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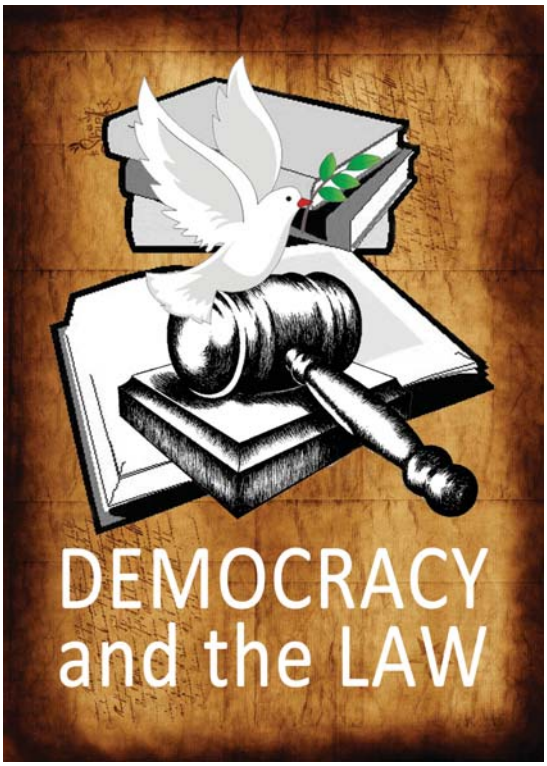

The PHILJA JUDICIAL JOURNAL

JANUARY-JUNE 2007 VOL. 9, ISSUE NO. 27

DEMOCRACY AND THE LAW

I. LECTURES

II. REFERENCES

The PHILJA Judicial Journal

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II. REFERENCES

Philosophy of Law in Historical Perspective

(From Ancient Times to the 21st Century)*

Prof. Eugenio H. Villareal **

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* Delivered at the *Seminar on Democracy and Law at the Service of the Human Person* on February 15, 2007 at the Eduardo Aboitiz Development Study Center, Cebu City.

** Professor Eugenio H. Villareal obtained his Bachelor of Arts in Legal Management degree in 1984 and Bachelor of Laws degree in 1999 from the Ateneo de Manila University, with honors. He teaches Legal Philosophy and Legal Technique and Logic, among other subjects, at the Ateneo de Manila School of Law. He is a Mandatory Continuing Legal Education (MCLE) lecturer for Trial Skills, Pre-Trial Skills, Legal Writing, and Legal Ethics for the Ateneo Center for Continuing Legal Education and Research, as well as other similar institutions, and is also a Pre-Bar Reviewer of the Ateneo de Manila Law School for Partnership Law. Prof. Villareal is a professorial

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grantee of the Nippon Foundation, also at the Ateneo de Manila School of Law. He is a founding partner of the Law Firm Escudero Marasigan Vallente & E.H. Villareal (EMSAVVIL Law). He also teaches Civil Procedure and Evidence at the Polytechnic University of the Philippines (PUP) College of Law.

His previously published works are *Filipino Legal Philosophy and Its Essential Natural Law Content*, 50 Ateneo Law Journal 294 (2005), and *Offending Religion: Right or Liberty (Walking Through the Right-Duty Dichotomy with Hohfeld, Finnis and May)*, 51 Ateneo Law Journal 28 (2006).

I. "Essential" Preliminaries

Relevance – for those engaged in that noble enterprise which is the law, it is worthwhile to revisit and reflect on its "what," "why," and "for whom," all of which will hopefully lead to a more meaningful "how."

Philo-sophia (Love of Wisdom) – wisdom which can be attained by the natural light of reason (our capacity to think, put things together in our mind, and draw conclusions).[1]

Wisdom – knowledge of things by their ultimate causes.

Law (Lex – from the Latin verb ligare, i.e., to bind) – means direction to the end, being bound to the end; hence, when a being acts according to its nature by tending to its own end, *it is fulfilling a law.*

"Classical" Definition of Law – "a certain ordinance of reason for the common good, made by him who has care of the community, and promulgated."[2]

- It belongs to **reason** to direct to an end – hence, it is the starting point of all human acts.[3]
- **Law** is a rule and measure of acts, whereby man is induced to act or is restrained from acting.

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1. Cf. De Torre, Joseph M. Christian Philosophy, 3rd ed.
2. *Summa Theologiae*, I-II, Q. 90, A.4; cf. St. Thomas Aquinas: On Law, Morality and Politics (Baumgrath, W. and Regan, S.J. R., Eds.), 1988.
3. Cf. De Torre, Being is Person: Personalism and Human Transcendence in Socio-Economic and Political Philosophy (2005).

Man being endowed with reason, the law is thus an integral part of man's being man – *with law, we become truly human.*

II. Beginnings

After the creation:

> x x x *the Lord God commanded the man saying, 'you may freely eat of every tree of the garden; but of the tree of knowledge of good and evil you shall not eat, for in the day that you eat of it you shall die'.*[4]

In this, we see:

- the fact of a Supreme Being – God
- the notion of command and the "threat" of a sanction
- *justice* – giving God his due
- *(strict) right* – God's entitlement to be obeyed
- *duty* – an imperative in man to follow what God has commanded; in particular, the duty of our first parents "to recognize that they are creatures and have to (revere) and *respect goodness*, as reflected in the laws of creation and in the *dignity proper to man as a person.*" "Were man to want to decide on good and evil for himself, ignoring the goodness God impressed on things when he created them, it would mean man (wanting) to be like God."[5]

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4. Genesis 2:16-17. Cf. Allan, Gregory, "The Origin of Law" <http://www.lawfulpath.com> (last accessed January 15, 2007).

5. Commentary on Gen. 2:16-17, The Navarre Bible: The Pentateuch (1999).

- God leaving the way open to the possibility of evil in order to ensure a greater good, *i.e., freedom* which is God's gift to man.

A. Ancient China

As early as 2100 to 1600 BC, law was being promulgated and followed during the Xia dynasty (feudal in character, law established and enforced the obligations of various classes).[6]

B. Code of Hammurabi (Babylon)

Reigned approximately 1790 to 1750 BC,[7]

- Command of the gods to do judgment on earth Preamble:

  > *Then Anu and Bel delighted the flesh of mankind, by calling me, the renowned prince, the god-fearing Hammurabi, to establish justice on earth.*

- Series of judgments and orders made by King Hammurabi – idea of laws made by men for men, albeit with divine authorization (moral duty and divine command).
- General legal issues and disputes determined by more or less rational process, including rules on evidence.

C. Ancient Egypt's Ma'at (circa 1400 BC)

The concept of law, morality and justice, deified as a goddess (considered as a concept of order, she came into existence at the moment of creation, but without any creator)[8]

6. <http://www.biologyoflaw.com> (last accessed January 15, 2007) run by the Franklin Pierce Law Center.
7. Mc Coubrey, H., The Development of Naturalist Legal Theory, 1987.
8. Cf. <http://www.en.wikipedia.org> (last accessed January 15, 2007).

- depicted in art as a woman with outstretched wings and a carved ostrich feather on her head;
- codified set of laws, notion of right and wrong, concept of truth, and respect for as well as adherence to a divine order.

D. Mosaic Law *(**circa 1300 BC,*** when the Israelites probably left Egypt, amidst the construction of the main buildings of Ancient Egypt) –

Promulgated during the 40 years for which it was ordained that the Israelites lead nomadic life in the wilderness of Arabia Petraea before entering the Promised Land; committed to writing by Moses himself in Exodus, Leviticus, and Numbers (elements of which were later elaborated and/or developed in Deuteronomy).[9]

- The law (*Torah*) commences with the Ten Commandments in Exodus 20;
- Believed to be ordained by God Himself for the benefit of the people (hence, the secular implications and elements in the law); imbued with moral authority (*morality* – the quality or condition of a human act as to whether it is good or evil)[10] and imposing a moral obligation; perceives a fundamental linkage between religious, moral and legal obligations.[11]

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9. Cf. The Navarre Bible: the Pentateuch, *supra*; see also Morris, M. F., (An Introduction to) The History of the Development of the Law, 1911.

10. II Faith Seeking Understanding (Belmonte, C., Ed.), at p. 25; cf. Nabor-Nery and Nery, St., Ethics, 2003.

11. McCoubrey, *supra.*

- Human law and religious law cannot be divorced – hence, it is a *grave mistake* to look upon the Ten Commandments as purely religious precepts, the expression merely of the moral law, and binding only upon individual consciences.[12]
- Consider the observations of the late Justice M. F. Morris:[13]
  - Only two of the Ten Commandments are of a purely spiritual or religious character, i.e., dealing exclusively with the direct relations of man with his Creator.
  - Three of the Ten Commandments establish the foundation for all the provisions of the Municipal Law in respect of the domestic relations; one enunciates the sacredness of human life – and human law regarding homicide adds no more to it than to supply the penalty for its violation. In two, the law of private property is epitomized; and the administration of justice rests upon the precept – 'Thou shall not bear false witness against thy neighbor.'
  - Moses recognized the tribal organization of Israel, traceable back to the 12 sons of Jacob. Moses sought to perpetuate such organization and in doing so, laid down the foundations for both republicanism and local self-government. "The 12 tribes were 12 confederated States leagued together in a common union."

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12. Morris, M.F., *supra.*

13. Court of Appeals of the District of Columbia, USA.

- Notwithstanding the agricultural character of the Israeli people, they had a law on contracts – which contained an absolute prohibition on usury – one is prohibited from charging any interest for a loan of money on a brother Israelite; aliens, however, may be charged interest.
- The Israelites had a criminal code which made murder, kidnapping, rape, adultery, blasphemy, and certain unnatural acts of lust as capital offenses (punishable by death by hanging or stoning); highway robbery and larceny were subject to compulsory restitution two, four or five times the value of the property taken – inability to pay led to slavery.
- There was equal protection under the law for both Israelite and alien – except in regard to usury.
- For capital cases, no one should be convicted on less than the testimony of two witnesses (Numbers 35:30); this was later extended to cases not necessarily capital (Deuteronomy 19:15).
- Mosaic law contained a law on inheritance which provided that inheritance was to be always retained in the tribe. Because of this, women who owned property were not allowed to marry outside their tribe.[14]

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14. Cf. Numbers 36:1-11 (Laws about Wives' Inheritance); this reflects the belief that the Land is a gift from God, not to the people in general but to each family and each individual – it follows that the portion allotted to each has to be carefully looked after as a gift from God (The Navarre Bible, *supra*).

E. Ancient India - Laws of Manu (Manava Dharama Shastra) - (circa 500 BC)

It is made up of 2,684 verses, 12 chapters, of norms of domestic, social and religious life under the mantle of Brahmin influence.[15]

- ascribed to the mythological Manu, said to be the forefather of all humans
- codified the caste system and discussed the stages in life of the so-called "twice-born" man[16]
- Strikingly similar (to present day) judicial proceedings[17]
  - Every distinct community had its own court, composed of four to six judges, one a chief judge and the other associate judges selected either by election or by inheritance (these local courts settled most of the controversies and proceeded more summarily, with less formality, than the higher royal courts).
  - In the royal courts: complaint was in writing; specified time was allowed for the defense to present its position – four kinds were allowed: denial, confession, confession and avoidance, and previous adjudication; witnesses were produced and were required to establish a fact under oath; and objections can be made against the capacity or competence of a witness.

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15. Cf. <http://www.hinduism.about.com> (last accessed January 17, 2007).
16. Cf. <http//www.en.wikipedia.org> (last accessed January 15, 2007).
17. Morris, *supra.*

- The headings of the Code dwelt with very familiar subjects – Recovery of Debts, Deposit and Pledge, Sale without Ownership, Concerns among Partners, Resumption of Gifts, Non-payment of Wages, Non-performance of Agreement, Rescission of Sale and Purchase, Disputes between Owners of Cattle and their Servants, Disputes on Boundaries, Assault; Defamation, Theft, Robbery and Violence, Adultery, Duties of Husband and Wife, Partition of Inheritance, Gambling and Betting.

F. Ancient Greece

- 1350-1400 BC – Believed to be the reign of Cretan King and Lawgiver *Minos*, who is known to have influenced legislation of other Hellenic states, as well as that of Rome.[18]

- 624 BC – *Draco* appointed Archon of Athens, later was responsible for the revision of laws of the state, especially the penal code; his so-called *Draconian code* was extremely severe (thought to be written in blood) – e.g., vice of idleness was punished in the same manner as murder.

    - According to *Draco*, "the smallest transgression in the law deserved death." He could find no more rigorous punishment for the more atrocious crimes; and hence, was "compelled" to prescribe an equal penalty for all.[19]

- 594 BC, *Solon* becomes Archon of Athens, and was tasked to revise the work of Draco. Under *Solon*, Athens had a

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18. Morris, *supra.*

19. Morris, *supra.*

bicameral legislature – the General Assembly and the Senate.[20]

- Like the Israelites, the Greeks addressed the potential conflict between man-made law and the moral law.
- *Socrates* (469-399 BC) believed that there exists a settled moral order.[21] Ironically, *respect for that moral order was translated into a person's moral obligation to obey the laws of the state even when he believed it to be wrong, unjust or immoral.* This was made explicit in *Crito*, an exposition of Socratic thought written by his greatest follower *Plato* (429-347 BC).
- In *Crito, Socrates* is made to explain to his companion named Crito why, though his condemnation to death may have been unjust, he must still abide by the state's decision and would be wrong in trying to escape penalty.[22]

  Socrates believed that:

  - the existence of the state rests upon its laws;
  - although a citizen should argue for changes when the law is bad, he is nonetheless bound to accept the law so long as he remains a citizen;
  - escaping punishment under any unjust law would be unfilial as it is disobedient against the entity that raised and nurtured him;
  - refusing obedience would subvert the social order of the state as the validity of its prescription will be denied;

20. Morris, *supra.*

21. McCoubrey, *supra.*

22. Lloyd, Dennis, Idea of Law, 1981.

- subversion of the legal order of the state is more harmful in its general consequences than any individual injustice that an innocent person may suffer; and
- refusing obedience will in breach of an agreement to obey the laws of the state implied by one's continued residence when all the while the latter is free to leave and dwell elsewhere (we actually see here the roots of the *social contract* theory).[23]

- To live then according to the law was the highest unwritten law. But then, with this, the justest man can die unjustly (like *Socrates*). *Plato* later propounded the following solution:

> only when the state itself embodied the idea of good could the life of an individual be properly be sacrificed to the state.[24]

- *Aristotle* (384-322 BC), most famous pupil of Plato and teacher of Alexander the Great, is the acknowledged father of the school of Natural Law.[25] He posited:
  - the proper end of law is to make men "good," which is not to say that we merely coerce men to avoid *vice* (essentially any evil habit – the opposite of *virtue,* which is essentially a good habit);
  - this view is based on the idea that all things have an inherent potential for development, the achievement

23. McCoubrey, *supra.*

24. Lloyd, *supra.*

25. Cf. <http://www.en.wikipedia.org> (last accessed January 15, 2007).

of which is the "good" of the phenomenon concerned (*teleological approach*);

- law, therefore, must aim to guide the natural human potential for virtue into the achievement of the "good" life through the inculcation of good habits;
- man's progress from potency to actuality can, however, be diverted by reason – a faculty in man which can be abused in much the same way that it can be used correctly for the good;
- one of the consequences of man's rational nature is his being a *politikon zoon*, i.e., a political animal whose natural tendency is to combine in social organizations culminating in the state; and
- it being the proper tendency of all things to develop their own particular "good," the state becomes a means whereby its citizens may attain the "good" life.[26]

G. Law in Ancient Rome

- *Roman Republic* (510 BC to as early as 44 BC, when Julius Caesar became Dictator – which marked the beginning of the *Roman Empire;* other years considered as the beginning of the Roman Empire are 31 BC, when Julius Caesar's successor Octavian was victorious at Actium, and 27 BC, when Octavian was awarded the title of "Augustus.")[27]
  - Roman civil law, which was further developed and perfected during the Roman Empire, finds its roots

26. McCoubrey, *supra.*

27. Cf. <http://www.en.wikipedia.org> (last accessed January 18, 2007).

in the so-called Law of the Ten Tables (451 BC) (the law was inscribed in 10 brass tablets set-up for public notice on the walls of the Temple of Jupiter); two tablets were later added and so the code was renamed *Law of the Twelve Tables*.

- The *Law of the Twelve Tables* was later supplemented by the *Praetorian* Edicts (these were summaries of the results of previous rulings on legal controversies by the Praetor[28] as well as rules of conduct for subsequent legal actions; there were also edicts on entirely new matters if circumstances warranted the same).
- *Marcus Tullius Cicero* (106-43 BC), who belonged to this area, is known to have the best known ancient formulation of the so-called *Natural Law Theory*,[29] to wit:

> *True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands and averts from wrongdoing by its prohibitions.* And it does not lay its commands or prohibitions upon good men in vein, though neither have any effect on the wicked. It is a

28. Akin to what we know of England's Lord Chancellor, the Praetor was the great conservator of the Roman law, the authoritative expounder for the time being of legal principles, and the person who set in motion and controlled the machinery of the Roman legal system. (Cf. Morris, *supra*)

29. This shall be discussed at length later in this outline.

> sin to try to alter this law, nor is it allowable to repeal any part of it, and it is impossible to abolish it entirely. x x x Whoever is disobedient is fleeing from himself and denying his human nature, and by reason of this very fact he will suffer the worst penalties, even if he escapes what is commonly considered punishment.[30]

- During this time, the idea of *jurisprudence*,[31] as we know it today – **the theory and philosophy of law** – had already taken shape.
- At one time, jurisprudence was determined by what was called the College of Pontiffs (*Pontifex*), which had the exclusive power to make judgments of fact, as well as expertly interpret (as *periti*) *traditional law*, i.e., body of oral laws and customs handed down through the years (tradition); the Pontiffs were later replaced by the *Prudentes* in 3 BC.
- *Jurisprudence* had three main aspects, to wit:
  a. natural law (cf. Cicero, *supra*) – that unchangeable law that human legal institutions must follow and match
  b. analytic jurisprudence – deals with questions like "what is law?"; "what are the criteria for legal validity?"; and what is the relation between law and morality?"

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30. Brix, Brian, "Natural Law Theory." A Companion to Philosophy of Law and Legal Theory (Patterson, Dennis, Ed.), 1999. (Italics supplied).
31. Cf. <http://www.en.wikipedia.org> (last accessed January 15, 2007).

c. normative jurisprudence – dealt with the "ought" aspect of the law.

- *Roman Empire* – (from as early as 44 BC to its dissolution during the division between the Western Roman Empire and the Eastern Roman Empire in 476 AD).[32] – Hellenistic tradition (theories of Socrates, Plato, Aristotle, and the *Stoics*)[33] was initially dominant; but with the conversion of *Emperor Constantine the Great* (306-337 AD), there had to be an accommodation *vis-à-vis* the Judaeo-Christian notion of law.[34]
  - Law essentially defined sin and warned men of its practice, maintaining thus social order
  - Law was needed to curb sin and that in the absence of sin, there would have been no need for any prescribed conduct as people would then be living in accordance with divine law – human law was a coercive measure rendered necessary by man's fallen nature.
  - The secular state and its laws were necessary props of social order and, perhaps unwitting, agents of the Divine purpose which can perform well or badly in any given set of circumstances as the case might be.[35]

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32. Cf. <http://www.en.wikipedia.org> (last accessed January 15, 2007).

33. The Stoics taught that there is a universal and rational order – *cosmopolis* as compared to the city-state's *polis* – which governed all men and was not merely the privileged insight of Greek citizens. This order – called *natural law* – was knowable by human reason.

34. McCoubrey, *supra.*

35. McCoubrey, *supra.*

III. Later Roman Law and Development of Natural Law (Middle Ages)

A. Augustine of Hippo (345-430 AD)

Augustine of Hippo taught that *"Lex aeterna est qua justum est ut omnia sint ordinatissima"* – Eternal law is that law by which it is just for everything else to be ordered. Temporal law (*Lex temporalis*), on the other hand, was needed to coerce those willfully inclined to err and stray in ways harmful to the rest of society. But like all things created in the universe, temporal law is subject to the *Lex Aeterna*, which is the will of God.

- In the face of temporal law which contradicts the Eternal Law, Augustine wrote, *"Lex esse non videbitur quae justa non fuerit"* – no true law could be unjust. Thus – any temporal law which conflicts with the Eternal Law might indeed have coercive force but unlike "good" laws, would make no claim upon the conscience of the subject.[36]

B. Corpus Juris Civilis (promulgated 529-534 AD)

Byzantine Emperor Justinian I compiled all imperial pronouncements having the force of law from the time of Hadrian; revived Roman law (after 300 AD, the development of jurisprudence just became a bureaucratic activity, this changed with the coming of Justinian I), which ultimately became the foundation of law in all civil law jurisdictions. This also influenced canon law.

- Included *Codex Justiniani* (first part completed April 529), reflected social order of the time: the emperor, as

36. McCoubrey, *supra.*

monarch, had unlimited legislative, executive and judicial power; and

- Brought about *Digesta (Pandectae)*, a collection of legal writings, and *Institutiones* (Elements), students' textbook (*n.b.* law schools were created as early as the Roman Republic, *supra*) later developed into a jurists' manual.

C. Thomas Aquinas (1225-1274 AD)

Thomas Aquinas defined law in general as "an ordinance of reason made and promulgated for the good of the community by the person to whom its care is entrusted."[37]

There are thus three basic elements in true or authentic law-making:

a. rational aim for the common good;

b. enactment by authority; and

c. promulgation.

These elements, notwithstanding Aquinas' being a theologian and a Dominican religious, do not necessarily have any "religious" connotation.[38]

Law as *rationis ordinatio* includes all rules of reason up to and including the will of God.[39]

According to Aquinas, there are four kinds of (*true*) law:

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37. McCoubrey, *supra*; see *Summa Theologiae,* I-II, Q. 90, A.4; cf. St. Thomas Aquinas: On Law, Morality and Politics (Baumgrath, W. and Regan, S.J., R., Eds.), *supra.*

38. McCoubrey, *supra.*

39. McCoubrey, *supra.*

a. *Eternal Law* – the will of God governing the motions of the universe and is "law" in its widest significance comprising "natural laws" as understood by scientists as well as philosophers and lawyers;

b. *Natural Law* (*Lex Naturalis*) – law of reason promulgated by God in man's nature (thus, immutable), whereby he can discern how he should act; stated otherwise – it is the human participation in the *Lex Aeterna* discovered through reason; includes the observable order of the universe;

c. *Divine Law* (*Lex Divina*) – Scriptural Revelation by which man is directed to perform his proper acts in view of his last end, which is God; this partially reveals, to the extent determined by the Creator, the Eternal Law; and

d. *Human Positive Law* (*Lex Humana*) – man-made law, but necessarily derives its moral authority from concordance with Eternal Law as from time to time revealed through Divine Law or made perceptible through Natural Law.[40]

Human positive laws which are consistent with the natural law are just. Those which are not are perversions of true law, and do not bind in conscience.[41]

Aquinas, however, did not mean that in order to have any moral claim to obedience, a positive enactment must copy natural

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40. *See* Rice, Charles, 50 Questions on The Natural Law, 1996; also Summa Theologiae, I-II, Q.91, A.4, Baumgarth and Regan, S.J. *supra*; and Mc Coubrey, *supra.*

41. Brix, Brian, *supra.*

law slavishly. Human law could properly relate to natural law in two ways – by direct extrapolation or as a specific formulation of more general natural norms.[42]

IV. Francisco de Vitoria; Philosophy of Order; "Democracy of the Person"

Francisco de Vitoria (1486-1546) is a Spanish theologian and philosopher, acknowledged by the United Nations in 1976 as its precursor and the Father of International Law;[43] his teachings were *rooted in that of Aquinas* and was an influence for host of other theologians and philosophers (e.g., Surarez, Molina, Bellarmine, Grotius, Pufendorf, etc.); in regard to the former Spanish colonies where Native American slaves were being treated harshly by Spanish settlers, then Pope Paul II followed Vitoria in *espousing equal human rights for the native peoples of the New World.*[44]

In 1511, Vitoria expounded the fundamental equality of all human beings and acknowledged that the ultimate sovereignty of the people is given to them by God. Vitoria spelled out *the*

42. McCoubrey, *supra.*

43. De Torre, Joseph, "The Roots of International Law and the Teachings of Francisco De Vitoria as a Foundation for Transcendent Human Rights and Global Peace, 2:1 Ave Maria Law Review 123, Spring 2004, citing Press Release, United Nations, Kofi Annan Stresses Importance of Universality of Human Rights, etc., April 12, 1999 <http://www.un.org/News/Press/docs/1999>.

44. Notably, Charles V issued the New Laws of the Indies in 1542, four years before Vitoria's death; cf. De Torre, *ibid.*

inviolable rights to life, to liberty, and to self-rule, including the right to private economic initiative and to participation in public life. He came out with a "virtually complete enumeration of human rights and the principles of democratic government and law." He echoed Aquinas' teaching that *no one is a slave by nature:*

> (a)ll men and women are equal by nature inspite of their existential inequalities, and they can never lose their fundamental rights even if they fall into sin.[45]

Vitoria's philosophy focused on the human person and human society; it is a "philosophy of order" in which authority and law – bespeaking thus a rational ordering, i.e., one that is not arbitrary or voluntaristic, are the basis and justification for power to govern.

- Power is bestowed on the rulers by the people, not as "numbers," but as, consistent with Aquinas' notion of Natural Law, *persons aware of their subjective responsibility and dignity as beings open to infinite transcendence and objective values*. This philosophy thus translates into an idea of democracy grounded on the dignity of the human person.[46]
- *Jacques Maritain* echoed Vitoria:

  > There is no need to add that the will of the people is not sovereign in the vicious sense that whatever would please the people would have the force of law. The right of the people to govern themselves proceeds from Natural Law; consequently, the very exercise of their right is subject to Natural Law. If Natural Law is sufficiently valid to give this

45. De Torre, The Roots, etc., *supra.*

46. De Torre, The Roots, etc., *supra.*

> basic right to the people, it is also valid to impose its unwritten precepts on the exercise of the same right. *A law is not made just by the fact that it expresses the will of the people. An unjust law, even if it expresses the will of the people, is not a law.*[47]

- *Samuel Pufendorf* (1632-1694) – similarly followed Vitoria and came up with his definition of *Natural Law – that which fits the rational and social nature of man so necessarily that without its observance there could be no honest and peaceful society in mankind* (bringing to the fore the fact that positive law – and by extension, legal positivism, is not founded on the general constitution of human nature, but purely on the will of the lawgiver.[48]
- Relevantly, the American Declaration of Independence and the American Constitution, to cite a few examples, mirror the Natural Law Theory of Vitoria.[49]

V. Legal Positivism and Enlightenment Jurisprudence

Legal Positivism:

> the simple contention that it is in no sense a necessary truth

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47. Maritain, Jacques, Man and The State 48 (Catholic University of America Press, 1998) (1951); cf. De Torre, *ibid.*
48. Pufendorf, Samuel, The Whole Duty of Man, According to The Law of Nature (2003 trans.) (1673); cf. De Torre, The Roots, etc., *supra.*
49. De Torre, *ibid.*

that laws reproduce or satisfy certain demand of morality, though in fact they often do.[50]

This tradition of legal philosophy has two central beliefs:

a. *Social Thesis* – what counts as law in any particular society is fundamentally a matter of social fact or convention; and

b. *Separability Thesis* – there is no necessary connection between law and morality.[51]

It is basically "lawmaking by mere will."[52]

Thomas Hobbes (1588-1679), in *Leviathan*, went to the extent of "absolutizing" the state, the laws of which determine what is legally right or wrong.[53]

A *"primitive"* notion of this idea of law is John Austin's (1790-1859) *"command theory of law"* – law is the order of the sovereign backed up by the threat of sanction in the event of non-compliance. Legality, in this regard, is determined by its source – the will or command of the sovereign, and not its substantial merits. The problem with this is that there may be laws which do not rely on sanctions to motivate compliance. There

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50. Hart, H.L.A., The Concept of Law, 1986; cited in Villareal, E., "Filipino Legal Philosophy and Its Essential Natural Law Content," 50 ATENEO LAW JOURNAL 294 (2005).

51. Coleman, Jules and Leiter, Brian, "Legal Positivism," A Companion to Legal Philosophy, etc., *supra.*

52. Riley, Patrick, *Natural Law v. Legal Positivism*, Fellowship of Catholic Scholars Newsletter (1992), X Documentation Service, January 1997.

53. De Torre, J., Being is Person, etc., 2005, *supra.*

are also laws which do not restrict, but rather expand liberty. Also, it is possible that a sovereign might perish, and yet laws can remain binding even after his death.[54] Hence, H.L.A. Hart's formulation of his concept of law.

In the quest to determine the validity of law, that it is indeed authoritative, Hart stressed that there is a difference between what the law ***is*** and what the law ***ought*** to be. This, although that is objectively possible for the rulers of a community to so agree – and in doing so, create a social fact or convention – that a moral value of a norm be a condition for its validity. This latter submission is called *incorporationism*.[55]

Against incorporationism is the restrictive view favored by positivist philosopher *Joseph Raz* (1979, 1985) – *that the possession by a norm of a moral value cannot be a criterion for legal validity; the criterion of legality must only be some social fact*.[56]

In answering how law motivates compliance, Hart explained that law consists of two distinct types:

a. *primary rules* – those that limit or expand liberty; and

b. *secondary rules* – which he says are *about* the primary rules, and are of three kinds:

    a. rules that create the *power to legislate;*

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54. Coleman and Leiter on *Austin v. Hart,* "Legal Positivism," *supra.*

55. Coleman and Leiter, *supra.*

56. *Ibid.*, see also Raz, The Authority of Law, 1979; "Authority, Law and Morality," The Monist, 68, 295-324 (1985).

b. rules that create the *power to adjudicate;* and

c. the *rule of recognition.*[57]

The rule of recognition is not power-conferring; it sets out the conditions that must be satisfied for a norm to count as part of the community's law. According to Hart:

> *when there is law, there are primary rules that impose obligations and a rule of recognition that specifies the conditions that must be satisfied for a rule that imposes obligations to be a legal rule.*

These are the minimum requirements for the existence of a legal system.[58]

Legal positivism is rooted in the philosophy of the *Enlightenment,* which denied the power of man's reason to know the objective truth. The *Enlightenment's* main dogma is that:

> man must overcome the prejudices inherited from tradition (and) have the boldness to free himself from every authority in order to think on his own, using nothing but his own reason.[59]

> *Truth is no longer an objective datum* x x x It gradually becomes *something x x x which each one grasps from his own point of view,* without ever knowing the extent his

57. Hart, H.L.A., The Concept of Law, *supra;* Coleman and Leiter, *supra.*

58. Hart, H.L.A., The Concept of Law, *supra;* Coleman and Leiter, *ibid.*

59. Rice, Charles, 50 Questions, etc., *supra,* citing Joseph Cardinal Ratzinger, Address to Consistory of College of Cardinals (April 1991); "The Problem of Threats to Human Life," *L'Osservatore Romano,* April 1991.

