The Catholic Lawyer

Volume 9
Number 1 *Volume 9, Winter 1963, Number 1*

Article 6

September 2016

Natural Law Norms

Brendan F. Brown

NATURAL LAW NORMS†

BRENDAN F. BROWN*

BOTH THE NATURAL and the supernatural laws provide norms of morality, namely, fundamental standards or criteria by which to distinguish right from wrong. This paper is concerned with the norms provided by the natural law as they relate to justice in the moral and legal orders. It will not deal with charity, or with divine justice under the supernatural law.

I

The norms in the moral and legal orders find their common basis in the dictates of the natural law, that part of the eternal law which refers only to the actions of men. It is known or discovered immediately by man through unaided reason, though ultimately it proceeds from the Divine Lawgiver. It conforms to the essence of rational human nature. It is a source of obligation for men because it has been ordered by the Creator of nature. It establishes a norm of objective morality, imposing certain obligations to God, to others, and to sub-rational nature through obligations owing to one's self.[1]

The natural law is truly law because it has been promulgated in man's reason as an ordinance for the common good, by Him who has the care of all things. It is given content by the reasonable man, following right reason. Justice and charity are the two chief mutual obligations of human beings toward each other as imposed by the natural law.

Law and morals are related to each other from the point of view of the virtue of justice, in its proper and ordinary sense of a cardinal virtue, which perfects the will by inclining it to render to each his own. The sciences of law and of morals are connected in many ways. Thus,

---

† To be published in the proceedings for 1962 of the American Catholic Philosophical Association.

* A.B., LL.B., Creighton University; LL.M., J.U.D., Catholic University of America; D.Phil. in Law, Oxford University, England; Dean of Catholic University of America, 1949-1954. Dr. Brown has been a Professor of Law at Loyola University, New Orleans, since 1954.

[1] Brown, *Natural Law: Dynamic Basis of Law and Morals in the Twentieth Century*, 31 TULANE L. REV. 491 (1957).

both have the same subject matter of human conduct, namely, *justice*. Both have authority to direct human conduct to the objective of justice. Both promote justice in order to establish friendship and orderly relations among men in society. Both share the same end, namely, the preservation of the moral order by justice, despite differences in regard to respective functions.[2]

But law and morals are distinct sciences in several respects. Thus, the conscience of the individual is the chief concern of morals, but not of law, which is an extrinsic social science. The concept of obligation differs in morals and law. In the moral sphere, the obligation to render to every man what is objectively owed to him arises from an inner realization that there exists a moral obligation which *ought* to be discharged. As soon as the moral obligation is recognized, the will is moved because it is good and virtuous and inclines toward the right. Obligation is voluntarily fulfilled because of the *virtue* of justice. In morals, the decision is not coerced by extrinsic force or pressure. Indeed, a moral decision in the realm of justice which is coerced loses its moral worth.

The unique characteristic of law, however, is that it *imposes* norms of justice upon individuals for the sake of the common good. Law focuses its attention upon the external act of justice, resulting in the effects of exterior peace and order which are the results of the right psychological attitude of the citizen. Law compels the meeting of the obligation of justice, if necessary, by appropriate juridical institutions. Law has a power of coercion which morals does not have. As Professor Rommen has pointed out: "The juridical character of an act is evidenced by the perception and recognition that this possible use of force is not in conflict with the inner nature of the act in question."[3] But the actual use of coercion does not change the inner nature of the legal act in question.

Right or justice is distinguishable from such social virtues as refer to another, such as friendship, gratitude, liberality, or love of neighbor, insofar as it is *enforced* by the command of the state. Thus the duty of gratitude is an ethical duty *only*, because it is not actionable. Again, there are certain moral duties to oneself and to God. But these are not legal duties in the strict sense. St. Thomas Aquinas was aware of the similarities and differences between the moral and legal orders. Implicit in his writings are the principles which govern the relationship of these two orders. This is so although he was writing primarily as a moralist and a theologian.[4]

Justification for the use of force in compelling justice is to be found in the fact that justice is necessary for peace and tranquility in a community. No community could long exist without peace. Justice is the cohesive element in society, in which man, as a rational and social animal, must live according to the norms of the natural law if he is to realize the ends of his nature. But only force will restrain some in the community from acting unjustly. Besides, the disciplining influence of force

---

[2] SHEEDY, MATERIALS FOR LEGAL ETHICS 14, 15 (1950).

[3] ROMMEN, THE NATURAL LAW: A STUDY IN LEGAL AND SOCIAL HISTORY AND PHILOSOPHY 208 (1948).

[4] SUMMA THEOLOGICA, II-II, q. 58 (1st American ed. English Dominican Province transl. 1947).

produces a good pedagogical effect when the law is just.

