

II. Природне право у розмаїтті перспектив



Stéphane Bauzon

Ph. D., Professor,
Tenured Professor of Philosophy of Law Department
of humanities,
Philosophy and History of Arts – University
of Rome Tor Vergata
(Rome, Italy)
ORCID ID: <https://orcid.org/0000-0002-1622-7758>
Bauzon@uniroma2.it

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CLASSICAL NATURAL LAW, A METHODOLOGY FOR JUSTICE

ABSTRACT. Justice is the name for a human characteristic that everyone feels spontaneously: what is fair or unfair in a social relationship. Animals do not have justice. The human reason (*logos* – *λόγος*) acts in order to reveal what is included in justice. Thus, as a participation in justice, the human conscience (*logos*) finds the law. Away from modern (and current) theories of natural law that sets rules either to be applied directly to social reality or to be individual powers to be opposed to positive law, the classical theory of law is a social quest directed toward doing the right thing. In the wake of Aristotle, classical natural law is a methodology (based on dialectics) to find justice in society. The etymology of dialectics, *dia-lectos*, teaches us that it signifies the exchange of words between different interlocutors. In this sense, dialectics is practiced every day by those gathering together, who receive advice relating to a given situation. Dialectic does not solely aim to persuade; but also tries to look for the natural law. Legal conclusions, notwithstanding the authority submitting them, are ultimately questionable. Having been born in dialectic, these conclusions remain as such. Nonetheless, their very existence gives the natural law, a fragmented expression of justice. Unlike morality, or the precepts of divine law, natural law is not given at all: it must be established through dialectic. Morality retains a reduced role, broadly limited to the discovery of natural law's essence, for example by prohibiting murder from being accepted in principle. Still, such a moral prescription does not solve the problem to know who is guilty of murder. As a methodology, classical natural law acknowledges the contingency of social norms with regard to the distribution of common goods. As a process that attends to the common good available and the merits of people understood in a broad fashion as encompassing the resources they possess, classical natural law cannot a priori determine what specific rights or goods particular specific people should have. Adapting to reality is necessary: a dialogue is always established to amend the contours of justice. For this purpose, classical natural law is the methodology for justice to achieve its new forms, to distinguish new data from the social distribution of goods and responsibilities. The protection of the worker, of the minor or of the foreigner is of indisputable moral value, though its implementation follows the oscillations of time. However, as a moral horizon, seeking justice involves a perennial effort to recognise other humans as human.

KEYWORDS: justice; Aristotle; natural law; classical theory of natural law; methodology; dialectics.

Justice is the name for a human characteristic that everyone feels spontaneously: what is fair or unfair in a social relationship

Even a young person can apprehend deep in their heart that something is right or wrong in a specific situation. Killing a person, stealing a thing or lying to people are immediately denounced by all as contrary to justice. As a human characteristic, justice is a sentiment to be found everywhere and all the time in all human beings. It appears to all that justice gives us the command to denounce every unjust act. Since it is written into our human condition, justice is to be defined as an obligation to do the right thing. Bluntly put, it is human to always seek justice. Conversely, animals follow instinctively Darwin's law of nature (the survival of the fittest); while human beings develop social obligations that go beyond biological impulses. A limitation to primitive human needs seems to have been put (by nature or by God) into our human character in order to avoid unfair excesses in our living together. Differently from other living creatures, humans protect the weak and they make mutual promises to be respected. Without the feeling of justice, the strong may prevail but it is always for a time being because empirically, as J.-J. Rousseau said, '*Le plus fort n'est jamais assez fort pour être toujours le maître*'.¹ Reason without justice is a mere technical mental-process and it is not enough to prevent human beings behaving like beasts and to conduct a never-ending predation to others' lives and goods. The ability of humans to master nature is never a guarantee that justice will be done. The technological means that humans have developed can turn out to be tools to exploit other's weakness and to deprive them of their lives and properties. As it is put in Plato's famous dialogue of *Protagoras*,² the amazing human power of having fire (fire, here, is the symbol of human technology) is not enough to have justice; it is quite the opposite. Protagoras speaks of the well-known myth of Prometheus, the Titan who stole the fire from the Gods to give it to mankind. Prometheus did this as a friendly gesture to humans in order to allow them to defend themselves against animals and the cold. His brother Epimetheus is often depicted as a fool who did not provide humans enough talents to survive in nature. Indeed, Epimetheus is dispraised as silly, as indicated by his name in Greek: "afterthought". On the other hand, his brother Prometheus, whose name in Greek signifies "forethought" is supposed to be witty. In the myth, as underlined by Protagoras, Prometheus is not so clever, nor able to understand human nature; indeed, once equipped with fire, humans are enabled to cause greater destruction and awful injustice. As a tool, its use has to be directed toward a fair end, otherwise fire (i. e. technology) is liable to be used for horrific purposes. The sophist Protagoras is wise to emphasize the genuine gifts that consent humans to live up to their

