EPITOME OF CLASSICAL NATURAL LAW

Michel Villey

Translated in two parts by Guillaume Voilley[*]

Translator's Introduction

Michel Villey (1914–88) is doubtless a key figure in twentieth century French jurisprudence, and a rather unique one too, which can be considered paradoxical. For Villey never claimed to invent or uncover anything new. On the contrary, as a legal historian and a specialist of Roman Law, he persistently claimed to lend his voice to an age-old philosophy he himself designated as 'classical natural law', by which he meant, first and foremost, the philosophy of law of Aristotle, of the Roman jurisprudents of the classical period inasmuch as, he contended, they held to Aristotle's philosophy, and that of Thomas Aquinas. Humbly, his own philosophy is in the first place a reading of theirs — an artefact of Roman Law, some of his critics retorted ...

The primary merit of Villey lies in the pertinence of his reading which was definitely singular, at any rate in France where jurisprudence was little esteemed and 'classical' *jusnaturalism* disdained if at all understood. In this context, Villey's works and teaching, which combined historical research with philosophical reflection, were strikingly novel. For despite the seeming triviality of certain formulae, it is a philosophy essentially alien from our most current — dare I say 'modern'? — attitudes of mind which Villey expounded from his early works in the 1940s until his last, 'Le droit dans les choses', published shortly after his death. (This particular article deserves to be mentioned here since it appeared in English under the title 'Law in Things' in Paul Amselek and Neil MacCormick (eds), *Controversies About Law's*

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[*] The translator, after being a diligent student of law and particularly of its philosophy — following *inter alia* the jurisprudence course of Professor W Twining at UCL, obtaining a DEA of philosophy of law under the supervision of Professor Alain Sériaux in Aix-en-Provence, France, and a Masters in the same discipline in Uppsala, Sweden — is currently occupied in Malmö, Sweden, with activities of a rather different character, which he not infrequently deplores. Incidently he feels compelled to say that the similarity between his own name and that of the author is purely coincidental and should not puzzle anyone. He thanks Mme Madeleine Villey and Professor François Terré — current editor of the Archives de philosophie du droit — for their benevolence regarding the enterprise now half completed, Graeme Orr from Griffith University for his precious help and his even more precious friendship, all the people who closely or not participated in this work, and Professor Alain Sériaux, without whose teaching the idea of translating Michel Villey might never have crossed his mind.

Ontology, Edinburgh University Press, 1991). Holding fast to this philosophy, he gave at the same time an overview of the major developments in the history of jurisprudence through the critical analysis of certain authorities (William of Ockham, Hobbes, Burke, Kant, Hegel, to name a few), of certain schools or trends of thought (e.g. the modern school of natural law, utilitarianism), and of certain notions (particularly that of subjective rights, or of the rights of man).

To my mind, for the purpose of a translation, the 'Abrégé du droit naturel classique', here rendered as 'Epitome of classical natural law', offers a good approach to the philosophy of Michel Villey (it will appear in two parts in different issues of *Griffith Law Review*). Despite being a fairly early work, which first appeared in 1961 in the 'Archives de philosophie du droit' (APD) series of which Villey was the editor from 1959 until 1985, it encompasses many of the themes Villey pursued throughout his life and is thus apt to give the reader a more or less comprehensive overview of classical natural law as Villey understood it. On the other hand, what it does not comprehend is a minute analysis of a particular point or issue, or a detailed criticism of a particular creed or theory. The reader anxious to pass judgment, if previously ill-disposed towards natural law, should adopt a becoming demeanour of circumspection. A further reason for this concerns Villey's style, which might at first be confounding: although never outright disrespectful, it is more often than not jocular. Distinctively unacademic, some might say ...

As regards the work of translation itself, remembering Villey's distrust of translators and commentators, I strived to make the translation plain rather than pretty. In this respect, I will merely mention the most fundamental of difficulties, that concerning the very word *droit*. *Droit* may have the meaning of 'right', as in *les droits de l' homme* — 'the rights of man', but is otherwise French for 'law': *le droit naturel* = 'natural law'. More troublesome however is the fact that two words in French (or even more than two, depending on context) might be translated as 'law', namely *droit* but also *loi*. Broadly speaking, the first would correspond to *jus* and the second to *lex* in Latin, with clearly different implications from the point of view of the philosophy of law. I tried as much as possible to make it plain when the original reads *droit*, or *loi*. By and large, when I used 'law' — and not 'a law', or 'laws', or 'the law of the land', etc. — the original is '*droit*'. Otherwise, '*loi*', i.e. a positive enactment, generally speaking, should be understood. I chose not to disrupt the flow of the text with observations about occasional ambiguities.

Editors' Note

This first half of the translation of the 'Abrégé du droit naturel classique' encompasses Part I and the first two sub-sections of Part II of the original. It is intended to publish the remaining half of this translation in (2001) 10 *Griffith LR*.

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Reader, I will not wrong you. It is unfortunate to add yet a new number to the thousands of books and articles which, since the beginning of this century, have taken the title of natural law. In the 'Archives de philosophie du droit' series, I counted 30 such works. This is the bibliographical aspect of what Mr Rommen named 'perpetual return', and Mr Battifol recently labelled the 'perpetual resurrection' of a corpse one does not get tired of burying anew.

But two remarks must be made:

(1) All this literature is far from considering, under the same title, the same subject. As with most terms in the language of philosophy, the expression 'natural law' has multiple meanings. Not long ago Mr Wolf classified them and commented upon them with Germanic rigor, starting from the observation that the word 'nature' is susceptible of seventeen meanings whereas 'law' admits of fifteen:[1] this yields 255 imaginable combinations, hence nearly 255 meanings for the expression natural law. But it must be added that not all of these meanings are equally authentic and that most are improper. Yet contemporary studies still refer, in the main, to the relatively recent doctrines of 'the School of natural law'; doctrines of natural law which have retained but the label and lost its substance; doctrines which were largely subdued by juridical positivism, even if in a very incomplete and easily criticisable way.

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[1] Wolf, *Das Problem der Naturrechtslehre*, Versuch einer Orientierung, 1955.

At the end of the nineteenth century, a book such as Bergbohm's manifested the most radical ignorance of what classical natural law was;[2] even nowadays, the critique which Mr Kelsen believes he is directing against the idea of natural law, demonstrates his intention to ignore its principal form. The primary and authentic form of natural law must be directly looked for in the works of its inventors: Aristotle, father of the doctrine, or Thomas Aquinas who, although he crowns it with a theology, is for the rest, its wonderful interpreter. This is a form with which contemporary jurists are much less familiar. However, it is the most important historically: for it is only during a specific part of the modern era that the 'School of natural law' enjoyed victories, themselves incomplete, the proximity of which hides from us the fact that they were relatively brief. How more numerous and durable is the long lineage of jurists, from Rome and the medieval world and still today, who drew their philosophy from Aristotle or Aquinas; and the lineage of schools of rhetoric and philosophy where this conception of law, more or less faithfully transmitted, was officially taught. This one is indeed the *classical* form of natural law.