> viewpoint corresponds to the object itself x x x The idea of the good is put outside of man's grasp. The only reference point for each person is what he can conceive on his own as good.[60]

As if anticipating the evolution of the *social thesis*, the Enlightenment brought forth the social contract theory – the theories of the social contract were elaborated at the end of the 17th century:

> that which would bring harmony to men was a law recognized by reason and commanding respect by an enlightened prince who incarnates the general will x x x.[61]

A champion of legal positivism and Enlightenment jurisprudence was *Hans Kelsen* (1881-1973). Kelsen taught that:

> Any content whatsoever can be legal; there is no human behavior which could not function as a content of a legal norm. (T)he only requirement for a law to be valid and binding is that 'it has been constituted in a particular fashion, born of a definite procedure and a definite rule.'[62]

VI. Modern-Day Approaches to Natural Law

A. Lon L. Fuller (1902-1978)

Lon L. Fuller taught that the nature and operation of law can be understood by resort to the so-called Two Moralities:

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60. *Ibid.* (Italics supplied.)

61. *Ibid.* (Italics supplied.)

62. Kelsen, Hans, The Pure Theory of Law: Part II, 51 Law Q. Review 517, 517-518 (1935); cited by Rice, Charles E., "Rights and the Need for Objective Moral Limits," Ave Maria Law Review, Vol. 3, March 2005.

a. *Morality of Aspiration* – morality of the Good Life, of excellence, of the fullest realization of human powers; and

b. *Morality of Duty* – (starts at the bottom of human achievements) lays down the basic rules without which an ordered society is impossible, or without which an ordered society directed toward certain specific goals must fail off its mark; it is the morality of the Old Testament and the Ten Commandments.[63]

Fuller then goes on to explain the *Internal Morality of the Law*, which embraces the Two Moralities. In gist, this consists of a series of requirements that any law or system of laws must meet in order to merit the title of law:

- Generality;
- Promulgation;
- Minimal Retro-Activity (Rule-Making and Application);
- Clarity;
- Consistency;
- Undemanding of the Impossible;
- Constancy Through Time (Infrequent Changes); and
- Congruence between Official Action and Declared Rule (Law as Announced).

Linked to the Two Moralities, these eight requirements are not merely procedural indications for the making and application

63. Fuller, Lon L., Morality of the Law (1964, 1969); cf. Villareal, 50 ATENEO LAW JOURNAL 294, *supra,* and *McCoubrey, supra.*

of laws. The writer submits that they actually point to fairness, or better still, *justice* – which is "a habit whereby man renders to each one his due by a constant and perpetual will."[64]

B. John M. Finnis[65]

John M. Finnis taught the **Theory of Basic Goods and Practicable Reasonableness**. According to Finnis, there are a number of distinct but equally valuable intrinsic good, i.e., those valued for their own sake, called "basic goods" – life and health, knowledge, play, aesthetic experience, friendship, practicable reasonableness, and religion. These are self-evident, meaning that any of these goods cannot be derived from some more fundamental proposition.

- *Basic Requirements of Practicable Reasonableness* – series of intermediate principles through which the consideration of basic goods move to moral choices, e.g., one may never choose to destroy or damage a basic good regardless of the benefit one believes will come from doing so; in other words, the end does not justify the means if a basic good is at stake.
- *Other Basic Goods* – rational plan of life, no arbitrary preferences among persons, foster the common good of the community, and no arbitrary preferences among the basic goods.[66]

64. *Summa Theologiae,* II-II, Q.58, A.1; cf. Villareal, *supra.*

65. John Finnis holds the Biolchini Family Professorial Chair at the Notre Dame Law School in the United States. He teaches Jurisprudence, as well as the Social, Political and Legal Theory of St. Thomas Aquinas. Cf. Brix, "Natural Law Theory," *supra.*

66. Brix, *ibid.,* cf. Finnis, J.M., Natural Law and Natural Rights (1980).

The notion of basic goods is relevant to any evaluation as to the validity of any man-made law and somehow echoes Aquinas:

> one has the obligation to obey just laws; (and with respect to those which are unjust, one can comply with them) only to the extent that (they are) compatible with moral norms and necessary to uphold otherwise just institutions.[67]

In this connection, a 2005 study commented:

> Easily, the partnership between morality and the law essentially requires recourse to *fundamental, objective, and unchangeable norms* that will guide human beings in their earthly pilgrimage. There is an essential regard for the absolute and inescapable movement toward *perfection*.[68]

C. Ronald Dworkin[69]

"Rights Thesis" and Theory on the Nature of Legal Principles (1978) – Legal systems contain principles. Legal principles are moral propositions that are grounded on past official acts (e.g., statutes, judicial decisions, etc.). Dworkin argued that in deciding cases, judges are bound in the common law context to consider these principles. An example is the matter of road use. The improvement of standards for road use is a mere "policy," but the idea that "no man shall profit by his own wrong" is a principle."[70]

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67. Brix, *supra.*

68. Villareal, 50 ATENEO LAW JOURNAL 294, *supra.*

69. Ronald Dworkin is successor to H.L.A. Hart as Professor of Jurisprudence at Oxford. *See* Mr. Dworkin's Taking Rights Seriously, 1978.

70. McCoubrey, *supra,* on The Rights Thesis of R.M. Dworkin.

These principles are translated into rights, rights to which the community has committed itself. According to Dworkin:

> The community's true morality is not to be discovered by taking opinion polls about particular moral issues. It is to be discovered by asking what answer to a particular issue would fit consistently with the abstract rights to which the community has already committed itself in its constitution and institutional practices – such rights to liberty, dignity, equality and respect.[71]

VII. Filipino Legal Philosophy

In his Elements of Filipino Philosophy (1993), religious scholar Dr. Leonardo N. Mercado, SVD listed the following traits of Filipino legal thinking:

- *duty-oriented* (and hence, the Filipino is no stranger to the right-duty dichotomy often discussed in occidental legal philosophy);
- *interiority* (it is from the innate goodness of man that responsibility springs);
- *"law" comes from within* (akin to the notion of Natural Law as written in man's heart); and
- *humanized (taong-tao)* (law is experiential and part of daily living).

A 2005 paper proposed two additional attributes of Filipino legal philosophy:

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71. McCoubrey, *supra*, citing Dworkin, Taking Rights Seriously, pp. 177-178.

- personality-oriented; and
- law is inseparable from morality.[72]

VIII. Recurring Themes in Legal Philosophy and a Reflection for Today

Through time, philosophical inquiries on the nature of law have consistently dwelt on the following matters:

- the nature of law as something which compels;
- the determination of an objective norm for validity;
- the question of authority;
- the relation of law and morality; and
- the orientation of law toward a defined *good*.

Evident here is man's desire to have a fundamental, definitive and immutable idea of law. After all, law is meant to be a steady guide to achieve all that is good – for the individual as well as for the community. Hence, the inescapable relation between law and morality – which even legal positivists can hardly deny (their recognition of the question of what the law ***ought*** to be attests to this). But, problems still often arise when people start to define what is good. The annihilation of a particular tribe or race may be "good" to a ruler no different from the recently executed Iraqi leader, but is downright evil to his victims, as well as for most of humanity.

A key to understanding what is good is a sound understanding of who the human person is and what is so essential in him that no worldly institution can ever contradict or change. In other

72. Villareal, *supra*.

words, law has to be based on the objective truth about man. And here is where Natural Law, that so-called "manufacturer's manual,"[73] makes perfect sense. As early as 1942, Prof. Francis E. Lucey, S.J. of Georgetown University described the infirmity of Enlightenment-inspired legal positivism and realism:[74]

> *Non-natural law systems of Jurisprudence rest on a view of man's nature that makes man independent of his creator and hence the helpless prey for his fellowmen. For Holmes and the realist he is a sort of superior animal. For Scholastic Natural Law, man is a being with a mind and a soul, and hence, superior to animals.* He derives his dignity not from other men, but from God his creator. This question of God and morals in law is the real basic difference between Natural Law and other philosophies of law. *If there is no God, man is only an animal.* He has no innate dignity and no *de jure* independence. He is bound by no norm. *Morals have no place in law. Man is subject to the law for animals, physical force. This much must be said for Realism. If man is only an animal, Holmes was correct, Hitler is correct.*[75]

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73. Cf. Rice, Charles, 50 Questions, etc., *supra.*

74. Cf. Leiter, Brian, "Legal Realism," A Companion to Legal Philosophy, etc., *supra.*

> "Legal Realism" refers to an intellectual movement in the United States that coalesced around a group of law professors and lawyers in the 1920s and 1930s. These intellectuals advocated a realistic look at how judges decide cases, i.e., "what the courts x x x do in fact," as their intellectual forbear Justice Oliver Wendell Holmes put it. This is what makes law according to them, and not because legal rules require particular results.

75. Lucey, S.J., Francis E., "Natural Law and Americal Legal Realism: Their Respective Contributions to a Theory of Law in a

Writing in 2005, Prof. Charles E. Rice of Notre Dame Law School and Ave Maria School of Law commented on the Enlightenment jurisprudence's warped understanding of the human person as:

> an isolated, autonomous individual whose relation, if any to others arises not from any social nature he has but rather from his personal choice, from the social contract.[76]

This, Prof. Rice said, is the origin of the "pro-choice" ideology which holds that the mother has a relation with the child in her womb *only if she chooses.* In the same token, husband and wife are related to one another *only as long as they consent to it.* With this, the "autonomous individual" creates his own morality.[77]

At first glance, this individualism is quite attractive as it apparently accords great respect for individual rights. Paradoxically, however, this undue elevation, notes Prof. Rice, leaves the human person under the mercy of the state. Addressing the disregard for Natural Law and of its being a participation in the *Lex Aeterna,*[78] the former Joseph Cardinal Ratzinger wrote:

Democratic Society," 30 GEO. L.J. 493, 531 (1942) (italics supplied); cited by Rice, Charles, "Rights and the Need for Objective Moral Limits," Ave Maria Law Review, Vol. 3:1, Spring 2005.

76. Rice, C., "Rights and the Need for Objective Moral Limits, etc.," *ibid.,* see also Rice, C., The Winning Side, 2nd ed., 2000.

77. Rice, C., *ibid;* see also John Paul II, Veritatis Splendor (St. Paul, 1993 ed.).

78. The writer asserts that any discussion of the law must necessarily point to the existence of the Divine. All human law is merely a participation in the Divine Law. Relevantly, the Supreme Law of the Land begins with the Filipino people's appeal to

> When the common reference to values is and ultimately to God is lost, *society will* then *appear merely as an ensemble of individuals placed side by side, and the contract which ties them together will naturally be perceived as an accord among those who have the power to impose their will on others x x x. The 'enlightened despot' of the social contract theorists became the tyrannical state, in fact totalitarian, which disposes of the life of its weakest members, from an unborn baby to an elderly person, in the name of public usefulness which is really on the interest of a few.*[79]

Under legal positivism, the otherwise and unqualified natural respect for and protection to life can be, and has indeed been, watered down by a utilitarian emphasis on *quality of life.* Instead of life *per se* being the absolute, *health* and *quality of life* have

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the "aid of Almighty God." (Philippine Constitution Preamble; *see* Bernas, S.J., Joaquin, The Constitution of the Republic of the Philippines: A Commentary (2003 ed.), which noted the choice of the phrase "Almighty God" as being more personal – and hence, "more consonant with Filipino religiosity" – over the 1973 Philippine Constitution's "Divine Providence." Relevantly, the Declaration of Independence (dated July 4, 1976) of the original Thirteen States of the United States of America similarly commences with an appeal to the "Laws of Nature and of Nature's God" and acknowledges the "Creator (as having endowed the American People) with certain unalienable rights." *See* Riley, Patrick, *Natural Law v. Legal Positivism*, Fellowship of Catholic Scholars Newsletter, December 1992, Vol. 16, No. 1; *see also* Documentation Service, Theological Centrum 16-17 (January 1997).

79. Ratzinger, Joseph (Cardinal), "Threats to Human Life Address x x x to the Extraordinary Consistory of the College of Cardinals," 1991, in 36 The Pope Speaks 332 (1991).

become the focal point of legal protection, to the point of virtual divinization. Thus, "the human being who does not possess the desired 'minimal' quality does not deserve to be kept alive."[80] This has led to proposals for "eugenic parameters for the purpose of selecting those who deserve to be accepted or kept alive and those who are to be abandoned or suppressed via euthanasia."[81]

A. Gomez-Lobo, professor of metaphysics and moral philosophy at Georgetown University in Washington, D.C., struck down such destructive belief, stating that:

> [a] person suffering from health problems is still enjoying the basic good of life, [which good] is distinct from any evil the person may be undergoing. Hence, claiming to benefit a person by intentionally killing [him because of a perceived] low quality of life x x x is deeply wrong.[82]

Considering then the destructive consequences of legal positivism *vis-à-vis* the human person, and consistent with the inherent unity of law and morality in Filipino legal philosophy, the writer believes that the recurring questions in regard to the true nature of law are all best answered by a faithful – for these times, a heroic – adherence to the Natural Law theory.

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80. *Gauging What Quality of Life Means,* Zenith – The World Seen from Rome, Weekly News Analysis, (March 5, 2005), at <http://www.zenith.org> (quoting the remarks of Pontifical Academy for Life President Bishop Elio Sgreecia before the said Academy's General Assembly gathered on February 21-23, 2005).

81. *Ibid.*

82. *Ibid.* (quoting Prof. A. Gomez-Lobo).

Natural Law and Its Basis on Natural Reason: How Do People Understand the Natural Law?*

*Rev. Fr. Cecilio L. Magsino***

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* Delivered at the *Seminar on Democracy and Law at the Service of the Human Person* on February 15, 2007 at the Eduardo Aboitiz Development Study Center, Cebu City.

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I. Introduction

I have based this presentation on the book of Martin Rhonheimer: *Natural Law and Practical Reason: A Thomist View of Moral Autonomy* (2000).

These are some ideas many people have about the natural law:

- Natural law is composed of moral norms derived from "nature" as such (what is naturally given or presented).

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summa cum laude, in 2001 from the Pontifical University of Holy Cross in Rome.

He was ordained priest on August 15, 1984 at the Shrine of Our Lady of Torreciudad in Huesca, Spain. Fr. Magsino served as Chaplain to various Centers of Opus Dei in Manila (1984-1995) and PAREF Woodrose School in Alabang, Muntinlupa (1995-2002). Prior to his being priest, Fr. Magsino worked as an Instructor of Physics at the University of the Philippines (1982-1983).

Fr. Magsino was the co-editor of the *Daily Roman Missal* of the Studium Theologiae Foundation in 1989.

- These moral norms, that are independent of any opinion or concrete needs of the individual, are imposed from the outside. All the person has to do is to apply these norms to the concrete situation.
- To find out if an action is moral or not, we have to look into the consequences of the action and weigh the results to determine if the action is worth pursuing or not.

There are indeed certain "naturalistic" misunderstandings of the nature of natural law and the foregoing ideas are examples of them. In this presentation, we will see that there are indeed misunderstandings. We will also attempt to answer the following questions about the natural law:

- What is meant when we say that human nature is the foundation of moral norms?
- What are the methodological principles for an ethics that makes use of arguments that follow the natural law theory?

We will try to understand the answer of St. Thomas Aquinas: the natural law is a law of the practical reason. The theory of the natural law is a theory of the practical reason.

As we will see, this concept of the natural law has anthropological implications: personalist anthropology is assumed.

II. A Reconstruction of the Theory of Natural Law Necessary

In recent years, it has been believed that the philosophical basis for the theory of natural law is seriously defective. It has been labeled as "physicalism," "biologism," or "essentialism."

A. Physicalism

The leading objection to the theory of natural law is that it constitutes a "physicalism" or "naturalism." Objectors claim that through the theory we are attempting to derive ethical norms from laws (especially biological laws) that are in accord with being. Now these laws belong to the pre-moral sphere. This procedure is not correct for two reasons:

1. moral norms cannot be drawn from pre-moral sphere ("ontic," physical or biological) laws or values; and
2. an "ought" cannot be derived from an "is."

There does exist this school of natural law theory that can be described as "physicalistic."

The mistake of this school is the inability to understand the *constitutive role* played by practical reason in the recognition of moral values. Natural law is understood as something that belongs to the nature of things rather than belonging to where it should belong, to practical reason. This school does not see the role that practical reason has in *constituting* natural law itself. This is the way St. Thomas conceived the natural law, the natural law is not something simply "discovered" by reason. It is constituted by reason through an act of practical understanding. Practical reason is the "law-giver" and not simply and executor or discoverer of the law. Reason has the function of being the "evaluator" of human behavior. The task of reason is to "put things in order." Unless this is understood, it will not be possible to conceive the natural law as "an ordering of reason."

Frequently, many people who believe in the natural law theory think that the natural law belongs to the natural order of things, something like the laws of nature. It is something that is there in nature and that reason simply "reads it off." In this way of looking

at natural law, what "is" prescribes "what ought to be done." So the maxim goes, "Become what you are!" or "Fulfill your essence!"

B. The Essentialist Interpretation of the Natural Law

The essentialist interpretation of natural law puts it not in the order of reason but in the order of nature (the order of how things are and by "things" we mean natural things as opposed to human reason itself).

This view holds that what something should be – its perfection and fulfillment – can be derived from its nature or its essence. Every entity possesses an essence and the powers that flow from it. The essence, because it is the foundation of the entity's operations, qualifies them as either good or bad. If the entity's operations develop the entity, then they are good. If they hinder its development, then they are bad. *Agere sequitur esse*, as the Scholastic adage goes.

While this argument is indeed valid for natural things, it does not apply unconditionally to the case of the human person. The human being is very much unlike other created beings. In his behavior, he is not subject to a single determinate thing. His actions are free. He may perform his actions according to nature or not according to nature.

With this appeal of having recourse to "human nature" as the basis for judging the goodness or evil of human actions, we arrive at a methodological dead end. The question is one of method: how do I know human nature and its demands? How do I know what fulfills it or hinders its development? We know human nature through human behavior, which is qualified as moral. But this qualification of "moral" cannot be derived from the "essence" of man.

The assumption is that the essence of man provides us with an idea of a goal that man should tend to, and therefore, a measure of excellence and perfection. This is what Josef Pieper would say: "Become what you are!" It is a nice thing to say but it is not so useful for purposes of methodology and analysis. The question can be raised: "How can I become what I am?" Of course, we understand Pieper to mean that man fulfills himself through actions and man must act to become fully man. So the maxim presupposes two meanings of the word "man" – the first is the "specific nature of man" and the second is man "in the state of being a perfect man."

And so we are saying that we can deduce what is good for man by looking at his essence "as specific nature." Then we also say that the essence that is really valid for deducing what is good for man is the perfected essence only after a process of becoming perfect. So, the measure of the good is not that which is, but the knowledge of what should be. From the individual person's point of view, this poses a real practical problem: how do I know, judging from my essence, what is it that will really perfect my essence?

And so, we have two "natures" in this issue, the "raw essence" and the "perfected essence." Though they are both found in human nature, the one cannot be deduced from the other.

Moral goodness is really the fullness of the essence of man: it goes beyond nature and the principles of essence. It cannot be derived from the principles of the essence of man. Moral goodness is something added to the essence of man and is therefore accidental to him.

Moral goodness is derived from human actions that are born of man's powers, which in turn are based on man's essence. While the essence of man is necessary for his actions to come into being,

the field of his actions is not necessary for his essence. Whether a man acts or not, will not make him lose his essential being as a man. The field of man's actions is the field of freedom. Moral goodness is founded on man's essence, but it does not derive from his essence.

We know from experience that the knowledge of goodness and evil does not come from an insight into what is essential in man. Much more is required. It requires a practical experience and a further insight into what this experience means for man. Of course, this practical insight is based on human nature; but goes beyond what is simply human nature.

C. The Naturalist Understanding of the Natural Law

A mistaken understanding of the natural law is to identify the natural law with the laws of nature (the regularities and natural processes found in nature). This would be tantamount to moralizing the natural order as such.

Would we regard any action that accords with the processes or laws of nature as morally upright by that mere fact? For instance, we know that the law of nature would require that a man eats to preserve his life. Would eating and eating be morally upright just because it follows the law of nature? Or would an action that goes against natural processes or laws of nature be considered morally depraved just because the action went against nature? For instance, would substituting a damaged heart for another one or cutting off one's appendix constitute a morally illicit act just because these acts go against the natural dispositions?

One can see that going with or against nature does not determine the moral goodness or evil of actions. But it is reason that knows there is some moral goodness or evil involved in the

actions. And reason knows the reasons why the actions are good or evil. The acts are good or evil *not* because they go according to nature or against nature, *but because they go against right reason*. And so, Thomas says: "By the law of God, these things alone are prohibited, which are against reason."[1]

The moral order is not something that is derived from the order of nature. It is rather the opposite: the moral order is derived from *reason's interpretation of the natural order in the light of the order of reason*, which is the order of virtue (right reason). It is the work of practical reason. And so, the natural order that reason presupposes is not yet the natural law. Aquinas would say "it pertains to the natural law" but it is not yet itself the natural law. This law arises in the order of reason when *reason sees what the due good proper to the natural inclinations is* so that these inclinations achieve their ends in a truly human manner. Nevertheless the presupposition of the natural law which is the natural order of things has to be there for the natural law to exist.

Natural law is natural because it arises in man from principles that belong to human nature: it is constituted by reason which is something natural to man. *It belongs more to the order of reason* than the order of nature (although it is based on human nature). Nature is the presupposition upon which reason builds the natural law. Nature provides the beginning, the seed of virtue. Reason then constitutes the natural law looking into and reflecting on the order of nature. The natural law is called natural not because it is identified with the order of nature or because it reflects physical regularities, *but because it is a natural working of reason*. This latter puts order into the natural inclinations and prescribes a behavior that accords with human nature so that a man can said to be acting according to right reason.

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1. *Contra Gentiles*, III, c. 125.

III. Practical Reason as Basis for Morality

The first question we must pose when we want to answer the question, "What is morally good?" is not the question "What is man?" but rather, "How should we behave?" and "What should I do to be fulfilled?" The answer to these last two questions can give us a hint to be able to answer the question about the essence of man.

Here, we are dealing with questions that have to do with human actions that strive for a goal; and that goal is what we call the "good." Striving for a goal implies the existence of our knowing power, reason, which intends the goal or the good. We come to know the existence of practical reason – that kind or reason that verses over things that we must do or must not do. It is our very same intellect that enables us to discern what is the good and what is not; and so to discern what is suitable for achieving through action and what is not.

Moreover, after practical reason has discerned what is suitable or not, the same reason becomes preceptive or imperative – it issues the command, "the good must be done and evil must be avoided."

It is this reason that ensures that man acts in conformity with his nature and dignity. St. Thomas stated:

> The good of each thing lies in this: that its operation is in accordance with its form. The peculiar form of man is that he is a rational animal. Whence it is fitting that the function of man is good, insofar as it is in accordance with right reason, for perversity of the reason goes against the nature of reason.[2]

2. In I Ethic., lect. 2.

From this statement of Aquinas we can gather the basis for determining what is good for man: it is not his essence or his substantial form. The measure to aid in determining the good is right reason (practical reason). This is our reason that emits judgments about our actions, those that we are doing, have done or about to do.

St. Thomas further asserts:

> It is clear, then, that the difference between good and evil, considered with regard to an object, is a difference that essentially arises in relation to reason: namely, whether the object matches it or not.[3]

As we can see, Aquinas is saying that to determine good or evil, we are not matching something in relation to man's essence, but in relation to his reason. It is reason that constitutes an object to which reason itself compares man's behavior. This object made by reason is what gives moral specification to his actions.

IV. Natural Law as the Work of Reason

For Aquinas every law is essentially something that "belongs to reason"[4] and is a "work of reason":

> Law is a rule and measure of acts, whereby man is induced to act or is restrained from acting x x x. Now, the rule and measure of human acts is the reason, which is the first principle of human acts.[5]

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3. S. Th., I-II, q. 18, a.5.
4. S. Th., I-II, q. 90, a.1.
5. S. Th. q. 94, a.I.

In human actions, the first thing that occurs is the knowledge of the end and the intention to achieve it. This implies an act of reason. It is human reason that gives the ordering that becomes the principle of human actions. It has this law-giving function. From this we can see that the natural law is a result of the work of reason.

The natural law is not power, a habit or a simple act of reason but something that is constituted through an act of reason. It involves universal judgments that verse over human actions. These judgments that the practical reason pronounces are also *preceptive*, they involve commands or precepts. Reason perceives what is truly good for man and once it does, it issues the command: "The good must be done and evil must be avoided."

Another quotation from Aquinas:

> The natural law is something constituted by reason, just as the proposition is a work of reason.[6]

V. The Constitution of the Natural Law through Natural Reason

Here is a text of St. Thomas on the role of reason in constituting the natural law:

> Just as in the speculative reason, there are also in the practical reason primary, non-derivable and universally known judgments. These are judgments whose terms are known to all. The terms for practical judgments of this kind consist in each case of a good and a practical predicate, to be pursued or to be avoided.[7]

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6. S. Th., I-II, q. 94, a.1.

7. S. Th., I-II, q. 94, a.2.

The first principle of the practical reason: "The good must be done and evil must be avoided" might seem to be an empty formula. It seems to say nothing, it is too general or too fundamental. And yet the first principle does not need to say anything: it is enough that it issues a command: the good has to be done, evil has to be avoided. This principle is clear and present to all other principles and judgments formulated by practical reason. As Aquinas says, it is the foundation of all the other precepts of the natural law.

Through our practical reason, we are able to discern human acts that really obtain what is good for the human person. Once this discernment is achieved, reason itself gives the precept that the good ought to be done. At this point, practical reason has constituted a law, which because it is based on the nature of man and of things and is formulated by reason which is also part of human nature, is called the natural law.

VI. The Spontaneous Comprehension of Fundamental Human Values

Man has natural inclinations; by implication we understand these inclinations to be based on human nature. They are not acquired tendencies. By nature, they aim at goods that are proper to each of them. The natural end of these tendencies do not yet belong to the "ought" that belongs to the order of practical reason: *the shift to the order of reason occurs when practical reason comprehends these goods as practical goods*, and so they are "seekable" and so it makes them its own. This process takes place spontaneously and naturally. We can say that man has the natural capacity to comprehend the fundamental human values and goods.

The natural inclinations have a spontaneous dynamism that is quite independent of reason – meaning that they can and do take place even if reason does not intervene. I am naturally inclined to eat when I am hungry. Man is naturally attracted to woman. This does not mean that these natural tendencies cannot be subject to reason. The goods of the natural tendencies on the level of the natural are not yet "goods of reason." Though St. Thomas calls them "general rules or measures for everything that man must do – and of these things (actions) the natural reason is the measure, even though the natural reason is not the measure of the things that are by nature."[8] The natural inclinations form the basis of the standard: they are not yet the standards, they still do not have the power to govern actions. It is practical reason that is the standard – it is reason that puts order in one's natural inclinations.

VII. The Order of Reason and the Order of Virtue

In practice, we have the experience that to act according to right reason is to act in a virtuous manner. An act is considered virtuous not because it has naturally attained the end suited to it, but rather because it has been ordered by right reason and has been subordinated to it.

This makes us understand that the order of virtue is the same as the order of right reason. St. Thomas says that the good of man towards which moral virtue is directed consists in this:

8. S. Th., I-II, q. 91, a.3 ad 2.

> that reason sufficiently recognize the truth and that the lower tendencies be ordered in accordance with the rule of reason.[9]

Man is a unity of body and soul. Being a body too, man has natural inclinations in his bodily part that may be similar to the lower species of animal: nutrition, reproduction, sensation, etc. But we must keep in mind that these inclinations are not merely "animal"; being part of man, by nature they are already human. To regard them as "animal tendencies" would be to put a split or dichotomy in man which is going to spell disaster for a correct understanding of human nature. Some people think that these lower tendencies become human only when they are integrated into the sphere of what is specifically human – the intellectual sphere. To make this clear, we can cite the case of the tendency towards self-preservation (to preserve one's own life). Though we have this in common with all other living creatures, this tendency in man, in itself, is already a human tendency.

These natural tendencies are already human to begin with. Nevertheless, in the practical and operative sphere, these tendencies must still be ordered by reason according to their truly human meaning and that ordering ought to be followed.

We must also avoid the opposite tendency: the naturalistic position, which claims that man is a complex of natural inclinations that would already constitute norms in themselves without further "processing" by reason and as such they would already constitute precepts of the natural law.

All human tendencies occur in the unity of the human person who is a unity of body and soul, a unity of mind and emotions, a unity of reason and natural tendencies. Because of this unity,

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9. *De Virtutibus,* a.9.

all natural inclinations in man have a relationship of value to the entirety of man, including naturally his reason. This value is not simply what the inclination tells us, but it is discovered after relating the natural inclination's relationship to what is specifically human, namely reason.

VIII. Moral Virtue as the Integration of the Natural Inclinations to the Ordering of Reason

The natural orientation of every human inclination towards its "proper good" must be brought into the orientation of each inclination towards its specifically moral good. This moral good is the good of reason. Only then will the human good really constitute moral virtue. Only then does the fully human meaning of each one of these natural ends become clear in the context of the totality of human person. Thus for example, in the case of man, the natural tendency to preserve one's life does not mean for him to simply preserve his life so as just to live or exist. That would be true for plants or animals. A man wants to live for further aims and ends that he has because of his reason. The meaning of his life and of preserving his life has a relationship to his reason. He wants to live his life to the fullest.

Every natural inclination, though already a "human good" will reveal its specifically human meaning only in the context of being ordered within the order of reason. Reason is able to tell us the truly human way of obtaining human goods. These human goods must be achieved to respect our dignity as persons. This order, as experience points out to us, is the same as the order of virtue. The order of reason reveals to us the true character of the natural inclinations. Reason would not achieve this if it did not

respect the value of human inclinations as the conditions that constitute the human person and morality.

