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Natural Law Theories in the Twentieth Century

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SUMMARY

Natural Law Theories in the Twentieth Century

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If Karl Magnus Bergbohm (1849–1927) had lived later in the 20th century, he would have had an opportunity to use his bloodhound's sense of smell with much greater satisfaction in sniffing out the hidden presence of natural law in the legal doctrines of the time (see Bergbohm 1973). I will try to carry on his work, certainly without his acumen, but also without his preconceived hostility.

We need to preliminarily distinguish natural law from the *doctrines* of natural law. The latter are manifold and often very different from one another, but they are linked by the persistence of an identical problem, that of the existence of a law not produced by man or, more modestly, of the presence in positive law of some strictly legal elements not posited by man. That is natural law as a problem, while a natural law doctrine is any of the possible answers to that problem. The problem is one, the answers many. The problem persists throughout the history of legal thought; the answers appear and fade away and return, at times in a renewed form, but they always depend on the historical evolution of positive law.

Natural law theory can present itself as a deontological conception of law, that is, it can say the way positive law *ought* to be. From this point of view it is distinguished from other deontological conceptions of law by the way it identifies the criteria of the legal ought.

Natural law theory can also present itself as a theory of law, that is, it can describe law as it is. From this point of view it is distinguished from other theories by the way it defines the *concept* of law. It is only in this second sense that natural law theory can properly be situated in the sphere of the knowledge of law and so can be compared with, and can compete with, other theories of law, and in particular with legal positivism.

In the first sense natural law theory belongs to the sphere of ethics or politics or, more precisely, to the sphere of the moral or political criticism of positive law, and in principle it is compatible with legal positivism. Nevertheless, in the history of legal thought it is not at all easy to distinguish the two meanings of natural law theory, in part because a deontological conception of law often presupposes a concept of law already fraught with elements of natural law.

Since the most typical and controversial meaning of natural law theory is the one linked to its claim to be a theory of law, attention will be paid here to this meaning.

Natural law theory as a theory of law is generally speaking interested in addressing some of the following contentions: (1) that law must be described in light of its practical sense, that is, it must be described as a reason for action; (2) that the contents of law cannot be determined regardless of an attentive look at human nature; (3) that legal theory implies value judgments with a cognitive content; (4) that law and morality are necessarily connected; and (5) that natural law has a legal character.

Obviously, it is very unlikely that a doctrine of natural law should endorse *all* of these contentions, and so there will be stronger and weaker conceptions of natural

law. Which of these contentions are strictly indispensable in characterizing a theory of law as a natural law theory? Which of these characteristics is the strictly indispensable one, without which one can no longer speak of a natural law theory? It is impossible to answer this question without moving into the internal point of view of a doctrine of natural law. For this reason, in this historical investigation we will adopt the broadest possible meaning of natural law theory.

For natural law theory to maintain its salience, it cannot just recognize that positive law in its origin and in its practical application is not self-sufficient, having to resort to external elements (of a moral, social, or economic nature). Nor even can it just observe that legal systems, as cultural expressions, are steeped in positive morality. Rather, the stronger claim to be made is that factors not ascribable to human will play a normative role and are already marked by their own legality, even if they still need to be taken through a process of positivization. This also explains why among the distinctive characteristics of natural law theory I have not included the distinction between what is natural and what is artificial. The fact is that not everything that is artificial stands in opposition to nature, and indeed nature, if it is to have any value, always needs to be expressed by human work.

After a century marked by legal positivism, on different occasions the 20th century witnessed a return to natural law. This is not so much due to antipositivism, which grouped a range of philosophical tendencies (see Fassò 2001, 214). Indeed, the reciprocal independence of philosophical and legal positivism has been abundantly demonstrated (see, for instance, Pattaro 1974). The reason is instead to be sought in the conjunction between social transformation and the triumph of legal-philosophical speculation, which became autonomous both from the philosophers' philosophy of law and from the jurists' philosophy of law.

Three revivals of natural law can be identified: one at the beginning of the 20th century, one provoked by World War II, and one proper to contemporary constitutionalism beginning in the last two decades of the 20th century. All three belong to the so-called short century, but we need to realize that the same label encompasses a broad spectrum of different cultural phenomena and philosophical trends. If there are three rebirths, it means that there have been as many deaths or crises (see Bobbio 1965, 180) and consequent returns of legal positivism (cf. Lang-Hinrichsen 1954).

1) The revival of natural law in the early 20th century was in reality brought about by a dissatisfaction with 19th-century legal positivism, which in general had pursued the objective of rigorously separating out the legal sphere, unduly neglecting moral ideals and the social bases of law.

2) The revival of natural law after World War II was obviously prompted by the fact that evident and serious violations of human dignity had been permitted or at least not prevented by positive law, so it was felt necessary to avoid that from happening again.

3) The revival of natural law at the end of the 20th century was provoked by the greater role the question of human rights assumed within constitutional regimes, with the consequent transformation of the very way of conceiving positive law. Here the rebirth of natural law is confused, often indistinguishably, with the crisis within legal positivism.

1. The First Revival

1.1. Natural Law and Legal Science

In 1854, Bernhard Windscheid proclaimed that "the dream of Natural Law is over," but in 1884 he reluctantly admitted that the dream of "a universal, fixed and unchanging law grounded in reason" was still alive (Windscheid 1904, 9, 105; translated in Bjarup 2005, 292).

In the early 20th century, when post-Kantian natural law theory had long since died out (see, for instance, Ahrens 1838–1840), the revival of natural law was possible because of the wearing out of legal positivism and the renewal of Catholic natural law theory, though the two cultural phenomena developed separately and remained separate.

Within legal positivism there emerged nonpositivist tendencies that confusedly manifested a restlessness and increasing dissatisfaction in legal science. This, however, often did not mean an explicit recourse to natural law, which in the most benevolent cases was seen as a morality external and extraneous to positive law. At the same time, Catholic natural law was developing its own moral theory, freeing itself of eclecticism. In this way it was able to intervene in the theoretical debate about law and legal science, but with results limited to the sphere of jurists of Christian persuasion. This new cultural climate helped to accredit the plausibility of natural law orientations. This is precisely the connotation of the first revival of natural law, meaning that its presence was accepted where it had hitherto been radically denied.[1]

The slow and systematic construction of 19th-century legal science had been possible because it did not presuppose a law at the mercy of a fluctuating sovereign will: Rather, on Savigny's conception, law harked back to an objective order existing in society, an order from which it drew all its stability (see Fioravanti 2011). Once the fundamental legal categories had been worked out, positive law had lost contact with its social bases on the assumption that lived a life of its own. In the place of society and the people there now was the state, that is to say, an artificial order. Therefore, the formula of the *Rechtsstaat* is representative of this self-foundation of law in the 19th century.

This state of affairs went through a crisis when the issue of the correctness of judges' decisions could not be fully resolved by an appeal to strict conformity with the legal norms (see Schmitt 1912). Legal claims may be grounded in sources other than the statutory law. The possibility of *contra legem* law is accepted. These other sources can be those of legal praxis or of legal science itself, but also, deeper down, those of social life.

Although in the first decade of the 20th century many works were published on natural law, the first scholar expressly to speak of a rebirth of natural law was Joseph Charmont (1910).[2] He saw it as a form of "legal idealism" that accorded

[1] A reconstruction of this reappraisal of the concepts of natural law in Europe and in the United States can be found in Haines 1930.

[2] For what can be considered a corresponding text in American culture, see the article by Morris Raphael Cohen (1916).

legitimacy to those moral claims which would have been disqualified had law been merely seen as a set of technicalities. More than to natural law, however, Charmont, following in the footsteps of Raymond Saleilles (1902), made reference to natural rights as having their origin in the 17th- and 18th-century classical school of natural law (see Solari 1904) and their full development in the French Declaration of the Rights of Man and of the Citizen and the American Declaration of Independence, as well as in Kant's thought. What Charmont defended was above all the role of the subject of law, sterilized mostly at the hands of utilitarianism and philosophical positivism. He very clearly saw the problem of the conflict between law and individual conscience and reevaluated the thought of Rudolf von Jhering, who unlike Savigny stressed the active role of the struggle for subjective rights and the importance of aims in law.[3] However, Charmont did not appear very consistent with his Christian subjectivism when he traced the causes of the revival of natural law to the organicistic solidarism of Émile Durkheim, to Geny's theory of free scientific research, and even, albeit with some reservations, to the theory of objective law advanced by Léon Duguit, regarded as a crypto–natural lawyer (see also Haines 1930, chap. X). These references would have required greater consideration of natural law as an objective morality.

Indeed, the renewed attention to natural law in legal science was hindered by the circumstance that natural law was confined to the field of morality and clearly distinguished from positive law. Even if, as Jean Dabin (1928, 431) remarked, the natural law of moralists could be accepted by jurists as a rational ideal law, it remained external to positive law (see Ripert 1918), while as a subjective right it could give rise to legal claims.

However, a true rebirth of natural law cannot be described solely by reference to Enlightenment natural rights. It is necessary above all that objective moral values be perceived as meaningful for the concept of positive law. We will start by examining the evolution of the relation between natural law and morality, and then we will consider the cultural phenomenon involving legal science taking up ethico-social concerns.

1.2. Catholic Natural Law Theory

In the early 20th century, natural law became a candidate for serving a dual function, to use a distinction drawn by Lask (1950, 6–7). From a formal point of view (formal natural law) it presented itself as a criterion for the validity of positive law and as a foundation of its normativity (a metaphysical doctrine of the sources of law); from a material point of view (material natural law) it sought to dictate the necessary contents of positive law. To be sure, recourse to metaphysics was not seen favourably by the dominant philosophy; for its part legal science did not appreciate the lack of any distinction between morality and law, for it was concerned to defend the principle that formal legality should be equidistant from ethical ideals and from mere facticity. Set in opposition to "the idealistic doctrine of

[3] As we shall see, this reference to Jhering's thought would assist the first rebirth of natural law.

natural law," then, was "the realistic doctrine of positive law" (Bergbohm 1973, 144).

As is well known, the main defence of natural law came from the long tradition of the Catholic Church, which had long been going through a period of internal cultural travail. From the standpoint of natural law, this change of heart did not concern the traditional contents but rather affected the theoretical bases. These were primarily of a theological nature and so not very meaningful to nonbelievers.

There are two ways of considering natural law: as a universal morality founded on a general idea of human nature and on the use of natural reason, and as a specific moral tradition that formed within the Christian faith and in the shadow of the Scriptures (see Porter 2003; MacIntyre 1988). For the medieval Schoolmen, who sought to carry forward the Greek and Roman tradition, both Scripture and reason are expressions of the same divine wisdom and so are isomorphic. Not only was natural law inspired by Scripture, but the latter was also interpreted in light of natural law. In modernity, the two sources of Christian revelation, reason and Scripture, have become independent of one another, even though they are compatible. For Grotius, Hobbes, and Locke, Scripture validates what reason discovers on its own. But when the possibility of a scientific knowledge of morality is affirmed, natural law is conceived as a set of rational rules deduced from first principles and there is no further need for Scripture. Accordingly, the survival of Catholic natural law theory was made to depend on the possibility of showing that its specific contents were grounded in a rational ethics set in contrast to Enlightenment ethics. But in the early 19th century, Catholic doctrine did not yet have a philosophical compactness of its own and became eclectic, with strong influences coming from Locke's natural law theory and Condillac's sensationalism. Still, in mid-19th century, the signs of a revival of the Catholic philosophical tradition of law became clearly manifest above all in the thought of Antonio Rosmini (1841–1843) and in that of Luigi Taparelli d'Azeglio (1840–43). At the end of the 19th century, a return to the thought of Thomas Aquinas provided a more rational foundation for the Catholic doctrine of natural law, which was completely reworked. Even today Thomist thought can be said to remain the only organic doctrine of natural law, both inside and outside the Catholic Church. In Protestantism, natural law began to draw philosophical attention only after the tragic experience of the Holocaust.

Throughout the 20th century, the Aquinas's thought showed its remarkable ability to survive its transient interpretations. Consequently, Catholic natural law theory contains a variegated range of approaches to his thought on law and justice. After pointing out what the principal approaches are, I will try to outline the elements they have in common so as to provide a general identification of this current of thought.

The rebirth of Thomism in Catholic thought was supported by Leo XIII's the encyclical letter *Aeterni Patris* (1879), and it started in pontifical universities, and so in an ecclesiastical milieu, owing to the cultural training of the clergy. (For this reason its first organic expression was markedly Scholastic, though it was very different from its medieval expression.) But with the rise of the social question and the exhortations contained in the 1891 *Rerum Novarum*, the social part of Catholic doctrine began to gain wider currency.

The philosophical and theological movement of neo-Scholasticism was promoted above all by the Jesuits at the end of the 19th century, and it quickly

spread not only in Italy but also in Belgium, France, and Germany, aspiring to take on the role of the philosophy proper to the Catholic Church. Especially with regard to natural law and morality, the German-speaking countries were the most fertile for this school of thought,[4] both because of the strength of a rationalistic tradition that overstressed the connection between Thomas Aquinas and Christian Wolff and because of the need to give cultural substance to the political presence of the Catholics in Bismarck's Germany. So imposing was this movement that it led some to speak of a "restauratio christiana juris naturalis" (Hollerbach 1974, 114).

In general the attitude of neo-Scholasticism was that of frontal opposition to the philosophical currents dominant at different times: first to positivism, neo-Kantianism, and neoidealism, and then to Marxism, phenomenology, existentialism, and analytical philosophy—all immanentist philosophies. For this reason, too, neo-Scholasticism took on a rationalistic form very distant from the ancient Christian moral tradition. Not satisfied with so many external enemies, it also provoked lively and at times very heated debates. Neo-Scholasticism persisted until after World War II, though it gradually abandoned its original expository style.

Neo-Scholasticism was a method for studying and expounding Aquinas's thought, a method that inevitably became a way of interpreting it. With this rigorously and rigidly syllogistic method, neo-Scholasticism was dry, confutative, and peremptory. The tendency was to establish philosophical and theological theses distinctive to Catholic thought. Among them there were, obviously, those regarding natural law and the relation between law and morality. For a paradigmatic example of this style of thought, one need look no further than the work of the Jesuit Victor Cathrein (1845–1931). His writings, among which there are some on law (see Cathrein 1891, 1901), spread widely and have been reprinted in numerous editions down to our own day.

The study of Aquinas refused to be imprisoned in Scholastic methods, and after a few decades the need was felt for a direct contact with his writings, that is to say, a contact no longer mediated by traditional commentators and no longer couched in stereotyped formulas. In some measure, this made it possible to recover the old Scholastic tradition founded more on the universality of human capabilities and virtues than on that of moral norms (see Sertillanges 1916). This new tendency, which spread above all in the French-speaking countries, favoured a historical approach over a systematic one, something that had already been prefigured by Martin Grabmann and his school. One of the first works in this direction was concerned precisely with natural law, and it is that of Odon Lottin (1931).

Among the advantages of historiographical research were that it brought out the rich complexity of Aquinas's practical philosophy, and they reignited the issue of his relation to metaphysics. The fact is that the rigorously deductive method by which moral problems were dealt with in neo-Scholasticism were not well-suited for practical reason. The disadvantages, by contrast, were those of any historiographical research, meaning that it cannot present itself as a militant philosophy. Still, the direct approach to Aquinas's texts and its intellectual attitude

[4] Here we can point to the works of Theodor Meyer (1885), Georg von Hertling (1893), Johann Haring (1899), Constantin Gutberlet (1901), Joseph Mausbach (1918), and Martin Grabmann (1922).

helped to free Catholic thought from the *hortus clausus* of ecclesiastical universities and sparked the interest of lay intellectuals. This fostered greater freedom compared to other ecclesiastical traditions of thought, as well as greater creativeness in its applications.

The fruits of this second phase would be seen much later, when Thomism became disconnected from political conservatism, with which it had been once identified, even though that connection was not at all obvious (see Maritain 1984, 1988b). Another later consequence was that non-Scholastic theories of natural law were modelled, as those of Heinrich Rommen and Jacques Maritain, to whom we will return.

The last phase in the interpretation of Aquinas in the 20th century sees a departure from a holistic reconstruction of his thought and the development of largely independent currents, including one that focuses on practical reason, the sphere in which natural law belongs (see Viola 1998). This allows us to bracket off, without wholly forgetting, both the theological drive and the metaphysical foundation of natural law, while at the same time abandoning neo-Scholastic rationalism once and for all. This new orientation tends to equate the problems of natural law with that of ethical cognitivism understood in terms of practical reasonableness, and it is also nurtured by important contributions from Anglo-Saxon culture, both English and American.

We will now try to identify the elements common to the treatises on natural law in the first phase of Thomism by taking Cathrein's conception as paradigmatic, for it is much more clear-cut and rigorous than the others. The other two phases will instead be mentioned in connection with their respective historical periods.

As is well known, natural law theory also serves a political function, one that cannot be fully understood without keeping social context in mind. At the beginning of the 19th century, during the Restoration, the main problem of Catholic political thought was that of the justification of authority. At the end of the 19th century, it instead became more urgent to justify obedience to the commands of this authority, since the throne was moving further and further away from the altar. For this reason the question of law took on an absolutely central role as an intersection of theology, metaphysics, and morality.

According to Catholic doctrine, the obligation to obey positive law is a moral obligation. This means that this obligation is ultimately founded on God, from whom there originates both the order of nature and that of morality. Only God can create obligations for beings who are created free, and God does that through the law. Human law is the last link in a chain that begins with eternal law, and its fulcrum lies in natural law. This scheme is common to Catholic natural law theory throughout time. But within the scheme, variants are possible that may even differ widely from one another.

According to Cathrein (1893, 146, n. 199), moral obligation derives from a theoretical truth that indicates what actions are intrinsically good or bad. This truth concerns human nature as shaped by a rule of reason drawn from natural inclinations. Here we should note the strict derivation of the practical norm of human action from creationist metaphysics.

As regards the relation between natural law and positive law, certainly Cathrein reprises Aquinas's theses on the two modalities of derivation (*ad modum conclusionis* and *ad modum determinationis*), though without emphasizing the distinction between them. But in any case the moral bindingness of positive law

depends entirely on its conformity to natural law, which in itself can constitute a true legal order needing the positive order especially for a more effective protection of the natural laws themselves. Hence Locke is not entirely forgotten, while the polemic target is Kant and his distinction between morality and law, the moral order and the legal order.

According to Cathrein (1893, 216-217, n. 297), without a natural legal order, positive law could never be deemed unjust, there would be no intrinsically unjust actions, and international law would be impossible. This is considered that part of positive law which is most directly dependent on natural law, and hence superior to the law of the state itself.

Despite this strong natural law theory, Cathrein endorses the positivist idea of the importance of constituted authority. When faced with the issue of whether the judge can directly resort to natural law, Cathrein agrees that the duty attached to that office is to apply the positive law even though it may be unjust law, unless the injustice is so serious as to force the judge in conscience to resign. This means that safeguarding the constituted order is regarded as a dictate superior to considerations about the justice of any single law.

Cathrein's doctrine, though much admired for its stringent rigour, appeared too rigid and compact to be able to influence legal science, including the kind of legal science that was open to natural law. The immutability of natural law was affirmed in an absolute way (ibid., 175, n. 236–8). Yet Aquinas himself, following Aristotle, had spoken of the *mutability* of human nature, and so of natural law. This implied that the positive legal order had a much more significant role than it was recognized to have by Cathrein, and as a result it proved more acceptable to jurists (see Dabin 1928, 432). Even so, Cathrein's thought has stood as the most consistent model of natural law theory in the legal imagination, especially for the purpose of *refuting* that theory.

In conclusion, the general characteristics of Catholic natural law theory can be listed as follows: theism, a metaphysical foundation based on a correspondence of the order of the good with the order of being, objective ethics and ethical cognitivism, a teleological derivation of the precepts of natural law from human nature, the universality and immutability of natural law, and the axiological conformity of positive law with natural law.

Each of these tenets has been bitterly challenged by adversaries. The most common accusation has been an undue derivation of normativity from human nature (see Kelsen 1949b, 484), that is to say, from empirical natural inclinations, which in fact Locke had rightly rejected as a criterion of morality. But according to Aquinas, the forms of the good, which natural law is aimed at, are learned by reason as "those things to which man has a natural inclination" (*S.T.*, I–II, 94, 2). So it is reason that distinguishes good desires from bad ones, both present in human nature (see Zuckert 2007). According to Scholastic philosophy, reason is not sufficient for there to be normativity, and the transcendence of being and the good is necessary, and only theism succeeds in founding normativity. For this reason Catholic natural law theory is opposed to the immanentism and mechanicalism typical of modernity.

In answering these criticisms, Catholic natural law theory has shown a certain capacity for flexibility and evolution, but never to the point of losing sight of the pedigree traced out above. The very understandable general tendency has been to increasingly underline the role of human reason in knowing good and evil, the just

and the unjust, thus making such knowledge independent of any given conception of divinity, but never going so far as to embrace immanentism. If the theses advanced by Cathrein, for whom natural law consists in unchangeable precepts drawn from human nature as willed by God,[5] are compared with the more recent ones of John Finnis, for whom natural law consists in evident principles of practical reasonableness, it will become possible to appreciate the way and the extent to which a doctrine claiming to be immutable can change.

Strictly speaking, neo-Scholastic natural law theory is not a theory of law but a theory of morality, a reduction of natural law to moral philosophy (see Brieskorn 2009). This is the main reason why Catholic natural law theory did not succeed in making its way into the debates in philosophy and legal science, remaining a body extraneous to them throughout the first half of the 20th century. However, some claims of natural law not infrequently presented themselves within the theories of positive law. And it is that story that I intend to reconstruct here.

1.3. Formalism and Natural Law

In the second half of the 19th century, legal philosophy took its first steps as a discipline independent of both general philosophy and legal science. But the path was not easy, for on one hand, in order for legal philosophy to be recognized as a true philosophical discipline, it had to establish a close connection with the dominant currents of the time, which were positivism, neo-Kantianism, and neoidealism, but on the other hand, these philosophical orientations did not pay adequate attention to the legal phenomenon. Philosophical positivism considered law an antiquated technique of social control; neo-Kantianism tended only to think of it in the framework of outward precepts and their coerciveness; neoidealism either reduced it to economics or drowned it in ethics. Accordingly, philosophers of law almost always appeared heterodox in a tradition of thought they themselves worked in, and so they were looked on with suspicion by philosophers at large. While philosophers demoted them to the rank of jurists, the latter did not regard them as belonging to their club (see Cammarata 1922, for example, as concerns Italy).

Indirect help came from attempts to free legal science from "metaphysics" and from identification with the *iuris naturalis scientia* of modernity, bringing an empirical scientific approach to bear on legal science in hopes of finding common concepts and rules within the legal system and between different legal systems. In 1890, the German jurist Adolf Merkel (1836–1896) published *Elemente der allgemeinen Rechtslehre* (Elements of the general theory of law), which ushered in a "positive science of law," decidedly opposed to natural law. But mere generalization of the contents of positive law could not rescue the latter from contingency and historicity. As Radbruch (1914, 16) remarked, the ambition of the general theory of law to take over philosophical research on the concept of law led to a "euthanasia of legal philosophy." The most vigorous reaction was that of neo-Kantian legal philosophy, which can be considered the promoter of a way of seeing

[5] "Ergo reicienda est *moralis* quae vocatur *independens* seu *laica*" (Cathrein 1893, 161, n. 219).

legal philosophy that would condition the entire first half of the 20th century. This current gained much ground, especially in Germany, Spain, and Italy, to such an extent that it can be considered the first, and perhaps so far the only, great European legal philosophy (see Alexy et al. 2002).

Generalization of normative contents is blind if it is not guided by logical transcendental forms capable of giving a scientific solidity and status to epistemological legal knowledge. It was necessary to pass from the technical legal sciences to theoretical legal science. These objectives were pursued with full awareness by neo-Kantian legal philosophy, because a doctrine of the universal forms of law promised to confer a scientificness on legal empiricism. But the legal forms the neo-Kantians were thinking of were not the same thing as those of the general theorists of law, who were concerned with the problem of the legal qualification of actions or facts and not with that of the transcendental conditions of legal experience.

