THE ETHICAL ROOTS OF LAW

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In two previous articles which appeared in this Law Journal [1] we discussed the genuine concept of the natural law as expounded in the philosophy of St. Thomas; and we said that, as a consequence of the growing conviction in the minds of modern jurists of the futility of the juridical order that is not founded on an ethical scheme of values, there is today all over the world a gradual resurrection of natural law jurisprudence.

Among die-hard positivists, however, there still lurks an instinctive aversion to natural law jurisprudence, because they charge that natural law jurisprudence is a doctrinaire, aprioristic system which attempts to construct the whole structure of law, *more geometrico,* with no better apparatus than the scholastic syllogism—a method clearly at variance with Holmes' famous aphorism that "the life of the law has not been logic: it has been experience."

It is the purpose of this article to show how irrelevant this charge is against a jurisprudence founded on the genuine Thomistic concept of the natural law, a jurisprudence which, as a matter of fact, would find no difficulty in subscribing, as far as method goes, to Holme's views that "the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more

[1] *Ateneo Law Journal,* Vol. II, No. 4; Vol. III, No. 1.

to do than the syllogism in determining the rules by which men should be governed."[2]

Natural law in the sound Scholastic tradition was never meant to be a substitute for positive human law, but only its ultimate foundation. The positive must be rooted in the natural, the juridical on the ethical; but, granted this, the juridical is free to express itself in any historical form, as long as it does not cut itself off from its ethical roots, that is to say, from the existential ends of human nature. If positive human law is to deserve its name, it must serve the common good, which it can only do, if it conforms itself to the exigencies of reality: the reality of human nature and the reality (economic, political, cultural, etc.) of the actual world in which man develops his personality.

The charge that natural law jurisprudence is unprogressive, reactionary; that, intent on judging everything *sub specie aeternitatis,* it fails to do justice to man's temporal needs, and to keep abreast with the exigencies of modern science, economics, sociology, etc.,—this charge may rightly be made against the rationalistic 'law of nature' jurisprudence founded on Hobbes', Locke's, or Rousseau's, political theory; it cannot be made against the natural law jurisprudence founded on St. Thomas' philosophy. This should be evident to anyone who understands St. Thomas' concept of human nature as a *social* nature which needs the discipline of human law, and his concept of the state as offspring of human nature, which, like man himself, advances from the imperfect to the perfect only by gradual steps. For whether law should be a dynamic structure capable of organic growth and living adaptation, or, on the contrary, a structure of a purely static mold, unresponsive to the changing dimensions of history, will depend ultimately on our fundamental concept of human nature.

If we conceive human nature as fundamentally *asocial,* and man as a self-enclosed and self-regarding individual not intrinsically meant for society, as he is so conceived in Hobbes,' Locke's or Rousseau's theory, law would be something totally extrinsic to human nature, an alien force exerted on man by the state, and the state itself, under

[2] Holmes, *The Common Law,* Boston, Little, Brown and Company, 1951, p. 1.

the supposition, would be a purely artificial structure brought about by the fact of man's fallen nature. As a consequence, statesmanship would be reduced to a science of force, that is to say, to figuring out mathematically (as Bentham tried to do on the principle of pleasure and pain) what punishment should be meted out to induce men effectively to act within the law. The art of governing would call for no special knowledge of human nature as modified by the peculiar habits and circumstances of civil life. It would call only for force to adjust not law to human nature, but human nature to 'law.'

But where human nature is conceived as intrinsically *social* and *political,* as it is in the philosophy of St. Thomas, the state is not looked upon as something standing outside of man or above man. It is rather looked upon as 'man writ large' (to use Plato's phrase), a juridical explicitation of man's social and political exigencies. As Helmut Kuhn puts it: "We do not build a state to live *in* (as we live in a house)—we live the state. Our living state is an integral part of our lives. Here the builders are what they build." [1] Consequently, like the state of which it is the essential structure, law, too, is not something extrinsic and heteronomous to man, but something intrinsic and original in his social and political being. Law-making, therefore, is an art, according to St. Thomas, that calls for an intimate knowledge of human nature and of the peculiar customs of the people. For "law is framed as a rule or measure of human acts. Now a measure should be homogeneous with that which it measures . . . Therefore laws imposed on men should also be in keeping with their condition . . . should be possible according to the customs of the country." [2]

It was not the natural law jurisprudence, traditional among scholastic philosophers since the time of St. Thomas, that claimed to be able to construct the whole structure of the state at one fit of rationalism. The claim was made by the 'law of nature' theorists of the 18th century, who followed in the footsteps of Hobbes, Locke, and Rousseau. However divergent their metaphysical postulates may have been, their political theories agreed on this: that the state

[1] "Thought and Action," 8 *The Journal of Politics,* 454.
[2] *Summa Theol.,* I-II, q. 96, a. 2.

to ends, the utilitarians, who recognize no existential en in man, would, if anything, *adapt ends to means.* That to say, they do not admit any ends but those which ma makes for himself and puts to the test of experience. these ends 'work,' that is, if they are found satisfying, the are true ends. "Purposes in life are made," they say, "n found." There is nothing to life but action, and actio is a measure unto itself. In Holmes' words: "From th point of view of the world, the end of life is life. Life action, the use of one's power. As to use them to thei height is our joy and duty, so it is the one end that justifie itself." [1]

