

1-1-1956

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Recommended Citation

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http://scholarship.law.nd.edu/nd_naturallaw_forum/12

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NATURAL LAW IN ITALY IN THE PAST TEN YEARS

IN 1947 **GIORGIO DEL VECCHIO**, the best known and leading figure among the Italian philosophers of law, took up again the publication of the *Rivista Internazionale di Filosofia del Diritto*, a periodical which the Fascist anti-Semitic laws had taken from him in 1938. On reassuming the direction of the periodical he wrote: "We would like to appeal for a return to the eternal idea of natural law, to that pure principle of justice which rises above the contingent vicissitudes of positive legislation as a permanent criterion, and which alone, if it is respected, can lead men to a true and lasting peace."¹

The old master of Italian juridical philosophy was interpreting in these words a widely diffused state of mind easily explainable in the aftermath of the world conflict and of the civil war which in Italy accompanied the final phases of the war. If, in fact, as a few pages further on in the same review another old and illustrious student of juridical philosophy—and a positivist adversary of natural law—wrote, "There are moments—and they cannot be rare in the life of anyone who has the habit of reflecting on problems such as those of justice and law, which are so serious and which impinge so closely on everyone's fate—there are moments in which one feels himself attacked by the emptiness of that doubt, which is not only that of skepticism, but is innate in every form of criticism of experience, moments in which one would quite willingly lean toward repose and comfort in those consoling doctrines which, far from exciting doubts, try to placate them, and far from insisting on the problematical nature of concepts, like that of justice, try to give a fair reply to all questions."² Surely one of those moments was—and for the Italians more than for any other nation—that which followed the war and the disappearance of the Fascist regime. The tragic and direct experience, on the one hand, of the iniquities of a positive legislation, as in the racial laws, indifferent to the universally acknowledged and essential rights of the human being, and of the frightful consequences to which the politics connected with that legislation had led, and on the other hand, the spectacle and the threat of other regimes similar in nature—these things clearly called for the finding of judicial principles valid not merely because of their positive force due to the authority of the State. They made one hope that the new laws which Italy was preparing to write would be inspired by these principles. Meanwhile, a problem which had frequently confronted Italian jurists and those of many European states in the recent past still appeared urgent—that of the conduct of someone asked to apply a law which his moral conscience makes him consider unjust.

Moreover, the Italian philosophical environment—dominated at the end of the last century and the beginning of this one by positivism and then by historical

1. *Premessa alla Terza Serie*, 24 RIVISTA INTERNAZIONALE DI FILOSOFIA DEL DIRITTO 3 (1947).

2. Alessandro Levi, *La "Giuridicità" nella Filosofia Tomistica e Neotomistica*, 24 *id.* 86.

idealism, and opposed to the idea of natural law—had been profoundly altered.³ The crisis of idealism showed itself in the dispersion of its old adherents in various contradictory directions, among them that of Catholic spiritualism* linked with the fortunes of political Catholicism which seemed to many the surest defense against the menace of communism. This Catholic trend, without declaring itself on the side of Thomistic positions and without therefore embracing the official Catholic doctrine of natural law, could not (because of the central position in its philosophy of the concept of *person* and because of its links with the thought of Antonio Rosmini, during the last century one of the most positive proponents of natural law) fail to be sympathetic with this rebirth of the idea of natural law, in spite of the historical scruples of some of its representatives.

In addition, the renaissance of Catholic thought strengthened and spread Neo-Thomism, which had kept alive the Catholic tradition of natural law, even though there are rare signs of it in the prewar period; and in fact Giorgio Del Vecchio began to draw nearer to Thomistic philosophy while yet remaining faithful to the original Neo-Kantian basis of his thought. It was Del Vecchio who had, at the beginning of the century, in the era of dominant positivism, defended the universal value of natural law and to whom as early as 1934 Pope Pius XI had written, through the then Cardinal Pacelli, that in his books he pointed out "substantial elements of that *philosophia perennis* which . . . is satisfied by the nourishment of the eternal wisdom."⁴

In fact, in the purely philosophical field, in which Catholic spiritualism is accompanied by other active and efficacious currents of thought, from existentialism to Marxism and logical neo-positivism, which now seems in great vogue

3. A full account of the attitude of Italian juridico-philosophical thought concerning natural law in the immediate postwar period can be found in Di Carlo's *Sostenitori ed Avversari del Diritto Naturale*, 17 IL CIRCOLO GIURIDICO L. SAMPOLO 7-26 (1946).

* The term "spiritualismo," here translated "spiritualism," is a term of particular significance in Italian and, indeed, Continental philosophical thought, and must be interpreted with care. The first caution is to avoid any association with such English terms as spiritualism and spirituality, the first with its "psychic," the second with its "ascetical" connotation. Spiritualism in European philosophy is basically the doctrine that all reality is "spirit"; that is, an active, present principle, and that there is no being which is conceivable apart from this principle. Spirit in turn generates the forms of actual existence, either by a continuous process, as in historical spiritualism; by an ultimate self-generative act called autochthysis, as in actualism; or by a personal creative act as in theistic spiritualism. The basic categories of spiritualism are act and presence; between them these exhaust the realm of existent forms. (This note is presented by A. R. Caponigri.)