In these transcendental legal forms of neo-Kantianism one can still perceive a vestige of natural law, or at least of its claim to the universality of legal experience and its internal consistency. This fact should not be underplayed, because this is a standard that is very difficult to satisfy on a strictly formal plane. That this presupposition can by itself be interpreted as a sign of natural law theorizing is recognized by Kelsen himself:[6]

> With the postulate of a meaningful, that is, non-contradictory order, juridical science oversteps the boundary of pure positivism. To abandon this postulate would at the same time entail the self-abandonment of juridical science. The basic norm has here been described as the essential presupposition of any positivistic legal condition. If one wishes to regard it as an element of a natural-law doctrine despite its renunciation of any element of material justice, very little objection can be raised; just as little, in fact, as against calling the categories of Kant's transcendental philosophy metaphysics because they are not data of experience, but conditions of experience. What is involved is simply the minimum, there of metaphysics, here of natural law, without which neither a cognition of nature nor of law is possible. (Kelsen 1949a, 437)

The problems brought into focus by neo-Kantian legal philosophy can only be understood in relation to the problem of the distinction between the natural sciences and the human sciences. In 1883, Wilhelm Dilthey published his *Einleitung in die Geisteswissenschaften* (Introduction to the spiritual sciences). The peculiarity of the cultural and symbolic expressions of the human world moves away from the empirical methods of the natural sciences and invites questions about the way we come to know the values and judgments of relevance with which the world produced by human works is interwoven.

The disputes that arose on the proper place of legal science largely depended on the very way of understanding its object, that is to say, the concept of law. From the start, jurisprudence appeared to be a borderline science as to both its object and its method. The classificatory spirit of the time could not accommodate this

[6] It is well known that according to some commentators Kelsen's thought is a form of natural law theory without natural law. René Marcic (1919–1971) sought to apply Thomist natural law theory to the pure theory of law (see Marcic 1969; see also the debate with Kelsen in Voegelin 2004, 126ff.).

eccentric position of law and explored all possible ways to avoid it, but without yielding any convincing and definitive results.

The *moral sciences*, which the neo-Kantians preferred to refer to as *cultural sciences*, created for them two difficulties of opposite kinds: On the one hand, in these sciences the possibility was lost of clearly separating science from philosophy, description from evaluation, and explanation from understanding, while on the other hand contents of a historicist and relativistic nature were introduced into philosophical speculation. This led to the need to face the problem of the relationship between historical reality and values. In the cultural sciences, values played a role similar to that of neo-Kantian forms. But they were much too like the objects of abhorred metaphysics and so had to be treated adequately.

1.3.1. The Nature of Law

The Kantian transcendental project is at once subjective and universal. The effort to identify the conditions for the possibility of every experience in the law had to be accompanied by a conviction that this experience could not purely and simply be reduced to a shapeless set of facts or to an essentialist structure relating to positive law as such.

If we want to seek traces of natural law theory in neo-Kantian legal philosophy, however weak these traces may be, we will have to start from the firm belief in the objective value of science and, above all, in the possibility of conferring scientific dignity on legal experience. This conviction was founded more on the method of legal science than on its object. According to Rudolf Stammler (1856–1938), who will be taken here to be the most representative exponent of neo-Kantian legal philosophy, one of the errors of natural law theory is to believe that scientific validity lies in the results of the method used and not in the method itself (Stammler 2000, 91). And yet the method of neo-Kantian legal philosophy itself has some characteristics that are proper to natural law.

In two respects Stammler's thought is less distant from natural law theory than he would like. From the point of view of legal theory, the distinction between pure or a priori legal concepts and empirical or a posteriori legal concepts is based on the universality of the former, which the latter lack. Consequently, the distinction between a pure theory and an empirical theory of law is clearly an epistemological substitute for the traditional ontological distinction between natural law and positive law. From the point of view of the purpose of law, natural law is taken into account again but in an original way rich in potentialities for development. Stammler rejects the ontological or anthropological sense of nature and rather sees nature as a search for a "uniform and universal essence" or, even more precisely, as the "permanent unity and systematic uniformity" of an area of experience (Stammler 2000, 73). And it is precisely here that lies the greater proximity of Stammler's thought to natural law theory, despite the influence of the Marburg school (see Müller 1994).

The fact is that this concept of nature is applied to law itself, understood as an idea of social cooperation, which presents itself as a specific object needing special investigation. We thus move from a natural law based on human nature to an investigation of the "nature of law," which has a teleological character. In this sense, although the distinction between natural law and positive law cannot be

understood as a genetic one (as a distinction based on origins), the systematic distinction according to which the nature of law is found in the idea of a legally ordered life in general preserves its value (Stammler 2000, 76, 166). Stammler expressly recognizes that "all positive law is an attempt to be just law" (ibid., 24) and that the purpose of natural law is to become positive law. Above all, however, he claims that it is necessary to preserve the general justice of the legal order by respecting what we would recognize today as the principles of the rule of law. These principles make it possible to respect the nature of law and the social purpose of the legal order. Law is in fact an indispensable means of social unity.

According to Stammler, law is a form of social life, for no society is possible unless the pursuit of common purposes is constrained through an external rule. This constraint is the logical condition of social activity and therefore constitutes its form, while the material is the world of needs that informs social activity itself. For Stammler (1928, paras. 35 and 56), the concept of law lies wholly in the formal element. In this way he argues that normative content is irrelevant to the purpose of the concept of law, a thesis typical of the stance against natural law. Nevertheless, it is for the sake of common purposes that freedom and autonomy have to be somehow limited.[7]

For these reasons the formal or logical concept of law, which in itself is inert on a practical level, has to be integrated by the *idea of law*, that is, by the value of justice. In this way law becomes a principle of social behaviour on the basis of the ideal of a "community of freely willing men" (*eine Gemeinschaft frei wollender Menschen*), or men who voluntarily submit to the rule of law for a social or cooperative ideal (ibid., 204).

Stammler thus subscribes to a view that would persist in legal philosophy in the first half of the 20th century: The search for just law is admissible only as a practical ideal of law (from a deontological perspective), not as a theory of law, since the latter concerns the *is* of law and not its ought. The concept of law is constitutive, while the idea of law is only regulative. Even so, investigations on right law (*richtiges Recht*) were considered a proper part of legal philosophy—and not, as Kelsen would later claim, part of the ethical or political sphere or at any rate of a sphere external to the law—and in this way the ideal of justice took on an importance internal to positive law itself.

As is well known, Stammler translated the idea of natural law into that of "a natural law with changing content" (*ein Naturrecht mit wechselndem Inhalte*) (Stammler 1924, 174). This expression has given rise to two broad interpretations, for they can be taken to mean that right law is *formal law* or that is it *cultural law* (Radbruch 1950, 60). Certainly Stammler (2000, 89) does not share the natural law thesis on the invalidity of unjust law and maintains that such law is not logically contradictory and does not in the least authorize its arbitrary violation. Stammler's recourse to natural law means that in stating what right law is we have to follow a principle of reason held up as a social ideal, an ideal of mutual respect among people united under law (see ibid., 159). So this, too, is a formal ideal, echoing the principle of natural justice under which equal cases must be treated equally. Since in applying this ideal we have to take changing empirical

[7] This teleological conception of social science came under sharp criticism from Max Weber (1907).

circumstances into account, the content of right law is by nature changeable. In any case, the problem of justice pertains to the philosophy of positive law and has to remain wholly internal to it.

The separation between law and morality could thus be captured by following two different paths: one that excludes every moral element from the nature of law and one that searches for a morality internal and proper to law, and clearly distinguished from general morality. Stammler opts for the second way. Since the presence of moral aspects in the nature of law could not be denied, law's internal control on morality can preserve the autonomy of the legal sphere. "The land must not be governed by a foreign power" (ibid., 39). Here we are looking at what today we would call "ethical positivism."

If we now compare Stammler's thought with Cathrein's, the central point appears to be the separability of the is of the law from its ought. Cathrein had claimed that unjust law is not true law, just as a fake friend it is not a true friend. Stammler replied that the most appropriate comparison is not with friendship, which is a concept already enveloped in value, but with a sermon: An unjust law is a real law just as a bad sermon is still a real sermon (see Stammler 2000, 88). Stammler added that the concept of law is not contradicted by a content that might command polygamy, the burning of widows, slavery, or the exposure of weakly children. Yet he could not deny that this contradicts the nature of law as informed by the principle of mutual respect among people united under law.

The distinction between the *concept* of law (deriving from Kant) and the *idea* of law (deriving from Hegel) was aimed at separately satisfying two demands of legal knowledge that were difficult to reconcile. On the one hand, the theoretical investigation required an understanding of law independent of its particular and factual historical realizations and free of evaluative content. In this respect, epistemological constraints went hand in hand with those of legal certainty. On the other hand, the practical investigation entailed that positive law should be subject to value judgments and to possible criticism by the moral conscience where this law aspires to become an obligatory rule of human behaviour. Between the concept and the idea there was the slender common element of the importance of otherness or intersubjectiveness.

Neo-Kantianism thus takes on the task of holding together, though in a sort of artificial cohabitation, the two fundamental problems of legal philosophy, that is, the theoretical-cognitive one and the practical-normative one (Banfi 1926, 195).

In the subsequent development of neo-Kantian legal philosophy it proved very difficult to maintain a separation between the concept and the idea of law in the manner dictated by Stammler. In Italy, a criticism of legal positivism had already been advanced precisely by neo-Kantian thinkers (see Petrone 1895; Bartolomei 1901). However, it was only with Giorgio Del Vecchio (1878–1970), the greatest Italian neo-Kantian legal philosopher, that this became evident. Del Vecchio gradually moved toward natural law theory. This was possible thanks to a major change in the way to go about dealing with the problems regarding the concept of law.

In the first place, while Stammler derived the concept of law from a reflection on legal science and on its transcendental bases (theoretical legal science), Del Vecchio, working from the Kantian distinction between *quid ius* and *quid iuris*, assigned this task to legal philosophy, which he understood as capable of an autonomous cognitive approach to its object.

In turn, philosophical investigation does not confine itself to *logical* research but also includes both *phenomenological* research on the universal or common character of legal experience and *deontological* research relating to the ought of positive law (the triadic theory of law).[8] This implies that a philosophical knowledge of law by the same token includes both its logical concept and its own ideal, that is, its ought. The relation between the two consequently becomes much closer than that prefigured by Stammler, both belong to the same global cognitive enterprise.

In characterizing the experience of law on the basis of a principle of practical evaluation, in keeping with the line of thought embraced by the Baden school, we are already taking that experience to be part of ethical life and a modality internal to it. This means that the concept of law is not entirely normatively inert: It is "a value-laden claim like any other." Morality and law are not separate but distinct (this is the doctrine of the differential features of law), since there are two ways of evaluating human action, the one internal to the subject (the person) and the other intersubjective and external, where possible actions between multiple subjects are coordinated on the basis of an objective ethical principle (see Del Vecchio 1962, 226). It is even conceded that law and morality belong to the same ethical system and so that there cannot be any contradiction between them (cf. ibid., 227), a thesis that natural lawyers also maintained, though in a non-formal way. Here one can notice an attempt to translate the pre-Kantian or Leibnizian natural law theory in a formalistic fashion. This means that the concept of law already has a "practical" character, and so that it is not in the least neutral or normatively inert, as Del Vecchio kept repeating. At this point it becomes clear that the relation between neo-Kantianism and natural law theory turns entirely on the way the concept of law is understood, since the scientific dimension and the practical one did not seem compatible with the philosophy of the time.

According to Del Vecchio, positivity does not belong in any essential way to the concept of law, which strictly consists in the intersubjective form of legality, something that a law as a juridical proposition possesses even before being enacted and even after it is repealed (see Del Vecchio 1911). Accordingly, one would also need to admit that even a proposition of natural law, which for Del Vecchio can only be a proposition deducible from reason alone, has a juridical form on a par with positive laws. As a result, the only difference between positive law and natural law will rest on imperativeness and coerciveness, which are the characteristics typical of the positivity of law. However, one can no longer see what purpose this concept of law serves.

For instance, the legal form of slavery is curiously defended by Del Vecchio not on the basis of the positive laws that allow slavery but on the ground that the concept of slavery possesses the formal characteristics of law, being a form of property. Thus slavery realizes the *concept* of law but not its *idea*: "It is legal but

[8] This tripartite division of the tasks of legal philosophy has been widespread, especially in Latin America and in other countries in Europe that speak Romance languages, in part because of the numerous translations of Del Vecchio's works. The influence of this theory also extends beyond neo-Kantianism. One need only note that Bobbio's distinction among the approach to law, the theory of law, and the ideology of law can in some respects be considered a reworking of the three-dimensional theory of law (Bobbio 1965, 112–4).

not just" (Del Vecchio 1962, 368; 1922, 89). However, if legality is independent of positive legality, then we cannot see why the prohibition against slavery cannot be considered legal in addition to also being "just." In short, it is impossible to maintain the validity of unjust law without giving weight to positivity in the concept of law.

Moreover, since the form of legality is independent of positivization, it would seem that any coordination of social actions is in itself "legal." It follows, however, that the role of the ethical principle is lost, as it is lost the distinction between law and other social rules, which are likewise bilateral and external.

But in reality, if we are to fully appreciate Del Vecchio's thought, we will need to consider his well-known investigation on justice, where legality itself is linked to a formal concept of justice, which in turn is more easily connected with justice in an ideal sense, conferring a more unitary dimension on legal-philosophical reflection (see Del Vecchio 1924).

In the last phase of his thought, Del Vecchio moved increasingly closer to a form of rationalist or metaphysical natural law theory, a fact attesting the demise of neo-Kantian legal philosophy.

Back in 1921, a keen, though much discussed, critic of neo-Kantian legal philosophy, understood to encompass both Stammler's and Kelsen's version, highlighted the aporias and weakness of this conception, identifying them in the rigid separation between transcendental forms and empirical reality; in the rejection of the Kantian "thing in itself," in such a way as to prevent the ideas of reason from having a regulative and normative role; and in the very decline of the object of legal science (see Kaufmann 1921). The same author later noticed the tendency of the time to pass from a neo-Kantian epistemology to the ontology of Aristotle, Aquinas, and above all a reinterpreted Hegel (cf. Kaufmann 1931). In short, the division between the nature of man and the nature of law was challenged.

In effect the neo-Kantian conception contains insurmountable aporias. The main difficulties derive from the "positive" character of law, which the neo-Kantians certainly did not intend to challenge. And yet, subjecting legal positivity to logical-formal conditions of a Kantian type doubtless meant recognizing its inadequacy for the purpose of defining the nature of law. For this reason the neo-Kantian conception of law has been considered as collateral or complementary to legal positivism. In this very view, however, lay a trap, in that the increasing importance of the formal legal relations was destined to obscure the defining role of legal positivity.

It has also been shown to be impossible to formulate a logical concept of law wholly indifferent to values. What does the neo-Kantian concept of law refer to? The attempt to answer this question made it necessary to either return to facts, forsaking the universality of law, or to take the path of values, conferring greater cognitive importance on the idea of law (see Treves 1934).

1.3.2. Law and Values

Taking the *cultural sciences* seriously meant searching for a connection between facts and values, something that Kantian orthodoxy did not allow. Thus a heterodox strand of thought developed that also proved attentive to Hegel's teaching. Attention to method was not pursued to the point of losing sight of the meaning of the object of study.

To better illustrate these problems I will turn to a thinker whose writings on law are sparse but who nonetheless exerted an underground influence on legal-philosophical speculation in the first half of the 20th century (see Hobe 1973; Carrino 1983). Emil Lask (1875–1915) clearly rejected metaphysical natural law theory, arguing that it Platonically duplicates legal reality. Only empirical reality exists, but as Rickert had observed, this reality is "irrational." From a philosophical point of view, this same reality is "the scene or the substratum of transempirical values or meanings of general validity" (Lask 1950, 4). Legal philosophy looks at reality from the standpoint of absolute values: It reflects on the meta-empirical meaning of empirical law, and in this way it rejects both metaphysical natural law and relativist historicism.

> Natural law wants to conjure the empirical substratum out of the absoluteness of value; historicism wants to conjure the absoluteness of value out of the empirical substratum. (Lask 1950, 12).

Here I would only like to stress the nonpositivist aspects of this theory of law. Lask thought that the only possible form of natural law theory was the metaphysical one. But he was wrong.

In the first place, for Lask, law is characterized by typical values, which can certainly be viewed in light of the idea of justice, but the latter in turn is worked out on the basis of different conceptions of the world. These legal values can be perceived only in their operativeness in historical life, and yet they preserve their absoluteness, that is to say, they remain outside the world. In this concretizing of values into norms, a finalistic conception of law is revealed on which the production of legal norms, institutes, and concepts is linked to an idea of purpose that governs the correctness of law. In general, the process through which law is formed is teleological.

The idea of purpose, as we have seen, was also present in Stammler, but it was still generic and in substance individualistic. Things change when Lask maintains, following Hegel and Gierke, that empirical law can take on a universal meaning only if connected with a specific social value, the transpersonal one of community life, displacing Stammler's atomistic ideal (see Lask 1950, 17ff.). What comes into relief, then, in an outlook that can be considered Aristotelian, are goods and purposes not proper to individuals singly considered but to individuals bound to the life of a human community, even though Lask insists on the distinction, previously underlined by Wilhelm Schuppe (1884), between an empirical use and a transcendental use of the teleological principle.

> The destination (*télos*) immanent in particular relationships of life, such as property, family, rank, class, or state, is to provide the "objective and real principle of legal philosophy." (Lask 1950, 15)

So there are goods or values that can only be attained *through* law and *in* law, and this is a typically natural law perspective. The real object of legal science is law with its world of values and not only the laws or statutes (cf. Lask 1950, 38).

Another idea that gains ground is that the phenomenal substratum requires reference to values and that these differ from one another owing to the difference in the substrata by virtue of which they are valid (*hingelten*). And in this way, doubt is implicitly cast on the asserted irrationality of the substratum.

If there are values specific to law, even if tied to a given conception of the world among others, then it can be said that there is a "nature" of legality in the Hegelian sense of the objective spirit and that there are tasks that must be performed by the human community. And this is a natural law principle set in the world of history and culture. Lask takes up Jellinek's doctrine of the "ethical minimum," a minimum core of common ethical ideas seen as the internal structure of socio-typical value.

The doctrine of the value typical of law also has the effect of no longer interpreting law itself as a social technique in the service of extrinsic ends (something that Lask wrongly accused Kantian individualism of). Law can instead be viewed as much more than a simple means: It can be understood as a fundamental element in the articulated structure of the objective spirit (see Lask 1950, 13). Here, too, we can recognize a nonpositivist attitude.

It can therefore be claimed that a necessary condition for a conception to be considered nonpositivist and as open to natural law theory lies in its consideration of law not only as a fact and an instrumental value but also as a value in itself, that is, not only as a means but also as an end in itself. At this point the central problem of legal philosophy becomes that of the relation between law and value.

As far as value is concerned, there are only three possibilities: a form of knowledge can be *blind* to value, it can be *connected* to values, or it can *itself* be valuative. In the two latter cases the discussion is about the objectivity of value. As is well known, in the first decade of the 20th century the controversy over values (*Werturteilstreit*) was decisive in defending the scientificity of the social sciences and their independence from politics. The value-free principle, deriving from the impossibility of any rational and objective knowledge of values, did not in the least imply that values are arbitrary, contingent, or purely emotional, or even that the social sciences can do without them. The relationship to value is endowed with some intelligibility based on our understanding and recognition (*Bekenntnis*); otherwise, it would be a baseless act of faith.

In any case, as we have seen, one cannot avoid considering law as geared toward values and aiming at typical values as distinguished from the canonical values of truth, goodness, and beauty. Gustav Radbruch (1878–1949), carrying forward the legacy of Lask, sums up the latter's legal philosophy as follows: "Law is the reality whose meaning [*Sinn*] is to serve justice" (Lask 1950, 75).

To understand in what sense Radbruch's conception represents a further small step toward natural law theory, we need to pay attention to some evolutionary elements.

In the first place, necessary consequences are drawn from a consideration of law from the viewpoint of the world of culture, in which Is and Ought in some way meet, thus resolving the incommunicability that Kantianism typically sees between them. Legal normativity can be understood only insofar as it is linked to cultural facts that identify and concretize it. This makes it possible to put to good effect

Lask's idea of the interrelatedness of methods in the study of law, a necessary outcome of the interconnectedness of Is and Ought.

Radbruch fully consciously sought to bring to fruition the conception put forward by Stammler, who had developed the role of the idea of law in legal philosophy but did so only in a "methodic" sense. It was now necessary to give it a "systematic" dimension, since the core meaning of law lies wholly in its idea, that is, in its being oriented toward the value of justice. The result is an overturning of Stammler's conception: The concept of law is considered a mere substratum that must be illuminated with meaning, indeed a meaning that cannot even be formulated without reference to the idea of law: "The concept of law can be defined only as the reality tending toward the idea of law" (Radbruch 1950, 69). The idea of law is obviously inspired by Stammler's right law, again taking a neo-Kantian outlook (Wiegand 2004).

Driven by this relation to justice as a value, legal-philosophical reflection takes on greater internal compactness. It is not divisible into separate research sectors, as in the triadic theory of law, and becomes a global and unitary enterprise. Its task is to understand law through its ideal type, that is, through all its most elevated paradigmatic aspects, with no exceptions. Hence Radbruch is against a reductionist conception of law, whether it is the kind that disregards the merit of law or the kind that disregards its effectiveness. Law is now fully considered as a distinctive cultural object not to be confused with power or morality. None of the particular cultural instantiations exhaust the potentiality of the ideal type, and they all manifest the great mutability of cultural products, but always within the same ideal frame. However, it would be improper to set this scheme of thought next to the model of the relation between the principles of natural law and their historical concretizations, since the idea of law captures not the ideality but the global sense of legality and its typical praxis.

Law is not justice but a complex and specific way of *relating* to justice. Indeed, if we examine all the aspects that according to Radbruch are present in the idea of law, we realize that the latter is internally and radically conflictual, both because of the conflict of values that constitutes it and because of the opposition between value and contingent reality. For Radbruch, the values present in the idea of law consist in justice, purposiveness (*Zweckmässigkeit*), and legal certainty. Justice is seen as "an empty category that may be filled with the most varied contents (cf. Radbruch 1950, 131). It is a formal value, linked to equality and equity, but is not formalistic, because it controls the way we can formulate and interpret the content of law. Purposiveness concerns the content of law, and so the suitability of the means to the end pursued. This process of realization has a political and particularizing character, and precisely for this reason it is potentially opposed to the general equality of justice. Precisely at this point we meet Radbruch's so-called relativism (see Spaak 2009). The choice between political values cannot be scientifically grounded but is rather entrusted to our judgment according to conscience, which must not be confused with mere arbitrariness. In any case the sphere of choice is not infinite but can be referred to three constellations of political values: individualistic, trans-individualistic, and trans-personalistic. This means that general political aims are also subject to the general condition of significance. Lastly, there is the question of legal validity, which is linked to positivity, and yet it is also subject to value judgments, which makes certainty

functional to peace and order: "Justice is the second great task of the law, while the most immediate one is legal certainty, peace, and order" (Radbruch 1950, 118).

The framework of this conception is undoubtedly positivistic, both because of the formal character of justice and because of the priority given to certainty, but it is supported by the conviction that a certain degree of justice will in any event be achieved by the very *form* of legality. As we know, this conviction would subsequently be proven wrong, and then Radbruch would show he was not prepared to renounce justice for certainty, or substantive justice for merely formal justice.

