

Preface

Justice

When we think about natural law, we will think about Justice. “Natural law is the pedagogy of justice...a treasure of Western political and judicial thought.” This straightforward claim captures what the author Paulo Ferreira da Cunha illuminates in this book. The centrality of justice to natural law is unquestionable and its implications are multiple. On the critical side they help dispel historical mistakes about natural law while exposing false paradigms, conceptual collisions, and prejudiced accounts. On the positive side the implications of justice broaden the definition of natural law. They help to reveal its chronology, rationalize its “friends”, and expose natural law’s pluralism. Justice shows its place not only in history but hint at the way forward for the morality of natural law as a higher-law guides for problems that face our world today.

Ferreira’s critiques do not all face his adversaries. Natural law has always criticized itself. Its ongoing dialogues and resulting pluralism are virtues. Ferreira’s work is an attempt to make us familiar again with the best in natural law while frankly confronting its problems. It does just that.

The author of this impressive study takes us through the relevant processes in moral philosophy connecting ideas and sequences that shed light on the varied natural law dialogues themselves. He does this analysis with insight and acuity. And when one reflects on the meanings lodged within the 2000-year-old history of this famous moral idea, *iusnaturalism*, depths appear that do not always show on the surface. For example, the longer range consequences of *iusnaturalism* are set forth. Natural law reveals a courageous longevity in face of querulous criticisms. Causal influences between natural law and natural rights appear plausible. Maneuvered concessions to legal positivism appear throughout the history of natural law, and axiological problems rise up in identifying natural law with nature. These sometimes paradoxical areas of thought speak to the breadth and universalism of natural law morality. When its history is added to its breadth, we have a subject matter that periodically needs the kind of scholarly review this book undertakes.

Added to the aforementioned consequences and implications of natural law that have the power to move people to action or to change their thoughts, natural law

does what it has always done since Sophocles' *Antigone* captured the essence of its early philosophy. It stands, Ferreira da Cunha reminds us, as an unavoidable "bridge between law and morality." "...Antigone and Natural Law are far from being absolute winners in practice, but they have an undeniable moral victory," he writes. This is the posture that, in my judgment, adorns natural law with its most prestigious and abiding virtue.

But there is something more vigorous. This is its capacity to deliver blows to untrammelled power. Ferreira da Cunha calls natural law a "juridical vigilante of power". Pondering on this unique and stupendous task, it is inconceivable that, however, in recess natural law now quietly waits, the idea of winning the war over immoral coercive force can never take a rest from civilization's infinite needs.

As a "juridical vigilante," natural law positions itself as the Rule of Law, the crown supreme over all legal thought. No administrative decree, legislative rule, judicial pronouncement—indeed not even consuetude on the stage of human history—supersedes the strength and dignity of this higher law. Occasionally its otherwise unbroken chronology goes out of commission and imperialism reigns. But justice comes back again because the higher law lodges deep in the human psyche.

The Project

"Natural Law was the main philosophical legal paradigm for centuries." The author's project is simple and straightforward. 1. As critic, he oversees the "myths and realities of Natural Law." 2. He presents current new ideas about Natural Law, such as Vital Law and neo-constitutionalism. 3. Relatedly, he previsions their potential success through his own scholarly grasp of the core epistemologies developed around this giant philosophical preoccupation. Throughout this problematic journey, Ferreira's tone is one of scholarly fairness. But what is one to be fair about? He answers, the challenges are "new ideas, new movements, and new authors that Natural Law theory cannot avoid or ignore."

"A perfect juridical world is not the one where one theory wins and another loses, but the one where one is always demanding from the other to perfect himself." "...our goal is only to have an intermediate reflexion as if we had a quiet rest under the great Oak to calm down from the theoretical wars and to think over, because the war has not ended."

Natural law and its subscribers are not eliminated from Ferreira's critical insights. And opposition enthusiasts in his study are as objectively viewed as natural law subscribers. Theories on both sides are sometimes muddy, sometimes useless. "Decalogue mentalities" reduce natural law to a frozen code. Dogmas leave no room open for debate. Natural law cannot measure itself by old or misbegotten conceptions. Ferreira's liberal pluralism on the subject buries these stones in the dust. Natural law lives, changes, and takes new forms. History has seen its development. Ferreira's *Rethinking Natural Law* helps to assure that this inquiry never stops.

What is Natural Law?

Undaunted by the long life of natural law, its multiple definitions, “different epistemic horizons,” and, sadly, opponents’ unwarranted derogations, political manipulations, false imagery, and pseudo-principles that beg the question—Ferreira da Cunha pauses to give a fair shake to definitions of natural law that by and large have stood the test of time.

“What do we really mean by ‘nature’? Are we talking about an ideal model of nature (or nature as an ideal)? Is nature a divine emanation? And, if so, is it a complete *chef d’oeuvre* or a perfectible work, which is possible to be improved precisely by men’s hand, invention, art and labour? Or, on another register, can we identify nature and reason? And Reason has often been divinised—so, we would have nature as goddess Reason garnished with ethics, values and/or virtues and, hence, a matter of axiology.”

