A. The significance of the concepts for democracy

The crisis of the age in which we live is so serious and decisive for the whole of mankind that if we do not make up our minds to deal with it in a radical manner, we shall face a worse disaster than that of the Second World War - and a much more extensive one.

One of the more basic defects of man - though not the only one - which allow problems to develop for the worse is a lack of understanding of concepts, a matter which to most people seems insubstantial and unimportant in the extreme, and so irrelevant to their problems that they believe that it will deceptively distract them from the much-desired solutions - or, rather, solution: material prosperity!

However, the truth is dramatically different. Man has always invoked concepts - at least symbolic ones - which were related to his well-being, such as God, country, prosperity, freedom, welfare, security, development, democracy, justice, and many others. Nevertheless, his response to these is extremely unclear, affective, and without any attempt to investigate the relation between them and reality. People do not examine, for instance, if the results brought about by an off-hand interpretation of them is in accordance with what they usually tend to believe, or what might be erroneous in their interpretation, and many other problems.

Arbitrary governance is always based on desires and instincts, as to which, of course, no serious interpretation of concepts is required, and thus the management of public affairs becomes relatively simpler: its aim is control for selfish purposes. The only factor which can interpret or be interpreted is the desire of the ruler and the ruled and the calculations of the competing forces.

On the other hand, in democracy, the definition of the content of ideas is necessary, and, when this is judged essential, the re-definition of their meaning, because democratic governance - in theory at least - has the common good, or at least the common interest, as its aim, as it balances conflicts of interest and rights and brings about adjustments to new conditions of consciousness of a dynamically evolving world.

And here, of course, a degree of checking on those ideas which tend to abolish democracy is needed, but apart from this, a collective undertaking of responsibility towards ideas and concepts is also required if we wish democracy to mean an increased participation of
society in governance.

Without the voluntary undertaking of responsibility and participation, there is no serious democracy.

B. The concepts of Positive and Natural Law

A similar problem, albeit at a higher level of conceptual clarification, has presented itself in Law with the problématique: what kind of law should constitute a criterion of legal thought and legislation: Positive Law (ius positivum), which is regarded as being law simply because it has been enacted (either on the basis of a previously determined procedure, or arbitrarily), or Natural Law (ius naturale), which has an affinity with the concept of Justice and in accordance with more internal values, involved in human nature?

Needless to say, of course, that in both cases there are infinite possibilities for distortion, whose existence is confirmed by history, and inevitably we are not going to escape their side-effects when we choose and interpret according to the current situation and to our desires, nor shall we escape the pressing need to take the trouble of research and of conceptual understanding, or to pay the price of real implementation. As Prof. Dimitris Tsatsos says: "The danger of arbitrariness exists always and everywhere when man acts with power in his hands". [i]

Positive Law has the advantage that it is much more easily definable and approachable, and this makes for fewer and smaller obscurities in its administration. Moreover, those of its concepts which present the greatest difficulty in interpretation are those which are proper to Natural Law, as being more abstract. Positive Law can be imposed either because society willingly accepts it, or because the power of authority is strong enough to impose it, even against the wishes of society.

Such was the case with dictatorships, absolutist and totalitarian regimes of every form, with any regime of injustice and brute power. A powerful figure may, for example, legislate while absolving himself of the responsibilities by the 'law' which he himself imposes (positive law); he may violate by his own law the principles of equality and freedom; he may even violate the
constitution, which is a country's supreme law.

This may even come about in a procedurally 'lawful' way. Such a violation of the law as to its substance, if not as to its form, may be based, for example, on the corruption of state functionaries who succumb for a consideration to the demands of the powerful figure, whether these belong to the legislative body, or to the administration, or somewhere else. In this case, what we have is a law which is formally lawful constitutional, but substantively unjust.

Corruption can act in this way because it is, in essence, violence, a violation of democracy, of social cohesion, and of the purpose of the law. It thus gives rise to a gap in the cohesion and the causal connection which should exist between the rulers and the ruled on the basis of the popular mandate, that is, in reality it abrogates the popular mandate.

