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THE PROBLEM OF NATURAL LAW

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Using the term "natural law" one may encounter theoretical difficulties. They result from the ambiguity of the notions of "law" and "nature" present in particular doctrines of natural law which differ in their essence, origin, content and function. The extensive literature on the subject indicates that this term appears all throughout the history of social thought and exceeds the sphere of European culture. The great chronological range of the problem corresponds with a very large scope of its subject matter; it involves almost all the problems of the highest values, taken up by various disciplines, such as law, ethic, politology, theology and history. Its fullest reflection, however, is to be found in the history of political and legal doctrines. The complexity of the subject results also from the changeability and the variability of the functions which natural law performed in the history. The recognition of the difficulties connected with any attempt to consider natural law may lead to the impression of confusion which hardly yields to scholarly analyses.

The basic literature on natural law eliminates this impression of confusion. Most of the papers on the subject aim at finding new methodological formulae facilitating a chronological and objective synthesis of the diffuse material. The history of the doctrines of natural law indicates that similar problems underlie the multitude of accumulated meanings. They arise from questions concerning particular values, which can be derived from the relation between the meanings of the notions of "law" and "nature". The history of the doctrines of natural law reflects the attempts at finding legitimate answers to these questions. It indicates, at the same time, that the human quest for values is infinite, each new particular social situation demands different values and it is in this sense that the quest is universal and eternal. Every successive answer creates deeper and "better" questions and each "better" question demands a "better" answer. The most general questions concerning natural law can be asked only on the

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basis of more specific ones formulated by representatives of particular branches of knowledge which accept this law.[1]

The questions of lawyers referring to natural law focus on the search for such values as justice, equity, lawfulness, which either confirm the positive law or question its relevance in view of those values which are recognized as an ideal for positive law. Legislators tend to conceive of natural law as the source of material norms indicating the principles, the limits and the goals of their activity. Judges try to find in it the rules of interpretation of positive law, which would fill the gaps in the legal system and justify desviations from the norms of positive law in particular situations. In the system of common law the doctrines of natural law attempt to systematize the basic legal principles indispensable for jurisdiction and stress the fact that some constitutions originated from natural law. Officers of state administration also refer to natural law and expect to find in it clues for their practical activity. Philosophers of law speculate whether there exist universal legal values, what is their relation to culture, and especially to a variety of cultures, and, finally, whether these values undergo changes.

An ethicist approving of the content of a particular doctrine of natural law seeks for ethical grounds of positive law and for the criteria of its evaluation. As a rule he puts it in the form of relation between positive law and morality which is often identified with natural law. These relations can be based upon one of the following assumptions: a conflict between positive law and morality, their mutual exclusiveness, identification of natural law with morality or morality with natural law, neutrality of law towards morality consisting in the lack of any connection and conflict between them, a harmony between natural law and morality or their dialectical relation. The great variety of possible relations should be multiplied by diverse conceptions of morality: individualistic, altruistic, naturalistic, materialistic, idealistic, relativist absolutistic, teleological, utilitarian, etc.

The doubts with which a polititian, and particularly a politologist, approaches the problem of natural law concern: the significance of natural law in the legitimation of revolutionary, evolutionary and conservative attitudes; the way of solving the perennial conflict between the desire for absolute power and the limitations imposed by natural law taking the forms of superiority of natural law over the authority, the superiority of power over natural law, the opposition of natural law towards power, the opposition of power towards natural law, a compromise or neutrality between them; the justifiability

[1] Welzel, H., *Naturrecht und materiale Gerechtigkeit*, Göttingen, 1962.

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of violence and coercion in politics and the right to resistance; a conflict and harmony between the individual and the state or between the society and the state; the bases of the state grounded in natural law, the forms and the types of the state and the desirable solutions concerning social and state institutions.

The questions of a theologist pertaining to natural law concern, among others, the following issues: is there a uniform and universal christian natural law or is there a multitude of them; are the sources of natural law grounded in the Revelation, the Bible, the christian tradition, the believer's conscience or in mystical contemplation; should the relation of law and religion also involve natural law; how should the content of natural law be conceived of from the point of view of a particular trend of christianity and a historically determined conception within its framework; is natural law the expression of divine grace, a subjective judgement, an oral command of God's messenger, or a directly revealed divine norm; how can its commands be evolved —on the basis of analogia entis, analogia fidei, or analogia relationis.

