The Role of Natural Law after World War II (Case of Nuremberg Trial)

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Abstract: Natural law is a set of inherent rights, based on the nature and existence of every man. Everyone has equal natural rights (such the right to live and physical inviolability or personal freedom) irrespective of gender and his age, his position in society, time, place and order the state in wich he lives. Such as natural law is one universal right, applicable to all men and all times. Natural rights are *pre* and *on- state*, and therefore inalienable right of "permanent". They differ from law and other legal norms, historically variable, set by the state (positive law). In this study we will be to stop the influence of natural law after World War II, since this is the period in which it had a great influence, especially in regard to the doctrine of international law and human rights. Focus of the study will also be its role in postwar national courts and especially the case of International Court of Nuremberg.

Keywords: moral; right; natural law; positive right

1. Introduction

Philosophical thought of natural law is found since the most primitive stages of social development until today, represented by the theory of natural law. A crucial element of this theory is its dualistic character, which means that its representatives, unlike most of the positivists, acknowledge the existence of both rights and placing them in a hierarchical order, determine that the positive rights should be conformity with natural law. Consequently positive system that does not coincide with that right, does not bind legal force. Also positive law must have the function to liability orders made effective through this right (Troper, 2003, p.10).

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Representatives, ideas, opinions, ratings, forms of natural theory are numerous. Thus it is known the division that made this theory in theological one, which focuses on the relationship of law, morality, divine or cosmic order, and secular theories which borders on the link to the right morals. A more recent classification is the one that separates the theory of naturalism in classic and modern. But despite the various classifications, that a lawyer be the legal representative of naturalism, his theory must accept two main theses:

a. exist morality and justice principles, generally available and accessible to human reason;

b. legal system or a norm can not be considered legal if it is contrary to the morality and justice (Nino, 1996, p. 24).

The theory of natural law has gone through several stages, each of which carries with it the characteristics of the relevant era, showing the close relationship between law and society development. So the Nineteenth Century is characterized by increased positivistic attitude toward the law and the collapse of naturalism. In this period, precisely the one that precedes is positivism and one of the proponents of positivism, John Austin, argued that "*to better understand the law, we have to examine it separately from morality, as they are both distinct institutes from each other*" (Ikonomi, 2010, pg.40). Legal positivism appear in different variants, but ideological variant of the thesis had the greatest impact according to which: "*whatever the content of norms of positive law, they have validity and must be implemented by citizens and should be applied by judges, regardless of their moral scruples*" (Nino, 1996, p.110). This is the thesis by the which, positivism is consistently criticized by legal naturalism, being that the last one has regarded it as the essence of legal positivism and has accused it as a doctrine that has served to justify strong regimes, having set the theoretical framework within which can be justified regimes such as Nazism.

During the Twentieth Century, there was a renaissance of natural theory, although the situation was not the same everywhere. For example England did not display any interest until after World War II, while in the US lawyers often addressed this right when interpreted fundamental rights chapter of the American Constitution. But despite the different trends, some of the factors that led to the revival of natural law in many countries, especially after the two World Wars were:

- the collapse of economic and social stability throughout the world;

- expansion of activities of governmental institutions, especially the intervention increasingly large of state institutions in the private live of citizens through law;
- the development of weapons of mass destruction and their use in wars across the world;
- doubts increasingly larger for the success of science to identify and solve problems of humanity (Ikonomi, 2010, p. 41).

All these showed that positivism, particularly his ideological variant can not do anything to overcome or improve situations such as those where society was found during this period. In particular, World War II noted that the separation of law from morality creates opportunities for totalitarian regimes and massive violation of human rights. In this context, the revaluation of positivistic thought and natural law during the Twentieth Century is substantially the result of tyranny and political instability in this period, especially from *ex post facto* reflection of lawyers on the history of law in Nazi Germany. Proponents of naturalism taking into account the experience of Nazi consider sharing law from morality and positivism on the whole, as a weapon in the hands of the tyrant. In this period occurred what Kelzen said in an attempt to set a pure theory of law "*legal positivist science, purified from politics, sociology, psychology, is successful only in periods of social equilibrium. While in the absence of public balance should be directed to the theory of natural law*".

