

A Philosophy of Law

RANHILIO C. AQUINO*

The *Legal Philosophy* course in the law curriculum of the Philippines is a two-unit course. Sometimes, it is even pointed out that the subject is not within the ambit of the Bar Examinations. Students of law in the Philippines then are, not quite surprisingly, of the view that the subject is just one of those courses thrown in to supplement the main "course". It is likewise a fact that many who teach the subject hardly have the least notion of and familiarity with philosophy and the philosophical method, with the result that the subject often degenerates into a boring sampling of odd ideas about law, with professor and student alike enslaved to some mediocre textbook on legal philosophy.

Generally, philosophy is not taken seriously or, if it is, it is left to the musings of a select few who have the time — and the leisure — as well as the apparently esoteric powers of philosophical insight. This attitude is unfortunate, and its unfortunate consequences make themselves felt in our law students and practitioners. I am not alone in the observation that law students are obsessed with passing the Bar Examinations. Their studies and researches are aimed then at only one goal: making a passing grade. This is not surprising, after all their professional future depends on the test results. To the average law student, then, studying law is knowing what the law says, memorizing

*Fr. Ranhilio Callangan Aquino, Ph.D., J.D., is a Professorial Lecturer in philosophy and in civil law at the Graduate School of the University of Santo Tomas, Manila; Research Fellow, Catholic University of Louvain; Member of the International Law Association and of the International Commission on International Law in Domestic Courts.

some of its more significant ramifications as expressed in binding judicial precedent and applying law and jurisprudence correctly to given cases. Almost totally absent is the reflection, creativity and call to genius that can make of the law what Professor Perelman correctly calls “juris-prudentia” (*Broekman: 1992*) — and a “science”, in the sense of an organized, respectable and challenging study based on keen observations of man and his life in society coupled with an insightful grasp of the consequences of prescriptions on social living and a sober idealism that allows one to set goals and orientations. When one is dead-set on knowing (which usually translates into “memorizing”) codal provisions and jurisprudential citations, then there is hardly any room for the highly educated adventure that allows one to ask — and to attempt at solutions — whether civil law systems would not profit immensely from the flexibility of common law that allows for the meaningful evolution of law through precedents. There will be no interest in criticizing traditional and long-accepted formulas of contract law to determine whether or not the nebulous concepts of “intention of the parties” and “consideration” still make sense. The rules on evidence become a confusing maze of suggestions, prescriptions and injunctions lacking the coherence that only a sound epistemological base can give them. More disturbingly, even, the canons of legal and judicial ethics are reduced to a set of convenient “points of agreement” that may be glossed over when the exigencies of the moment seem to call for not-too-ethical solutions! Sectors decry the debasement of the legal profession and rightly so, for they who are privileged to wear the purple of the legal profession — that traces its lineage to the purple edges of the Roman toga that had its home in the Senate and graced the Forum — must, indeed, possess the nobility marked by a fidelity to justice born of wisdom! Certainly, it is not the man who can rattle off articles, sections and provisions who is wise, but the man who sees how all that the law provides leads (or does not lead) to a more human and humanly ordered society.

Philosophy of law is then not a leisurely pursuit that the law — and lawyers — can do without (or even postpone). Underlying all legislation and rule-making is a philosophy, perhaps unarticulated but nevertheless operative and efficacious. If justice is to be achieved, not as some fixed and static “ideal” but as a project, then the philosophical matrix of law and decision-making has to be brought to the level of reflection, that is explicated and criticised.

What *philosophy of law* is will quite obviously be dependent on what *philosophy* is. I propose to deal with the matter by taking cues

from ancient as well as contemporary approaches to the philosophical enterprise:

1. "Philosophy is the knowledge (*scientia*) of things by their ultimate causes or reasons (*per ultimas causas vel rationes*)". This has been the Scholastic formulation which in turn goes back to Aristotle.

We have said in the *Ethics* what the difference is between art and science and the other kindred faculties; but the point of our present discussion is this, that all men suppose what is called Wisdom to deal with the first causes and the principles of things...(*Metaphysics*, I,1)

And then he says of "final causes":

Further, the final cause is an end, and that sort of end which is not for the sake of something else, but for whose sake everything else is; so if there is to be a last term of this sort, the process will not be infinite. (*Metaphysics*, II, 2)

I render Aristotle's "prima principia" and "ultimae causae" as the undergirding purpose and the sustaining orientation and motive force of things. Under this account then, it becomes the task of the philosophy of law to unveil the goal of the law and its underlying motives — not really the motives of the legislators, primarily, but of society that creates laws and sustains them. This is no small matter, and its consequences bear explication. If the law has an identifiable goal and is indeed sustained by motives that can be referred to, then there are standards by which to determine whether a law should have been passed or not; there is a measure by which to evaluate the sustainability of an enactment. While the demise of the "natural law" doctrine has been widely announced, references to "the common conviction of civilized nations" in the sphere of international law as well as to "equity and the conscience of the court" in municipal law seem to me to render pronouncements as to its obsolescence premature.

2. It is the task of philosophy to provide the person with a "map" that gives coherence to his activities and that makes of human life a meaningful whole. Of this task of philosophy, Professor Van der Veken of Louvain writes:

The metaphysician tries to elaborate a helpful, illuminating, clarifying view of reality, as he sees it. Here metaphysics is seen as a conspectus, map, grid or framework with which we can arrange and structure that which is given in our experience, considered as a whole, into some meaningful, organic unity. A

metaphysical system is the linguistic formulation of such a conspectus on the world as a whole, which would otherwise be left obscure, problematic, and unclear. Hence the practical relevance of the metaphysical scheme: it helps a person situate himself in the whole...(Van der Veken: 1993)

Philosophy provides a cosmic-map so that man's endeavours may have some coherence. Obviously map-making calls for creativity and ingenuity, especially when the terrain to be mapped out is nothing less than human life itself. So there will always be something exciting and adventurous about the philosophy of law, and there will be something permanently *tentative* about it! A philosophy of law will always be the proposal of a philosopher or a jurist on the place of philosophy in human becoming, in that momentous project of being-human and in the historicity of man. That such a "map" is called for becomes dramatically clear when we recall that one of the present time's dissatisfactions is with the dictatorship of the sciences and the human bankruptcy of an age that has made of science the autocratic paradigm. (cf. *de Schrijver: 1993*) While indeed science is effective and efficient, it can be inhuman, but there still remains the search for the "humanum", the vision of being "fully human, fully alive". To be a humanizing factor, the law has to share this vision; it has to have a place in this scheme. This is what the philosophy of law is all about. In discussing property and property rights, for example, the jurist is not some automaton applying fixed and unyielding command-statements to a situation. He must ask himself how well (or "unwell") present principles of proprietary rights serve the purposes of doing justice in a society marked by severe inequity.

