

FREEDOM OF CONSCIENCE AND RELIGION AS FUNDAMENTAL HUMAN RIGHTS. A COMMENTARY

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I wish to put a question mark in front of two fundamental concepts that stand today in the centre of the public debate: what is 'freedom of conscience' and what are 'fundamental human rights'?

It seems to me that a preliminary clarification on these two issues may help us to better understand what values are at stakes in the current discussion on human rights.

What is freedom of conscience and what is conscience? Socrates explains to us that there is an inner voice in man that forbids him to do what is wrong. This voice contrasts with the inclination given to the will by the passions and instrumental leanings of the individual. In the classical vision of conscience, conscience contrasts with the lower potencies of man and leads to the discovery of the will that must stay in accord with the intellect. Conscience forbids Socrates to comply with the laws of Athens when this compliance would have saved his life and would have avoided the death sentence of the Areopagus. Against the will to life and all inclinations of the senses, conscience indicates the most difficult path of action: the sacrifice of one's life in order to obey to truth, in order not to betray truth. Conscience defies all social powers and the threats they bring to bear against the individual in order to compel him through the menaces of the use of force or through the corruption of promises of sensual satisfaction.

We find again the same pattern when Socrates refuses to save his life through an escape from his jail that his friends had already prepared. Conscience forbids him to disobey the laws of Athens.

The commandment of the law must be complied with even when it demands the sacrifice of life. The only justification not to do what the laws demand is not to betray the truth the intellect has recognized. If conscience authorizes us to disobey the laws of the country this is possible only

because of a law that stands higher and above the law of the state. Conscience is free from the duty to obey the laws of the state because she complies with a higher law, the law of nature.

If we move our attention from Greek philosophy to Greek tragedy and from Socrates to Euripides we are confronted once again with the same patterns. Antigone wants to comply with a law that stands over the law of the state, the law of nature.

To make a long story short: the obedience to truth makes men free from the commands of all earthly powers. Truth will make you free. Truth, and nothing else. If we understand the structure of thought that I have tried to delineate, then it becomes apparent that there has been a significant shift in the use of the word conscience and of the word freedom in the contemporary philosophical and political debate.

In order better to understand this point we may ask the question: what is left of conscience when we renounce the idea of truth? Can we be free if we do not obey truth?

Conscience that does not have any living relation to truth loses its justification and its meaning. It is no more the right to obey truth but rather the right to obey one's arbitrary inclinations. Socrates said: I disobey the laws of the state because they are unjust, they pretend of me that I do what is morally wrong.

The Anti/Socrates of our times would say: Conscience gives me the right to do whatever I wish, to follow my passions and nobody has a right to demand of me any justification of my decisions. This corresponds to the historical and sociological process that Max Horkheimer labelled 'Befreiung des Genusses', liberation of pleasure.

In this case and according to this mood conscience protects me from all outside interventions to allow me not to obey to truth but to surrender to the pressure of instincts and passions.

Let us make one thing clear: conscience is an inviolable defence of the integrity of the person. When somebody opposes to an intromission coming from outside the conviction of his conscience nobody can enter into his conscience and judge whether this conscience is correct or not and not even whether he is saying the truth or just making an instrumental use of the word conscience in order to defend his wish to remain dependent upon his passions.

We must deny any public authority the right to enter into the sacred place of conscience. We cannot however at the level of cultural analysis avoid the necessity of becoming aware of the shift that has occurred in the concept of conscience.

Let us now take one step forward. What is the meaning of freedom of conscience, once we have registered the ambiguity that has entered now into the concept of conscience?

In the classical perspective the enemy of conscience are the passions and the instincts of the individual. In the archetypical case of Socrates conscience speaks against the instinct of self-preservation and survival. The knowledge of truth obliges the person to comply with what has been recognized as true. Conscience is the place in which this act of recognition takes place and is also the agent that exercises a coercion on the passions of the soul. The passions have a natural propensity to follow their own inclination against truth and against conscience. This inclination may be reinforced by human individuals or socially empowered agencies that can impose their will on the person by threatening her with a punishment in case she does not comply with their demands.

