Marquette Law Review

Volume 26
Issue 1 *December 1941*

Article 2

1941

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THE BASIC IDEAS IN THE PHILOSOPHY OF LAW OF ST. THOMAS AQUINAS AS FOUND IN THE "SUMMA THEOLOGICA"*

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INTRODUCTION

DURING the seventeenth and eighteenth centuries, when all jurisprudential theories were more or less under the influence of what might be called "secular natural law," it was commonly thought that an entirely new approach to juristic thinking had been discovered. This general belief was due almost completely to Pufendorf who claimed that there existed no natural law in the middle ages. He made the totally unfounded assertion that Grotius was the true founder of the "Natural Law School," and that to himself goes the credit of having put natural law on a strictly scientific basis.[1] His belief, undoubtedly, is but the result of the general disregard in which the middle ages and scholastic thought in particular were held during the seventeenth and eighteenth centuries. Pufendorf convinced himself that the schoolmen had spread great darkness over the whole field of philosophical and legal thinking. He frequently called the middle ages "regnum tenebrarum."[2] And Christian Thomasius—disciple of Pufendorf—in his "Historia Iuris Naturalis Paulo Plenior" (1719), referring to the middle ages, often uses the phrase, "misera conditio iuris naturalis." Pufendorf's attitude caused a great and lasting breach in the development of the legal-philosophical tradition of the Western world. This was due, primarily, to the great scholarly reputation which Pufendorf—unwarrantedly—enjoyed throughout the seventeenth and eighteenth centuries, during which time he occupied the place of a nearly uncontested leader among juristic thinkers. The result was that

*EDITOR'S NOTE: In submitting this article to the REVIEW, Dr. Chroust wrote: "It has always been felt . . . that a short and simple presentation of St. Thomas's jurisprudence would be of great help to the student of jurisprudence. It is, however, impossible for the average student to make use of all the Thomistic sources and the Thomistic literature, since the amount of prescribed reading in the general course of jurisprudence—at Harvard and elsewhere—is already enormous. On the other hand, it has been my personal experience that, even among non-Catholic students, a great interest exists for Thomistic jurisprudence, which would be greatly increased if some kind of simple but thorough presentation of this topic could be made available to the average student." The editors of the REVIEW believe that this article is of the type of which Dr. Chroust writes.

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[1] PUFENDORF, SPECIMEN CONTROVERSIARUM, c. 1, sec. 4; and c. 5, sec. 22.

[2] *Ibid.*, c. 1, sec. 1 and 5.

this disdain for the schoolmen became somewhat of an academic "dogma," the more so, since no one felt it necessary to venture beyond Grotius or Pufendorf in order to learn what had actually been done in the field of jurisprudence long before the arrival of Grotius. So it is not altogether surprising that neither he, nor the many natural law thinkers following him could appreciate the schoolmen and their important achievements in the domain of natural law.

Of course, not all the blame can be laid at the feet of Pufendorf. At approximately the same time, the first comprehensive "history of philosophy" appeared under the significant title: "De Doctoribus Scholasticis Corrupta Per Eos Divinarum Atque Humanarum Rerum Scientia" (1665)—by Adam Tribbechovius. In 1742 Brucker's "Historia Critica Philosophia"[3] was published, which likewise was based on an "anti-scholastic" approach to the subject. These two books did much to open a wide gap between the philosophy of the middle ages and that of "modern" times, becoming somewhat the standard "textbooks," consistently imitated by subsequent works on the history of philosophy.

This general "reaction" against scholastic thought had its prime source in the rise of a new type of philosophy which tried, in an independent manner, to solve the problems which it had in common with theology. From a mere presentation or defence of the accepted Church dogma it passed to its criticism, and finally, in complete independence of religious interests, sought to derive its new teachings from the sources which it thought it possessed in the "lumen naturale," that is, in human reason and experience.[4] Thus all that the middle ages had contributed to man's knowledge and moral comfort was thrown out as unworthy even of research. It was this complete break with the tradition that made for a long time to come the medieval mind seem not understandable to "modern" minds.[5]

By doing what the men of the seventeenth and eighteenth centuries felt it beneath them to do, that is, by making a thorough study of the sources of medieval philosophy, we should be able to change rather drastically the grim picture painted by Pufendorf and others. As is probably true of many great philosophical works of lasting importance,

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[3] Brucker's "Historia Critica Philosophiae" was probably Kant's main source of historical information.

[4] Compare, for instance, Laurentius Valla, "Dialecticae Disputationes contra Aristotelicos" (1499), III, 9; Bernhardinus Telesio, "De Natura Rerum Juxta Propria Principia" (1566), Prooemium; Francis Bacon, "The Advancement of Learning" (1609), III, 1 (Works, edit. Spedding, I 539); Nicholaus Taurellus, "Philosophiae Triumphus" (1573), I, 1; Aureolus B. Paracelsus, "Das Buch Paragranum" (1565), edit. Hauser, II, 23 et sequ.; Giordano Bruno, "Della Causa, Principio et Uno" (1584), I, 2 and 6 et seq.

[5] See, in this connection, H. Heimsoeth, "Die sechs grossen Themen der abandlaendischen Philosophie und der Ausgang des Mittelalters," 2d edition, Berlin, 1934.

a germ of almost every school of jurisprudence may be found in the "Summa Theologica." But two are particularly prominent—primarily that of natural law, and secondarily that of the social-philosophical school.[6]

It was such great thinkers as St. Augustine, Alexander Helensis, Bonaventura, Albertus Magnus, and especially St. Thomas Aquinas who elaborated thoroughly those bases of natural law that Pufendorf could not believe were to be found in the writings of the schoolmen. It is safe to say that such legal systems as those of Pufendorf, Thomasius, or Wolff, which were supposed to be entirely new systems of natural law in contradistinction to the scholastic systems, were in their essence nothing but a revival of scholastic legal thought, with very little change; much inferior, however, in "quality" as well as in understanding the real problem of natural law.

St. Thomas divided his philosophical system of law into three major sections: 1. The Eternal or Divine Law, 2. The Natural Law (Lex Naturalis), and 3. The Human Law. Under each there are several subdivisions. We shall consider them in this, his own, order.

