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ON THE POLITICAL CHARACTER OF LAW*

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I — Is a Political Character an Essential Element of the Law?

As is well known, numerous characteristics of law, especially in contemporary times, have been the object of intensive and precise investigations to determine whether or not they constitute essential elements of the law. For instance, the

* From the *STUDI IN ONORE DI ALFREDO DE GREGORIO*. Translation by Louis Del Duca, B.A. Temple, LL.B. Harvard.

imperativeness (*i.e.*, the imposition of a duty), the bilateral character (*i.e.*, the relationship, between two personalities), the coerciveness (the presence of sanctions which force an individual to act in a given manner), the positive effectiveness, and the derivation of the law from the state** have been investigated. It is now almost unanimously accepted that the first two characteristics mentioned are essential elements of the law. Vigorous disputes still exist with regard to the others. But we do not wish to discuss these disputes at this time, because if we did we could not help repeating what we have attempted to demonstrate elsewhere on these concepts.

It has recently been maintained that the law necessarily possesses a political character. Professor Francesco Olgiati, who is known and esteemed by every student of jurisprudence, is a particularly authoritative exponent of this doctrine. In presenting his argument, Olgiati considers earlier writers, and in particular St. Thomas Aquinas, who in his opinion agreed with this thesis. Subsequently, the question was handled by various authors, who expressed extremely diverging opinions on the matter. Therefore this argument is worth considering, even though briefly. It will undoubtedly be of interest to jurists since it concerns the logical concepts of law.

"The *polis*," states Olgiati, "is the end to which — indirectly or directly — law because of its intrinsic nature tends to develop."¹ "The law forms and develops itself within the political society, it grows and develops with this society."² But the concept of law, argues Olgiati, still referring to the Thomistic doctrine, as well as the concept of the political society, have as their end the *bonum commune*. Law is equivalent to justice and therefore law must refer itself to justice.

** *Translator's Note* — The original Italian term used by Professor Del Vecchio at this point was "statualita." This has been translated as "statuality." Del Vecchio, *On the Statuality of Law*, XIX, 3d Series, JOURNAL OF COMPARATIVE LEGISLATION AND INTERNATIONAL LAW 1 (England 1937).

¹ OLGIATI, IL CONCETTO DI GUIRIDICITA IN SAN TOMMASO D'AQUINO 138 (2d ed. 1944).

² *Id.* at 143.

An unjust law, therefore, "*non est lex, sed legis corruptio.*" For the political society, *polis*, one must understand not a society ordered in an indifferent manner, but a "*societas perfecta*" directed to achieving the common good. Political society, from his point of view, therefore, presupposes this final or teleologic tendency (which is implicit in the relationship between people) even if these relationships between people precede the formation of states.

II — *Political Justice in the Aristotelian Doctrine.*

It is worth noting — even though Olgiati did not particularly consider this subject — that the doctrine of St. Thomas on this argument reproduces to a large extent, and often translates *ad litteram* that of Aristotle. If, therefore, we analyze the Aristotelian source, it will be easier to understand more precisely the real significance of the doctrine.

Aristotle well understood that justice consists of a relationship between two or more persons; absolute justice, *haplos dikaion*, denotes precisely this relationship in its purest and most universal form. This form manifests itself positively in the *polis*, that is in the State, where many men participate in a community life as free and equal citizens. In this manner one can distinguish the concept of political justice, *politikon dikaion*, which Aristotle treats as similar to absolute justice, *haplos dikaion*, establishing between them a certain correspondence.³

But, if for Aristotle political justice (or, as we would say, the law of the State) represents the most perfect realization of the ideal of justice, he admits nevertheless the existence of other types of justice, in which the ideal of justice is less perfectly achieved. He notes for example, the right of a master

³ See ARISTOTLE, NICOMACHEAN ETHICS V. vi, 1134a 26. The two concepts, although closely related are however not identical. Cf. I HILDENBRAND, GESCHICHTE UND SYSTEM DER RECHTS — UND STAATSPHILOSOPHIE 303 *et seq.* (1860); FILOMUSI LA DOTTRINA DELLO STATO NELL 'ATICHTA GRECA NEI SUOI RAPPORTI CON L'ETICA 85 (1873).

over his slaves, *despotikon dikaion*, and of a father over his children, *patrikon dikaion*, which together with marital rights of a husband or wife constitute a type of law of domestic relations, *oikonomikon dikaion*. The imperfections of these types depend on the fact that in them there is a relationship of subordination or belonging between one person and another, and not a coordinating relationship between two free and equal persons. However, Aristotle recognized the existence of a juridical order distinct from the State's political order in the family institution. Actually he maintained that historically the family preceded the State.⁴ This corresponds in substance to the findings of modern studies. Aristotle notes that the union of a number of families gives birth to a village, *kome*, and the union of a number of villages gives birth to the State, *polis*. There is no doubt that this has a major importance in the Aristotelian system, because it responds to the natural instinct of the human being, which is described by the well known formula, *politikon zoon*. This does not mean that according to Aristotle, every type of association or community has a political nature. However, these associations or communities do have in all cases a certain law, that is to say their own juridical order.⁵

