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# NATURAL LAW IN THE MODERN EUROPEAN CONSTITUTIONS

*Gottfried Dietze*

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THE SECOND WORLD WAR has brought about one of the most fundamental revolutions in modern European history. Unlike its predecessors of 1640, 1789, and 1917, the revolution of 1945 was not confined to one country. Its ideas did not gradually find their way into the well-established and stable orders of other societies. It was a spontaneous movement in the greater part of a continent that had traditionally been torn by dissension; and its impact was immediately felt by a society which was in a state of dissolution and despair. The revolution of 1945 had a truly European character.

There was no uprising of a lower nobility as in 1640; of a third estate as in the French Revolution; of the proletariat as in Russia. Since fascism had derived support from all social strata and preached the solidarity of all citizens of the nation, there could hardly be room for a class struggle. Finally, this was not a revolution against some *ancien régime*. The fascist governments denounced the past and claimed to be revolutionary. Of recent origin, they received their authority from the very people who were now denouncing them. Those who survived the war could hardly blame their forefathers for their misery. A strange revolution indeed: there was no former generation or class to blame. Here was a refutation of the consequences of one's own negligence or intent, an agonizing appraisal of one's own guilt. The liberation from fascism did not free the individual from his bad conscience, nor did the classic thought that democracy inevitably leads to dictatorship comfort the men of 1945.

No wonder this revolution was bare of enthusiasm. No better future was in sight. The millennia of the *Imperium Romanum*, the *Tausendjährige Reich*, the *Ordre Nouveau* had failed to arrive. Nobody dared suggest a new millennium, even of the democratic brand.<sup>1</sup> All knew that democracy

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1. For the political crises that confronted constitutional democracies before the rise of authoritarianism, see, for Italy: LUIGI VILLARI, *THE AWAKENING OF ITALY* 1-207 (1924); C. SFORZA, *MAKERS OF MODERN EUROPE* 319 ff (1928). For the Weimar Republic: C. B. HOOVER, *GERMANY ENTERS THE THIRD REICH* 32-95 (1933); R. T. CLARK, *THE FALL OF THE GERMAN REPUBLIC* (1935); E. A. MOWRER, *GERMANY PUTS THE CLOCK BACK* (1939); WILLIBALT APELT, *GESCHICHTE DER WEIMARER VERFASSUNG* (1946); FERDINAND FRIEDENSBURG, *DIE WEIMAR REPUBLIK* (1946). For the Third Republic: ROGER PINTO, *ÉLÉMENTS DE DROIT CONSTITUTIONNEL* 269-99 (1948); PAUL FARMER, *VICHY, POLITICAL DILEMMA* (1955).

had paved the way for dictatorship only a few years before. Mussolini, Hitler, and Pétain attained power legally under democratic constitutions.<sup>2</sup> Besides, by the end of the war the meaning of democracy had become more and more confused. Not only had Goebbels called the Hitler régime a democracy, but the Communists also set up "peoples' democracies" in Eastern Europe, maintaining that their forms of government were more democratic than those of the West. The question of legitimacy was raised. The *résistance* was generally accepted as a justified illegality against some fraudulent legality. But was democracy the panacea? Before the advent of fascism, most people agreed that legitimacy could only be derived from the people as the *suprema potestas*. The principle *vox populi vox dei* was not subject to much criticism. But had this deistic concept not resulted in a positivism which not only made dictatorship possible, but also served as a most powerful weapon in the hands of authoritarian rulers? In 1945 skepticism about democracy ran as high as hatred of dictatorship. A general apathy was the consequence. The *fin de siècle*, predicted since the last century, seemed to have arrived. European society looked like an old man who has come to realize the futility of a lifetime and, full of disappointment, said "no" to everything. No fascism, no communism, no free enterprise, no planned economy were wanted. Friedrich could very well speak of the "negative" revolution after the Second World War.<sup>3</sup>

Nevertheless, this negativism constituted something positive. No matter how much apathy and skepticism existed in 1945, every revolution, as an immediate reaction against something, has immediate ends and aims. The "negative" revolution of 1945 was negative indeed, insofar as it was mainly a reaction against a juristic positivism which under the dictatorships had been carried to extremes. Quite naturally, refuge was sought in natural law, which

2. Mussolini was asked by the king to form a new cabinet on Oct. 29, 1922, following the failure of former Prime Minister Salandra to form a cabinet. He was appointed Prime Minister the next day. His first cabinet included members of all parties, except the Marxist parties. On Nov. 18 Mussolini obtained a 306:116 vote of confidence in the Chamber, and on Nov. 25 he was granted plenary powers by a vote of 275:90. Hitler was appointed Chancellor on Jan. 30, 1933, by President Hindenburg. His first cabinet was a coalition cabinet with the German Nationalists. The Enabling Act of March 24, 1933 (RGBl. I,141) was passed by the Reichstag by a vote of 441:94, against the votes of the Social Democrats. There were no votes from 81 communists and 26 socialists, for they were either imprisoned or in hiding. In France, the act for calling the National Assembly for the purpose of amending the constitution of the Third Republic was passed in the Senate by a vote of 225:1, in the Chamber of Deputies by a vote of 385:3. The communists were barred from voting. The National Assembly convened on July 10, 1940, and enacted a law giving plenary powers to Pétain. Even if one counts against this act the votes of the communists, who were not present, it would have passed with a comfortable majority. The vote was 569:80. No party voted en bloc against the act.

3. Carl J. Friedrich, *The Political Theory of the New Democratic Constitutions*, 12 *REVIEW OF POLITICS* 215 ff. (1950).

promised to assure the restoration of the dignity of man in a political society. Consequently, people returned to the principles of 1640 and 1789. In spite of the apparent weakness inherent in democracy, the Third and Weimar Republics appeared as a golden age when compared with the Fascist state, the Third Reich, and the Vichy régime. Of all governments, democracy was still believed to be the one that was most likely to guarantee the individual's freedom and happiness. The citizens of a society seemed to be the best guardians of their rights.

However, the period after the war was also characterized by a rejection of the merely reasonable and by a resurgence of faith. The rationalist parties which had their ideological roots in the age of reason, like the Liberals and Social-Democrats in Germany, the Radical-Socialists and Socialists in France, and their Italian counterparts, were on the decline. On the other hand, Christian-Democratic parties became more influential. The brotherhood of those who believed in utilitarianism and economic determinism was being replaced by a community of Christians. The term "internationalism" was avoided and the idea of a common culture emphasized. This replacement of the consciousness of a common economic interest by that of a common cultural heritage led to a revival of the European idea.