A rough diagram of St. Thomas Aquinas's system of law may be of help in understanding each part in its relation to the whole, and to the other parts:

I. Lex Aeterna or Divine Law.

II. Lex Naturalis, which partakes in, and is derived from the Divine Law. This is divided into (a) primary natural law, and (b) secondary natural law. The latter derived from the primary natural law principles.

III. Human or Positive Law which derived from natural law by the use of human reason, and must be in conformity with the Divine and natural laws. It is necessary because the precepts of the natural law are quite often blurred in the mind or heart of man through sin.

Lex Aeterna or Divine Law

The great task of St. Thomas Aquinas was to complete the process of reconciling the Aristotelian-Alexandrian tradition with Christian thought, a task begun by Alexander Helensis, Banaventura, and Albertus Magnus. His ultimate endeavour was to formulate and ground an absolute and harmonious "cosmic order" where everything would have its particular place according to its specific characteristics or properties. Therefore one of his main tasks underlying his "Summa Theologica" was to determine the position of man in this eternal and wise order of the created Universe. In this created world order

[6] Jhering, Der Zweck im Recht, 2d edition, II, p. 161 ff. (quoted in footn. 57).

St. Thomas Aquinas conceives of three realms.[7] First, the "Ontological order" of things according to which everything existent is determined by its desire of preserving its being. Secondly, the "cosmic-vitalistic order" which deals with such teleological functions as procreation and the satisfaction of other vital animal needs that nature has taught all animals according to the eternal order of things. Thirdly, the sphere of the "animal rationale et sociale," which is the realm of moral perfection—to know the truth about God, and to live in society.

In all these realms there is but one basic law—the Lex Naturalis, by means of which God maintains order within the created Universe. Since man is a rational creature, endowed with the faculty to know the truth about God, the Lex Naturalis becomes for him in particular a participation in the Lex Aeterna,[8] that is, a participation in the Divine Wisdom. Both these concepts, the Divine reason and the Lex Aeterna, were first developed by St. Augustine. St. Thomas frequently refers to him as an authority, and particularly as regards these notions.[9] Since the Lex Aeterna, which "is nothing else than the type of Divine Wisdom, as directing all actions and movements,"[10] constitutes the foundation of St. Thomas's theory of law, and because he himself credits St. Augustine as being his authority, we shall deal shortly with St. Augustine's Lex Aeterna, in order to give us a better understanding of St. Thomas's basic position.

St. Augustine says in "De Diversis Quaestionibus," quaest. 79, art. 1, "est enim lex universalis, divina sapientia." In "De Libero Arbitrio," I, 6, he furthermore states: . . . "that Law which is called the Supreme Reason, which must always be followed, and through which the bad ones earn (deserve) the miserable, and the good ones the blessed life, through which all that we speak of as temporal is carried out in the right manner, and is directed (changed) in the right way, cannot be understood to be otherwise than unchangeable and eternal." And in the same work at I, 5, he asserts that the Eternal Law exists in the mind of God where all things are directed to their proper ends. And again he says that, "the Eternal Law is Divine Reason, the Will of God, which orders us to maintain the natural order . . . "[11] Thus St. Augustine founded and defined the basic concept of the whole of the natural law of the middle ages, by introducing the concept of the Lex Aeterna.[12] It is most important to remember that his Lex Aeterna is

[7] SUMMA THEOLOGICA, I. II., quaest. 94, art. 2.
[8] *Ibid.*, quaest. 91, art. 2; art. 3; art. 4; quaest. 93, art. 6.
[9] *Ibid.*, quaest. 91, art. 1; art. 2; art. 3; art. 4; art. 5; quaest. 93, art. 1; art. 2; art. 3; art. 4; art. 6.
[10] *Ibid.*, quaest. 93, art. 1.
[11] "Contra Faustum," XXII, 27.
[12] St. Augustine carried his Lex Aeterna principle into his Lex Naturalis. For the Lex Aeterna is indelibly impressed on the soul of man. "Ex hac ineffabili atque sublimi rerum administratione, quae fit per divinam providentiam, quasi transscripta est naturalis lex in animam rationalem, ut in ipsa vitae

not an impersonal law or "cosmic reason" like that of the Stoics to which God, too, would have been subjected, but it is the personal will of God Himself.

St. Thomas Aquinas's conception of the Lex Aeterna is very similar to that of St. Augustine. It is the objective and absolute *a priori* of everything that is called a "rule and measure." It exists in itself and can only be conceived through itself. The Divine intellect eternally remains the measure and rule of all things, and each thing has truth to the degree that it presents the Divine intellect. So a Divine concept—here the law—is true by reason of itself.[13] St. Thomas Aquinas states that the law is the practical reason emanating from a ruler. The created Universe is ruled by Divine providence, consequently the community of the Universe is governed by Divine reason. So the very Idea of the eternal government of all things in God has the nature of a law. And since the Divine reason is not subject to time, but is eternal, its law, too, must be eternal.[14] All things are created by Divine wisdom, and that type of Divine wisdom which moves all things to their due end bears the character of a law. Hence the Lex Aeterna is nothing but Divine wisdom directing all actions and movements.[15]

St. Thomas Aquinas gives four reasons for the necessity of the Lex Aeterna. The first is that man is ordained to an end—to eternal happiness. Since he could not achieve this end through his own powers, it is necessary that he be directed to it by a law given by God. But it is his second reason that is of greatest importance for his theory of law. He says, "because, on account of the uncertainty of human judgment, especially on contingent and particular matters, different people form different judgments on human acts; whence also different and contrary laws result. In order, therefore, that man may know without any doubt what he ought to do and what he ought to avoid, it was necessary for man to be directed in his proper acts by a law given by God, for it is certain that such a law cannot err."[16] His third reason is that man is not competent to control the interior workings

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huius conversatione moribusque terrenis homines talium distributionum imagines servent." (De Diversis Quaestionibus, quaest. 53, art. 2.) Thus we find in ourselves the ultimate principles of right and justice. The Lex Naturalis is but the preservance of the eternal "cosmic order," as expressed in the Lex Aeterna. "Deus ordinavit omnia et fecit omnia . . . et gradibus quibusdam ordinavit creaturam a terra usque ad coelum, a visibilibus ad invisibilia, a mortalibus ad immortalia. Ista contextio creaturae, ista ordinatissima pulchritudo, ab imis ad summa conscendens, a summis ad ima descendens, nusquam interrupta, sed dissimilibus, temperata, tota laudat Deum." (Psalm 144, 13.) And in "De Libero Arbitrio," (I, 6, 15) he states: "Ut igitur naturae legis notionem, quae impressa nobis est, quantum valeo, verbis explicem, ea est, quae iustum est, ut omnia sint ordinatissima."