These less important communities, in contrast to the political community, pursue particular ends, and are therefore in some respects a subordinate part of the political order, which seeks to organize the entire social life of the community.⁶ But the common good, which should be the ultimate goal of this social organization, is not always achieved. Actually it is not even pursued by all political organizations, which degenerate

⁴ ARISTOTLE, POLITICS I. ii, 1252a - 1252b. In another sense, not dealing with the order of development of these organizations but with their teleologic significance, Aristotle affirms instead the supremacy of the City-State over the individual. *Id.* at 1253a 20.

⁵ "En apase gar koinonia dokei ti dikaion einai." ARISTOTLE, NICOMACHEAN ETHICS VIII. ix, 1159b 26.

⁶ *Cf. id.* at 1160a 9.

every time that rulers use their powers to serve their own selfish ends.

The explicit declaration of Aristotle on this point illustrates how completely free his position was from the dogmatic exaltation of the State, which was to appear later in other philosophic systems. The various distinctions delineated by Aristotle between natural justice, *phusikon*, and positive law, *nomikon*; between the written law, *gegrammenon*, and the unwritten law, *agraphon*, etc., also illustrates how extensive, objective, and thorough his understanding of the complex juridical phenomena was. This is further seen in his refusal to reduce the definition of law to an oversimplified unilateral formula such as that which maintains that the political sanction of the State is the necessary and exclusive element which characterizes the law.⁷ This is all the more significant, since his observations evidently could not go beyond the reality of his times, nor include types of juridical orders which are *sui generis*, such as international and canon law, which were to develop in a later age.

III — *The Doctrine of Saint Thomas Aquinas.*

The Aristotelian doctrine was transmitted, as we indicated, into the Thomistic system, even though this is based in its more general premises on different principles which are essentially theological. The *lex aeterna* dominated the *lex naturalis*, and this dominated the *lex humana*; the first (*i.e.*, the *lex aeterna*) is the *ratio divinae sapientiae* which rules the

⁷ It is true that Aristotle declares that natural justice constitutes a part of political justice, NICOMACHEAN ETHICS V. vii, 1134b 19, but not in the sense that the value of natural law is dependent on being recognized or sanctioned in the positive juridical order, but in the sense that the positive juridical order must of necessity recognize natural law and achieve it, at least to some degree, even though the positive law is subject to change. Aristotle thus attempts to account for the fact that in the juridical systems of various nations there are certain similar parts and others which are dissimilar. This is analogous to the later teachings of the Roman jurists. However, Aristotle explicitly affirms that the laws of natural justice, precisely because they are founded on the laws of nature, are in themselves universally valid above all human regulations or decrees. NICOMACHEAN ETHICS V. vii, 1134b 25-1135a 15.

world; the second (*i.e.*, *lex naturalis*) is the manifestation of this rule in man limited by the capacity of his nature; the third is an invention of man, by which the *lex naturalis* is applied to specific situations in order to achieve the *bonum commune*.⁸ However, St. Thomas, like Aristotle, expressly considers the hypothesis that the man-made law departs to a lesser or greater extent from this end. This man-made law, in extreme cases therefore, ceases to be binding. Also here then, we have no preconceived exaltation of the State nor of the law which the State creates. Worth noting also is the fact that St. Thomas distinguishes clearly the positive law in *jus gentium* and *jus civile*,⁹ noting that the first stems directly *ex lege naturae, sicut conclusiones ex principiis*; while the second also derives from the natural law, but only according to those principles which a State considers advantageous. The rights of the people are therefore not dependent on the State. This is sufficient to demonstrate that St. Thomas does not consider the political sanctions of the State as an essential element of the law. One might add, as several authoritative interpreters of the Thomistic system note, that in addition to the *jus civile* there is not only the *jus gentium*, but also that of the Church: "the common division of human law is into civil and ecclesiastical with regard to the two powers to which the Christian world is subject, namely ecclesiastical and civil power."¹⁰ Taking up and developing the Aristotelian theory referred to above, Aquinas declares that justice has this unique feature in comparison to other virtues, namely that it regulates one man's relationship with another.¹¹ Justice, and therefore also the law which must seek to achieve justice,

⁸ ST. THOMAS, *SUMMA THEOLOGICA*, I-II quaest 91-97.

⁹ *Id.* quaest 95, art. 4.