This was, then, the dualism of the postwar revolution: the break with a positivism that had reached extremes under the dictatorships was accomplished through a revival of natural law in its most comprehensive sense. While the natural law concept of the 17th and 18th centuries was accepted by many, it was rejected—as an outgrowth of mediaeval nominalism and a stepping stone to 19th century historicism and positivism which in turn paved the way for the barbarism of our century—by those who believed in faith rather than man's reason. They were theists rather than deists and wanted to revive the natural law of the Middle Ages. Seeing nothing in the rights of man of 1789 but a product of a rationalism that had become more and more atheistic and that considered human reason as the source of all revelation, they believed in a natural law which was derived from the order created by God, in which man's nature was the source of, and his reason nothing but a means to, revelation. Natural law was not just some product of human reason, but a system of norms which through reason could be found in the order erected by God, in which God was both *principium* and *finis*. They believed in a law which was not *quod apud omnes gentes observatur*—law that is valid with all peoples as positive law—but a law which Plato had referred to as the law in itself, νόμος κατ' αὐτό τὸ ὄν τοῦ νόμου. Cicero had said of it that it was the same in Rome and Athens, unchangeable and eternal at all times and for all peoples, the voice of God himself, which could not be abolished; nor could its validity

be contested by the resolution of a senate or a plebiscite.<sup>4</sup>

With the resurgence of natural law came a desire for weak government as a guarantee of the existence of natural rights. This is not surprising. Natural law had not only been cast aside by the positivists,<sup>5</sup> but through the concentration of power in the hands of the dictators, it had also become either totally banned or twisted beyond recognition.<sup>6</sup> The *quaestio iuris iuris* had been answered by the positivists with the formula "law is law."<sup>7</sup> Some jurists even precluded that question by identifying law and state.<sup>8</sup> Under these doctrines the dictators were able to consider all their actions as right and just. This led to a denial of individual rights and, considering the omnipotence of the dictator, to an absence of constitutionalism.<sup>9</sup>

## II

NATURAL LAW thus played a decisive role in the quest for constitutionalism. It found expression in the wave of constitution-making which swept the Continent after 1945, and which in its extent can be compared to similar tendencies after the Declaration of Independence, the French Revolution, and the liberation of the South American colonies. Constitution-makers even went

4. De Republica, III, 22.

5. Very typical is Windscheid in his Greifswald university address of 1854: "The dream of natural law is over, and the titanic attempts of the newer philosophy were not able to storm into heaven." Karl Bergbohm, in his *JURISPRUDENZ UND RECHTSPHILOSOPHIE* (1892), set out "to eradicate the weed natural law stock and barrel." In spite of its rejection of natural law, Bergbohm's book offers an excellent survey of the history of natural law. But already Kohler could state in his *RECHTSPHILOSOPHIE* at 53 (2d ed. 1917) that contrary to his intention, Bergbohm demonstrates the untenability of positivism.

6. Thus the nazi government maintained that the concentration camps served humanity because they separated the bad citizens from the good and valuable members of society. Euthanasia and compulsory sterilization were justified in the interest of a higher humanity which prescribed the elimination of "ballast" for the sake of the present and future generations. Christian concepts were blamed for maintaining misery. Ironically enough, there was written above the gate to Buchenwald concentration camp, "To Each His Own" (*Jedem das Seine*).

7. This formula precludes the possibility of judging a law by the postulates of other norms. From a non-positivist point of view, the principle "Gesetz ist Gesetz" must appear as untenable as the principle "Mark ist Mark," which was announced by German jurists after the First World War, in view of the fact that the inflation had reduced the original value of the mark to about one millionth.

8. Especially HANS KELSEN, *REINE RECHTSLEHRE* 117 ff. (1934). The identification of law and state means to Kelsen that the state can do no wrong: "A wrong of the state must under all circumstances be a contradiction in terms." *HAUPTPROBLEME DER STAATSRICHTSLEHRE* 249 (1923). See also *id.* at 248, 449; *ALLEGEMEINE STAATSRICHTSLEHRE* 107-110 (1925).

9. Already the Declaration of the Rights of Man of 1789 recognized the protection of the individual's rights and the separation of powers as premises for constitutionalism: "Toute société dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a point de Constitution" (art. 16).

so far as to transmute the right of revolution into constitutional norms,<sup>10</sup> something which so far had been considered a contradiction in terms. Natural law found expression in the French Constitution of 1946, the Italian Constitution of 1947, and the German Basic Law of 1949. But whereas the former are content with an assertion of historical natural law, there break through, in the Bonn constitution, strong elements of the Aristotelian-Scholastic concept of natural law.

As could be expected from a movement that was a reaction against one common foe, namely, fascist authoritarianism, all three constitutions embody certain common ideals. They assert a belief in the brotherhood of man.<sup>11</sup> The French preamble "solemnly reaffirms the rights and liberties of man and of the citizen consecrated by the Declaration of Rights of 1789." Italy affirms the rights of Mazzini's good citizen.<sup>12</sup> Germany protects the dignity of man (Art. 1), abolishes capital punishment (Art. 102) and compulsory military service (Art. 4). Finally, all three constitutions set up a form of government which under the doctrines of the age of reason seemed most likely to effectuate the individual's happiness, namely, democracy.

The importance attributed by the constitution-maker to the principles of natural law can be seen from the fact that the transmutations of some of those principles into positive law are made immune from legal change. The French and Italian constitutions provide that the republican form of government may not be the subject of an amendment to the constitution (Art. 95, 139 respectively). The Basic Law prohibits amendments "by which the organization of the federation into states, the basic co-operation of the states in legislation or the basic principles laid down in articles 1 and 20 are affected" (Art. 79). The German constitution thus goes beyond its French and Italian counterparts. Not only is the democratic form of government permanently secured, but also the individual's fundamental rights and the separation of powers and federalism—two means for the protection of those rights.

This distinction is fundamental. In France and Italy, the democratic *pouvoir constituant* protects itself through the perpetuation of democracy (or republicanism). In Bonn, on the other hand, the democratic constitution-maker, while making democracy immune from the amending process, also protects the individual and thus guarantees his freedom from democracy. Since under all three constitutions the amending power is vested in the legislature,

10. Constitution of Hesse of 1946, art. 147; constitution of Brandenburg of 1947, art. 5; constitution of Bremen of 1947, art. 19.

11. See, for France, preamble; Italy, art. 11; Germany, preamble and art. 1 and 2.

12. Statement of Ruini, rapporteur of the Commission for the Constitution. *Progetto di Costituzione della Repubblica Italiana, Relazione del Presidente della Commissione, 1947* TIPOGRAFIA DELLA CAMERA DEI DEPUTI 4, col. 1 (Rome).

this most democratic branch of government is more likely to infringe upon the rights of the individual through an amendment under the French and Italian constitutions than under the Basic Law.