[13] SUMMA THEOLOGICA, I. II., quaest. 93, art. 1.

[14] *Ibid.*, quaest. 91, art. 1.

[15] *Ibid.*, quaest. 93, art. 1.

[16] *Ibid.*, quaest. 91, art. 4.

of other men, and yet that being necessary to virtue, the Lex Aeterna has to intervene or supervene. His fourth reason is that human laws alone could not forbid or punish all evil deeds, because if it tried, it would hurt more than help the common good.

There St. Thomas Aquinas has stated the essence of Christian thought—the final resort to God. He has pondered the enigma of "different people forming different judgments on human acts," presumably one judgment being as firm and reasonable (as far as the human could see) as the other. And yet there had to be for him, as there must for all men with intellectual and spiritual intensity, some set of values on which he could base his own philosophy and convictions. And since the thought of his days, like all true Christian thought, abhorred the thinking in terms of the relative, he went to God, "in order . . . that . . . (he might) . . . know without any doubt what he ought to do and what he ought to avoid."[17] The idea that his premise was not fully demonstrable as far as natural reason is concerned, seemed, in his Faith, a perfectly natural thing, and never gave him pause. For he knew that it was unshakable and true.

All men, some more and some less, know of the Lex Aeterna.[18] For "by way of participation, the Lex Aeterna resides in that which is ruled and measured."[19] But no one can know the Lex Aeterna in its entirety; yet every rational creature knows it in its reflection or effect. Every knowledge of the truth is a kind of reflection and participation of the Lex Aeterna, which is in itself the unchangeable truth."[20] All that is in things created by God . . . is subject to the eternal law: while things pertaining to the Divine nature or essence are not subject to the eternal law, but are the eternal law itself."[21]

All laws insofar as they partake of right reason, are derived or proceed from the Lex Aeterna. Nothing is just and lawful but what has been drawn from the Lex Aeterna.[22] For "the power of the second mover must needs be derived from the power of the first mover."[23]

God imprints on the whole of the created Universe the principles of its proper actions, making thus all actions and movements subject to the Divine government, to the Lex Aeterna.[24] "It is evident that all things partake somewhat of the eternal law, in so far as, namely, from its being imprinted on them, they derive their respective inclinations to their proper acts and ends. Now among all others, the rational creature

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[17] *Ibid.*, quaest. 91, art. 4.
[18] *Ibid.*, quaest. 93, art. 2.
[19] *Ibid.*, quaest. 91, art. 6.
[20] *Ibid.*, quaest. 93, art. 3; quaest. 91, art. 2.
[21] *Ibid.*, quaest. 93, art. 4.
[22] *Ibid.*, quaest. 93, art. 3.
[23] *Ibid.*, quaest. 93, art. 3.
[24] *Ibid.*, quaest. 93, art. 4.

is subject to Divine providence in the most excellent way, in so far as it partakes of a share of providence, by being provident both for itself and for others. Wherefore it has a share of the Eternal Reason, whereby it has a natural inclination to its proper act and end."[25] It is God, the Creator of all things, who imprints on the soul of man the principles of his proper actions. This constitutes man's participation in the Lex Aeterna, a participation which is called the Lex Naturalis Moralis, and which forms the ultimate source of his own law—the human law.

Lex Naturalis (Moralis)

In the field of the Lex Naturalis (Moralis), or in short, of the natural law, too, St. Thomas Aquinas had the benefit of St. Augustine's works. They both arrived at the basis of their natural law in a similar manner. To St. Augustine and St. Thomas the Lex Aeterna is the absolute and objective *a priori*. The natural law stands in its relation to the Lex Aeterna as a "subjective" *a priori* of right and justice, being imprinted on the soul of man. The natural law is, in varying degrees, the rational creature's participation in the Divine reason, the Lex Aeterna—which exists only in the mind of God. It is, in other words, the "imprint" of the Lex Aeterna on men's souls.[26]

The natural law in St. Thomas Aquinas is primarily an ontologically grounded "regula et mensura," an "ordinatio ad finem."[27] In the "Summa Theologica," I. II., quaest. 91, art. 2, he says, ". . . law, being a rule and measure can be in a person in two ways: In one way, as in him that rules or measures; in an other way, as in that which is ruled and measured, since a thing is ruled and measured, in so far as it partakes of the rule or measure. Wherefore . . . it is evident that all things partake somewhat of the eternal law. . . . Now among others, the rational creature is subject to Divine providence in the most excellent way, in so far as it partakes of a share of providence . . . and this participation of the eternal law in the rational creature is called the natural law."

As to the manner in which man is able to become aware of the Lex Aeterna, in order to make it the basis of his laws, St. Thomas asserts that man is conscious of the Lex Aeterna, and, therefore, also conscious of the natural law, "because the rational creature partakes thereof (of the Lex Aeterna) in an intellectual and rational manner,

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[25] *Ibid.*, quaest. 91, art. 2; and art. 4.
[26] St. Augustine, "De Diversis Quaestionibus," 53, quaest. 2.
[27] Summa Theologica, I. II., quaest. 90, art. 1; art. 2; art. 4; quaest. 91, art. 6; quaest. 93, art. 3; quaest. 95, art. 3; quaest. 96, art. 1; art. 2.

therefore the participation of the eternal law in the rational creature is properly called a law, since law is something pertaining to reason."[28] In this point St. Thomas differs from St. Augustine, who claims that the soul is intuitively certain of the idea of justice which is ineradicable.[29]

The precepts of the natural law are discovered by reason. For natural law is man's participation of the Lex Aeterna.[30] The human reason cannot know the Divine reason perfectly and completely. But the speculative reason of man does have a participation in the Divine reason, whereby we have within ourselves a knowledge of certain general principles of right action,[31] which are called "natural law."

