FESTSCHRIFT FOR JULIUS STONE

A Tribute to Julius Stone on his Retirement from the Challis Chair of Jurisprudence and International Law at Sydney University

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ON THE OBJECTIVE FOUNDATION OF NATURAL-LAW NORMS

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Before entering into the topic of the objective foundation of natural-law norms I would like to declare my attitude to natural-law thought. I do not regard myself as its adherent nor its adversary. The controversy of iusnaturalism *versus* legal positivism leaves me rather cold. Often neither party to the controversy seems to have a very clear idea of what the opponents stand for. Sometimes even the proponents *themselves* seem to have no clear idea what *they* stand for. Yet iusnaturalism and legal positivism are unmistakable intellectual realities. Some of their variations appear to be rather foolish or even irresponsible, while others are plausible and quite defensible. As for natural-law thought, its basic preoccupation is with formulation of the requirements, standards, or criteria of goodness, rightness, or excellence of law.

It may be asked whether it is possible at all for a lawyer or legal philosopher to be neither a natural lawyer nor a legal positivist. As for lawyers, it depends on how the respective positions are defined. In their historical manifestations, these positions do not appear to be dichotomic or mutually exclusive. Intermediate positions are possible; one may even entertain iusnaturalist ideas on some points and legal positivist ideas on others. Of course, ardent natural lawyers, like religious or political fanatics, are wont to declare: "He who is not with us is against us!" But fanatics need not be taken seriously. The legal philosopher is not required to take sides in the natural law controversy at all. A legal philosopher can very well consider it as his only task to seek and set out what is going on and what is contained in the area of fundamental legal thought.

To provide authority for the norms or normative systems of natural law, an objective foundation is sought by natural lawyers for this law. Thus they speak of the "derivation" of natural-law norms from certain ascertainable facts encountered in social reality or in the reality of individual human beings. They employ the phrases

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"human nature" and "nature of things" for referring to the objective foundation of natural law. Usually regarding natural law as *knowable* from certain facts, they are inclined to align themselves with ethical cognitivism.

The cognitivist trend in natural law thought is subject to challenge by the invocation of the principle of the underivability of an "Is" from an "Ought", a principle first formulated by Hume and later espoused by Kant. It is still rife to say that there is an "unbridgeable gulf between the realms of the Is and the Ought." The formulation of the principle in question in such a manner is not a sober way of conducting philosophic argument. What is proported to be said in this way is that it is impossible to *logically* derive value judgments or norms from statements of fact alone.

There is no metaphysical or other mystery involved in this claim. It is based on a basic principle of logic, which admits only those elements in a valid conclusion that are present in the premises from which it has been derived. This principle is considered a nuisance by most natural lawyers and many moral philosophers. Therefore, great trouble has been taken to refute or to restrict it. It would be instructive to consider what chances exist to remove the hurdle which this principle ostensibly imposes on the natural lawyer in his effort to provide an objective foundation to the norms or systems of natural law.

A radical way of dealing with the Humean principle is to say that logic itself is man-made, and like any human achievement, is subject to change and overhaul. Since geometricians have been able to construct systems of geometry without the axiom of parallels and since logicians have been able to construct systems of logic which do not include the law of the excluded middle, why cannot a system of logic be constructed that would allow a conclusion to have elements other than those contained in its premises?

A simple answer to this question is that the whole idea of formal logic, which is based on transformation and not on transmutation of formulae, would be lost in this way. Such a system of logic would defeat the purposes of cognitivist natural lawyers and moral philosophers. They would like to establish the validity of their derivations beyond any doubt. A transmutational logic would provide no such certainty.

It is worth considering whether the principle that a conclusion cannot contain elements that are not contained in its premises really has a universal validity in formal logic. If it can be shown that

this principle has exceptions or requires restriction, the cognitivist natural lawyer or moral philosopher could entertain the hope that the hurdle of the Humean principle can be surmounted. A ray of hope seems to come from the theorem of addition, according to which, from any proposition, an alternative proposition can be derived, in which the given proposition is one option, and any other proposition whatsoever can be the alternate. Thus, under the theorem of addition, from *p* it is correct to conclude *p or q*. From this it appears that the conclusion contains an element, namely *q*, which is not present in the premise, that is, in *p*.

The above argument is sound, but is incapable of affecting the Humean principle. According to a firmly established convention in the construction of inferences in logic, there is no need to state the laws of logic, that is, its axioms or its theorems, in the premises. All appropriate logical laws can be regarded as belonging to the derivation basis of an inference. Thus, the above inference can be presented like this:

$$\frac{\begin{array}{l}\textit{If } p \textit{ then } p \textit{ or } q \\ p\end{array}}{p \textit{ or } q,}$$

which shows that the conclusion does not contain any element that is not contained in the premises.

There is also another way which might yield a chance for disputing the universal validity of the logical principle in question. According to the theorem of *ex falso quodlibet* any conclusion follows from self-contradictory premises. Accordingly, the conjunction of a proposition and its negation yields any proposition whatsoever. From *p and not-p* follows *q*. It may be said that in the real world mutually inconsistent states of affairs do not exist and thus a self-contradiction can never be posited as a premise in an inference relating to the real world. An answer to this objection is that in legal reality self-contradictions can very well occur; they do occur here in the guise of antinomic norms eventuating here and there in legal systems. This rejoinder can by its turn be rebutted by pointing out that antinomies are normative phenomena and thus the inferences in question do not receive their premises from facts but from norms or values.

