

## Types of Natural Law.

By Franz L. Neumann.

Today we are faced with a revival of Natural Law. At the turn of this century, such a renaissance would have been inconceivable. Natural Law was dead. Karl Bergbohm's<sup>1)</sup> witchhunt against Natural Law in all its forms, and in all juridical disciplines, impressed the stamp of ridicule upon all its adherents. When, in 1904, George L. Scherger published *The Evolution of Modern Liberty*,<sup>2)</sup> he could rightly sum up the attitude of his period in the following way: "The theory of Natural Law is an exploded theory, no longer accepted by any scholar of repute." Legal positivism, with its thesis that law is nothing but the sovereign's will, had exterminated all attempts to measure the system of positive law on some normative standard.

But today it takes considerable courage to deny the scientific validity of Natural Law. It has again permeated political and legal thought, and forms almost a compulsory introduction to many political pamphlets. It takes the form of a revival of thomistic Natural Law or of the rationalistic doctrines. Even Fascist and National Socialist theories are beginning to use the propagandist potentialities of the postulates of Natural Law, often merely for foreign consumption. Equality, liberty, and justice still taste sweetly to many. It is thus good policy to cover reactionary, regressive, and anti-rational politics with the cloak of a more than 2000 year old tradition.

If we wish to preserve the heritage of Natural Law, we must restate it. Such an undertaking can only be successful if, by developing the historic types of Natural Law, we find common traits which can be spoken of as progressive elements of modern society.

### I.

Natural Law doctrines begin by asserting the existence of a state of nature and thus of a specific nature of man. Man is either good or bad, a lamb or a wolf, social or isolated, peaceful or warlike, religious or pagan. From this state of nature the character of civil society is deduced. It is either liberal or absolutist, democratic or aristocratic, republican or monarchic, socialistic or based on private

<sup>1)</sup> *Jurisprudenz und Rechtsphilosophie*, Vol. I, Leipzig, 1892.

<sup>2)</sup> New York, 1904, p. 11.

property. The relation between law and the State is equally derived from the defined state of nature. The State may swallow up the law, or the law (the natural rights) may annihilate the State: The State may stand above, or below, or side by side with the law.

It is obvious that any such doctrine of Natural Law is philosophically deficient. It is exposed to the reproach of arbitrariness. Hume, in his *Treatise of Human Nature*, had prepared the first attack on the essence of Natural Law. There can be no rational principles of right and justice which are necessary and inescapable. They are conventions which are valid merely because man follows them. They cannot be shown to be necessary since it is always possible to conceive the opposite.<sup>1)</sup> From the general philosophical position of Hume it follows that his attack upon Natural Law is not restricted to this branch of moral philosophy but is rather contained in his denial of the universality and necessity of reason, and upon his insistence that general ideas are merely derived from the particular, merely represent the particular, and can never provide universal rules and principles.<sup>2)</sup> It is in fact in line with Helvetius' rejection of Natural Law, arising from the same mistrust of universal and innate ideas.

Hegel's criticism is far more decisive, for, from the very basis of his philosophical idealism, he disclosed the dogmatic and arbitrary character of the traditional Natural Law doctrines.<sup>3)</sup> Hegel condemns them because they subordinate the State to the antagonistic interests of an individualistic society. His criticism applies equally to both trends of Natural Law: the empirical and the critical. For the former he analyzes Rousseau and Hobbes; for the latter, Kant and Fichte. Hegel reproaches the empirical theory with isolating one side of human nature (p. 328). It eliminates "specific customs, history, education," and is left with "man" in "the naked state of nature" (p. 339), a mere abstract phenomenon. Hegel continues that such a procedure cannot provide a criterion enabling us to determine the boundary between chance and necessity, "what could thus remain in the chaos of the natural state or in the abstraction of man and what must be eliminated." "The guiding principle of the *a priori* is the *a posteriori*" (p. 339). The empirical doctrines thus destroy the unity of the whole of human relationships; they arbitrarily elevate one aspect of human nature, one impulse, one whole set of postulates for the ordering of human society. Neverthe-

<sup>1)</sup> The best exposition of Hume's position is to be found in George H. Sabine, *A History of Political Thought*, New York, 1937, pp. 598-616.

<sup>2)</sup> Cf. the article of Herbert Marcuse in this number.

<sup>3)</sup> "Über die wissenschaftlichen Behandlungsarten des Naturrechts" (not translated) contained in *Schriften zur Politik und Rechtsphilosophie*, ed. G. Lasson, Leipzig 1913, pp. 329-416.

less the empirical doctrines are rated more highly than the critical ones because they at least have recourse to experience (pp. 344-345). However, Kant's doctrine of practical reason appears to Hegel not drive, to the rank of the absolute (p. 342), and deduce from it a only tautological but immoral. Whether it is possible for a definite purpose to become the basis of a moral law, can only be answered if it has already been decided whether or not this purpose is worthy of being realized. This decision will vary according to historical circumstances. Kant illustrates his universal norm from the example of private property which, according to him, is accepted by everyone. But according to Hegel, everyone is at liberty to deny private property and to arrive at a different moral law. The Kantian principle of universality becomes an immoral principle if an immoral wish is powerful enough to be regarded as sufficiently important. It could then be "elevated to the rank of a principle and there is absolutely nothing that cannot in this way be made into an ethical law."

Hegel's criticism is not very different from Rousseau's famous statement in his *Discours sur l'Inégalité*<sup>1</sup>): "He (the Natural Law theorist) begins by casting about for the rules which, in their own interest, it would be well for man to agree upon; and then, without any further proof than the supposed advantage thus resulting, he proceeds to dignify this body of rules by the name of Natural Law. All the philosophers of his school have followed the same method. The result is that all the definitions of these learned men, in standing contradiction with each other, agree in this conclusion only: that it is impossible to understand, impossible therefore to obey, the law of nature without being a deep reasoner and a very great metaphysician. And that is only another way of saying that, for the establishment of society, man must have made use of the wisdom which is, in fact, only gradually acquired by a small minority of men and that with the utmost difficulty, in the bosom of society itself."

But in every Natural Law doctrine there is one element which Hegel, incorporating it in his Philosophy of Right, recognizes as progressive, as the emanation of reason possessing true universality. We must, therefore, be careful not to confuse the many criticisms of Natural Law. If Hume rejects it because there can be no rational justice, if George Sorel<sup>2</sup>) denounces it because of its arbitrariness, or if counter-revolutionists attack it because it contains revolutionary elements, they attack it because they deny the possibility of a

<sup>1</sup>) C. E. Vaughan, *The Political Writings of J. J. Rousseau*, vol. I, p. 137. The translation is taken from C. E. Vaughan, *Studies in the History of Political Philosophy before and after Rousseau*, vol. I, Manchester 1939, pp. 172, 173.

<sup>2</sup>) *Le Procès de Socrate*, Paris 1889.

rational theory of justice. That is quite different from a theory of law which (like Hegel's) asserts the possibility of constructing a rational theory of right and justice but which merely denies that the historic forms of Natural Law have fulfilled this possibility.