Similarly, the legislatures in France and Italy may restrict those rights according to the express provisions of the constitution. The preamble of the French constitution protects the rights of 1789 only to the degree that they are "recognized by the laws of the Republic." In Italy, the scope of the individual's rights—highly proclaimed in the text of the constitution—is left to the discretionary definition of the legislator.

Under the French and Italian constitutions, which start out from the premise that the legislature as the reflection of the people's will can do no wrong, the individual, of whom Rousseau once said that he is born free and in chains everywhere, can actually be a slave and be put in chains by the legislature. But under democracy, as envisaged by the Basic Law, man must be free. The framers of the French and Italian constitutions, believing in the infallibility of the *volonté générale*, accepted the emancipation of man through popular government without qualifications. The constitutional convention in West Germany was aware of the dangers inherent in democracy. While regarding popular government as most conducive to the protection of the individual, the delegates at Bonn were distrustful of the infallibility of human reason and more cautious toward democracy. The French and Italian constitutions consider the principles of historical natural law as sufficient for the protection of man. The Basic Law maintains that these principles, while cherished, might not suffice to guarantee the individual's rights. This subtle difference is reflected in the preambles. The French constitution speaks of the principles of 1789, the Italian of "fundamental principles" as they were understood by Mazzini, namely, the principles of the Declaration of the Rights of Man.<sup>13</sup> The German people, on the other hand, enacted the Basic Law "conscious of their responsibility before God and mankind." Not only man's subjectively conceived natural law is being taken into consideration, but God's own law, an objective, ever-present norm, the *lex aeterna* to which the *lex naturalis* is subordinate. In the Basic Law, there is evident a belief in the *universale ante rem*. The constitution, its institutions and those living under it appear as *universale in re*, and not just as something independent of a higher norm.<sup>14</sup>

13. *Ibid.*

14. See HEINRICH KIPP, *NATURRECHT UND MODERNER STAAT* 11-39 (1950).

## III

THIS INSERTION of natural law concepts in the Basic Law cannot primarily be considered as a reaction against or an improvement of the constitutions of France and Italy. Of course, it is apparent that these constitutions with their stress upon democracy and legislative supremacy, were immediate reactions against a régime considered brutal because of its denial of popular participation in government, and the Basic Law, in turn, was a conservative reaction against the democratic excesses of those constitutions. However, the Basic Law can rather be considered as marking the conclusion of a development that had been going on in the German states since the end of the war. The Bonn constitution is a national mirror of the modern state constitutions, reflecting their common features as well as their differences.<sup>15</sup>

In all these constitutions, there is evident a resurgence of natural law—and of its dualistic character. Whereas some states, mainly those of the Soviet zone, were content with an assertion of the principles of the French Revolution, most West German constitutions also contain elements of the older natural law.

Again, all constitutions, as a reaction against the Hitler régime, embody certain common ideals. They proclaim the equality of man, the protection of the individual's basic rights, and self-government. Also, most of these constitutions protect these principles from the amending process. The constitution of Saxony-Anhalt provides that "constitutional amendments shall not infringe upon the democratic principles of the constitution and the republican-parliamentary form of government" (Art. 58). The constitution of Brandenburg contains a similar provision (Art. 35). Finally, that of Saxony prohibits amendments that are incompatible with democracy and humanity (Art. 97). A protection of the individual from democracy is indicated here. However, since the concept of humanity is not defined, it appears doubtful whether the individual could derive any rights from this provision. Like other Eastern constitutions, that of Saxony seems to accept the Rousseauistic doctrine that popular government is of necessity humane, and that a conflict between the

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15. The following states (Länder) passed new constitutions in the years after the war: Württemberg-Baden (1946), Bavaria (1946), Hesse (1946), Thuringia (1946), Saxony-Anhalt (1947), Brandenburg (1947), Mecklenburg (1947), Saxony (1947), Rhineland-Palatinate (1947), Baden (1947), Württemberg-Hohenzollern (1947), Bremen (1947). The Basic Law was drafted in 1948.



interests of the individual and society is not possible.<sup>16</sup>

The picture is different in West Germany. The constitution of Baden prohibits an amendment of the "vital basic parts of a democratic constitution" (Art. 92). At first glance, this seems nothing but a repetition of the Eastern practice of making democracy immune. However, according to the preamble the people of Baden, when making the constitution, acted as "trustee of the old tradition of Baden." This tradition is that of a democratic *Rechtsstaat*, in which the protection of the individual is considered the end of popular government. Other West German constitutions do not deviate from this principle and express it in even more unequivocal terms. The constitution of Hesse, while exempting the democratic, republican-parliamentary form of government from the amending process, also prohibits the establishment of any form of dictatorship (Art. 150). This includes the dictatorship of a democratic majority: Art. 26 says that the individual's basic rights are unchangeable. The Bavarian constitution exempts the democratic principle from amendment (Art. 75) and prohibits a restriction of the basic rights guaranteed under the constitution (Art. 98). Württemberg-Baden excludes amendments which would be in contradiction to the spirit of the constitution, a spirit which is quite similar to that of the constitution of Baden.<sup>17</sup> Rhineland-Palatinate, while protecting the democratic form of government, expressly secures the individual's liberty from the amending power (Art. 129 in connection with the preamble; Art. 1 and 74). Finally, the constitution of Bremen, omitting a reference to democracy, declares the immunity of the individual's basic rights from the amending process (Art. 20).

Summarizing, we may say that the makers of the constitutions in the East were content with putting the democratic form of government beyond the jurisdiction of the amending power. Those in the West, while protecting democracy, primarily gave consideration to the rights of the individual. This difference is as fundamental as that observed between the French and Italian constitutions and the Basic Law. In the Soviet zone the people, by precluding an amendment of the democratic form of government, were merely perpetuat-

16. Compare, in this connection, article 99 of the constitution of Mecklenburg: "All efforts to abolish or restrict the democratic form of government or the basic rights of the citizen are unconstitutional. They are to be punished as a crime against the constitution. . . . Details shall be regulated by law. Unconstitutional tendencies do not become legal through the observance of the forms that are prescribed by this constitution." Here the question arises whether the restriction extends to the amending power. The answer seems to be in the negative because of the provision, "Details shall be regulated by law." (*Argumentum a maiori ad minus*).

