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The Return of Universal Law

RESUMEN

La tesis de este artículo es que la Ley Universal es el descendiente directo de la que alguna vez se llamó Ley Natural, y que ella posee la mayor parte de las virtudes que esta última preserva y ninguna de sus deficiencias. Ejemplos escogidos para ilustrar la tesis son la abolición del castigo por la así llamada brujería, la abolición de la esclavitud y la reciente emergencia de la Corte Criminal Internacional. Sostengo que en todos estos tres ejemplos presenciamos un cambio de paradigma en el pensamiento moral, un cambio según el cual, como fácilmente convienen los esencialistas, los consecuencialistas y aquéllos cuyo pensamiento se inspira en una pretendida fuente externa tal como Dios o la revelación, aunque no se ponen de acuerdo en cuanto al por qué, en buen número de asuntos morales, tiene sentido hablar de una Ley Universal vinculante. Esta Ley Universal, que ahora es entendida como un *aceptación de obligarnos universalmente con respecto a cierta concepción*, tiene el mérito de trascender incluso las diferencias filosóficas mayores, y de afincarse firmemente en el mejor de todos los fundamentos, la elección humana libre.

Palabras Clave: LEY NATURAL, LEY UNIVERSAL, ESENCIALISMO, CONSECUENCIALISMO, ELECCIÓN LIBRE.

ABSTRACT

The argument of this paper is that Universal Law is the direct descendent of what was once called Natural Law, and that it possesses most of the virtues that the latter enshrined and none of the inadequacies. Examples chosen to illustrate the thesis are the abolition of punishment for so-called witchcraft, the abolition of chattel slavery, and the recent emergence of the International Criminal Court. In all three instances, it is argued, we are looking at a paradigm shift in moral thinking, whereby it is tacitly agreed upon by essentialists, consequentialists, and those who draw inspiration for their thinking from some putatively external source such as God or revelation, that on a number of moral issues a binding Universal Law makes good sense, even if they fail to agree among themselves as to exactly why. This Universal Law, now understood as an *agreement to bind ourselves universally in some certain regard*, has the merit of transcending even major philosophical differences, and of securing itself firmly on the best of all foundations, free human choice.

KeyWords: NATURAL LAW, UNIVERSAL LAW, ESSENTIALISM, CONSEQUENTIALISM, FREE WILL.

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A few years ago I was in Greece, attending one of Sophocles's most famous plays, *Antigone*. As readers of the play will recollect, Antigone has the temerity to disobey an edict put out by her father King Creon to the effect that her rebellious brother Polynices will remain unburied after perishing in battle against the king. Her argument is that there are laws more binding than the ones promulgated by kings, and this is an instance of one such law. How did the first Athenians react to this stance? We cannot be certain, but we can offer a fairly good guess, since we know that the trilogy of which *Antigone* formed a part in fact took first prize at that particular festival. And it was clearly a play that proved equally appealing to the audience of which I myself formed part over two millennia later.

The law to which Antigone was appealing might perhaps be called Universal Law, and for the moment I should like to simply call it that, without attempting to delve further into arguments that might have been used to validate it. It is clearly more than just individual conscience, given the generality of the claim Antigone makes. And it is something that she thinks transcends even the dictates of a given set of religious beliefs, since it is said to transcend even Zeus. But whatever it is, it continues to strike a chord in the hearts of many, long after Sophocles has left the scene.

At first sight, what Antigone is appealing to is what has come to be called Natural Law. Certainly, within a century of Sophocles's play Plato, in the *Laws*, was making extensive use of Natural Law as the supposed basis of much of the legislation underpinning his new Magnesian Society. And with some startling effects. To readers of earlier dialogues, like the *Symposium*, *Republic* and *Phaedrus*, it seems clear that, while he reacted to physical homosexuality, as he seems for that matter to have reacted to physical heterosexuality, with a frisson of disgust, we are hardly prepared for his stance in his last work, the *Laws*, when, now applying a doctrine of Natural Law, he is uncompromisingly advocating the most drastic punishment Greeks could ever imagine, deprivation of civic rights,⁽¹⁾ for homosexual practices. Or to readers of the earlier dialogue *Gorgias*, for that matter, in which some of Socrates's most powerful barbs were reserved for the 'naturalist' sophist Callicles. What has happened? Well, primarily Plato has perhaps unwitting both proposed a major theory of law and exposed its weakness all at the same time. The word Nature can be used in many different

