EPITOME OF CLASSICAL NATURAL LAW (PART II)

Michel Villey

Translated in two parts by Guillaume Voilley[*]

Translator's Introduction

This is the second half of a translation from the French of Michel Villey's (1914–88) 'Abrégé du droit naturel classique', originally published in 1961 in the *Archives de philosophie du droit* (APD) series. I chose to conclude the first half with Part II–2 of the original, so that the second half would commence with the section titled 'The Method of Natural Law', in which Villey endeavours to describe the means by which juridical reasoning strives to reach its goal, *viz* the just resolution of particular cases. Up to that point, Villey's reflections were essentially centred upon the notion of justice, as the titles of the sections of the article indicate. In short, justice was recognised as a virtue whose object, according to the classical definition, is to give to each his own (*suum cuique tribuere*). This object is law, understood as the Latin *jus* (that is to say, what is just), in contrast to *lex* (that is to say, what is legally prescribed).

From seeking the end of justice and defining its object — law/*jus* — Villey moves on, in what follows, to describe how, in practice, this end can be reached. Although he never cherished the somewhat artificial and rigid two-part structure of French legal *exposés*, it is the structure he later adopted in his *Philosophie du droit*, which originally appeared in two volumes titled *Définitions et fins du droit* (*The Definitions and Ends of Law*, 1st edn, Précis Dalloz, 1975) and *Les moyens du droit* (*The Means of Law*, 1st edn, Précis Dalloz, 1979), and which has just recently been reprinted in a single volume (*Philosophie du droit*, Dalloz, 2001).

In both the latter part of his *Philosophie* and here (although in the second half of his 'Abrégé' it is obviously less elaborate), the keynotes are dialogue, dialectics and the Aristotelian virtue of prudence analysed most notably by Pierre Aubenque in his *La prudence chez Aristote* (1st edn, Quadrige/PUF, 1963). These are recurrent themes in Villey's reflections, exemplified in early articles such as 'Logique d'Aristote et droit romain', *Revue historique de droit français et étranger* (1951); later ones such as 'L'art du dialogue dans la Somme théologique' (APD, 1984); and even his last book, *Questions de Saint Thomas sur le droit et la politique* (*Questions of Thomas Aquinas on Law and Politics*, ,

* The translator wishes to express his gratitude to Bronwyn Statham and Graeme Orr from Griffith University, and again to Mme Madeleine Villey and Professor François Terré. He was kindly advised to reveal something of his whereabouts. Electronically, he is at fum769g@tninet.se but his true earthly abode will indefinitely be at 20111 Calcatoggio, Corsica.

1st edn, PUF, 1987). It is also where his scepticism as to whether we ever can reach or achieve what is just is most perceptible. This scepticism evoked criticism from another important French advocate of *jusnaturalism* (see Alain Sériaux, 'Le droit naturel de Michel Villey', *Revue d' histoire des facultés de droit et de la science juridique*, no 6, 1988, where the author contends that the epistemological aspect of Villey's thinking ultimately supersedes the otherwise ontological dimension of his philosophy).

It is also of note that the second half of the 'Abrégé' includes a fairly long section devoted to a critique of the notion of subjective rights — another important theme in Villey's work. In many articles, notably those published in the *Archives*, Villey elaborated this critique around the claim that the notion of rights had a very different meaning in Roman law from what it has today; in other words, that the notion as we commonly understand it did not exist in Roman law — although it is not fully apparent in the 'Abrégé', Villey chiefly attributed the invention of the notion of subjective rights to William of Ockham (cf in particular 'La genèse du droit subjectif chez Guillaume d'Occam', APD, 1964). Villey contended that our modern notion of subjective rights is erroneous and misleading, and on this point — as on many others — his classical natural law is clearly distinguishable from the philosophy of the modern school of natural law. His reflections on this were finally put in book form in *Le droit et les droits de l' homme* (*Law and the rights of Man*, 1st edn, PUF, 1983) — for a discussion, in English, of Villey's thinking on this issue, see Brian Tierney 'Villey, Ockham and the Origin of Individual Rights', in John Witte and Frank S Alexander (eds), *The Weightier Matters of Law: Essays on Law and Religion — A Tribute to Harold J. Berman* (Scholars Press, 1988).

Finally, I wish to make a remark concerning Aquinas's major work whose title is consistently rendered in French as '*Somme théologique*' (see, for example, the recent four-volume translation published by *Les Éditions du Cerf*, 1985). Hence my choice of the Latin equivalent, *Summa theologica*. However the true original title is *Summa theologiae*, the difference being in the use of the adjective 'theological' instead of the genitive 'of theology'. Both Latin titles are equally used when referring to the work in English publications.

Editors' Note

The first half of the translation of the 'Abrégé du droit naturel classique' can be found at (2000) 9 *Griffith LR* 74. This, the second half of the translation, commences at Part II–3 of the original (from 'The method of natural law' on).

CONTENTS

The Method of Natural Law

The word 'nature' is equivocal, as are most abstract terms in the language of philosophy, such as the word 'reason' itself, or the term 'law'. Each philosophy distorts these terms, and remodels them according to its fantasy. At the beginning of the modern era, 'natural law' was often taken to mean the few core rules already existing in the 'state of nature', that supposed primitive state of humanity before any civilisation. This is the language of Hobbes, which already carries positivism within it. Others, who have not yet given up hope of drawing from nature a body of practical rules for the present world, mean by the word 'nature' something they call the 'nature of man' — that is to say, the nature of the individual apprehended outside his social world and his history. This is the tendency of Grotius and Pufendorf, and their successors in the so-called modern school of natural law. At the head of their systems they lay down a definition of 'man', of the essence of man, reduced to a few summary traits — as simple as a mathematical axiom. And then, they give the appearance of deducing rules from this axiom. This odd, mongrel figure of the nature of the individual effects the transition to Kant's rational law, where the maxims of the individual's subjective conscience serve as a starting point for the deductive system of law.[1]

Let anyone who wishes to understand something of classical natural law leave this confining notion of the 'nature of man' in the cloakroom. Classical thought does not work on abstract constructions. No doubt it lays down the existence of a 'nature' which is the *end* of human existence: our 'nature' is not the embryo or the wailing infant in swaddling-clothes (nor of course the

1 APD, 1961.

depraved person), but the person supposed to have reached her full perfection (cf Thomas Aquinas, III, qu. 2, art 1 and for example Aristotle, *Pol*, I, I, 7). But this nature could only ever amount to the unknown pole of our research, the infinite end of an asymptote, as invisible for us as the judge in Kafka's *The Trial*. Since our nature is our end, we are ignorant of our nature. We are ignorant of the ultimate end. In the course of history, man never ceases to invent ends which will more or less come close to, but which are not, the ultimate end. Man, as he is, is the only possible field for our observations.

To seek the natural order, we will need to start from the visible world. Here we see that man is a social being, like bees and gulls, engaged in the social bonds of family, work or the city. So the object of our study will be societies themselves, as currently found in nature. And we see that humans are varied, and not at all reducible to the simplistic, summary and uniform sketch that the moderns make of them, but changing because they are free, engaged in situations that vary in time and space, and always instigating novel enterprises and ways of living. Nor, of course, is our world a stream which never resembles itself, as the historicists would have it. The banks at least remain stable. Our world is a compound of constancy and diversity, and as such we must observe it in all its diversity. We must observe the nature of men rather than of man — the 'nature of things', as we shall see shortly.

Shall we doubt that this is the method of natural law? Classical thought certainly carried this philosophy into effect. In any event, it was applied by Aristotle, the father of natural law, and also, we are told, of comparative law. With his team, Aristotle began by analysing about a hundred constitutions, from amongst which the constitution of Athens comes down to us today. The despotic monarchies of Asia Minor, the Spartan aristocracy and the democracy of Athens, diverse regimes appropriate to the rural cities or the Acropolises, to warrior peoples or merchants — nothing escaped this Montesquieu of Antiquity, as Aristotle is also called. These investigations served as the basis for the conclusions in the *Politics*.