And so, Aquinas concludes:

> Virtue of the appetitive part (moral virtue) is nothing other a certain disposition or form, stamped and pressed upon the appetitive power by reason.[10]

IX. Natural Inclinations as Seeds of Virtues

Natural inclinations in natural things differ tremendously from natural inclinations in man. The natural inclinations in natural things determine them to a specific way of acting – always the same in the same circumstances – and so, we can recognize that a certain dam was made by a beaver. But this is not the case with man, he has an appetitive power that is not determined to act in a single manner. This appetitive power (the will) is governed by his reason. Reason is what gives form and determination to the will. Moral virtue is a certain quality that resides in the will. It is a kind or "nature," a second nature that tends to make the will act in a singular and specific way and this way is the "good of reason," which is now the "true human good." This good is multiple and varied, just as the natural inclinations and their respective "goods" are.

Here the Stoic doctrine of the natural inclinations as "seeds of the virtues"[11] is confirmed by Aquinas but with a modification. Aquinas says that the natural inclinations belong to the natural law because they also correspond to an impression of the eternal

10. *De Virtutibus,* a.9.

11. S. Th., I-II, q. 94, a.2.

law in man. Aquinas' other definition of the natural law is it is "man's participation in the eternal law of God."[12] But it must be pointed out that the natural inclination in themselves are not yet the natural law in the same way that we cannot consider the proper acts of the natural tendencies as acts of virtue. We know that if the natural inclinations were not governed by reason, they can lead to inhuman results.

The natural law comes into existence when reason governs the movement of the natural inclinations. It is an ordering of reason within the context of the natural inclinations. The natural inclinations we are speaking of do not refer only to the inclinations of the physical or bodily part of man but also to the inclinations of the rational part of man, his will. Even the natural inclination of the will (to the good) has to be governed by reason (justice).

And so, moral virtue is the perfecting of the natural inclination through the ordering work of reason so that it is conformed to right reason. The natural inclination is only a certain beginning of moral virtue and the natural law, the seed of moral virtue and the seed of the natural law.

X. The Constitution of Objects of the Precepts of Natural Law

We have said that reason constitutes the natural law. The object of the natural law is something that is desirable that is understood and ordered by reason. The objective content of the natural inclinations is expressed in a universal manner through the natural law. To be objective means that the content of the natural inclinations are ordered, measured and integrated by the workings

12. S. Th., I-II, q. 93.

of reason into the context of the whole person, into the purposive dynamics of human existence.

Natural law comprises elements of both nature and reason. There is not only the element from nature, but there is also an ordering of reason that works on it, so that what began by nature is carried out in accord with reason and thus in a human manner.

But we must note that reason itself is something natural to man. The good of reason fundamentally is something we know "naturally." Reason is naturally inclined to the end of man's actions that are due to him as a person.

The natural inclinations of the person are many and varied. He is inclined to preserve his own existence, to feed himself and take care of himself. He is inclined to unite to the opposite sex, an inclination directed to the preservation of the human race. There are inclinations that are exclusively human – to seek to know the truth, to live out the demands of justice.

These natural inclinations are recognized as such by reason. But reason goes further and it recognizes the manner in which these inclinations ought to be integrated into the context of the totality of human actions and existence so as to carry them out in a fully human manner.

XI. The Natural Law is the Law of Virtue

The natural law is not a universal norm under which particular cases must be subsumed; it is not a law that I "apply" to particular circumstances. Rather, it is the preceptive (commanding) ordering of practical reason. If we understand the natural law in this way, it will be the sole foundation upon which human actions can be carried out in its specifically human character. As a foundation, it

does not hinder nor pose a threat to the individual's freedom; it becomes the very basis of the individual's freedom. It is the starting point of a vast array of possible human behavior and concretizations on the part of the individual person.

Man is a being capable of steering himself towards what is true and good, through his natural and practical reason. Reason is that principle that facilitates his acting freely and autonomously. This freedom acquires its true and full meaning only when the person is virtuous. The virtuous person is the existential incarnation of the natural law; we can say that the natural law is operative or lived out in the case of a virtuous person. Aquinas says that virtuous persons are a "law unto themselves."[13] In the same lesson, Aquinas asserts that virtue "consists the highest degree of human dignity, because such a person is not led by others but by himself to what is good." Moral virtue is measure and order in human behavior: this measure and order has its origin in practical reason, which constitutes for the person the natural law. And so, the natural law is the law of virtue.

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Saint Thomas Aquinas, *Summa Theologiae.*

13. Ad Rom. II, lect. 3.

Civics and the Law: Building Nationhood*

Paul A. Dumol, Ph.D. **

The Philippines is not yet a nation. It is a nation in progress, which means it is in evolution, it is evolving:

- Independent barangays: before 1580
- Independent towns: 1580 up
- Ethnic groups or regions: 1896
- Nation: 1896 or 1898 or 1946

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* From the powerpoint presentation delivered at the *Seminar on Democracy and Law at the Service of the Human Person* on February 15, 2007 at the Eduardo Aboitiz Development Study Center, Cebu City.

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He obtained his Bachelor of Arts in Communication Arts degree, *summa cum laude* and valedictorian, from the Ateneo de Manila University; Master of Arts in Liberal Arts with specialization in Philosophy from the University of Navarre in Spain; Licentiate in Medieval Studies with specialization in Philosophy from the Pontifical Institute for Medieval Studies in Canada; and Doctor of Philosophy in Medieval Studies from the University of Toronto, Canada.

Nationhood in 1898 was a project, not yet a reality. The original meanings of *bayan* before 1580 are the following: It is a community in which one's house is located, for example, the *barangay.* It is place where one's parents reside. It is part of one's identity.

In the community, there is sharing of common duties and there is dialogue.

It is a special project:

- Not just a nation of people who spoke the same language but a nation of people who spoke different languages: a nation of nations.
- For the Tagalog-Pampanga project to take off, it would have to be accepted by all the ethnic groups in the Philippines.

The first third of the 20th century was a crucial period in the Philippine history. The conditions for a national community appeared:

a. All Philippine communities were conquered by Americans;

b. The political structure of a Philippine state was put up;

Dr. Dumol also authored several plays, entitled, *Ang Paglilitis ni Mang Serapio; Cabesang Tales; and Libretto of Ang Pagpatay kay Antonio Luna.* As an artist, Dr. Dumol was a recipient of the Centennial Honors for the Arts in the field of drama, given by the Cultural Center of the Philippines (1999); Catholic Authors Award, given by the Asian Catholic Publishers (1999); and Pambansang Alagad ni Balagtas in the field of drama, given by the Manunulat ng Pilipinas (2002).

c. Infrastructures of a national community were in place: communications, roads, transportation;

d. a *lingua franca.*

Social evolution proceeded at different speeds in different parts of the country.

Pag-ibig sa tinubuang bayan [love for motherland], is an expansion of love for others, in this order:

- *Pag-ibig sa pamilya* [love for family];
- *Pag-ibig sa tinubuang pamayanan* [love for community]; and
- *Pag-ibig sa tinubuang rehiyon* [love for region].

From the proceedings of the Synod of Manila of 1582:

> Assuming that the jurisdiction of the king and his governor over this land x x x is just, we say that in the bigger and more settled towns the governor should appoint, aside from the *alcaldes mayores,* Indian judges chosen by the Indians themselves that would take care of ordinary justice and order and ordinary lawsuits.
>
> Third, because the judge should have knowledge of his community and its own laws, customs, practices, and abuses, and of this the *alcalde mayor* cannot have complete knowledge, because he has to rely on the interpreter, and if [the interpreter] is an Indian, he cannot understand the Spaniard well, and if a Spaniard, he does not understand the Indian well. And so, when someone intends to know the truth, he errs, to the grave scandal of the Indians, who no longer bother with what follows.

Law defines a society: it determines the scope of the common good.

The Philippines is not yet a democracy. It is a democracy in progress.

The nation as first envisioned by Dr. Jose P. Rizal, Emilio Jacinto and Apolinario Mabini is a society with civil rights and civic freedoms.

The gap between the vision and reality of Filipino society was noted by:

- Rizal in the last chapter of his *El Filibusterismo;*
- Jacinto in *Cartilla;* and
- Mabini in *El Verdadero Decalogo.*

The Philippines at the end of the 19th century is a collection of autonomous towns under a single ruler, the Captain General. Emilio Aguinaldo is the new Captain General. There is vertical loyalty (traditional society) but no horizontal loyalties (civil society).

In traditional society, the upper class is composed of *datu and maginoos* and the lower class is composed of *timawa, aliping namamahay and aliping sagigilid.*

Hindi pantay-pantay ang tao. [There is no equality among people in the society.] Society is held together by vertical loyalties.

In the modern version of traditional society, the upper class of society in town are the mayor and the rich families while the lower class are the goons, workers and domestic helpers.

We ignored the gap, we concentrated on gaining independence. We expanded town politics to cover the entire country. Politics as compromise.

The result is the combination of traditional society (substance) and civil society also known as "democracy" (shell).

Since 1983, the movements for democracy are the EDSA 1 and 2. *Their failure to change Philippine society informs us that hope for change is not in changing the national leadership.*

The biggest obstacle to the attainment of a civil society is the *alipin* mentality (dependency) among the poor and the *maginoo* mentality (privileges) among the rich and powerful.

Not *alipin* mentality alone nor *maginoo* mentality alone but *maginoo-alipin* mentality in all individuals.

The *maginoo-alipin* mentality exhibits:

- two attitudes;
- two ways of acting; and
- two ways of speaking.

Our problems today are dependency and privileges. Dependency is characterized by lack of initiative, laziness, and poverty. Privileges include exemption from the law, exemption from ethics, and corruption.

From Eliodoro Robles' *The Philippines in the 19th Century*:

> To make statements valid, particularly in cases involving non-Christian Chinese, the witness was required to demonstrate the truth of his statements by cutting off the head of a live white rooster brought to him for that

purpose. Before performing the act, refusal of which was taken to mean falsehood, the *gobernadorcillo* would utter the following: 'You realize that if you do not tell the truth, the blood of this rooster will be the blood of your family and your parents, who will thereby experience nothing but misfortunes and bad luck.'[1]

1. Fulgosio, Fernando, Cronica de las Islas Filipinas (Madrid: Rubio, Grillo y Vitturi, 1871).

The Role of the 21st Century Judge in Governance*

*Chief Justice Artemio V. Panganiban***

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* Delivered at the *Seminar on Democracy and Law at the Service of the Human Person* on February 16, 2007 at the Eduardo Aboitiz Development Study Center, Cebu City.

** Chief Justice Artemio V. Panganiban was appointed to the Supreme Court in 1995. He is the concurrent Chairperson of the Third Division of the Supreme Court and the House of Representatives Electoral Tribunal (HRET), as well as the Chairperson of seven committees involved mainly in judicial reforms in the Supreme Court, namely, the Committee on Public Information, the Committee on Computerization, the Committee on Judicial Excellence, the Committee on Legislative-Executive Relations (LERCOM), the Committee on Raffle for Division Cases, the Committee on Knowledge-Sharing, and the International Conference and Showcase on Judicial Reforms. He is also the Vice Chairperson of the

I. Introduction

At the outset, allow me to thank the venerable Justice Ameurfina A. Melencio Herrera, Chancellor of the Philippine Judicial Academy (PHILJA) for inviting me to be the resource speaker on "Democracy and Development: The Role of the 21st Century Judge in Governance," a topic that forms an integral part of the two-day *Seminar on Democracy and Law at the Service of the*

Supreme Court Committee on Publications, a Member of the Supreme Court Executive Committee for the Judicial Reform Program, and a Consultant of the Judicial and Bar Council.

Described by a colleague, Honorable Justice Antonio T. Carpio, as "undoubtedly the most prolific writer of the Court, bar none," Justice Panganiban has penned, during the last 10 years, more than 1,000 full-length decisions, several thousand minute resolutions disposing of controversies, and the following books: *Love God Serve Man; Justice and Faith; Battles in the Supreme Court; Leadership by Example; Transparency, Unanimity and Diversity; A Centenary of Justice; Reforming the Judiciary; The Bio-Age Dawns on the Judiciary, and Leveling the Playing Field.* As Honorable Justice Romeo J. Callejo, Sr. puts it, "One book a year and no cases left undecided. This is Mr. Chief Justice Artemio V. Panganiban's unsurpassed record. It is also the best summation of judicial reform." Another colleague, Honorable Justice Angelina Sandoval-Gutierrez, lauds his "pre-eminent judicial craftsmanship, social philosophies, and literary style."

Chief Justice Panganiban obtained his Bachelor of Laws degree from the Far Eastern University (FEU) in 1960, graduating both as *cum laude* and FEU's Most Outstanding Student. He placed sixth in the Bar Examinations of that same year, with a grade of 89.55 percent. A popular campus figure, he was, among others, a Founder and former President of the National Union of Students of the Philippines.

Human Person, jointly sponsored by PHILJA and the Values for Development Foundation (VDF).

This topic is close to my heart. I believe it is a restatement of my own judicial philosophy of "Liberty and Prosperity under the Rule of Law." Liberty is another word for democracy and prosperity, for development. As you may know, I have written a new book which came out last October 2006, entitled *Liberty and Prosperity*. These two beacons of justice – liberty and prosperity – may also be broadly referred to as freedom and food, ethics and economics, integrity and investments.

This Seminar gives me the welcome opportunity to answer a critical question raised as a result of my initial column at the *Philippine Daily Inquirer* last Sunday, February 11, 2007: Did I, as Chief Justice, have a vision-mission, and did I accomplish it?

For easy understanding, let me divide my discussion into three general topics: *liberty, prosperity* and *rule of law*.

II. Safeguarding Liberty

Safeguarding liberty (or democracy, for that matter) has long been a traditional expectation from our courts. Their role is to be the great equalizers when individual freedoms – whether civil, political or economic – are buffeted by the awesome powers of the State and governmental institutions. These epic constitutional struggles between the government and its citizens are written in the annals of our nation's history, to be invoked over and over, as often as challenges to individual liberty persist to this day.

Indeed, an individual becomes a majority of one when courts uphold that person's freedom, which may have been transgressed

by an unconstitutional law passed by the people's representatives and approved by a President elected by a majority of the voters.

From the British Magna Carta, to the French Revolution, to the American Declaration of Independence, and to the Filipino struggle for nationhood as codified in the Malolos Constitution, history rings for the people's right to participate in the political processes, including the freedom to vote and be voted for; as well as the freedoms of expression, of assembly and of religion.

A never-ending saga of trials and triumphs for the judiciary and for our people is the battle for civil liberties, especially the inviolability of our persons from illegal arrests and our homes from arbitrary searches and seizures, those guaranteeing our freedoms of abode and travel, and the so-called Miranda rights of persons accused of crimes.

III. Judicial Policy to Uphold Liberty

How is liberty safeguarded by the judiciary? Answer: In litigations involving civil liberties, the scales of justice should weigh heavily against the government and in favor of the people – particularly the poor, the oppressed, the marginalized, the dispossessed, and the weak. Laws and actions that restrict fundamental rights, like freedom of expression and of the press, come to the courts with a heavy presumption against their validity. This policy is commonly referred to as "heightened" or "strict" scrutiny.

Consistent with this policy of "strict" scrutiny, the Supreme Court last year – during my incumbency as Chief Justice – promulgated three landmark decisions involving:

1) Executive Order No. 464 in which the right of Congress to summon executive officials for investigations in aid of

legislation, in conjunction with the people's right to information on matter of public concern was upheld;[1]

2. the so-called Calibrated Preemptive Response (CPR) policy which was scuttled, as the High Court ruled in

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1. *Senate v. Ermita*, GR No. 169777, April 20, 2006. More accurately, the Court invalidated the major provisions of Executive Order No. 464. In its simplest terms, the Decision held that Congress had the right to compel the appearance of executive officials in congressional investigations, because the power of legislative inquiry was as broad as the power to legislate. Hence, held to be unconstitutional were the provisions of EO No. 464 that allowed the Executive Branch to evade congressional requests for information without properly invoking executive privilege in recognized instances. Nonetheless, the Court directed Congress to indicate, in its invitation to executive officials, the subject matter of the inquiry and of related questions, so that the President or the Executive Secretary could properly invoke executive privilege, if warranted.

   To the extent that investigations in aid of legislation were to be generally conducted in public, the Court held that:

   > any executive issuance tending to unduly limit disclosures of information in such investigations necessarily deprives the people of information which, being presumed to be in aid of legislation, is presumed to be a matter of public concern. The citizens are thereby denied access to information which they can use in formulating their own opinions on the matter before Congress – opinions which they can communicate to their representatives and other government officials through the various legal means allowed by their freedom of expression x x x.

favor of the people's right to peaceful assembly for a redress of grievances;[2] and

3. Presidential Proclamation No. 1071 in which the fundamental rights of the people under a "state of national emergency"[3] were recognized. Verily, in all these pivotal cases, the Supreme Court upheld the primacy of civil liberties over governmental actions.

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2. *Bayan v. Ermita*, GR No. 169838, April 25, 2006. This *ponencia*, penned by Justice Adolfo S. Azcuna, stated thus:

> x x x [T]his Court reiterates its basic policy of upholding the fundamental rights of our people, especially freedom of expression and freedom of assembly. In several policy addresses, Chief Justice Artemio V. Panganiban has repeatedly vowed to uphold the liberty of our people and to nurture their prosperity. He said that 'in cases involving liberty, the scales of justice should weigh heavily against the government and in favor of the poor, the oppressed, the marginalized, the dispossessed and the weak. Indeed, laws and actions that restrict fundamental rights come to the courts with a heavy presumption against their validity. These laws and actions are subjected to **heightened** scrutiny.'

3. *David v. Arroyo*, GR No. 171396, May 3, 2006. Writing for the majority in this case, Justice Angelina Sandoval-Gutierrez ruled as follows:

> All powers need some restraint; practical adjustments rather than rigid formula are necessary. Superior strength – the use of force – cannot make wrongs into rights. In this regard, the courts should be vigilant in safeguarding the constitutional rights of the citizens, specially their liberty.
>
> Chief Justice Artemio V. Panganiban's philosophy of liberty is thus most relevant. He said: 'In cases involving liberty, the scales of justice should weigh heavily against the government and in favor of the poor, the oppressed,

IV. Nurturing Prosperity

While safeguarding liberty is a fairly common task for the judiciary, nurturing prosperity is something even seasoned jurists and lawyers may not all readily understand and agree with. Some may even disagree with the proposition that judges should exert conscious thought and effort to nurture progress. After all, the traditional realm of the judiciary had been confined to the determination of legality, not economic viability.

It is equally true that the two political branches of government – meaning the Presidency and Congress – have been given the primary responsibility of promoting the economic well-being of the country. Nonetheless, I maintain that the judiciary has a similar duty to nurture prosperity and to alleviate poverty. I have three major reasons for my position.

First, our 1987 Constitution contains several provisions involving the economic rights of our people, which the judiciary is mandated to protect and enforce. Thus, our fundamental law[4] commands the State to:

> the marginalized, the dispossessed and the weak.' Laws and actions that restrict fundamental rights come to the courts with a heavy presumption against their constitutional validity.

4. The following provisions of the Constitution, among others, mandate the State to promote economic prosperity:

> **Article II**
> **Declaration of Principles and State Policies**
>
> **Sec. 9.** The State shall promote a just and dynamic social order that will ensure the prosperity and independence of the nation and free the people from poverty through policies that provide adequate social services, promote full

promote a just and dynamic social order that will ensure the prosperity and independence of the nation and free the people from poverty x x x.

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employment, a rising standard of living, and an improved quality of life for all.

SEC. 17. The State shall give priority to education, science and technology, arts, culture, and sports to foster patriotism and nationalism, accelerate social progress, and promote total human liberation and development.

ARTICLE XII
NATIONAL ECONOMY AND MATRIMONY

SECTION 1. The goals of the national economy are a more equitable distribution of opportunities, income, and wealth; a sustained increase in the amount of goods and services produced by the nation for the benefit of the people; and an expanding productivity as the key to raising the quality of life for all, especially the underprivileged.

The State shall promote industrialization and full employment based on sound agricultural development and agrarian reform, through industries that make full and efficient use of human and natural resources, and which are competitive in both domestic and foreign markets. However, the State shall protect Filipino enterprises against unfair foreign competition and trade practices.

In the pursuit of these goals, all sectors of the economy and all regions of the country shall be given optimum opportunity to develop. Private enterprises, including corporations, shall be encouraged to broaden the base of their ownership.

SEC. 12. The State shall promote the preferential use of Filipino labor, domestic materials and locally produced goods, and adopt measures that help make them competitive.

Equally significant is Article XII, which is devoted in its entirety to "National Economy and Patrimony," the goals of which are set forth without equivocation:

> a more equitable distribution of opportunities, income and wealth; a sustained increase in the amount of goods and services produced by the nation for the benefit of the people; and an expanding productivity as the key to raising the quality of life for all, especially the underprivileged.[5]

We can truly say that in our country, Franklin Delano Roosevelt's famous "freedom from want"[6] has been constitutionalized. What we need is a responsive government to implement it and a prudent judiciary to enforce it.

It is also clear that the Constitution does not contemplate palliatives as the solution to our economic woes. Donations and dole-outs, while welcome, cannot constitute the promise of prosperity that the fundamental law holds out. What the spirit and the letter of the Constitution demand is the institutionalization of *social justice*. Thus, the Constitution expressly ordains as follows:

> The Congress shall give highest priority to the enactment of measures that protect and enhance the right of all people

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> **SEC. 13.** The State shall pursue a trade policy that serves the general welfare and utilizes all forms and arrangements of exchange on the basis of equality and reciprocity.

5. Art. XII, Sec. 1.

6. During his annual message to the United States Congress on January 6, 1941, Roosevelt outlined, as his vision for the world, four freedoms: freedom of speech and expression, freedom of every person to worship God, freedom from want, and freedom from fear.

> to human dignity, reduce social, economic and political inequalities, and remove cultural inequities by equitably diffusing wealth and political power for the common good.
>
> To this end, the State shall regulate the acquisition, ownership, use and disposition of property and its increments.[7]

But the Constitution does not end by merely directing that priority be given to social justice. It further decrees that:

> [t]he promotion of social justice shall include the commitment to create *economic* opportunities based on freedom of initiative and self-reliance.[8]

In so doing, it subscribes to the classical thought that social justice is a matter of distributive justice; *that is, all* social groups participate equitably in the resources, the patrimony and the progress of the nation. Hence, the systematic and systemic exclusion of any social group from the blessings of prosperity constitutes social injustice.

V. The Private Sector's Efforts to Alleviate Poverty

Second, these social justice mandates of our Constitution are matched with equal fervor by the private sector globally and nationally.

Hear this. Some of the most learned minds in the world today have called attention to the abysmal gap between the haves and the have-nots. Thus, they propose ingenious solutions to

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7. Art. XIII, Sec. 1.

8. Art. XIII, Sec. 2.

economic deprivation and want. In his new book, *The End of Poverty*,[9] Jeffrey D. Sachs holds that freedom and equality are meaningless to people who wallow in grinding poverty, debilitating disease and inexplicable hunger.

He argues that the United States spent $450 billion in 2005 to sustain its military superiority, but would:

> never buy peace if it continues to spend only around one thirtieth of that [sum], just $15 billion, to address the plight of the world's poorest of the poor, whose societies are destabilized by extreme poverty and thereby become havens of unrest, violence, and even global terrorism.[10]

With the same fervor, *Time Magazine's Persons of the Year for 2005* – the world's richest multi-billionaire couple Bill and Melinda Gates; and rock star Bono – have come down from their fabulous nests of luxurious living to save 700,000 lives through vaccinations and public health care.

> The Gateses, having built the world's biggest charity with $29 billion endowment [an amount equal to what the World Health Organization disburses], spent the year (2005) giving more money away faster than anyone ever has, including nearly half a billion dollars for the Grand Challenges, in which they asked the very best brains in the world how they would solve a huge problem, like inventing a vaccine

9. Penguin Press, New York, 2005. See also J. STIGLITZ AND A. CHARLTON, FAIR TRADE FOR ALL, (2005). This book exhorts developed countries to modify World Trade Organization (WTO) rules to enable developing countries to cope with globalization as a means to reduce poverty.

10. *Id.* at 1.

> that needs no needles and no refrigeration, if they had the money to do it.[11]

It seems to me that Bill Gates now devotes more of his time and genius to spending his fortune prudently than to earning it feverishly.[12]

In turn, Bono, reports *Time:*

> charmed and bullied and morally blackmailed the leaders of the world's richest countries into forgiving $40 billion in debt owed by the poorest. Now these countries can spend the money on health and schools rather than interest payments, and have no more excuse for not doing so.[13]

The Gateses' and Bono's redefinition of generosity:

> is not about pity. It is more about passion. Pity sees the suffering and wants to ease the pain; passion sees injustice and wants to settle the score. Pity implores the powerful to pay attention; passion warns about what will happen if they don't. The risk of pity is that it kills with kindness; the promise of passion is that it builds on the hope that the poor are fully capable of helping themselves if given the chance.

The Gateses' passion for philanthropy in alleviating the world's poverty and diseases drew a mind-boggling $30 billion worth of

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11. *Time*, December 26, 2005, January 2, 2006, p. 26.

12. Indeed, at 50, Bill Gates is relinquishing his day-to-day business responsibilities as Microsoft chair as of July 2008, in order "to focus more on philanthropic work." Time, June 26, 2006, p.14.

13. *Id.*

stocks in blue-chip Berkshire Hathaway, given by investment guru Warren Buffett.[14]

In our country, the imperatives of social responsibility in the systematic dispersal of private wealth to alleviate poverty has, in the private sector, been pioneered by the Philippine Business for Social Progress (PBSP). Member-companies of PBSP contribute a fixed percentage of their net incomes to a common fund to pursue humanitarian causes.

Along the same line, the big business conglomerates – like Ayala, Metrobank, Philippine Long Distance Telephone Company (PLDT), Yuchengco Group of Companies (YGC), Aboitiz; and those of Taipans Henry Sy, Lucio Tan, John Gokongwei,[15] and Emilio Yap – have formed their own philanthropic foundations to pursue educational, health, livelihood, and other social causes designed to minimize poverty and to help the people help themselves.

Other noteworthy causes include media outreaches like *Bantay Bata* of ABS-CBN and the *Kapuso Foundation* of GMA 7; pro-

14. This sum will be given gradually beginning July this year and continuing every year, for as long as one of the couple – Bill, 50; or Melinda, 42 – is active in the Bill and Melinda Gates Foundation. But each installment must be spent in the year it is given. For 2006, Buffett has donated 602,500 Berkshire B shares valued at about $1.5 billion, which must be spent by the Gates Foundation within the year. Time, July 10, 2006, p. 13.

15. Philippine Daily Inquirer, August 13, 2006, p. A1:

> To celebrate his 80th birthday on August 11, 2006, John Gokongwei donated all his personal holdings (amounting to P10.25 billion) in JG Summit to the Gokongwei Brothers Foundation, which in turn donated P50 million to the University of San Carlos in Cebu City.

poor programs of religious groups like Catholic Charities and *Pondong Pinoy;* and civil society groups like *Gawad Kalinga,* led by Antonio Meloto who recently merited a Ramon Magsaysay Award. I believe that **the only justification for accumulating enormous wealth is the zeal and the ability to distribute it wisely to the needy and the hungry.**

Third, not to be outdone, the world's most important developmental institutions, like the United Nations Development Program (UNDP), the World Bank (WB) and the Asian Development Bank (ADB) have learned over the years that their goals of alleviating poverty and propelling economic growth cannot be attained, unless there is:

> a well-functioning judicial system [that] enables the State to regulate the economy and empower private individuals to contribute to economic development by confidently engaging in business, investments and other transactions.

This stance explains why the UNDP is passionate about broadening the poor's access to justice; why the World Bank wants:

> an effective and efficient judicial system that protects citizens from the abuses of government and safeguards the rights of the poor;[16]

and why the ADB desires "to enhance the effectiveness and the accountability of the judiciary."[17]

The foregoing pronouncements of our Constitution, as well as the activist efforts of the worldwide and local business/philanthropic sectors and the supportive stance of international

16. LEGAL AND JUDICIAL SECTOR MANUAL (2002), a World Bank publication.

17. *Law and Policy Reform,* ADB Report, January 2005, pp. 26-28.

developmental institutions to help the human race buttress my belief that political liberty, the clarion call of the past, must continuously be safeguarded in the present and in the future, if we must be true to Wendell Philip's reminder that "eternal vigilance is the price of liberty."

However, I am equally persuaded that the prosperity of our people requires as much nurturing in the present century as that accorded to liberty in the past. To be relevant, courts must be constantly attuned to the needs of the present and the vagaries of the future, so that they can respond timely and prudently to the people's ever-expanding well-being.

VI. The Judiciary's Response to the Call for Poverty Alleviation

Truly, no one in this country – whether in the government or outside – can ignore these three developments favoring the pursuit of prosperity and development. Judges cannot close their eyes to these stark realities that grinding poverty, crampling disabilities, and debilitating diseases are anathema to freedom and democracy. The vital question for us this morning is: How can, and how has, in fact, the judiciary responded to the call for the alleviation of poverty, disease and disability?

Answer: In litigations affecting prosperity, development and the economy, the courts – as a matter of policy – must defer as much as possible, to the actions of the political branches of government, namely the Presidency and Congress. This approach is referred to as the "deferential" interpretation of laws and executive actions.

How has this judicial policy been implemented by the Supreme Court in its decisions? Let me cite two specific cases.

In *Tanada v. Angara,*[18] the Court deferred to the wisdom of the Senate when it upheld that legislative body's consent to the Philippine ratification of the World Trade Organization (WTO) Agreement. To demonstrate this deference more vividly, I would like to quote portions of the Decision, as follows:

> It is not impossible to surmise that this Court, or at least some of its members, may even agree with petitioners that it is more advantageous to the national interest to strike down Senate Resolution No. 97 (which embodied the Upper House's consent to the ratification of the WTO Treaty). But that is not a legal reason to attribute grave abuse of discretion to the Senate and to nullify its decision. To do so would constitute grave abuse in the exercise of our own judicial power and duty. Ineludably, what the Senate did was a valid exercise of its authority. As to whether such exercise was wise, beneficial or viable is outside the realm of judicial inquiry and review. That is a matter between the elected policy makers and the people. As to whether the nation should join the worldwide march toward trade liberalization and economic globalization is a matter that our people should determine in electing their policy makers x x x.

This *laissez-faire* judicial policy on economic issues was reiterated in *La Bugal-B'laan Tribal Association v. Ramos,*[19] which affirmed the constitutionality of the Mining Law allowing 100 percent foreign investments in *large-scale* mining. Thus, the Court held thus:

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18. 338 Phil. 546, 604-605, May 2, 1997, per Panganiban, *J.* (now *CJ*).

