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HENRY S. RUTTLE, Esq., LL.D. in the Chair.

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**REFLECTIONS ON LAW—NATURAL,  
DIVINE AND POSITIVE**

By

PROFESSOR J. N. D ANDERSON, O.B.E., M.A., LL.D.

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THE VICTORIA INSTITUTE

22 DINGWALL ROAD, CROYDON, SURREY

# REFLECTIONS ON LAW—NATURAL, DIVINE AND POSITIVE

BY PROFESSOR J. N. D. ANDERSON, O.B.E., M.A., LL.D.

## SYNOPSIS

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Legal developments in many different countries to-day forcibly remind us of the medieval classification of law as natural, divine and positive—with its inherent recognition of a transcendent law to which positive law ought always to approximate.

This attitude seems strangely alien to most modern theories of jurisprudence, especially in Britain and America. Yet none of these theories, on examination, prove wholly adequate; and a return to the recognition of certain ultimate values is overdue.

The long history of the theory of natural law in the West reveals that concept as undergoing many transformations. Yet in some of these it remains basic to much of the law of the Western World, and is to-day receiving a new emphasis.

A brief examination of the Chinese, Hindu, Jewish and Muslim theories of law discloses many points of similarity. And even in the customary law of tribal Africa the same basic concepts emerge.

It seems clear, then, that the idea of a transcendent law, whether expressly enjoined by the Creator or inherent in His creation, represents a conviction which is in some sense common to mankind.

It is also interesting to observe the prominent, and even somewhat equivocal, part which is being played by some of these concepts in contemporary developments in Asia and Africa—e.g. in India, where the Fundamental Rights (natural law) sometimes come into conflict with “revealed” religion; in the Middle East, where the concepts of divine law and positive law are in competition; or in Pakistan, where a similar conflict is imminent. And the attitude of mind of those Muslims and Hindus who face these problems, intellectual and moral, is itself instructive.

Nor can the Christian lawyer conclude such a reverie without some consideration of the attitude which he must himself take to this whole question of law—divine, natural and positive.

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Legal developments which are taking place before our eyes to-day in many different countries—in India and Pakistan, for instance, or in the Near and Middle East, or even in Malaya, Indonesia and parts of Africa—inevitably call to mind the mediaeval classification of law as natural, divine and positive. Not, indeed, that the content of this three-fold division was ever regarded as mutually exclusive. For “natural law”

was thereby conceived as divine law deducible, or actually deduced, by natural reason, as inherent in the nature of man and of human society; "Divine Law" was the term used, in this context, for the law of God as inculcated by the precepts of revealed religion; and "Positive Law" represented the legal system applied by the courts of any, or every, national State. Thus all natural law was necessarily divine, and some divine law was also positive. By some the precepts of revealed religion were regarded as vouchsafed to correct and amplify the deductions of natural reason, while what reason established as natural law was taken by others as a criterion to test the validity of propositions for which claims were made to special revelation.<sup>1</sup> Both, however, stood together, over against positive law, as the ideal of which the latter was, at its best, only an imperfect transcript and, at its worst, an impious distortion; for it was by this ideal law that positive law must always be judged, and to it that it must ever seek to approximate.

Any such conception seems exotic and unrealistic in the light of most contemporary speculations in jurisprudence, especially in Britain and America. Here the existence, character and content of divine law are usually regarded as exclusively the concern of the theologian, while the theory of natural law has commonly been relegated to the spheres of the moralist or historian; the current debate about the nature of law has tended to be pursued, by lawyers, on a very different level.

The analytical jurists, for example, lay a primary emphasis on the total exclusion of any abstract, ideal concepts from the study of law and concentrate on examining the structure of some actual legal system by means of logical analysis. Such is the attitude of the "Imperative School", typified by Austin, whose view may be summarized in his assertion that "The matter of jurisprudence is positive law: law, simply and strictly so called: or law set by political superiors to political inferiors".<sup>2</sup> To Austin all law, properly so called, represents, in the final analysis, the command of a sovereign power. But the analytical jurists also include writers like Kelsen, with his "pure theory of law": for he, like Austin, confines the province of jurisprudence to law as it is, not as it should be; he, like Austin, seeks to free the law "from the metaphysical mists with which it has been covered at all times by the speculations on justice or by the doctrine of *ius naturalae*,"<sup>3</sup> and proceeds to analyse it with the aid of logic alone; but, unlike Austin, he does not regard law as the command of a sovereign but as a system or hierarchy of norms which

<sup>1</sup> Cp. F. Pollock, *Essays in the Law*, London, 1922, 42-4.

<sup>2</sup> J. Austin, *The Province of Jurisprudence Determined*, London, 1954 edition, 9.

<sup>3</sup> H. Kelsen, "The Function of the Pure Theory of Law," in *Law: A Century of Progress*, New York, 1937, II, 237.

prescribe what always *ought* to happen in given circumstances<sup>1</sup>—all resting, in the final analysis, on the “basic norm” of the “first” constitution of the state concerned.<sup>2</sup>

Against any such logical abstraction the historical jurists react strongly. To them the basic question is how the law has in fact come to be. It is determined, Savigny affirmed, by a nation’s peculiar history and character, and cannot be changed arbitrarily. “Like language, manners and constitution, law has no separate existence, but is a simple function or facet of the whole life of the nation. In early times the common conviction of the people is the origin of the law. But with the development of civilization the making of law, like every other activity, becomes a distinct function, and is now exercised by the legal profession”. So law “arises from silent, anonymous forces, which are not directed by arbitrary and conscious intention, but operate in the way of customary law”.<sup>3</sup> This attitude can easily develop, of course, into Hegel’s view that the national State is “the actuality of the substantial will” which is “an absolute and unmoved end in itself” and “has supreme right against the individual”.<sup>4</sup> And from such an attitude the Western world has already suffered—and is still suffering—grievous wounds, as Rosenberg’s phrase “Law is what the Aryan man considers as law; non-law is what the Aryan man rejects”<sup>5</sup> eloquently testifies, or the Communist thesis that “Law is a system (or order) of social relationships which corresponds to the interests of the dominant class and is safeguarded by the organized force of that class”.<sup>6</sup>

A similar insistence that it is utterly unrealistic to attempt to analyse law in a vacuum is found among the sociological jurists, but with a certain difference of emphasis. To them the paramount consideration is not so much the history of the law as the mutual influence of law and society. Thus the primary unit is not the individual but the social group, for the individual “is never actually an isolated individual; he is enrolled, placed, embedded, wedged, into so many associations that existence outside of these would be unendurable.” Similarly the law “does not consist of legal propositions, but of legal institutions. In order to be able to state the sources of the law one must be able to tell how the State, the Church, the commune, the family, the contract, the inheritance came into being, how they change and develop”.<sup>7</sup> Where, then, the first concern of

<sup>1</sup> H. Kelsen, *General Theory of Law and the State*, Cambridge, Mass., 1949, 123 ff and 153.

<sup>2</sup> Cp. *ibid.*, 115 f.

<sup>3</sup> Kantorowicz, “Savigny and the Historical School of Law,” in 53 *L.Q.R.* (1937), at 332 ff.

<sup>4</sup> Hegel, *Philosophy of Right*, translated by T. M. Knox, Oxford, 1942, 155 ff.

<sup>5</sup> Cp. Hughes, *Jurisprudence*, London, 1955, 10; also J. W. Jones, *The Nazi Conception of Law*, in Oxford Pamphlets on World Affairs, especially 12–16.

<sup>6</sup> H. Kelsen, *Soviet Legal Philosophy*, London, 1955, 20.

<sup>7</sup> Erlich, as quoted by Hughes, *Jurisprudence*, at 127 f. Cp. Erlich, *Fundamenta Principles of the Sociology of Law*, translated by W. L. Moll, Cambridge, Mass., 1936 474 f.

the historical jurists is the integrity of history, the insistence of the sociologists is on the integrity of society and its institutions.

