JUSTICE AND THE LAWS[1]

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IN the famous treatise on *The Laws of England* by Blackstone, published in four large volumes in 1769, there are but two pages devoted to the natural law and the law of nations. It is interesting in these days, when English judges and professors are apt to deride the whole conception of natural law or any law beyond the customary and the legislative, to see how far already the abandonment of any eternal or moral juridical reference had proceeded even in Blackstone's day. His acknowledgement, perfunctory and abbreviated as it is, constitutes almost the last reference to any juridical principle (beyond parliamentary democratic desire), to govern the making or interpretation of laws in England: the doctrine of the absolute sovereignty of Parliament has become unchallengeable.

Yet, under the heading 'Of the nature of Laws in general' Blackstone still writes:

> Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being; and as man depends absolutely upon his Maker for everything, it is necessary that he should, in all points, conform to his Maker's will,—which will is called the Law of Nature; and there are three great principles of this law, namely,—that we should live reputably, should hurt nobody, and should render to every one his due; and to these three principles Justinian has, in fact, reduced the whole doctrine of law.
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> The constitution and frame of humanity afford a striking proof of the benevolence of the Creator,—the laws of eternal justice being inseparably interwoven with the happiness of every individual; and the human reason not sufficing, of itself, to teach this law, therefore the beneficence of the Deity has aided the imperfection of human reason by an immediate and direct revelation, this revealed law being declared by the Holy Scriptures; and upon these two foundations, nature and revelation, depend all human laws.
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> But man was formed for society, and is not capable of living alone, nor indeed has the courage to do it; and it being impossible

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> for the whole race of mankind to be united in one great society, they must necessarily divide into many, forming separate states and nations, entirely independent of each other, and yet enjoying a mutual intercourse. Hence arises a second kind of law to regulate this mutual intercourse, called 'the Law of Nations'—and which the civil law calls the *jus gentium*,

Though, somewhat inconsistently, he continues, speaking of the English local municipal law, that it is

> ' a rule of civil conduct' — as distinguished from a rule of morals or of faith; for municipal law regards man as a citizen, and as being bound towards his neighbour in other duties than those of mere nature and religion.

It is instructive to compare such casual treatment of the eternal or natural law with the views of St Thomas Aquinas, writing long before Parliament had claimed its now undisputed sovereign power. We know how in the *De Regimine Principum* it is declared that monarchy is the best form of government (Cap. III), but that monarchy may come to be corrupted into tyranny, which is the worst; for 'human law has the quality of law only so far as it proceeds from right reason; and in this respect it is clear it derives from the eternal law. In so far as it deviates from reason it is called an unjust law, and has the quality not of law, but of violence.'[2] So, in substance, taught all the medieval politicists, but with the Reformation another principle is apparent—to quote Professor Chambers in his *Life of More*: 'Parliament left it to the King to define what men should believe on pain of death'.[3] Nor was this power, whether parliamentary or regal, limited to beliefs; the fact that absolute power has passed from kings to parliaments has obscured the fact that thereby justice, in its widest sense, has been made subordinate to proclaimed law.

Yet the assumption that justice is a divine attribute, regulating ultimately the actions of all men and societies, has never been entirely lost, notwithstanding the efforts of the absolutists. Even after the ideals of the Church to maintain a Christian universal law had come to be disregarded, Grotius, Locke, Montesquieu, Kant and Jefferson all proclaimed in one form or another the notion of an over-riding law of nature, that first fully proclaimed by Aristotle. In America, the 'Rights of Man' depended upon it, as did, in essence, the French declaration of the 'Rights of Man' and

2 *Summa Theologica* Q. XCII, Art. 3 ad. 2.
3 p. 303.

the Code Napoleon, and, of recent times, the United Nations have endeavoured to restore the notion of natural law in their declarations of human rights. Yet here, in England, we have to recognise that the very notion that an Act of Parliament (or regulation properly made under it) can be impeached on any more general principle than the wishes of Parliament itself will find no kind of acceptance, indeed will be rejected, in every court of justice. Judges may, and do, attempt to modify injustice arising from too pedantic a construction of a particular Act in a natural sense, but when the words of the sovereign legislature are express, they can do nothing but give effect to its provisions.

In reading the literature on the subject, one is struck by the almost universal congratulatory tone expressed by British publicists on the absence of any expressed moral principle in English legislation. When England was governed by an aristocracy having a common ethic, based largely upon early classical tuition, an unconscious restraint limited legislation to the remedying of what were thought to be immediate mischiefs, but in our age (a fatherless society, as it has been called by the psychologists) one may look in vain for any such moderating consideration. The only limitation placed upon legislators today is fear of public opinion, which itself is by no means always on the side of natural justice and, in any case, is liable to manipulation by mass suggestion through press, wireless or television or some other device, methods increasingly the subject of study by politically interested psychologists.