17. The partition of the German southwest into the states Württemberg-Baden in the north and Württemberg-Hohenzollern and Baden in the south was due to the occupation of the northern part by the United States, and of the southern part by France. The former states of Baden and Württemberg have a long democratic tradition.

ing popular majority rule, or the republican-parliamentary form of government. In the West the people, acting as a constituent group, while securing their future participation in government, let it be known that democracy is only a means for the good of the individual. Consequently, they protected man as much from a despotism of the popular majority as from that of a monarch or an aristocracy. The people were emancipating the individual rather than themselves as a group. Since in the German state constitutions the amending power is vested in the legislature,<sup>18</sup> this branch of government is, in respect to the restriction of basic rights through amendment, more powerful in the East than in the West.

Similarly, those rights, while proclaimed in the Eastern constitutions, are subjected to restrictions by the legislature, which is considered "the supreme democratic organ of the state."<sup>19</sup> On the other hand, the West German constitutions restrict the legislative body as much as they restrict the executive and judiciary. Under Art. 20 of the constitution of Bremen and Art. 26 of that of Hesse, the provisions guaranteeing private rights are directly binding upon the legislature, the judges, and the administration. The constitution of Rhineland-Palatinate binds the legislative, judicial, and executive branches to protect the individual's basic rights, which are recognized as being derived from natural law (Art. 1). Under the Eastern constitutions, private rights appear as being subjectively perceived by the *pouvoir constituant* and thus as being granted by the maker of the constitution. Their scope can be perceived anew at any time by the amending power, and thus they can become subject to restriction and abolition. Since the legislature is also entitled to define the extent of the individual's private sphere, private rights are as much by the grace, as they are at the mercy of, the legislator. Under the Western constitutions, basic rights appear as an objective value. The *pouvoir constituant* does not grant them, but merely guarantees them. Having their roots in a natural law that is not so much the creation of human reason but of God, these rights are immune from a subjectivist interpretation and can be neither amended nor abolished. In the East, the legislature is credited with infallibility, which, somewhat in a mystical way, like the *volonté générale*, cannot err; but in the West it is reduced to Rousseau's will of all, a sum of

18. Württemberg-Baden, art. 85; Bavaria, art. 75; Hesse, art. 123; Bremen, art. 125; Rhineland-Palatinate, art. 129; Baden, art. 92; Württemberg-Hohenzollern, art. 71; Thuringia, art. 39; Saxony-Anhalt, art. 58; Brandenburg, art. 35; Mecklenburg, art. 60; Saxony, art. 96. In the states of East Germany and Rhineland-Palatinate, the constitution may also be amended by referendum. The constitutions of Bavaria, Hesse, and Baden prescribe a compulsory referendum upon an amendment proposed by the legislature. The other constitutions provide for the possibility of a referendum.

19. Thuringia, art. 8; Saxony-Anhalt, art. 24; Brandenburg, art. 9; Mecklenburg, art. 22; Saxony, art. 26.

particular wills that may be deceived and so will wrongly. In the East, the makers of the constitutions fulfilled a constitutive act when adopting private rights; but in the West they were, when transmuting natural law into positive norms, only fulfilling a declaratory function.

The belief in the natural law of the Aristotelian-Scholastic tradition finds expression in different provisions of the West German constitutions. Whereas the people in the East stressed solely such concepts as liberty, equality, fraternity, those in the West emphasized also the rôle of God, morals and the family, often connecting these values with those of Christianity.

The constitutions of East Germany do not make references to God, not even in the provisions which guarantee freedom of religion. The Western constitutions often contain an *invocatio dei* in the preamble. The Bavarians reject a "state and social order without God." The people of Baden and Württemberg-Baden enacted their constitutions full of "confidence in God." The constitution of Württemberg-Hohenzollern was framed "in obedience toward God and with confidence in God, the only just judge." The people of Rhineland-Palatinate, "conscious of their responsibility toward God," consider God "the source of all justice and the creator of all human society."

Whereas the Eastern constitutions refrain from mentioning morals and ethics as binding the human lawmaker, some constitutions in the West make explicit reference to morals and ethics. Art. 1 of the constitution of Rhineland-Palatinate recognizes a "natural code of morals" and "natural justice"; Art. 1 of Württemberg-Baden an "eternal code of morals"; Art. 4 of Württemberg-Hohenzollern shows a belief in the "moral community of men."

Aside from such a general recognition of morals and ethics, many constitutions reveal an influence of natural law upon the organization of human life in such fundamental institutions as marriage, the family, and education. Marriage and the family are called "the natural foundation of human society," "communities with their own natural right" (Rhineland-Palatinate, Art. 23). Art. 124 of the Bavarian constitution sees in marriage and the family the "natural and moral foundation of the human community," Art. 101 of the constitution of Württemberg-Hohenzollern "the most important foundation of a moral and orderly community life."

According to Art. 25 of the constitution of Rhineland-Palatinate, which is similar to Art. 126 of the Bavarian constitution, the parents have "the natural right and the supreme duty to bring up their children to a state of physical, moral and social fitness." This right forms, according to the constitutions of Rhineland-Palatinate (Art. 27) and Northrhine-Westphalia (Art. 8) the foundation for the organization of the school system. Under Art. 114 of the constitution of Württemberg-Hohenzollern the will of the parents is

decisive for the type of school which their children attend, and in Bavaria all educational matters are to be decided by the parents (Art. 25). The parents also determine whether their children should participate in the religious instruction offered in the public schools.<sup>20</sup>

Concluding our inquiry into the natural law content of the German state constitutions since 1945, we may say that the constitutions in West Germany, while sharing with those in the East many of the natural law concepts of the age of reason, contain strong elements of philosophical natural law. It is true that not all West German constitutions are equally enthusiastic about the older natural law. One discovers that different concepts of natural law exist not only between East and West Germany, but also within West Germany. The final result of West German postwar constitutional development—the Basic Law—reflects this division. The Parliamentary Council in Bonn was by no means unanimously in favor of an *invocatio dei*, or for that matter, an acceptance of natural law as some absolute norm.<sup>21</sup> Many of the delegates wanted merely to go back to the principles of Weimar and the “historical concept of natural law,” upon which these principles had been based.<sup>22</sup> On the other hand, there existed a strong tendency toward the rejection of historical natural law, which, as had been learned from bitter experience, proved inadequate to prevent legal positivism and the advent of authoritarianism. The outcome was, as in all constitutional conventions, a compromise. Both the philosophical and historical concepts of natural law found expression in the Bonn constitution.