By the inexorable and unbending logic of Positive Law we shall be led to absurdities. For example, a constitution, insofar as it has been voted by parliament, should be regarded as lawful even if it establishes the slavery of people because of debt (something which Solon abolished some 2,500 years ago). What was imposed by the powerful figure would be regarded as just.

On the other hand, Natural Law is related to the concept of Justice and constitutes a source of the concept of the dignity of man. It is, however, difficult to define and agree upon its content in each specific instance. Furthermore, those in power at the time can, by employing abstract terms, such as 'freedom', 'equality', and many others, represent themselves as infallible and superior to the sovereign people in the manner of a priesthood (regardless of their actual field), given that already in the past it was held that the values of Natural Law stemmed from the Divine, and that the religious priesthood represented these values in an infallible way. The side-effects of this view are known to us from history, and again, of course, we have totalitarianism and brute power.

The problem is, therefore, that, to avoid these side-effects, the following must take place in the social process:

1. The various concepts and values of Natural Law must be as far as possible understood;
2. It must be possible for them to be incorporated into law.

3. A sufficient response of society to these and their timely protection must be possible.

If these things cannot be achieved, then the law will always be at the mercy of a change in power. And, naturally, for there to be this maturity and preparedness on the part of society, a fundamental change in society's criteria of value and true sociability are required - as we shall see below.

C. The relation between Positive and Natural Law

In essence, Positive Law has functioned with a relative adequacy for democracy just because it has had as its source of inspiration abstract concepts of Natural Law, given that all the social struggles for democracy have been based first of all on such concepts, which, having been accepted to a significant degree by societies, have been institutionalised by law.

Naturally, at this point the following logical reflection is unavoidable:

Given that any principle in order to become law presupposes social struggles which impose it as law, the reference to Natural Law as being more ethical is superfluous. In other words, in any event, power, wherever it comes from, is what creates and imposes law - therefore we shall always be talking about Positive Law.

This is true. However, it overlooks a serious factor in social developments: consciousness. Consciousness is the source of every such process, social, individual, collective. And social struggles themselves are determined by consciousness.

Social struggles themselves are governed and inspired by basic notions of Natural Law, such as, for example, by the idea that all men are born equal and with certain fundamental and inalienable rights which we encounter in the declaration of the American and the French
THE ROLE OF THE LAW AND THE RELATION BETWEEN POSITIVE AND NATURAL LAW

Revolution, and which clearly belongs to the sphere of Natural Law.

Consequently, the correct understanding of the principles of natural law leads to the efforts of society to establish them as rules of law.

But when consciousness cares only for results, then society is entirely unprepared for a reversal in reading of and prone to distortion of concepts, which can also take on legal form. Thus it is limited to an ex post facto reflex action of the instincts, precisely as when someone rises up when he is deprived of the means of survival and not before, when this deprivation was in preparation. Thus the reaction is imperfect, it operates only within the obvious and tangible, that is, in the field of need and competition, because it is itself competitive and, therefore, stillborn, so that it is unable to support the enduring force and implementation of the principles which it invokes in the hour of need, since it is indifferent to these, as long as it does not touch the individual in a tangible way. Then, again, man remembers Natural Law, but after the event. "In the end, that is to say, possible invocation, inter alia, of Natural Law coincides with those moments when Positive Law loses its connection with history. In these cases, Natural Law can function as law."

Truly social consciousness possesses fullness of understanding relevant to its age of the concept as necessary constituents of sociability and is the only fit to support the enduring force of the principles and not to permit their overthrow. Why is this? Because ideas have a universal force, that is, they apply to everyone, and when a person understands this reality and ceases to interpret them individualistically, he is then in a position to respect what they enjoin for the common good, even if this is not in his interests. We could here recall an incident preserved by Plutarch.

After the victorious battle of Plataeae, Themistocles presented himself before the assembly of the Athenians and told them that he had a thought which would be very beneficial for the city, but that it had to remain secret. The Athenians then told him to reveal it only to Aristides (whom they trusted) so that they could examine it together. What was Themistocles' idea? Since it now seemed that the danger from the Persians had passed, they should burn the ships of the other Greek cities so that Athens would remain an all-powerful naval power. Aristides reported to the Athenians that he had never heard an idea more beneficial to the city – or more unjust. The Athenians then ordered Themistocles to abstain from the implementation of his idea.