This thesis is in part accepted by the American "realist" school of jurists, but in part only. They direct their attention almost exclusively to the legal institutions as such, and emphasize the uncertainty and the arbitrary element which these institutions inevitably embody. Their attitude can be summarized in the famous dictum of Judge Holmes: "The prophecies of what the courts will do in fact, and nothing more pre-tentious, are what I mean by law"; or, again, in the words of Professor Llewellyn: "The doing of something about disputes, the doing of it reasonably, is the business of the law. And the people who have the doing in charge, whether they be judges or sheriffs or clerks or jailers or lawyers, are officials of the law. What these officials do about disputes is, to my mind, the law itself."<sup>1</sup> But besides these American jurists, the term "realist" may also be applied to a group of Swedish thinkers, whose approach is much more philosophical. Thus Olivecrona is of the opinion that "The 'binding force' of the law is a reality merely as an idea in human minds. There is nothing in the outside world which corresponds to this idea."<sup>2</sup> The idea, indeed, even fulfils a "dangerous, reactionary and obscurantist function. It suggests to the human mind that law is something standing outside and above the facts of social life, that law has an independent validity of its own which is not man-made, that it has a realm of its own outside the world of cause and effect. . . . The reality is that law is made by men, that it exerts pressure on men, on the public and on policemen and on judges; it is therefore a most potent influence on conduct, but only in the natural realm of cause and effect."<sup>3</sup>

But a growing body of "teleological" jurists regard all these theories as inadequate. It is essential, they emphasize, to consider the ends and purposes of law in a much more radical way. An answer must be found somewhere to the basic problem of the intrinsic validity of law. To the analytical school the primary question is one of purely formal validity. So, to take an extreme example, if a formally correct legislative enactment were to give a dictator the power to issue any edicts he saw fit, and if he, in turn, were to issue edicts, in the proper form, making incest lawful and infanticide obligatory, these edicts would satisfy all the demands of valid law. To the realist the same would, presumably, be true if such were in fact the decision of the courts or the effect of such edicts on the public and its appropriate officials. But no such attitude will satisfy the teleological school. Law, they emphasize, must always remain intimately related to justice and morality, and some attempt must be made to find an absolute criterion by which positive law may be judged.<sup>4</sup> It is clear, then, that to

<sup>1</sup> Llewellyn, *The Bramble Bush*, New York, 1951, 12.

<sup>2</sup> K. Olivecrona, *Law as Fact*, 17.

<sup>3</sup> Hughes, *Jurisprudence*, 162.

<sup>4</sup> Cp. Paton, *Jurisprudence*, Oxford, 1951, 27.

some the wheel has turned almost its full circle, and the way is again open for a new approach to a consideration of the classifications of the past.<sup>1</sup>

That the customs and laws of primitive peoples, in the West as well as in the East,<sup>2</sup> were regarded as emanating from a divine origin, scarcely needs elaboration. This can be shown to be true, for example, of the Greeks, the Romans and the Germans.<sup>3</sup> Thus the concept of divine law can be traced right back to antiquity. The doctrine of natural law in any articulate form, on the other hand, seems to demand a considerable degree of philosophic thought.<sup>4</sup> It is not surprising, then, that it first emerged, in the West, among the Greeks. It can there be traced back at least as far as Heraclitus of Ephesus, who taught that "Wisdom is the foremost virtue, and wisdom consists in speaking the truth and in lending an ear to nature and acting according to her. Wisdom is common to all. . . . They who would speak with intelligence must hold fast to the (wisdom that is) common to all, as a city holds fast to its law, and even more strongly. For all human laws are fed by one divine law."<sup>5</sup> Thus the doctrine emanated, in Heraclitus, from a conservative attitude of mind, which found in the transcendent law the ethical foundation for the binding force of positive law. But very soon the same basic concept was used by the Sophists for radical and even revolutionary purposes; for they emphasized the discrepancies between the positive laws of the Greek city-states and the basic moral law which alone had any inherent value, and were the first to stress what came to be regarded as the natural rights of men.<sup>6</sup> And while the Sophists' views developed, among the Epicureans, into scepticism and what Rommen has described as the first legal positivism, the teaching of Heraclitus was elaborated by Socrates, Plato and Aristotle, each in his own distinctive fashion, and handed on to the Stoics,<sup>7</sup> whose view may be summarized in the statement of Cicero: "True

<sup>1</sup> Thus Professor J. L. Montrose has recently remarked that "In the realm of legal philosophy natural law is once again busily employed in burying its undertakers. . . . Outside the United Kingdom the signs are not that the tide is at the turn, but that the return of natural law is a flooding full tide" (*Political Studies*, III, 3, Oct. 1955, 212).

<sup>2</sup> See below.

<sup>3</sup> Cp. in this context H. A. Rommen, *The Natural Law*, trans. by T. R. Hanley, St. Louis, Mo., 4th printing, 1955, 3 and 4.

<sup>4</sup> It is quite unnecessary, however, to explain this—as is so often attempted—by the hypothesis that the conviction gradually gained ground that "the tribal deities are not the ultimate form of the religious background of reality. For if an eternal, immutable law obliges men to obey particular laws, behind the popular images of tribal deities exists an eternal, all-wise Lawgiver who has the power to bind and to loose". (Rommen, *The Natural Law*, 4 and 5). On the contrary, the same basic conclusion could even more naturally have been reached by peoples who still retained a faint memory of a monotheism they had once known but had largely forsaken, as St. Paul asserts was in fact the case. (Romans 1: 18–32).

<sup>5</sup> Quoted by Rommen, op. cit. at 6, from Fragments 112–14, in C. M. Batewell, *Source Book in Ancient Philosophy*.

<sup>6</sup> Cp. *ibid.*, 8–11. Thus Alcidas asserted that "God made all men free; nature has made no man a slave".

<sup>7</sup> *Ibid.*, 8–26. The Stoics also, however, took over some of the views of the more moderate Sophists (e.g. natural rights), and handed them on to the Roman jurists.



law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions. . . . It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. . . . And there will not be different laws at Rome and at Athens . . . but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and one ruler, that is, God, over us all, for He is the author of this law, its promulgator, and its enforcing judge".<sup>1</sup> It was in this way, and under the influence of Stoic philosophy, that the doctrine of natural law may be said to have entered Roman law; for not only did the idea of *ius naturale* underlie that *aequitas* which came, in the hands of the praetors, to replace much of the ancient law, but the same idea can also be found in the *Institutes* of Gaius and the *Corpus Juris* of Justinian, where the emphasis passes over from the contrast between the eternal law and the dictates of men to the distinction between the law common to all nations (*ius gentium*) as corresponding to the basic requirements of humanity—and the law peculiar to the Romans as such (*ius civile*).<sup>2</sup>

The next major development was for the concept of natural law to be reinterpreted by the Christian Church.<sup>3</sup> In the hands of the Canonists it was sometimes identified with divine law in contra-distinction to customary law, as in Gratian's *Decretum*: "Mankind is ruled by two laws: Natural Law and Custom. Natural Law is that which is contained in the Scriptures and the Gospel." And this law must necessarily prevail over every rival, for "Whatever has been recognized by usage, or laid down in writing, if it contradicts natural law, must be considered null and void".<sup>4</sup> It was, moreover, regarded as essentially inherent in human nature; although a distinction was made between a primary natural law, applicable to a state of innocence, and a secondary natural law, applicable to human nature since the Fall.<sup>5</sup> But it was with the Scholastics, and particularly Thomas Aquinas, that the idea attained its full systematization. To Aquinas, natural law was not merely the "eternal law" as contained in the Scriptures and the Gospel but, more specifically, the participation in the eternal law by rational creatures, who "have a certain share in the divine reason itself, deriving therefrom a natural inclination to such actions and ends as are fitting. . . . As though the light of natural reason, by which we discern good from evil, and which is the Natural law,

<sup>1</sup> *The Republic*, III, xxii, 33, trans. by C. W. Keyes.