A historian dealing with the history of the doctrines of natural law cannot fail to take into account the above-mentioned points of view. Above all he should take up the following crucial problems: the evolutionary lines of the doctrines of natural law since their beginnings; social determinations of the emergence, the revival the decline and the decay of reflections on natural law; assimilation of certain intellectual trends by the doctrines of natural law and inspiring other ideas; the functions and the role of the doctrines of natural law in their effect on the fates of particular individuals and human societies; the methods and the methodological canons appropriate scientific interpretation of the history of the doctrines of natural law. The Marxist history of the doctrines of natural law shows that each answer to these questions must take into consideration the diversity of those doctrines in relation to specific material and ideological determinations of a particular place and time.

The content analysis of the above-mentioned specific questions leads to the selection of a permanent core common to the whole history of the doctrines of natural law and defined as "the problem of natural law".[2] This problem falls into several essential questions formulated on a high level of abstraction admitting the possibility of extremely diverse concrete answers.

The first question concerns the existence of natural law, its origin and acceptance. The view which persists and predominates in the lit-

[2] The issue is also discussed by Waskiewicz, H., *Historia teorii prawa naturalnego*, p. 84 ff.; *cf*, Friedmann, W., *Legal Theory*, London, 1953.

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erature distinguishes two large groups of authors who, according to their positive or negative answers to this question, are classified, respectively, as the adherents of natural law or the adherents of legal positivism.

The second question is connected with the essence of natural law. One can state without much exaggeration that there are as many answers to this question as there are authors. Nevertheless, there is obviously a possibility and need for their classifications based on criteria common to their groups and defined as being in agreement with "nature".

The third question is one about the content of natural law and the subject of its injunctions and interdictions. This question involved, among others, the problem of social and political institutions which are appropriate from the point of view of a particular doctrine of natural law.

The fourth question includes the problem of the function of natural law in general and in its particular varieties. A very wide issue of the relation of natural law to positive law, which is a crucial aspect of the problem of natural law, also comes under this heading.

Answers pertaining to the highest values concerning human activity which have been accumulated in the course of history are focused on the questions constituting the problem of natural law. As the necessity for evaluating things and phenomena, which only in exceptional cases leads to the idea of natural law, is inevitable in the human society, the problem of natural law is, by analogy, a "necessary", universal and insoluble issue.

The "necessity" of formulation and emergence of the problem of natural law resulted, on the one hand, from the inevitable need to evaluate things and phenomena, which the individual is faced by in his social life, while, on the other hand, it was the effect of the original lack and the subsequent rejection of scientific evaluation of things and phenomena which is inherent in Marxism and Leninism. As a necessary problem it is the expression of the perennial human nostalgy for permanent values underlying individual and social life. It is this persistent nostalgy that Kant refers to:

> Everything flows by us like a river, and man's altering taste and his changing fates make all this game uncertain and illusive. Where shall I find constant points of nature which man would be unable to move, and how can I tell which bank to hug?"[3]

The reference to certain absolute and constant values within the structure

[3] Kant, I., *Sämtliche Werke*, Gttingen, 1911, Vol. 11, p. 241.

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> of natural law finds a particularly strong response in human minds in those periods when the existing authorities totter and the relation decline. It is the veil of naturallaw that makes specific class goals appear as constant postulates or norms of a higher order and is used to legitimate both the most backward and the most progressive theories as a means of either reinforcing the existing relations or a challenge to a revolution.[4]

The universal character of the problem of natural law consists in the fact that it is the questions constituting it and not the answers formulated by the authors of the doctrines of natural law that are "relevant for all nations and in all times".[5] The temporal aspect of this universalism lies not in the durability of the solutions postulated by particular doctrines of natural law but in the persistence of the problem itself as a manner of looking for the highest values. Sometimes the presence of the problem is obscured by verbal differences,[6] yet it does not contradict the fact that natural law is a "recurrent dillema" which is manifest with different strength and emphasis. Hence one can speak of "the cyclic recurrence of natural law", "revivals of natural law" or "a rediscovery of natural law".[7]

While the search for the highest values is the search for the ultimate principles of social life by the majority of thinking people, the problem of natural law is a general issue. The scientific requirements which are indispensable when solving problems of this kind, as well as the appropriate methodology are determined by Marxism and Leninism. The contemporary versions of natural law, rejecting Marxism and Leninism as a scientific explantion of the problem of the highest values are based on particular postulates of science and some of its achievements. As one of the authors puts it:

> In an attempt to discover general principles, which is the ambition of natural law, one should possess profound knowledge concerning a very large variety of phenomena and aspects of social life. It is important, moreover, that this knowledge should not be confined to a single society, but it should cover the largest possible number of societies in time and space.[8]