II

Now what is the responsibility of the civil law to implement the justice of the moral order? Here civil law will mean human positive law which has been commanded by the political sovereign, *i.e., Jus Civile* in its strict sense. It will not signify the *Jus Gentium* (law of nations), or even the *Jus Civile* in the wide sense of a complete body of national social control, for that would comprehend natural national law to the extent that positive law may have failed to reinforce the primary dictates of the natural law with appropriate legal sanctions.

The responsibility of the civil law toward the justice of the moral order is limited to the effectuation *only* of those minimum standards of moral conduct which are immediately essential for the maintenance and promotion of the common good. This limitation of responsibility is the result of the characteristic end of civil law, and of the restricted availability and effectiveness of methods of enforcement. It is not the duty of the civil law to compel the observance of all obligations of justice as determined by the moral order. It can not and should not attempt to forbid all injustice.

The minimum standards of justice which are required for the good of society will vary from time to time in the light of the constantly shifting fact patterns of the economic, political, cultural and sociological conditions of a particular community. The positive law is obliged to look realistically at the customs of the country, the capacity of the generality of men therein to meet moral standards, and the nature of things in general. But the boundary line between law and morals should shift in the direction of an enlarging transformation of the norms of the moral order into law. This will occur whenever *public opinion* determines that it is necessary for the common good, and applies political pressure upon the legislator, in the event that the lawmaker himself has not taken the lead in bringing about this transformation.

But within the limits described above, the civil law must apply the universal idea of justice.[5] The immutable idea of right must dwell within the body of the positive law. The vitality of civil law depends, therefore, upon the extent of its justice. This in turn depends upon the reasonableness of the law.

Now some of the norms of justice which are necessary for the preservation of society are *static,* while others are *dynamic.* The static norms of justice, such as the precepts of the Ten Commandments, are immutable, but the conclusions reached by the application of these immutable norms to changing social facts produce sub-norms, which are dynamic and mutable. The positive law is bound substantially to implement the content of both types of norms by way of conclusion. They bind both the moralist and the legislator.

In turn, state law has both static and dynamic norms. Its static norms are such because they fall within the sphere of natural morality. They are necessary conclusions of moral principles of justice. Thus the positive law which forbids and punishes the injustice of theft or murder is mandatory because it is a deduction by reason

[5] Leibholz, *The Foundations of Justice and Law in the Light of the Present European Crisis,* 212 DUBLIN REV. 44 (1943).

from a primary and necessary conclusion of the natural law.

But the dynamic norms of the positive law are reached not by deduction, but with the aid of induction. The precise content of these norms is not dictated by the justice of the moral order. Hence the lawmaker is allowed a certain discretion within the area of right reason. These dynamic norms are in the nature of temporary normative generalizations which the legislator reaches by induction from a multiplicity of facts. These generalizations relate to acts which are morally indifferent in themselves, but become normative by the authority of the lawmaker who has acted reasonably in establishing a rule which he regards as necessary for the common good. Many examples may be given. Thus the positive law may determine the precise manner in which the property of an intestate will descend, or establish a system of community property between husband and wife. Again, the state may render criminal an act which is morally indifferent in itself, as when it imposes penalties for violations of laws which have been passed against gambling. These mutable norms are justified as long as they are the result of reasonable induction from the sociological facts in question.

III

Civil law is obliged to implement not only that part of the justice of morals which is necessary for the common good by deduction and determination, but it must also do this in a complete way. The total implications of justice can be understood only when it is recognized that justice directs man in his relations with other men in a *twofold* sense, namely, as to fellow men who are his equals, in the sense of commutative justice, and as to fellow members of a complex, politically-organized community, in the sense of legal, distributive, and social justice.

In both the moral and legal orders, there are two general areas of commutative justice, namely, *assumed* or voluntary relationships, as in the sphere of *contracts*, and *imposed* or natural relationships, as in the law of *torts*. In the moral order, *injury* is the voluntary and causal violation of the strict right of another, not simply a mere infliction of material damage. Both in morals and in law, there may be damage in fact, without injury, or injury without damage. But while *injury* in *morals* is always voluntary and intentional, in the sense of resulting from a morally bad will on the part of the actor, nevertheless in the *legal* order *injury* may result from negligence, or thoughtlessness, or may even be imposed upon a defendant under the doctrine of liability without fault on the ground of social justice, which outweighs the moral claim of the individual to commutative justice. The legal orders of the civilized communities of the world, especially the Roman, Canonical, and Anglo-American legal systems, have rightly given increasing recognition and enforcement of the moral rights of the individual in the matter of his personality and substance. Examples of the former would include rights of life and physical integrity, liberty, good name, marriage, worship, education, freedom of expression and association. Illustrations of the latter would be the rights of the individual to acquire, retain, and dispose of property, within reason, as a necessary means for the preservation of his human dignity.[6]

[6] Pius XII, *Christmas Message of 1942*, in PAPAL PRONOUNCEMENTS ON THE POLITICAL ORDER 166 (Powers 1952)

Although *civil rights* belong to men, as citizens, not *as men,* so that they come from the state, and are derived from the obligation of justice only indirectly, yet such rights have also been justly expanded over the centuries. Trial by jury would be an example. Within recent years, vast improvement has taken place in regard to the removal of restrictions on the exercise of certain civil rights unjustly restricted.

