

THE FOUNDATION OF POSITIVE LAW

by Benedict Cevens

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Thesis presented to the Faculty of Philosophy of the University of Ottawa as partial fulfillment of the requirements for the degree of Master of Arts.

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Ottawa, Canada, 1952



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Acknowledgment

This thesis was prepared under the guidance of Reverend Father Roland Ostiguy, O.M.I., B.A., Ph.D., Th.L., Professor of Ethics and Social Philosophy at the University of Ottawa.

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TABLE OF CONTENTS

Chapter	page
INTRODUCTION	V
I.---SOME MODERN THEORIES OF LAW	1
1. Leo Petrazycki	
2. Rudolf Stammler	
3. Hans Kelsen	
4. M. Duguit	
II.---THE NATURE OF MAN.	16
III.---INTELLECT AND WILL	21
IV.---THE NATURAL LAW.	27
V.---THE CONTENT OF NATURAL LAW	35
VI.---THE REVIVAL OF NATURAL LAW	44
VII.---THE RIGHTS OF THE HUMAN PERSON	52
VIII.---THE NATURAL RIGHTS OF THE CIVIC PERSON	68
IX.---AUTHORITY.	77
X.---CONCLUSION	85
XI.---ABSTRACT OF THE THESIS	96
XII.---BIBLIOGRAPHY	100

Introduction

With the growth of cultural development the interdependence of individual men increases. The broadened field of men's inter-related activities demands an order, the minimum of which is secured by positive law. An individual man more and more tastes the binding force of positive law and persistently asks: Why have I to restrict my liberty because of this or that positive law? Is this law just? Why have I to obey the law when I sometimes have an opportunity to escape from it? What is the foundation of positive law?

The conception of positive law has caused much trouble to modern jurisprudence. John Austin, in "The Province of Jurisprudence Determined," comes to the conclusion that positive law is the command of the sovereign of the independent political society, obedience to which is ensured by the application of physical force. 1) This conception destroys the meaning of law. If law is to be obeyed because of physical force, it does not seem wrong that the sovereign and his laws founded on physical force should also be overthrown by physical force. Therefore, there is no law at all, but only might. Many unfortunately are convinced that right is might. I was present at a meeting in the Latvian city of Madona during the Communist occupation of 1941, when a high official from Moscow, Comrade Shelepov, declared:

1) J. Messner, Social Ethics, B. Herder Book Co., St. Louis, Mo., and London, W.C., 1949, p. 207.

"If you are prosecuted and punished, it is not because you are guilty, but because you are too weak to resist."

St. Thomas thus defines law: *Quaedam rationis ordinatio ad bonum commune ab eo qui curam communitatis habet promulgata.* 1) This definition is universal and can be applied to every law. Concerning the positive law the expression, "qui curam . . . habet," implies obligation on the part of the lawgiver. It is the obligation to promulgate law "ad bonum commune." Such an interpretation of law shows positive necessity to obey the law. Obedience is founded on man's reason and not on physical force. It is in accordance with the dignity of man. Modern jurists grasp the importance of the objective character of law, but they find it difficult to answer the question, "Whence is the power of the human legislator derived?" For those who do not want to admit a moral order independent of arbitrary human judgment, it is indeed hard to give an answer.

It seems also that great misunderstanding is caused by too much artificial determination and separation of branches of different social sciences. The scientists of positive law tend to find sufficient explanation of positive law within the limits of this law itself. Those who defend natural law are often content to explain general principles without reducing them to concrete social circumstances. The "positivists" see the multitude of different trees but cannot see the forest; the "naturalists" see the forest but do not distinguish the trees in it. There is

1) St. Thomas, Summa Theol., Ia IIae, q.90, a.4.

some truth in the saying of Descartes, "All the sciences are so interconnected that it is much easier to study them all together than to isolate one from all the others." 1)

In my treatise, "The Foundation of Positive Law," I shall present my material whilst keeping in mind, as a central point, the individual reasoning man obeying the law in general and the positive law in particular. Law imposes on man an obligation which directs and limits individual freedom. Man, however, is essentially free. His freedom increases with the increase of intellectual development. As the consciousness of individual freedom grows, personal responsibility also increases. Man is free to choose, but he must necessarily bear the consequences of his free choice.

The positive law covers only a small external field of human activity. Man does not begin and does not end his destiny in a legal order established by human lawgivers. An individual needs society, but at the same time, in respect to his ultimate destiny, he transcends society.

The system of positive law cannot be separated from the order of the universe. The order must have a meaning and an end. The first lawgiver is the Creator of all things. The system of positive law must correspond to human nature tending toward man's ultimate destiny.

1) Cairns Huntington, Law and the Social Sciences, Harcourt, Brace and Company, London, 1935, p.1.

I.---Some Modern Theories of Law

1. Leo Petrazycki:
 - a. His notion of law
 - b. Law in man's mind
 - c. Moral and legal emotions
 - d. No law outside man
2. Rudolf Stammler:
 - a. The concept of law
 - b. The idea of justice
 - c. The general principles of morality
 - d. The social ideal
3. Hans Kelsen:
 - a. Pure science of law
 - b. Law in the category "must"
 - c. Meta-legal rules of hypothetical value
 - d. Positive law only, objectively binding
4. M. Duguit:
 - a. The rule of conduct and the rule of law
 - b. The rule of needs supreme
 - c. Man has duties only, no rights
 - d. Social solidarity is the universal end
5. Conclusion:
 - a. No foundation of positive law
 - b. Positivism unquestionable "dogma"
 - c. Natural law alive in practical life

1. Leo Petrazycki (1864-1931) 1)

All Petrazycki's works are written in Russian. A complete translation into Polish of his "Introduction into the Study of Law and Morals, Principles of an Emotional Psychology," third edition, was published in 1930 in Warsaw. To Petrazycki it seemed ridiculous that jurisprudence was regarded as a science without any agreement as to its subject-matter. The theorists, in their law definitions, almost inevitably state what it "ought" to be, not what it actually is. In the opinion of Petrazycki, who was a positivist, the treatment of subject-matter which is not, but which ought to be, cannot be regarded as scientific. We must discover a criterion for discerning whether this or that speculation on what law ought to be is good or bad. Speculation on what law ought to be is better than the worship of that segment of law which positive law so imperfectly covers. Law is correlated to environment, to geographical, racial, political, social factors. The scientific methods are analysis of psychological phenomena, Petrazycki's attempt to lay the foundation for an adequate theory of motivation. Man's conduct, besides being biologically or physically conditioned, is also in many respects conditioned by a multitude of "musts" and "must nots." There is a variety of ethical imperatives. We have to study morals and law in the minds of human beings. The maxim, "Ignorance of the law is no excuse," would hardly be valid unless a good deal of the law were not in the minds of the people. Law recognized by the state is not

1) A. Meyendorff, Leo Petrazycki, Modern Theories of Law, Oxford University Press, Humphrey Milford, London, 1933, p.21-37.

all the law, and its systematization is not all that one ought to expect from a science of law. Biology and sociology, history and revised psychology would supply the real material to be examined. Petrazycki understood the task to re-examine the process of human motivation, to analyze the dynamics or mechanism of the urges and repulsions which have a normative power. His aim was to discover the process by which the individual and the community come to share or to differ in their legal and moral concepts.

Petrazycki's psychological theory of law attempts to solve the antinomy between the moral and legal dictates of the individual mind and those of society. Some psychological emotions impose conduct which is not related to anybody's claim (imperative norms of a unilateral nature). The imperative-attributive emotions imply another subject to whom a right to claim that attitude is attributed. There is a tendency toward positivation and unification of the moral and the legal emotions. By the moral emotions petrazycki means all kinds of individual emotions.

The psychological theory of law does not pretend to possess a criterion for what law ought to be. Petrazycki, as a positivist, was unable to transcend the sociological phenomena. Petrazycki's theory had a great, valuable influence on such a naturally non-balanced state as czarist Russia, where Petrazycki was an influential professor of law. Law is not simply a result of the struggling social forces within the state. Petrazycki's moral imperative is "blind" and cannot be a rational measurement of

the positive law in respect to its "ought to be." The psychological school of law can help to adjust the positive law to the voluntary acceptance of the law by the majority of the people in the state. Positive law is directed to the "ought to be" acts of the members of society in future. In this respect the psychological school has no rational criterion. "Thus psychological jurisprudence is clearly concerned with one aspect of the operation of law upon men and men upon law." 1)

1) Julius Stone, The Province and Function of Law, Sydney Associated General Publications, NY, Ltd, 1946, p.33

2. Rudolf Stammler (1856-1938) 1)

His notable works: *Wirtschaft und Recht* (1906), *Die Lehre von dem richtigen Rechte* (1902), *Theorie der Rechtswissenschaft* (1911), *Lehrbuch der Rechtsphilosophie* (1922). Stammler distinguishes between technical legal science and theoretical legal science. Theoretical legal science is concerned with the justification of actual law, with the discovery of more fundamental principles of positive law. He seeks to disentangle the pure forms of law, that is the necessary and universal elements which are found in all legal proportions irrespective of their particular content or matter. Stammler distinguishes between the concept of law and the idea of justice.

(a) The Concept of Law

There are two ways in which order is introduced into the contents of consciousness: perception and will. Law is a species of volition. Will may relate to the ordering of means and ends within a single personality, which constitutes the sphere of morals. Society is a group of wills functioning as ends and means in relation to one another. Law is a species of binding will, other-regarding, self-authoritative and invisible.

(b) The Idea of Justice

Some acts of will are as the means for the attainment of a particular aim or end. If the end is desired, the means must also be desired (Kant's hypothetical imperative). Some acts may claim universal validity (Kant's categorical imperative): do this without any regard to any particular end to which you may or may not be inclined. To the first formula of the cate-

1) Morris Ginsberg, *Stammler's Philosophy of Law, Modern Theories of Law*, Oxford University Press, Humphrey Milford, London, 1933, p. 38-51.

gorical imperative---so act that you may at the same time will that the maxim of your action shall become a universal law--- according to Stammler must be added the idea of justice. It is the idea of a complete harmony of all striving or endeavour. This idea of harmony bids us ever to subordinate the particular to the universal. The idea of justice can be applied to both species of volition: (1) morality as an expression of the inward personality, and (2) law as a volition concerned with the external relations of men. In the case of morality Stammler introduces the notion of "pure will," i.e. the will unconditioned by particular desires. From this notion of the "pure will" there follow the general principles of morality:

(1) The principle of truthfulness: Do not seek to escape from yourself; seek to harmonize the conditioned with the unconditioned.

(2) The principle of perfection: Do not let any particular aim dominate your will.

The fundamental principles of "right law":

(1) Principles of respect:

(a) No act of will should be subjected to the arbitrary control of another

(b) No justice claim is valid save on condition that the person to whom it applies may remain his own neighbour.

(2) Principles of co-operation:

(a) No member of a legally bound community may be arbitrarily excluded from it.

(b) No legal right may be exclusive save in so far as the person excluded may still remain his own neighbour.

According to Stammler, law is not derived from the state, which is conditioned by particular circumstances and cannot belong to the pure forms of law. He bases his theory on the Kantian philosophy. The notion of natural law is replaced by moral imperatives as the measurement of positive law. The only difficulty is: How are the moral imperatives themselves to be measured? As for Kant, so for Stammler there is no answer in man's "pure reason." However, Stammler was aware of the necessity of finding an objective criterion for positive law. He says: "Legal statutes must be measured by some standard or other to prove that they are justified . . . the doubt whether the existing law is in conformity with reason cannot be simply pushed aside." 1)

Stammler distinguishes between the form and the content of law. This form is the conditioning element of legal content. His concept of formal law is very close to the idea of natural law. The content of law is measured by the social ideal, which likewise is not without a content that supplies a standard. Thus Stammler arrives at the idea of "natural law with a changing content." 2)

- 1) Heinrich A. Rommen, The Natural Law, B. Herder Book Co., St. Louis, Mo., and London, 1949, p.131.
- 2) Heinrich A. Rommen, The Natural Law, p.229, note.

3. Hans Kelsen (1881-) 1)

Kelsen's principal works are: *Hauptprobleme der Statsrechtslehre* (1923); *Das Problem der Souveranitat und die Theorie des Volkerrechts* (1928); *Allgemeine Staatslehre* (1925). Kelsen attempted to build up the "pure science of law" without any ethical tendency. He insists repeatedly that only a purely analytical approach to law can be regarded as scientific. Kelsen accepts the basis of Kant's method that knowledge is not merely a passive picture of the objective world but that it creates its objects according to its inherent law from the material given by the senses. Law is the product of a mental operation. It is a phenomenon in the category of "must" (das Sollen) as distinguished from the category of existence (das Sein). Kelsen insists on the distinction of legal science as a normative science from natural science. Any concrete law in the domain of natural science is a specific application of the general law of causality. It shows a certain event as the necessary consequence of another. The rules of logic, grammar, ethics, aesthetics, and law are normative rules. They do not predicate what actually happens.

From the fact of what is and what shall be two distinct modes of thinking follow: the category of causation and the category of norms. Why a legal rule is obeyed is a question in the domain of individual or social psychology and, as such, is outside the domain of legal science. The question of why a legal rule is binding can be answered by reference to another

1) H. Lauterpacht, Kelsen's Pure Science of Law, Modern Theories of Law, Oxford University Press, Humphrey Milford, London, 1933, p.105-138.

higher legal rule. The reasons which prompt us to accept the validity of the fundamental rule outside the positive legal system are in themselves meta-legal. The meta-legal rules can be assumed, but they have only hypothetical validity. The initial hypothesis of a legal system is an act of human intelligence. The hypothesis is not a dictate of a higher power, not a deduction from an immutable principle of justice; it is an assumed hypothesis glorying in its realistic relativism.

