DICTIONARY
OF THE HISTORY
OF IDEAS

Studies of Selected Pivotal Ideas

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VOLUME III
Law, Concept of
Protest Movements

CHARLES SCRIBNER'S SONS • NEW YORK
private individuals in the sale of realty (Jones v. Mayer Co., 392 U.S. 409).

This humanistic attitude toward people, as distinguished from associations, corporations, and all impersonal groups subsumed under the constitutional term "persons" in the Equal Protection Clause, makes for a greater equality in protection and in treatment. In this respect the United States has permitted its judges to lead in determining whether or not such Clause is to be extended beyond its former boundaries. But equal protection is not limited to this Clause; it is accorded in many and different ways, in addition to the voluntary methods adopted by religious and other groups, and individuals. For example, there are other Clauses available, as well as various legislatures and chief executives who may also so act, either independently or in conjunction.

There is thus a broadening of equality and equal protection, a greater inclusion of people within its concepts, with more extensive and deeper protection accorded, even while the built-in historical method of classification remains. For example, equal protection in its general and not necessarily legalistic sense, is also found through the negative use of the Due Process Clause, which generally limits governments in the United States when these seek to prevent permanent resident aliens from working, operating businesses, or otherwise earning a living. The Constitution's Commerce Clause (Art. I, §8, cl. 3) is also used to enable the federal government to prevent inequalities which may not be otherwise reachable. The Bill of Rights, among other things, enables all persons to demonstrate peacefully and to speak and protest so as to obtain equality in all facets of life, and gives any accused the right to counsel regardless of financial inability to pay. The legislatures, either federal or state, may strike at discrimination and the unequal treatment of black people, aliens, or others in job opportunities. The chief executives, whether federal, state, or local, may exert similar negative and positive powers with respect to their armed and police forces, and otherwise.

Other Countries. What the United States is doing through its various powers and organs, and what its people do voluntarily, meet with varying degrees of opposition; such opposition is also found elsewhere in the world, sometimes in a repressive fashion. Rhodesia is only one example. Nevertheless, the idea of equal protection and treatment has spread during the last two centuries to the point where the United Nations' purposes include the development of "friendly relations among nations based on respect for the principle of equal rights," etc. (Charter, Art. 1, par. 2). So, too, does India's Constitution provide for equality (Arts. 14-18) and other rights, as does that of the Philippines, which contains a Bill of Rights. In 1968 the new Canadian Prime Minister reportedly promised "to strive for a just society with all possible freedom for individuals and equal sharing of the country's wealth."

The desire for equal protection and treatment politically, economically, educationally, and in all other aspects of human behavior and conduct has spread with the "revolt of the masses" envisaged since Christ. This current desire and need for such negative and positive equal protection is aggressive, that is, the people press for it, but is also defensive, that is, persons and nations which can aid do so not only for humanitarian reasons but also for self-interest. Some feel that this glacial movement toward equality will result in a complete levelling of differences and the elimination of all classifications, but this is impossible. What appears more likely to happen is a general raising of the economic standards of living, equal participation in government and culture, and otherwise the enjoying of more of the good life by those once classed as inferiors.

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[See also Class; Democracy; Enlightenment; Equality; Hierarchy; Justice; Law, Due Process, Natural; Property.]

NATURAL LAW AND NATURAL RIGHTS

I. DEFINITIONS

The expression "natural law" includes the ideas of nature and law, two nouns which do not lend themselves to univocal objective definition or even at least to general or commonly accepted usage. One recent
author Erik Wolf (Das Problem . . . , Ch. I, Part III) enumerates twelve meanings of "nature" and ten meanings of "law," which yield 120 possible combinations and almost as many definitions of the expression "natural law." We may add that if it is theoretically possible to think of supporting a specific agreement as to the present meaning of "nature"—again in this case not overlooking all the other historically accepted meanings—on the other hand, it is certain that there is no hope of finding a similar agreement about the idea of "law": the definition of law entails reference to philosophical presuppositions and consequently is not susceptible to supporting an indispensable general consensus. The definition of law is indeed the rock of Sisyphus.

To define natural law in an objective manner by disengaging it from its environment, from the schools which employ the expression, or from the political and legal organs which make use of it, is therefore an undertaking doomed to failure from the start. Hence it is necessary, if we wish to avoid confusion, always to qualify the expression: for example, classical natural law (to make the Aristotelian or Thomist conception precise); Stoic natural law; Protestant natural law; positive natural law characteristic of one of the forms of contemporary natural law (the legal sense of natural law); and so forth.

Furthermore, certain essential features of natural law can be formulated by specifying it in contrast with conventional law: nature opposed to convention, justice to legal right, even unwritten law opposed to written law, the permanence of certain human values confronting the transitory character of other values derived especially from the state. Seen in this light natural law appears as a group of principles that transcend the law of different epochs and regrouping a set of norms endowed with a certain continuity by opposition to the law of a given epoch, which is transitory and changing; for the law of any epoch is the interpreter of the preceding one, whereas natural law is the law which outlives the times.

Though the expression "natural law" is equivocal, the idea of "natural rights" presents much less ambiguity. By "natural rights" we understand the subjective rights that man possesses as a human being, which are granted to his person for the protection of certain essential interests. These rights are considered the irreducible legal patrimony of every human being as part of his very nature. They are based on the idea that only a human being is a person, and that every human being is a person. As a consequence, these rights are inalienable and imprescriptible. Inalienable, because if these rights would be given up, man would cease to be a person and become a case of alienation; imprescriptible, because if these rights ceased to exist (extinctive prescription), man would likewise cease to be a person in his presribed condition.

Natural rights thus appear as a manifestation of individualism, man being considered in his own nature independently of his political allegiance. They consecrate the idea of the dignity of the human person considered as such.

II. HISTORICAL ORIGINS

Greece and Rome. The idea of natural law is tied to the conception of an organized universe; the idea can be disengaged only after a society has become aware of the regularity, the succession, the repetition of natural phenomena, the existence of cycles and the ability to make predictions, predictability based on the existence of interrelations with the physical world. Natural law assumes a spatiotemporal representation of the universe. Hence it is at a loss when confronted with the many discrepancies in the magical condition of societies lacking any ordered structuring. But as soon as the idea becomes clear that there exist laws governing natural phenomena, there develops immediately the conception of a general principle and ubiquitous organizer of the initial chaos.

In Greece the idea came to a head quickly. Incoherence gave way to order. Since certain phenomena in nature answer to laws, it was logical to believe that all phenomena answer to laws and that notably societies, peoples, and relations among individuals would also answer to a preestablished integral order which needed only to be sought and discovered. It was namely the idea of Kosmos, the order of things in contrast to disorder, confusion, and chaos. The single directing principle was supposed to govern everything including men placed at the center of the universe and societies having the same characteristics as the other elements in the external world. Whence the idea that there exists a set of general and universal norms inherent in nature itself, especially in human nature, and which would be imposed upon man's will insofar as his will manifests itself in the form of custom or law. Heraclitus, for example, defined wisdom as consisting of "a single thing, to know the thought which governs all things everywhere" (Heraclitus, frag. 41; Jean Voilquin, p. 76). This thought is the "Logos" whose meaning is surely difficult to comprehend exactly, but which—as Voilquin proposes (p. 76, note 48)—appears ready to be reason insofar as it is common to all creatures, because reason contains the laws that govern the world: "It would be in some manner the communality of universal thought, the wisdom which is one, excluding the neo-Platonic and Stoic meaning" (ibid.).

