

Edmund Burke's analysis of law and legitimacy in the '*Tract on the Popery Laws*'

The *Fragments of a Tract Relative to the Laws Against Popery in Ireland*, usually known as *Tract on the Popery Laws*, dated from 1766, according to a letter dated 1780, addressed to Lord Kenmare¹. It is thought this letter accompanied the third chapter of the work sent to Lord Kenmare. Burke's opinion of this text, more than a decade after he wrote it, was that only Chapters II and III remained relevant. The second chapter was a sort of introduction to a synthesis of these laws suitable for publishing; the third, a general analysis over the legitimacy of the laws. During Burke's life, the text itself was never published.

After presenting a synthesis of the laws against popery, Burke then writes a dispassionate analysis questioning whether such a law could possibly correspond to the solid principles of legislation or even an acceptable definition of law. He concludes that the principles on which these laws are based and the action resulting from them are so far apart from the laws of civilised people that it is both fitting and prudent to consider that these laws are, at the very least, suspect². It is usual for Burke to ratify what is common practice with the idea that, morally, there was little or nothing to invent. He considers that what common sense sanctioned, which corresponds to practice crystallised over generations, was subject to a process of refinement over time and transmitted wisdom that was prudent to follow. His approval of prescription indicates an intellectual humility that gives more value to the conquests of wisdom that transcends the individual and identifies with mankind's sagacity rather than arrogant innovation. Taking into consideration that previous to Protestant domination Ireland was Catholic, these

¹ *The Correspondence of Edmund Burke*, T. Copeland (Gen. Ed.), Vol. X, Cambridge & Chicago, Cambridge University Press, The University of Chicago Press, 1978, p. 6. (henceforward C, Vol. and page)

² Cf. *Fragments of a Tract Relative to the Laws Against Popery in Ireland* in: *The Works of the Right Honorable Edmund Burke*, VI, Boston, Little, Brown and Company, 1865, p. 318. (henceforward TPL, and page)

laws constitute an example that, I quote, ‘an opinion at once new and persecuting is a monster’³.

In the drawing up of new laws the legislator’s duty is first to make sure that the law does not commit an injustice to the individual and secondly that it is inspired in identical laws already proven in practice. But, in the case of the laws against popery that, according to Burke in his letter to John Cox Hippiusley dated 1793, were being applied, with some variations, for close on two hundred years⁴, this was a case of repealing an established law. As a consequence the task becomes more difficult since laws support each other and therefore to reform part of them can endanger others that were not supposed to be affected. Since these were ancient laws, mere imperfection is not a sufficient reason for their repeal, as all human work is imperfect. All laws, at one time or another, are or can become, in a certain measure, object of criticism but nonetheless they are not subject to repeal. For this to become legitimate it is necessary to prove that they are not merely imperfect but also perverted and that their application contradicts the actual nature of the law that is the defence of the common good. I quote:

“In the question concerning the repeal of an old one, the work is of more difficulty; because laws, like houses, lean on one another, and the operation is delicate and should be necessary: the objection, in such a case, ought not to arise from the natural infirmity of human institutions, but from substantial faults which contradict the nature and end of the law itself, - faults not arising from the imperfection, but from the misapplication and abuse of our reason. (...) a law may in some instances be a just subject of censure without being at all an object of repeal”⁵, end of quote.

When violations against the law, and against the intentions of a just government, are serious and its effects are felt throughout society, or at least through a significant part of it, we are facing an objection that touches the roots and the principles of the law itself. When a decree law is based on a perverted

³ *TPL*, 339

⁴ *C*, VII, p.443

⁵ *TPL*, p. 319.

principle, it is not where the law is effective that is good but rather it is the defects of the law that result in benefit. This inversion in principles allows its perverseness to become more evident.

In the case of the Popery Laws no one believes that maintaining a large number of people deprived not only of privileges but also of the commonplace advantages for which society was constituted can be done for the good of those people or could, at any time, even tacitly, be ratified by them. Although in his *Appeal from the New to the Old Whigs* (1791) Burke defends that the social contract did not need forcibly to be ratified by the individuals because at no time have the generations that followed the institution of the contract been free from society to choose to adhere to the contract or not. In the analysis of the *Tract on the Popery Laws* he admits that tacit agreement is required for the ratification of the constitution and thus the laws that applied to Ireland lacked that sanction and could not actually be recognised as laws. This variation is justified because in the *Appeal* the discussion involved the constitution under which the people had progressed and had been contented. For this reason, men did not have ‘the right to put the well being of the present generation wholly out of the question’⁶, so that the contract don’t need to be ratified, but in the case of the Popery Laws the question was precisely the opposite, I quote:

“They have no right to make a law prejudicial to the whole community, (...) because it would be made against the principle of a superior law, which it is not in the power of any community, or of the whole race of man to alter, - I mean the will of Him who gave us our nature, and in giving impressed an invariable law upon it. It would be hard to point out any error more truly subversive of all the order and beauty of all the peace and happiness of human society than the position that any body of men have a right to make what laws they please, - or that laws can drive any authority from their institution merely, and independent of the quality of the subject matter. No arguments of policy, reason of state, or preservation of

⁶ *Appeal from the New to the Old Whigs*, in: *The Works of the Right Honorable Edmund Burke*, IV, Boston, Little, Brown and Company, 1866, p. 80. (henceforward ANOW, and page)

the constitution can be pleaded in favour of such a practice’⁷, end of quote.