Natural law is based on the assumption of a natural order whose rules---unlike those of positive law---are valid not because they are made by a human authority, but because they originate from God, nature or reason, and are therefore just and adequate. The validity of the norm of natural law is thus absolute; the validity of positive law is assumed inasmuch as it is based on the hypothetical fundamental rule. Juridical science can assume the validity of only one of these systems: the system of positive law or the system of meta-legal hypothetical rules. On no account can both systems be regarded as valid. The natural law idea is due to the tendency to duplicate the objects of knowledge by picturing entities---"res in se" (Ding in sich)---existing behind the phenomena and independent of human reason and senses. This results from man's lack of confidence in his own powers. The rejection of the natural law is the affirmation of the dignity and autonomy of man. Kelsen doesn't want to go beyond observable phenomena. He insists that he has always kept his legal science apart from his moral Weltanschauung.

Kelsen contends that a normative oughtness is not to be founded upon being. A norm must always be founded upon a higher norm. There is the postulate of an original norm. His basic norm is a merely hypothetical construction. Kelsen's agnosticism prevents him from looking for the basic norm in a fundamental being of the metaphysical order. His "pure science of law" is devoid of factual content. There is an unbridgeable opposition between existence and oughtness. This results from the rejection of an ultimate Being, in which factual existence and oughtness finally coincide.

According to Kelsen's theory the state is a system of norms. But a system of norms presupposes a real authority issuing the norms and persons who obey these norms. 1) How can a merely hypothetical presumption impart to positive law an obligatory character? *Nemo dat quod non habet*. It is a system of norms without authority, a legal order without justice. The whole profound problem of just law disappears.

1) Heinrich A. Rommen, *The State in Catholic Thought*, B. Herder Book Co., St. Louis, Mo., and London, 1950, p.34.

4. M. Duguit (1859-1928) 1)

Duguit tried to outline a positive and realistic theory of the state. It was to be built from the facts in life without preconceived hypothesis.

Men live together in societies and are dependent upon one another. They have common needs and, at the same time, they also have different needs which are to be satisfied by the exchange of reciprocal services. The progress of humanity goes in both directions of individual activity. From the immanent force of things there arises a rule of conduct. Man must do all that naturally tends to promote social solidarity. The rule of law imposes different duties upon different persons. The conditions of society change, but the negative and positive aspects of the obligation are unchangeable. The state cannot be regarded as transcending the law. The duty of the rulers is greater than that over whom they rule. The state is a body of men issuing orders to other men. The rulers must recognize man's need to live and his title to the means of life. The state has the obligation to assure to each and all of its citizens the means to enable them to contribute all it is in them to give to the fullest realization of social solidarity. The state is beneath the rule; it is an instrument and not an end. Duguit denies the sovereignty and the personality of the state. The needs of the rule of law are alone supreme. The action of the state simply means that certain officials have carried out the order of a minister.

Duguit insists that there are no rights in society: duties alone exist. Each of us has certain functions to perform, born of

1) Harold J. Laski, M. Duguit's Conception of the State, Modern Theories of Law, Oxford University Press, Humphrey Milford, London, 1933, p.52-67.

our position in society. The function of the state is to provide for certain public needs which are growing each day more varied, more imperative, and more numerous. The whole theory of the state is contained in the idea of social need.

Duguit¹ emphasizes the distinction between constitutional and ordinary legislation. The constitution is an attempt to make the rule of law enforceable upon the government. This rule of law exists apart from any intervention of the state. Yet he denies the consequence that this rule must come from a higher principle of the metaphysical order. He introduces the notion of "law of purpose." The end or object of the norm is the criterion of right and wrong. He says that social solidarity is the universal end. How may we distinguish a state from a robber band? He adds that the rule of law is characterized by the end of social solidarity and by the justice of the sanctions of the rule. Ultimately the justice of the sanction would be the criterion of the right or wrong of the positive law. In spite of himself Duguit¹ ^{opened} ~~argued~~ the way to the idea of natural law. "Duguit's principle of social solidarity as the source and critical norm of the positive law is in fact one element of the Thomistic natural law as the basis of natural law." 1)

1) Heinrich A. Rommen, The State in Catholic Thought, p.211.

5. Conclusion

The so-called modern theories of law are on the plane of positivistic conception. Empiricism, which dismisses metaphysics as impossible, is believed to be the only right method in the cultural sciences. The only way to true knowledge of the law is exact analysis of actually existing law, present and past. The philosophy of law should therefore rest upon and be restricted to mere external experience.

The philosophy of law needs to understand the ultimate principles of law, the nature of law, its obligatory character, the intrinsic difference between right and wrong. Law is enacted not for the sake of law itself. Law is an order. The question concerns not so much what is, but what ought to be in future. True understanding of law calls for something more than empirical phenomena---what is. We must know why this law is right and binding in conscience. There is no answer in modern theories of law based on positivistic preconception. Empiricism leads us not only to relativism, but to scepticism as well. The natural scientists invade legal philosophy. The will of the state, the general will of the citizens, is the source and criterion of law. There is an attempt to explain the law by the struggle of interests in the mechanical environment. Historical materialism reduces law to the dominating force of the ruling class. Strictly speaking, there is no law at all. The law is force on the plane of production. Man is something more than a highly developed animal. There is no place for a personal God, man's spiritual, immortal soul, man's ultimate goal transcending material needs. Man has no free will. In society there is no other law than the positive law enfor

by the state. The state is a necessary product of the evolution of social forces. The law of the stronger holds sway. The law indicates what is the actual sociological situation of struggling classes. Law is merely what is actually enforced, not what is enforceable.

The moderate form of positivism acknowledges the positive law as legally binding. It avoids the question of the basis of the binding character of law. The inherent justice or the moral lawfulness of the action commanded by the positive law is rejected as irrelevant to the sphere of law. The reason for the foundation of positive law cannot be found. For the positivist who restricts himself by the presumed positivistic conception, it is impossible to find such a reason. Law is the will of the state (the theory of will). There is no solution of the question concerning the intrinsic difference between right and wrong. There must be a criterion of distinction between the positive law as it is and as it ought to be.

In actual practice pure positivism is never carried through. Positive law itself often refers to good faith and to good morals. Law exists prior to jurists and legal philosophers.

Positivism in legal philosophy is the result of the undermining of metaphysics and of classical and Christian philosophy at the hands of both Kantian criticism and empiricism. In practical life, however, the idea of natural law has strong roots in the human mind. Natural justice is inscribed in man's heart. Very often man does not know the rights contained in positive law codes; he nevertheless knows, in so far as he is able to use his reason, what is right and what is wrong. It is easy to profess positivism

in a culture that is secure and established in the long run. In this case positive law is adjusted to the natural law manifested in the community. It is different in times of social tension and unrest, as is the case today. How can a positivist defend this or that positive legal system if he denies the criterion behind the positive system? What should be contained in the legal system and what should be excluded as naturally unjust? "The absence of any widespread faith in a natural law, outside the influence of the Catholic Church, is thus significant. It may well testify as to the deep-rooted conflicts and divergencies as to the new values which, it is almost universally agreed, are still in the agony of birth in the world at large." 1)

1) Julius Stone, The Province and Function of Law, p.220.

II.---The Nature of Man

1. The importance of the right notion of human nature
2. The irrational element
3. The proximate and ultimate end
4. Physical laws and the laws of man
5. The optimistic and pessimistic theories
6. Man---animal sociale

The fundamental prerequisite in social sciences is the right understanding of man's nature, man's rightful activities in society, his transcendent solitary destiny. It seems to me that most difficulties and disagreements arise among the scientists of social studies because of different conceptions of human nature. Man is a rational animal. This notion is very general. Man is born only potentially rational. Rationality develops and increases little by little in the course of man's personal life. A child's rationality is supplied by the care and authority of its parents. Every adult relies to some degree on the authority or rationality of others. Every man, no matter how wise he may be, must recognize the laws and authority of one higher than himself. Man's rationality stops at the grave.

Man is a kind of compendium of the universe. He is a microcosm. In man there are to be found inorganic, vegetable, and animal elements. Man, by the composition of his body, is a part of the cosmic world. By nutrition, by growth, by reproduction, he is an ally of the vegetable kingdom. Sensation makes him an animal. The truly distinctive feature of man is intelligence. However, man's intelligence does not free him from the weight of matter subjected to physical laws, from irrational animal nature. Intelligence is a light indicating a superior destiny. Intelligence would not be given to man if he had to stay on the animal plane. Intelligence must have some purpose. Its purpose can be only the activity which leads, by subordination of the different steps in life, to an ultimate end. If there is no ultimate end in man's life, there is no purpose in any of his actions, because he values each of his achievements in respect to its usefulness for the next

step. It is not usefulness for me where I am at the present moment; it is the usefulness of my free actions in respect to my ultimate "should be" end. If we deny the validity of metaphysics, final causes, and the existence of an Absolute, we are unable to find an ultimate foundation of positive law. Kelsen admits that he has his own personal Weltanschauung, which can rest only on metaphysical and theological speculations. But he refuses to disclose his Weltanschauung. It is possible he was ashamed to appear on the stage of "the childhood" or "youth" as it would be according to the "dogma" of the father of positivism, Auguste Comte. I think this view is applicable in some degree to every so-called modern theorist of positive law who is unshakable in his positive stand and who accepts Kant's metaphysics of denial of metaphysics.

"And in the quest for those forces which animate and energize society he (the sociologist) will again discover that it is from man that all social activity springs. Again, when he inquires into the purpose of society, a number of ends will require scrutiny, all pointing in one way or another to the question of man's own ends." 1) We study physical sciences to discover the laws of nature in order to make use of them in subjecting the physical forces for our benefit. The laws of man, in order to be laws in the true sense, are on a different plane in relation to those of the physical world. Those are the laws to which we ourselves are subject. It is true that, so far as our body is concerned, we are subject to physical laws. In so far as we are on the plane of a vegetative and sensitive being, we ~~are~~ share the laws of the

1) J. Messner, Social Ethics, p.3.

kingdom of plants and animals. Reason is a gift which places man above the animal. If reason is abused, however, man sinks below the animal. If reason is not used, man remains on the plane of the animal with the exception that he is aware of his life as meaningless. Reason is given to man so that he may realize the position he is in and the validity of his concrete actions in respect to their ends and the unity of ends in respect to man's final end.

The ultimate basis of every political system is a certain theory of the nature of man. The theories which are optimistic concerning the moral nature of man, incline to liberalism or even anarchism. Those who are pessimistic about human nature believe in the necessity of an absolute state power. Both extremes in practice are proved to be wrong. No matter what an individual thinks about human nature, he needs society and lives within it. On the other hand, there is no foundation for an unrestricted absolute state power. If humanity is massa damnata, there is not a worthy man who can act as absolute ruler.

The philosophia perennis has the traditional idea of the nature of man. The origin of the state lies in the rational, social nature of men. In so far as man is animal rationale, he is also animal sociale. To human nature belong certain acts which find their end in community, such as love, piety, friendship, etc. "Cogito, ergo sum" should be "Cogito, ergo sumus." For we think by verba mentis, by words of the mind. Therefore a sphere of absolute solitude is not separable from the social sphere of the person. 1) Man is born in a family into social life. He grows

1) Heinrich A. Rommen, The State in Catholic Thought, p.77.

and develops in society, and in so far as an individual progresses in his perfections, the community also profits.

The state has its origin in man's rational nature. The authority of the state ultimately originates in God, but political authority depends on the consent of men associating for political life. Therefore, political authority as human authority can demand only reasonable obedience.

III.---Intellect and Will

1. Moral order
2. The supremacy of intellect
3. The freedom of the will
4. The intellectual appetite or will
5. The will tends toward the ultimate goal.

Order conforms to the natures of things. For inanimate and for living but irrational creatures there is an order of necessity. In so far as beings are endowed with reason and freewill, there is a moral order, an order of freedom to act. Man is free to act but is necessarily obliged to bear the consequences. "The order of being confronting the intelligence becomes the order of oughtness for the will." 1) "If the good is always 'the end because of which' one makes a thing, evil is what one avoids . . . It is only the distinction of good . . . e.g., there is only one way of being in good health, but illnesses are legion; one can fail in virtue in more than one way." 2) It is objective order established by God's wisdom to be attained and preserved as a norm of the finite will. The law of order lies in the nature of things as God's wisdom ordains them.

However, for many centuries there were two concepts of law and obligation. In the one, law is an act of the intellect because law is concerned with the relation and order of necessary means to an end. Only the intellect can perceive such a relation. In the other concept of the primacy of will, law is an act of will because the order of such a relation must be the work of the will. Whether a law will oblige or not depends upon the will of the lawgiver.

Albert the Great, St. Thomas, and many others give superiority to the intellect. "The act following the election (the impetus or command) pertains to the intellect because it directs the means elected to the end. Hence the law is an

1) Heinrich A. Rommen, The Natural Law, p.175.

2) Paul Siweck, S.J., The Philosophy of Evil, The Ronald Press Company, New York, 1951, p.15.

act of the intellect, and obligation must be based on the objective nature of the acts which are the objects of the intellect." 1) The will's act of election is possible because the intellect is capable of diverse conceptions of the good. The causality in election, which pertains essentially to the will, is material when considered in relation to the intellect, and the causality of the will is formal. In order to have an act of will one must understand the object of the will and the value of this object which is to be realized by the will. The act of the will materializes that which ~~is~~ already grasped by the intellect as desirable. The essence and binding force of law is not in the act of will. It is in the nature of things and their objective order. The things are desirable not because we wish them, but we desire them because we understand them to be good. In practical jurisprudence there is no doubt concerning the primacy of the intellect. A criminal is punished not because he willed and performed an unlawful act, but because he did it with the understanding of wrong-doing. Man has to understand not only what his will is after; he has to understand also the consequences of a completed act. In court, therefore, the question is: Is the accused in a position to stand trial? By this we mean that the accused understood the illegal nature of an intended act and that he had free will to perform it or not to perform it; that being attracted, however, by some strong motive, he completed it, but that now, in the moment of the trial, he may be unable to grasp the punitive nature of the court's sentence. If one did a criminal act without understanding that one is doing wrong, one is not responsible for this act.