Yet it is just the varying historic types of Natural Law, far more than an epistemological discussion which reveal the content of truth contained in them. For it is the truth of the Natural Law doctrines with which we are primarily concerned. Our discussion can thus not be merely a sociological one, putting into the forefront the connection between thought and social condition, between the genesis of a doctrine and its meaning. Such analysis will undoubtedly help us to reveal the amount of truth contained in Natural Law doctrines. But in itself it cannot furnish the criterion. In searching for the criterion we must avoid the pitfalls of both dogmatism and relativism. The maxims of right cannot be deduced from mere formal concepts which are in turn wholly arbitrary and dogmatic. That is a mistake which Kantian legal philosophy shares with the Natural Law doctrine. On the other hand, we must not be driven to the extreme of positivism, pragmatism, and perhaps still further to a nihilistic relativism. The truth of a doctrine does not depend solely upon its utility. Many propositions of Natural Law are progressive, though they may appear futile in certain historical situations. Others may serve in one historical stage and may be worthless in another one. The truth of a doctrine will depend upon the extent to which it embodies concrete liberty and human dignity, upon its ability to provide for the fullest development of all human potentialities. It is thus in the historic development and the concrete setting of the Natural Law doctrines that their truth must be determined.

## II.

What is the basis of a Natural Law theory?<sup>1)</sup> The answer must necessarily be: nature. That means, in the first place, the nature of law. Every Natural Law doctrine tries to answer such questions as the character of the law, its validity, the relation between State, law, morals and so on. If this alone were the task of Natural Law doctrines, they would be nothing but a philosophy of law, or rather,

<sup>1)</sup> Benjamin Fletcher Wright, in *American Interpretations of Natural Law*, Cambridge, U. S. 1931, pp. 333-8, distinguishes eight meanings of the concept "natural."

Divine—Reasonable (Discovered by human reason)—In accord with the constitution of man—In keeping with custom firmly established—Just and equitable—Ideal, contrasted with the actual—Appropriate and useful—Original, as contrasted with the conventional.

Although these categories are exhaustive, this does not necessarily mean that they answer the philosophical question.

philosophy of law would be Natural Law, which is obviously not the case. The solution of this dilemma can only be that Natural Law tries to solve the philosophical problems of law by some specific method, by some special approach,—that is, by deriving the principles of law from the lawfulness of nature.

What do we mean by nature in this connection? Do we mean the nature of man, that is, the psychic, internal nature, or do we understand by it physical, external nature? Do we mean man himself, or the objects around him? Can a Natural Law doctrine deduce its propositions from the laws governing physical nature? Apparently only if there is an intrinsic connection between man and external nature, so that the laws governing the latter are also valid for the psychic structure of man. If such an intrinsic connection is not claimed and if the principles of law are nevertheless deduced from external nature, then we have a mere analogy between human and external nature. The order of nature becomes then a mere symbol for the order of society, as in the apologetic writings of the Middle Ages, which justify the division between rulers and ruled, between *sui iuris* and *iuris alterius*, by referring to the hierarchic order of external nature or even to the structure of a cathedral building.<sup>1)</sup> If, however, man is a part of external nature, subject to its laws and determined by the iron necessity from which external nature cannot escape, then we have—as in the stoic, to some extent in the thomistic, and in the pantheistic and deistic philosophies—specific theories of Natural Law.

It may be assumed that man, outside his socio-political existence, does not exist or is, at least, not considered as relevant. Man has rights and duties not as an isolated individual, not prior to civil society, but only in and through it. Such doctrines are, in consequence, not theories of Natural Law. That is especially true of Aristotle, for whom there is neither an antagonism between the individual and the State nor between society and the State. The power of the Polis is no external one confronting individual rights of the citizens. The rights of the citizens are rather rights of the *status activus*, expressing the identity between man and the State of which he is a member. The Solonian legislation even went so far as to make it the duty of every Athenian to take up arms in the factional struggles on penalty of losing his citizen rights.<sup>2)</sup> It is true that, throughout his *Ethics*, Aristotle contrasts laws with natural justice,

<sup>1)</sup> Wilhelm Schwer, *Stand und Ständeordnung im Weltbild des Mittelalters*. (Schriften der Görresgesellschaft No. 7), Paderborn, 1934, pp. 32-50.

<sup>2)</sup> Aristotle, *Atheniensum Respublica*, transl. Kenyon (Oxford ed.) Vol. X (1911) ch. VIII, 1.

or human with natural justice, or even laws with nature.<sup>1)</sup> But these statements do not give the slightest suggestion that the individual has rights outside of and even against the Polis. Nor does the introduction of the concept of equity alter our view. Equity is, in Aristotle's definition, a correction of the abstractness of universal rules. But, in his own words, law and equity are "not opposed to one another." "They appear to be neither absolutely the same nor generically different."<sup>2)</sup> The standards of equity in Aristotle's philosophy of law are—it seems—not determined solely by the specific characteristics of the citizens concerned, but derive from the "nature of things," from the concrete configuration of the specific case in which the claim of the individual may be but one of the determining factors.

It follows from the previous discussion that any legal philosophy which refuses to consider man as an isolated individual endowed with specific drives, cravings, instincts (or whatever word we may choose), or driven by the forces of objective nature, prior to the creation or independent of civil society, cannot be a Natural Law philosophy. It may have an idea of justice. It may develop the standards of right from the structure of civil society and its needs. But it cannot be said to represent a doctrine of Natural Law. Any other definition would make the term Natural Law even more protean than it actually is within the so defined limits.

If we limit Natural Law doctrines to those which assume (either as a fact or as a hypothesis) the existence of an isolated individual prior to the establishment of civil society, the content and the structure of the Natural Law theory will obviously be determined by a philosophy of man. Man may be considered as essentially good, as essentially wicked, or as neither good nor bad. The first view is held by the more liberal, the second by the more absolutistic, the third by the purely democratic theorists.

Accepting the optimistic view of man's character (e.g. as with Hooker and Locke), Natural Law must reach the conclusion that no civil society can deprive man of his original rights. Nor need it do so for man is essentially good. The pessimistic view (Epicurus, Spinoza, Hobbes) must be primarily interested in the preservation of order, peace and some kind of living together under common law without regard to man's inborn rights which, owing to man's essential wickedness, could only turn life into a war of all against all. The agnostic view (Rousseau) believes that only in civil society can man's original rights merge with those of his fellow citizens into one

<sup>1)</sup> *Ethica Nicomachea*, transl. Ross (Oxford ed.) Vol. IX (1923) 1134 b, 18; 1136 b, 32; 1133 a, 30.

<sup>2)</sup> op. cit. 1137 b, 7; 1137 a, 34.

collective right. According to Rousseau it is not man's character which is a cause of his corruption. It is society which makes man depraved, for in the state of nature, man is "*ni bon ni méchant.*"<sup>1)</sup>)

### III.

It follows from our viewpoint that Natural Law doctrines must postulate the existence of a system of norms independent of the decision of the sovereign power, and even independent of God's decisions. In the words of Leibnitz, "justice were never an essential property of the Deity if law and justice would depend on its arbitrariness. It is thus that justice contains *laws of equality and equity which are founded not less in the nature of things and of the moral ideas than the principles of geometry and arithmetic.* . . . Some were foolish enough to maintain that God could lawfully condemn an innocent because the law is also his creation."<sup>2)</sup>)

How is it possible objectively to derive valid laws from the wills of the individuals? This is the crucial question with which Natural Law is concerned. Is it possible to construct universally valid rules, not arbitrarily imposed from above, but springing from the free consent of the individual? An affirmative answer can be given only if we assume that man is endowed with reason. We shall return to this problem later. The political form in which this free consent of man can be expressed is the social contract. And it is at this place that Natural Law doctrines and social contract theories come into contact. We mean here only genuine social contract theories and not doctrines of a governmental contract. We are concerned only with those theories which derive the very existence of civil society, and not merely its specific form of government, from the consent of man. It is fairly evident that Natural Law and social contract are not identical categories. If a right is derived from the nature of man, it cannot be conceived as the mere creation of the social contract.<sup>3)</sup>) There is, therefore, even a certain contradiction between Natural Law and social contract. The latter justifies the use of coercive power, whereas the optimistic Natural Law doctrines profess to justify original rights against such coercive powers. No social contract theory necessarily follows from the optimistic Natural Law doctrine. Historically, the optimistic views have taken two forms. The theory of natural rights may be superimposed upon nearly every theory of

<sup>1)</sup> On Rousseau's theory of the natural state cf. C. E. Vaughan, *The Political Writings of J. J. Rousseau*, vol. I, pp. 158, 159.