¹ 'The strongest is never strong enough to be always the master' in Rousseau J-J, *The Social Contract or Principles of Political Right*, book 1, chapter 3.

² Plato's dialogue of *Protagoras*, 321:322.

ontological condition; one is justice (*dikè- δίκη*) and the other is respect (*aidos- αἰδώς*). These gifts are divine, they are offered to humans by Zeus himself. For the ancient Greek, classical natural law is a divinely inspired justice (*dikè*). It is not easy to penetrate the genuine meaning of Greek words. Any translation takes our mind in a linguistic structure that is estranged to the Greek way of thinking. At least, it is to say that the word “*dikè*” (*δίκη*) is to be found in the word “*dikaion*” (*δικαίον*). As a neutral substantive, ‘*dikaion*’ indicates a “being” and also a social relationship. “*Dikaion*” is often translated in English by “just” or “right”. “*Dikaion*” is based on nature, the nature of a social relationship. As a result, it is misleading to translate “*dikaion*” by the word “right”, which nowadays refers to a personal legal power. “*Dikaion*” is closer to the word “law” in the sense that is to be understood objectively, as a part of justice that the law places as a object in front of us (objectum). Furthermore, “*Dikaion*” is about the social relation; what links humans to one another. The Latin for “law” is “*legem*”, which comes from “*ligare*” meaning ‘to link’. The expression “natural law” is polysemic, according to one philosophy, as such the meaning can be quite different. The definition of “natural law” is to be taken here as a synonym of “*dikaion*”. To avoid confusion, the adjective “classical” is added in order to make clear that our understanding of natural law is based on ancient philosophy, more specifically the philosophy of Aristotle.

The purpose of this article is to bring about the perennial methodology of classical natural law in order to reveal justice

But if justice has a divine origin, how can humans express it? The human reason (*logos – λόγος*) acts in order to reveal what is included in justice. Thus, as a participation in justice, the human conscience (*logos*) finds the natural law. Away from modern (and current) theories of natural law that sets rules either to be applied directly to social reality or to be individual powers to be opposed to positive law, the classical theory of natural law is a social quest directed toward doing the right thing. The classical natural law is the just distribution of goods and responsibilities through a research aimed at justice. The concept of natural law is still strongly discussed among scholars who fail to share a mutual definition of natural law, to say the least. Some authors⁴ very much lay the emphasis on imposing the values of natural law into society’s legal order (like the prohibition of abortion, seen as a basic human good not to be discussed). They use the term ‘natural law’ as being rules (or orders) stemming from human values. Other authors⁵ perceive natural law as the virtue of keeping

³ See for a detailed explanation, Stéphane Bauzon, *Le métier de juriste: du droit politique selon Michel Villey* (Presses de l’Université de Laval, coll Diké 2003) 65–88.

⁴ Among them, see: John Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980); Robert P. George, *In Defense of Natural Law* (OUP 2001).

⁵ Among them, see: Alasdair Chalmers MacIntyre, *After Virtue* (University of Notre Dame Press 1981); Pierre Manent, *Natural Law and Human Rights: Toward a Recovery of Practical Reason (Catholic Ideas for a Secular World)* (University of Notre Dame Press 2020).

up moral tradition. Here, the law remains a command, but is derived from an unwritten constitution that keeps the morality of a community. Finally, some authors⁶ (like myself) see natural law as a methodology (or a dialectic) that looks for justice. In the wake of Plato, moreover, Aristotle, they develop a theory of natural law based on the social dialogue for the search of justice.