In such a conception the world does not develop
in an order according to time, but in an order according to thought, which moreover sees the world as one. The laws, besides, are not due to man's will alone or maintained solely by human support, but "are nourished by a single divine law which rules over all, as it pleases, sufficing and surpassing in all things" (Voilquin, frag. 114). Thought is considered the highest virtue, and wisdom consists in saying what is true and in acting according to nature by listening to its voice.

We find again a moving and coordinating principle of a similar or at least analogous nature, in Anaxagoras of Clazomena, in the form of πνεύμα ("mind") infinite and autonomous, mingling with nothing, "alone with itself and by itself." It is at once the directing principle and the moving principle; it is the ordering principle of the universe μάκαρ δίκαιον πνεύμα. The idea of a law higher than human law can be perceived to emerge here with the opposition between nature and convention. The idea of nature is extended farther. Besides purely physical nature, education is capable of producing kinds of conduct which are so well integrated with our personality that they are indistinguishably fused with natural sorts of behavior. "Nature and education are close to each other, for education transforms man, but through this transformation creates in him a second nature" (Voilquin, frag. 33).

The opposition between a higher law inherent in the logos, which organizes the world, and man-made law finds its dramatic illustration in the fifth century B.C. in Sophocles' Antigone (ca. 454-459), putting into relief the contrast between Creon's edict and the Gods' unwritten and infallible laws. Let us not be mistaken about it; however, it is less a matter in this case of appealing to a natural rather than to a supernatural law against the state, but it was more specifically a case of a moral against a legal duty. In fact, Antigone appealed to piety.

Recourse to an organizing principle of the cosmos as evidence of intelligence is found again in Socrates in the form of the tendencies according to which it is normal to live, whereas Plato does not refer to empirical phenomena but to ideas realized in the "eternity of nature." Moreover, Plato defines justice in the Republic as conforming to nature (Republic, IV, 444d). Justice and nature are thereafter indissolubly linked. Furthermore, he distinguishes the written law from the unwritten law; the former governs cities, the latter issues from custom and manners, that is to say, from natural conduct.

Aristotle brings to natural law theory an essentially new contribution by deriving the concept of right from the idea of justice, the latter being the appropriate mean that the judge maintains between the parties in court (Nicom. Ethics, Book V, Ch. IV, 8). The right is called δίκαιον "because the division is made in two equal parts" (δίχος); it is as though one were to say "divided in two" (δίκαιον) and the word for judge (δίκαιος) is synonymous with "he who divides in two" (δίκαιος). In other terms, the judge apportions to each his due, that is, fixes in fair proportion the goods and benefits which men share within the city. It is a specific instance of justice within the idea of general justice. The magistrate is just in the largest sense for in exercising his power he is the guardian of this general justice. And where there is justice, there is also equality (Ethics, Book V, Ch. VI, 5). The aim of judicial activity is therefore the right, the right of the city, a political right insofar as it aims to establish this equality. Now this political right exists either by natural origin or by its basis in law (Ethics, Book V, Ch. VII, 1).

Aristotle envisages nature as the source of justice even if beside nature there exists legal justice. Justice is thus sought in nature itself, that is, outside of man in a world external to man. Justice is no longer taken from the principle organizing chaos, nor from internal reason, but from the observation of the world. The criterion of original nature is found, what "everywhere has the same effect and does not depend on diverse opinions" (Ethics, ibid.) in contrast with what is based on law. Furthermore, he argues against those who would question whether right can be in part natural on the ground that what is natural should be immutable and have the same effect everywhere, whereas right is always changing. For Aristotle, nature in fact is susceptible to modification and is not immutable; skill can be acquired and modify nature (the handicrafts are an example). It is up to man consequently to discern by observation and by interrogating nature what is natural and what conforms to its order, natural right consisting precisely in finding that justice is in consistent harmony with the natural order and thereby objective. There is accordingly a common external reference to individuals to which one may have recourse in order to determine what is each one's just due. The totality of these conclusions forms natural right whose content tends to evolve to the extent that nature itself evolves, and to change in proportion to which man tends to change. A theory of this sort leads necessarily to casuistry.

The Stoic doctrine by comparison with Aristotle's theory marks a return to a less legalistic conception, being almost entirely part of a moral theory. Nonetheless, nature occupies a fundamental place in it. Nature is an "hexis," an essence which is self-moving through seminal reasons, producing and containing what she provides in limited periods of time, and giving birth to things similar to those from which she has been detached. Her aim is both utilitarian and agreeable.
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As for the world in general, it is governed by a destiny which is the linkage of the causes of things, or again, reason.

We see something of the sort reappear in a logos, a part of which is attributed to man in the form of rational faculties; but it is clearly no longer the logos of Heraclitus. On the contrary, the world "is a living reasonable being, animated and intelligible," according to Chrysippus. Man can, therefore, perceive the structures of this rationally intelligible world through reason as interpreter. Reason, having been given to reasonable animals in a more perfect fashion, to live according to their nature, becomes for them the same as to live according to reason which is the regulator of instinct. To live in conformity with nature is conducive also to living in accord with virtue, for nature leads to virtue.

Furthermore nature's gifts consist of good instincts only. Hence justice can result only from nature and not by human decrees, as is also the case with law and right opinion. Hence the subordination of decree and convention to a higher norm which integrates the just. This higher norm is surely not juridical, and Michel Villey (I, 135) was correct in challenging the view that it is, but it is a means of knowing the right rule and of singling out the norms that can qualify as natural, for these norms are in conformity with nature or with the intelligible structure of reality. Undoubtedly the norms thus singled out are not what observation of nature shows, but they are what a rational process yields. As a consequence, we have another meaning here for the expression "natural law" but this meaning is destined to have profound repercussions. In any case it is a declaration that the just is not a matter of convention. Moreover, by virtue of the fact that this theory is inscribed in an ethics in which corruption is absent, reference is made to man.

Applied to jurisprudence such a theory by its very nature leads man to scrutinize the nature of man and to place man at the center of the legal construction of right. Whence, the idea of "natural rights" comes to the fore.

On these foundations the idea of natural law penetrated Roman law. But before approaching this problem it is important to show briefly that the natural law doctrine was far from encountering unanimity in Greek philosophy.

In opposition to the current of natural law, there was in fact a steady stream of what, for lack of any more adequate expression, may be described as positivist thought. Archelaus, the teacher of Socrates, thought that "the just and unjust are not such by nature, but by custom." Similarly the Pyrrhonians and Epicureans, on the grounds of their philosophy, subscribed to the same point of view since the essence of things could not be perceived. There is an echo of this doctrine in Lucretius' De rerum natura. The coexistence, consequently, within philosophy itself of two irreconcilable, irreducibly opposed tendencies is found, moreover, again in nearly every period.

Roman Law. It was through the path laid down by middle Stoicism that the doctrine of natural law reached Roman jurisprudence. The very ancient Roman law knew nothing in fact of natural law. Every law was tied to political allegiance. Once this allegiance was over, the law also terminated and the legal bonds which united the individual to the city were severed, so that the city was then deprived of any legal prerogative.