> Where there arises a conflict between legal certainty and justice, between an objectionable but duly enacted statute and a just law that has not been cast in statutory form, there is in truth a conflict of justice with itself, a conflict between apparent and real justice. (Radbruch 2006b, 6–7)

In order to emphasise the positivistic orientation of the first phase of Radbruch's thought, an assertion is often invoked that is entirely contrary to the famous Radbruch formula: "It is the professional duty of the judge to validate the law's claim to validity, to sacrifice his own sense of the law to the authoritative command of the law, to ask only what is legal and not if it is also just" (Radbruch 1950, 119). But if it depended only on that, then even Cathrein ought to be considered a legal positivist philosopher. In reality, as Stanley Paulson (2006) has rightly pointed out, the positivist orientation of Radbruch's first phase is certainly not founded on a separation between morality and law and carries with it a theory of justice or of the way in which law is related to justice.

In effect, law proceeds by successful and unsuccessful attempts alike, which nonetheless remain formally valid in view of the good of peace and order. However, the fact remains that they are "failures," that is, they do not fully bring out the nature of law, which is to be just. In any case, human works of justice are never endowed with absoluteness, so they cannot claim to prevail over individual conscience (see Radbruch 1950, 118).

Against true natural law philosophy, Radbruch makes two accusations that are in fact not new: that this philosophy defends the scientific intelligibility of values and their enactment, and that it volatilizes the material substance of law, thus undervaluing its resistance to values, or losing sight of the historicity of law (see Radbruch 1950, 121). Even so, he does not make the nature of law wholly dependent on its historical sources, and specifically on those of the state, which undoubtedly controls its contents (purposiveness) but not its form. Just as science preserves its autonomy even when its results are used by the state, so law—a tool of the state—withstands every improper use and imposes its conditions on the political will (cf. ibid., 199). At least this is the conviction that drives Radbruch in his first period.

Neo-Kantianism and the philosophy of culture did away with the couplet of 19th-century legal positivism based on the conjunction between the facticity thesis and the separability thesis. But they also rejected the couplet of natural law doctrine based on the conjunction of the normativity thesis and the morality thesis. They thus inaugurated that search for the third way that is still underway today. Is this an enterprise that can hope for success? Radbruch started to move in this direction, but on the horizon there already loomed problematic issues regarding

legal normativity, or the type of constraint created for users of law, first among whom the judges. But this issue cannot adequately be addressed without first specifying the ambit or scope of legal normativity and the object of legal science. Can law be reduced to statutory law?

1.4. Antiformalism and Natural Law

Legal formalism dealt with methods of investigation and the construction of concepts, taking as its empirical object the normative datum of the state's positive law. But now we may want to ask whether positive law itself can fully be identified in this way, and whether it is necessary to go beyond normative statutes. This new attitude can be captured in the dictum "Law does not *dominate* but rather *expresses* society" (Cruet 1908, 336; my translation, italics added).[9]

The antiformalist reaction, already very much present in the last decade of the 19th century, was given a new lease on life by the reaction against the exegetical school in France and by the debates on the application of the German Civil Code (BGB) in Germany, and it lasted until the eve of World War II.

Legal antiformalism is a label that generally encompasses a heterogeneous cluster of theories of law, prominent among which are the sociological ones. Distinctions and differentiations can also be made by looking at the particular aspects of law and the legal practices from which this current proceeds.

These aspects can in principle be said to lie in the general problem of the origin and purpose of law and in the more specific one of the sources of law and the way positive law ought to be interpreted and applied.

This radical change in the approach to positive law affords new opportunities for natural law to make its voice heard, though antiformalism often distances itself from it. But we must not allow ourselves to be conditioned by similar statements, because natural law as a problem can hide in other guises. The historical school of law, too, had been a fierce adversary of natural law, and yet the method used by German Pandectism—a method the historical school eventually endorsed, not only because of its Scholastic conceptualism but also because of its universalistic pretensions—had aspects that undoubtedly savoured of crypto–natural law (see Wieacker 1952, 228ff.). The presence of a natural law vein in sociological theories of law has been stressed, among others, by Kelsen (1911, 16; cf. also Menzel 1912) as well as by Bobbio, who regarded them as "a form of updated natural law theory" (Bobbio 1965, 141).

1.4.1. The Living Law

In general, antiformalism rejects the formalist thesis that positive law exists only when legal propositions are formulated and made official. If it is true that law has a practical character and is constructed in view of a purpose, as Rudolf von Jhering (1877–1883) showed, then the existence of law can be said to already start with its initial formation in social life. The science of law has to be able to describe this

[9] The French original: "Le droit ne domine pas la société, il l'exprime."

process by which positive law is formed. So, for example, in the 1913 work *Grundlegung der Soziologie des Rechts* (Foundation of the sociology of law), Eugen Ehrlich (1862–1922) sums up the idea as follows:

> At the present as well as at any other time, the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself. (Ehrlich 2002, LIX)

Social relationships are thought capable of generating legality on their own (they are jurisgenerative), preceding the possible official formalization of law. From this standpoint, natural law can no longer be accused of not being true law by reason of its not having been positivized or formalized, though the accusation that it is ideal or unreal law stands. In this connection, Ehrlich links the theme of natural law to legal philosophy, which in his opinion only deals with the legal ought, while the sociology of law as a theoretical science of law (*Rechtswissenschaft*) deals with the facts of law, those that Jellinek called "normative facts," according to the outlook of a positivism that in truth is too elementary and naive. But Ehrlich, one of the founders of the sociology of law, was not a philosopher (see Villey 1968, 353): He was a historian of law looking to recover what had been lost in the teaching of the historical school, that is to say, the view that law is rooted in the social order. We should now take up the question whether and in what sense natural law theory is present in this theoretical science of law.

The sociological conception of law undoubtedly has the same enemy as natural law: the thesis of the legal monopoly of the state and the negation of legal pluralism. With natural law it shares the thesis that laws as social rules guide the action of the members of society at large (rules of conduct) and are not only those primarily aimed at officials (particularly judges) for the purpose of resolving controversies in a certain way (rules of adjudication). The sociological conception thus also shares with natural law the thesis that coercion is a secondary trait in the definition of law (see Ehrlich 2002, 61), in that law is such to the extent that it is accepted by the members of a community (*Anerkennungtheorie*). Furthermore, likewise similarly to natural law theory, the sociological conception rejects the separation of law and morality and so the idea that judges may not decide cases on the basis of rules that do not issue from the state (cf. ibid., 39–40).

The strong suit of this conception consists in its showing that "the practical concept of law" is in fact very different from that prefigured by the legal science of the time, which therefore stands accused of being prescriptive and even ideological. Indeed, both judicial decision-making (see Ehrlich 1903) and legal reasoning in general (see Ehrlich 1918) are informed by psychological and social factors and are very far from confining themselves to logical deduction from norms. Hence the attention to the ethics of the legal profession and to legal science seen as an exercise of practical reason (*praktische Jurisprudenz*).

Lastly, we have to remember, and stress, the conception of "living law," that is to say, the "law which dominates life itself even though it has not been posited in legal propositions" (Ehrlich 2002, 493). Much more than statutory law, the living law captures the idea that law isn't so much a specialized social technique as it is what guides human behaviour. Once again this idea is close to natural law theory, or at least it could be defended from that perspective (see van Klink 2009).

Despite all these possible similarities, Ehrlich's conception is actually naturalistic rather than like natural law. Like Otto Gierke, Ehrlich is interested in the origin of positive law and finds it in "the inner order of associations" and the order of human groups, which spontaneously organize in response to increasingly complex needs and interests. When Ehrlich turns to the problem of distinguishing legal norms from other social norms, he resorts to the feelings of the members of social groups, reducing the problem to a question of social psychology. One may well wonder by what criteria a feeling can be identified as "legal," distinguishing it from others without having first cleared up the difference between law and nonlaw. If the sociology of law as a theoretical science of law needs to resort to social psychology to define the concept of law, this means that it cannot on its own achieve its explanatory objectives. Moreover, Ehrlich's social psychology is vague and approximate and is exposed to the charge of irrationalism. Undoubtedly, among the driving forces of the legal development of social institutions there are also emotional factors. Ehrlich himself dangerously invokes the need for an intervention by charismatic and exceptional personalities in resolving the most arduous problems of justice and the common good (see Ehrlich 2002, 207). In the end, claiming that law is what people believe it to be does not solve the problem, especially when there are conflicting beliefs. But in this respect, too, Ehrlich's work is pioneering.

There is thus configured a third path next to the idea of law as will, as legal positivism claims, and that of law as reason, as natural law theory claims: It is the idea of law as feeling or empathy. This is a strand of thought also pursued by a contemporary of Ehrlich's, the Russian thinker Leon Petrażycki (1867–1931), who later distinguished official law from an unofficial or "intuitive law" independent of external authority, and in this he would be followed by other sociologists and philosophers of law down to our own day (see, e.g., Podgórecki 1974; Treviño 2007, part III). Petrażycki considers natural law a form of unofficial law that is still primitive and naive: He thus sets out to replace it by disclosing its mechanisms of psychological projection (see Petrażycki 1955, chap. VI, sec. 33), and then anticipating someway Scandinavian legal realism (cf. Pattaro 2005, chap. XV).

In the natural law tradition, by contrast, there is the constant idea that law is a normative and not merely a psychological concept. Even the doctrine of the natural inclinations, which might make one think of Ehrlich's legal feeling, is worked out with reference to a concept of human nature based on a creationist theology and metaphysics, such that having an obligation is not confused with feeling obliged.

The importance of Ehrlich's conception lies more in its *pars destruens* than in its *pars construens*, and more in its descriptions than in its explanations. His confutation of the paradigm of legal formalism is based on facts rather than on theory. He very effectively shows that the practice of law actually unfolds in a different way than is prefigured by official legal science, and on this very premise he challenges that science, though in his own turn he fails to offer a clear solution. He thus recovers some aspects of the natural law tradition (not always wittingly), but grafts them onto a positivist framework, seen as a refuge from neo-Kantian formalism. His appeal to the doctrine of the "nature of the thing" (*Natur der Sache*)—which unlike Geny he applies to the field of public law—could have opened philosophical reflection to the reasons why social life organizes itself in similar or analogous forms, but Ehrlich (2002, chap. XV) never abandons his empiricism, which is wary of generalizations. It goes to his credit, however, that he

did not emphasize the collective will of the social group to the detriment of the individual, as other sociological currents would instead do (see, for instance, Levy-Bruhl 1951).

In conclusion, sociological antiformalism claims not only that law has social origins but also that it is often produced by society unintentionally, and above all that it already exists as effective positive law even before its possible conceptual or legislative transcription. And this is a step in the right direction compared to the historical school of law.

1.4.2. Positivist Neo-Thomism

While Ehrlich and the sociology of law emphasized the presence of nonstate law alongside that of the state, French institutionalism turned to the problem of the social origin of the state. The state is a macro-institution that has the same nature as all other social institutions. It is a construction built starting from the institution, the market, and the contract (see Maspétiol 1968). It is therefore necessary to work out a general theory of institutions, of which the law is an essential component; in other words, a theory of institutions is needed that is at once properly social and properly legal.

This theory is marked from the start by the cultural background of its founder, Maurice Hauriou (1856–1929), a scholar of administrative law who at the same time professed himself a liberal, a Catholic, and a follower of Aquinas's philosophy (see Millard 1995, 386–87). As a liberal he was linked to the 1789 Declaration of the Rights of Man and of the Citizen; as a Catholic he took an active part in the cultural renewal of the pontificate of Leo XIII and is thought to have been close to the political-religious movement known as Le Sillon and to the milieus of liberal Catholicism; as a Thomist philosopher he did not look back to neo-Scholasticism but pursued a personal synthesis of his own in which major influences of Bergson's and Durkheim's thought can also be noticed. In any case his stated objective was to show that Christianity is a driving force of civilization capable of building on the advances of modernity (see Jones 1993, chap. VII).

He was hostile to idealist subjectivism and behavioural social science, mistakenly suspecting that his colleague Léon Duguit was a proponent of that discipline. The dominant idea was the continuity between nature and spirit, and so between the natural and the cultural sciences, seeing analogies and correspondences between biological processes and social ones—a typically Bergsonian idea that, as we know, would reach its theological conclusion in the thought of Teilhard de Chardin. In French institutionalism we see the application of social vitalism to the theory of law in the form of objective idealism.

Hauriou was avowedly an advocate of natural law. But in his strictly legal writings he spoke very little about it, and in his theoretical work, the 1925 *La théorie de l'institution and de la foundation: Essai de vitalisme social* (The theory of institution and of foundation: Essay on social vitalism: Hauriou 1927), he says nothing at all about it. Accordingly, it would seem logical to turn to the occasional writing in which he speaks more at length of natural law. And here it can be ascertained that, in his view, natural law is not about guiding institutions and is not even to be identified with justice but rather consists in a set of rules relating to the defence of individual rights. Starting from the general principle that "law is a sort

of conduct geared toward order and justice" (ibid., 795; my translation),[10] he conceives natural law as that amount of justice that is guaranteed in every true legal order, which is tasked with reconciling the need for stability and continuity with the need to respect people's rights. So natural law is not ideal law, for that would amount to confusing it with justice, but rather law already present on its own in human history. The precepts of natural law rest on the data of the natural history of humankind and on the process of civilization but are manifested as a historical belief in egalitarian and democratic principles. This is a naturalistic vision, and it has aptly been defined "a positivist neo-Thomism" ("un néotomisme positiviste": Brimo 1969, 65). Without any justification, Hauriou upholds both the absoluteness of natural law and its cultural and historical character. He defends it strenuously, so much so that he accuses Savigny of having deprived legal science of the contribution of natural law (see Hauriou 1918),[11] but at the same time, like a true positivist, he does not assign it any place in legal science.

Hauriou's real contribution to the doctrine of natural law lies not only in the view of public liberties as part of constitutional legitimacy on account of their supra-legality, superior to the written constitution itself (and here he is referring to the 1875 constitution, which did not include a bill of rights; cf. Hauriou 1923, 298), and not only in the conviction that the general principles of law are not enacted but on the contrary are "discovered" by the judge, but also and especially in his concept of institution.

In this connection, Hauriou's approach to positive law cannot adequately be understood without bearing his Christian and Thomist inspiration in mind. The idea of the work to be realized in a social group or for the benefit of this group is certainly not Hegel's idea but is an even more refined way to prefigure the concept of practical reason, that is, of reason that guides action and makes it alive from within. Hence positive law presents itself as a social practice governed by reason and not by will. Hauriou insists that "the guiding idea of the enterprise" (what Hauriou calls an *oeuvre*) is not to be confused either with the notion of end or with that of function, because it remains immanent in the process of its realization and is not even exhausted by it. This means that positive law is in an ongoing state of becoming, even as it imparts stability to the institution that has produced it, and it contains its own yardstick. Positive law is pervaded by the dialectic between determinacy vs. indeterminacy, so its historical concretization is never completed once and for all.

> There is the domain of function: the administration, and a determined group of public services. Then there is the domain of the directing idea: the political government, which works in the undetermined area. And the fact is that the political government is of much more vital interest to citizens than the administration, which shows that what is undetermined in the directing idea has more influence over men than what is determined under the form of function. (Hauriou 1970, 102)

[10] The French original: "Le droit est une sorte de conduite qui vise à réaliser l'ordre et la justice."

[11] In France, World War I provoked a reaction against German legal science, deemed responsible for the conflict, and so also a rebirth of natural law doctrines, seen as typical of Latin peoples (see Battaglia1929, 79).

The proper relation between positive law and institutions is not the relation between a tool and its function or between a technique and its purpose, but is rather a means-end relation in which the means are inherent in the end itself, since that confers stability over time, without which institutional enterprises cannot be such. This relation of means to end is precisely that of Aristotle and Aquinas.

Lastly, Hauriou appears to be very attentive to the process by which the guiding idea is interiorized by those who take part in the institutional enterprise: He thus rejects an extrinsicist vision of law, though some have accused him of collectivism (see Platon 1911) and even of being a precursor of Nazism (on the manifold interpretations, see Gray 2010, 33ff.).

The task of the theoretical jurist is not to deal in natural law, but to work out a scientific conception of positive law. Still, it is a task inevitably influenced by cultural and philosophical presuppositions. Hauriou's conception is undoubtedly marked by an unspecified and implicit natural law theory.

Despite the philosophical uncertainties, Hauriou brought to legal science a principle that belongs to the history of natural law: Cooperative activities are possible only if there is also a common direction despite the variety of intents and interests. On this view, the theory of institution is equipped to embrace the concepts of authority and the common good, which as is well known belong to the Thomist natural law tradition, a tradition that other exponents of French legal institutionalism indeed also look to.

The first of these is Georges Renard (1876–1943),[12] a disciple of Hauriou's who, after a first work of a more legal character (see Renard 1930), tried his hand at the arduous enterprise of setting out a general philosophy of institutions (see Renard 1939), a philosophy he develops applying the concepts distinctive to Thomist metaphysics and, above all, that of the analogy of being (in the footsteps of Lachance 1933). We have now entered that second phase of Thomism marked, as noted, by a certain independence from traditional Scholasticism.

According to Renard, the notion of institution is analogical, and so is that of law. In this way he seeks to overcome all dualisms and also to pursue a social pluralism positing a unity across differences. Here we will not be concerned with the philosophical importance of this conception of law or with its fidelity to Aquinas's thought, both of which have been authoritatively and emphatically called into question (see Bobbio 1936). What is important to stress is rather the way in which natural law is regarded.

Renard does not proceed from precepts of natural law from which to derive positive law, as was instead usual in neo-Scholasticism. Natural law must not be seen as an ideal model or even as a source from which to derive positive laws but as "the analogical reason of law, the *ratio juris*" (Renard 1970, 293), or what links up the different positive legal systems and is not exhausted by any of them: "The analogical reason is only a potency with limitless possibilities of actualization" (ibid., 300). As Renard says, quoting Lachance, natural law is "sheer law." In fact natural law is not understood to exist outside positive law, just as man does not

[12] Aside from Renard, others who claim to be followers of Aquinas are Joseph T. Delos, who applied the theory of institutions to international law (see Delos 1931), and Georges Gurvitch, who upheld a transpersonal conception of law (see Gurvitch 1932).

exist in general, since only concrete men exist. Even so, while the concept of man is univocal and not analogical—and according to classical metaphysics it points to a specific essence—Renard's concept of law does not have any substantive content of its own and dissolves within the social group into a set of formal relations among order, authority, and the common good. The result is that of more or less justifying *any* legal order, thus seriously undermining the possibility of using higher criteria by which to judge the justice of positive law. And this leads to social conservatism, or at least it deprives natural law of its function of criticizing social injustice, something for which there was a great need at that time in particular.

Lastly, to Renard we owe the formula "natural law with a progressive content" (Renard 1927, chap. IV). The formula is set in opposition to the previously mentioned one by Stammler, "natural law with a changing content," but it has the defect of not setting conceptual limits on the legal sphere. Jacques Leclercq would try to recover this line of thought in the formula "natural law with changing and progressive applications" (Leclercq 1927, 45), but that, too, remains vague.

French institutionalism is very significant in the history of natural law theory, in that it develops some perspectives on society and law that encourage us to reflect on the problems natural law is concerned with: the plurality of the sources of law; antistatism, in opposition to Raymond Carré de Malberg; social pluralism; and the search for shared ends and values (see Gurvitch 1935). The influence of these convictions has been much greater than has institutionalism as such. Still, the increasing emphasis on the social objectivism of legal rules by comparison with the conception defended by Hauriou himself, who also defended natural rights, helped to highlight two lines of thought within natural law theory: the traditional one of neo-Scholasticism, based on the tenets of natural law, with the risk of turning them into a legal order superior to the positive order; and the one that emptied natural law of specific contents to make it the principle of the objectivity of the positive legal order, with the risk of depriving it of its critical function. In either case, the subjective rights of the person were underdetermined.

1.4.3. Filling Gaps and Finding the Law

The orientations so far examined are antiformalist by virtue of their approach to the study of law. Law has to be regarded as a phenomenon which derives its original structure from society and which is aimed at making social life possible. The legal formulation is considered a product of the social origins of law. But there is also another antiformalist orientation, one that proceeds from the problems connected with the application of the written law and reaches the conclusion that a written text alone is insufficient in identifying what the law is. What is contested is the principle of the completeness of a legal system as such, a principle that follows as a corollary of the dogma of the legislator's omnipotence. What is claimed is that there needs to be an appeal to legal resources not governed by the legislator's will. This can be considered a "jurisprudential" antiformalism understood in both senses of that term as referring to legal practice and legal science.

This orientation, too, even more than the previous one, paves the way for a rebirth of natural law. Corresponding to the different ways of addressing the problem of filling legislative gaps and finding the law are different attitudes to natural law.

1.4.3.1. Irreducible Natural Law

The French jurist François Geny (1861–1959) was the first to challenge the positivistic vision of the sources of law in its totality within the frame of a theory of legal science.

Geny starts out from the interpretation of the written law with a view to establishing the legislator's will, which he recognizes as having a central role, though not in the formalist and literal sense of the exegetical school or the formalist and conceptual one of the Pandectist method. Since there are often lacunae in the written law in relation to the demands of the concrete case, the problem arises of how to fill those gaps. To this problem Geny devotes most of his theory of legal science. This means that in his opinion the shortcomings of the written law are much greater than is commonly thought, and also that there are other sources of law to which to have recourse in working out what the law says. The task of filling the gaps belongs to the jurist, not the judge, because the nonformal sources of law demand two sorts of work, on the one hand finding or recovering the law and on the other giving it a technical elaboration. If, instead, the main task were the judge's, we would have to either acknowledge the existence of an already formed natural law or entrust the judge with a role as a *maker* of law. Geny rejects both solutions. The search for the law has to be both *free*, that is, not constrained by positive authority, and *scientific*, that is, founded on objective elements, or *données* (see Geny 1954, vol. II, 78).

These nonformal sources present themselves as facts, and in this way a positivist conception of science is maintained, but among these facts there are also the demands of reason and appeals to values, and this takes us away from mere factualist empiricism. Geny is a follower of Bergsonian philosophy and subscribes to its attempt to harmonize philosophical positivism with metaphysics and to its recourse to intuition as a form of knowledge (see Oppetit 1991). There is thus prefigured both a broader conception of natural or nonpositive law—expressed in the concept, deriving from Montesquieu, of the nature of things ("la nature des choses": Geny 1954, vol. II, 75–9; cf. Villey 1965), formed on the basis of a combination of elements that are real, historical, rational, and ideal—and a narrower and more specific conception that identifies natural law with the rational datum. As a testament to the major influence of Geny's thought, it has also been noticed that the real or natural datum finds greater emphasis in Duguit, the historical one in Saleilles and Hauriou, and the ideal one in Ripert and Josserand.

In Geny's work the presence of natural law is at one and the same time pervasive and elusive. Volume II of his main work is expressly devoted to *L'irréductible droit naturel* (the irreducible natural law), and volume IV turns to the problems of the conflict between natural and positive law (Geny 1914–1924). Geny distinguishes not only ideal law from natural law (ibid., vol. I, 52–3) but also and especially, in an open controversy with Cathrein, moral from legal natural law (ibid., vol. IV, 217; see also the criticisms in Dabin 1928, 456–7). Natural law has an integrative and subsidiary function in comparison with its function in the classical and neo-Scholastic approach, for it is reduced to the necessary minimum and consists of universal principles that are infinitely mutable in their application. Geny distances himself from Stammler's natural law with variable content, because

he defends a fixed and stable centre of evident principles with ethical and legal but highly indefinite content. This "irreducible natural law" is seen as a framework law or, as Rommen says, "a skeleton law" (Rommen 1998, 151).

One must not seek an authentically philosophical perspective in Geny's thought. From this point of view he is an eclectic, as is appropriate for a jurist to be and as is usually the case with all those who accord primacy to the concrete experience of law and do not intend to sacrifice that experience to an abstract conception. The central idea is that natural law, like positive law, belongs to the practice of law and to its historical execution.

