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NOTE

POLITICAL OBLIGATION AND NATURAL LAW

In a former article of mine, I discussed the concept of political obligation. Here I shall restate the conclusions arrived at in that article, in order to show how the concept of political obligation is related to natural law. Then I shall attempt to point out the type of help that the latter is able to give toward the solution of a concrete case, namely, the Middle East crisis.

Ι

The specific content of political obligation is relations of power. Its concern is that the exercise of power serve the end of the power relation. I think that I have already proven that the remaining types of obligation—moral and legal—differ from political obligation not only in content but also in the structure peculiar to each.

In the first place, political obligation is not legal obligation in the sense of a duty imposed by positive law. This becomes evident when one considers the possible conflict of responsibilities that press on the politician. On the one side he has the duty to maintain constitutional standards, but on the other it is possible to imagine a case where he would have to pay scant attention to them in order to "save the state." Political obligation, then, does not consist in the legal and constitutional duties of the head of state. If it be so construed, his role is reduced to that of a mere functionary. But in two senses, political obligation does approach legal obligation. In the first place, in a nation in which the rule of law prevails, the ruler's conduct is subjected to this rule of law, and a large number of legal responsibilities fall on him. I do not mean to suggest that this is bad, for the rule of law constitutes at present the surest means of guaranteeing the liberty and security of the individual. In the second place, the whole domain of authority can be expressed in terms of legal rights and obligations. Nevertheless, political obligation is not the same as legal obligation.

Moreover, political obligation is not identical with moral obligation, although, like legal obligation, it can give rise to moral obligation. That a man "ought" to fulfill his political obligation is neither more nor less true than that he "ought" to obey the law. It depends on the circumstances. To view political obligation and moral obligation as identical would result in one of three consequences. First, political action might be "sanctified," and an affirmation of power trans-

^{1.} Notas para una Teoría de la Obligación Política, Revista de Estudios Políticos, No. 85 (Madrid, 1956), 3.

formed into "a supreme ethical duty." Secondly, the individual might be constrained to obey all existing authority because that authority had a moral sanction. Thirdly, since the individual would inevitably react against the foregoing, political reality might degenerate into anarchy, since the individual would be converted into a "conscientious objector" who would re-examine at each turn the advisability of his allegiance to the ruler.

Political obligation is not, then, legal obligation, but rather a context for the whole system of legal obligations. And it is not moral obligation, though under certain circumstances there can be a moral obligation to fulfill it.

This will appear with greater clarity if we examine the subject of the respective obligations. At first glance it would appear that the answer would have to be one and the same, because the only possible subject of obligation is man. This may be conceded; but we must understand that man is not always "only a man," and consequently he is not always obligated "only as a man." He may also be considered as "a subject of law" and also as "a citizen." Insofar as he is purely and simply a human being, man is the subject of moral obligation. He must constantly make moral judgments in the whole area of social existence, and he is endowed with a morally responsible conscience. But insofar as he is a "subject of law," man is bound by legal obligation. Insofar as he is a citizen, he is subject to political obligations. The distinction between man-as-man and manas-citizen was noted by Aristotle 2 and St. Thomas Aquinas.3 It was left to Rousseau to spell out the concept of citizenship. For him, that concept embodied the two elements of the political relationship, namely, the ruler and the ruled: "Les mots de sujet et de souverain sont des correlations identiques dont l'idée se réunit sous le seul mot de citoven." 4

Political obligation, then, is not reducible to the other forms of obligation, any more than the concept of citizen is reducible to the concepts of man or of "subject of law." The concept of citizen is smaller than the concept of man, for it is contained in it; but at the same time the concept of citizen is greater than the concept of "subject of law." In order for political life to be possible, it is necessary that the "subject of law," without ceasing to be such, be at the same time a citizen, for otherwise he would be merely a slave. And if political life is impossible without the citizen, it is necessary to recognize the concept of "man" as an ontological supposition and condition sine qua non of all "legal subjection" and of all citizenship.