The penetration of Greek ideas was, however, to modify this point of view, especially after 146 B.C. when Greece was annexed. The praetor's edict and the jurists' works were the vehicle for this penetration, so long as the jurists belonged to the intellectual aristocracy and kept a share of the power, their influence was consequently decisive on the evolution of Roman law.

Middle Stoicism, notably that of Panatneas and Posidonius, made the matter easy moreover, for it revised the very narrow positions held by the original Stoics, yielding on certain points, and proposing especially an active morality. "The wise man does not live in the desert, for he is sociable by nature and made for action. He exercises to strengthen his body, and he will pray to the Gods and make vows to obtain their blessings."

However, the thought of Plato and Aristotle was for all that not neglected. They are the source of those famous definitions: of Law (Jus) as "the art of the good and the equitable" (Jus est ars boni et aegui) by Celsus, and of Justice as "the constant and perpetual will to attribute to each his due" (Iusticia est constant et perpetua voluntas ius sum cuique tribuendi) by Ulpian. These definitions were undoubtedly of Greek origin.

The famous definition, not of natural right but of natural law, is formulated by Cicero in his De republica (3.22.33): "True law is right reason which conforms to nature" (Est quaedam vera lex recta ratio, naturae congruens); it is nonetheless Stoic and constitutive of an ethics whose content is made clear in De inventione (2.53.161), namely, the law engraved in our hearts, as are religion, piety, gratitude, vengeance, respect, and truth.

But if the distinction between law and justice is not too clear-cut, the distinction between natural law and the law of the city was soon adopted by the jurists who with much less oratory took up again the
Stoics' notion of natural reason enabling one to distinguish among the norms that would qualify as natural. Gaius, in Book I of his Institutes (Digest, 1.11.9) taught that "all the civilized peoples govern themselves partly through the law common to all peoples, and partly through the law peculiar to themselves, for when a nation creates a law, it becomes its own 'civil law,' while the law established by natural reason among all men is observed equally everywhere and is called the law of all people (lex gentium), obligatory on all nations."

The separation is clearly made, for lack of being well made: this law of peoples, product of natural reason, is necessarily the most ancient "for it was born with the human species" and the compelling character of natural reason with respect to positive law is undeniable. Hence civil law cannot be arbitrary for it is limited by natural reason (naturalis ratio).

Probably even more stoical is the tripartite division of Ulpian: natural law, human law, and civil law. This division reveals the wish to allow nature to play as extensive a role as possible.

Is the influence of natural law, conceived as stemming from natural reason, only an ornament of Roman law, a kind of addition to its basis which was probably quite different, a general introduction to a law which would have had no use for it? The answer appears to us subtle. It is certain that the analysis of the Digest proves that the part played by natural law in the regulation of an institution like marriage is important (Digest, Book XXIII, title II, law 14, sec. 2). As a single example: the cognatio servilis ("slave status") prevents the marriage of a liberated slave with his mother, his sister, or his sister's daughter, and reciprocally a liberated father could not marry a liberated daughter. The reason: "in marriage the natural law and the feeling of decency are to be observed" (in contratendis matrimonis naturale jus et pudor inspiciendus est). Likewise, the evolution of the status of the slave seems to be well based on the Stoic idea that all men are equal—a line of reasoning contrary to that of Aristotle. At first, the slave's acquisition of a name, then of limited property (peculium), and finally, of the right to manifest and declare his freedom as a person—all that indicates an evolution based on a principle borrowed from the Porch of Stoicism.

As for the law of contractual obligations, there seems to be no exception to its having been conceived with the theory of natural obligations. On the other hand, it is true that most of the jurists' works remain works of casuistry, and to this extent they may be claimed to be more Aristotelian than Stoic since natural law never appears in their works dressed in the form of a deductive system.

The Christian Contribution. The influence of Stoic thought came to fruition with the advent of Christianity. Humanitarian Stoicism, at the time of the Antonines, led Roman society to Christianity, while the jurists were welcoming the idea of a justice superior to human laws. We have already indicated the definitions of Celsus and Ulpian. Saint Augustine, in his City of God, was to be the first to formulate clearly the doctrine by which participation in God's thought and creative work is imposed as a moral and obligatory end. Natural law is nothing but the formulation of this moral order. Now, there is an undeniable hierarchy: the superiority of life over organic matter, and among living creatures, the primacy of the life of the mind over that of the senses.

The subordination of matter to the mind and the subjection of the senses to reason were to become the fundamental principles of natural law. At all times in every period and in every place, actions are considered just and others unjust, licit or illicit, authorized or forbidden; forbidden: to betray one's country, to steal, to kill, not to do unto others what one would not have others do unto one. This emphasizes at the same time the recognition in man of preexisting rights in the form of individual rights, natural rights which were to be recognized in every individual as his irreducible patrimony.

The reconciliation of Stoic with Christian thought is appropriately referred to Saint Paul. The principal text is that of the Epistle to the Romans 2:14–15 which declares that nature has given the pagans something, a law engraved in their heart, to which their conscience bears witness as well as their thoughts. Here was an undeniable coming together of reason, natural law, and consciousness of this law. This uniting was already present in Judaism.

Teaching about the natural consciousness of good and evil was taken up again by Justinian. God is believed to have confirmed natural law or to have given it to mankind.

However, this reconciliation which led to a form of rational law was not to be without frequent vehement opposition: Lactantius strongly opposed Zeno's maxim "to live according to nature" and "to live according to reason." In any case, the appeal to reason as the regulating element of individual life and the recognition of natural law in men's hearts were triumphantly expressed by Saint Ambrose in an explicitly Paulist perspective. Saint Augustine's position is a more complex one; the text of the Epistle to the Romans should be interpreted in the sense that all the natural virtues can be considered as virtue only through grace. There is no nature which can lead to virtue apart from grace, so that natural law is natural by reference to God.
idea of reason is surely not eliminated, it is referred to divine reason and reinforced by divine will. Furthermore, it may be inferred that God imposes only commandments conforming to an order called natural.

The Stoic influence is nevertheless assured even though there is little unanimity about purely rational natural law. The whole problem of ontology is posed here. However, the existence of a natural law categorically opposed to positive law is not questioned and the definition of these respective laws remains a classical question just as it was in Roman law.

Isidore of Seville, in his Etymologies (ca. 633), announced the dichotomy: "All laws are either divine or human" (Omnes leges aut divinae sunt, aut humanae). The former flow from the "constant Divine nature," and the others from human customs and manners (humanae moribus constant). Divinity and nature in that way form again an indissolubly linked pair. However, the Roman tripartite division of Ulpian was not formally abandoned, but was to undergo a profound modification. Natural law is common to all peoples, the civil law appropriate to each people, the jus gentium is used among the majority of peoples. Natural law is the same everywhere, for it is not the work of an initial institution but the result of a genuine instinct, based on nature independently of the vacillations of opinion with divergent views of civil law.

Isidore's classification, though it preserves the formal framework of Ulpian, still profoundly modifies the content of the ideas. Natural law (jus naturale) included the law common to man and animals and the law common to all men. The category of jus gentium thus became dispensable and was to be used in order to rearrange the rules of public international law utilized by most nations, such as rules about the occupation of vacated lands, their organization and defense; rules about war and the aftermath of war, rules about treaties, captivity, postwar boundaries, immunity of elected officials, as well as interdictions of marriage between foreigners which would be one of the matters subject to the law of peoples until the end of the eighteenth century.

