

## *Natural Law, The Rule of Law, and Liberty*

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RECENT BREATHTAKING EVENTS in Eastern Europe bear witness that man's quest for liberty cannot be fully suppressed. Pope John Paul II observes that while regimes may adopt a variety of measures to curtail liberty, thereby making its "exercise ...more or less difficult, ...they cannot destroy it." Such attempts to thwart man's nature, which seeks freedom, is "wrong from an ethical point of view," and societies which attempt to do so, sow the seeds for their own collapse. Arbitrary regimes like those that collapsed reflect the weaknesses of systems of law constructed on the subjective preferences of man unaided by the informing principles of the natural law.

Some theoreticians argue that man is determined in his actions and beliefs by external forces only. It is clear that such notions stem from fantasy and ignore the importance of recognizing that men pursue purposes they determine for themselves. Man's relationship with his fellows requires the existence of coherent and reasonable rules that determine how people should act; how means would be identified that are proper for man's actions; what should be the source from

which such rules are derived; and the scope of the applicability of rules. Men, of course, can act in violation of such rules even if to do so would oppose their own good. If men are to be persuaded to obey such rules, some explanation must be offered that demonstrates that adherence to such rules serves them better than violation of these rules. Explanations based on materialist or utilitarian arguments are unpersuasive since they provide no moral justification for acceptance. Conduct and belief that are proportionate to man must conform to the moral code necessitated by the created order in which he lives.

Individually determined "moral foundations" can be offered to provide explanation and support. Such attempts, however, are insufficient, incomplete, and erroneous, and they cannot create truth. Man's created nature compels his conformity to a pre-existing moral order that commands recognition of and deference to the value and dignity of all human beings. Human reason and divine revelation enable man to discover this moral foundation, on which human rules must be constructed if they are to serve man's proper end. This moral foundation, as John Paul II says, is premised on the unity of the body and soul in individual human beings, and further that the exercise of human free will is "linked

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with all the bodily and sense faculties”:

The person, including the body, is completely entrusted to himself, and it is in the unity of body and soul that the person is the subject of his own moral acts. It is in the light of the dignity of the human person—a dignity which must be affirmed for its own sake—that reason grasps the specific moral value of certain goods towards which the person is naturally inclined.

John Paul II adds that given the nature of human beings, and their determinate spiritual and bodily nature, they are properly impelled to accept the moral requirement of loving and respecting “the person as an end and never as a mere means,” which implies, “by its very nature, respect for certain fundamental goods, without which one would fall into relativism and arbitrariness.”

In light of man’s nature, rules which should govern and control man’s affairs cannot serve human dignity and value properly unless constructed on the foundations of Christian natural law and divine revelation. Although human reason can construct rules of all sorts and with varied content, such rules, unless they instruct and restrain man in conformance with his true nature and purpose, constitute an erroneous and insufficient basis for an enduring and civilized order. Any other foundation provides nothing more than man’s attempt to “self-design” himself and others.

Saint Thomas has illuminated for us the ways in which natural law would properly guide us in fashioning rules to serve our ability and desire to become fully human.

Human reason when properly formed and employed can fashion rules that serve the dignity and value of men. Based on Christian morality, these rules enable men to pursue their true and proper end and provide for the means for men’s proper development. Rules based on

other foundations are nothing more than arbitrary exercises of power and control.

Saint Thomas says that every individual person bears “the same relationship to the whole community as the part bears to the whole.” However, “Man is not ordered to political society by reason of himself as a whole and by reason of all that is in him.” Thus, he reasons that man—as a whole man suited for eternal salvation—is not subordinate in importance or value to the society of which he is a part. As a material creature, man is dependent, insecure, relatively helpless, and must rely on others for his survival and physical well-being, and consequently has certain obligations to his society—to abstain from certain actions and an obligation to others. Thus, properly restrained and instructed, man serves the common good. If the common good is served, man simultaneously serves his individual good, since there is a reciprocity between them. It is this reciprocal relationship that enables man to fulfill his human potentiality.

The state properly serves only as a *facilitating* agency for the society, and should fashion laws that properly assist and restrain men in meeting their duties and obligations.

Saint Thomas says the law is “nothing else than an ordinance of reason for the *common* good, made by him who has care of the community,” and that, further, if a human law “disagrees with the natural law in something, it will not be a law, but the perversion of law.”

The universe reflects God’s reason and design; it embodies divine reason’s conception of all things, and has designed all things with a purpose. There is no randomness or purposelessness in God’s universe.