According to this philosophy, therefore, there is nothin behind rights but facts; there is no abiding reason behin the law, but only progress, or at any rate, process, history It is not strange then that Cardozo (himself a pragmatis to a certain extent), decries the lack of fundamental prin ciples that will give stability and direction to law:

> We have had courts and recorded judgments for centu ries, but for lack of an accepted philosophy of law, we hav not yet laid down for our judges the underlying and con trolling principles that are to shape the manner of thei judging. We do not yet know either our powers or ou duties . . . I feel very profoundly that . . . many of the blunders of courts have their origin in false conceptions, o at any rate in varying conceptions, of the limits of judicial power, the essence of the judicial function, the nature of the judicial process. We may not hope to eliminate impatience of judicial restraint . . . till we settle down to some agreement about the things that are fundamental.[2]

But this is precisely what is wrong with pragmatism. Since it considers all truth, relative, born of experience, not merely borne out by it; and since experience varies with time and place, pragmatism cannot give a permanent juridical framework to law. The next best thing it can do is what Pound calls "social engineering," which consists in "finding out by experience and developing by reason the modes of adjusting relations and ordering conduct which will give the most effect to the whole scheme of

[1] Lerner (Ed.), *The Mind and Faith of Justice Holmes,* p. 42.
[2] Cardozo, *Selected Writings,* p. 249.

interests with the least friction and the least waste." [1] What are these interests and how are they to be determined? And since conflict of interests is inevitable, what is to be the standard by which conflicts are to be resolved and interests harmonized? Pound's answer would seem to be this:

> It is the task of the jurist to ascertain and formulate the jural postulates not of all civilization but of the civilization of the time and place—the ideas of right and justice which it presupposes—and to seek to shape the legal materials that have come down to us, so that they will express or give effect to those postulates. There is no eternal law. But there is an eternal goal—the development of those powers of humanity to their highest point.[2]

According to this we must accept as valid whatever happens to be the "received ideal" of the age ("received" in this context means "successfully asserted" in society, a fact to be gathered from the body of authoritative materials of decision and of the judicial process, and in the juristic writings of the times), and in terms of that ideal, we must adjust the conflicting claims and demands involved in the existence of civilized society and give effect to as much as we may with the least amount of friction and waste.[3] This, it seems to me, is but Bentham's principle of utility in a slightly different garb. And as Ernest Barker points out, "it leaves us a pragmatic justice of the *fait accompli*, destitute of foundation and reference. This pragmatic justice necessarily has for its fellow an equally pragmatic system of law. Law, which is the visible expression of justice, becomes accordingly a simple activity of 'social engineering,'" [4] And in an illuminating footnote, Barker adds:

> It would be a drab world in which there were only 'social wants' and 'social engineers' for their satisfaction. The actual world is a world of persons; and because it is, it is also a world of values, which persons are capable of apprehending, and in the light of which they are capable of acting. Such a world is not a fact of the past, and of the centuries from 1500 to 1900; it is a fact of all time. It is also a world which needs something more than efficacious social engineering—though there is room for some 'engineering' in the way of removal of obstacles, if only there is a vision of what is to be attained when the obstacles are removed.[1]

[1] Pound, *Social Control through Law*, New Haven, Yale University Press, 1942, p. 134.
[2] Pound, *Interpretations of Legal History*, pp. 158-164.
[3] *An Introduction to the Philosophy of Law*, New Haven, Yale University Press, 1922, p. 99.
[4] Ernest Barker, *Principles of Social and Political Theory*, Oxford, Clarendon Press, 1951, p. 172.

C.K. Allen of Oxford, likewise, takes exception to Pound's theory of social interests because, like Ihering's older theory (whose influence on Pound's thinking is hard to miss), it really fails to tell us "what 'the whole body of human wants' are, and whose wants are to be satisfied and whose to be sacrificed, and *why* wants are wanted and whether justly and wisely or not and by what guiding principle the minimum of friction and waste is to be achieved."[2] To decide these questions without reference to an objective norm of value is to be guided by pure expediency which, even in the realm of the practical, creates more problems than it solves. Hence he concludes that "amid the clamor of multiplying and contending interests, the quiet voice of the philosopher, reminding us of such elementary principles as justice and liberty, may teach us more wisdom and resolve more of our doubts than the statistician, the fact-finder and the whole teeming multitude of —ologists."[3]

The fatal defect then of sociological pragmatism is that it intends to build "a civilization of means without ends." It divorces the practical intellect from the speculative, and makes it the slave of the will instead of its guide. In St. Thomas' philosophy of law the speculative intellect which perceives man's existential ends is the measure of the practical intellect which seeks the means to those ends. "The end is fixed for man by nature. But the means to the end are not determined for us by nature; they are to be sould by reason." [4]

Hence there are two moments, we might say, in the creation of law: the moment of contemplation or theory, which gives meaning, rationality, to law; and the moment