<sup>2</sup> Cp. d'Entrèves, *Natural Law*, London, 1951, 24-31. The term *ius gentium* was at times used in a theoretical sense, approximating to *ius naturæ* (Cp. Gaius, who identified the two terms); but more often it was used in a practical sense, of the law applicable to non-citizens.

<sup>3</sup> Where the deistic views of the Greeks and Romans were at once replaced by the personal Creator God.

<sup>4</sup> d'Entrèves, *Natural Law*, 33 f. (Cp. *Decretum Gratiani* I, v, 1, para 1.).

<sup>5</sup> Rommen, *The Natural Law*, 36-8. The distinction between a primary and secondary law of nature had been made by the Stoics, but not with this theological connotation.

were nothing else than the impression of the divine light in us". This is because "Grace does not abolish Nature but perfects it", and because Revelation similarly perfects Reason. Again, "St. Augustine says: 'There is no law unless it be just'. So the validity of law depends upon its justice. But in human affairs a thing is said to be just when it accords aright with the rule of reason: and . . . the first rule of reason is the Natural law. . . . And if a human law is at variance in any particular with the Natural law, it is no longer legal, but rather a corruption of law".<sup>1</sup> In the Reformed theology, with its insistent emphasis on the "total depravity" of human nature since the Fall, the place accorded to natural reason by the Schoolmen was, indeed, taken (in part) by the doctrine of "common grace": but the result, in the present context, was not substantially different.<sup>2</sup> And in England the influence of Hooker tended to preserve the doctrine of the Schoolmen, for he taught that man always had knowledge of "Law Rational", that is, "the law which human nature knoweth itself in reason universal bound thereto" and which embraces "all those things which men by the light of their natural understanding evidently know (or at leastwise may know) to be be seeming or unbeseeing, virtuous or vicious, good or evil for them to do."<sup>3</sup>

In the hands of Grotius the Arminian and, still more, in the hands of the rationalists of the succeeding centuries the idea underwent a further change—back, in effect, to an attitude adumbrated by the Sophists.<sup>4</sup> Grotius himself put forward, as no more than a theoretical abstraction, the thesis that natural law would be valid even if there were no God or the affairs of man were no concern to Him.<sup>5</sup> But to many of his successors this was much more than a theoretical assumption. The whole concept, moreover, changed from a theory of natural law to a theory of natural rights, with a primary emphasis on the individual. The focal point was not the natural law of God which men could, in part, comprehend but the inherent and "sacred" rights of man.<sup>6</sup> It was thus that the Virginian Declaration of Rights, 1776, asserted that all men had "certain inherent rights"; it was thus that the American Declaration of Independence

<sup>1</sup> *Summa theologica*, as quoted by d'Entrèves, *Natural Law*, at 39–43.

<sup>2</sup> For the idea of a law "written on the heart" was thoroughly Biblical: cp. Romans 2: 12–16. What the Reformers denied was that "the order of the precepts of the natural law" was, since the Fall, "according to the order of natural inclinations", or that man now has "a natural inclination to know the truth about God" and can trust his own natural reason (Cp. *Summa theologica*, as quoted in Rommen, *The Natural Law*, 49).

<sup>3</sup> *Social and Political Ideas of the Sixteenth and Seventeenth Centuries*, London, 1926, 73 (chapter by Prof. N. Sykes).

<sup>4</sup> See above, and cp. Rommen, *The Natural Law*, 10 and 11.

<sup>5</sup> *De Iure Belli ac Pacis*, Prolegomena, para. 11, as quoted by d'Entrèves, *Natural Law*, at 52.

<sup>6</sup> Another characteristic of natural law as developed by thinkers of the Enlightenment was the belief that human reason could evolve a complete system of this law down to the most minute details.

<sup>7</sup> J. W. Jones, *Historical Introduction to the Theory of Law*, Oxford, 1940, 119.

declared that men are "endowed by their Creator with certain unalienable rights" which are "self-evident"; and it was thus that the French National Assembly "resolved to lay down, in a solemn Declaration, the natural, inalienable and sacred Rights of Man."<sup>1</sup>

Not many years ago even this, however, would have sounded somewhat of an echo of a by-gone day. But such ideas have recently gained a new lease of life by the Universal Declaration of Human Rights adopted in 1948 by the General Assembly of the United Nations in Paris. In large part, no doubt, such declarations can be dismissed by lawyers as 'ideological programmes or metaphysical ideals'. But even in the common law the idea of natural law, in some of its connotations, has always survived, as Pollock reminds us, "under the name of reason, reasonableness, or sometimes natural justice . . . but the difference of terminology has tended to conceal the real similarity from English lawyers during the last century or more."<sup>2</sup> It is in the theory of the law of nature, too, that Pollock finds the "origin both of the maxim, still received, that a custom cannot be good if it is contrary to reason, and of the doctrine—now rejected, but current . . . down to the eighteenth century—that a statute may be held void for being repugnant to reason or 'common right'."<sup>3</sup> It is on this concept, again, but in rather different connotations, that both the validity of the law merchant has been held to be based<sup>4</sup> and the foundations of modern International Law have been built—for this law has been considered to be "founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage."<sup>5</sup> It is in part, moreover, in the validity of this basic concept that the justification for the Nuremberg trials must be found; for such, as d'Entrèves has pointed out, is the origin of the assertion "So far from it being unjust to punish him, it would be unjust if his wrong were to go unpunished", and of the rejection of the defence of superior orders.<sup>6</sup> Somewhat similarly, the French

<sup>1</sup> d'Entrèves, *Natural Law*, 48 ff.

<sup>2</sup> Pollock, *Essays in the Law*, 31.

<sup>3</sup> d'Entrèves, *Natural Law*, 42. For a discussion of the idea of "fundamental law" in English legal history, cp., *inter alia*, J. W. Gough, *Fundamental Law in English Constitutional History*. And Mr. R. O'Sullivan, Q.C., has argued persuasively "that the law of nature was throughout the creative centuries of the common law a familiar idea and a guiding principle among lawyers and judges, and that it may even be said to be the source or spring of the common law as it was conceived and developed by Bracton and Fortescue and Littleton, and Thomas More and Christopher St. Germain and Coke and Holt, and even by Blackstone"; while he also emphasizes both the "identity of meaning and use between the law of nature of the canonists and the law of reason of the common lawyers" and the vital role played throughout long periods of English legal history by the "concept of a universal law of nature, that is superior to Pope and Prince and Parliament". ("Natural Law and Common Law," *The Grotius Society*, 1946, 119, 129 and 138).

<sup>4</sup> Sir John Davis, *Concerning Impositions*, as quoted by Pollock, *Essays in the Law*, at 55.

<sup>5</sup> Cp. Silesian Loan Case (opinion of English law officers), quoted by Pollock, *ibid.*, at 64.

<sup>6</sup> *Natural Law*, 110.

Civil Code makes it incumbent on a judge who can find no relevant provision to rely on the principles of natural equity in reaching a decision. As for the concept of divine law, it comes as somewhat of a shock to the modern lawyer to read the dictum of Chief Justice Bert, in 1828, that "There is no act which Christianity forbids that the law will not reach: if it were otherwise, Christianity would not be, as it has always been held to be, part of the law of England."<sup>1</sup> This, it can confidently be asserted, was an outrageous overstatement; but the influence of the Christian religion on the common law and statute law of England is still not far to seek, while it was only as recently as 1917 that the Lord Chancellor, in his dissenting judgement in the House of Lords in the famous case of *Bowman v. The Secular Society Ltd.*, could say that it had been "repeatedly laid down by the Courts that Christianity is part of the law of the land, and it is a fact that our civil polity is to a large extent based upon the Christian religion. . . . (This) is quite sufficient reason for holding that the law will not help endeavours to undermine it."<sup>2</sup> Both natural law and divine law represent, therefore, in Western thought the notion of an eternal justice; "a justice which human authority expresses, or ought to express—but does not make; a justice which human authority may fail to express—and must pay the penalty for failing to express by the diminution, or even the forfeiture, of its power to command. This justice is conceived as being the higher or ultimate law, proceeding from the nature of the universe—from the Being of God and the reason of man. It follows that law—in the sense of the law of the last resort—is somehow above law-making. It follows that lawmakers, after all, are somehow under and subject to the law."<sup>3</sup>

But all this concerns the Western world, and comparatively well-trodden paths. Yet this basic idea is by no means confined to the West. Among the Chinese,<sup>4</sup> for example, a variety of concepts which bear a distinct resemblance to some, at least, of those which have thriven in Europe, lie at the very basis of legal thought. From the earliest times the Chinese believed that Heaven or the heavenly Emperor (*T'ien Ti*) was the ancestor of man, and that the Son of Heaven (*T'ien Tzū*) or the earthly Emperor had the duty of leading mankind to follow the behests of Heaven, chiefly disclosed by oracles. Later, but at least as early as Confucius, the notion developed that Heaven had implanted in men's

<sup>1</sup> Quoted in Macmillan, *Law and Other Things*, Cambridge, 1937, 70.