Among the leading representatives of the Renaissance to natural law , we can mention Radbruh and Fuller. Fuller, one of the most prominent philosophers of the XXth Century, brought an original contribution to natural law thinking, moving away from the classical theory and offering a new elaborated one, where the emphasis is not placed on the supreme principles with divine or natural origin, but on legal and transparent procedures. In his most important piece "The Moral of Law", he sees morality as a characteristic of law and says that right must have a minimum content of moral. According to him, moral of law has a procedural character, which means that it is related to how law is created, published, interpreted and applied. This procedural morality of law or moral interior consists of several principles which underline the fact that right should consist of a general nature rules and that these rules should be announced, to be clear and unambiguous, feasible and realizable and do not change frequently. By analyzing the legislative process in Nazi Germany, Fuller said that the Nazi legal system

failed to implement these principles, therefore can not be called at the legal system. Today the Fuller procedural principles are found in almost all modern legislation.

Undoubtedly had an impact on the opinion of this period the german philosopher Radbruch, who was converted from positivist to naturalist. By analyzing the Nazi period he saw that was abusing whith the concept of obeying law, on behalf of the slogan "law is law". According to him, this had strongly contributed to the inhumane acts of Nazism. He stated that human moral principles are part of the concept of law and no law, statute or any other normative act is valid unless it respects the principles of morality (Dramrosch & Henkie, 2001, p. 405).

Rebirth of natural law in this period was important for the dimensioning of international law, even most of naturalists think that this trend finds more field application in international law. These include some representatives as Giorgio Del Vecchio, Roberto Ago or Alfred Verdross, who think natural law is the basis of law in general and international law in particular (Puto, 2012 pg.511). Because of the importance of this point, it will be treated as separate issue.

2. The Impact of Natural Law at the Nuremberg Trials and The National Courts of War

After World War II, judicial processes for war crimes, legal basis which supported these courts, the principles followed to judge the defendants, were undoubtedly influenced by the naturalistic ideas renewed in this era and so goes on questioning the values of legal positivism. The debate between positivists and natural law authors turned into a debate that has to do with the concept of rule of law and the report law - moral. Two questions arose in this period:

a. Do we have to accept the positivist idea that in determining rights and obligations must cast aside all moral standards?

b. Should morally acceptable goals guide policy decisions?

This debate and the role of natural law influence after World War II, is manifested most clearly through the International Court of Nuremberg, which was returned to the arena of natural law philosophical - legal debate.

On 20 November 1945 the Allied forces (US, USSR, UK, France) winner emerged from World War II, gathered in the german city of Nuremberg (the symbol of Nazism and the persecution of Jews), in the Palace of Justice, to develop the first

trial in the history of humanity by the International Criminal Court, *ad hoc* created, as a result of the Treaty of London, on August 8, 1945 (Mayda, 1972, p. 22). By this arrangement was created the Statute or the London Charter, which gave the Court jurisdiction to prosecute crimes against peace, war crimes, crimes against humanity, creating *a post factum* law to lay the foundations of individual criminal responsibility for acts that when they were done, they had violated international law of that period, namely Brian-Kellogg Pact, the Geneva Convention, the Treaty of Sevres. Here is based also one of the most frequent criticisms made to the Court of Nuremberg, as a result of violation of *non retroactive effect* principle of criminal law. But in such cases, we should note that the use of a retroactive law no matter how bad it is, is certainly more honest.

There are 13 recognized processes of Nuremberg , divided into two groups, where obviously the first process was the one who had the greatest impact on international public opinion. In this process were adjudicated by the Nuremberg Military Tribunal, 24 generals and leaders among the most notorious Nazi Germany, and six criminal organizations among which the SS and Gestapo.