At times, the concept of citizen has been exalted in some political notions. At the expense of that condition of individuality proper to human beings, it has been asserted that the human being reaches his highest glory as a citizen. This forms the basis of the Greek notion that Socrates adopted in bowing to the sentence imposed on him. It is also the basis of the doctrine of Hegel who, distinguishing between "subjective morality" and "objective ethics," places the state in the highest scale of moral values, and thus justifies his affirmation that "man's greatest obligation consists in being a citizen of the state." ⁵ This state-

^{2.} Politics, 1276 b 15-20.

^{3.} Summa Theologiae, I-II, q. 92, art. 1; II-II, q. 47, art. 10.

^{4.} Contrat Social, 8 Oeuvres Complétes 170 (1790 ed.).

^{5.} GRUNDLINIEN DER RECHTSPHILOSOPHIE 258 (Hoffmeister ed., Hamburg, 1955).

ment is acceptable on the condition that one also accepts the fact that the greatest obligation of the citizen is not to forget that he is a human being.

Political obligation is, then, the obligation of the citizen in his double role of ruler and subject, connected one to the other in a manner that expresses, and at the same time makes possible, that political community which is a necessity of human existence. The citizen-ruled is subject to power and owes it respect. The citizen-ruler is also bound by it and cannot abjure it. Authority and subjects alike are bound and obligated by power. Though power arises as a result of habitual obedience, it thereafter becomes a separate entity whose survival is grounded on general assent.

So the subject is more than a mere subject with legal and moral obligations to obey. He is in addition an active creator of power. His responsibility as a citizen—his political obligation—consists not only in a passive and external obligation but also in an active and responsible collaboration. On the other hand, authority has not only the right to command, in the sense of an arbitrary exercise of the will or even in the sense of having the opportunity to wield physical force, but in addition has the obligation to command that which normally can be obeyed and probably will be, considering the responsible and free condition of the citizen thus commanded.

The essence of political obligation is "willingness to use power." But subjects also have power, for it does not exist without their consent. Their political obligation is, then, the duty to obey authority with the same conscientiousness with which they constantly establish authority. Such conscientiousness alone will sustain political liberty, which is not a gift gratuitously received but rather a victory that must be won. So there rests on the citizen a duty not to fall into the condition of a passive subject. He must resist authority when it becomes a unilateral force that denies the assent by which it is sustained.

As for the rulers, the willingness to use power establishes several elements in the content of their political obligation. First, they must not destroy their power by making an arbitrary or irrational demand that will be obeyed only when force is used.⁶ Second, they must preserve power by making demands, that they, by the use of their political instinct, expect to evoke the assent of those under them. Thus they will create a system of law under which authority is obeyed and ought to be obeyed. Third, they must not renounce power, even if ideologically inclined toward liberty, in specific situations where granting liberty to some would destroy the liberty of others and the liberty of all would be best guaranteed by the exercise of power.⁷ Fourth, they must use power when faced with internal forces of destruction that are based on power, in order to gain the necessary allegiance of the citizenry. Fifth, they must use and concentrate power in an

^{6. &}quot;Imperii vis omnis in consensu obedientium est": Pufendorf, De Iure Naturae et Gentium (1749 ed.), bk. 7, c. 3, p. 1. Cf. the theory of power of Max Weber, in Wirtschaft und Gesellschaft (1925).

^{7.} See Mannheim, El Hombre y La Sociedad en la Época de Crisis 124 ff. (Spanish ed. 1935); Diagnosis of Our Time 6 ff., 30 ff., 134 ff. (New York, 1944); L. Legaz, El Individuo entre el Estado y las Fuerzas Sociales, Derecho y Libertad (Buenos Aires, 1952); L. Legaz, Función del Derecho en la Sociedad Contemporánea, Estudios Sociologicos Internacionales (Madrid, 1956).

amount sufficient to maintain it in the face of the challenge of another political entity. This would involve, in an extreme case, resorting to war.

This possibility of war has its risk. The risk is that authority then endangers the very political entity that it wants to defend. And it must play for its existence on a single card, for if it loses it can no longer engage in peaceful negotiations. Here we see best the nature of political obligation; it is "the one possibility" and inherently involves great risk. Thus also the subject's "obligation of resistance" in the extreme case is "the one possibility," carrying with it the greatest risk to his existence not only as a citizen but as a human being.