Here is another model. I believe that the Roman jurists were trained by their schools of rhetoric in the classical philosophy of natural law, and that they often consciously employed it. It is odd when some object, statistics in hand, that the *Digest* does not mention classical natural law page after page. After all, one does not acknowledge, every minute of the day, the method one is using or the philosophers by whom one is inspired. (I believe I ate bread three times a day since I began drafting this article, but I have not mentioned it yet.) The introductions to the didactic juristic works of the Romans refer to natural law in terms which are, in the main, essentially faithful to the Aristotelian doctrine, albeit tinged with stoicism. They recommend the observation of the world as it is. Ulpian says that jurisprudence is primarily 'the study of things', on the basis of which one discerns the just and the unjust. Like a botanist, Gaius classifies the different species of men, objects and juridical actions (at least those he can observe within the Roman world, since he deals mainly with the *jus civile*). And most of the works of jurisconsults are works of *casuistry*; each case is the object of an observation. For this reason,

even the Romans hold to natural law! It is not a question of deducing a system of rules; classical natural law does not assume the form of a deductive system.

At the end of the sixteenth century, the great public law specialist, Jean Bodin, declared that he was applying the method of natural law. He inquired, through history and the histories of newly encountered peoples, into the institutions of the Jews, the Greeks and the Romans of modern Europe. He was tirelessly curious, open to all and every experience, but he worked to distinguish between the natural institutions, adapted in accordance with justice to the circumstances of their time and place; and those which deviated from order, missed their goal or revealed themselves to be pernicious and fragile, because they ran counter to the nature of things. But when have we seen a serious legislator ever proceed in another way? No doubt the means may vary with the volume of the information used. The Roman jurisconsults who are the principal authors of our present laws (we owe more than half of our *Code Civil* to them) proceed with much good judgment, on the basis of a very small number of examples. Some ministers or counsellors, who we suppose to be fulfilling their office conscientiously, invert the proper proportion of information to good judgment; at any rate they summon statistical curves and tables. For example, if they draft a law for a matrimonial regime, they will not fail to collect information about the different customs spontaneously exhibited in notarial offices and in the social milieu under consideration, and about their 'social' and 'human' consequences (that is to say, their relation to the ends of the human species). Natural law is an experimental method.

I hear time and again that the doctrine of natural law renders juridical life sterile. Don't those who say this mistake their adversary? A moment ago, I noted where our post-Kantian conception of justice was leading, because it discounts this means of the juridical art (*viz* the observation of nature) in favour of stiff, emaciated and useless rules. The classical method of natural law produced flexible laws well adapted to the circumstances of time and place. 'The Acropolis is oligarchical and the plains are democratic.' The same status cannot suit the moderate climate of Greece and the hot territories of Africa; the cities of merchants and farming communities, and so on. This is what Aristotle teaches, and the most famous page of his *Ethics* on justice states that natural law changes because man changes. Thomas Aquinas employs the same formula fifteen times (*natura hominis est mutabilis*).[2] He means that the laws are mutable (*De mutatione legum*). The same laws are not suitable to the different states of man, in a democratic regime and in an oligarchical one, before and after the advent of Christ (Ia IIae qu. 104, art 3). In certain societies, marriage between very distant cousins must be prohibited; in others it is prohibited only between close relatives (suppl. qu. 54), and so on. Whilst being immune to the excesses of sociologism, the genuine advocates of natural law are at the same time close neighbours of the sociological school. Their view of the just is relative and open to progress; it is also the view which

---

2 Ia IIae qu. 94, art. 5 — qu. 95, art. 2 — qu. 96, art. 2 — qu. 97, art. 1, 2, 3 — qu. 100, art. 8 — qu. 104, art. 3 — IIa IIae qu. 57, art. 2 — *Sup.* Qu. 41, art. 2, etc.

corresponds to the needs of the juridical art, and which modern philosophy has ceased to provide.

The Limits of Natural Law

Without doubt, the price paid for the pertinence and ampleness of these results is a lack of certainty. It cannot be denied. Natural law does not display the haughty assurance of certain modern moralists. Modern morality, purportedly sourced in reason, claims to find in reason secure 'principles' of immutable value, which no novel experience can ever change, since these principles owe nothing to experience. It 'deduces' a system of rules of justice, logically springing from — and thus as certain as — those principles. It *knows* that torture is unjust or that man has a right to culture. How precious this glamorous assembly of rules of conduct would be to us, if only they were true! But it is presumptuous to declare the *rules* of the just. Our classical philosophy did not have that much ambition.

I do not know if there really are, deep inside human reason, substantial laws of justice, but we can be sure that we will not find any legislation *formulated* in nature. If we understand the word 'law' in the sense of a formulated rule, *there are no natural laws*. Let us be cautious with this equivocal (or more exactly 'analogous') term. True, Aristotle, in the *Rhetoric*, advises lawyers to appeal, in the absence of other arguments, to the laws drawn from nature, or according to nature (νομοι χατα φυσιν). But beware: at this point the expression is presented as synonymous with unformulated, *unwritten* law (νομος αγραφος). Let us have no illusions about the law of nature: its content remains elusive. As for Thomas Aquinas, it is true that he teaches the existence of an 'eternal' law, a law which is immensely rich, and which regulates with certainty all events in the universe, and notably all the acts of human history. Unfortunately, he adds at once, we do not know of what it consists. God's reason is unfathomable, and the eternal law does not resemble our human laws, which are expressed in words and written down. The eternal law is law merely by *analogy*.

Aquinas's thought concerning the 'natural law',[3] which feeds on rather diverse sources, such as the teaching of Saint Paul, Cicero and the Stoics, as well as on Aristotle's doctrine, is intricate. We have, he says, knowledge of certain natural 'principles' because God deposited them in our subjective conscience; moreover, they are confirmed on several occasions in the texts of the Judeo-Christian revelation. But these are vague, general and formal principles: you must do good and shun evil, or you must do unto others as you would have them do unto you. As such, these principles may serve as a guide to individual *morality*, but they do not suffice for law.[4] When we strive to know *what* the good is, *which* acts we must forgo — that is when we strive to 'determine' those precise, objective *relations* which constitute *law* — then we

---

3 *Translator's note:* Villey is now discussing *la loi naturelle*, that is, law in the sense of *lex* rather than *jus*.

4 On the difference between 'moral' and juridical precepts, cf my article in APD, 1960, p 55 et seq.

must turn to this other source of knowledge, *viz* the observation of nature. Let us revert to this method: what then do we find in nature? Some projection, some *reflection* of the divine order. The creator's plan acts upon the world of human actions in a manner similar to a law of physics, although with less rigour. We tend to follow this order spontaneously, in an unconscious, instinctive way, like beasts and plants. Mixed with this tendency to follow this providential order, there also exist in man *tendencies* which incline him to leave this order, for the fallen man is also the slave of the 'law of sin' (*lex fomitis*). We will attempt to sift the coherent acts which are in harmony with our ends, separating them from those acts which go against nature. We will thus obtain from the natural law, through its effects, some *indirect* knowledge. But we will not obtain access to the divine centre from which legislation proceeds, nor to the natural *law* itself. It exists — I assert it does — but its intimate consistency will be forever unknown to us. We can only ever strive to extract the pure gold of the natural law from the compound of human acts, without ever perfectly isolating it.

One will not understand this method unless one resolutely breaks away from modern idealism; and, in relation to the problem of knowledge, one embraces the realist philosophy of Thomas Aquinas. Can one believe that it was necessary to wait for Marx in order to know that conscience only comes after existence, and thus to free ourselves from the arrogance of rationalism? There is not one concrete piece of knowledge in our brains which is not in things first and which does not come to us from things. To obtain a pure and complete knowledge of natural law, it would be necessary for us to have the example of a society of perfect people. Our science of natural law is only ever worth, at most, as much as the best *examples* upon which we found it. Undoubtedly, we are perpetually tempted to feign to having reached that goal. One imagines that Aristotle and Thomas Aquinas themselves would have fallen into this trap, and that, observing the most well-established institutions of their time, such as slavery (and, for Aristotle, the city), they would have wrongly held them to be permanent features of humanity's true nature. But these reproaches are less pertinent to the masters than they are to certain successors. This is not to say that Aristotle and Thomas Aquinas could never be mistaken. The admiration I have for their philosophy does not go so far as to credit them with the gift of foreseeing the future, nor to follow blindly every one of their practical conclusions. But it *suffices* to say that they themselves had a clear consciousness of the *provisional* character of their results.