<sup>2)</sup> From: E. G. Guhrauer, *Gottfried Wilhelm von Leibnitz*, 2 Vols. Breslau 1845, Vol. I, p. 233.

<sup>3)</sup> This point is made by Julius Kaerst, "Die Entstehung der Vertragstheorie im Altertum" in *Zeitschrift für Politik*, Vol. II (1909) p. 536.

civil society. If thus superimposed, it has a constitutional function: to limit, to restrict and to guide the activities of the State by the original rights to life, liberty and property.

Whereas a theory of Natural Law does not necessarily lead to a social contract doctrine, a social contract theory is logically impossible without a corresponding view of Natural Law, either explicit or implicit. Every social contract reduces the will of the state to the wills of the individuals and must thus have a definite view of man's character prior to the conclusion of the social contract.

If we analyse the relation between Natural Law theories and contractual theories we come to the conclusion that although both doctrines validly establish the normative element, they are logically incapable of developing the coercive element without which law is only a concept.

If a man is really good in the state of nature, why should he part with his freedom and form a civil society? If he is a lamb, why must he transfer his original rights to some common coercive agency? If he is truly good, his cravings can be harmonized without coercion. The anarchists are thus indeed the only consistent theorists of the optimistic Natural Law doctrines, while neither Locke nor Adam Smith can possibly develop a consistent theory of the State. If Locke describes the natural state as one of "peace, goodwill, mutual assistance and preservation,"<sup>1)</sup> why then is a State necessary? It is because, although Locke's treatise is written as an attack on Hobbes, and almost always with an eye on Hobbes, Locke could not but ultimately accept the propositions of Hobbes' theory, namely, that men are sometimes "grasping hucksters, quarrelsome tyrants, rebels."<sup>2)</sup> There is hardly any difference between Hobbes' construction and the following statement by Locke: "whosoever out of a state of nature unite into a community must be understood to give up all the power necessary to the ends for which they unite."<sup>3)</sup> Nor must we be deceived by the apparently deliberate omission of the word sovereignty. Locke's prerogative power "to act according to discretion for the public good, without the prescription of the law and sometimes even against it" fulfills, for all practical purposes, the needs of the sovereign power, especially in the field of foreign policy.

The inability of the pessimistic doctrines to secure the continuous existence of a coercive authority which is independent of the antagonisms of the individuals in society is brought out strikingly in the philosophies of Hobbes, Spinoza and Kant. At first sight, the differ-

<sup>1)</sup> *Treatise*, p. 19.

<sup>2)</sup> C. E. Vaughan, *Studies* vol. I, p. 169.

<sup>3)</sup> *Treatise*, p. 99.

ences between the three philosophies appear to be considerable. Hobbes still allows the individual important remnants of natural rights.<sup>1)</sup> Spinoza's doctrine makes the individual give up his rights in their entirety. No one retains even the shadow of such rights. Law is merely the command of the sovereign. There is no right to resist. The subject is merely *alterius iuris*, the State alone is *sui iuris*.<sup>2)</sup> Kant also rejects the right of resistance<sup>3)</sup> and constructs the most rigid theory of law yet devised, although it contains, at the same time, some of the most progressive elements of modern legal thought. All three philosophers, although establishing the absolute sovereignty of the State, bow to accomplished facts, and acknowledge the possibility of refusing obedience. Hobbes<sup>4)</sup> dissolves the bond between rulers and ruled when the former is no longer capable of performing his side of the bargain, namely to protect the subjects, to guarantee peace and order, and to secure their property. Spinoza<sup>5)</sup> corrects his political theory by his legal theory. Law is might. Each one has as much right as he has might. Each group may at any moment become *sui iuris*, seize power and demand obedience. Kant,<sup>6)</sup> in a modest note to his *Rechtslehre*, admits that after a successful revolution the subjects owe obedience to the new powers.

It follows from this short critical examination that every Natural Law doctrine is self-contradictory. None of the theories is capable of explaining the validity of a system of norms derived merely from individual consent. All of them are compelled to admit into their system a non-normative element, namely power, thus overthrowing their whole elaborate structure.

<sup>1)</sup> i.e. "Law of Nature obliges always in conscience (in foro interno), but not always in foro externo" *Leviathan* (Molesworth ed.) Vol. III, ch. XV, p. 145 or "If the sovereign commands a man, though justly condemned, to kill, wound or maim himself; or not to resist those that assault him; or to abstain from the use of food, air, medicine or other things without which he cannot live, yet hath that man the liberty to disobey."—*op. cit.* ch. XXI, p. 204. Note the ambiguity of the words "not always" in the first, and "other things" in the second quotation.

<sup>2)</sup> *Tractatus Politicus* (Opera ed. van Vlooten and Land 3rd ed. 1913) ch. IV, 5.

<sup>3)</sup> *Metaphysik der Sitten*. *Rechtslehre* II, 1. Allgemeine Anmerkung A. (Transl. Hastie p. 175) "For, whoever would restrict the supreme power of the state must have more, or at least equal power, as compared with the power that is to be so restricted, and if competent to command the subjects to restrict, such a one would also have to be able to protect them; and if he is to be considered capable of judging what is right in every case, he may also publicly order resistance. But such a one, and not the actual authority, would then be the supreme power: which is contradictory." The reasoning is unassailable.

<sup>4)</sup> *Leviathan* ch. XXI, p. 208: "The obligation of subjects to the sovereign, is understood to last as long, and no longer than the power lasteth, by which he is able to protect them. . . . The sovereignty is the soul of the commonwealth; which once departed from the body, the members do no more perceive their motion from it. The end of obedience is protection."

<sup>5)</sup> *Tractatus Theologico-Politicus* ch. XVI; *Tractatus Politicus* ch. II, 4.

<sup>6)</sup> *op. cit.* p. 181.