4. The ideas of Del Vecchio on natural law appear, it may be said, in all his works including the very diffuse *Lezioni di Filosofia del Diritto* and the equally well-known *Giustizia*. Among the recent articles devoted to this point I recall *Dispute e Conclusioni sul Diritto Naturale*, 26 RIVISTA INTERNAZIONALE DI FILOSOFIA DEL DIRITTO 155-62 (1949), which had already appeared in 1 IUSTITIA 3 (1948) with the title *Le Concezioni Moderne del Diritto Naturale* and which was later included in the volume *Diritto Naturale Vigente*, of which I shall speak later; and *Mutabilità ed Eternità del Diritto*, 5 JUS 1-14 (n.s. 1954), which is without doubt the most valuable writing on natural law inspired by Catholic principles which has appeared in recent years. See in addition *Essenza del Diritto Naturale*, 29 RIVISTA INTERNAZIONALE DI FILOSOFIA DEL DIRITTO 18-24 (1952). The thought of Del Vecchio and other authors on natural law is set down by Artana, *Contributi alla Rinascita del Diritto Naturale*, 26 RIVISTA INTERNAZIONALE DI FILOSOFIA DEL DIRITTO 419-49 (1949); see also VIDAL, *LA FILOSOFIA GIURIDICA DI G. DEL VECCHIO* (Milan 1951), or in shorter form, Aceti, *Il Più Recente Pensiero Filosofico-Giuridico di G. Del Vecchio*, 5 JUS 259-78 (n.s. 1954).

among youth—currents which all criticize and refute the idea of natural law—this idea appears to arouse less favor than among the jurists: they in turn were in the past no less bitter critics of natural law because of the almost complete domination among them of juridical positivism. The most eloquent proof of this renewed interest on the part of many Italian jurists in natural law can be found by running through the indices of the two officially Catholic law reviews: *Jus*, of the Catholic University of the Sacred Heart in Milan, and *Iustitia*, of the Union of Italian Catholic Jurists. *Jus* frequently prints articles dedicated to natural law; and *Iustitia*, in its first number (1948), opened a discussion of the “basic problem” which faces the conscience of the Catholic jurist when confronted with a law which may not conform to the principles of his faith. Numerous articles on this point anticipated the exhortation made by the Pope to Catholic jurists to examine thoroughly the problem of the conduct of the jurist in regard to unjust laws.

In a discourse directed to the delegates to the first Congress of the Union of Catholic Jurists, on November 5, 1949, Pius XII drew attention to “the unsolved contrasts between the noble concept of man and law according to Christian principles . . . and juridical positivism,” pointing out the conflict of conscience which arises for the Catholic jurist “who strives to keep faith with the Christian concept of law . . . particularly when he is in the position of having to apply a law which his own conscience condemns as unjust”; but already in the Encyclical *Summi Pontificatus* (1939) and in the Christmas radio address of 1942 the Pontiff had reaffirmed the eternal validity of natural law, and the Italian Catholic jurists were at that time already turning toward its re-evaluation. Since 1947 one writer has strongly vindicated the juridical quality of natural law, a quality which he on the other hand denied to the laws whose content was opposed to it;⁵ and another writer has devoted an entire volume to the problem of the unjust law.⁶ Meanwhile, in the review *Iustitia*, the discussion of the same problem was growing intense. This then formed the focal point of the “workshop” held near Varese in June, 1949, by the Union of Catholic Jurists on the theme *Effective Natural Law*, a theme which expressed with polemic evidence a clear-cut point of view.

Both the conclusions of the delegates to the workshop and the writings which appeared from 1948 to 1951 on this point in *Iustitia*, along with the text of the Pope's speech and the article of Del Vecchio mentioned above which serves as an introduction, were collected in a volume published in Rome in 1951 which has as its title the theme of the workshop, *Effective Natural Law*. This is rather useful for anyone who wishes to form an idea of the opinions of the Italian Catholic jurists on this question;⁷ it is useful even if the impression which emerges

5. Domenico Barbero, in the work *DIRITTO E STATO* (Milan 1947), then condensed as an “introduction” in *SISTEMA ISTITUZIONALE DEL DIRITTO PRIVATO* (4th ed., Turin 1955) with the title “Diritto e Legge” and, with the same title, in the volume *STUDI DI TEORIA GENERALE DEL DIRITTO* (Milan 1953). In this last named volume see also the text of the lecture given by the author in 1952 in the Catholic University of Milan, previously printed with the title *Rivalutazione del Diritto Naturale*, 3 *JUS* 491-507 (n.s. 1952).

6. PAOLO GUIDI, *LA LEGGE INGIUSTA* (Rome 1948).

7. The contents of the book have been set down and summarized in the article by G.B.P. (Giorgio Balladore Pallieri), *Diritto Naturale Vigente*, 3 *JUS* 144-47 (n.s. 1952), and some-

from it is, to use the words of one of the most authoritative participants in the meeting, that among the delegates there exists, in regard to the effectiveness of natural law, "a remarkably surprising disparity of points of view,"⁸ and (once again having recourse to the words of another participant in the discussion, the Jesuit Father Lener⁹) "a profound disorientation" caused by the conflict which is held to be ineluctable between the asserted truth of natural law and the dogmatic principles and practical exigencies of positive jurisprudence. Of the 21 Italian jurists whose opinion is reported in the volume,¹⁰ certainly not all and indeed not many accept what ought to be, according to the title of the volume, the thesis of all of the contributors: that natural law has a vitality of its own, above and beyond law imposed by the State. It would take too long to give here the individual theses, even in the form of syntheses; but certainly while manifestly everyone feels the problem of the duty of the conscience confronted with unjust law to be "a basic problem" (this was the title of the article which first appeared anonymously but in fact written by Santoro Passarelli, which began the discussion in *Iustitia*), it is equally evident that almost all are aware of the danger that would be imminent in basing the principle of verifiability by the citizen of the legitimacy of the laws of the State, with the consequent renunciation of what, at least in continental European countries, is considered an essential requisite of law, its certitude.

And it is significant that, among those who show themselves most troubled about accepting the radical solution of the full effectiveness of natural law, there are a philosopher, a constitutionalist trained in philosophy, and a historian: Giuseppe Capograssi, Carlo Esposito, and Ugo Nicolini, who, better than the jurists themselves, could, although for different reasons, see with great profundity into a problem whose terms seem simple but which excludes any simple solutions (which are, however, not lacking in the volume). Nicolini, in particular, who in several works¹¹ examined the problem of the unjust law historically, has more concretely and indeed with more historical sense taken up a problem which easily leads to anti-historical solutions.