In all cases, justice is a divine gift in classical philosophy

To go back to Plato's dialogue *Protagoras* in which justice is divine, one must bear in mind that the Titan Prometheus failed to save humans from their greedy and outrageous needs to satisfy their basic desires. For once, Socrates has to give in to Protagoras's argument; the divine origin of justice is given equally to all human beings. In contrast to the wisdom of technology (like architecture, medicine or engineering), the wisdom of justice is not limited to the few, but it is for everybody⁷. The concept of justice as a divine gift can also be found in the Ancient Testament with King Solomon⁸. Not everyone has justice in the Jewish narration; Solomon is a king, the son and heir of the great king David. Nevertheless, everyone is able to recognise wisdom in his administration of justice. In a dream, God invites King Solomon to make a request. Solomon did not ask for fame, new territory, nor gold; but he asks for a 'listening heart' so that he may govern and discern right from wrong. In this perspective, it is to be highlighted that justice is a divine gift that is essential to rule a nation, much more than material strengths. It is also significant to note that Solomon's divine gift is used for the very first time during a trial opposing two harlots. The equal access to justice is made quite clear, here; king Solomon did not reserve his gift for important people but for two female prostitutes. King Solomon shows a genuine respect toward the mother who wants her baby back and he does not look at her weak social condition. His cunning proposal to cut in half the disputed baby consents him to reveal the real mother: the one who loves her offspring to such a point of accepting to risk losing custody in order to keep the baby alive. King Solomon has received by God a listening heart which is open to what others have to say, to discern between good and evil. In the Hebrew text, the 'listening heart' is "*lev sh'ma*" (עֲמֻשְׁבֶּלֶת); "*lev*" means heart and "*sh'ma*" means listening.

It means understanding; but also obeying, as it can be found in the famous assertion "*sh'ma Israel*", "Hear, O Israel"⁹. The heart is the symbol of true human intelligence, which has to listen to justice. Following from this, in the

⁶ Among them, see: Leo Strauss, *Natural Right and History* (The University of Chicago Press 1953); Michel Villey, *Le droit et les droits de l'homme* (PUF 1983).

⁷ Plato's dialogue *Protagoras*, 322d.

⁸ 1st *Book of Kings*, 3:9.

⁹ In the *Deuteronomy* 6:4, the first verse orders monotheism: "*Hear, O Israel: the Lord our God, the Lord is one*" (קְדָם הַיהוָה יְהוָה יְהוָה אֱלֹהֵינוּ יְהוָה אֶחָד).

Bible, the “listening heart” is a capacity expanded to any Hebrew in Jeremiah¹⁰ and eventually to any human being in the New Testament. According to Saint Paul, *‘for when the Gentiles who do not have the law by nature observe the prescriptions of the law, they are a law for themselves even though they do not have the law. They show that the demands of the law are written in their hearts’*¹¹. The heart, as the symbol of human life, renders the law – as written into it – to be the very principle of our living together. The analogy between the Greek text and the Judeo-Christian texts offers a similar anthropological definition of justice as being put in our very human nature by God. Human nature bears in itself justice; but human beings still have to understand what makes us make the right decision: we need to reveal the natural law of our choices. Human nature, to be fully human, must excel in the understanding (*logos- lev sh’ma*) of where natural law lies in every human relationship. Everyone is conscious of justice; yet, to be able to find the natural law, we ought to seek justice with common intelligence. A sparkle of God’s wisdom may be in each of us; but justice is ontological: it defines us as human being and not as simple animals driven by instincts. For Protagoras, or for saint Paul, justice is divine in its origin; but to achieve justice every human has to wisely reveal the natural law in our society. In the XIIIth century, saint Thomas Aquinas would say that the natural law is to be obtained through reasoning. If the heart is the place of justice, the intellect (*intelligere*) is the tool to express natural law. To do so, the reason needs to collect sensitive pieces of information and elaborate them according to what our heart tells us about justice. The aforementioned reason gives reality to natural law: *“lex naturalis est aliquid per rationem constitutum”*¹².