Neither Aristotle nor Thomas Aquinas ever claimed to hold the last word on justice; neither was dogmatic. One keynote of their philosophy of law, which has not been emphasised enough, is that their method of seeking the just is *dialectical*. Dialectics, the method by which we strive to close in upon a transcendental truth without ever claiming to reach it fully, 'to approach' it as the English would say, is also the method of natural law. It is the method of Aristotle's *Politics* and of the *Summa Theologica*, as well as of the Roman or medieval jurists, at least during the first phase of the juridical art, which is the quest for justice. Now a dialectician never concludes *once and for all*; rather, he remains ready to withstand the shock of, and to take account of, a novel

opinion or a new line of reasoning, like a medieval master before a *quæstio disputata*. Just as in a trial, we will always have to listen to the addresses of counsel. The dialectician will always welcome not only the *authorities* which any interlocutor will throw into the discussion, but also any '*examples*', the second method of scholastic reasoning. Bodin, following the same path, can go further than his master, Aristotle, because he has at his disposal a more extensive historical experience, and because he can contrast with the ancient institutions of slavery and citizenship the examples of the state and liberty which ensue from more recent experience, and which, he demonstrates, *better* correspond to the natural ends of humanity.

Anyway, the goal we are striving for is not, and must not be, to draw a useless tableau of an ideal justice, made for a perfect society. To this theoretical construction, Thomas Aquinas devoted (in the *Prima* qu. 92, 96, 98, 100, on the state of original perfection, in the times of earthly paradise) no more than a few very cautious pages limited to a few vague principles. The just which the jurist seeks, the just we need, is the solution suited to our present condition, to the present morality of human nature. It is, as I said earlier, the very act which I must accomplish, *hic et nunc* (*supra*, I–3).[5] It is itself as changing as the ever-novel situations to which it responds. Hence, how could our intelligence apprehend, express and capture in the set formulae of human language, that which is infinitely moving? The results at which our theoretical research arrives (for example, Thomas Aquinas in his Ia IIae qu. 62 et seq.) will therefore always have only a preparatory bearing. Their role is merely heuristic. One of the themes which all classical authors since Plato have most frequently and most forcefully stressed is the inability of any formula to express the just adequately, since, as they never cease to repeat, human matters are mobile, whereas the laws are rigid.[6]

To conclude, one of the fundamental axioms of natural law (so often asserted by our two authors) is that law cannot acquire the deductive form or the necessity of a *science*[7] (επιστημη). *In negotiis humanis non potest haberi demonstrativa probatio.* It is a matter for *prudence* (φρονησις), a flexible approach to contingency. Prudence is the proper virtue of the legislator and of the jurist (whom the Romans named *jurisprudent*).

Intelligence alone, applied to the natural facts, does not generate the solution. What is the *just* solution of the Algerian crisis? How many arguments are advanced on both sides! How few certain answers I have! To be sure, I do

---

5 *Translator's note:* this is a reference to the section of this article titled 'Justice and Utopia' (2000) 9 *Griffith LR* 88.

6 Boniface VIII and John XXII, faithful interpreters of the Thomist doctrine, lay stress on this point in their prefaces to the *Sexte* and the Clementine compilations (the *Sacrosanctae* and *Quoniam* Bulls): the variability of social conditions and of law itself is put forward to justify the necessity of positive legislation.

7 *Contra*: Villey, 'Logique d' Aristote et droit romain' in *Leçons d' histoire de la philosophie du droit*, p 171 et seq. In the second part of his article, the author seems to me to have mistakenly attributed to Aristotle the pretentious ambition to turn law into a 'science', and he has failed to recognise the essential role of prudence. However, he made amends in a *Post scriptum*, see p 162.

not deem it pointless that one of the rare spirits of our time, imbued with classical culture and being an enemy of all fanaticisms as well as adept in true justice, may attempt to indicate the flexible *framework* in which such a solution can occur, in accordance with what the 'lesson of history' indicates and as apparently prescribed by the 'nature of things'. But these sources remain vague as long as a positive decision has not determined them. What is the rate of the just price? The classical authors never thought that 'nature' supplied the figure. Money itself, notes Aristotle, is a creation of the law. The just price will be determined by the common agreement (or custom) which is generated by the market, or by the assessment of the prince. As to fixing it by reason alone, I am the first to say that it is impossible. It is a matter of positive justice.[8]

'What do we really know?' This is the conclusion of the wise. The philosophy of the classical authors is closer to scepticism than to modern dogmatism. If I hold that a revival of natural law answers our present needs, it is not at all because this doctrine gives us the moon. On the contrary, it is because it is an opportune reminder of our limits — the best antidote to modern systematism.

Theory of the Positive Law

In this way we can explain the existence of a second source of law, which is the law in the sense of the human law, the *voluntary decision* of the legislator (or of the judge) of doctrine or of the parties to a contract. And I do not see that there exists any other *rules* than these.

Here again, how commonly is the thought of Aristotle and of Thomas Aquinas misapprehended by its interpreters! And how irrelevant the usual positivist criticism! Classical natural law *never* underestimated the importance of positive laws. I consider that classical natural law already has all the advantages (if not the ridiculous excesses) of juridical positivism. Does not Aristotle begin his analysis of justice by noting that the law is also a source of the just? Does not Thomas Aquinas grant an essential place, in the exposition of the sources of law, to the *human law*, formulated or 'promulgated' by public authority, and normally sanctioned by it? A few pages later we render an account of a book by Sten Gagner on the history of legislation.[9] The greatest merit the author attributes to Thomas Aquinas (and through him, to Aristotle) is to have given rise to the flowering of decretals and ordinances which mark the end of the thirteenth century, when the gigantic advances of modern legislation began. The term *law*, which we see taking the place of *jus* in the course of the Middle Ages, evokes precisely the fundamental importance of the legislative function, of the authority which *rules* or *regulates* (*regere*, whence *droit*) the social order. And the technique of the jurist, for the most part, is made up of the knowledge of these rules.

---

8 As was shown in the *Revue Thomiste* by the research of Albert Sandoz on the true philosophy of Thomas Aquinas and of his great commentators.

9 *Infra*, reviews. (*Translator's note:* this reference is to the original volume, ie APD, 1961.)

A first question is this: why tarnish the mirror of true justice with the gross simplifications of our written laws? Because being a jurist (concretely) is not only to devote oneself to speculative inquiries, not only to be an academic, but also to *act* and to combat injustice. Just as we need firm rules and an imposed 'discipline' to fight against the invasion of sin within ourselves, within a society the injustice of the few must be contained by the government of 'others'. A juridical apparatus must be established, and the majority of judges, who are varied in their learning, must be guided in their task by the wisest, and through laws (Ia IIae qu. 95, art 1, etc). It is absolutely true that our rules will never embrace law perfectly, and that a formula will never express all aspects of justice, but in order to achieve some justice, we must at some point put an end to the search for justice, and agree upon certain solutions, which can be preserved for some time from debate, and which the social body can impose upon individual lapses. These rules will be equal for all; and by their very existence, whatever their deficiencies, they will effect a rudimentary equality. These are rules grossly established, says Thomas Aquinas, *in plerisque*, that is giving consideration to the majority of cases, and which we accept the need to follow even when they seem absurd. I thus stop at a red light even when there are no pedestrians at the crossing. Such is the realisation of law, without which justice would be but an impotent good intention.

A second concern is this: what is the immediate source of the rules of law? Since the study of nature can potentially yield only an indistinct outline — a direction rather than a firm result — a rule will only receive its form, beyond the primary work of intellectualisation, via the intervention of a *will*. All our rules have a positive origin. They proceed from the spontaneous agreement of the people, from the conscious decision of the city's élite, from the acknowledged authority of *jurisconsults*, from the office of the judge, or from the command of the prince. Man is social, and within any human society there are people invested with either a certain competence or a preponderant power, who by that very fact are naturally responsible for common affairs. As members of that group, we receive from these natural authorities the practical determinations of the common social order, just as our limbs receive injunctions from our brain.