1) Thomas E. Davitt, S.J., The Nature of Law, p.221, B. Herder Book Co., St. Louis, Mo., and London, W.C., 1951.

If a man is responsible for his act but at the moment of his trial is unable to realize the nature of punishment, he is not in position to stand trial.

Without intellect there cannot be will. Let us now examine the nature of the will, which can be considered as an internal instrument of the person engaged in a concrete activity to attain the result intended by the intellect. The will can be considered as an element in a person's conduct only in so far as we admit the freedom of the will.

We distinguish two kinds of freedom: freedom of spontaneity and freedom of choice. Freedom of spontaneity is active indifference, immunity to extrinsic determination. "Libertas a coactione seu libertas spontaneitatis invenitur in omni activitate ab intrinseco profecta et deest tantum in iis quae fiunt coactione seu impulsu ab extrinseco contra naturalem inclinationem." 1) I think that freedom of spontaneity can be reduced to freedom of choice. If one has a tendency to have freedom from extrinsic necessity, it means one did make a choice of personal autonomy. Freedom of spontaneity is a necessary condition of freedom of choice in pursuing "naturalem inclinationem."

There is no doubt about the existence of freedom of choice in man, unless we deny factual experience and the existence of the extramental world. The will or appetite is rooted in the soul. When this appetite has its root in the knowledge of the senses, it is called sensitive appetite, which is common to men and animals. The intellectual appetite is rooted in intellectual knowledge; it excludes animals. The object of the intellectual

1) Josephus Gredt, O.S.B., *Elementa Philosophiae*, I, p.473, Aristotelico-Thomisticae, Editorial Herder, Barcelona (España), 1951.

appetite or will is good as it is known by the intellect. It is the good in itself essentially distinct from the good found in sensible things. The intellect transcends sensible objects, and the will, enlightened by the intellect, necessarily strives for absolute happiness, which is to be found in the absolute Good, which is God. We necessarily desire God, and yet only by virtue of a free option which ^{it} remains in our power to decline. Even in this necessity of possessing the absolute Good we have free choice. "There is in the human will a certain passive indetermination, from which it emerges sometimes without our wishing it . . . ; and sometimes by our wishing it, by an act of free will; such a potential and passive indetermination is a mark of the weakness of the created being. It does not constitute liberty; it does not exist in the divine will." 1) Maritain excels the primacy of the will to pass from the speculatively practical judgment, incapable of determining efficaciously the act of willing, to a practically-practical judgment. Here he sees the greatest possible resemblance between an act of the person as a person and the creative fiat. It is true, on the practical plane, that our step is not determined by the intellect. On the contrary, the will often determines the intellect. However, in so far as man is a rational being, the general direction of existential movement of person is determined by the intellect. And again, after the intended act is completed, the intellect reflects on it, values it, and decides upon the next accomplishment. The state of personal independence is not an ultimate goal of man. Man, as a contingent being, cannot remain independent and sufficient in himself. This state implies personal

1) Jacques Maritain, Scholasticism and Politics, p.79, Geoffrey Bles: The Century Press, London, 1945.

responsibility. Man has to choose something, and on his choices depends his ultimate end, which can be nothingness or, by virtue of God's grace, eternal beatitude.

Man cannot wish nothing. When he wishes, his will tends necessarily toward good. Between equally obtainable goods man, by direct actions, chooses the one which is better. By possession of this good he is enabled to tend toward the next good, which is still better. Therefore, the natural end of man, if he does not abuse his will, is the ultimate good, Goodness Itself.

IV.---The Natural Law

1. The ontological order
2. The natural law alive among common people
3. The presuppositions of the natural law idea.
4. The necessity of metaphysics
5. Divine authority is decisive

The inorganic world and organic beings which lack intelligence and free will are subject to the laws of nature without being aware of this subjection, without raising any problem about their fate. Man, although having his material roots in the animal kingdom, rises into a superior sphere of action because of his intelligence and free will. Man, however, in so far as he is intelligent and free, transcends only the blind necessity of the animal kingdom and enters a new order of things, to which he has to adjust himself in order to act as a free and intelligent being. This ontological order of things manifests the existence of natural law.

The common man is fully convinced that there is a difference between what is just and what is formally legal. This natural conviction is so strong among the common people that they simply cannot tolerate injustice even if they do not directly suffer from it. Dr. Benes, the late President of Czechoslovakia, in his letter of June 13, 1943, to Stalin says: "U.S.A. neither can nor will prevent the final annexation of the Baltic States by Soviet Russia, but it is necessary to think of world public opinion; it is necessary to find the right way and a good procedure to calm public opinion." 1) We know what happened afterward to Dr. Benes himself and his state. A few years later Cardinal Mindszenty, the Primate of ^{Hungary and} ~~Czechoslovakia~~, said: "Here I stand for defending my God, my Church, and my Nation---for that is my duty. Compared with the sufferings of my compatriots, my fate is without any importance!" 2)

1) H. Valdemars & K. Vicsis, We Accuse the East; We Warn the West, Drintarzeme and Scholar, Germany, 1948., p. 6.

2) Op. cit., p.1.

What is said above indicates the existence of the idea of justice among common men and how wrong are the positivists and politicians who depart from natural justice. How many people behind the "iron curtain" are suffering different persecutions and death because they prefer to be just rather than, by obeying unjust laws, to enjoy material comforts of this life! Are these people foolish? I don't think it is wisdom for one to support the slaughterhouse through one's own moral suicide in order to gain a little time to be physically slaughtered afterwards.

The present condition of our civilization demands that we realize and follow the necessary order based on the nature of things in order to preserve the dignity of human life and life itself. It is not important what things we picture in our imagination; it is important what things and their order are followed in reality. There is the question of natural order, natural law.

The idea of natural law rests on the following presuppositions: 1) 1. A last and profound unity of mankind in human conscience---There exists some unity of human nature through all history, in all nations. 2. The ability of the human intellect to perceive the essential and the unchangeable nature of things. The measure of our knowledge is things in their reality. Even Kant, with his notion of the subjective categories, cannot deny this universal fact. He has to admit--- and he does admit---the existence of objective reality. There is only the question of the knowability of reality as noumena. It seems that Kant, by overstressing the subjective character of our knowledge, is inconsistent with himself. In denying the access of the human mind to objective reality (Ding in

1) Heinrich A. Rommen, The State in Catholic Thought, p.169.

sich) he is talking of the essential nature of the human mind. If he doesn't know things as they are in themselves, how does he know the essential nature of the human mind in other men? Is it not a contradiction to say that the essential (objective) nature of the human mind is to know only the phenomena of things? If my mind grasps external things only as the determinations of my subjective mind, my understanding of the minds of others is also subjective. 3. It is granted that the human mind is able to know the nature of things. The degree of perfection realized in the nature of an existing thing is also the degree of the goodness in this thing. 4. It presupposes the superiority of the intellect. I make an act of the will because my intellect presupposes that the end to be obtained by the act of the will is good. It is not made good by my intellect or will; it can be good or bad according to the true nature of the thing. Intellect precedes an act of the will, and intellect judges the completed act of the will.

In short, these four presuppositions are: 1. unity of conscience in human beings; 2. the ability of the human intellect to perceive the objective nature of things; 3. the ability of the human mind to recognize the nature of things in their objective perfections and ends; 4. superiority of intellect.

We are real persons containing our human nature "in re" and the things around us are real. Our intellect and will do not create the natures of things. By choosing things we adapt them to our own nature destined to attain our ultimate end. "Ideal man" as a seed implanted in us by the Creator must become in the course of our actions a "real man." "The ideal man

represents the consummation of all our natural tendencies taken together. It does not depend on us to create this ideal at our pleasure or to abstain from doing so. Man is born with this ideal as he is born with a certain nature that is especially his own, and his effort in this sense is self-imposed just as his natural inclinations are." 1) Different things are related among themselves. There is an order in the hierarchy of things. There is a tension, a progression of things toward perfection of their individual natures. It is movement toward the ideal or, by abusing our will, away from this ideal. "There is, therefore, no genuine philosophy without metaphysics; and ethics or philosophy of law without metaphysics is without a basis." 2)

The idea of a universal order of being is fundamental for the philosophical foundation of the concept of natural law. From a recognized order of being follows the moral order. Any effort of philosophy and human thought is an effort to discover things as they are and as they are related to one another "in re." Even those who deny the ability of the human mind to penetrate into the noumena of things have to admit the existence of the outside world of phenomena in their objective reality. How can one speak of subjective determinations in respect to the outside world, if he has no idea of objective reality and if he does not understand this idea as the representation of objective reality? If one confines oneself only to the subjective aspect of things, it is an arbitrary choice. Our arbitrary choice is not the measure of things. The things themselves and their real nature contain the force which convince us to judge:

1) Paul Siweck, S.J., The Philosophy of Evil, p.127.

2) Heinrich A. Rommen, The State in Catholic Thought, p. 172.

Was my former act of intellect right or wrong in respect to the object of this act? Is the result obtained by my will good or bad? There can be argument concerning how far the human mind is able to penetrate into the essences of things, but there cannot be any argument concerning the decisive character of real things in respect to our minds. Even most confessed sceptics learn in order to obtain more knowledge. What is the use of learning if there are not objective things which can be known to the intellect of the one learning? What is the meaning of preaching scepticism if one is not sure of the existence of other men listening? If there are no real things around me, neither are there real other men. Whether we are sceptics, relativists, or realists, we are all living in the same objective world, in the same real order of things. In so far as we are intelligent and free beings, our conscience tells us where we are and where we should be in the real order of things.

The universe is order manifesting the eternal law instituted by the divine reason. The eternal law is defined: "ratio divinae sapientiae secundum quod est directiva omnium actuum et motionum." 1) The manifestation of the eternal law in free, rational beings is called the natural law. In the light of reason man recognizes the order as one that ought to be realized by himself. St. Thomas speaks of a participation of all creatures in the divine law. It is a participation according to the natures of creatures. Non-rational beings follow their nature blindly. Creatures, in so far as they are rational and

1) St. Thomas, Summa Theol., I-II, 93, 1.

free, act freely, and therefore the result of their actions is moral reward or punishment. Men are anxious to increase their knowledge, to exercise their rationality more fully. That is why men, by their nature, are inclined to obtain as much knowledge as possible concerning the world they live in, the order of things, and men's destiny in the world. However, as the trees in the forest are of different height, so are men in society. It is the office of the wise man to institute order. It must be an order corresponding to and depending on the divine order of things. This order must be the means supplementing and helping each one in society to reach the ultimate goal of man in the divine order. Man neither comes into this world according to the order established by man, nor does he end in this order. It is terrifying to think of the leaders of society who abuse their position and lead their subordinates away from the divine order. These leaders take on themselves all responsibility for those who are deceived by them. One day those leaders also have to leave behind the legal order established by them and enter a new order, where they are not leaders any more but subjects of the higher authority.

"The natural law is the supreme standard for all human acts. Every human authority is subject to it. No human authority can demand obedience against it. All human authority remains such only so far as its commands do not contradict natural law. Both the subject and the authority are subordinated to natural law." 1)

This must be maintained because of the notion of higher authority than the human lawgiver. Man cannot excuse

1) Heinrich A. Rommen, The State in Catholic Thought, p.182.

himself by following the human authority which commands something in contradiction to the higher order of things. Man naturally chooses things which he understands to be the best for him. If man understands that a command of human authority is against the authority of divine order, he has to choose the more genuine authority. The ultimate end is decisive; the ultimate authority is to be obeyed.

Those who deny the existence of natural law and the knowability of objective reality, and who yet impose their own rules upon others, are contradicting themselves. If man is unable to know objective reality, how can the legal system be known to those who did not create this system?

V.---The Content of Natural Law.

1. In the nature of things.
2. The self-evident moral principles.
3. Natural tendency and experience.
4. Moral consciousness.
5. The natural law is active.

The content of natural law is contained in the nature of things. God did not create the world and afterwards impose on it extrinsic constraint. Natural law is the very nature of things. According to this nature, things begin to exist, act and after completion of their purpose pass away. How is the world possible, and how did it become actual? It is because of the Causa Prima. Creatures act according to their own nature as *causae primae*. When the natural sciences investigate the laws of nature, they concentrate on discovering properties and the natures of things. The physical laws are there whether they are discovered by men or not. The same principle can be applied in discovering natural law in man.

"The content of natural law is the sum total of the moral principles which are directly evident or derived from such self-evident principles by way of reasoning on the ground of individual experience or scientific analysis of reality." 1) I think it would be enlightening to confront this statement with the principle which may be worded: To no one is given anything by nature which is not needed by the one to exercise its existence and to reach its proper end; by exercise and proper use we increase our abilities, and by not using them we lose them. In our complicated modern society there is great need for a stable, just order, which can be established only by recognition of the natural law. However, for a long time our modern society has not been using the natural law as a standard and measure for social structure. The adherence to natural law by common people is very often considered as an impediment to the progress of social

1) J. Messner, Social Ethics, p.58.

development. Individuals are influenced very much by environment. It therefore happens that people who really believe in the existence of objective order in things lose sight of the natural law in their practical activities. The natural law must be revered, known and experienced by individuals in the strength of the faith and personal responsibility. Credo ut intelligam; intelligo ut credam. The natural law of human conduct is correspondence with man's existential ends. Natural law is for man that which the essential reality of his nature demands from him and in which his nature finds fulfillment.

Every man is striving for good. There are as many goods as there are drives to be satisfied. Each good must be related to the whole of the self and not alone to individual drives and impulses. The valuation of the various goods corresponding to the impulses finds place in the moral order. Man feels the necessity of subordination of all his impulses in the unity of moral order on which he recognizes the dependence of his whole person.