<sup>2</sup> A.C. [1917], 406 ff., at 428.

<sup>3</sup> To borrow words used of natural law alone by Sir Ernest Barker, *Traditions of Civility*, 312-13. It is impracticable, in the scope of this paper, to discuss the views of recent advocates of natural law. The tendency is, however, to give it severely restricted scope and to recognize changing applications.

<sup>4</sup> I am indebted, in this outline of Chinese concepts, both to my colleague Mr. H. McAleavy and to the contribution of Hu-Shih to the 1951 *Proceedings of the Natural Law Institute*—from which the quotations have been taken.

breasts a consciousness of its behests, so the road to right conduct lay in self-scrutiny. In the sixth century B.C. Lao-tzu, allegedly the teacher of Confucius, laid great emphasis on the Way (or Law) of Heaven (*T'ien-tao*), which he conceived in terms of man standing aside while Heaven itself worked out its will. This concept was given a new meaning in the fifth century B.C. by Mo-Ti, who taught that the Will of Heaven (*T'ien-chih*) should be the criterion both of moral judgement and human law. "Now I have the Will of God, I shall use it to measure and judge the laws, penalties, and governments of the kings, princes, and grand officers of all states in the world; and I shall use it to measure and judge the words and acts of all the people. Whatever is in accordance with the Will of God is right; whatever is opposed to it is wrong."

Again, in the third century B.C., in the earliest extant commentary on the *Book of Lao-tzŭ*, it is stated that "*Tao* (the way of the law of Heaven or Nature) is that by which all things become what they are; it is that with which all *li* (the law of things) is commensurable. Each of the ten thousand things has its own distinct *li* but the *tao* commensures the *li* of all things." Similarly Mencius, at about the same date, affirmed that "All mouths of men agree in enjoying the same relishes; all ears agree in enjoying the same sounds; all eyes agree in recognizing the same beauty. Is there nothing which all minds agree in affirming to be true? What is it then which all minds recognize to be true? It is *li* (universal law) and *i* (universal right)."

Both in the classical language and in popular parlance, moreover, the terms *Tao-li* (literally the way, or law, of reason) and *T'ien-li* (literally the way, or law, of Heaven) are of frequent occurrence. *T'ien-li*, indeed, was sometimes regarded as interchangeable with *T'ien-tao*; but at other times the latter was used of the universal, immutable law of God or Nature and the former of that law in its manifold manifestations in the universe.

It is noteworthy, however, that the Chinese concept does not stress the natural rights of man as an individual, but insists instead on his duty of proper subjection in his various human relationships. As a result, moreover, of the distinctively Chinese identification of Heaven in its moral or spiritual sense with Heaven in the sense of physical nature, human conduct is regarded as so much part of the natural order that improper behaviour causes such disruption in the rhythm and harmony of the universe as to result in various kinds of natural calamities.

In addition, the canon of sacred Scripture of Confucianism was, until fairly recent times, revered in China as the highest authority in all matters of morals, law, social relations and government policy. Thus these Scriptures represented, to the Chinese, something very close to the concept of divine law: a law to which social reformers and political critics continually appealed, and which the most despotic ruler scarcely dared openly to challenge.

The doctrine outlined above remained the dominant force in China till the end of the Empire. It was modified in part, however, by the opinions of the Legalists, who were especially influential during the fourth to third centuries B.C. and insisted on the necessity for positive law and, in particular, severe penal codes which must be administered with impartial severity. This new emphasis not only played its part in the unification of China under Ch'in Shih Huang in the third century B.C., but gave rise to a whole succession of dynastic penal codes. Yet many provisions of these codes, especially those of a "civil" or "family" nature, seem to have been regarded more as official enunciations of an ideal than as binding enactments; and the pure Confucian doctrine remained throughout in the ascendant.

Among the Hindus<sup>1</sup> somewhat similar ideas were current. Thus the term *Rta*, which is a Vedic expression not used by the classical jurists, is said to include the three meanings of "the course of nature", "the correct and ordered way of the cult of the Gods", and "the moral conduct of man."<sup>2</sup> But the key to the Hindu ideal of life is provided by the term *Dharma*, again of Vedic origin, which is used in classical Sanskrit in the sense of the totality of positive and negative injunctions derivable from the Veda (the source of all knowledge), as interpreted by the prehistoric Sages, applicable to an individual and relating to his sex, age, station in life and civil function. It is also permissible to refer to the sum total of all *dharma*s as *dharma* in the abstract. Thus every human being has his or her own individual *dharma* to practice; and this constitutes what may be termed the God-given law of man's being which, though difficult to discover in its individual application, is yet immutable in its essence—and every transgression of which involves the most serious consequences, in future existences if not also here and now. It is the duty of the king, moreover, to uphold and enforce *dharma*s (or *dharma* in general). In theory he cannot legislate, or his powers of legislation extend only to issuing particular orders in particular cases; instead, it is for him to apply this eternal law, to which he is himself subject.

The doctrine that all civilized peoples have certain institutions and laws in common did not, however, impress the ancient Hindus, because their learning, by definition, came from a particular revelation to which they alone were heirs. Yet reason was certainly called in aid both to elucidate (and thus apply and expand) the sacred sources and to mitigate the untoward effects of a rigid or too literal application of an unequivocal injunction. It is thus that *nyāya* (the science of reasoning) is frequently used to prevent a text being applied without due regard to what amounts to equity or "natural justice".

<sup>1</sup> I am indebted, in this summary of Hindu ideas, to my colleague Dr. J. D. M. Derrett.

<sup>2</sup> By Dr. V. Kane, in *History of Dharmasāstra*, Poona, 1930, IV, 2-5.

Again, the notion of Eternal Right (*sanātana-dharma*) has always been a vital influence in India. Although the concept is, clearly, exceedingly difficult to define or apply with any precision, yet most Indians have always felt that they know the essential difference between what corresponds thereto and what does not. And the ancient courts certainly claimed to apply this notion as it was embedded in the traditional wisdom of their remote Aryan ancestors, distilled through the trained minds of successive generations of professional commentators.

When we turn to the Jews<sup>1</sup> we find that their whole attitude was dominated by the idea of divine law. The Old Testament is full of laws, yet scarcely a law properly so called emanates from king or council. There was only one Lawgiver, and only one Source of the law which governed the community: "The Lord is our Judge; the Lord is our Law giver; the Lord is our King."<sup>2</sup> And this fact is emphasized in the very form of many Biblical laws, which frequently end in the refrain "I am the Lord."<sup>3</sup> The Rabbis, moreover, reinforced this attitude when they emphasized that the people of Israel were not the servants of their kings, but of God alone. Thus we read in the Talmud:<sup>4</sup> "To Me are they servants, but they are not servants to other servants."