19. 445 SCRA 1, December 1, 2004, per Panganiban, *J.* (now *CJ*).

> x x x. The Constitution should be read in broad, life-giving strokes. It should not be used to strangulate economic growth or to serve narrow, parochial interest. Rather, it should be construed to grant the President and Congress sufficient discretion and reasonable leeway to enable them to attract foreign investments and expertise, as well as to secure for our people and our posterity the blessings of prosperity and peace.

VII. The Rule of Law

The last key words are "rule of law." The safeguarding of liberty and the nurturance of prosperity must always be planned, worked on and carried out in accordance with and within the limitations contained in pre-agreed rules and procedures.

Let me give some parallels in our common experiences. Every sport has rules. When these rules are violated, a foul is called and, depending on the gravity of the act, the offender is penalized. No team, no matter how talented or strong, can win without following the rules. Thus, when a basketball player "forces" himself on the opposite team, a foul is called and the basket made is not counted. The referees cannot award the trophy, until the game is finished within the prescribed period. After the regulation time, no basket may be counted.

In the same manner, no person may be deprived of life, liberty or property without due process of law. In their impatience, some people resort to short cuts and condemn an accused because time-consuming "procedures" should not stand in the way of "justice." If the accused is obviously guilty because his crime had been committed in the full view of cameras, why should the State waste valuable time and resources in hearing and trying him? Just jail him, period. So they say.

There is an inherent danger in this argument. When people ignore the rule of law and belittle due process, they really abet authoritarianism. What differentiates libertarianism from authoritarianism or dictatorship is the rule of law. No person, no matter how powerful or talented, can be above the law. Everyone, rich or poor, powerful or powerless, must follow pre-agreed rules.

The rule of law also differentiates democracy from the rule of the mob. The mere fact that the gallery wants a team to win despite violations of the rules will not entitle that team to the trophy. In the same manner, the mere fact that, allegedly, six million people have lodged a petition[20] to initiate changes in our Constitution in violation of the constitutional procedures governing amendments and revisions is of no moment; it cannot be allowed. The rule of law will not allow cuts and bully tactics. The end never justifies the means.

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20. In the famous 2006 initiative case, *Lambino v. Comelec*, GR No. 174153, October 25, 2006, I wrote in my Separate Concurring Opinion, thus:

> At bottom, the issue in this case is simply the Rule of Law. Initiative, like referendum and recall, is a treasured feature of the Filipino constitutional system. It was born out of our world-admired and often-imitated People Power, but its misuse and abuse must be resolutely rejected. Democracy must be cherished, but mob rule vanquished.
>
> The Constitution is a sacred social compact, forged between the government and the people, between each individual and the rest of the citizenry. Through it, the people have solemnly expressed their will that all of them shall be governed by laws, and their rights limited by agreed-upon covenants to promote the common good. I[f] we are to uphold the Rule of Law and reject the rule of the mob, we must faithfully abide by the processes the Constitution has ordained in order to bring about a peaceful, just and

In a speech before the *Global Forum on Liberty and Prosperity* held in Makati on October 18-20, 2006, Canadian Chief Justice Beverley McLachlin exclaimed that the:

> rule of law is the cornerstone of all democratic societies x x x without the rule of law, government officials are not bound by standards of conduct. Without the rule of law, the dignity and equality of all people is not affirmed and their ability to seek redress for grievances and societal commitments is limited. Without the rule of law, we have no means of ensuring meaningful participation by people in formulating and enacting the norms and standards which organize the kind of societies in which we want to live.

VIII. Epilogue

Ladies and gentlemen, a year ago, on January 16, 2006, I had an interesting roundtable discussion with Professor William Easterly, who had recently published a much-acclaimed book entitled *Elusive Quest for Growth*. Among the discussants were Finance Secretary Margarito Teves, former Prime Minister Cesar Virata, former National Economic and Development Authority Director-General Felipe Medalla, Senator (and Senate Ways and Means Committee Chair) Ralph Recto, Banker Vitaliano Nañagas, Economist Romeo Bernardo, Business Leader Jaime Augusto Zobel de Ayala II, Professor Alex Magno, International

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humane society. Assuming *arguendo* that six million people *allegedly* gave their assent to the proposed changes in the Constitution, they are nevertheless still bound by the social covenant – the present Constitution – which was ratified by a far greater majority almost 20 years ago. I do not denigrate the majesty of the sovereign will; rather, I elevate our society to the loftiest perch, because our government must remain as one of laws and not of men.

Monetary Fund (IMF) Resident Representative Reza Baqir, and World Bank Country Director Joaquim von Armsberg (the dinner host).

Professor Easterly opined that most economically advanced countries – like the United States[21] and many states comprising the European Union – had adopted liberal democracy, in which human rights were zealously protected.[22] He added that under these benign regimes, entrepreneurs felt comfortable and thus invested their money for the long term.

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21. The United States, with a *per capita* income of $41,800, is considered the world's richest economy. It did not achieve this status overnight, however. The key to its economic success is consistency. Compared with China's staggering 9.6 percent growth per year from 1990 to 2003, US growth rates have been relatively modest at 3.3 percent. But, in a span of two centuries (1820-1998), the US has maintained a steady average growth rate of 1.7 percent per year of *per capita* GNP. Its sustained growth is attributed to a stable, transparent and independent government with credible and consistent economic policies. (Figures taken from CIA World Factbook 2005 <http://www.cia.gov/cia/publications/factbook/rankorder/2004rank.html> (visited January 10, 2006); and Recent Economic Performance, WORLD DEVELOPMENT INDICATORS (2005), an annual publication of the World Bank <http://devdata.worldbank.org/wdi2005/Section4.htm> (visited January 31, 2006).

22. The discussion was summarized by Prof. Alex Magno, in his column in the *Philippine Star* on January 19, 2006.

When confronted with other models of economic prosperity like China,[23] Singapore,[24] and Chile, Professor Easterly conceded that there was no single formula for rapid economic growth. He theorized though, that for the long term, liberty must still stand side by side with prosperity as the durable formula for lasting economic success.

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23. The rapid growth of China has been unprecedented. Its average annual growth rate of 9.3 percent from 1990 to 2003 has been nothing short of phenomenal, and it shows no signs of slowing down in the near future. With a growth rate of 9.5 percent in 2004 and after the government announced robust economic growth of 9.9 percent in 2005, China has overtaken France and Britain to become fourth on the list of the world's biggest economies.

    What makes the case of China more inspiring is the fact that in 1981, it was among the poorest countries with more than 60 percent of the population living on less than $1 a day. This poverty level was cut in half by 1990 and again by 2001. And China was able to achieve all of this under a one-party rule. (Data from *Recent Economic Performance*, WORLD DEVELOPMENT INDICATORS (2005), *id.;* Channel News Asia International Business News <http://www.channelnewsasia.com/stories/afp_world_business/view/190006/1/.html> (visited January 31, 2006); and CIA WORLD FACTBOOK (2005) <http://www.cia.gov/cia/publications/factbook/rankorder/2004rank.html> (visited January 10, 2006).

24. Singapore is yet another success story. With average annual growth rates of 6.7 percent from 1980 to 1990 and 6.3 percent from 1990 to 2003, it has grown – in a short span of three decades – from being among the world's poorest countries to one having *per capita* income levels that match those of highly industrialized nations. The Singaporean government maintains a significant amount of control over the economy. Even then,

To my mind, the peculiar facts and distinct circumstances of the Philippines make the formula "Liberty and Prosperity Under the Rule of Law" still the most viable economic and judicial philosophy here. After all, during the years of Martial Law, authoritarian rule was proven to be incapable of producing meaningful long-term economic progress. Even more important, our people value their freedoms very dearly and will not exchange them for food. Indeed, the Filipinos may endure occasional hunger, but they will never tolerate injustice and indignity for long.

In the past, judges confined themselves to mere legalisms and narrow interpretations of the Constitution and the law, and left governance issues completely in the hands of the political branches of the government. However, I believe that the present Constitution and the contemporary events I mentioned have made it imperative for judges to participate in governance, especially as it relates to the preservation of our democracy, the pursuit of development and the observance of the rule of law.

Finally, our 1987 Constitution has imposed upon the entire judiciary, the duty – not just the power – to strike down grave abuse of discretion committed by any branch or instrumentality of the government, including the Executive and Legislative Departments. By imposing upon all judges the burden to determine issues of grave abuse of discretion, our Constitution

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Singapore has become a haven for international investors. [Figures culled from *Recent Economic Performance*, WORLD DEVELOPMENT INDICATORS (2005), an annual publication of the World Bank <http://devdata.worldbank.org/wdi2005/Section4.htm> (visited January 31, 2006); and the CIA WORLD FACTBOOK (2005), <http://www.cia.gov/cia/publications/factbook/rankorder/2004rank.html> (visited January 10, 2006)].

has thereby commanded them to be activists in protecting people's political rights and in promoting their economic well-being. And by prudently exercising this constitutional duty, the 21st century judges are really pursuing their proper roles in the governance of our country.[25]

Maraming salamat po.

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25. *See* Panganiban, *Leveling the Playing Field* (2004) for an extended discussion, particularly pages 19-20, thus:

> During the last few years, the Supreme Court has invoked its expanded *certiorari* duty to strike down several government contracts and actions that were entered into with grave abuse of discretion by the agencies concerned. Notable among these were the Meralco rate increases authorized by the Energy Regulatory Commission, the reclamation of certain portions of Manila Bay, the construction and operation of Terminal III of the Ninoy Aquino International Airport, the computerization of the 2004 elections, and the private operation of on-line Internet gambling.
>
> In voiding all these agreements, the Court invoked its duty to uphold the Constitution and the law, pointing out that the rule of law was an essential ingredient of good governance and economic progress. It stressed that public biddings must be transparent and even-handed. In some of these transactions, shades of corruption and wrongdoing were hinted at by the Court. In one case, it even openly criticized the contract for being the 'grandmother of all scams.'

Tolerance, Respect and Multi-culturalism*

*Rev. Fr. Peter Cenzon, Jr.***

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* Delivered at the *Seminar on Democracy and Law at the Service of the Human Person* on February 16, 2007 at the Eduardo Aboitiz Development Study Center, Cebu City.

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Fr. Cenzon was ordained priest in Madrid, Spain in 1977. He obtained his Bachelor of Arts in Economics, *magna cum laude,* from De La Salle College in Manila (1972) and Master of Arts in Education from the University of Navarre in Rome (1974). Fr. Cenzon took his Licentiate in Philosophy at the Pontifical University of Holy Cross in Rome (2000) and currently updating his doctoral thesis in Social Philosophy on *The Metaphysical Foundations of Social Relations in Saint Thomas.*

His pastoral activities include: pastoral work among high school and university students and helpers of Manila from 1978 to 1982 and of Singapore from 1982 to 1989; Chaplain of the Institute of Education in Singapore from 1988 to 1989; and pastoral work among professionals, university students and housewives from 1989 to present.

Going on air in the aftermath of 7/7,[1] Tony Blair declared:

> It is through terrorism that the people that have committed this terrible act express their values, and it is right at this moment that we demonstrate ours x x x. When they seek to change our country or our way of life by these methods, we will not be changed.

Was he accepting Huntington's prediction of a clash of civilizations?[2] Several attacks[3] before and since 9/11 carried out by groups who claimed responsibility had given as their rationale for US troops' presence in Saudi Arabia, Allied coalition policy in Iraq and the Palestinian question. Was not the motivation then also and even mainly political?[4] If Blair implicitly accepted the Middle East connection, was it only the terrorists' methods that he was against? Though motivations can be interweaving, they may not exclude the multi-culturalist one, the clash of values.

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1. The July 7, 2005 string of bombings in London.
2. In summer of 1993, Harvard political scientist Samuel Huntington published the article "Clash of Civilizations" in *Foreign Affairs*.
3. The US Embassy in Kenya, the USS Cole in Aden, Bali in 10/2, Jakarta Marriot Hotel in 8/3, Madrid trains in 3/4, Jakarta Australian Embassy in 9/4, etc.
4. Alienation among British Muslims pointed to the connection with UK foreign policy, and in particular in Iraq, and the US government's influence on it: Cfr. Online survey between September 8-27, 2006, of 1,213 people including students, housewives, academics, human rights/political activists and those working in business, finance, and health and service sectors conducted by the 1990 Trust; also BBC online, December 4, 2006.

> Deeply impressed upon (2006) is the general danger of a clash between cultures and religions – a danger that hangs threatening over our time in history. – Benedict XVI[5]

I. Multi-culturalism

In the last quarter of 2004, Rocco Buttiglione,[6] finally withdrew as Italy's candidate for EU justice minister after he infuriated the parliamentary committee for saying that he believed gay sex to be a sin and that marriage was meant to provide women with the right to have children and the protection of a man, even if he was ready to uphold laws reached democratically. He was seen unfit to hold office in increasingly multi-cultural and secular Europe. Since then, following the murder of Dutch film producer van Gogh and the sentencing of his attacker, a Muslim militant, who said during his sentencing in court, in the presence of the victim's mother, that he would repeat what he had done, *i.e.*, slit van Gogh's throat for having produced a film[7] offensive to Muslims, were the occasion to present itself again, the Dutch government has now required more stringent citizenship tests of immigrants to make them conform to Dutch values, in the same way that British society, put on the defensive after 7/7 for its traditional approach of live and let live, has changed tack to actively promote peculiarly British values and to integrate its minorities' values to the values

5. Address, December 22, 2006, in *L'Osservatore Romano*, Weekly English Edition, No. 1, January 3, 2007, p. 5.

6. Italian philosopher-politician, ex-Italy culture minister, personal friend and confidant of John Paul II and now, Benedict XVI.

7. *Submission*, which portrayed the plight of women in Islam.

of the mother liquor of mainstream British society.[8] Is the European multi-culturalist project in tatters?

Multi-culturalism, the promotion of equal treatment for all cultures, already has sparked debates, in the US where being politically correct requires people and leaders to walk on eggshells– *e.g.*, the use of the hyphen to describe sizable and growing ethnic minorities and to which substantial numbers of individual American now belong – African-American, Latin-American (Latino), Asian-American, etc., – in order to avoid anything that might give offense to them and in Europe, notably the UK, historically home to many immigrant groups. The traditional melting pot image has given way to the bowl of salad, as multi-culturalism is described, the strong identification with one's own culture, with its implication of cultural relativism – all values are valid, values are relative to culture. Understandably, its critics see multi-culturalism, retentive of cultural identity, obstructive to blending, tantamount to building walls of separation,[9] and impeding, instead of fostering, community cohesion, thus becoming a threat to the making of a nation *"e pluribus unum."*

Nevertheless, while recognizing that cultures are diverse, maintaining that all the values they incorporate are of equal value is not easy. Such expediency may buy time, but may not narrow real and perhaps irreconcilable differences concerning the big issues of religion, language, morals, etc., close to the hearts of men. Turkey's application to join the European Union has been put on hold for decades now, for reasons that include, among others, honor killings. Given the confluence of cultures in today's globalized

8. Like the Australian policy at present.

9. As David Cameron, present head of the Conservative Party in the UK, said recently: cfr *BBC* online, January 29, 2007.

world, national social harmony is increasingly thought to be more effectively fostered if core values – in Britain's case, tolerance, respect for the rule of law, fairness, knowledge, understanding and respect for other countries, cultures and religions – are inculcated from young-citizenship courses annexed to history for 11-16 year olds in schools – recognizing that the values and attitudes that the youth learn will shape the kind of country Britain will become, in order to help individuals overcome xenophobia, stereotyping prejudice, intolerance and bigotry, and the minorities' cultural values are blended with them. Philippine society seems less beset with integration problems because for one, there is only one sizable local minority group with a militant history, the Filipino Muslims, whose culture and past has not harmoniously blended with mainstream Philippine society and in fact amongst its members has had advocates – even to the point of resorting to violence – for autonomy, if not separatism. Moreover, the Asian consensus approach to problems differs markedly from the Latin temper, more violent in tone, or from the Western Anglo-Saxon one, more confrontational. Though the political and cultural aspects are interwoven, the political aspect is at the forefront, the cultural one remaining in the background.

Long before Huntington published his controversial article, Canadian statesman Lester Pearson, in the early years of the Cold War, had warned of the looming civilizational conflicts.[10] But today's globalized world, never before seen in history, of the easy and swift movement of goods, services and ideas across national borders, be they good or bad for its immediate impact on individuals and societies has made more pressing the need for comforting solutions.

10. Cfr. Huntington, S., *The Clash of Civilizations and the Remaking of the World Order;* Simon and Schuster, 1996, p. 39.

Complicating the debate is religion, since many, in identifying with their culture, also identify with it. Far from being strange, historically religions always have been a significant part of cultures.[11] Difficulties arise when people[12] become ambivalent towards religion, not a few seeing it more of a social menace than a force for good.[13] With Christian practice in the West in clear decline for some time now and the simultaneous rise in numbers[14] and practice of Islam, the question "Do the tenets of religion clash with the values of civilized society?" comes up.

II. Tolerance

For a while, the Buttiglione treatment seemed about to repeat itself when Ruth Kelly, committed Catholic mother of four, got appointed first as minister of Education, then of Communities and Local Government in Tony Blair's cabinet, came under criticism for refusing to reply to journalists when they posed the question "Is homosexuality a sin?" This time the issue was not so much a

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11. Cfr. Huntington, S., *o.c.*, and Dawson Christopher, *The Dynamics of World History*, Mentor Omega, p. 128.

12. The UK, to take an example: 6 adults aged 18+ by phone between December 12 and 13, 2006.

13. The *Guardian* in the UK on December 23, 2006 reported that:

> more people think religion causes harm x x x than good x x x that an overwhelming majority (82%) see (it) x x x a cause of division and tension, greatly outnumbering the smaller majority (16%) who x x x believe x x x it can be a force for good.

14. Estimates of 20 million Muslims in Europe.

conflict of national cultures but one between secular orthodoxy, become increasingly the ideology of the post-Christian West and traditional Judaeo-Christian orthodoxy, between the morally neutral State and the "intolerant" religious dogmatists. The secularists and the liberals in the name of individual freedom – based on the pursuit of happiness – reject any imposition of dogmatic positions by anybody. Such thinking lies behind the right to abortion, the right to divorce, the right to contract marriage with the same sex, the right to end life – whether of the terminally ill or of the malformed newly born.

Philip II, who spent time living among Protestants in Germany, England and the Netherlands already understood the *realpolitik* counseled peaceful coexistence and toleration in the Netherlands in 1591; the Edict of Nantes established it in France in 1596.[15] But it was in Westphalia in 1648 that first recognized the spirit of tolerance of the new rationalist mind-set[16] for all Europe, buying it some measure of temporary calm after the sundering of Christian unity unleashed the political or religious hatreds and intolerance that set Europe afire with the exhausting sanguinary wars of religion.

Tolerance marked an advance to the previous thinking behind Islam's spread throughout the Middle East and overrunning of Spain in 711 until it was stopped at Poitiers in 732 and Vienna in 1683 and the Christian response to it: from the First Crusade launched in 1192 to the Reconquista completed by Ferdinand and Isabella in January 1492, the inferior status accorded to non-

15. Kamen, Henry, *Empire. How Spain became a World Power 1492-1763*, Perennial, Harper Collins, NY, 2002, p. 310.

16. *Gran Enciclopedia Rialp*, t. 23, entry "Westfalia, Paz de."

Muslims in the Ottoman empire and the expulsion of the Jews by March 1492 and the Muslims from Spain, from 1609 to 1614.

"Finally," in the 18th century, Enlightenment Liberalism,[17] with the epoch-marking French Revolution, separating faith from law, successfully proposed tolerance as a *modus vivendi* of modern civilized society – "finally," because "peace, the effect of justice,"[18] is never permanent, "never achieved once and for all"[19] – each generation must build it up continually.

Beginning with the attempt to keep religion within the bounds of reason, Deism, one of the roots of modern secular thought, eventually replaced revealed religion with natural religion. Though it acknowledges God as the world's Creator, it also holds that He has left the world to men to run it as reason shows them. Born in England in the 17th-18th centuries, it passed on to France where the Montesquieu-Voltaire-Rousseau triumvirate radicalized it, bringing it to its last consequences: the disappearance of faith, spirit and the world of the supernatural, atheism ushered in; the natural, reduced to the purely material; the empirically verifiable become the perceivable by human senses; and ethics, based on personal feelings become whatever is good for the individual.

With this, the Enlightenment liberals managed to put freedom in the center of political life. Influenced by Locke, Voltaire became

17. Arises out of the slow process that begun economically in capitalism and the industrialization, which in turn begun with the Renaissance of the 14th century until it breaks out in the age of manufacture and the growth of agriculture and trade in the Industrial Revolution.

18. Isaiah 32:17.

19. Vatican Council II, Pastoral Constitution, *The Church in the Modern World*, no. 78.

the passionate champion of tolerance and implacable enemy of all forms of intolerance and fanaticism, advocating the need to crush religion and the Catholic Church.[20] Yet the Enlightenment solutions are at their root Christian – the foundations of rationality and internal cohesion of Enlightenment ethics had long been provided by Christianity itself: the very separation of faith and law, its relative autonomy *vis-à-vis* the religious sphere, the church-state, God-Caesar duality, so absent in Islam, for instance, has its roots and justification in Christianity.[21] Even the freedom of faith and the dignity of man that the Enlightenment reproposed have Christian origins.[22]

It is Deism's extreme forms – keeping beliefs totally within private life, locking religion in the sacristy – or relativism – holding that everything, including contradictory and irreconcilable affirmations of life's basic questions, is of equal value – the justification of the manner some controversial political, moral and social issues have been resolved today, e.g., *Roe v. Wade* in the US, based on the right to privacy – and the *burkha* ban in the schools by the French courts, basing themselves on the secular character of the State – that may not be easy to sustain; more calls are being made for a more careful reflection on basic ethical values such as social peace, freedom and justice.[23]

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20. Cfr. *Gran Enciclopedia Rialp*, t. 23, entry "Voltaire."

21. Ratzinger, Joseph, *Church, Ecumenism and Politics*, St. Paul Publications, Middlegreen, Slough, England, 1988.

22. Ratzinger, J., Address "Christianity and Europe's Crisis of Culture," April 1, 2005, quoting also Vatican II, *Gaudium et spes,* address at Subiaco, Italy.

23. Cfr. Ocariz, Fernando, Mons. "Delimitacion del Concepto de la Tolerancia y su Relacion con el Principio de Libertad," in *Scripta Theologica* 27 (1995/3) 865-883.

"Toleration," *The Oxford Companion to Law* says, is the "acknowledgment of the liberty of persons to hold beliefs or do things which were not permitted or are not acceptable to a large number of persons in the community. The 'practical recognition of individual freedom of conscience and of belief,' it 'has frequently been used of permitting of freedom of worship to non-Catholics in Catholic countries and conversely, but it extends more widely, to social and political views, to practices and conduct.'"[24] Legally, it looks into the "circumstances and degree in what respects and how far toleration should be permitted at a particular time by law," which may deem desirable or necessary "restrictions on particular beliefs or conduct x x x in the interest of national security, public health, general moral standards, or the health of the participants x x x and the protection of other members of society."[25] It is distinguished into legal and moral.

But whether legal or moral, toleration assumes the absence of coercion not because all values are held relative nor because truth is ultimately unknowable[26] but because the dignity of the human person, open to truth and social by nature, requires that the methods of searching for the truth, and once found, practicing and spreading it, accord with this dignity.[27]

24. Walker, David, MA, PhD, LlD, FBA, One of Her Majesty's Counsel in Scotland, Of the Middle Temple, Barrister, Regius Professor of Law in the University of Glasgow, *The Oxford Companion to Law*, Clarendon Press, Oxford, 1980, p. 1223.

25. Walker, D., *o.c.,* p. 1223.

26. Although in divine matters, truth it is said to be ascertainable, in human matters, it is also said to be relatively more difficult and takes time to be seen and even longer to be accepted.

27. Cfr. Vatican II, declaration on religious freedom *Dignitatis humanae*, December 7, 1965, esp. no. 2.

In the 13th century, Aquinas held that "a wise lawgiver should suffer lesser transgressions, that the greater may be avoided"[28] and that "in human government also (which is) derived from Divine government and should imitate it, those x x x in authority, rightly tolerate certain evils, lest certain goods be lost, or certain greater evils be incurred,"[29] citing Augustine's view on prostitution:[30] "If you do away with harlots, the world will be convulsed with lust."[31]

Inspite of globalization, no universal culture has resulted. Yet, cultural confluence need not lead to cultural equivalence and if certain conditions are met one can reasonably assuage fears of civilizational clashes. While one can see that while some cultures put a premium on some things more than on others,[32] in matters of basic human goods – e.g., the inclination to marriage, the inclination to life preservation, the inclination to seek the truth and spread it, etc., a wide consensus prevails, even if this does not equate to a system of universal ethics as yet. Perhaps the closest that comes to its basic principles is, aside from the Ten Commandments, the Universal Declaration of Human Rights, adopted on December 10, 1948 by the UN General Assembly with 48 in favor, 8 abstaining, no one opposing all 30 articles, 23 of them unanimously,[33] which has become the set of core

28. *Summa Theologiae*, I-II, q. 103, a.3, reply to the second objection.

29. *Summa Theologiae*, II-II, q. 10, a.11.

30. Which has since then become a classic example of legally tolerated lesser evils.

31. *De ordine* ii, 4.

32. Studies have shown differences between Chinese and Malay culture.

33. Glendon, *o.c.,* pp. 169-170.

principles acceptable to the whole world in principle, even if not always in practice.

The attempt to craft the "first international bill of rights" "so basic that the framers believed no nation would wish openly to disavow them," expressive of the universality of human nature[34] and the commonality of human reason rising above accidental cultural particularities, was actually "peripheral to the main purpose of the United Nations," and came more "as a concession to small countries and in response to the demands of numerous religious and humanitarian associations that the Allies live up to their war rhetoric by providing assurances that the family of nations never again countenance such massive violations of human dignity."[35]

In recent years, the charter's universality came under attack[36] but the fact that so far no better alternative has been found has amply ruled in favor of its defenders. Though John Paul II, who made personalism the hallmark of his papacy, throughout his pontificate defended democracy wholeheartedly as a system that more perfectly than any other embodies the truth of the person's basic dignity,[37] noting the "almost universal consensus with regard to the value of democracy (as) x x x a positive 'sign of times' x x x,"[38] nevertheless, the world presently watches America

34. Sources were canvassed from North and South, East and West.

35. Glendon, Mary Ann, *A World Made New*, Preface, pp. xv-xvi.

36. On the occasion of the 50th anniversary of the charter, there has been criticism from some (like Lee Kuan Yew) from countries still colonies in 1948: cfr. Shashi Tharoor, "Are Human Rights Universal?" *World Policy Journal*, Vol. XVI, no. 4 (Winter 1999/2000); Glendon, *o.c.*, p. 224.

37. Glendon, *o.c.*, pp. xvi-xvii.

38. Glendon, *o.c.*, p. xvii.

struggling to implant its brand of democracy in Iraq, stalled by an endless host of problems not only in the battlefield but also in the ongoing debate in the minds of so many: Is liberal democracy universal or cultural? Are ideas of individual liberty, political democracy, the rule of law, human rights, cultural freedom, etc., unique to the West? And if so, aside from the beautiful logical ideas, to implement them, are not local cultural traditions also required?

At the very least, it has the merit of having withstood the classic test of time, its 50th anniversary celebrated worldwide a few years back. Today it remains "the single most important reference point for cross-national discussion of how" human beings can order mankind's future together "on an increasingly conflict-ridden and interdependent planet."[39]

Among the articles that are most salient for our purpose are:

> No. 2, the universal entitlement to all rights and freedoms stated in the document, 'without distinction of x x x race, color, religion x x x, national or social origin;'
>
> No. 18, 'the universal entitlement to the right to freedom of thought, conscience and religion', which 'right includes the freedom to change religion or belief, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance;' and
>
> No. 29, which acknowledges 'universal duties to the community' and 'in the exercise of rights and freedoms, the universal subjection only to such limitations as determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.'

39. Glendon, *l.c.*

Unfortunately, the elegant document, "has come to be treated more like a monument to be venerated from a distance than a living document to be reappropriated by each generation,"[40] "widely praised x x x but little read or understood."[41] It is but typical of human nature not to properly appreciate what it perhaps enjoys at present but whose deprivation it did not personally or collectively directly experience, in a vital way in past horrors, like Rene Cassin, one of the framers of the charter, whose 29 relatives were Holocaust victims. For its 30 concise articles were woven into a unified document on the basis of practical, not theoretical agreement by men and women coming together from different languages, cultures, religions, political systems, personal histories,[42]

40. John Humphrey, Canadian 40-year-old McGill University international law professor, Charles Malik, Lebanese, Greek Orthodox Arab, philosopher; Peng-chun Chang, from China, educator, John Dewey's student in the US; Rene Cassin, French Jew, lawyer, 1968 Nobel Peace Prize winner, ardent supporter of a Jewish homeland, lost 29 relatives in concentration camps; Carlos Romulo, Filipino journalist, Catholic, Pulitzer awardee for his articles predicting the end of colonialism; Hans Mehta, India, who made sure the paper spoke with power and clarity about equal rights for women well before they were recognized in most legal systems; Alexei Pavlov, Russian; Hernan Santa Cruz, Chile, leftist, close friend of Salvador Allende, he lobbied for placing social and economic rights alongside traditional political and civil liberties, Jacques Maritain, French Thomist social philosopher and especially Eleanor Roosevelt, whose prestige and personal qualities helped her influence key decisions of her country: *see* Glendon, *o.c.*, pp. 77-78.

41. John Paul II, Encyclical *Centessimus annus*, no. 46.

42. John Paul II, Encyclical *Evangelium vitae*, no. 70, also as quoted by George, Robert, *The Clash of Orthodoxies*, 151 Books, Delaware, 2001, p. 139.

and ironically, headed by Eleanor Roosevelt who initially prided herself on not liking the word "tolerant."

Moreover, its enumerated specific rights can only mean something for the individual when incorporated into national legal systems. As the document is not legally binding, up to now, some signatory nations represented in the General Assembly that adopted it continue to honor it more in the breach than in its implementation.