3. Philosophy is the endeavour of uncovering the "meaning" of phenomena. A phenomenon is that which is present-to-view, that which appears. The important realization is that the meaning of the appearance has to be sought out, for the meaning can be concealed. The law is a phenomenon and it has so often be categorized with other social phenomena that its uniqueness — and therefore distinct meaning — has been missed. To contend with the phenomenon seriously, one cannot be its apologist. The partisan is so taken up by the phenomenon that its meaning is concealed to him. The convict will see only the harshness of penal law, just as the complaining witness will see in it an instrument of vindication. Is there anything more than these partisan claims? There is in our regime of law in the Philippines the fact of a Constitution with which statute, rule and order alike must conform or risk being struck down as unconstitutional. What do we make of the alignment

of statute and rule with the Constitution? What is this phenomenon called "constitution"?

At the service of uncovering meaning is *hermeneutics*. Hermeneutics indeed has evolved from merely being the science of interpreting texts to being, thanks to the philosophical output of Gadamer, Ricoeur and Habermas, the very structure of human understanding and existence itself. Hermeneutics calls for "dialoguing" with the text of the law — which means that the law, as well as the readers (and interpreters) of the law must speak alike. It calls for the deconstruction of pseudo-knowledge so that the richness of symbol and metaphor may truly emerge. Would it not be interesting — and of utmost importance — to do a hermeneutic of the doctrine of the non-suability of the state? Will we, perhaps, not find in it the carried-over concepts of a sovereign being above law and litigation? And what shall we make of the accretion of generations of jurisprudence that have attempted to make sense of the doctrine? Quite interestingly, Bernas does admit that the provision (*Art. XVI, Sec. 3*) finds its roots in the veneration of Sovereign (the King) by being above suit. Quite paradoxically, because only the King could give consent to suit, when the King was abolished, so did the means of giving consent, and we (as descendants of the Americans in jurisprudence, for better or for worse) are left with this principle. Bernas also takes care to point to the discomfiture he feels with adopting Holme's justification of the principle. (2 Bernas: *The Constitution of the Republic of the Philippines — A Commentary* 538). That there is much subject for hermeneutic in this regard is clear from the rather curious jurisprudence of *Switzerland General Insurance v. Republic*, 32 SCRA 227 cited by Padilla.

The doctrine on non-suability of the state recognized in this jurisdiction even prior to the effectivity of the Constitution is a logical corollary of the positivist concept of law which to paraphrase Holmes negates the source of the law on which such a right may be predicated. (3 Padilla: *The 1987 Constitution of the Republic of the Philippines — With Comments and Cases* 622).

Now, but really, what do these high-faluting words mean? I do not see any connections between positivism in law and this obscure theory. There are some indications though of a sedimented concept of the "divine rights" of kings.

4. A very important tradition in philosophy is the *analytic tradition*. The philosopher does not masquerade as a scientist; he then does

not proffer "facts" and "data" which scientists may have overlooked or failed to present. Starting from this very salutary reminder of the difference in domains, the analytic tradition, particularly through Ayer, makes it the task of philosophy to *describe* that which is observed. (Ayer: 1956) The core problem of philosophy then becomes one of deciding how the facts presented to it are to be described. This calls for giving a logical account of the way we use our terms. The fact is that in law, we sometimes use impressive and sonorous terms but fail miserably in the task of rendering a logical account of how these terms are to be used. One such term is "sovereignty". With this as our battle-cry, we ousted the Americans from Subic and Clark. We justified the extra-constitutional events of 1986 by appealing to the will of the "sovereign" people. But it is international law that suffers especially from the careless use of the term, for by invoking "sovereignty" some states refuse international scrutiny of what would otherwise be truly global concerns, such as human rights. Now, exactly what is "sovereignty"? If we give a clear, and logical account of the term, are we perhaps not using it as a facade for our unknowing? Consider the following interesting situation: "Sovereignty" is a key word in the Philippine Constitution. The beautiful phraseology of Article II, Section 1 will hardly be forgotten: "The Philippines is a democratic and republican State. Sovereignty resides in the people and all government authority emanates from them." When called on to be logically clear about "sovereignty", the Supreme Court hardly fulfilled its task. In *Sanidad v. Commission on Elections*, 73 SCRA 333, the Court said:

This is the concept of popular sovereignty. It means that the constitutional legislator, namely, the people, is sovereign.

Now, what kind of a logical account would that be? It is obvious to anyone familiar with American political law that the belief in the "sovereignty" of the people is a cornerstone of the body-politic. In *Chisholm v. Georgia* 1 L Ed 440, 455, however, we find it candidly admitted:

To the Constitution of the United States the term "sovereign" is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not, perhaps, have comported with the delicacy of those who ordained and established that Constitution. They might have announced themselves "sovereign" people of the United States: But, serenely conscious of the fact, they avoided the ostentatious declaration.

This seems to be just it — a propensity on our part to be prodigal with our terms, but sparing in responding to the demands of exactness. If so many consequences, many visceral, follow from “sovereignty”, logical analysis is a procedure we cannot dispense with.

The philosophy of law will, in Dworkin’s words, be “parasitic” on the traditional great branches of philosophy.

1. The question of the nature of the law is an *ontological* problem. There is the endeavour to know what makes law what it is. Like all ontological ventures, there is the effort at “eidetics”, the grasp of the essence of law. At the same time, the traditional doctrine of *analogia entis*, the analogy of Being, is helpful and regulative. “Being” knows different realizations, for while God, an idea, man and a stone are beings, they ARE in different ways. At the outset, it must be pointed out that the same thing SHOULD be recognized of law. Inability to appreciate analogy at work will raise such artificial questions as whether international law, lacking a legislative body to enact it, or strictly defined penal sanctions for its violation, is truly law or not. It is law, of course, and the consequences of refusing to admit its character as law can only deter efforts at bringing about rational rapprochement between nations through the instrumentality of a legal order. But, admittedly, it is law of a different kind from domestic or municipal law.

Inquiries into essences are also inquiries into the way we use our terms. Instead of asking then: “What is the essence of law?”, we can ask ourselves: “Which prescriptions, statements or institutions do we describe as law?”, “Under what conditions do we speak of law?”. We are called on to give an account of the way we use the word *law*, but I also hope it is clear now that this is not “mere semantics”, for it has to do with what Scholastic philosophers thought to be one of the sublime purposes of philosophy — the grasp of essences, a passion shared by Husserl who envisioned phenomenology to make possible “eidetic reduction”. An equally pivotal concept in the philosophy of law whose ontology we seek is *justice*, and the effort of a contemporary philosopher like John Rawls should remind us that the search for its essence has not been called off!