(2) It is true that classical natural law is not to the taste of today's academy. Aristotle's natural law? I regret, my poor friend, it has already been dealt with three thousand times! Still available are: Kierkegaard — Heidegger and Sartre. Of course one would prefer to announce, so that the subject be more worthy of our Centre de Recherche Scientifique Universitaire, an existentialist system, or else a Teilhard-de-Chardinist, 'egologist' or, I don't know, a 'tridimensional' system; to bring yet another model to which one could attach one's name, to the panoply of errors on which the authors of our manuals feed their collections. Upon reflection, let us renounce the idea of making such a scandal. Unfortunately, the lot of the philosophy of law is, above all, to give meaning to very banal formulae which apparently everyone *knows* to the point of being tired of hearing them. It has all been said. The juridical experience in Greece in the fourth century BC (if not as extended as ours) was already so sufficient that the genius of Aristotle was able to isolate its principles. But to retain the living sense of his teaching, its moral significance (this is a concealed invitation to defeat our native inclination to laziness, routine and confusion) demands from us the same form of suspension from active life (if one is permitted to use the language of Scheler). This will never be common; it will always be a matter for a few, and its results are precarious. Therefore let us begin anew.

I hate this common prejudice, ensuing from the 'philosophy of history' of the past century, loaded with presumption and vanity and consecrated in French faculties by the dreadful separation of scientific specialities, that the doctrines of the past have no other interest than the 'historical', i.e. that they are dead entities. Because when it comes to conceiving the object and sources of law, no reading has so far appeared to me as fruitful as that of Aristotle and

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[2] In Bergbohm's famous work, *Jurisprudenz und Rechtsphilosophie*, there is one line on Aristotle's doctrine and a few notes on Thomas Aquinas which, unfortunately, show a total lack of understanding.

Thomas Aquinas; no philosophy has appeared to me more sound and worth retaining. (1) To begin with, rarely would we find in other philosophers such a direct attention to juridical phenomena: Comte, Kant or Spinosa showed a late but sharp interest for law, but started from other experiences, either moral or scientific. On this point what is there to say of someone like Sartre or Heidegger, and how could their philosophy shed light upon an experience they ignore? (2) In addition the philosophies of Aristotle and Thomas Aquinas appear to me to have the merit of being purely speculative, a characteristic which has become rare nowadays, and which is even very poorly regarded. But let everyone do his work; a theory can be serious only if it is not vitiated by haste and the prejudices of practical life. Our office is not to serve passionately the triumph of any value in particular, apprehended to the detriment of other values, such as the value of individual freedom rather than public order. It is to understand impartially; not to construct but to observe. We shall see that jurists have special reasons to repudiate idealism: to prefer to the *Zurück zu Kant* of the end of the nineteenth century this other adage: *Zurück zum Aristoteles*!

I do not see that we have at our disposal, despite the recent flowering of studies on this subject, a history of classical natural law. Everybody seems to know enough of natural law to condemn it disdainfully. Our colleagues are blessed with knowledge, but where have they found even the most rudimentary exposition of it? Such an exposition will not be found in this brief article, the purpose of which is not to give a historical study. Besides I could not provide it: the reader might as well know that I find myself in the countryside, without a library, from which it follows that this article will, by necessity, not be weighed down with bibliographical references. The only things at my disposal are white paper, ink and a fountain pen, and the time for meditation which academic vacation so parsimoniously provides. This might be for the better. The historians of philosophical doctrines often forget that their discipline ought to be auxiliary, and that enquiries are endless. For once I will attempt to gather a few fruits rather than to analyse under a magnifying glass the roots of the tree. I will not purport to make a survey of all Aristotle and Thomas Aquinas: can one from a single angle see all the facets of a summit? Therefore untroubled by historical completeness, I will only retain the elements of their doctrine of natural law which can be used today, only the aspects through which this philosophy (professed officially until the demon of originality invaded all things, including universities) can still help to fill the vacuum of contemporary legal theory. It can restore: (I) the consciousness of the *raisons d'être* and of the ends of our work; (II) a less incomplete vision of the sources on which justice draws; and I believe (III) that law professors will, as a consequence, find in it the occasion to straighten up a few chapters in their courses.

I The Aims of Law, and Justice

The Avatar and Metamorphosis of Justice

We shall, to begin with, place natural law in its chronological framework in accordance with the method that my history masters taught me, by which I

mean we shall place this doctrine in the present world where it has to be exercised.

Has it become superfluous to try to understand the object and limits of one's work? One observes that the thinking of most contemporary jurists is, on this point, largely non-existent. Very few jurists care to know what they are useful for; they obey. Positivism has handed juridical life over to the dead letter of statutes, cases and precedents, or to the arbitrariness of force. The most extreme testimony of this voluntary humiliation is that some of the most influential theorists of law profess the monstrosity, which the Kelsenian school brought to its height, that law is a *science*, a neutral science, an objective science. It is clear here that science and practice have been confused. Law (if not the philosophy of law) is a practical occupation. Through his works, through his advice, a lawyer clearly intends to guide the judge and sometimes the legislator. He is not neutral or irresponsible. And every practical activity serves ends, and chooses goals, other than truth alone.

This is so obvious that some go about looking again, as they say, for the values of law. But their answers are not always acceptable. They say that jurists serve order and security. But do we serve any order? And is it not our particular office to distinguish, amongst the orders and the commands coming from various powers, those which have to be obeyed? Aren't we confusing the job of the lawyer with that of the policeman? Somewhere else I read that the end of law is utility; an odd formula, and rather empty unless it be specified for what and to whom one wants to be useful. It seems that one prefers to doze off in this *technicism* which Jacques Ellul has so lucidly denounced,[3] and this proposition disguises a categorical refusal to become aware of one's ends. Does one mean that one offers one's services to the appetites of individuals, or to the collective enrichment of the state or of humanity, or to the progress of production whatever its consequences might be? Utilitarianism neglects to clarify who the beneficiaries, individual or collective, of this increase of wealth will be; and it is precisely this apportionment, rather than enrichment itself, that could be the task of law. One is the task of the jurist, the other that of the economist.

And what of *justice*, which common sense could have contemplated as the end of law? For jurists to have had the courage not to disavow it, it would have been necessary that scientism had not, since the beginning of the modern era, constantly used it as a target: it smacked of 'metaphysics', and deserved nothing but a smile from positivist minds. Science took up the task of explaining and demonstrating the genesis of this artificial notion, by reference to, for example, the need for security (Hume); the quest for pleasure (Bentham); or the historical transformations of the modes of production (Marx and Engels). Only the appetite for material well-being was perceptible to modern science, and justice was reduced to it. All in all, that which is just does not exist: it is a chimera. And yet it seems impossible to account for the autonomous existence of law without referring to justice. Hence several contemporary doctrines make an effort to reintegrate this notion. But justice

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[3] Jacques Ellul, La Technique.

has emerged so weakened from the attacks, so incompletely restored, that these attempts fall short.

The notion of justice jurists receive today from common thought is very far from that of Aristotle (which I will soon analyse). It seems to proceed from modern philosophy above all, principally Kant. We have Kant to thank for an attempt, contrary to Hume's scepticism, and contrary to the negations of the eighteenth century, at reconstituting the virtue of justice.[4] Yet Kant mainly focused on the subjective morality of the individual, the specific characteristics of which he works in depth. But his experience of law is less authentic. Our ordinarily received opinion about justice, which appears to me to owe a lot to his influence,[5] is remarkably improper to the needs of law. Let us briefly point out some of its deficiencies.[6]

(1) We create for ourselves a very idealised image of justice which is, as such, ill-adapted to our societies as they are. Justice would be the point of perfection of liberty, equality and fraternity. Now perhaps the wise or the saintly already live in this world beyond, in a perfect, *fraternal* world where the liberties of each and any are absolute ... But we demand that the jurist be on this earth, not in paradise. That all men be *equal* (e.g. before 'culture', before 'health'), that war be banned and all violence illegitimate — for me I refuse to see in this rules of law. The science of law must keep away from science fantasy.