III. Respect for the Dignity of the Human Person, the Heart of Peace, the Way Forward

> The problem of the ways towards peace has x x x become a challenge of primary importance.[43] Much is spoken of human rights but often forgotten that they need a stable foundation, none other than the dignity of the human person.[44] Respect for the person, the supporting column of the entire, great edifice of peace,[45] promotes peace.[46]

The West today, holding individual freedom as the supreme value, sometimes fails to see the corresponding need to associate it with other freedoms, for it to do man good, and to see that a freedom understood as liberation from all norms can be self-destructive. Neither does it always see its necessary linkage with

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43. Benedict XVI, *L'Osservatore Romano*, No. 1, January 3, 2007, p. 5.

44. Benedict XVI, *o.c.,* pp. 1, 5.

45. Benedict XVI, *o.c.,* p. 1.

46. Benedict XVI, *Message for World Peace Day*, January 1, 2007, n. 1.

the truth about man and its conformity to his nature, which, in Ratzinger's words, consists in "being-from, being-with and being-for," thereby situating freedom in an ordered coexistence with other freedoms.[47]

Law, whether local or international, in this sense, is not the opposite of freedom but its very condition, and doing away with it will not enhance freedom: witness the harvest the coalition forces have reaped in the second Iraq war after bypassing the UN.

Together with law, what human freedom additionally requires is a purification of man's heart in order to make the coexistence of freedoms appropriate for him. Totally pulling God and religion out of the public square, atheism, in other words, does not, and historically has not guaranteed more freedom. Rather, on occasion it has paved the way to anarchy, which, in turn, led to totalitarianisms that began with messiahs promising paradises that turned out to be mirages that evaporate, when not waste lands.[48] It is in this sense that Benedict XVI fears the slow march to atheism of a post-Christian Europe as explanatory of the rise of Islam there.[49]

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47. Ratzinger, J., *Truth and Tolerance, Christian Belief and World Religions*, Ignatius Press, 2004, p. 256.

48. Hitler's Germany. Said Gil Robles in one of the last speeches in the Spanish *Cortes* on the eve of the Civil War: "A country can live under a Monarchy or a Republic, with a parliamentary or a presidential system, under Communism or Fascism! But it cannot live in anarchy," in Thomas, Hugh, *The Spanish Civil War*, Harper, 1961, pp. 4-5.

49. Cfr. Ratzinger, J., *Church, Ecumenism and Politics*, p. 226.

In 1986 John Paul II invited religious leaders to a joint prayer meeting for peace at Assisi. The first pope to set foot in a mosque, publicly kiss the Koran, pray in a synagogue hoped that "all the world's believers x x x work tirelessly to ensure that religious convictions may never be the cause of division and hatred.[50] If religion is seen as a threat and a form of intolerance, will it not be because that religion is a sick and degenerate form,[51] sometimes hijacked for political causes?

If democracy is defined as no more than a majority-minority mechanism to decide issues – and no less than Justice Scalia replied to a questioner saying: the whole theory of democracy, my dear fellow, is that the majority rules; that is the whole theory of it. You protect the minorities only because the majority determines that there are certain minority positions that deserve protection[52] – with God and religion, as the perceived source of dogmatism and intolerance, banished from secularized public life, will it not lead progressively to the sad reality pointed out above by Ratzinger's prognosis?

Being

> fundamentally, democracy x x x a 'system' and as such x x x a means and not an end, x x x its 'moral' value is not automatic, but depends on conformity to the moral law to which it, like every form of human behavior, must be subject: x x x its morality (depending) on the morality of the ends which it pursues and of the means which it employs.[53]

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50. Easter Message, 2002.

51. Cfr. Ratzinger, J., *Truth and Tolerance*, pp. 203-304.

52. George, R., *o.c.*, p. 130.

53. John Paul II, Encyclical *Evangelium Vitae*, no. 70.

This being so, if I may borrow from legal language, one may at times have to go beyond political procedures in order to reach substantive justice. A proper understanding of democracy may necessitate tracing it to its ultimate roots, to well beyond the establishment of parliamentary supremacy, first in the Magna Carta of 1215 and then, in 1688 and go back all the way to the Greeks who directly linked democracy and *eunomia*, good law, law not open to manipulation, law that depends on moral criteria. Let us listen to Aristotle:

> *As man is the most noble of animals if he be perfect in virtue, so is he the lowest of all, if he be severed from law and righteousness.*[54]

The enormity of occasionally reported white-collar scandals, whether in Wall Street or in London or in DC, far exceeds the petty offenses of cell phone snatchers on Manila FXs.

In mid-19th century, Abraham Lincoln went over *time-bound* historical law – the Taney Court in the Dred Scott case, had ruled that "blacks were noncitizens and nonpersons for all practical purposes and therefore possessed of no right that white people must respect"[55] – which remain human products, and appealed instead to the *timeless* rationality of the equality principle, enshrined in the American Declaration of Independence. By linking law with *eunomia*, the precondition of law becomes also a precondition of democracy, opposed to mob-rule, including the tyranny of the majority. A democracy that has *eunomia* as a

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54. *Politics*, Bk 1, Ch. 2, 1253a, R. McKeon (Ed.), Random House, NY, c1941.

55. George, Robert, *o.c.*, pp. 129, 155.

precondition will include shared respect for moral values and for God.[56]

The keeping of God in public life and his recognition as a value will naturally include tolerance for atheists because democracy's functioning requires respect for conscience, which speaks out when guided by moral values, including the basic Christian ones, which Ratzinger asserts can be realized even when Christianity is not explicitly recognized, and which values – take the Ten Commandments, for instance – are also present in many non-Christian religions and cultures. They are present because they are an explicit expression of the universal natural law.

You may wonder why I bring up the scenario of the secular public square. I do not know if Philippine society will always remain the way it is at present: Judaeo-Christian. Globalization is already here and there is no stopping its currents and cross-currents. Different values and countervalues will be championed, novel legislation proposed, attempts to rewrite the constitution repeated: at bottom, what will be at stake are values. On the basis of natural law or reason, values originating from the Judaeo-Christian tradition, though not exclusive to it, and in fact shared with other traditions, are defensible.

Let us now come to the theme of this seminar: "Democracy and Law at the Service of the Human Person," inspired by John Paul II's social philosophy

> Authentic democracy is possible only in a State ruled by law, and on the basis of a correct conception of the human person[57]

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56. Cfr. Ratzinger, J., *Church, Ecumenism and Politics*, p. 234.

57. John Paul II, Encyclical *Centessimus Annus*, no. 46.

and link it to the objective we set out to achieve earlier, "Tolerance, Respect and Multi-culturalism," to try to show that in a progressively globalized world, the confluence of cultures need not inevitably lead to a clash of civilizations, provided there is tolerance and respect.

Cultures and religions are many and varied, each placing a premium on its own values. To be sure, not all of the values embodied in them may be of equal validity, in the same way that not all cultures may possess the same humanity. Some of them may contain values that are dubious, if not downright negative. One can mention the caste system and the *suttee*, the obligatory self-immolation of widows on their husband's funeral pyres in Hinduism, or the occasional lapse into violence that some Muslim groups seem to fall into. Well known also is the bloodbath of Jews and Muslims that the Crusaders indulged in upon reaching Jerusalem, or slavery in ancient Greece and in America, both North and South, and until recently, apartheid in South Africa. This, however, is not the place to discuss the relative merits or demerits of cultures, in itself a delicate task requiring much sensitivity. As has been said, though in divine things it may be easy to see the truth, in human things, it can be relatively more difficult:[58] what is concave to you is convex to the person in front of you.[59] What is clear is this: it takes time – sometimes centuries – for mankind to refine his moral common sense.

In regard to religious freedom, Vatican II declares, basing itself on "the dignity of the human person, *i.e.,* beings endowed with reason and free will and therefore personal responsibility, *x x x*

58. St. Josemaria Escriva.

59. St. Josemaria Escriva.

man's natural duty to seek the truth and to adhere to it once known," qualifying at the same time "the duty possible only within freedom," and qualifying it further as "a right whose exercise cannot be interfered with as long as the just requirements of public order are observed."

Hence, a possible way out, perhaps the only way out of the impasse of the confrontation of civilizations, is to base all human rights on the dignity of the person. The Greeks, in particular the Stoics and Aristotle, intuited the individual's unique importance. But the *polis*, peculiar to them, excluded women and slaves,[60] and further differentiated mankind into Greeks and barbarians, who were the non-citizens. After the Stoics surpassed the particularism of the *polis* and expanded citizenship to the *civitas maxima*, the great world state,[61] it was left to Christianity, which became an undeniable influence in Western European thought, to fully recognize the person's great dignity, lying on the fact of his creation unto the image of God and open to sharing His life, an openness present potentially even in non-Christians.

Respect for the dignity of the human person leads to respect for his right to practice his religion, to its right practice. As John Paul II said in his last public appearance in Muslim Kazakhstan less than two weeks after 9/11,

> In this Land of encounter and dialogue, x x x I wish to reaffirm the Catholic Church's respect for Islam, for authentic Islam: the Islam that prays x x x. Recalling the

60. Torrell, Jean Pierre, *St. Thomas Aquinas*, Vol. II, Catholic University of America, 2003, p. 280.

61. Cfr. Rommen, Heinrich, *The Natural Law, A Study in Legal and Social History and Philosophy*, Liberty Fund, Indianapolis, c1998, p. 22.

> errors of the past, including the most recent past, all believers ought to unite their efforts to ensure that God is never made the hostage of human ambitions. Hatred, fanaticism and terrorism profane the name of God and disfigure the true image of man.

In fact, in the survey cited earlier of British Muslims, an overwhelming number do not think Blair and Bush represent Christians.[62]

Even in far from ideal conditions that make the practice of the right to religion difficult, as pointed out by Benedict XVI when he called for reciprocity in his visit to Turkey in November 2006, the principle of tolerance remains relevant, whether one be responsible for public order or one is a member of a minority: in the absence of better conditions sometimes one has to tolerate lesser evils, in view of social peace, an important element of the common good.[63] Tolerance is not the highest value: the common good is.

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62. Passing judgment on past events is not easy, aside from the fact that John Paul II asked for forgiveness on behalf of the Catholics responsible for past excesses as the new millennium dawned. Even Mahathir Mohammad during his time as Prime Minister of Malaysia distanced himself from some Muslim fundamentalist groups which he viewed as unrepresentative of Islam, in the same way that he thought that the Inquisition was not representative of Christianity: *see Asiaweek* archives of the period 1994-2000; *see* also endnote 4.

63. Cfr. De Pedro, Javier, *The Ontological Foundations of Law*, Lecture 8 "Tolerance and Respect for Personal Convictions," (unpublished), delivered at a seminar organized by the Values for Development Foundation and the Philippine Judicial Academy in September 2004, at Tagaytay City.

Freedom is linked to truth, identical in the end to the good, and the path to it, especially in multi-cultural societies, goes by the way of education, dialogue and persuasion. As the preamble of Vatican II's declaration on religious freedom reads, "truth can impose itself on the mind of man only in virtue of its own truth, which wins over the mind with both gentleness and power."[64]

Noteworthy is the warning Lord Chief Justice Philips of Worth Matravers, the most senior judge of England and Wales, addressed to UK government ministers. He said that failure to protect the human rights of Muslim groups would fuel support for terrorism in Britain. He singled out respect for human rights as a key weapon in the battle of ideologies. Since World War II, he said:

> we've welcomed to the UK millions of immigrants from all corners of the world, many refugees from countries where human rights are not respected. It is essential that they, their children and grandchildren are confident that their adopted country treats them without discrimination and with due respect for human rights.

Then he warned:

> If they feel not fairly treated, consequent resentment will inevitably result in the growth of those who, actively or passively, are prepared to support terrorists bent on destroying the fabric of society,

He pointed out that:

> the Human Rights Act is not merely their safeguard; it is a vital part of the foundation of our fight against terrorism.

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64. Vatican II, Declaration on religious freedom *Dignitatis humanae.*

He explained that:

> terrorism is not easily defined. As an ex-colonial power, the UK was responsible for detaining without trial as terrorists suspects in India, Kenya, Cyprus, men who have gone on to be their country's leaders.

and said that:

> There are still minorities, striving for independence, who resort to measures condemned by regimes in power, as terrorist,

adding that the UK faced:

> a new kind of terrorist. The suicide bomber x x x a new phenomenon and one against whom the theory that punishment defeats crime is inapplicable.

He criticized the government, saying that:

> the government response had been to bring measures which courts had ruled incompatible with the Human Rights Act.[65]

Noteworthy because in substance it coincides with what Benedict XVI said last January 1, when, in warning of the culture clash danger, he also put forward respect for dignity of the human person as "the supporting column of the entire great edifice of peace."[66]

In 1989, the Singapore President at the time said to Parliament that Singaporeans were getting more exposed to Western cultural influences, for good or for ill. He lamented that "traditional

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65. Verkaik, R., *The Independent*, October 20, 2006.

66. Benedict XVI, Reflection before the Angelus, January 1, 2007, *l.c.*, p.1.

Asian ideas of morality, duty and society that had sustained them in the past" were giving way to a "more Westernized, individualistic, and self-centered outlook on life." He then brought up the need to identify the core values which his country's different ethnic and religious communities had in common and "which capture the essence of being a Singaporean," suggesting the four values of:

1. Placing society above self;
2. Upholding the family as the basic building block of society;
3. Resolving major issues through consensus instead of contention; and
4. Stressing racial and religious tolerance and harmony.

The address led to extensive discussion of Singaporean values and two years later, to a government White Paper that endorsed all four, adding a fifth, namely, the prioritizing of individual merit in order to obviate the danger of the degeneration of the Confucian values of hierarchy and family into nepotism.

This commonality of values is what Huntington advocates: the promotion of what is common to most civilizations. Albeit in varying degrees, moral concepts of truth and justice are found in many moralities and cultures:

> the one truth of man, in which the good of all and freedom are indissolubly related to each other, x x x expressed most centrally in the x x x Ten Commandments, which in many respects correspond to the great ethical traditions of other religions.[67]

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67. Ratzinger, J., *Truth and Tolerance*, p. 254.

Noteworthy again is the focus on commonalities as a way out of the impasse, for it coincides with the Last Will and Testament of John XXIII, today Blessed, which were not accidental to his life, spent in years of service in Bulgaria, Romania, Turkey and Greece, with their cultures and religions so different from his own. Faithful to his Catholic and Western European heritage, he also admired the Turkish people[68] and championed peace and ecumenism. Not a coincidence was the title of one of his encyclicals *Pacem in Terris*. A part of his testament relevant to our subject this morning reads:

> At the hour of saying goodbye, or rather,
> till we meet again,
> *Let us seek what unites us,*
> *Instead of what divides* (italics mine)
> x x x Truth and Goodness.[69]

IV. The Role of Judges and Values

Like the 18th century thinker who saw manners and morals as the *keystone* of an arch when he likened the nation's laws to arch's *arc*, Tocqueville in his tour of the fledgling American nation in the first half of the 19th century concluded that *mores*[70] was one

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68. Cfr. John XXIII, *Journal of a Soul*, trans. Dorothy White, Image.

69. John XXIII.

70. The habits of the heart, the different notions that men possess, the various opinions current among them, the sum of ideas that shape their mental habits: *see Democracy in America*, trans. G. Lawrence, JP Mayer (Ed.), p. 287.

of the great general causes that helped maintain the democratic experiment. But more than 2,000 years before them, Aristotle had seen that it was friendship that held cities together, and suggested that legislators "be more concerned about it than justice, adding that if people were friends, they would have no need of justice."[71] Thus, Judge Learned Hand:

> I often wonder whether we do not rest our hopes too much upon constitutions, upon laws, and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.[72]

Aside from the law, democracy needs values: without them, it is not easy to see how it can function, for democracy, in presupposing agreement on common values, needs them ultimately to support its institutions.[73] In fact, Ratzinger asserts that:

> democracy depends far more on *mores* than on institutions: x x x the stronger the support of *mores* the less will the *instituta* be necessary.[74]

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71. *Nicomachean Ethics*, 1155a2, trans. T. Irwin, Hackett 1985.

72. Dilliard, Irving, (Ed.), *The Spirit of Liberty: Papers and Addresses of Learned Hand*, NY, Knopf, 1953, pp. 189, 190.

73. Cfr. Ratzinger, J., *Church, Ecumenism, Politics*, pp. 188, 238.

74. Ratzinger, J., *o.c.*, pp. 253-254

Time and again, observers have pointed out that in our own country, what may not be needed are more laws, but a more determined and consistent implementation of the same, together with more civics. Although the dispensation of justice is their ordinary occupation, judges perhaps also can remember that in doing so, they foster and protect moral values, some of them common to many cultures and religions, thus helping keep in place the keystone in the arc of the arch of democracy.

Democracy, Law and the Human Person in the Philosophy of Karol Wojtyla*

Alma S. Santiago, Ph.D. **

I. Introduction

We live in a nation in which many of our most debated political issues are those in which people's personal morality is involved. Issues such as **abortion, physician assisted suicide, contraception, recreational use of drugs** and **gay rights**

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are those that people consider to be fundamental to their systems of morality, and that they are often unwilling to compromise on. However, decisions must be made, and it is the politicians who must make them. This is problematic to many people. They worry about having others decide these sensitive issues for them and about the danger of having politicians "legislate morality." Underlying this discomfort are profound differences regarding the source and nature of morality and the proper relationship of moral judgment to law and public policy.

Moral and political philosophy is, in very significant measure, an inquiry into human nature, dignity and destiny. It necessarily proceeds from an effort to understand human nature and its implications for matters of personal and political action of the integral directiveness of this human nature. This effort, to the extent of its success, sheds profound light on the intrinsic worth or value – the dignity – of the human person and on what, in reason, men and women are called upon to do and to avoid doing in light of the dignity of the human person.

Today I wish to explore the work of Karol Wojtyla, popularly known as Pope John Paul II, who has taken the measure of the problem and identified core principles of personal and political morality that all citizens – whatever is the religious denomination – can share. John Paul II is an original philosopher whose phenomenological analysis of human experience lays bare many profound truths about the dignity of the human person. His philosophical anthropology enables him to propose values that ring true to many men and women of other religions or of no religion. This paper offers an introduction to some aspects of Karol Wojtyla's thought; my goal is to present his thought to examine in depth its implications and applications.

II. The Human Person

A. The Acting Person

Wojtyla has established a philosophical anthropology which sees the human person in his concrete and integral totality, in his unique, personal subjectivity that leads to the *understanding of what is primordially and irreducibly human.*[1] He mentioned that the definition of a person as *rationalis naturae individua substantia* "had determined the 'metaphysical site' for the personal interpretation of man's subjectivity."[2] He asserts categorically "that the experience of man cannot be exhausted by way of cosmological reduction. It is necessary, Wojtyla insists, to dwell upon what makes man simply a person, a subject, and not just 'that man'."[3]

1. Cf. Karol Wojtyla, *Subjectivity and the Irreducible in Man,* in Analecta Husserliana, Vol. 7, Anna-Teresa Tymieniecka, Ed. (Dordrecht, Holland/Boston, USA: D. Reidel Publishing Company, 1978), 108-109. This will henceforth be called AH.

2. *Ibid.,* III.

3. Karol Wojtyla, *Subjectivity and the Irreducible in Man,* in AH, III. It has to be noted that Karol Wojtyla was one of those philosophers who formed a new version of Thomistic philosophy called *Lublinism* where the person, as a self-identified existing "I" who is conscious of his own unique and unrepeatable existence, is given more emphasis. Man is viewed as an agent who experiences his own existence in both the immanent and the transcendental order of his human nature. This Lublin Thomism is the intellectual environment of Wojtyla. Cf. Andrew N. Woznicki, *Lublinism - A New Version of Thomism*, in **Existential Personalism**, Proceedings of the American Catholic Philosophical Association. Vol LX. Ed. Daniel O. Dahlstrom, Washington DC: ACPA, 1986, 23-27. Idem,

Thus, Wojtyla tries to enrich the one-sided aspect of man's rationality by including within the definition of man's subjectivity the entire range of human action.[4]

John Paul II has often been described as a *"personalist"* because of his emphasis on the value and dignity of the human person. That dignity and worth belong not to "the 'abstract' man, but the real, 'concrete,' 'historical' man x x x in his unique unrepeatable human reality."

In *The Acting Person*, a work first published in Polish in 1969 before he became pope, Cardinal Wojtyla expounded a theory of the person as a self-determining agent that realizes itself through **free and responsible action**. Activity is not something strictly other than the person; it is the person coming to expression and constituting itself. In *The Acting Person,* he uses an analysis of consciousness to unfold his notion of man as being free and self-determining. For it is his consciousness of himself as one who is an efficient cause of his own action and of his self-actualization that allows the human being to have a sense of responsibility for his actions and his character.

Revised Thomism: Existential Personalism Viewed from Phenomenological Perspectives, in **Existential Personalism**, Proceedings of the American Catholic Philosophical Association. Vol LX. Ed. Daniel O. Dahlstrom, Washington DC: ACPA, 1986, 38-49.

4. Cf. Woznicki, Andres, *A Christian Humanism: Karol Wojtyla's Existential Personalism,* New Britain, CT: Mariel Publications, 1980, 17.

I. Freedom: The Uncoerced Ability to Know and Embrace the Truth

In the exercise of freedom, man is not bound to *objects;* he is bound to the *value/truth* of the object. Wojtyla explains that "it lies in the nature of every 'I will' – which is always object-oriented and consists in an 'I want something' – that it is constantly prepared to come out towards a good."[5] Yet, value does not absorb the subject and thereby cancel out freedom, for even value itself depends on the moment of decision and choice which is nothing other than the dynamism of autodeterminism. Thus, human freedom, Wojtyla avers, is freedom not *from* but *for* value.[6]

The *will* is intrinsically and naturally attracted to the good or the value. The readiness of man to respond to good or value is rooted in his inner commitment to truth.[7] The "moment of truth," that is the truth to which man is innerly committed is the axiological truth, which is the knowledge of the true goodness or value of the object. Knowledge of the value of the object presupposes not only the apprehension of goodness or badness of the object, but also the judgment that the attribution of the value of the object is indeed the "truth" of the object.[8] Moreover, the **"moment of truth"**

5. *Ibid.,* 128.

6. Cf. *Ibid.,* 132. See also Avery Dulles, *"John Paul II and the Truth about Freedom,"* in **First Things** 55 (August-September 1995: 36-41. Also, Thomas Dailey, *Toward a Culture of Truth: Higher Education and the Thought of Pope John Paul II,* Logos: A Journal of Catholic Thought and Culture 3:2 (Spring 2000): 145-164.

7. Cf. *Ibid.,* 135-139.

8. Cf. *Ibid.,* 145

becomes itself the principle of decision, choice and action. The recognition and affirmation of the specific reference of the acts of the *will* to truth summons the person to affirm this truth by an act of choice. The truth, recognized as a moral good, therefore, becomes the criterion of the will's choice. The person is *called* by obligation to realize this moral good, thereby confirming and realizing the good which is essentially a realizing of himself as a person.[9] The essential "surrender of will to truth"[10] ultimately accounts for the person's transcendence in his action, and his self-fulfillment therein.

In addition to offering a view of human nature in which the person is the highest value, Wojtyla presents the person as essentially social and destined to find its fulfillment in the gift of self to others, John Paul II puts forward a vision of freedom that contrasts sharply with the individualistic view of freedom that underlies classical liberalism, and many other strands of contemporary American thought. In the individualistic vision, freedom consists primarily in the absence of external constraints and the consequent ability to make one's own choices, without reference to external standards. John Paul II offers a sharply different view of freedom. Freedom, he says:

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9. Cf. *Ibid.,* 166; Cf. also Ardrzej Szostek, *Karol Wojtyla's View of the Human Person in the Light of the Experience of Morality,* in **Existential Personalism**, 54; For an excellent exposition of Wojtyla's morality of human action, refer to Martin Rhonheimer, *Intrinsically Evil Acts and the Moral Viewpoint: Clarifying a Central Teaching of Veritatis Splendor* in **The Thomist,** 58 (1994), 1-40.

10. *Ibid.*

> *possesses an inherently relational dimension x x x. [It is placed] at the service of the person and of his fulfillment through the gift of self and openness to others.*[11]

Freedom, according to John Paul II, consists not in self-initiation without reference to specific goals but in the ability to choose the true and the good without coercion:

> A person who is concerned solely or primarily with possessing and enjoying, who is no longer able to control his instincts and passions, or to subordinate them by obedience to the truth, cannot be free: *obedience to the truth* about God and man is the first condition of freedom, making it possible for a person to order his needs and desires and to choose the means of satisfying them according to a correct scale of values x x x.[12]

At this juncture, we need to highlight the underlying premises of the concept of freedom: that there is a truth about God and man, and that human beings are capable of knowing it. In sharp contrast to the prevailing skepticism about our ability to know, John Paul II vigorously defends human ability to reach truth, not only about the physical universe that surrounds us, but more importantly about ourselves, and ultimately about God.

The human person, with his reason, is he says,

> *capable of recognizing both this profound and objective dignity of his own being, and the ethical requirements that derive from it. In other words, man*

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11. *Evangelium Vitae, supra* note 13, ¶ 19.

12. *Centesimus Annus, supra* note 15, ¶ 41.

> *can discern in himself the value and the moral requirements of his own dignity.*[13]

His argument, however, rests not primarily on the authority of ancient philosophers but on common human experience, and concretely on the pursuit of truth both in daily life and in science.[14]

The question, of course, is not whether human beings desire to know the truth – which they obviously do – but whether they can actually do so. John Paul II considers it "unthinkable" that "a search so deeply rooted in human nature would be completely vain and useless."[15] The fact that we can search for the truth and pose questions about reality, he says:

> implies the rudiments of a response. Human beings would not even begin to search for something of which they knew nothing or for something which they thought was wholly beyond them. Only the sense that they can arrive at an answer leads them to take the first step.[16]

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13. Pope John Paul II, Address to the Participants in the General Assembly of the Pontifical Academy for Life, ¶ 3 (February 27, 2002).

14. John Paul II's style in argument here owes much to the German phenomenologist Max Scheler who excelled at describing experiences and values. John Paul II wrote his second doctoral dissertation in philosophy on Scheler. Karol Wojtyla, *System etyczny Maksa Schelera jako srodek do opracowania etyki chrzescijanskiej* [The Ethical System of Max Scheler as Means of Constructing a Christian Ethics] (doctoral dissertation, Jagiellonian University) (December 1953).

15. *Id.*, ¶ 29.

16. *Id.*

The fact – unfortunately attested to by our personal experience – that we can reject good and choose evil is a sign that we are free, but in John Paul II's view it is a manifestation of the limitations of our freedom.[17] We are most fully free when we freely choose the true and the good.[18]

2. Conscience

The experience of a moral duty to do something because it is good and to avoid something because it is evil is made possible by *conscience*. As a norm of morality, *conscience* plays a vital role in Wojtyla's concept of self-fulfillment. It is the function of conscience to judge the moral value of the action, that is, to determine the good or evil contained in the act, and to draw forth, as a consequence in the person, the sense of obligation entailed in the knowledge that the act is good and must be performed or it is evil and should therefore be avoided. According to Wojtyla:

> the assertion "X is truly good" activates the conscience and thus sets off what is like an inner obligation or command to perform the action that leads to the realization of X is most strictly related with the specific dynamism of the fulfillment of the personal ego in and through action. It is from this point of view that duty is discussed here x x x.[19]

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17. *See* Pope John Paul II, Message for XIV World Day for Peace, ¶ 7 (January 1, 1981).

> It is a caricature of freedom to claim that people are free to organize their lives with no reference to moral values, and to say that society does not have to ensure the protection and advancement of ethical values.

18. Veritatis Splendor, *supra* note 17, ¶¶ 31-56.

19. *Ibid.,* 163.

The transition from conscience's judgment about the moral value of the action to the sense of obligation is due to the surrender of conscience to truth which is intrinsically constitutive of freedom and self-determination in every human act, and the concomitant, self-objectivizing turn of the *will* towards the ego in every act.[20] In conscience, the authentic transcendence of the person in action is realized; it is owing to conscience that the human act is formed as the willing and the choosing of the true good.[21] Guided by a properly formed conscience, the person can conduct himself as a moral agent.

Every human being has a conscience, and although one may decide not to listen to one's conscience, the expression "he has no conscience" is internally contradictory, for not having a conscience means the denial of being human. The conscience can however only function well in case of a free mind. A free mind is a mind that is free of all external influences (including the political and religious); a mind that has neither been manipulated nor indoctrinated; a mind that is not disturbed; a mind that can choose in full freedom between the options it has at its disposal or which it is offered.

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20. This shows the movement from the ontological *"is"* to the ethical *"ought"*: the assertion *"X is truly good,"* is transformed into a practical demand, *"I should perform the action that leads to the realization of X."* It results in an experience of obligation. The experience takes place in the conscience which becomes the source of the moral norms. The truth of something leads to a concrete and real obligation. Cf. *Ibid.*; Also cf. Kupczak, **Destined for Liberty. The Human Person in the Philosophy of Karol Wojtyla/John Paul II**, 130.

21. Cf. Wojtyla, *The Person: Subject and Community,* in RM 286.

B. Participation and Common Good

Persons, moreover, are essentially social and oriented to life in community. They achieve themselves as persons by interaction, giving to others and receiving from them in turn. To reconcile the good of the community with that of its individual members, Wojtyla proposed a **theory of participation**. Wojtyla clarifies that mere membership in a community does not constitute participation. Existing and acting "*in common with others*" does not speak of community in its proper sense. There is something more in the community than merely existing and acting "in common" with others. This leads us to the concept of the **common good** that authenticates the existence of community. The *common good,* conceived as the goal of acting, can be seen in a two-fold interrelated manner. *Objectively*, it refers to the "good of the community,"[22] the objective goal, which gives the reason why people act together for the realization of a good cannot be achieved by the individuals in isolation. *Subjectively*, the objective common good is "subjectively" chosen by the individual as his own good.[23] In this regard, we can say that the moment of participation inheres among others in choice. The person chooses, as his own, the common good. Wojtyla explains:

> each of its members expects to be allowed to choose what others choose and because they choose, and that his choice

22. "The common good," Wojtyla declares, "becomes the good of the community inasmuch as it creates in the axiological sense the conditions for the common existence, which is then followed by acting." AP, 282. For some lucid discussion on the *common good*, refer to Kevin Doran, **Solidarity: A Synthesis of Personalism and Communalism in the Thought of Karol Wojtyla/Pope John Paul II** (American University Studies, VII) New York: Peter Lang, 1996.