2. The philosophy of law calls on *logic* and *critical theory*. There is first the problem of legal reasoning. It is clear that the simplicity of the syllogism and its rules will not suffice. More satisfactory, perhaps, is the suggestion made by Toulmin that we look at “warrants” and “grounds” and “backing” when we examine a conclusion of law or its rebuttal. (Toulmin: 1984)

A theory of meaning is at the heart of the effort to understand statutes and enactments. It is an accepted principle in law that while legislative intent is one consideration to be made in *statutory construction*, it is not what transpired in the halls of the legislature that finally determines what the law is to mean but what the Courts pronounce its meaning to be. The doctrine of *legal meaning* well-entrenched in both common law and civil law (particularly in the Philippines) indeed recognizes “legislative supremacy”, the exclusive competence of the legislature to enact law, but equally upholds “judicial finality”, the determinative status of the rulings of the courts on the interpretation of statute. (*Dickerson: 1975*) There are some presuppositions of the doctrine that bear close examination: there is the presupposition that the enactment, when written, maintains a life of its own that allows it to enter into dialogue with the contemporary reader in that hermeneutic circle so engagingly discussed by Gadamer; there is then an implied rejection of a brand of “romanticist hermeneutic” (also known as the “fallacy of literality”) that would have us unearth the intentions of the author to be able to say with certainty what the text of the law means. One appreciates the urgency and the centrality of the task of dealing with the question of meaning in regard to the intendment of the Constitution and of treaty.

A critical theory that also brings to light the “moral convictions” of society cannot be dispensed with. No matter that we may legitimately maintain the distinction between law and morals, the fact is that the law frequently adverts to morals. Contracts, for example, are null and void if they go against public order and morals. Now if legal commentators and practitioners alike are not to wallow in uncertainty and in the vagaries of the term “morals”, a critical theory must be turned to. Remedies in equity, to take another example, are available when one appeals to the “conscience” of the court to redress an “unconscionable” situation for which remedies at law are not sufficient. Calmari and Perillo then correctly say:

“...the foundation stone of much of equitable doctrine is the concept of unconscionability. Although in some areas of the law of contracts, such as mistake and penalty clauses, where the concept has been used to set aside contracts or contractual clauses, elsewhere it has frequently been used merely as a basis for denying the remedy of specific performance while leaving the contract intact...Refusal of enforcement, states the Restatement, depends upon the moral standards of enlightened judges.” (*Calmari-Perillo: 1987*)

3. That there are *epistemological* problems that philosophy of law must likewise deal with is obvious if one is sensitive to the underpinnings of that whole corpus of adjective law on evidence. When is doubt reasonable? On the resolution of this question may lie the liberty of an accused, or his loss of it (and perhaps, when the death penalty have been legislated into efficacy, even his life). The law on negotiable instruments and commercial paper charges certain parties with "superior knowledge" surrounding instruments and therefore deprives them of the lee-way afforded other parties. In our statute books is still the doctrine that a contract is a "meeting of minds". Surely, all this calls for close and critical examination of such claims as "knowledge" and the very interesting problem that was the center-piece of Ryle's opus, "mind".

In law, the phrase "the party who knew or should have known" will be frequently encountered. More often than not, it will be linked with questions as to who should be presumed to be acting "bona fide". If the law endeavours to be science (the "science of jurisprudence"), then it certainly cannot rely on common-sense and uncritical opinions about such vital concepts. Quite interestingly, for example, there is such a thing as the "parole evidence rule" — when a contract is deemed exclusive and integral, evidence of other terms not included therein is inadmissible. On the other hand, in maritime and admiralty law, there is the famous *English rule* in regard to bills of lading. The bill of lading is evidence of a contract; it is for this reason that American law holds the definitiveness of its terms and applies a rule analogous to the parole evidence rule in regard to it. The English rule, however, rests on the argument that since the bill of lading is evidence of an agreement of affreightment entered into by the parties, terms of that agreement earlier arrived at can prevail over the terms explicitly contained in the Bill of Lading. All this gravitates around the important notion of "evidence"—what evidences, what is evidenced, what is evidence—and this is certainly an epistemological concern, especially dear to supporters of a "rational belief" or "justified (= *evidenced*) belief" theory of truth.

Different standards of proof are furthermore called for different causes of action: some civil actions call for "preponderance of evidence"; petitions for some judicial reliefs call for "clear and convincing proof"; convictions call for "evidence beyond reasonable doubt". Obviously, many judges can only call on what is commonly considered "preponderant", "clear and convincing" and "beyond reasonable doubt". Again, if we are to take the law seriously — and we have every reason for doing so, considering that we have to do with the legitimation of acts and

institutions in society — then the vagaries of “common sense” will not suffice. The cutting-edge of epistemological inquiry must be sought.

4. *Ethics* or moral philosophy will likewise be relevant to a philosophy of law. Notwithstanding the claim that one of positivism’s greatest achievements has been the separation of “morality” and “legality”, I also asserted in an article on “The Legal Aspects of International Conflict Resolution” (*Philippiniana Sacra*: XXVIII:82, 1993) that one who looks to the “motive forces” behind the shaping of law will find moral convictions. When legislators move for the amendment or repeal of law, when interest-groups lobby for the enactment of law, and when the citizens clamor for extra-constitutional measures, there clearly is a standard operative that is not the law itself. Many used to call this supra-legal standard “natural law”; today, it may be disliked because of its theistic associations, but however one may call it, there is an appeal to moral consciousness, to the sense of what is right. When this is seen to be so, the question “Is it really right?” will not be too far behind! It is a settled principle of the *Law on Salvage* in admiralty and maritime law that a salvor who saves goods in danger of perishing is entitled to award; one who saves human life alone, however, is not so entitled. (3*A Benedict on Admiralty 7th Ed Section 24*). Strange, is it not, that the saving of goods should be awarded, while the saving of life should not be! Yet there is a “policy” the law on admiralty impresses on all here: while the saving of the goods of another is meritoriously voluntary, the saving of human life is obligatory. It will then not do to equiparate the saving of life with the salving of goods by awarding both. Is there anything repugnant about finding in this “policy” embodied in the law on salvage the moral conviction of the superiority of human life as a value? In *The Corfu Channel Case (The United Kingdom v. Albania)*, 1949 I.C.J. 4, Albania was held liable for damage inflicted on vessels that had hit mines on entering its territorial waters. After reiterating the doctrine on the right of innocent passage, the Court adverted to “elementary principles of humanity” to argue for Albania’s obligation to inform incoming vessels of the pernicious presence of the mines. Clearly no convention or treaty could be univocally cited, neither was customary law usefully reflected in the practice of states and in their official pronouncements in this regard, but the court did not hesitate to invoke the conscience of civilized nations — what some authors have called “international morality”. Now if there is “international morality” that has legally relevant effects, there must be morality, and this is why ethics is a concern of the philosophy of law.