The role of some living things is achieved by inward movements that are a part of this design. Man, however, has implanted in his heart and mind God’s

design for him, and knows by inclination, and more fulsomely by reason, God's purpose for him, but this realization depends on the proper exercise of his free will.

Only God has full knowledge of eternal law, and temporal man can only know the eternal law partially by means of the natural law and divine revelation, which are sufficient to restrain and instruct him properly in his conduct and belief.

Since laws derived from right reason have as their ultimate source the eternal law, only the actions of the perfectly good man conform with the eternal law. Imperfect men, those who improperly employ their reason, are subject to the eternal law only imperfectly, and their actions and beliefs often work contrary to their individual good and the common good. Men who do not act in accord with eternal law suffer what the eternal law decrees, which, in part, is their incompleteness in being fully human.

All human societies require rules that preserve cohesion, order, and predictability. The degree to which societies do not provide these qualities shows how far they depart from achieving what is required of a society that serves man's proper end. All properly formed human rules derive from the fundamental precept of natural law—to do good and to avoid evil. Properly formed rules based on this precept enable men to live properly—in harmony with their fellows, and serving God. The force of law depends on its justice, according to Saint Thomas, that is, when it encourages man to act in ways that facilitate his becoming fully human, and deter him from those actions and beliefs which impede his becoming fully human.

Man's intuitive understanding of the natural law is heightened and improved by the proper use of reason, which enables him to understand the benefits to be derived from following the natural law.

The operation of the human law in societies is contextual and contingent. Various choices may be made in societies that do not diminish the value of the natural law's precepts, such as how to punish an evil doer. When choices have been made, however, they become obligatory for securing the expectations that are now protected by the law.

Since just human laws oblige men to obedience, the state is obliged to make law's content conform to the precepts of the natural law. Thus, human laws are unjust and contrary to the individual and common good when they exceed the authority of the lawgiver, impose disproportionate burdens on some, or provide particularized benefits to some. Such laws characterize totalitarian orders which seek to control all facets of men's lives.

Saint Thomas allows for changes in human law when such changes are conducive to the common good. Changes without such justification, however, are prejudicial, since the benefits of change must be able to outweigh the costs that will result from its impact on patterns of customary obedience.

Saint Thomas maintains that since human reason is unequipped to understand and comprehend fully man's final end, something more is needed to instruct and restrain him. Divine revelation provides such guidance. God's revealed law properly assists man in directing him to act and believe properly in order to achieve salvation, which is an end not proportionate to the understanding of natural reason. Divine revelation guides man to his end and denominates those actions conducive to its achievement. Further, because of the uncertainty of human judgment, different people form different judgments regarding human acts. In order that man may know without doubt what ought to be done and what avoided, it is necessary for man to be directed by God's law that

completes what man's reason can tell him. Human law governs man's external acts. Men cannot know the interior purposes and beliefs of another. The perfection of virtue requires man to conduct himself rightly in his acts and in his thoughts. Instruction and restraint of the inner man cannot be controlled or compelled by human law, but divine law provides direction and control of man's inner thoughts so that he can be properly guided and assisted in rejecting all that deflects him from his proper end. Internalization of "good values" provides a more secure path to human happiness and a livable society than a society dependent solely on the power of the state to control human conduct and belief. Human law cannot punish or forbid all evil deeds, and if it attempts to do so, would simultaneously do away with many good things. The result of such attempts would hinder man's ability to serve his own individual good and the common good. If evil is to be forbidden and punished, man needs divine law to supervene, and by affecting man's conscience, deter him from that which is evil.

The need and role of divine law in human affairs is critical. A society that depends solely on the force of arms and unaided human reason to achieve order, stability, predictability, and peace, is doomed to destruction.

Man has a specific end in God's created universe—to become fully human in his search for salvation. He must exercise all of his faculties—intellectual, physical, and spiritual—in this process, and God has equipped man to pursue and achieve his end. First of all, man will be properly instructed and restrained by the moral imperatives derived from natural law and divine revelation. Proper human purposes are thus identified by the natural law and divine revelation, and provide the foundation for facilitating societies in serving proper human

purposes. Man's attempts to predicate societies and instruct and restrain human action and thought on self-determined predicates deter him from the proper use of his liberty. Purposes, goals, laws, rules, predicated on man's subjective preferences, lead to difficulties. Such subjective preferences reduce man's abilities to identify and correct problems, but they also impede in serious ways man's search for and realization of true human liberty.