The classical natural law is the fruit of dialectics

The etymology of dialectics, *dia-lektos*, teaches us that it signifies the exchange of words between different interlocutors. In this sense, dialectics is practiced every day by those gathering together, who receive advice relating to a given situation. Dialectic does not solely aim to persuade; but also tries to look for the natural law. This being so, any persuasion that aims to produce certain dispositions in the listener (by method of leveraging his personal feelings) is quite opposed to dialectics. The art of persuasion becomes the art of the strongest. Nature succumbs to the tyranny of fallacious words, to the power of seductive verbs with no regard to justice. Just like Callicles, rhetoricians justify their oratory struggle in the name of (biological) nature:

¹⁰ *‘But this is the covenant which I will make with the house of Israel after those days, says the Lord. I will place my law within them, and write it upon their hearts’* Jeremiah 31:33, *The New American Bible* (2002).

¹¹ Saint Paul, *Romans* 2:14-15, *The New American Bible* (2002).

¹² Saint Thomas Aquinas, *Summa Theologiae*, Ia-IIae, q. 94.1.

the battle of the strongest¹³. Evaluating justice in a relationship is no longer the goal; conversely, the imposition of a conception of things that serves only one's interests, becomes the focal point. In this sense rhetoric is opposed to dialectic. Instead, dialectic is a guiding thread, a collective effort to regulate social life. Regardless of the result of these multiple deliberations, dialectic appears to us as a natural law in organizing social life. Dialectic is a search aiming to overcome any divergences of opinion, in order to reach a common truth about justice, which proceeds from an exchange of points of view between several people, allowing the rejection of unilateral positions. Dialectics is a work that has humble ambitions, it is not a logic on abstract reasoning. Embodied by human disputes, the fruit of dialectic is a common understating of the natural law of contingencies. One's spirit cannot pretend to incorporate reality into the web of a totalizing logic. Dialectic focuses on particular knowledge of natural law. In the end, a judge concludes the dialectic. The judge proclaims what seems to be the right result, once the elements have been debated; this is the *iurisdiction* of Roman law¹⁴. Legal conclusions, notwithstanding the authority submitting them, are ultimately questionable. Having been born in dialectic, these conclusions remain as such. Nonetheless, their very existence gives the natural law, a fragmented expression of justice. In Roman law, justice is not obtained from written rules (*ius non ex a regula sumatur*), it is a natural law that is manufactured by the existing legal case (*sed ex a iure quod est regula fiat*); furthermore the generality of positive law is deceptive, or even dangerous (*omnis definitio in iure periculosa est*)¹⁵. Dialectic is not a relative notion that could be reduced to a roll of dice, akin to judge Bridoye in Rabelais's novel *Gargantua and Pantagruel*¹⁶. Rather, natural law exists in itself and the judge sheds light on this.

Classical natural law is different from morality

In other words, there is a significant difference between doing the right thing and being a rightful person. Unlike morality, or the precepts of divine law, natural law is not given at all: it must be established through dialectic. Morality retains a reduced role, broadly limited to the discovery of natural law, for example by prohibiting murder from being accepted in principle. Still, such a moral prescription does not solve the problem to know who is guilty of murder. Besides, the modern paradigm of natural law is centred on the concept of "power of the individual". This can be seen in the common expression: "I have the right (i.e., power) to do such and such". The assertion of a right is not just a right of forbearance, but the advancement of a personal

¹³ In Plato's dialogue *Gorgias* the sophist Callicles states that it is a natural law for the strong to dominate the weak (482:484).

¹⁴ On *Iurisdiction*, see Mario Talamanca, *Istituzione di diritto romano* (Giuffrè 1990) 303–20.

¹⁵ Masurius Sabinus, in *The Digest of Justinian* (530–533), 50.17. 1.