Effective Natural Law, in short, rather than proposing a solution, defines in all its complexity a problem which remains unsolved; and this is so true that even

what more amply and critically in the article by Uberto Scarpelli, *Diritto Naturale Vigente?*, 9 *OCcidente* 99-123 (1953). For a critical reevaluation see Giuseppe Marchello, *Sul Diritto Naturale Vigente*, 18 *ANNALI DELLA FACOLTÀ GIURIDICA DELL'UNIVERSITÀ DI CAMERINO* 163-77 (1951).

8. Barbero, *Rivalutazione del Diritto Naturale*, cited in 3 *JUS* 492 (n.s. 1952).

9. Salvatore Lener, *La Certezza del Diritto, il Diritto Naturale e il Magistero della Chiesa*, 1 *STUDI GIURIDICI IN ONORE DI F. CARNELUTTI* 345-87 (Padua 1950). Such an essay is also noteworthy as a very strictly orthodox manifestation of Catholic thought in this connection.

10. R. Angeloni, G. Astuti, D. Barbero, G. Bozzetti, G. Capograssi, F. Carnelutti, V. Chieppa, V. Del Giudice, G. Del Vecchio, F. M. Dominedò, F. Di Piazza, M. Elia, C. Esposito, P. Frezza, G. Graneris, G. Grosso, S. Lener, G. Morelli, U. Nicolini, U. Radaelli, F. Santoro Passarelli.

11. *IL PRINCIPIO DI LEGALITÀ NELLE DEMOCRAZIE ITALIANE* (Milan 1947); *Certezza del Diritto e Legge Giusta nell'Era Comunale*, 4 *STUDI GIURIDICI IN ONORE DI F. CARNELUTTI* 293-310 (Padua 1950).

among the Catholic jurists themselves the discussion continues.¹² The same uncertainties arise to perplex those who see the matter from the opposite point of view, who, convinced of the necessity first of all of the certitude of law and therefore of the bond between the judge and the rule of positive organization, cannot deny the difficulties which that concept implies and who would like to find a way to reconcile the antithetical requirements of certitude and of the justice of the law.¹³

Taking part in the debate which developed in *Iustitia* was Francesco Carnelutti, a Catholic jurist, Honorary President of the Union of Catholic Jurists and the most widely known of Italian jurists. But his article,¹⁴ even though it recognizes the "basic problem," did not seem to try to identify the problem with that of the conflict between positive law and natural law. This conflict was, according to him, rather between law and fact, since law by its nature never perfectly equals fact, which can always be presented as an exception in relation to any law whatsoever: a profound and undeniable truth, the discussion of which, however, avoided the matter of the problem which the promoters of the debate had intended to impose on it. And in truth Carnelutti, although he is most Catholic (besides his very many famous works on jurisprudence, he has also written a *Meditation on the Ave Maria*, an *Interpretation of the Pater Noster*, and *Glosses on Matthew's Gospel*), has only recently and with some uncertainty and reservation been disposed to accept what is indeed a main point in official Catholic philosophical-juridical thought: belief in natural law. As late as 1939, in the volume *Metodologia del Diritto*,¹⁵ and more decisively in an article with the almost irreverent title *Natural Law*?¹⁶ he had denied on logical grounds that there could be any law other than positive, since what stands above the law could not be law. Nevertheless, in the same pages of the *Metodologia* in which the concept of natural law was attributed to an unpardonable misunderstanding, he spoke of ethical laws which stand above the law and of "rules which the lawmaker must observe . . . laws which are the highest and the most difficult to grasp and in connection with which it is understood how nature which establishes them can be nothing but a divine order." But Carnelutti too must have been attracted by that dialectic of ideas which leads those who approach or return to Catholicism, for extra-philosophical or irrational reasons, to embrace its entire philosophy little by little, even if reluctantly at first. It was precisely while praising St. Thomas Aquinas that Carnelutti, thanking God for having permitted him to move beyond the convictions expressed in the *Metodologia*, declared that the law is "truly natural" in that it is born of morality, and that natural law "is such all the more because it is revealed to the conscious-

12. Consult for example Dominedò, *Giurisprudenza dei Valori*, 1 STUDI GIURIDICI IN ONORE DI F. CARNELUTTI 469-87 (Padua 1950); Garbagnati, *Il Giudice di Fronte alla Legge Ingiusta*, 2 JUS 431-50 (n.s. 1951).

13. A typical expression of this perplexity is the article by Ettore Favara, *Il Problema della Legge Ingiusta*, 4 SCRITTI GIURIDICI IN ONORE DI ANTONIO SCIALOJA 201-16 (Bologna 1953).

14. *Legge e Fatto nel Problema Fondamentale*, 2 IUSTITIA 17 (1949); also in DIRITTO NATURALE VIGENTE 89-97.

15. 29-30 (Padua 1939).

16. In the review 406 NUOVA ANTOLOGIA 144-50 (1939). This is a polemic reply to the Jesuit Father Messineo who had criticized in *Civiltà Cattolica* the condemnation of natural law contained in the *Metodologia*.

ness of man as an ethical, supernatural and infinite principle."¹⁷ The echo of the famous words of St. Thomas is evident. But an explicit "conversion" on properly juridical grounds did not take place until 1951 when, with an article which caused considerable comment, he came to speak of a "complex of rules which appear to be born in the world of the spirit just as plants are born in the world of nature," defining this complex expressly as "natural law" and pointing out in various aspects of juridical life the proof of the insufficiency of positive law.¹⁸ Some uncertainty and some reservations persist, but the immanent logic of the Catholic position forces the jurist to accept natural law. Although regarding it as no less "pharisaical" than positive law and foreseeing the end of both of them since they are both morally deficient, he is henceforth convinced that "if it does not conform to natural law, positive law cannot function."¹⁹

I have dwelt at some length on the case of Carnelutti both because of the authoritative position he enjoys in the field of Italian judicial studies and the impression which the evolution of his thought has made, and because this evolution is characteristic of a large part of Italian culture other than in judicial matters and even in the political life of Italy. In politics there are now diffused and becoming increasingly dominant in common thought ideas such as that of natural law, of Catholic origin, which have inadvertently worked their way into surroundings at the outset indifferent and hostile. These ideas are accepted today perhaps without full awareness of the scope of such an acceptance, the nature of which is extrinsic and contingent.