(2) In Kant's philosophy, the essence of morality is obedience to laws, a sequel of voluntarism. Only express rules are endowed with positive existence, only they have a practical utility. Hence, justice will only be conceived in the anthropomorphic guise of a kind of legislative Code. Further the laws here envisaged will be seen as permanent, since in this philosophy, our knowledge of what *morally must* be does not owe anything to the objective and moving facts of history, but claims to be all rational. From modern rationalism emerges the astonishing conception according to which the rules of morality should necessarily be immutable. Now a justice indifferent to circumstances of time and place is hardly of any use to jurists.

(3) And most importantly, the justice of the modern concerns the subjective intentions of individuals rather than their external activity. Kant places at the peak of his justice, amongst other very general maxims, the obligation to respect the grandeur of the human person and its moral liberty which is presupposed in others just as we feel it within ourselves. And this principle of the respect due to the human person has become the *leitmotiv*, and the sum of justice. As modern doctrine tended towards this result since the beginning of the seventeenth century, we have turned justice into that virtue which respects other persons, their dignity, their liberty, their 'rights'. Now

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4 Cf my article 'Kant dans l' histoire du droit' in *La Philosophie politique de Kant*, PU 1961, p 49.

5 As well as to the revival of stoicism (right at the beginning of the modern era) about which similar observations may be made. Cf my article: 'Deux conceptions du droit naturel dans l'Antiquité', in *Leçons d' histoire de la philosophie du droit.*

6 Cf my study: 'Quatre ouvrages sur la justice', APD, 1960, p 215.

such formulae may help to orient a set of morals (or what we today call so) but in spite of the frequent use many of my colleagues make of them, they leave jurists starving. I wish nothing more dearly than to respect the human person; but it does not seem to me to constitute a program for juridical studies. We might just as well try to solve a juridical problem with the principle of the respect due to the human person as try to calculate the age of the captain on the basis of the dimensions of the vessel. I am perfectly willing to respect the right of others, but *where* does this right end, what is its precise consistence? Is it to be infinite (as its beneficiaries gladly imagine) as in, for example, these 'rights of man' to 'health' or to 'culture' which are written in our constitutions? Or must right coincide, as Hume says, with effective possession? But this solution is not tenable. Delimiting the law is precisely our problem, and this doctrine of justice does not provide anything for this measurement.

This modern justice is either too vague, or too fixed or too utopian. The jurists of our time who undertook to recapture the values of law and attempted to revalidate the pursuit of justice, have been compelled to leave but a restricted space for it beside the values of order or economic progress. They concede that the just solution would in fact be unacceptable: the rules which justice would dictate to us would have to be 'corrected' taking into account the useful and the practicable, etc. Such is the doctrine of the 'plural values of law' professed by Mr Roubier, Mr Dabin, and accepted by many others.[7] I can only see in this an 'eclecticism', in the most unfavourable sense of the term, which still cannot, as these authors confess, free us from juridical positivism.[8] For who will decide the share to be allotted to 'progress', to order, to what is 'practicable', to what is just? There is ground to fear that the 'useful', this hollow term, malleable according to the passions of each and any, will dominate. What a field to abandon to arbitrariness! Is it submitting to justice the work of the legislator to allow him to move away from it at all times under various pretexts? How this philosophy abandons us to uncertainty! The inadequate notion of justice which modern philosophy constructs for us makes it impossible that the *just* be the aim of law.

Law and Justice in Classical Natural Law

In order to understand the classical philosophy of natural law, one must entirely free oneself from these post-Kantian conceptions which are so deeply embedded in contemporary thought. It is not asking too much from a jurist to ask of him fifteen minutes of meditation on the *object* of the virtue of justice. Let him who will not make the effort to move back to this source renounce comprehending anything of natural law.

One observation to begin with: the doctrine of natural law resolutely makes the just the very soul and essence of law; it closely intertwines the two terms. The classical theory of *law* which we go looking for primarily in Book V of the *Nichomachean Ethics*, or in the IIa IIae qu. 57 et seq of the *Summa*

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[7] Cf my article: 'Une définition du droit', APD, 1960, p 59.

[8] Kant himself practically ends up in juridical positivism. Cf my article: 'Kant dans l' histoire du droit'.

Theologica is a theory of justice and is so presented. The Greek and Roman languages show this intimate relation with all its consequences. In Greek, the same term (διχαιον) serves to designate 'just' and 'law', since all the effort of jurists is directed to seeking the just solution. Likewise in Latin, Thomas Aquinas defines law (*jus*): *id quod justum est* — or *objectum justitiae*. The assimilation of the two terms is also present in the Roman jurisconsults of the classical era, who seem to have accepted, to a large degree, this theory of the ends of law and who did not fail to reproduce it in the general exposition of Justinian's *Digest* Book I Title I, *De justitia et jure* '*Jus est autem a justitia appellatum ...*' *Cujus merito quis nos sacerdotes appellet; justitiam namque colimus* ...As nowadays, it is the same word which designates the virtue of justice and the juridical apparatus.

To the activity of jurists, the classical doctrine attributes a transcendental end, the service of justice. It does not recognise in it any other end, neither 'utility', nor wealth, nor 'order', nor 'security'; this would reduce law to other categories of practical action, and deny the specificity of the juridical art. It is true that on the whole, law serves the good of the human species; but in doing so law serves the total and 'common good', and not one of these definite and particular goals. The role of law is to put in order our particular covetousness in accordance with a superior end (cf. Ia IIae qu. 90 art. 2). Almost undoubtedly, justice will take into account those interests that the subjects of law show for wealth or order or for liberty: these are the matter of its research and the data of its problems. Let the jurist ignore neither the good, nor the agreeable, nor the beautiful, but consider them from the angle of the value of justice alone.[9]

Such is the kind of service we indeed expect from the juridical art: to discover the just solution, that on which the parties can be led to agree and before which there is a greater chance they will be prepared to bow. To find the just is the proper task by which the jurist feels himself useful, it is how he helps to put an end to the violence of individuals, his contribution to peace. The more or less just character of the solution is his specific contribution, which is a factor of much importance in the efficacy of the sentence. That thereafter the executive apparatus offers its assistance, adds to the sentence a sanction, is another thing, the practical importance of which cannot be denied. But let us not confuse the job of the magistrate with that of the policeman.

Will it be objected that the just is an illusion? The positivists may well deny its existence in their books and from the chair. None however has yet succeeded in his daily practice in driving the word from his own language. One of them contradicted himself, when he deemed — from what I have heard — that a partisan of justice and classical natural law could not 'justly' be qualified as a philosopher of law; and they are even less inclined to prevent popular common sense from associating the notion of justice with the activity of the judiciary. In this respect the recent school of phenomenologists (and principally Max Scheler)[10] seems to me to have pertinently refuted positivism:

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9 Cf Une définition du droit, p. 58.

10 Cf my essay on 'Max Scheler et le droit', after Dupuy, in APD, 1960.

it was not very scientific to contest a value which everybody intuits as strongly as the experience of sensible objects. Still, what this value and this tendency consist of has to be recognised, for justice as Aristotle and Thomas Aquinas analysed it, is quite different from the notion constructed by Kant. And this analysis gives full value to the marvellous texts of the *Ethics* and of the *Summa Theologica*, the keys to the classical philosophy of natural law and common treasure of the Occidental juridical culture. It is no honour to our education system that so many jurists today do not read these texts.