These ideas were taken up again and even highlighted by Gratianus (fl. 1140). The beginning of the Decretal of 1140 is in fact a gloss on the first of Isidore's classifications: "the human race is governed by two things, natural law and custom."

The confusion between divine law and natural law was complete. Besides, Gratianus was as clumsy as Isidore in reconciling this bipartite division with the tripartite division of natural law, law of peoples, and civil law.

Natural law is the oldest, going back, as it does, to the origins of mankind. Civil laws afterward codified the habits and customs of men. Natural law is the most stable, without variation in each era. Finally, natural law transcends positive law in such wise that if certain things are accepted by custom or by written law but are contrary to natural law, they are null and void (causa et iuris sunt habendi).

The Decretal played an important role in the evolution of Christian thought; actually influenced by the reflections of jurists and theologians, the Decretal was enriched by a whole battery of commentaries and ideas, at times profound and always ingenious.

The idea of natural law was to be put to the test. The decretalists were divided on the question whether there exists a law common to men and animals. Rufinus eliminated this idea which Etienne de Tournai, on the other side, defended, admitting at the same time the jus gentium which identifies the law arising from the community of civilized peoples with natural law, reserved for men. On the whole, thought on the subject was wavering; the meanings given to the expression "natural law" multiplied; they were not only numerous but also irreconcilable (see, for example, the Summa Lipsiensis of 1186 which set up six successive definitions going from miraculous revelation to the teaching of reason and to simple morality). However, a deepening of thought should be noted, one resulting from the analysis of the rules of natural law. Not all of them are equally constraining.

Thanks to these analyses, natural law takes on an eminent value, differing from positive law with respect to four distinctive characteristics:

1) its origin (natural law goes back to the beginning of mankind);
2) its domain (it is common to all);
3) its worth (it is a measure or standard);
4) its rigor (it is immutable in two of its three parts).

The theologians' task is more explicative than analytical; they explain the Bible by relating it to natural law (Exodus 3, 22; the polygamy of patriarchs, fornication, etc.). However, certain theologians contribute important matters with respect to the idea itself; such was the case with William of Auxerre (fl. 1231) who insisted on the innateness of natural law and its close association with sympathy, or innate moral sense, which as an activity starts with the contemplation of God or with the knowledge of observable things. Then there was Albert the Great (1206–80) who defended vigorously the idea that natural law is the rational feature of human law, certain precepts being at the same time natural and rational (conservation of the species, for example), other precepts being simply rational (those of religion). The rational is not opposed to nature, for human nature is rational.
End of the Middle Ages and William of Ockham. The intransigent Augustinian conception of Christianity was thus subdued and a return to the ancient sources was bound to occur. Saint Thomas Aquinas was going to refer back to these sources, more particularly to Aristotle's natural law. From Aristotle he borrowed the evolutionary feature of a changing natural law, for human nature is variable. Hence, laws are themselves susceptible to variations. The precepts of natural law are the first principles of human action. Man's initiative returned to the forefront in the quest and discovery of law.

In short, Aquinas viewed the universe as governed by eternal law; man is subject to natural law, which is only the reflection of divine reason, and finally human law simply applies the precepts and principles of natural law by adapting them to the particular needs and circumstances of social life. The eternal or divine law integrates natural law, but natural law is distinct from divine law in that the latter includes the many truths of a supernatural order foreign to natural law. Natural law appears here not as natural in the first sense of the term, but as rational human law for man is a reasonable creature.

Natural law consists henceforth in fundamental primordial judgments of a moral order; synteresis is its habitus or way of functioning. Natural law is therefore not the synteresis but its object. The system thus is clear: natural law constitutes the principle of universal order and archetype of all law; natural law permits man to participate through his reason in divine or eternal law; finally, human law is integrated in natural law by being a projection of it as the function of fulfilling social needs. Hence it is possible to resist unjust laws. Since natural law is the intended product of natural reason, it participates in nature.

What then happens to the universality and immutability of natural law? Universality holds only through certain universal principles (act according to sound reason), immutability is relative by virtue of the very nature of man. Man is impelled by sound reason towards the quest of the common good, for an individual's ideal is realizable only to the extent that the community's ideal is realized.

The voluntarist current was not however obliterated, and the return to this position was very plainly discernible in William of Ockham, in the fourteenth century. He opposed both Aristotle's realism and Aquinas' moderate form of realism. For Ockham, only individuals exist; man as an abstract category is a creation of the mind—such is his essentially nominalist thesis. Hence, there arises the tendency to think of law chiefly as starting from the individual and not by virtue of relationships among individuals, which tendency will lead ultimately to formulating individual prerogatives and to setting down exactly the rights of individuals. The very idea of natural order appeared to Ockham contrary to divine omnipotence. Participation in any reason (logos) whatever, which would impose on God rules external to Him, would be unacceptable.

Henceforth legal precepts are not and cannot be based on reason, nor possess any intrinsically good value, God, all powerful, can order what He pleases. The law thus finds the justification of its validity simply in the fact that it is a command. Consequently, Ockham cannot recognize as sources of civil law any other laws than the expression of the will, and no longer of nature. Natural law, in such a conception, becomes again justice “contained . . . in writing” (in scripturis . . . continetur), and no longer the group of rationally necessary precepts.

The Renaissance. The Renaissance was, in the person of the French thinker, Jean Bodin, to announce the return to a Stoic natural law. In his picture of universal law, Jean Bodin resumed the bipartite division of common law: natural law, human law. Natural law is called so because it is innate, ever since the origin of mankind, and that is why it is always equitable and just. Bodin extrapolates from the De inventione (2, 53, 161), but refuses to accept Ulpian's idea of a law common to man and animals. Opposing human law to natural law, he depicts natural law as instituted by men in conformity with nature and in view of their needs. He includes in natural law the law of peoples (in Gaiss' sense) and the civil law belonging properly to each nation, but dispenses with natural law for this purpose when it is a question of defining the art of law. In Bodin's Republic, the natural faculties of individuals are recognized as equivalent to laws (natural laws). Positive law has no other aim than to assure the individual the legitimate prerogatives which he holds by virtue of his nature, by the needs and aspirations of his being. All this does not, however, prevent the State from being the true sovereign, and the will of the Prince from being its voice. Absolutism is not in any case complete for this sovereignty is exercised only with regard to the positive law. Above the State and binding it is natural law; the danger is thus conjured away.

The School of Natural Law. The so-called school of Protestant natural law arose in the seventeenth century with Grotius, incorrectly described as the father of natural law. His originality is undeniable, but a great part of his natural law work is only the consolidation of tradition. The Aristotelian and Thomistic foundation is unmistakable. Man is characterized by a nature at once sociable and reasonable. Whence it follows that all the norms, which in the light of man's
reason favor his life in society, are in harmony with his nature. Man has a genuine instinct for sociability; as soon as he perceives the necessity of human interdependence, he proposes a rule to obey laws that he is reasonably expected to observe as actually necessary to his life. It is of the nature of an intelligent and free man to accept this rule; but differing from physical laws, man’s laws may not be obeyed, and therefore it is necessary to supply them with sanctions; these sanctions should have to be rarely applied for otherwise there would be anarchy leading to the disappearance of social life.