What does it mean when we say that political obligation is "the one possibility"? In a certain sense, any obligation is "the one possibility"; if something is obligatory, the possibility of doing otherwise may be said to lack not only obligation but also existence. Recognizing that possibility of doing otherwise, however, does not always imply the ontological annihilation of the reality from which the possibility receives its meaning. This may be seen more clearly in the case of legal obligation. Legal obligation is presented to man in a vista of possibilities. That vista is defined by a legal norm of disjunctive structure. Two possibilities are presented: to perform the required act or to infringe upon the norm. The latter possibility carries with it the applicability of a legal consequence known as the sanction. Thus it may be said that the conduct the law calls for is obligatory, for it alone avoids the sanction. But he who violates a legal norm does not ontologically destroy that norm or its applicability to himself. On the contrary, he puts the case where it will reach its formal realization, for the formal realization of the law lies in the application of the sanction. Consequently, the fulfillment of a legal obligation is not the one possibility open to man qua subject of law, because not fulfilling it destroys neither his status as a subject of law nor the formal and existential reality of the legal norm, which precisely in that case receives its application.

Legal obligation may also be viewed in the light of its moral compulsion. Although moral compulsion differs from legal obligation in that legal obligation inherently contains a social dimension, the subject of law is also a human being, so that his legal obligation can be looked at from the perspective of his final end and moral good. But moral obligation is no more the one possibility open to man qua man than legal obligation is the one possibility open to man qua subject. This is not to say that the moral order admits of choice among various possibilities as if they were indifferent to man's final end, but rather that choosing from among possible courses of conduct, one contrary to a moral obligation does not annihilate the essential moral nature of the subject. A moral disorder is produced, but the situation that follows is formally moral even when materially wrong. So also one who produces a "monstrosity" in the artistic order, does it within a situation that necessarily must be defined as "esthetic," because only in that situation is one given the possibility of producing a "monstrosity" or a masterpiece.

But the frame of possibilities that forms the background of man's position as a political being—as a "citizen"—is reduced to only one possibility or, to put it another way, to various methods of carrying out only one possibility. No choice

exists. Unlike the case of the subject of law violating the law, no alternative possibility exists in which there would be a formal realization operating as a counterweight to the infraction. Moreover, unlike the case of the man violating the moral order, the citizen who fails to carry out his political obligation does not, in the particular situation, preserve his political nature. For example, it cannot be said that voting is "good" political behavior while non-voting is "bad" political behavior. All that can be said is that voting is political behavior and non-voting is not. Thus the citizen who fails to fulfill a political obligation places himself to that extent outside the political arena, annihilating ontologically by his actions the complex of authority into which he is introduced and his own status as a political being—that of citizen. It is not possible for man qua political being—citizen or ruler—to fail to fulfill his political obligation for legal reasons or for moral reasons.

The citizen who does not carry out his obligation to resist when faced by a power that has lost its justification for existence, contributes to tyranny. The politician who cannot win general assent for his actions destroys authority, and his work basically lacks political sense. The political leader who abjures the use of power in the face of powerful internal forces or of subversion accomplishes nothing and produces a void in which the power he ought to contest becomes supreme. The politician who, as a result of legal scruples, views indifferently the collapse of his government and of the whole system of values that it represents and does not fulfill his political obligation to "save the state," also places himself outside the political arena, because he fails to exercise the one possibility he has. And, finally, the politician who does not face up to the tremendous responsibility of war when the necessity arises, performs the most extreme kind of negation of statesmanship, because it is only by denying inwardly his status as a politician that he fails to recognize what political obligation demands of him. Thus there is an element of truth in the view of Carl Schmitt that there is no other justification for war than politics.8

This view, however, must be taken with a certain caution and with some reservations, for to accept the idea of political obligation as distinct from moral and legal obligation means also to accept it with its intrinsic limitations. For, necessarily in the political order, the "lack of choice" and the responsibility of "self-assertion" lend themselves to the most whimsical interpretations and to the justification of monstrous actions. These possibilities should not lead one to deny the concept, but they should lead one to an awareness of its limits. In this connection, Collingwood, who has defined duty (in the area of political action) as "that decision made because no alternative is possible," requests that it not be confused with the false decision adopted under the psychological pressure of passion or desire. The latter, he says, is not a true decision, because the necessity that produces it is not the reasonable necessity that a free man ought to obey, but rather the arbitrariness of the tyrant, for in such an instance

^{8.} Cf. C. Schmitt, Der Begriff des Politischen (1929).