Yet from an early date the divine law as revealed in the Old Testament Scriptures was augmented by a great body of oral law, as developed by generation after generation of pious scholars. In theory, however, this was as much divine law as that written in the Scriptures, for the doctrine prevailed that God had given Moses on Sinai both a written and an oral law. Not only so, but all that was progressively included in this oral law came to be regarded as revealed to Moses himself, for the Talmud says: "Whatever a competent student, in the presence of his teacher, will yet derive from the Law, that was already given to Moses on Mount Sinai."<sup>5</sup> And this oral law, with its age-long development, represents, on the one hand, a massive extension of the Old Testament law by means of human reasoning and argumentation and, on the other, an avoidance of the implications of some of the sacred texts by a process of casuistry. These developments, moreover, were in part facilitated by the distinction which the Rabbis made between those features in the divine law which could not be understood by man but must be implicitly obeyed<sup>6</sup> and those

<sup>1</sup> I am indebted, in these references to Jewish ideas, both to my colleague Mr. I. Wartski and to Rabbi Solomon Freehof's contribution to the 1951 *Proceedings of the Natural Law Institute* (15 ff).

<sup>2</sup> Isaiah 33: 22.

<sup>3</sup> Cp. Lev. 19.

<sup>4</sup> Kiddushin 22, 2.

<sup>5</sup> j. Megillah IV, 74 d.

<sup>6</sup> E.g. the law concerning the red heifer (Numbers 19). What seems particularly to have mystified the Jews was the fact that, while its ashes served to purify the unclean, yet those concerned with its slaughter, etc., suffered defilement. Thus the relevant section of the *Pesiqta Derav Kahana* states: "But God said: 'A statute have I made, a decree have I decreed, and you are not permitted to transgress them'."

features whose underlying purpose could be apprehended and even extended by analogy.<sup>1</sup>

It might, moreover, be argued that the Old Testament itself includes a doctrine of natural law in the passages in honour of that Wisdom by which "Kings reign, and princes decree justice" and "princes rule, and nobles, even all the judges of the earth"; and which was, itself, "set up from everlasting, from the beginning, or ever the earth was".<sup>2</sup> But Wisdom, in these passages, seems so manifestly personified as to become the Old Testament equivalent of the New Testament divine Logos.<sup>3</sup>

In the Muslim theory the divine law (the Shari'a) is, again, wholly paramount. It governs every aspect of life and constitutes a complete code of conduct or scheme of duties. Every act of man is classified, according to a widely accepted system, as either commanded, approved, left legally indifferent, disapproved or forbidden by God Himself, Who is regarded as the only Lawgiver. True, it is the duty of the Caliph or Sultan to lead the Muslim community in war and act as its executive in peace; but he is under, not above, the sacred Law and may not meddle in what God has prescribed. It is, at the most, only within the category of acts which are left legally indifferent by the Shari'a that the ruler can properly legislate; and even then the jurists preferred to regard his injunctions as administrative regulations rather than actual legislation.

The sphere of human positive law is, then, completely subordinate, in the Muslim view, to the divine law. Similarly, in the opinion of the most orthodox school of Muslim theologians, there is no place whatever for any concept of natural law; for the Ash'aris denied not only that man's reason is competent to apprehend, of itself, the difference between virtue and vice but even that such qualities as virtue and vice exist *per se*, or have any meaning whatever, apart from divine Revelation. It is true that all Muslim jurists agree that certain qualities, such as justice, enhance a man's prestige, while others, such as oppression, undermine it; that some acts conduce to certain purposes and further their ends, while others do not; and that human reason can perceive and appreciate factors such as these.<sup>4</sup> But the Ash'aris denied that man could, of himself,

<sup>1</sup> For a discussion of a "civil" law, based on statutes of the community and applied according to the "dictates of reason", among the Jews of Spain in the fourteenth century A.D., see an article by J. L. Teicher "Laws of Reason and Laws of Religion" in *Essays and Studies Presented to Stanley Arthur Cook*, London, 1950, 83 ff. Teicher suggests that the "dictates of reason" in this context represents the *ius naturale* of Roman law.

<sup>2</sup> Proverbs 8.

<sup>3</sup> The emphatic insistence on the need for social justice and righteousness which marked the writings of the Prophets is also relevant in this context.

<sup>4</sup> I am indebted in these passages to Maḥmūd Abū Daqīqa, *al-Qawl al-Sadīd*, Volume for Third Year Students of Theology at the Azhar, 229 ff.



perceive any quality in human acts which is intrinsically praiseworthy on earth and meritorious in heaven, or which deserves blame on earth and punishment in heaven. More, they denied that there was in fact any essential quality in the acts themselves which made them so. God did not command some things and forbid others because the first were intrinsically good and the second intrinsically evil; on the contrary, the former were only virtuous because God commanded them, and the latter vicious because He forbade them.<sup>1</sup>

But this theory, though dominant, was by no means undisputed in Islam. The Mu'tazilīs, for instance, took a very different view. They asserted that human acts were either good or bad in themselves, and that God commanded the good because it was good and forbade the bad because it was evil. More, they held that in some cases human reason could perceive, independently of any direct Revelation, that an act was good or bad in itself, and in this case Revelation did no more than confirm the judgment of the human mind; in other cases, however, man could not,<sup>2</sup> of himself, perceive the essential virtue or vice inherent in an act, and in these circumstances it was only direct Revelation which made manifest the essential nature of the acts concerned.<sup>3</sup>

Yet others, such as the Māturīdīs and many Ḥanafī jurists, took up an intermediate position. They agreed with the Mu'tazilīs that human acts were in fact good or bad intrinsically, and that human reason could in some cases perceive their quality even apart from Revelation. But, unlike the Mu'tazilīs, they refused to admit that the perception of what was virtuous or vicious involved any apprehension of a divine command or prohibition—except, according to al-Māturīdī and the Shaykhs of Samarqand, in regard to the basic duty of belief in God and his Prophet, while the Shaykhs of Bukhara excluded even this. They denied, therefore, any duty or responsibility to practice virtue or abstain from vice before

<sup>1</sup> The similarity between this attitude and that of Duns Scotus and, still more, William of Occam, among the Scholastics, is most striking. Thus Rommen says of the former that he believed that "morality depends on the will of God. A thing is good not because it corresponds to the nature of God or, analogically, to the nature of man, but because God so wills"; and of the latter that for him "the natural moral law is positive law, divine will. An action is not good because of its suitability to the essential nature of man . . . but because God so wills. God's will could also have willed and decreed the precise opposite . . . Thus, too, sin no longer contains any intrinsic element of immorality . . . it is an external offense against the will of God" (*The Natural Law*, 58 f.).

<sup>2</sup> Not, however, because of any doctrine of Original Sin, but rather the inscrutability of many divine commands.

<sup>3</sup> Here the affinity is with Aquinas among the Scholastics, for he found the basis for natural law not *primarily* in the will of God but in His divine essence and reason; and thence also in the nature and reason of man.

the Law had been enunciated.<sup>1</sup> It is plain, then, that the concept of natural law is utterly alien to the Ash'arī philosophy of life but is basic to the Mu'tazalī opinion, while the Māturīdīs and Hanafīs fall somewhere between the two viewpoints.

Nor is this all. Even within the divine law as represented by the Shari'a, it must be emphasized, there is an enormous amount which has been deduced by the mind of man. Even in the classical theory of Islamic jurisprudence it is acknowledged that the early jurists, in default of a relevant text, relied on their own judgment as to what best accorded with the spirit of the sacred law. And although this liberty of judgment later became progressively restricted to a strict process of analogical deduction, the Hanafīs allowed their early jurists on occasion to discard the rule to which the ordinary application of analogy would lead in favour of a view they felt to be "preferable", while the Mālikīs (and others) allowed rules to be accepted, where no divine text applied, because they appeared to be in the general interests of the community. Again, a distinction was often made between those divine commands the reason for which was beyond human understanding and which must therefore be blindly obeyed (*al-ta'abbud*) and those commands which were conceived as designed to confer some distinct and recognizable benefit on man and which might, in certain circumstances, be interpreted and applied accordingly. But the dominant emphasis was always on the inscrutability of the divine commands—a consideration which was often called in aid to justify those "devices" which the jurist-theologians of Islam themselves invented to enable persons to achieve by indirect means, and without any direct infringement of the letter of the law, purposes which would otherwise have been frustrated by the presence of some express and definite prohibition.