In treating the question of morality, the substance of the problem is the true reality of man, the perfection of human nature in its essential functions. The tools to be employed by man in the journey from the point where he stands to his ultimate end are intellect and will. The ~~xxx~~ attainment of the ultimate end is at the same time the attainment of ultimate happiness. It is the state of true reality intended by human nature at the very beginning of man's existence destined for fulfillment at the end. *Ens et bonum convertuntur.* "Bonum autem

et malum dicitur per respectum ad finem." 1) The principle, "Finis coronat opus," has the greatest importance in its application to the social sphere. Nothing that is morally wrong can be economically or politically right. All social systems and institutions have to stand the test of the ends ordained in essential reality, and ultimately of the existential human ends.

Natural law is not only an object of the speculative intellect. As physical laws can be verified by experiment in the laboratory, so every man experiences the existence of natural law within himself. Many men, misled by false conceptions, seek happiness outside the sphere of goods and values leading to the existential ends. They find no meaning in life. They attempt to make life bearable by escaping from self. However, the trivialities of existence, the engagement of external excitements, cannot satisfy men. Voltaire, that favourite of fortune and nature, said: "Happiness is but a dream; suffering is a reality. I have been experiencing it for eighty years. I do not know of anything to do except resign myself to it and remember that flies are born to be eaten up by spiders and men to be eaten up by grief." 1) On the other hand, we know many men who are not favoured by fortune or nature but who nevertheless are living a life of deep happiness. In some penitentiary institutions a special punishment is used to break down disobedience of convicts. This method consists in the employment of convicts in a purposeless job. For example, they have to carry sand from one place to another and then carry the same sand back to its former place. Man seeks a purpose in each of his actions and he seeks the purpose of his life. In the course of his life man has to leave

1) Paul Siweck, S.J., The Philosophy of Evil, p. 155.

behind many things; he even has to forsake his lesser self in order to attain to his higher self. The meanings of different actions of the person are subordinated to the progress of the person itself. This progress can take place only on the road paved by natural law.

Not only in personal life, but also in the social sphere, man experiences the existence of natural law. It is true that this social experience becomes apparent over a longer period than personal experience because the social bodies have a longer life-time. In history books we find many good examples. Many strong nations have declined in their progress and perished because they departed from natural law. There is a similarity between the physical laws and natural law. In order to do something we have to know first what its possibilities are and what value the attained end will have in further activities. We cannot arbitrarily stick and keep together things which naturally do not fit each other. We cannot keep and enjoy things which naturally do not fit in the course of our human destiny toward the ultimate end. A good thing is good because it objectively contains good qualities fitting us and not because our imagination pictures it as good. We cannot convince real things in their actions, but the real nature of things convinces us; are we right or wrong in our judgment about them? Evil cannot become a permanent reality. The lack of fulfillment of being is lasting only when we have chosen the wrong things. Franz von Baader said: "Only that is not to be (is prohibited) which ultimately cannot be." 1)

When we consider the different movements in our modern society,

1) J. Messner, Social Ethics, p.48.

we can be sure that those social ends intended by Communism, which is contradictory to human nature, cannot succeed. It is possible that Communism can overcome all the other social forms, but it cannot rule for a very long time. Communism is not reality; yet many people are falsely convinced. In 1933 Stalin, answering a letter of comrade Ivanoff, said that in Soviet Russia there is not yet a Communistic social order, that there is only a continuous revolution toward the Communistic order, which is possible only in the whole world or nowhere. The real striving force of Communism is: 1) the employment of man's natural desire for happiness, 2) the insufficiency of the capitalistic order for satisfying man, 3) the sacrifice of the present for the future. Communism is a kind of religion without God. Without recognition of true religion and the natural order of things, it became blind, cruel, and disastrous for man. The true Communists are potentially saints. The devils are turned angels. As devils can act only so long as there are good things to be destroyed, so atheistic Communists can work only for destruction.

However---nullum malum sine bono est. In the present situation the men of Christian civilization are forced: 1) to be aware of their real happiness, 2) to make all possible effort for the realization of justice and charity in society, 3) in the light of man's destiny and ultimate end to sacrifice that which is of less value to that which is of higher significance.

The substance of natural law is manifested in our moral consciousness. There is a similarity between our moral consciousness and the speculative mind. As the mind uses the principle of contradiction in deciding between two mutually

contradictory judgments, so the moral consciousness knows that two mutually contradictory acts cannot both be right. Moral principles are known a priori. However, like every human faculty, moral consciousness gets its development and strength through training in the proper social environment. If man acts according to his natural inclination to know the truth and to act rightly, and if he is not misled by the abused authority of others whom he trusts, he has moral security of acting rightly. The fundamental moral truth is self-evident: Good must be done, and evil must be avoided; preserve moderation and avoid extremes; do not do to others what you do not wish them to do to you; contracts must be fulfilled; God must be honoured. The Decalogue covers the derivative principles of the general principles of moral conduct. The progress of civilization in its complexity demands that the more remote principles be applied to the detailed situations of social life. The majority of people are unable any further to grasp the totality of the social order as it is and as it should be. Philosophy and science are increasingly called to investigate reality, to deduce moral rules. True authority in social relations is needed more and more.

To my mind, in the sphere of social authority, the root of the disaster of our modern society is lying. How can anyone be an authority for others if he does not recognize authority over himself? Of what moral support can one be to others if one claims that there is not an objective reality or, at least, does not know it? There is no answer for a man asking advice. An honest, simple man is perfectly sure of an objective difference

in effect between two opposite possible actions. He needs help, which cannot be given to him. He is even discouraged in his natural inclination toward truth. Why look for truth if a learned man says that it cannot be found? Of what authority can those be who claim that good is that which one finds useful? What is useful for me in regard to my personal development? The man who asks is left in blindness and to chance. People are asking these questions, and with the increase in the complexity of society, an authoritative answer is inescapable. The Communists claim that they know the end of society and the duties of man, and therein lies their strength. They are consistent in their program and its practical application. We know their end cannot be achieved; their method is cruel and repugnant to human nature. Many, however, do not know this and are deceived. Christians, who realize this modern tragedy, have the duty of activating all their abilities in demonstrating what is right for man to do. Modern liberals must be alarmed: does not their empty and purposeless liberalism end in the darkness of slavery?

It is clear that our modern society, which to some extent embraces the whole world, is in need of generally recognized natural order. There is no need to invent this order. This order is to be found and experienced in the nature of man, as well as in his relations to his fellow man and to God. Christianity originated our culture, which now needs the restoration of Christian moral principles in society in order to save it. Many are asking, "Is Christianity really going to be replaced by something else? Christianity never will be replaced. Only

Christians who in practice are not Christians may be replaced. Father Lombardo, who is preaching in many countries and converting people to Christian practices and social justice, has good reason to predict a wonderful rebirth of Christendom. This reason is self-evident: people need not only to be called Christians, but to be Christians in the true sense. If the people do not succeed in this, this generation will perish. Atheists, however, finding themselves victorious but realizing nevertheless that happiness cannot be established without the recognition of natural law and God, will turn their vital desires in the right direction---to the true religion.

VI.---The Revival of Natural Law

1. The changeable social order.
2. Stammler's approach to natural law.
3. The sociological and normative order.
4. Material and formal justice.
5. No personal liberty without natural law.
6. Soviet Russia.
7. The Nuremberg trial.
8. Slow progress.

Positivism can dominate in the science of jurisprudence as long as there is a stable social order based on the tradition established in the long run of undisturbed social development. In this state the natural law does not disappear; it just retreats from the focused attention of men. The natural law is still there; it works unnoticed. In times of social insecurity, when the legal order is questioned, the idea of natural law reappears in man's consciousness with all its importance. If the question arises of whether this or that legal order must be retained or changed, the standard for the decision, the unwritten law, must be found.

The positivists of the last part of the nineteenth century were forced to find some measurement for positive law. Stammler distinguishes between the form and the content of law---in the Kantian sense, of course. "Form" or formal means the same as "conditioning." Stammler asks under what conditions positive law can be true law. Law is a "conditioning and determining form" of social life as matter. We might ask Stammler what he means by "social life." How is it possible to have "social life," i.e. the unity of persons, without the constant and necessary element of their unification? We can expect the answer that every "social life," as matter, has its formal "conditioning" element. If between matter and form there is inseparable union and interrelated dependence, why is there no equilibrium? Positive law is never stable. This "social life," which changes the "conditioning" element, must have some natural formal element in order to exist and cause the change

of the formal "conditioning." In other words, the mutability of the formal positive law requires something more stable, which, as such, remains at least in the process of this mutability.

However, Stammler's doctrine of law attains to contents; these are the "social ideal" of the community of "freely willing men." Naturally, we may ask: What is the "social ideal"? How can we know it? What element makes "freely willing men," as different individuals, at the same time desire a common object? If the "freely willing men" of the community do not agree in their object, how can the community be maintained? Stammler says that the free will of men must be measured by "right"; the community of freely willing men reject what is not right, as slavery, polygamy, despotism, etc. Stammler is very close to the idea of natural law; only the Kantian philosophical pre-conception prevented him from taking the final step into the doctrine of natural law.

Jellinek makes a distinction between legal theory and social theory. The legal theory is constructed along positivist lines. The legal theory has recourse to sociology, where the idea of unalterable norms at times breaks through. Professor Sinaiski (at the University of Riga until 1944) distinguishes between factual society and normative society. Normative society is a codified body of actually existing positive law which establishes an order for factual or sociological society. Here again the question of the norms underlying the positive legal order is inescapable.

The codes of positive law often contain as normative principles the expressions: good faith, good morals, etc. The Latvian

Criminal and Civil Process Codes threaten with punishment the judge who refuses to hand down a decision on the plea that the law is silent on the matter. He has to make the decision in good faith according to his conscience. We distinguish between formal justice and material justice. When it happens that positive law which does not agree with the natural law is applied in a concrete case, we say: It is right formally but not materially; ultimately we feel it is wrong.

The present situation of our civilization especially presses on man's conscience to recognize and enforce the natural law. What kind of conscience must a positivist have in saying that the legal order---e.g. in Soviet Russia---is right? A foundation of international law is impossible according to the positivist doctrine because an international lawmaker is wanting. However, the circumstances demand the recognition of natural law. Even totalitarian governments are forced to justify their laws by recourse to the term, "natural law"---of course in an abused sense. They use the terms, "democracy" ("people's democracy"---in order to appear more noble), "natural law," "natural rights of the nation." Thus it happens that we use the same terms but have in mind different and often opposite meanings. The positivist denial of natural law is very much responsible for the totalitarian regimes. If there is no ontological oughtness rooted in the real nature of things, or if we don't know the nature of things, what prevents us from doing what seems pleasing to us? The same method for the same goal is used in the investigation of social phenomena as in the realm of physical sciences, i.e. to discover the laws of nature and to use them as freely and conveniently as possible.

In this manner, man himself is treated as a physical phenomenon and is used as an object by another who has political power.

" . . . there are no personal liberties of the individual which fall outside the realm of the state and which must be respected by the state . . . The constitution of the Reich is not based upon a system of inborn and inalienable rights of the individual." 1) What is the state? There can be only one rational answer: the state is an actual power of the Fuehrer whose will and commands keep his subjects in a social unity. Man succeeded in subjecting the nature and to some extent he succeeded in subjecting himself to the experimentation of the "irrationally" rational man. When all the means at the disposal of the modern state are applied, an individual in the totalitarian state is helpless. He must choose either to live in conformity with the state and often act against his own conscience and personal dignity, or to face persecution and death. Bestiality in Soviet Russia is advanced so far that there is not any respect before death (of course, when the death punishment is applied to others). In 1941 in Riga, Comrade Ponumerenko, in his course of indoctrination (at which I myself was forced to be present), explained how the Communist Party progressed in efficiency and "wisdom." His arguments were: After the revolution of 1917 we simply destroyed our many enemies. Then we discovered that before destroying them we could make use of their physical strength. We put them into concentration camps at hard work. In this way we achieved two objects: we destroyed our enemies, and they did valuable work for us. He mentioned as a special achievement the fact of NEP (New Economical Policy). Shortly after the

1) Ernst R. Huber, Verfassungsrecht des Grossdeutschen Reiches, Hamburg, 1939, p.361.

revolution the government was in a very disastrous situation. The economy was in chaos. The political power, which was not yet established, was threatened. Then Lenin decided to replace the so-called military Communism with NEP. Free competition and free enterprise and market were permitted. Economic security was attained and the revolution was saved. When the Communists felt themselves to be strong enough in their position, they replaced NEP by the so-called revolutionary socialism with the ultimate goal---practical Communism. Comrade Ponumerenko explained how they profited by NEP: 1) the Communist regime was saved, 2) our potential enemies were detected, 3) our labour camps were filled. In the period of free enterprise the Communists listed all the men who were active in the establishment of private business as people with capitalistic tendencies who could not be trusted. After these ambitious men had completed their mission, they were condemned to slow death in the concentration camps. (It was the "gratitude" they received for saving Communism.)

Without God there cannot be natural law; without natural law there is an end to our civilization. Nevertheless the atheistic Communists are consistent and rational in their positivistic conception. If there is no God, no personal responsibility outside society, why not exploit everything that can be exploited in this life? It is a contradiction to be a confessed positivist in the sense of Auguste Comte and to be restrained by the moral order. Men who believe in God are at the stage of childhood according to Comte. To be on the positive stage of human progress, and to act like a child, is an inexcusable position.

Many are looking desperately for just order outside the positive laws of the state. Some authors point to the trial at Nuremberg as an excellent example of the manifestation of natural law. "Be it finally noted that when it comes to the application of the basic requirements of justice in cases where positive law's provisions are lacking to a certain extent, a recourse to the principles of natural law is unavoidable, thus creating a precedent and new juridical rules. That is what happened, in a remarkable manner, with the epoch-making Nazi war crimes trial in Nuremberg." 1/ This fact indicates two things: Men are conscious of 1) the insufficiency of positive law, 2) the primacy of material justice contained in natural law. However, we cannot be too optimistic about this progress. There are the questions: 1) Why did not the other states officially condemn Nazism as soon as it took over the German government in 1933 and began to commit crimes against humanity? 2) What kind of justice is it? Soviet Russia took a chair among the judges to represent natural justice. Soviet Russia's leaders, as the more cynical and more cold-blooded and with the longer record, should have been judged first. Where were those judges when Pope Pius XI issued the encyclical, "Mit Brennender Sorge" (1937)? It is easy to proclaim the existence of rights when someone sees profit in it. We no longer remember the famous Roman principle: Vivat justitia, pereat mundus.