#### IV

THE PRESENCE of the older natural law in the Basic Law marks a decisive change in the German legal tradition. It amounts to a renunciation of the positivist dogma that the state is the source of all law. Through the insertion

20. Württemberg-Baden, art. 39; Bavaria, art. 137; Hesse, art. 58; Rhineland-Palatinate, art. 35; Baden, art. 28; Württemberg-Hohenzollern, art. 115. In Bavaria and Rhineland-Palatinate, the students may decide whether they want to participate in religious instruction, at the age of eighteen. The constitutions of East Germany contain no provisions for religious instruction in the public schools. They provide only for the rights of the parents to decide what religion their child should have. At the age of fourteen, this decision rests with the child himself. (Thuringia, art. 79; Saxony-Anhalt, art. 95; Brandenburg, art. 68; Mecklenburg, art. 92—here the age is fifteen).

21. Delegate Heuss warned that one should not consider natural law as something absolute and that the new constitution should not be based on metaphysics. He and delegate Schmid were opposed to an *invocatio dei*, which was, in their eyes, a strain upon religion. See *Die Entstehungsgeschichte der Artikel des Grundgesetzes*, I JAHRBUCH DES ÖFFENTLICHEN RECHTS, NEUE FASSUNG 30, 52.

22. See the statement of delegate Schmid, *id.* at 48. Delegate Suesterhenn was a leader among those who were in favor of an orientation toward the older natural law. *Id.* at 29, 42.

of the *invocatio dei* the constituent power no longer appears as sovereign. Rather, it is bound by a code of ethics which has its roots in the will of God. Likewise the legislature, as *pouvoir constitué* created by the *pouvoir constituant*, may do wrong. Therefore, its acts had to be subjected to a test as to their compatibility with the constitution and natural law. For the exercise of this reviewing function, a special court, the Federal Constitutional Court (Bundesverfassungsgericht), was established.<sup>23</sup> The democratic vogue is being checked by the conservative robe.

Judicial review is new in Germany. As in most continental countries, Montesquieu never had as great an impact upon Germany as did Rousseau. Consequently, legislative supremacy was established in most German constitutions that came into being between the French Revolution and Hitler's accession to power.<sup>24</sup> In the Weimar Republic, it is true, certain steps toward judicial review were taken. In the constitutional convention at Weimar, Hugo Preuss stated that judicial review would prevail if not expressly forbidden.<sup>25</sup> Heinrich Triepel strongly came forward in favor of judicial review, with support from other jurists.<sup>26</sup> The courts groped with the problem in the years after the adoption of the constitution,<sup>27</sup> and their efforts culminated in the decision of the Reich Court (Reichsgericht) of November 4, 1925, which recognized judicial review.<sup>28</sup> Other courts followed suit.<sup>29</sup>

23. Basic Law, art. 92 *et seq.* For commentaries on these articles, see GIBSE, GRUNDESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND (1949), and v. MANGOLDT, DAS BONNER GRUNDEGESETZ (1953).

24. Only the constitutions of Bavaria (art. 72) and Prussia (art. 61, § 1) provided for judicial review after the first world war. Thoma was right when in 43 ARCHIV FÜR ÖFFENTLICHES RECHT at 274 he said: "Nichtprüfung ist der bisher traditionelle, und — wer möchte es leugnen?—vom Standpunkt der Justiz betrachtet, durchaus befriedigende Zustand gewesen. . . Nichtüberprüfung ist das uns historisch Gegebene, ist deutsche, ja europäische Tradition und durchaus *causa favorabilis*."

25. *Verhandlungen des Verfassungsausschusses*, 336 STENOGRAPHISCHE BERICHTE 483 *et seq.*

26. Triepel in STREITIGKEITEN ZWISCHEN REICH UND LÄNDERN, and in 39 ARCHIV FÜR ÖFFENTLICHES RECHT 533. Those supporting Triepel were, to name a few, Buchler, Fleiner, Fleischmann, Kaufmann, Nawiasky, Poetsch, Schmitt, Stammler and Stier-Somlo. Among the judges, Simons (President of the Reichsgericht).

27. RGSt. 56, 177; RGZ. 102, 164; KG. Nov. 26, 1920; KG. Nov. 1, 1921; Reichsfinanzhof, 5, 333 and 7, 97. A note may be permitted here that German decisions are quoted by giving the name of the court, or its initials, first (RG. for Reichsgericht, KG. for Kammergericht, OLG. for Oberlandesgericht, AG. for Amtsgericht, OVG. for Oberverwaltungsgericht etc.) and the date of the decision next. To the initials of the Reichsgericht are added Z (for Zivilsachen) which indicates a civil case, St (Strafsachen) which means criminal cases. The decisions of the Reichsgericht and the Reichsfinanzhof are quoted by volume and page, as above, or by date.

28. RGZ. 111, 320. For a discussion of that decision, see Carl J. Friedrich, *The Issue of Judicial Review in Germany* 43 POLITICAL SCIENCE QUARTERLY 196-97 (1928).

29. Reichsfinanzhof Dec. 7, 1926 (32 DEUTSCHE JURISTENZEITUNG 233); Bayerisches Oberstes Landesgericht March 3, 1926 (31 DEUTSCHE JURISTENZEITUNG 903); OVG. Hamburg Jan. 17, 1927 (56 JURISTISCHE WOCHENSCHRIFT 1288).

In spite of all these efforts, however, judicial review did not become generally accepted. The positivist tradition of the Empire, founded by jurists like Gerber, Laband, and Georg Jellinek, had a firm grip upon the men of the Weimar period. Gerhard Anschütz, the leading commentator on the constitution,<sup>30</sup> expressed the prevalent opinion when he opposed judicial review.<sup>31</sup> Calling attention to Art. 76, which provides that "the constitution may be amended by process of legislation," Anschütz concluded that "the constitution and the statute are manifestations of the will of the very same power, the legislative power."<sup>32</sup> Therefore, the Weimar constitution did not recognize a distinction—so characteristic of the American system—between the amending and the ordinary legislative power. Consequently, Anschütz reasoned, there was no room for judicial review. A law that had come about in the forms prescribed by the constitution had to be applied by the judge and obeyed by the citizen, irrespective of its compatibility with "custom, morals, good faith, natural law, justice, equity and reason."<sup>33</sup>

This argument refuting judicial review had inescapable consequences. The whole constitution was put at the disposition of the legislature, "irrespective of the content and the political consequences" of the legislative act.<sup>34</sup> In a similar manner, Hans Kelsen saw no limitations upon the legislature in the exercise of its amending power.<sup>35</sup> Legal positivism had been brought to an extreme. Carl Schmitt's thesis on the restriction of the amending power was a last warning.<sup>36</sup> The crusade for freedom through a restriction of the legislature came to an abrupt end with Hitler's accession to power. Weimar had been the captive of the positivism of the Empire.<sup>37</sup> The National Socialists took over this heritage with open arms. They cunningly shifted legislative

30. DIE VERFASSUNG DES DEUTSCHEN REICHS, art. 70, nos. 2-5; art. 102, nos. 3-6 (4th rev. ed. 1932). Anschütz stresses that judicial review was also not permitted under the Imperial constitution.