Even when we turn to customary law, moreover, we find that somewhat similar ideas, although in a far less developed form, are frequently inherent in such legal theory as exists. To take an example from Africa, Professor Max Gluckman affirms that the Lozi of Northern Rhodesia

<sup>1</sup> This controversy resembles, but with a difference, that between Vasquez, and Suarez and Bellarmine, among the late Scholastics. Thus Vasquez "regarded rational nature, irrespective of the positive will of God, as the primary ground of the obligation to obey the natural law. For him, consequently . . . the natural law is not properly law in the strict sense". For Suarez and Bellarmine, on the other hand, the natural law is "a judgment of reason which presents actions as commanded or forbidden by the Author of reason, because the light of reason shows them to be in agreement or disagreement with man's essential nature; and at the same time reason judges that God wills that which accords with nature" (Rommen, *The Natural Law*, 64 f.). Similarly, Grotius on the one hand "defended the nominalist doctrine that essentially bad acts are evil, not because they are intrinsically at variance with God's essence, but because they are forbidden by God"; yet on the other hand defined the law of nature as "a dictate of right reason which points out that an act, according as it is or is not in accordance with rational and social nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God" (*ibid*, 71 f.).

generally consider that "their major laws are *milao yabutu*, laws of humankind, or *milao yaNyambe*, laws of God, and that they embody general principles of morality. They believe that these laws and principles are themselves obvious and self-evident to all men, even to Whites".<sup>1</sup> The term *milao yaNyambe* is, it seems, primarily used by the Lozi of the laws of nature in a material or scientific sense, and *milao yabutu* of those other laws of God "which more patently refer to certain moral premisses in Lozi social life" or which "lie at the basis of social life everywhere".<sup>2</sup> Thus the Lozi consider that fundamental questions of right and wrong are inherent in the reason (*ngana*) of man, are obvious to and accepted by men of all tribes and nations, and ultimately derive from God.<sup>3</sup> And Professor Schapera, writing of the kindred Tswana people, informs us that they speak of their laws "as having always existed, from the time that man himself came into being; or as having been instituted by God (*Modimo*) or by the ancestor spirits (*badimo*)."<sup>4</sup>

No attempt need here be made to analyse, or to compare in detail, the different concepts of divine or natural law which have prevailed, respectively, among the Chinese, Hindus, Jews, Muslims, Greeks, mediaeval Schoolmen and eighteenth-century Rationalists, for instance. Nor is there any call to try to determine the extent of the debt owed by the Muslims to the Jews and the Greeks; by the Schoolmen and Canonists to the Jews, the Greeks and the Arabs; or by any two groups to some common source. It is enough—and this is, indeed, the primary conclusion of these reflections—to emphasize the fact that the basic idea of a transcendent law, whether expressly enjoined by the Creator or inherent in His creation, is by no means confined to any one people or civilization. On the contrary, it seems to represent a conviction which is in some sense common to mankind—a conviction which may, indeed, be disparaged or denied in periods of sophistication, tranquillity and agnosticism but which regularly reappears—as has been noted by more than one writer—in times of despotism, jeopardy or a return to religious faith.

It is also, however, of considerable interest to observe the prominent, and even somewhat equivocal, part which is being played by some of these concepts in contemporary developments in Asia and Africa. Thus the Fundamental Rights enunciated in the Indian Constitution may, in practice, represent little more than the basic liberties previously enjoyed under the common law, just as they are, beyond question, protected and enforced by the equivalent of the English prerogative writs. But, however this may be, their enunciation as "fundamental rights" clearly betrays their connection with the American and French Declarations and, through these, with the doctrine of natural law in its eighteenth-century

<sup>1</sup> Max Gluckman, *The Judicial Process among the Barotse*, Manchester, 1955, 203.

<sup>2</sup> *Ibid*, 165.

<sup>3</sup> *Cp. ibid*, 203.

<sup>4</sup> I. Schapera, *A Handbook of Tswana Law and Custom*, Oxford, 1938, 39.

guise of the inherent rights of man. As such, moreover, it is fascinating to observe how they are being called in aid to-day to abrogate some of those institutions, such as caste, which partake, to Hindus, of the nature of divine law as enjoined by their revealed religion.

Thus Article 14 of the Indian Constitution provides that the State "shall not deny to any person equality before the law". Article 15 goes further and lays it down that, as between citizens, the State may not discriminate on grounds only of religion, race, caste, sex or place of birth; and that no citizen may, on these grounds, be subjected to any disability, liability, restriction, or condition with regard to access to any buildings or facilities maintained out of State funds or dedicated to the use of the public. Article 17, moreover, forbids "untouchability" in explicit and general terms, and declares that the enforcement of any disability arising therefrom shall constitute an offence punishable by law. And appeal may, of course, be made to these rights against any statute which is alleged to infringe their terms. But it must be observed that while the phrase "equality before the law" has been interpreted to mean the equal subjection of all persons to the law,<sup>1</sup> the phrase "equal protection of the laws" does not mean that all laws must be uniform, but rather that a law "may not discriminate for or against a person or class, unless there is a rational basis for such discrimination."<sup>2</sup>

Previously, indeed, the High Court of Bombay had on three occasions given the narrowest possible definition of the meaning of religion in so far as those clauses in the Indian Constitution which safeguard religious freedom are concerned;<sup>3</sup> but the Supreme Court has now ruled that

<sup>1</sup> *Surapayal Singh v. U.P.*, A.I.R. [1951] All. 674.

<sup>2</sup> A. Gledhill, *Fundamental Rights in India*, 42; cp. *Bombay v. F. N. Balsara*, A.I.R. [1951] S.C. 318. Two examples of attempts to impugn legislation (whether by statute or Government order) by an appeal to these Rights (e.g. Art 15 forbidding discrimination on grounds of religion *only*) may be cited by way of illustration. In the first, which succeeded, the Madras Communal Government Order of 1948, which allotted vacancies in Government colleges in fixed proportions between Brahmins, Non-Brahmin Hindus, backward Hindus, Harijans, Anglo-Indians, and Muslims, was held to be void, as deliberately classifying applications for admission to the colleges on the basis of caste and religions, irrespective of individual merit. (Gledhill, *ibid.*, p. 49). But, in the second, an attempt to impugn the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949, as discriminating between Hindus and Muslims on grounds of religion only was rejected by the Court, which held that the Constitution, by placing legislative power in respect of personal law on the Concurrent List, had recognized a classification already existing; and that the essence of this classification was not a matter of religion only, but a result of the fact that Hindus and Muslims had preserved their distinctive personal law throughout the centuries. (*Dorairajan v. Madras* A.I.R. [1951] Mad. 120. Cp. Gledhill. *op. cit.*, 50).

<sup>3</sup> "It is not every aspect of religion that has been safeguarded, nor has the Constitution provided that every religious activity cannot be interfered with. . . . Whatever binds a man to his own conscience and whatever moral and ethical principles regulate the lives of men, that alone can constitute religion as understood in the Constitution." [*Ratilal Panachand v. State of Bombay* (1953), 55 Bom. L.R. 86 (at p. 96)]. Cf. also *State of Bombay v. Narasu Appa*, A.I.R. [1952] Bom. 84 (at p. 86) and *Taher Saifuddin v. Tyebbhaji Moosaji*, A.I.R. [1953] Bom. 183 (at p. 188).