^{9.} THE NEW LEVIATHAN [28.83 (Oxford, 1942): "Duty as a form of political action is the case where a decision made by a ruling class and enforced by them upon the corresponding ruled class is made because no alternative is possible."

a so-called free man becomes a slave faced by psychological forces which he should resist.¹⁰ Political obligation presupposes the disappearance of all alternative in the sense that the politician has to know that the political body, being what it is, cannot follow more than one determined line, and that, in certain circumstances, it will be foolish to endeavor to have the political body follow a path that it dislikes because of its nature or its traditions.¹¹ To sum up, then, political obligation is defined by "the one possibility," because it lacks a politically possible alternative. It is therefore reminiscent of Machiavelli's concept of "necessity." But we need not follow Machiavelli in making this form of obligation the highest value in the scale of values.

Political obligation is rooted in the fact that there is and has to be power, but power does not constitute a scale of values radically autonomous with respect to "good," which morality defines, or to "justice," which is the highest value in social living. Politics is not to be confused with morality, but politics is, in the final analysis, human action and as such is susceptible of appraisal as morally good or morally bad. Politics is not to be confused with law, but it is a reality of social living and, consequently, cannot be alien—either proximately or remotely—to a sense of justice or injustice. This is all the more so since all great politics must lead inexorably to a great legal creation.

In consequence, political obligation, although not legal obligation, is not completely foreign to justice-Machiavelli himself spoke of "knowing how to command" as "commanding with discretion." 12 And although political obligation is not moral obligation, availing oneself of "the one possibility" (of which political obligation consists) can involve a profound moral sentiment, or an immoral one. For this type of obligation is "the one possibility" politically, but humanly there is always the possibility of renouncing the political sphere. To be sure, it is possible that certain moralizing or legalistic attitudes simply conceal a cowardly bungling before the responsibilities of power: one who does not have the courage to carry out his political obligation can easily turn his eyes to possible moral or legal duties that hinder him. On the other hand, the opposite case frequently arises in which one refuses to see anything other than that which marks his political obligation. This can also be a bungling attitude. Using the smoke screen of "political necessity," some persons try to silence the cry of conscience when faced with an actual outrage. Lastly, I might venture to say that precisely because the political sphere unfailingly affects human existence, we cannot even be sure beforehand whether the supreme gesture of renouncing the political sphere for reasons of conscience at decisive moments of history, might not finally result in the birth of a more just system and more efficacious organization of the human community.

II

In stating that political obligation is not legal obligation, I have meant that it does not constitute a positive-legal obligation—a "legal duty." But as has been

^{10.} Id. ¶28.84.

^{11.} Id. ¶28.88,

^{12.} MACHIAVELLI, DISCOURSES 151, 384 (COMPLETE WORKS, 1813 ed.).

pointed out, since politics constitutes a form of social reality, it cannot be alien to the fundamental social virtue which is justice; the possibility remains open, therefore, of saying that political obligation could be a form of natural-legal obligation—a duty imposed by natural law. In any case, it is appropriate to consider the relationship between political obligation and natural law. I shall quickly examine this problem in the context of a concrete example taken from the very recent past—the recent decision of England and France to occupy the Suez Canal Zone in Egypt. I am not going to attempt to pass final judgment on this action, but merely try to open up the various possibilities of passing judgment that are offered by natural law postulates.

At the outset, it might be fitting to make a "legal" judgment on the Anglo-French action—that is to say, to decide whether it constituted an "exercise of right" or the "fulfillment of an obligation" of positive law. Such a legal basis cannot be discovered. I believe that France and England cannot show any legal text or article of international treaty that legally authorized their action. Article 1 of the United Nations Charter declares that the primary purpose of the members is to maintain international peace and security and, to that end, "to take effective collective measures for the prevention and removal of threats to peace, and for the suppression of acts of aggression or other breaches of peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of peace." Article 2 states 13 that "all Members must settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered" and that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." 14 Finally Article 33 states that "the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice." If none of these means are successful, the parties must refer the dispute to the Security Council (Article 37). According to the provisions of the United Nations Charter, then, there is no legal basis for the Anglo-French action. It cannot be justified on the ground of a close relationship of causality with the Egyptian action of nationalizing the Suez Canal because it took the form of an invasion of Egyptian territory by Israel.