It is true that our survey does not cover all forms of Natural Law. But our criticism applies equally to all known expressions of it. In some, the inner antagonism is even more apparent. In Bodin's doctrine the two elements, the normative and the power factors, stand completely unrelated to each other, and it is impossible to claim that Bodin's system is logically consistent.<sup>1)</sup>

## IV.

Only one form of Natural Law theory avoids the pitfalls of both—anarchy and arbitrary rule—the democratic doctrine given by Marsilius of Padua and even more so by Rousseau. It may be true that Marsilius did not develop a genuine democratic theory because he identified the people with its "*pars valentior*."<sup>2)</sup> But even taking this limitation into account, the accomplishment of Marsilius was never surpassed except by Hobbes and Rousseau. In Marsilius' system, Natural Law serves for the establishment of a completely self-sufficient secular state. From the nominalist position of a dual truth, a rational and revealed one,<sup>3)</sup> Marsilius succeeds in breaking away from political Augustinism and scholasticism. Compelled to seek a rational justification of the secular power, he had to have recourse to a social contract, erecting the State upon the free consent of the people, even if only a part of it was taken into consideration. With the establishment of the State, Natural Law disappears. It has merely an advisory character, lacking the "*vis coactiva*."<sup>4)</sup> The State becomes a unity. Its power is one and indivisible. There is but one law governing the State and but one central authority. So strong is the unity and secularity of the State that Marsilius, anticipating Hobbes and Spinoza, demands the control by the State of ecclesiastic education and of the religious cults.<sup>5)</sup> We must admit that Marsilius only develops the beginnings of a consistent theory in which natural

<sup>1)</sup> Bodin: *les six livres de la république*, Lyon 1588. I quote a few examples:

I, VIII: la souveraineté est la puissance absolue et perpétuelle d'une république, and

I, I: République est un droit gouvernement de plusieurs ménages . . . or

I, X: la loi n'est autre chose que le commandement du souverain, usant de sa puissance.

I, VIII: Si donc le Prince souverain est exempt des loix de ses prédécesseurs, beaucoup moins seroit il tenu aux loix et ordonnances qu'il fait; car on peut bien recevoir loi d'autroy, mais il est impossible par nature de se donner loy, and

I, VIII: mais quant aux loix divines et naturelles, tous les Princes de la terre y sont subjects, et n'est pas au leur puissance d'y contrevenir. Et par ainsi la puissance absolue des Princes et seigneuries souveraines ne s'étend aucunement aux loix de Dieu et de nature.

<sup>2)</sup> as has been pointed out by Charles H. McIlwain, *The Growth of Political Thought in the West*, London, 1932, p. 303 and Marsilius of Padua, *Defensor Pacis* ed. Previté-Orton, Cambridge (England) 1927, Dictio I, XII.

<sup>3)</sup> Georges de Lagarde, *La Naissance de l'Esprit Laïque*, vol. II, Paris, p. 86.

<sup>4)</sup> *Defensor Pacis*, Dictio II, v. p. 147.

<sup>5)</sup> *Defensor Pacis*, Dictio II, xxi, p. 335.

rights are preserved even though they are at the same time surrendered to the State. This is attained through the arbitrary restriction of the consent of the people to its *pars valentior* where unity and harmony can be relatively easily established. Had he extended the democratic concept to embrace the whole populace, the internal contradictions of the theory would at once have become apparent.

The solution was accomplished by Rousseau. We presuppose a knowledge of his political theory: the establishment of the general will from the will of all, the claim that in spite of the surrender of all individual rights, they are nevertheless preserved in the general will. This may be taken to mean either a dogmatic and totally unproven assertion, or a mere ideology to justify the rule of majorities and of representative bodies.<sup>1)</sup> Only if we interpret Rousseau's political theory as based upon a definite social theory can we understand how a rational order of human life can really be developed from his principles. There appear to be two alternative social conditions underlying Rousseau's political theory. The one, well known, is his preference for small city states and his abhorrence of large cities.<sup>2)</sup> The other, little known, are his postulates with regard to the economic substructure deemed necessary for the realization of a rational—that is, natural—order. Rousseau had a deep insight into the fundamental economic antagonisms produced by private property. In *Émile* he makes the following remarkable statement: "This right (namely property) is inviolable and sacred for the State so long as it remains private and individual. But directly it is considered . . . as a right common to all citizens, it is subordinated to the general will, and the general will can annul it. The sovereign has no right to touch the possessions either of one individual or of several. But it has every right to appropriate the possessions of all."<sup>3)</sup> Property, in order to remain private and individual, must be equally distributed. Such equality is not only not dangerous but beneficial.<sup>4)</sup> If, however, such equality can no longer be established, then there is but one way out—communal property. "*Loin de vouloir que l'état soit pauvre, je voudrais au contraire, qu'il eût tout, et chacun n'eût sa part aux biens communs qu'en proportion de ses services.*"<sup>5)</sup> Only if accumulated property is no

<sup>1)</sup> For support of this view, see *Contrat Social* II, 2 (note of 1762); or the *Corsica Constitution* (Vaughan Vol. II, pp. 313, 351) where he recommends a mixed government and Estates General.

<sup>2)</sup> Une capitale est un gouffre . . . De la capitale s'exhale une peste continuelle . . . *Économie Politique* (Vaughan Vol. II, p. 253).

<sup>3)</sup> *Émile*, Book V, (Vaughan vol. II, p. 152).

<sup>4)</sup> *Lettres de la Montagne* (letter v.) (Vaughan vol. II, pp. 342, 343).

<sup>5)</sup> *Corsican Constitution* (Vaughan, vol. II, 337).

longer dangerous is the general will the true representation of the wills of all. The sovereign power then ceases to be sovereign, is no longer an external power confronting the subjects. It is rather society itself which governs and administers itself. "*Car la propriété particulière étant si faible et si dépendante, le Gouvernement n'a besoin que de peu de force et conduit, pour ainsi dire, les peuples avec un mouvement de doigt.*"<sup>1</sup>) Rousseau's doctrine does not truly achieve the preservation of the rights of all in the general will, except in connection with the specific social theory. Without it, his doctrine is the ideology of representative democracy, and is thus exposed to the reproach that the majority does not necessarily represent the truth. Nevertheless democratic Natural Law does at least provide the formal framework within which it is possible to harmonize the wills of individuals.

## V.

Must we, therefore, in spite of its inner consistency, discard the doctrine of Natural Law? The answer will depend upon the evaluation of the basic element underlying all the doctrines of Natural Law.

If every doctrine of Natural Law is based upon men as an individual, either autonomous or subject to the lawfulness of external nature, then man must be considered as a rational individual. That in turn implies the recognition of the essential equality of human beings. And this again leads to the universality of the Natural Law doctrine which is the central view common to all doctrines. It also follows that no theory of Natural Law can accept facts as they are and because they are. Natural Law doctrines are thus fundamentally opposed to traditionalism and historicism. Each human institution is open to critical reason, none is exempt from it. Finally, Natural Law doctrines cannot be reconciled with anti-rational doctrines, such as Vitalism, Universalism or the theory of Charismatic Leadership. If Life is an original datum, irreducible and not open to critical examination; if the Whole stands categorically before the individual; if obedience is owed because a leader is endowed with superhuman, God-like qualities; then reason is excluded. It is true that attempts have been and will be made to reconcile anti-rational political theories with Natural Law. Such attempts appear to be meaningless. The protagonists of anti-rationalism<sup>2</sup>) have themselves acknowledged the incompatibility of their position with Natural Law doctrines, whatever form they may take.

<sup>1</sup>) *Corsican Constitution*, (Vaughan vol. II, p. 355).

<sup>2</sup>) esp. Pareto.