The great and important innovation of Thomistic natural law thinking consists in the use of the "natural practical reason"[32] of man. This "practical reason" functions parallel to the "natural speculative reason."[33] "Ratio speculativa et practica" becomes a standing formula with St. Thomas, thereby ending the unchallenged supremacy of the speculative reason. The "practical reason" is on an equality with the speculative reason, inasmuch as the structure of both is identical. "A law is the dictate of practical reason. Now it is to be observed that the same procedure takes place in the practical and in the speculative reason: for each proceeds from principles to conclusions."[34] From

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[28] *Ibid.*, quaest. 91, art. 2. See also quaest. 90, art. 1. It is worthwhile to note that scholastic thinkers always speak of Lex Naturalis, and not of Ius Naturale, as did the "secular natural law" thinkers of the seventeenth and eighteenth centuries. For all law (lex) is based on an obligation or duty. See, for instance, SUMMA THEOLOGICA, I. II., quaest. 90, art. 1. "For lex is derived from ligare (to bind), because it binds one to act." Compare SUMMA THEOLOGICA, I. II., quaest. 97, art. 1. Hobbes seems to have grasped the spirit of the scholastic natural law when he says, that "lex enim vinculum est, ius libertas (licence). (De Cive. cap. 14, 14, n. 3.)

[29] St. Augustine, "Confessiones," II, 4. See also footnote 14. The nation of the lex naturalis—which is impressed on our soul ("De Diversis Quaestionibus," quaest. 53, 2)—comes to us through the use of reason, while through our moral conscience we become intuitively aware of the fact that the Lex Aeterna is the true essence, the last resort of all that is called natural law. It is our moral conscience, which through the process of "recollection" remembers the "nucleus" of all natural law, that is, the eternal law. This notion of "recollection" of the eternal law, of the "essence" of natural law is distinctly Platonic.

[30] SUMMA THEOLOGICA, I. II., quaest. 91, art. 2.

[31] *Ibid.*, quaest. 91, art. 3; quaest. 90, art. 2; quaest 94, art. 1; quaest. 91, art. 2; quaest. 94, art. 6; quaest .95, art. 2.

[32] *Ibid.*, quaest. 91, art. 3; art. 4; quaest. 94, art. 1; art. 2; art. 4.

[33] *Ibid.*, quaest. 91, art. 3; quaest. 94, art. 2. See, however, quaest. 94, art 4: "The speculative reason is busied chiefly with necessary things . . . The practical reason . . . is busied with contingent matters, about which human actions are concerned: and consequently, although there is necessity in the general principles, the more we descend to matters of detail, the more frequently we encounter defects. Accordingly then in speculative matters truth is the same in all men, both as to principle and as to conclusions . . . But in matters of action, truth or practical recitude is not the same for all, as to matters of detail, but only as to the general principles."

[34] *Ibid.*, quaest. 91, art. 3.

naturally known indemonstrable principles we proceed to more particular determinations. The place of the practical reason in the natural law is to discover and formulate a practical human law.[35] "The precepts of natural law are to the practical reason what the first principles of demonstration are to the speculative reason; because both are self-evident principles."[36]

There are several principles or precepts of natural law, all of them, however, based on a common foundation. "Now as 'being' is the first thing that falls under the apprehension simply, so 'good' is the first thing that falls under the apprehension of the practical reason, which is directed to action: since every agent acts for an end under the aspect of the good. Consequently, the first principle in the practical reason is one founded on the notion of the 'good,' viz., that 'good' is that which all things seek after. Hence this is the first precept of law, that 'good' is to be done and pursued, and 'evil' is to be avoided. All other precepts of the natural law are based upon this: so that whatever the practical reason naturally apprehends as man's good (or evil) belongs to the precepts of the natural law as something to be done, or avoided."[37]

This is to St. Thomas Aquinas the "principium per se notum" and "indemonstrabile," the common foundation on which all laws are based, the highest principle and first precept of law. Previously he had already demonstrated that the natural practical reason can perceive only certain most general principles or precepts, but never all of the different precepts which are contained in the Lex Aeterna.[38]

The most general principle of law, namely that the good is to be pursued, and the evil to be avoided,[39] constitutes a self-evident principle, from which are drawn "first, certain most general precepts that are known to all; and secondly, certain secondary and more detailed precepts, which are, as it were, conclusions following closely from first principles."[40]

"As regards the general principles whether of speculative or practical reason, truth or rectitude is the same for all, and is equally known to all."[41] And since these principles are instilled into man's mind by God,[42] they can never be blotted out of the hearts of men.[43] Thus

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[35] *Ibid.*, quaest. 91, art. 3; quaest. 94, art 4.
[36] *Ibid.*, quaest. 94, art. 2. See also quaest. 91, art, 3; quaest. 94, art. 4.
[37] *Ibid.*, quaest. 94, art. 2.
[38] *Ibid.*, quaest. 91, art. 1.
[39] *Ibid.*, quaest. 94, art. 2.
[40] *Ibid.*, quaest. 94, art. 6. See also quaest. 91, art 3.
[41] *Ibid.*, quaest. 94, art. 4.
[42] *Ibid.*, quaest. 90, art. 4. See also quaest. 91, art. 4; quaest. 93, art. 5; quaest. 94, art. 4.
[43] *Ibid.*, quaest. 91, art. 3; art. 6; quaest. 93, art. 6; quaest. 94, art. 4; art. 6.

they never change.[44] The ultimate principles of right and justice, of goodness and rectitude are immutable.