¹⁶ François Rabelais, *The Life of Gargantua and of Pantagruel* (1564), third book, v. 44.

right of claim, to have something realised, something given. The current legal concept of dignity, for instance, has much to do with morality. As a moral claim, human dignity became independent of one's merits, unlike the general use of *dignitas* in Roman law, which generally identified a conveyed status. Dignity has come to be used to affirm an abstract egalitarian notion of an innate status of humans. In summary, modern dignity stands in stark contrast with the classical understanding of dignity, which tends to recognize the differences among human beings, including their differences of conveyed or accrued status. Dignity in this classical sense is to be found in every Western European legal corpus prior to the Enlightenment. As a consequence, the notion of classical natural law, which lies at the root of European jurisprudence, has been substantially altered. The cardinal principle of classical natural law is: "*ius suum cuique tribuendi*"¹⁷, which ultimately means that everyone is to receive that amount of goods which he merits within a community. It is merit, not an abstract right, that is recognized. No concept of abstract equality is to be found in classical natural law. On the contrary, natural law recognizes a hierarchy of citizens based on their merits and directed toward the common good. As a result, different members of the community (or the state, to use modern political terms) can be entitled to receive different proportions (from another member) of the common good according to their merit (or excellency¹⁸) in the community. The content of natural law in any community is a quest. There is no pre-conceived, proper, end-state legal distribution of rights. As a process that attends to the common good available and the merits of people understood in a broad fashion as encompassing the resources they possess, classical natural cannot *a priori* determine what specific rights or goods particular specific people should have. For example, classical natural law does not tell us in what way common health goods should be shared.

As a methodology, classical natural law acknowledges the contingency of social norms with regard to the distribution of common goods

As a consequence, for example, it can be deemed "fair" in one country to give "free" state-supported health care to everybody. On the contrary, in another country, it can be "fair" to give no one "free" state-supported health care. The same can be said about the same country in different periods of its history. Classical natural law offers no universal¹⁹ solution to the question of how to distribute goods and responsibilities. Among the consequences of this state of affairs is that there is no *a priori* answer to the question of justice;

¹⁷ Ulpian, in *The Digest of Justinian* 1.1.10: '*Iustitia est constans et perpetua voluntas ius suum cuique tribuendi* <...>.'

¹⁸ The "excellency" refers here to the Aristotle's concept of *áristos* (ἄριστός), it is the ability to flourish one's talent. It differs from the modern political concept of aristocracy.

¹⁹ About the concept of universality and its current limitations in politics, see Chantal Delsol, *Le crépuscule de l'universel* (Cerf 2020).

classical natural law is a methodology to find justice in a place at a certain time. Ultimately, it involves a tragedy²⁰, because the distribution of common goods always involves a decision that is hard, provisional, and less than ideal.

Classical natural law is an act of solidarity

Human justice protects the weak: the one with less freedom, the one with social dependence, the one being discriminated, etc. The surge of various legal protections is not only a simple historical evolution. A historical graduation of human rights into various generations is somewhat misleading. More than differences in the generation of human rights, we have here to consider the gradual expressions of the same identity of justice. Justice is a perennial defence of the weak; but it adapts, through classical natural law, its field of expression following the historical times of humanity. Moreover, the idea of progress in the implementation of justice is abusive. It is indeed difficult in the social contingency to distinguish what constitutes an irreversible progress. Adapting to reality is necessary: a dialogue is always established to amend the contours of justice. For this purpose, classical natural law is the methodology for justice to achieve its new forms, to distinguish new data from the social distribution of goods and responsibilities. The protection of the worker, of the minor or of the foreigner is of indisputable moral value, though its implementation follows the oscillations of time. However, as a moral horizon, seeking justice involves a perennial effort to recognize other humans as human. Forgetting to recognize the vulnerability of the life of other humans, forgetting to consider their need for protection, to behave as if other humans did not exist are acts that deny justice! The moral horizon of justice obliges us not to see other humans as things, as burdens that we can remove. Looking at, and talking to, other humans means taking seriously our human nature. Scorning other humans and remaining silent when faced with human misery is an offence to justice, since it means treating humans as mere disposable objects. As a methodology for justice, classical natural law ought to always be an act of solidarity. Solidarity can certainly be done privately, for it is indeed important that each of us become morally aware of the good to be done to others. Solidarity, however, is part of a broad movement that unites and includes all human beings, speaks to them directly and refuses any reification of human life. On the one hand, Classical natural justice is the endeavor to put, here and now, justice for all humans living together according to one's merit. On the other hand, justice is threatened when we forget the social bond which spontaneously prompts us to help the weak, those in need.