Justice and Utopia

Rigorously, Aristotle's doctrine proceeds from an analysis of language as it spontaneously exists, as it exists *naturally* among the Greek people, and of the thought it comprises. First, Aristotle is not unaware of the fact that the word *justice* covers in fact, already among the Greek people of his time, a plurality of meanings. It can designate the inner equilibrium of man, the harmonious submission of the sensual instincts to courage and reason, for example when Plato in *The Republic* applies the term to individual virtue, a meaning which Thomas Aquinas will mention, qualifying it as 'metaphorical'. Or, in the sacred literature of the religions of salvation (in biblical texts such as Saint Paul's epistle), the term evokes a supra-terrestrial, extra-temporal ideal, the state of man before the fall, or of man redeemed by faith, the perfect reconciliation of man and God. A description of this justice of the state of primary perfection is to be found in the first part of the *Summa Theologica*.[11] These secondary significations may be useful to other disciplines (private morality or religion).

There exists in the same way a series of neighbouring virtues such as religion towards God, piety towards parents, humanity, good faith — which are sometimes qualified as 'justice' by extension. Thomas Aquinas tries to give an exhaustive enumeration of them on the basis of Macrobe's or Cicero's lists:[12] a commonplace of the philosophy of Antiquity. The enemies of natural law (from Augustinus, disciple of Plato, to Kelsen, inspired by Kant) will later pretend to mistake these aberrant or sublimated forms of Justice for the principal species which classical philosophy had succeeded in distinguishing clearly: but specifically, justice is *social virtue*. It supposes within a social group (the best example being the city) quite distinct and contradictory interests; it is a virtue *ad alterum*, which aims at relations between persons opposed to each other. We know that Aristotle conceives of it only between citizens *sui juris*, and not between members of the same family (father and son, husband and wife, master and domestic) because the son, says Aristotle profoundly, does not appear as absolutely *other* than the father; their interests are not separate enough. Hence the Roman jurists avoided treating intra-family relations, the duties of the father towards the son, as those of the master towards the slave: although these duties undoubtedly existed, they did not

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[11] Ia qu. 92, 96, 98, 100, etc.

[12] IIa IIae qu. 80.

concern law. This particular treatment of the family corresponded to a type of social structure which has in the main disappeared.

Let us draw from this realistic analysis a first lesson which should not be useless for many of our contemporaries. Provided that the diverse notions which vulgar language confounds under one and the same term be distinguished and classified, and that the derivative meanings be set aside and the projector focused on the principal one, justice no longer appears to us as the reverie of an unrealisable ideal. The just cannot be the impossible, nor can it be postponed indefinitely. The just is not the world as it should be, but the act which I must accomplish right here. This virtue is practised here below, *hic et nunc*, not in the beyond of a mystic community; and not even in these present communities, such as the family, which are already the pale image, the imperfect prefiguration of the kingdom of heaven. Justice has no relation to the salvation of a renewed humanity at the end of the centuries, nor to the refinement of private morality; it concerns law.

Justice and Rules

Continuing his description of the specific meaning of *justice*, Aristotle observes that the term may indicate two rather different species of conduct, even though they may not be without some mutual relation. Right from the beginning of Book V of the *Nichomachean Ethics*, he points out that by just conduct we rather frequently understand conduct 'conforming to the laws': the term 'just' makes us think of the term 'legal' (νομιχον). In truth, this formula is somewhat equivocal for perhaps it refers here to a 'natural' law, a non-written law which would be law in a metaphorical sense only? More often than not, vulgar language defines as 'just' that conduct which conforms to some positive or expressly formulated rule. This is the sense which survives today, recapturing the first moment of Aristotle's demonstration. Mr Perelman (for example) hardly wants to know of any other.[13] But Aristotle goes beyond this point and we immediately see him pulling closer together the idea of the just and a second notion, that of the equal (ισον). Aristotle seems to prefer this second substantial criterion since it is around it that his ulterior developments are ordered, as we shall see later. Likewise in Thomas Aquinas' classification, which is of a much more scholarly appeal, a larger space is reserved for 'particular justice' which is opposed to 'legal justice'.

The pursuit of justice is much more (although the two are not without relation either) than the application of written rules. The just is beyond the law of the land. Aristotle will make us understand this even more clearly in his chapter on equity: equity goes against the law, or at least it does violence to the terms of any legislative rule; and yet, and by this very fact, because it adapts to circumstances and realises the *equal* better, because it is unformulated, it is the veritable justice, the highest level of justice, the *superjustice*, as Thomas Aquinas says (*question* 120 of the *Secunda Secundae*, dedicated to the *épikeia*). Both willingly take up the theme, already dear to Plato in his *Republic*, of the imperfection of any rule or formula of justice: human matters

[13] Perelman, *De la justice*, 1945.

are moving and unpredictable. The justice which concerns them and which must adapt to infinite variety cannot be captured in any given text.

The classical doctrine of natural law thus recognises and keeps in mind the transcendence of justice. Perhaps it would be unnecessary to stress this had we not just met the example of the contrary attitude. Many today believe in holding to the express laws of justice. Poor justice, how incapable of sufficing to the needs of law, blind as well as intolerant, pitifully suffocating under abstractions! It would seem that the just solution is the one based on ignorance of the concrete data of the problem. I hold rather that *no rule* could definitively express the just despite prejudices to the contrary. What gross simplifications run in today's public: only proportional representation would be 'just', even if this electoral system were causing damage to the whole nation? Did I read in the works of grave authors that 'adverse possession' would be an 'unjust' institution? Let us not generalise: even if it is unjust on the part of the usurper to profit from adverse possession, it can at the same time be just for the *magistrate* to protect this dishonest possession so that the interests of third parties are not sacrificed.[14] It would also be unjust to 'condemn the accused without certain evidence'. But if we always had to wait until the perfect proof of the defendant's fault (and in any case proof of what we call their moral 'responsibility') be brought, there would no longer be any convictions — the world would be full of people who had been tricked, of assassinated shopkeepers, of raped girls. Concretely, the judge is accountable for this: should the Pharisaic yells of the writers of manifestos pile up against him, he will make use of the means available, and content himself with an approximate evidence.[15] True justice will sometimes dare to take the risk of condemning an innocent.

Justice is a *problem* which arises under new terms with each human act and which, each time, must receive a slightly different response whose terms will change with the circumstances of the act, the interests it affects, or even its author. Being just is no more to restrict oneself to a set of maxims than being a poet is to follow the laws of the Poetical Art, or being a composer, to obey a treatise on harmony and counterpoint. One does not possess justice; justice cannot be turned into manuals, it does not project itself into a code of statistical rules. It is an effort, an aim. Let us pursue the analysis of this aim.

The Object of Justice

Everybody knows (although modern translations have upset its meaning)[16] the classical definition of the object aimed at by justice. In its specific meaning,

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[14] Cf Une définition du droit, p 56 et seq.

[15] Following Aristotle, Thomas Aquinas writes: 'In negotiis humanis non potest haberi demonstrativa probatio et infallibilis: sed sufficit aliqua conjecturalis probabilitas, secundum quam rhetor persuadet' (Ia IIae qu. 105, art. 2 ad 8). Cf my article: 'La responsabilité pénale chez Saint-Thomas', *Annales de la faculté de droit de Strasbourg*, 1961.