As much as Geny broke the positivist streak of the 19th century, his thought also gave dissatisfaction to many moderate legal positivist theorists (see Ripert 1918) and to natural law theorists themselves (cf. Villey 1963). That said, Geny's natural law theory is innovative in several respects: (1) His way of conceiving natural law is rigorously secular, or at least it is so in its intentions (see Geny 1933);[13] (2) in seizing on natural law to defend the autonomy of law as such, Geny, polemicizing with Salleilles, does not resort to external props (like the spirit of the people, the social bases of law, public opinion, or popular consent) but rather appeals to custom and the nature of things; (3) his use of analogy, clearly distinguished from interpretation, as the logical structure proper to legal science makes possible the connection between written law and natural law; (4) natural law tends to be identified with the problem of the nature of law; and (5) Geny refrains from equating natural law in a narrow sense with the idea of justice, an idea that belongs to the ideal datum and has emotional characteristics linked to beliefs and intuitions and yet is also part of the object of legal science.

Unlike Stammler, Geny tends to treat all aspects of law—including ideal ones—in terms of scientific truth, because he has a conception of the experience of law as a unitary body that can be fully realized only if aimed at realizing justice at a given time and in a given space in accordance with appropriate rules (see Geny 1914–1924, vol. I, 47–55). He is well aware, however, of the tension between law and justice, as can be appreciated from the attention he devotes to the right to resistance.

Unlike Geny, other French jurists also influenced by Bergson's thought have undervalued the rational character of natural law in favour of intuitive law, thus embracing a legal science grounded in feeling, or *Gefühlsjurisprudenz* (see, for instance, Le Fur 1937, and the commentary in Collina 2007).

1.4.3.2. A Transient and Frail Natural Law

Between the coming into force of the German Civil Code and the Weimar Republic there came the German free law movement. It originated from the Society for Legal Science, founded in 1903 by Hermann Kantorowicz (1877–1940) and Gustav Radbruch, though the latter would subsequently to dissociate himself from the movement, as he was not happy with the term *freies Recht*, preferring instead *außerstaatliches Recht* (see Kantorowicz Carter 2006, 666). In 1906, under the

[13] In 1923, Geny established a chair of natural law calling it "Introduction philosophique a l'étude du droit" (Philosophical introduction to the study of law).

pseudonym Gnaeus Flavius, Kantorowicz published the manifesto of this movement and titled it *Der Kampf um die Rechtswissenschaft* (The battle for legal science) echoing Jhering's *Der Kampf um's Recht* (The struggle for law).

This movement, too, emerged in reaction to legal positivism: It sprang from the combined influence of the historical and the positivist schools in elaborating the German Civil Code. The central issue now was no longer only that of the gaps in statutory law but also that of its utter inability to account for the whole of positive law from manifold points of view. The first problem lies in the uncertainty involved in the recognition of the appropriate positive norm, both because theories of legal validity are not unequivocal and because concrete cases cannot be made to fall within univocal categories. The methods for interpreting norms are manifold and do not all lead to the same result. Logical methods of argumentation are in competition with one another: reasoning by analogy, argumentation *a contrario*, recourse to general principles, presumptions and legal fictions, the construction of legal concepts. In this situation jurisprudence, in the twofold sense as the science of law and as case law, is free to settle on the solution it prefers. And then the jurist and the judge are faced with the alternative between deciding according to their motivated subjective preferences, as the French judge Magnaud maintained, and looking for the best possible interpretation of the law (see Lombardi Vallauri 1990).

As can be appreciated, the free law movement was interested in the tasks of the judge and not only in those of the jurist. Some proponents of the movement, such as Ernst Fuchs, worked in the legal professions. Legal science itself was seen as operative and creative, while Geny was still committed to his descriptive model. The free law movement deliberately abandoned the positivist model of legal science once and for all and opened up to the perspective of practical reason, though it did so in a confused way.

All these conditions certainly predisposed people favourably toward natural law, but it won't suffice to reject positivist legal theory by branding it as a form of natural law theory. In reality, the common way of thinking in natural law was very similar to that of positive law: In both cases the concern was ultimately to have a set of norms. Ronald Dworkin will consider this a semantic conception of law, against which he set an interpretive or practical conception. The free lawyers moved precisely in this direction. Their ambition was to modify the approach to positive law. The point was not so much to reveal the inadequacy of the state's law and the presence of other sources of law as to modify the concept of positive law itself.

Free law is all positive law, to be sure. However, the latter is regarded not as fully realized and defined from the outset but as a process always moving toward completion by working from normative materials of various kinds, including those originating from the state. Positive law is human work and constantly under construction. Among these normative materials there are undoubtedly some that are not positive, like the general principles of law, values, fairness, *rationes decidendi*, and principles of reasonableness, but none of that warrants our setting the free law movement next to a doctrine of natural law, because the decisive element lies in their foundation. The term *free* in *free law*, I would argue, has a very different meaning than it does for Geny, who understood it to describe scientific research as independent of political authority, whereas here *free* describes positive law itself, which does not in principle depend on any predetermined parameters,

of either a voluntaristic or a rational character. *Free* means "incomplete." In this sense, the free law movement is against both positivist legal theory and the doctrine of natural law. Nevertheless, from the former there derives the conviction that law is founded on power, will, and choice, while from the latter there derives the demand that the choices made by the jurist and the judge should not be arbitrary but rationally justified.

In the 1906 manifesto, Kantorowicz mentions natural law on several occasions: *"The new conception of law presents itself as a resurrection of natural law in renewed form"* (Kantorowicz 2011, 2008; italics in the original). But he immediately clarifies that this novelty of "natural law of the twentieth century" consists in freeing itself from its universal and unchangeable character so as to take on a particularistic and historical one, so it has the merit of being the first and original form of free law as nonstate law. Obviously, this natural law has very little to do with Catholic metaphysics, still very much present in Geny's thought, and it rejects every form of Scholasticism. It is a natural law as "transient and frail as the stars themselves." Kantorowicz exemplifies that remark by making reference to Stammler's *Richtiges Recht* (Right law), Ehrlich's *Frei Rechtsfindung* (The free finding of law), Mayer's *Kulturnormen* (Cultural norms), Wurzel's *Projektion* (Projection), Stampe's *Interessenwägung* (The weighing of interests), and Rümelin's *Werturteile* (Value judgments) (ibid., 2008–9).

The new ideals are sought in the social function of legal prescriptions and in the social effects of judicial decisions. Jurists and judges have to be inspired by the new postulations of appropriateness to the values of the people, of professionalism, of impartiality, and of fairness. If these are respected, "the movement strives with all its might towards a goal that contains all the others stated, the highest goal of all legal action: justice" (ibid., 2028).

The reference made to the values espoused by the people is clearly a reference to Savigny's thought, with the important difference that by that time the idea of an objective legal order specific to the people had been lost. Social relationships are understood through the people's consciousness about norms—a consciousness they develop as they interact in concrete situations—and are not universal but transitory and contingent, always changing as society changes. They are not based on human nature but require an act of recognition and of will by the people and an act of normative understanding by the jurist and the judge. It is worth mentioning in this regard that the Swiss Civil Code, enacted in 1907, contains the famous Article 1, authorizing judges to act as if they were legislators when no law is applicable. The attention paid to the judge's role, the interpreter's personality, and his or her emotions also explains the influence the free law movement had on American legal realism, sensitive to the distinction between explicit and implicit law (see Kantorowicz and Patterson 1928, 692; cf. also Herget and Wallace 1987).

The stress laid on the social perception of justice has led some scholars to claim that the free law theory indirectly paved the way for Nazi legal theory and practice, but this claim has been persuasively rejected (cf. Grosswald Curran 2002, 162). In any case, free law is not an invention of legal interpreters but is already present in social life in an implicit way and *in statu nascenti*.

In conclusion, one has to wonder whether the appeal to values as historically perceived—and ultimately the appeal to social consensus and common opinion in general—deprives legal theory of its critical strength, and so whether legal theory is compatible with natural law. As was noticed by one of the founders of the

Institut International de Philosophie du Droit et de Sociologie Juridique, natural law at the start of the century found itself in this impasse: If it is unchangeable, it is contrary to life; if it is variable, it winds up being confused with the vague and dangerous concept of public opinion (see Le Fur 1937, 181).

1.4.3.3. The Aims of Law

The excessive weight given to the interpreter's individual evaluation of the law led the jurisprudence of interests (*Interessenjurisprudenz*) to seek a more objective basis on which to address the problem of normative gaps. For this reason, recourse was made to an investigation of those interests that have been at the root of legislative norms, this for the purpose of evaluating norms anew.

The central idea is that law is a way to deal with the conflict among the interests present in every human society. Official law consists in the resolution of this conflict by political authority, but legislative gaps require a new evaluation by interpreters.

This definition of law clearly has a finalistic character (the teleological school). Once more, we can see here the influence of Jhering (1877–1883), according to whom law is created by its aims, while according to the proponents of the Pandectistic school and the jurisprudence of concepts (*Begriffsjurisprudenz*) the aims of law do not belong in its definition. So the effort was to better specify Jhering's orientation, identifying the aims of law in its underlying interests. But this, too, is a highly indefinite notion, which as Binder observed tends to have an empirical-descriptive character, thus losing its original teleological dimension.

Philipp Heck (1858–1943) specified that this was not just a matter of material interests but also of cultural tendencies (*Begehrungsdispositionen*), thus including as well the highest interests of humanity, such as religious or ethical ones (see Heck 1948, 33). But this should lead to diversification in the criteria for evaluating interests. In reality, this school paid attention to economic interests above all others, thus in some respects anticipating the economic analysis of law.

In the first place the judge will have to respect the legislator's solutions for solving conflicts among interests. If a norm presents lacunae, it will be necessary to integrate it, protecting those interests that according to the legislator are worthy of protection. But if cases come before the court that have not been taken into account by the legislator, then the judge has to behave as if he or she were a legislator. The preference accorded to analogy over the *argumentum a contrario*, a form of argument obviously favoured by formalism, makes it possible to see a continuity between the work of the judge and that of the historical legislator.

The fundamental novelty of the jurisprudence of interests consists in having introduced a new method for interpreting the state's norms, a method that rejects the idea, still present in the free law movement, of interpretation confined to the text of law. Not the text but the aim of law (or *ratio legis*) can show what its lacunae really are. So as we ponder over the relation between the jurisprudence of interests and natural law, it is to this novelty that we specifically have to look.

The official attitude of the jurisprudence of interests is one of opposition to natural law, since natural law is conceived on the model of the conceptualism of the Pandectistic school and all a priori conceptions of law (see Rümelin 1948, 7ff.). Legal science must instead start from the social facts tied to interests, and must

follow their transformation into legal prescriptions, in which the extralegal dimension is still very much present. Accordingly, legal norms can ultimately be found to derive from legal and extralegal concepts that are interconnected. In any case, concepts are an epiphenomenon and do not have any legal causality: "Law is not created by concepts but by interests, by the end pursued" (Heck 1948, 35).

In spite of the stated intents of the jurisprudence of interests, traces of natural law theory can be espied in that movement, and they can be summed up as follows.

To begin with, the choice between the formalistic or conceptual method and the teleological one is undoubtedly guided by a value judgment about the aims of law, a judgment that confers a specific meaning on law.

Secondly, resorting to interests and the conflict among interests is tantamount to seeking the genesis of law in social relations that are "natural," or at any rate certainly not created by the sovereign's will. There are also the interests of the legislators, who want their commands to be practicable (an interest in practicability, an interest of presentation). For this reason, according to Heck, it is not enough to refer only to the aim of law, for that causes one to lose sight of the conflict among real interests at its basis. The science of law looks well beyond the legislators' work, which is submitted to the jurists' judgment: It looks to real life or, as Heck puts it, it "wishes to serve everyday life."

Lastly, the web of interests goes far beyond the confines of a national legal system, and so legal systems should be conceived as open-textured. A merit of the jurisprudence of interests is to have appreciated the practical importance of comparative law. In the background one can glimpse the conviction that interests potentially have a certain intrinsic order and that law can go back to the original composition of interests.

Legal antiformalism, in all of the versions considered, is representative of two fundamental concerns: On the one hand is a concern with the connection between law and real life; on the other, a concern with the connection between legal science and the social sciences. The former is a practical concern; the latter, a theoretical one. They can coexist, on condition of subscribing to the view that inherent in the social relations of real life is an objective order which science can demonstrate and which constitutes a criterion for measuring, judging, and interpreting legal prescriptions. In this sense the aspirations of natural law can be considered in a way present, in different degrees of intensity, in legal antiformalism. After all, expressed in real life are not only facts but also values, and the two are inextricably interwoven. Consequently, legal science cannot avoid making value judgments, and the spurious idea of natural law as an objective social order has to accept the mutability and contingency of social life.

1.5. Beyond Formalism and Antiformalism

The conflict between formalism and antiformalism, which marked the first half of the 20th century, substantially developed around the question of how to conceive legal science and its relation to other sciences. But it is also necessary to mention another direction of thought, driven by the intention to overcome the divide between formalism and antiformalism by challenging the primacy of legal epistemology over legal ontology.

The phenomenological orientation had limited resonance in legal philosophy, to be sure. But, over and above any reference to Edmund Husserl's philosophy, it did wind up bridging legal reflection between the first and the second half of the 20th century. The motto adopted by this orientation was that of a "return to things themselves," that is to say, an effort to perceive the essence of law, without the filter of legal science and cutting through the law's historical manifestations, which are purely empirical and transient. From this perspective, law is a modality of intentional conscience concerned with social actions in which bonds are formed between the I and you in the form of rights and duties marked by reciprocity.

For the phenomenological orientation, the examination of social acts, which affect law (especially the act of promising, in private law, and that of commanding, in public law), has neither a factual nor a normative character but a purely theoretical and structural one. This vision of law is not based on concepts, which are built for abstraction, or on consent, which is not by itself a basis of truth, but on eidetic intuitions, which precede all experience and confer a meaning on it.

Law is considered to belong to a third sphere of being, clearly distinguished from that of facts and from that of values. Consequently, phenomenological description strips law of its practical character, both in the instrumental sense as a means of social utility and in the valuative sense as an embodiment of justice. The study of positive law loses all scientific importance and is demoted to the status of a mere technique, but the study of natural law is equally delegitimized, both on the theoretical plane, as belonging to an outdated form of metaphysics, and on the practical plane, since it, too, is a cultural phenomenon devoid of absoluteness and so of any capacity to found positive law. In short, true law is wholly separated from valid law and from just law.

Phenomenology paves the way for a new philosophical approach to law, distancing itself both from the social metaphysics of natural law theory and from the social science of positivism (see Bobbio 1934, 137).

Reinach (1883–1917) explicitly takes on the problem of the relation between his conception of pure law and natural law, which he rejects because of its ideal character and its unfounded universalism (see Reinach 1983, 133–9). He admits that in certain cases the propositions of pure law can help fill legislative gaps. He also admits that there is a problem of connection between essential laws and the particular communities of life in which they are realized. But for him these are wholly secondary aspects that do not concern the central objective of the phenomenological conception of law. In truth, however, if the practical character of the idea of law is denied, then we are talking about something different from what jurists, judges, and legislators deal with.

Despite this originality of phenomenological speculation, there is no doubt that its function is to highlight the meaning of historical social acts, connecting them with their eidetic structure, which certainly does not derive from human will. The world of social acts in their essential purity is not an artificial world. In this, phenomenology is very distant from a positivist theory of law. The reason for moving away from natural law theory, regarded as a purely deontological doctrine, is that according to Reinach these social acts apply not only to the human world but also to every imaginable world, that is to say, they are not founded on philosophical anthropology. Phenomenology aspires to rid itself not only of the psychological dimension but also of all anthropomorphism if it is to be pure theoretical thought. But this heady separation between pure ultramundane law

and mundane empirical law is very difficult to maintain. It has been noticed in this connection that in fact, in spite of Reinach's intentions, not every content of positive law is compatible with his a priori law (see Seifert 1983, 227–30). Edith Stein (1891–1942) is aware of this. She traces the phenomenological roots of law to the person, understood as an intersubjective and empathetic being. Hence the possibility of critically judging the laws of the state (see Stein 1925).

Indeed, Gerhardt Husserl (1893–1973), the son of Edmund Husserl, deals with the relation between the essence of law and its positive force, taking the central problem of legal philosophy to lie in legal validity. This validity has a temporal and spatial character and, at the same time, a normative one (*normatives Sein*). The anthropological dimension thus reappears in the Heideggerian form of human existence as being-in-the-world (*in-der-Welt-sein*), and the world of positive law and that of pure law are connected (see Husserl 1955).

Every legal system has a temporal character and belongs to a determined life-world (*Lebenswelt*). But the circulation of legal ideas and the very continuity of positive law can only be achieved through a process of detemporalization (*Entzeitung*), making it possible to move from one vital sphere to another. This process brings out the fundamental legal structures, seen as nuclei of meaning stripped of their historico-temporal form and furnished with a claim to universality. This is not true natural law, because we are talking about truth propositions deprived of normativity and of ought. Nevertheless, without these normatively inert legal apriorisms, human orders and legal norms would not have an ultimate foundation, since pure and simple human volition is not a satisfactory justification for the nature of the thing called law.

So the phenomenology of law has shown up an aspect that undoubtedly belongs to the problems of natural law, which is to say that present in positive legal systems are persistent objective legal categories, common archetypes, and legal invariants that take on the particular form of life-worlds. This makes it possible to speak of an identity of the legal sphere despite the differences among historical arrangements. However, natural law needs not only the universality of its categories but also the normativity of its principles. The *punctum dolens* of legal phenomenology lies in the relation between Is and Ought: On the one hand legal phenomenology belongs with those philosophies that separate the two worlds, while on the other it aspires to *overcome* this separation.

The phenomenological orientation would survive the very conception that brought it into being. Evident traces of these problems can be found throughout German legal thought in the wake of Pufendorf's *entia moralia*, reinterpreted in light of the concept of the "nature of the thing" as a *Sollenstruktur.* But we are now very distant from Reinach's original intentions.

The first rebirth of natural law thus happened simultaneously in different philosophical and cultural orientations and in different conceptual sectors. Catholic natural law theory worked out a complete conception that was made increasingly flexible and complex by the legal science influenced by it. Formalism progressively opened up to legal values, so much so as to include them in the concept of law. Antiformalism denounced the loss of the social bases of positive law and fought against statism. In this way, it came up against nonpositive law, both because of the sources of that law and because of the indeterminacy of the state's law and the incompleteness of the legal system, with the consequent problem of the gaps and aims of law, and in reference to legal universals that are

variously concretized in positive legal orders. By that time the problems of natural law had crept into the very theory of positive law. Dissatisfaction with 19th-century positive law theory was too widespread to be underestimated, and it was owed to both the concept of law and to the processes by which law is interpreted and applied, but the philosophical landscape was too fragmented and confused. Navigating between Is and Ought meant finding one's way between the rock of sociologism, which reduced values to facts, and that of neoidealism, which sublimated facts in the absolute spirit.

2. Natural law and Totalitarianism

These intellectual vicissitudes of the concept of law were put to the test by an epochal event that deeply marked European history and split the 20th century in two. The advent of totalitarian regimes highlighted the inadequacy of legal formalism, the very easy drifting of antiformalism, and the political inertia of the metaphysical vision. Although the legal culture of the *Rechtsstaat* drew strength from a glorious tradition, it appeared incapable of fending off the economic and political forces at work in human history. We will limit ourselves to Nazi totalitarianism, because it drew on the legal culture at that time regarded as the most advanced in Europe.

2.1. Nazi Law

The heavy economic toll of World War I—coupled with the crisis of liberal individualism and the humiliating peace conditions imposed on the German people—contributed to the isolation of Germany from the strand of European culture that developed out of the Enlightenment. This also had immediate effects on legal culture, which had been deeply marked by German legal thought since the 19th century. That precisely German legal thought proved not just incapable of keeping the totalitarian state in check but was even willing to support it in many cases is a lesson in history that must not be forgotten. The Nazi regime was supported by great jurists like Julius Binder, Carl Schmitt, Ernst Forsthoff, and Karl Larenz (see Kaufmann 1983).

As far back as 1922, Ernst Troeltsch clearly identified the antagonism present in Europe:

> Those who believe in an eternal and divine Law of Nature, the common nature of human beings and the unity of destiny pervading mankind, and find the essence of humanity in these things, cannot but regard the German doctrine as a strange mixture of mysticism and brutality. Those who take an opposite view—who see in history an ever-moving stream of unique forms, each of which is shaped on the basis of a law which is always new—are bound to consider the West-European world of ideas of cold rationalism and equalitarian atomism, a world of shallowness and Pharisaism. (Troeltsch 1934, 201–2)

In reality, neither legal positivism nor natural law theory can be listed among the main causes of totalitarianism, but neither did they pose a true obstacle to it, the former because of its exsanguine formalism, the latter because of its theoretical

and practical weakness. The accusations the proponents of the two groups subsequently exchanged were clearly ideological, each seeking to turn history to its own advantage. Historical facts can disprove a doctrine only when deliberately and directly applied to it.

Whereas the neoidealist philosophy of Italian Fascism rejected both Catholic metaphysics and modern natural law theory, Nazi propaganda made abundant use of the expression *natural law*. Even so, we are clearly situated outside and against the natural law tradition, as can be appreciated by the overwhelming revival of natural law theory in postwar Germany.

Here we will confine ourselves to listing the reasons why Nazi culture was not compatible with natural law, as they are significant for the history of natural law theory in the second half of the 20th century.

Nazi law has an avowedly particularistic character. The intention was to restore Germanic law to its original purity. At the 1933 Leipzig Congress, jurists argued for the need to expunge from the law of the Third Reich all Latin influences, all universalistic abstraction, and the germs of liberal individualism. A new history of law was to start! But we must not confuse the Third Reich's imperialist ambitions with the universalistic appeal rooted in the idea of natural law. It is true that there was a revival of Gierke's conception of natural law (*gierkische Renaissance*), but only with the most moderate wing of Nazi legal science (e.g., Koellreutter 1932).

Nazi law has a naturalistic character, for it is rooted in the ethno-biological bases of the German people (*Blut und Boden*, or Blood and Soil) and in a specific race (*Rassenseele*). The *Volksgemeinschaft* (or people's community) is conceived as a natural and organic unit to which single individuals are functional. The natural law tradition, by contrast, very clearly draws a sharp distinction between natural laws and the laws of nature: the former are normative, being formulated by practical reason, while the latter are factual. The law of the strongest is not strictly a natural law but, if anything, a law of nature.

Nazi legal culture affirms the principle of the primacy of the political. Accordingly, the distinction between friend and enemy prevailed over the legal and humanitarian principle of equality (see Schmitt 1932). Without this principle, natural law is nonsense.

Consequently, Nazi law rejects normativism and embraces the principle of effectiveness. The normative ought is replaced with the strength of the concrete order (Schmitt 1932). Law is merely a tool in the hands of power. The state is a machinery (*Apparat*) that answers directly to the Führer (*Führerprinzip*). *Führung* (leadership, rulership, command) does not mean *Regierung* (government), since the commands issued by authority of the *Führer* do not guide the action of free and equal persons, who need reasons for action, but strictly determine their conduct as an efficient cause, and that is contrary to the spirit of the rule of law.

In 1934, after the Night of the Long Knives, came the ex post facto enactment of the "Law Regarding Measures of the State Self-Defence," which retroactively legalized the killings committed during the purge (Evans 2005, 72). The importance of this statute goes beyond the circumstances of its enactment, because it introduced a dispensation from the principle of nonretroactivity in the Nazi legal system. This, too, is contrary to the spirit of the rule of law.

Nazi law rejects the concept of subjective rights (see Larenz 1935), which it considers to be at the origin of liberal individualism (cf. Höhn 1934). The

individual has no rights as such but is only recognized as having a personality in the community (*Gemeinschaftspersönlichkeit*). This, too, is contrary to the natural law tradition, in which we find the origins of subjective rights as antecedent to the will of the state. Aversion to subjective rights would become very important to understanding the characteristics of natural law theory in the postwar period.

If the state is an expression of the concrete order of the life of a given people, then it is identified with justice. No longer is it possible to draw a distinction between formal and substantive justice: "Law is what benefits the people" ("Recht ist, was dem Volke nutzt": Radbruch 2006a, 13). This means that arbitrary power and violence are law if deemed useful to the people, and that what any authority commands for the benefit of the people is for this very reason just.