For de Maistre and Bonald, Natural Law and social contract theories represented everything which was execrable in this world. They were responsible for the French revolution and they ran counter to the very principles upon which the world rests and must continue to rest. "Man . . . as an individual is too wicked to be free"<sup>1</sup>) "Reason is but a brute which must be destroyed by every means" (I, 357). No human institution originates from Reason, which would only prevent and destroy it (I, 367). True, he occasionally plays with the concept of "Nature." The "aristocracy is sovereign by nature and the French revolution offends the eternal laws of nature" (I, 357). But it is not more than a mere playing with words, for the justification of the authorities lies in faith and patriotism (I, 37). It is not the nature of man, it is "authority" which "has planted the seeds of civilization in society."<sup>2</sup>)

Donoso Cortès in Spain, as a Catholic, and Friedrich Julius Stahl in Prussia, as a Protestant, expressed the same hatred of Natural Law as did de Maistre and Bonald. Donoso Cortès denounced the social contract as an absurdity.<sup>3</sup>) He foresaw the growth of European despotism and he believed that democracy prepared the way for a "gigantic, colossal, universal, and immense tyrant" (*l'Église et la Révolution* (1848) Vol. I, 332). Like de Maistre and Bonald he believed in the essential wickedness of man.<sup>4</sup>)

Friedrich Julius Stahl, the founder of the conservative theocratic theory of the Prussian State, intended his whole work to be nothing but a refutation of Natural Law and the Hegelian theory of the State. For this purpose he divided all political parties into two kinds—revolutionary and conservative. By revolutionary this great demagogue not merely understood the socialist doctrines but all liberal, all democratic, in short, all those political parties in the Church and the State in which the Natural Law ideology was still alive. "It is a revolution to oppose civil society to the state of nature, and thereby to set man free from all traditions of law and custom, to reduce the well ordered society to an original chaos and to take from this chaos the standards by which the social order is measured. It is a revolution to destroy the whole public body of the State, the whole moral order of the nation, and to leave nothing except the rights and the mutual security of the individuals. It is, finally, the essence of revolution, to deny to the authority power in its own right, founding it on the will of the people.

<sup>1</sup>) de Maistre, *Oeuvres Complètes*, Lyon 1891-1892 Vol. II, 399.

<sup>2</sup>) Bonald, *Oeuvres Complètes*, Paris 1864, Vol. I, 121.

<sup>3</sup>) Pie IX, (1847), in *Oeuvres de Donoso Cortès, Marquis de Valdegamas*. Third ed. Lyon 1877, Vol. I, p. 217.

<sup>4</sup>) *Polémique avec divers journaux de Madrid* (1849) Vol. I, 359.

Natural Law from Grotius to Kant is the scientific foundation of revolution."<sup>1)</sup>)

Stahl's criticism is applicable, and with as much justification, not only to the rationalistic but also to the ancient and thomistic theories. This can be shown if we turn to the pragmatic character of Natural Law doctrine and attempt to develop a pragmatic typology. We may then roughly divide Natural Law doctrines into conservative, absolutistic, liberal, democratic and revolutionary.

## VI.

The representative conservative doctrine is the thomistic one. Its structure is so well known that hardly anything need be added. God is the source of the *lex divina*. From the *lex aeterna* is derived the *lex naturalis*.<sup>2)</sup> All men, as rational creatures, participate equally in the *lex naturalis* (1, II, 91, 2). Its supreme principles are eternal and unchanging, though their recognition may be hindered by passion (1, II, 91, 6). Below the *lex naturalis* come the positive laws which must conform to three conditions. They must serve the common good (1, II, 90, 2); they must be just, that is, the burdens must be distributed according to proportional equality; and, finally, they must be issued by a legislator within the bounds of jurisdiction (1, II, 90, 4). Any norm which fulfils these three conditions is binding both in *foro conscientiae* and in *foro externo*. If the conditions are not fulfilled, passive resistance becomes a duty since even God cannot dispense with the prescriptions of the *lex naturalis* (1, II, 100, 8 ad 2). The hierarchy of the threefold norms has been carried out with meticulous care.

There is no doubt that thomistic Natural Law is, on the whole, a kind of codification of the feudal order, a completely authoritarian order.<sup>3)</sup> Saint Thomas accepts and justifies the distinction between *sui* and *alieni juris* (2, II, 183, 1), between the *optimates* at the top, the *populus honorabilis* in the middle, and the *vilis populus* at the bottom of the social pyramid (I, 108, 2). Even slavery, though a necessary evil, is legitimate, and property is by no means the product of original sin. The doctrine of original communism is therefore rejected.<sup>4)</sup>

Insofar as thomism endows a profoundly antagonistic society with the sanctity of Divine and Natural Law, it is no more valid than any

<sup>1)</sup> *Über die gegenwärtigen Parteien in Staat und Kirche*, Berlin 1883, p. 23.

<sup>2)</sup> *Summa Theologia*, I, II, 91, 2.

<sup>3)</sup> J. N. Figgis, *Studies in Political Thought from Gerson to Grotius*, Cambridge, England, 1931, p. 12; Schwer, *op. cit.*, p. 9.

<sup>4)</sup> Bede Jarrett, *Social Theories of the Middle Ages*, Boston 1926, p. 104; Schwer, *op. cit.* p. 34.

other Natural Law theory. But to see thomism merely as a kind of ideology intended to cover feudal exploitation with the cloak of an eternally valid law is to present but one aspect of the system. The recognition of man as a rational creature means that "every individual is by virtue of his eternal destination at the core wholly and indestructible even in relation to the "Highest Power."<sup>1)</sup> The doctrine thus contains a psychological dynamism which completed itself in spite of the mere ideological character of parts of the thomistic theory. It is just this rational and fundamentally optimistic theory of man which sets the thomistic doctrine against political Augustinism and the adoration of thaumaturgic kings. Thomism is the response of the catholic church to the challenge of political Augustinism. Thomism also gave the church a weapon for attacking the superstitious adoration of kings who, through the unction, claimed charismatic powers. The belief in the *mana* of kings, particularly expressed in their alleged healing power, ran counter to the very foundations of the church. It placed the king above the church and made him God-like. The king is then not merely "God's deputy on earth," to use Bracton's phrase, but he becomes a little God himself. The idea, oriental in origin, was transplanted in the west through Alexander of Macedonia, who claimed and received veneration as God.<sup>2)</sup> It was in full swing under Augustus, who was acclaimed as the Messiah. It was accepted by the Germanic tribes, where the charisma were supposed to reside in the tribe.<sup>3)</sup> It was bitterly attacked by the church although, to a large extent, the church was responsible for the continuous life of this superstition. When the Carolingians overthrew the Merovingians by their famous *coup d'état*, it was the church which, through Pipin's unction, endowed him and his successors with supernatural justification. The Pope, as the oracle of Natural Law, even made the unction a sacrament, thus admitting that the king is God's vessel and that God's grace rests upon him: In doing so, the Church, for reasons of expediency, abandoned its old policy of fighting against the veneration of the Byzantine kings, especially the *Proskynesis*. It soon had to take up the fight against the increasing deification of kings. The French kings from Robert the Pious, and the English kings from the Plantagenets, claimed and practised the power to heal, especially to heal scrofula (the "King's Evil"). The Gregorian dispute was not merely a fight for power between the

<sup>1)</sup> Otto Gierke (transl. Maitland), *Political Theories of the Middle Ages*, Cambridge, England, 1927.

<sup>2)</sup> Julius Kaerst, *Studien zur Entwicklung und theoretischen Begründung der Monarchie im Altertum*, München, Leipzig 1898, pp. 40, 41.