From the general precepts of natural law, by means of which the rational creature partakes of the eternal law,[45] follows the "secondary natural law" which contains more detailed precepts, and which provides an immediate basis for the human law, that is, for the "administration of justice." This "secondary natural law"[46] is but a body of conclusions drawn from the "primary natural law," from the general and basic principles of natural law.[47] It constitutes that very instance which gives true authority to all human laws. Hence the need for human reason to proceed from the general principles of natural law in order to sanction human law.[48] While the "primary natural law" cannot be abolished from the hearts of men, the "secondary natural law" can be blotted out, either by evil persuasion, corrupt habits, and vicious custom, or by certain human laws which are contrary to the natural law.[49] "The natural law, as to general principles, is the same for all, both as to rectitude and as to knowledge. But as to certain matters of detail, which are conclusions, as it were, of those general principles, it is the same for all in the majority of cases, both as to rectitude and as to knowledge; and yet in some few cases it may fail . . . by reason of certain obstacles."[50]

These conclusions drawn from first principles cannot always be drawn with absolute certainty. For "the practical reason is concerned with practical matters which are singular and contingent. . . . Wherefore human laws cannot have that inerrancy that belongs to the demonstrated conclusions of science."[51] The fact that these conclusions lack inerrancy does not lessen, however, their importance. "Nor is it necessary for every measure to be altogether unerring and certain, but according as it is possible in its own particular genus."[52] The secondary principles of natural law are not valid for all times and all places, but do, and must change.[53] For the "practical reason," which draws these conclusions, called "secondary natural law" principles, is concerned with matters that are "contingent," in other words, with human actions, and not with things.[54] And the more "contingent" it becomes as we descend to matters of detail, the more frequently defects are encoun-

[44] *Ibid.*, quaest. 94, art. 5.
[45] *Ibid.*, quaest. 91, art. 3.
[46] *Ibid.*, quaest. 94, art. 4; art. 5, art. 6.
[47] *Ibid.*, quaest. 91, art. 3; quaest. 94, art. 4; quaest. 95, art. 2; art. 4.
[48] *Ibid.*, quaest. 91, art. 4.
[49] *Ibid.*, quaest. 94, art. 6
[50] *Ibid.*, quaest. 94, art. 4.
[51] *Ibid.*, quaest. 91, art. 3. See also quaest. 94, art. 4.
[52] *Ibid.*, quaest. 91, art. 3. Also quaest. 92, art. 2; quaest. 94, art. 4.
[53] *Ibid.*, quaest. 94, art. 4; art. 5.
[54] *Ibid.*, quaest. 94, art. 4.

tered and alterations needed. Because "the truth is not known to all men as regards the conclusions, but only as regards the principles which are called common notions."[55]

The "contingent matters" to which St. Thomas Aquinas refers are the "human matters," which are extremely varied as time and place change. Thus it will be impossible to have detailed laws governing human actions that will be just in every instance. It is most understandable, therefore, that St. Thomas Aquinas declares that conclusions derived from first principles are variable, though the first principles remain altogether immutable.[56] However, these changes can only be by "addition," to supply what was wanting in the natural law. "Nothing hinders the natural law from being changed; since many things for the benefit of human life have been added over and above the natural law, both by the Divine Law, and by human laws."[57]

Positive or Human Law

St. Thomas Aquinas states that the precepts of law are concerned with human acts or "human matters." So the third major problem with which he deals is whether there is such a thing as a Positive or Human Law that controls human acts. He concludes that "it is from the precepts of the natural law, as from general and indemonstrable principles, that the human reason needs to proceed to the more particular determination of certain matters. These particular determinations, devised by human reason, are called human laws, provided the other esential conditions of law be observed . . . "[58] Man must have laws framed by man because he cannot achieve perfection of virtue—which is his end in life—by himself. The object of the law is to let man have peace and virtue. Man cannot gain virtue by himself alone because

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[55] *Ibid.*, quaest. 94, art. 4.

[56] *Ibid.*, quaest. 94, art. 2; art. 4; quaest. 95, art. 5. St. Thomas Aquinas's notion of a "secondary natural law" constitutes one of the most important innovations in the field of natural law thinking. It was taken up by Hugo Grotius, who calls it "ius naturae pro certum rerum statu," or "ius naturae non proprie, sed reductive" (De Iure Belli ac Pacis, I. cap. 1, sec. 10). Pufendorf speaks in this connection of a "ius naturae hypotheticum," in contrast to "ius naturae absolutum" (Ius Naturae et Gentium, II, cap. 3, sec. 22-24). Since Christian Wolff the "primary" and the "secondary" natural law have become the "inborn" and the "acquired" human rights.

[57] *Ibid.*, quaest. 94, art. 5. It is interesting to see, in this connection, Rudolf von Jhering's attitude towards the philosophy of law of St. Thomas Aquinas: "This great mind correctly understood the realistic, practical and the social factors of moral life, as well as the historical . . . In amazement I ask myself how it is possible that such truths, once they were uttered, could be forgotten so completely by our Protestant Savants? What false roads would have been spared, had they taken them to heart! For my part, I should probably not have written my book, had I known them; for the basic ideas I occupied myself with are to be found in that gigantic thinker in perfect clearness and in most pregnant formulation." (Der Zweck im Recht, 3d edit. (Leipzig, 1898), vol. II, p. 161 ff.)

[58] *Ibid.*, quaest. 91, art. 3.