The panel consisted of the Allied court. The defendants have not been allowed to contesting their composition, and ironically, those who for years had violated the rights of morality, already came with the thesis that the universality moral principle of which the accused and accuser should be subject to the same standards, must be applied.

The charges were:

1. conspiracy, preparation of a common plan to commit crimes;
2. Crimes against peace, directing wars of aggression against other states, causing World War II in violation of 34 international treaties;
3. War crimes, for violation of International Law of War, through the inhumane treatment of civilians and prisoners of war, torture, slavery, robbery;
4. Crimes against humanity, for committing extreme acts against political opponents, ethnic and racial minorities (genocide of Jews).

The charge also made by winning state prosecutors, throughout the process illustrated 12 years of macabre regime in all its terrible details through documentary evidence (2500) and hundreds of eyewitnesses. Evidence presented in this process prove to figure out the most horrific and horrendous acts: 50 million

people waiting for justice! In front of these facts, although was implemented the principle of contradiction, the defense did not have much to debate.

Below will be treated in a philosophical and legal interpretation, through the report naturalism – positivism and right – moral, theses of prosecution and defense.

Thus pitted lawyers with prosecutors of the case, which in fact are expressions of ongoing confrontation between the two theories, legal naturalism and legal positivism. The defense did not deny the facts on which rested charges, but disputed its legal qualification. According to her, the accused had committed acts that despite their moral value or not they had been entirely legitimate in accordance with the law of time and place where they were performed. They had acted in full compliance with legal norms issued by legitimate organs of the National - Socialist state. They not only had been authorized to do what they had done, but in some cases had been legally obliged to do it. Thus on the basis of "*obedience to the head of state*" who had built an autocracy from which it was impossible to escape, the accused should not be declared guilty, as had been simply executing orders given from above. The only guilty of atrocities of fascism was Hitler! Also protecting recall a basic principle of justice, accepted for a long time, that the Nazi system itself had not known: *nullum crimen, nulla poena sine lege praevia*. They claimed that if convicted the accused, would violate this liberal principle, because these acts, object to judgment, were not punishable under the law at the time and place where they were performed.

Contrary to this thesis, charges in naturalistic terms, argued that was superfluous talking about right and legal system, as they were not in front of such a system whenever a group of people manage to impose some rules in a given society and use force to implement them despite the moral value they have. This conception according to her, had led to the wrong slogan "law is law". They also recalled that norms issued by people must came after some principles universally valid and irrevocable, which establish criteria of justice and fundamental rights, existing in human nature itself: the right to life, physical integrity, freedom of thought, conscience and of religion, freedom of expression, the right to non-discrimination, the right to a fair trial. The totality of these principles constitute what is called the "natural right", a right that is present both in national and international law. Positive rates issued by people constitute the right only if they are in accordance with these principles. Given that the rules of the Nazi regime are not legal norms, they do not be applied to legitimize acts carried out in accordance with them. They violate the most basic principles of natural law, a right that existed at the time they

were made, exists today and will exist forever. Therefore turns absurd claim that to punish the defendant would lead to a violation of "*nullum crimen, nulla poena sine lege praevia*". On the other hand the defendants had violated international law and therefore should be punished.

The decision was pronounced on october 1, 1946, after 218 days. It strongly supported the charge and *inter alia*, announced 11 death sentences. Despite the criticism to the Nuremberg Court, especially in procedural terms and for the fact that the Tribunal served more as the retaliation of Allied to judge under the spirit of "justice of the winners", is indisputable its moral value for punishing atrocities that should not be forgotten ever! Nuremberg Trial is one of the most important processes in human history because it marks the expression of a universal consciousness. Renaissance naturalist ideas influenced the process to reject Nazi right and to reassess the natural rights of man. In connection with the characteristics of the German legal system and whether we are faced with a valid legislation or not, is interesting to quote the view of representatives of the Renaissance era of natural law. According to Fuller, Nazi laws were secret and made it impossible for citizens recognizing the legal basis which support the activity bodies. He argued that the Nazi system was not only inefficient, but lacked all procedural standards of justice and transparency. According to him, violation of procedural standards leads to the adoption of laws morally unjust and that these violations were so serious in Germany at that time, that we can say that the entire legal system ceased to exist as such. As a result, war courts should not recognize the Nazi law.