[1] *Ibid.*, p. 172.
[2] Allen, "Justice and Expediency" in *Interpretations of Modern Legal Philosophies* (ed. Paul Sayre), New York, Oxford University Press, 1947, p. 25.
[3] *Ibid.*, p. 27.
[4] *Ethic.*, VI, 2.

of action, which actualizes, to a relative degree, never absolutely, the rational objective contemplated in the law. Contemplation, which is the steady vision of the end, must guide action, which is adaptation of means to end. In contemplation, compromise is the unforgivable sin; in action compromise almost always is the indispensable virtue. How to actualize principle in action without betraying it through compromise: herein lies the supreme art of statesmanship. Herein, too, lies the agony of human decision. It is out of this decision, by which the ideal is wedded to the actual, that the *juridical* is born.

The Nature of the Juridical

The juridical is not identical with, nor separate from the ethical order. It exists *in* and *by* the ethical order, while remaining *distinct* from it. Both extremes are to be avoided: on the one hand, the identification of the juridical with the ethical, which results in the formal *moralization* of positive law, (as in Hegel's philsophy, for whom the state was the ethical whole, the incarnation of God in history); on the other, the absolute separation of the juridical from the ethical, which results in the total *legalization* of the state, (as in Kelsen's "pure jurisprudence," which equates state and law).

In the sound natural law tradition, the juridical is the existential form of the ethical. Any juridical reality—the state, its constitution, its bill of rights, the marriage contract, etc.,—is fundamentally a *good* (*bonum humanum*), rooted in an innate exigency of man's social nature, and actualized in a concrete situation by the choice of reason. Hence, there are two intrinsic elements in the concept of the juridical: the element of *natural justice,* and the element of *human choice* or convention. The intellect perceives the element of justice in the order of ends *given* in human nature; the will chooses in the order of means *to be given* (actualized) by reason.

To make the juridical purely the work of reason without the element of choice is to fall into determinism; it is to condemn man to the instinctive level of ants and bees, whose 'social' organization is indeed a marvelous work of reason (the Creator's reason), but one which is made *in* and *through* them, rather than *by* them and *for* them. This is the road to Hegelian *panlogism* or to dialectic materialism. On the other hand, to make the juridical purely a creation of the human will is to fall into voluntarism; it is to identify the state with power, law with force. This is the essence of juridical positivism.

In the sound natural law tradition, the concept of the juridical entails both an act of reason which perceives the *justice* of the end, and an act of the will which chooses the *useful* means to the end in the light of a concrete situation. The choice of means is, of course, necessarily related to the nature of the end; but, whereas on the ethical level that relation is seen in its abstract necessity, on the juridical level that relation is seen as embodied in the contingent realities or terms of the situation. When a people juridically organized decides to have a democratic form of government, that government is the offspring not of an ethical compulsion, but of a juridical choice. The choice is made not on the basis purely of human nature in its abstract perfection, but of human nature as concretely modified by the social habits, culture,and historical conditioning of that particular people. The state, therefore, though a natural *institution,* is in its concrete form of government the offspring of *convention*, or human choice.

Jus quia Justum or Jus quia Jussum?

Hence, the question we must ask ourselves at this point is this: If the juridical is an offspring of convention, is it that convention that gives it *validity?* To be more specific, if to take an example, the state is brought into existence by the consent of the people, is it that consent that defines the essential ends of the state, and gives authority to its laws? In its ultimate terms, this is the age-old question which Aristotle phrased: "Is the just (*justum*) natural or conventional?" and the modern phrase: Is "*jus quia justum?* or *jus quia jussum?*" Is law (right) justice? Or is law (right) command? In other words, how is justice related to law and law related to justice?

To use an analogy, we may say that law (the juridical) is related to justice (the just) in the way language is related

to thought.[1] As words are meaningless without ideas, and ideas are socially incommunicable without words, so law (the juridical) has no authority, no moral validity, unless it embodies justice (the just), and justice has no social existence or actuality unless it is embodied in law (statutes or custom). A word must embody an idea or it would not be a real word but mere sound. So, too, a law must embody justice or it would not be a real law, but mere force. And as the people's choice or usage is the reason why this particular word means this particular idea, so, too, it is the choice or consent of the people (or of the ruler acting in their name) that is the reason why this particular law embodies this concrete form of justice. But, on the other hand, as words (taken materially) have no meaning of their own, but all their meaning derives from the ideas they embody, so, also, law has no other authority or binding power but what is derived from natural justice.

Consequently, there is in the juridical a *natural* element of justice behind the *conventional* form, just as behind the conventional form of language (words) there is the natural faculty of speech (ideas, *verba mentis*). If there were no natural element of ideas intelligible to all behind the conventional form of words, no translation of ideas from one language into another would be possible. In like manner, if there were no natural just (*justum naturale*), naturally recognizable by all men, behind the conventional forms of human laws and institutions, no law of nations (*jus gentium*), or Common Law, or international law would be possible; nor would there exist a common pattern of basic ethical values recognized by all or almost all peoples.