“Freedom of religion in the Constitution of India is not confined to religious beliefs only; it extends to religious practices as well, subject to the restrictions which the Constitution itself has laid down.”<sup>1</sup> Even so, legislation has been promulgated providing that outcastes and untouchables may enter temples,<sup>2</sup> in spite of the fact that this is utterly repugnant to the religious principles of the higher-caste Hindus who founded and endowed these temples, which have been desecrated and made unfit for worship, in their view, by the consequent influx of untouchables. Somewhat similarly, a statute of the Central Legislature has recently been enacted<sup>3</sup> providing that anyone who obstructs an “untouchable” in the exercise of any of the rights conferred by this Act shall be punishable; and that anyone who imposes any disability on one who refuses to practice untouchability will also be guilty of an offence. It is clear, then, that the Indian reformers are determined to abolish all distinctions of caste root and branch, in so far as this can be accomplished by legislation; and this in spite of the fact that caste is an institution both praised and rationalized in the *dharmasūtra*, which is regarded by all orthodox Hindus as representing divine law.

Somewhat similarly, the Bombay Prevention of Hindu Bigamous Marriages Act, 1946, penalizes polygamy, which the Hindu Scriptures sanction; the Hindu Marriage Act, 1955, provides for divorce, which their Scriptures prohibit, and permits persons to marry whose union, according to those same Scriptures, is incestuous; and the Special Marriage Act, 1954, facilitates the inter-marriage of Hindus and Muslims by means of a civil contract, although such marriages are absolutely forbidden by the religious law of both religions. It seems clear, then, that although the personal law of each religious community is being maintained, in general terms, for the present—in spite of the apparent inconsistency between this (and, in particular, some of the relevant rules) and the fundamental rights discussed above—yet the Indian reformers are already taking tentative steps in furtherance of Article 44 of the Indian Constitution, which provides that “The State shall endeavour to secure to the citizens a uniform civil code throughout the territory of India”. This can only be described either as a triumph of enlightenment over traditionalism or as a victory for natural law, in one of its connotations, over what has always been regarded as divine law.

There is, moreover, a marked similarity, in some respects, between the attitude of the Indian reformers and the position assumed by progressive opinion, in recent years, in the Muslim states of the Near and Middle East. Thus it was characteristic of the Ottoman and Egyptian reforms of the

<sup>1</sup> *Commissioner v. L.T. Swamiar*. A.I.R. [1954] S.C. 282, at 283.

<sup>2</sup> Cp. the Temple Entry Acts of Madras, Travancore and Bombay.

<sup>3</sup> Untouchability (Offences) Act 22 of 1955; cp. also the East Punjab Removal of Religious and Social Disabilities Act, 1948, and similar enactments in West Bengal and Bihar.

last century that life should be divided, in a way never before openly acknowledged in Islam, into two distinct spheres: the secular and the religious. This was to include (unlike India) a distinction between the Shari'a courts and the secular courts; and the intervening years have witnessed a progressive restriction of the sphere of the religious courts, and of the "divine" law which they apply, in such countries as Egypt, Syria, Lebanon, Iraq, Jordan and the Sudan. It would seem, however, that there is a certain difference of approach in this matter: for, whereas the progressive restriction of the sphere of religious law may appear to the Indian reformers as a triumph of reason (and thus, in a sense, of natural law) over tradition (represented by the alleged divine law), and so of the ideal over the retrogressive, the professed attitude of most Muslims in the Near and Middle East has always been to recognize the Shari'a as the ideal, and to seek to justify all departures therefrom as regrettable concessions to the exigencies of modern life.<sup>1</sup> Yet this attitude can scarcely be consistently maintained. For the Muslim reformers have not been content only to replace the divine law, in so far as criminal and commercial law (and much else) is concerned, by codes of predominantly Western and secular inspiration, but have also been actively engaged in the reform of the religious law itself, as applied by the Courts. Thus a number of attempts have been made in country after country, to put an end to child-marriage, although this is regarded, by the orthodox Muslim, as sanctioned by the divine law as revealed, in this instance, by the inspired example of the Prophet<sup>2</sup>; a scheme was devised in Egypt, and has been given legislative effect in Syria, restricting the right of a Muslim to have more than one wife;<sup>3</sup> and a number of not very decisive steps have been taken towards limiting a Muslim husband's unrestricted right of unilateral divorce.<sup>4</sup> Yet it is significant that these innovations have everywhere, except in Turkey, been introduced by means of some device or formula which either professes to re-interpret the sacred law or at least to avoid any direct repudiation of its dictates.

<sup>1</sup> It should be noted in this context that in Sa'udi Arabia and the Yemen the sacred law still reigns supreme, nominally at least; while in Turkey it has been completely abandoned, officially, in favour of a wholly secular law.

<sup>2</sup> E.g. in Egypt (Cp. article by J.N.D. Anderson, "Recent Developments in Shari'a Law, III", in *The Muslim World*, April 1951, 113 ff.); in Lebanon under the Ottoman Law of Family Rights (Cp. 116 f.); in Jordan (Cp. "Recent Developments in Shari'a Law, VIII", in *The Muslim World*, July 1952, 191 ff.); and in Syria (Cp. "The Syrian Law of Personal Status", in *B.S.O.A.S.*, 1955, 37 f.).

<sup>3</sup> Cp. "Recent Developments in Shari'a Law, III", 122 ff. and "The Syrian Law of Personal Status", 36 and 38.

<sup>4</sup> Cp. "The Problem of Divorce in Shari'a Law", in the *Journal of the Royal Central Asian Society*, 1950, XXXVII, 2, 171 ff.; "Recent Developments in Shari'a Law, V", in *The Muslim World*, Oct. 1951, 274-7 and 287-8; and "The Syrian Law of Personal Status", 39-40 and, especially, 41-2.

There can be no doubt, moreover, that problems of a broadly similar nature will arise, before long, in Pakistan. Unlike India, which is now a secular Republic, Pakistan has been proclaimed to be an "Islamic Republic", and the Qur'an and Sunna have been acknowledged as fundamental to the Pakistani way of life. It may well be, of course, that this represents little more than a recognition that the very *raison d'être* of Pakistan was the desire of most of the Muslims of the Indian sub-continent to form a state in which they could follow their own religion and culture without any possible dominance by the Hindu majority and, as such, may mean no more than the claims which have sometimes been made that Christianity is part of the law of England. It certainly seems most unlikely that the prescriptions of the Shari'a regarding hand-cutting for theft, stoning for adultery or death for apostasy from Islam will in fact be imposed in Pakistan, or that witnesses will be considered ineligible in that country by reason only that they are not Muslims.<sup>1</sup> Moreover, experience in Egypt<sup>2</sup> shows how difficult it is for a modern state to put the clock back, and to abandon "Western" law for a code which is basically Islamic. In particular, it seems wholly impracticable to maintain the traditional prohibition of any loan at a fixed rate of interest, even if room is left for those "devices" which have always made it possible for this rule to be largely evaded in practice.

Nor is the field of possible conflict limited to that between the new outlook which now prevails in the Orient—whether regarded as "Western" or as founded on natural law and the fundamental rights of man—and the religious or "divine" law. Another fertile source of conflict is between customary law and divine law, as exemplified, for instance, in those Muslim communities—whether in Africa, Malaya or Indonesia—which still follow a matrilineal system of inheritance, for among such the Quranic injunctions regarding succession are consistently flouted. In British colonial territories, moreover, the application of both customary and Islamic law is commonly restricted by a proviso that it must not be contrary to "natural justice"—a phrase which clearly makes a direct appeal to the doctrine of natural law. Similarly, on the positive side, the concept of the law of nature, which was formerly one of the means by

<sup>1</sup> This last point might, in any case, be regarded as contrary to the fundamental right of equality before the law.