What grants the legitimacy to law is its conformity to the original justice. This need totally restricts the possibility for men to constitute laws without taking this requirement into account or that laws derive their legitimacy merely from the reasons handed down by authority and that it is possible to dispense with the analysis of its intrinsic goodness: the ‘legality’ of the law is linked to its subordination to natural law that obliges it to consider the common good. This same viewpoint also prevents laws from being considered as a legitimate means, justified solely as instruments to achieve a specific end that is considered good in itself, as in the case of the Popery Laws, that allegedly, was to prevent new conversions to Catholicism.

Burke is usually accused of wishing to preserve the *status quo* and to do what was necessary to preserve the existing situation and so avoid change. In part this corresponds to a frequent inclination of the author, understandable under the light of the principle of prescription and intellectual humility that makes him prefer what has been tested over time in relation to individual innovation. “As no water can rise higher than its spring”⁸, as he himself said, neither does the individual superimpose himself on the wisdom of the species whose refinement takes place throughout generations. However, on analysing the situations of great disrespect for human dignity as in the case of the analysis of the laws that guaranteed English ascendancy or of Hastings’ action in India, Burke had the occasion to show the underlying hierarchy of his conservative attitude: one has to preserve what one has, and change what has to be changed, respecting inherited tradition that has taken years to build. This should be done because we recognise that the wisdom of individuals is nothing compared to the wisdom of the human species crystallised in its cultural achievements. There is however, no reason of

⁷ *TPL*, pp. 321-2.

⁸ *TPL*, p.333.

State or for the preservation of the centuries-old constitution that justifies not subjecting laws to the original justice and to its basic function that is the common good, I quote: “All human laws are, properly speaking, only declaratory; they may alter the mode and application, but have no power over the substance of original justice”⁹, end of quote. Human laws are instruments that execute the detailed application of justice but they do not alter its nature. To ignore this hierarchy would be to produce false laws that are not in reality valid.

Burke considers that political good and evil are never absolute. We can always see him defending the moderate solution even for those situations he condemned. This is because he feels that extreme attitudes and solutions are peculiar to the abstract consideration of the subjects but not from a wise point of view that should characterize the politician. The abstract approach can cause collateral damage, which should be avoided. In fact, in whatever situation, we can find aspects that should be preserved or whose changes should be slow and insensitive since we are dealing with matters that affect people’s lives as Burke mentions in *Reflections*¹⁰.

It is worthwhile emphasizing this moderate viewpoint since we believe this is one of the reasons why Burke condemns an abstract approach to human rights. Some of his interpreters classify him as an enemy of human rights and forget that in his refusal to confirm these rights abstractly there was a corresponding struggle to put into practice other rights whose realization depended on the analysis of the circumstances and of a prudent balance between good and not so good choices. This was a struggle to which he strongly dedicated his political activity. The moderate position adopted by Burke is more complex than the interpretation that he merely opposes human rights.

⁹ *TPL*, p.323.

¹⁰ Cf. *Reflections on the Revolution in France* in: *The Works of the Right Honorable Edmund Burke*, III, Boston, Little, Brown and Company, 1865, p. 456. (henceforward *RRF*, and page).

On society and the defence of human rights he says: “Everybody is satisfied that a conservation and secure enjoyment of our natural rights is the great and ultimate purpose of society, and that therefore all forms whatsoever of government are only good as they are subservient to that purpose to which they are entirely subordinate”¹¹, end of quote. This statement, compatible with the Lockean notion of social contract, refers to the preservation of natural rights as the ultimate goal of society.

The truth is that Burke recognises the existence of human rights – those without which human nature could not achieve its complete development – whose defence determines the establishment of civil society. But once man has entered society, he gives up the possibility of making individual demands on those rights based on its merely abstract consideration since its abstract appreciation is incompatible with its real and circumstantial existence, the only real possibility.

Burke states in his *Reflections* that abstract perfection of rights corresponds to its breakdown in practical terms¹². Rights considered abstractly, as the rays of light whose straight-lined path is deflected on crossing a denser matter, would also be altered by a society where its practical appreciation would demand an attention to multiple factors. These rights would find their viability based solely on circumstances in order to preserve the complex Burkean social contract that may be synthesized into a moral compromise between generations where the present generation is only one of the partners in the contract¹³. This partner would be prohibited from eliminating the contract through the compromise it has maintained with the past and future generations, equal partners in the contract. Any other attitude would, according to Burke, be anti-social: to possess those selfish rights and to be a people is a contradictory notion¹⁴.

¹¹ *TPL*, p.333.

¹² Cf. *RRF*, p. 312-3.

¹³ Cf. *RRF*, p. 359.