Most recently a United States congressional committee completed investigation of the slaughtering of Polish army officers in the forest of Katyna. The evidence was that this was the deed of Communists. When the United States asked the

1) Jacques Maritain, Man and the State, p.95 (footnote), The University of Chicago Press, Chicago, Illinois, 1951.

Soviet Government of Russia what they had to say on their behalf, the answer was: We finished our investigation in 1945 and proved that this was the deed of the Nazis, and you did not object to our findings.

Unquestionably there is marked progress toward natural justice. This progress, however, is slow yet because the basis for the moral order, the true religion in practice, is not generally realized. "Man must be made to understand that the mechanical transformations he has introduced in his environment and his adaptation to them will mean either progress or ruin according to whether or not they are accompanied by a correlative improvement in his moral attitude." 1) Human evolution depends above all on the progress of morality. The moral code has not varied for ages. It cannot be perfected; it is, or it is not. In the course of history there were abuses of moral principles. However---ab abusu ad usum non valet consequentia. . The moral rules do not make mistakes; it is man who does. These rules are invariable: their progress consists only in their diffusion. Now there is the duty of morally conscious men to spread these ideas and to engrave them in the hearts of others."Man can aspire to joys higher than those of his animal ancestors, and men who are convinced of the contrary---or who pretend to be convinced---are to be pitied, if they are simple citizens, and to be dreaded, if they are leaders. They work against evolution, against the divine will; they do evil." 2)

1) Lecomte du Nouy, Human Destiny, Longmans, Green and Co., New York, London, Toronto, 1947, p.139.

2) Lecomte du Nouy, Human Destiny, p. 147.

VII.---The Rights of the Human Person.

1. The natural law as a basis.
2. The irrational element in man.
3. Jus gentium.
4. In positive law.
5. Professor Gettell's position.
6. The separation of positive law from moral conscience.
7. The moral order decisive.
8. The historical approach.
9. Man animal sociale.
10. Plato.
11. Aristotle.
12. The Middle Ages.
13. The stress of personal liberty.
14. Bonum ultimum.

In the preceding chapters we discussed the problem of justification of the positive law. All scientists interested in the matter cannot avoid this problem. Those who deny the existence of natural law are given a good chance to see the consequences of their doctrine in the totalitarian regimes. After this bitter experience of despotism we can face the future either with despair or with hope. And so long as we want to live we must have hope. Hope in the social sphere lies only in the recognition of natural law. If there is no natural law we cannot speak of the rights of the human person. In the latter case we may enjoy only the concessions of a powerful Leviathan.

Natural law binds every person, and this universal duty secures to us our fundamental rights. It is because we belong to the family of creatures placed by God's wisdom in an order suitable for each species to reach its proper end. Man, as the being sharing in spiritual nature, must have the right to pursue his ultimate end, which is outside civil authority.

Natural law cannot be considered as a completely detailed code applicable a priori to all circumstances of social life. The idea of natural law impresses upon our conscience the general direction of our destiny. Many things are left undetermined by natural law. These things must be determined by the free initiative of human reason. Nevertheless, if man wishes to enjoy his freedom, he must exercise it, keeping in mind the progress toward the ultimate end. One act of a person must be subordinated to the next. If man claims to be rational, all his actions must have a rational order befitting

the actor. If man wants to be happy, he himself, transformed by his actions, must conform to the objective order leading to his ultimate end.

Our definition of man is: animal rationale. However, our rationality is a changing element. Infants are not actually rational beings. No one can rightly say that he has nothing more to learn. The first principle of moral law is: Do good and avoid evil. It is the principle for those who exercise their reason. Man begins his life with the principle: Do. He exists and acts unconscious of what he is doing. This principle, "do," follows the whole course of the individual's life. We must do good and at the same time strive to do better. We cannot stop because time does not stop. The permanent personal judge is our conscience. Our reason is the bridge between the conscience and trustworthy human authority ultimately resting upon divine authority.

In the long run of history people recognized the validity of some normative principles applicable to every man and every nation. These principles, which are intermediary between natural law and positive law, are called: jus gentium, or the law of nations. The law of nations is conclusions derived from the principles of natural law. "The only way to realize the inner consistency of all that, and correctly to grasp the Thomistic distinction between natural law and jus gentium, is to understand that a precept which is like a conclusion derived from a principle of natural law, but which in actual fact is known through inclination, not through rational deduction, is part of natural law; but that a precept which is known through rational deduction, and as a conclusion conceptually inferred

from a principle of natural law, is part of jus gentium." 1) According to St. Thomas jus gentium is more connected with positive law (Sum. Theol. I-II.95.4), because it is proximately based, not on ~~natura~~ natural inclination but on man's reason. For another reason also jus gentium cannot be considered as an indisputable basis of positive law. Jus gentium represents an achievement of humanity in the past. We believe in human progress. Jus gentium can be taken into account only as the measurement of our progress or regress.

As a prolongation and extension of natural law, there are the laws dominating in a concrete political society. These laws are called positive laws. Here we are entering the field of the most acute tension in our modern society.

Professor Gettell says: "Accordingly, no legal restriction can be placed on the lawmaking authority of the state, and, conversely, no authority except the state can create law . . . Only those rules which the state creates or which it recognizes and enforces become law." 2) This conception of law seems arbitrary and positivistic. He asserts that "the laws of God, the fundamental principles of justice which are embodied in natural law or which result from the social nature of man" are not laws (op. cit. p.167). According to him, the only source of law and sanction is the state. "Whether one drives on the right or the left side of the street involves no moral issue . . . Some laws may even offend the moral sense of many persons and be considered by them unjust and undesirable. Laws permitting amusements on the Sabbath or legalizing prize fights are exampl

1) Jacques Maritan, Man and the State, p. 98 (note).

2) Raymond Garfield Gettell, Political Science, Ginn and Company Boston, 1949, p. 167.

There is, therefore, a legal conscience as well as a moral conscience, and the two do not always coincide." 1) Arguments like these we can find in every book of the school of positivist law. There is a tendency to consider the moral conscience as a remnant of an undeveloped man. "Whether one drives on the right or the left side of the street" is an indifferent fact both in regard to the moral conscience and in regard to the duty of the state authority. In this matter the state is free to decide. When the state has made the decision, each citizen is bound by moral conscience to observe this rule because unified order in this matter is necessary. The second example about the Sabbath is simply confusion of justice and charity. If I were ordered by the state to attend places of amusement against my moral duties, an injustice would be done me. If there is permission only, my moral rights are not impaired. My fight against this permission would be based on charity because I consider that the duty of the state consists not only in the maintenance of citizens in the status quo but also in the care of their progress. Positive laws, in so far as they are laws, must always be binding in moral conscience. Every positive law must be binding not only on the conscience of the subjects but also on the conscience of the lawmakers. Only in this conception can we see the distinction between a band of gangsters and an army or a state (St. Augustine).

Modern theories of law are trying to separate positive law from moral conscience. The results are evident. Ambitious men who have managed to accumulate fortunes by unlawful means and who have escaped legal sanctions, are by many considered as heroes, as examples to be followed. Man can successfully develop

1) Raymond Garfield Gettell, Political Science, p.187.

only in favourable circumstances. In our modern society these circumstances are often denied. Man wants to be wise; he imitates others; he is looking for better examples. If the learned men, the leaders of the state, are acting without any respect for moral conscience, the moral conscience of an individual, instead of progressing, falls into regress. Thus man becomes "free." He can do everything he likes. The only consideration to be taken into account---if an intended act is legally unlawful---is how to escape legal punishment; and there can be three chances: 1) The corpus delicti may not be discovered. 2) If the corpus delicti is discovered, the criminal may not be found. 3) If the criminal is found, the crime may not be proved to have been committed by him. According to positivist theories of law, there is nothing wrong when one is lucky enough to escape due punishment.

Concerning conscience in the legal order, it may be objected that we don't know the conscience of others. It is true that we don't know it directly, but we know it nevertheless by our own individual experience and by the fact that all men have the same essential nature. It is a universally recognized principle that man is responsible for his deeds only in so far as he is conscious of his act as wrong. The state has abandoned investigation into the conscience and thoughts of the individual in so far as these internal dispositions are not materialized in external facts, not because these internal dispositions are unimportant, but because these internal facts are hard to control.

The rules of the state are dead letters if they are considered only as mechanical necessities. These rules must be inspired by the spirit of material justice with the purpose in mind of the development of individuals. The rules of the state have to be considered as the external landmarks where the subjects of law and the authors of law meet. Citizens have to obey the law in realizing its binding force in conscience and in trusting the authors of law. The lawmakers are obliged in conscience to create a social order and to encourage the citizens in the development of their human dignity. There are not two separate orders in human progress, one moral and the other legal. There is only one line on the road of progress, and this is a moral one. The order represented in positive law is just an expression of the point actually reached by society as a whole. When we study the various codes of a certain nation through centuries, we get a very instructive notion of human development. In these studies we have to keep in mind that human progress does not always represent a straight line. Progress is often marred by regress. Another important condition is to be at a sufficient historical distance from a social phenomenon to be examined. Very interesting are the criminal codes of the German states before Germany was unified. These codes in their replacements in the course of time show two characteristics:

- 1) The field of social phenomena under the regulations of the code increases. This means that the phenomena which were not mentioned in the previous code are dealt with in the following one.
- 2) The severity of sanctions decreases. In the earliest codes almost every crime was followed by capital punishment.

The varieties of capital punishment were used according to the gravity of the crime. Death by the sword was considered the noblest form of capital punishment. Death by hanging or drowning was considered shameful. In the case of especially grave crime the victim was tortured before execution by a shameful death.

If we draw two lines based on these observed facts and if we prolong these lines representing progress, we can conclude that the ideal theoretically to be reached in the course of progress is: 1) Every human act is right or wrong. 2) There is no punishment inflicted by other men, and ultimately there is no need of positive law any more. It is true that we cannot expect such a perfect state of social development of society as a whole, at least in the prospective future. However, these observations show that our direction of progress is on the moral plane and that progress itself is connected with the progress of our conscience. If the system of positive law is based on natural law, and if this system on the line of natural progress is not placed too close to factual society and not too remote from it, the moral conscience of the majority of individuals coincides with the norms expressed in the actual system of positive law. The aim of an individual in society is not only to obey the prescripts of the positive law, but to transcend the level of moral standards laid down by this positive law. They often know very little about the actual norms of positive law, but, nevertheless, they are good citizens. They prepare the new grounds for the advanced system of positive law.

There is no doubt that our modern society entered a blind street. In some countries in the name of progress there is a remarkable regress. In the name of justice systems of terrible injustice are imposed upon the people. It is because man discovered that there is nothing to be discovered in the nature of things. Now man has to experience the consequences of this "discovery."

Here again, a very instructive object of study is the progress of the juridical process in the German states. All through the centuries there is an unchangeable principle: *Bin ich schuldig oder nicht, weiss niemand als Gott und ich* (Am I guilty or not, no one knows except God and myself.). The problem was not in the principle itself---no one doubted its truth; there were only different methods of practical application of this principle. In the earliest stage there was made every attempt to discover a sign of God's judgment. It was believed that God, in every case, shows a sign which must be discovered to make the judgment of a judge agree with the judgment of God. For example, when one accused of a crime was brought before the judge, the judge determined what sign was to manifest the will of God: e.g. if a white horse steps with the right foot first over the sword laid down on the road, the accused is not guilty. If two persons accuse each other in inflicted injustice, the judge determines the kind of test which is to show who of the two is right: e.g. both to be tested are kept for some time under water, or they have to keep in their hands for a determined period a piece of white-hot iron. After the test, the one who is less injured is right and the other one is guilty. There

is the historical foundation of the duel, which takes place even in our modern society in some circles of "aristocracy."

In the course of history man realized that the sign of God's will must be manifested in man's conscience. Witnesses sworn by the priest are considered as a reliable source of truth: Durch die zwei Zeugen Mund wird die Sache kund. (By the mouth of two witnesses the matter is evident.) In this manner the formal juridical process developed: Nihil in iudicio iudicis quod non est in actibus. (Nothing in the judgment of a judge which is not contained in the files collected in the case.)

In all these methods of finding truth in a court-room there is one leading idea---the desire to discover God's will. At the same time, when different methods were employed to discover the truth without any regard to the conscience of the one accused, there were also marked tendencies to pay attention to one's conscience concerning his deed under the consideration. There is the initiation of the inquisitive juridical process, which by impartial jurists is considered as progress. However, we must not forget that every true idea can be used and abused.

The fundamental idea that there is a God, that His justice in created things must be discovered, was the leading idea in the progress of society. The methods were sought, valuated and replaced with this fundamental idea in the minds of those who felt responsibility concerning the progress of society. In the history of social development we see fluctuations in different directions. Because the social units were smaller in size and less dependent on one another, the danger of a wrong social idea was comparatively small. It was easier to regain equilibrium

and to continue progress on the true road. In our period of history we are facing the fact that the social body increases in size and intensity. If the leading ideas in our society are wrong, the disaster extends to millions of people. Man, encouraged by his management of the laws of nature, became too proud. In his obscurity he does not see the unchangeable laws of his own destiny. The tragedy of our time resembles the tragedy in heaven when Lucifer was born.

The person requires to be a member of a society. He needs society because, according to his nature, he can develop his personality only by being open to the communications of other persons. By means of knowledge and love the person is helped by others and helps others. Society furnishes the person with the conditions of existence and development. Man cannot achieve his fullness alone. He depends upon the aid of his fellows. This aid consists not only in the receiving of essential material goods but also in the attainment of a certain degree of elevation, in knowledge and perfection of moral life. Because man is animal rationale, he is also animal sociale. Through the help of education and the co-operation of other men, he tends toward his human dignity.