[4] Borucka-Arctowa, M., *Prawo natury jako ideologia antyfeudalana*, Warszawa, 1957.
[5] Kasparek, F., *Filozofia prawa i jej stanowisko w dziedzinie nauk prawnych*, Kraków, 1887, p. 27.
[6] On the subject *cf.*, Ehrenzweig, A. A., *Psychoanalytic Jursiprudence*, New York, 1971, p. 44 ff.
[7] *Cf.*, among others. Charmont, J., *La renaissance du droit naturel*, Paris, 1911; Rommen, H.A., *Die ewige Wiederkehr des Naturrechts*, München, 1936; Scott, B., *Readiscovering Natural Law*, Santa Barbara, 1962.
[8] Ladrière, J., "Socjologia a myśl chrześcijańska", in *Socjologia religii*, Warszawa, 1962, p. 146.

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Speculations suggested by the authors of the doctrines of natural law are unacceptable from the standpoint of Marxism and Leninism, yet, at the same time, it is hardly questionable that the problem of natural law constitutes a certain basis for the integration of the extremely diffuse non-Marxist knowledge of the highest values.

The "insolubility" of the problem of natural law means, to put it in other words, the lack of lasting solutions of this problem in spite of the aspirations of the authors of many doctrines of natural law to make their ideas seem impossible to refute. This insolubility is determined by the dynamic character of the highest values which always reflect particular historical conditions concerning human existence and consciousness. Each generation of theorists of natural law, and even particular thinkers, differ in the way they see the objective diversity of social needs and keep giving them new formulations. The necessity of this diversity of the doctrines of natural law resulting from the specificity of historical conditions is the source of their temporal, objective, subjective and territorial limitations. Apart from these objective determinations there appears a separate subjective factor which affects to a considerable degree the specificity of the solutions of various problems of natural law suggested by particular authors. As Kasparek remarks aptly, "there has never been, nor can ever be, any consent on natural laws. Many men many minds. Thus, each mind has put the matter differently and has taken a different law for natural law".[9]

The objective and subjective understanding of the dynamics of values does not exhaust all the difficulties connected with the search for solutions of the problem of natural law, which would be of universal standing. Moreover, these difficulties result from fundamental axiological arguments which resolve themselves into two essential questions concerning the education of values and their cognitive usefulness. The first question is whether it is possible to educe non-relativized valuations from statements relating to the empirical reality, while the second question is whether the value of truth or falseness in the logical sense can be applied to non-relativized valuations.

Two standpoints, called "naturalism" and "antinaturalism", have developed respective of positive or negative answers to the first question. "The naturalists", including the authors of the doctrines of natural law, assume the possibility of educing non-relativized valuations from statements concerning the empirical reality. Thus they entertain the "naturalistic illusion" which consists in inferring duty from being.

[9] Kasparek, F., *op. cit. supra*, note 5, p. 28.

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Legal positivists, who are typical representatives of antinaturalism, deny any possibility of this type of reasoning. Marxist theorists of law are right to claim, however, that only relativized valuations can be educed from the knowledge of reality.

Positive or negative answers to the second question result in two contradictory groups of doctrines which are, respectively, valuating, axiological, often close to idealistic philosophy and sometime called cognitivism, while on the other hand these doctrines are non-valuating, descriptive, axiologically neutral, known also as positivistic descriptivism. The first group includes all the doctrines of natural law while the second group of doctrines is best exemplified by legal positivism. Marxist legal theorists point out to the weaknesses of cognitivism, but they do not fully approve of the standpoint of positivistic descriptivism. They maintain that the cognitivistic attitude cannot be justified since the valuating character of a statement cannot by itself prove its own justifiability without being verified in the light of facts. Cognitivists justify their assertions not on the basis of facts but on the assumption that they express some ideals, thus confusing what is with what should be.

The cognitivistic attitude which the authors of natural law assume is not convincing because the valuations occurring in science cannot be justified differently from other scientific assertions which are void of valuation; their valuating character does not in itself justify them. While the cognitivists ascribe the quality of truthfulness to all valuations, the representatives of positivistic descriptivism go to the other extreme denying the truthfulness of any valuations. Despite all the discrepancies of opinion, Marxists legal theorists generally accept a view which avoids these extremities. They argue that certain valuations expressed in statements valuating the reality do not meet the requirements of truthfulness in the logical sense.