While the sustained attacks on the courts and on lawyers is both unjust and unjustified, especially since they remain largely unsubstantiated and blown out of proportions by media engaged in demagoguery, there is in the events of recent days a salutary reminder that the canons of judicial and legal ethics are more than statements of professional convention. They are rather the distillation of the conviction of jurists as to what is proper/right/moral in the conduct of magistrates on the Bench and members of the Bar. And if these canons are not to be subject to the unpredictability of whim and the fickleness of persuasion, then a serious inquiry into their validity — involving an examination of the moral standards used — is certainly in order.

I. THE LAW

In the introductory notes to *The Philosophy of Law*, Dworkin distinguishes between three uses of the word “law” (*Dworkin: 1977*):

- i. Law as a *social institution*.
- ii. Law as a *particular type of rule or prescription*.
- iii. Law as the *propositions of law*.

As a social institution, law is an aspect of what Peter Berger calls “nomization”. It is cosmos — an orderly world — that allows man to be human, not chaos. Man imposes order, and orders his relations with others. He thereby resolves conflict, tames the world, harnesses its energies, and interacts with others in supportive relations of love and friendship. But there has to be order, and law is an institution of social order. *Ubi societas, ibi lex* remains a good insight!

Dworkin introduces us next to the very intriguing question: What constitutes this institution called “law”? And here, quite expectedly, there are different proposals, not necessarily competing, but each underscoring a facet of the legal institution. The Constitution does advert to this usage of the term “law”. The Preamble enunciates our hope for the “blessings of independence and democracy under the rule of law...”. Surely, what is referred to is a society the goes by law. Article II, Section II declares “the generally accepted principles of international law as part of the law of the land...”. Part of the social institution we call “law” will then be what international jurists call “peremptory norms of international law” and even customary international law. In judicial landmark, *Marbury v. Madison* 5 US (1 Cranch) 137 (1803), a

decision that explicitated the constitutional framework particularly for judicial review, called attention to the social institution of law that held the American political fabric together when it called attention to its centrality.

The government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right. If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.

That ours is a “government of laws” says a lot especially when this provision is juxtaposed with the well known statement of sovereignty residing in the people. Without calling attention to the paradox, Bernas opines that the parallel provision in the American Constitution (Article IV, Section 4) “is to guarantee against two extremes: on the one hand, against monarchy and oligarchy, and on the other, *against pure democracy*.” (2 Bernas 21, underscoring mine). Again the paradox of “public sentiment” or “common will” having to conform to the Constitution — and thus, to the regime of law — is evident in *People v. Pomar*, 46 Phil 440 where the Supreme Court ruled:

The constitution or the law of the people of a state is the supreme law of the land. The police power of the state cannot be exercised in contravention of the inhibitions of the constitution. *Neither public sentiment, nor a desire to ameliorate public morals of the people of the state will justify the promulgation of a law which contravenes the express provisions of the fundamental law of the people.* Amendments to the constitution must first be made. (Cited in 1 Padilla 25).

There is therefore a certain “magnitude” in the law — a magnitude that, in a very real sense, makes it more powerful than the wishes of the “sovereign people”, for having ordained a regime of law by assenting to an organic act, they are bound by it. Affairs of state can no longer yield to every whim even of the majority.

So far, then, I have attempted to draw the lineaments of law as a social institution. It is that which gives order to social life and, in this measure, is an aspect of what Berger calls *nomization*. To be human, man orders his world. Absolute disorder is incompatible with being human, and while we may have varying standards of orderliness, it

remains true that each does try to put some order in his affairs, in his dwelling and in his workplace. Man becomes by structuring his personal, social and natural environments. The process of nomization involves three steps:

i. *Externalization*: Man projects his concept of order into the world and structures it accordingly. Thus the Founding Fathers of the United States of American decided that the "order" they wanted for their democratic federation would involve a tripartite governmental framework: a branch to enact the laws, a branch to see to their execution and a branch to interpret them definitively and to define rights and obligations.

ii. *Objectification*: The order projected becomes part of either the personal, social or physical worlds. My imposition of order becomes objective, factual. Thus, my parents' picture-frame must be to the right of my book-shelf, and should the cleaning boy change the order, I would either call his attention or restore the picture-frame to its "real" place (but "real" is what I really determined its place to be). For all citizens of the United States then, the three branches of government, though mutually cooperating, are distinct, each with its function. It is a *fact* that the judiciary cannot and should not legislate (except in the limited sphere of judicial rule-making), and neither should the legislature attempt to interpret law with pretensions at definitiveness. This fact, however, is one resulting from an earlier imposition of the Founding Fathers' conviction about the proper order of the body-politic, coupled with the continued acquiescence of the populace.

iii. *Internalization*: The objective scheme of things structures my thinking about things, and the thinking of society. We therefore react quite strongly, and quite rightly, against encroachments by the Executive on the independence of the Judiciary. It *should not* be — with a "should" that originates from the governmental structure as is in place, remembering at the same time that it is a structure we have ourselves put in place.

What Berger says about internalization is of utmost importance. (Berger: 1967) The survival of any social institution depends on its internalization. Another way of putting this is saying that the moment members of society keep the institution external to them, it will not survive. When people no longer thought in terms of the Divine origins of the absolute rights of monarchs, talk of rebellion filled the air, the Bastille was stormed, and soon crowned heads started to roll! Essential

too to the survival of law as a social institution is its observance by a cohesive community and communication between members of the community. Prognosis can only be poor for a system of law that is largely ignored by the population. One therefore understands why agents of the law must act with dispatch in arresting those who flaunt violation of the law; courts must, with equal dispatch, deal severely with violators if the impression is to be made without doubt on society that it pays to obey the law and does not pay to break it. Exchange and dialogue between members of society who uphold the law and seek its protection, who invoke it, or who criticize it with the purpose of improving on it is of the essence in keeping the regime of law in place. Where the law is not talked about, where the individuals in a body-politic do not support each other in maintaining it, or deal with each other in its terms, it soon fades into oblivion.

I now turn to the second acceptance of law — that is, law as a specific (special) set or type of norms. There are norms that dictate who should sit where at a formal banquet and while violation of these norms can be very embarrassing, the coercive force of state will not be called upon to vindicate parties aggrieved, nor will the courts be invoked to enforce rights. One's religious beliefs and religious community — the church — lay down norms for living. He is certainly a short-sighted lawyer or jurist who underestimates the potency of moral or religious norms. Because of these norms, Crusades were launched ("God wills it"), kings have been deposed and monarchies dismantled, dictators ousted ("A government that assumes power through fraudulent means has no right to demand the obedience of the people" — Catholic Bishops' Conference of the Philippines). While these norms may play a considerable role in shaping law, they do not, of themselves, constitute law. The prescriptions of one's parents are very real prescriptions, accompanied with some form of sanction for their violation, but these are not laws in the sense we now use the term.