[16] Cf my article: 'Suum jus cuignetribuens', in *Mélanges de Francisci*, I, p 363 et seq.

justice tends to give to each his own (*suum cuique tribuere*), that of which he is worthy, that which he deserves relative to what the other members of the social group deserve.

To be exercised, it supposes a plurality of associated people or human groups who dispute separate goods in this world. And the intention of justice is not only to respect (as the modern translations say) the prerogatives of others, but first (since it has to be done) to measure these prerogatives, then to ensure effectively the portion of these disputed goods ascribed to each, to evaluate the proper portion, neither too large nor too small, but which holds the middle between these two excesses. This is why, in his technical vocabulary, Thomas Aquinas poses that justice seeks an objective middle, a middle in things themselves, a *medium rei*. As far as justice entails, to begin with, an intellectual work (before the ulterior stadium of execution) it thus seeks to determine the proper rapport or relation between *things* distributed among persons.

This is why the just may be expressed schematically, as the Pythagorean school had perceived, in mathematical formulae. One of the two notions which justice evokes in the mind of Aristotle, in the first paragraphs of his analysis, is that of the equal (ισον); this equality is either simple or proportional. Allow me to sum up this theory of the two justices traditionally designated by the names distributive and commutative. It is not always well understood. Ordinarily too much is demanded from it, such as some ready-made solution to the practical problems of law which this theory does not claim to furnish. I rather see in it a phenomenological analysis of the intention of justice and of the species of relations it tends to determine.

In the first type of justice, distributive justice, which is also the principal and corresponds literally to the above mentioned definition (*jus suum cuique tribuendi*), the relation involves four terms since at minimum the problem of justice involves two persons and two fractions of goods to be shared between them. The relation we seek will be just if the same proportion exists between the two persons, and the two portions of goods or honours which will be devolved to each respectively. For example — if you allow me to give this classroom case — if the supposed proportion of the political virtues of the President of the Republic and Mr Debré is equal to that of the honours conferred to the one and the other:

$$\frac{\text{de Gaulle}}{\text{Debré}} = \frac{\text{President of the Republic}}{\text{Prime Minister}}$$

Aristotle uses the same mathematical formula again, a few pages later, about the theory of the just price: it would be just that the proportions be equal between the price of the house and the work of the architect on the one hand, and the price of the shoe and the work of the cobbler on the other:

$$\frac{\text{work of architect}}{\text{work of cobbler}} = \frac{\text{price of house}}{\text{price of shoe}}$$

The formula is of a more elementary structure, that of a simple or arithmetical equality, in the complementary hypothesis of the so-called commutative justice — supposing the proportions already calculated, the consistency of the assets of our two characters previously established by distributive justice, it may happen that this just equilibrium is disturbed by a subsequent event: for example, as the result of a theft which took a certain value from one and gave it to the other. This imbalance must be 'corrected' in order to *re-establish* the just proportion. Theoretically it will suffice to replace in the assets of the first a value equivalent to that of which he has been deprived; therefore, it will suffice if the damages which are allotted are arithmetically equal to the prejudice suffered. If I took from your pocket a packet of tobacco (supposing that the relation between our two fortunes were held to be well matched), you have a right to the monetary equivalent, which our finance minister has assessed to be 140 francs.

1 packet of tobacco = 140 francs

Here is the origin of the Roman institution of unjust enrichment, and also of the theory of real contracts (for example of the *mutuum*), of 'synallagmatic' contracts and, to a degree, of the classical treatment of the *damnum injuria datum*. In all these cases, our equation will include only two terms, and will concern *goods* only. This is so because we are only dealing with a mere 'commutation' of goods in previously distributed amounts where people had been taken into account. This second type of justice, which Aristotle called 'corrective' justice, has but a subsidiary office.[17]

These formulae are obviously too simple to be of any application in the concrete life of the law: there are always more than two people interested in a trial, indeed there is an infinity, which makes the calculus impracticable, in addition to the fact that goods and 'honours' and the merits of persons are not always measurable. And Aristotle knew that well. Is there anything essential to retain from this analysis? Is it not of little practical interest, telling us nothing that is not very banal?

And yet, how far are we here from the Kantian notion of justice! Justice is not only the private moral virtue which respects the right of the other, supposedly known in advance: it fulfils a *public* function; it inquires into the consistency of the reciprocal rights of each. Let us abandon to private morals the concern of quietly (and vaguely) 'respecting' the 'human person'. The intention of justice is to calculate a proportion before assuring its effective application. Now what is it that the judge, or the legislator, is seeking? Is this not their very work? The virtue of justice is not the good disposition of the heart towards the person of the other, which we could exercise while ignoring

[17] It is interesting to follow through modern works the gradual deformation of this doctrine of the two justices: in modern contractualism, the only one practically retained, but distorted, is commutative justice which is treated independently of distributive justice, of which it is was originally but an extension. See my article on Les fondateurs de l' Ecole du droit naturel au XVIIe siècle (infra), and the works of Dognin to be published in APD 1962.

the law; it is primarily the occupation *par excellence* of the jurist, his project, the very substance of his intellectual works, the duty corresponding to his specific status. It is true that each human being participates in this, but only to the extent that each citizen participates in law, as executor.[18] Law and the just are synonymous terms: cleaned of the disguises with which Kantism had travestied it, but bare, as Aristotle faithfully observes and draws it, the aims of justice *coincide* identically with those of law.

Conclusion: Law and Morality

Once rediscovered, the ancient philosophy of the just thus allows us to restore the *moral* significance of the juridical art.[19] It is not true that the jurist is the servant of force or of *de facto* cupidity. Nor is he the neutral *savant* who does not know what he is working for: he is an agent of justice, he is an agent of *morality*. What now? Has this prolonged voyage amongst abstractions merely led us to this worrying conclusion? To ruin the autonomy of law? To dissolve the rigor of this science into the indistinct meanderings which we imagine to be inherent in *all* morality? To incite the judge to infiltrate the legal subject's matters of conscience? Reader, if you have followed well, you will see that this is in no way the case. For the classical doctrine of natural law never assimilated law to *the whole* of morality, or even of the duties towards others. And this is for two essential reasons:

(1) First of all because the science of the just, as I presented it, is but a *moment* of morality. It is one thing to define *objectively* the just *relations* (*justum — jus*); it is another thing to penetrate the intention which makes man *subjectively* just (*justus*). Aristotle observes forcefully that it is possible to do unjustly (with ill intention) 'just things', and vice versa: I could steal by mistake, *de facto* or *de jure*, or pay my taxes merely out of fear of the authorities. Thomas Aquinas often takes up this theme,[20] and in truth the intimate motives of action, which alone could make man responsible before internal conscience, are much more difficult to determine, and are only susceptible of shifting, approximate descriptions; they will be perceived with certitude by God alone. But the jurist does not care about the uncertainties of subjective morality; he merely aims at the correctness of the exterior *act*. Law, as we can see, is but a stage and an instrument of concrete morality; in principle — apart from rare interferences (for example in penal law) — intentions are outside its competence.

(2) We have seen that justice is something *relative* and that its formula varies according to the nature of the act and the situation of the agent; that 'the just' often presented itself in a different way from the points of view of the magistrate and of the mere individual. For example: it may be unjust *of me* to profit from the provision of article 1341 of the *Code civil*, and to refuse to pay

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[18] Ia, IIae qu. 61, art. 1.

[19] See my article: 'Sur l'antique inclusion du droit dans la morale', in *Leçons d'histoire de la philosophie du droit*, p 147.