It seems that among various interpretations of the origin and the essence of the doctrines of natural law, the most convincing are those which connect them with the considerations of values.[10] It is beyond any doubt that values can be and should be analysed from many different standpoints which would jointly reveal the multiformity of this complex phenomenon. However, a monograph on the problem of values, taking into account their multiformity, has long been a task far beyond the capabilities of an individual scholar. Thus, confining our considerations to most general remarks concerning mainly

[10] Among others, Watkins, F., "Natural Law and the Problem of Value–Judgement", in *Political Research and Political Theory*, O. Garcean (ed.), Cambridge, Mass., 1959, pp. 58-74.

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the legal aspects of the problem, we can state that the valuation of things and phenomena of social life has been man's faculty ever since the beginnings of his rational existence. This valuation consists in making constant choices of what man needs and values in the process of satisfying his own as well as social interests and reaching his intended aims. Man is compelled by the process of valuation to express his positive or negative attitude towards contemporary events through particular values. Valuation is inherent in the activity of each rational human being, each community and each society, and in this sense it is a universal process.[11]

The universality of man's valuating attitude towards events and facts does not contradict the existence of considerable differences in establishing values which correspond with human aims and needs formed by specific historical, ideological and class contexts. The class approach to values, placed in particular historical conditions, explains these and other peculiarities of the character and complex of what people consider to be values or non-values (which is obviously also important) but the explanation of the nature of values and their origin is to be found in the general historical foundations of individual and social life.[12] Recently these problems have been strongly emphasized by Marxist scholars who aim at their scientific explanation. It can be stated, therefore, that the problems of values are present in all the non-Marxist and Marxist views on law, state and society. Various formulations of the doctrines of natural law constitute a permanent basis for the non-Marxist thought.

The Marxist reflection on values explains the origin, the nature and the limitations of the content of the doctrines of natural law. It proves that the basic error of those doctrines in their axiological aspect is their adoption of the assumptions of idealistic philosophy which separates social goals and valuations pertaining to them from social being. Ignoring or rejecting the casual nexus existing between the material conditions of social life and the values which are their expression must lead to subjectivism and the recognition of values as autonomous philosophical categories.[13] When there is no uniform philosophy and method which would, similarly to Marxism, explain the problems of values scientifically, the ideas of natural law are generated under the impact of a strong need of the human mind to confirm the rightness of actions undertaken by man. Man tends to give his subjective valua-

11 Tugarinow, W. P., *Toeria wartości w marksizmie*, Warszawa, 1973, p. 6.

12 *Ibid.*

13 Peteri, Z., "O niekotorych czertach doctriny wozroździennogo jestiestwiennogo prawa", in *Kritika sowriemiennoj burzuaznoj tieorii prawa*, Moskwa, 1969, p. 130 ff.

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tions the quality of objective valuations resulting apparently from the same reality. For this purpose he ascribes his subjective judgements to the nature of reality in order to derive them subsequently as allegedly objective rules.[14]

It should also be added to the above remarks that the Marxist theory of law and morality does not give up valuating positive law by means of non-legal values and valuations. As valuation and estimation are common phenomena in social life, social science would be unable to perform its functions properly if scholars did not valuate objects of their research. Marxist theorists, being aware of the fact that the realm of legal phenomena is charged with estimations and valuations, cannot, however, approve of the estimation and valuation of positive law from the position of the doctrines of natural law. The principal reservations of the Marxists towards these doctrines result from the vagueness of the social source of their content, the weakness of the base of the estimations they contain and the insufficiency, or even fallacy, of their justification. Moreover, they are often characterized by a groundless conviction that social relations are subject to any regulation by means of appropriate legal measures. Thus, these doctrines overlook the essential fact that law is a reflection of particular configurations of social forces.

Marxist science, while rejecting the doctrines of natural law as non-scientific explanations of the problem of values, appreciates, however, their historical role and significance. It recognizes, in particular, the great attractiveness of the terminology of natural law due to its long-established tradition, its solemn tone and its great persuasive power of appeal. According to a wide-spread view which has a bearing on the estimation of the values inherent in the doctrines of natural law, the values seem to be the higher, the longer their life is, the more extensive and expressive they are, and the less they must seek support in other values.