One attempt at identifying the type of norm that can be considered law was Aquinas': "nihil est aliud quam rationis ordinatio ad bonum commune ab eo qui curam habet communitatis promulgata". (*Summa Theologica*, Ia-IIae, q.90, a.4). [The law is an ordinance of reason ordered towards the common good, promulgated by him who has charge of the community.] It then would not suffice, in the thought of Thomas, to promulgate an ordinance. It had to be a *reasonable* ordinance, in short, a norm that was in conformity with the dictates of right reason for no one, Aquinas argued, can ever be compelled to do that which is unreasonable. There was a further requirement: that it had to be

ordered towards the common good. Austin's position then that the type of norm called law is that which is given by a segment (or an individual) of society who is not himself in the habit of being ordered towards the other segment that is in the habit of submitting to such orders would have been grossly inadequate for Aquinas. He would join Hart in objecting that a bully who was in the habit of having his way with others would then issue orders with the force of law! Hart, however, would protest against Aquinas' conflation of "moral requirements", i.e., conformity with the dictates of right reason and ordering towards the common good. For his part, Hart proposes that law as a social institution exists when people submit to norms that set out how other norms are to be laid down. Clearly, Hart wishes to take away the power of "law-making" from the gunman who terrorizes his victims. The law-givers then, themselves, are also under law (which, to my mind, Aquinas insisted should be "the law of reason" — natural law). It follows from Hart's conception of law as a social institution that law as a type of norm admits of two kinds: a norm for the laying down of other norms, and norms of conduct (doing and not doing). Hart is however insistent that the distinction between *law* and *morals* be maintained. Law, he opines, can best be dealt with without having recourse to the vagaries and variegated conceptions of morality. (Hart: 1983)

Philippine jurists and legal experts reflect the tension between "moral considerations" and "legal considerations". Arturo Tolentino accepts from Sanchez-Roman the definition of law as "the science of moral rules, founded on the rational nature of man, which govern his free activity, for the realization of the individual and social ends, of a nature both demandable and reciprocal." (1 Tolentino: *Civil Code of the Philippines, Commentaries and Jurisprudence*, 1). Later on, Tolentino accepts the traditional distinction, espoused by Scholastic philosophers themselves, between *law* and *morals*, asserting that "the field of morals is more extensive than that of law". (1 Tolentino at 2). In trying to identify that type of norm that law is, Tolentino proposes a three-fold typology: *mandatory*, which commands that something be done; *prohibitory* which commands that something not be done; and *permissive*, which commands that what it permits should be tolerated. (1 Tolentino at 4). This typology rests on what, for Tolentino, are the essential features of law as norm: first, a rule of human conduct; second, promulgated by competent authority; third, obligatory; fourth, of general observance. It will at once be observed that Tolentino attempts to strike a balance between the positivist approach and the classical proposal. The requirement that the authority be *competent* is present

in Aquinas' definition, but it can also be seen as compliance with Hart's requirement that he who lays down norms of conduct must have first submitted to the norms for the formulation of norms. "Obligatory" is best interpreted as "enforceable by the coercive authority of the body-politic" for "moral norms" are also obligatory. Quite admirably, Justice Paras commences his equally well-known commentary on the Civil Code by a well-written presentation of the traditional theory of law. I take this opportunity to pay tribute to a jurist who is cognizant of the philosophical underpinnings of legal points. Paras' discussion of law and of its divisions — though Scholastic in inspiration — commends itself to the diligent student. I wish more writers of law books were as sensitive to the philosophical issues involved in law. It is this sensitivity that saves the study of law from being an almost *programmed* application of statute and precedent to obtaining circumstances. (Parenthetically, I must remark that Paras wrongly attributes the classical definition of law given *supra* to Augustine). Justice Paras typifies "human positive law" as "a reasonable rule of action expressly or directly promulgated by competent authority for the common good, and usually, but not necessarily, imposing a sanction in case of disobedience." (1 Paras: *Civil Code of the Philippines Annotated* 2 - 3). From this he draws the characteristics of law as a type of norm: first, a reasonable rule of action; second, due promulgation, noting that without this, "obedience can hardly be expected"; third, promulgation by competent authority; fourth, generally, a sanction imposed for disobedience. It does seem then that leading Philippine jurists are inclined towards the "classical" approach to law. It should be noted though that already in the 3d Century B.C., a Chinese philosopher, Han Fei Tzu, acclaimed by Fung Yu-Lan as the last and great synthesizer of the Legalist School of Thought, announced: "A law is that which is enacted into the statute books, kept in government offices, and proclaimed to the people." (in *Wing-Tsit Chan* 256). This was some form of positivism!

From Han Fei Tzu's formulation, we see quite clearly the intentionality of the positivist position. Quite accurately, to me, positivism points out what the law, as a special type of norm, factually is. It has therefore been said by commentators on the subject matter that the whole discussion between the classical tradition and the positivist proposal is a discussion between what the law *is* (a set of norms formulated in accordance with law-making norms) and what it *ought to be* (reasonable and ordered towards the common good). While I shall tackle the issue in much greater detail later, for now, it is useful to remark that whether the citizen thinks the law reasonable or not and

ordered to the common good or not will in no way stop the Executive arm of government from enforcing it and the Courts from administering it. On the other hand, when citizens perceive the law — or, worse still, the laws — to be unreasonable and unjust, serving the interests of those in power, they may not have the patience to wait for the opportunity to correct the situation by the exercise of their right to suffrage. A revolution is always an extra-constitutional possibility!

We come to “law” as “proposition of law.” To assert that the law guarantees to the accused the right to counsel is to cite a proposition of law, specifically a provision in the Bill of Rights. To demand of the obligor that he deliver not only the thing but its fruits to the obligee in accordance with the guarantee of the law is to make use of a proposition of law, specifically Art. 1164 of the Civil Code of the Philippines.

What makes a proposition of law one is that it is found in the organic laws, statutes, administrative regulations or procedural rules of the appropriate branches, instrumentalities or agencies of government. We can go further and in accordance with the doctrine of *legal meaning* find propositions of law in the binding authority of judicial decisions. Thus, unfair competition is to be found not by a dissection of elements in product presentation and dress, but in the totality of the impression that these give. This is a proposition of law laid down in *Del Monte Corporation v. Court of Appeals*, 181 SCRA 410, a proposition very difficult to reconcile with the Court’s ruling — to mind, regressive — in the celebrated *Asia Brewery v. San Miguel* case.