<sup>3)</sup> Fritz Kern, *Gottesgnadentum und Widerstandsrecht im früheren Mittelalter*, Leipzig 1914, p. 20.

secular and spiritual authorities, but the fight of a rational doctrine of Natural Law and against the magic and supernatural powers of kings.<sup>1)</sup> In the course of the discussion, the unction ceased to be considered as a sacrament, the emperor became a layman like any other, and throughout the middle-ages and far into the 18th Century the church waged a tireless war against the superstitious practices.<sup>2)</sup>

Only when seen in this dual polemical position is it possible to understand the essentially progressive trait of thomistic Natural Law, in spite of its ideological character.

## VII.

It is exactly on this point that we can clearly see the incompatibility of Calvin's political theology and, to a lesser degree, of Luther's doctrine, with Natural Law. Calvin's political thought is directed against two opponents: medievalism on the one hand and the revolutionary Natural Law of the sects on the other. Thomas Aquinas is as much his enemy as are the anabaptists.<sup>3)</sup> Man is no "rational creature," for his "integrity of understanding has been destroyed"<sup>4)</sup> by his fall. Truth cannot be perceived for there is only a restricted capacity of perception. The ultimate truth can never be ascertained by reason but merely by God's grace.<sup>5)</sup> "Here we are led back to our birth in order to show us that the reason which we possess is a gift of God outside of our nature . . . when a child leaves the womb of his mother, what wisdom does it possess? . . . a child is less than the poorest beast . . . how is it that we possess the spirit of intelligence when we have come to age? It is necessary that God gives it to us."<sup>6)</sup> God's election is not a reward for a pious life or

<sup>1)</sup> Marc Bloch, *Les rois thaumaturges. Étude sur le caractère surnaturel attribué à la puissance royale particulièrement en France et en Angleterre*. Strasbourg, 1924, p. 123. Bloch reproduces a particularly important letter from Gregor VII to Archbishop Hermann of Metz. I give an English translation: "Where does one find among the emperors and kings a man who equals by his miracles St. Martin, St. Anton or St. Benoît, not to speak of the Apostles or martyrs; who is the emperor or king, who has resuscitated the dead, given health to the lepers and light to the blind? Consider the emperor Constantine, of pious memory, Theodore and Honorius, Charles and Louis, all friends of justice, propagators of the Christian religion, protectors of the church; the Holy Church praises and reveres them; it does not indicate that they have excelled by the glory of such miracles."

<sup>2)</sup> The great medieval English humanist, John of Salisbury, *Policraticus* ed. Webb (Oxford 1919) Vol. I, p. 202, denounced the thaumaturgic powers of the kings as a dangerous regression.

<sup>3)</sup> J. W. Allen, *A History of Political Thought in the Sixteenth Century*, London, 1928, pp. 35-48.

<sup>4)</sup> *Institution Chrétienne* II, 2, 14.

<sup>5)</sup> *op. cit.* II, 2, 12.

<sup>6)</sup> quoted and translated from Marc-Edouard Chenevrière, *La Pensée Politique de Calvin*, Geneva-Paris, 1937, p. 59. The quotation is from *Corpus Reformatorum*, Vol. 33, p. 542.

for good works, it is an arbitrary decision and may even be conferred upon a pagan. The ruler, the magistrate, the successful business man, the political leader, the foreman in the factory, all of them owe their position to God's election. They must, therefore, be obeyed. It is not the abstract authority relation which receives the sanctity, but, rather, the concrete holder of power who is endowed with charismatic qualities. There can thus be no trace of Natural Law. If the conscience of man is corrupt, so is Natural Law. The law of nature does not make it possible to perceive God's justice.<sup>1)</sup> Conscience and Natural Law are unable to teach us our behaviour. The State is neither a natural institution nor the product of man's needs and wants. It is God's institution. By establishing the "divine right of the established order,"<sup>2)</sup> Calvin demanded voluntary obedience to all the established powers.

Two objections may be raised. First, Calvin sometimes speaks of a mutual obligation between rulers and ruled. But he explicitly and implicitly denounces the mediaeval doctrine of the governmental contract, and there can be no doubt that the obligation which he has in mind is not a contractual one but unilateral towards God.<sup>3)</sup>

Secondly, there is the famous proclamation of the right to resist conceded to those magistrates who have the constitutional right to do so.<sup>4)</sup> This statement, of which much has been made in the history of political thought, does not give the slightest indication that Calvin recognizes some kind of Natural Law.<sup>5)</sup> If the Protestant monarchomachs<sup>6)</sup> used Calvin's institution they falsified French history in order to fabricate a historic right of resistance against the monarchy. If Henry of Navarre encouraged Hotman to continue his "researches" into French history together with Duplessis-Mornay<sup>7)</sup> in order to solidify Henry's position, Natural Law plays no rôle. Here are *ad hoc* doctrines not based on original rights of man but on so-called historical rights of certain privileged groups. If John Knox in Scotland, in attacking his Catholic queen, arrogated to himself the right of resistance, he might have deviated from Calvin's Institution or he might have considered himself the "saviour of his people,"

<sup>1)</sup> *Institution Chrétienne*, II, 8, 1; IV, 20, 16.

<sup>2)</sup> Georges de Lagarde, *Recherches sur l'Esprit Politique de la Réforme*, Paris, 1926, p. 227.

<sup>3)</sup> *Institution Chrétienne*, IV, 20, 29; IV, 20, 27.

<sup>4)</sup> *op. cit.* IV, 14, 17.

<sup>5)</sup> Kurt Wolzendorff, *Staatsrecht und Naturrecht in der Lehre vom Widerstandsrecht gegen rechtswidrige Ausübung der Staatsgewalt*, Breslau, 1916, has shown that Calvin's right of resistance is a mere generalization from existing constitutions.

<sup>6)</sup> esp. Francois Hotman, *Francogallia*, 2nd ed. Colonia 1574, and the author of the *Vindiciae*.

<sup>7)</sup> Beatrice Reynolds, *Proponents of Limited Monarchy in Sixteenth Century France*. Columbia Dissertation, New York, 1931, p. 92.

the latter concept playing a decisive rôle in Calvin's system. The stress which has always been laid on the right of resistance by magistrates has tended to overshadow another means of overthrowing established government outside the framework of the constitution. Calvin maintained that God may send the people a providential saviour.<sup>1)</sup> He may appoint one of his servants and send him out to punish an unjust ruler and deliver the people from oppression. It is again characteristic that the deliverance of man from despotic rule is entrusted to a charismatic leader. The oppressed themselves are never allowed to revolt. The only freedom left to the oppressed is to obey either their ruler or their saviour. The anti-rational and anti-Natural Law is thus apparent not only in Calvin's doctrine of authoritarian rulership but equally in his doctrine of revolution.<sup>2)</sup>

### VIII.

There is a profound difference between the conservative Natural Law doctrine of thomism and the rationalistic—absolutistic doctrines of Hobbes, Spinoza and Pufendorf. At first sight the three systems appear to be profoundly retrogressive since they apparently sacrifice human rights to the all pervasive power of the state. Hobbes' theory must, however, be contrasted with the Tudor<sup>3)</sup> and Stuart<sup>4)</sup> theories of kingship. "The King is, in this world, without law, and may at his lust do right or wrong, and shall give accounts but to God only."<sup>5)</sup> This is no longer the medieval theory of kingship which placed the king under Natural Law and made him responsible not merely to his

<sup>1)</sup> *Institution Chrétienne*, IV, 14, 17.