31. Others opposing judicial review were Arndt, Giese, Walter Jellinek, Thoma, Wittmayer. For a survey of those opposed to judicial review, see Walter Jellinek, *Das Märchen von der Überprüfung verfassungswidriger Reichsgesetze durch das Reichsgericht*, 54 JURISTISCHE WOCHENSCHRIFT 454.

32. Anschütz, *op. cit. supra* note 30, art. 76, no. 1.

33. *Id.*, art. 102, no. 4.

34. *Id.*, art. 76, no. 3. Cf. RGZ. 118, 325.

35. KELSEN, ALLOEMEINE STAATSLHRE 107.

36. VERFASSUNGSLEHRE 11 *et seq.*, 18 *et seq.*, 102 *et seq.* (1928); see also BILFINGER, REICHSSPARKOMMISSAR 16-18; Triepel in 31 DEUTSCHE JURISTENZEITUNG 849. Paradoxically Carl Schmitt, who came forward with his thesis at the time when he was supporting the Weimar Republic, later became a defender of the Hitler régime. Hans Kelsen, on the other hand, was one of its first victims.

37. Anschütz, *op. cit. supra* note 30, art. 76, no. 3. Also Jeselson, *Begriff, Arten und Grenzen der Verfassungsänderung*, Diss. Heidelberg, 1929, p. 67. For a different opinion, see Bilfinger, *Verfassungsrecht als politisches Recht*, 18 ZEITSCHRIFT FÜR POLITIK 228 (1929).

power from the legislature to the executive in a manner legalized by the letter of the constitution and used the positivism developed under the tradition of the *Rechtsstaat* for the exercise of their rule of injustice. What originally had been considered a Magna Charta for the protection of the individual had, step by step, degenerated into a Magna Charta for the government's suppression of man.

Judicial review, a dead issue in the Third Reich, was after the war established to a degree that was beyond the keenest hopes of its advocates in the past decades. The acceptance of judicial review by the different states had been so general and enthusiastic<sup>38</sup> that the framers of the Basic Law, unlike their predecessors at Weimar,<sup>39</sup> decided to provide for it in the constitution. Furthermore the judges, eager to prove their farewell to a positivism that, under the Hitler régime, had discredited many and driven more to the verge of professional suicide,<sup>40</sup> took care that their new right was not just on paper. Their exercise of judicial review was broad in scope. Not only were statutes struck down for being unconstitutional, but also for being incompatible with natural law.<sup>41</sup> To make things complete, even constitutional norms were tested as to their compatibility with the constitution and natural law.<sup>42</sup> And this natural law was not only that of the age of reason, but that which derived from the Aristotelian-Scholastic tradition. The dream of Kohler had at last come true, decades after this man's valiant fight against the rising tide of positivism.<sup>43</sup>

38. Constitutions of Württemberg-Baden, art. 92; Bavaria, art. 65; Hesse, art. 131, 132; Rhineland-Palatinate, art. 129, 130, 136; Baden, art. 114, Württemberg-Hohenzollern, art. 65.

39. In the constitutional convention at Weimar, the attitude of the delegates was not determined by their party affiliation. The delegates Ablass (Democratic Party), Kahl (German People's Party), and Sinzheimer (Social-Democratic Party) were against, the delegates Düringer (German National Party), Katzenstein (Social-Democratic Party) and Preuss (Democratic Party) for judicial review.

40. For the problem of the responsibility of the judges under an authoritarian régime, see Coing, *Zur Frage der Haftung der Richter für die Anwendung naturrechtswidriger Gesetze*; Figge, *Die Verantwortlichkeit des Richters*; Becker, *Der richterliche Widerstand*, 1947 *SÜDDEUTSCHE JURISTENZEITUNG* 61, 179, 480.

41. See the decisions of the AG. Wiesbaden of Nov. 13, 1945 (1946 *SÜDDEUTSCHE JURISTENZEITUNG* 36); of the OLG. Freiburg of July 4, 1946 (1946 *DEUTSCHE RECHTSZEITSCHRIFT* 93); of the OLG. Stuttgart of Sept. 4, 1946 (1946 *SÜDDEUTSCHE JURISTENZEITUNG* 236); of the KG. of Oct. 29, 1946 (1947 *SÜDDEUTSCHE JURISTENZEITUNG* 257).

42. See the decisions of the OVG. Lüneburg of March 16, 1950 (1950 *DEUTSCHES VERWALTUNGSBLATT* 407); of the Bayerischer Verfassungsgerichtshof of April 24, 1950 (1950 *VERWALTUNGS-RECHTSPRECHUNG* 237); of the Verfassungsgerichtshof of Württemberg-Baden of Nov. 13, 1950 (1950 *DEUTSCHE RECHTSZEITSCHRIFT* 566); of the Bundesverfassungsschrift of Oct. 23, 1951 (1951 *NEUE JURISTISCHE WOCHENSCHRIFT* 877); of the Bundesverfassungsgericht of Dec. 18, 1953 (1954 *JURISTENZEITUNG* 32). See, in this connection, the author's *Unconstitutional Constitutional Norms?* in 42 *VA. L. REV.* 1 (1956).

43. KOHLER, *LEHRBUCH DER RECHTSPHILOSOPHIE* 32 *et seq.*, 43-44 (1923) contains strong polemics against the secularization of natural law by Grotius. He wanted an orienta-

## V

JUST AS THEY refrain from recognizing the older natural law, the French and Italian constitutions do not protect the individual from legislative oppression through judicial review. In the French constituent assembly, judicial review was considered a conservative and undemocratic phenomenon. There was, to be sure, created a Constitutional Committee (*Comité Constitutionnel*), which was to "determine whether the laws passed by the National Assembly imply amendment of the constitution" (Art. 91). But its task was to bring the constitution into harmony with the statute rather than to strike down statutes because of their unconstitutionality. The fact that the Constitutional Committee is stipulated in title XI also renders it liable to abolition by ordinary statute without any possibility of raising the technical question of constitutionality by the ordinary procedure. As to the individual's basic rights, their protection through the Committee is not possible, owing to the exclusion of the provisions of the preamble from the competency of the Constitutional Committee.<sup>44</sup>