There is therefore an alliance between social authorities willing to enslave the person and the instinctual structure of individual. This becomes apparent, once again, in the case of Socrates. The Athenians threaten Socrates with the death punishment and they imagine that he will bow to the awe and fear of death. The power of conscience counteracts and balances compulsion and fear. Obedience to truth is here opposed to obedience to the power of the state *and* to the instinctual passions. The pressure coming from the outside, from the social powers, and the pressure coming from inside, from the instinctual structure, are here allied among themselves.

In this perspective freedom is based on knowledge of truth and obedience to truth. Aristotle explains that a man who does not stand in command of his passions cannot be free and is a slave by nature.

The power of despotism enslaves man entering into an unholy alliance with the inferior passions of the soul.

G. Mazzini summarizes this anthropological vision saying that there is only one right, the right to comply with one's duties. At the beginning of the Protestant Tradition Martin Luther makes a sharp distinction between the Christian freedom of the spirit and the freedom of the body. The first is based on the recognition of truth. The second on the denial of truth.

The classical structure of the concept of freedom of conscience runs today the danger of being turned upside down. We seem to have entered into a particular paradox of freedom. The human subject does not recognize any truth and therefore the only normative truth is that there is no truth. As a consequence, no limit can be imposed upon the control of passions over the individual. Without truth, spiritual freedom becomes impossible and instinctual

freedom is all that is left. This freedom includes the possibility of making use of other human beings if only one succeeds in obtaining their consent. Now a conscience void of any content seems to have entered into an unholy alliance with passions and the only function she exercises is that of removing any limits set to the arbitrary will of the individual.

What shall we say in front of this evolution in the concept of freedom? Can freedom exist without the authority of truth?

In order to answer these questions we must make one important distinction between private and public sphere.

I suggest we should adopt the following principles: many evils must be tolerated in order not to forbid greater goods. If an individual says that he in his conscience does not see any reason not to satisfy his passions we cannot impose on him a truth he does not recognize. If on the one hand (ontologically) conscience is based on truth, on the other hand truth is also (functionally) dependent upon conscience, because the authority of truth in the individual and concrete case is dependent upon the recognition given to it by conscience. This does not imply, however, that we should not recognize in the public sphere the truth this individual does not want to accept in his private life. And individuals who pretend that their conscience does not accept this or that value have no right to pretend that these values be banned from the public square because they are (or pretend to be) offended by their recognition. Let us imagine that some of us do not recognize the value of the family: They cannot be constrained to act according to this value. But they cannot pretend that the state does not support the family and recognize its value affirming that in this case they would be discriminated. The family is a public value, other forms of sexual relations pertain to the private sphere. We mean that the state or the other political communities have a right and a duty to protect values, and social interests closely related to values, that manifest themselves in the conscience of the people, even if some people resist these values. If within a religious community one member is an atheist he does not have the right to pretend that the public space remain void of any religious signification. He has the right not to participate but not the right to forbid others to act in the public sphere according to their convictions. If we disavow this principle the result will be the 'naked public sphere' described by R.J. Neuhaus.

How shall we determine which values should be allowed in the public sphere? I suggest the following response: through a public discussion oriented by the natural law. We cannot avoid the criterion of consent. This is linked to an elemental perception of human dignity: why should I act

according to the judgement of another human being and why should his perception of values enjoy a privilege over mine? I have the right not to accept a position I am not convinced of. In the last instance, in the process of formation of the common will of a political community, we have to vote. Of course we know that the majority is not always right. Sometimes the majority opinion is wrong. After all we know that the majority was against Socrates and voted him to death. The justification of the democratic principle does not lie in the superstitious idea that the majority is always right but in the principle of human dignity. According to this principle I must be able to feel the action of the community to which I belong as my action, and this implies that I participate with equal rights in the decision-making process. The right to participate is however balanced by the duty to offer a reasonable argument and of listening to the reasonable arguments produced by others. The vote should take place between alternative formulations of the common good and not between conflicting interests with the majority ready to completely sacrifice the legitimate interest of the minority. We have said that the public discussion should be oriented by the natural law. What does it mean? Natural law is not a fixed set of precepts but rather a form of reasoning based on self-evident principles and historical experience. I have written in this article that the family belongs to the public interest and should have an official recognition while other lifestyles should remain in the sphere of privacy. Why? In the family children are born and educated. Without children a nation disappears from history. The new generation will take care of the old and the alliance of the generations pertains to the essence of mankind. The family is the appropriate environment in which children are born and raised. Children can be born also out of wedlock but they need the care and the protection of their parents and the family is the social institution where this is guaranteed in the best possible way. The demand that the family receive public recognition is grounded in the social function of the family. Those who do not perform the social function of the family cannot have the same rights as the family. Nobody should be compelled to get married and to raise a family but those who do not shoulder this burden cannot pretend to enjoy the corresponding rights. The state has an interest in the existence and in the strength of the family and has therefore a duty to encourage and protect it.