<sup>2)</sup> I do not deal with Luther's political theory because he has none. His concept of Christian Freedom, although conceived entirely as inner freedom (*Of Christian Freedom*, 1520), where freedom of the soul and subjection to external authorities are merged, still allows the opposition of a bad world by a truer and better one. Luther, in contrast to Calvin, distinguishes between the office as such, which may and must demand unconditional obedience, and the office-holder. In spite of the authoritarian character of his political writings, Lutheranism could, because of the concept of inner freedom, become the ideological basis for the revolutionary Natural Law of the sects (i.e. *das Magdeburger Bekenntnis*, cf. Allen, op. cit. pp. 103-106) and the constitutional Natural Law of Melancthon. The relation of Luther to Natural Law is still the subject matter of much controversy.

The following are important:

Karl Holl, *Gesammelte Aufsätze zum Kirchengeschichte*, Vol. I, 4th and 5th ed. Tübingen, 1927, esp. pp. 155 seq. and 239 seq.

Eugène Ehrhardt, *La Notion du Droit Naturel chez Luther*, Paris 1911.

Franz Xaver Arnold, *Zur Frage des Naturrechts bei Martin Luther*, München 1937 (catholic, with imprimatur).

<sup>3)</sup> An excellent presentation of the Tudor theory of kingship is presented by Franklin van le Baumer, *The Early Tudor Theory of Kingship*, New Haven, 1940.

<sup>4)</sup> The best analysis of the theory of kingship of James I has been given by Charles H. McIlwain in his introduction to *The Political Works of James I*, Harvard, 1918.

<sup>5)</sup> W. Tyndale, "Obedience of a Christian Man" in *Doctrinal Treatises by W. Tyndale* ed. H. Walter (Parker Society) Cambridge, 1843, p. 178.

conscience but to man. Henry VIII is likened to the "Son of Man." One "dares not cast (his eyes) but sidewise upon the flaming beams (of the king's) bright sun which (he) in no wise can steadfastly behold."<sup>1</sup>) Obedience to Henry VIII was not merely a civil duty; it also became a religious duty. Lutheran and Calvinist doctrines, remnants of medieval Natural Law, and above all the adoration of the king's person, form the hodge-podge which constitutes the theoretical basis of the Divine right. Nor were the Stuart theories any better.

Yet the need for concentration of national power was indisputable. A secular state was needed, free from the supremacy of the Catholic church, capable of fighting foreign invasion, subordinating local and feudal autonomies. The rule of the king could, in the period of religious schism, no longer be justified by thomistic Natural Law. The adoration of the king may have been expedient so long as the king really seemed to emanate some kind of charisma. This is hard to conceive with Henry VIII and impossible to imagine with Charles I. There remained but one doctrine: the theory of the social contract, derived from the pessimistic view of man's nature. It provided the means for establishing authority and justifying any authority which could protect the frontiers, restore peace and order, and secure property. In spite of its absolutistic character, Hobbes' theory is, however, at its core democratic.<sup>2</sup>) The democratic starting point is clearly expressed by Hobbes himself. The "people rule in all governments," because every government, when first established, was necessarily a democracy.<sup>3</sup>) The democratic kernel and the inherent revolutionary dynamics were clearly perceived by the Court and rejected by the ruling classes, who were afraid and ashamed of that outspoken philosopher whose materialism allowed no veiling ideology. "I never read a book which contained so much sedition, treason and impiety" exclaimed Charles II. The contemporary political theory recognized this revolutionary tendency as clearly as Friedrich Julius Stahl did subsequently.<sup>4</sup>)

The same holds true of Spinoza. The establishment of the secular and rationally justifiable authority in Holland was a much more progressive postulate than any of the political demands of other groups. The flirtation of William of Orange with the democratic movement is no more edifying than the pseudo-democratic theories.

<sup>1</sup>) from Baumer's book, p. 86.

<sup>2</sup>) A very careful analysis of the change in Hobbes' social contract theory has been made by Frédéric Atger, *Essai sur l'Histoire des Doctrines du Contrat Social*, Paris 1906.

<sup>3</sup>) *Philosophical Rudiments*, Molesworth, ed. Vol. II, pp. 100, 160.

<sup>4</sup>) Gierke draws attention to the absolutist Johann Friedrich Horn who, in his *Politiorum pars architectonica de Civitate*, Traj. a. Rh. 1664, denounced Hobbes as a revolutionary. Gierke, *Athusius* (transl. as *The Development of Political Theory* by B. Freyd) New York 1938, pp. 76, 79, 177.

Pufendorf, in his rather flat rationalism, considers Natural Law as an imperfect obligation lacking the necessary sanctions. The fulfillment of Natural Law is "left solely to the divine judgment seat,"<sup>1)</sup> and "neither the fear of divinity nor the sting of conscience are sufficient."<sup>2)</sup> At the same time Pufendorf laid the basis of the *Rechtsstaat* theory. From the maxims of his Natural Law he developed a complete and self-sufficient system of rational law which, with almost mathematical precision, defined the rights and duties of the citizens, their contractual relations, the protection of their liberty and property. So complete was this system that, far into the period of liberalism, it could still serve as the textbook of jurisprudence.<sup>3)</sup>

We may sum up: Although the absolutistic theories of Natural Law sacrifice human rights to the need for establishing a central coercive authority, they are predominantly rational because they base the authority upon the consent of man. They, too, must therefore recognize the essential and indestructible rationality and equality of man.

## IX.

We do not need to add much about revolutionary Natural Law doctrines. It would be wrong to assume that they are always progressive. They are often merely devices to entice dissatisfied masses and to utilize them for narrow and completely egotistic aims. From the abundance of material, hardly ever discussed, we may choose, at random, some examples of this social phenomenon. There seem to be genuine revolutionary Natural Law doctrines in the heterodox theories of the middle-ages, especially in Latin Averroism. The most striking misuse of a genuine revolutionary Natural Law doctrine is that in the Albigensian movement. A movement, pledged to realize a perfect life on this earth, fighting against simony and Nicolaism—which had been resurrected in spite of the Gregorian reform—a movement which attacked a vulgar and debauched clergy, challenged the right of property and rejected the right and duty to carry arms; which advocated, though obscurely and in a very contradictory way, some kind of socialism deduced from original rights of man,<sup>4)</sup> was misused by feudal aristocrats and finally exterminated.

Nor can we find any progressive Natural Law doctrine in the

<sup>1)</sup> *Elementorum Jurisprudentiae Universalis* (1660) (transl. Oldfather). Classics of International Law, Oxford, 1931, p. 160.

<sup>2)</sup> *De Officio Hominis et Civis Juxta Legem Naturalem*, 1623 (transl. Moore). Classics of International Law, Oxford, 1927, p. 104.

<sup>3)</sup> Pufendorf's position and influence are almost identical with that of Blackstone.

<sup>4)</sup> P. Alphanéry, *Les Idées Morales chez les Hétérodoxes Latins au XIIIe Siècle*. Paris, 1903.

disputes between Philip the Fair and Boniface VIII. The theories of the curialists (especially Aegidius Romanus) and of the Royal party (John of Paris, William Nogaret, Pierre Dubois) are opportunist theories of the very worst kind.<sup>1)</sup> We must not forget that the apologists of Philip the Fair (like William Nogaret) and of Ludwig of Bavaria (like William Ockham<sup>2)</sup> never hesitated to endow their masters with supernatural qualities,<sup>3)</sup> selecting their arguments from every available doctrine whether it be Augustine or St. Thomas, Aristotle or the Roman Lawyers, the Old or the New Testament.