The constitution of Italy makes provision for judicial review through the establishment of a Constitutional Court (*Corte Costituzionale*) (Art. 134-137). However, in its function of protecting the individual from legislative encroachments, it can hardly stand comparison with its German counterpart. It judges "controversies concerning the constitutional legality of the laws . . . of the state and the regions" (Art. 134). Its main function is to protect the authority of the newly created regions and to test their laws, i.e., to secure the unity of law in a regionalized nation. The right to review acts of the national legislature is considered more or less incidental. At any rate, the Constitutional Court is not likely to protect the individual from legislative acts, since under the constitution the scope and definition of the individual's basic rights are left to the discretion of the legislature.<sup>45</sup>

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tion of positive law toward the older natural law which he considered an absolute norm which, however, could vary in the different societies and times. See also MODERNE RECHT: PROBLEME 1-15 (2d ed. 1913). Kohler's concept of natural law thus comes close to that of Stammler, who believed in a natural law with a changing content. DIE LEHRE VOM RICHTIGEN RECHT 82 *et seq.* (2d ed. 1926).

44. The most comprehensive treatise on the problem of judicial review in postwar France is JEANNE LEMASURIER, *LA CONSTITUTION DE 1946 ET LE CONTRÔLE JURIDICTIONNEL DU LÉGISLATEUR* (1954). Pp. 133-246 deal with the Constitutional Committee. This work also contains a valuable bibliography. For other commentaries on the Constitutional Committee, see GEORGES VEDEL, *MANUEL ÉLÉMENTAIRE DE DROIT CONSTITUTIONNEL* 551-56 (1949); JULIEN LAFERRIÈRE, *MANUEL DE DROIT CONSTITUTIONNEL* 953-57 (2d ed. 1947); MAURICE DUVERGER, *MANUEL DE DROIT CONSTITUTIONNEL ET DE SCIENCE POLITIQUE* 376-78 (5th ed. 1948); MARCEL PRÉLOT, *PRÉCIS DE DROIT CONSTITUTIONNEL* 539-541 (1950).

45. For a discussion of judicial review in the constitutional assembly, see *Atti dell' Assem-*



In the French and Italian constitutions, then, the reaction against fascist authoritarianism and its positivism, resulting in the suppression of the individual, is reflected in the reinstatement of popular government according to the principles of 1789. The will of society is considered sovereign and can do no wrong. From the sovereignty of the *pouvoir constituant* there follows a merely nominalistic recognition of natural law by that body: only what is recognized by the *pouvoir constituant* as natural law is natural law! The sovereignty of the constituent power is, in the constituent act, transferred to the lawmaker. From this follows not only a subjectivist interpretation of natural law by the legislator but also the denial of judicial review.

## VI

WE MAY THUS say that from among the constitutions coming out of the European revolution of 1945, those drafted in West Germany may be considered the most "revolutionary" since they show a most unequivocal break with a positivist past. Here the makers of the constitutions recognized some objective natural law as their guiding principle,<sup>46</sup> and, by transmuting it into constitutional norms, had to subject the legislature—as nothing but a *pouvoir constitué*—to these very norms. The institution of judicial review, considered by many as the complement of an objective natural law, was adopted as the

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*blea Costituente* (Seduta de 31 gennaio 1948), vol. XI, p. 4336. For a discussion of the Court and judicial review, see CARLO ESPOSITO, *LA COSTITUZIONE ITALIANA* 263-81 (1954); ROBERTO LUCIFREDI, *LA NUOVA COSTITUZIONE ITALIANA* 197-205, 235-37 (1952).

46. For the possibility of objective values, see MAX SCHELER, *DER FORMALISMUS IN DER ETHIK UND DIE MATERIALE WERTETHEK* (1st ed. 1916, 2d ed. 1921, 3d ed. 1927), and NICOLAI HARTMANN, *ETHIK* (1926). In the foreword to the third edition of his great criticism of Kant, Scheler takes issue with Hartmann's denial of a person-relation (Personrelation) man-God. Scheler thus comes close to a theory of ethics and justice which is based upon metaphysics and theology. Says he to Hartmann: "Wenn wir auch gelernt haben, uns um den 'objektiven Gehalt' der Werte zu kümmern, so dürfen wir—sollen wir nicht in einen den lebendigen Geist erstarrenden Objektivismus und Ontologismus zurückfallen—das sittliche Leben des Subjektes als Problem nicht vernachlässigen. Überhaupt muss ich einen von Wesen und möglichem Vollzug lebendiger geistiger Akte ganz 'unabhängig' bestehen sollenden Ideen—und Werthimmel—'unabhängig' nicht nur von Mensch und menschlichem Bewusstsein, sondern von Wesen und Vollzug eines lebendigen Geistes überhaupt—prinzipiell schon von der Schwelle der Philosophie zurückweisen. . . . Endlich kann ich auch die vollständige sachliche, nicht nur methodische Losreissung der ethischen Probleme von der Metaphysik des Absoluten (Religionsphilosophie); der 'Person' vom Grunde aller Dinge, nicht billigen" (pp. XIX-XX). The recognition of natural law as an absolute norm, possibly in the sense of Kohler and Stammler, does not necessarily imply a total rejection of considerations of utility. It is interesting to note, in this connection, certain passages of Thomas Aquinas' *Summa Theologica*, according to which the function of law and justice lies in their utility: I. II. qu. 95. a.3: "Finis autem humanae legis est utilitas hominum"; I. II. qu. 96. a.1: "Finis autem legis est bonum commune"; I. II. qu. 97. a.1: "Rectitudo legis dicitur in ordine ad utilitatem communem"; I. II. qu. 96. a.4: "Iniustae autem sunt legis dupliciter:

most natural restriction upon the legislature. As distinguished from the French, Italian, and East German constitutions, those of West Germany do not merely check the evil of autocracy through the institution of popular government. Framed under the impression of the shortcomings of the Weimar Republic, they also prevent a resurgence of a legal positivism through proper restrictions of popular power. They thus check the danger of a democratic despotism and thereby go to the root of what may be considered the evil of our century.

This evil seems to be identical with what may easily become the evil of democracy, namely, sheer majority rule. Jacob Burckhardt shared Ranke's doubts as to the value of the sovereignty of the people.<sup>47</sup> The French Revolution, which "considered itself the symbol of freedom," appeared to him "as fundamentally unfree as a forest fire."<sup>48</sup> "The decisive innovation that was brought about by the French Revolution," he said, "is the authority and the desire to change matters for the public weal."<sup>49</sup> He, like many of his contemporaries,<sup>50</sup> saw the reason for the *fin de siècle* in the increasing power of the *volonté générale*. These warnings, sounded in the last century, were quelled in the coming revolution of the masses until, in the end, the individual was eliminated in the mass movement of fascism. The failure to recognize the fact that unlimited democracy had made possible the rise of modern dictatorship caused in France and Italy the omission of constitutional provisions providing for checks upon the majority.