The end of society is its common good. It is the good of society as a whole and at the same time the good of each person who constitutes society. In an ideal society there is perfect agreement between the good of the society and the good of each individual belonging to this society. Each person is striving for good. For each creature there is a natural order in this striving and the end to be achieved. Man's most important tool

in his striving is intelligence. If each one in society were conscious of his natural obligations, there would be no necessity to secure the rights of an individual against the community. Every person acts according to his reason and authority. Man who has some authority acts according to his reason, and still higher authority which ultimately rests on the authority of God as He is revealed in creatures and by revelation. As there is a natural order of things in nature, there should be observed a natural order in the hierarchy of society. This consideration is a good foundation for Plato's doctrine that the individual is determined by his subordination under the purposes of the whole community. Each individual, according to his talents, is incorporated in some particular group, and each group and every individual, in the harmonious co-operation of all its parts, form the well-being of each individual and of the state as a whole. Plato imposes drastic limitations on the individual in favour of the state. However, he requires that the state make important contributions to the good of the individual. The state is treated as a preliminary means for man's transcendental end, which consists in his happiness both here and in the other world.

Aristotle's viewpoint is more in accordance with the practical life. He criticizes Plato: ". . . Plato in the Republic . . . desires to abolish private property and the family . . . He wishes to make all his citizens absolutely alike; but the differentiation of functions is a law of nature. There can be too much unity in a state . . . The abolition of property will produce, not remove, dissension. Communism of wives and children will destroy natural affection . . . The advantages to be expected

from communism of property would be better secured if private property were used in a liberal spirit to relieve the wants of others . . . Plato's . . . idea is impracticable." 1)

In the Middle Ages the individual was completely imbedded in the group; no question arose about the antagonistic attitude of the individual with respect to the community. Man was formed by the community spirit of the Church in a determined relationship to his neighbour, to civil laws, and to the head of the state. But even in the Middle Ages tension developed between the individual and the state. Individualism reached maturity in the Renaissance and the liberalist Enlightenment. This liberalism, in the economic sphere, developed into a system where the strongest in the name of liberty suppressed the weaker. It was the liberty of the minority to exploit the majority. This caused the Communist movement.

Man is by his nature a member of a community. In a perfect society based on the practice of justice and charity, there is no place for the tension between the community and its members. But, because of man's nature, impaired by original sin, he often falls back a step or two on the ladder toward perfection. Many men who are in possession of authority abuse their authority. Therefore we have to insist on the liberty of individuals rather than on the liberty of the officials of the state in so far as those who have political power are not acting in accordance with natural law and the order revealed by God.

Man is related to the community as a part is to the whole, the imperfect to the perfect. Maritain distinguishes two aspects of man---the aspect of individuality and the aspect of personality. 2)

1) Aristotle's Politics, translated by Benjamin Jowett, the Modern Library, New York, 1943, p.331

2) Jacques Maritain, Scholasticism and Politics, p. 45.

In the aspect of individuality man is only a part of the community. In the aspect of personality, man, because of his spiritual soul, transcends temporal society. "And in so far as he is a material individuality, he enters into society as a part whose good is inferior to the good of the whole; nevertheless, this good itself of the whole, in order to be what it is---that is to say, superior to the private good---must necessarily profit individual persons and be redistributed to them, in respect of their rights and their dignity." 1)

As there is an ontological order of goods which come the Good in Itself and which tend toward this Good in Itself, there is also a proper order of society which unites individuals in their strivings toward the ultimate Good. "St. Thomas assigns to the religious community the same religious last end as to the individual. With all clarity he says that not only the individual but the community will attain the enjoyment of the vision of God." 2) When the different communities where an individual member takes part correspond to the natural "should be" order, there cannot be opposition between bonum privatum and bonum commune. These two kinds of bonum are united in the bonum ultimum. Bonum privatum cannot be considered as good completely inclosed in the sphere of an individual. Bonum privatum is the good attained in communication with other beings. In the case of man, this private good generally is obtained and maintained by the sharing in the common good of society. On the other hand, there are as many bona communia as there are communities. Ultimately there cannot be bonum privatum without bonum commune and vice versa.

1) Jacques Maritain, Scholasticism and Politics, p. 58.

2) Hans Meyer, The Philosophy of St. Thomas Aquinas, B. Herder Book Co., St. Louis, Mo., 1948, p.444.

However, society as such does not act. The actors are every member of society, each one according to his position in the community. The individual, as a member of society, has his personal duties toward the various forms of the community. He has personal responsibility. If man acts freely, the results of his actions are attributed to him personally. Therefore the individual man cannot be dissolved in the community. Man, as a rational creature, resembles God to some degree. He is placed directly in the providence of God. Man as a part of the community in regard to his spiritual soul is in itself an open whole toward his ultimate destiny. "A single human soul is of more worth than the whole universe of bodies and material goods. There is nothing above the human soul---except God. In regard to the eternal destiny of the soul, and its supratemporal goods, society exists for each person and is subordinated to it." 1) Man as a spiritual person, a being endowed with reason and free will, capable of self-reflection and self-determination, has a special dignity. He is destined for a supernatural union with God. Man is the image of a particular divine idea. The community itself is only the actualization of a reality contained in the nature of every individual person. Man, with all he is and all he has, is not entirely subordinated to the political community. His relation to the political community does not decide the merit and demerit of his actions. With all he is and has, man is subordinated rather to God. 2) The natural and divine laws defend the rights of the individual person. The community cannot actualize its end, the common good, unless individual men live together and work together. On the other hand, the welfare

1) Jacques Maritain, Scholasticism and Politics, p. 58.

2) St. Thomas, De Reg. Princ., I, 14; Summa Theol. Ia IIae, q.21, a. 4 ad 3.

of the members is rooted in the welfare of the whole. The direction of the will of the virtuous man and the direction of the prescriptions of the laws that aim at the common good are identical. 1) The community and the individual person cannot be made the mere means of each other. In the right social order, adjusted to the natural and divine laws, the community and the individual persons in the mutual relationship are able to attain their own elevation and perfection.

1) St. Thomas, Summa Theol., Ia IIae, q.96, a.5.

VIII.---The Natural Rights of the Civic Person.

1. The right to physical existence.
2. The right to property.
3. The right of physical freedom.
4. The right to work.
5. The right to marry.
6. The right of man as a spiritual person.
7. The natural rights of communities.
8. The right of nations.

No state denies some natural rights of the individual person. Even Soviet Russia, especially at the beginning of the revolution, used as the most attractive slogan proclaiming for each one justice, freedom, equality and charity (brotherhood). However, the fundamental rights of the individual are often denied in practice. Unworthy men who have control over the huge modern state abuse their authority. In our modern society there is a tendency to exercise the authority of the state denying dependence on natural and divine laws. The stress on recognition of natural individual rights is of great importance. We shall enumerate most essential individual rights.

1. The right to physical existence.--- This right is a presupposition for all other rights. This right implies the right to self-defence, the right for personal liberty required for existence. This right demands the minimum for a particular station in life. The right to physical existence has priority over the right to property. In cases of extreme need the natural law permits the person in need to take another's property. The existence of the human person has priority over material goods. Capital punishment is not in opposition to the right to physical existence. If a man freely commits a grave crime, he thereby subject himself to the punishment corresponding to that crime. This resembles suicide.

2. The right to property.---This right consists in the right of possession, the right to earnings, the right of management, disposal and use. The original owner of all property is God. The lower must serve the higher; the imperfect must serve the more perfect. Material goods must serve man in his striving

for spiritual goods. According to this principle the human person can neither give himself nor be forced into slavery. All modern civil codes recognize this principle. The obligations of a contract which impose upon a human person a state of slavery or which can result in imposing some kind of slavery are declared by law to be invalid.

Man is an image of God, and as such he has the right of free disposal of external things. External possessions are the basis for the development of the human personality. Man has to assume responsibility for himself, for his family. He is enabled also to perform works of charity when he is entitled to private property.

"True happiness flows from the possession of wisdom and virtue, and not from the possession of external goods. But a virtuous life must be equipped with external goods, as instruments. These laws hold good of both states and individuals." 1) The possession of private property is fitting in the line of man's striving for ultimate perfection. Man's claim to private property is in conformity with the social order itself. Man will care more for what belongs to him alone. Private property is the basis for a person's individual responsibility in his actions; it is an important factor of personal security and social peace. Private property is based on justice: to each one according to his personal achievements. In order to maintain the social order every individual has to pay taxes according to his income, which it is possible to have and to secure only in the maintaining of social order. Taxes must be sufficient not only to maintain the social order, but also to secure it and exercise works of charity where the individuals are deficient.

1) Aristotle's Politics, p.44.

St. Thomas makes a distinction between the right of acquisition and administration of external things and the right to use them. Contrary to the Roman conception of private property--- *jus ad usum et abusum*---he stresses the point that with respect to the right to use a thing man may look on it not only as his personal possession but also as the property which he is willing to share with those who are in need.

Communists have the principle: from each one according to his ability, to each one according to his services. They intend to reach the principle: from each one according to his ability, to each one according to his needs. They are aware of human nature by which each one has a natural tendency to exercise his personal activities and to secure his own personal integrity by retaining individual liberty. Therefore, Stalin in his writings stresses the necessity of changing human nature. It is an impossible task. How can man change his nature? Man acts according to his nature, and by acting he perfects and completes it. It is impossible to act according to one's nature to destroy it. "Naturam expellas furca, tamen usque recurret." 1)

3. The right of physical freedom.---This right is universally recognized in our Christian civilization. The institution of slavery caused many controversies in earlier times. Slavery may be based only on the ignorance of slaves or on physical force imposed upon them. Even an animal is entitled by nature to depart from its master when it is mistreated. One man cannot be the ultimate end for another. Seneca ascribed the body of the slave to the master but the spirit he considered exempt from this ownership: *homo sacra res hominis*---treat your slaves as you yourselves wish to be treated by your superiors; treat them so that

1) Horace, Epistles, I, X, 24.

they will reverence you and not fear you.

Christianity contributed much to the abandonment of the institution of slavery. This process was slow because of historical inheritance and because the primary aim of the Church is not so much to change social institutions as to take care of man's spiritual soul. On the other hand, we have no reason whatsoever to be proud of our modern achievements in this matter. There is a tendency to exploit masses morally and physically for the worldly benefit of a few. For example, the whole system of Soviet Russia is based on the highly developed institution of slavery. The truce negotiation in Korea concerning the exchange of war prisoners is another example. Communists are denying the right of the individual to decide whether he is willing to return to Communist rule or not.

4. The right to work.---Man has the right and obligation to work. This right to work is the most fundamental right of the individual. Every living being has a strong urge to preserve its own existence. In our society almost everything, as property, belongs to someone. When someone is unfortunately born into a poor family, he has to have work in order to exist and develop. Society must keep open fields of work for those who need the work in order to exist. There is much injustice in so-called capitalistic regimes. If we say, "This is mine; that is yours," and if somebody has nothing to be called his and is nevertheless ordered not to steal, he has the right, based on natural justice, to exist by his work. The social order based on the institution of private property and free competition is unjust if the propertyless individuals are not given the opportunity to exist by their work. If society is unable to supply work, the obligation of the community

is to supply the minimum of goods for sustaining the existence of its needy, unemployed members. Man has a right to work since he has a right to live. The next right in line of importance is the right to demand a just wage.

5. The right to marry.---This right is based on the natural urge to preserve the human species. This right was not denied even to slaves. However, this right is denied in the modern institution of slavery. In Soviet Russia people in the concentration camps don't have the right to marry. This right is not observed even outside labour camps. Very often the husband is separated from the wife, the parents from their children. They have not their own homes, and have little chance of reunion.

To marry is a right but not an obligation. Some ideals cannot be realized in the married state. The choice is left to individuals according to their inclinations, talents and vocations. Marriage is connected with other natural duties and rights. There belongs the right of the parents to take care of the physical and moral development of their children.

6. The rights of man as a spiritual person.---Man is destined to a supernatural end. He has the right to develop his spiritual and moral powers. Man has both the right and the duty to worship God. He must have freedom of conscience in religious and moral matters. This problem in the course of history has caused many controversies, misunderstandings and abuses. Indeed, conscience cannot be changed by external force. There cannot be a true religion without the inner conviction of the person. External force necessarily creates internal opposition. In our modern times of intensified social interdependence, man is advised and

asked to do many different things. He sometimes finds that these demands are not of any benefit either to himself or to the community. He has acquired the habit of being cautious concerning the admonitions of others. Unfortunately this habit to some extent is active also in religious matters. Many don't understand that the practice of religion is not so much for the benefit of the Church as primarily and essentially for that of the one practising it. Many think that if they are unable to become saints at once they don't try to better themselves. Inner conviction based on the freedom of conscience and personal responsibility is the best foundation for advancement in religious and moral matters.

7. The natural rights of communities.---Communities are based on the social nature of man. Communities are conditioned and founded in the natural law.

The family and the state are unavoidable institutions in the social order. These communities cannot be replaced by each other. Each has its own sphere of rights based on the natural law. Besides these, there are many communities corresponding to the different fields of men's free co-operation. The freedom of association secures the achievements of common interest. It establishes equilibrium in the social order and serves the purposes of justice. Much credit must be given to the labour union movement for its defence of justice for the working man.

The Church, with its special institutions, has an outstanding position among other communities. Its duty---and therefore its right---is to transmit and to vivify the revealed Word of God to men. To fulfill this most important mission the Church has the

right to the religious education and training of the faithful, to establish and to direct institutions and organizations serving the purposes of the Church.