Thus, even if the number of volumes devoted specifically to natural law is small,²⁰ anyone who leafs through the Italian juridical reviews, the collections of studies in honor of this or that master, or the acts of congresses and conventions, frequently comes across articles having natural law as their theme.²¹

17. *La Crisi del Diritto*, 12 ACTA ACADEMIAE SANCTI THOMAE AQUINATIS (1946); also in GIURISPRUDENZA ITALIANA (1946); then reprinted in 2 DISCORSI INTORNO AL DIRITTO 80-82 (Padua 1953).

18. *Bilancio del Positivismo Giuridico*, 1 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 281-300 (1951); also in 2 DISCORSI INTORNO AL DIRITTO 241-60 (Padua 1953).

19. *La Morte del Diritto*, LA CRISI DEL DIRITTO 184 (Padua 1953); 2 DISCORSI INTORNO AL DIRITTO 284.

20. Of great bulk but of little originality is the work by G. B. Biavaschi, *IL DIRITTO NATURALE NEL MODERNO PENSIERO FILOSOFICO-GIURIDICO* (Udine 1953); the little book by Nino Nava, *MORTE E RINASCITA DEL DIRITTO NATURALE* (Modena 1953) is not particularly noteworthy.

21. Without pretending to give a full list of these writings, we add to those already mentioned: Lorenzo Mossa, *La Rinascita del Diritto Naturale dopo la Catastrofe dell'Europa*, 2 NUOVA RIVISTA DI DIRITTO COMMERCIALE 77-86 (1949); Biondo Biondi, *Scienza Giuridica Come Arte del Giusto*, 1 JUS 145-76 (n.s. 1950); and also *Esistenzialismo Giuridico e Giurisprudenza Romana*, 1 *id.* 107-18, and in 1 STUDI GIURIDICI IN ONORE DI F. CARNELUTTI 97-115; Cicala, *Ordine Giuridico e Ordine Morale nella Parola dell'Augusto Pontefice*, 61 IL DIRITTO ECCLESIASTICO 42-47 (1950); CUSIMANO, *IL FONDAMENTO DELLA GUERRA NEL DIRITTO NATURALE* (Messina 1952); Vincenzo Sinagra, *Esistenza e Validità del Diritto Naturale*, 24 IL CIRCOLO GIURIDICO L. SAMPOLLO 265-95 (1953); Nino Nava, *Il Diritto Naturale come Struttura della Persona*, I PROBLEMI ATTUALI DELLA FILOSOFIA DEL DIRITTO 99-105 (Milan 1954); Pizzorni, *Il Vero Concetto del Diritto Naturale*, 7 SAPIENZA (1954); Bettiol, *Dal Positivismo Giuridico alle Nuove Concezioni del Diritto*, 5 JUS 189-95 (n.s. 1954)—interesting for the polemic points in connection with Kelsen, whose fame in America is attributed by the author to the fact that there does not exist in the United States "a true scientific foundation for the law."

Most of these articles are favorable to natural law and welcome with satisfaction its renaissance, although the subject seemed as recently as fifteen or twenty years ago to be buried forever among the memories of a remote past.

In addition to some works which consider natural law objectively in one of its special aspects²² or which appraise its prospects in the framework of the direction of contemporary thought,²³ we must now take note of the critics, the adversaries of the renewed natural law movement. Strange as it may seem, they are not found principally among the numerous idealists to whose thought historicity is essential. Confronted by the phenomenon of the rebirth and the new success of natural law these latter have been silent up to now; and some of them, by their adherence to Catholic spiritualism have even been led to the threshold of natural law by that inexorable dialectic of ideas, which, in the realm of Christian philosophy, carries one inevitably if unwittingly from Augustinian positions, which are easily accessible to idealists "of the right," to Thomistic positions. There is, for instance, the case of one of the best and most authoritative representatives of Catholic spiritualism, Felice Battaglia, who in the past was not led by the idealistic and historical origin of his thought to consider sympathetically the idea of natural law, and who recently wrote words which express without question the need for receptivity to values which in law transcend those imposed by the simple fact of the positivity of the law, maintaining that the law, which is "*jussum* in its original aims wants to be *justum* at the peak of its conscious function, in the aggregate goals of life."²⁴

Still the positivists persist in opposing natural law: both those of the old school who have survived the violent assaults which idealism had carried out against their positions in the past, and the followers of logical neo-positivism, many of whom turn their attention to juridical problems examined in the light of analytical philosophy. A representative of the positivism which we might call classical in its criticism of the new doctrine of natural law, is an old and illustrious legal philosopher, Alessandro Groppali,²⁵ who vigorously ascribes to positive law alone the character of juridicity (he, too, pointing out in this respect the uncertainty and perplexity mentioned by the Catholic jurists), and fears that the Catholic thesis of the illegitimacy of laws contrary to natural law may be pushed so far as to want to give to the Constitutional Court the power to verify the conformity of the laws, not only to the written constitution, but also to the natural law. These ideas, even though he does not say so, have been proposed indeed by some writers²⁶ on the rather questionable presupposition that

22. In its relation to canon law the following study it, but from different points of view: Giuseppe Olivero, *Diritto Naturale e Diritto della Chiesa*, 61 *IL DIRITTO ECCLESIASTICO* 1-41 (1950); and Enrico Di Robilant, *SIGNIFICATO DEL DIRITTO NATURALE NELL'ORDINAMENTO CANONICO* (Turin 1954).