¹⁰ "Divisio communis legis humanae est in civilem et ecclesiasticam, ratione duarum potestatum quibus orbis christianus subicitur, scilicet potestas ecclesiastica et potestas civilis." 2 *SUMMAE S. THOMAE* 544 (Marietti ed., Billuart, 1940).

¹¹ ". . . ut ordinet hominem in his quae sunt ad alterum." ST. THOMAS, *SUMMA THEOLOGICA*, II-II quaest 57, art. 1; quaest 58, art. 2.

consists of a relationship between persons. This fundamental concept has always remained incontrovertable because successive inquiries could only confirm it: sometimes illustrating its various aspects in the light of experience, other times, by using a deductive method, deepening its basic logical significance.

The many distinctions drawn by Aristotle in the field of justice, namely among the various types of rights and law, are generally conserved by St. Thomas; who however adds others, in accord with the principles of his own system. For instance, especially the *jus divinum* "*quod divinitus promulgatur.*" As St. Thomas explains in a passage perhaps not sufficiently considered: ¹²

In part it consists of those things which are naturally just (although man is incapable of understanding this justice); in part it consists of those things which are made just by divine ordinance. Therefore also divine justice as well as human justice can be divided into these two parts.

It is not worth pointing out the extent to which this concept exceeds the limits of the State, and therefore those of the political order.

If, however, the Aristotelian distinction between *simpliciter justum* (in which one finds a condition of party, as for example when two persons are equally subservient to the authority of the State) and the other type of *justum*, as the *paternum* or *dominativum* (where one finds instead a predominance of one person over another ¹³), reappears in the Thomistic system, a careful examination demonstrates that such distinctions have much less importance in the Thomistic system than in the Aristotelian system. The references to

¹² "Partim est de his quae sunt naturaliter justa, sed tamen eorum justitia homines latet; partim autem de his quae fiunta justa institutione divina. Unde etiam jus divinum per haec duo distingui potest, sicut et jus humanum." *Id.* quaest 57, art. 2, reply 3.

¹³ See ST. THOMAS, *SUMMA THEOLOGICA*, II-II quaest 57, art. 4; quaest 58, art. 7, reply 3; I-II quaest 114, art. 1; III quaest 85, art. 3, reply 2.

politicum justum in relation to *simpliciter justum*, are in the works of St. Thomas purely incidental, and do not at all effect the definition of the essential elements of justice and of law which are elsewhere given by him without mention of the political nature of law.

The observations and reservations which St. Thomas makes apropos of the distinction previously indicated between *politicum justum* and *simpliciter justum* are important. They tend to limit the significance of this distinction. It is clear that he admits the existence of various types of positive law, also recognizing, as does Aristotle, that the civil or political law is more perfect than the law of domestic relations.¹⁴

A son, as such, belongs to his father, and a slave, as such, belongs to his master; yet each, considered as a man, is something having separate existence and distinct from others. Hence in so far as each of them is a man, there is justice towards them in a way. . . .

But not even *politicum justum* constitutes, for St. Thomas, the absolute archetype of justice, because it is subordinated to the *lex naturalis*, which in turn is subordinated to the *lex aeterna*. In substantiation of this, it is worth noting the fact that St. Thomas, even though he followed the Stagirite, did not utilize his formula (actually a little ambiguous) by which the *politikon dikaion* would include natural justice, *phusikon dikaion*, as one of its parts.

IV — *Juristic Character (Giuridicita) and Positive Character of the Law.*

The previous discussion permits us to conclude that a political character is not an essential element of the law for either Aristotle or St. Thomas.¹⁵ Leaving aside the interpreta-

¹⁴ "Uterque tamen (filius et servus), prout consideratur ut quidam homo, est aliquid secundum se subsistens ab aliis distinctum. Et ideo in quantum uterque est homo, aliquo modo ad eos est justitia." ST. THOMAS, *SUMMA THEOLOGICA*, II-II quaest 57, art. 4, reply 2.

¹⁵ To sustain his opposing interpretation of the thought of St. Thomas, Olgiati cites LACHANCE, *LE CONCEPT DE DROIT SELON ARISTOTE ET S. THOMAS* (1833). In this

tion of these authors, we will now directly consider the problem in its logical aspects.