We have here translated in a more modern language one of the oldest principle of natural law that was formulated already by the Romans: '*jus naturale est quod natura omnia animalia docuit, sicut maris et phoeminae coniunctio, prolis procreatio etc.*' (natural law is what nature has taught all

living beings, like the union of the male and the female, the generation of children etc.). The way in which humans generate and educate children is of course different from that of animals. In the animal world the preservation of the species does not encompass a preoccupation with the destiny of each individual and most of the offspring die before reaching adulthood. In the case of man each individual is in her/himself precious and we try to protect in so far as possible each human being that is born. The natural law is not valid in the same way for men and for beasts. Men have to adapt the general principles that regard also animals to the specific personalistic nature of man. This comes better to the fore in another quotation from St. Thomas Aquinas 'Lex est quaedam hominis ad hominem proportio quae servata societatem servat, corrupta corrumpit' (law is a certain proper relation of men to one another, if it is preserved the society will flourish, if it is disregarded the society will perish). Natural law is intrinsic to human nature and to the nature of the human society.

Human rights are connected with human nature. Every human being has the right to attain the ends that are proper to his human nature. This foundation of natural law is completely secular, not ecclesiastical. It belongs to the most precious heritage of the Enlightenment and can be found in authors like Locke or Leibniz, Barbeyrac or Voltaire. We can read this language of natural rights in the American declaration of independence and in the American constitution.

What happens to human rights when they are disconnected from the idea of natural law? It seems that all rights disappear but one. We will call this right the right to non discrimination. Any human demand is equally legitimate as any other. Each man determines her/his own nature and has the right to do so with an equal recognition of the state. The right to non discrimination absorbs all other rights. This right to non discrimination seems to flow from the principle of equality of all human beings. On second thoughts it becomes apparent that it is not so. Aristotle has formulated the principle of equality in the following way: the just man will treat the same situations in the same way and different situations in different ways. It is unjust to treat the same situations in different ways but it is equally unjust to treat different situations in the same way. Is it a discrimination against homosexuals to say that they do not have the right to marry among themselves? It seems that, since they cannot have children, their lifestyle does not perform the social function of marriage and therefore cannot be recognized as marriage. Not all demands constitute rights. To discriminate etymologically means simply to make distinctions. There are distinctions

that are justified and distinctions that are unjustified. Not all distinctions are unjustified and cannot therefore be labelled as (unjust) discrimination.

Much of the public debate in our countries today moves around the non discrimination principle and the need to qualify it. It is therefore necessary to go back to a form of public discourse that allows us to make the proper distinctions and this leads us back to the natural law tradition.

Not all wishes and demands of the individual constitute human rights. Some of them are based on human nature and can be defended on the basis of natural law and some others do not. We must be able to make the proper distinctions. In the private sphere these distinctions are made by the individual and the state should not interfere, even if the judgment of the individual should be wrong. *Conscientia erronea obligat* (even if wrong conscience maintains the right to command). In the public sphere the distinctions are the result of a public discussion based on natural law.

The sphere of privacy must be left to the individual. If he opposes the rights of his conscience not to be interfered with, nobody can overcome this barrier, although he may make use of the rights of his conscience to subtract his action to the examination of his conscience or to choose a course of action contrary to his conscience.

What cannot be accepted is that it should be forbidden in the public sphere to act according to reason and natural law because of an alleged human right not to be discriminated that might be offended by the public recognition of a value the individual does not accept as rule of his action.

Values that cannot be *imposed* on the individual can and should be *recognized* and *enhanced* by the public authority.

All that we have said in this contribution can be seen as a commentary to a principle of the teaching of Benedict XVI: not all wishes can be labelled as rights.