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The Elements of Law

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THE ELEMENTS OF LAW, by *Thomas E. Davitt, S.J.*

Little, Brown & Co., Boston, 1959. Pp. 370. \$9.00

Reviewed by

JOHN C. H. WU*

This book is an introductory book on jurisprudence, which the author identifies with the philosophy of law. The book is divided into four parts. The first part deals with "man-made law," the second with

acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Engel v. Vitale*, 18 Misc.2d 659, 660, 191 N.Y.S.2d 453, 459 (Sup. Ct. 1959). The *Engel* case is a learned and exhaustive opinion by Meyer, J., which holds that the noncompulsory recital of this prayer by public school children pursuant to a Board of Education resolution, is not violative of the Federal or State Constitution. At this writing an appeal is pending in the Appellate Division. See discussion of this case in 6 CATHOLIC LAWYER 164 (Spring 1960).

³⁹ DUBAY 162-64.

⁴⁰ *Id.* at 165-68.

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"man-discovered law," the third with "integration of man-made law," and the fourth with "background of law." The first part has six chapters, treating of the nature, end, content, source, sanction and obligation of man-made law. The second part has five chapters, treating first of references, in judicial decisions and legislative enactments, to a law not man-made, then of the nature of man-discovered law, its content, source and end, its sanction and obligation, and finally its relation to man-made law. The third part has eight chapters, treating first of principles and patterns of

⁴¹ *Id.* at 163. President Eisenhower's statement to the 1955 White House Conference on Education said that education "should be under the control of the family and the locality. It should not be controlled by a central authority." *Ibid.*

integration, then of constitutions, crimes, torts, property, contracts and equity. The fourth part has two chapters, treating of law as an instrument of government, and political union and the common good.

It is clear that the book has a wide coverage. The only regrettable omission is the law of domestic relations, especially as this particular topic is announced along with the others on page 154.

It is a work of solid scholarship and clear thinking. The chapters on "man-discovered law" constitute the most original part of the book. The author is bold enough to drop the phrase "natural law" and substitute for it the phrase "man-discovered law." Many of us may not agree with him on the necessity or desirability of doing this. This reviewer, for one, does not. But the author has his reasons which are far from flippant. Let me quote:

The phrase "natural law" has had a checkered history. It is open to many diverse, contradictory and misleading interpretations, some of which we have seen. Used even as synonymous with man-discovered law as here explained, it does not express the meaning it is intended to convey: a *naturally promulgated* law discoverable in its promulgation.¹

He is aware that some words, such as "right" and "state" have to be retained even though they are inexact and somewhat unsatisfactory, because "their use has become so common that any attempt to root them out of men's minds would be futile." But he thinks that the phrase "natural law" does not belong to this class. "In fact, a great part of the legal world despises it and looks upon it as meaningless. Even those who do use it must have recourse to

other expressions to give it meaning — if they do not merely mouth the phrase as a magic formula." Then comes the challenging question:

Would it not therefore be better to expend our efforts trying to find better ways of expressing what man-discovered law is than to retain the phrase "natural law" tenaciously and then squander our time jousting with the shadowy apparitions which have been conjured up by our use of it?²

After quoting a long passage from Judge Jerome Frank, who also complained of "the misleading connotations and embarrassing historical associations of the words 'Natural Law,'" the author goes on to say:

The thing discussed is more important than the words used to discuss it. If an idea recurs in legal thinking as persistently as does "natural law" and if it is developed in so many diversified ways and has so many different meanings, only one conclusion can be drawn: there is some definite datum that men are trying to explain and its explanation is intricate and complex.³

This definite datum the author identifies with the "demands expressed by a man's nature."⁴ He thinks that this expression "brings out more accurately than 'natural law' what it is that is being referred to: a law naturally promulgated through men's dynamic nature."⁵

I do not think that it is so important to drop the term "natural law" and adopt instead "man-discovered law" or "demands expressed by a man's nature." It is merely a question of semantics. The real difficulty lies in securing an agreement among jurists of different philosophies and ideologies as

² *Ibid.*

³ *Id.* at 150.

⁴ *Ibid.*

⁵ *Ibid.*

¹ DAVITT, *THE ELEMENTS OF LAW* 149 (1959).

to what demands expressed by human nature are truly fundamental and ontologically rooted. The author is right in saying that the word "natural" refers to *natural promulgation*. "What is called natural law is actually a natural *promulgation* of eternal law."⁶ So far I agree. But I think that there is another connotation to the word "natural"; it refers to the *ontological givenness*, which the author rightly stresses in his exposition of the nature of "man-discovered law."