No one can deny that (as was already amply demonstrated) all juridical propositions imply and denote a coordination of the actions possible between several subjects. This coordination enables one of the subjects to act in a certain manner, without meeting opposition from another. We are dealing therefore with an interpersonal relationship, in which rights correspond to obligations. This simple scheme would exist even if only two persons existed on the earth, or else, for example, on an island; and even if only one person existed who thought of himself as being in a possible relationship with another person. In another work I have made clear that such a contraposition of the ego to alterego is not something accidental, but it is an epistemological necessity, that is, a true category of our intellect.¹⁶

The logical scheme of the juridical order does not have, strictly speaking, any other requisites than those previously indicated. It includes all the possible activities of several subjects. These activities are the concrete manifestations of this logical scheme. They can be merely ideal or hypothetical, or also positive; but on this point a little discussion will be useful.

work however, in addition to the political element of the law, other characteristics of law are discussed. Lachance insists, for example, that, ". . . the political community, like every perfect organism, must in itself be composed of heterogenous parts, on the one hand of diversified organs, of private associations of natural cells and elementary principles on the other." LACHANCE, *supra* at 290. He continues, "And everything else which has direct reference to society has a complete life and a whole purpose of its own, which life it presupposes and which it calls upon the natural and private associations to furnish." According to his point of view, ". . . the three elements which integrate the notion of law and right are properly and intrinsically contained in secondary forms of law." LACHANCE, *supra* at 291. It therefore does not seem to us that the thinking of Lachance is completely in accord with that of Olgiati. One notes, for example, how Lachance considering the various types of law attributes a political character only to some of them. LACHANCE, *supra* at 322.

¹⁶ For further discussion of this subject, see DEL VECCHIO, *LA GUISTIZIA* 81 *et. seq.* (4th ed. 1951).

The affirmation of one's subjective self and the recognition of another's subjectivity are elements which arise and develop necessarily in every conscience; which is to say that law develops naturally from the human spirit. Just as human life can develop itself only via a series of intersubjective relations, so the data of individual consciences, even if they are not in all respects similar, arrange themselves in such a manner as to produce a type of average result which constitutes the positive law of each people. This law which is constantly reintegrating and readapting itself is subject historically to a certain variability because of the perennial vitality of its sources, while at the same time it tends to assume a coherent structure in the process of becoming a functioning system.

One should conclude from this that the positive nature of law — which must not be confused with the juridical nature of law — is something which involves diverse stages of development. The process of forming positive law is extremely complicated, especially since the product of the individual conscience manifests itself not only in the general system of laws of an entire population, but also in the laws of minor social organizations, of which every individual is a part. Nothing is more contrary to the truth than the prejudice, still found amongst jurists, which maintains that only one juridical order, namely that of the State, exists, and that all law emanates from the State. The truth of the matter is that juridical orders develop in multiple forms wherever human life exists, and that the State is only the order, amongst the many juridical orders, which because it is a manifestation of the preponderant social will, has achieved the highest degree of effectiveness. The minor juridical orders, which do not regulate the entire life of their members, but only some aspects of it, often insert themselves in the preponderant juridical order, and in this manner become a part of it while retaining their own sphere of autonomy. However, cases of

divergence and complete autonomy do occur. For example, the minor social units may not wish to or may not be able to act in accordance with the norms imposed by the juridical order of the State.

Social and juridical phenomena are in this respect so vast and rich that it is impossible to describe them adequately even in rough outline in such a brief work as this. We will only observe a few of the characteristic aspects, that is, some of the forms in which the juridical productivity of the individual manifests itself within and sometimes contrary to the juridical order of the State. One should not be misled by the fact that such a production (actually autonomous), on coming in contact with other juridical orders which are already well established, often accommodates itself to these orders and thus appears to be created by them. Such is the case of the customs which growing independently of legislative norms are subsequently recognized by legislative norms. Such is the case of domestic and family law, especially of the power of the *pater familias* which without doubt assumed its general characteristics long before a system of norms was imposed by the State. However, even more noteworthy is the tendency currently observable to form professional organizations; unions, corporations, etc., with their own juridical orders which, as regards their by-laws that are not in conflict with the laws of the State, are not subordinate to the authority of the State, nor do they obtain their authority from the State. An open conflict between various political orders is thus apparent. This conflict, in the course of historical evolution, can and must in some manner resolve itself. It nevertheless illustrates the possibility of a legal order not derived from the State.

As is already apparent, the gregarious tendency which exists in man (that which Grotius calls *appetitus societatis*) can manifest itself simultaneously in different organizations, creating amongst these a network of complicated relation-

ships, in which the less important organizations develop within the framework of the more important organizations. Rousseau expressed the idea well when he stated that, "All political society is composed of other and lesser societies of a particular nature, none of which has the same interests and principles as the political society itself."¹⁷ Undoubtedly each society or organization has its own order, that is to say each lives according to prescribed rules, written or unwritten. Chaos rather than society would exist without these rules. Even when these rules are derived from a larger and more potent organization such as the national state a certain juridical productivity nonetheless manifests itself to such a degree within the limits of power of the minor organizations that one can conclude that the life of a social organism is never completely passive in this respect. Often social and juridical orders are formed spontaneously and independently of every preceding system, and even revolt directly against the juridical system of the State.

It is obvious, that in such a case the State will certainly declare such an organization illegal; but this illegality is merely relative, that is to say it is effective only from the point of view of the particular state making the declaration of illegality. Objectively speaking, however, a certain legality must be recognized in these organizations in so far as imperative and intersubjective norms exist in the relationships between the constituents of the organizations.