Continuing the analogy, as, in the history of language, it is not the grammarian's rules that determine usage, but popular usage that determine the rules, so, too, in jurisprudence it is not laws (imposed from above) that shape customs, but customs (the ethics and ethos of a people) that shape law. It is true that laws shape customs in turn, but only after they have been accepted and lived, working as it were not from outside, but from inside the ethical structure of the community. In other words, law can do this only in the measure in which law is not, or has ceased to be, a mere imposition from an outside force, and has become integrated directly or indirectly with the ethical conviction or value-system of the people.

As Pound puts it: "Law cannot depart far from the ethical custom nor lag far behind it. For law does not enforce itself. Its machinery must be set in motion and guided in its motion by individual human beings; and there must be something more than the abstract content of the legal precept to move these human beings to act and direct their action."[1] Statesmanship therefore shows its real skill not so much in the drafting of a law, as in the art of social pedagogy, in the importing of a *paideia*,[2] so to speak, that will create a favorable socio-ethical climate for the law and sustain it in existence. For, as Aristotle reminds us, the law has no effective power to command obedience except the power of habit.

Indeed the *primum mobile*, so to speak, of government, even of dictatorial government, is not force, but an idea: a system of values crystallized into a common goal, a myth-system,[3] to use MacIver's ambivalent term; a constitution, in the sense Aristotle[4] uses the word, or in St. Augustine's pregnant phrase, "an agreement as to the objects of their

[1] A. P. d'Entreves calls attention to the analogy between law and language. He says: If law be considered primarily as a "sign" or an indication of a quality, language and law cannot fail, to appear closely similar. The parallel is further confirmed by the similarity between the work of the jurist and that of the grammarian and linguist. Both purport to formulate the general rules applying to the use of certain symbols or signs which men use for qualifying certain given situations. Both lead to an increasing degree of abstraction and "formalism," and are thus liable to the same fallacy of forgetting that the rules which they lay down have a meaning only in so far as they refer to a living reality. Grammars and dictionaries, phonology and morphology do not make a language. Jurisprudence is unable to say the final word about law." *Natural Law*, p. 120.

[1] Pound, *Law and Morals*, Chapel Hill, University of North Carolina Press, 1922, p. 122.

[2] In the *Laws* Plato defines the essence of culture or *paideia* as: "the education in *arete* from youth onwards, which makes men passionately desire to become perfect citizens, knowing both how to rule and how to be ruled on a basis of justice." *Cf. Laws*, 643e; Werner Jaeger, *Paideia: The Ideals of Greek Culture* (trans. Gilbert Highet), New York, Oxford University Press, 1945, Vol. III, p. 224.

[3] "By *myths* we mean the value-impregnated beliefs and notions that men hold, that they live by or live for. Every society is held together by a myth-system, a complex of dominating thought-forms that determines and sustains all its activities . . . When we speak here of myth we imply nothing concerning the grounds of belief, so far as belief claims to interpret reality. We use the word in an entirely neutral sense." MacIver, *op. cit.*, p. 4.

[4] It is inevitable, says Aristotle, that the canons of good and bad must be the same for the polis and the polity. For the polity is as it were the life (*bios tis*) of the polis." Aristotle, *Politics*, IV, 11.

love."[1] For the dominant group may forcibly impose their will upon the rest of the people, but only because they themselves were first united by something other than force. And what is true of the genesis of government is no less true of its growth and conservation: it cannot endure on sheer power alone, it must somehow rest on the shared beliefs and values of the people.

For this reason the first thing a dictator does after a successful *coup d'etat* is to restore the operation of the legal order, and to have himself constitutionally invested with legal powers, hoping thus to transpersonalize his rule of force into a rule of law and eventually to win ethical support in the minds of the people.[2] This is one more proof that law, to be valid, must embody justice, and justice, to be actual and operative, must be embodied in law. "Justice without power is impotent" says Pascal, "and power without justice is tyrannical. We must then combine justice and power, and for this end make what is just, strong or what is strong, just."

The practical task of jurisprudence and the practical nature of the juridical could not be described better than in these words. "The task of jurisprudence is to embody the idea of justice in political and legal institutions. The embodiment of it in law, or in judicial decision, or in social institutions, at the dictate of prudence, is what we call *juridical*. As no human institution can be perfect, no juridical creation can be an absolute embodiment of justice. "We must recognize," says Sturzo, "that every legal institution in the concrete is a synthesis of the rational and of the animal, or, better, of the spirit and of the letter. The letter grows old with that which passes away in the historical process, while the spirit is renewed in that which survives." In this the juridical does but reflect the dynamism of human life, which is never wholly lived, but is a constant process to a fuller life. The evolution of

[1] *De Civitate Dei*, XIX, 24.