The claim to the not-existence of law in Nazi Germany, was a conclusion which had reached the other lawyers naturalism supporters, among them Franz Neumann, well-known lawyer who worked in Germany during gradually coming to power of Nazis. He wrote that: "*There is no a kingdom of law in Germany, despite that there are thousands of rules technically countable*". He argued that such a system is the manipulation of people by terror. The law, according to him, is characterized by *voluntas* (expression of the sovereign power) and *ratio* (expression of reason or rational principles embodied in the general ethical postulates).

The debate naturalism - positivism and the triumf of natural law doctrine, continued in practice postwar German courts, under the influence of the Nuremberg trial, showing that the differences between positivism and natural law are not simple theoretical character, but have significant impact in the practice of courts. In addition to the version submitted by Fuller and Neumann, a great

importance and attitude in this regard, had the german jurist Gustav Radbruch. He says that every lawyer or judge should denounce any legal norm that violates the basic principles of morality, no simple argument that is immoral, but it is invalid, then there is no legal validity and consequently, should not be taken into consideration in individual concrete issues. According to Radbruch, a law is valid if it:

a. exceeds formal tests of legal validity of a particular system and, most importantly;
b. does not violate the basic principles of morality.

Radbruch attitude materialized by the practice of courts in postwar Germany where, in many cases, war criminals, spies and informers were punished on the basis of his ideas. One such case is that of the Nazi informant. So in 1944, a woman who "wanted to get rid of" her husband, denounced him to the Nazi authorities, informing that he had made offensive statements against Hitler. The woman had no legal obligation to report this act, although her husband's statements were openly against the Nazi constitution at that time which consider illegal all statements that propagate against the strength and power of the Third Reich. Based on this legal basis her husband was arrested and sentenced to death. In 1949, the wife was charged in a West German court for the crime of "illegal deprivation of liberty of others". This offence was penalized by the Criminal Code of 1871, which was in force since its adoption. Before the court, the woman argued that her offence was in accordance with the Nazi statute and therefore she had not committed any crime. The Court of Appeal, which took into consideration the issue, found the woman guilty of deprivation of liberty of others arguing that: "*The statute was contrary to conscience sound and concept of justice for all normal human beings*". This means that the statute was invalid in 1994 when the event happened, because it was immoral, consequently, the woman would be punished by the code of 1871 for wrongful deprivation of liberty of another.

This reasoning is followed by other issues, which are considered as the triumph of natural rights doctrine.

3. Influence on the Doctrine of International Law and Human Rights

The Influence of natural law, undoubtedly is found in international law doctrine and may be we can say that this is the most important impact that it has today.

After World War II was spread the idea of "primacy" or the "superiority" of international law on the interior, as well as the idea of affirming a "global right" belonging to the future. These ideas have arrived to our days and are characteristic for most lawyers. Today abstract principles of natural law serve to resize the principle of sovereignty state in the name of a sequence that is organized on a global scale and in an ideal that is based on a universal right.

Here it is worth mentioning the idea of the Italian lawyer, Del Vecchio who says that permanent peace is achieved through the "brotherhood of all". He supports this brotherhood in a supranational order. Del Vecchio calls the "natural reason" as the basis of any right, including here also, international law.

Another Italian lawyer, Roberto Ago, spread the idea of "spontaneous law" as a variant of natural law. This right, according to him is not derived from a formal source, but arises spontaneously in people's consciousness and find more application in international law, as there is no special organ for extraction rates.