Lastly, moving the party outside the legal control of the state is in marked contrast with the conception of the *Rechtsstaat*, as Nazi law stands above the law. Schmitt's doctrine of the "state of exception" (*Ausnahmezustand*) is incompatible with the rule of law and is founded on moral relativism of a Hobbesian type. As far back as 1937, Ernst Fraenkel qualified the Nazi state as "discretionary" (*Massnahmenstaat*), in that government by decree outbalanced government by general norms.

Since the judge has to interpret the law in the light of the Nazi *Weltanschauung*, one can no longer speak of the neutrality of the judiciary. The principle *Nulla poena sine lege* is no longer valid, since there can be behaviours contrary to the community yet not directly written into law. It is replaced with the principle *Nullum crimen sine poena*, an overt violation of habeas corpus. It may even be too charitable to speak of the creation of a "dual state," because governmental institutions themselves frequently operated in contempt of the law (see Fraenkel 1941).

Nazi law thus violated two necessary conditions of natural law theory: the substantive condition regarding the moral content of legal norms, and the formal one regarding the legal system as a whole, a condition requiring respect for the principles of the rule of law. It is very difficult to imagine a legal system as contrary to the natural law tradition as the Nazi regime was. So one would at least expect the proponents of natural law to have been among the staunchest opponents of the Nazi regime. But, surprisingly, with some remarkable exceptions, such as Rommen (1998), that was not to be, and we now need to identify the reasons for it.

In criticising Nazism, Catholic theology found itself in a more favourable position than Reformed theology, which from Luther to Barth had consolidated and reinforced an attitude contrary to natural law. Yet the intellectual reaction that German Catholicism had to Nazism was inadequate and, to an even greater extent, unsatisfactory.

There are historical and cultural reasons that explain this weakness of Catholic natural law theory. The first of these was the legacy of the *Kulturkampf*, which compelled Catholics to show their ability to integrate and cooperate in social and political life. Conspiring with that influence was an initial affinity with some of the themes that drove Nazism—two in particular, namely, communitarianism, in contraposition to liberal individualism, and a tendency toward anti-Semitism (actually much less marked than in Protestantism)—but without foreseeing or desiring its violent outcomes. But after 1933, following the *Gleichschaltung*, a policy designed to absorb all non-Nazi organizations and keep them in check, it became clear that the compromise the Catholic Church came to with Nazism was

no longer viable. Even so, a very cautious attitude prevailed that favoured indirect to frontal criticism (see Dietrich 1987). The Church became overly concerned with defending the possibility of carrying on its religious mission in German society, and too little concerned with the common good of this society as a whole (see Dietrich 1988). Along with racism, however, there was a point that Catholicism absolutely could not accept, and that is Rosenberg's 1937 statement that "National Socialism always claimed the whole of man and his entire personality." This claim clearly bespoke an antireligious attitude.

Aside from the moral and political responsibilities, which will not be an object of investigation here, an important theoretical lacuna in Catholic natural law theory was highlighted. In principle, starting from *Rerum Novarum*, Catholic natural law sought to respond to all the central problems of social and political life. But in fact, it paid too little attention to the strictly political aspect. A realist attitude to all political regimes, including dictatorships, had taken hold in the conviction that it was enough to require that they meet certain conditions, especially as concerns the *bona particularia* of the family and educational freedom (see Böckenförde 1961–1962). In the Catholic natural law of that time there was no adequate reflection on the rule of law, limited government, or democracy, all questions that were already present in some form in Aquinas's thought.

In these circumstances the concept of the common good—one of the fundamental pillars of Catholic natural law theory—failed to yield evaluation criteria (when truly needed) capable of critical and operational force. Accordingly, natural law fell into a void and became an inert or merely abstract doctrine, incapable of holding concrete political institutions to critical scrutiny. It appeared evident that a doctrine of natural law is not complete if it cannot also express a political theory.

Moreover, the metaphysical bases of Catholic natural law theory, developed by neo-Scholasticism, favoured the elaboration of abstract principles valid for every time and place, even though, for this very reason, such principles turned out to be decontextualized and inert on the sociopolitical plane. On the other hand, nonmetaphysical natural law—variable, irreducible, or progressive—was vague and for that reason could not furnish stable and reliable criteria of judgment.

2.2. The Nuremberg Trials

The Nuremberg trials undoubtedly compelled people to reconsider the possibility that natural law could be effective in cases of clear contempt for human dignity. There was a widespread conviction that Nazi war criminals had to be brought to justice under the law, but there was also broad disagreement about the *justification* for such punishment. Particularly indicative in that regard is the following statement by Kelsen:

> Justice required the punishment of these men, in spite of the fact that under positive law they were not punishable at the time they performed the acts made punishable with retroactive force. In case two postulates of justice are in conflict with each other, the higher one prevails; and to punish those who were morally responsible for the international crimes of the Second World War may certainly be considered as more

important than to comply with the rather relative rule against ex post facto laws, open to so many exceptions. (Kelsen 1947, 165)

That noncognitivist and cognitivist theorists agreed on this point is evidence of at least some objectivity in the criteria for identifying injustice, or "at least a rudimentary non-relativist ethic" (Alexy 1999, 33). And that brings natural law back into play. Still, on the legal plane, the way punishment of those found guilty is justified is by no means irrelevant, and in this respect the divide remains between legal positivism and natural law theory.

For a better grasp of the issue, we ought to remember that it fundamentally concerns international law, which was considered less rigorous and developed than domestic law, that is, less purified of natural law elements. Cathrein had previously argued that it is impossible to justify international law if there is no natural law.

A rigorous application of the principles of the *Rechtsstaat*—especially the principles *Nullum crimen sine lege* and *Nulla poena sine lege* in connection with the prohibition on retroactivity in criminal law—would have made the punishment of Nazi war criminals illegal (though not unjust). Since, as was just observed, it was thought necessary for punishment to have the seal of legality, different justification strategies were adopted within the two groups.

Legal positivism would obviously have been fully satisfied if at the time the acts were committed the positive laws (national or international) had contained provisions making those acts crimes. But nothing of the sort existed in the international law in force at the time. Accordingly, the advocates of legal positivism fell back on a search for principles already contained in the law, however much not fully developed, and went looking for them in the interstices of the Kellogg-Briand Pact of 1928 or the 1899 Hague Convention. These were certainly very defective legal rules if judged against the positivist ideal by which the punishment distinguishes the law from morality. But these attempts proved unsatisfactory, since the model of law held up by traditional legal positivism, centred on the commands of the sovereign state, was incapable of adequately accounting for international law (in general, see Paulson 1975). So, in a last-ditch attempt, some exponents of legal positivism abandoned the thesis of the stringency of the principle of nonretroactivity (see Kelsen 1945), but this meant sawing the branch on which people were sitting, for if such a principle can be defeated by a superior value, then this means that, at least in some cases, moral principles prevail over legal ones. Hitler also thought the same thing, though espousing a very different concept of morality.

Hart's conception goes in the same direction as Kelsen's, though in relation to the issue of obedience to the sovereign's commands, in stating that "laws may be law but too evil to be obeyed" (Hart 1957–1958, 620, and also Hadelmann 2005). But if a valid norm must not to be obeyed, then it is normatively inert, that is to say, it is not a real norm.

Even within natural law theories, a range of positions can be observed. Traditional metaphysical natural law theory makes a strong case for the invalidity of unjust laws and accordingly holds those who obey such laws legally responsible. Consequently, a positive law that simply recognizes natural law principles, which by definition everyone already recognizes from the start, cannot strictly be considered retroactive. This thesis as a general proposition appeared overblown to

many theorists of law, and apt to seriously undermine the certainty of law. As is well known, Gustav Radbruch formulated a more downsized version of it, independent of metaphysical natural law theory:

> The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as "flawed law" [*unrichtiges Recht*], must yield to justice. (Radbruch 2006b, 7)

Radbruch's formula essentially says that extreme injustice cannot count as law. There is therefore a certain connection between law and morality, though it is limited to extreme cases. Moreover, Radbruch introduces another thesis:

> Where there is not even an attempt at justice, where equality, the core of justice, is deliberately betrayed in the issuance of positive law, then the statute is not merely "flawed law," it lacks completely the very nature of law. (Ibid.)

Hence in addition to unjust laws there are nonlaws. Radbruch would reaffirm his natural law theses in *Vorschule der Rechtsphilosophie* (Primer on the philosophy of law: Radbruch 1948a), where legal philosophy is conceived as a doctrine of right law (*richtiges Recht*).

This opens up a third way of natural law theory, in which the formal principles of the rule of law are part of the concept of law. Nazi laws should not have been complied with because they violate these principles. But this strand of thought, developed, as is well known, in the United States by Lon Fuller, has no echo in the European cultural landscape, and one can understand the reasons why. For one thing, not all Nazi laws were thus vitiated and, for another, the rules followed at Nuremberg were themselves applied retroactively, at least as regards the *nulla poena* principle, and so in violation of a fundamental principle of the rule of law. It must be recognized that there was no way to circumvent this problem: It was necessary to frontally address the question of the substantive justice of law.

In fact neither legal positivism nor natural law theory in their pure form were invoked by the judges of the Nuremberg Court. A pragmatic path halfway between the two prevailed: On the one hand an effort was made to demonstrate the prior existence of international rules of law (for this reason, for instance, the application of rules on crimes against humanity was limited to the war context), and on the other there was invoked the particular nature of international law, marked by an appeal to the common conscience and to the principles of basic humanity widespread "among civilized people."

The Charter of the International Military Tribunal contained an affirmation of the principle of individual criminal liability for the most serious violations of international humanitarian law, even when people acted out of obedience to higher orders. This is an important point in the history of natural law in the second half of the 20th century, as it put an end to the state's absolute sovereignty and provided legal recognition of the values of morality and conscience.

The time had now come to consider not which legal philosophical conception had favoured Nazism, but what conception of the law could help to avoid it being repeated.

3. The Second Revival

3.1. The Enforcement of Natural Law

As we have seen, the first revival of natural law was characterized on the one hand by a consolidation of Catholic doctrine and, on the other, by the dissemination of ideas linked in some way to natural law but essentially rooted in a dissatisfaction with formalistic positive law theory. Between the first and the second revival there is the watershed of World War II, which radically changed the framing of the problem much more than World War I had (see Kühl 1990; Kaufmann 1991). It appears evident that the first issue to be addressed, before turning to the role of natural law in the *theory* of law, is that of its role in the actual *practice* of positive law.

The Nuremberg trials did not remain an isolated case, especially in the *Bundesrepublik*. Specifically, the German courts and the Federal Constitutional Court of Germany itself in some cases expressly used the Radbruch formula to ground the conviction of Nazi war criminals, and in more recent times it also used the formula in its decisions on the so-called Berlin wall shootings by the *Volkspolizei*, or *VoPo* (see Alexy 1999, 19–22). Natural law in the form of a minimum objective morality had a concrete influence in judicial practice, and not only in West Germany.

Natural law would soon crop up in the legislation of the Federal Republic of Germany as well, particularly in criminal and family law. But that is even more evident in the *Grundgesetz* and, more in general, in all the constitutions enacted after World War II, which were presented as a supra-statutory law superior to the state's powers (see Rosenbaum 1972, 106–30).

This presence of natural law elements in the rules and practice of positive law may be overt or hidden, but regardless, in it lies the new and distinctive trait of the second natural law revival.

It is certainly not a new thing for the positive law to be applied and interpreted by also taking extralegal elements into account, especially after the theses advanced by the free law movement. The new development instead lies in the active presence of natural law in the lawmaking processes, that is, in the positivization of law at large.

In Italy the Association of Catholic Jurists—inspired by the 1942 radio message in which Pius XII reaffirmed the eternal validity of natural law, this time with the inclusion of human rights (cf. Gonella 1942)—coined the significant formula "natural law in force" (Angeloni et al. 1951). In Germany, too, people spoke of "positivized natural law" (Müller 1967, 10–2; see also Foljanty 2013). This was also an appeal to the jurist's and the judge's conscience and to legal ethics in relation to unjust law, in such a way that the problem of the justice of positive law would not be deemed extraneous to the judges' professional role, as legal positivism by contrast maintained. If the whole legal enterprise takes justice as its aim, then the theory and philosophy of law should take justice into account, with a consequent deep transformation of the paradigms at work in the tradition of legal science since the 19th century. In fact, however, it was not so or at least it did not happen in a significant way. The theory appeared more resistant to natural law

than practice has been. The appeal to natural law often did not correspond to a different way of seeing the theory of legal science.

3.2. Common Values and Natural Law

The presence of natural law in postwar legal philosophy came about through a progressive and significant transformation of moral culture in general.

The reaction against the crimes perpetrated by the totalitarian regimes helped to consolidate a broadly shared substantive ethic, regardless of the foundations on which such an ethic is made to rest. Instead, as we have seen, in the first half of the 20th century the only full-fledged conception of natural law was the Catholic one, which finds a specific justification on theological, metaphysical, and anthropological bases. This made it possible to hold up common or shared moral values without having to endorse foundations that many were not prepared to accept. So, for example, there were those who maintained that natural law and individualistic modern ethics were incompatible (see Piovani 1961). Consequently, the traditional relation between positive and natural law was replaced with that between law and morality. This also avoided the need to invoke "nature," which in ethics divides much more than it unites. But setting aside both the legal character of natural law and its natural character meant a profound transformation of the traditional issue, whose real effects would not show themselves until a few decades later. For the time being we should only note that, unlike what is the case in natural law, the existence of shared values is a factual matter which is predicated on consent, but which at the same time also presents itself as endowed with normativity.

The passage from natural law to an ethics of shared values was also perceived in the Catholic culture as an opportunity for dialogue (see Delhaye 1960). Neo-Scholasticism had by now abandoned its typical syllogistic method and presented itself in a more discursive form, more attentive to a deeper distinction between law and morality (cf. Graneris 1949) and moderately open to the historicity of law (cf. Olgiati 1944). But it was essentially aimed at supporting the traditional theses of neo-Thomism, with few serious attempts at bringing the theory up to date, especially in the areas of human rights, international law, and social ethics (see Messner 1950, Auer 1956, Verdross 1958, and Ütz 1958–1963).

Within Catholic natural law theory the most significant innovations originated from the epigones of the second phase of Thomism, which as previously remarked was based on a direct reading of Aquinas's works in light of the philosophical problems of the time. Here we will simply emphasise the contribution of two thinkers that in some respects influenced the Second Vatican Council: the Frenchman Jacques Maritain (1882–1973) and the Pole Georges Kalinowski (1916–2000).

Maritain believed firmly in the ductile capacity of Thomism to seamlessly bring the emergent cultural values into its fold: These were values he himself identified and at times harbingered, as by making the case for world governance. Rejecting the state's sovereign omnipotence in the name of the priority of the human person (see Maritain 1951), he understood the importance of democracy (cf. Maritain 1988b). A supporter of the Universal Declaration of Human Rights, he was committed to showing the connection between human rights and the traditional

problems of natural law (see Maritain 1988a). In particular, giving further impetus to the spread of the ethics of shared values, he defended the possibility of practical accord and cooperation among very different ideal and cultural families on the theoretical plane, prefiguring Rawls's overlapping consensus (see Maritain 1990). His exile to the United States, during World War II and for some years after the war ended, allowed him to appreciate American political culture, from which he drew inspiration (see, for instance, Pound 1942). Maritain's social and political writings, in both Europe and the United States, can be said to have been more influential than his general philosophical thought.

As regards natural law more directly, Maritain regarded its principles not as general precepts but as universal "dynamic schemes" operating in all cultures in an unconscious way and amenable to a wide variety of concretizations (see Maritain 1951, 93–4). The idea is taken, once more, from Bergson, but is elaborated on the basis of a cultural concept of human nature. Positive law—the primary meaning of law—obviously belongs to the cultural dimension and is the fruit of practical reason, which imparts order to human actions by means of "knowledge through inclination." This means that the derivation of positive law from natural law *ad modum conclusionis* must also be conceived not in a deductive sense but as a historical concretization among many possible ones. Maritain did not succeed in further specifying this strand of thought, which he intended to back up with the support of cultural anthropology (see Maritain 1986; Viola 1984). Even so, it stands as a variant on the other previously discussed interpretations of the relation between natural law and positive law in the framework of Aquinas's thought.

From this perspective, Maritain's thought on natural law unwittingly crosses into a tradition of thought that spans from Vico to Gadamer, the latter also having invoked ideal schemes of action (Gadamer 1960, 302ff.). Natural law constitutes a necessary condition for the practicability of positive law, an internal source of guidance for the latter that cannot be disregarded. This "just by nature" never exists in a pure form but is manifested through its cultural concretizations, which require the exercise of the judicial form of *phronesis*, or practical reasonableness.

Georges Kalinowski, for his part, addressed natural law not directly but looking at its cognitive presuppositions. If value judgments and norms themselves do not have any truth value, then natural law and the moral law, however interpreted, do not have any rational justification. Kalinowski, coming from the famous Polish school of logic, contributed to the development of deontic logic at the same time as the Dane Alf Ross, the Finn Georges Henrik von Wright, and the German Oskar Becker were conducting their investigations, but independently of them. Careful to defend the peculiarity of practical knowledge, which had aroused the interest of other researchers inspired by Thomist thought (see Simon 1934), he maintained that science cannot properly set the truth conditions for practical knowledge, which instead require philosophical perspectives, that is, strictly dialectical ones. According to Kalinowski, first value judgments are based on evidence and support one another with the aid of the virtues, while second value judgments are verifiable on a logical plane (cf. Kalinowski 1967). In his opinion it is necessary to abandon a static concept of human nature, typical of modern natural law theory, and to clearly distinguish normality from normativity, which is compatible with the mutability of human nature (see Kalinowski 1983; Kalinowski and Villey 1984).

Christian culture was not limited to the Thomist school but also developed in a secular version. Recourse to an ethic of shared values also made for greater freedom from a Christian perspective. Here begins what was previously indicated as the third phase of Thomist natural law theory, in which what is at stake is no longer fidelity to a school but the intersection of different philosophical models, from Aquinas to Kant.

The Italian philosopher Alessandro Passerin d'Entrèves published a study that was emblematic of this new cultural atmosphere (Passerin d'Entrèves 1951). Although this was clearly an introductory text and was modest in its tone, it is representative of this secular turn in natural law theory of Christian persuasion. The goal was to reconstruct a tradition of thought that preserves its critical role in Western social and political history. The effort, proceeding from the natural light of reason, capable of distinguishing good from evil, the just from the unjust, was to find norms that are not only a measure of human action but also a judgment on its value. According to Passerin d'Entrèves, who followed Aquinas in a non-Scholastic way, it is possible to have a rational foundation of ethics. Law is recognized as having a moral character and is thus brought back into the fold of morality, yet there is a specificity to it that is not based on the stifling distinguishing traits of tradition but on the possibility of translating moral norms into legal principles. Precisely in that effort, according to Passerin d'Entrèves, lies the task proper to natural law, the task of serving as an interface between morality and positive law. It is interesting to note that in this way a traditional aspect of natural law was vindicated that had been entirely forgotten, namely, the important role natural law plays not only in the formation of legal language and the construction of legal categories, but also in the way in which law is produced and put into practice (cf. also Simon 1992). It is thus shown that the validity of law stands on more than mere legality.

In the same strand of thought, though with greater attention to the teaching of historicism and the transcendence of faith (see Fassò 1956), we find the Italian legal philosopher Guido Fassò (1915–1974), who in 1964 published a study on the historical role of natural law theory to reaffirm its validity in Western political history. Fassò notes that it is impossible to understand the meaning of constitutionalism and the liberal state without considering natural law. But it needs to be observed that, like Passerin d'Entrèves and unlike the other previously mentioned Thomist authors, Fassò places a premium on natural law theory, and above all defends the role of reason in law, which in keeping with the English tradition is viewed by him as *artificial reason*, a reason at once not absolute and clearly distinguished from the sovereign's imperious will (see Fassò 1999, 217–52).

The experience of totalitarianism also led Protestant theology, traditionally very distrustful of natural law, to reexamine its views on the relation between nature and grace. A systematic attempt was made to examine the manifold natural law models (see Wolf 1955, 1947). By comparison with the strand of thought contrary to natural law—positing the existence of two kingdoms and spanning from Luther to Barth—the Calvinist treatment of moral conscience left open the possibility of natural revelation (*revelatio generalis*) beyond specifically evangelical revelation, and this made possible a dialogue with Catholic theology (see Böckle 1965 and also Reber 1962). The central problem therefore becomes what Brunner calls the point of connection (*Anknüpfungspunkt*) between the action

of God and man's response. The admission of the existence of various arrangements or orders of creation and justice (cf. Brunner 1943), thus making room for natural law, leaves unprejudiced the question of subjective human action burdened by sin, and makes it necessary to set power on a theological foundation. That is precisely the outlook on which Protestant theology approaches law and politics (see Künneth 1954). Brunner rejected the equation between law and power and on that basis took exception to legal positivism. Even so, every formalization of natural law is extraneous to the Protestant vision, and there is a preference for turning to conscience. What is good cannot be preestablished once and for all: The good lies in obedience to God's command at any given moment (see Brunner 1939, 33). This paved the way for a situational ethics, which had already been prefigured by Bonhoeffer (1949, 215), and which intersects with the existentialist trends of the time. On this path, Protestant thought is somewhat cautious toward natural law as an objective secular ethics, as is evidenced by the writings of Ellul, who passionately stressed the subversive strength of Christianity against established institutions, first among which the ecclesiastical ones (see Ellul 1946, 1988). But even in Catholic theology the traditional way of seeing natural law was challenged (see, for instance, Böckle et al. 1966).

3.3. The Nature of the Thing

The shock of the war led many legal philosophers to reexamine their own thought, and there were many "conversions" to natural law, some in truth certainly dictated by opportunism but others sincere. On the opposite side there was a return to philosophical positivism in the guise of logical neopositivism and analytic philosophy, which presented themselves as methods of scientific investigation to be applied to legal science as well. But in general the urgency of providing a theoretical answer by which to account for the facts of history—not a preconstituted answer or one or deriving from an implied general vision—prevailed over the need to stay true to any given current of thought. This helped legal philosophy gain greater autonomy from general philosophy, setting in motion a distancing process that was destined increase over time.

As legal philosophy began to take on a history of its own not ancillary to general philosophy, a conflict emerged between those who as a priority saw legal philosophy as an epistemology of legal science and those who defended its speculative character. This brought back the perennial contrast between legal positivism and natural law theory. But now it was clear that the effort was to give an answer to the same problem, that of defining positive law. On the one hand the general theory of law, following in Kelsen's footsteps, took an epistemological course, thus freeing itself of the particularism of legal dogmatics; but on the other, the legitimacy of a philosophical conception of positive law was vindicated. The conflict was set precisely on the plane of the general approach to positive law, and so no longer was there a distinction between the philosophers' philosophy of law and that of the jurists.

Among the philosophical currents of the first half of the 20th century that appeared to be most involved in the drift toward totalitarianism was undoubtedly neoidealism. This current was responsible for dismantling the cognitive credentials of legal science, reducing the essence of law to an act of subjectivity

that posits norms and continually overcomes them, and absorbing individuality within the subjectivity of the absolute spirit. The legal philosophy of neoidealism, in both its historicist version and its absolutist one, took the strongest conceivable stance against natural law, even outdoing philosophical positivism in this regard, despite some attempts at recovery (see, for instance, Antoni 1959).

If normativity comes from the immanent acts of the spirit in its internal dynamism, then in principle there is no limit to the subjectivity by virtue of which norms are set. It was thus necessary to reconsider the foundation of legal normativity so as to set limits to be respected. This is the general thrust of the second revival of natural law. Indeed, nature, understood as a simulacrum of objectivity, became the constraint the spirit tends ceaselessly to overcome. And yet the reduction of nature to pure facticity was the main theoretical obstacle that made it impossible to recognize a source of normativity in nature itself. It was the challenge of overcoming this obstacle—through orientations grounded in a creationist metaphysics, though not always—that engaged natural law theorists after World War II.