23. Cf. *Ibid.,* 277.

> will be *his own good* that serves the fulfillment of *his own* person. At the same time, owing to the same ability of participation, man expects that in communities founded on the common good his own actions will serve the community and help to maintain and enrich it.[24]

It is this subjective appropriation of the common good with which participation is identified, and owing to participation, the community acquires a "quasi-subjectiveness,"[25] because each member of the community subjectively chooses the common good as his own. This brings out the axiological or moral significance of the common good. The individual's choice of the common good as **his own** constitutes the subjective or "personalistic" aspect of the common good. His choice of or for the common good, owing to participation, brings him self-fulfillment. In the context of marriage, for example, husband and wife must subordinate themselves to the common good, that is:

> procreation, the future generation, a family, and at the same time, the continual ripening of the relationship between two people, in all the areas of activity which conjugal life includes.[26]

Willingly and consciously choosing the common good puts them both on equal footing. In this case, no one possesses a higher value than the other. Both are in the same measure and to the same extent subordinated to the good which constitutes their common end. Wojtyla argues:

> man's capacity for love depends on his willingness consciously to seek a good together with others, and to subordinate

24. Wojtyla, PC, 283.

25. Wojtyla, AP, 277.

26. LR, 30.

> himself to that good for the sake of the others, or to others for the sake of that good.[27]

Having established the axiological or moral significance of the common good, we can say therefore, that the individual good must be subordinated to the demands of the common good. Individual good, if need be, has to be sacrificed for the good of the community. The sacrifice demanded of its members does not, however, destroy the social nature of man because "such a sacrifice corresponds to the ability of participation inherent in man, and because this ability allows him to fulfill himself, it is not 'contrary to his nature'."[28] This shows that the true common good cannot be opposed to the real good of any individual within the community.

Now, there are extremes in the interpretation of the common good which cause its distortion. These are virtual denial in **individualism** and its deification in **objective totalism**. These two distortions deform the meaning of the common good and prevent its realization. In **individualism**, people act together to protect themselves from each other. The individual is regarded as the supreme and fundamental good to which all interests of the community are subordinated. At this point, let Wojtyla speak on the ills of individualism:

> individualism limits participation, since it isolates the person from others by conceiving him solely as an individual who concentrates on himself and on his own good; this latter is also regarded in isolation from the good of others and of the community x x x. For the individual the "others" are a source of limitation x x x. If a community is formed, its

27. *Ibid.*, 29.

28. Wojtyla, AP, 283.

> purpose is to protect the good of the individual from the "others."[29]

From the individualistic point of view, participation, which is an essentially constituent human property that allows the person to fulfill himself in "acting together with others," is denied of him. Some kind of authority, then, which will be vigilant in the protection of the common good is a requisite of the community. However, this necessity can, in turn, lead to another distortion – totalism. **Totalism**[30] completely absorbs the individual into the community. The individual is regarded as the chief enemy of society and of the common good. States Wojtyla:

> since totalism assumes that inherent in the individual there is only the striving for the individual good, that any tendency toward participation or fulfillment in acting and living together with others is totally alien to him, it follows that the "common good" can be attained only by limiting the individual. The good thus advocated by totalism can never correspond to the wishes of the individual, to the good he is capable of choosing independently and freely according to the principles of participation.[31]

As presented above, the real community therefore will strive to avoid the danger of either individualism or totalism, reconciling in a living and sensitive balance both the rights of the individual and the just claims of the common good. The succeeding sections provide two directions the **I** takes in the realization of the personalistic value of this action and his self-fulfillment in his existing and "acting together with others."

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29. Wojtyla, AP, 273-274.

30. Totalism is also referred to as anti-individualism or reversed individualism. Cf. Wojtyla, AP, 274.

31. *Ibid.*

Up to this point, we have defined the person as a personal subjectivity who is not only an ontological subject of his own acting and dynamism but also a subject living through his own deeds and experiences, with personal dignity inherent in his human nature. We have likewise touched on the concept of participation which allows the person to share in the humanity of the *other*, thereby fulfilling himself in his actions – precisely in his existing and acting together with others. In the next topic we shall present the person whose subjectivity is defined, clarified and conditioned by following the natural law.

III. Person, Natural Law and Democracy

Existing and acting together with others, the human persons must be willing to share in the realization of the common good. Living in a community, the human persons are governed by laws. Now, questions of laws and policy ought to be decided in accordance with natural law.

The natural law is not a series of arbitrary precepts, but a set of conclusions about what is fitting to our own nature and the nature of the world in which we live, conclusions that we reach by reflecting on ourselves and the world in which we live. In this sense, John Paul II equates natural law with **"human reason itself which commands us to do good and counsels us not to sin."** ***Natural law*** is the idea that **there is an objective moral order, grounded in our essential humanity, and which holds universal and permanent implications for the manner in which we should conduct ourselves as free and responsible human beings**. John Paul II stresses repeatedly "the role of human reason in discovering and applying the moral law." He views the principal tenets of the moral law not as religious precepts, but as truth about who we are and what

it means to flourish as a human being, truths which reason can attain even without the help of Christian revelation. Consequently, "the 'natural law' written in the human heart" is available to all men and women, whether believers or not, and should inform their individual and social conduct, including the civil law.

In John Paul II's jurisprudence, civil law – whether statutory, judge-made, or merely customary – is, like any other type of law, "an ordinance of reason." In this sense, John Paul II, quoting Thomas Aquinas, argues that valid civil laws must respect the natural law:

> *Every law made by man can be called a law insofar as it derives from the natural law. But if it is somehow opposed to the natural law, then it is not really a law but rather a corruption of the law.*
>
> Now, what is the difference between the two? How does one determine whether a law is just or unjust? A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas:
>
> *An unjust law is a human law that is not rooted in eternal law and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust.*

John Paul II rejects the contention that democracy means that

> *the legal system of any society should limit itself to taking account of and accepting the convictions of the majority* or that it should be *"based solely upon what the majority itself considers moral and actually practices.*
>
> *He acknowledges that history has known cases where crimes have been committed in the name of 'truth,' but he points*

> *out that equally grave crimes x x x have also been committed* and are still being committed in the name of 'ethical relativism.'

Everyone, he observes, is horrified by the crimes against humanity which proliferated in the 20th century. But, he asks, *"would these crimes cease to be crimes if, instead of being committed by unscrupulous tyrants, they were legitimated by popular consensus?"* [32]

John Paul II is acutely aware of the fact that any claim to possess moral truth will be criticized by many as anti-democratic. He responds, however, that democracy itself is weak and exposed to the danger of deteriorating into a tyranny of the majority (or of those who are able to manipulate majority opinion) unless it is founded on true values and ethical principles:

> *a democracy without values easily turns into open or thinly disguised totalitarianism.* x x x. [T]he defense of universal and unchanging moral norms is a service rendered not only to individuals but also to society as a whole: such norms 'represent the unshakable foundation and solid guarantee of a just and peaceful human coexistence, and hence of *genuine democracy*.' In fact, democracy itself is a means and not an end, and '*the value of a democracy stands or falls with the values which it embodies and promotes*.' These values cannot be based on changeable opinion but only on

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32. *Id.* American history provides painfully compelling evidence for the proposition that majority support is no guarantee that laws are just. For long periods of time, slavery, extermination of the Native American population, and the Jim Crow laws enjoyed majority support in our country. *See, e.g.,* JACQUELINE JONES, et al.

> the acknowledgement of an objective moral law, which ever remains the necessary point of reference.[33]

A climate of moral relativism is incompatible with democracy. That kind of culture cannot answer questions fundamental to a democratic political community: *"Why should I regard my fellow citizen as my equal?"; "Why should I defend someone else's rights?"; "Why should I work for the common good?"* If moral truths cannot be publicly acknowledged as such, democracy is impossible.[34]

Legal positivism rejects natural law mainly for the reason that, according to the positivists, this theory cannot be verified, and is therefore suspect. This is however nothing but academic hypocrisy, and shows that academics must not be allowed to rule us and our world, but rather that they should be kept under lock and key in their ivory towers. But they have unfortunately been able to

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33. *Message to Academy of Social Sciences, supra* note 48, ¶ 2 (*emphasis added*) (quoting *Centesimus Annus, supra* note 15, ¶ 46; *Veritatis Splendor, supra* note 17, ¶ 96; *Evangelicum Vitae, supra* note 13, ¶ 70). John Paul II refers here to ethical principles and values rather than to strictly religious truths. He is not calling for a theocracy, and in fact considers religious freedom an essential element of human flourishing. *See, e.g.,* Pope John Paul II, Message for XXI World Day for Peace (January 1, 1988):

> [R]eligious freedom, an essential requirement of the dignity of every person, is a cornerstone of the structure of human rights, and for this reason an irreplaceable factor in the good of individuals and of the whole of society, as well as of the personal fulfillment of each individual.

34. cf. *Veritatis Splendor,* n.101.

convince the simple-minded politicians that positive law provides them with unlimited powers, with the result that legal positivism is now in control of our world and our lives. Very convenient for the said politician of course, who have found in positivism a justification to make laws at will and with any content they happen to like or require.

I certainly do not deny the fact that people in our culture, including reasonable people, disagree about fundamental moral questions, including questions pertaining to homosexuality, abortion, physician assisted suicide, and the recreational use of drugs. Nor do I deny that some measure of moral disagreement – though not necessarily moral disagreement – is inevitable under circumstances of political and religious liberty. Catholics and other natural law theorists maintain, however, that on certain other issues, including certain fundamental moral and political issues, **there are uniquely correct answers**. The question whether there is a human right against being killed whimsically, for example, or being punished for one's choice of vocation, admits of a uniquely correct answer that is available in principle to every rational person. Pro-life advocates assert that there is similarly a human right against direct killing of innocent human beings, irrespective of race, ethnicity, and sex, but also irrespective of disability, age, size, location, stage of development, or condition of dependency. Differences over such issues as right to life, personal freedom, abortion and euthanasia may be "reasonable" in the sense that reasonable persons can err in their judgments and arrive at morally incorrect positions. But, assuming there is a truth of these matters, errors of reason must be responsible for anyone's failure to arrive at the morally correct positions. There are many possible roots of such errors, not all of which involve culpability or subjective guilt on the part of individuals who make them. Ignorance of, or inattention to, certain relevant facts

or values may be the source of a particular error. Prejudice or other subrational influences – which may be pervasive in a culture or subculture making it difficult for any of its individual members to reason well about certain issues – may block insights that are critical to sound moral judgments. And, of course, logical failures or other errors in the reasoning process can deflect judgment in the moral field as they can in all other fields of inquiry. Nothing in the position of natural law theorists (or "rationalist believers") entails the proposition that we can always easily arrive at correct moral positions or that we will not sometimes (perhaps often) get things wrong.[35]

John Paul II notes with approval the values that generally prevail in democratic systems such as:

> ***the dignity of every human person, respect for inviolable and inalienable human rights, and the adoption of the 'common good' as the end and criterion regulating political life x x x."*** [36]

These values, however, he contends, need a more solid and stable foundation than "provisional and changeable 'majority' opinions."[37] They will not be secure unless they are based on "the acknowledgment of an objective moral law which, as the 'natural law' written in the human heart, is the obligatory point of reference for civil law itself."[38]

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35. *See* Robert P. George's *Democracy, Law and the Human Person* in *Fondazione "Centisimus Annus - Pro Pontifice."* An International Conference on "Democracy, Institutions and Social Justice," Princeton University, May 18, 2006.

36. *Evangelium Vitae, supra* note 13, ¶ 70.

37. *Evangelium Vitae, supra* note 13, ¶ 70.

38. *Evangelium Vitae, supra* note 13, ¶ 70.

Democracy would be in danger, and would lose its moral value "[i]f, as a result of a tragic obscuring of the collective conscience, an attitude of skepticism were to succeed in bringing into question even the fundamental principles of the moral law."[39] Without a foundation in stable moral convictions, democracy itself "would be reduced to a mere mechanism for regulating different and opposing interests on a purely empirical basis."[40]

If there is no objective standard to help adjudicate between different conceptions of the personal and common good, then democratic politics is reduced to a raw contest for power. If constitutional and statutory laws are not held accountable to the objective moral law, the first casualties are justice and equity, for they become matters of personal opinion. John Paul II's stress on the dignity of each person precludes "using" human beings to achieve the goals of the society as Marxist and other totalitarian regimes would do. Rather, in his view, the function of the state is to promote "the common good," understood not as the aggregate of the goods of a majority of individual, but rather as the *"sum of social conditions which permit and foster in human beings the integral development of their person."*[41] Rather than the person existing to serve some higher good, the person is the end and goal at whose service the state exists: *"the origin, the subject and the purpose of all social institutions is and should be the human person."*[42]

39. *Evangelium Vitae, supra* note 13, ¶ 70.

40. *Evangelium Vitae, supra* note 13, ¶ 70.

41. Pope John Paul II, Message for World Day for Peace (January 1, 2005).

42. Encyclical Letter from Pope John Paul II to the Bishops of the Catholic Church, *Veritatis Splendor* [The Splendor of Truth], ¶ 97 (August 6, 1993).

This is especially important for democratic societies, since one of the truths contained in the mystery of our creation by God is that the human person must be *"the origin, the subject and the purpose of all social institutions."*[43] Our intrinsic dignity and inalienable fundamental rights are not the result of social convention: they precede all social conventions and provide the norms that determine their validity. The history of the 20th century is a grim warning of the evils that result when human beings are reduced to the status of objects, be manipulated by the powerful for selfish gain or for ideological reasons. In proclaiming the truth that God has given men and women an inestimable dignity and inalienable rights from the moment of conception, you are helping to rebuild the moral foundations of a genuine culture of freedom, capable of sustaining institutions of self-governance that serve the common good.

There is a tendency to see intellectual relativism as the necessary corollary of democratic forms of political life. In such a view, truth is determined by the majority and varies in accordance with passing cultural and political trends. From this point of view, those who are convinced that certain truths are absolute and immutable are considered unreasonable and unreliable. The lay faithful are particularly responsible for enriching the democratic process of peoples with human and Christian values, by relying on intelligent and continuous educational activity. Democracy, whether it has been long-established or recently introduced, can be endangered by viewpoints or conduct inspired by indifference or relativism in the area of morals, ignoring the true value of the human person. *A democracy that is not based on the values proper to human nature risks compromising the peace and development of peoples.* As history demonstrates, *a democracy without values*

43. *Gaudium et spes,* n. 25.

easily turns into open or thinly disguised totalitarianism." [44] Democracy itself is a means and not an end, and *"the value of democracy stands or falls with the values which it embodies and promotes."* [45] These values cannot be based on changeable opinion but only on the acknowledgment of an objective moral law, which ever remains the necessary point of reference.

IV. Conclusion

John Paul II offers a penetrating and remarkably coherent set of answers to the most fundamental questions lawyers face as persons, as professionals, and as citizens. His ***vigorous defense of the dignity and value of every human life*** and his stress on the ***role of inter-personal relations in the development of each individual*** marks out a path between the two extremes which mar contemporary understandings of the human condition: **collectivism**, which sacrifices the person to the goals of the group, and **individualism**, which fails to recognize that individuals find their ultimate fulfillment not in isolation, but in service to others and to the common good – a good not only of the community, but of each person who contributes to it.

Natural law, as Catholics understand it, truly demands that "the interests of all" be taken into account. This is the implication of the principle that each and every human being is fashioned in the very image and likeness of the divine creator and ruler of the universe and, as such, shares equally a fundamental dignity that others, including those exercising the highest worldly authority, are bound in reason to respect and protect. Moreover, natural law is nothing other than a doctrine of public reasons, *viz.*, "reasons

44. *Centesimus Annus,* n. 46.

45. *Evangelium Vitae*, n. 70.

that would command a universal consensus under ideal conditions of discourse and meanwhile are available to, and could be accepted by, anyone who is willing and able to give them fair and adequate attention."[46] These reasons, embraced and proclaimed by the Catholic Church, can be, and have been, affirmed by people who know nothing of, or do not accept, Jewish or Christian revelation or the authority of the Church or any other institution. Respect for these reasons ***as reasons*** accounts for the honored place of dialectic in the tradition of natural law theory and the emphasis of contemporary natural law theorists on full and fair debate in the forums of democracy on such issues as abortion, euthanasia, embryonic stem cell research, human cloning, and marriage. In this context, it is important to remember that political community thrives only on *free and responsible participation of all citizens in public affairs*. In fact, such participation is a "necessary condition and sure guarantee of the development of the whole individual and of all people."[47] Thus, it is important that Christians be helped to show that the ***defense of universal and unchanging moral norms is a service rendered not only to individuals but also to society as a whole:*** such norms "represent the unshakable foundation and solid guarantee of a just and peaceful human coexistence, and hence of *genuine democracy.*"[48]

46. Finnis, Natural and Discourse on Ethics

47. *Sollicitudo rei socialis*, n. 44.

48. *Veritatis Splendor,* n. 96.

Address of His Holiness John Paul II to Young Muslims*

Dear Young People,

I give thanks and glory to God who has granted that I should meet with you today. His Majesty the King did me the honor of visiting me in Rome some years ago, and he had the courtesy to invite me to visit your country and meet you. I joyfully accepted the invitation from the Sovereign of this country to speak with you in this Year of Youth.

I often meet young people, usually Catholics. It is the first time that I find myself with young Muslims.

Christians and Muslims, we have many things in common, as believers and as human beings. We live in the same world, marked by many signs of hope, but also by multiple signs of anguish. For us, Abraham is a very model of faith in God, of submission to his will and of confidence in his goodness. We believe in the same God, the one God, the living God, the God who created the world and brings his creatures to their perfection.

It is therefore towards this God that my thought goes and that my heart rises: it is of God himself that, above all, I wish to speak with you; of him, because it is in him that we believe, you Muslims and we Catholics. I wish also to speak with you about human values, which have their basis in God, these values which concern the blossoming of our person, as also that of our families and our societies, as well as that of the international community.

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* Apostolic Voyage to Togo, Ivory Coast, Cameroon, Central African Republic, Zaire, Kenya and Morocco on August 19, 1985.

The mystery of God, is it not the highest reality from which depends the very meaning which man gives to his life? And is it not the first problem that presents itself to a young person, when he reflects upon the mystery of his own existence and on the values which he intends to choose in order to build his growing personality?

For my part, in the Catholic Church, I bear the responsibility of the successor of Peter, the Apostle chosen by Jesus to strengthen his brothers in the faith. Following the Popes who succeeded one another uninterruptedly in the passage of history, I am today the Bishop of Rome, called to be, among his brethren in the world, the witness of the Christian faith and the guarantee of the unity of all the members of the Church.

Also, it is as a believer that I come to you today. It is quite simply that I would like to give here today the witness of that which I believe, of that which I wish for the well-being of the people, my brothers, and of that which, from experience, I consider to be useful for all.

First of all, I invoke the Most High, the all-powerful God who is our creator. He is the origin of all life, as he is at the source of all that is good, of all that is beautiful, of all that is holy.

He separated the light from the darkness. He caused the whole universe to grow in a marvelous order. He willed that the plants should grow and bear fruit, just as he willed that the birds of the sky, the animals of the earth and the fish of the sea should multiply.

He made us, us men, and we are from him. His holy law guides our life. It is the light of God which orientates our destiny and enlightens our conscience. He renders us capable of loving

and of transmitting life. He asks every man to respect every human creature and to love him as a friend, a companion, a brother. He invites us to help him when he is wounded, when he is abandoned, when he is hungry and thirsty, in short, when he no longer knows where to find his direction on the pathways of life.

Yes, God asks that we should listen to his voice. He expects from us obedience to his holy will in a free consent of mind and of heart.

That is why we are accountable before him. It is he, God, who is our judge; he who alone is truly just. We know, however, that his mercy is inseparable from his justice. When man returns to him, repentant and contrite, after having strayed away into the disorder of sin and the works of death, God then reveals himself as the One who pardons and shows mercy.

To him, therefore, our love and our adoration! For his blessing and for his mercy, we thank him, at all times and in all places.

In a world which desires unity and peace, and which however experiences a thousand tensions and conflicts, should not believers favor friendship between the men and the peoples who form one single community on earth? We know that they have one and the same origin and one and the same final end; the God who made them and who waits for them, because he will gather them together.

For its part, the Catholic Church, 20 years ago at the time of the Second Vatican Council, undertook in the person of its bishops, that is, of its religious leaders, to seek collaboration between the believers. It published a *document on dialogue between the religions.*[1] It affirms that all men, especially those of living faith, should respect each other, should rise above all discrimination, should live in harmony and serve the universal

1. *Nostra Aetate.*

brotherhood.[2] The Church shows particular attention to the believing Muslims, given their faith in the one God, their sense of prayer, and their esteem for the moral life.[3] It desires that Christians and Muslims together "promote harmony for all men, social justice, moral values, peace, liberty."[4]

Dialogue between Christians and Muslims is today more necessary than ever. It flows from our fidelity to God and supposes that we know how to recognize God by faith, and to witness to him by word and deed in a world ever more secularized and at times even atheistic.

The young can build a better future if they first put their faith in God and if they pledge themselves to build this new world in accordance with God's plan, with wisdom and trust.

Today we should *witness* to the spiritual values of which the world has need. The first is *our faith in God*.

God is the source of all joy. We should also witness to our worship of our God, by our adoration, our prayer of praise and supplication. Man cannot live without prayer, any more than he can live without breathing. We should witness to our *humble search for his will;* it is he who should inspire our pledge for a more just and a more united world. God's ways are not always our ways. They transcend our actions, which are always incomplete, and the intentions of our heart, which are always imperfect. God can never be used for our purposes, for he is above all.

This witness of faith, which is vital for us and which can never tolerate either infidelity to God or indifference to the truth,

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2. *Cf.* document cited in 1, n.5.

3. *Cf.* n. 3.

4. *Ibid.*

is made with respect for the other religious traditions, because everyone hopes to be respected for what he is in fact, and for what he conscientiously believes. We desire that all may reach the fullness of the divine truth, but no one can do that except through the free adherence of conscience, protected from exterior compulsions which would be unworthy of the free homage of reason and of heart which is characteristic of human dignity. There, is the true meaning of religious liberty, which at the same time respects God and man. It is the sincere veneration of such worshippers that God awaits, of worshippers in spirit and in truth.

We are convinced that "we cannot truly pray to God the Father of all mankind, if we treat any people in other than brotherly fashion, for all mankind is created in God's image."[5]

Therefore we must also *respect, love and help every human being*, because he is a creature of God and, in a certain sense, his image and his representative, because he is the road leading to God, and because he does not fully fulfill himself unless he knows God, unless he accepts him with all his heart, and unless he obeys him to the extent of the ways of perfection.

Furthermore, this obedience to God and this love for man should lead us *to respect man's rights*, these rights which are the expression of God's will and the demands of human nature such as it was created by God.

Therefore, respect and dialogue require reciprocity in all spheres, especially in that which concerns basic freedoms, more particularly religious freedom. They favor peace and agreement between the peoples. They help to resolve together the problems of today's men and women, especially those of the young.

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5. Decl. *Nostra Aetate*, n. 5.

Normally, the young look towards the future, they long for a more just and a more human world. God made young people such, precisely that they might help to transform the world in accordance with his plan of life. But to them, too, the situation often appears to have its shadows.

In this world there are frontiers and divisions between men, as also misunderstandings between the generations; there are, likewise, racism, wars and injustices, as also hunger, waste and unemployment. These are the dramatic evils which touch us all, more particularly the young of the entire world. Some are in danger of discouragement, others of capitulation, others of willingness to change everything by violence or by extreme solutions. Wisdom teaches us that self-discipline and love are then the only means to the desired renewal.

God does not will that people should remain passive. He entrusted the earth to them that together they should subdue it, cultivate it, and cause it to bear fruit.

You are charged with the world of tomorrow. It is *by fully and courageously undertaking your responsibilities* that you will be able to overcome the existing difficulties. It reverts to you to take the initiatives and not to wait for everything to come from the older people and from those in office. You must build the world and not just dream about it.

It is *by working in harmony* that one can be effective. Work properly understood is a service to others. It creates links of solidarity. The experience of working in common enables one to purify oneself and to discover the richness of others. It is thus that, gradually, a climate of trust can be born which enables each one to grow, to expand, and "to be more." Do not fail, dear young people, to collaborate *with the adults*, especially with your

parents and teachers as well as with the "leaders" of society and of the State. The young should not isolate themselves from the others. The young need the adults, just as the adults need the young.

In this working together, the human person, man or woman, should never be sacrificed. *Each person is unique* in God's eyes. Each one ought to be appreciated for what he is, and, consequently, respected as such. No one should make use of his fellow man; no one should exploit his equal; no one should contemn his brother.

It is in these conditions that a more human, a more just, and a more fraternal world will be able to be born, a world where each one can find his place in dignity and freedom. It is this world of the 21st century that is in your hands; it will be what you make it.

This world, which is about to come, depends on the *young people of all the countries of the world*. Our world is divided, and even shattered; it experiences multiple conflicts and grave injustices. There is no real North-South solidarity; there is not enough mutual assistance between the nations of the South. There are in the world cultures and races which are not respected.

Why all these? *It is because people do not accept their differences:* they do not know each other sufficiently. They reject those who do not have the same civilization. They refuse to help each other. They are unable to free themselves from egoism and from self-conceit.

But God created all men equal in dignity, though different with regard to gifts and to talents. Mankind is a whole where each one has his part to play; the worth of the various peoples and of the diverse cultures must be recognized. The world is as if it were a living organism; each one has something to receive from the others, and has something to give to them.

I am happy to meet you here in Morocco. Morocco has a *tradition of openness*. Your scholars have travelled, and you have welcomed scholars from other countries. Morocco has been a meeting place of civilizations: it has permitted exchanges with the East, with Spain, and with Africa. Morocco has a *tradition of tolerance;* in this Muslim country there have always been Jews and nearly always Christians; the tradition has been carried out in respect, in a positive manner. You have been, and you remain, a hospitable country. You, young Moroccans, are then prepared to become citizens of tomorrow's world, of this fraternal world to which, with the young people of all the world, you aspire.

I am sure that all of you, young people, are capable of this dialogue. You do not wish to be conditioned by prejudices. You are ready to build a civilization based on love. You can work to cause the barriers to fall, barriers that are due at times to pride, but more often to man's feebleness and fear. You wish to love others, without any limit of nation, race or religion.

For that, *you want justice and peace*. "Peace and youth go forward together," as I said in my message for this year's World Day of Peace. You do not want either war or violence. You know the price that they cause innocent people to pay. Neither do you want the escalation of armaments. That does not mean that you wish to have peace at any price. Peace goes side by side with justice. You do not want anyone to be oppressed. You want peace in justice.

First of all, you wish that people should have enough on which to live. Young people who have the good fortune to pursue their studies have the right to be solicitous about the profession that they will be able to exercise on their own behalf. But they also must concern themselves with the living conditions, often more difficult, of their brothers and sisters who live in the same

country, and indeed in the whole world. How can one remain indifferent, in fact, when other human beings, in great numbers, die of hunger, of malnutrition or lack of health help, when they suffer cruelly from drought, when they are reduced to unemployment or to emigration through economic laws that are beyond their control, when they endure the precarious situation of refugees, packed into camps, as a consequence of human conflicts? God has given the earth to mankind as a whole in order that people might jointly draw their subsistence from it, and that every people might have the means to nourish itself, to take care of itself; and to live in peace.

But important as the economic problems may be, man does not live on bread alone, he needs an intellectual and spiritual life; it is there that he finds the soul of this new world to which you aspire. Man has a need to develop *his spirit and conscience*. This is often lacking to the man of today. Forgetfulness of values and the crisis of identity which frustrate our world oblige us to excel ourselves in a renewed effort of research and investigation. The interior light which will thus be born in our conscience will enable meaning to be given to development, to orientate it towards the good of man, of every man and of all men, in accordance with God's plan.

The Arabs of the Mashriq and the Maghrib, and Muslims in general, have a long tradition of study and of erudition: literary, scientific, philosophic. You are the heirs to this tradition, you must study in order to learn to know this world which God has given us, to understand it, to discover its meaning, with a desire and a *respect for truth*, and in order to learn to know the peoples and the men created and loved by God, so as to prepare yourselves better to serve them.

Still more, the search for truth will lead you, beyond intellectual values, to the spiritual dimension of the interior life.

Man is a *spiritual being*. We, believers, know that we do not live in a closed world. We believe in God. We are worshippers of God. We are seekers of God.

The Catholic Church regards with respect and *recognizes the quality of your religious progress*, the richness of your spiritual tradition.

We Christians, also, are proud of our own religious tradition.

I believe that we, Christians and Muslims, must recognize with joy the religious values that we have in common, and give thanks to God for them. Both of us believe in one God the only God, who is all Justice and all Mercy; we believe in the importance of prayer, of fasting, of almsgiving, of repentance and of pardon; we believe that God will be a merciful judge to us at the end of time, and we hope that after the resurrection he will be satisfied with us and we know that we will be satisfied with him.

Loyalty demands also that we should recognize and respect our differences. Obviously the most fundamental is the view that we hold on the person and work of Jesus of Nazareth. You know that, for the Christians, this Jesus causes them to enter into an intimate knowledge of the mystery of God and into a filial communion by his gifts, so that they recognize him and proclaim him Lord and Savior.

Those are important differences, which we can accept with humility and respect, in mutual tolerance; there is a mystery there on which, I am certain, God will one day enlighten us.

Christians and Muslims, in general, we have badly understood each other, and sometimes, in the past, we have opposed and even exhausted each other in polemics and in wars.

I believe that, today, God invites us *to change our old practices*. We must respect each other, and also we must stimulate each other in good works on the path of God.

With me, you know what is the reward of spiritual values. Ideologies and slogans cannot satisfy you nor can they solve the problems of your life. Only the spiritual and moral values can do it, and they have God as their fundament.

Dear young people, I wish that you may be able to help in thus building a world where God may have first place in order to aid and to save mankind. On this path, you are assured of the esteem and the collaboration of your Catholic brothers and sisters whom I represent among you this evening.

I should now like to thank His Majesty the King for having invited me. I thank you also, dear young people of Morocco, for having come here and listened with confidence to my witness.

But still more, I would like to thank God who permitted this meeting. We are all in his sight. Today, he is the first witness of our meeting. It is he who puts in our hearts the feelings of mercy and understanding, of pardon and of reconciliation, of service and of collaboration. Must not the believers that we are reproduce in their life and in their city the Most Beautiful Names which our religious traditions recognize for him? May we then be able to be available for him, and to be submissive to his will, to the calls that he makes to us! In this way our lives will find a new dynamism.

Then, I am convinced, a world can be born where men and women of living and effective faith will sing to the glory of God, and will seek to build a human society in accordance with God's will.