23. Goffredo Quadri, *Giusnaturalismo 1950*, 31 *RIVISTA INTERNAZIONALE DI FILOSOFIA DEL DIRITTO* 106-16 (1954), and *I Problemi Attuali della Filosofia del Diritto*, 31 *id.* 125-35.

24. *Odierna Tendenze della Filosofia del Diritto*, 9 *RIVISTA TRIMESTRALE DI DIRITTO E DI PROCEDURA CIVILE* 246-51 (1955); also in *SCRITTI DELLA FACOLTÀ GIURIDICA DI BOLOGNA IN ONORE DI U. BORSI* (Padua 1955).

25. By Groppali, see *Diritto Naturale e Diritto Positivo*, 1952 *ECO DELLA GIUSTIZIA*; and *Il Diritto Naturale e la Corte Costituzionale*, 30 *RIVISTA INTERNAZIONALE DI FILOSOFIA DEL DIRITTO* 38-50 (1953).

26. For example, Garbagnati, in the article mentioned in 2 *JUS* 148-49 (n.s. 1951).

the Constitution, having accepted certain principles of natural law, meant to accept the whole doctrine. On the political plane also these ideas present grave difficulties because placing an ulterior order of values above that expressed in the written constitution would open the way for analogous demands on the part of supporters of other ideologies maintaining a different concept of justice. This is a tendency which has already been apparent in several politicians, who claim that the concept of constitutionality is not to be understood as purely juridical.

Different in its arguments but analogous in substance is the criticism which Norberto Bobbio, one of the most authoritative philosophers, applies to the doctrine of natural law. Taking his cue from the recent Italian translation of a volume by d'Entrèves, *Natural Law*, written originally in English, and from the publication of other English works on natural law, Bobbio has shrewdly discussed the legitimacy of such a law,²⁷ bringing out clearly that to the exigency of an objective ethic affirmed by the natural law proponents, there simply never is a corresponding formulation of indisputable maxims of conduct, universally valid, which do not succumb to any historical change.

But it is not for this reason that the adversaries of natural law fail to appreciate the demand, expressed by the natural law philosophers in a radical form, for an ideal of justice above the law which is effective from the mere fact that it is *in civitate posita*: the favor which the "institution" theory enjoys among many jurists and philosophers does not cause the attribution of the character of juridicity to laws diverse from those of the State to encounter grave obstacles, and therefore it does not cause one to consider scandalous the thesis of a juridical provision not only not ordered by the State but superior to the State. This is so even though there is no admission necessarily of a juridical order which is universally and absolutely valid, an idea repugnant to the historical approach which has inspired much of Italian culture.

Even more appreciated is the demand, both political and moral, that legislators and the State in general respect the essential rights of the person, even if these latter are understood on a historical rather than rationalistic or naturalistic level, and even if their positive formulation is required in order to accept their juridical character and force. As will now be more clearly seen, this is what Groppali does; likewise Scarpelli, a young magistrate who follows the analytical philosophers and is close to the thought of Bobbio; and Bobbio himself does not deny entirely the need for a criterion of evaluation for historical law, provided that this criterion does not assume the form of an absolute or purely rational idea.²⁸

Catholics and others, natural law proponents and historical or positivist thinkers are moreover all agreed, though moving from diverse premises, in affirming the necessity of respect for the fundamental rights of man. They are on this point opposed to the spokesmen of totalitarian states. In 1946, when the assembly which was to give Italy its new republican constitution began its work, the Jesuit Father Messineo declared that the original rights, borne by the person in his own free and spiritual being and never to be violated even by constitutional and

27. *Sul Diritto Naturale*, 45 RIVISTA DI FILOSOFIA 429-38 (1954).

28. *TEORIA DELLA SCIENZA GIURIDICA* 36 (Turin 1950).

authoritative power, are protected by an invariable natural law.²⁹ From a historical point of view, on the other hand, Vincenzo Palazzolo soon afterward examined the significance of the declarations of the rights³⁰ in order to draw from them the "real social and human basis" and "to clarify the most important tendencies of contemporary constitutional life"; and Felice Battaglia, who in 1946 had again published his *Carte dei Diritti* which had been postponed for the addition of the Charter of the United Nations, was in 1950 studying the international protection of human rights.³¹ His collection of charters was prefaced by an essay, *I Diritti Fondamentali dell'Uomo, del Cittadino e del Lavoratore*,³² and he had at the printers a study, *Libertà ed Uguaglianza nelle Dichiarazioni Francesi dei Diritti dal 1789 al 1795*.³³ Also in 1950 Giuseppe Capograssi was explaining the *Dichiarazione Universale dei Diritti dell'Uomo*, written in 1948, reaffirming its practical juridical value.³⁴ Father Messineo had already written on this last work.³⁵

Also published in 1950 is a fuller study of a similar nature, the volume by Massimo Curcio, *La Dichiarazione dei Diritti delle Nazioni Unite*,³⁶ as well as an essay by Giovanni Ambrosetti,³⁷ which attempts to find the link between the rights of man and the historical concepts in which they must be rooted. In 1951 we find a work by Arturo Carlo Jemolo, a jurist and a rather well-known historian, foreseeing the foundation of human rights in the conscience of the people and in custom.³⁸ We find also a lecture by Bobbio to the students of the Turin Military School³⁹ and finally an article by Groppali,⁴⁰ which affirms, in conformity with his positivist convictions, the necessity for even the fundamental rights of man to be positively recognized by the juridical structure because they can be made to have value. But he certainly does not deny their character of "natural and primary exigencies" which in a certain sense force the State to recognize them.