Although the strategies employed in addressing this challenge were manifold and quite varied, they often overlapped in important respects, and the effect was to produce a certain eclecticism.

A common element can be identified in what has been called the "doctrine of the nature of the thing," but only if we give that doctrine a much broader sense than that used by those who expressly looked to it. In this way we can understand all those conceptions that seem to embrace the idea of an objective structure which the positive legal creation of norms is called on to somehow respect.

The doctrine of the nature of the thing had been put forward by Radbruch in a form that was still subsidiary to positive law, where it was seen as the objective meaning to be extracted from the conditions of life and as the force driving the transformation of legal institutions in response to social change (see Radbruch 1948b, 147). But it was reprised in a broader way in the postwar period (see Baratta 1959).

The modest version of the doctrine of the nature of the thing is the one that recognizes the importance of that nature when it comes to interpreting and integrating the law itself but not as regards the *sources* of law. This was the version espoused by Bobbio (1958), who thus lent support to Radbruch's theses, giving them an even more restricted form. But in this form the doctrine has very little importance for natural law, except to the extent that fairness is a concern of natural law.

Bobbio notes that the doctrine of the nature of things is hostile to voluntarism, statism, and legislative fetishism—the same enemies as those of natural law. But as much as Bobbio may avoid a metaphysical concept of nature, he cannot avoid the naturalistic fallacy. In the manner of the antiformalist sociological conception, he recognizes the pluralism of legal sources but confuses the sources from which law is derived with those on which basis norms are qualified. In reality, the doctrine of the nature of the thing must be linked to teleological and sociological methods that guide the judge and the jurist in interpreting legal norms and the nature of legal institutes. That is all.

In reality, even for natural lawyers the doctrine of the nature of the thing was not meant to add a new source of law competing with the positive law or superordinate to it. It was instead meant to challenge the positivist doctrine of the sources of law itself or, more precisely, to challenge the way statutory law was

conceived as a source of law. It was not a matter of introducing a new source—that of the nature of the thing—alongside the others, but rather of rejecting the idea of law as an issuance of the legislator's will. On the contrary, law was subjected to constraints both at the moment of its production and at that of its interpretation. These constraints had the same function as the traditional ones of natural law (that is to say, they were among the elements required to define the validity of law or to establish its normativity), but they differed from the latter in some significant respects. The fundamental difference lies in the *realism* of the nature of the thing. The facts invoked by the nature of the thing are not bare or "naked" but are instead enveloped in values. And here the difference among the various renderings of the doctrine of the nature of the thing depends on how they see the kinds of facts to be taken into account and the kind of relation these facts bear to values. That doctrine rejects the metaphysical abstractionism of traditional natural law theory, precisely because the latter does not succeed in making natural law effective. For all these reasons, the doctrine as a whole can be regarded as an attempt at a profound revision of natural law theory (see Poulantzas 1965).

What emerged as the central legal-philosophical problem was that of the relation between facts and values, between real law and ideal law, since their separation, that is, dualistic thought, was considered responsible for the inertia of theory toward history.

The different versions of the doctrine of the nature of the thing often depend on the nature of the facts considered. These can be any of the following: the very mode in which law is experienced, the human condition, the ontological structure of legal culture, and the concrete legal situation. Let us take them up in turn.

3.3.1. Law as Experience

The philosophy of law as experience, which did not intend to break entirely with idealism and historicism, found its greatest expression in Italy. The principal proponent of this orientation was Giuseppe Capograssi (1889–1956), who did not abandon the central importance of conscience proper to idealism but did reject its absoluteness (see Capograssi 1959a). Law is not a set of rules but an activity that expresses itself in different forms reflecting the different ways in which individuals relate to one another and to goods (see Capograssi 1959b). These relations are always present in legal systems, and the problem is to protect their meaning in the application of law. Capograssi defends the individual against the voracity of the state's power and works out a form of Christian existentialism inspired by Augustine and Rosmini. Like Vico, he seeks natural law in the historical development of positive law, by looking at the way law comes into being rather than at its normative or prescriptive form. Law as such, unqualified, is a unitary practical experience whose aim is to strive for the infinite, all the while preventing individuals from escaping such a striving.

Capograssi's influence on Italian legal culture was a major one and favoured the development of the natural law orientation, though he himself was not strictly an advocate of natural law in the traditional sense.

In its further development, the philosophy of law as experience saw the need to better delimit what is distinctively legal in human experience, distinguishing that element (the law) from other forms of practical life. In this sense it is the nature of

legal experience that presents itself as the "thing" to be defined. Thus, for example, Enrico Opocher (1914–2004) looked to the trial and to litigation in identifying this specificity involved in putting into practice the value inherent in law. This strand of thought is meant to avoid both transcendental formalism and historicism, as well as legal positivism and traditional natural law theory, so as to affirm law as a value (see Opocher 1983, 267–315). Without a doubt, the centrality of the value of justice, the primacy of reason over will, and the recognition of truth in legal judgment are all natural law aspects, but in the thought of Opocher the temporal process by which the value of law is objectivised is not governed by any well-defined criteria other than the formal Kantian criterion of the coexistence of freedoms.

3.3.2. The Human Condition

Another orientation looks above all at human existence and its relational conditions of development. This strand of thought ought to be further distinguished into two orientations.

There is first of all an attempt to apply the philosophy of existentialism to reflection on law and society, though the results have not, in truth, been remarkable, this owing to the original vocation of a conception born of the uprooting of humans from their place in the world (see Battaglia 1949). It is very difficult to find natural law in a philosophy that defends the primacy of existence over essence. Nevertheless, in various respects existentialism undoubtedly contributed to this second rebirth of natural law.

Personalism, which owes a lot to the effort made by Emmanuel Mounier (1905–1950) to give it wide currency and a revolutionary edge, in turn played a central role in renewing social anthropology, placing it at the centre of philosophical reflection (see Mounier 1936). Personhood, in which being and the good are identified, takes on the role of a supreme value. The dignity of the human person is considered a sacred value, and the person himself or herself is seen as a plexus of social relationships reflected in the political form of participatory democracy. Personalist thought is certainly not analytical, so it would be vain to seek in it any systematic working out of moral principles. Even so, the primacy of the human person, taking the place of creationist metaphysics, becomes the valuative basis for a new expression of ethical and legal principles.

Also very much present in atheistic or secular existentialism is the theme of social justice, both in the form of a hopeless denunciation and in that of a commitment to the construction of emancipatory social relational structures, as can be appreciated in the thought of Maurice Merleau-Ponty (1908–1961). In the place of a natural law there is undoubtedly the demand for responsible choice as the fundamental basis of human existence (see Scarpelli 1949). Further, existentialism was also behind the effort to explore the basic forms of social life, from mere coexistence to political society down to communion (see, for instance, Berdjaev 1936). Today a certain return to existentialist perspectives can be observed in studies in Law and Literature.

The attempt to bring the existentialist perspective to bear on the categories of legal science remained isolated (see Cohn 1955). It was trenchantly criticized by Kelsen (1957, 161), who compared it to a vogue that made its way to the suburbs

after it lost its lustre in the metropolis, though it was defended by Arthur Kaufmann (1958, 23).

More significant, in that it came into being within legal-philosophical reflection, was the other strand of thought, for which "the thing" to be thematized as having an essential nature was the cultural world created by humans, and so also the strictly legal world.

We take as emblematic in this regard the thought of Werner Maihofer (1918–2009). The facts of culture cannot be treated like natural facts, because value is immanent in them from the start. Value therefore does not remain a pure subjective element of the conscience, as Radbruch maintained, but rather enters the world of being. However, this being is not that of nature but that of history—the order of human coexistence created by humans themselves (see Maihofer 1958). Therefore, the nature of the fact is the process by which we realize we have to be in the world of being. Dualistic thought is superseded by a monistic vision aiming to overcome the dichotomy between Ought and Is, between subject and object.

Konkrete Naturrecht (or concrete natural law), as Maihofer called it, has a typological character, in that it is founded on the roles that humans play in concrete social life, understood as formed by plexuses of rights and duties, expectations and obligations. These roles represent relationships of coexistence, and they change over time, but at every moment in history they are normative, meaning that rules are drawn from them according to the method of the Kantian categorical imperative and that of the principle of reciprocity. Maihofer does not mean to put forward an ideal of justice or even to defend a new source of law, but is only interested in ascertaining that the layperson and the jurist alike follow positive law in light of rules proper to the meta-positive law on which positive law is founded.

This strand of thought was the same as that of the others, but with some variants, sometimes more attentive to the prelegal limits on the contents of legal validity (see Welzel 1951), and sometimes proceeding on the basis of Scheler's material ethics, more concerned with the relation between historical conscience and the universal values of the person to which the law is linked (see Coing 1950). But all agree in rejecting a metaphysical foundation of natural law as incompatible with the historicity of human existence.

So why still call it "natural law"? Perhaps because, though created by humans, it presents itself as an objective constraint, albeit a historical one, on individual conscience? This still seemed to be too extrinsic in the eyes of a more consequent natural law theory. Although Sergio Cotta (1920–2007) also adopted a phenomenological and existentialist perspective, he criticized Maihofer's theses, arguing that they lead to a dissolution of human authenticity behind the mask of social roles. In this way law would not be an expression of the mode of being distinctive to humans (see Cotta 1991). For this reason it is necessary to connect natural law to the fundamental modes of human coexistence, understood as the set of conditions and principles required for an authentic existence of the relationships that form the basis of legal phenomena. The focal problem of natural law is not to identify precepts dictated by human nature but to justify the obligatoriness of positive law, which cannot in turn be explained on factual or voluntaristic bases (cf. Cotta 1981). This conception, too, as I see it, is inscribed in the general horizon of the doctrine of the nature of the thing, but since the "thing"

is now our being human that binds the structure and content of the legal phenomenon, the basis of the law turns out in the final analysis to have a metaphysical character.

3.3.3. The Ontological Structure of Law

The third version of the doctrine of the nature of the thing turns directly to the structure of positive law considered in itself. In it a marriage is forged between Is and Ought, between the social fact and normativity.

If we take Arthur Kaufmann (1923–2001) to be representative of this strand of thought, we again see an effort to bring Thomas Aquinas's philosophy of being to bear on the concept of law as regards the distinction between essence and existence.[14] This leads one to exclude the both essentialist path of idealistic natural law and the empiricist one of legal positivism, thus looking for a third path.

> Positivism regards the validity of the norm to be the result of its effectiveness; idealistic natural law regards validity as the criterion of the effectiveness. The problems concerning "law and power," "justice and certainty," are finally insoluble for both views. (Kaufmann 1963, 81–2)

The third way consists in considering positive law to be internally never fully realized once and for all but always in search of the realization of its own essence. The universal is met only in the particular. The nature of the thing lies in its manifesting itself in the particular concretization of something universal. The law-thing always has a historical character, so as Gerhart Husserl previously noticed, law has the "time-structure of historicity." This means that natural law itself, which is equated with justice, has a historical character (see Kaufmann 1957, 11ff.), though it is not on that account relativistic. Natural law must not be confused, as Aquinas's followers have often done, with the fundamental principles of law and morality, which have an abstract and decontextualized character. Lying somewhere between these principles and mere positivity is precisely natural law, in that it confers a normative ought on the latter. Legal positivism is accused of defining positive law in such a way as to assert as true the thesis already implicit in that very definition, namely, the thesis of the separation between law and morality. If we instead look at the effective reality of law, we cannot exclude the presence of evaluations and moral values in law.

From this perspective, law can no longer be equated with positive law, as legal positivism would have it. After all, this distinction had been enacted in Article 20 of the *Grundgesetz*, establishing a bond between the judge and the *Gesetz und Recht* (statutes and the law). The statutes are only one element of law, which also includes what the concrete case contributes in an institutional way to the formulation of the rule, bringing in legal principles, general clauses, maxims based on experience, and so forth (cf. Esser 1956). The statutes and law are to one another as power is to action, and possibility to reality. The statutes are not yet the

[14] A conception of the nature of the thing even more closely derived from Aquinas's thought was developed by Herbert Schambeck (1964).

reality of law: They are only a stage—a necessary one, to be sure—in the path toward the realization of law (see Kaufmann 1977, 157).

At this point legal philosophy finds itself having to take the path of hermeneutics, which can no longer simply be seen as the art of interpreting texts, since it reflects the very nature of law, which lies in its being structurally indefinite and open-ended (see Kaufmann 1965). Also developed in those same years were the philosophical hermeneutics of Gadamer (1900–2002), likewise sensitive to the question of the "nature of the thing" (see Gadamer 1993).

In Italy Emilio Betti (1890–1968) had actually already worked out a hermeneutic conception of legal interpretation that from a philosophical point of view was based on the philosophy of values advanced by Nicolai Hartmann (1882–1950). But Heideggerian hermeneutics had come into being in direct opposition to the purported objectivity of the philosophy of values, in which it perceived a hidden desire for power and a failure to recognize the subject in his or her capacity for moral choice. Nevertheless, replacing the distinction between essence and existence with the ontological one between being and entity did not seem to make it possible to specifically recognize regional ontologies, among which is that of law. Indeed, Kaufmann, criticizing Maihofer, notes that law as a regional ontology can be developed only as a philosophy of essence in Edmund Husserl's sense (see Kaufmann 1963, 84–5). Still, it is true that what law is depends on the question of why there is law, which in turn takes us back to the social nature of the human being. So there arose the issue of the configuration of a philosophical hermeneutics suited to working out the concept of law.

Gadamer's conception, though dependent on that of Heidegger, sought to reconcile the permanence of values with their status of dependence on a given ethos, so as to avoid cultural relativism. The basic effort was to pursue a nonmetaphysical objectivity of values. To this day there is an ongoing discussion about whether this goal has been achieved in an acceptable way. It needs to be recognized that the relation between philosophical hermeneutics and natural law theory remains problematic. But the connection between philosophical hermeneutics and the call to rehabilitate practical philosophy (see Riedel 1972–1974) makes it possible to address present-day problems involving the concept of law, the identification of law with social practices rather than with norms, and the role of the virtue of *phronesis* (see Kriele 1979).

So between legal positivism and rationalistic natural law theory there opens up the third way of "hermeneutic natural law theory," which rejects (*i*) the dualism between Is and Ought, (*ii*) the identification of law (*ius*) with statutory law (*lex*), and (*iii*) the view of law as already set, embracing instead a view of law as a process in action.

3.3.4. Ipsa Res Iusta

We can finally turn to a version of the nature of the law-thing that invokes not the general structure of positive law but the concrete legal situation, in whose regulation ultimately lies the aim of the legal enterprise.

Michel Villey (1914–1988), polemicizing with rationalism and the abstractionism of modern legal science, and making use of the experience of Roman law and Aristotle's philosophy, argued for the primacy of the concrete case,

requiring the judge to look to social relations in working out the correct balance between rights and duties (*res iusta*). Law already exists in things (*id quod iustum est*) and must be recognized by observing social reality on the basis of a dialectical method. The rule drawn from the concrete situation is valid only for the situation itself, and so is not strictly speaking law. Villey reserved the concept of norm for a general provision deriving from human or divine authority. Hence what is designated as "natural law" is not a set of norms or principles but is rather a set of relationships between humans and things and among humans themselves: These relationships are inevitably changeful but always reasonable (Villey 1976).

In a keen historical reconstruction, Villey (1975) shows that our way of seeing law and putting it into practice has changed so much over time as to lose its original reason for being. Christian theology has given us the primacy of law, and modern thought has set into motion a process of subjectivization of law that exists to this day with human rights (see Villey 1983). The conjunction of these two cultural factors has pushed law into the arms of morality and into the science for which both modern natural law theory and legal positivism are responsible. Hence Villey's real contribution to the problems relating to natural law lies in his conception of law in general, since the primacy of law and of subjective rights, which are two sides of the same coin, frustrates the *ordo rerum* and turns law into a purely artificial construct for administering conflicting claims.

It has to be recognized that by observing the impossibility of returning to the past, Villey identified two essential themes for the fate of natural law: that of the epistemological status of jurisprudence and that of the role of the legal subject.

The view of jurisprudence as a science, and not as an art, put natural law in a blind alley, because the natural sciences rejected any teleological conception of nature, and the human sciences, though open to values, could not set values on a philosophical foundation. Moreover, the practical character of law and its being geared toward the concrete case were in any event lost.

The second issue was even more important. The premodern legal tradition had stressed the objective character of natural law. There is to this day a discussion about whether Roman law and medieval thought adequately recognized natural rights, which certainly develop fully in modernity. Hence natural law theory is called on not only to account for natural rights but also to work out the question of whether the objective dimension or the subjective one takes priority. While natural law in an objective sense met with the obstacle of the rejection of teleological conceptions of nature, natural law in a subjective sense now turned to the concept of the human person, which is a development of the legal subject in modernity. Consequently, the theory of natural law faces the thorny problem of the relation between the human person and human nature.

The second revival of natural law is marked by the need to fight the spectre of totalitarianism. This seems to be possible only on condition that natural law be seen as immanent in positive law itself, such that neither can be known without the other. With a play on words, natural law can be said to belong to the nature of positive law. This is an epochal turn by comparison with preceding natural law theory, which was intent on deriving positive law from natural laws, a turn that had earlier been timidly preluded by antiformalist positive law theory. Its immediate result was an opening of legal science itself to the questions with which natural law is concerned. Yet jurists rarely went beyond a more or less rhetorical appeal to moral values, since the whole apparatus of European legal dogmatics had

been constructed in such a way as to be impermeable to natural law. But in philosophy and theory of law, conceptions developed that were often not metaphysical but avowedly open to recognizing objective constraints within positive law. Underlining the historical strength of these constraints is the fact that they are reduced to problems pertaining to the "nature of the thing," which is a nonmetaphysical way of defending the conjunction between facts and values.

4. The Third Revival

We have seen that in the two decades after World War II there was more discussion about the relation between positive law and natural law than about the content of the latter. In fact, the strengthening of a shared morality also inclusive of public life made less dramatic the issue of the relation between law and morality and more crucial that of the definition of positive law (see Viola 1989). No significant reflection was devoted to what moral values were connected with positive law, while the main interest was on whether these values were external or internal to the concept. It is on this issue that the debate between natural law theory and legal positivism was focused.

The dominant philosophical theme in this frame of thought was that of the normativity of positive law and its basis. According to the most rigorous natural law theory, positive law is in a proper sense obligatory to the extent that its norms are binding on the substantive moral plane. Full legal validity implies axiological validity. Accordingly, one is not legally obligated to obey immoral laws. It follows, however, that legal obligation is entirely absorbed within, and identified with, moral obligation. The most moderate version of natural law theory admits that the formal validity of legal norms in itself makes these norms obligatory, though only *prima facie*. This is a presumptive normativity that must be validated all things considered. On this basis, which to some extent takes into account the principle of legal certainty, a dialogue with legal positivism became possible. Legal positivism in turn gradually departed from its traditional insistence on the primacy of the sovereign's will and on legal sanctions—both entirely inadequate in explaining normativity in a strict sense—while also rejecting Kelsen's hypothetical normativity: In so doing, legal positivism moved toward a conventionalist approach to legal obligation. This also explains the increasing success and spread of Hart's theory of law. In general, the influence of Anglo-Saxon analytical jurisprudence grew in non-English-speaking countries, chipping away at the traditional primacy of German philosophy and legal theory.

The transformation the basic legal positivist model underwent as a result of the ideas advanced by H. L. A Hart (1907–1992) was mainly targeted at Austin's conception of the legal norm as the sovereign's command. However, it also obliquely took aim at Kelsen's concept, which from a descriptive point of view had maintained the same vision of the law as Austin's (*keine Imperativ ohne Imperator*). The basis of legal legitimacy shifted from the sovereign's perspective to the behaviour of officials and other participants in putting law into practice, a conception on which the acceptance of legal rules rests solely on the way they are used. That shift paved the way for the importance of practical reason in legal theory and yielded effects that could hardly be contained within any strictly legal positivist conception (see Hart 1994). Indeed, with foresight Kelsen had kept

practical reason away from the pure theory of law, considering it a Trojan horse of natural law theory (see Kelsen 1979, 52–7). Although Hart supported a clear-cut separation between law and morality, he himself saw that separation in the weak sense ("there is no necessary connection") and not in the strong sense ("necessarily, there is no connection") (Postema, 325 note 50).

If we take the standpoint of practical reason, we cannot take a strictly causal or psychological approach to power relations—the raw material of legal obligation. On the contrary, we will have to pay special attention to the reasons for complying with or accepting normative precepts, even if these reasons are not necessarily moral ones. What is important is the change that took place in way law was considered, no longer as a piece of machinery (as a social technique) serving to elicit acquiescence in view of the aims of peace and social order, but as a social practice in which all users of law participate in a responsible way. Hence the stronger emphasis on the effectiveness of law and the theory of legal interpretation.

This evolution of legal philosophy was part of a more general trend in philosophical thought in the last decades of the 20th century, a trend that led to a rehabilitation of practical philosophy (see Riedel 1972–1974) and acknowledged the peculiar role of *prudentia* over *scientia*. Contributions from very different streams of thought were made to the reappraisal of practical knowledge, ranging from the philosophy of language (Stephen Toulmin, Richard Hare, Kurt Baier) to rhetoric (Chaïm Perelman), scientific constructivism (Wilhelm Kamlah, Paul Lorenzen, Oswald Schwemmer, Friedrich Kambartel), the revival of the categorical imperative as a principle of universalizability, neo-Aristotelianism, discourse ethics (Jürgen Habermas, Karl Otto Apel), and Gadamerian hermeneutics. This unexpected convergence was supported by a common search for a rational justification of practical judgments without which ethical, political, and legal debates are meaningless.

In this effort, continental philosophy converged with analytical thought, though taking different approaches and methods. We need to be fully aware of this attention to practical reason and to the different ways of seeing it if we are to properly capture the modalities of the third rebirth of natural law. But before legal theory could take full advantage of these new philosophical trends, it had to wait for a profound transformation in the general framework of positive law.

4.1. Interpretation and Legal Reasoning

At the end of the 1960s, the climate was no longer favourable to postwar natural law theories, and legal positivism clearly prevailed. Moreover, and as a general rule, when the structures and institutions of positive law become firm and stable, and when interpretive practice is consistent and not very controversial, a reliance on the procedures to be followed and a widespread agreement on the way in which to proceed will favour and strengthen the plausibility of legal positivism. Only when controversy heats up—and there is no longer a solid consensus on the proper way to assess the validity of legal norms or to interpret them—new spaces and opportunities for natural law theory can open up. It is a different matter when natural law has to be applied, for it can be used not only to challenge but also to legitimize constituted power, as happened in Franco's Spain or in Argentina under

the generals.[15] However, this conclusion stands only so long as broad social consent is maintained regarding the main contents of normative ethics. Natural law theory can be characterized as potentially revolutionary in principle (see Kelsen 1934, para. 8), even though in practice it has often been conservative.

In those years the task pursued by legal positivism was to construct a theory of law on neopositivist and analytical bases. The legal system, as the proper focus of legal positivism, has been described with specific reference to its formal and procedural structure, while special attention has been paid to legal science and its epistemological bases. And yet, the theory of law was internally divided by the debate between formal conceptions of law deriving from Kelsen and realist ones of Scandinavian origin.

A bird's eye view of such a positivist theory of law will reveal the following components: (*i*) a rigorously value-neutral theory of legal validity (law as fact); (*ii*) the state's law as the paradigmatic and focal form of positive law; (*iii*) a vision of the legal system as an orderly set of coercive norms; and, in general, (*iv*) a theory of legal science as a logical organization of the contents of norms (see Bobbio 1979). Moreover, in the manner of the language analysis, greater importance is ascribed to issues relating to the interpretation of legal texts and terms.