Thus the European nations, through their different concepts of democracy, demonstrate the eternal dilemma of popular government, which is one of the degree to which majority rule should be permitted. It was a great fortune for the United States that its democratic revolution was concluded in the

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uno modo per contrarietatem ad bonum hominum . . . ex fine, sicut cum aliquis praesidens leges imponit onerosas subditis, non pertinentes ad utilitatem communem, sed magis ad propriam cupiditatem vel gloriam"; I. II. qu. 97. a.2: "Lex humana intantum recte mutatur, inquantum per eius mutationem communi utilitati providetur"; II. II. qu. 78. a.1: "Leges humanae dimittunt alique peccata impunita propter conditiones hominum imperfectorum, in quibus multae utilitates impedirentur, si omnia peccata prohiberentur poenis adhibitis." The protestant Rudolf v. Jhering had, in view of the writings of Thomas, to admit in a note of the second edition of *DER ZWECK IM RECHT* (1916) at 126: "Staunend frage ich mich, wie war es möglich, dass solche Wahrheiten, nachdem sie einmal ausgesprochen waren, bei unserer protestantischen Wissenschaft so gänzlich in Vergessenheit geraten konnten? Welche Irrwege hätte sie sich ersparen können, wenn sie dieselben beherzigt hätte! Ich meinerseits hätte vielleicht mein ganzes Buch nicht geschrieben, wenn ich sie gekannt hätte, denn die Grundgedanken, um die es mir zu tun war, finden sich schon bei jenem gewaltigen Denker in vollendeter Klarheit und prägnantester Form ausgesprochen."

47. *WELTGESCHICHTLICHE BETRACHTUNGEN* 132 (Kroener ed.). He refers to the idea of popular sovereignty as the "ferment of the modern world."

48. *WELTGESCHICHTLICHE BETRACHTUNGEN* 279 (Kaegi ed. 1941).

49. *HISTORISCHE FRAGMENTE* 205 (1942).

50. Stendhal, Niebuhr, Kierkegaard, to name only a few.

short period from 1776 to 1789. The Founding Fathers were aware of the fact that "in our opposition to monarchy, we forgot that the temple of tyranny has two doors. We bolted one of them by proper restraints; but we left the other open, by neglecting to guard against the effects of our own ignorance and licentiousness."<sup>51</sup> The Federal Convention checked the excesses of democracy and preserved free government. Europe, ten years after the defeat of fascism, is still in the throes of its democratic revolution. In Germany, the danger of a democratic legal positivism seems, for the time being, banned. The situation is different in France and Italy. Possibly, caution was not as necessary here. Although legal positivism existed in the Western countries before it was introduced in Germany,<sup>52</sup> its dangers were early perceived and thus natural law never quite disappeared in those countries.<sup>53</sup> Nevertheless, there exists a present danger of democratic despotism which, since it is not clear to many, must be pointed out.<sup>54</sup>

Georg Jellinek, the positivist, once said that law is an ethical minimum.<sup>55</sup> Since it is an *ethical* minimum, it should be derived from some superior, objective ethical norm, which exists irrespective of its recognition by man. For the sake of the individual's freedom, this norm would then be the guide for a democratic as much as for an autocratic *pouvoir constituant*. It was

51. Benjamin Rush in his *Address to the people of the United States of 1787*, in HEZEKIAH NILES, *PRINCIPLES AND ACTS OF THE REVOLUTION* 402 (1822).

52. Two generations before positivism reached its climax in Germany, the French jurist Bugnet made the statement that for him there existed no civil law, but only a civil code: "Je ne connais pas de droit civil; je n'enseigne que le Code Napoléon." Quoted in J. BONNECASE, *ÉCOLE DE L'EXÉGÈSE EN DROIT CIVIL* 128 (2d ed. 1924). The development in France, characterized by a positivistic transformation of the law into a legality that is based on statute, was, in the first half of the nineteenth century, considered the very essence of the progress of civilization and humanity. Great representatives of the so-called "école de l'exégète" were Carré de Malberg, G. Jèze, M. Waline, G. Ripert, V. J. Basdevant. As to Germany, Kirchmann's address *Die Werthlosigkeit der Jurisprudenz als Wissenschaft* was made in 1847. Windscheid, in his university address at Greifswald, stated in 1854 that the dream of natural law was over. However, juristic positivism reached its climax in Germany only after the foundation of the Empire in 1871. Its main representatives in public law were Gerber, Laband, Georg Jellinek, Hans Kelsen.

53. See LAMENNAIS, *PROGRÈS DE LA RÉVOLUTION ET DE LA GUERRE CONTRE L'ÉGLISE* (1829), and the writings of de Tocqueville. As late as 1916 the eminent French jurist Maurice Hauriou made the statement: "Or, la Révolution de 1789, ce n'est pas autre chose que l'avènement absolu de la loi écrite et la destruction systématique des institutions coutumières. Il en est résulté un état perpétuellement révolutionnaire, parce que la mobilité de la loi écrite n'étant plus équilibrée par la stabilité de certaines institutions coutumières, les forces de changement se sont trouvées plus puissantes que les forces de stabilité. En France, la vie sociale et politique, absolument vidée d'institutions, n'a pu se maintenir provisoirement, avec bien des soubresauts, que grâce au niveau élevé de la moralité générale." (*PRINCIPES DE DROIT PUBLIC* XI).

54. The danger is clearly recognized by Louis Rougier in his *LA FRANCE À LA RECHERCHE D'UNE CONSTITUTION* (1952).

55. *DIE SOZIALETHISCHE BEDEUTUNG VON RECHT, UNRECHT UND STRAFE* 45 (2d ed. 1908).

considered as such by the fathers of some of the modern European constitutions.

The revival of the older natural law signals a new beginning on the continent. It ties in with the European spirit that is so characteristic of the revolution of 1945 and of the constitutions framed in its wake.<sup>56</sup> Historical natural law, mainly oriented toward popular sovereignty, facilitated nationalism rather than the European idea. The older natural law, on the other hand, could reassume its historical rôle and bring about a *ius publicum Europaeum* as a step toward the political unity of a continent that is representative of Western civilization.

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56. Compare the preamble of the French constitution, article 11 of the Italian constitution, and the preamble of the Basic Law.