ways, with dramatically different results. If by 'nature' one means 'Nature red in tooth and claw', Callicles (in the *Gorgias*) is being castigated by Socrates for using nature as the basis for a dog-eat-dog, might-is-right vision of how nations and individuals should conduct themselves. If, on the other hand, by nature one means a teleologically underpinned world in which basic ends or objectives are clearly identifiable in terms of specified functions, evil will be easily identifiable as any attempt to frustrate those functions; and in this teleological vision Plato was followed in large measure by Aristotle and the Stoics in antiquity and by the great majority of later theologians in both the Greek east and the Latin west, culminating in the powerful writings of Aquinas. Both visions of nature as potential models for conduct, I need hardly add, have had a long history and continue to have great influence. The conduct of any number of tyrants up to and including some only-too-recent ones tends to exemplify the first of these, which we might call the vision of Callicles; while the contents of several papal encyclicals over the past century, drawing directly on the vision of the Plato of the *Laws*, serve as a good example of the second.

Neither of these models, however, it seems to me, has in fact anything to do with what Antigone was appealing to. A little closer to it, perhaps, was what the ancient Romans, during the time of the expansion of their empire, tended to call the *ius gentium*, that 'common element', in Wollheim's words, which they kept on finding or thought they kept on finding 'in a large variety of (legal) codes and systems'. Like the appeal of Antigone, this *ius gentium* was relatively (and perhaps mercifully) unclear as to its supposed rationale - until, that is, Stoic philosophers like Cicero got their hands on the idea, and turned it into a claim that the common element in question is that universal element in all law that is dictated to us by what, borrowing a phrase of Aristotle, he called 'right reason'. Since Nature, for the Stoics, was itself instinct with Reason, it too could be called in, along with human reason, as the great universal arbiter of conduct, individual, civic, national and trans-national.

But the problem with this is exactly the same as the one we saw when discussing Plato; why this (rather benevolent) vision of Nature rather than the more brutal one attributed by Socrates to the Sophists? So it comes as no surprise that in the third century we find Ulpian trying to disentangle the concept of a *ius gentium* from that of Natural Law. But by then it was probably too late,

and till the sixteenth century the two tended to be treated as being so closely related as to be almost synonymous, when Suarez finally made another attempt, this time rather more successful, to disentangle them.

A further overlay of complexity to the whole business was provided in the 13th century by Aquinas, who distinguished four types of Law: eternal law (i. e., law as it appears to the mind of God; divine law (i. e., the laws laid down by the Church under divine guidance); human positive law; and natural law (seen, along Stoic lines, as an amalgam of the laws of nature and laws derived from 'right reason's' ability to perceive values and weigh them against one another [Rubin 1997, p. 17]). Sound religion and Natural Law (or is it the other way round?) are now firmly proclaimed to co-incide.

All of which has led to a distinction, prevalent in our own day, to distinguish two fundamentally contrasting, and supposedly contradictory visions of the grounds for conduct: the so-called 'naturalistic' model, prevalent till about the 17th. century, and the so-called 'positivistic' model from that time till the present. But this distinction, it seems to us, is unobvious, and should be resisted. Antigone's claim has become encrusted with too many philosophical barnacles over the centuries, and it is far from clear that what she was maintaining was what has come to be called Natural Law (in *any* of its competing and often contradictory versions), and still less that Divine Law, mentioned by Aquinas, with which Natural Law is supposed to co-incide. As we saw, the law of which Antigone spoke transcends, she claimed, even Zeus himself. This law consists, she says, of the 'unwritten, solidly based νόμιμα θεῶν that are not something for today or yesterday, but abide forever, with no-one knowing from what source they came' (*Antigone* 454-6). They consist of 'customary ways of conduct' (νόμιμα) that are clearly thought by Antigone to be binding on the gods themselves (θεῶν), even Zeus, and derive from a source beyond human comprehension.