Ferreira’s treatment of the three topics that follow have especially captured my curiosity and so

I feature them here.

Natural Law as Ontology

First, we can go two directions with this puzzling claim that Ferreira da Cunha sets forth. Two interpretations suggest themselves to me. We can construe natural law as residing in the cosmos itself, in nature. This makes the normative order ontological. Or the other way around: We can contend that the cosmos, indeed all that exists, all corporeal and non-corporeal being, is inherently normative. Either approach, standing alone, should preoccupy contemporary scholars until the end of time! The “naturalistic fallacy” stands in the way here, relating facts to norms without justifying the transition. Of course the direction reasoning goes regarding this ontological claim should first reflect an understanding of what exactly a normative reality consists of.

What really can be understood and meaningfully argued for by holding nature as moral? Ferreira’s view that natural law is a pedagogy may be a helpful perspective here, serving to eliminate natural facts that are irrelevant, or if relevant cannot be well defended. Ferreira’s own ontological claim emphasizes *human* nature. The reasonableness of this restriction sheds light on the early Stoics’ identification of reason with human nature. Since *logos* was thought by Stoics to define all of nature, our human rational capacities became an intimate partner with nature in the familiar, classical definition of *iusnaturalism*.

Originally *iusnaturalism* also grounded its ethicality in divinity, as with Stoics in fourth century BCE (with a nod to Socrates and an earlier nod to their “science model,” Heraclitus). The logic is straightforward. God is the active energy that brings the cosmos into being. As supreme embodiment of Good, it follows that God is also agent of the ethical domain of creation. Hence by casting divinity on nature,

this syllogism congeals moral law as an ontological reality. This makes it a “*natural law*.” On its long journey through our cultural repertoire, the reality of the moral domain has penetrated religious and secular perspectives alike with the intrigue of how to make sense of the axiological as itself an innate occupant in a world of fact.

Legal Positivism

“Everything we have mentioned leads us to admit that Natural Law played a [strategic] role in the limitation of power as a barrier against abuse, arbitrariness, tyranny, despotism.” A second topic well treated in Ferrerira’s book is legal positivism, the strongest, most lasting, and oppositional critic of natural law since—we extrapolate here—the dangerous, anarchic rhetoric of ancient Alcibiades, and his cultic nay-sayers and skeptics. Ferreira da Cunha is as fair-minded with positivism as with natural law adherents. Indeed, he makes a good case for “the necessity of positivism.” The positivist perspective—“Right or wrong, it’s the law”—can silence the destructive hackles of anarchy that take advantage of the non-coercive world of morals. Legal positivism can be a check on runaway democratic power too. “...legalism is an important principle of reality against all the forms of ‘free jurisprudence’ that too often take risks of losing common sense.”

“...we have to underline that the invocation of positive law, namely the law itself, has been in certain cases a decisive barrier against the abuse of power: not only of the absolute power, but also of the democratic power which, from time to time, falls into the trap of power itself becoming now and then so absolute and so despotic as the essentially tyrannical power. ...it seems appropriate and useful for us to honour the tradition of Natural Law, but not forgetting the sometimes cyclonic efforts of legal positivists, who also played an important role from time to time, for example against the rulers who did not respect the law itself.”

A main problem for the positive law, however, is that positivists believe positive law is complete in itself. Ferreira da Cunha writes,

“... positive law has no detachment from its own reality....without the window of Natural Law, positive law would be the same as a subordinate, more or less mechanical activity. Law would be just another way of force, power and politics.” The “supremacy of principles extends its realm throughout the territory of law. It prevails over positive legislation and customs. They are mere voluntary human creations... which are changing mainly under the pressure of political winds and humours.”

Father of Human Rights?

A third topic in this book arouses special interest.

This is the contention, quite contemporary, that natural law is the “philosophical father of natural rights.” Is this conceptual elision so obvious? One differential

between natural law and natural rights stands out. Natural law obligates *me personally* to conduct myself in accord with the higher law of morals. Natural rights, on the other hand, obligate *the other party* to respect my autonomy. Of course the obligations among all parties are reciprocal.

Ferreira da Cunha explores this claim of patrimony with favorable intonation. "...to say that natural rights and human rights are basically the same thing...that is a very deep identification..." The vocabulary of rights has already spawned practical institutions. "...the European Court of Human Rights, International Criminal Court are, for example, realities of judicial defence of rights, and rights that did not have before a sufficient protection, or any protection at all."

It is easy and impelling to believe that with the gradual fading of natural law thinking, an apt replacement, human rights, has appeared. "Natural law lives today within human rights." To symbolize: Parents grow frail, sicken, and die. Yet sometimes their children go on with refreshing novelty and adventure. However, what is obsolete seldom recovers in familiar form. Is natural law a piece of old, defunct machinery? "...historical interest for the museum of ideas," Ferreira da Cunha puts it. The ancestral genes, even if good, are not always strong enough to survive.