Unfortunately, it is only rarely and in individual instances that men are truly social. Most of the time, they are characterised by an anti-social attitude concealed by an outer sociability. As
Ioannis Zisis says, there is "a social organisation of anti-sociability" in a society which is fundamentally alienating and competitive.

D. What is the practical benefit of these thoughts?

Up to the point where Positive Law contains principles of Natural Law, there seems to be no problem. The problem begins to appear when Positive Law (that is, lex lata) is cut off from the abstract moral principles of natural law through the gradually increasing estrangement of the structure and direction of the ruling power from the popular mandate, or, worse, from the common good.

We must accept that usually a subversion of principles does not occur out of the blue. Anti-social power does not increase instantaneously, but by degrees. No overthrow of social balances occurs suddenly without prior preparation. Men are usually enticed by values which are interpreted individualistically (such as freedom) and by the 'substitutes' with which they are supplied provisionally, and for that reason they do not interest themselves in those barely perceptible and gradual qualitative changes by which they are not directly affected. However, these small - seemingly 'insignificant' - interpretative changes are agents of the accumulation of power by those who seek them and may be averted peacefully only when the power of enforcement is still inadequate. In this critical period of time, understanding on the part of society and its 'moral and political' preparedness to reject what goes against the individual and society are of great importance. But, on the one hand, complacency, with the inertia which accompanies it, and the expectation of personal benefit, on the other, have always been a support for distortions of power and, thus, the responsibilities of societies themselves, in spite of the fact that they do not admit this.

These scarcely perceptible steps towards the subversion of principles of law may initially start out from a field of distortion of interpretation of the principles of law and justice, such as freedom, equality, individual development, about which no one cares, since the issue of principles in a period of prosperity seems a matter of indifference, and perhaps an annoyance, when the model of human life is only or by any means individual material prosperity. This, when it becomes surplus to needs (as in the case of excessive concentration of money), can no longer be based on these principles. For example, how does the principle of equality serve the desire for needless economic development or for over-consumption or for social superiority? Naturally, at the ultimate point of need, for example, in conditions of starvation, there is an accord and coincidence of the moods of the crowd, but that occurs at the level of instincts and the need for instinctive collectivity which is protective for the individual. However, this is not the true sociability of democracy.
Sociability is understanding and self-initiated responsibility as an element of freedom. The interpretation of freedom as irresponsibility (which is the prevailing interpretation) is as anti-social as it is foolish. Self-initiated responsibility must be a constituent part of democracy and not unaccountable 'liberty'. The element of self-initiation shows that responsibility is not imposed from without and thus freedom is retained - and that is also a necessary constituent of democracy.

The fact, however, is that for the present, man is not mobilised in good time and before the visible results, because he has no vision and inspiration. Visions for the many are totally obscure or so closely tied up with the desire for material prosperity that when this is fulfilled, man remains void of vision and inspiration for life. It must be understood that concepts are not a theoretical construct which serves us in an instrumental way in our pursuits by providing moralistic excuses. Furthermore, no theory is valid unless it is an evolutionary part of life. We would stress the 'evolutionary', because there also is the opposite, which, however, destroys life, such as, for example, power as a selfish imposition of strength (which is not true governance) destroys social and individual life, although it is an animalism as part of life, an animal characteristic which we clearly encounter in nature, and, consequently, is a part of life, the predominance of which, however, must be surpassed.

This vision and inspiration exists in Natural Law. How this will be interpreted or whether someone arbitrarily undertakes its representation is an issue which must be dealt with by self-initiated responsibility and the preparedness of men and their society. One thing which is certain is that in each case of inaction, refusal, and inability to understand, the abuse of power lurks.

Voluntary responsibility also leads to preparedness, otherwise preparedness on its own is competitive and without vision. This is because consciousness is the prime cause of the evolutionary process, and thus, depending upon the level of apprehension, the - famous 'timing' of the reaction is appropriate or inappropriate. Focusing on causes, to sum up, leads to timely apprehension and reaction. Otherwise, the reaction is inappropriate as regards timing, and ineffectual.