The authors of all the types of doctrines of natural law aim basically at finding "equitable", "just" and "true" natural law which would be common as well as constant. Throughout their attempts these authors commit several mistakes thus making their doctrines liable to various criticisms which can be grouped in the following types: *1*) objections which are to prove that natural law is not law in a strict sense; *2*) charges which prove that it is not natural; *3*) statements questioning the universal and absolute character of this law;

14 Kelsen, H., "Platon und die Naturrechtslehre", *Osterreichische Zeitschrift für Offentliches Recht*, 1957, p. 1 ff.

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4) criticisms connected with the sanction as an attribute of law and the effectiveness of natural law.[15]

The critics of the "legal" side of the doctrines of natural law try to prove that the essence of every law is the ability to apply state coercion in order to extort obedience towards the content of its injunctions and prohibitions. Natural law, if we assume that it does exist, is incapable of exerting this kind of coercion. The doctrines of natural law, often assuming that the state of nature did not fully ensure the security of the society, impair the reliability of natural law in fulfilling its proper function which consists in ensuring security and peace in the society. If natural law is assumed to have been obligatory during the period of the state of nature, then it did not fulfill its tasks properly since a need emerged to constitute positive law. Furthermore, if one assumes the obligatory positive law instituted by the state to be a reaction to the inefficiency of natural law, then natural law is simply unnecessary as a set of unpracticable rules.

The criticism of the doctrines of natural law in the aspect of "nature" questions the sensibleness of the use of this ambiguous term which includes not only diverse but often mutually incompatible contents (this also refers, to a considerable degree, to the notion of "law"). It is indicated here that under the conditions of differentiated cultures, ideologies, styles of life, needs and people's requirements it is impossible to reduce this differentiation to one or even several "natural" philosophical categories. It is argued on the basis of the studies of man that there is not anything like unchanging human nature which does not undergo formation in the process of social life. The Marxist psychology shows that no tendencies result from human nature as such, but they are introduced to it by the society and by the conditions of human existence. This psychology points out, at the same time, to a certain true element present in the doctrines of natural law, which emphasizes dispositions common to all people. These dispositions reveal the ever-increasing uniformity of the desires of mankind and create new hopes for social reformers. In spite of this, the critics of the doctrines of natural law are right in their arguments questioning the justifiability of deriving any rules of human behaviour from human nature.

Arguments against the universal and absolute character of natural law are based on historical, ethnological, anthropological, psychological and sociological evidence revealing the changeability and the rela-

15 *Cf.* Bobbio, N., "Arguments contre le droit naturel", in *Le droit naturel*, Paris, 1959, pp. 175-190; Slipko, T., *Etos chrześcijański. Zarys etyki ogólnej*, Kraków, 1974, p. 266 ff.

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tivism of values. Moreover, "an attempt at constructing an ethical system which, in a society divided into antagonistic classes, would be consciously accepted by all and would serve all to the same degree, must result in an inevitable failure".[16]

The critics of the doctrine of natural law often argue that they do not propose any lucid solution of the problem of sanction as an attribute of law. This must have a negative bearing on the effectiveness of natural law which is also frequently questioned by proving the lack of real programmes and means for the transformation of social relations according to the ideals of natural law.

The Marxist criticism of the doctrines of natural law approves of these arguments, yet it does not give up associating the considerations of natural law with the problems of values. The Marxist legal theory points out, on the one hand, to the need of class interpretation of positive law from the point of view of particular values, while on the other hand it considers law to be the carrier of particular values.

As G. L. Seidler aptly remarked:

> Law understood as the body of norms observed and respected by the authorities and the citizens —usually called the standing order— is always the carrier of particular values. It is due to law that the society learns authoritatively what ought to be considered right, just, good and purposeful —in short, what kinds of behaviour acquire positive qualification, and which of them are recognized as negative. From the moment of issuing the norm the values expressed in law become for the society a motivating power of its conduct and gradually shape the mode of thinking and valuation.[17]

The Marxist theory of law and ethic does not abandon attempts at constructing a scientific, universally relevant ethical system. These attempts must

> / . . . / go in two correlated directions. On the one hand they tend towards levelling and eliminating different social conditions bringing into life particular ethical norms, while on the other hand they are directed towards the consolidation and propagation of elementary moral norms, the transformation of the particular norms into universal standards or towards eliminating them.[18]

Engels anticipated these trends in the following way: "most elements ensuring durability are certainly included in that morality which currently represents the transformation of the present into the

[16] Jezierski, R., *Klasowy charakter moralności*, Poznań, 1969, p. 140.
[17] Seidler, G. L., "Idea ladu w systemie wartości", *Państwo i Rrawo*, 1975/7, p. 29 ff.
[18] Jezierski, R., *op. cit. supra*, note 16, p. 140.

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future, namely the morality of the proletariat."[19] The contemporary Marxist theory of law and ethic specifies this forecast in the light of practical transformations of the structure, the aims and the consciousness of socialist societies.

19 Engels, F., *Anty-Dühring*, Warszawa, 1948. p. 111 ff.

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