8. The right of nations.---No one can deny that every nation, small or big, has the natural right of self-determination and self-development as an equal member in the family of nations. When we consider how this right is observed in international politics, we must be ashamed concerning our civilization. There is a test problem of the moral conscience of mankind. The only authority in the world is the Pope who consistently raises his voice in defending the rights of man and nations. It seems that until now the interests of free nations have not extended beyond the boundaries of the individual nation. Declarations of the rights of nations are only the means for national purposes. Much is said about peace. Peace must have a foundation, and this foundation can be justice only. There is much talk about charity in international relations and about economic help to underdeveloped regions of the earth. Charity cannot replace justice. Without the restoration of natural rights in international relations there cannot be peace.

The unity of individuals and collaboration among nations can be established only on the recognition of natural law. Commenting on the report that some countries were urging the United States to accede to Red China's demands that all prisoners be exchanged (as cattle on the market, without any consideration of the rights of the human person), the Ensign, in its issue of April 26, 1952, says: "This, if true, is a shocking indictment of those countries and their leaders. It falls far short of what the world has a right to expect of supposedly Christian governments. We're absolutely sure it's not the attitude of any of the Englishmen."

French or Canadians we know." It is a fact that many politicians and responsible leaders of state consider as the highest wisdom to act freely, i. e. with no respect for the natural rights of other nations and foreign human persons. It is surprising to observe how many people who know what to say and have the natural duty to act in the preservation of justice, are calm when the injustice is not inflicted on them but only upon their neighbours.

"Two equally obvious facts, then, are to be noted: first, that there exists a general consciousness of the solidarity of mankind and a desire for international unity, for the pax Christiana or, if you will, the pax humana; secondly, that this unity does not exist in fact." 1)

1) Vladimir Solovyev, Russia and the Universal Church, Geoffrey Bles, London, 1948, p. 12.

IX.---Authority.

1. The different forms of community.
2. The natural subordination.
3. Unity in social order.
4. Society as an organism.
5. Authority and power.
6. The direct basis in eternal law.

We can distinguish different communities in the social order. These communities serve various ends and purposes. ~~These~~ Communities are graded according to graded order of goods and the means employed to achieve these goods. The communities differ from one another not only quantitatively, but also qualitatively. The higher forms of the community are something more than the sum of the lower forms.

The earliest form of the community is the family, which is more necessary than and prior to the state (*homo naturalius est animal conjugale quam politicum*---St. Thomas, in VIII Eth. Nic., 12). Marriage arises from man's nature and develops into the moral sphere of mutual love and assistance among the members of the family. By the union of several families a community is formed which increases the efficiency of the member families. The state is the frame for the perfect economic, spiritual, and moral life of a nation. "The state is the highest form of community and aims at the highest good." 1) St. Thomas considered the state only as the most perfect community for the things that are necessary for life, "*quod bonum rei publicae est praecipuum inter bona humana.*" 2)

The various forms of community grow in hierarchical order. Each form retains its integrity by entering as a component element into the higher form. The state is often compared to a living organism. There is a unity and the general common direction toward common good. If man were only an individual being, he would be solely under the rule of God; otherwise, he would be his own master. But man lives and perfects himself in the community. There is no community without some dominating principles and without authority which co-ordinates all members of the community in accordance with those principles. Each community is incorporated in the higher form

1) Aristotle's Politics, p.31.

2) St. Thomas, In Lib. Pol.I; De reg. princ., I, 1.

of community, and the highest form is incorporated in the order of the universe which is ruled by God. When I say what I can do, what I should, what I have to strive for, I am talking of the natural order of things. An order can be only through subordination, co-ordination and superordination according to the divine precept that the higher in authority and power always governs the lower.

The authority in an order is as the soul of a living organism. It is the power and guiding principle of the unity tending toward an end. St. Thomas distinguishes between two kinds of organisms: the physical organism, in which the individual member lacks independent existence and activity, and the moral organism, in which the members have an independent existence and activity. The community is a moral organism. To take care of the common good is the task of the whole community. St. Thomas says: *ordinare in finem est ejus, cuius est proprius finis*. The power to make laws rests either with the people or with that person who represents the people. Every community must have an authority. Therefore authority, as a necessary element of the community, is based on the natural law. The community as a whole is the seat of its authority, just as the soul is present in an organism. Neither authority nor the soul are created by their organisms. Authority is present in the community because of divinely instituted natural order. St. Thomas favours, as the best form of state government, the constitutional monarchy. This form of government secures unity and the participation of people in government. The most important duty of the state is the defence of the state against external enemies, the establishment

of internal peace, the observance of justice.

The state and civil authority are based on the natural law. The civil authority, as the naturally necessary element of the state, is obliged to carry out its functions according to the principles of natural law, because the authority is not a product of the creation by the one holding it. The civil authority must collaborate with the Church because the citizens cannot be divided. The same person at the same time is a citizen and a person striving for spiritual perfection. The state must promote public morality by positive legislation.

The community is a unit secundum quid, i. e. a unity of order. The individuals may be considered as matter and their unity in the community as form. As in the biological organism, matter is continually changing while form is preserved. However, the individual members of the state are more than matter: they are free rational beings, active and responsible for their individual ends.

The life-time of a state is longer and more stable than that of the citizens. Individual citizens die and new ones are born, but the state remains. The order of the state cannot be arbitrarily imposed by the individuals holding civil authority. The rulers, when they were born, found the state already present, and they have to leave it as a state for others. Order in the state is enduring. It is based on the natural law, exists under a common authority and is born of the natural desire of men for social activity. The state is a guardian and promoter of common good. The individual person must find justice and a favourable ground in the state for the fulfillment of his duties as a citizen and as a person having a spiritual soul.

The state may not be considered as an inorganic thing on which unity may be imposed on many individuals from without. The social structure of the state is an organic unity in which the political, social, and juridical institutions grow.

Individuals are united in the community with one another and for one another. Individuals are members of a whole which, as a working unit, has its being in the members and through the members, but in so far as it is a whole it is above the members. "The common good of the state and the particular good of one person differ not only in degree but by a formal difference. The nature of the common good and the individual good are different just as the nature of the whole is different from the nature of the part." 1) The common good is the justification of the existence of the community. Therefore, there are as many kinds of community as there are kinds of common good. These different kinds of common good must have a natural co-ordination and subordination according to man's nature with respect to man's ultimate end. The state has no right to impede or deny the development of its citizens in worshipping God, in their activities in religious communities. The principle raised after the Reformation---*cujus regis, ejus religio*---is wrong.

The authority of the state has its primary source in the Author of all created things. Maritain distinguishes between authority and power thus: "Authority and power are two different things. Power is the force by means of which you can oblige others to obey you. Authority is the right to direct and command, to be listened to or obeyed by others. Authority requests power. Power without authority is tyranny." 2) Authority comes first; power is justified only in so far as it rests on authority. If authority is obtained before the

1) St. Thomas, Summa Theol., IIa IIae, q.58, a.7 ad 2.

2) Jacques Maritain, Man and the State, p. 126.

exercised power of this authority, it means that the authority is based on natural law. If the power can be exercised only because of authority, it is evident that this power must be determined and directed according to the principles of natural law. Authority as such is independent both of the one holding it and the people subordinated to it. "Ergo auctoritas politica immediate est a Deo a lege aeterna, quatenus immediate a Deo est humana natura naturaliter ad societatem ordinata." 1)

There is a question of importance dealing with the relationship between the people and their rulers: whether authority primarily rests in and springs from the people or whether authority rests in the persons themselves invested with it. ". . . do the people, when they invested certain men with authority, keep their right to self-government and their authority to rule themselves?" 2) To this question Maritain answers yes. The question, and consequently the answer, seems to me ambiguous. How can we talk about the people in a political sense as acting, as having "their authority" already before investing "certain men with authority"? People without authority as a uniting element cannot act. We cannot find in the world people without authority and political authority without people. Political authority cannot be considered either as a simple aggregation of the natural rights of individual persons or as a part of the authority of individuals. The authority of the rulers is that of a new quality.

This conception of political authority does not destroy "democratic philosophy." The people or groups of the people have the right to control and even to oppose their government, not in so far as it exercises their right authority, but in so far as it

1) Josephus Gredt, Elementa Philosophiae Aristotelico-Thomisticae, Vol. II, p.424.

2) Jacques Maritain, Man and the State, p. 129.

abuses its authority. There may be strife of the people against men who do not exercise their authority properly or impose on their subjects power not justified by the authority. Both the citizens and the rulers have to observe their duties based on natural law, molded by customs, traditions, and actual circumstances.

"Then two main points of doctrine, to which our preceding remarks have already alluded, would be clearly brought out. The first relates to the fact that in investing rulers with authority the people lose in no way possession of their basic right to self-government. The second relates to the fact that the representatives of the people are not mere instruments, but rulers invested with real authority, or right to command." 1) It seems to me impossible that the people should transfer some of their rights to rulers ~~and~~ and yet not lose those rights. Maritain says that the teacher does not divest himself of his own science, if his disciple, as a deputy for the teacher, teaches. It is true, but this example is not applicable to explain the relationship between the people and its authority. Here are only two subjects: the people and the rulers. If the people is the teacher, the rulers don't have the science taught, or vice versa.

It is true, the rulers are the representatives of the people and not mere instruments. However, this right to represent and to command is based directly on the eternal law. It does not mean that the rulers are independent of the people and that they can do what they want. They are the servants of the people. They have duties and corresponding rights to provide for the common good of the people. They must love their people, understand its actual state of development, and direct and promote good tendencies.

1) Jacques Maritain, Man and the State, p. 134.

If the rulers do not act according to their duties, they are not rulers but usurpers of their office. In this case the people has a natural right to oppose their rulers.

Democratic machinery is necessary not so much for the distribution of rights and duties among the members of the state as because of the frequent abuses of rights. From this it follows that monarchy does not necessarily mean a bad form of government and that democracy works without mistakes. Harmony in social order consists in the realization of duties and rights manifested in the conscience of each member of the community. Because of human weaknesses and the bad faith of some individuals, the freedom in democratic order provides the necessary conditions for the display of individual interests. In this way some kind of equilibrium is obtained. However, this order is not an ideal one, where the rights of an individual are determined by what he can and the duties by what he can not do in society because of the opposition of others. The rights and duties of individuals cannot be exclusively determined by the stronger groups of society or by the rulers of the state. On the other hand, the rulers, who are supposed to be persons more advanced in virtue, have no right to follow the unjust demands of the majority. Every one, and especially rulers, has to reconcile his conscience with the direct considerations of natural-law principles.

X.---Conclusion.

1. Right or might.
2. Natural law.
3. Common sense.
4. Positive laws based on natural law.
5. Personal responsibility.

The foundation of positive law is the problem of utmost importance. Our modern civilization is based and it grows on the detailed division of labour and the exchange of goods. States are becoming all powerful and citizens are more and more controlled and directed by the state. In this situation there is a persistent question of the justification and foundation of positive law. Has the positive law a quality by which it must be obeyed without any regard to physical enforcement, or is the positive law based on the power of the state and is it to be obeyed because of the threat of punishment? In other words, is it true that right is might?

Many modern jurists believe that the positive law rests on the force of the state. In this conception the positive law loses its meaning. Why, then, are we talking about law? If the positive law is force, then each one is justified in evading the force imposed upon him by others and in trying to subject others. It really would be society with the ruling principles: *Homo hominis lupus est; bellum omnium contra omnes.*

Common people in general are conscious of the existence of natural order and material justice. The rulers who are supposed to be the wisest and best men often work against the tendencies of the common people. Instead of discovering and explaining the natural order of human perfection, they deny this order. We have to draw the limits of arbitrarily exercised human forces. Just law cannot be based on force, nor only on the free competition of interests of the individuals or groups.

The only basis of positive law can be the recognition of natural law. The natural law doctrine is based on the natural order of things. The natural law idea has been elaborated and defended by many outstanding men throughout the centuries.

This idea has special importance in our times. We have to realize that the characteristic of every social law is not only to know the law but to act accordingly. By acting according to our reason we perfect our knowledge. Unfortunately, we often forget the natural law when our interests are not touched directly. If we want to live in peace and order, we have to defend the natural law even when our enemies are benefited by it. The natural law cannot be effective if it remains in theory only. Our time is the time of action.

The modern jurists mentioned in the previous chapters did not succeed in establishing the justification of positive law. They all had preconceived positivistic ideas. Physical phenomena can be explained as facts in their necessary connection and succession. The phenomenon of law is of a peculiar character. It is not fact, but is an "ought to be" norm, by the observance of which social facts must be produced. The ~~physical~~ positive law cannot be explained by the conception and method employed in the investigation of physical phenomena. Petrazycki claimed that law is in man's mind. Man has moral and legal emotions. There is a question without answer: How can I know which of my emotions are moral emotions and which are legal emotions? The human person cannot be divided. Moral emotions cannot oppose legal emotions. The categorical imperative "must" cannot be a foundation of positive law. This imperative is an empty notion. If the ruler imposes on his subjects an unjust law and motivates it by the categorical ~~imperial~~ imperative "must," how can we oppose this law relying on our "must." Which one of the "musts" is right? The categorical imperative of individuals must have an objective foundation outside the minds of individuals. Otherwise we don't have a measurement. There is no

solution in the case of conflict of individual categorical imperatives. We know from experience that some men are not acting according to their moral inclinations. The categorical imperative may be only the effect of the natural necessity which must be examined by reason.

Stammler's notion of the social ideal without admittance of natural law is an empty dream. On what basis can we agree about our common social ideal, and what means have to be employed in attaining this ideal? In order to make progress toward this social ideal we must realize the natural order of things and the real road which we have to follow. If the social ideal is based only on arbitrary judgment, we may be easily led in the opposite direction. A good example is Soviet Russia.

Kelsen's "pure science" of law cannot be an explanation of law. We can explain different laws in their order of a legal system, their historical development and degrees of universality, but we cannot explain the legal system as a whole by this system itself. Kelsen admits meta-legal rules and positive law rules. The meta-legal rules cannot be only of hypothetical value. These rules are determining factors in legislation. Their reason must be inflected in positive laws. If positive laws have binding force, it does not mean that the meta-legal rules cannot have this force. How is it possible that positive laws spring from meta-legal rules and after the establishment of positive law these meta-legal rules have no more binding value? If this is so, the positive law has no more reason to be kept in force.