Natural law is thus a presentation of right reason according to which we necessarily judge an action to be just or immoral depending on its conformity with reasonable and social nature. God, the author of nature, may thus defend some laws and condemn others (Grotius, De jure bellii ac pacis, Vol. I, Ch. IX, 1). On the other hand, the originality of Grotius is to have pushed the thought of Saint Thomas to its extreme limits. In fact, reason is no longer the reflection of the divine nature, but is inherent in the very nature of man; everything “would take place somehow even if it were admitted that there is no God (an impiety which cannot be anything but a possible crime), or if there is a God, that he is not concerned with human matters” (Grotius, ibid., Prolegomena, para. 2). The idea is not a formally new one, since Hugh of Saint Victor had already expressed it, and Suarez after him, but it was no longer a scholastic hypothesis. Natural law was secularized in germ by Saint Thomas who offered an entire intellectual attempt aimed at giving natural law an objective basis. Moreover, Grotius’ method opened the door to the construction of a rational law no longer verified by experience but deduced abstractly, without considering “any particular fact,” taking as initially given only the nature of man. It was a very sharp break with Aristotelian and Thomistic empiricism which was to lead to “rational natural law” and to enjoy an enormous success until the beginning of the nineteenth century; it has been severely criticized since then.

Grotius’ teaching was confirmed and amply developed. Spinoza’s Ethica brought philosophical support by affirming that each being tries necessarily to persevere in its nature. Man consequently is opposed to everything which can destroy his existence, and natural law will help him realize this aim.

It was in 1672 that Samuel Pufendorf, in his De jure naturae et gentium (8 vols.), and in 1673 in De officio hominis et civis juxta legem naturalen (2 vols.), extended considerably the ideas of Grotius. Natural reason is concerned with terrestrial duties and allows us to establish the scale of our duties imposed on us for the protection of human society. Theology is domiciled in an otherworldly domain.

Rational natural law was to acquire in that way an eminent place and was imposed as much on matters relating to personal individual law as to those of citizens and affairs of state and relations among states; we need recall only Cumberland, Barbeyrac, Wolff, and Burlamaqui in the eighteenth century. A common trait running through all these authors’ writings, the permanent nature of man illuminated by right reason, has as its corollary universal rules of behavior logically deduced and indispensable for the survival of any society. Although the impulse seemed irresistible, and man in such a system enlightened by his reason can deduce all of law and then discover the universal rules governing human actions, nevertheless there were still solid points of resistance. Adopting the viewpoint of Montaigne, Pascal in his Pensées (Sec. V) was to make a harsh criticism of this universal justice and rational law. Pascal’s aim was obviously apologetic: the unity of religion opposing the heterogeneity of law or positivist position.

Hobbes occupies a special place by himself with his critical stand on sociability. His De cive contains a sharp criticism of Aristotle’s idea of man as a social creature. Far from being impelled by a natural desire to be united, men being equal by definition, distrust one another and fight and injure each other often in seeking the same thing. The natural state of men is a perpetual war of all against all. Men, no doubt, are not intrinsically bad, but they have a complex nature. In any case, however, in the state of nature they are selfish and hence enemies. As the supreme evil is suffering and death, they consequently go ahead and unite in a society under the influence of fear and insecurity and delegate their powers to an authority which would be all the more absolute insofar as Hobbes made the social contract the basis of a civil state. All powers were in that way to be concentrated in the hands of the sovereign.

The law of nature rationally demands respect for this pact and regard for the justice emanating from the sovereign. The Leviathan’s universal society thus appears as an anthropomorphic creation intended to guarantee the security and protection of men. As for natural law, it holds only in the state of nature, but in a politically organized society the positive law emanating from the sovereign is obligatory, a consequent return to positivism.

The Eighteenth and Nineteenth Centuries. The preceding historical exposition has enabled us to discern at least four forms of natural law: classical, Stoic, voluntarist, and rational natural law, justifying what we said about the necessity to qualify the expression. The school of natural law met with such great success that it affected the whole political philosophy of the eighteenth century. Without minimizing the influence
of Crozus and Pufendorf, it was John Locke who marked most profoundly the later development of this philosophy in the domain of natural rights and thereby of individualism, as the result of the publication in 1689/1690 of his Two Treatises of Government. The individual is at the center of this work which counterbalanced Hobbes’s work. Men are by nature in a state of perfect freedom and complete equality. However, freedom is not license. The state of nature possesses a law which is reason, and reason teaches that no one should injure another’s life, health, freedom, or property. Every human being, furthermore, should have the right to protect his prerogatives drawn from natural law, chiefly to remain in the free state of nature and not to be subjected to the political power of anyone else.

If men do unite in a society, it is by their consent, and they then form a community. But this community can live effectively only when a method of arriving at decisions is adopted, namely, the law of majority vote. He who enters a society remits power consequently and necessarily to the majority of the members. The theory of the social contract is in that way clearly expressed. Now, through this contract the individual does not give up all his natural rights, but only the part necessary for the good of the whole society. He preserves his individual rights, and political authority is limited in its action by the unconditional respect for these rights. There is thus a sharing of things. Power which does not aim at the common good or invokes the domain reserved for individual rights is tyrannical and may be resisted by force. Locke’s work had an immediate and enormous success, not only in England, but also in France and in Germany.

The ideas of Montesquieu, brought up in the school of natural law, are no less important for the evolution of political society. His The Spirit of the Laws is built on natural law in a unified framework: “the laws are the necessary relations derived from the nature of things.” Justice is prior to every contingent aspect: “To say that there is nothing just or unjust except what the laws order or forbid, is to say that before a circle is drawn the radii are not equal.” Natural law then forms the framework and boundary of the powers of the civil laws, as shown by the title of his famous chapter “On Civil Laws which are contrary to Natural Law.”

Montesquieu’s essential contribution is not, however, in the sphere of natural law, which he does not question or improve upon, but rather in the matter of natural rights: defense of freedom, essential prerogatives which flow from freedom, guarantees against arbitrariness on the part of governing rulers.

In the sphere of ideas, the role of Jean Jacques Rousseau and of his version of the social contract is just as important as that of Locke and Montesquieu, although Rousseau’s predilection for natural law is more questionable. He surely admits the postulates of natural law; men’s native freedom and equality. But the state of nature cannot be maintained among them. Hence, the necessity of shaping a form of association which defends and protects with all the common force the person and property of each; in this association each one, by uniting with all, obeys only himself, however, and remains as free as before. This form was elaborated by starting with a genuine fiction “the general will.”

Through the “social contract,” which entails “the complete alienation or surrender of each member with all his rights to the community,” the moral collectivity called the State is established. The aim of the State is to carry out the general will which cannot err since no one is unjust to himself. The social contract gives the State an absolute power; the general will expressed by the majority necessarily implies the assent of the less enlightened minority. Of course, citizens will preserve a “natural right” as individual persons, but the sovereign alone will judge the importance of this right. This absolutism of the law contained in germ the absolutism of the State.

All these theories were soon to find a field of application. The accession to independence by the United States had brought with it published declarations which were marked by national and individualistic natural law ideas guaranteeing citizens against abuses by the sovereign power. The Constitution of the State of Virginia (1776) is prefaced by such a declaration, and the same is true of the constitutions of the states of Pennsylvania, Maryland, South Carolina, Vermont, Massachusetts, and New Hampshire which were adopted between September 1776 and October 1783.