[2] "The assent of the public consciousness to the formulation of law . . . is necessary if the juridical order is to acquire moral value . . . Resolution into ethics is necessary for the stability of the juridical order and prevents its disintegration . . . it is the factor that can give law an objective and intangible value. For this to come to pass, the law must have an evident content of justice, something sacred and rooted in nature, and a clear relationship to a principle superior to man." Nicholas Timasheff, *An Introduction to the Sociology of Law*, Harvard sociol. studies, III, Cambridge, 1939.

law from its pre-legal stage of self-help, through its period of *themistes*, of custom and judge-made law, down to our legislated law, is a history of man's rational adaptation to the changing conditions of human life. This adaptation is not a constant progress at every step, but only a relative progress "shot with regressions and involutions;" still, it is, in the long view of history, "a rational becoming," a process towards a more rational institutionalization of the idea of justice.

Hence, we must not condemn juridical institutions merely because they do not embody perfect justice, nor, on the other hand, must we worship them, as if they did. Perfect justice would be abstract justice, and, in Burke's aphorism, "its abstract perfection is its practical defect."[1] To be operative, justice must take on a concrete form, and to do this is to forego that much of abstract perfection as cannot be realized under prevailing social conditions.

On the other hand, from the fact that legal institutions are merely relative embodiments of justice, we must not conclude that justice itself is relative, that it is a mere creation of the will; that like the changing institution in which it is embodied, it, too, is changeable; and that, therefore, nothing is just or unjust but human law makes it so. "Even though all things which among us are just be somewhat changed, still some of them are naturally just . . . Those which pertain to the very nature of justice can in no way be changed.[2] This passage is taken from St. Thomas' commentary on Aristotle's idea of political justice (*justum politicum*), which is precisely what we mean by the *juridical*. Aristotle says:

> Of political justice part is natural, part legal—natural that which everywhere has the same force and does not exist by people's thinking this or that; legal that which is originally indifferent, but when it has been laid down is not indifferent, e.g., that a prisoner's ransom shall be a mina . . . Now some think that all justice is of this sort, because that which is by nature is unchangeable and has everywhere the same force (as fire burns both here and in Persia), while they see change in the things recognized as just. This, however, is not true in this unqualified way, but it is true in a sense;

[1] *Burke's Politics*, p. 304.

[2] *Ethics*, V, 12.

> or rather with the gods it is perhaps not true at all, while with us there is something that is just even by nature, yet all of it is changeable; but still some is by nature, some not by nature.[1]

The meaning of this capital text is not that there exists a legal just *apart* from the natural just, as if the legal had a quality of justice all its own, distinct from that of the natural; as if, in other words, human convention could *constitute*[2] just or unjust what was not already so before convention. Nor, on the other hand, does Aristotle mean that there exists among men a natural just *apart* from human choice or convention. In the existential order neither the natural just nor the legal just can have any reality among men apart from a conventional structure (a law, a judicial decision, a custom, an institution), for they are not two things which may exist separately: they are more like two principles which make up a thing. To use a Thomistic analogy, in the political just (the juridical) the natural is to the legal or conventional, what in an existent, essence is to existence: essence and existence, the natural and the conventional, are *not two beings which are,* but beings or *principles by which something is.* The natural can have no existence but what it receives from the conventional, and the conventional can have no quality of justice but what it receives from the natural. In other words, unless men embody the principle of justice in law or in institutions, it will have no juridical or social existence, it will remain an ethical abstraction.

Ex Facto Oritur Jus

How then do we give concrete juridical existence to natural justice? This we do by *positing a fact* in which

[1] *Ethics,* V, 7.

[2] Kreilkamp takes Pound to task for ascribing to Aristotle the concept of a political just that is at times purely positive and therefore morally indifferent: "Aristotle recognizes the indispensability of both parts of the political just; it is as impossible for the natural just to enter into a concrete political situation apart from the positive as for the positive to stand without the natural. What else can we think, when Aristotle in establishing the connection between the immutability and the natural, says that "in this world, although there is such a thing as natural justice, still all justice is variable?" It is clear that he considers the immutability of the natural just no impediment to its union with the positive just, which is a variable form of the just." Karl Kreilkamp, "The Immutable Natural Law," 18 *Fordham Law Review,* 173 (November, 1949).

justice is actualized into concrete rights and duties. A man must first "possess" an unowned thing (a *res nullius*) before natural justice, which entitles him to use material things for the support of life, becomes a concrete right to own this horse or this land. Through the conventional fact of "possession" abstract justice is actualized into the concrete right of private ownership. A man and a woman must first posit their free consent in marriage before they actually acquire the reciprocal rights and duties inherent in the natural society of husband and wife. The common consent (express or tacit) must first become a fact before civil society or the state could arise.

Thus, generally speaking, any juridical reality presupposes not only a relation of justice perceived by reason, but also a fact posited by the will, which actualizes that relation into a concrete right in a concrete situation. But the fact and the right, though inseparable in a concrete juridical reality, are not identical, no more than the word and idea, though inseparable, are identical. "Possession" as *fact* is not the *right* of ownership; mutual consent does not define the rights and duties of marriage, nor does the consent of the people determine the nature of the state. As Burke put it: "When we marry, the choice is voluntary, but the duties are not a matter of choice: they are dictated by the nature of the situation."[1] The same is true of natural rights. Hiring a workman is a matter of free contract, but the workman's right to a minimum living wage is not: it is dictated by the nature of the situation. There is, consequently, in the concrete reality of the living wage contract a natural element as well as a conventional (legal) element. That a workman be paid so many dollars an hour, is a fact determined by agreement or by law; it is a matter of convention. But that the workman's wage (whatever that be in terms of dollars or pesos) be big enough to enable him and his family to live a decent human life, this is a principle of natural justice. Only to the extent that this principle is embodied in a wage contract will that contract be just. Men can only posit a fact or a situation or a relation, out of which justice arises; they cannot create justice. As Jacques Chevalier says:

[1] *Burke's Politics,* p. 394.