Importance in the arsenal of natural law today has also the point of view of the Austrian lawyer Verdross who watched the UN Charter and subsequent documents of human rights, as an opportunity to essential change for the creation of a *sovra-nacional* right.

A new stage in the development of international law marked undoubtedly the decision of Nuremberg's Tribunal. This is documented in the "Principles of International Law recognized by the Charter and the Nuremberg Tribunal's dictum", held in 1950 by the International Law Commission of the UN. Here was decided the summary in a draft code of important principles regarding war crimes, crimes against peace and crimes against humanity, charging individuals whith criminal responsibility. Also was jumped the idea not only for the design of international criminal codes, but also for the creation of a Permanent International Criminal Court. The Statute of the Court and the UN Charter, stipulate that if war becomes fait accompli, despite the measures taken to prevent it, should not allow it to turn into a criminal system, but rather the warring parties must be taken before the obligation to adhere to human norms of international law. All these developments, as the result of Nuremberg Court, under the influence of natural

law, had a major impact on the further development of international law, and in particular in the context of human rights, giving world a dimension of new, of more humane. In relation to the importance of human rights received in this period, we can mention the ideas of Ronald Dworkin. He is often portrayed as a representative of natural law, although it is not clear whether Dworkin has identified himself completely with a stream or another. Moreover, he criticizes natural law as well as positivism, being positioned in a medium between these two currents, or, as it is often called as a representative of a third theory, he has to do more with human rights than morality or sanction. Anyway we will be stopped to the ideas that he has in common with naturalism. Thus, when Dworkin talks about the position and activity of the judge, says he can change the rules in the name of rights, relying on principles. According to him these principles generally incorporate moral basis of a special legal system, principles that are part of every system. According to Dworkin, the functional role of the courts is the enforcement of law on behalf of rights.

4. Conclusion

Dworkin's ideas and all the others mentioned above are just one of the examples show that one of the most significant developments of natural law on international law doctrine, is undoubtedly the protection of human rights. Regard it should be noted, first of all, the commitment of the UN in this field with acts such as the Charter of the United Nations (1945), The Universal Declaration of Human Rights (1948), The Covenant on Civil and Political Rights (1966), The Covenant on Economic, Social and Cultural Rights (1966), or the commitment of Europe whith The European Convention on Human Rights, (1950).

Brian Bix, scholars of law, when talking about the role and importance of natural law puts it: "*The theory of natural law has played a central role in the development of modern political theory and international law. It is no coincidence that the United States Declaration of Independence (1776), claims its authority from the* "*law of nature*" *and refers to the* "*inalienable rights*" *to life, liberty and the achievement of happiness. Analogously, the French Declaration of the Rights of Man and the Citizen (1789), declares natural rights, inalienable and divine rights of human.*"

So we could continue his reasoning, whith the Universal Declaration of Human Rights, which in its Article 1 states that: "*All human beings are born free and equal*

in dignity and rights. They are endowed with reason and conscience and should act towards each other in a spirit of brotherhood."

Meanwhile, in Article 3, 4, 5, states that everyone has the right to life, liberty, security, and that no one shall be held in slavery or be subjected to torture or cruel, inhuman or degrading punishment.

To continue with the Preamble of the Covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights, which states that: "*.... In accordance with the principles proclaimed in the Charter of the United Nations, recognition of the dignity that belongs to all members of the human family and of their right to equal and inalienable, is the foundation of freedom, justice and peace in the world, ... these rights derive from the inherent dignity that belongs to every man.*"

Also the European Convention on Human Rights in Article 2 declares the right to life, Article 3 prohibits torture, and Article 4 prohibits slavery and forced labor. These are just some of the most important acts which together with a series of others, today constitute the basis of international law of human rights, thus realizing the "positivization" of natural law. Its impact in this regard is very important, and that expressed by the International Court of Nuremberg, which although many critics as a process more moral than legal, does something very important... choose the future!

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