We are aware of the fact that this thesis provokes opposition, especially for sentimental reasons. However, we must observe facts and analyze them with rigorous logic without being influenced by any prejudice. "*Non ridere, non lugre, neque detestari, sed intelligere,*" states the admonition of Spinoza. Value judgments can be and should be objects of another investigation (deontological) but certainly must not

¹⁷ ROUSSEAU, *De l'Economic politique*.

effect investigations which seek to discover the characteristics of the species observed.

Precisely in order not to evaluate in a prejudiced manner the diverse juridical structures, it is necessary not to confuse this evaluation with a statement of the elements which go into the making of a juridical order. It is not scientifically correct to make summary judgments of merit or non-merit, when one is merely attempting to discover whether or not a given characteristic is a necessary element of the law.

Let us admit also that in the majority of cases the social organizations declared "illegal" by the State are directed towards dishonest and reproachable ends; and let us admit also that in the majority of cases the activity of the State is directed towards the attainment of justice. But this, at least in the philosophic camp, must be ascertained by reason and not merely on the basis of a simple prejudice which assumes that the entire organization of the State is always directed towards the attainment of justice, and conversely that all organizations which oppose the State should be condemned. In the presence of a tyrannical state, secret organizations may have the highest ethical value (one thinks for example of the Mazzinian Young Italy; and it is superfluous to cite other recent examples); while they may also have an internal legality, with autonomous attributes of power and of rights and duties in the relationships of their members.

On careful examination one notes that that which distinguishes the State from minor organizations existing in its midst is not a higher degree of ethical perfection — which probably may be so in the majority of cases, but is not always the case. Actually the distinguishing factor as we have already noted is its greater effectiveness vis-a-vis other organizations, which themselves become states or organs of state when they acquire this preponderant effectiveness. The minor degree of effectiveness which these organizations possess does not signify a lesser degree of legality, *giuridicità*, since this

formal characteristic does not depend on the real efficiency of the norm, but only on its logical significance.

V — Juridical Orders Existing Independently of the State's Political Order.

Autonomous organizations may exert authority in an area not within the limits of State authority and also include individuals who are citizens of diverse states or stateless persons. In this area the juridical phenomena are also extremely varied. However, it is not necessary to pause here to consider the diverse types of associations, national and international, which often have little importance.

There is, however, a vast organism of great spiritual significance which merits attention even at the end of our study. I refer to the Catholic Church. The Church is certainly not a state, but it nevertheless has its own juridical order with its own Code and magistrates. Its authority, civil and penal, is exercised over all the faithful, in a sphere of competence which exceeds that of the single states which are represented in the Church. How could we, without obvious error, deny the juridical nature of the norms of the Canon Law or attribute to it a political nature which could minimize or alter its significance?

There is another juridical system which is not identified with that of any state which we cannot overlook. This is the system of international law. The norms of which international law consists are derived partially from agreements between various states, but they have a more profound root in the natural uniformity of the human mind. It is useful to note that the validity of agreements voluntarily concluded are based on a principle of natural reason, which cannot be the result of these agreements, precisely because it is the presupposition on which all agreements must be based. In remote ages this principle was, without doubt, spontaneously felt

and reduced to custom. Other norms regulating war and peace amongst nations also have an equally spontaneous origin. The absence of a corresponding political unity has not prevented the formation of such a system, whose juridical nature cannot be denied, regardless of its lack of positive effectiveness, if one considers its ultimate end.

VI — The Production of Juridical Norms by the Individual Conscience.

To distinguish the logical form of the law from its contingent manifestations certainly does not mean to ignore the importance of these manifestations, especially that of the State which predominates over others because of its greater effectiveness. For organs of the State it is obvious that other coexisting systems are not valid unless they are recognized by the State. Such an observation is equally true for all other organizations. This is the abstract and dogmatic solution of a problem, which in concrete reality assumes an extremely more complex aspect, because of a series of interactions amongst norms of various kinds, origins, and effectiveness.

Let us not forget that in the life of the law there is a fundamental factor, inexhaustible and always active. I refer to the individual conscience from which the norms of systems of law which are in force are derived, and which maintains its insuppressable autonomy even vis-a-vis these prevailing systems of law. This autonomy is exercised, within narrow limits, in the act of interpreting existing rules when their meaning must be determined in the context of specific factual situations, at which point the basic or fundamental source of the law must be considered. But this autonomy is exercised in a much greater degree when the individual mind, according to its innate faculties, conceives norms diverse from those currently in force to be more just. Those who are attached to the positive school refuse to consider these conceived norms as constituting a part of the legal order. However, we

do not know to what other category such conceived norms should be relegated, if not to that which has as its base the logical form of law. Therefore we do not hesitate to ascribe to these conceived norms the designation of law even though they do not possess a positive nature. A majority vote might confer this characteristic on these norms, but it would not confer a juridical character on them. This juridical characteristic, *la giuridicità*, is dependent solely on the intrinsic significance of the norm. For the same reason an abrogated law does not become an economic, religious, moral or any other type of norm, but conserves its juridical nature even though it has lost its vigor.