Duguit's doctrine concerning the rule of needs as supreme principle is no explanation of a legal system. Needs must be valuated and ordained to purposes. Outside the needs there must be

a higher principle of measurement. Social solidarity cannot be obtained without admitting of an objective standard by which individual needs can be measured. If man has duties only, somebody must have the rights. We can admit that in respect to God everyone has duties only. In society, because we have those duties, we have also duties and rights in the relationship among men.

In dealing with the foundation of positive law the right notion of human nature is of decisive importance. It is not a notion which may be pictured or dreamed. It is a disposition of mind concerning man's position in the natural order of things, his right road, in subordination of proximate ends, to reach man's ultimate end. Man is a needy being. He needs society, collaboration with others, and trustworthy authority and guidance. One is more prudent and more advanced in virtue than another. Social stability and peace can be attained only by the realization of natural order and man's objective ultimate end.

Our light is our reason. In so far as we are rational beings, we first must know what to do and not will to do first and afterward see what we have done. It is too late to change the deed. It is true that sometimes in particular circumstances man does not know what to do. However, if the man wants to do what is right he can rely on his conscience, authority, and the revealed Word of God.

Common sense is a good guiding rule. However, if we are dealing with social sciences we must analyze the notion of common sense. It cannot be left blind or simply denied. Common sense is an important factor in society. It is not established by human legislation. Common sense is a reflection of human nature in the ontological order. Metaphysical principles must be applied to throw light on common sense and the whole social order in its unity as

reflecting the unity in nature. Those who deny metaphysics are unable to look for the rational explanation of social order. One phenomenon as a whole cannot be explained by itself.

The content of natural law consists in general principles of human nature directly known by the intellect. The whole Decalogue is a direct derivation from the natural law. Some positive law norms are directly derived from the natural law. These norms have the natural law content, and they are classed among positive laws with respect to its promulgation. Some positive laws are more remote derivations. Only those positive laws are just which accord with the natural order of things. The positive law can command only those things that are in accord with the natural law or are left undetermined by it. As soon as those indifferent things are determined by the positive law, this determination has binding force. Therefore, St. Thomas says that in both the divine and human law some things are commanded because they are good and some are forbidden because they are evil, while some things are good because they are prescribed and evil because they are forbidden. 1)

Just positive laws, both those which are directly derived from the natural law and those which are determined by civil authority, are binding in conscience. Unjust laws are not binding in conscience because of the principle: God is to be obeyed rather than man. Positive law must be in accord with the divine law, the law of nature and of the common welfare.

In our time the recognition of natural law is of special importance. Positive laws or the rulers of states must have an objective standard of measurement. How can we say that Nazi laws and the laws of Soviet Russia are unjust if we do not recur to the

1) St. Thomas, Summa Theol., IIa IIae, q.57, a.2 ad 2f.

laws which are outside human legislation? There is a tendency to revive the natural law not only in its idea, but also in practice. Maritain excels as an example of the practical application of natural law in the Nuremberg trial. I myself am not very optimistic about this case. The idea of natural law by right use can be strengthened and by abuse degraded. The requirements of strict law are: 1) the law must be enforced as soon as it is violated, without any respect to the actual interests; 2) the judges must not be partakers of the crime which they are considering. Those requirements were not fully present in the Nuremberg trial.

If the natural law is not recognized and enforced by necessity of its own, we cannot speak about right and wrong outside the system of positive law. Ultimately, positive law loses its meaning and becomes a force of the strongest. There cannot be two consciences in man opposing or not coinciding with each other. The real destiny of every man is the same. The only difference is how far each individual is on the same road of personal perfection. Some individuals are under the line marked by the system of positive law. The majority of the citizens are above this line, and some persons are very far ahead. The system built by positive laws is for the average people. It contains the minimum of norms which must be observed in order to have community. Those people who don't have a developed morality within their conscience must be forced to the necessary social order from without. It is an art of politicians and the rulers to find the proper point for the system of positive law on the one and the same line of human development. If this legal system is lifted too high, and the average people are morally unprepared for so advanced a normative standard, instead of good intentions this

system would be harmful for the people. This legal order would not be observed by the majority and the law would lose its respect among the people. On the other hand, if the legal system were placed too low, it would be of little profit to the society as a whole.

This consideration indicates that positive law, which must be universal and adjusted to the average man, cannot embrace the whole of the members. There is a place for different communities on the level of positive law standard and above it. By saying "above it" I do not mean that those communities or their members are exempt from the obligations of positive law. Those people are not satisfied to fulfil only the duties prescribed by the positive law. Besides those they are freely united in the communities to secure personal progress of perfections, to exercise the works of charity, and education. To this group especially belong different religious communities.

Not only the unity and welfare of the state must be taken into ~~the~~ account, but also the rights of individual persons, such as the right to physical existence, property, work, etc. Without safely guarded essential rights of the person, there cannot develop personal responsibility, dignity of person and ultimately the community as a whole. The guaranty of necessary personal rights is not only demanded by natural law, but it is also a requirement for the progress of the whole community.

It seems that in our modern times there is an exaggerative tendency to stress the importance of the positive legal system. This causes difficulty for Maritain to save ~~some~~ also-called democratic philosophy and to be in accord with the teaching of St. Thomas.

Maritain is forced to abandon the Thomistic conception, "Auctoritas politica immediate est a Deo."

In order to understand the whole problem more adequately we have to distinguish three kinds of facts which make the social structure of the state. These facts are: 1) physical, 2) sociological, and 3) normative. By physical facts I mean the facts which happen outside the social or legal control and which nevertheless influence society. To this group of facts belong the facts of nature, climate, flood, disease, etc., and the facts done by persons, e.g. crimes. Crime, as a fact, causes new particular rights and duties. The state officials have duties and rights to punish the criminal. The criminal has the duty of undergoing the punishment, and he has also new rights to defend himself in order not to be punished more severely than prescribed by the law.

By sociological facts I mean the tendencies, actions and accomplishments of individuals and groups of the state. Most of the social activities are not prescribed by the positive law. Social interplay among individuals and groups is a matter of legal universal system as a form.

By the normative facts I mean the application of normative order to particular cases. We must not forget that the positive law system covers very incompletely the field of individual activities. Positive law based on observed social phenomena orders only that which must necessarily be done and what must be avoided. We can speak about the quantity of moral energy contained in society. The positive law system must take into account this strength of moral energy.

In the democratic state the sociological facts are of decisive importance. If a politically influential group demands a change of law, it is changed, and sometimes it is done by imposing injustice upon others. These sociological facts determine the persons of different offices. Not always can we say that the persons chosen are real representatives of the people. Many voters are deceived by political leaders. Some who are elected have no majority vote of the people (e.g. a population of twenty millions elects their president, but eight millions abstain from voting, and a candidate who receives seven millions of votes is elected president. Formally, according to the constitution, he is the representative of the whole population, but not materially).

Every person has his own personal responsibility not only toward his neighbours and the authorities of the state, but also according to his conscience directly toward God and natural law. If an elected person has his authority given to him by the people, he has responsibility only before the people. Maritain cannot reconcile his notion of authority transferred by the people and justification of the Nuremberg trial. Hitler wrote his book, "Mein Kampf," long before he took the power of the state. In this book he expounded his whole doctrine, which ^{was} followed afterward. The Nazi regime came to power legally, with the consent of a majority of the people. We can justify this trial only on the basis that the Nazi leaders had responsibility before eternal law, and consequently their authority rested directly on eternal law.

The doctrine that authority rests directly on eternal law, does not destroy the democratic conception. The democratic order is secured by the natural law principle that contracts must be

kept. One who by democratic machinery is chosen for the post must respect the limits of authority offered to him. However, he has direct responsibility before God, if in his capacity he does not do the best he can and does not abstain from evil.

The appeal of flattery to the common people is artificial and in our time is becoming dangerous. Many are trying to calm their conscience by placing all responsibility upon the people. It follows as a consequence that no one feels direct personal responsibility. The people, consisting of persons, becomes a mass. The term, "people," is abstract. The real actors are individuals, and each one of them has to realize his own responsibility. Personal responsibility increases with the increase of knowledge and with the assumption of higher authority among others.

XI.---Abstract of the Thesis.

The expansion of civil authority on the horizontal and vertical plane resulted in an increase of positive-law legislation. An individual person becomes more and more subjected to and directed by the state. In this situation an individual man asks on what rights the demands of the state are based and why he is obliged to forsake a large part of his freedom. The answer to this question cannot be that it is because the state is strong and an individual man is weak. To everyone it is clear that there is a difference between force and right.

In our unstable modern age there is an intensive tension among different legal systems, each one of which is trying to justify itself and to renounce the others.

The justification of the rights of the state with respect to its citizens and the valuation of different legal systems needs an objective measurement. The requirements of this measurement are: 1) it must be of the same nature; 2) it must be unchangeable; 3) it must not be produced by man or the state; 5) it must have an obligatory character. This measurement or foundation of positive law can be found only in the nature of things. The ontological ordination of things is the foundation of the social order.

The jurists who deny metaphysics are unable to find a foundation of positive law. There is no solution in dividing a legal system into parts. The most important part of a legal system, the constitution, still requires a rational foundation. The measurement of positive law cannot be physical or sociological facts, as e.g., time cannot be measured by feet and inches. Law must be measured only by law, i.e. a law existing before all human laws are made.

Man, with his rational and social nature, with his conscience and his own destiny, is not made by human laws. The natural law inherent in human nature and known by man's intellect, is the genuine source and, therefore, the measurement of positive law.

The source of law is intellect, for the natural law divine intellect, for the human law human intellect. The reason of human law is not produced by the human intellect itself: it is only known to the human intellect. The reason of human law is the reason expressed in natural law. The general principles of natural law are known to man directly. With the increase of man's experience those general principles become detailed. Man's conscience is a bridge, where the natural law and the possibilities of man's future free actions meet. Man's conscience tells what is right or wrong.

As every human faculty can be strengthened and increased in power, so the moral conscience can be increased in favourable circumstances by exercise. Our modern times are not favourable for man's moral development. The very idea of right and wrong in moral order is often denied. However, there is a tendency to recognize the principles of natural law in practice. There is a marked progress in the revival of natural law. Only one defect must be removed: the natural law must be observed and enforced for the sake of law itself and not only because the defender of natural law, by defending it, expects direct profit.

An important problem of today is the determination of the inviolable rights of individual persons in their relation to the authority of the state. The observance of individual rights depends very much on the organization of the state. In our civilization the best possible form of government is democracy.

It is dangerous to put all the power of the state into the hands of one or a few rulers. On the other hand, there is a tendency to diminish the responsibility of the individual in the organism of the state. Everything is considered right that sometimes, by applied artificial means, is considered the voice of the people. The real actors in the state are individual persons. No one can make others responsible for his own deeds. A child, the father of a family, a representative in high public office, each, according to his capacity, is also directly responsible before God and His laws. Man is not forced to assume the duties which are against his conscience. If he assumes these duties, he cannot put the responsibility on someone else.

There is no positive law in the true sense if it is not based on natural law. If there is natural law, there is also its Giver. The ontological order of creatures, as it is reflected in the human intellect, is the real basis of positive law order.

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XII.---Bibliography.

1. Aristotle's Politics, translated by Benjamin Jowett, The Modern Library, New York, 1945.
2. Davitt, Thomas E., S. J., The Nature of Law, B. Herder Book Co., St. Louis 2, Mo., and London, W.C., 1951.
3. Gettell, Raymond Garfield, Political Science, Ginn and Company, Boston, 1949.
4. Ginsberg, Morris, Stammeler's Philosophy of Law, Modern Theories of Law, Oxford University Press, Humphrey Milford, London, 1933.
5. Gredt, Josephus, O.S.B., Elementa Philosophiae Aristotelico-Thomisticae, Editorial Herder, Barcelona (España), 1951.
6. Huber, Ernst R., Verfassungsrecht des Grossdeutschen Reiches, Hamburg, 1939, p.361
7. Huntington, Cairns, Law and the Social Sciences, Harcourt, Brace and Company, London.
8. Laski, Harold J., M. Duguit's Conception of the State, Modern Theories of Law, Oxford University Press, Humphrey Milford, London, 1933.
9. Lauterpacht, H., Kelsen's Pure Science of Law, Modern Theories of Law, Oxford University Press, Humphrey Milford, London, 1933.
10. Maritain, Jacques, Man and the State, The University of Chicago Press, Chicago, Illinois, 1951.
11. Maritain, Jacques, Scholasticism and Politics, Geoffrey Bles, The Century Press, London, 1945.
12. Messner, J., Social Ethics, B. Herder Book Co., St. Louis 2, Mo., and London, W.C., 1949.
13. Meyendorff, A., Leo Petrazycki, Modern Theories of Law, Oxford University Press, Humphrey Milford, London, 1933.
14. Meyer, Hans, The Philosophy of St. Thomas Aquinas, B. Herder Book Co., St. Louis 2, Mo., 1948.
15. Nouy, Lecomte du, Human Destiny, Longmans, Green and Co., New York, London, Toronto, 1946.
16. Rommen, Heinrich A., The Natural Law, B. Herder Book Co., St. Louis 2, Mo., and London, 1949.
17. Rommen, Heinrich A., The State in Catholic Thought, B. Herder Book Co., St. Louis 2, Mo., and London, 1950.

18. Siweck, Paul, S.J., *The Philosophy of Evil*, The Ronald Press Company, New York, 1951.
19. Solovyev, Vladimir, *Russia and the Universal Church*, Geoffrey Bles, London, 1948.
20. Stone, Julius, *The Province and Function of Law*, Sydney Associated General Publications, PTY, LTD, 1946.
21. Valdemars, H., and K. Viciis, *We Accuse the East, We Warn the West*, Drintarzeme and Scholar, Germany, 1948.

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