If the action cannot be justified legally, it is obvious that a "moral" reason for it can never be advanced. In any event, I am not interested here in the fact that the French and English governments have been able to believe "in conscience" that they acted rightly. What might be of interest is the objective aspect of the morality of the action taken. This brings me to the question of the natural law, about which I shall have something to say later.

After putting aside the legal and subjectively moral aspects, it might be fitting

^{13.} Point 3.

^{14.} Point 4.

to project the question into a purely "political" sphere. The Anglo-French action has been a political act—not of internal politics but rather of international politics. Every state has an international politics to the extent that it plays an active role in the international community of which it is a member. According to the doctrine of Vittoria, each state, acting as a depository of the authority of the whole world, becomes a part of the political community. This political community is ruled by an objective transcendent law—the natural law—and various agreed, customary, and jurisprudential norms that make up the ius gentium positivum. This is so because no personified and institutionalized "international authority" exists, and therefore it is necessary that the community of nations act through the "princes" of the various nations that form it.15 Today the international community possesses an institutionalization that was lacking in the age of Vittoria, but the impossibility of identifying in the final analysis the "international community," and the tenuous and technically imperfect type of its "law," has the result in the international order that the purely political aspects of the relationship predominate, and so the impossibility of "legalizing" the life of the international community is more intensely evident. Therefore, in spite of the existence of fixed institutionalized bodies, "international politics" are not guided (as in the state) by these bodies, but rather by certain nations that by reason of various historical considerations reach a position of leadership. Thus certain actions of these nations that do not constitute an exercise of a right or a fulfillment of a duty on either the legal or the moral plane can take their place as political actions (which, of course, does not exclude them from moral or legal appraisal, since they are accomplished by men and so can be described as just or unjust). When events are looked at from this point of view, it could perfectly well happen that the Anglo-French intervention in Egypt would have the sense of fulfillment of a "political obligation" since, as members of the international community, France and England could consider that they were faced with "the one possibility," there being no alternative in the political sphere.

Was there actually no alternative? I repeat that I am not trying to judge the action with the idea of finding at any cost justification for either side. Certain circumstances permit me to believe that there was no alternative, for the result of the Israeli attack on Egypt, in the light of the probable Egyptian reaction, was easy to predict: a speedy intervention in Egypt's favor by other Arab countries and subsequent support from Russia, which is politically interested in finding motives for extending its sphere of influence in the Middle East. In the face of such an extended conflict, any action by the United Nations to avoid "war" in the real sense would have been extremely difficult. But the Anglo-French ultimatum to Israel and Egypt, carrying weight because of its unusual aspect, and the later landing in the Canal Zone, limited the extent of the conflict from the very beginning. This argument from probability brings us to the supposition—without going more deeply into the matter—that France and England, while defying a tremendously unfavorable world opinion, assumed at that moment

^{15.} Quod principes non solum habent auctoritatem in suos, sed etiam in extraneos ad coercendum illos, ut abstineant se ab iniuriis, et hoc iure gentium et orbis totius auctoritate": De Iure Belli 19 (Getino ed.).

nothing more nor less than the fulfillment of a "political obligation," as members of the international community. Faced with this situation, the United States and the majority of the member countries of the United Nations have concerned themselves with the legal and moral aspects of the question, either openly or secretly regarding France and England as guilty of an "act of aggression."

There remains one final point to consider. Political obligation is "the one possibility"; the politician has no alternative, within the political situation. Humanly, however, he always has an alternative: either to fulfill or not to fulfill his political obligation. I am not talking about matters of small moment, but about extreme cases where the individual politician faces a momentous choice, and where the decision to abandon the field of the political involves the highest drama. In any case, the supreme criterion for this supreme decision lies in the natural law.