¹⁴ Cf. *ANOW*, p. 188.

The compatibility of this vision of an intergenerational contract whose preservation involves equating of the rights as dependants of, and internal to, that same contract and the appreciation that the establishment of society is made for the natural defence of human rights is a peaceful notion. That is if it is understood that the establishment of the Burkean intergenerational contract can never completely disregard the natural human rights as stated, for example, in the *Speech on the Clerical Petition about the Subscription to the Thirty-nine Articles*: “When tyranny is extreme, and abuses of government intolerable, men resort to the rights of nature to shake it off”¹⁵ or in the *Tract on the Popery Laws*, a text of great interest here, where Burke states: “the happiness or misery of multitudes can never be a thing indifferent. A law against the majority of the people is in substance a law against the people itself; its extent determines its invalidity”¹⁶, end of quote.

In general terms the rights of man become those rights that are compatible with society, something that is in itself also natural and vital to the development of man. Human nature has always required the society in which it is involved for its complete development and structure. I quote: “Men are never in a state of *total* independence of each other. It is not the condition of our nature”¹⁷. The social environment accompanies the individual from the beginning: man develops and grows as a human being in the heart of society and it is impossible to consider one moment when the influence of society is not present. I quote once again:

“The state of society (...) is a state of Nature, - and much more truly so than a savage and incoherent mode of life. For man is by nature reasonable, and he is never perfectly in his natural state, but when he is placed where reason may be best cultivated and most predominates. Art is man’s nature”,¹⁸ end of quote.

¹⁵ *Speeches of the Right Honorable Edmund Burke in the House of Commons and in Westminster Hall*, Vol. I, London, Longman, Hurst, Rees, Orme and Brown, 1816, p.110

¹⁶ *TPL*, 320

¹⁷ *Letters on a Regicide Peace-I*, in: *The Works of the Right Honorable Edmund Burke*, Vol. V, Boston, Little, Brown and Company, 1866, p. 321.

¹⁸ *ANOW*, p. 176.

The invoking of abstract rights unconnected with the circumstances of its application is deferred whenever it is considered they are incompatible with the preservation of society in the hear of which these rights make sense. The abstract denial of human rights is compatible with the assertion of specific rights that emerge from social intercourse. Society should guarantee the rights without which man cannot develop as man, I quote:

“far am I from denying in theory, full as far is my heart from withholding in practice (if I were of power to give or to withhold,) the *real* rights of men. In denying their false claims of right, I do not mean to injure those which are real, and are such as their pretended rights would totally destroy. If civilized society be made for the advantage of man, all the advantages for which it is made became his right,”¹⁹ end of quote.

The rejection of the abstract rights of man is made to preserve the rights of the individual. It is really a condition for its effective enjoyment since the affirmation of the abstract rights would destroy the possibility of the application of the real rights susceptible of being enjoyed in the context of political society that in its opinion the abstract claim of rights would put at stake.

The safeguard of fundamental rights is guaranteed by law that, for Burke, as referred to by Sir Ernest Barker²⁰, grants legal capacity and only capacity. If it accomplishes the function of guaranteeing the equity of legal capacities, it respects the principle of equality in a just measure. This principle is absolutely perverted in the Popery Laws and this is what led Burke to discuss the real rights that the law disrespects such as the right to property on a permanent basis, susceptible of accumulation, that Burke considers as the basis of all other social rights and of the moral growth of society²¹; the right to Christian religious freedom²²: “Religion,

¹⁹ *RRF*, p.352.

²⁰ Cf. Barker, Ernest, *Principles of Social & Political Theory*, Oxford, Clarendon Press, p. 151.

²¹ “Allow a man but a temporary possession, lay it down as a maxim that he can never have any other, and you immediately and infallibly turn him to temporary enjoyments”. *TPL*, p. 352.

therefore, is not believed because the laws have established it, but it is established because the leading part of the community have previously believed it to be true”²³; the right to education, and the right to justice.

After a detailed analysis of the disrespect of all these rights Burke concludes:

“the stock of materials by which any nation is rendered flourishing and prosperous are its industry, its knowledge or skill, its morals, its execution of justice, its courage, and the national union in directing these powers to one point, and making them all centre in the public benefit (...) if we show that these penal laws of Ireland destroy not only, but every one, of these materials of public prosperity, it will not be difficult to perceive that Great Britain, whilst they subsist, never can draw from that country all the advantages to which the bounty of Nature has entitled it”²⁴, end of quote.

The Popery Laws represented a failure of the English governance itself because as Burke stated later in *Reflections*:

“It is with the greatest difficulty that I am able to separate policy from justice. Justice is itself the great standing policy of civil society, any eminent departure from it under any circumstances, lies under the suspicion of being no policy at all”.²⁵

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²² Although Burke defends religious freedom in general, specially when it respects to English presence in India, in the *Tract on the Popery Laws* he specifically mentions the freedom for the Christian faith.

²³ *TPL*, p. 338

²⁴ *TPL*, p. 351

²⁵ *RRF*, pp. 438-9.