The French Declaration of the Rights of Man was inspired by these examples. Recall that this Declaration proclaimed that the aim of every political association is “the preservation of the natural and imprescriptible rights of man,” liberty, property, security, and the right of resistance to oppression.

Natural law and natural rights triumphed, but the very extension of the victory of rational natural law was going to bring about its defeat. The French codes presented as works of reason—which, moreover, they were not—appeared as models of legislation which were supposed to be applicable to other States; this extrapolation brought in its wake some severe reactions, despite the philosophical support given to Rousseau’s idea by Kant, for example. Kant, in fact, defended the classical distinction between natural law and positive law by basing natural law on the rules that reason recognizes a priori. He thereby made a rational place for freedom in his otherwise mechanist-
cally oriented and formal system. Post-Kantians, like Fichte, put a heavy emphasis on this *a priori* idea which gave the idea of law a supremely abstract character (Stammler).

The reaction came to be organized in Germany as well as in England and France. The German historical school was under the leadership of von Savigny, who published his famous work *On the Call of our Time for Legislation and Science of Law* (1814). It contested the idea that law could be rational, law being on the contrary the expression of the soul of a people whose law is latent in its manners and expressed in its customs. This is, of course, an historical conception, but it is also a romantic one, and Hegel, who presented himself as an adversary of Savigny, shared with him an opposition to natural law. Hegel, on the other hand, identified the rational with the real. Therefore, the real allows one to know the rational; the development of history progressively reveals the mind. Besides, man matures not through living as an individual, but does so collectively. The State is presented as the synthetic center of the general interest and good, being the reality of the moral idea.

Hegelianism, revived by Kohler at the end of the nineteenth century, was to find some disciples also in the Third Reich's official builders of its ideology.

In England, the reaction against natural law began with Bentham's *Principles of Morals and Legislation* (1789). Bentham denounced the theory of natural law as arbitrary and based his doctrine on social utility. John Stuart Mill and Herbert Spencer enlarged this idea, which had an equivalent expression in Germany in the teleological view of law held by Jhering.

The French reactionary movement was directed not so much against natural law as against natural rights. It was led by Joseph de Maistre and Louis de Ronald who took sharp exception to the abstract nature of man in their attack on natural law.

The utopian socialism of Saint-Simon and Fourier, on the other hand, placed the whole emphasis on society rather than on the individual and gave no value to law itself. Proudhon is more subtle. Auguste Comte, finally, set natural law aside for the sake of social physics.

Marx and Engels cannot be confined to any national setting because of the widespread import of their message. The *Communist Manifesto*, issued in 1847, took a firm stand against the idea of objective immutable or eternal truths. Law results from the economy which is the substructure (*Unterbau*) whereas law is the superstructure (*Ueberbau*). Law is the will of the ruling class enacted in statutes whose aim is determined by the material conditions of existence of this class. If one questions this by asking, "Are there no eternal truths like liberty, justice, etc. which are true of the whole society?" the sharp answer is, "Communism abolishes eternal truths; instead of transforming religion and morals, it abolishes them." Positivism appeared, then, to triumph and natural law seemed destined for an irrecoverable decline.

But again, a reaction took place. A number of philosophers and jurists were indeed frightened by the possible consequences of strictly positivistic theories of law which ran the risk of validating the worst injustices. Thus a new effort soon emerged in jurisprudence on the side of natural law.

**The Contemporary Period.** The tendency to return to the principles of natural law appeared at the end of the nineteenth century and soon grew rapidly.

Beudant published *Individual Law and the State* (1891); Saleilles, in 1902, spoke of "the renaissance of natural law," an expression which Charmont picked up for the title of a volume in which he put together a series of lectures he had given during the academic year 1908–09 at Montpellier, translated soon after into English and published by A. W. Spencer (Boston, 1916).

The second volume of Geny's four-volume work on *Science and Technique in Positive Law* (1921–30) bears the epigraph "irreducible natural law." It was a new declaration of a law above the legislator, and opposed the voluntarism of legal positivism. For some it was a matter of moral truth that would be imposed on the legislator, but for others it was really a matter of a distinctive legal order with the capacity to limit and even to replace the standards of positive law contrary to its imperatives.

Man would remain at the center of this renewed conception of natural law, the idea revolving entirely around the eminent dignity of the human personality basic to a series of obligations: respect for life, liberty, honor, etc. The needs of social life also entail some obligations: respect for contractual agreements, for example. The relations of the State and citizen are subject to these essential rules. Rational ethical duties are combined with social needs. These theories of natural law are not, however, reducible to a unified system.

The Neo-Thomist school challenges the absolute separation that Kant and more recently Kelsen have established between the "is" and the "ought." Man has an ultimate end directed towards the good by virtue of man's divine essence, whence the principles of justice are to be found at the center of natural law. The rational development of these principles should lead to a check on positive law, and to adapt the latter to social requirements by respecting the moral requirements. On this theme there exist many variations (Leclercq, Coste-Floret, Massis, Maritain, and others).
Michel Villey occupies a marginal place in this movement because he is a resolute Thomist and Aristotelian. Thanks to his profound analysis, however, he renewed the usual meaning given to the message of Thomas Aquinas and Aristotle.

Law is confounded with the quest of justice. Natural law implies a specific method: that of controversy; it links up with the studies, in the domain of casuistry, of the Belgian National Center of Logical Research.

The Protestant school, or better the Protestant vision of natural law, tries, following Brunner, to construct a reformed theory of society. Natural law is based neither on a cosmic nature nor on the abstract individual, but on man as the concrete bearer of the moral values of freedom which are prior to positive law, and on man as a social creature whose vocation is fulfilled within the social matrix. This idea is not far from Thomism. The reaction here is accountable as one due to the amoral character of strictly positive law. The restricted cognizance, in rules of law, of norms satisfying only formal requirements clashes too violently with that dynamic store of moral values carried by social man within himself, and leads to too many inadmissible ethical consequences. This reaction can be seen historically in the fields of both the philosophy of law and of political philosophy (cf. the Declaration of the Rights of Man, 1789). It has a non-negligible place in what Wiederkehr calls the “philosophy of the manuals,” that is, the philosophy which is not expounded by those specializing in philosophy of law, but by writers expounding a branch of positive law. It is found in various countries in diverse forms (Georges Scelle, Hauriou, Roobier, Battifol, Del Vecchio, d’Entréves, de Jouvencel, and others) and even in Germany, where Helmut Coing in 1947 wrote on “The Supreme Principle of Law, an Inquiry into a new foundation for Natural Law” (Die obersten Grundsätze des Rechts, Ein Versuch zur Neubegründung des Naturrechts). To Coing, what is permanent in law are the basic situations assumed by him to be repeated constantly in history because of the constant condition of man and his nature. Among the spiritual needs of man is the sense of right which renders to each his due (sum cuique) and to the moral values required by human coexistence, values which have their source in human nature. Finally, natural law has preserved and does preserve a non-negligible place in judicial decisions, a fact which leads us to formulate a theory of positive natural law, that is to say, a law which emerges from the living judicial scene.