Not only do rights accrue to the individual person in consequence of the demands of justice, but also to the state, as protector and promoter of the common good.

It has rights of personality and substance analogous to those of the human person. Indeed, the state is an artificial person, a moral person, with a moral life vicariously derived from the natural persons subject to its rightful authority. Civil law carries out a mandate of legal justice when it punishes treason and unjust attacks against the rights of the state.

Legal justice sometimes requires a sacrifice of an individual good.[7] This type of justice directs men to render to the state and society their due. But it is to be noted that there is a reciprocal duty on the part of the rulers and the ruled.[8] The rulers are to make just laws and to administer them justly. The ruled are to abide by these just laws. Not only are the rulers or lawmakers bound to obey the just laws which they make, but the state itself, as an artificial person, is subject to the obligations of justice imposed by the natural law, a basic historical cornerstone of Anglo-American constitutional law. It is the duty of the state and those responsible for its acts to play a positive role in the promotion of the common good.

Again, justice in the moral order directs lawmakers to pass laws which will achieve a *distribution* of the benefits and burdens of social life in accordance with the needs and merits of the citizens. It is to be noted that distributive justice relates to the distribution of *public,* as distinguished from *private,* property. Important legal areas involving distributive justice are the filling of public offices, tax laws, and legislation concerning compulsory military service. Distributive justice is violated in the political process whenever public servants engage in graft and corruption, accept bribes, or have recourse to political expediency. Sometimes dishonest acts by public officials include violations of commutative justice as well as distributive justice.[9]

I come now to a controversial area in the discussion of social justice. My views in this connection have perhaps been influenced by the impact of the School of Sociological Jurisprudence, so ably developed in the United States by Roscoe Pound from European sources, when he was dean of the Harvard Law School. This is still the dominant school of jurisprudence in this country, despite the tremendous advances made within the past quarter of a century by the School of Objective Natural Law.[10]

The core of the Sociological School is its theory of interests, based on the individual interest, which is roughly analogous to the subject matter of our commutative justice; the public interest of the state, which corresponds to approximately that area which we describe as legal justice; and the

[7] NEWMAN, FOUNDATIONS OF JUSTICE: A HISTORICO-CRITICAL STUDY IN THOMISM 3-5 (1954).
[8] CATHOLIC ENCYCLOPEDIA *Justice* 573 (1910).
[9] CONNELL, MORALS IN POLITICS AND PROFESSIONS 77-89 (1946).
[10] BROWN, THE NATURAL LAW READER 1-46 (1960).

social interest, which is analogous to the content of what we should describe as social justice. The interests of society, as distinct from the state, are dominant. Society is regarded as a faceless entity, and the common good is identified with its interests apart from the moral value of the individual persons in society.[11]

To refute this erroneous concept of society and of the common good, the School of Objective Natural Law may do well to recognize society as a moral person, analogous to that of the state, which has long been regarded as such a person. The common good thus becomes the basic moral interest of society, but as an artificial person, which exists for the individual person, and has no rights except insofar as they advance the dignity of the human person. Instead of speaking about the common good of the state under *legal* justice we may refer to the common good of society as a distinct entity.[12] The great social benefits, which have arisen during the current stage of the socialization of the law, would be interpreted as the implementation of social justice, rather than as a vindication of the social interest.

[11] 3 POUND, JURISPRUDENCE §§ 80-99 (1959).
[12] *But see* FERREE, THE ACT OF SOCIAL JUSTICE 80-141 (1951).

IV

Justice requires not only that law be directed to its proper end, namely, the common good, but it must also be made by a legislator who is competent to make the particular law. This is a jurisdictional matter. Besides, law must be administered justly by just procedural law.

Recourse must sometimes be made to equity to overcome the limitations of strict positive law. Legislators in formulating just laws prospectively are unable to anticipate every possible situation. Hence the judge must have discretion to change a law intrinsically for example, by interpretation, or to apply the natural law in instances of first impression. If a law is not for the common good when related to a certain person or to a particular situation, it may be decided that the law is not applicable. A form of equity may enter into the administration of executive justice when a pardon is given to a person justly convicted and sentenced under a just law.

Although unjust law is not binding in conscience, yet *prudence* may dictate obedience to certain types of unjust law to avoid public disturbance or scandal. An example would be where an unjust law takes away a person's right to a thing, but does not order him to do something intrinsically wrong.