Unless man is instructed and restrained by the moral imperatives of natural and divine law he becomes captive to himself in identifying and pursuing the end he chooses for himself, and employs means which are fashioned by the operation of his uninformed, unrestrained, and uncontrolled human reason and passion. Self-created ends can use power to achieve acceptance by others, but such an achievement by power does not find proper receptivity in the inner being of others. Any acceptance, therefore, must be solely a submission to power, not reason, justice, or the common good. Men who are compelled to tailor their beliefs and actions to choices made by others are deprived of the proper use of their reason and free will in seeking their proper end and serving the common good. Such consequences and effects are totally inconsistent with a person's freely chosen response to his true potential as man, and provide an ineffective foundation for an enduring social order.

Theories which support secular liberal regimes deserve defense and an endorsement solely because, when properly adhered to, they release men in significant ways in the use of their liberty. When allowed to do so without unreasonable interference, man may respond to his free will, which, if properly instructed and restrained, serves not only his true end but also contributes to the achievement of the common good. In

order to facilitate man in taking actions which contribute to his own good and the common good, liberal regimes, when properly instructed and restrained, adhere to a legal order fashioned to assist man in taking actions consistent with his potential as man. Much of the history of the development of the common law demonstrates how this has been done intelligently and constructively over the course of the centuries.

Modern societies generally do not reflect the standards advanced by Saint Thomas. In the age of the “legislated law” men have most consistently used law to serve their own partial good or the partial good of others. This has made it more difficult and, indeed, less likely for man to serve the common good. This distortion of the proper use of law is a result of “legal realism” which dominates contemporary legal thought. The disastrous consequences of this situation are so evident as to make further comment unnecessary.

Other societies adopt what Jacques Maritain calls the posture of the “decoratively” Christian order characterized by multiple rules designed to produce adherence to a “proper” morality. Such attempts are well intended but mistake the true purpose of the natural law, to develop conditions and circumstances in which a person may truly be “reformed” in response to a properly instructed and restrained use of free will. While some control of human behavior is necessary in order to protect the virtuous from the non-virtuous, these measures are insufficient for the “reform” of the entire person. Such reform can be achieved best in a society that comprehends the values of subsidiarity, human liberty, and the effective means for developing proper restraint and instruction of individuals. Such tasks are performed by multiple institutions and associations, and the law’s proper purpose is to facilitate the operation of these

constructive and reforming institutions. In doing so a state’s laws should reflect the common sentiment that inheres in man to live a life directed to the common good. Consequently, the law may be used to prohibit behavior that threatens the peace, order, stability, and predictability of a society. However, the state must never employ the law to construct or direct subsidiary institutions that conform in purpose and in practice to ends determined by the state. If the state does so it distorts its proper function as a part of the society. The state can never properly serve as the agency to determine all things in the society and must fashion its laws in conformity with the principles commanded by the natural and the divine law.

Saint Thomas points out that man, by nature, is ordained to live in the society of his fellows and he must accommodate his person to this reality. Man is destined to serve his proper end, and is equipped, as Saint Thomas observes, “to act according to his reason: and this is to act according to virtue.” In shaping man to conform to his nature, the instruction of the young is critical, and where it has been sufficient, men will pursue the virtuous life by admonitions alone. And since, for some individuals, conformity to one’s nature is not achieved, they must be “restrained from evil by force and fear,” and the “kind of training which compels through fear of punishment, is the discipline of the laws.” If human law is to operate properly in society it must serve those ends consonant with the natural law in intent, content, and end. If human law is to be useful to man it must foster religion, promote discipline, and further the common good. To achieve these three objectives the discipline of the laws must be “adapted to each one according to his ability, taking also into account the ability of nature.” Thus differentiation in the application of law to children and to the mentally incompe-

tent is acceptable, as are different laws applied to man's freely chosen relationships resulting from marriage, family, etc. The content and end of the laws as Saint Thomas points out, may vary regarding time and place since the particular needs to be served are contingent on the various contextual situations in which they apply. In any case, the law is useful in prohibiting evils, real or potential, and thus is necessary for the achievement of the common good.

If human law is to conform in intent, content, and purpose with the natural law, certain requirements must be met. First of all, laws must apply universally to all persons within the society. It is appropriate, however, for some laws to apply to persons with a particular status which they have freely assumed, such as married persons or persons with children. Such distinctions are acceptable and consonant with natural law, since they are consequences of one's direct, freely willed choice. This reflects Saint Thomas's observation that "[S]ome things affect the community in one respect, and individuals in another. These are called *privileges*, *private laws*, as it were, because they regard private persons, although their power extends to many matters." Exclusions from the operation of the law, as in the case of children or mentally defective persons, must be designed to reflect the society's common understanding of what constitutes such disabilities. Such exclusions must be either impermanent as they are for children who, in the natural course of living, will remove exclusions; or, as in the case of the mentally defective, must be determined through the application of knowable proceedings that delineate the factors that constitute such defectiveness.