This last point brings me to the matter of “penumbral propositions”. How does one arrive at a proposition of law? The answer given above is straightforward: open the statute-books and check, or review binding decisions. But some propositions do not yield to such a straightforward examination. These are the penumbral propositions. We are then confronted with the question: When is a proposition of law *true*? Now, this last word has caused a lot of trouble in the history of philosophy. There are, it is said, four theories of truth:

i. The correspondence theory that maintains that p is true if and only if p, i.e., “The moon is full” is true if and only if the moon is in fact full — a correspondence between the proposition and the way things are.

ii. The coherence theory that holds that it is the compatibility of a proposition with other accepted propositions that allows it to be counted as true. So that “q” is true when one accepts first that “p → q” and

then “p”. I maintain that “It is sunny today” is true if I can also accept as true that “It is bright outside”, “Laundry-women are hanging clothes out to dry”, “There is hardly a cloud in sight”, “A check with the weatherman confirms that it is sunny over Metro Manila”.

iii. The pragmatic theory that was designed to face the issue of how “ethical” or “value” judgements could be said to be true. Under this theory, such judgements are true if the consequences to which they lead are desirable or acceptable. “Abortion is immoral”. To judge the truth of this proposition is to ask ourselves whether we would like the termination of human life at the stages of its development or evolution when it is helpless, and whether we can live with such interferences.

iv. The rational belief theory that maintains that a statement is true when there is justification for it. This is the theory of truth that brings one to the very difficult questions of evidence and verification.

I have always maintained that one should not make of distinctions exclusive disjunctions when the latter were not meant. I do not hold these four theories to be “competing” theories of truth, but four different uses of the word “true”. Each has its field of applicability, and each is a useful analysis of the way we use the word “true”. Turning now to the penumbral propositions of law, we see that courts, in laying down the applicable rule, determine whether it is the proposition of the plaintiff or that of the defendant (confining ourselves to pure questions of law) that is most coherent with clear and unequivocal propositions of law. Thus we have the proposition that a limited partner who participates in the management of the partnership enterprise thereby subtracts himself from the protection granted by law to limited partners. This holding is coherent with the propositions in regard to limited partners and limited partnerships.

Where, with acceptable logical procedures and the accepted rules of statutory construction, courts show the coherence between a ruling and the propositions of law on which, it is claimed, the ruling rests, the latter itself becomes a proposition of law. This is obviously the coherence theory at work.

It should be remarked, however, that one of the guides courts invariably use in determining the acceptability of a construction is by looking to its possible consequences and results. Where absurdity results, the proposition is rejected. The presumption, of course, is that the legislature never intends to be unreasonable or to legislate absurd-

ity. Thus too, in the process of determining which position is coherent with accepted propositions of law, there is recourse also to the pragmatic theory — anticipation of the results of an interpretation.

When a purported proposition of law does not follow, and cannot be shown to follow from unequivocal propositions of law, it must be rejected as a proposition of law.

Hart on the Separation of Law and Morals

Hart is unrelenting about the separation of law and morals, but also takes a critical view of Bentham and Austin's position that there is law where orders are given by uncommanded law-givers who are obeyed by the rest of the population. When there is an order therefore issuing from that part of the population habitually issuing orders and habitually obeyed, and where the other segment of the population habitually submits itself to such orders, one speaks of law. Following from this concept of the law as a social institution is the view that law, as a type of rule, will be the orders issued by the uncommanded rulers.

Hart takes this position to task by calling attention to the fact that, as it is, it would make of the hijacker who wields the gun and yells his orders to a plane-full of passengers, docile because of fear, the source of *law*. Of course it can always be argued that the element of *habit* is not present: passengers are not in the habit of rendering obedience to such a man. Hart's point though is clear. There is something lacking in an account of law that makes of it orders of an ordering person or group habitually obeyed. This lack, Hart is quick to point out however, is not meant to be filled in by some *moralism*, the inclusion of the demand that aside from an order issued by a person or by persons habitually obeyed, the order be moral, or conform to *natural law*. Rather, the key to jurisprudence is the submission to a set of rules that define how rights and obligations are created.

We can then indicate this theory with the following diagram:
 Population—> Rules for the creation of rights and obligations—>
 Orders prescribing what may be done, what should be done or not done.

Obviously the hijacker is eliminated, and even the legislators are subject to some rule that determines how orders are to be given that command performance, non-performance or the creation of right.

Why must there be a separation of law and of morals? Hart argues

that "what the law is" is an issue distinct from "what the law ought to be". This, I think, is the bottom-line. Under the draconian laws then in place in the Soviet Union, many were consigned to the Gulag Archipelago or left to wither away in psychiatric wards on the basis of penal laws that would not pass the tests of most theories of morality. The rest of the world then would have been justified — and was in fact justified — in castigating what was then the Soviet Union for its *immoral* laws. But the fact that many measures were immoral does not prove that there was NO law in the Soviet Union at that time. One can always argue that the laws *should not have been*, but the fact is that they were! When therefore the "war-criminals" were prosecuted, the defense that they were acting in obedience to then existing law was ruled out and while most of the war tribunals invoked such allusions to morality as "the conscience of civilized nations", "common standards of decency" and "accepted norms of humanity", Hart says that candor would have made the tribunals acknowledge that they were in fact applying some law retroactively, namely, the law punishing collaborators. Odious as retroactive laws may be, especially in criminal proceedings, Hart thinks it is more candid to accept that one is in fact judging the accused by laws applied retroactively — and this step need not be unreasonable by merely being retroactive. The *ex post facto* application of a law would be the result of weighing which results one prefers: the result of allowing collaborators to go unpunished (by adhering unwaveringly to the doctrine against *ex post facto* laws) or the result of punishing the guilty and deterring others from the same conduct (by retroactively applying a penal provision).

"What is written is written!" This is Pilate's, but it also seems to be the formula for "mechanical" adjudication. Is it a judge's function to determine the facts, look through the code and see which provisions are closest to the facts adduced? If this were so, I have many times suggested that a computer properly programmed in the future would do a better job, and probably there would be little reason for semi-literate detractors of the judiciary to protest against "hoodlums in robes." But there is the aspect of *jurisprudence*, i.e., the "prudence" one needs to determine the *jus* under variegated circumstances and concatenations of facts. Hart deals with this issue in what he calls the "penumbral cases". The law is categorical, but facts in life seldom are. Chuang-tzu said the same thing of logic. I can hardly be expected then that the law is so formulated as to anticipate every possible application, nor are border-line cases avoidable. But Hart insists that if there are border-line cases, there must be lines! When a lawyer argues his

border-line cases, there must be lines! When a lawyer argues his position in a penumbral case, he appeals to some purpose or policy that the law purports to promote that would be best served by a certain holding of the court. When a judge rules on a penumbral case, he actually rests his judgment likewise on some policy or purpose which he thinks should be promoted over others. Judgments labelled as "mechanical", Hart correctly observes, are those that hold a preference for conservative policies and objectives but rest, nevertheless, on these goals. Obviously, in "penumbral cases" there will be reference to what is "desirable", "promotive of justice", "humanizing" or even outrightly "moral". Hart remains firm however in his stand that there is no reason to confound law with morals. He writes:

...to assert mysteriously that there is some fused identity between law as it is and as it ought to be, is to suggest that all legal questions are fundamentally like those of the penumbra. It is to assert that there is no central element of actual law to be seen in the core of central meaning which rules have, that there is nothing in the nature of a legal rule inconsistent with all questions being open to reconsideration in the light of social policy. (*Dworkin: 1977*)

That there are "grey areas" is certainly no argument against the existence of "white" and of "black". I take Hart's assertion to be this: Whether there is law or not cannot be settled by invoking the moral convictions of a people. This is not to say that in the formulation of law or in the decision between various possible interpretations of law, morals has no place at all. It is just to underscore the fact that the existence of law cannot be a matter left to the debate between different schools of morality.