<sup>2</sup> Where 'Abd al-Razzāq al-Sanhūrī, the chief architect of the recent Civil Code, while claiming that he would yield pride of place to no one in his love for the Shari'a, not only admitted that little that was new had in fact been borrowed exclusively therefrom, but stated categorically that "I assure you that we did not leave a single sound provision of the Shari'a which we could have included in this legislation without so doing. We adopted from the Shari'a all that we could adopt, having regard to sound principles of modern legislation; and we did not fall short in this respect" (J. N. D. Anderson, "The Shari'a and Civil Law", *The Islamic Quarterly*, I, April 1954, 29 ff.). But the attempt to draft a civil code with the Shari'a as its primary source is, it seems, being pursued in Syria.

which the sway of Roman law, often regarded as "written reason", was extended in Europe, has in the modern age been used to expand the sphere of application of the common law; for in India and elsewhere British courts have been empowered, in default of any other suitable law, to decide litigation in accordance with the dictates of "justice, equity and good conscience";<sup>1</sup> and this, in turn, has been held to mean the rules of English law so far as they are applicable to the society and circumstances.<sup>2</sup> And it is interesting to observe a similar development in the Egyptian Civil Code of 1948, where the first article enacts that "In the absence of any provision which is applicable, the Judge shall decide according to custom and, in the absence of this, in accordance with the principles of the Shari'a. In the absence of these, the Judge shall apply the principles of natural justice and the dictates of equity".<sup>3</sup>

It is intriguing to speculate, moreover, about the various attitudes of mind which may characterize those Muslims and Hindus, for instance, who are faced by cases of conflict, whether apparent or real, between their divine law as it has always been interpreted and those more liberal ideas which may appeal to them, consciously or unconsciously, as natural law. An equivalent to the mediaeval dichotomy between Church and State, or between the religious and the secular, may represent a workable compromise in practice, but scarcely provides a satisfying synthesis. Some, no doubt, still regard the divine law, as authoritatively expounded, as the basic ideal, but recognize that circumstances in the modern world are singularly adverse to its application; but this, too, scarcely resolves the conflict. Others, again, feel that their theologians and jurists went astray in some, or even many, of their deductions, and that the divine law, in its essence, cannot be at variance with what their reason now approves. Yet others would, no doubt, draw further distinctions, and regard part of their sacred law as representing the eternal law and part as inspired concessions to human weakness, or to the circumstances of time and place.<sup>4</sup> Such, it seems, is an increasingly common attitude among Muslims towards such matters as the ideal of monogamy on the one hand and concessions to polygamy on the other. And there are some, no doubt, who have been

<sup>1</sup> Thus a Bengal Regulation of 1793 prescribed that, where no indigenous laws were properly applicable, the judges were "to act according to justice, equity and good conscience"; and Pollock remarks that, English officials in India being what they were, they naturally interpreted these words as meaning such rules and principles of English law as they happened to know and considered applicable (*Essays in the Law*, 75).

<sup>2</sup> 14 I.A. (1886-87) at 96.

<sup>3</sup> These provisions reappear, but in a different order, in the Syrian Civil Code, 1949.

<sup>4</sup> Cp. Hooker's view that positive laws, whether human or divine, were "either permanent or else changeable according as the matter itself is concerning which they were first made; whether God or man be the maker of them, alteration do they so far forth admit as the matter doth exact" (*Social and Political Ideas of the Sixth and Seventh Centuries*, 77). This represents a radical way in which the alleged immutability of divine law may, in part, be denied and avoided: cp. Matt. 19: 8.



impelled by such considerations to doubt the basic validity of their revealed religion.

Nor is it possible for the Christian lawyer to conclude such reflections without some consideration of the attitude which he must himself take to this whole question of law—divine, natural and positive. Only a very tentative and general answer can be attempted in the concluding paragraphs of this paper; but certain basic considerations seem sufficiently clear.

To the Christian, in the first place, God has spoken, through both the Old and New Testament Scriptures and, pre-eminently, through Christ Himself. In the Old Testament, in particular, there is much that can only be described as divine law; and this may be subdivided into the moral law, the ceremonial law and the law designed to govern the Hebrew people in their tribal and national life. This last (part of which, moreover, clearly represents concessions to human weakness or modifications of the moral law to meet the needs of a very imperfect community)<sup>1</sup> has accomplished its purpose with the substitution of a spiritual Church for a theocratic nation,<sup>2</sup> and has thus been "fulfilled";<sup>3</sup> and the ceremonial law has also done its work in pointing to Christ and His redemption, and has now no other significance: but the moral law, although equally fulfilled in Him, is itself of eternal and unchanging validity, and has been re-emphasized and re-imposed in the New Testament—although more by way of the enunciation of principles than the prescription of detailed regulations.

Equally, however, the Christian believes that this moral law may be known, in part,<sup>4</sup> even without special Revelation. It is thus that God's eternal power and Godhead are "understood" by observation and reason<sup>5</sup>; and it is thus that those who have no Revelation may prove that the requirements of the divine law are "written in their hearts" and consciences, and may fulfil its precepts "by nature".<sup>6</sup> And this applies, of course, to those who belong to any other religion, even where the Christian cannot accept what they claim as direct Revelation to be authoritative as such.

Yet again, the Christian lawyer will recognize the absolute necessity for human positive law. He may, of course, belong to more than one school of jurisprudence in his view of how this law should be defined, the sources from which it is derived, and what constitutes its binding force.

<sup>1</sup> Cp. Matt. 19 : 8 and above.

<sup>2</sup> Cp. Matt. 21 : 43; 1 Peter 2 : 9.

<sup>3</sup> Cp. Matt. 5 : 17.

<sup>4</sup> That is, in its basic principles, rather than its detailed applications, many of which may, in any case, vary to some degree according to circumstances.

<sup>5</sup> Rom 1 : 20.

<sup>6</sup> Rom. 2 : 14, 15.

But he will also regard it as binding on his conscience—except, that is, in so far as it may in some cases run diametrically counter to the transcendent law as directly or indirectly revealed—because the divine law has itself made him subject to “every ordinance of man”<sup>1</sup> and has enjoined on him all the duties of good citizenship<sup>2</sup>, while he can also readily appreciate the chaos to which any other attitude would lead. Where, however, any clear case of conflict may arise, this must be recognized for what it is; and he should neither assert that the divine law abrogates the positive law as such or that the positive law absolves from obedience to the divine. Instead, he should use every legitimate means to remove any radical contradiction between the law of the State and the law of God or Nature—while recognizing that there must always be a certain antithesis between them<sup>3</sup> and avoiding, to the best of his ability, all attempts to secure the enforcement by law of what no law can properly enforce or to impose his own convictions, however sincere, on other people. And where a radical contradiction can neither be avoided nor remedied the Christian must be prepared, in the last resort, to disobey the positive law and take the consequences.

Nor is this attitude to the relative claims of the law of God and the law of man in any way peculiar to the Christian. On the contrary, there are many, from a variety of different religions, who would take up much the same position—except, of course, in regard to the Person, book or other revelation in which the divine law is authoritatively proclaimed. What is peculiar to the Christian is the conviction that the demands of the divine law—which all men, in their different degrees, have failed to meet—have been perfectly met, by God Himself, in Christ and His Cross, so that he who confesses his guilt and embraces this provision may not only entertain a wistful hope of some capricious mercy but may enjoy the assurance that the divine law will itself declare him free from condemnation—that is, that he is justified;<sup>4</sup> and that the requirements of that law, so impossible of attainment to human nature, may be more and more fulfilled in the life of one over whose heart the Divine Spirit progressively extends His sway—that is, that he may be sanctified.<sup>5</sup>

<sup>1</sup> 1 Peter 2 : 13.

<sup>2</sup> Luke 20 : 25; Rom. 13 : 1-7.

<sup>3</sup> Cp. Brunner's statement (as quoted by N. Micklem, *Law and the Laws*, at 12) that “the modification of the status of man due to evil necessitates a modification of the order of justice, not only in the sense that it becomes a co-ercive system of positive law but also in the sense that the substance of this positive law cannot coincide with that of the law of nature laid down in the order of creation. That is why there *must* be a difference, if not an antithesis, between positive law and the law of nature”.

<sup>4</sup> Rom. 3 : 21-31; 7 : 1-6.

<sup>5</sup> Rom. 8 : 4; Hebrews 10 : 16.