The laws must be general, as Saint Thomas says, and the "law should be framed, not for any private benefit, but for the common good of all its citizens."

Prescriptive and proscriptive laws must not only contain what is needed in order to deter men from actions injurious to themselves and others, but also help men in pursuing their true happiness and ultimate good. The content of such laws must be "non-specific" in the sense that the rule is not constructed to identify in all but name a particular set of individuals but must pertain to all. The extensiveness of such control or permission is dependent on prevailing contextual and contingent circumstances. Law must not prohibit men from exercising choices, pursuing objectives, or employing means that would significantly enhance their liberty or fundamentally assist them in becoming more fully human. Thus, for example, marriage, the bearing of children, the choice of vocation or occupation, cannot be controlled or directed by the state, except as such controls or directions are composed of elements conducive to the common good, such as the prevention of marriage between persons of certain consanguinity, or the prevention of abortion. Such laws should not deny persons the chance to pursue a particular vocation or occupation or to demonstrate their individual competency to engage in such a vocation or occupation. In all such instances, there must be known and knowable procedures available to those affected, who may contest such limitations. The major objective of this standard of generality is to avoid specific classifications which are unwarranted by any reasonable standard of justice, or which reflect the arbitrary desire to impose particularized costs or provide particularized benefits to a determinate set of individuals. This element of generality is central to the requirement of indeterminacy, which means that it is not known who will be affected by the application of such laws.

Saint Thomas has shown that the content of human laws may vary due to contextual and contingent conditions.

Similarly Hayek and others have suggested that the law reflects the common expectations held in a given society, and that translation of these expectations into rules of law requires that a determination must be made that will protect some claims while denying protection to others. Thus, rules related to the operation of contracts, inheritance, torts, criminality, etc., must be drafted with a necessary sense of indeterminacy. While varying, depending on the given circumstances in a society, they are indeterminate in terms of who will be affected, and will be called into play when dispute occurs among parties related to the legitimacy of their expectations.

Those laws prevailing in a given society at a given time must be knowable. Saint Thomas maintains that law must be promulgated, that it must be made known that such is the law. On a day-to-day basis humans conduct their lives generally in accord with what is required for adherence to the law. However, disputes arise when individuals in dealing with others feel that their legitimate expectations or actions are denied or prevented. In such instances it is imperative that individuals have access to a formal determination of which expectations are protected and what actions are permitted. Properly developed legal systems reflect the common understanding regarding such matters, but a free society assures that more specific determination exists than just common sentiments or feelings, and this specific determination is embodied in the law, access to and understanding of which is assured. As societies become more complex it becomes more imperative that persons have access to knowledge regarding the content of the law either directly or mediately by the use of a professional class of lawyers. In the course of their daily lives individuals conform to such rules, even though such conformity does not result from a conscious identifica-

tion of the act with a specific law. Nevertheless, when they are accused of having violated one or some of them, they must have recourse to knowledge about those rules. Because properly constructed law reflects an understanding of what actions are appropriate in the exercise of free will there is no need to determine the legal ramifications of every act. However, in those instances where circumstances and conditions require a determination of the outcome of a dispute or issue, the law that should govern must be knowable. The application or content of any law or laws derived from the subjective preferences of officials, would fail to provide the degree of objectivity required by properly developed law, which prohibits arbitrary governance.

In giving effect to these requirements of the law—universality, generality, indeterminacy, and knowability—laws in a society that are consistent with the natural law must reflect three additional requirements. Since it is illogical to argue that liberty means that each person in a society may pursue whatever ends he wishes by any means he chooses, any examination of liberty must concern itself with three major issues that minimize the degree to which man's liberty will be restrained by governmental power.

First, men must exist in social arrangements that have a certain common quality of life. Such arrangements may be induced by notions of a particular faith, history, or a common objective. To hold such arrangements in place, the liberty of the individuals must be subject to some limitation in order to persuade or compel men to remain loyal to these given arrangements and their purposes whether this be in a family, a voluntary association, or a political order. The concept of liberty does not prohibit coercion to assure adherence to the expressed values and rules of such ar-

rangements. Indeed, the concept of liberty necessarily presumes that non-state organizations such as families, religious communities, voluntary associations may deal harshly with deviation by their members from the prescribed conduct. Such treatment would encompass ostracism, rejection, exclusion, or other penalties. The possibility of such sanctions induces conformity among members of such arrangements and acceptance of their purposes. Government's role is thus necessarily circumscribed and limited if such institutions and their members are to enjoy liberty.