In general, the linguistic turn—which characterized the philosophy done proceeding from both Wittgenstein's and Heidegger's thought—made the concepts of meaning and understanding central to philosophical investigation and led to the discovery of a close link between language and action, as well as between language and the interpretive community. This cultural context was favourable to legal thought, which had always been engaged in issues of interpretation (see Jori 1994).

There is no necessary connection between a formalistic theory of law and formalism in the application of law and in legal reasoning. For example, Kelsen's theory of interpretation is certainly not formalistic, and Hart's recognizes the possibility of interpretive discretion. But if interpretation and argumentation take on a major role in legal theory itself, as the view from practical reason implies, the theory's formalism is also seriously threatened. And that is precisely what happened. Which explains why a description of the developments of the theory of interpretation and of the theory of legal reasoning is necessary, since it was primarily through these theories that a climate favourable to the third revival of natural law could develop.

The disconnect between law as described in legal theory and law as a practical enterprise was growing beyond the physiological threshold dictated by the evolution of society. More in particular, while on the one hand legal positivism defined law as a set of norms flowing from a stable hierarchy of sources (certainty) amenable to logical ordering through the work of the jurist (consistency) and capable of satisfying the demands of justice without any integration (completeness), on the other hand law as a practical undertaking instead brought to light the inevitable uncertainties of legal decisions, the role of general clauses,

[15] On the question of whether an emerging democracy has an obligation to take action against the leaders of a past dictatorial regime for crimes against humanity on the basis of the precedent of the Nuremberg trials, see Nino 1998.

and the inadequacy of a rigorously neutral logic and of purportedly infallible interpretive methods (cf. Engisch 1956).

At first this interference of legal practice in the theory of law was avoided: Problems pertaining to the interpretation of law were carefully kept separate from problems concerning its application. Accordingly, the theory of law dealt with the interpretation specific to the jurist, and legal science was seen as a theoretical activity aimed at faithfully reproducing the legal system. The activity of judges and officials in the application of law, by contrast, was left to investigations of a descriptive or sociological kind. Consequently, whereas the theory of doctrinal interpretation had a normative character—for it prescribed how a jurist should behave in dealing with legislative language—investigations of judicial interpretation showed how law was *in fact* applied, that is, by recourse to value judgments and subjective choices by the interpreter. These analyses showed that the ideology of interpretation is necessarily present in practice (see Wróblewski 1972).

In the background of this theoretical framework it is still possible to detect the influence of Savigny, whose theory of interpretation was framed in large part as a response to the demands of legal doctrine and legal science. Furthermore, it can be easily acknowledged that while in common law countries the theory of legal interpretation develops toward a judge-centred approach, in non-English-speaking countries, based on civil law systems, it takes a jurist-centred approach. In the latter there is a stronger tendency to apply deontic logic to the interpretive processes of legal science, conceived as a meta-language aimed at describing a prescriptive language which is precisely that of norms (see, among others, Alchourrón and Bulygin 1971). However, it becomes clear that even the interpretations and doctrines of jurists have an ideological character, in that they manipulate the legal system in its contents, too, even as they claim to make it rigorous on a formal plane (cf. Tarello 1971).

This is one of the fundamental points of dissent between formalist and realist theories of law. The former are still bound to a conception of meaning as preconstituted by the legislator and passively reproduced by the interpreter, while the latter maintain a sceptic conception on which meaning is "ascribed" by the interpreter at the interpretive stage.

Although theories of natural law do not have a theory of legal interpretation of their own, they are rooted in an ancient tradition linked to the plurality of the sources of law, to the rejection of the idea that rules are rigidly hierarchical, to the importance of jurisprudential and judge-made law, to the centrality of reasoning by analogy, and to the role of *auctoritas doctorum* in the very production of law. This tradition goes from Roman law to the *ius commune* (see Lombardi Vallauri 1964). However, despite appearances to the contrary, the same tradition is also still at work in the interpretive practice of civil law systems, at least if we look carefully at actual interpretive processes (the common law of civil law systems).

One can thus easily understand why formal theories of law are accused of "logicism," that is, of reducing law to formal logic of a deductive type. In the attempt to defend legal certainty, the real processes by which law is formed and

applied are neglected. Logicism is substantially a form of "legalism" (see Lombardi Vallauri 1981).[16]

By contrast, in relation to realist legal theories, the disagreement of natural law theories concerns not the description of interpretive processes but the ethical noncognitivism and the psychological reductionism from which realists proceed as background assumptions. As much as value judgments and value choices play an inevitable role in the interpretive activity aimed at finding the solutions that can be deemed the fairest or most correct among all possible alternatives, this does not mean that the interpreter's discretion is wholly arbitrary and escapes the control of reasonableness and the need for an adequate justification. If value judgments are irrational and purely ideological, then it is impossible to manage or control the interpreter's unavoidable discretion. But if we can recognize that between the two extremes of scientific rationality and irrationality there is the wide landscape containing the reasonable, the probable, the fitting, and the equitable, then the natural law tradition still has something to say in defending the value of the certainty of law.

In turn, if legal reason is one of the possible aspects of practical reason, then the role of the interpreter, jurist, or judge is also to check and develop the *ratio legis*. So we have here a reversal of the perspective of classical legal positivism, from the idea of interpretive discretion as a threat to the legislator's will to its being a necessary instrument for perfecting the law (*Rechtsfortbildung*). Only in context can law be perfected and its compliance with practical reasonableness tested and fostered through the resources of case law and of judicial activity, and among these resources one should not underestimate the role of precedent, or *ratio decidendi* (cf. Kriele 1979). Nobody holds a monopoly on the use of reason.

As was to be expected, the development of the theory of interpretation gives greater importance to the theory of legal reasoning. Indeed, between interpretation and argumentation there is continuous circularity (see Ricoeur 1995): In order to interpret legal texts it is necessary to reason, and in order to reason in law it is necessary to interpret legal texts (see Viola and Zaccaria 2011, 98ff.). Legal argumentation has a pragmatic character in that its goal is practical, being concerned with justifying judicial decisions. As a result, interpretation itself becomes a decision when a solution is chosen among the admissible ones. Practical reason is aimed precisely at justifying decisions, supporting them with arguments in principle acceptable to everybody. The fact is that something can be valid as a "reason" only if endowed with universality, however much on certain conditions and in certain spheres.

In addition to marking the difference between ascribing a meaning to a legal text (the activity proper to interpretation) and justifying a decision (the activity proper to reasoning), we should also note that in argumentation an intersubjective relationship is present that is usually absent in interpretation, or at least is usually believed to be absent. Argumentation takes place among a subject who proffers an argument; a discursive situation, which is a pragmatic context or, more broadly, a

[16] The line of thought that refuses to separate the interpretation of law from its application and rejects the logicism of legal dogmatics is well rooted in Italian jurisprudence. aside from specific natural law orientations: see Carnelutti 1951a, 1951b; Caiani 1954; Ascarelli 1955; and Betti 1971.

form of life (see Aarnio 1987, 211ff.); and another subject or an audience to be convinced by appealing to reasons for action.

The logic of law can be divided into two main branches: the new rhetoric, whose main focus is persuasion rather than demonstration (see Perelman and Olbrechts-Tyteca 1958)—and which, in a broader form, includes the theory of topics (cf. Viehweg 1953) and dialectics (cf. Giuliani 1974), and even the more recent fuzzy logic (see Zadeh 1975; Haack 1996)—and argumentation theory in a strict sense, which follows a demonstrative method, albeit renouncing absolute claims (see Aarnio et al. 1981). Argumentation theories of legal reasoning, which developed in those years in Europe (especially in Germany, Poland, and the Scandinavian countries) are manifold (cf. Feteris 1999), but the most important of them agree in considering legal reasoning a special case of practical reasoning, in that legal and practical reasoning alike are governed by the same general rules, even though the former is also subject to the constraints dictated by positive law. Hence, no sharp separation can be maintained in legal reasoning between law and morality, just as—in line with what has already been noted—it is also very difficult to maintain such a separation in legal interpretation.

The presence of elements external to positive law—elements originating in an area in which legal practice borders with and blends into ethical claims and social factors—is particularly evident in the distinction between *internal* justification, which presupposes the premises from which to deduce or infer a decision, and *external* justification, aimed at resting these premises on a rational foundation (see Wróblewsky 1974). The latter kind of justification—the privileged field of legal reasoning—has to resort to resources that are external to legislation and belong in a broad sense to law as a practical enterprise, an activity that extends to doctrine, precedent, and legal maxims and is sensitive to normative and value claims.

From this point of view, positive law cannot be claimed to be a self-enclosed and self-justifying world (see Hruschka 1972), nor can the natural law model be considered obsolete or ruled out. All these theories are certainly united by their rejection of metaphysics and by the conviction that it is impossible to found ultimate values. But then the practical universality that reason claims for itself once again leads one to call its philosophical bases into question. Not only is there at work a belief that a common element can be found among the plurality of ideas on justice, but also, and especially, the appeal to a universal audience made up of all normal and competent humans in effect presupposes an anthropological commonalty that is typical of natural law doctrines (see Perelman 1945).

The development of studies on interpretation and legal reasoning has shown the inadequacy of both the positivist and the natural law paradigms separately taken. Law cannot be reduced to a fact without losing something important to its concept, but it cannot be reduced to a value, either, without losing its effectiveness, which distinguishes it from morality. For this reason one can easily understand that theories of legal reasoning themselves tend to turn into true and complete theories of law, or at least they tend to generate such theories from within, distancing themselves both from legal positivism and natural law theory, thus helping to confer on legal thought in the closing decades of the 20th century a characteristic that has lasted down to the present.

Since a theory of law is aimed at working out a concept of law, it is legitimate to expect from it a full-blown conception of positive law rather than a mere description of particular aspects of it, however important such aspects may be. But

in the practical domain every description makes it necessary to first determine what aspects of the experience are truly relevant and meaningful in the eyes of the theorist. Every judgment on relevance is inevitably a value judgment. Accordingly, from the standpoint of practical reason the concept of law is at once descriptive and normative. The claim that practical reason is based on a purely descriptive method can lead either to incomplete conceptions or, worse, to ones that are irrelevant to law as a practical enterprise.

For these and many other reasons, in the 1970s the need was felt for a profound renewal of the theory of law, with major effects on the eternal conflict between legal positivism and natural law theory, precisely the conflict we are here interested in.

4.2. Christian Natural Law Philosophies

We should now go back to Catholic natural law theory in the last phase of its evolution in the 20th century. Let us recall that by "Catholic natural law theory" is meant what can be considered an expression of the official tradition of the Catholic Church. As noted, this strand of thought was influenced above all by Aquinas's thought as subsequently strengthened. There are doubtless other forms of natural law theory inspired by Christian values, often in a dialectical position vis-à-vis ecclesiastical natural law.

From a philosophical point of view, as much as the orientations of the past abandoned arid Scholastic formulas, they substantially remained unchanged and were expressed in abundant often boilerplate literature serving to spread a conception (see, for example, Pizzorni 1978), with only rare examples of speculative originality (e.g., Pieper 1953, 1963). The central idea is that of natural law as an objective order of ethico-legal values corresponding to the demands of human nature "conceived aright," that is, on the basis of Catholic Church tradition as supported by Thomist metaphysics (though with few references to Holy Scripture, it should be stressed). The argument was that Christian ethics is fully capable of a rational foundation and so is also valid for nonbelievers. But this rationality is not to be understood in the sense of modern natural law theory, of which Enlightenment natural law theory is seen as the highest expression on account of its subjectivist and immanentist outcomes. There was no interest whatsoever in the evolution of legal and political philosophy, but even more significantly, no account was taken of the nascent claims of practical reason. At the same time, however, this did not account for the whole of Catholic natural law theory.

With the pioneering work of Josef Fuchs (1955), the question of natural law came very much into prominence in the Catholic moral theology of the time, which not infrequently freed itself of the shackles of neo-Scholasticism (see Häring 1954), and which, under the thrust of ecumenicalism, conversed with Protestant theology (see, in general, Gustafson 1978). At first, the renewal of moral theology took an existential orientation more attentive to the concrete exercise of moral action in the conditions that shape the life of faith and charity and with the help of grace, avoiding philosophical discussions on the foundation of natural law, which Fuchs instead addressed frontally. These theological debates had an influence on the Second Vatican Council (1962–1965), and with French Catholic philosophy they

indirectly contributed to an evolution of the Catholic Church's official doctrine of natural law. But we need to be clear about where these innovations of the Council really lay.

Natural law as divine law and as an objective order of moral values was reemphasized in full continuity with tradition, but now greater attention was being paid to the question of subjectivity in moral choice. Natural law is present in the moral conscience, whose intangible dignity was stressed (*Gaudium et spes*, para. 16). Consequently, the role of freedom was thrown into greater relief, though with an eye to the objective moral good (ibid., para. 17). The result was a full reconciliation with the problem of human rights, seen as natural rights founded on natural law (see the encyclical letter *Pacem in terris*, 1963). These rights were seen in an anti-individualistic light and were blended into the principle of solidarity. There was a reaffirmation of the primacy of the human person as "the subject and goal of all social institutions" (*Gaudium et spes*, para. 25), and the principle of laicity came into view in the recognition of the autonomy of temporal realities (ibid., para. 36). At the height of the Cold War there was an insistence on the question of peace and the ability of the international legal order to make it possible (ibid., chap. V). Lastly, in a special declaration of the Council dedicated to the right to religious freedom (*Dignitatis Humanae*), this right was presented as the central locus of conscience and of personal life plans in relation to public powers.

The focus of the Second Vatican Council in regard to natural law can thus be said to have lain precisely in the relation between law and conscience, a question that was already being energetically discussed in moral theology at the time (e.g., Böckle 1965). This question, which would be taken up *ex professo* in the 1993 encyclical *Veritatis Splendor*, falls within the sphere of the problems of practical reason, or at least that was a step in this direction.

The encyclical *Humanae Vitae* (1968) reopened a discussion that until a short time earlier had subsided: It was devoted to the philosophical bases of natural law and its contents. The importance of this encyclical lies not so much in the specific question that provided the occasion for it, namely, contraception, but in its way of addressing that question, by appealing more to natural reason than to religious principles. So the problem arose as to whether this encyclical was binding on those believers who were not convinced by the reasons given. Catholic natural law theory once more found itself facing the arduous task of reconciling the rational foundation of moral norms with the principle of authority. At the same time it was evident that the common morality to which the contents of natural law were tied had begun a process of erosion and destabilization.

One of the unintended consequences of the encyclical was to focus natural law on questions of *private* morality, while for the Catholic tradition natural law was primarily concerned with *social* morality.[17] Accordingly, natural law was identified *tout court* with the moral law. When in the last two decades of the 20th century a renewed interest was taken in the social doctrine of the Church, the contribution of an updated natural law theory proved to have only a limited capacity for innovation.

[17] On the mistrust of natural law as a tool susceptible of ideological use, see Ratzinger 1964.

The debate sparked by *Humanae Vitae* was concerned more with moral theology than with philosophy. Indeed, precisely in theology, among other fields of study, we find a claim being made for the autonomy of reason in a sense very close to Kant's. Moral normativity springs from human reason, which is set outside the order of being and makes it an ought (see Auer 1971). We are no longer only talking about the personal autonomy at issue in the debate between law and conscience but about the moral autonomy or "self-legislation" (*Selbstgesetzlichkeit*) of reason. Needless to say, this was a context in which natural law in the Thomist tradition disappeared,[18] or else it was profoundly refashioned (see Auer 1977), and its place was taken by the ethos of the world (*Weltethos*). This seminal idea would find its ultimate development in the *Declaration toward a Global Ethic*, written by Hans Küng and approved in Chicago on September 4, 1993, by the Parliament of the World's Religions (see Küng and Kuschel 1993, cf. Küng 1998).

Natural law theory—which at this point should more accurately be described as "Christian," in that it challenged the traditional tenets of Catholic natural law theory—now went off in two directions depending on whether or not it accorded importance to nature as the order of being in providing a foundation for moral norms. A new discussion emerged on the correct way to interpret Aquinas's thought in light of the alternative between the Aristotelian and Kantian conceptions of practical reason (cf. Höffe 1971).

What has been presented as the second phase in the interpretation of Aquinas (see § 1.2 above) set the stage for a critical use of his thought open to comparison and evolution. This is the third phase of 20th-century Thomist hermeneutics. What I mean is aptly summed up as follows:

> To be a Thomist today in a judicious and effective way is undoubtedly to have a sense of tradition, as St. Thomas himself had, but also a sense of historicity, progress, and philosophical criticism. (Van Steenberghen 1987, 196; my translation)[19]

This view of Aquinas's thought as no longer a complete system but a critical method ushered in a fragmentation into specific or sectoral studies in which greater attention was paid to theology than to philosophy and to ethics than to metaphysics (cf. Bonino 1994). This made possible interpretations of Thomist natural law that did not a priori exclude the influence of modern philosophy, particularly of Kant's thought, which since Cathrein's time had been regarded as the main adversary. Obviously, conflicts of interpretation did arise—at times

[18] It is interesting to note that in political theology in general, and in liberation theology in particular, there is no appeal to natural law, and sometimes there is even some hostility toward it (see Gutiérrez 1973). Liberation theology, animated by wholly legitimate demands for justice, draws on primary evangelical sources (the option for the poor) and on socioeconomic analyses influenced in some respects by Marxism. It is inspired by Bartolomé de Las Casas rather than by Francisco de Vitoria (cf. Gutiérrez 1989). In this way, there is brought back to life the anarchic vein of Christianity and its controversial tendency to go beyond the boundaries of the legal framework (cf. Sohm 1909).

[19] The French original: "Être thomiste aujourd'hui d'une manière judicieuse et efficace, c'est avoir sans doute, comme St. Thomas lui-même, le sens de la tradition; mais aussi le sens de l'historicité, du progrès et de la critique philosophique."

acutely, all internal to the Catholic world—but this helped to breathe new life into problems that had grown stale.

One of the best fruits of this turn is found in Martin Rhonheimer's interpretation of the Thomist doctrine of natural law (cf. Rhonheimer 1987). Through ample documentation the thesis was maintained that the appeal to "nature" in natural law has to be seen as an appeal to reason, which (unlike what Auer thought) was conceived as an integral part of human nature and as having a personalistic structure. This reason is in turn the "practical" reason linked to the Aristotelian ethic of virtues (see Rhonheimer 1994). As we shall see, this vibrant abandonment of a "naturalistic" conception of natural law was very similar to the one previously pursued by John Finnis in 1980.

Also belonging to the sphere of Christian natural law theory is the thought of Otfried Höffe (1943–), who draws on the legacy of modern natural law theory and its constructivist method of political society for a meta-positive criticism of law and the state (see Höffe et al. 1987 and also Ilting 1978). To modern natural law we owe not only the theory of natural rights, the precursors of human rights, but also that set of principles and guarantees that form the basis of the rule of law and of democracy. Höffe rejects legal positivism in all forms: Austin's imperativist one, Kelsen's normativist one, Hart's empiricist one, and Luhmann's procedural one. But Höffe also abandons the very term *natural law*, because of its naturalistic connotations, and prefers to speak of *political justice*, understood by him to consist in a transcendental structure proper to a free community based on the principle of advantageous coexistence of freedoms in a distributive sense (see Höffe 1987). As is evident, this conception fits into the present-day debate on theories of justice, whose roots in natural law are unquestionable, with particular reference to Locke and Kant (see Höffe 2006).

An opportunity for the development of natural law theory, though in a different sense from the conceptions just referred to, is afforded by the ecological emergency, which suggests that we shouldn't separate human nature from nature in general (cf. Viola 1997, 45–60 and chap. IV) or at least to reconsider the relation between them (see Zacher 1973; Hösle 1991).

In conclusion, in the 1970s, neo-Scholastic natural law theory was radically challenged by Christian thought, and new paths were tried out that moved away from a "naturalistic" conception of natural law—and at times from a "metaphysical" conception of natural law as well—and closer and closer to conceptions of law framed from the perspective of practical reason. There emerged the central role of the dignity of the human person receiving consent, at least formal consent, over and above cultural and ideological differences.[20] Still, it bears noting that these investigations pay scarce attention to the legal sphere, favouring instead the moral and political spheres. At the same time, the declining interest in the legal issues addressed in natural law in Europe is made up for in the United States by a growing and continuing interest in Aquinas's ethical and legal thought.

[20] An influential voice in favor of natural law sprang out of the different sphere of Marxist theory. Ernst Bloch, well aware of the distinction between natural law as a critical ideal and its contingent historical incarnations, considers natural law a watchdog necessary for the dignity of the human person in connection with the values of equality, fraternity, and solidarity, though there remains the utopian vein expressing the need to go beyond positive law once social and economic exploitation is eliminated (see Bloch 1961).

4.3. The Evolution of Positive Law

As noted, when natural law becomes an object of moral philosophy or theology, its strictly legal aspect is undervalued. But in the 1980s the revived interest that legal and political philosophy took in natural law was favoured by a profound transformation of the general configuration of positive law founded on the primacy of the state's law. This evolution hasn't yet attained a stable order. In this context, natural law reemerged in changed forms both as a constraint on normative contents and in a deontological role in criticizing institutions and shaping the law.

Legal positivism in turn found itself facing a serious theoretical difficulty largely owed to the increasing expansion of human rights in domestic and international law. Indeed, it is very difficult to continue to maintain that law is a fact, since law is clearly shaped by evaluations and value judgments. For legal positivism, the imperative to rely on an empiricist philosophy is an obstacle to formulating an adequate descriptive theory of positive law as it actually is. To insist on this philosophical background is to fall into a philosophers' philosophy of law, though this time not involving any *idealist* philosophers. So there emerged a normative version of legal positivism (ethical positivism) proper to a jurists' philosophy of law concerned to defend the value of liberty and self-determination, both threatened by the confusion between law and morality (see, in Italy, Scarpelli 1965). However, if legal positivism is understood as an ideological or political option, then it is not clear why the opposite option, namely, natural law theory, is to be seen a priori as devoid of meaning.

The transformation of positive law is marked by three closely connected processes that are still underway: legal decodification, constitutionalization, and internationalization. It is interesting to note that, especially in civil law countries, these three evolutionary aspects have in common the crisis of the state's law. Note that state-law has been the reference point for logicist legal positivism. We will now have a look at these three phenomena in the legal history of our day, only so as to identify the spaces which opened up for the third revival of natural law, but which at the same time conditioned its forms of manifestation.

When the postwar constitutions began to reveal their potentialities, the first effect was that the code regime gradually lost centrality (legal decodification). This is quite understandable, since there is now a law (supra-statutory law) that stands above statutory law. But we are not only talking about a formal change in the legal system, since this superior law dictates the values and aims that ordinary legislation has to pursue. The innovation relative to the past is that these values and aims, which by their nature have an ethico-political character, are now also "legal," in that they are enshrined in that eminently legal document which is the constitution. Every form of legislation has always been governed by values and aims, but these were considered external to the strictly legal sphere. This made it possible to construct a concept of law and of legal science with a view to securing the autonomy and separation of law from other spheres of practical life. But now this is no longer possible, in part because the plurality of these values and aims would be wiped out by the standardizing uniformity of the categories of legal dogmatics. In this connection, there is an increase in special laws and sectoral regulations owing to greater sensitivity to social pluralism. Accordingly, the code

takes on the role of a residual law to which to have recourse only if special laws do not exist or contain lacunae. This fragmentation of legislative material into legal micro-systems is undoubtedly a sign of the disappearance of that unitary will that once characterized the state's internal sovereignty (see Irti 1979).

The idea that there are values and aims that in themselves are strictly "legal" is typical of natural law theory throughout the ages. The present-day legal situation can be read as confirmation of this thesis, but one can likewise maintain that such values and aims are "legal" only insofar as they are "positivized" in constitutional charters, in such a way that legal positivism is not ruled out. A characteristic of the third revival of natural law is its not automatically implying a decline of legal positivism. But the question remains: Can constitutions legitimately take any value or aim as fundamental?