This is how human laws are born. They are not 'deduced' from nature; they are in part arbitrary. Yet Thomas Aquinas maintains that they are 'derived from the natural law', in that the legislative rule either constitutes a stage in the quest for natural law (*conclusiones*), or adds to it the precision necessary for its practice (*determinationes*) (Ia IIae *ibid.*, art 2, cf. *infra*, III–2). According to the classical authors, there is an intimate collaboration, a relation of means to end, a complementary association, between justice and human positive law, rather than tension between the two. I cannot conceive of a worse misinterpretation than the accusation of *dualism*, by which Kelsen imagines that he is doing away with the doctrine of natural law. One fancies that there were *two* opposed or juxtaposed systems of rules: the system of positive laws, and that of natural laws. But a moment ago, when we analysed the first step of the juridical art (that is, the quest for the natural just), we did not find rules. It is absurd (although, unfortunately, neo-Thomists hardly refrain from it) to go

about composing 'treatises of natural law'. It is not the task of philosophers of law to make the law. Natural law is but a *method*; the path followed by *jurists*, to whom it falls, in the course of legal history, to bring these rules to completion, since every rule of law is the sum of reason and will. Law is a factual truth, not a utopian fancy. Any serious legislator begins, more or less, by consulting the nature of things and wants — or at least so he claims — to formulate a just solution; whether he succeeds is another matter.

The ultimate merit I recognise in the classical philosophy is that it provides us with a valid theory of positive law, something after which modern positivism vainly strained. (a) Will we still go about professing, in the century of 'political science', that the law is the 'expression of the common will'? And after so many subtle psychological studies, will we still say that the law owes all its might to police coercion? Where does its binding force come from? Positivists should be deeply grateful to the doctrines of natural law for giving them this demonstration. Of course the legal rule is not justice, but it is the *instrument* of justice; or its provisional substitute, a scant, emergency lighting with which we must content ourselves. It shares the nature of justice because of the work it accomplishes in the service of justice. As certain philosophers of law have begun to say anew, in the name of 'phenomenology' or of 'the analysis of language', the idea of a law implies that of the just. It is just to drive on the right hand side of the road, and to declare one's income on 28 February. Isn't this the way things really are?

(b) Having failed to justify the authority of positive laws, legal positivism exaggerates, to the point of absurdity, the respect we owe them. It collapsed into a form of legalism, which many of our contemporaries have denounced as untenable. But with more sagacity than our sociologists of law or than the German school of free law, natural law avoided this idolatry of the law. I hold that the legislator fails in his work if he does not serve *in* the quest for justice and the common good, the *ends* of which he is specially in charge. In accordance with Thomas Aquinas's pregnant formula, an 'unjust law *is not a law*', just as a knife which does not cut is not a knife. Legislative authority is not the absolute power which positivists wished it to be, but one function amongst others. As the rudder of a ship is but a mechanism, a defective rudder must be changed, or its trajectory corrected. I would not advise anyone (and anyway the advice would be as vain as it is immoral) to follow all the orders of obvious tyrants. I demand that jurists have the liberty to judge the law. For everyone, each judge, each policeman, is *responsible* for his own acts (this is Thomas Aquinas as much as Sartre). If they deem that the application of the law, *overall*,[10] goes against justice, jurists will get round the law. Whatever else they may do, is not what I am attempting to describe here the true behaviour of our magistrates as they are? Is there not a 'jurisprudence' which goes beyond and against the law? Once and for all, the doctrine of natural law is but a realistic description. I cannot understand why it is denigrated in the name of 'science', when it corresponds to the facts.

---

10 Cf *infra*, pp 166–67.

III The Fruits of Natural Law

I was about to put the pen down when it occured to me that my reader may not exactly have a grudge against the *falsity* of the philosophies of Aristotle or Thomas Aquinas. My reader may, I am afraid, have taken too little interest in them to judge their truth, sensing perhaps the vanity of their analyses. Here I have to admit the reader is right, at least to a certain degree.

One must concede that in practice, legal positivism comprises errors that lend it some degree of appropriateness. It is true that judges are free to control the positive law (and will anyway do so, whatever our theory), and since they have, on the whole, a tendency to abuse this liberty, it would be useful not to draw their attention to this liberty of theirs, and to inculcate in them the sole cult of the law. When disorder threatens, it is better to say nothing about public safety, and to speak of the constitution instead. The positivist doctrine becomes efficient by focusing on part of the truth. I concede that positivism could be the most desirable of teachings and a good truth for the vulgar: in other words, a good, *exoteric* doctrine. After all, if disguising justice a little inside the reverie of an ideal world, when most reduce it prosaically to the established regime (thereby mistaking it for the respect due to the human person, who is simultaneously and universally ill-treated) is indeed fallacious, then this fallacy is salutary! *Oportet hæreses esse*! But what principle of *action*, what progress, what 'transformation of the world' can we draw from Aristotle's neutral and complete description? His philosophy is not sufficiently full of life (if not of the life of the intellect, to which not everyone is responsive).

Here, let us stop pleading in favour of a lie; it is not sincere. Such pragmatic treachery will eventually turn against its authors. For a few years it serves the unilateral objective for which it is devised (for example, strengthening order, or individual liberty), but it will very quickly exceed the intentions of those responsible for it, and it will be discovered that these goals were hastily and improperly defined, or that they are already ruled out by circumstances. In sacrificing its *raison d' être*, truth — the equalisation of things and intellect — to the idols of businessmen, the academy could be making a grave mistake.[11]

More than any other, the twentieth century, being devoted to technical activity where everything betokens contempt for speculation, is led astray by the unilateral theses which are the legacy of the philosophy of former generations and which we entertain through routine and intellectual inertia, despite their being no longer adapted to the present situation. We worship science while we are being crushed by mechanics, and the time has come to fight scientific imperialism and legalism, before we suffocate under the weight of state laws, and so on. The fallacious modern philosophies of 'legal positivism' congest the minds of jurists, or at least of those who, due to their profession, let themselves be affected by such philosophies; that is to say, the minds of those whose profession is to deal with law scientifically. Once one

11 *Translator's note:* the original is '*adéquation de l' esprit aux choses*', which is a direct translation of the classical definition of truth as *adæquatio rei et intellectus* (cf Thomas Aquinas, *Quætiones de veritate*, qu. 1, art 1).

leaves the university with a diploma, one quickly escapes the influence of theory. But the philosophy of law bears heavily on study, and my reader is not unlikely to be a student or an academic.

Assuming I were to teach civil law, here are a few places where I would endeavour to free such teaching from these after-effects. Admittedly, this assertion is quite pretentious. Nor am I unaware of the fact that it exceeds my capacities, or that one would find in classical natural law enough to entertain many years of study. But let us simply gather a few crumbs.

Hierarchy of the Positive Sources of Law

Assuming that legal doctrine has not changed all that much from when I was a student (it must have sustained the invasion of sociologism), then it must remain legalistic.

Twenty years ago, I was taught the laws are sovereign, for the modern social contract theory *leads* to legal monism. At the time when this philosophy was most vigorous, it endowed the *Code Napoléon* with an actual monopoly. Now that it is impossible to refuse to see the luxuriant and disorderly blossoming of jurisprudential, customary or doctrinal rules, this philosophy leads theoreticians to conceive questionable fictions. We harmonise present facts with old principles, by feigning to believe that these new species are mere branches derived from the legal tree, and that the judge's creations draw their binding force from a mandate conferred by the legislator. But if custom and jurisprudence were indeed mere complements of the law, submitted to its empire, how could they so often bend and contradict the law? I grant that incoherence is merely a venial fault for a jurist, who is a man of action rather than of science, and for whom results count more than rigour in reasoning. I see here a new piece of evidence of this, albeit one which does not quite absolve the authors of our textbooks.

On the contrary, the classical philosophy of natural law leads to *pluralism* (a pluralism of *positive rules*). It admits unhesitatingly that the judge draws the directives and the precise *determinations* of positive law (which he needs inasmuch as justice is rarely obvious), from sources that are by nature multiple. Various authors contribute to their creation, each gifted with particular advantages or shortcomings, but all equal in title under the sole magistracy of what is just (cf. *S. Th.* Ia IIae qu. 95, art 4).

1 Among the creators of rules, we will surely have to count the central powers of the state. Who, asks Thomas Aquinas, would be in a better position to promulgate and enforce positive law, than the prince, who holds public force and is by this very fact responsible for common affairs — *princeps qui curam populi habet*? Nowadays, above all, justice commands us to make ample use of *the law* in the strict sense of the word, *because* it is at the highest level a factor of unity, of certainty, and of foreseeability. A mercantile society requires reliable solutions, because in such a society, the interests of third parties demand uniform rules. An unstable and heterogenous society, lacking firm morals or manners, feels more than any other the need for public sanction. Perhaps also, we are simply accustomed to invoking the laws, and

upsetting this common habit would damage the interests of many. In this respect, the English follow other erring ways (but it is true that they have more manners!). Among the French, one will more widely take into account the laws made by public authorities, by which I mean those *de facto* authorities which alone are in the position to promulgate common rules, without worrying too much about whether these authorities actually represent the alleged will of the French people, or about whether the election of the members of parliament, or the statutory powers of the executive, are indeed in order.