[20] See my article: 'La responsabilité morale et pénale selon Saint-Thomas', in *Colloque de droit pénal*, Annales de la Faculté de droit de Strasbourg, 1961.

my debt under the pretext that my creditor does not possess a written title of it. But it is just *for the judge* to refuse to grant the creditor the support of public force because the judge must take into account not only my own interest (very unworthy of protection under the circumstances) but also the interests of third parties, because the interests of third parties demand a uniform mode of proof. Count Etienne d'Orves was just in his acts of resistance, as the German tribunal solemnly proclaimed before condemning him; but I would not dare assert that his conviction was unjust. In any case, Etienne d'Orves himself had both the heroism and intelligence to approve of his judges' action. An extreme and problematic case. Ordinarily, there must exist a correspondence between the acts which private morality prescribes and the acts prescribed by the judge, but only a correspondence.

Now, to whom are our works of jurisprudence addressed? We ordinarily (if not exclusively) address them to the juridical world: law is above all the morality of the judge, the justice of the judge; the justice of the individual arises only (as I said) inasmuch as he is the executor of a presumed judicial order. Our books of law deal with the *sanctions* which judges have to impose upon human acts and relations. Now the judicial sanction must be handled gravely, and with uniformity, to do *justice* to the interests of society as a whole. How Thomas Aquinas insists on thus situating the function of the terrestrial judge! I do not ignore that a large number of our duties towards others remain outside the field of vision of the judge: take, for example, our most refined social obligations — friendship, liberality, charity — which by their very delicacy are repugnant to being sanctioned; or the individual's duty in justice which obliges him to pay his debt despite the absence of a title. They do not concern the jurist; they concern *casuistry*, the unfashionable twin sister of the juridical art. After all, Roman jurists knew as well as we do how to make these necessary separations; they knew very well how to distinguish the debt claimable at law from the natural obligation. It was not necessary to wait for juridical positivism with all its excesses; natural law suffices in this.

Without embracing the whole of morality, law takes place within the realm of moral science, of which it constitutes a well-defined part. It is surprising that we could question something so obvious. All that claims to guide human conduct (assuming that it is not purely a matter of technical rules, which is not the case here), and to dictate to man absolutely obligatory acts, is *by definition* moral. It is only in Kelsen's brain, and not in the common mind, that the word *Sollen* receives two different senses, one for law and one for morality. I hold that the magistrate *must morally* pronounce in favour of the beneficiary of adverse possession, and dismiss the claim of the creditor short of title. Only a false notion of justice — abstract, utopian, subjective — has led a few of our theoreticians to disregard the fact that the juridical art belongs to morality.

The repeated assaults of juridical positivism undoubtedly succeeded in obscuring the link between morality and law. We imagine obtaining, by separating them, two purer representations of these two concepts: of morality, a high notion; of law, a more realistic one. Now this divorce has been accomplished to the detriment of both. By denying morality the contribution of

jurists (and casuists) we make of it a hollow and unsubstantial doctrine. A merely 'formal' set of morals fails to show us which *acts* we must commit or not commit, to provide us with an objective guide to our conduct which is, above all, what we expect from a moralist. Because to be subjectively just, altruistic and saintly would be beyond my power, I can at most try to act as though I were just, as a sinner executing the *acts* which a saint would execute. I ask to be taught the acts which I should do rather than what I should be.

Separated from law, justice becomes the sterile phraseology which I denounced a moment ago. We have deprived it of its body. Law separated from the just no longer has a soul; nor a *raison d'être*; nor any title to obedience. Today a demonstration ought not be needed of how much the authority of law would quickly dissolve if law ceased to receive the force which morality allots it, if the rules of law did not contain with them something of justice. If the virtue of justice were not interested in the rules of law, did not press man to coin as well as to obey them, how ineffective they would be! We are beyond explaining the power of the laws by reference to the guns of the police.

This is what the common man believes, and I stick to it, because the philosopher's role is not to invent but to recognise, to express what spontaneously exists. Minerva's bird only sings the day after it has shone. Following common experience, the classical doctrine of law recognises justice as the specific aim of the juridical art. It reduces entirely to this simple definition: law, the object of our efforts, is nothing other than the just in so far as we can attain it; *id quod justum est.* An old formula, and how worn down, with which I would blush to conclude if we retained only its letter. What remains is for us to fill it anew with meaning. The time has come to move on to its consequences.

II The Sources of Law — The Method of Natural Law

A Century of High Culture

Here yet again is a subject as theoretical, and no less futile, apparently, than the preceding: i.e., the second major question of the philosophy of law. It is about discerning not the goals, but the means of the juridical art; about drawing the map of the main roads by which juridical reasoning proceeds towards its solutions; in other words, it is about exploring the sources of the just.

No doubt the manuals in use raise the question in rather different terms. Our positivist doctrine of the sources of law seems to me to revolve, if I dare say, in the same nothingness as the goals of the juridical art. More often than not, in following the laudable concern of avoiding philosophy, one proceeds in an authoritarian mode. We are taught that the sources of law are first, enactments; second, precedents, etc. I may be an intractable and too demanding student, but I would like to know *why*, what the reasoning of this list and of this hierarchy is, and maybe would it be useful to check them from time to time. One would realise that the doctrine rests on fragile foundations. It is above all very incomplete: in my mind, the first office of a treatise on the

sources of law would be to teach the legislator how to legislate; the magistrate how to build a jurisprudence (since there exists a jurisprudence independent of the statutes). Yet nothing in these chapters. The doctrine stops half-way. It does not succeed in flying above the positive texts, the *results* of the juridical art, when we wanted to know *how* to arrive at these results. We content ourselves with peculiarly fragmentary answers, even if we do not yet reach, as a certain sociologism does, the derisory culmination: 'The prophecies of what the courts will do in fact, and nothing more pretentious, is what I mean by the law' being professed in a certain American school. An excellent formula for business men or 'juridical counsellors', but one which will inform *judges* little on the best way to decide; it is worth nothing for the instruction of *jurists*; it is a refusal to face the problem of the sources.

There is a crisis in the doctrine of the sources of law. I think that we must again impute it to modern, and above all Kantian, philosophy of justice. I will now consider not the object of this philosophy but its content and sources of knowledge. It is Kant's settled belief in his incomplete attempt at restoration, that we cannot draw anything from the observation of nature for the science of justice. The facts, he says, do not teach us anything about law: all our science of what ought to be can come only from ourselves, our own conscience, our own reason, from an inner, subjective source. But from this source nothing very substantial flows and whoever commits himself to the doctrine of the cognition of the just will not succeed in accounting for the origin of law.

Hence the failure of Kant's juridical theory, and above all the failure of the new species of natural law which reappeared, in a subjectivist climate, at the beginning of the twentieth century, such as the neo-Kantian doctrines of Stammler and of Del Vecchio. Unfortunately, one must also add here the doctrines of certain neo-Thomists who are very unfaithful to Thomas Aquinas. I will not teach anybody anything new by noting the fragility of their conclusions which, moreover, are as variable as the tastes of these different authors. Thus Kant, when he was entrusted with teaching philosophy of law, affected to draw from his principles of pure practical reason — that is to say, essentially, to draw from respect for the human person (because I discover in myself the dignity of the human being) — a series of juridical rules corresponding to the ideal of the bourgeois jurists of his time: respect for property, the binding force of contract, the necessity of state authority, etc. Unfortunately, at the same time Fichte was deducing from the same premises the opposite juridical regime, since, from the respect of the person one can infer both the absolutism of private property (if one endeavours to respect the person of the proprietor) as well as of the restriction of this right in the interest of others. Socialism or communism can just as well commend themselves to Kant's first principles.