It is therefore not in the name of the omnipotence of the State—or even simply of the absolute pre-eminence of the rules imposed by the State over any other rules whatever—that the jurists and philosophers who deny natural law

29. *I Limiti del Potere Costituente*, 97 LA CIVILTÀ CATTOLICA 400-09 (I 1946).

30. CONSIDERAZIONI SULLE DICHIARAZIONI DEI DIRITTI (Milan 1947).

31. *La Protezione Internazionale dei Diritti Umani*, 17 RIVISTA DI STUDI POLITICI INTERNAZIONALI 233-47 (1950), and under the title *Verso Una Nuova Fase della Protezione Internazionale dei Diritti Umani*, in 1 STUDI IN ONORE DI A. CICU 65-81 (Milan 1951).

32. LE CARTE DEI DIRITTI 13-36 (2d ed., Florence 1946).

33. (Bologna 1946).

34. "La Dichiarazione Universale dei Diritti dell'Uomo e il Suo Significato," in the little work DICHIARAZIONE UNIVERSALE DEI DIRITTI DELL'UOMO 9-20 (Padua 1950).

35. *La Dichiarazione Internazionale dei Diritti dell'Uomo*, 100 LA CIVILTÀ CATTOLICA 380-92 (II 1949); see also *I Diritti dell'Uomo e l'Ordinamento Internazionale*, 100 id. 493-504 (III), 32-45 (IV); and *La Persona Umana e l'Ordine Internazionale*, 100 id. 493-503 (IV), both by the same author.

36. (Milan 1950).

37. *Il Problema dei Diritti Umani e l'Esperienza*, 17 ANNALI DELLA FACOLTÀ DELL'UNIVERSITÀ DI CAMERINO 125-60 (1950).

38. *I Diritti Umani nella Coscienza Sociale*, 28 RIVISTA INTERNAZIONALE DI FILOSOFIA DEL DIRITTO 489-95 (1951)

39. LA DICHIARAZIONE UNIVERSALE DEI DIRITTI DELL'UOMO (Turin 1951).

40. *I Diritti Naturali nella Costituzione della Repubblica Italiana*, 28 RIVISTA INTERNAZIONALE DI FILOSOFIA DEL DIRITTO 410-20 (1951).

intend to limit the nature of juridicity to positive rules alone. The dangers of identifying the State with absolute value are, because of bitter direct experience, present to all Italians to such a degree that, as has been seen, not even the idealists of Gentile's school are opposed to the rebirth of natural law, though their doctrine could indeed once again lead them to such an opposition. Nor do the positivists, both old and young, mean to deny the aspiration of men to a set of laws better than the positivistically effective one; they do not exclude the possibility of an evaluation of these laws on the basis of a higher justice. The leader of Italian positivism himself, Roberto Ardigò, spoke moreover of "social idealities," born of the very psychology of society and destined to work on the evolution of ethical and juridical rules. Even less do these writers doubt the necessity of respect for the basic rights of man even when they are conceived as historically determined. What prevents the admitting of a natural law which is effective above and beyond positive legislation is the necessity of not giving up the certitude of the law and of freeing the application of the law from any subjective evaluation—an obvious source of error and arbitrariness that might allow abuses no less serious than those committed by the totalitarian states. This necessity is somewhat more strongly felt in the countries of continental Europe than in the Anglo-Saxon areas where the juridical conscience of the citizens has by long tradition been prepared for the great scope of the powers of the judge. Besides—and here the problem clearly reveals the political and ideological character which is at its base—the Catholic belief in the identity of natural with divine law, and even more with the interpretation of divine law given by the Church of Rome, arouses in non-Catholic jurists and philosophers an understandable reaction to the political developments which that identification may lead to, particularly in a land like Italy, where the problem of the relationship between State and Church is today even more delicate than ever because of the new position to which Catholic political forces have been carried by the fact that in them is recognized the only effective opponent to communism when it loomed before most Italians as a huge menace. Beyond the considerations of a philosophic nature concerning the validity of the doctrine of natural law on the speculative plane, and beyond the considerations of a juridical nature concerning the value of the certitude of the law—what often determines in the last analysis the taking of a position for or against natural law is the fact that the natural law doctrine reborn today is Catholic and its acceptance or its denial implies, potentially at least, certain political consequences.

While there have been no recent studies specifically on natural law in ancient thought, the interest taken by Italian juridico-philosophical thought in recent years in the problem of natural law shows itself also in numerous historical studies which have as their object the doctrine of natural law either in its medieval forms or in those of modern times. To give an account here of all the works of this type which have directly or indirectly to do with natural law is certainly impossible; nor is it possible in any way to give much more than a list of the main studies on the subject. But these notes may give an idea of the fervor of the historical studies which the subject has led to.

There are several causes for this flowering of research, from the constantly

active Italian tradition of studies of the history of philosophy in general to the endeavor of Catholic writers to penetrate into and to disseminate the knowledge of Scholastic natural law, and to the interest of lay democratic political thought in the classics of modern liberalism. Thus there have been, first of all, new editions and translations, complete or partial, of texts from St. Thomas⁴¹ to St. Robert Bellarmine⁴² for matters pertaining to Scholastic thought; from Grotius⁴³ to Hobbes,⁴⁴ to Locke,⁴⁵ to Spinoza,⁴⁶ to Leibnitz⁴⁷ for what concerns the natural law of the Aufklärung. This does not take into account the numerous texts destined for school use.