2 No lesser for us must be the weight of *custom*. The people as a whole form the first body capable of spontaneously producing common laws. According to the admirable analysis of the *Summa Theologica*, the will of man working out the definition of the rule may just as easily reveal itself *facto*, through repeated acts, as it does *verbo*, in an express formula (Ia IIae qu. 97, art 3). Jurists will always show a fondness for this most ancient way of determining what is just, as it offers the advantage of stability. Although it is less useful in a 'dynamic' society than in a static one, it is folly to scorn custom as rationalists and positivists do.

3 Once we have repudiated voluntarism, nothing forces us to recognise, in our political assemblies, a monopoly over human laws. I am not a 'democrat', and entertain no superstition concerning the myth of the social contract. Let us therefore leave parliamentarians where they are. There are other experts in France whose 'authority' equally entrusts them with this public function of determining what is just. By their *nature*, without having to run for election to the legislature, they are organs of the state. In ancient Rome, as well as in ancient France, *doctrine* played the leading part when it came to laying down the rules of law, and it is not at all likely that this phenomenon is complete. An opinion of Mr Ripert may, in fact, have the same weight as an opinion given by Julian or Sabinus except that we check whether they offer the same guarantees of knowledge and independence, and hence whether they bear the same 'authority'. The 'common opinion' of the body of French civil law jurists will weigh even more.

4 Finally, all these reasons combine so that we must take into account the definitions of law laid down by judges who are experts in their own right and to whom judicial routine gives some chance of continuity; that is to say, we take *jurisprudence* into account. I refer particularly to the judges of the Supreme Court, since they participate in the power of the public authorities, and due to their eminent wisdom. Nothing is more normal in the eyes of natural law than the existence of *judge-made law*.

Before any hearing, no judge can surrender the free *responsibility* of his personal decision. It is simply not conceivable. It is for him to *choose* between the guides who press round him with contradictory pieces of advice: the laws of state, legal doctrine or current jurisprudence. It is for him to decide whether to follow this advice or to make his own conclusions prevail. It is for him to decide, he is free; let us qualify that, he is free before justice. This freedom

must be balanced against the risk that may attach to violating orders of the state; it is not necessarily just for a judge, by losing his position, to condemn his children to starve. The choice may occasionally be difficult and heavy, and law is never given in advance.

Yet the role of doctrine, insofar as it seeks to bear upon the judge's decision and the efforts of the legislator in his sphere, is indeed to establish some order in this plurality of sources, and to impose a hierarchy. As for classical natural law, it fails in this respect, and I readily acknowledge that the classical philosophy does not suffice for this task. From the philosophies of Hobbes, Locke or Kant, one can draw a hierarchy of the sources of law, but not from the philosophy of Aristotle and Thomas Aquinas. As we saw, the classical thesis is that such *determinations* must rest upon the experience of the particular circumstances of each time or era, of each country, and of each type of dispute. To define the order of precedence of the sources of French civil law is the business of the French jurists of the twentieth century, observing the conditions under which the activity of French judges is carried out. One can merely suggest a few directives:

1 The solution will vary according to the type of matter in dispute.[12] Very often, justice commands the primacy of state laws. It is the regime corresponding to the *de facto* political structures of contemporary France, and it has the advantage of doing justice effectively to the interests of third parties. However it is not true in every field. The law itself will frequently be the first to acknowledge its own incompetence. Take for example the question of the custody of children after divorce. The very text of the law purports to refer the judge to the report of some expert social worker, or perhaps even of a psychologist. In truth, the law is merely granting what it was forced to grant. The truth is that justice requires in such a matter the solution which is most in keeping with the nature of the circumstances, rather than a uniform solution. Given contemporary morality, I think that this procedure would and should be roughly the same, even if the *Code* had not so cautiously mandated it.

   To chart the sectors of juridical life where violation of legal texts is advisable would be a useful project. Although judges are probably too shy to admit to doing it, and although the positivist doctrine is certainly reluctant to prompt them to do it, everybody knows that they do not altogether refrain from violating legal texts. It is not by virtue of the law that divorce by mutual consent is practically permitted in France, but against the intention of the law (whatever formal compromise might be invoked).

2 In any case, I will not accept the deceptive dogma of the *absolute* sovereignty of state laws. Justice is ultimately the sole arbiter (on

---

12 Gratian thus strives in his first 20 distinctions to classify the domains where Holy Scripture, Canons, imperial constitutions, Patristics, customs, etc will normally be recognised as authorities. It is an indispensable introduction to the solution of the *casus* of the second part of the *Decretum*.

condition that we do not understand it in the abstract, idealised style of modern thinkers, but in the realistic manner of Aristotle and Thomas Aquinas).

I would be a little astonished to be followed this far. I will not therefore conceal the fact that following the classical doctrine of natural law would be inconvenient for academics, for it ruins the very conditions necessary to the existence of a 'science' of law. At present, only the upholding of the sovereignty of the law preserves the coherence of law. The law distributes and limits the respective roles of judges (as we saw in the example of custody of children after divorce), of custom and of doctrine, in the creation of law. In this way it avoids contradictions. If the law does not decide between the various answers emanating from these various sources, and thus resolve the conflicts that arise, legal science will have to surrender all hope to determine the solution by itself. A legal solution to each problem must *exist*, says Kelsen; therefore there must be a sovereign rule.

I realise that my target is the postulate of the 'unity of the juridical order'. Is it the case that it alone makes possible the existence of a science of law? Yet I do not care whether a 'science' of law is possible or not. I certainly acknowledge the value of a certain and predictable solution. I am ready to set a high value upon the considerable interest attracted by the advantages of a common and mechanically calculable decision. However this is but one of the values between which law must choose. If the scientific solution (established on the basis of laws) reveals itself to be, *overall*, unjust, nobody will be willing to observe it. Kelsen himself must admit this. Why then should we continue to call it *law*?

There is no 'positive order'. Disorder is the positive fact, and the quietude of order belongs to a city other than ours. It is better to acknowledge the fact that here below, any juridical solution (that is to say, one that is just overall, and thus which does not surrender the value of security) remains more or less uncertain. It involves a choice between several rules and depends on our *prudence*. It is to a large degree 'scientifically' unpredictable. We have to recognise that law must not be made after the model of mathematics. I do not expect a machine, even an electronic one, ever to be able to replace the jurist. Will our teaching lose its rigour and its beautiful logical organisation? Perhaps it will be less noxious, perhaps it will contribute less to the estrangement of law from life; perhaps the present crisis of law, so deep and dangerous, would thereby be attenuated. Regarding human actions, one observes that too much certainty is inappropriate. After all, it may well be the case that too much order does not suit law. In any event, the doctrine of natural law would lead us to a certain degree of disorder (without necessarily going back to the excessive uncertainty of certain earlier civilisations).

The Method of Interpretation: Natural Law and Positive Law

Let us pause a few pages into our textbook on civil law, at the chapter on the *interpretation* of rules of law. I do not have the book at hand, but will I be mistaken in assuming that one barely manages to shake off the old tyranny of the exegetical method, which is the by-product of voluntarism and the outcome

of an erroneous analysis of human law (conceived of as merely *will*, or as the voluntary 'command' of the legislator)?

May the civil law jurist allow me to refer him, at this point, to the *Summa Theologica*: Ia IIae qu. 95, art 2 (cf IIa IIae qu. 57, art 2), dealing with the two modes of 'deriving human law from natural law'. Or, if my colleague does not have time to read the *Summa Theologica*, let him meditate for a moment on the notions of 'natural law' and 'positive law' as understood by classical writers. Only now am I coming to this distinction, which has been distorted by very many interpreters, but which we have now learned not to mistake for the distinction between the natural 'law' and positive law.[13] Any human law is positive, but is grafted on to the theoretical quest for the just according to two distinct modes:

(a) As we saw, part of the rules of law proceeds from the purely arbitrary will of the legislator. In the language of Thomas Aquinas, these are *determinations* in the strictest sense of the word. Consider the piece of traffic regulation which enjoins us to drive on the right, and not on the left as in England; or a decision of the Supreme Court whose only goal would be, in a given case, to standardise precedent. Here we encounter a 'positive law' or 'positive just'. It is just to drive on the right, because it has been decided so; the just proceeds from a command (*justum quia jussum*). Whoever looks for this type of justice must *deduce* it from the text itself. *In this case*, the deductive, exegetical method will be welcome. When the Roman jurisconsults comment upon the law of the XII Tables, the praetor's edict or the edict of the curule aedile, they cling religiously to the words — that is, the utterances (*verba*). In the same way, the English, who are better acquainted than us with the doctrine of Aristotle, employ this method as regards statute law.