It is hardly necessary to caution that in affirming the common nature of positive and non-positive law, we do not intend in the least to repudiate the authority of the former, nor to place the obligation of observing the positive law at the mercy of any or all subjective value judgments. This obligation has profound reason supporting it, which we need not repeat here. Also unjust laws must, in general, be respected by those who hope for reform. Only in extreme cases does the obligation to respect the established order cease. The problem which now presents itself is of another nature. Just as positive legislation varies, so too the determination of the just and the unjust formed by the individual conscience may be a little varied. The same logical form in fact permits a changeable content. The variations are easily explained partially because the law, absolute in principle, must nevertheless adapt itself to the particular circumstances to which it must be applied, partially because the human spirit is continually developing over a series of stages of perfection, and partially because the human mind is not infallible, and errors are possible in this as in every other subject.

If, however, deviations have occurred, as is undoubtedly true, also in the development, "*elaborazioni spontanee*", of the individual conscience attempting to achieve justice, one

must recognize that such deviations were, in general, less numerous and less grave than those which occurred amongst the positive law jurists. It is well known that in the area of positive law not only opposing interests but also diverse and often violent passions are stimulated, while in the speculative field the search for natural justice is accomplished by rules according to the formula of Tomasius "*ex ratiocinatione animi tranquilli.*"

Some simple but fundamental maxims of justice or of natural law were already discovered, as was noted, by ancient philosophy. The same maxims reaffirmed and strengthened by Christianity were later developed by the *ius naturae* schools, which, despite various disputes and certain methodological imperfections, maintained firmly the noble idea of a universally valid law founded on natural principles and therefore superior to the arbitrary decisions of governing bodies. In this manner a true system of rights belonging to a human being precisely because he is a human being, and not because these rights are conferred on him by the State, was formed. In effect, these rights were considered as the presupposition of the State itself. This philosophical conception later passed from the purely doctrinal to the political field, becoming the program not only of progressive reform, but also of insistent demands and revolution in the most critical moments of modern history. The triumph of that program was such that it was transmitted, as fundamental documents, into the constitutions of the more advanced states; and it is not an exaggeration to state that the world today considers the positive recognition of the natural rights of man as an intangible conquest where they have been so recognized. In those parts of the world where they have not yet been recognized, they are considered a goal which must necessarily be reached.

The prejudices of certain schools, which because of a narrow positivism oppose the admission of natural law as a necessary and scientifically legitimate idea, thus receive from

the facts themselves the most severe contradiction. It is also fair to note that even from the heart of the positive school, contradicting its original premises, a voice has sometimes arisen in defense of the concept of natural law. Such, for example, is the case of Spencer, who in his work entitled *Justice*, has outlined a system of natural rights similar to that previously outlined by the rationalist school.

If one understands the real significance of this idea as a part of the order of values of which the supreme reality is composed, he will recognize in it a perfect type of juridical order, prior in existence and superior to every political or state order. In the majority of cases in relation to this concept, the positive manifestation of the law represents only a *consecutivum*.

VII — *Criticism of the Thesis of the Political Character of Law.*

From the preceding discussion it should be sufficiently clear that a political character, *l'elemento della politicita*, is not an essential element of the law. Even if we do not wish to discuss the controversial problem of natural law, there are, within positive law, relationships and systems of law which possess the logical characteristics of a juridical order without constituting a political entity.

It does not seem necessary to refute *in extenso* the contrary opinion, which is maintained principally, as we noted, by Professor Olgiati, partially because such a refutation is already implicit in the preceding considerations, partially also because, if this point of view had some adherents,¹⁸ it also

¹⁸ For example, Di Carlo states: "It seems to me that one can devise a doctrine of the political nature of law which is contained in its just terms without reference to any excessive or improper language." S. TOMASSO D'AQUINO, *SUMMA THEOLOGICA (La giustizia, II-II quaest 57-61)* 34 (Lumia's transl. 1950). Other scholars have tended to agree with him. Nirchio, Book Review, 20 *SOPHIA* 82, 83 (1952); Zampetti, Book Review, 43 *REVISTA DI FILOSOFIA NEO-SCHOLASTICA* 266, 267 (1951).

had some critics to whom we shall refer the reader¹⁹ even though we do not completely agree with them.

Let us consider several points which in our opinion have not yet been adequately considered.