Seen from this angle, a certain number of general principles of law, after being approximated and brought together, benefit from a common consensus. On the other hand, natural law continues, as in every epoch, to experience serious resistance on the part of positivists whether they are state socialists or sociologists (Ripert, De Page, Kelsen, Bobbio, Eisemann, and others).

The validity of legal norms cannot be based on two eventually irreconcilable foundations; to recognize the primacy of natural law would mean destroying that of positive law. Without positive law, however, natural law would be inexact. Finally, the adversaries of natural law, analyzing the idea of natural law, challenge especially its conformity with human nature.

These objections do not appear to be decisive; the first sin by excess of logic; since the hierarchy established between natural law and positive law suffices to eliminate this objection; since the second objection is justified only to a lesser degree, it would be more exact to say that natural law allows the extraction of general rather than inexact rules; the third objection is acceptable only to the degree that this law would necessarily be innate, which is only one way to look at it. Moreover, historical study asserts that the debate is far from ended.

III. ANALYSIS OF THE ACTUAL CONCEPT OF NATURAL LAW AND ITS FUNCTIONS

Natural law appears as a model of positive law (when the meaning given to this expression is law imposed by authority, whether it be legislative or judicial), but it is nothing but a model. Natural law appears equally as a limitation of positive law, in the sense that it seeks to guarantee a certain irreducible content of the law, thereby limiting the liberty of the one who imposes the law whether he be a legislator or a judge. But it is no more than a limitation.

Natural law is really nothing but a model or a limit because it is realized in positive law, as actual judicial experience proves. Therefore, there is no necessary conflict between ideal law which ought to be and positive law which is. The opposition or antinomy, on the other hand, generally tends to diminish as positive law takes in a sufficient share of natural law even as it always takes in a minimum amount of moral value. But the amount of natural law taken in by positive law does not affect its quality. Natural law and positive law are neither opposed to each other nor are they placed side by side as the elements of a mosaic; they are complementary to each other and they are intertwined. Hence we have to separate out the functions of natural law in order to analyze it with circumspection.

To our understanding, natural law has three juridical functions: a supplementary function; a function of control or regulation; a motivating or creative function. The supplementary function comes into play when it
is proper to close up the gaps in positive law. The legislator cannot foresee every case of conflict and consequently cannot formulate rules for all conflicts. In the same way the judge is limited in his mission by the cases submitted to him. Judicial rule is thus necessarily limited even when it has the unconditional value of obligatory precedent. Certainly many cases are solved, either by reference to the law, or by reference to precedent, but there are many hypotheses where there is an absence both of legislative norms and of precedents. The juridical order of law (judgemade law) then has a lacuna or deficiency.

Now, it is a principle that the judge must judge (see, for example, article 4 of the French civil code), and cannot abscond from his duty under the pretext of the law’s silence; the non liquet (“the case is not clear”) is in fact exceptional.

In such a case the judge must himself formulate a rule or a norm which would undoubtedly be decisive but which under these circumstances would perform not be arbitrary. Accordingly, the judge’s tendency is to refer to principles, and among these, when the personality of a man is involved in the conflict, the reference in particular is to the principles of natural law on account of the human values it comprehends. Natural law is thus called upon to meet the deficiencies of judicial ordinances and to supplement positive law; thereby the rule of natural law becomes the rule of positive law.

Under these circumstances natural law’s function of control or regulation is nonetheless assured. Indeed, experience proves that the jurist brings judgments to bear on the rule of law, conspicuously in countries of written law. Undoubtedly, positivists challenge this prerogative: “the judge judges according to the law, he does not judge the law,” they write freely. But the contrary is verifiable: the fact is that the jurist compares the positive rule with the model of natural law, and limits or departs from the rule of positive law when it seems too obviously to contradict this model. Judges do so today, and they always have done so.

This regulative function of natural law is obviously much more disputed than its supplementary role. The dogma of the separation of powers is really put to the test since the judicial power eventually understands it is censoring the work of the legislative power, and is doing so not by virtue of a fundamental law of the State charter (the Constitution) but by virtue of unwritten principles, essential principles of justice which would be imposed over any legislation for the sake of justice. Such a function is obviously inconceivable in Kelsen’s system or in any system of so-called pure law. Yet experimental verification leads to the sure conclusion that at least some judges do not hesitate to test the internal content or intrinsic basis of the rule of law, and to limit or put aside the rule if its content is too obviously contrary to the so-called principles of natural law.

A variant of this attitude is seen in an intermediate position which consists in putting aside the rule set by authority insofar as the legislative power has not clearly expressed its will to infringe, in a limited domain, upon a principle generally known to be one of natural law. In short, the motivating or creative role of natural law no longer seems disputable. The rule of natural law serves the legislator as a support for creating a legal norm and to give the law in this case more of a declarative value than a created one. The rule is then supposed to have existed always, if not in its form at least in its basis, which falls back on the idea of legal retroactivity, the declarative norm being only the recognition of a preexisting legal principle. We need only think of the judgments relating to war crimes brought under the positive law of different countries in the aftermath of the second world war. But beside its juridical functions, natural law also has a metajuridical or political function which is at least as important; again, as De Page has so subtly remarked, it is less in this case the notion of natural law than the idea of natural right which is involved. A society’s law is not a static but a dynamic affair. Called upon to govern social relations, it is not indifferent to the transformation of these relations, and must therefore follow this evolution more often than it leads it. This observation has been made for thousands of years and the principle of law arising from the fact was already recognized in the “rule of the old law” (regulae juris antiquae) in the Digest of Justinian. This necessary adjustment can be realized thanks to the adaptation of the existing system of law through the methods of judicial interpretation, which is in fact both explicative and creative. However, the possibilities of active interpretation are limited by technical reasons. First of all, interpretation has to operate under certain conditions. Although it is possible, by questioning the clarity of a juridical rule, to attribute a new meaning to it, still the jurist being essentially conservative, will not admit departing too far from the old rule. Abrupt mutations do occur, but they are exceptional and pointed out as such by the doctrine. Furthermore, the process of interpretation is relatively slow in its action and in its effects. A sudden change in jurisprudence has to be prepared. Coming out of the lower courts it has to be progressively confirmed by the higher courts. Moreover, a sufficient number of cases must be presented for the new theory to be elaborated, made exactly clear, and confirmed. Now it is a matter of chance as to which kinds of cases that
LAW, NATURAL AND NATURAL RIGHTS

IV. ANALYSIS OF THE CURRENT IDEA OF NATURAL RIGHTS

According to the theory of natural rights, the dignity of the human person is supposed to take precedence over any social order. With Alfred Verdross we may formulate five propositions which follow from this axiom:

1. each social order must recognize in the person a sphere within which the person may act as a free and responsible agent;
2. the law must protect and guarantee the free exercise of a person's action;
3. the authority of the governing body must be limited;
4. respect for this limitation must be guaranteed;
5. respect for authority is not absolute, but subordinate to the dignity of the human person.

Natural rights, being tied by hypothesis to the very nature of man and prior to any social order, cannot be conferred by political authority, but should be recognized and declared by the latter. Despite the lack of such declarations, these rights exist nonetheless. Declarations are therefore only a solemn affirmation of these rights and only a catalogue of the latter, as well as an expression of the wish to protect these rights. Natural rights presuppose a fundamental postulate of equality. They are indeed tied to the idea of justice, that is, to equal treatment for all those who belong essentially to the same category. Natural rights, in short, imply the notion of a human family, in which no discrimination is permitted whether based on sex, race, religion, or any other criterion.