Liberty also requires that the government not discriminate by the use of the law. That is to say, what may lawfully be claimed by group A cannot be denied to group B. For example, the right to enter into contracts cannot be denied to one group while permitted to others, with such exceptions as are necessary on obvious and justifiable grounds such as mental incapacity or age, since the very meaning of the concept of liberty logically makes such distinctions and classifications possible and usable. Likewise, treason, rioting, or other forms of violence by persons or organizations may be prohibited and permit punishment by the state for their commission.

Second, the power of the state must not replace the functioning of multiple associations and organizations men freely choose to create. This is particularly true of the family, and the term family here specifically refers to the familial relationships of husbands and wives, their offspring, and blood relatives. Also the power of the state should not intrude into the operations, rules, and practices of voluntary associations men create, whether these be social clubs, commercial ventures, religious bodies, educational establishments, or whatever. It is improper for state power to be used to refashion either the family or the voluntary associations to ends

and purposes defined by the state. The state's role in respect to these types of human associations is to monitor and control external acts that threaten violence or particularized and severe harm to persons not associated with them, or the violence of members of a group against each other.

Further, the state can enforce *bona fide* agreements among and between such groups, or even members of such groups with one another. The state may legitimately prohibit activities which threaten or inflict physical harm on others, and may abolish groups that have as their purpose the destruction of the society by violent means. Certainly, the particularities of such restrictions and controls call for more specific examination than can be given here, but the principle is evident and necessary. Liberty cannot survive in the face of an active state that exceeds its legitimate role of preserving tranquility, security, and predictability in order to facilitate the activities of such institutions. The state must leave men free to pursue their own objectives and purposes, individually or in conjunction with others. Additionally, an active state is antithetical to liberty because it enervates the ability of individuals and associations to offer constructive, wholesome, and productive contributions to the operation of the society at large, and to serve the particularized needs of their members. Such associations result from the exercise of men's liberty and equip them to meet the tests and challenges of living and dying in a fashion supportive of human nature. Modern history has demonstrated tragically and graphically the cost to human needs and the quality of human life when state power directs man's acts and choices, even when it seeks to act magnanimously.

Third, the two preceding elements compel certain conclusions regarding the issue of the locus of power in a



society, since this bears critically on the matter of human liberty. The decentralization of governmental power provides the greatest possible protection of liberty and is achieved by limiting the forum within which such power can operate and the scope of such power. These limitations may result either from necessity or from design. Those stemming from necessity are, in large measure, capable of being minimized if not eliminated by technology. Despite the benefits to the human condition that technological improvements may provide, they are easily transformed into implements for the extension of power at the cost of liberty. Because such threats inhere in technology as such, jurisdictional limits by design are necessary to curtail centralized power.

An extended forum ruled by centralized power constitutes a dangerous threat to human liberty. The mere extensiveness, unless it is illusory, requires that centralized power must deprive its constituent units the ability to oppose its applications of power. The more remote the center of power from the objects of its attention and control, the less responsive it will be to the issues, expectations, aspirations, and values that are important to those at a distance. The logic of coherence requires centralized power to arrange, design, and compel all facets of the diverse interests, expectations, aspirations and values present in

a society, into what centralized power identifies as the needed symmetry for their successful direction and control. Finally, any power capable of being superior to other power will act to extend the scope of that power's application and control, until it can no longer be opposed. The only way to prohibit such centralization then, is by designing and instituting such limitations. Such control by human action can be instituted either by tradition, custom, belief, or consciously created institutional arrangements to effect such control. It is for this reason that constitutional arrangements have merit. A properly designed and operating constitutional order permits and encourages adherence to the principles of subsidiarity. The acceptance of this doctrine is necessary in order to assure that human freedom will be properly protected and thus to conform to the dictates of the natural law.

Reaffirmation of the value of liberty and its significance for human living is needed generation after generation. If it is not reaffirmed in this fashion and with this regularity its survival is threatened. Although events indicate that the desire for liberty can never be fully expunged from human valuing, the achievement of it may impose such a high cost that it will not be sought actively, or that it may be pursued with terrible cost.