In the presence of facts which demonstrate how a juridical order can exist also in the absence of a *polis* or State, Olgiati attempts to defend his thesis, by maintaining that the political character of law is a tendency rather than an existing fact. "The *polis*," he states, "is the end towards which — directly or indirectly, — law, because of its intrinsic nature, tends to develop."²⁰ He adds,²¹

What difference does it make if at the dawn of civilization only Adam and Eve existed? Even the primordial ancestors, at a time when the state could obviously not have been in existence were *naturaliter* oriented towards the *societas* and towards the future social organizations, as the seed is ultimately oriented towards the plant and the forest. . . . The relationships between two persons must not and never can be thought of as existing prior to this political orientation.

We readily recognize the ingenuity of this argument; but we must also state that with such an argument the meaning of the words used becomes uncertain and the scope of our problem is changed. If, as the same author admits, "Law existed before states were formed";²² and if interpersonal relationships having the characteristics of a juridical order existed

¹⁹ GRANERIS, CONTRIBUTI TOMISTICI ALLA FILOSOFIA DEL DIRITTO 43 *et seq.* (1949); Battaglia, *Recensione di F. Olgiati*, [April-Dec. 1947] RIVISTA INTERNAZIONALE DI FILOSOFIA DEL DIRITTO 258-263; Corti, *E' la politicita la nota essenziale del diritto?*, 72 LA SCUOLA CATTOLICA 58-68 (1944); Levi, *La giuridicità nella Filosofia tomistica e neo-tomistica*, [Jan.-March 1947] RIVISTA INTERNAZIONALE DI FILOSOFIA DEL DIRITTO 81-88; Messineo, *Il concetto di giuridicità*, [1943] 4 LA CIVILTÀ CATTOLICA 317-321. Olgiati has replied to some of these critics, repeating his thesis without modification, but in a clearer manner. He writes: "So far as I am concerned, there is an identity of right and justice, and justice in turn connotes a political element." OLGATI, INDAGINI E DISCUSSIONI INTORNO AL CONCETTO DI GIURIDICITÀ 61 (1944).

²⁰ OLGATI, IL CONCETTO DI GIURIDICITÀ IN S. TOMMASO D'AQUINO 138 (2d ed. 1944).

²¹ *Id.* at 151-152.

²² *Ibid.*

when no political organization was yet in existence, then we cannot correctly maintain that the concept of politically sanctioned norms must be included in our definition of law. We must not confuse the intrinsic end of a given relationship with the end which it actually achieves because of contingent factors. Actually all interpersonal relationships do not have as their end the State. Neither do they necessarily tend to orient themselves towards the State's political order. In response to Olgiati's analogy one notes that the truth of the matter is that not all seeds produce a forest; and that no botanist would claim that a seed had to be defined in terms of its capacity to produce forests.

Olgiati next considers the medieval guilds, *Gewerkschaften*, and admits that their norms were juridical although they were not imposed by the State. Nevertheless, he wants to recognize even in these professional organizations a political character, for the reason that they had "an ultimate relationship to the life of the State", because "the sense of *civitas*, of a collective body unifying the energy of individuals . . ." ²³ was so highly valued in those times. This reasoning is a little vague. The political nature of the organization should result from its own functioning and not from a mere distant relationship which is not clearly defined.

With regard to international law, Olgiati, after recognizing its juridical nature, attempts to demonstrate its political character in the following manner. He argues that States, ²⁴

. . . are individual entities ultimately subject as a matter of natural law, to a superior and supreme body, which, when it shall truly include all of the States of the world shall constitute the *polis* par excellence.

We agree with this; but note that although this *polis* does not yet exist, international law does exist.

²³ *Id.* at 157.

²⁴ *Id.* at 156.

VIII — *The Ideal of Justice and Juridical Realism.*

It is useful to state at this point some general conclusions which result from the previous discussion.

The Aristotelian doctrine of the State, like the Platonic, reflects the common belief of the Greeks that the *polis* was the supreme reality "*suprema realta.*" Only in this manner can we explain certain theories which depict the city-states as perfect associations and the perfect actualization of the ideal of justice. However, when these formulas are received and reconsidered in the Thomistic System, they assume a different significance because they have been inserted into a broader setting, in which other principles are dominant. Above the *lex humana* there exists, in the Thomistic System the *lex naturalis*, and above this is the *lex aeterna* or divine law. It is true that natural law is a part of the Aristotelian System; but it possesses a much more important position in the Thomistic System. Especially in so far as it connects itself with an even higher law, which was ignored by Aristotle, namely, the divine law. It is sufficient to remember in this regard the explicit declaration of St. Thomas according to which citizens have the right and the duty not to obey the laws of the State when they impose obligations contrary to natural or divine law.