> Man did not invent justice any more than he invented fire. Human laws do not constitute equity; they have no other end save to manifest it, and man has no other duty save to observe it. Thus all human institutions, as Socrates has already stated, have no worth or permanence save as they are modeled upon a Divine institution; human laws have no force, they neither command nor win man's obedience, save in the measure in which they express a right inherent in nature, that is, in the end which has been appointed to man, and over which man has no control.[1]

What then is the role of man in the making of the law? Is human legislation no more than an exercise of logic by which reason draws conclusions from self-evident principles of justice? If so, human legislation will merely manifest a law, not *make* one, just as the discovery of the law of gravitation did not make it, but merely manifested it in a formula. Human law then would be, in that case, not really human, but divine, for God would be its sole author, and man would be merely its promulgator. But surely a human legislator is more than this. Just as in the physical order man is a true cause of action, though a secondary one and by participation, so, too, in the moral order he is a true cause of human law, though, likewise, a secondary cause and by participation. And just as man as a physical cause does not make the *esse* (or the 'to be') of a thing, but only its *fieri* or its 'becoming,' so, analogously, as a moral cause man does not make the *justum* (the justice of the law which is derived from man's nature, hence, ultimately from God), but only its *justificatio,* that is, man by his free choice or decision causes this action, this procedure or this institution, etc., to 'become' just, that is, to embody in itself the idea of justice.

That is fundamentally what legislators do when they legislate, and what judges do when they hand down a judicial decision.[2] They do not legislate or pronounce

[1] Quoted by Fr. Moorhouse Miller in "The Modern State and Catholic Principles," 12 *Thought* 42.

[2] Cardozo quotes Geny's words approvingly: "A priori the process of research (la recherche), which is imposed upon the judge in finding the law seems to us very analogous to that incumbent on the legislator himself. Except for this circumstance . . . that the process is set in motion by some concrete situation, the considerations which ought to guide it are, in respect of the final end to be attained, exactly of the same nature as those which ought to dominate legislative action itself, since it is a question in each case, of satisfying, as best may be, justice and utility by an appropriate rule." *Selected Writings,* p. 156.

judgment in a vacuum of ethical abstractions. They are faced with the practical task of securing order, justice and freedom in a given historical situation. They must, therefore, assemble the irreducible facts which they consider material in a concrete legislative problem or judicial case, and to the best of their ability embody in them the principle of justice which ought to govern from the nature of the situation or relation.

This is clearly the case in the judicial process, when constitution and statute are silent or vague, and the judge must look to the common law for the rule to fit the case. As Professor A. L. Goodhart of Cambridge says:

> The judge founds his conclusions upon a group of facts selected by him as material, from among a larger mass of facts, some of which might seem significant to a layman, but which to a lawyer, are irrelevant. The judge, therefore, reaches a conclusion upon the facts *as he sees them.* It is on these facts that he bases his judgment, and not on any others . . . *It is by this choice of the material facts that the judge creates law.* A congeries of facts is presented to him; he chooses those which he considers material and rejects those which are immaterial, and then bases his conclusion on the material ones. To ignore his choice is to miss the whole point of the case.[1]

This is, of course, even truer of the legislative process. The legislators must study the facts of the problem and must be guided in their decisions not purely by abstract principles of justice, but, like the judges, they must take into account what might be called by analogy the 'precedents' of the case: the historical experience and social habitudes of the people for whom they are legislating. The task of the legislator is not to escape the stubborn realities of the age in search for an unattainable ideal, but, to the extent in which history would yield to reason, to embody that ideal into those realities.

Unlike the speculative philosopher whose business is merely to mark the proper ends of government, the statesman, who is the philosopher in action, must find out the proper means for the realization of those ends. He must not lose himself in the contemplation of the best, but

[1] Arthur L. Goodhart, *Essays in Jurisprudence and the Common Law,* Cambridge, Cambridge University Press, 1931, p. 10.

must translate the best into the dimensions of the possible. He must harness the abstract principles of natural justice into working rules of the legal order, and create social and political institutions that will embody man's natural rights. It is not enough, for instance, to affirm that all men are created equal. The principle of equality must be embodied in legal institutions, like the secret ballot, collective bargaining, jury trial, etc., and in methods of procedure, like the majority vote, presumption of innocence, and so on. Necessarily, by being institutionalized, natural justice is bound to lose some of its abstract perfection, and, in unforeseen and exceptional cases, even become a material source of injustice, for no human institution can be perfect nor can a human legislator foresee every case that might arise; nor, even if he did, would it be wise to frame a particular law for every individual case.[1] To fit the law to every individual case is the task of judges, who in their decisions must never be blind to the claims of justice and equity. They must be, in St. Thomas' vivid phrase, *justitia animata,* 'living justice,' not the dead hand of the law.