(b) But human laws comprise another element. Insofar as they are products of the intellect, they are an attempt at expressing natural law. They are the moment when the quest for natural law stops and comes temporarily to a *close* (*conclusiones*, says Thomas Aquinas). And the justice these laws pursue is therefore natural justice, justice *per se*, which is not just because it is commanded, but is commanded because it is just (*jussum quia justum*).

For the most part, the rules of *doctrinal origin*, which are the most numerous and ancient at our disposal, come under this category. A good half of classical Roman law was thus born of the doctrinal authority of jurisprudents. The same applied to the private law of ancient France, and our *Code Civil* itself is, above all, the transcription of Roman and modern doctrines. It is a doctrinal 'conclusion' of natural law that a person is responsible for the damage or injury caused by their own fault (art 1383). Now, to the extent that the *sense* of a rule of law (that is to say, its *tendency*, its direction) is to indicate the just rather than to enact a command, we shall not

[13] *Translator's note:* here the original for 'law' is *loi*, whereas it is *droit* in the previous sentence.

use it in the same way. Obedience will be less suitable than active collaboration.

To begin with, legal doctrine does not enjoy the *imperium*; Mussolini and Hitler are always right, not the academics; and not legislators either when they officiate as academics. One has the right to discuss their theses, as the Roman jurists would, opposing the opinion of Sabinus with that of Labeon; and just as Gratian's *Decretum* proceeds by the *dialectic* method. Gratian confronts the solution presented by Augustine with the one which seems to follow from a particular text by Saint Jerome, with a certain canon formulated by a particular council, with a pontifical decretal, with some part of a Roman *constitution*. Through this free *discussion*, he proceeds to a decision he expresses in a *dictum*.

Secondly, no human expression of natural law, be it transcribed in a code or not, fully achieves law, since law is an adjustment to a concrete situation which the law could not foresee (*supra*, I–4).[14] The legal formula is then the *instrument* of the law's search, a means of approach rather than the answer. Shall I return, asks Thomas Aquinas following Aristotle, a weapon to the madman who had entrusted it to me, on the sole basis that the law stipulates that deposits must be returned? Would a policeman be stupid enough to apply the rules of traffic regulation to a case of a breakdown at a pedestrian crossing? One does not mechanically *deduce* the decision from the legal rule: *Non ex regula jus summatur*, as the Roman jurisconsult says. One does not follow the law, one uses it intelligently as an *aid* without being enslaved by its terms, just as the architect uses the laws of mathematics. The judge, Mr Coing used to say, is similar to the conductor actively interpreting the music of the composer. No longer is there a place for the mechanical method of exegesis, instead we require freer behaviour on the part of the judge, behaviour that implies that he turns directly to nature: *Quia non sermoni res, sed rei debet esse sermo subjectus* (qu. 96, art 6). There is no separation between the legislative and judicial tasks, but an identity of function, of goal, and of method. In this case, the judge is the equal of the legislator; not his executor, but rather his successor.

The provisional 'conclusions' of natural law and the 'determinations' of positive law thus need to be treated differently. This distinction could be precious to us again, only we would still have to put it into practice. It is the job of the professor of civil law to distil, in any particular article in the *Code*, or judgment, or common doctrinal opinion, that which, by its object, is the result of theoretical reflection from that which results from an act of decision-making. Concerning this latter part of any legal rule, I would recommend to him a flexible mode of interpretation.

What practical benefit does this give us? We were looking for a middle way between that vestige of voluntarism, the absolute sovereignty of the legal text; and the disorder and unbridled liberty, for example, of existentialism and of the German school of free law. Natural law suggests to us a fair line of

---

14 *Translator's note:* this is a reference to the section of this article titled 'Justice and Rules' (2000) 9 *Griffith LR* 84.

demarcation between deduction and research, between order and life. We suffocate under the burden of state laws. The development of natural law is crushed under the dead wood of outdated codes and the unnatural hypertrophy of positive law. Everyone deplores the gap between the science of law and life, yet despite the still too timid efforts of an author like Gény, free doctrinal research cannot blossom. Without losing the order which legal rules convey, natural law would give us back a good degree of liberty.

The Language of Subjective Rights

Here is an even bigger subject upon which our critical reflection could try its skill. As I stated in another work,[15] the general terms of legal vocabulary, which are the principal tools of juridical reasoning, have been remodelled since the seventeenth century, first by jurists of the 'School of modern natural law', and then by those of the school of pandectists. In doing so, the fundamental notions of person, contract, obligation and right have been given a very different sense from that which they had in Roman law and the classical tradition.

I will take as an example the term *subjective right*, which plays a predominant role in the present science of law.[16] (I) It is a central notion around which our systematic *exposés* have structured themselves since the modern reversal of the system of the *Institutes*.[17] It is beyond doubt that it originates in modern philosophy. Born of the negation of the ancient, classical, objective order,[18] it developed with the progress of subjectivism. Ockham, Hobbes and the philosophers of their school renounced the idea of reading relations or social obligations in 'nature'. All they discern in it are individual 'rights', powers or liberties, naturally unlimited as long as the positive law proceeding from the assent of the citizens (and therefore indirectly proceeding from these very liberties) does not limit them.

In Kant's philosophy, the subjectivist premises of the novel notion of 'right' fully come to light: subjective rights are deduced from the innermost conscience of man; they emanate from the person separately considered; they are the expression of her liberty. They are presented as a 'moral quality' of the individual, as the 'faculty' or the 'power of his will'. This is how, after the movement of the 'school of modern natural law', pandectism elaborates its definition.

---

15 'Kant dans l' histoire du droit' in *La philosophie politique de Kant*, PU 1961, p 49. Cf *Leçons d' histoire de la philosophie du droit*, p 282 et seq and p 291 et seq.

16 Cf the important article by P Roubier, 'Les prérogatives juridiques' 1960 APD 65 et seq. One will find in it a defence of the notion of subjective rights, but with too many nuances and distinctions, unfortunately, for my 'epitome' to enter.

17 Cf my *Recherches sur la littérature didactique du droit romain*, 1946, p 43 et seq. and *Leçons*, p 196.

18 'Les origines de la notion de droit subjectif' 1953 APD 163, re-edited in *Leçons*, p 249 et seq. Cf H Coing (1959), 'Zur Geschichte des Begriffs "subjektives Recht"' in *Das subjektive Recht und der Rechts schutz der Persönlichkeit*.

Subjective rights — not only those proclaimed in our 'Declarations' (the right to do what we will, to think, write and publish what we please, to circulate freely, etc) but also the civil law rights of property, of liability and so on — were originally conceived as natural rights and are still conceived in this way. True, a rather well-received (albeit incoherent) doctrine would tend to delude us into believing that our 'rights' are the product of positive law (which would, by the way, amount to sacrificing individual liberties to the discretion of the state). But let us stop speaking of subjective rights: the positive law creates neither 'liberties' nor 'powers'.[19] No! Hidden behind our vocabulary of subjective rights is the idea (not absurd at all) that *nature* endows us with powers, and we call these powers rights.

One can further observe that, from their origin, our rights retain something indefinite, since the liberties from which subjective rights proceed would have been absolute in the state of nature. It is true that, in the 'civil state', our rights could not remain absolute, and I certainly expect the law today to set boundaries to them on many sides, yet never on all. After defining property as 'the right to enjoy and dispose of things in the most absolute way', the legislator thus adds, 'provided one does not make use of them in a way prohibited by laws and regulations'. This is a serious restriction indeed. But unless this article from the *Code* is absolutely devoid of meaning, it indicates that, when there is no express prohibition, the judge ought to rule in favour of the owner. In the absence of an explicit exception, the right of property retains its absolute and unlimited character. This calling to the infinite is linked to the idea of 'power', a certain, natural form of activity, designated here by a *verb* (to circulate, to think, to dispose of a thing, etc) being *left* entirely to the discretion of its holder (which the term *right* expresses).