Who will decide? For the majority of authors I fear that it is the most subjective of sentiments, once it is acknowledged that this knowledge proceeds from an inner source. Today each decorates with the name of justice his particular prejudice (his intellectual habits inherited from a particular education) or, very naively, the principles favourable to his own interests. But lately I denounced these commodities of language in the works of Mr Ripert

who, without excess of critical spirit, assimilates justice to the liberal rules of the *Code civil*, because, however presently inapplicable, they correspond to the preferences of his personal sentiment. The jurists of the beginning of this century held the most gratuitous of conceptions about the content of justice, generally in line with Mr Ripert. They thus went about teaching that adverse possession which dispossesses the proprietor in favour of an usurper is an unjust institution because 'justice' postulates that the right of property is perpetual ... Others are convinced that justice is all embraced in the formulae of a certain Christian socialism, half-way between socialism and liberalism. How can we discuss this? The assertions of most of our contemporaries are drawn from their own 'conscience', without any objective reasoning. Their justice is a 'sentiment'. Before such whimsy, how tempted we could be to admit that the positivists are right; that Mr Waline is right when comparing natural law to love and to Spanish hostels ('where each only finds what he himself brought'); that Kelsen is right when he makes Pontius Pilate's formula his own: what is truth, justice? Justice is but a label with which you gratuitously dress up your most ill-founded subjective preferences, but a fallacious cover of intolerance.

Arbitrariness is not the only deficiency of the subjectivist method. The subjectivist method is incapable of leading to substantial results, at least from the point of view of jurists; it only leads to hollow discourses, such as the excellent but very insubstantial principle of 'respect of the human person' or 'respect of property', an empty formula if nothing indicates the limits of property. It is only with the help of fallacies and gross errors of reasoning that some theoreticians, less honest and prudent than Kant, give themselves the appearance of inferring from the principles of practical reason less formal conclusions. Further, these conclusions are of a too rigid and ambitious structure. Because they would like not to owe anything to experience, but be strictly deduced from the 'principles of reason', they assume the aspect of fixed rules of universal scope claiming unconditional obedience: 'national sovereignty is unlimited', or 'the right of property is inviolable and sacred'; unless one holds the contrary opinion, and 'war' or 'torture' are 'unjust' acts, or that 'each citizen has a right to subsistence'. Unfortunately how many of our contemporaries are there for whom justice is embodied in such simplistic maxims, professed with all the more intransigence the more one is incapable of grounding them objectively! What a catastrophe if we took them seriously, that is to say if we carried these formulae from the sphere of abstract verbalism where they unfold to that of practical application! If justice were this dogmatism, it would be better to expel it from the field of the study of law! Better positivism than that sort of natural law! That is to say, it is better to leave the invention of law to chance, to the arbitrary will of the legislator, than to ground it on such a deceitful science.

But let us leave these philosophies of neo-Kantian justice, which are not all that important. And now let the positivists consider the mote in their eye. Does juridical positivism (not, to tell the truth, in the version which Kelsen offers, but in the traditional form inherited from Locke or from the school of the social contract) not conceal the same vice?

It is true that positivism renounces the idea of drawing from justice the *content* of law. We purport to leave the responsibility for its construction to the arbitrary will of the legislator, and we hope, thus, to limit the damage. And yet we feel the need to *justify* the power of the legislator, or at least the authority of laws. Our doctrine of law too is a doctrine of justice. We cannot ground the value of our positive law except by resting it on justice. But on which justice? Already the great inspirers of our theory of the sources (such as Hobbes, Locke, Rousseau) leaned towards subjectivism. Within their own conscience, they thought they found the rule, immutable and rigid, that our promises must be kept. In order to establish the authority of the positive laws of the state, all that was necessary was to add the social contract to this rule.

Juridical positivism (to this day in its most ordinary form) remains an unconscious residue of the doctrine of the social contract and, beyond the social contract, this allegedly just rule according to which one must keep one's word: juridical positivism is itself, therefore, the product of the subjectivist method of discovery of justice. It shares all the vices of this philosophy, it presents the same arbitrariness, and the same fallacies, and the same noxiousness. Hume had already shown very well the extent to which this allegedly absolute rule according to which one must always keep one's word — which indeed Aquinas would not have accepted — lacked foundation: since when would I be obliged to follow an absurd promise? But the social contract is equally a myth: were we to have to wait until it were effectively consented to, or until the laws were the expression of the common will, we would live until then, and for a long time, in anarchy. There is no need to add that juridical positivism leads to disastrous acts; that it makes us follow the orders of tyrants, or at least accustoms the body of jurists to this passive behaviour; that it paralyses the progress of law, smothering the French jurisprudence of the twentieth century under the out-of-date rules and principles of the *Code civil*; that it is responsible for the stagnation of the juridical art and for its increasing anachronism. Were it possible, it would lead to the reduction of law to laws. These are the remote effects of modern contractualism, of a deficient philosophy of the sources of the just.

In truth, today this legalism is but a vestige. It hardly deserves yet another refutation. Contemporary doctrine, in reaction, throws itself into the scientific nihilisms which I denounced at the beginning of this section. It *records* the liberty of the judge towards the laws of the land. It would be better to *teach* the judge the extent to which his duty is obedience to those laws, and what other sources one must follow when one does not have that law as a guide. We are in the process of substituting a false doctrine of the sources with the absence of any doctrine at all. If legalism already renounces the art of legislation, abandoning the content of laws to the alleged will of the legislator, 'realism' prompts us even more forcefully to the resignation of the doctrine. Realism abdicates the task of guiding the judge, a primary function of the science of law. It records the behaviour of judges without recommending norms any longer. It abandons them to 'historical determinism', let us say accident, chaos. The juridical art disappears. Such is the 'science' in which some of our contemporaries revel, a dead dog policy rather than a doctrine of law, the result

of a now complete severance of law from justice, and of the loss of natural law.

Nature as the Source of the Just

Let us then have the humility to ask classical philosophy again about the sources of the just. First a preliminary remark: the texts of Aristotle and Aquinas on which I have so far commented, have taught us nothing yet on this question; they concerned exclusively the object of justice, not its sources. We still do not know whether there is a *natural* just. To say that justice means to 'allocate to each his right' informs us neither about the content nor about the means which we could have to determine the right of each; it merely indicates its *form* in a Kantian sense. To say that the just is to be analysed as a certain proportion does not tell me which it is. I know that it is just to pay the just price to my seller, that is to say a sum equal to the value of the merchandise, but it is still necessary to estimate this value. I know that the honours and public offices will be justly distributed if a certain correspondence is respected as regards the persons of the citizens; but I still do not know which sort of correspondence. Aristotle warns us that the solutions would be different under a democratic regime (where the number of votes counts) from those under an aristocratic regime where these solutions are calculated according to virtue, wealth, or capacities. Choosing between these two criteria, which will lead to opposite results, is not his concern at this stage. Modern readers, anxious to obtain an answer which serves their passions, be these liberal or socialist, hurry to read a solution where the text refrained from premature conclusions: of the *cuique suum tribuere* they make a justification of liberal property — a program for social reforms out of the just price; or of distributive justice — a choice in favour of aristocracy. There is nothing of this sort in Aristotle.[21] Philosophy takes its time, serialises its problems.