Because of the innate imperfection of all human institutions, which are, more often than not, a compromise between what is best and what is possible, or between the good that can be had and the evil that cannot be avoided, or even as a compromise between evil and evil: the framing of a constitution or of a judicial decision is not a simple matter of syllogizing from abstract principles of justice, or of, "matching colors" of judicial precedents.[2] Nothing juridical is born without the travail of human choice. The lawmaker must choose between means and means, strike a balance between competing interests in the light of the common good, as this good appears attainable in the concrete situation. The judge, too, must choose, from among the congeries of facts presented to him, those facts which in the light of jurisprudence, he considers material to the just decision of the case.

Hence, both the lawmaker and the judge must work with facts, and not with ideas only; with the precepts of prudence which history provides, and not alone with the principles of justice which reason perceives in the nature of things. This wedding of fact and principle, of justice and prudence, of reason and history, of the natural and the conventional, is the very essence of the juridical, and is not brought into existence without the 'creative' act of human choice.

If we understand the dualism of the juridical we shall appreciate the wisdom behind the old maxim of the civilians: *"ex facto oritur jus."* They did not mean that fact is right; but that right, is born, arises out of, a fact. A fact must be posited by man in explicit or implicit obedience to the existential purposes of his social nature, in order for a concrete right to be actualized. Man has a right to life; hence he has a right to the means of life. But until he tills the land or works in a shop, his right to a livelihood is a mere abstraction. *Fact* and *principle* must, therefore, exert a mutual causality—principle 'justifying' fact, and fact 'actualizing' principle—in order to produce the juridical, which is justice embodied in law or institution. Justice itself is timeless, unchangeable; but its embodiment is not. This is what Aristotle meant by his cryptic statement quoted above: "with us there is something that is just even by nature, yet all of it is changeable." Juridical institutions as such are subject to the process of history; they have their day, and when they have outlived their usefulness, they must give place to institutions "whose time has come." "Law," Justice Brandeis observes, "has everywhere a tendency to lag behind the facts of life." [1]

Hence, Brandeis was deeply convinced that neither lawmakers nor judges nor lawyers can serve the ends of justice without studying the social facts as they are, and not as they are imagined to be. This conviction gave origin to a novel type of legal brief—the so-called "Brandeis Brief,"

[1] As St. Thomas points out: "If there were as many rules or measures as there are things measured or ruled, they would cease to be of use, since their use consists in being applicable to many things. Hence *law would be of no use, if it did not extend further than to one single act."* (*Summa Theol.,* I-II, q. 96, a. 1.) "Even if a law-giver were able to take all cases into consideration, he ought not to mention them all, in order to avoid confusion; but *he should frame the law according to that which is of most common occurrence." Ibid.,* q. 96, a. 6. Underlining added.

[2] As Cardozo says: ". . . no system of law can be evolved by such a process (matching the colors of the case against those of analogous cases) . . . It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins." *Selected Writings,* p. 113.

[1] Justice Brandeis, *The Curse of Bigness* (ed. O. K. Fraenkel), New York, Viking Press, 1934, p. 319.

based on marshalled facts and figures, relevant to the operation of the law, and which brought on an expansion of the principles of judicial notice in the law of evidence, so as to include factual documentation and statistical studies that had direct bearing with the case at court. Brandeis believed that "no law, written or unwritten can be understood without the full knowledge of the facts out of which it arises and to which it is tot be applied." [1] He writes in his dissent in *Adams* v. *Tanner:*

> Whether a measure relating to the public welfare is arbitrary or unreasonable, whether it has no substantial relation to the end proposed, is obviously not to be determined by assumptions or by *a priori* reasoning. The judgment should be based upon a consideration of relevant facts, actual or possible—*Ex facto jus oritur.* That ancient rule must prevail in order that we may have a system of living law.[2]

This is not a plea for legal positivism. What is wrong with positivism is not its reliance on facts, but its efforts to identify facts with rights or principles, or, what amounts to the same thing, its effort to divorce facts from principles. Social facts do not create principles; they give us a deeper insight into the meaning and inner logic of principles, and they determine the manner in which principles are to be applied in a concrete situation.

The Point of Intersection

And, ultimately, as we said in a previous article, there must be some self-evident principles of right and wrong upon which all men could agree. By and large, men do agree on certain inalienable human rights. The history of freedom from the signing of the Magna Charta to the

[1] Alfred Lief (ed.), *The Brandeis Guide to the Modern World,* Boston, Little, Brown and Co., p. 101.