(II) Now, against these modern conceptions, let us oppose the philosophy of Aristotle and Thomas Aquinas. I doubt that subjective rights are a very felicitous invention. Let me anticipate a piece of criticism: I do not despise individual liberties. How absurd! I would rather renounce a hundred times all these claims in favour of classical natural law than waive my 'right' (if we must talk that way) to say what I please, or even my 'right' to holidays, or my 'right' to go about freely. Furthermore, because of the present climate of state control, and before the perils to which legal positivism exposes liberty today, I even prefer that these rights be solemnly 'declared'.

Yet the classical philosophy appears to me capable of providing us *the same services* while using another, more accurate language. Nor do I see that the great, classical philosophers, although they did not speak of subjective rights, denied the *substance* of most of these liberties. Aristotle, to whom we owe the best of apologies for private property, did not; nor did the Roman jurisconsults, who defended the *dominium* — that is to say the sovereignty of the head of family over his household; nor did Thomas Aquinas,. who constructed his natural law upon the inclinations of man. What tendency is more fundamental in man than that of freely pursuing his full personal development? This egoistic tendency is sound; it conforms to the natural order.

---

19 Cf Héraud, 'Sur deux conceptions de la compétence' 1959 APD 35 et seq.

According to the classical authors, it deserves to be protected. One did not have to wait for Bentham to realise that.

Even the most refined liberties, with whose invention our legal textbooks glorify modern philosophy, would equally have found a place in the classical system of thought. Take, for example, the freedom of conscience or of opinion, at least as regards the state, within Christian medieval law. For Thomas Aquinas and most of the great jurists of his time (as already was true of the Stoics), a comprehensive part of human life escapes state control and is answerable only to the spiritual order. The slave (who, by the way, no ancient text ever deprived of 'every right') thus sees his religious life and his marriage protected. The freedom of conscience of Thomas Becket *vis-à-vis* the King of England was better protected juridically than the same freedom of a French bishop against the Republic. Medieval universities did not enjoy, as against temporal power, a lesser freedom of opinion than do ours. And these spheres of independence (with respect to the state) were protected by law. Because it implies a refusal to assimilate law with the state, and keeps the science of law above the state, adhesion to natural law is by itself a stronger guarantee than our grandiloquent and contradictory 'declarations' of rights.

But here languages differ. The Roman jurists, who certainly envisaged the *dominium*, or the *patria potestas*, or the right of the creditor to demand that an obligation be performed, did not qualify them as *jura*. They did not say that the very faculty to go where one pleases, to enjoy silence, or to dedicate oneself to *otium* or to *negotium* constituted a *right*. Why? The truth is that these faculties to 'act', and these liberties, which are notions of vulgar language upon which jurists operate (as they do with other realities, such as life, people, physical entities) are given prior to the elaboration of law and remain *extra-juridical*. Liberty (as Sartre would say) is an inescapable given. These very faculties are facts of brute nature (as Spinoza rightly pointed out). There is no need for jurists to grant them existence. Of course each of us would still, within himself, want these faculties to be authenticated by law, and would want to be granted, under the protection of the police, a legally free hand against the resistance of others in order to act without hindrance. And we may dream of a world where these infinite liberties, the object of our yearning, would be recognised as *rights*. Such is the inclination of modern idealism, and the path leading to subjective rights. But true justice is not wrapped in these individualistic reveries. Jurists must, of course, take into account the infinite value of the human person and of his liberty (notably enhanced by Christianity, and earlier by Stoicism). It is one of the elements of their problem. But it is not its outcome. The virtue of charity pauses to contemplate these infinite values, but jurists do not work in the realm of the unlimited. They are entrusted with defining relations and proportions: the share that each (*suum cuique*) should have in the social or common goods (cf. *supra* I–5).[20]

The ancient Roman idea of *jus* corresponded to this more restrictive and realistic notion of justice. Fifteen years ago, I devoted an article to the study of

---

20 *Translator's note:* this is a reference to the section of this article titled 'The Object of Justice' (2000) 9 *Griffith LR* 85.

Roman vocabulary, which failed to receive the approbation of all the Romanists who read it[21] — most having completely failed to grasp what the dispute was about, or perhaps my explanation of it was too obscure. This question cannot be explained without philosophy. In order to establish the right of everyone (*jus suum cuique*) — or, alternatively, of any thing — classical juridical science does not begin with the individual, but objectively, with the bulk of social goods to be shared. The right of each is a quota. A right is not therefore the 'attribute' of the individual considered in isolation, but a thing, an *objective* thing (an 'incorporeal thing'), a delimited quantity of prerogatives or duties. It is not the 'faculty' to accomplish a particular activity (to move about freely, to speak one's mind, or to cultivate the land)[22] but — and here is the fundamental nuance — it is a *zone* of power, a sector of activity delimited with respect to other sectors attributed to other associated persons.[23] In the *Institutes* of Gaius, the slave, the master or the citizen are each alloted their *jus*, their special *status*, as each part of a house (the roof, the living-room or the kitchen) deserves a separate regime. I further noted that a right thus understood (as a status of each person or of each thing) not only implied privileges, it implied duties as well. The *jus civitatis*, for example, involved obligations such as military service. The debts due could weigh heavier than the profits. And so with the *jús suum* of the criminal — for example, in a parricide, the share the convict deserved to receive according to distributive justice, was to be thrown in the Tiber in a bag filled with vipers.[24] Having reflected a little better than us on the object of law and of its sources, our ancestors did not mistake it for natural anarchy or the liberty of our dreams. Here, briefly summed up, is what I had noticed in certain texts of Roman law.

(III) It is a fact that, despite the attack of sociologists (and principally of Duguit), subjective rights continue to head the bill. We never cease organising colloquiums on the 'rights of the human person', and solemnly proclaiming new 'rights' of the individual (the right to 'leisure', to 'work', to 'culture' or to 'health'). In 'civil liberties', our professors of public law have just invented yet another course in the subjective rights of the individual against the state. Meanwhile, professors of private law exert themselves to translate our law into the language of subjective rights: a 'right to silence' because a certain decree happens to forbid one to honk one's horn; a right to 'modesty' whenever an association devoted to the protection of families wishes to forbid obscene

---

21 *RHD*, 1946, p 201, re-edited in *Leçons*, p 195 et seq. Cf 'Du sens de l' expression *jus in re* en droit romain classique' in *Mélanges de Visscher*, I, p 428 et seq, *Le 'jus in re' du droit romain au droit moderne*, Publications de l' Institut de droit romain, VI, 1950, p 187 et seq. 'Suum jus cuique tribuens' in *Mélanges de Francisci*, I, 1954, p 363 et seq.

22 On the correct translation of the Roman expressions *jus eundi — jus utendi — jus fruendi* (where the gerundive must be read in its substantival, and not verbal, sense), see the aforementioned articles.

23 In 1494 in Tordesillas, a treaty drew a line separating the areas of colonial conquest shared between the Portuguese and the Spaniards. Is this to say that the Portuguese would have the 'right to conquer' all the territories east of this line?

24 *Mélanges de Francisci*, I, p 363 et seq.

films, etc. I am not convinced that these literary exercises are indispensable, nor that they lead to very felicitous results.

Let us grant that the modern notion of subjective rights was somewhat useful in its day. It was an instrument of combat, and constituted one of those myths which, by their very falsity, generate progress. More precisely, it was useful as an antidote against the excessive growth of state power and against the modern legal positivism with which it is entwined in such a contradictory way. When one teaches that law is entirely abandoned to the discretion of the state, it is better to balance this affirmation (especially when one is not too afraid of incoherence) with the opposite error, *viz* that there exist subjective, individual rights.

Yet, as I said earlier, an antidote remains a poison which is better injected very carefully, lest we become too accustomed to it. Today, our notion of subjective rights betrays a large measure of error and malfeasance.

(a) Our notion of subjective right — a utopian notion, bearing the seal of idealism and juridically inadequate — regularly fails us when we seek to apply it. For a century now, the formulae in which our subjective rights are coined have not ceased to embarrass the science of law because of their excessive and impractical character.