A Scholastic Treatment of the Nature of Law

In characteristic fashion, Thomas of Aquino develops a systematic treatise on law in his best-known work, the *Summa Theologica*. I must direct the earnest student however not only to the treatment of law but also to the questions and articles that treat of justice. I will indicate the main themes and key arguments of Aquinas in this section. Known for the depth of his insights, Aquinas received requests for guidance from many, even from princes and rulers. In response to one such request, Aquinas wrote *De Regimine Principum*, a letter to the sovereign of Cyprus on kingship. Like the *Summa Theologica*, the work was not completed, but what we have is sufficient to constitute a Thomistic

treatise on the rule of Christian sovereigns. It is then relevant also for a study of the philosophy of law.

Aquinas accepts the common persuasion that it is the purpose of law to regulate behavior, to prescribe what must be done and to determine that in regard to which man must forbear. From this premise Aquinas argues that law must be *reasonable*, for it is reason that in fact directs a person's acts. The general rubric then of human behavior is "the reasonable," and if law falls under the category of institutions that regulate human behavior it is must be reasonable — what Aquinas calls an *ordo rationis*, an order or ordinance of reason. It is immediately obvious that Aquinas is not only *describing* law as it might exist. Aquinas rather lays down the criteria that which purports to be a law must fulfill in order to govern human conduct. Obviously, the possibility of ordinances that were unreasonable was not unknown to Aquinas. He, after all, wrote of tyranny in some of his works and even championed the right of the oppressed in some situations to revolt. But a prescription that was unreasonable could not qualify to be a law, even if it might be foisted and forced on the people as one. This important point should be remembered whenever the Thomistic theory is contrasted with the more popular *positivist* theories today.

Section 22, Article III of the Philippine Constitution proscribes "*ex post facto* laws", basically laws that penalize acts which, at the time of their commission, were not crimes. While both Padilla and Bernas point to the doctrine *Nulla poena sine lege* (There is no punishment for that which is not a crime) as the insight that supports the Constitutional provision, I think it rather clear that the basis for the exclusion of *ex post facto* laws (especially when penalties are involved, which is true of criminal cases to which alone jurisprudence applies the prohibition of *ex post facto* laws) comes from the nature of law as *regulative* of behavior. Now only that which is to be done can be regulated, i.e., future acts. Hence only acts performed posterior to the promulgation of a law are acts that were within the regulation of such a law.

So basic is the persuasion that the law can govern only future acts and so odious is the nature of an *ex post facto* law that a State in the present world would have immense difficulty justifying its position were it to punish crimes *ex post facto*. A number of international conventions and treaties lay down an *international injunction* against "*ex post facto* laws". This means that he whose rights are violated by

the enforcement of *ex post facto* laws can seek the protection of the mantle of international law.

Article 11, paragraph 2 of the celebrated *Universal Declaration of Human Rights* provides:

No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Exactly the same provision is reproduced in Art. 7, paragraph 1 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. It will be recalled that the Swiss Federal Court made compliance with the provisions of this Convention in conjunction with a trial of the Marcos heirs a condition for the Philippines' recovery of the Marcos deposits in Swiss banks. Article 15 of the *International Covenant on Civil and Political Rights* reproduces the anti-*ex post facto* law provision of the earlier documents, but also allows nations to punish acts which international law holds to be criminal, even if at the time of their commission, there might have been no domestic law on the matter. Obviously, the State-parties to the covenant recognized certain acts as so despicable as to be held by all to be criminal. This to me is a deliberate and welcome effort to make citizens of states cognizant of their international obligations as citizens of the world-community that has arrived at certain realizations of what is human and inhumane.

This whole discussion points to the regulative role of law vis-a-vis human behavior. It is because of this regulative role that Aquinas insists that law be "according to reason", for it was unconscionable to him (as I think it should be to us) that the person's behavior should be regulated by what is unreasonable.

Aside from being "ordo rationis," Saint Thomas thought that the law should meet other requirements expressed in his famous definition: The law is an (1) an order of reason (2) promulgated (3) by one who has authority over the community (4) for the common good. The need for promulgation is obvious; no one can be expected to obey that which has not been made known. That this requirement is generally accepted is readily seen from the fact that statutes and enactments have clauses stipulating their efficacy after publication in a journal or newspaper of general circulation. Article 2 of the *Civil Code of the Philippines*, for

example, ordains that “laws shall take effect after fifteen days following the completion of their publication in the Official Gazette, unless it is otherwise provided”. [It will be remembered, Justice Paras points out, that Executive Order No. 200 of 1987 provides for publication either in the Official Gazette — which is unknown to most of our people — or in a newspaper of general circulation.] “Secret decrees” then, as were alleged to have existed in the dark days of Martial Law under Ferdinand Marcos, are obnoxious and irreconcilable with this requirement. There is no way of knowing what a “secret decree” prescribes or proscribes; neither is there a way then of knowing how to act in accordance with it. “Ad impossibile nemo tenetur” — and here the impossibility owes not to the impossibility of performing or forbearing, per se, but to the impossibility of performing or forbearing absent knowledge of what must be done or avoided.

Simple and reasonable as the requirement may at first seem, however, it does hide thorny questions, foremost of which surrounds the familiar doctrine: “Ignorantia juris non excusat” ... Ignorance of the law does not excuse! The most facile reconciliation with what has been held above is to apply it to what Scholastic moral philosophers have traditionally called “affected ignorance” — the ignorance of one who deliberately keeps himself uninformed so as to be free from the obligations of the informed! But the law, as it exists, is not so generous. The doctrine is laid down by the Civil Code which provides in Article 3 that “[i]gnorance of the law excuses no one from compliance therewith”. Senator Tolentino admits that this expectation is not realistic.