[2] 244 U. S. 590; It is interesting to contrast Brandeis' 'factual' bent of mind with Holmes' 'philosophical' bias: "Brandeis the other day drove a harpoon into my midriff with reference to my summer occupations, (writes Holmes to Pollock). He said you talk about improving your mind, you only exercise it on the subjects with which you are familiar. Why don't you try something new, study some domain of fact. Take up the textile industries in Mass. and after reading the reports sufficiently you can go to Lawrence and get a human notion of how it really is.—I hate facts. I always say the chief end of man is to form general propositions—adding that no general proposition is worth a damn." *Holmes-Pollock Letters,* Vol. II, p. 13.

United Nations' Universal Declaration of Human Rights, to say nothing of the bills of rights embodied in most of our modern constitutions, is proof of this universal agreement. Starting from this fact, then we ask: Whence are these human rights? Since they are inalienable, they cannot be derived from the state. Since they are universal, that is, since they belong to every man regardless of race or country, they must be derived from something that is found in every man "from the simple fact that man is man, nothing else being taken into account." [1] This something is the essential reality of human nature. It is from the innate exigencies of this nature that these rights are derived by a process of reasoning all but innate. These fundamental rights which the Roman jurists and the Fathers of the Church called *Jus Naturale,* and modern jurists and statesmen call *Human Rights,* rights which underlie the dispensation of justice under the *Jus Gentium* and the English *Common Law,* are, as D'Entreves says, the point of intersection between law and morals.[2] At this point, "which is the ultimate origin of law and at the same time the beginning of moral life proper," [3] compulsion becomes conviction as law ceases to be force, and becomes reason.

Unless we admit this point of intersection, where the juridical coincides with the ethical, the factual with the normative, we shall find no justification for sovereignty other than naked force, and we shall have to accept "the equation of might and right as a final proposition." Granted this point of intersection, the human law can look to the natural law as to its ultimate foundation and the living source of its validity.

The natural law will not indeed furnish us with a detailed blueprint of the social and political order. That is not its function. But it will give us the basic structure of justice upon which to build the state, and the objective norms of value by which to judge, and put order into, the competing ideals and economic interests of the age. And it is, perhaps, this basic structure and these basic norms of value that mankind needs most today, for, as the Holy

[1] Maritain, *The Rights of Man and Natural Law,* p. 69.
[2] A. P. D'Entreves, *op. cit.,* p. 116.
[3] *Ibid.,* p. 122.

Father tells us in *Summi Pontificatus,* "the prime and most profound root of all evils with which the City is today beset" is a "heedlessness and forgetfulness of the natural law."

This is doubly tragic for a world that is facing, "the crisis of unity." For the supreme fact of this century seems to be that the world, for the first time in history, has become one and is conscious of its unity. No man or nation now can survive in economic or political isolation. Henceforth each one needs everyone else.

The task, therefore, which jurisprudence faces today is vaster and more complex than ever. The problem of reconciling the conflicting claims of authority and liberty, of security and free enterprise, of national sovereignty and international cooperation cannot be solved at its technical periphery, so to speak, in terms purely of methods of procedure, or 'social engineering;' it must be solved at its ethical center, where man confronts the state, and challenges, not the procedure but the very substance of the law, not its 'correctness,' but its justice, which is its sole title to existence. It is here that juridical positivism finds itself without an answer. But it is precisely here that the questions that really matter are asked.

When the Nuremberg Court was asked by what right it could punish the Nazi criminals in defiance of the time-honoured principle, "*nulla poena sine lege,*" juridical positivism itself so to speak, stood on trial for its life, and was found 'guilty,' when the Court rendered judgment in these words: "So far from it being unjust to punish them, it would be unjust if their wrong were allowed to go unpunished." This manner of reasoning, coupled with the rejection by the Court of the defence based on superior orders is a vindication of the validity of natural law jurisprudence, and one more proof of its 'resurrection' in the legal world of today.

CASES NOTED

CIVIL LAW

CONJUGAL PROPERTY; TRANSMISSION AND ACCEPTANCE OF REAL PROPERTY BY GRATUITOUS TITLE CANNOT BE PRESUMED.

FACTS: Clodualdo Vitug contracted marriage with Gervasia Flores, and with whom he begot three children, named Victor, Lucina and Julio, the last leaving the plaintiff Florencia Vitug as the only heir. On second marriage with Donata Montemayor, Clodualdo had eight children, namely Francisca, Jesus, Salvador, Enrique, Prudencia, Anunciacion, Pragmacio and Maximo. During the second marriage Donata Montemayor inherited from her parents some parcels of land valued at ₱9,461.87. By virtue of the industry and efforts of the spouses Clodualdo and Donata, these nipa and mangrove lands were converted into fishponds and subsequently sold to the spouses Simeon Blas and Maxima Santos, and to Teofilo Martinez for the total sum of ₱116,468.37. Deducting the amount of ₱9,461.87, the value of the property inherited by Donata for which she ought to be reimbursed in accordance with Art. 1404 of the old Civil Code, there remained ₱107,006.50. From this sum the spouses bought 22 parcels of land for ₱30,000 and 8 parcels of land for ₱65,000, or a total of ₱95,000 was utilized from the sale of the converted fishponds, thereby leaving a balance of ₱12,006.50.

After the death of Clodualdo, Donata filed the intestate proceedings of the conjugal property, wherein she was appointed ad-