The first of these natural rights is obviously freedom. From it follow the other basic rights, notably property, the patrimonially protected prolongation of freedom, the security of guarantees of the free enjoyment and right of resistance to oppression, which is the supreme remedy against a political power's failure to respect natural rights or to be constrained by legal means to respect those rights. These are, moreover, the other basic rights recognized by the French Declaration of the Rights of Man of 1789 (article 2) and restated in the Constitution of 1791: "the aim of every political association is the consecration of the natural and inalienable rights of man. These rights are freedom, property, security, and the right of resistance to oppression."

The expression "natural rights" is consequently often a synonym for the "rights of man." In a more technical sense the expression is reserved for the right of existence, bodily safety, health, sexual life, personality, respect for mortal remains, etc.

Bound up with a historico-critical development, the
idea of natural rights is subject to evolution and thereby to a growing enrichment; a comparison of recent declarations with those of the eighteenth century is very enlightening in this respect. The extension of natural rights to new domains is a constant one, for example, in the social or cultural domain (see the Universal Declaration of the Rights of Man of December 10, 1948 which was accepted by the General Assembly of the United Nations).

CONCLUSION

Nobody today believes in an objective natural law inscribed in the nature of things which, if it were transcribed, would suffice to yield a positive law. But there are very few people today who admit the conception of positive law as a law arbitrarily imposed by a legally recognized legislative power.

Though it is true, in any case, that law is a human product, it is not true that it can be arbitrarily imposed without consideration for the social function which it must fill. Beyond what Professor Lon Fuller calls the “inner morality of law,” which consists of a set of rules that are related to what the Americans call “due process,” there is room to consider, in the elaboration and application of the law, the so-called “nature of things,” although this “nature of things” cannot by itself prescribe precise rules of law.

Let us take the example of a piece of legislation which for the first time authorizes the legislator to arrange with the greatest liberty a traffic code; no general principle of law, no rule of justice in this domain limits his legislative power. Let us suppose he announces the rule that every vehicle must be driven on the right side of the road, in the direction it is moving. In principle, there is no opposition to this regulation. However, the nature of things intervenes in the form of a mountainous road where two vehicles cannot cross at any point, and when a permanent one-way road cannot be established, it goes without saying that the local administration, or the judge in its absence, will have to define the conditions for utilization of this road, taking account of the location of the places and the needs of the community. Here, priority would be given, either to a certain type of vehicle; whether it were ascending or descending; or temporary or alternative one-way roads or a completely different solution, compatible with the technical condition and with the most rational possible utilization of the existing road, would be organized. But it would not occur to anybody to claim that the adopted regulation could be considered completely arbitrary.

A similar problem appears where “the nature of things” is not of a purely technical matter, but institutional or moral. Given what is considered marriage in our society, with the relationships between husband and wife, between parents and their children, what should the judge do in the present state of legislation, if in a family that has an infant child, one of the parents, for example, the father, changes his sex? The “nature of things” will oblige the judge not to refer to a predetermined solution, but to find a solution compatible with the family relationships and with the interests of all those who are involved in this unusual situation.

That which has traditionally been qualified as “natural law” presents a collection of limitations of every sort left to the discretion of the legislator, of the administrator or of the judge, by drawing their attention to a collection of exigencies which they must respect in order that the law may fulfill its avowed function. If the legislator, who acts in a general manner, does not fulfill this task, the administration or the judicial power will take charge. If that is not possible for them, for any reason, the social discontent which would result, depending on its intensity and extent, may lead to an opposition to power, to a reversal of the majority, or even to a reversal of the system.

Indeed, it is only to the degree to which those who have the authority to legislate, to govern, or to judge, fulfill their mission in a manner that does not displease the governed too much, that their authority will suffice to maintain, without too much effort, obedience to the law. But, if we admit that this obedience is the function, not only of brute force, but also of the respect which the system and its directors inspire, we come to the conclusion that any realistic study of law cannot neglect this aspect of the adaptation of juridical solutions to social exigencies, permanent or lasting, which is historically summed up in the idea of natural law or natural rights.

BIBLIOGRAPHY

LEGAL PRECEDENT

I. GENERAL

As a general idea "precedent" is not restricted to juristic situations or the determination of legal controversies. Human conduct in general is largely based upon past experience. Thus precedent serves not only as an aid to resolve instant problems by reference to past practice but also is used consciously or unconsciously to direct the course of legal or other social developments. Psychologist, sociologist, philosopher, and lawyer, whose paths may diverge on many issues, are here on common ground. Resort to precedent anticipates the evolution of ideas and theories regarding it. Hoebel, a social anthropologist writes:

Regularity is what law in the legal sense has in common with law in a scientific sense. Regularity, it must be warned, does not mean absolute certainty. There can be no true certainty where human beings enter. . . . In law, the doctrine of precedent is not the unique possession of the Anglo-American common law jurist. . . . [P]rimitive law also builds on precedents, for there too, new decisions rest on old rules of law or norms of custom, and new decisions which are sound tend to supply the foundations of future action (Hoebel, p. 28).

The psychological motivation to accept—at first unquestioningly—the validity of the conduct patterns of the past has been noted by many. Thus F. Pollock, of an older generation, thought it "... not unlikely that this is the manner in which the ideas of precedent and custom are formed. What has been done before is done again, not because it seems the best thing to do, but because there is an unreasonable tendency to do it" (Pollock, p. 165). K. Llewellyn, who concludes that "case law in some form" is found wherever there is law and that precedent is operative if the idea is consciously recognized, asserts: "Towards its operation drive all those phases of human makeup which build habit in the individual and institutions in the group" (Llewellyn, "Case Law").

If there is a general natural inclination to regard past experience and decisions as guides to future action, lawyers more than other groups perhaps have used and elaborated the concept of precedent in many ways, in many legal systems, and in many epochs. Jurisprudence and judicial practice may often seem to conflict—sometimes for quite creditable reasons. Though precedent may first have been recognized and accepted through irrational or unreflecting attitudes, the idea or concept of legal precedent has been supported by a variety of cogent arguments. In particular it has been said from Aristotle or Chaim Perelman to be a basic principle of the administration of justice that like cases should be decided alike. Such at least is the equality of "formal" justice, "The rules of justice," says Perelman, "arise from a tendency natural to the human mind to consider as normal and rational . . . behaviour in conformity with precedents" (Perelman, p. 86). Without the guidance of precedent based on the accumulated wisdom of the past and declared as the basis of decision by the authorized oracle, whether judge or jurist, men, it is said, would have no certainty of the law or confidence in equality before an evenhanded justice. Precedent assists the litigant or his adviser to assess the extent of his rights and duties and restricts the scope of litigation. Nor is it the party litigant or accused alone who rejects the idea of arbitrary justice. The judge or other lawgiver, unless he claims to speak as the medium of the gods with access to supernatural revelation or as an autocrat, prefers as a rule to show preexisting legal justification for the decision or sentence which he pronounces. Judges of lesser ability and experience may be fortified by the opinions of the most eminent. Moreover, in the busiest courts where most