E. The abrogation of principles of Natural Law already legislated
1. Undefined principles

There is not only the case of those principles of Natural Law which are unknown, or, even if known, are still unintelligible. To the extent that the abstract principles of Natural Law are undefined or capable of a host of definitions, a double problem arises as to:

(a) what their content is;

(b) the fact that man has always had the tendency to ascribe authority to persons or to ideas in the way... he understood, or to maintain that he is the authentic interpreter of them. It is here that the principle difficulty in the interpretation of Natural Law lies. A rational judgement is needed as to the real possibilities of man's approaching the interpretatively absolute. Since the answer can only be an honest admission of man's inability to approach the absolute, what is required of each of us is a modesty in interpretation, and a systematic 'serving' of the principles of Natural Law through intensive dialogue.

In no circumstances, however, can we be deprived, because of the difficulties, of this source of inspiration and of the great principles which relate to the Common Good, which has been both the cause of all positive individual and social developments, and the concern of religions and major social movements, regardless of their distorted interpretation and implementation. In the last analysis whatever good has been contained in Positive Law has been based on principles of Natural Law.

2. The legislated principles of Natural Law

The truth is that, in contemporary societies, Natural Law is not entirely undefined. Modern constitutions, as fundamental laws, contain a host of its principles, such as human dignity and the value of man. Consequently, if these principles are suddenly abrogated - whether directly or indirectly – by interpretations which restrict them or reverse them, we must take the view that the new law (even if this is a constitution which by a revision abrogates these principles) violates these higher principles, whether these are still contained in the constitution or have been rescinded. In this case, moreover, we cannot maintain that Natural Law is unknown and undefined, since it was already contained in the constitution, and that its abrogation constitutes a social involution or cultural degradation - and anyway we cannot
The interpretation of such principles is subject to evolution, but this cannot contract their content or their universality, which would be contrary to democracy.

If the personal development of the individual, for example, as an individual right means that someone can gain so much power that it permits him to use it at will against society and individuals, this can only be a distortion by interpretation which without due form turns freedom into unaccountability, which abolishes the freedom of others, and, consequently, democracy. In other words, it is unsound for any constitutional provision to be cut off from the provisions of the constitution as a whole, because in this way distorting emphasis on the interpretation of a certain principle contrary to the content of the other principles, as, for example, of freedom against the welfare state, is being allowed. And, naturally, the checks themselves which must be applied may, in their turn, be turned into lawlessness. The difficulty is unavoidable, and for that reason social maturity over the evolving process of democracy is called for. Such a warped interpretation in effect accepts the animal principle that only the one who can survives, or, in other words, the law of the fittest. However, in order to understand the consequences of this interpretation, one must be aware, to a certain degree at least, of the content and the importance of great Ideas, such as Freedom.

The same efforts must be made for the evaluation of the other parameters of democracy, such as political parties and the separation of the powers. This, however, will be the subject of analysis in another article.

3. Levels of rules of law

Here, of course, we are talking about rules of law which involve, usually, important principles - ideas enshrined in constitutions. If these are abrogated directly by a revision of the constitution or if laws are voted and applied which abolish them without due lawful in practice, then we have a cultural degradation of society, and that is not permissible. Other laws and provisions which do not affect the standing of these fundamental principles can, naturally, change freely.

The issue of ideas - and not of ideologies, which are thymic fixations with interpretations of ideas or with ideals - is what contains the models for men and is the propulsive factor in the efforts of man and the direction of his will. This is not a luxury but an immediate need. If man refuses to concern himself with this either in the period of need (because then,
supposedly, he does not have the powers), or in the period of prosperity (because, supposedly, he has no need of it), then there is no way out from the grave problems of our age; but neither is there any excuse for this neglect.

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Lawyers, members of the Secretariat of Solon NGO

Photo from Wikimedia


[iv] Zisis, Ioannis, member of the Solon NGO, from an unpublished text, 1981.