I have returned to Antigone because she expresses most perfectly, to my mind, a belief in universal standards of conduct that makes no claims to knowing with any degree of sophistication what its philosophical basis might be but maintains it nonetheless. And it is this belief, whether still unencumbered like Antigone's, or possibly encumbered by continuing appeals to Natural Law, or Revelation, or whatever, that never seems to go away, despite the rise in

recent centuries of a more overtly positivist approach to law-making. In calling it Universal Law we should like to suggest that, unlike Natural Law, it is in no clear way a competitor with positive law for the loyalty of law-makers, political scientists and philosophers. Because, as we understand it, it is in fact in no way grounded in essences or revelation. It is, rather, a set of commonly agreed upon norms of conduct that grows in extent and clarity with the passage of time, thanks to continued public argument, education, and experience, including the experience of the working out, one way and another, of much positive law. Let us illustrate this with two brief examples.

After three centuries of horrors that do not bear description, in the 18th century the pursuit and elimination by burning of so-called witches simply died out. In this respect at least, the human race grew up. As Professor Trevor-Roper has pointed out, no great argument appeared to crush the movement; we simply grew to appreciate that the whole phenomenon was an aberration and an abomination, and this appreciation has since simply become part of our common moral consciousness. The same can be said for chattel slavery. After millennia of acceptance of such by the vast majority of humankind, we have in the course of less than two centuries come to repudiate it as an abomination, and react with horror when on occasion we hear reports from various parts of the world that it may still not have completely left the scene.

Which brings us round to the subject of tolerance. It is, it seems to us, within the realm of *tolerance and its limits* that much of the progress has been made since the time Locke penned his famous treatise. While descriptions of Universal Law in terms of Nature have fallen easily to the criticisms of Bentham, Mill and others, Universal Law itself, properly described, has gone calmly on. For *its* much more defensible base is in fact the *empirical* one of reasoned argument and experience, and it continues to fashion for itself an ever growing body of norms that do not, as Antigone thought, apply universally because they stem eternally from some *external* ordinance that transcends us all, but that we *ourselves*, in the course of debate, argument and experience, often spanning centuries, come to *demand* that we apply universally to ourselves simply as humans. The power and often spectacular results of this process often remain subterranean and unnoticed for great lengths of time, till we take time out, sometimes after a period of great national or international trauma that has

shaken us, like World War II, to look more broadly at history and do a reckoning. Two of these spectacular results, involving witchcraft and slavery, I have just mentioned, each serving as a new 'bottom line' in our sense of communal justice and the range of tolerance. Another, without a doubt, this time dealing with the *limits* of tolerance, is the concept of a crime against humanity, born of the bitter experience of the horrors of World War II and the broadly held feeling that, if these horrors were not to recur, some more comprehensive norm of conduct was needed than anything that could be accomplished simply by the positive laws of nation states. And a final one that should be mentioned, this time as an example of a still-continuing movement that could well result in yet another bottom line to our moral consciousness, involves capital punishment. If the debates around this topic go the way we expect they will, a century from now (when we shall perhaps mercifully not be around to defend ourselves if our prediction is wrong), a *new* brick in the masonry of communal moral consciousness, or Universal law, will have been added, and a new generation will look back with astonishment on the death penalty, too, along with things like chattel slavery, the persecution of so-called witches, and the absence for so long in human history of the concept of a crime against humanity, and wonder aloud why it took us all so long to achieve so elementary a level of universally accepted norms of tolerance and the limits of tolerance.

Let me at this point put two possible objections to my claim, and in answering them broaden the picture somewhat. First, it could well be said that slavery and persecution of witches are still not entirely dead, and that the world still seems to be full of tyrants who act as though they have no notion of the concept of a crime against humanity. And second, no *universally* acceptable arguments have ever in fact been put forward in defence of the points I have made about witchcraft, slavery and crimes against humanity, so in what way can my claims be reasonably considered universal, any more than earlier claims based on either essentialist or consequentialist theory?