"the natural law was perverted in the hearts of some men, as to certain matters . . . which perversion stood in need of correction."[59] It is, in short, the fall of man which perverted human nature, blurred his reason, and weakened his will.[60] The human law is to enable disabled persons to follow the dictates of the natural law.[61] It is interesting to note that the positive law of St. Thomas Aquinas not only safeguards the natural law through the appliance of compulsion, but also supplements the natural law by creating the "secondary natural law."[62]

Though the positive law is framed by man, it is not in the form of an arbitrary command by a sovereign or despot, because all human law must stand in close relationship to natural law.[63] Or, to be more exact, all power to frame human law must be derived from natural law.[64] A law which is not in conformity with the natural law, is no law at all. "The first rule of reason is the law of nature, . . . consequently every human law has just as much of the nature of law, as it is derived from the law of nature."[65]

St. Thomas Aquinas also makes some very interesting observations about the fact that all human law should be statutory, and unlike the Anglo-American common law, not to be decided upon by judges. For in the first place, it is more probable that a few wise men can be found to frame the (statutory) laws, than it is that you could find all the wise men that would be necessary to judge cases as they arose. Secondly, there is more time to think while making laws than while judging cases as they arise, and so the laws would be wiser. And most important, they would be made in an abstract atmosphere, not under the compulsion of human passions and prejudices of the moment.[66]

According to St. Thomas Aquinas the human law must fulfill the conditions requisite to a thing which has a purpose or an end. "It is ordained to an end, and is a rule or measure ruled or measured by a higher measure. And this higher measure is twofold, viz. the Divine law and the natural law. The end of human law is to be useful to man."[67] There are three other conditions which must be fulfilled by the human law. The first is that it shall be virtuous. Secondly, it must be just, possible to nature, according to the custom of the country, and suitable to the time and place. And thirdly, it must be necessary, useful, clearly expressed, and framed not for a private benefit, but

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[59] *Ibid.*, quaest. 94, art. 5. See also quaest. 93, art. 6; quaest. 94, art. 4.
[60] *Ibid.*, quaest. 93, art. 6; quaest. 94, art. 4; art. 5; art. 6.
[61] *Ibid.*, quaest. 95, art. 1.
[62] *Ibid.*, quaest. 91, art. 3; quaest. 94, art. 5; quaest. 95, art 2.
[63] *Ibid.*, quaest. 91, art. 3; quaest. 94, art. 2; quaest. 95, art. 3; quaest. 92, art. 2.
[64] *Ibid.*, quaest. 93, art. 3; quaest. 95, art. 2.
[65] *Ibid.*, quaest. 95, art. 2. See also quaest. 95, art. 3.
[66] *Ibid.*, quaest. 95, art. 1. See also quaest. 91, art. 4.
[67] *Ibid.*, quaest. 95, art. 3. See also quaest. 93, art. 3.

solely for the common good.[68] Without these conditions, a law is not a law.[69] He is fully aware that the general principles of natural law cannot be applied to all men in the same way for all times and in all places. Because of the great variety of human affairs, the human law must vary among different peoples.[70]

The statement that the human law must be framed for the common good, according to the custom of the country, and suitable to the time and place, betrays a deep understanding of the social function of the law. According to St. Thomas Aquinas, law is something pertaining to reason "to direct to the end, which is the first principle in all matters of action."[71] "Now the first principle in practical matters, which are the object of practical reason, is the last end: and the last end of human life is bliss or happiness . . . Consequently the law must needs regard principally the relationship to happiness. Moreover, since every part is ordained to the whole, as imperfect to perfect, and since one man is a part of the perfect community, the law must needs regard properly the relationship to universal happiness."[72] "Whenever a thing is for an end, its form must be determined proportionately to that end . . . Everything that is ruled and measured must have a form proportionate to its rule and measure. Now both these conditions are verified in human law: since it is both something ordained to an end; and is a rule or measure ruled or measured by a higher measure. And this higher measure is twofold, viz., the Divine law and the natural law . . . Now the end of human law is to be useful to man . . ., viz., that it foster religion, . . . ; that it be helpful to discipline . . . ; and that it further the common weal."[73]

"Since the law is chiefly ordained to the common good, any other precept in regard to some individual work must needs be devoid of the nature of a law, save in so far as it regards the common good."[74] For "every law is ordained to the common good."[75] "Nothing stands firm with regard to the practical reason, unless it be directed to the last end which is the common good: and whatever stands to reason in this sense, has the nature of a law."[76] Actions are indeed concerned with particular matters: but those particular matters are referable to the common good, not as to a common genus or species, but as to a common final cause, according as the common good is said to be the

[68] *Ibid.*, quaest. 95, art. 3.
[69] *Ibid.*, quaest. 92, art. 1; quaest. 95, art. 1.
[70] *Ibid.*, quaest. 95, art. 2.
[71] *Ibid.*, quaest. 90, art. 1.
[72] *Ibid.*, quaest. 90, art. 2.
[73] *Ibid.*, quaest. 95, art. 3.
[74] *Ibid.*, quaest. 90, art. 2.
[75] *Ibid.*, quaest. 90, art. 2. See also quaest. 90, art. 3; art. 4; quaest. 92, art. 1; quaest. 95, art. 1; art. 3; quaest. 96, art. 1; art. 6.
[76] *Ibid.*, quaest. 90, art. 2.

common end."[77] The common good is, therefore, the true "social good," regulated according to Divine justice;[78] it is the all pervading purpose in the human law. This proves that St. Thomas Aquinas does not place the individual interest, the right to free self-assertion, in the highest place.[79] It is the social interest, the common good that is to be fostered, even if the individual rights of man at times should suffer.[80]

The law must "take into account many things, as to persons, as to matters, and as to times."[81] "Now it happens often that the observance of some point of the law conduces to the common weal in the majority of instances, and yet, in some cases, is very hurtful."[82] Should such a case arise, the law should not be observed, in order to maintain the common weal which the lawgiver had in view.[83] Thus equity or "epikeia"[84] becomes part of the general scheme of justice of St. Thomas Aquinas. Equity is a kind of justice which is not better than all justice; but it is better than legal justice, "since it is not possible to lay down rules of law that would apply to every single case. Legislators in framing laws attend to what commonly happens: although if the law be applied to certain cases it will frustrate the equality of justice and be injurious to the common good which the law has in view. . . . In these and like cases it is bad to follow the law, and it is good to set aside the letter of the law and to follow the dictates of justice and the common good. . . . To follow the letter of the law when it ought not to be followed is sinful."[85] Equity does not set aside what is just, nor does it pass judgment on a law claiming that it was not well made. It merely states that the law is not to be observed in some particular instance. For "without doubt he transgresses

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[77] *Ibid.*, quaest. 90, art. 2. In order to understand more fully the true meaning of the Thomistic term, "common good," we should remember that, "the goodness of any part is considered in comparison with the whole . . . Since then every man is a part of the state, it is impossible that a man be good, unless he be well proportionate to the common good: nor can the whole be well consistent unless its parts be proportionate to it. Consequently the common good of the state cannot flourish, unless the citizen be virtuous, at least those whose business it is to govern. But it is enough for the good of the community, that the other citizens be so far virtuous that they obey the commands of their rulers." *Ibid.*, quaest. 92, art. 1.