The deference now paid to statutory enactment is a growth of many centuries. In the Middle Ages it was by no means easy for the judges to say where the law-making power resided, or what was the force of a particular mandate; sometimes the King acted of his own motion, sometimes by the advice of the Council or magnates, later through Parliaments. In any case when a new law was to be considered it was regarded in relation to the existing common law, and to the law of nature. The ecclesiastical courts, which had a far wider jurisdiction than they have now, and indeed were concerned with nearly all moral behaviour as well as questions of church government, marriage and wills, and the Court of Chancery, exercising equity, were even more influenced by the notion of the divine and natural law than were the common lawyers. In any event we find the doctrine of reference to the

universal law as late as the time of Coke (James I) and, as has been shown, it is given a lip-service by Blackstone. Not until the nineteenth century was the absolutism of Parliament finally judicially declared as completely supreme over all other laws, human or divine.

No sooner was Parliament so enthroned as absolute than it began to suffer diminution of power by its own act: that is, by delegation of its powers to ministers and other authorities. The statute of Sewers of Henry VIII gave powers to commissioners to make laws within their commission, and the same device was largely used in ecclesiastical matters to further the King's (or his Vicegerent's) powers of amendment of religion or the spoliation of ecclesiastical property. The Tudor Statute of Wales in effect gave autonomy to the government in the principality, and in the eighteenth century the Crown was given almost unfettered disciplinary authority over the Army by the Army Act 1717. The commissioners of customs and excise were also about the same time endowed with considerable inquisitorial and taxing powers.

By 1860, writes Professor Allen in his *Law and Orders*, thirty-three out of 154 statutes delegated powers of various kinds; in the period between the Wars there were 1,500 orders delegating powers—today there are far more. Many orders are administrative, but some set up quasi-judicial bodies, from which there is often no appeal except to the Minister appointing the tribunal; some orders give powers to Ministers themselves to interfere even with the liberty or property of the subject and some give similar powers to his subordinates. All these *privilegia* could, of course, in theory, be withdrawn by Parliament just as Parliament created them, but the practical possibility of such repealing, once a 'welfare state' has been erected upon them, is very remote. As was stated from the Bench in 1930 in Yaffe's case, 'Parliament has said: after the passing of this Act, the minister can do what he likes'. The monarchical power of Henry VIII's Statute of Proclamations (which gave his edicts the force of law) has thus returned in another guise.

I mention these facts to show how little opportunity exists today to consider whether a particular parliamentary or ministerial act is within the ambit of the natural law. Never (as in those countries once so much on that account despised for their possession of a written constitution) is it possible to challenge the exercise

of parliamentary power in the Courts on the ground that an act is contrary to natural law. Yet most written constitutions have been based upon that foundation, and we may live to regret the very elasticity of our laws which allow those possessing power, if they can but persuade the public to acquiesce — today not a difficult task—to ordain what they will.

I would emphasise this English absence of parliamentary restraints by turning to a consideration of another Anglo-Saxon community, the United States of America, which, while enjoying in company with England the benefits of the common law, has nevertheless based its constitution upon a written declaration of human rights which the Supreme Court will interpret and enforce.

The express division in the United States of the powers of government, based perhaps upon the *Esprit des Lois* of Montesquieu, while not expressly recognising natural law, at least tends to curtail the theory of absolute parliamentary sovereignty which then obtained, and still obtains, in England. It is associated with the preamble to the constitution of the United States of 1787 which provides that

> We the People of the United States in order to form a more perfect union, *establish justice*, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

The direct reference to justice will be noted, nor will it be forgotten that in the earlier opening words of the *Declaration of Independence* occur the well-known words

> We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.

And that,

> when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute

despotism, it is their right, it is their duty, to throw off such government and to provide new guards for their future security.

Such sentiments, it may be thought, directly derive from Saint Thomas—though the founders of the United States would have been horrified to learn that they had been inspired by a papist! This return to natural law had its reactions in Europe; the Hague Convention of 1906 spoke of the 'governance of the law of nations derived from the laws of humanity and from the dictates of public conscience', and in our time the words 'general principles of law recognised by civilised nations' appear in article 28 of the statutes of the International Court of Justice. The proceedings against the major war criminals as Nuremberg were said to be founded on natural law and the accusations against the war criminals were made on the score that the Nazis had invaded personal rights, liberty of social co-operation, and the self-determination of nations. Similar charges were made in Japan—a significant recognition of the universality of natural justice.

But in recognising of the return of an appreciation of the natural law, we must not overlook the fact that the foundation on which natural law itself depends, the divine will of God—the eternal law—has so far failed to win general acceptance. Yet, as the psalmist said, without that final sanction all is vain. It is one of the functions of the Church to restore the acceptance of the law eternal as the basic principle of all jurisprudence. Meanwhile the restoration of natural law as a juridical norm may at least help to establish that universal justice which is one of the essentials of a world-wide Christendom restored.

NOTICE

The next contribution to this series on 'Some Contemporary Moral Problems' will be an article on 'The Ethical Basis of Medicine' by Fr Hilary Carpenter, O.P. (Provincial of the English Dominicans).

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