In response to the first objection I would reply, not that there are not continuing instances of the horrors mentioned, but that a major change in public thinking has in the first two instances already taken place and in the latter instance is in process of doing so, and it is from this vantage-point that we now look,

or are beginning to look, with great moral disgust on things that only a brief while ago were, except to a tiny minority of lonely souls crying in the wilderness, considered to be absolutely normal and reputable. To put it in slightly different terms that have become popular in recent years in a somewhat different context, we are looking at what seems to me a 'paradigm shift' in *moral* thinking that is at least as significant, and probably a lot more so, than say the shift from a geocentric to a heliocentric theory of the universe.

Which brings me to the second objection. One of the greatneses, it seems to me, of Plato's 'Socratic' dialogues is that, despite the fact that no final definition of some general term in question I ever reached, people still rightly conclude that such dialogues are not to be counted failures. The reason for this, I would argue, is an instinctive feeling on the part of very many people that progress is not necessarily measured by the winning of arguments. Sometimes it is enough to have managed to jettison a number of bad arguments to feel that one is in a position to take important moral decisions, even though no universally agreed-upon, knock-down argument has been presented, or looks likely ever to be presented, in support or some particular moral point at issue.

And it is this, I argue, that constitutes the paradigm shift in question. No universally acceptable argument was ever put forward that brought about the relatively sudden cessation of the persecution of so-called witches in mid-eighteenth century Europe. And the same goes for slavery. In the latter case, indeed, it took a major civil war, rather than argument, to decide the matter. But the result was the same. After a certain time, humankind simply came round to the view that slavery is an abomination, and any instance of it discovered in our times is rightly pilloried as the continuance of the residual thinking of a dark age we repudiate.

Which brings me back to the idea of a paradigm shift in our moral thinking. Till now philosophers have tended to assume that the great divide between essentialism and consequentialism is just about unbridgeable, except by lucky accident, when putative essence and consequence just happen on occasion to coincide. But the paradigm shift of which I am speaking teaches us that this is probably too pessimistic an assessment of our reaching large-scale agreement on a number of matters of centrally important moral concern. The Socratic approach has come into its own again, and we now seem happy to

accept that, after listening to argument for a time, we eventually begin to feel a moral obligation to come to some conclusion and act, whether the argument appears to have been satisfactorily resolved yet or not, and indeed sometimes in face of the fact that the argument appears to very many people to be of its nature irresoluble.

None of which will of course stop essentialists from continuing to argue essentially and consequentialists consequentially. But it offers hope that Heraclitus was on the right track long ago when he said that with the passage of time we 'discover more'. In this case, I wish to say, what we 'discover' is hardly what is essentially the case, unless we are prepared to admit that, despite the existence and eternally binding nature of certain supposedly essential moral truths, we have somehow often for centuries failed to see them, and indeed at times acted in a manner diametrically opposed to them. And even if, miraculously, all stripes of consequentialist were to come to agreement on a particular point, such that they would wish to call their joint conclusion 'universal law', there would still be the problem of reconciling their claim with that of any essentialist who argued otherwise.

The way out of this dilemma, it seems to me (and it is this that constitutes the 'paradigm shift' of which I speak) is to think in terms of *agreement*, after argument no doubt but not necessarily in dependence on any particular argument, *to be bound as humans by certain norms of conduct in certain respects*. The universality of the agreement is by *choice*, not by reference to some external agent, such as God, or by reference to supposed essences *in re*, or by argument from simple consequentiality, though all three of these may well have figured in the hard debate leading up to the agreement. It is not just a watered-down compromise, since the agreement is to have norms that are *universally binding*, and it transcends, while respecting, *all three* moral approaches just mentioned.

To put the matter in biological terms, my claim is that, as the human race 'grows' as a moral unit, it comes to agree, more and more, with the passage of time, on what it will accept – one might wish to put this more strongly, *demand* – as being universally binding upon it. This, it seems to me, is a sense of Universal Law which has come into its own since the Nuremberg Trials in particular, and is now rapidly gaining acceptance, and galvanizing the activities of institutions like the International Criminal Court. It is a renewed and re-invigorated sense of the term that right-thinking people cannot help but be happy with.