It is another passage of the *Ethics* which deals with the knowledge of the content of justice. We know Aristotle's first response: we extract the just from the observation of *nature* in the first place; there are laws constituted according to nature ('χαια φυσιν'). There is a just, there is a natural law ('διχαιον φυσιχον'). Opposed to the subjective method, which purports to deduce justice from the principles of inner reason, there is another method which seeks justice outside ourselves, in the outer world. We are here at the heart of the doctrine of natural law.

To begin with we will glance at its 'metaphysical' premises. It implies a postulate which modern science thought it could dispense with, that the

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[21] Thus Aristotle's intention is certainly not to measure distributive justice according to the democratic standard of equality, as certain interpreters wrongly understood when modern philosophy (utopian and subjectivist) brought about the temporary triumph of egalitarianism. Nor is he well disposed to the aristocratic principle of the proportion according to merit; rather, he will ultimately give his voice to a middle solution. We will learn this later, in the *Politics*, when from the observation of nature Aristotle will draw the doctrine of the Polity, the mixed regime. Pol. IV, 7, ed. Thurot, p 260 et seq.

movements of living beings are explicable on the basis of final causes. The life and growth of a plant can only be apprehended according to a finality, according to its native orientation to become a tree, to produce flowers and fruits (and maybe the fruits are to nourish man). The life and movements of animals can be apprehended only in relation to their tendency to preserve themselves, nourish themselves, preserve their species. Their acts cannot be explained by the mere mechanical effect of efficient causes as Descartes imagines; they appertain to another kind of *order* governed by *final causes.*[22]

Now then, concerning human acts, the knowledge of this order is simultaneously more difficult and of heavier practical implication. The difficulty stems from the privilege of man to be endowed with voluntary action, that is to say liberty; and man's liberty implies that he may err from the path leading to his natural ends. Man, says Aquinas, is also the slave of the 'law of sin' (*lex fomitis*), which leads him from the right way (Ia IIae qu. 91.a.6). It belongs to us to discern the acts which are really useful to our species and which fall within the order of the ends, from irrational deviations, the pursuit of illusory goals, lost acts, doomed impasses. This is how we frame our moral science: for, acts without final causes, acts which we cannot make reasonable by relating them to ultimate ends, are faults for us, whereas there is virtue in following the reasonable order of which nature spontaneously offers us examples.[23] Thus, suicide is a fault because one observes in man, as in animals and plants, a natural tendency to self preservation. Here is another example which is developed at length in the *Summa Theologica* and which I here simplify: one recognises in man a tendency, specific this time, to the development of his reason and of his virtue. The pursuit of that end implies a prolonged education and therefore that childhood and youth should be spent in a strong family environment; therefore divorce, if it disrupts that environment, constitutes a fault. We extract law from the observation of the natural tendencies of human action.

Am I ridiculous if I still take this philosophy seriously? In Aquinas it receives the confirmation of faith, of the theological belief in the goodness of the creator. God did not make an 'absurd' world; for Christians, this argument seems to be decisive. But we can reach it with Aristotle via purely profane means, via nothing more than speculation and full openness to the world, which reveal to us an admirably well ordered nature. Doubtless it is a mere

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[22] On the revival of finalism in contemporary science, see the observations of Verdross, *Abendländische Rechtsphilosophie*, p 186 et seq.

[23] The consideration of a goal, which raised enthusiastic commentaries from Jhering, thus finds a place in the Thomist doctrine of law, so miraculously complete: the just is ultimately that which serves the good of man. We thereby acknowledge the ultimate utility of the juridical art. But here there is no trace of utilitarianism: for these Thomist notions of good, or of the end of the human species, have a completely different consistency to those of pleasure, or of empirical goals. The jurist will never submit to the definite interests of private individuals, for his role is to judge them, to 'put them in order', according to a 'common' good which is not given beforehand, and which it is the very mission of the jurist to discover, to give rise to (Ia IIae qu. 90, art. 2).

hypothesis that the activities of the living have a meaning and are oriented towards natural final causes; yet I do not see in accepting it anything more arbitrary than in the other postulate upon which the modern sciences have built: namely, the determinist postulate of the order of efficient causes. But to leave the heights of philosophy, two remarks will take us back to the level of law.

The doctrine of natural law escapes the first two reproaches levelled against subjectivism: sterility and arbitrariness. To start from the observation of nature, to draw from *objective* sources, is the only procedure capable of giving us no longer a formal set of morals, but one loaded with content; capable of equipping us with rules of conduct; capable of teaching us objectively which *acts* are good and which acts are sins, such as that suicide is a fault, or temperance a virtue, because the one is noxious to, and the other serves, the natural tendencies of man. And doubtless this will not be all there is to morality: on top of this and via other means, one still has to deal with the more subtle, and more elusive morality of *intentions* which can be satisfied with vaguer formulae; and one still has to deal with the 'supernatural' morality of the theological virtues of faith, hope and charity.

But we ourselves have nothing to do with theological morality; we jurists are entrusted with the exterior implementation of the social virtue that is justice. I am seeking the just allocation, the 'portion due to each', the just limit between my field and my neighbour's. How, from a subjective source in myself, in my conscience, in 'reason', could I find what is necessary to solve the dispute between myself and the other? In myself I will undoubtedly discover nothing but the conviction of the pre-eminence of my case, of my infinite 'subjective right'; or, empty formulae. Not in any case will I discover this limit, this objective proportion between my possessions and those of others, which has to be determined. A serious juridical doctrine can never be expected from an individualistic philosophy (that is to say one which sets the principle of knowledge in individual reason). And, for the same reasons, one is justified in foreseeing that the existentialist movement will not bring anything positive to the philosophy of law (but perhaps new bewilderment).

A definition of the relations between two persons can only come from a source exterior to these two persons: where will we draw it from? Will it be from positive law? Will we abandon ourselves to the legalism which is the limit of modern juridical doctrine? But this doctrine does not succeed in showing that the laws are just, and therefore in establishing their authority. Will it be from divine revelation? But divine revelation is silent on this matter, and the authentic oracles of religion have ceased to respond to requests concerning the temporal order.[24] There is no other procedure but to interrogate nature, and to attempt to recognise the order which it perhaps conceals – an objective, and therefore juridical order. If a natural order does not exist, distributive justice no longer has an object, a *raison d'être* (and thus the

[24] See my article: 'Une enquête sur la nature des doctrines sociales chrétiennes', APD, 1960, note at p 52 et seq.

moderns have lost its meaning). Without nature there is no justice. Only 'nature' is capable of giving substantial answers to the questions of jurists.

Only nature is capable of giving solutions acceptable to the various parties to a case, and upon which they may agree. If the content which I purport to give to the just is founded in my conscience, on the inner particulars of my reason, what hope may I have to come to an agreement with an adversary? My convictions are liberal, those of another are socialist, with the same intransigence, the same subjective assurance. Our divergence is without remedy. Subjectivist fanaticisms cannot be discussed; what ground for discussion is there? There is no common reference upon which to open a dialogue. It cannot be otherwise unless we consent to seek the principles of the just outside ourselves. And whoever believes (that is to say all of us) that it is not vain to look for just solutions, recognises consciously or not, that natural law exists. Ever since there were jurists who endeavoured to restore understanding between legal subjects, I think that all of them have employed the method of natural law. It is now time to specify the requirements of this method and the ambitions it sets for itself.