In conclusion, classical natural law is not an attribute of the subject; it does not flow solely from the will, convention or morality. To grasp classical

²⁰ In particular, one should read Garrett Hardin's famous article 'The tragedy of the commons' [1968] 162 (3859) Science 1243–8.

natural law, one must get out of these fomented abstractions of the theory of subjective law, focused on the power of the individual. Ockham's, and later Hobbes's, nominalist philosophy presides over the birth of subjective law and its corollary, the exaltation of power. Classical natural law is a dialectical evaluation that recognizes the merits of each. This evaluation ends in a division of goods, an operation inscribed in social relations that excludes any other unilateral vision of justice. In this perspective, it is not the human, but social life that reveals justice. As a dialectic, classical natural law (*dikaion*) is a methodology to give what is due according to merits. Nonetheless it ought to seriously take into account the protection of the weak, which is the cause, and moral horizon, of justice (*dikè*).

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Стефан Баузон

КЛАСИЧНЕ ПРИРОДНЕ ПРАВО, МЕТОДОЛОГІЯ СПРАВЕДЛИВОСТІ

АНОТАЦІЯ. Справедливість – це назва людської характеристики, яку кожен відчуває стихійно: що є справедливим чи несправедливим у соціальних відносинах. Тварини не мають справедливості. Людський розум (*logos – λόγος*) діє для того, щоб виявити, що включає в себе справедливість. Таким чином, як участь у справедливості людська совість (розум) знаходить право. Далеко від новітніх (і сучасних) теорій природного права, що встановлюють правила, які застосовуються безпосередньо до соціальної реальності, або є індивідуальними повноваженнями, що протиставляються позитивному праву, класична теорія права – це соціальне прагнення, спрямоване на вчинення правильних дій. Слідом за Аристотелем, класичне природне право – це методологія (заснована на діалектиці) для пошуку справедливості в суспільстві. Етимологія діалектики, *dia-lectos*, вчить нас, що вона означає обмін словами між різними співрозмовниками. У цьому сенсі діалектику щодня практикують ті, хто збирається разом, хто отримує поради щодо певної ситуації. Діалектика націлена не лише на те, щоб переконати, а й на те, щоб відшукати природне право. Юридичні рішення, незважаючи на владу, яка їх затверджує, у кінцевому підсумку сумнівні. Народившись у діалектиці, ці рішення залишаються такими. Проте саме їхнє існування є джерелом природного права, фрагментованого виразу справедливості. На відміну від моралі або заповідей божественного закону, природне право не дається взагалі: воно повинно встановлюватися за допомогою діалектики. Мораль зберігає зменшену роль, загалом обмежується відкриттям сутності природного права, наприклад, заборонаю в принципі сприймати вбивство. Проте такий моральний припис не вирішує проблему, щоб дізнатися, хто винен у вбивстві. Як методологія класичне природне право визнає випадковість соціальних норм щодо розподілу загальних благ. Класичне природне право не може апіорі визначати, якими конкретними правами чи благами повинні володіти конкретні люди, оскільки це процес, який стосується загального блага та заслуг людей, які широко розуміються як такі, що охоплюють ресурси, якими вони володіють. Необхідна адаптація до дійсності: завжди встановлюється діалог, щоб змінити контури справедливості. З цією метою класичне природне право є методологією для досягнення справедливості нових форм, для розпізнавання нових даних від соціального розподілу благ та обов'язків. Захист працівника, неповнолітнього чи іноземця має безперечну моральну цінність, хоча його реалізація залежить від коливань часу. Однак як моральний горизонт пошук справедливості передбачає багаторічні зусилля, щоб визнати інших людей людьми.

Ключові слова: справедливість; Аристотель; природне право; класична теорія природного права; методологія; діалектика.