On these and other authors there has been a rich harvest of critical studies, of different forms and naturally of varying quality, but all attesting a renewed interest in the matter. The figure of Grotius has aroused particular interest. Studied in all the aspects of his complex personality by Antonio Corsano, who devoted a large volume to him,⁴⁸ Grotius has been the subject of many individual studies, above all in regard to the connection between his doctrine and Scholasticism and the relationship in his thought between rationalism and history.⁴⁹ This question is at the heart of a very recent volume by Ambrosetti,⁵⁰ who had already embarked on studies in the juridical thought of Suarez⁵¹ and of the whole of

41. In addition to the *Scritti Politici* edited by Passerin d'Entrèves (Bologna 1946), there has been published a selection of passages from the *Summa Theologica* (*La Giustizia 2a 2ae, Questioni 57-61*), with an introduction by Di Carlo (Palermo 1950).

42. *SCRITTI POLITICI* (Giacon ed., Bologna 1950).

43. *PROLEGOMENI AL DIRITTO DELLA GUERRA E DELLA PACE* (Fassò ed., Bologna 1949); further, see *PROLEGOMENI AL DE IURE BELLI AC PACIS* (2d ed., Palermo 1948), with an introduction by Di Carlo.

44. *ELEMENTI FILOSOFICI SUL CITTADINO* (Bobbio ed., Turin 1948).

45. *DUE TRATTATI SUL GOVERNO* (Pareyson ed., Turin 1948).

46. *TRATTATO TEOLOGICO-POLITICO* (Casellato ed., Venice 1947); *TRATTATO POLITICO* (Formaggio ed., Turin 1950).

47. *SCRITTI POLITICI E DI DIRITTO NATURALE* (Mathieu ed., Turin 1951).

48. U. GROZIO. *L'UMANISTA, IL TEOLOGO, IL GIURISTA* (Bari 1948).

49. See, in addition to the numerous articles by Droetto in the *Rivista Internazionale di Filosofia del Diritto* (1947: 58-80; 1948: 374-93; 1949: 211-40; 1950: 481-526; 1951: 296-302), those by Del Vecchio, *Über die Rechtsphilosophie des Hugo Grotius*, 38 *ARCHIV FÜR RECHTS- UND SOZIAL-PHILOSOPHIE* 162-71 (1949) and, under the title *Note Groziane*, in 27 *RIVISTA INTERNAZIONALE DI FILOSOFIA DEL DIRITTO* 357-64 (1950); Donati, *Del Diritto Soggettivo e Del Merito, Commento a Grozio*, 25 *id.* 28-58 (1948); Fassò, *Ugo Grozio Tra Medioevo ed Età Moderna*, 41 *RIVISTA DI FILOSOFIA* 174-90 (1950); *Ragione e Storia nella Dottrina di Grozio*, *RENDICONTO DELLE SESSIONI DELL'ACCADEMIA DELLE SCIENZE DI BOLOGNA, CLASSE DI MORALE* 115-44 (1949-50); *Sull' Interpretazione di Alcuni Passi Groziani*, 28 *RIVISTA INTERNAZIONALE DI FILOSOFIA DEL DIRITTO* 753-61 (1951). To these writings are to be added those of Di Carlo, *Precisazioni sul Pensiero Giuridico di Grozio*, 22 *IL CIRCOLO GIURIDICO L. SAMPOLO* 225-48 (1950), and *Per l'Interpretazione di Alcuni Passi di Grozio*, 22 *id.* 279-88 (1951); and finally that of Frosini, *Ugo Grozio e il Razionalismo Giuridico*, 2 *ANNALI DEL SEMINARIO GIURIDICO DELL'UNIVERSITÀ DI CATANIA* 360-65 (1948).

50. *I PRESUPPOSTI TEOLOGICI E SPECULATIVI DELLE CONCEZIONI GIURIDICHE DI GROZIO* (Bologna 1955). Interesting in this connection is the perspective in which natural law is seen by Mario Giuliano (*LA COMUNITÀ INTERNAZIONALE E IL DIRITTO*, Padua 1950), whose interpretation of Grotius and other writers of the 17th and 18th centuries is remarkably close to that stated by some of the authors who perceive some historical motive in those doctrines.

51. *LA METAFISICA DELLE LEGGI DI SUAREZ* (Rome 1948).

Scholastic thinking.⁵² Battaglia likewise discussed Suarez⁵³ bringing to light as did Ambrosetti the historical aspects of his natural law concepts. Father Carlo Giacon also wrote about the juridical thought of Scholasticism.⁵⁴

Medieval natural law was treated by Ugo Nicolini, in the works listed above, and by Antonio Rota,⁵⁵ Dario Composta,⁵⁶ and Ugo Gualazzini,⁵⁷ all discussing the concepts of the doctrine among the canonists and glossators. The first influences of Christian theories of natural law on Roman law were studied by Biondo Biondi,⁵⁸ one of the most active proponents of the perennial validity of the former. On the doctrine of natural law in St. Thomas there remains to be mentioned an article by Giuseppe Graneris,⁵⁹ another of the writers whom we have seen to be engaged in the debate among Catholic jurists on the subject of the actual effectiveness of natural law.

For readers of English there has already been noted above one of the principal Italian historical works on natural law, *Natural Law*, by A. P. d'Entrèves, which, although it was written in English originally, has now appeared in an Italian version;⁶⁰ I shall not, however, dwell long on this work, which deserves a special study. The volume by d'Entrèves is in any case the only historical study on natural law of a general nature which has appeared in the last few years in Italy, if one leaves aside the historical portion of the book by Biavaschi already mentioned (adequate but of doubtful value), and of the university course of Bobbio which has been published in mimeographed form under the title *Il Diritto Naturale nel Secolo XVIII*.⁶¹ To the numerous monographs should be added a short but discerning article by Del Vecchio on contractualism⁶² and one by Bobbio devoted to Hobbes,⁶³ the book of F. Magliano on the juri-

52. IL DIRITTO NATURALE DELLA RIFORMA CATTOLICA (Milan 1951).

53. *Società Civile ed Autorità nel Pensiero di F. Suarez*, 27 RIVISTA INTERNAZIONALE DI FILOSOFIA DEL DIRITTO 213-34 (1950), and *I Rapporti dello Stato e della Chiesa Secondo F. Suarez*, 28 *id.* 691-704 (1951).