The claim that natural law is a genuine ancestor of natural rights gathers good credentials though, attractive and worthy of argument. Leo Strauss argued for it, with careful amendments, in his well-received *Natural Right and History*. He writes,

"Natural Law leaves behind an unforgettable trail made of fights for liberty, for Justice and for fairness. And among all these powerful and meaningful imprints in history, Human Rights are one of the most important legacies, because there can be no doubt about the origin of Human Rights in Natural Law."

Brian Tierney's thesis carries the idea forward in his *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law 1150–1625*.

"(...) I use the terms natural law and human rights interchangeably. The term 'human rights' is often used nowadays to indicate a lack of any necessary commitment to the philosophical and theological systems formerly associated with the older term, 'natural rights'. But the two concepts are essentially the same."

And according to Francisco Puy (*Derechos Humanos, vol III*), "Human Rights are...today the contemporary language of Natural Law..."

Until further analysis examines again the conceptual or causal claim between natural law and natural rights, I would think "catalyst" a safe incentive to study the way moral naturalism holds back while moral rights challenge the sharp curves of legal modernity—and while *human* rights suggest certain conditions are needed for their global reach. It is hard to prove an influence, but nearly always harder to disprove one. I believe the way forward for this innovative theory is through language and culture studies. Through such investigations the above-mentioned provocateurs have for the most part already routed their contention that rights are born in the womb of natural law.

Justice Again

When natural rights are under consideration it is hard not to dwell on justice, the central idea which Ferreira da Cunha is at pains to relate to natural law. “Justice is a constant and perpetual will,” he writes, “and not a haven of peace to be achieved.” The history and meanings of this august idea, justice, are endless, its innuendoes and implications sometimes subtle and difficult, though not uncontested.

Since Aristotle’s treatment of justice in his *Politics* may be viewed as its comprehensive, philosophical source, this may be a resourceful work for critical review on the natural law-natural rights relationship.

As natural law embraces justice, does it also embrace its ally, equality? If so, does justice entail “equal treatment”? That can be assured in a fair court and resolved by a fair judge. Or do we mean “equal civil liberties” or “equal rights”? These ideas are easy to understand. They mean “Do not harm my justified liberties of action.” Free societies clothe individuals in inherent dignity. This inviolate moral property warrants opposition against coercive proclivities of intrusive, ad hoc governmental decrees. (In contrast, laws are not coercive when widely franchised democracies or consensual institutions decide them, and when people knowing them in advance are at liberty to choose what to do.) Or by the equality that clings to justice do we mean something substantially different from these higher-order principles with which persons face the provocations of politics? With these questions, it is most appropriate to conceive of natural law as a pedagogy of justice.

Ferreira da Cunha in this book does not argue for equality, or link it to natural law. But his inclinations about justice as a measure of impartiality lie in the direction of what today has come to be called “social justice.” This popular term embraces equality of a different kind from the meanings of equality just set forth. It embraces what we may call “distributive justice” which entails manipulating the material resources of a productive economy so as, allegedly, to even them out. Here, because state power is involved, we need natural law, what Ferreira da Cunha calls “critical neonaturalism,” more than ever, directing its normative energies to curb the “force, power, and politics” of marauding politicians. The best in positive law thinking can help here too if we keep in mind that morality is the other side of the bridge. Positive law can step in boldly when the social order needs a jolt. When, for example, prejudice bitterly cripples an innocent minority, moral convictions standing alone are simply not enough. “...the spirit of Justice[is]...what counts, and it counts even more today, in times of prolonged and deep crisis, when the world needs a meaning that Justice should help to find.”

The Way Forward

Today natural law studies are seldom found in university philosophy departments where historically they lodged in ethics courses. Some law schools wedge the subject into jurisprudence, but I would not be surprised if they do so not as a practical

theory worth examining in its own right but as an historical antiquity, an old way of teaching ethics. Whether natural law with its traditional or with a new vocabulary stays alive, the abiding meanings of this higher law will lose power to inspire and convince if confined to academia.

More than ever the vitality of natural law is needed in today's world as we see antagonisms, genocide, ethnic cleansing, crimes against humanity threaten peaceable alliances, and fraternal unity. These atrocities should prompt civilized peoples to preempt cruelties in nations acting as if every encounter is a military front. Communities worldwide are doing a fair job in providing the needy with food, water, and medicine. In this respect, natural law conceived as neoconstitutionalism can be seen to parallel aspects of the United Nations Constitution. How simply John Donne put it in his *Meditations*. "No man is an island, entire of itself." When we stretch natural law morality to imply a global attitude, the needs of individuals must be the paradigmatic essential.

If turning natural law from positive duties into natural rights is the contemporary way to think about natural law, then taking inspiration from Kofi Annan's "responsibility to protect" sets a precedent. Not the collectivist but the cosmopolitan perspective symbolizes the ethical core of this common humanity served by an equal justice. Ferreira da Cunha puts it, "the globalisation of Human Rights is a great triumph of Antigone." The great triumph is natural law's neoconstitutionalism as higher law, a powerful norm of conduct helping to rectify both intolerable deprivations and the needless fatalities of physical aggression. In the midst of our current global crises, Ferreira's writings lead toward a resurgence of believing the ethical approach, *iusnaturalism*, is foremost.

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