Natural law has different shadings according to the matter to which it is applied. Just as the human person has inalienable natural rights, states also have fundamental natural rights that parallel them. Thus, for example, the right that the individual has to his autonomy and liberty, is equivalent to the right of independence for states. There is nevertheless a difference. Man has a spiritual side. His autonomy and his liberty constitute an ultimate in the order of being and are, moreover, of value to the political community. But it cannot be said that the independence of nations is an absolute necessity for the international community. Nevertheless, there is no doubt that one of the foundations of international friendship is respect for the right of independence. Now Egypt has been attacked by Israel. The Anglo-French action was not a direct or complete attack on the independence of that country, but was an attack on a part of its territory in order to force a solution on the pending matter of the nationalization of the Canal. Insofar as the right of independence of Egypt was illegally violated, the Anglo-French action was not "just," although perhaps it was not sufficiently unjust for us to say emphatically that it was contrary to the natural law. It is fitting then to ascertain the sense of the natural law on that point which is involved in the problem with which we are concerned.

It is my understanding that from this point of view natural law is the body of objective criteria by means of which one can evaluate whether a political obligation or a legal obligation should be fulfilled. The person who resists a positive law that is obviously unjust or wicked, acts in accordance with the natural law, because the natural law embodies the criteria according to which positive law can be considered binding or not binding in conscience. So natural law is the supreme form of obligation. The conscientious objector who has not merely a sectarian adherence to a religious principle but rather has a certain conscience about the injustice of war, acts in accordance with the natural law, because the natural law contains objective criteria relating to the justice and the legality of war. In both cases, though, there has been a violation of a duty imposed by positive law.

In this matter of duties imposed by positive law, it is easy to establish a possible contrast with the natural law, because such duties are specified in positive norms of precise and fixed content. On the other hand, in the case of

political obligation the question is more difficult, because only a general notion of it exists (viz., "to save the state," "not to renounce power," "to have recourse to war only in an extreme case"). No "Code of Political Obligations" exists. It is the politician himself who must discover and decide whether he is faced with "the one possibility," and he must act according to his conscience. Consequently, political obligation, in its general sense, can never be in opposition to the natural law. On the other hand, natural law cannot unconditionally justify all fulfillment of political obligation, for there is always the possibility of abandoning the political situation, although this would present the politician with an enormous responsibility. In the whole area that lies between the two extreme cases of political obligation (resistance to power and declaration of war), the politician who removes himself from politics denies purely and simply his political condition without preserving, as a rule, any important human value. But accepting an unjust situation can, under certain conditions, represent a sublime form of heroism, just as renouncing war when war is, politically, "the one possibility," can result in a way of saving and fulfilling humanity. The criterion for that renunciation lies in the natural law. Natural law permits in that case not only an evaluation of the subjective morality of the act—that is, of the morality of recourse to war from the point of view of the intent of the government that goes to war -and of the suppositions that must be present if its conscience is to remain tranquil on a legal and moral plane. It also permits an evaluation of all the objective circumstances according to which fulfillment of political obligation can be considered fully justified from the point of view of humanity.

I am not going to judge the Anglo-French action in that light. In the first place, it has not been treated as a warlike action in the strict sense, although it is possible that it has not been defined as such simply because no one has had a real interest in it. But the argument dealing with war is wholly applicable to it, at least by analogy. I may admit that France and England had recourse to war because of "political obligation." But was the fulfillment of this obligation fully justified according to natural law? Were the risks run in that action made necessary by earlier bungling or simply "more legal" activity on the part of the French and English governments? To what extent have the old "colonialistic" prejudices influenced the situation? To what extent was the action really "the one possibility"? I would not be able to state unconditionally that all the requirements for a favorable answer—and consequently, a natural law justification of France and England's occupation of the Canal Zone-have been met. But it would also be frivolous to answer negatively without appeal. I cannot give an unequivocal answer. I simply affirm that it is possible and obligatory to evaluate the fulfillment of political obligation in the light of the natural law, because it is precisely in the extreme cases that the politician must know that though he may decide to risk all on one card, he ought not risk either his own soul or the destiny of mankind.

Luis Legaz y Lacambra