But apart from this question of terminology, there is no question that the author's presentation has the merit of translating the essentials of what John Wild calls the "authentic" tradition of natural law into the language of the twentieth century. The chapter on the content, source and end of "man-discovered law" is particularly valuable. "A man's natural drives," the author says, "are indicative of the demands of man-discovered law."⁷ These drives belong to various levels of human existence. Let me quote one passage in order to illustrate how skillfully the author renders Thomism into modern language:

Just as the rosebush strives to stay alive by seeking water through its roots and sunshine through its leaves, in like manner every man has an elementary drive to preserve himself in existence. Since the race of men must continue if there are to be men, every man, like all other animals, has a drive to unite sexually to keep the race in existence. And, since men need other men, each has a drive to live in community with others. Finally, since men are uniquely endowed with the powers of knowing and willing, they have a drive to use these powers in decision-making existence. These drives re-

garding the various levels of human existence, then, take their meaning from men's master drive for their highest development.⁸

After dealing adequately with the drives regarding the lower levels, the author comes to the Creator, who is at once the source and the end of natural law. He maintains that to speak of a "fundamental," "natural," or "higher" law without relating it to the Creator-lawmaker would be "to make of it a blind, irrational force that is in no way a law."⁹ He further asserts:

If there is a relation between the Supreme Being and law, between the Creator and certain fundamental claims, it must be based on the fact that he has created men *whose natures express* demands that are part of a law.¹⁰

That this insight, whatever may be its actual origin in the author's mind, is logically independent of the Christian revelation, may be illustrated by a stanza from an ancient Chinese poem, which both Confucius and Mencius warmly commended:

Heaven in giving birth to the multitudes of people,
To every faculty and relationship annexed its law:
The people possess this normal nature,
And they consequently love its normal nature.¹¹

The Confucians call this Heaven-made law, which is affixed to human nature, by the name of *Tao*. This, I submit, corresponds to what the author calls "man-discovered law."

Of all parts of the book the first part, dealing with "man-made law," is the least

⁶ *Id.* at 117.

⁷ *Id.* at 121.

⁸ *Id.* at 120.

⁹ *Id.* at 128.

¹⁰ *Id.* at 132.

¹¹ See Sih, *The Natural Law Philosophy of Mencius*, 31 THE NEW SCHOLASTICISM 317, 320 (1957).

satisfactory. I have serious reservations on what the author says about promulgation:

Law, then, described *in its function* as a guide for the people, is the sum of rules promulgated. . . . Defined, however, as it is *in itself*, law is a directive judgment of those with authority ordering means necessary for the common good.¹²

It seems that here the author has introduced a gratuitous and confusing distinction between the other essential elements of the notion of law and promulgation, a distinction which is absent in St. Thomas' definition: "An ordinance of reason for the common good, made by him who has care of the community, and promulgated."¹³ The very notion of law supposes both the law-making authority and law-obeying subject. It must in some way be communicated to the latter before it can be called "law." What only exists in the mind of the authority may indeed be a "plan," but not "law." The author seems to be under the influence of John Austin and Holland on this point. I have dealt with this point at some length in my work on Jurisprudence¹⁴ to which I wish to refer the reader.

Another point on which I cannot agree with the author is with regard to his statement that it is "questionable whether the phrase 'international law' has any valid legal meaning beyond that of contractual agreement." He says further, "if law presupposes

governmental authority, international law must be enacted by an international government."¹⁵ Now, to my mind, law presupposes authority, but not *governmental* authority. That international law has an independent existence even though it is, in many cases, administered by national courts, I have tried to show in my article on "The Common-Law Approach to International Law."¹⁶ I cannot enter upon the question here.

In addition, the chapter on the "sanction of man-made law" seems to me excellent. The author's treatment of "intrinsic sanction" is a valuable contribution in this field. Most lawyers are accustomed to think of sanction in terms of "extrinsic sanction." The author calls attention to some aspect of it here which must appear to many as new, but which is nevertheless real.

The third part furnishes interesting and profitable reading. Here the author's legal erudition is clearly shown. He has his definite views on all the fundamental institutions of the law. Whether you agree with him or not, he talks as a full-fledged lawyer. The chapter on equity is particularly happy. He thinks of equity as a "bridge between philosophical and legal thinking."¹⁷ Further "equity is standing confirmation that man-discovered law is a prior and more fundamental law. . . ."¹⁸

¹² DAVITT, *THE ELEMENTS OF LAW* 15 (1959).

¹³ *SUMMA THEOLOGICA*, I-II, q. 90, art. 4.

¹⁴ WU, *CASES ON JURISPRUDENCE* 224-40 (1958).

¹⁵ DAVITT, *op. cit. supra* note 12, at 66.

¹⁶ 5 *CATHOLIC LAWYER* 295-303 (Autumn 1959).

¹⁷ DAVITT, *op. cit. supra* note 12, at 308.

¹⁸ *Ibid.*