[78] *Ibid.*, quaest. 92, art. 1.

[79] *Ibid.*, quaest. 96, art. 1.

[80] *Ibid.*, quaest. 96, art. 2; quaest. 95, art. 3.

[81] *Ibid.*, quaest. 96, art. 1.

[82] *Ibid.*, quaest. 96, art. 6.

[83] *Ibid.*, quaest. 96, art. 5.

[84] St. Thomas Aquinas borrows this term from Aristotle, Nicomachean Ethics, book V, 10 ff.

[85] SUMMA THEOLOGICA, II. II., quaest. 120, art. 1; art. 2.

the law who by adhering to the letter of the law strives to defeat the intention of the lawgiver."[86] Thus equity is a kind of justice.[87]

The principles of human law are derived from natural law, and must be always in accordance with the Divine justice. This derivation comes about in two ways—but both are based on the use of reason. The first is purely deductive, demonstrable method, while the second is an application of a principle to facts. "It must be noted that something may be derived from the natural law in two ways: first, as a conclusion from premises, secondly, by determination of certain generalities. The first way is like to that by which, in sciences, demonstrated conclusions are drawn from the principles: while the second mode is likened to that whereby . . . general forms are particularized as to details; . . . Both modes of derivation are found in the human law. But those things which are derived in the first way, are contained in human law not as emanating therefrom exclusively, but have some force from the natural law also. But those things which are derived in the second way, have no other force than that of human law."[88]

In applying human laws to everyday affairs St. Thomas Aquinas finds that these human laws are general precepts. They would be of little or no use if they controlled only single acts. Now human acts are controlled through the decrees of "prudent men," and though these decrees are not laws in the strict sense, they are, nevertheless, legal, being applications of general laws to particular instances.[89] Human laws as well as decrees bind men in conscience if they are just; because they are derived from the eternal law,[90] and conform to the first principles of natural law. In order to determine whether human laws or human decrees are just, one must look first to its end, the common good. For only if they are enacted to achieve that particular end can they be called just.[91] Furthermore, the law that is made may never

[86] *Ibid.*, quaest 120, art. 1. This sentence is exceedingly interesting because it states the basic reason for the establishment of our own common law equity, and the purpose behind its existence. In the old days when the Old English Chancellor first started dispensing equity, he would essentially say in his injunction, "We do not say you cannot have your common law right, but if you insist on using it to defeat the ends of justice, you will have to do so in the King's jail." Francois Gény seems to have caught the spirit of St. Thomas Aquinas's equity in his "Méthode d'Interprétation et Sources on Droit Privé Positive," vol. II, p. 100 ff. He says, "The judge asked to enunciate the law, by supplementing the lack of, or by bridging the gaps in the formal sources thereof . . . should take into account the inspiration of reason and of conscience in order to probe the mistery of the 'just' before coming down to the examination of the positive nature of things which will settle its diagnosis, and will call into action the principle of reason . . . There are principles of justice superior to the contingencies of fact, and if facts determine the realization of those principles, they do not contain their essence."

[87] *Ibid.*, quaest. 120, art. 2.

[88] SUMMA THEOLOGICA, I. II., quaest. 95, art. 2.

[89] *Ibid.*, quaest. 96, art. 1.

[90] *Ibid.*, quaest. 93, art. 3; art. 4.

[91] *Ibid.*, quaest. 96, art. 1.

exceed the authority of the lawgiver. And finally, these laws or decrees must not be discriminatory, but must apply to all "according to an equality of proportion."[92] Consequently, a law is unjust if it is contrary to human good in any of the above mentioned ways,[93] or even more so, if it is opposed to the Divine good.[94] Now the unjust law not only does not bind the moral conscience, but it should be ignored by man, "provided he avoid giving scandal of inflicting a more grievous hurt."[95] But even if a law be just, still it is inevitable that in particular cases it will work an injustice; because it is impossible to frame a law that will be able to take account of all human "contingencies."[96] Ordinarily the judge of whether a particular application of the law will be unjust,[97] should be some constituted authority. St. Thomas Aquinas is fully aware that, if "the peril be so sudden as not to allow of the delay involved by referring the matter to authority, the mere necessity brings with it a dispensation, since necessity knows no law."[98]

The mere application of human law is always a matter of relativity.[99] Although the basic truths were absolute and immutable, St. Thomas Aquinas realized that the means by which the absolute purpose in the law—the common good—was to be achieved, depended for their validity and force on whether, in each case, they served to achieve this end.[100] No human law is absolute in its application, but is a relative good that has to show its worthiness before it has to be obeyed.[101]

Unlike the Divine law, the human law is neither absolute nor unchangeable. For human law is a dictate of human reason which is fallible and changeable in that it gradually advances from the imperfect to the perfect. In this way alone, the human law would and does change towards a better realization of the common good. On the other hand, it is the nature of the human law to direct and regulate the acts of man, and the law must, therefore, take account of man's progress and changed conditions. As man's condition changes, his requirements change, so that in this way, too, if the law would fulfill its purpose, it must be subject to change.[102] However, this change or evolution of

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[92] *Ibid.*, quaest. 96, art. 4.
[93] *Ibid.*, quaest. 92, art. 2.
[94] *Ibid.*, quaest. 96, art. 4.
[95] *Ibid.*, quaest. 96, art. 4. See also II. II., quaest. 104, art. 5.
[96] SUMMA THEOLOGICA, II. II., quaest. 57; I. II., quaest. 93, art. 5; quaest. 94, art. 4
[97] SUMMA THEOLOGICA, II. II., quaest. 120, art. 1.
[98] SUMMA THEOLOGICA, I. II., quaest. 96, art. 6. This is a very competent statement of the familiar common law doctrine of an act privileged in an emergency.
[99] *Ibid.*, quaest. 91, art. 1.
[100] *Ibid.*, quaest. 95, art. 3; quaest. 96, art. 1.
[101] *Ibid.*, quaest. 96, art. 4.
[102] *Ibid.*, quaest. 97, art. 1.