The mere demagogic function of revolutionary Natural Law becomes very clear in the doctrines of the Catholic monarchomachs, Jean Boucher<sup>4)</sup> and Guillaume Rose.<sup>5)</sup> Boucher's and Rose's theories are apparently democratic and far more consistent than those of their calvinist opponents. It is important to ascertain the social function of these democratic theories, because they became historical realities in the struggle of the League and of the City of Paris against Henry III and Henry VI. The New League of 1585, organized for the fight against Protestantism, had a firm hold upon the lower classes, fortified by the mob which soon played an outstanding rôle.<sup>6)</sup> The new program of the League promised everything to everybody: the restoration of true religion; of the liberties of the nobles; to help the people; to defend the rights of the *Parlements* and to demand the regular convocation of the Estates General. This did not prevent the alliance of the League with the Duke of Guise and with Spain. The ensuing civil war follows a familiar pattern. In the name of original human rights and of Natural Law, the League exhorted its adherents to kill and murder opponents. The City of Paris sent emissaries into the provinces in order to organize them on a strictly democratic basis. The demagogic character of Boucher's theory becomes still clearer after the accession of Henry IV. Paris was organized in 16 *Quartiers*. A municipal democracy was established with full concentration of legislative, administrative and judicial powers, which were finally transferred to a Council of Ten (1591). Emigrés were perse-

<sup>1)</sup> Richard Scholz, *Die Publizistik zur Zeit Philipp des Schönen und Bonifaz VIII*, Stuttgart, 1903.

<sup>2)</sup> Richard Scholz, *Unbekannte Kirchenpolitische Streitschriften aus der Zeit Ludwigs des Bayern*, Part I, Rome, 1911 §11; Part II, Rome, 1914 s. XII.

<sup>3)</sup> Bloch, *op. cit.*, pp. 129, 142.

<sup>4)</sup> *De iusta Henrici Tertii Abdicatione e Francorum regno*, Paris, 1589, and *Sermons de la simulée Conversion et Nullité de la Prétendue Absolution de Henry de Bourbon*. Paris, 1594.

<sup>5)</sup> Rose has been identified by Charles H. McIlwain as the English refugee William Reynolds. cf. Charles H. McIlwain, *Constitutionalism and the Changing World*, N. Y. 1939 (Who was Rossaes?) Rose's work was *De Justa Reipublica Christianae in Rege Impius*. Paris 1590.

<sup>6)</sup> Lavissee-Mariéjol, *Histoire de France*. Vol. VI, 1, Paris, 1905, p. 243.

cuted, their property confiscated, and revolutionary tribunals instituted. We have here a specific revolutionary Natural Law, a forerunner of that of the French revolution and of the Paris Commune of 1870. The doctrine of the social contract was used to invest popular bodies with full and even terroristic powers, completely discarding the separation of powers for which the French *Parlements* and the Estates General had been fighting and continued to fight. Though the organizational forms of the religious wars were revolutionary, the social aims were in no way so. Boucher, Rose, Dorléans, and other Catholic leaders of the League were genuinely concerned with the restoration of the Catholic religion. But the decisive powers, the feudal leaders at the top and the mob at the bottom, cared little for religious disputes. Instead, they used religion and the social protest of the impoverished masses for so complete a perversion of these postulates that the outcome of the religious wars was merely the stabilization of the royal authority and the complete suppression of democratic and liberal natural law.

## X.

Finally, we must mention the constitutionalist doctrines. Only a mere mention is necessary since they are very well known and, besides, have recently received admirable treatment from Charles Howard McIlwain.<sup>1)</sup> The constitutionalist doctrine may, as we already mentioned, be linked to any theory of the State except the charismatic one. It simply contains the demand for a restriction and limitation of the sovereign power by a system of norms which are regarded as being above the positive laws of the State. The line of development of the constitutionalist doctrine is clear. It runs from stoic natural law to the Roman jurists and Cicero. It pervades the legal and political thought of the middle ages. It becomes the theory of the French enlightenment.

That, of course, does not mean that modern constitutionalism is solely the product of liberal Natural Law. I have tried to show, in an earlier article in this journal<sup>2)</sup> that in continental Europe the influence of Descartes and mechanistic philosophy, especially on Montesquieu, must not be overlooked. Nor can restrictions imposed upon the sovereign power by tradition (such as the common law in England or the *Lois Fondamentales* in the *ancien régime*) be identified with Natural Law. Constitutionalism is thus made up of three

<sup>1)</sup> *Constitutionalism, Ancient and Modern*, Ithaca, 1940.

<sup>2)</sup> "Der Funktionswandel des Gesetzes im Recht der bürgerlichen Gesellschaft," *Zeitschrift für Sozialforschung*, VI (1937) pp. 542-596, esp. p. 556.

elements: optimistic Natural Law, mechanistic philosophy—that is, the belief in abstract general rules providing for calculable and predictable relations between the states and its citizens—, and common law embodying an old tradition. Constitutionalism likewise takes three forms: the German *Rechtsstaat*, where rights are preserved not by the participation of the citizens in the formation of the general will, but by the construction of an elaborate legal system providing for the highest amount of calculability; the English doctrine of the Sovereignty of Parliament and the Rule of Law where the protection of life, liberty, and property is primarily secured through the democratic origin of legislation and the tradition of common law; and the American form of judicial supremacy, which protects rights through judicial review of legislative acts, attempting to extend it over administrative decisions.

The one problem produced by the antagonism between the democratic conceptions and the liberal theories, cannot be exhaustively discussed here. I again refer to my earlier article. The doctrine of natural rights may very well be used for entirely reactionary aims, namely for the sabotage of democratic processes.<sup>1)</sup> The insistence upon the primacy of a liberal as compared with a democratic Natural Law is often the first step of a counter-revolution. To deal with these trends would involve a considerable enlargement of the present study. But though reactionary, even this perverted doctrine of Natural rights does at least contain elements of a rational theory of law. Though used for preserving antiquated positions, it still allows some discussion. The weakness of the constitutionalist doctrine is that it maintains its absolute and equal validity against any theory of the State, even against the democratic one. The democratic theory of Natural Law is, however, on the whole, a truer one than any other, since it provides for the rational justification of the State.

---

<sup>1)</sup> That is why it has been rejected by Linguet, the famous critic of the rationalistic-liberal natural law doctrines. (*Théorie des Lois Civiles*. London, 1767, 2 Vols.)

## CONCLUSION.

We may sum up the results of our analysis.

1. Every Natural Law theory, whether optimistic, pessimistic or agnostic, whether conservative, absolutistic, revolutionary, democratic or liberal, is based on the view that man is a rational creature.

2. It follows that only man and not artificial persons, like corporations or states, can base his rights on the law of nature.

3. Natural Law thus insists on the universality of law and the impossibility of reducing any man to the status of a slave.

4. It implies the impossibility, rationally to justify any kind of tyranny and oppression.

5. The truest of all Natural Law doctrines is the democratic one. Wherever a democratic Natural Law theory exists, a liberal one can only have a subsidiary function.

6. Whenever Natural Law doctrines deduce elaborate systems with political and social postulates (whether it be private property or socialism) they are arbitrary and have no validity.

7. The principles which are still valid, although not solely derived from Natural Law, are the generality of the law, the equality of men, the prohibition of individual legislative decisions, the impossibility of retroactive legislation, especially in penal law, and an independent judiciary.

This may be little. But that little stands in complete contrast to authoritarian theory and practice.