One also observes from this how justice is not in the Thomistic System as strictly allied to the State as it is in the Aristotelian system. Without doubt, St. Thomas also affirms (and who could deny it?) that the purpose of the State must be to achieve the *bonum commune*; but this end is considered as an ideal of a deontological character, instead of a fact which is necessarily found in all States. Even Aristotle had already, as we have previously noted, referred to such a distinction.

The clarifications made on all of this subject by juridical and philosophical investigations of the succeeding centuries,

and especially of the latest, and also the evidence supplied by new historical experiences are so precise and mark such an evident progress, that it seems to us that they cannot be ignored even if we retain the maximum respect for the ancient classic doctrines.

In the past ages the concept of law was identified with that of Justice. One cannot say that such an identification of the two which reappears also today in some theories is completely erroneous, because the two notions have a similar basis, and may also sometimes coincide. However, a more profound analysis completed by philosophers and jurists has demonstrated that the logical form of the law includes all the possible types of juridical reality, and not only that perfect type which is called Justice. This constitutes then a model and an ideal criterion, which enables us to evaluate all norms which belong to the logical form of the law.

Distinguishing in such a manner the reality from the ideal of the law makes possible the solution of problems otherwise almost insolvable. It also satisfies the logical and ethical needs of the human mind. On the contrary, the attempt to satisfy these diverse needs together with a single formula, must encounter an obstacle because of their diversity. Noble, without doubt, was the aim pursued by some great writers, declaring that "*lex injusta non est lex*"; but no jurist will refuse to consider as law juridical determinations which have all the formal requisites of law because they appear defective in the light of the supreme idea of justice. No jurist will ever consent, for example, to excluding the institution of slavery from the system of classic Roman law, though (as is recognized as a matter of fact by the same Roman jurists) it obviously contradicts the principles of natural law, according to which all men are equally free.

If one notes carefully, the principle of justice, or of natural law, reveals itself in a much purer form in its ideal validity, *ideale validita*, in so far as it detaches itself from its strong

attachment with the positive law. The positive law often differs from the just law. It nevertheless must be studied objectively in its specific manifestations (as positive law), regardless of how far it deviates from the ideal law.

Far from considering in a dogmatic fashion positive law as being synonymous with justice, we regard the positive law as being essentially subordinated to the valuation of what it can accomplish in achieving justice. Our conscience refuses to accept any fact which cloaks itself in the mantle of legality, but simultaneously refuses also to preclude the perception of such types of facts, precisely in order to be able to exercise over them a higher judgment in the province of pure reason.

The definition given by a hopeful and we might say almost ingenuous optimist, which generically attributes to the positive law and the State an absolute value, is immediately contradicted when subjected to a rational analysis and the test of history in every age. We believe to be inexact the doctrines which maintain that the law is always determined by particular interests or classes, and that the State is merely a multitude of people wherein "the strongest impose their will on the weakest."²⁵ Neither do we believe the opposing theories to be acceptable, which, with an equally arbitrary generalization, assert that "the common good and the law are two inseparable notions,"²⁶ or else they attribute to every state the extremely ambiguous character of the "ethical State."

If, in place of these opposing dogmatic views, we follow what we consider to be the correct method, we shall equally abstain from summarily exalting all States and likewise from condemning all anti-State or illegal organizations. It is useless to state that we share the dislike of Olgiati for criminal associations;²⁷ but this feeling must be the result of reason when

²⁵ 1 DUGUIT, *TRAITÉ DE DROIT CONSTITUTIONNEL* 655 (3d ed. 1927).

²⁶ See OLGIATI, *op. cit. supra* note 20, at 144.

²⁷ *Id.* at 148. Cf. STURZO, *LA SOCIETÀ SUA NATURA E LEGGI* 245 *et seq.* (1949).

we are passing judgment on such phenomena. In so judging we should not forget that quite frequently, especially by despotic governments, all opposition was characterized as criminal, sometimes for reasons which were not clearly blameworthy. In order to understand well the true nature of these phenomena one must above all retain his objectivity. If in many cases we also find in organizations declared illegal by the State, a system of imperative and bilateral norms which assign to its members correlative rights and obligations, we must not hesitate to attribute to them the formal character of law. At the same time, the legal order of these supposedly completely illegal organizations may possess a certain degree of justice, especially regarding its internal relationships. At this point the observation of Plato comes to mind, according to which justice amongst men is so necessary, that even robbers and thieves in their association with one another must observe certain principles of justice in order to achieve their common goal.²⁸

To him who considers the political order as being synonymous with justice, or as being an inseparable part of justice, we must finally object that not only the society of thieves but also that of states has frequently perpetrated injustices. We would go so far as to say that perhaps no delinquent or group of delinquents have ever so thoroughly offended the most elementary and inviolable principles of justice as the Nazi state did, for example, with its infamous racial laws and the inhuman manslaughter which followed them.

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²⁸ PLATO, REPUBLIC, I. 351C-352C.

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