally one could say on the same basis that the cases in which natural law, whether Catholic or not, appears as the basis for legislation and democratic institutions are historic accidents. It seems to me, however, that one should conclude that even formal or liberal democracy is based not on the acceptance of a natural law understood as a system of eternal and immutable principles but on the political maturity and the civil education of the people. In addition, it is based instrumentally on a system of juridical structure which assures a concrete balance among the various political, social, and economic forces. These are the elements which have assured the stability and vitality of democratic institutions in the Anglo-Saxon and Scandinavian countries. There, from the beginning of the nineteenth century up to today, hardly anyone has ever spoken of natural law. These elements are, on the other hand, lacking in other countries where democracy has always had a short and uncertain existence, countries where the doctrine of natural law in its Catholic form has always been present. One thinks here of Spain, Latin America, and the Latin countries in general.

This is not fortuitous. Arthur Utz, in this very review, wrote: "a legislative policy based on the absolute norms of natural law or of the Catholic faith is, with respect to error, but a policy of toleration. Hence, it can never acknowledge a formally equal right of the opposition."²⁷ This may be an extreme position, because a *juridical* equality may exist contingently even in a state whose legislation is inspired by absolute values if this legislation is tolerant. What exists with much greater difficulty is moral-political equality, that which makes the people, the *whole* people, feel that it is an active and living part of the state. It is this equality which creates in people the feeling of political responsibility which is a primary basis for democracy. Men on whom are imposed ideals which they do not feel and men who see their own ideal condemned as illicit or tolerated as error shy away from political life. They feel the law to be the will of someone else and often consider it an abusive power. They consider the state as a distant patron and often as an enemy. They cannot give life to a democratic society and they do not become free men because they are not educated to liberty and to responsibility. They remain subservient in their spirit, ready to accept despotic regimes; and when they rebel, they do so not in search of democratic liberty but of anarchy.

Aristotle said that the most important thing determining the stability of forms of government is civil education, because the laws, even the best of them, do not help if the citizens are not politically educated.²⁸ If in many countries of Europe and Latin America democracy has disappeared or is living an uncertain existence, it is precisely because those peoples lack civil and political education. Did this happen because the legislation of these countries ignored absolute values or because it adhered too closely to them?

III

At this point someone will say that I am an advocate of juridical positivism.

27. 3 NATURAL LAW FORUM 170, 172 (1958).

28. ARISTOTLE, POLITICA 1310 a.

In fact, many persons are convinced that whoever does not accept absolute natural law or does not attribute to absolute natural law all the virtues, including that of being the indispensable basis for democracy, is a "positivist," dedicated to the idolatrous cult of the state and of its laws.

But this alternative is not acceptable. One can reject absolute natural law and not be a positivist. A criterion of the value of positive laws may be derived from ideals of justice, themselves not conceived as absolute and eternal. This can permit criticism of the law of the state not less (and I believe better) than immutable natural law. This criterion is an alternative to the law of the state as the only valid norm of conduct. It is not in fact necessary that a person who does not believe that valid norms of conduct are only those imposed by the authority of the state must accept a body of law outside of the historical context, abstract and immobile. This is a concept which can be accepted with difficulty by men of modern times, at least men of modern European culture. The historical sense which is most alive in modern Europe prevents the majority of students of law from conceiving a law which does not evolve historically. In Germany and Italy, where the reaction against statism and juridical positivism has been stronger than elsewhere, there has been a strong rebirth of natural law. But it is considered most often as a "new natural law" which is not extra-historical. There has even been talk of "relative natural law." Its advocates have taken care to distinguish themselves from traditional advocates of natural law. The Catholic philosophers of law have forced themselves to bring the doctrine of St. Thomas into agreement with the requirements of history, attributing to the actual circumstances what he says in Question 94, Article 5, of the *Prima secundae* concerning the adaptability of natural law.²⁹

What is important, I agree, is that norms imposed by the state can and must be evaluated by a superior criterion. This valuation may force the citizens to reject the norm of the state, whatever may be the consequences. This criterion, in order for it to be really felt and to have real force, must be discovered by man in his own moral conscience and in the moral conscience of the people and of the time. This criterion cannot be rigid, petrified, "frozen" in an abstract, absolute, suprahistorical body of law. Above all, if this criterion is to become the basis for a truly democratic life, and therefore morally democratic even before juridically democratic, it must be living, concrete and actual in the historical conscience of men. Only in this way can this criterion serve as a foundation for a political life corresponding to the knowing and responsible will of the people. Otherwise it may become the foundation for absolutism, since values which the people do not recognize may be imposed with the argument that these values are absolutely valid and beyond discussion.

In order to be the foundation of democracy the criterion of value of positive law must, in sum, be historical. Insofar as it is different from the positive law

29. An extreme example of this trend occurred recently, when the major Italian Catholic juridical review, *Jus*, the organ of the Catholic University of the Sacred Heart in Milan, published a long article by the German Arthur Kaufmann, *Diritto naturale e storicità*, 10 *Jus* 178-196 (1959). This article gives an absolutely historical interpretation of the Thomistic doctrine of natural law.

and superior to it, may it be called "natural law," even if it is not eternal and immutable? If we understand natural law in the words of Utz to be "*the normative system emerging from the valuations of the members of society*,"³⁰ I am fully in agreement with anyone who declares that democracy presupposes natural law. *This* natural law on which liberty and democracy can be based cannot be an abstract dogma outside the history of man. It can be nothing less than the idea of justice which man finds in his own moral conscience. This idea is a principle of absolute value whose content can, however, be only that which the historical development of this moral conscience carries with it.

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(Translated by ROBERT D. NUNER)

30. Utz, *op. cit. supra* note 27, at 174.