54. LA SECONDA SCOLASTICA (Milan 1944-50; 3 vol.). The third volume is devoted to "I Problemi Giuridico-Politici. Suarez, Bellarmino, Mariana."

55. *La Concezione Giuridica della Società Naturale Umana agli Albori della Rinascita del Diritto*, 24 RIVISTA INTERNAZIONALE DI FILOSOFIA DEL DIRITTO 178-206 (1947); *Il Diritto Naturale Come Insieme di Norme Regolatrici dei Rapporti della Società Umana nella Dottrina della Prima Rinascenza Giuridica*, 25 *id.* 125-63 (1948); *Il Decretista Egidius e la Sua Concezione del Diritto Naturale*, 2 STUDIA GRATIANA 211-49 (1954).

56. *Il Diritto Naturale in Graziano*, 2 STUDIA GRATIANA 151-210 (1954).

57. *Natura, idest Deus*, 3 *id.* 411-24 (1955).

58. *La Concezione Cristiana del Diritto Naturale nella Codificazione Giustiniana*, 1 JUS 2-23 (n.s. 1950); 4 REVUE INTERNATIONALE DES DROITS DE L'ANTIQUITÉ 129-58 (1950).

59. *L'amoralità della Legge Giuridica di Fronte alla Dottrina di S. Tommaso*, 38 RIVISTA DI FILOSOFIA NEOSCOLASTICA 1-25 (1946).

60. LA DOTTRINA DEL DIRITTO NATURALE (Milan 1954).

61. (Turin 1947).

62. *Brevi Note sui Vari Significati della Dottrina del Contratto Sociale*, 24 RIVISTA INTERNAZIONALE DI FILOSOFIA DEL DIRITTO 207-12 (1947). On the same subject, involving constant references to the doctrine of natural law, is the volume by D'Addio, *L'IDEA DEL CONTRATTO SOCIALE DAI SOFISTI ALLA RIFORMA E IL "DE PRINCIPATU" DI MARIO SALAMONTO* (Milan 1954).

63. *Legge Naturale e Legge Civile nella Filosofia Politica di Hobbes*, STUDI IN MEMORIA DI GIOELE SOLARI 61-101 (Turin 1954). On Hobbes there is also an essay by Bianca, *DIRITTO E STATO NEL PENSIERO DI T. HOBBS* (Naples 1946).

dical doctrine of Spinoza⁶⁴ and that of Giulio Bruni Rocca on American natural law doctrines, interesting because so little known in Italy.⁶⁵ The doctrine of natural law among Italian thinkers has been treated by L. Bellofiore, who studied it in Vico;⁶⁶ by G. Marchello, who devoted his research to Romagnosi;⁶⁷ and by Sergio Cotta, author of a work on Filangieri⁶⁸ as well as a valuable book on Montesquieu,⁶⁹ an essay on *Il Pensiero Politico del Razionalismo e dell'Illuminismo*,⁷⁰ which gives considerable space to natural law, and a recent volume on St. Thomas⁷¹ in which the study of Thomistic juridical thought is discussed in an original manner in terms of the questions of contemporary juridical thought.

Certainly these writers often treat political theories in a broad sense, even more than the doctrine of natural law itself. Since in the cases I have noted here natural law is the foundation and the presupposition of political theories⁷² it is not incorrect to consider them all as sharing the interest, ethical and political as well as scientific, in the problem of natural law. The profound historical mark which idealism has left on Italian culture is indeed far from being cancelled, even if idealism has been for several years in a state of crisis. Idealism on the philosophical plane had led to a general denigration of natural law which was judged widely to be tainted with abstract anti-historical intellectualism. A purely philosophical revaluation of natural law in Italy is possible, if at all, within the limits of attempts, which have been shown to be numerous, to perceive in any manifestation of the thinking which is traditionally considered typical of natural law historical implications and meanings. These are in reality in opposition to the essence of natural law. Wherever the revaluation is tried in some other way—and in this context interest in natural law can mean revaluation—there must be repeated all that has already been said in connection with the many theoretical affirmations of the validity of natural law. These, rather than having scientific or philosophical value, have a political significance which might also be contingent, a political significance which nevertheless assumes great importance as exemplifying the state of mind of a large part of Italian postwar culture.

GUIDO FASSÒ

(Translated by ROBERT D. NUNER)

64. *IL DIRITTO NEL SISTEMA DI B. SPINOZA* (Milan 1947).

65. *LA DOTTRINA DEL DIRITTO NATURALE IN AMERICA* (Milan 1950). One should note also *LA RAGION PURITANA* (Milan 1954) by the same author.

66. *LA DOTTRINA DEL DIRITTO NATURALE IN G. B. VICO* (Milan 1954).

67. *LA DOTTRINA DEL NATURALE NELLA FILOSOFIA CIVILE DI ROMAGNOSI* (Turin 1955).

68. *GAETANO FILANGIERI E IL PROBLEMA DELLA LEGGE* (Turin 1954).

69. *MONTESQUIEU E LA SCIENZA DELLA SOCIETÀ* (Turin 1954). On Montesquieu there is also the work by Vidal, *SAGGIO SUL MONTESQUIEU* (Milan 1950).

70. *IN QUESTIONI DI STORIA MODERNA* 129-83 (Milan 1948).

71. *IL CONCETTO DI LEGGE NELLA SUMMA THEOLOGIAE DI S. TOMMASO D'AQUINO* (Turin 1955).

72. This is particularly true for the numerous writings on Rousseau, among which I recall those of Petruzzellis (1946), Saloni (1949), Testa (1954), Mondolfo (1954), and Einaudi (1954).