Everyone is conclusively presumed to know the law. This presumption is very far from reality; but it has been established because of the obligatory force of the law. Once the law has been promulgated and has taken effect, it is the duty of everyone to know it. (1 Tolentino 18)

Matters get even more complicated when we are reminded by Paras who cites *Adong v. Cheong Seng Gee*, 43 Phil 43 and similar cases that “ignorance of the law” refers not only to the literal words of the law, but also to the interpretation given it by the courts of justice. Of the maxim, Justice Paras says:

It would seem that this maxim is a but unfair today; before the compliance is required there must be due promulgation or the law; now then, the present method of promulgation — “publication in the Official Gazette” is clearly inadequate — firstly, the Official Gazette generally comes out several months late; secondly, how

many of our citizens can get hold of a copy thereof, much less, read the same? (1 Paras 23)

In his own notes on the Civil Code, Chief Justice Ramon Aquino observes that the provision against excuses from compliance arising out of ignorance of the law is likewise found in Section 23 of the Administrative Code of 1987. He calls the presumption that the law has been obeyed "disputable." (1 Aquino, *Civil Code* 5)

It is rather obvious then that our leading commentators agree that this is no easy doctrine, and yet it is a demand of social existence. Justice Aquino goes so far as to speak of a *necessity*. "The rule is founded not only on expediency and policy but also upon necessity." (1 Aquino 5)

Tolentino puts the consequences of a contrary position thus:

Evasion of the law would be facilitated, and the administration of justice defeated, if persons could successfully plead ignorance of the law to escape the legal consequences of their acts, or to excuse non-performance of their legal duties.

In other words, if the defense of "ignorance of the law" were admissible, it would be among the easiest of defenses to advance, and therefore the most frequently invoked. Law as regulative would then hardly have any teeth to it!

Here we have a very clear indication of the "social necessity" of law and of the marked difference between morals and law. A man who is honestly convinced that what the Church holds to be immoral is in fact moral commits no sin when he acts in accordance with his honest convictions and maintains the necessary deference towards the authority of the Church. This is all very well when one deals with the "internal forum", the realm of conscience and one's own moral life. Social living however has its exigencies and it is to these exigencies that law addresses itself. We therefore see that the overriding purpose of the law is making possible orderly social life.

It remains true that to him who does not know the law, there has been no promulgation in regard to him. But I think that the presumption of "knowledge of the law" can also be properly argued: He who takes part in a social order or, as in the case of aliens, enters into society takes it upon himself to conduct himself in the manner that society deems legitimate. The onus is then on him to be informed of the laws, at least those that are penal and punitive in character. One does not partake of the benefits of living in society without assuming the burden it

imposes — one of these is to know the rules by which that society goes: the acts it commands, allows and proscribes.

Aquinas requires that only he who has authority over the community can promulgate orders with the force of law. I feel justified in calling this the “formal element” of law because it is enactments that issue from the “law-making” mechanism of the body-politic or the community that qualify as law. This what positivist theory refers to when it recognizes a rule as a law on the basis of its “pedigree.” Because of this formal element, Aquinas’ theory is able to meet the objection levelled against Austin’s theory of order “issued by one habitually obeyed but himself habitually obeying none.” Neither the gunman nor the bully will be a law-giver because neither has “charge over the community” — authority. It is obvious that the law-making mechanism can take many forms: in a dictatorial state or an absolute monarch, it will be the word of the person who wields governmental authority. In the Philippines, our law-making mechanism consists, on the national level, of an enactment of the legislature gaining executive consent and withstanding challenge of constitutionality before the courts. To the tribute of Aquinas — who lived and wrote in the days of monarchies and was himself of the lineage of nobility — it must be pointed out that the authority to promulgate law could rest either on the people as a whole or on someone who serves as viceregent of the people. (*Summa Theologica*, I-II, q. 90, a. 3) Law must serve the common good (this is the “telos” of law), and only the people themselves or their viceregent can determine with definiteness what pertains to their common good. In the Reply to the 2d Objection of the article cited above, Aquinas argues that private individuals cannot promulgate law because they lack what he takes to be a concomitant of law — its coercive power. The coercive power of the law is what distinguishes it from a request or from other species of rule. Advice can be spurned with impunity, but if the same thing could be done in regard to the law, law-making would be effete. Penalties then are not incidental to law. They are intrinsically connected to authority and to the force that the law must have in order to be law. In the light of Aquinas’ insight that the people themselves have the primary authority to promulgate law, the *initiative* and *recall* provisions that are novel in the Constitution of 1987 are welcome developments. While apparently unwieldy to those for whom democracy is republicanism, the developments are not for that reason unacceptable.

How much authority must the law-giver wield? As much, Aquinas would answer, as is necessary to effect the common good. The “bonum

communis" is a concept inseparable from Aquinas' teleological anthropology. Man aspires after happiness (*beatitudo*) and it is the latter that perfects him, completes him. The good of the community then must be that which enables the members of the community to attain the human end — happiness. In this manner Aquinas draws the closest connection possible between *law* and the *human person*. There is certainly a wealth of insight here that we can so easily overlook these days. Indeed, in many respects, laws are society's responses to the demands of living in society. They are responses however ultimately directed towards more humane and humanizing living.

I think I have made it quite clear that Thomas of Aquino's theory of law is the statement of an "ideal." The latter term is perhaps not strong enough for lawmakers do realize that there are some imperatives underlying the enactment of law. Prescinding from the sad fact of the corruption (as well as the complacency) of the electorate, lawmakers know that when the measures that issue from the legislature are inimical to public interests, the power that the ballot carries can be directed at unseating them.

Because the *bonum communis* is the purpose of law, the members of the *communitas* must have some manner of seeing to their welfare through (and sometimes, in spite of) their representatives. Within the framework of Philippine political law, there are at least three ways. The first is obviously by the judicious exercise of the right of suffrage. This is why a person-directed electorate is ultimately a scourge to the common good. The people must know what a candidate represents, what platform he stands on, and what measures he intends to introduce. It is on this basis that the choice ought to be made. A second way is by lobbying. There is nothing illegal nor immoral about lobbying. Representatives, after all, have a duty to listen to public opinion. The public has a right to make its opinion known. It is not to be denied that illegal practices may be connected with lobbying, but the same thing may be said of almost anything else. Challenge of constitutionality before the courts may be counted as the third, for it is one way the public can direct the course of legislation. When these means fail and the people are sufficiently motivated, they may elect the way of "civil disobedience," sheer refusal to do as the law prescribes or to forebear from what it forbids. The efficacy of this measure depends, rather unfortunately, on numbers for where a substantial number of the citizenry should disobey, the coercive powers of the State cannot cope with the strain placed on its capacities. There is only so much room in our prison cells for a definite number of people, and our men in uniform

constitute a fragment of the entire population. It is many times imprudent for state authority to carry out punitive measures against a disobeying majority (or even substantial number of the population). Its credibility cracks when its inability to cope with the demands made on it by resolute opposition become evident. There is the ultimate solution of rebellion — a costly, bloody and destructive option which people turn to when they are made to experience in painful ways their helplessness in hopeless and dehumanizing circumstances.