Just open a recent textbook on 'civil liberties', and one will see that all our 'rights' so fulsomely proclaimed by our public law teachers are in crisis. They function badly. Neither the right to 'strike', nor 'freedom of assembly', nor the right to publish, nor even the natural right to freedom of movement, appear to be practicable as such. They are dreams about the future, rather than present realities. That exceptions must constantly be multiplied is an indication that the rule is badly drafted. And even if we focus entirely on defending our liberties *against the state*, it would be one thing to say that a *division* of prerogatives is instituted between the state and other forms of social control (so that, for example, matters of conscience and of education are outside the authority of the state, as was the case in the Middle Ages), but another to say that I have 'the *right*' to say and teach whatever I please (even, for example, rape, paederasty or treason). Classical language avoided such shocking formulae, whose *excessiveness* will always be recognised by common sense.

Technically, the subjective rights derived from private law fail similarly, insofar as they have been conceived as attributes of the human being and as 'powers' to will and act. These 'rights' are largely fictitious, and have always been so. Take property for example, subjectively defined by the *Code Civil* (art 544). Everybody knows that the utopian thesis of absolute property gave rise to its antithesis, communism, because of its extreme character. Besides, it quickly revealed itself to be unworkable. Hence jurists have had to get rid of it by constructing the bizarre theory of the 'abuse of rights' (which, as has often been noted, is a contradiction in terms).

(b) The notion of subjective rights not only provoked inexplicable difficulties for the science of law; it must above all be reproached for

misleading common opinion. Because it was born of a false (subjectivist) conception of justice, it promises more than it can and ought to deliver, thereby deluding every subject of law about the true scope of his rights.

Take public international law, for example. How much violence and injustice, and what oppression of minorities and excuses for dictatorship, did the dogma of the 'right of self-determination' give rise to? Because it is truly abstract, it is a theme for demagogic lawyers rather than a juridical truth. I read, in *Le Monde*, an ardent proclamation, by an existentialist philosopher, of the 'rights of the rebels, partisans of the FLN' to realise their full, human liberty by ruling over the whole of Algeria. He merely forgets to balance the liberties of this group against those of the other inhabitants of this territory. This is the task of the jurist, in the absence of which no 'right' can ever be determined. After that balancing, no right will ever amount to the type of unlimited liberty of which our philosopher dreams. As for internal affairs, we see everyone convinced that their subjective pretensions to 'health', to 'leisure', to a comfortable life, to silence or to 'culture' (naturally unlimited) have juridical value because they received the label 'rights'. Hence the chorus of infinite 'grievances' around us, which bespeaks a deep perversion of our sense of justice. Without taking the trouble to advance the faintest piece of evidence supporting their claim, as though the matter were perfectly self-evident, trade unions contend that education has a 'right' to more resources. Meanwhile there is no one in France who does not have the 'right' to see his standard of living rise, and who does not 'demand' that it does. People are easily seduced by the myth of a perfect society, and bad shepherds, in particular the political opposition, lure them into believing that it is near at hand: as though the ideal (and not juridical) society could possibly be achieved by means of law and within the temporal order.

It is not my intention to censure morals or manners. Let everyone follow his path; thank God not all men are jurists. It is good that each individual and each group feels an internal vocation for the infinite development of their being and power. But the spirit of justice is lost when *law* lets itself be overrun by one-sided, subjective convictions. Law must jealously hold on to its position as arbiter; and its symbol is the scale. The fact that the academy *claims* a larger share of the budget is a sign of life on its part, but let it think twice before *demanding* it. Only the share calculated with respect to the *whole* of the outgoings and incomings of the French state can receive the sanction of law. It alone deserves the authority, and therefore the label, of *law*. Only by using the *objective* method of natural law, then, does one enter the sphere of law (*supra*, II–2).[25]

[25] *Translator's note:* this is a reference to the section of this article titled 'Nature as the Source of the Just' (2000) 9 *Griffith LR* 94.

By following the example of classical Roman language — how much more accurate and precise than modern language — one can dream of banishing the notions of subjective rights from our juridical technique (eg property rights, the rights of creditors, real or personal rights). Juridical technique would gain much from this, inasmuch as these expressions conceal an inner lie and mistake law for pre-juridical, subjective pretensions.[26]

Is it over-ambitious to hope that this subtle and essential nuance, which separates a correct juridical language from an improper one, be taken into account? Shall we revert to Roman usage in our French faculties of law, where Roman law has recently and officially been dismissed? I will refrain from saying how, taking classical philosophy as a starting point, our concepts of 'person', 'obligation' or 'contract' would need to be re-thought somewhat.[27] This seems true to me, but I confess my incompetence, and so must again leave the matter to civil law experts. I do not know what the chances of such reform are.

Scholarly Programs

The only reform to which a few of my readers will likely be disposed concerns the title given to courses, and involves upsetting the curriculum (something we have grown accustomed to doing). Our syllabus proceeds less from a general overview of the goals and constituents of juridical education than it results from compromises between rival specialities. With some success, a tight coalition still defends its dogmatic teachings. The sociological faction launches vigorous offensives, and each time scores points in the struggle for teaching hours. The smaller units (like Roman law) disappear in the course of the struggle. The juridical establishment has fallen under the spell of one-sided philosophies which wrangle about remnants.

What would the revival of classical philosophy bring about? A little order, and perhaps a spirit of collaboration in place of an increasing fragmentation. If classical philosophy demonstrates the necessity of rules, and hence of dogmatic teachings (*supra*, II–5), it also discerns their limits. It will resolutely support the introduction of some sociology into juridical studies, but it will also offer the advantage of knowing what such sociology is all about, and why we have to cultivate this new science: namely, because the study of circumstances is *one of the necessary moments* in the quest for the just, which is beyond all rules and yet the aim of law (*supra*, II–4). As for history, I acknowledge its fundamental importance, not only for the art of natural law, which is a collective contruction whose attainment may be squandered if we lose its *tradition*, but also for positive law for which *custom* is the most certain

---

26 On other technical drawbacks of the notion of subjective rights, see finally the excellent article by R Orestano (1960) 'Diritto soggettivi e diritti senza soggetto' in *Jus*, p 1 et seq (with an ample bibliography).

27 *Translator's note:* A few years after the present work, Villey did write articles analysing these concepts in an historical perspective. See, in particular, his 'Préface historique à l'étude des notions de contrat', APD, 1968, and 'Métamorphoses de l'obligation', APD, 1970.

basis. I would retain Roman law. And above all, since the juridical art is a part of morality (*supra*, I–6),[28] and presupposes some reflection on the *ends* of human activities in order to prevent us being lured into the nothingness of utilitarian thought (*supra*, I–1),[29] I would ensure our students have plenty of time to cultivate their minds freely.

A hundred thousand sociological inquiries and a hundred thousand exegetical works will not give us this complete perspective on juridical studies which the designers of our academic programs need. Such works will only drive them from it. But it is really not the time to embark on this theme, since my holidays are coming to an end and I must conclude.

Specialissima

The reader will understand that I hesitate in recommending the doctrine of classical natural law to those who construct theses on, or so-called courses in, the philosophy of law. Right at the beginning, I outlined the forces levied against it. In its favour, we mostly remember that it may be the only doctrine founded upon the immediate observation of juridical phenomena, and not upon a philosophy of science or of morals forced upon law. It preserves law's autonomy from the peril, inherent in all other theories, that law will be absorbed by morality, political economy, management or political science. It endows us with a solid frame of thought, without prejudicing the particular embellishments we can seek in the works of other and more recent philosophers. It is the only philosophy of law which is honest, that is to say which is authentically speculative. Its value is guaranteed by the assent of thousands of jurists and philosophers. By and large, it has been taught for 25 centuries; it is one of the most ancient treasures of the occidental tradition (although nowadays, if anything, this is a mark against it!). The attacks launched against it have been mainly based on misconceptions, and once these are denounced, it will show obvious signs of revival. It will necessarily profit from the current reaction against modern subjectivism, rationalism and individualism. In closing let me mention one token of its revival: the extraordinary blossoming of re-editions of Aristotle (his *Ethics* and *Politics*) and Thomas Aquinas, which began about 10 years ago. I will not deny it every chance of being favourably received.

Hennequeville, 26 September 1960

---

28 *Translator's note:* this is a reference to the section of this article titled 'Conclusion: Law and Morality' (2000) 9 *Griffith LR* 88.

29 *Translator's note:* this is a reference to the section of this article titled 'Conclusion: Law and Morality' (2000) 9 *Griffith LR* 88.