I should like to finish by invoking him personally in your presence:

O God, you are our creator.
You are limitlessly good and merciful.
To You is due the praise of every creature.
O God, You have given to us an interior law
by which we should live.
To do Your will is to perform our task.
To follow Your ways is to find peace of soul.
To You we offer our obedience.
Guide us in all the steps that we undertake on earth.
Free us from evil inclinations which turn our heart
from Your will.
Do not permit that in invoking Your Name
we should ever justify the human disorders.
O God, you are the One Alone
to whom we make our adoration.
Do not permit that we should estrange ourselves
from You.
O God, judge of all mankind, help us to belong
to Your elect on the last day.
O God, author of justice and peace, grant us true joy and
authentic love, as also a lasting fraternity among all
peoples.
Fill us with Your gifts forever. Amen!

Address of His Holiness John Paul II to the Young People of Kazakhstan*

Dear Young People,

It is a great joy for me to meet with you, and I am deeply grateful for your warm welcome. I greet specially the Rector and the academic authorities of this new and already prestigious University. Its very name, *Eurasia*, indicates *the particular mission* which it has in common with your great nation which is a point of contact between Europe and Asia: *a mission of linking two continents*, their respective cultures and traditions, and the different ethnic groups who have mingled here through the centuries.

Indeed, yours is a country in which the world can see *accord and harmony between different peoples* as an eloquent sign of the vocation of all peoples to live together in peace, in mutual knowledge and openness, and an ever deeper discovery and appreciation of the distinctive traditions of each people. *Kazakhstan is a land of encounter*, exchange and newness; a land which stirs in everyone the desire for new discoveries and makes it possible to experience difference not as a threat but as an enrichment.

Recognizing this, dear young people, I greet each one of you. To all of you I say as a friend: *peace be with you*, may peace fill your hearts! Know that you are called *to be the builders of a better world*. Be peacemakers, because a society solidly based on peace is a society with a future.

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* Delivered at Meeting with Young People on September 23, 2001 at the Astana-Eurasia University, as part of His Holiness John Paul II's Pastoral Visit in Kazakhstan.

In preparing this visit, I asked myself what the young people of Kazakhstan would want to hear from the Pope of Rome and what they would like to ask him. My experience of young people tells me that they are interested in the basic questions. Probably the first question you would want to put to me is this: *"Who am I,* Pope John Paul II, according to the Gospel that you proclaim? What is the meaning of my life? Where am I going?" My answer, dear young people, is simple but hugely significant: *You are a thought of God,* you are *a heartbeat of God*. To say this is like saying that you have a value which in a sense is infinite, that *you matter to God in your completely unique individuality*.

You understand then, dear young people, why I come among you this evening with respect and trepidation, and why I look to you with great affection and confidence. I am happy to meet you, the descendants of the noble Kazakh people, proud of your indomitable yearning for freedom, which is as limitless as the steppe where you were born. You come from different backgrounds, in which suffering played a big part.

Here you sit *side by side*, in a spirit of friendship, not because you have forgotten the evil there has been in your history, but because you are rightly more interested in the good that you can build together. There is no true reconciliation which does not lead to generous shared commitment.

Realize that *each one of you is of unique worth*, and be ready to accept one another with your respective convictions as you search together for the fullness of truth. Your country has experienced the deadly violence of ideology. Do not let yourselves fall prey now to *the no less destructive violence of "emptiness."* What a suffocating void it is when nothing matters in life, when you believe in nothing! Emptiness is the negation of the infinite,

which your steppe-land powerfully evokes: it is the opposite of the Infinity for which the human heart has an irresistible longing.

I have been told that, in your beautiful Kazakh language, "I love you" is *"men senen jaskè korejmen,"* which can be translated as "I look upon you well, my gaze upon you is good." Human love, but more fundamentally still God's love for humanity and creation, *stems from a loving gaze*, a gaze that helps us see the good and leads us to do what is good: "God saw everything he had made, and he found it very good."[1] Such a gaze allows us to see all that is positive in things and leads us to ponder far beneath the surface beauty and richness of every human being we meet.

Spontaneously we ask ourselves: "What is it that constitutes the beauty and greatness of the human person?" Here is the answer I give you: what makes a human being great is *the stamp of God which each of us bears.* According to the Bible, a human being is created "in the image and likeness of God."[2] This is why the human heart is never satisfied: it wants more and better, it wants everything. No finite reality satisfies or placates its longing. Saint Augustine, one of the early Church Fathers, wrote: "You have made us for yourself, O Lord, and our hearts are restless until they rest in you."[3] Is it not perhaps the same intuition that prompts the question which your great thinker and poet Ahmed Jassavi repeats several times in his poems: "What is life's point if not to be given, and given to the Most High God?"

Dear friends, in these words of Ahmed Jassavi there is *a great message*, echoing what religious tradition describes as a "vocation." In giving life to man, God entrusts to him a task and awaits his

1. *Genesis* 1:31.

2. *Cf. Genesis* 1:26.

3. *Confessions,* I, 1.

response. To declare that the purpose of human life, with all its experiences, its joys and sorrows, is that it be "given to the Most High God" in no way diminishes or denies our life. Rather, it is an assertion of the supreme dignity of the human person: made in the image and likeness of God, men and women are called to cooperate in transmitting life and in ruling over creation.[4]

The Pope of Rome has come to say this to you: there is a God who has thought of you and given you life. He loves you personally and he entrusts the world to you. It is he who stirs in you the thirst for freedom and the desire for knowledge. Allow me to profess before you with humility and pride the faith of Christians: Jesus of Nazareth, the Son of God made man 2,000 years ago, came to reveal to us this truth through his person and his teaching. Only in the encounter with him, the Word made flesh, do we find the fullness of self-realization and happiness. Religion itself, without the experience of wondrous discovery of the Son of God and communion with him who became our brother, becomes a mere set of principles which are increasingly difficult to understand, and rules which are increasingly hard to accept.

Dear friends, you sense that *no earthly reality can fully satisfy you*. You are aware that openness to the world is not enough to satisfy your thirst for life and that freedom and peace can come only from Another who is infinitely greater than you, even though he is very close to you.

Realize that you are not your own masters, and open yourselves to the One who created you out of love and wants to make you worthy, free and good people. I encourage you to adopt this attitude of confident openness: learn *to listen in silence to the*

4. *Cf. Genesis* 1:26-28.

voice of God, who speaks in the depths of every heart; build your lives on sure and solid foundations; do not be afraid of commitment and sacrifice, which today require a great investment of energies, but which are the guarantees of success tomorrow. Discover the truth about yourselves, and new horizons will not cease to open up before you.

Dear young people, perhaps these words of mine seem unusual to you. To me, however, they seem relevant and necessary for people today, who at times delude themselves that they are all-powerful, because they have made great scientific progress and managed in some sense to control the complex world of technology. But every individual has a heart: *intelligence may drive machines, but it is the heart that beats with life!* Give your heart the vital resources which it needs, allow God to enter your life: then your life will brighten with his divine light.

I came among you in order to offer you encouragement. We are at the beginning of a new millennium: it is an important time for the world, because in people's minds there is a growing conviction that *we cannot go on living divided as we are*. Unfortunately nowadays, when communications are becoming easier by the day, differences are often apparent in still more dramatic forms. I urge you to work for a more united world, and to do so in your everyday life, bringing to the task the creative contribution of a heart renewed.

Your country is counting on you and expects much from you in the years ahead: the path your country takes will be determined by your choices. *You will be the face of Kazakhstan tomorrow!* Be courageous, fear nothing, and you will not be disappointed.

May the Most High God protect you always, and may his blessing be upon each of you, upon your loved ones and upon every aspect of your lives!

At the end of the talk to young people at the University, the Holy Father offered these remarks in Italian.

I wish to express my profound appreciation for the meeting with the University. The University is always very close to me. I am happy to find one here because it is the foundation of national culture and of national development. Culture is the foundation of the identity of a people. Thank you.

Faith, Reason and the University: Memories and Reflections*

His Holiness Benedict XVI

Your Eminences, Your Magnificences, Your Excellencies, Distinguished Ladies and Gentlemen,

It is a moving experience for me to be back again in the university and to be able once again to give a lecture at this podium. I think back to those years when, after a pleasant period at the Freisinger Hochschule, I began teaching at the University of Bonn. That was in 1959, in the days of the old university made up of ordinary professors. The various chairs had neither assistants nor secretaries, but in recompense there was much direct contact with students and in particular among the professors themselves. We would meet before and after lessons in the rooms of the teaching staff. There was a lively exchange with historians, philosophers, philologists and, naturally, between the two theological faculties. Once a semester there was a *dies academicus*, when professors from every faculty appeared before the students of the entire university, making possible a genuine experience of *universitas* – something that you too, Magnificent Rector, just mentioned – the experience, in other words, of the fact that despite our specializations which at times make it difficult to communicate with each other, we made up a whole, working in everything on the basis of a single

* Delivered at the Meeting with the Representatives of Science Lecture of the Holy Father held on September 12, 2006 at the Aula Magna of the University of Regensburg, as part of the Apostolic Journey of His Holiness Benedict XVI to München, Altötting and Regensburg on September 9-14, 2006.

rationality with its various aspects and sharing responsibility for the right use of reason – this reality became a lived experience. The university was also very proud of its two theological faculties. It was clear that, by inquiring about the reasonableness of faith, they too carried out a work which is necessarily part of the "whole" of the *universitas scientiarum*, even if not everyone could share the faith which theologians seek to correlate with reason as a whole. This profound sense of coherence within the universe of reason was not troubled, even when it was once reported that a colleague had said there was something odd about our university: it had two faculties devoted to something that did not exist: God. That even in the face of such radical skepticism it is still necessary and reasonable to raise the question of God through the use of reason, and to do so in the context of the tradition of the Christian faith: this, within the university as a whole, was accepted without question.

I was reminded of all this recently, when I read the edition by Professor Theodore Khoury (Münster) of part of the dialogue carried on – perhaps in 1391 in the winter barracks near Ankara – by the erudite Byzantine Emperor Manuel II Paleologus and an educated Persian on the subject of Christianity and Islam, and the truth of both.[1] It was presumably the emperor himself who set down this dialogue, during the siege of Constantinople between

1. Of the total number of 26 conversations (διϋλεξις – Khoury translates this as "controversy") in the dialogue ("Entretien"), T. Khoury published the seventh "controversy" with footnotes and an extensive introduction on the origin of the text, on the manuscript tradition and on structure of the dialogue, together with brief summaries of the "controversies" not included in the edition; the Greek text is accompanied by a French translation: "Manuel II Paléologue, Entretiens avec un Musulman. 7e Controverse," *Sources Chrétiennes* n. 115, Paris

1394 and 1402; and this would explain why his arguments are given in greater detail than those of his Persian interlocutor.[2] The dialogue ranges widely over the structures of faith contained in the Bible and in the Qur'an, and deals especially with the image of God and of man, while necessarily returning repeatedly to the relationship between – as they were called – three "Laws" or "rules of life": the Old Testament, the New Testament and the Qur'an. It is not my intention to discuss this question in the present lecture; here I would like to discuss only one point – itself rather marginal to the dialogue as a whole – which, in the context of the issue of "faith and reason," I found interesting and which can serve as the starting point for my reflections on this issue.

In the seventh conversation (διϋλεξις – controversy) edited by Professor Khoury, the emperor touches on the theme of the Holy War. The emperor must have known that surah 2,256 reads: "There is no compulsion in religion." According to some of the experts, this is probably one of the suras of the early period, when Mohammed was still powerless and under threat. But naturally the emperor also knew the instructions, developed later and recorded in the Qur'an, concerning Holy War. Without descending to details, such as the difference in treatment accorded

1966. In the meantime, Karl Förstel published in *Corpus Islamico-Christianum* (*Series Graeca* ed. A. T. Khoury and R. Glei) an edition of the text in Greek and German with commentary: "Manuel II. Palaiologus, Dialoge mit einem Muslim," 3 vols., Würzburg-Altenberge 1993-1996. As early as 1966, E. Trapp had published the Greek text with an introduction as Vol. II of *Wiener byzantinische Studien.* I shall be quoting from Khoury's edition.

2. On the origin and redaction of the dialogue, cf. Khoury, pp. 22-29; extensive comments in this regard can also be found in the editions of Förstel and Trapp.

to those who have the "Book" and the "infidels," he addresses his interlocutor with a startling brusqueness, a brusqueness that we find unacceptable, on the central question about the relationship between religion and violence in general, saying:

> Show me just what Mohammed brought that was new, and there you will find things only evil and inhuman, such as his command to spread by the sword the faith he preached.[3]

The emperor, after having expressed himself so forcefully, goes on to explain in detail the reasons why spreading the faith through violence is something unreasonable. Violence is incompatible with the nature of God and the nature of the soul. "God," he says:

> is not pleased by blood – and not acting reasonably (óýí ëüãù) is contrary to God's nature. Faith is born of the soul, not the body. Whoever would lead someone to faith needs the ability to speak well and to reason properly, without violence and threats x x x. To convince a reasonable soul, one does not need a strong arm, or weapons of any kind, or any other means of threatening a person with death x x x.[4]

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3. Controversy VII, 2 c: Khoury, pp. 142-143; Förstel, Vol. I, VII. Dialog 1.5, pp. 240-241. In the Muslim world, this quotation has unfortunately been taken as an expression of my personal position, thus arousing understandable indignation. I hope that the reader of my text can see immediately that this sentence does not express my personal view of the Qur'an, for which I have the respect due to the holy book of a great religion. In quoting the text of the Emperor Manuel II, I intended solely to draw out the essential relationship between faith and reason. On this point I am in agreement with Manuel II, but without endorsing his polemic.

4. Controversy VII, 3 b-c: Khoury, pp. 144-145; Förstel, Vol. I, VII. Dialog 1.6, pp. 240-243.

The decisive statement in this argument against violent conversion is this: not to act in accordance with reason is contrary to God's nature.[5] The editor, Theodore Khoury, observes: For the emperor, as a Byzantine shaped by Greek philosophy, this statement is self-evident. But for Muslim teaching, God is absolutely transcendent. His will is not bound up with any of our categories, even that of rationality.[6] Here Khoury quotes a work of the noted French Islamist R. Arnaldez, who points out that Ibn Hazm went so far as to state that God is not bound even by his own word, and that nothing would oblige him to reveal the truth to us. Were it God's will, we would even have to practice idolatry.[7]

At this point, as far as understanding of God and thus the concrete practice of religion is concerned, we are faced with an unavoidable dilemma. Is the conviction that acting unreasonably contradicts God's nature merely a Greek idea, or is it always and intrinsically true? I believe that here we can see the profound harmony between what is Greek in the best sense of the word and the biblical understanding of faith in God. Modifying the first verse of the Book of Genesis, the first verse of the whole Bible, John began the prologue of his Gospel with the words: "In the beginning was the ëüãïò." This is the very word used by the

5. It was purely for the sake of this statement that I quoted the dialogue between Manuel and his Persian interlocutor. In this statement the theme of my subsequent reflections emerges.

6. Cf. Khoury, p. 144, n. 1.

7. R. Arnaldez, *Grammaire et théologie chez Ibn Hazm de Cordoue*, Paris 1956, p. 13; cf. Khoury, p. 144. The fact that comparable positions exist in the theology of the late Middle Ages will appear later in my discourse.

emperor: God acts, óýí ëüãù, with *logos*. *Logos* means both reason and word – a reason which is creative and capable of self-communication, precisely as reason. John thus spoke the final word on the biblical concept of God, and in this word all the often toilsome and tortuous threads of biblical faith find their culmination and synthesis. In the beginning was the *logos*, and the *logos* is God, says the Evangelist. The encounter between the Biblical message and Greek thought did not happen by chance. The vision of Saint Paul, who saw the roads to Asia barred and in a dream saw a Macedonian man plead with him: "Come over to Macedonia and help us!" (cf. *Acts* 16:6-10) – this vision can be interpreted as a "distillation" of the intrinsic necessity of a rapprochement between Biblical faith and Greek inquiry.

In point of fact, this rapprochement had been going on for some time. The mysterious name of God, revealed from the burning bush, a name which separates this God from all other divinities with their many names and simply asserts being, "I am," already presents a challenge to the notion of myth, to which Socrates' attempt to vanquish and transcend myth stands in close analogy.[8] Within the Old Testament, the process which started at the burning bush came to new maturity at the time of the Exile, when the God of Israel, an Israel now deprived of its land and worship, was proclaimed as the God of heaven and earth and described in a simple formula which echoes the words uttered at

8. Regarding the widely discussed interpretation of the episode of the burning bush, I refer to my book *Introduction to Christianity*, London 1969, pp. 77-93 (originally published in German as *Einführung in das Christentum*, Munich 1968; N.B. the pages quoted refer to the entire chapter entitled "The Biblical Belief in God"). I think that my statements in that book, despite later developments in the discussion, remain valid today.

the burning bush: "I am." This new understanding of God is accompanied by a kind of enlightenment, which finds stark expression in the mockery of gods who are merely the work of human hands (cf. *Ps* 115). Thus, despite the bitter conflict with those Hellenistic rulers who sought to accommodate it forcibly to the customs and idolatrous cult of the Greeks, biblical faith, in the Hellenistic period, encountered the best of Greek thought at a deep level, resulting in a mutual enrichment evident especially in the later wisdom literature. Today we know that the Greek translation of the Old Testament produced at Alexandria – the Septuagint – is more than a simple (and in that sense really less than satisfactory) translation of the Hebrew text: it is an independent textual witness and a distinct and important step in the history of revelation, one which brought about this encounter in a way that was decisive for the birth and spread of Christianity.[9] A profound encounter of faith and reason is taking place here, an encounter between genuine enlightenment and religion. From the very heart of Christian faith and, at the same time, the heart of Greek thought now joined to faith, Manuel II was able to say: Not to act "with *logos*" is contrary to God's nature.

In all honesty, one must observe that in the late Middle Ages we find trends in theology which would sunder this synthesis between the Greek spirit and the Christian spirit. In contrast with the so-called intellectualism of Augustine and Thomas, there arose with Duns Scotus a voluntarism which, in its later developments, led to the claim that we can only know God's *voluntas ordinata*. Beyond this is the realm of God's freedom, in virtue of which he could have done the opposite of everything

9. Cf. A. Schenker, "L'Écriture sainte subsiste en plusieurs formes canoniques simultanées," in *L'Interpretazione della Bibbia nella Chiesa. Atti del Simposio promosso dalla Congregazione per la Dottrina della Fede*, Vatican City 2001, pp. 178-186.

he has actually done. This gives rise to positions which clearly approach those of Ibn Hazm and might even lead to the image of a capricious God, who is not even bound to truth and goodness. God's transcendence and otherness are so exalted that our reason, our sense of the true and good, are no longer an authentic mirror of God, whose deepest possibilities remain eternally unattainable and hidden behind his actual decisions. As opposed to this, the faith of the Church has always insisted that between God and us, between his eternal Creator Spirit and our created reason, there exists a real analogy, in which – as the Fourth Lateran Council in 1215 stated – unlikeness remains infinitely greater than likeness, yet not to the point of abolishing analogy and its language. God does not become more divine when we push him away from us in a sheer, impenetrable voluntarism; rather, the truly divine God is the God who has revealed himself as *logos* and, as *logos*, has acted and continues to act lovingly on our behalf. Certainly, love, as Saint Paul says, "transcends" knowledge and is thereby capable of perceiving more than thought alone (cf. *Eph* 3:19); nonetheless it continues to be love of the God who is *Logos*. Consequently, Christian worship is, again to quote Paul – "ëïãéêç ëáôñåßá," worship in harmony with the eternal Word and with our reason (cf. *Rom* 12:1).[10]

This inner rapprochement between Biblical faith and Greek philosophical inquiry was an event of decisive importance not only from the standpoint of the history of religions, but also from that of world history – it is an event which concerns us even today. Given this convergence, it is not surprising that Christianity, despite its origins and some significant developments in the East, finally took on its historically decisive character in

10. On this matter, I expressed myself in greater detail in my book *The Spirit of the Liturgy*, San Francisco 2000, pp. 44-50.

Europe. We can also express this the other way around: this convergence, with the subsequent addition of the Roman heritage, created Europe and remains the foundation of what can rightly be called Europe.

The thesis that the critically purified Greek heritage forms an integral part of Christian faith has been countered by the call for a dehellenization of Christianity – a call which has more and more dominated theological discussions since the beginning of the modern age. Viewed more closely, three stages can be observed in the program of dehellenization: although interconnected, they are clearly distinct from one another in their motivations and objectives.[11]

Dehellenization first emerged in connection with the postulates of the Reformation in the 16th century. Looking at the tradition of scholastic theology, the Reformers thought they were confronted with a faith system totally conditioned by philosophy, that is to say an articulation of the faith based on an alien system of thought. As a result, faith no longer appeared as a living historical Word but as one element of an overaching philosophical system. The principle of *sola scriptura*, on the other hand, sought faith in its pure, primordial form, as originally found in the biblical Word. Metaphysics appeared as a premise derived from another source, from which faith had to be liberated in order to become once more fully itself. When Kant stated that he needed to set thinking aside in order to make room for faith, he carried

11. Of the vast literature on the theme of dehellenization, I would like to mention above all: A. Grillmeier, "Hellenisierung-Judaisierung des Christentums als Deuteprinzipien der Geschichte des kirchlichen Dogmas," in idem, *Mit ihm und in ihm. Christologische Forschungen und Perspektiven*, Freiburg 1975, pp. 423-488.

this program forward with a radicalism that the Reformers could never have foreseen. He thus anchored faith exclusively in practical reason, denying it access to reality as a whole.

The liberal theology of the 19th and 20th centuries ushered in a second stage in the process of dehellenization, with Adolf von Harnack as its outstanding representative. When I was a student, and in the early years of my teaching, this program was highly influential in Catholic theology too. It took as its point of departure Pascal's distinction between the God of the philosophers and the God of Abraham, Isaac and Jacob. In my inaugural lecture at Bonn in 1959, I tried to address the issue,[12] and I do not intend to repeat here what I said on that occasion, but I would like to describe at least briefly what was new about this second stage of dehellenization. Harnack's central idea was to return simply to the man Jesus and to his simple message, underneath the accretions of theology and indeed of hellenization: this simple message was seen as the culmination of the religious development of humanity. Jesus was said to have put an end to worship in favor of morality. In the end, he was presented as the father of a humanitarian moral message. Fundamentally, Harnack's goal was to bring Christianity back into harmony with modern reason, liberating it, that is to say, from seemingly philosophical and theological elements, such as faith in Christ's divinity and the triune God. In this sense, historical-critical exegesis of the New Testament, as he saw it, restored to theology its place within the university: theology, for Harnack, is something essentially historical and therefore strictly

12. Newly published with commentary by Heino Sonnemans (Ed.): *Joseph Ratzinger-Benedikt XVI, Der Gott des Glaubens und der Gott der Philosophen. Ein Beitrag zum Problem der theologia naturalis*, Johannes-Verlag Leutesdorf, 2nd revised edition, 2005.

scientific. What it is able to say critically about Jesus is, so to speak, an expression of practical reason and consequently it can take its rightful place within the university. Behind this thinking lies the modern self-limitation of reason, classically expressed in Kant's "Critiques," but in the meantime further radicalized by the impact of the natural sciences. This modern concept of reason is based, to put it briefly, on a synthesis between Platonism (Cartesianism) and empiricism, a synthesis confirmed by the success of technology. On the one hand, it presupposes the mathematical structure of matter, its intrinsic rationality, which makes it possible to understand how matter works and use it efficiently: this basic premise, is to speak, the Platonic element in the modern understanding of nature. On the other hand, there is nature's capacity to be exploited for our purposes, and here only the possibility of verification or falsification through experimentation can yield decisive certainty. The weight between the two poles can, depending on the circumstances, shift from one side to the other. As strongly positivistic a thinker as J. Monod has declared himself a convinced Platonist/Cartesian.

This gives rise to two principles which are crucial for the issue we have raised. First, only the kind of certainty resulting from the interplay of mathematical and empirical elements can be considered scientific. Anything that would claim to be science must be measured against this criterion. Hence the human sciences, such as history, psychology, sociology and philosophy, attempt to conform themselves to this canon of scientificity. A second point, which is important for our reflections, is that by its very nature this method excludes the question of God, making it appear an unscientific or pre-scientific question. Consequently, we are faced with a reduction of the radius of science and reason, one which needs to be questioned.

I will return to this problem later. In the meantime, it must be observed that from this standpoint any attempt to maintain theology's claim to be "scientific" would end up reducing Christianity to a mere fragment of its former self. But we must say more: if science as a whole is this and this alone, then it is man himself who ends up being reduced, for the specifically human questions about our origin and destiny, the questions raised by religion and ethics, then have no place within the purview of collective reason as defined by "science," so understood, and must thus be relegated to the realm of the subjective. The subject then decides, on the basis of his experiences, what he considers tenable in matters of religion, and the subjective "conscience" becomes the sole arbiter of what is ethical. In this way, though, ethics and religion lose their power to create a community and become a completely personal matter. This is a dangerous state of affairs for humanity, as we see from the disturbing pathologies of religion and reason which necessarily erupt when reason is so reduced that questions of religion and ethics no longer concern it. Attempts to construct an ethic from the rules of evolution or from psychology and sociology, end up being simply inadequate.

Before I draw the conclusions to which all this has been leading, I must briefly refer to the third stage of dehellenization, which is now in progress. In the light of our experience with cultural pluralism, it is often said nowadays that the synthesis with Hellenism achieved in the early Church was an initial inculturation which ought not to be binding on other cultures. The latter are said to have the right to return to the simple message of the New Testament prior to that inculturation, in order to inculturate it anew in their own particular milieu. This thesis is not simply false, but it is coarse and lacking in precision. The New Testament was written in Greek and bears the imprint of the Greek spirit, which had already come to maturity as the Old Testament

developed. True, there are elements in the evolution of the early Church which do not have to be integrated into all cultures. Nonetheless, the fundamental decisions made about the relationship between faith and the use of human reason are part of the faith itself; they are developments consonant with the nature of faith itself.

And so I come to my conclusion. This attempt, painted with broad strokes, at a critique of modern reason from within has nothing to do with putting the clock back to the time before the Enlightenment and rejecting the insights of the modern age. The positive aspects of modernity are to be acknowledged unreservedly: we are all grateful for the marvelous possibilities that it has opened up for mankind and for the progress in humanity that has been granted to us. The scientific ethos, moreover, is – as you yourself mentioned, Magnificent Rector – the will to be obedient to the truth, and, as such, it embodies an attitude which belongs to the essential decisions of the Christian spirit. The intention here is not one of retrenchment or negative criticism, but of broadening our concept of reason and its application. While we rejoice in the new possibilities open to humanity, we also see the danger arising from these possibilities and we must ask ourselves how we can overcome them. We will succeed in doing so only if reason and faith come together in a new way, if we overcome the self-imposed limitation of reason to the empirically falsifiable, and if we once more disclose its vast horizons. In this sense, theology rightly belongs in the university and within the wide-ranging dialogue of sciences, not merely as a historical discipline and one of the human sciences, but precisely as theology, as inquiry into the rationality of faith.

Only thus do we become capable of that genuine dialogue of cultures and religions so urgently needed today. In the Western

world it is widely held that only positivistic reason and the forms of philosophy based on it are universally valid. Yet the world's profoundly religious cultures see this exclusion of the divine from the universality of reason as an attack on their most profound convictions. A reason which is deaf to the divine and which relegates religion into the realm of subcultures is incapable of entering into the dialogue of cultures. At the same time, as I have attempted to show, modern scientific reason with its intrinsically Platonic element bears within itself a question which points beyond itself and beyond the possibilities of its methodology. Modern scientific reason quite simply has to accept the rational structure of matter and the correspondence between our spirit and the prevailing rational structures of nature as a given, on which its methodology has to be based. Yet the question why this has to be so is a real question, and one which has to be remanded by the natural sciences to other modes and planes of thought – to philosophy and theology. For philosophy and, albeit in a different way, for theology, listening to the great experiences and insights of the religious traditions of humanity, and those of the Christian faith in particular, is a source of knowledge, and to ignore it would be an unacceptable restriction of our listening and responding. Here I am reminded of something Socrates said to Phaedo. In their earlier conversations, many false philosophical opinions had been raised, and so Socrates says:

> It would be easily understandable if someone became so annoyed at all these false notions that for the rest of his life he despised and mocked all talk about being – but in this way he would be deprived of the truth of existence and would suffer a great loss."[13]

13. Cf. 90 c-d. For this text, cf. also R. Guardini, *Der Tod des Sokrates*, 5th ed., Mainz-Paderborn 1987, pp. 218-221.

The West has long been endangered by this aversion to the questions which underlie its rationality, and can only suffer great harm thereby. The courage to engage the whole breadth of reason, and not the denial of its grandeur – this is the program with which a theology grounded in Biblical faith enters into the debates of our time. "Not to act reasonably, not to act with *logos*, is contrary to the nature of God," said Manuel II, according to his Christian understanding of God, in response to his Persian interlocutor. It is to this great *logos*, to this breadth of reason, that we invite our partners in the dialogue cultures. To rediscover it constantly is the great task of the university.

Terrorism and Human Rights*

The Rt. Hon. The Lord Phillips
Lord Chief Justice of England and Wales

It is a pleasure to be here this evening on my first visit to the University of Hertfordshire and indeed to Hatfield. My predecessor was, I understand, one of the first to give a lecture for the School of Law in this magnificent auditorium, when he delivered a lecture on the Constitutional Reforms in February last year, to bring the series of James Kingham Memorial Lectures to a close.

In this lecture, I propose to concentrate on a rather different subject, the complex history of the legislation and judicial reaction to that legislation in the United Kingdom – a story in which I have inevitably played a part – and there have been quite a few developments in that story over the past year.

These, however, pale into insignificance when compared to the importance of recent decisions of the Supreme Court of the United States.

The United States and the United Kingdom have seen themselves as partners in the fight against global terrorism, but partners who have differed in relation to the legal constraints on the methods used in that fight. In the United States the constraint is their Constitution. In the United Kingdom the constraint is the European Convention on Human Rights. While I shall

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concentrate on the United Kingdom, I shall be looking at developments that we have been following with great interest on the far side of the Atlantic.

Terrorism is not readily defined, and whether activities amount to terrorism can depend upon your point of view. One man's terrorist can be another man's freedom fighter.