the law should be gradual. St. Thomas does not believe that the human law should immediately be altered just as soon as something supposedly better is found. For there are other problems that must be considered besides the fact that in one particular instance a better rule has been discovered. The basic purpose of the law, the common good must be achieved at all costs. Only if the change of the law will serve this purpose may it be undertaken at once. For in general, any change of the law in itself may be detrimental to the common weal. The importance of the legal tradition, of stability and certainty, are not to be overlooked, because they, in themselves, conduce to the common good. A justification for changing the law exists only where a new rule will confer a very great and obvious benefit, or conversely, where the existing law is obviously unjust.[103]

"All law proceeds from the wisdom and will of the lawgiver; the Divine and natural laws from the reasonable will of God; the human law from the will of man, regulated by reason. Now just as human reason and will, in practical matters, may be made manifest by speech, so may they be known by deeds; since seemingly a man chooses as good that which he carries into execution. But it is evident that by human speech, law can be both changed and expounded, in so far as it manifests the interior movement and thought of human reason. Wherefore by actions also, especially if they are repeated, so as to make a custom, law can be changed and expounded; and also something can be established which obtains force of law, in so far as by repeated external actions, the inward movement of the will, and concepts of reason are most effectually declared; for when a thing is done again and again, it seems to proceed from a deliberate judgment of reason. Accordingly, custom has the force of a law, abolishes law, and is interpreter of law."[104] The reason referred to in speaking of the customary law is the "reason of the race," the "genius of a certain people." It is the "reason" of living; the reason found in experience. In short, it is a recognition of the value of a "common law" even in a "civil law" community.[105]

The human law makes for an equality among men, since all men, except the person from whom the law derives its authority, are subject to it. In a particular instance, where the law fails in its intended purpose, the ruler may give a dispensation so that a man will not have to observe the law, and this is only when such a dispensation will help to achieve the common good. Because even the ruler is subject to the Divine and natural laws.[106]

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[103] *Ibid.*, quaest. 97, art. 2.
[104] *Ibid.*, quaest. 97, art. 3.
[105] *Ibid.*, quaest. 97, art. 3.
[106] *Ibid.*, quaest. 97, art. 4; quaest. 96, art. 4.

Justice according to St. Thomas Aquinas is "a habit whereby a man renders to each one his due by constant and perpetual will."[107] It is, therefore, a "habit" that rectifies the will. Justice is essentially a relation to another. St. Thomas Aquinas concludes that Justice is a general virtue, in that it directs the acts of all the virtues to the common good. But the fact that it is itself a general virtue does not mean that it is the same as other virtues. "Not every moral virtue is about pleasure and pain as its proper matter, since fortitude is about fear and daring; but every moral virtue is directed to pain and pleasure as to ends to be acquired. For pleasure and pain are the principal end in respect of which we say that this is an evil and that a good: and in this way they belong to justice."[108] Justice is concerned only with external operations or relations between men, whereas the other moral virtues are concerned with internal things—the passions and the like—and the two are more or less mutually exclusive. But justice stands foremost among moral virtues, because it aims for the common good, while the other moral virtues deal with the good of the individual."[109]

According to St. Thomas Aquinas, law is part of morality. For morality is divided into individual morality, law, and "practical matters," such as economics. The basic characteristic of the law is mainly a negative one:[110] it cannot contradict the principles of the natural law, which is the moral law.[111] Because law itself must be virtuous.[112] On the other hand, law is not empowered to prevent all evil, or to achieve the good under all circumstances. "Human law does not forbid all acts, by the obligation of a precept, as neither does it prescribe all acts of virtue. But it forbids certain acts of each vice, just as it prescribes some acts of each virtue."[113] The human law is not made for the virtuous, but, primarily, for the "average person."[114] "The purpose of human law is to lead men to virtue, not suddenly, but gradually. Wherefore it does not lay upon the multitude of imperfect men, the burdens of those who are already virtuous, viz., that they should abstain from all evil."[115] It would be unjust to apply a system of law to all people—to the virtuous and to those lacking virtue alike[116]—that would forbid all that is contrary to virtue. All the

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[107] SUMMA THEOLOGICA, II. II., quaest. 58, art. 1. This definition is taken from: Digest, i I, De Justitia et Iure, 10; (Ulpian lib. I Regularum). "Justitia est constans et perpetua voluntas ius suum cuique tribuendi."
[108] *Ibid.*, quaest. 58, art. 9. See also I. II., quaest. 90, art. 2.
[109] SUMMA THEOLOGICA, II. II., quaest. 58, art. 1-12.
[110] SUMMA THEOLOGICA, I. II., quaest. 92, art. 1; quaest. 96; art. 2.
[111] SUMMA THEOLOGICA, II. II., quaest. 77, art. 1; II. II., quaest. 104, art. 5.
[112] SUMMA THEOLOGICA, I. II., quaest. 95, art. 3.
[113] *Ibid.*, quaest. 96, art. 3.
[114] *Ibid.*, quaest. 96, art. 2; II. II., quaest. 69, art. 1; quaest. 78, art. 1; quaest. 77, art. 1.
[115] SUMMA THEOLOGICA, I. II., quaest. 96, art. 2.
[116] *Ibid.*, quaest. 96, art. 5.

human law can do is to prevent things which would upset human society or the common good. For the human law does not compel in the same manner as do morals.[117] The human law can try to bring about the virtuous life of individuals,[118] but there is a higher realm for man to attain, the possession of God. And this end is not attainable by the purely natural powers of man, as expressed in the human law. It can only be achieved with the assistance of God.[119]

[117] *Ibid.*, quaest. 96 art. 5.
[118] *Ibid.*, quaest. 92, art. 1; quaest. 96; art. 2; art. 3.
[119] Grabmann, M., "Thomas Aquinas" (transl. by V. Mitchell, Longman's, Green & Co., 1928) p. 171.