If anyone still has the desire to continue the argument along these lines, he or she may be disillusioned about the possibility of surmounting the Humean principle by the realization that even an

inference under the *ex falso quodlibet* theorem does not produce a conclusion that contains an element not contained in its premises. For this theorem itself belongs to the derivation basis of the relevant inference, which can be expressed as follows:

$$\frac{\textit{If } p \textit{ and not-}p \textit{ then } q \qquad p \textit{ and not-}p}{q}$$

This expression shows that only a logical transformation, not a transmutation, is produced.

That there is no real hope for cognitivist natural lawyers and moral philosophers to derive logically a value judgment or a norm from statements of fact alone does not mean that natural lawyers have failed in their attempt to provide a rational foundation of natural-law norms or systems. They have only lost their chance to show that cognitivism in natural-law thought has a logical basis. One can still be a good natural lawyer without being a cognitivist natural lawyer. If a solid basis for natural-law norms or systems cannot be achieved by way of mere verification, one has recourse to a different procedure of justification of value judgments or norms, a procedure which is proper and "natural" for *them*. This procedure may be called "vindication."

It is undeniable that facts, too, can be important in the effort to show that a value judgment or a norm is well founded. But only *relevant* facts, not *mere* facts alone count for this purpose. Which facts are relevant and which irrelevant in the vindication of a value judgment or a norm is determined by the attribution of value-qualities to facts. A fact endowed with a value-quality constitutes a value, and *as such* is capable of being a reference for a value judgment or for a norm. The act of valuation is subjective in the sense that a valuating subject endows an object with a value-quality. However, the participation of the subject in this act does not condemn it to be arbitrary, as participation of the cognising subject in the act of cognition does not condemn knowledge to be arbitrary. Certainly, capricious, unwarranted valuations occur; however, there are also valuations preceded by a very careful and mature deliberation and supplied with good reasons.

If the deliberation preceding an act of valuation follows certain well-established rules of sound reasoning, superficiality, carelessness and narrow-mindedness in passing a judgment are reduced to a minimum and the chance of achieving an insightful assent to the

judgment resulting from the act is maximized. Such an insightful assent provides the rational warrant by which a value judgment or a norm is vindicated, that is, established as well founded.

There are fundamental principles relevant to the assessment of the worth of the actual or potential positive-law norms, the certainty and stability of which are scarcely less than the certainty and stability of statements of fact about human individual or social reality. For example, there can be little doubt about the requirement that the law ought to avoid arbitrary discriminations, that it ought to protect the lives of the members of the community, that it ought not to impose mutually inconsistent duties, and that it ought to be ascertainable. It is possible to challenge even these elementary principles of legal decency, but such a challenge is unlikely to come from or impress those who can be taken seriously. However, challenges have been made that fly in the face of our basic knowledge or understanding of the real world. Sollipsists have disputed the existence of external reality and sophists have contended that nothing whatsoever exists.

The conception that a rational foundation cannot be provided to norms or systems of natural law by verification of facts which bear on human pursuits and that such foundation is essentially provided by vindication of the values involved in matters of human concern implies a non-cognitivist approach to the problem of justification of these norms or systems. It is a matter of course that verification plays a role in the framework of vindication, for the justification of a value or a norm may be determined from certain facts, whose existence must be ascertained. This requires the verification of corresponding statements of fact. Among the facts to which frequent reference is made in the justification of natural-law norms are certain teleological trends observable in human behaviour; for example, the instinct of self-preservation, the inclination of man to live in a community, and man's drive to propagate his kind. These trends may account for why certain value judgments and their corresponding norms are virtually universal and why men almost universally endow certain facts with certain values. A teleological trend is still a fact and the statement of such a fact is in itself no value judgment or norm.

The term "natural law" meets with no empathy among many lawyers and is otherwise objectionable because of misleading connotations of the word "nature" and because under the label "natural law" some odd ideas have been served in the history of

thought. However, it can be argued that the term is far from being inappropriate. It can be used by those who reject the cognitivist approach to natural law. In English, "nature" means, *inter alia*, what is important, essential, significant, constitutive in a phenomenon. This aspect of the connotation of "nature" is quite consistent with the view that the well-foundedness of a value judgment or a norm is established not in the procedure of verification but in the procedure of vindication.

The non-cognitivist natural lawyer can also find a justification for the continued use of the term "natural law" through reference to the fact that approval based on an insightful assent often finds expression through the word "naturally"—namely, when it is said: "Naturally, this is right" or "Naturally this ought to be so," "naturally" performs here the same function as the expression "of course."

It may well be that the term "natural law" has outlived its usefulness and that it should be replaced by another expression, under whose label that which is sound and of continued value in natural-law thought would have a better chance to assert itself. However, an appropriate alternative term for "natural law" does not seem to be readily available. If a proper term can be offered, it may serve the purpose of promoting a fruitful interchange of ideas with those who have no feeling for the natural law tradition but who are nevertheless concerned with the achievement of high standards of contentual excellence in the creation and application of law.