As an ex-colonial power, the United Kingdom has been responsible for detaining without trial as terrorist suspects in India, in Kenya, in Cyprus, by way of example, men who have gone on to be their country's leaders. There are still around the world minorities, striving for independence, who resort to measures that are condemned by the regimes in power as terrorism.

But we are today facing a new kind of terrorism. Terrorism inspired by an ideology that treats as enemies those whose way of life is espoused by the vast majority in the democracies against whom the terrorism is aimed; terrorism whose motivation is not a desire for independence, but simply ideological hatred. And the ideology is so strong that some, at least of those who share it, are prepared to destroy themselves in order to more effectively destroy others. The suicide bomber is a new phenomenon and one against whom the theory that punishment deters crime is manifestly inapplicable.

In a time of national emergency, the reaction of those running a country, or making a country's laws, is to detain without trial those suspected of being at risk of committing subversive activities.

Such a course tends to be acceptable to the vast majority of the inhabitants of the country in question, who are not at risk of being locked up. Dicey, in his great work Introduction to the

Study of the Law of the Constitution[1] remarked "under the complex conditions of modern life no government can in times of disorder, or of war, keep the peace at home, or perform its duties towards foreign powers, without occasionally using arbitrary authority."

This reaction was reflected by the approach of the majority of the House of Lords to the interpretation of regulations introduced under wartime legislation in both the First and the Second World Wars which permitted detention without trial.

The most famous, or notorious decision was that in *Liversedge v. Anderson,*[2] where the House, in the face of a notable dissent by Lord Atkin, held that the Home Secretary was not required to give any reason for locking up a citizen pursuant to a regulation which gave him the power to do so if he had "reasonable cause to believe" him "to be x x x of hostile associations x x x and that by reason thereof it was necessary to exercise control over him."

As we shall see, it is no longer so easy for the legislature of the United Kingdom to confer such powers on the Secretary of State. The difficulty lies in the incorporation in our domestic law of the European Convention on Human Rights and the expansionist approach to the interpretation of that Convention of the European Court at Strasbourg. At the end of the Second World War, two Conventions were concluded, largely by way of reaction to that event. The first dealt with the manner in which a State should treat those within its boundaries. This was the 1950 European Convention on Human Rights.

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1. 8th ed., p. 271.

2. (1942) 2 AC 206.

The second placed restrictions on the circumstances in which a State could deport aliens who had sought refuge within its boundaries.

This was the 1951 United Nations Refugee Convention. This Convention required signatories to grant asylum to those who had fled persecution in their own countries. There was, however, an exception to this obligation. If an asylum seeker posed a threat to the security of the country in which he was seeking asylum, that country was entitled to deport him even if he faced the risk of persecution in his own country.

Although most of the signatories of the Human Rights Convention were also signatories to the Refugee Convention, the Strasbourg Court has held that the former Convention precluded repatriation of someone if he faced a serious risk of torture or inhumane or degrading treatment in his own country, even if he posed a threat to the security of the country in which he had sought refuge.

Article 3 of the Human Rights Convention places an absolute bar on subjecting someone to torture or inhuman or degrading treatment. In *Soering v. United Kingdom* [3] the Strasbourg Court held that Article 3 will be infringed if a person is extradited to a country where there are substantial grounds for believing that he will suffer such treatment. In that case, however, the Court stressed that inherent in the Convention was the search for a "fair balance between the demands of the general interest of the community and the requirements of the protection of an individual's fundamental rights."

The United Kingdom has always contended that this balance was not observed in the sequel to Soering, namely the case of

3. (1989) 11 EHRR 439.

Chahal v. United Kingdom.[4] In that case, the United Kingdom sought to deport to India Mr. Chahal, a Sikh separatist, who had been refused asylum, on the ground that his presence was not conducive to the public good for reasons of national security.

He resisted deportation on the ground that he feared that he would be tortured if he were returned to India. The United Kingdom Government argued before the Strasbourg Court that the Secretary of State was entitled to balance Chahal's interest as a refugee against the risk he posed to national security if not deported. The Strasbourg Court rejected this argument. It held that "whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State" it was unlawful to remove him. The activities of that individual, however undesirable or dangerous, could not be a material consideration.

This decision has far-reaching implications and, in a case that is presently before the Strasbourg Court, the United Kingdom has intervened in an attempt to get the Court to have second thoughts about Chahal. Let me explain the implications of that decision.

Article 5 of the Human Rights Convention provides that no one shall be deprived of his liberty, save in certain specified circumstances, the most material being lawful detention after conviction by a competent court. Another is lawful detention of a person against whom action is being taken with a view to extradition or deportation. Where, however, deportation is not possible because of the impact of Article 3, there is no right to detain a terrorist suspect without trial. Executive detention is

4. (1996) 23 EHRR 413.

not an option. Thus it follows from the decision in Chahal that the Convention prevents you from sending the alien who is a threat to your national security back to his own country, but does not permit you to detain him, if he insists on remaining in your country against your will.

The Strasbourg Court in Chahal struck a further blow to the United Kingdom's ability to take executive action in the interests of national security.

The Secretary of State had ordered that Chahal should be deported on the ground that his continued presence in the United Kingdom was not conducive to the public good for reasons of national security. When Chahal challenged that order by judicial review, the English court held that issues of national security were for the Security of State and could not be the subjected review by the court. The Strasbourg Court held that this was not good enough. Article 5(4) provides that anyone deprived of his liberty is entitled to challenge the lawfulness of his detention before a court. Chahal had not been able to make an effective challenge because he was not aware of the reasons why the Secretary of State had concluded that he posed a risk to national security. Article 5(4) had been infringed.

At the time of the decision in Chahal the United Kingdom had not made the Human Rights Convention part of our domestic law. It always respected, however, the judgments of the Strasbourg court. Chahal raised two problems.

The first was what to do with aliens who were a security risk but who could not be deported because they risked being subjected to torture or to inhuman or degrading treatment in their own countries. There was no obvious answer to this problem and, for the time being, the government shelved it. The other problem was more immediate. When the government wanted to deport

an alien on grounds of national security it would often not be willing to disclose to the alien the information that gave rise to the security risk. How could it cater to the alien's right under Article 5(4) to challenge his detention according to a fair procedure?

The government's response was to adopt a procedure that the Strasbourg Court had itself commended in Chahal – a procedure that the Court believed, perhaps not wholly accurately, existed in Canada. In 1997, it passed a Statute creating a Special Immigration Appeals Commission or SIAC. This consists of three judges, of whom the President is a member of the High Court.

Where applicants for admission to the United Kingdom are refused permission to enter or ordered to be deported on the grounds that this is conducive to the public good and, in particular, in the interests of national security, a right of appeal is granted to SIAC. Pursuant to the Act, procedural rules have been made designed to ensure that proceedings before SIAC do not lead to disclosure of material where this would be damaging to the national interest. Closed hearings take place in the absence of the applicant at which SIAC considers closed material. The applicant is represented by a special advocate but, once he has seen the closed material, he is no longer permitted to communicate with the applicant.

As I shall explain, SIAC has since been given other statutory roles in circumstances where the Secretary of State wishes to rely on material, disclosure of which would imperil security operations.

The creation of SIAC took place at the time of a change of administration under which, in 1997, "New Labour" replaced the old Conservatives. The Labour Party had made it part of their manifesto that they would incorporate the Human Rights

Convention and they proceeded to do so. They passed the Human Rights Act 1998, which came into force on October 2, 2000.

The Act is a typical British compromise. It preserves the supremacy of Parliament. In construing any Act of Parliament the court has a statutory duty to do so, if this is possible, in a way which renders the Act compatible with Convention rights. If this cannot be achieved, the Court can make a declaration that is not compatible with the convention, but at the same time giving effect to the Act's provisions. Parliament has a fast track procedure for amending legislation held by the court to be incompatible with the Convention if it chooses to do so.

As we shall see, the Human Rights Act has enabled terrorist suspects to challenge anti-terrorism legislation on human rights grounds and they have not hesitated to do so.

The task of the judiciary is, of course, to rule objectively as to whether or not legislation complies with the Convention. In performing that task we have upheld some challenges to legislation passed by Parliament. Ministers have, on occasion, tended to react to adverse judgments in a manner that has enabled the media to paint a picture of strife between Ministers and the judiciary. The judges are accused of defeating the will of Parliament. Let me make it plain that as far as the present situation is concerned, this is a false picture. I and the senior judiciary have to work closely with Ministers in relation to some aspects of the administration of justice and I believe that Ministers appreciate that judges are doing their best to apply the law and do not decide cases according to personal predilections.

I said that, after Chahal, the Government shelved the question of what to do about aliens whom they did not wish to have in this country because they were a threat to national security, but whom they could not expel because they would be at risk of

torture or inhuman or degrading treatment in their own countries. After 9/11, the Government hastened to address this problem. Article 15 of the Human Rights Convention entitles a signatory to derogate from some of its obligations "to the extent strictly required by the exigencies of the situation x x x in time of war or other public emergency threatening the life of the nation." On November 11, 2001 an Order was made derogating from Article 5(1) of the Convention in respect of:

> foreign nationals present in the United Kingdom who are suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organizations or groups which are so concerned or of having links with members of such organizations or groups, and who are threat to the national security of the United Kingdom.

Relying on this derogation, the Parliament then passed the Anti-Terrorism, Crime and Security Act 2001. Part 4 of that Act was particularly controversial. This permitted the Home Secretary to issue a certificate in respect of an alien if he reasonably believed that this person's presence in the United Kingdom was a risk to national security and suspected that this person was a terrorist. Under Section 23 of the Act, the issue of such a certificate rendered the alien in question subject to detention and deportation. If it was not possible to deport him because of the risk of torture or inhuman or degrading treatment in his own country, then he could be detained indefinitely in the UK without trial, pending ultimate deportation. The Act gave an alien so detained the right to appeal to SIAC against the derogation and against certification by the Secretary of State. Such appeal was subject to the SIAC procedure of closed material and special advocates.

The Secretary of State issued certificates in relation to a number of aliens that he was unable to deport and these men were detained in Belmarsh prison. They exercised their right to appeal to SIAC. They alleged that the derogation was unlawful in that there was no "public emergency threatening the life of the nation." They further alleged that the measure was discriminatory and thus contrary to Article 14 of the Convention in that it only applied to foreign suspected terrorists and not to British nationals. SIAC upheld the appeal on the ground that the order was discriminatory and contrary to Article 14.

The Secretary of State appealed to the Court of Appeal, which allowed the appeal, holding that the discrimination was justified because the detainees had no right to be in this country and, furthermore, were free to leave if they wished to. This reasoning did not withstand a further appeal to the House of Lords. The judgment of the House in *A v. Secretary of State for the Home Department*[5] is one of the most dramatic to have been given in my time in the law.

Exceptionally, nine Law Lords sat to hear the appeal. Their speeches run to over 100 pages. The first issue was whether there was indeed a "public emergency threatening the life of the nation" that justified the making of the derogation order. Eight out of the nine Law Lords reached the conclusion that there was. They attached weight to the fact that the Secretary of State and Parliament had so concluded and that SIAC, which had considered closed material, had confirmed this view. Particularly important was the nature of the test to be applied. In the leading speech, Lord Bingham cited a decision of the Strasbourg Court in *Lawless v. Ireland* (No. 3)[6] where the issue was whether low level IRA

5. [2004] UKHL 56.

6. (1961) 1 EHRR 15.

terrorist activity in Ireland justified derogation from Article 5. The Strasbourg Court gave this definition of "public emergency affecting the life of the nation":

> an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed.

Lord Hoffmann, in a lone and Churchillian dissent, applied a more fundamental test, which gave the words a more literal meaning. He said:

> Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.

He added:

> The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve.

This statement was received with enthusiasm by the liberal groups but not by Ministers, who considered that it violated the rule that a judge should not descend into politics. The fact remains that no other signatory to the Human Rights Convention had found it necessary to derogate from Article 5.

The second issue was whether the terms of the Derogation Order and of Section 23 of the Act satisfied the requirement that they should infringe Convention rights to no greater extent than was "strictly required by the exigencies of the situation."

Seven members of the House concluded that they did not. Three factors weighed particularly in their reasoning. The first

was the importance that the United Kingdom has attached, since at least Magna Carta, to the liberty of the subject. The second was that the measures attached only to foreign nationals. There were, however, plenty of terrorist suspects of British nationality. How could it be necessary to detain the foreign suspects without trial if it was not necessary to lock up the British suspects. Finally, the measures permitted those detained to opt to leave the country. If they were so dangerous, this did not seem logical, for they would be free to continue their terrorist activities overseas.

Accordingly, the House of Lords quashed the Derogation Order and declared that Section 23 of the 2001 Act was incompatible with the Convention.

This dealt a severe blow to the government's anti-terrorism strategy. The Government could, in theory, have disregarded the decision of the House of Lords and left Section 23 of the Act in force, but it has always respected judicial decisions on incompatibility. It did so on this occasion. It repealed the offending legislation and passed a new Act – the Prevention of Terrorism Act 2005. This empowers the Secretary of State, in specified circumstances, to place restrictions on terrorist suspects by making them subject to control orders. These orders can impose a wide variety of obligations such as curfew, electronic tagging, restrictions on association and on electronic communication, duty to report to the police station and so on. The Act makes provision for two types of control order.

The first imposes obligations which fall short of depriving the suspect of his liberty. These are likely to interfere with other human rights, such as the right to privacy and to respect for family life, but these are rights with which the Convention permits interference where specified circumstances, such as national security, justify this.

Such control orders are known as "non-derogating" control orders, because they do not derogate from Convention rights. The Secretary of State can impose such an order where he reasonably suspects someone of having been involved in terrorism-related activity and considers it necessary to impose the order in order to prevent him from continuing to be so involved.

The other type of control order is a "derogating control order." This is one that imposes restrictions that do amount to deprivation of liberty. Before such a control order can be made, the Government has to make a derogation order.

Having done so, it then has to apply to the court to make the control order. More than suspicion is required. The court has to be satisfied that the individual against whom the order is made has been involved in terrorism and that the order is necessary by way of response.

The 2005 Act makes a detailed provision for access to a court in order to challenge the making of a control order. Appeal is to a single judge, with a further right of appeal to the Court of Appeal. The regime of closed material and the special advocate is adopted. The Act provides that the principles of judicial review are to apply and that any human rights challenge is to be made in accordance with these statutory provisions.

In June 2005 the European Commissioner for Human Rights visited London. He questioned whether the new legislation was compatible with Convention obligations.

He suggested that the restrictions that could be imposed by non-derogating control orders might well amount to deprivation of liberty contrary to Article 5.

He also questioned whether the provisions for review by the court satisfied the requirements of a fair trial under Article 6. He commented:

> The proceedings fall some way short of guaranteeing the equality of arms, in so far as they include camera hearings, the use of secret evidence and special advocates unable subsequently to discuss proceedings with the suspect x x x. Quite apart from the obvious flouting of the presumption of innocence, the review proceedings described can only be considered to be fair, independent and impartial with some difficulty. Substituting "obligation" for "penalty" and "controlled person" for "suspect" only thinly disguises the fact that control orders are intended to substitute the ordinary criminal justice system with a parallel system run by the executive.

A month after the Commissioner's visit, on July 7 last year, we experienced in London a synchronized series of explosions on public transport, inflicting heavy loss of life and personal injuries. The suicide bombers responsible were all British subjects.

This, I suspect, persuaded most people in the United Kingdom that special measures to deal with terrorists were a necessity. Challenges of the new regime of control orders were, however, not slow in coming.

A non-derogating control order was made against a man referred to as MB. This was on the grounds that the Secretary of State reasonably suspected him of having been involved in terrorism-related activities and that the control order was necessary to prevent him from travelling from England to Iraq to fight with the insurgents there.

Because of this limited objective, the obligations that it imposed were relatively modest, including the surrender by MB

of his passport and an embargo on foreign travel. He sought a declaration that the 2005 Act was incompatible with the Convention because it did not provide for a procedure for challenging the imposition of the order that was fair. One complaint was on the use of closed material and a special advocate.

The case against MB depended very largely on closed material. His appeal came before Mr. Justice Sullivan. He accepted the argument that the Act did not provide for a fair trial and declared it incompatible with the Convention for this reason. The Secretary of State appealed. Because of the importance of the case, I presided over the appeal, sitting with the next two most senior judges, the Master of the Rolls and the President of the Queen's Bench Division. We allowed the appeal.

We held that the judge had wrongly concluded that the court's only role was the limited role of considering whether the Secretary of State's original decision had been flawed. We held that the court could and should consider whether the control order was justified on the basis of the evidence at the date of the hearing before us. What caused us most concern was the use of closed material, which meant that MB was not informed of the nature of the case against him. We decided, however, that where precautions against terrorism are concerned, the Secretary of State must be permitted, where the needs of security so demand, to avoid disclosing secret material.

The Strasbourg Court had itself indicated approval of the use of closed material coupled with a special advocate in Chahal. The safeguards put in place by the 2005 Act were the best conceivable in the circumstances. We refused permission to appeal to the House of Lords, but I understand that MB has petitioned their Lordships for leave to appeal and it may well be that our

judgment will not be the final chapter in the consideration of the use of closed material.

A little more than a week later we heard a second appeal from a decision of Mr. Justice Sullivan on control orders that was adverse to the Secretary of State. This concerned what purported to be non-derogating control orders against five Iraqi nationals and a sixth man whose identity was in doubt, but who was either Iraqi or Iranian. All were terrorist suspects and the orders made against them were draconian. Each was required to remain in a very small flat, in the case of five of the six, not in an area of his choosing, for 18 hours out of every 24.

The remaining six hours each day was a period of only relative freedom, in that each could not go outside a relatively modest geographical area, nor arrange to meet anyone who had not obtained clearance from the Home Office. Visitors to the flats also had to be vetted by the Home Office, and the flats were subject to random searches by the police. Each subject was restricted to a single land telephone line – the inference being that this would be monitored.

Mr. Justice Sullivan held that these obligations, when taken as a whole, amounted not merely to restrictions on movement but to deprivation of liberty, contrary to Article 5. As such, they could only have been imposed as derogating control orders after a derogation order had been made. In the event the orders were void, and he quashed them. The effect of his judgment was however, stayed, pending appeal to us by the Secretary of State.

This time we rejected the Secretary of State's appeal. We agreed with Mr. Justice Sullivan that the restrictions imposed by the control orders were so severe as to amount to deprivation of liberty.

We refused permission to appeal. The Home Secretary's reaction was to make new control orders, reducing the period of house arrest from 18 hours to 14 hours a day, albeit that he stated that this was less than the security services advised to be necessary. The Home Secretary has petitioned the House of Lords for permission to appeal against our judgment.

At the same time, the controlled persons are able to make a fresh challenge against the new control orders. Continuous litigation of this kind, and the uncertainty that it creates, is manifestly unsatisfactory.

Is there an alternative solution to the imposition of restrictions on liberty based on mere suspicion and on evidence that the suspect is not permitted to see?

Those who oppose the current regime argue that detention cannot be justified unless it can be proved that the detainee has been indulging in terrorist activity and that, if this can be proved, the terrorist should be prosecuted with due process of law. One of the problems with this solution is that evidence against terrorists so often consists of the product of covert surveillance which the security services are not prepared to disclose. Provision for telephone intercepts, themselves an infringement of the Convention right to privacy, is made by the Regulation of Investigatory Powers Act 2000.

This Act imposes a statutory prohibition on the use of such evidence in court. This accords with the wishes of the security services. There are many who believe that this blanket embargo cannot be justified.

Debate about the justification for resorting to exceptional measures to deal with terrorism often focuses on the extreme case of the use of torture. What if a bomb has been placed that is

likely to take countless lives and a terrorist has been caught who knows the location of the bomb?

In such a situation, cannot torture be justified in order to induce the terrorist to disclose where the bomb is hidden? The classic answer is that the law can never justify the use of torture, but in a situation such as that, the executive might be forgiven for acting in a manner that was unlawful. A more difficult question is whether there are circumstances in which evidence obtained by torture can be admissible in a court of law.

This question arose in the second round of litigation that had led to the Lords' famous decision in *A*. You will remember that in the case of *A*, the ground for detention was that the Secretary of State had certified that an alien was reasonably suspected of being a terrorist and reasonably believed to be a threat to national security. On appeal, SIAC had to quash the certificate if SIAC considered that there were no reasonable grounds for such suspicion or such belief. The issue was whether in reaching its decision SIAC could have regard to information which had been, or might have been, obtained by the use of torture. SIAC ruled that it could have regard to such evidence. By a majority of 2-1, the Court of Appeal upheld this ruling.

Their reasoning was as follows. The Secretary of State could not shut his eyes to information which had been obtained by the use of torture. To do so would be contrary to his responsibility for national security. SIAC could not ignore such evidence either, unless its acceptance would amount to an abuse of process.

There would be an abuse of process if the evidence received was the only evidence against a suspect and that evidence had been obtained by the use of torture to which the United Kingdom authorities were party. That was not the case, however.

On appeal to the House of Lords sitting seven-strong, the decision of the Court of Appeal was unanimously reversed. The House held that the Court of Appeal had been wrong to equate the position of SIAC with that of the Secretary of State. The issue for SIAC was whether SIAC had reasonable grounds for belief, not whether the Secretary of State had such grounds, and SIAC had to reach its decision on admissible evidence. Evidence obtained by torture was not admissible.

But what was of particular interest in relation to the decision of the House of Lords was a critical issue as to burden of proof. Was the burden on the detainee to establish that evidence had been obtained by torture in order to get it excluded, or was SIAC bound to exclude evidence unless satisfied that it had not been obtained by torture?

This question had to be considered having regard to the fact that the detainee might well not even be aware of what evidence was being held against him as the result of the use of closed material.

A minority of three, but a powerful minority as they were Lord Bingham, Lord Nicholls and Lord Hoffman, held that if there were grounds to suspect that evidence might have been obtained by torture, SIAC should reject the evidence unless satisfied that this was not the case. The majority, Lords Hope, Rodger, Carswell and Brown held that SIAC should admit the evidence unless satisfied, on balance of probability, that it had been obtained by torture.

You will appreciate that this was a significant victory for the security services, for when information is received from third parties, hard evidence that it was obtained by the use of torture is unlikely to be forthcoming. It is perhaps mischievous to wonder

whether the voting in the House of Lords might have been at all affected by the terrorist atrocities of the 7th of July.

Here I propose to leave the jurisprudence of the United Kingdom. In summary, I would comment that the Human Rights Act has unquestionably circumscribed both the legislative and the executive action that would otherwise have been the response to the outbreak of global terrorism that we have seen over the last decade. How about the position in the United States?

The United States

In the United States, the protection of the individual from executive action lies in the Constitution. That protection has been tested since the events of 9/11.

Within days of the attacks that took place on that day, Congress passed a joint resolution authorizing the President to "use all necessary and appropriate force" against those responsible for 9/11 "in order to prevent any future acts of international terrorism against the United States by such x x x persons."

A few weeks later, the Patriot Act significantly reduced the safeguards on the use by the intelligence services of covert surveillance.

More dramatic were the steps taken by the President in the exercise of executive authority. The administration promulgated a Military Order which claimed authority to detain without time limit any non-citizen whom the President had "reason to believe" was a member of Al Qaeda, was involved in international terrorism or was involved in harboring terrorists. The same Order authorized trials of non-citizens by military commissions. Several hundred persons were removed from Afghanistan, where they had been

captured, to detention at the United States Naval Base at Guantanamo Bay in Cuba.

The attraction of this location was that it was believed to be outside the jurisdiction of the United States courts so that an application for *habeas corpus* by a non-national would not lie.

At first this stratagem proved successful. The District Court of Columbia ruled that it had no jurisdiction over aliens detained at Guantanamo. These aliens included a number of British subjects, one of whom was a Mr. Abbasi. He, through relatives, instigated judicial review proceedings in the English court. He sought mandatory order that the Foreign Secretary should intervene on his behalf. The Foreign Secretary objected that the case was not justiciable as it called for a review of his conduct of foreign affairs and this fell outside the jurisdiction of the court. He also contended that the English court would not investigate the legitimacy of the actions of a foreign sovereign state. These submissions were accepted by the judge of first instance, who refused Mr. Abbasi's permission to seek judicial review. In the Court of Appeal, we overruled him and we heard Mr. Abbasi's application ourselves.

We held that, where human rights were engaged, the English court could investigate the actions of a foreign sovereign state. It necessarily has to do so in asylum cases.

We heard the case at the time when the District Court of Columbia had ruled that the United States courts had no jurisdiction over aliens detained at Guantanamo. After reviewing both English and United States authority, we commented:[7]

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7. [2002] EWCA Civ 1598 at paragraph 64.

> we do not find it possible to approach this claim for judicial review other than on the basis that, in apparent contravention of fundamental principles, recognized by both jurisdictions and by international law, Mr. Abbasi is at present arbitrarily detained in a 'legal black hole' x x x. What appears to us to be objectionable is that Mr. Abbasi should be subject to indefinite detention in territory over which the United States has exclusive control with no opportunity to challenge the legitimacy of his detention before any court or tribunal.
>
> It is important to record that the position may change when the appellate courts in the United States consider the matter.
>
> The question for us is what attitude should the courts of England take pending review by the appellate courts of the United States to the detention of a British citizen the legality of which rests (so the decisions of the United States courts so far suggest) solely on the dictate of the United States Government and, unlike that of United States citizens, is said to be immune from judicial review.

We decided that the court could do no more than require our Secretary of State to give consideration to Mr. Abbasi's predicament. We could not dictate to him how we should conduct foreign relations with the United States. As his evidence was that he was already in negotiations about the position of British detainees, we made no order against him.

Our judgment was subsequently referred to in a Brandeis brief, which was placed before the United States Supreme Court in *Rasul v. Bush,*[8] but I would not be so bold as to claim that this had any influence on the decision of that court.

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8. (2004) 542 US 466.

By a majority of 6-3, the Supreme Court held that foreign nationals held at Guantanamo Bay could use the US court system to challenge their detention. This decision struck an important blow for the rule of law in the United States. The merits of the detainees' claims for wrongful detention remain to be determined.

A second important decision of the Supreme Court in this area, *Hamdi v. Rumsfeld* [9] related to a US citizen, Mr. Hamdi, who had been declared an "illegal enemy combatant" by the United States Government and detained without trial, initially at Guantanamo and subsequently at military prisons on the United States mainland. His father filed a *habeas corpus* petition.

The Supreme Court held by an 8-1 majority that Hamdi could not be held indefinitely at a US military prison without the assistance of a lawyer and without an opportunity to contest the allegations against him before a neutral arbiter.

The Pentagon announced that it was establishing a Combatant Status Review Tribunal where detainees could challenge their enemy combatant status. They would, however, only have the assistance of a personal representative assigned by the Government, not a lawyer, and they would have to overcome a "rebuttable presumption in favor of the Government's evidence. On June 29 of this year (2006), the Supreme Court gave its decision in the important case of *Hamdan v. Rumsfeld*,[10] a Yemeni national detained at Guantanamo, challenged the jurisdiction of the military commission before whom he was due to be tried for conspiracy "to commit x x x offenses triable by military commission." The

9. (2004) 542 US 507.

10. (2006) 548 US 557.

Supreme Court upheld this challenge, holding that there was no basis for ousting the jurisdiction of the Federal Courts.

The military commission, both in structure and procedure, violated the provisions of both the Uniform Code of Military Justice and Article 3 of the Third Geneva Convention.

These challenges to executive action in the United States have related solely to attempts to oust the jurisdiction of the courts. Thanks to the Supreme Court those attempts have failed. The substantive measures that have given rise to jurisdictional challenge purport to apply to terrorists-suspects the right to detention that exists in relation to enemy combatants in time of war. Wars come to an end, but the end of what has been called the war on terrorism is not in sight. We have yet to see whether, and in what circumstances, indefinite detention of terrorist-suspects is compatible with the United States Constitution.

Very recently, a District Judge has ruled unlawful, as contrary to the Constitution, electronic surveillance carried out by the executive without the authority of the court. Her decision is, I understand, to be challenged on appeal. I shall follow the outcome of that appeal with interest.

So far, this lecture has been concerned with a historical survey of what the press like to picture as strife between the judge and the executive in relation to dealing with terrorism. In England and Wales there is no such strife. Policy is for the executive, but their policy must respect the rule of law. It is not for the judge to attempt to influence policy. The judge's job is simply to apply the laws that are made by a democratically elected Parliament. I propose, however, to conclude this lecture by explaining why I am content that the laws which I have to apply when dealing with terrorism include the Human Rights Act.

In the United Kingdom, the executive and the legislature have sought to deal with the threat of terrorism by imposing restraints on the freedom of those the executive suspects, but cannot prove, are involved in terrorism.

The Government recognizes, however, that the extent to which it is free to do so is circumscribed by the Human Rights Convention and that Parliament has determined that it should be the duty of the courts to rule on whether or not legislation is compatible with the Convention and to strike down secondary legislation or executive action that infringes the Convention. I believe that this is a satisfactory state of affairs.

The desirability of preventing terrorists from blowing up innocent citizens is one that we can all appreciate. We recently had a dramatic demonstration of the apparent success of the Security Services in doing this with the arrest of 24 young men alleged to have been plotting to blow up 10 airliners bound from the United Kingdom to the United States. But security operations such as these deal with the product of terrorism, not the cause.

Terrorism is spawned by ideology and the ultimate battle is one of ideology. John Reid, the Home Secretary, in a recent speech, said that we were living through what was "at heart an ideological struggle"; a struggle between democracies and "the core values of a free society" on the one hand and "those who would want to create a society which would deny all the basic individual rights we now take for granted" on the other.

At a lecture given at the London School of Economics earlier this year, Shami Chakrabarti, the Director of the human rights group Liberty, observed "the philosophy of post [Second World] war democrats is that of fundamental rights, freedoms and the rule of law. This is the legacy of Eleanor Roosevelt and x x x of

Winston Churchill" x x x. "If our values are truly fundamental and enduring, they have to be relevant whatever the level of threat."

I share these sentiments, coming from two very different quarters.

Respect for human rights must, I suggest, be a key weapon in the ideological battle. Since the Second World War, we in Britain have welcomed to the United Kingdom millions of immigrants from all corners of the globe, many of them refugees from countries where human rights were not respected. It is essential that they, and their children and grandchildren, should be confident that their adopted country treats them without discrimination and with due respect for their human rights. If they feel that they are not being fairly treated, their consequent resentment will inevitably result in the growth of those who, actively or passively, are prepared to support the terrorists who are bent on destroying the fabric of our society. The Human Rights Act is not merely their safeguard, it is a vital part of the foundation of our fight against terrorism.