If we now turn to these values and aims, we can easily appreciate that the constitutions enacted after World War II share a certain commonalty of value in form and substance, at least as a matter of fact (see Dietze 1956). All contain affirmations of justice regarding the rights of individuals and the organization of socioeconomic relations. As a whole they delineate the general characteristics of the common good that society is bound to pursue. Accordingly, the legal ought is no longer an issue solely concerned with constructing a picture of ideal law, as was typical of the traditional deontological task of legal philosophy. The legal ought is now in the first place an issue about the *validity* of law, and so is an object for legal science and theory. This is a fact that has major consequences for the very concept of law. The teleological structure of practical reason is now clearly seen to be a constitutive part of legal knowledge.

The affirmation of the primacy of the constitution is supported by its being written, long, and rigid, as well as by judicial review. There is thus prefigured a process of progressive constitutionalization of positive law that profoundly changes its identificatory structure.

Contemporary constitutionalism is a much more complex legal phenomenon than the provision of fundamental laws, since it implies a transformation of the very concept of juridical law. It would be misleading to consider constitutional law only as the addition of one more step, the highest, to the hierarchy of norms. The superior character of constitutional law distinguishes it from the statutory law not only as a matter of a lexical ordering but also in a strictly qualitative sense. The relationship between them is not one of univocality but one of analogy. Even though the world of positive legal rules has always been peopled by manifold forms that cannot be slotted into any single category, legal science has always searched for a main overarching category. Legal principles are now consolidated into normative form, a form that legal positivism tends to make into, or somehow connect with, the form of statutory law, always considered central, while natural law theory defends the normative autonomy and priority of those principles.

Obviously, constitutional law is not natural law, because it too is artificial and produced by human will. However, like natural law, it is a founding law and it governs civil coexistence. Its role is to urbanize values, making it possible to transform them into legal norms through rational processes of progressive determination, balancing, and weighting. It is *jurisgenerative*. In this way the principle of authority, or the primacy of the will, is limited, checked, and completed by the principle of reasonableness, which is substantiated by attitudes of openness toward the reasons proffered by others.

If we look at the jurisprudential practice of constitutional courts around the world, we can easily observe the presence of arguments drawn from moral and political philosophy. The arguments for decisions often resemble discourses on natural law, especially ones relating to personal statuses, the problems of life, and birth and death. Unwillingness to recognize all this as evidence of a return to natural law largely derives from an identification of natural law theory with the antipluralist contents that have traditionally accompanied it. But if natural law is founded on ethical objectivism, then all claims supported by reasons, rather than by mere preferences, are in a sense forms of natural law, or at least they can legitimately claim to be so. Nevertheless, it should be specified that the relation between positive law and natural law has been converted into that between law and morality.

The teleological tendency of legal reasoning is further supported by the spread of human rights in the practice of domestic and international law. The central importance taken on by human dignity sets in motion a process of constitutionalization of the person, a process that not only implies a recognition of the presence of objective values but also confers legal weight on the conscience of individuals and their autonomy (see Spaemann 1996).

The objectivism of values and the subjectivism of choices often coexist in a sharply conflicting way. The sharing of a common morality, which seems to have been strengthened by consent about human rights, actually dissolves with the passage from general declarations of rights to the practice of respecting those rights. And law now has to deal with moral pluralism that law itself has favoured. Human rights have no boundaries and develop a transversal language or *lingua franca*, establishing communication between legal systems previously conceived as self-enclosed. Positive law opens up to communicative perspectives with universalistic tendencies.

International law—which has always been regarded as defective law in legal science, even by Hart—becomes a reference point in the world dialogue on law, and in addition to developing as interstate law, it develops into the new forms of transnational and supranational law, as well as into the law of international organizations. International law is undergoing processes of constitutionalization, manifested in part in the recognition of peremptory principles, which after all were already present in the traditional *jus gentium.* Indeed, just to give one example, 1969 the Vienna Convention on the Law of Treaties states that there are norms existing as *jus cogens*, such that no exception to the can be carved out by an *inter partes* agreement.[21] In this way, supra-statutory norms are now recognized even in international law, with the consequence that, at least in theory, the will of states no longer counts as the last word. In general, despite the fragmentation of legal systems, there are standardization processes that make it possible to prefigure a global law, however much in a way that is still vague.

In this context, here only sketched out in broad strokes, there are doubtless new opportunities for the theory of natural law, but only if that theory can express itself in a new way and offer a better interpretation of contemporary law than that of rival theories.

[21] The notion of *jus cogens* was anticipated before World War II, and promoted afterward, by Alfred Verdross (1937, 1966).

4.4. The Third Theory of Law

The epoch-making work that ushered in a new phase in contemporary legal-philosophical culture is Ronald Dworkin's *Taking Rights Seriously* (Dworkin 1977). This work, ostensibly a revision within analytical jurisprudence, is in reality an attack on Hart's legal positivism. It follows a third way (see Mackie 1977) that does not just distance itself from both legal positivism and natural law theory but goes deeper, seeking to revolutionize the epistemological approach of the theory of law. In this respect Dworkin's conception, setting aside its particular and questionable aspects, preserves to this day a meaning paradigmatic of the new trend in the legal philosophy of the last two decades of the 20th century.

Dworkin (1986, chaps. II–III) distinguishes between semantic theories of law (which he intends to challenge) and interpretive theories, which he instead endorses. The former, which include most legal positivist theories from Austin and Kelsen to Hart, attempt to define the grounds of law through its identificatory criteria, as if the law were a preexisting object to be explained and as if there were a "nature of positive law." The latter instead believe that if we are to describe a social practice like law, we have to take a practical approach, justifying both the principles followed by those who use law (especially lawyers and judges) and the coercive force of such principles. In this second case, practical knowledge is seen not only in an applicative function but also as a distinct form of human knowledge based on interpretive concepts whose content is determined in relation to paradigmatic cases.[22] Thus Dworkin goes back, though in an independent way, to a hermeneutical perspective influenced by pragmatism.

In this context the traditional problem of the separation between law, on one side, and morality and politics, on the other, loses the centrality it has in semantic theories. Once law is conceived as a social practice, it is easy to understand why legal reasoning often resorts to moral or political arguments. These arguments are elements of law as much as the arguments that are usually understood as typically legal. The following question therefore needs to be addressed: How have natural law theories responded to the demands of the interpretive theory of law? In fact, the natural law theories so far discussed have a clear semantic and classificatory character.

Once more we have to distinguish a broad and all-encompassing view of natural law theory from a narrower and more specific one. The former has an exclusively metaethical character in that it looks to the investigative method of practical reason, while the latter also has an ethical character in that it looks to moral contents.

In a broad sense, all conceptions that reject the separation, descriptive or normative, between law and morals can be considered natural law theories. This can be said to apply also to all nonpositivist theories of law, that is, to all those conceptions that significantly make reference to an objective morality in legal theory. However, we would be misunderstanding the natural law tradition if we

[22] On the distinction between critical concepts, natural-kind concepts, and interpretive concepts, see Dworkin 2011, 158–70.

equated natural law theory with the connection between law and morality, as is often done today.

In a narrower and more appropriate sense, natural law theory is not only a theory of morality but also an ethic connected in some way with "human nature" and "natural reason," and it is also a theory of law because it argues as well for the legal character of natural law (cf. Simon 1992, chap. 5). If it is true that the appeal to nature can be seen in a broad sense—in such a way that respect for human dignity or the fundamental values can also be seen as a consideration of the "moral nature" of the human being—the legal character of natural law is precisely what ultimately specifies natural law theory. From this point of view, nonpositivist conceptions are not, strictly speaking, natural law conceptions.

The history of the relation between law and morality has shown that there is no necessary connection between natural law *qua* moral theory and natural law *qua* legal theory. One can without contradiction accept the moral theory of natural law and at the same time maintain the separability thesis (see Soper 2007). But in the authentic tradition, ancient and modern alike, natural law *is* law in a strict sense.

In virtue of all these possible combinations, the interstitial area between legal positivism and natural law theory today is increasingly widening, owing in part to the recurrent criticism of the value-free principle, and in part to the refusal to acknowledge the normative character of human nature in keeping with the thesis of the naturalistic fallacy. The rich debate within nonpositivism seems to render marginal the traditional opposition between the two extremes, an opposition that appears to have been overcome with the charting of a third way. Nevertheless, every so often in this middle ground, the atavistic conflict between the two hostile siblings flares up in new clothes, with visions closer to the two extremes.

So in a sense the third revival of natural law also concerns nonpositivist conceptions, leading to the rise of a debate within natural law theory broadly construed. The same thing happens in the house of legal positivism between the exclusivist orientation and the inclusivist one. Both legal positivism and natural law theory face an identity crisis. Neither can entirely reject the other's good arguments, and they labour to integrate them into their own conception in the most diverse ways, with results sometimes enlightening and sometimes confused.

It is worth noting, in general, that the reasons behind the third revival of natural law are much more complex than those of the two preceding revivals. It is not only a matter of revisiting the concept of law but also of dealing with ethical pluralism. The inevitable involvement of legal theory in moral conflict pushes all contenders willy-nilly into the arms of moral argumentation (once identified with natural law) as they find themselves advancing competing interpretations of the fundamental constitutional values.

In the cultural area we are considering in the last decades of the 20th century there are no major legal-theoretical innovations in natural law theory in a strict sense. Those who carry forward the tradition of Catholic natural law theory—like Francesco D'Agostino (2006) in Italy; Francisco Carpintero Benítez (1999), Jesus Ballesteros (2001), and Andrés Ollero Tassara (1996) in Spain; and Carlos I. Massini-Correas (2006) in Argentina—are mainly and perspicaciously committed to criticizing legal positivism above all from an anthropological and moral point of view, vindicating the need for a philosophical foundation of legal theory. In this way the debate primarily develops around the question of aims and values and not as a matter of legal theory in a narrow sense.

From the English-speaking area, which maintains its cultural leadership, comes the most interesting attempt to combine the natural law tradition from Plato onward with contemporary legal theory. In 1980, the fundamental *Natural Law and Natural Rights* came out, written by John Finnis (2011), testifying to the seminal character of Hart's thought, considering that like Dworkin, Finnis is a disciple of Hart.

The remarkable novelty in the thought of Finnis, who sets out to wed the Thomist tradition with the analytical method, consists in its being the first true theory of positive law framed from the perspective of natural law theory. More precisely, he gave us a natural law theory of positive law: "There is no proper place for a positivism outside natural law theory" (Finnis 2012, 71).

As we have seen, the prevailing tendency in Catholic natural law theory in the 20th century was to regard positive law as a tool for realizing natural law on metaphysical and theological bases, that is, on bases extrinsic to legal science. And even when there was an insistence on the rational laicity of the principles of natural law, as happened in the second half of the century, the effort did not yield a conception of positive law of its own competing with the legal-positivist conception. Finnis, by contrast, maintained that analytical descriptive jurisprudence needs the theory of natural law to establish its own internal principles and to support the practical attitudes of those who use law, as well as it needs a justification of authority and of its exercise in keeping with natural rights and the common good, and generally also in keeping with the rule of law. From a methodological point of view, the decisive move was that of rejecting in legal science the method of the distinction *per genus et differentiam specificam* and adopting the Aristotelian and Weberian method of the ideal or exemplary type and secondary cases. Only a full definition of law can stress law's close connection with morality in the unique flow of practical reasoning. But this does not mean that formal validity is in itself insufficient in giving rise to legal obligation, but the latter does need a deeper justification.

In this way Finnis defuses the disquieting Augustinian dictum *Lex injusta non est lex*, which made a dialogue with legal positivism impossible. But at the same time he rejects the clear-cut distinction between law and nonlaw embraced by legal positivism and traditional natural law theory alike, and he brings in the idea of the gradualness of obligation in realizing positive law in its fullness, an idea also already present in what was earlier termed "hermeneutical natural law theory." So here we have all the conditions needed for the civil law countries to embrace Finnis's thought, which for the moment is more influential in South America. In Europe the dominant problem continues to be that of the debate between positivism and nonpositivism, a debate centred on the relation between law and morality, and so on the separability thesis, and it is to this matter that we now turn.

4.5. Nonpositivism and Natural Law

The emblematic historical event of this period is no doubt the fall of the Berlin wall in 1989. This episode in history can be interpreted symbolically as expressing a desire to put an end not only to a political and cultural separation but perhaps also to *any* separation. Boundaries do not vanish, to be sure, but they are no longer seen as walls of division and exclusion: They rather become the locus or lingua franca

enabling an exchange with the other in which to listen to their reasons. The borders become a common ground.

Finding one's bearings in this common ground, which is no longer rigorously positivist and certainly not avowedly that of natural law, is not easy. Labels are no longer helpful. The neo-constitutionalist label is ambiguous and inappropriate, because it can have different and opposite meanings, signalling the difficulties of contemporary legal positivism. It is necessary to look at the real problems brought into focus by the new object of observation, that is to say, law in the constitutional state and in the global legal order. Positivist legal theory is forced to make some major adjustments. How far can it go without morphing into natural law theory?

This is a story that in a strict sense belongs to the evolution of legal positivism (see Section §§ above). Here we need only identify the moments of greatest proximity to natural law positions in the broadest sense.

The relation between law and morality can be observed from three points of view: that of the contents of legal rules, that of the normativity of law, and that of the formal structure of legal rules (see Viola 2009). To what extent does the revision of legal positivism in each of these three spheres take legal positivism dangerously close to natural law theory in a narrow sense?

To answer this question we have to bear in mind both the underlying theory of morality—which in natural law theory, as is well known, is objectivistic—and the way the role of legal theory is understood, a role that in natural law theory is to work out the criteria on which basis to justify our obedience to law. It is *in conjunction*, rather than separately, that these two theses properly configure a conception as being closer to natural law theory in a narrow sense.

In the nonpositivist camp, which is growing bigger and bigger, we will only look at some paradigm examples of each of the three points of view just indicated.

4.5.1. The Claim to Correctness

Robert Alexy (1945–) rejects both the descriptive thesis of the separability of law from morality and the normative thesis of separation, arguing that between law and morality there are actually necessary connections on both a conceptual and a normative level. Nonpositivism is distinguished from legal positivism in that it believes that essential to the concept of law is not only the element of legality, understood as conformity to the legal system and the social effectiveness of legal norms, but also the moral element, essentially centred on fundamental human rights, which have become positive principles of law in the form of "optimization commands" (cf. Alexy 1986). Nonpositivism is also distinguished from pure natural law theory, according to which only the moral element is essential. But we should note that this certainly is not the tradition of natural law, which has always been attentive to the positivity of law. And that brings Alexy's nonpositivism close to natural law theory in a narrow sense.

If immoral normative contents are unjust in the extreme, they can make legal norms invalid (and here Alexy accepts Radbruch's formula), but in most cases the outcome is a defect the legal system can remedy with its own internal resources. This is possible because positive law has an open texture, meaning that it is necessarily indeterminate. The judge, the prototypical participant involved in putting law into practice, is required by the claim to correctness to state the law by

recourse to principles both moral and legal. Judges do this through a balancing procedure, revealing the presence of moral principles internal to the legal system. Through the use of these principles, the claim to correctness becomes a claim of a moral kind, in that it invokes a morality that can be founded at the level of rational justification and is not just a claim of empirical consent proper to positive morality. In this respect the theory of law becomes part of the more general theory of moral argumentation, which looks to just morality as its regulatory ideal. In this connection, correctness (*Richtigkeit*) substantially amounts to rational acceptability based on good reasons (see in general Alexy 1994).

Alexy, as noted, has developed a well-known theory of legal argumentation (Alexy 1978) within a general theory of practical rational discourse. His thesis is that legal discourse is a particular case of practical discourse at large, in which the demand for justice is asserted within the constraints and conditions of the legal system (this is the special-case thesis, or *Sonderfallthese*). This means that in law, freedom of discussion is constrained by procedures set up to confer greater certainty on the expectations of citizens, but the fact remains that legal argumentation to all intents and purposes is part of practical rationality and its actualization in social reality.

The *Sonderfallthese* has been criticized, among others, by Habermas (1992), who in agreement with Neumann (1986, 90) has argued that legal and moral justice are heterogeneous, accusing Alexy of subordinating law to a morality conceived in the manner of natural law. But in order to properly speak of subordination in the sense just explained, one would have to show that in Alexy's theory the constitutive moral element of law takes priority over the other two—which it does not. On the contrary, while in most cases a moral defect cannot by itself make a legal norm invalid, a defect involving the formal characteristics of legal validity does in a strict sense deprive a norm of its legal quality. From this point of view Alexy's theory is less close to natural law theory in a narrow sense. However, if we compare his theory with Finnis's, there is one difference we will notice, among many others, in that it envisions a very different relationship between general practical reasoning and specifically *legal* practical reasoning. For Finnis, the latter is a phase internal to the general flow of practical reasoning, and even though it can be isolated, it does not yet lead to a concept of law in the full sense. For Alexy, the *Sonderfallthese* is instead conceived as an *Integrationsthese*, that is, as a way to strengthen the weakness of general practical discourse. This means that the need to realize justice in the *concrete* overrides the demand for its *full* realization. The legal system looks to practical reason as its deontological ideal (see Alexy 1987, 407). We can still hear the echo here of the neo-Kantian distinction between the concept and the idea of law. Even so, the effective presence of fundamental rights, coupled with the law's open texture and the role of principles, is such that the *Sonderfallthese* comes very close to the fullness of the moral claim.

4.5.2. Law's Normativity

The Argentinian philosopher Carlos Santiago Nino (1943–1993) starts out from a rejection of conceptual essentialism, arguing that conventionalism has made

possible a plurality of concepts of law, all legitimate on the basis of the point of view adopted. The choice depends on the aims assigned to the theory of law. This makes it possible to achieve compatibility between the descriptive concept of law proper to legal positivism—a concept useful in carrying out historical, sociological, or comparative investigations—and the normative concept proper to natural law theory, useful as a basis for legal decisions and claims. Accordingly, the atavistic dispute turns out to be essentially "trivial" (see Nino 1980, 543; cf. also Carrió 1983).

The normative concept of law is appropriate if our purpose is to *justify* obedience to the law, and not simply to *explain* such obedience, and if we take up the point of view of participants in legal practice, who in turn can participate on the basis of internal reasons or acting on extrinsic motives, but who are ultimately sensitive to the social practice of moral discourse (see Nino 1984).

On these bases it can be stated that the answer to the question Why obey the law? is moral and that moral discourse, which legal discourse has to take into account, is the only discourse with an autonomous and fully justificatory character.

Nino, inspired at one and the same time by Hobbes and Kant, is a supporter of ethical constructivism, which is certainly not the metaethics of traditional natural law theory (see Nino 1991, 64–72). Although moral facts are *constructed*, and so involve human work, the resulting construction is not thereby arbitrary, in that it is subject to limits and conditions dictated by its presuppositions and by its functions, which are to resolve conflicts and promote social cooperation. Moral discourse therefore has an ideal structure from which one can also derive a way of conceiving moral agents. The latter must be thought of as endowed with autonomy, that is, as capable of freely accepting the principles that guide their behaviour, and also as capable of rational communication; otherwise, moral discourse would be impossible. So this moral agent is ultimately the same as that of Kantian natural law theory. Moral discourse looks for intersubjective values or moral truths, whose role is ultimately to justify the legality of a legal system.

The justification of obedience to law cannot rest on law itself; otherwise, we would have an infinite regress. Nor can the chain of competence norms be infinite. It leads to norms that are not legal in the same sense as other norms. In general, it must be recognized that the constitution is not the most fundamental practice of a society, for in its own turn it rests on a more fundamental practice that also explains why we observe the constitition even when it is modified in a regular way. This is essentially Kelsen's intuition about the basic norm (*Grundnorm*), though Kelsen erroneously configures it in a hypothetical sense. In reality, the basic norm, which imparts validity to the ensuing constitutions, is not a legal norm according to the descriptive and institutionalized concept of positive law but an extra-legal principle of a moral character.

Hence the concept of validity, used from the internal point of view, is a normative concept that implies extra-legal or moral norms. Obviously, this is in the first instance a positive morality, but it is nonetheless subject to the practice of moral deliberation, in turn subject to revision by intersubjective critical morality. The most favourable political arena for the latter is that of deliberative democracy (cf. Nino 1996), which is enacted above all in processes interpreting and applying the law.

If we want to credit law with authentic normativity belonging to the sphere of morality and not merely with the exercise of force and coercion, then we will have

to abandon any insular conception of law as a freestanding enterprise. Every legal system possesses an internal normative reserve that is not strictly legal-formal and makes the obligatory force of its norms possible (see Nino 1994).

In conclusion, Nino maintains that if the theory of law is to have an active role, that of justifying obedience to law, it has to abandon conceptual positivism, which, being based on the separability thesis, cannot say if and when we have to follow legal norms. If law belongs to the sphere of practical reason, then once we appreciate that fact we can appreciate that law is a moral reason for action.

Very close to this conception is that of Manuel Atienza (1951–). He, too, maintains that acceptance of the rule of recognition requires a moral judgment (see Atienza 2001, 112), a line of thought he has recently summed up as follows:

> […] the two main reasons for rejecting ethical noncognitivism (and relativism, though obviously not understood as a position of descriptive ethics) are the following: (1) it does not allow the reconstruction of important aspects of legal practice (particularly the justification of legal decisions); (2) it is self-frustrating. The alternative should be a (minimal) moral objectivism which, in contrast to relativism, defends the thesis that moral judgments incorporate a claim to correction and, in contrast to absolutism, defends the thesis that moral judgments (such as those made by courts of last instance) should incorporate final reasons (in practical reasoning), but these should be open to criticism and, as a result, be fallible. (Atienza 2007, 244)

4.5.3. A Natural Law of Positive Law

The third perspective to be considered concerns the connection between law and morality as an element on which depends the way we conceive the very structure of positive law. This is a line of thought pioneered by the American jurist Lon Fuller, who in the formal principles of the rule of law identified a real morality internal to law (see Fuller 1969), to the point of speaking of "a natural law of institutions and procedures" (Fuller 1981, 32). But this perspective is now further broadened because of the variety of the forms of contemporary law, which is growing increasingly diversified both within each political community and without, in the international, transnational, and supranational sphere. Legal rules themselves do not all have the same obligatory force, and more and more frequently there are cases of soft law.

In this context we clearly see the inadequacy of the criterion of formal validity for identifying the positive law. This criterion is based on the origin of norms, an origin that today, more than ever, is not unitary, just as there are no stable hierarchies of sources of law. Consequently, the focal point shifts from the origin to the use of norms. The legal character of the rule is instead sought in the way the rule has to be put into practice, that is, how it is to be interpreted and applied. The formula of the rule of law can thus be understood as a meta-rule on the use of legal rules (see Viola 2011, 5). It is a normative conception of legal practice that concerns both the conditions that make rules practicable and the presence of special institutions of a political and jurisdictional character. It appears more and more evident that positive law is made up not only of norms but also of doctrines, principles, concepts, and institutions. All this concerns not only the contents of law but also its formal structure.

The upshot of the foregoing considerations is that there is no way to put law into practice without first making reference to the traditional principles of the rule of law, as is shown by the frequent recourse to this formula in international legal documents and in European treaties. But there is controversy today about what these principles are and how they relate to the concept of law.

On the one hand, the evolution of contemporary law seems to require reformulating these principles in an effort to forge a rule of constitutional law and a rule of international law (cf. Viola 2007), while, on the other, considering such principles as a constitutive part of the concept of law means seeing them in a normative sense and prefiguring, in the manner of Fuller, an ethic proper to positive law and sensitive to the ontological or historical characteristics of human nature. This, after all, is also the meaning of Hart's appeal to "the minimum content of natural law," since this "natural necessity" which law has to take into account is to be seen not in a causal sense but in a rational one (see Postema 2011, 330). This is the way in which practical reason has to take human nature into account.

So if we believe, in the manner of Dworkin, that the principles of the rule of law are not only formal but also substantive—in that they now incorporate human rights and the guarantees of contemporary constitutionalism—then the ethic of positive law grows even thicker, well beyond Fuller's intentions.

According to Luigi Ferrajoli (1940–), the legal validity of norms rests on a judgment that is objective and axiological yet internal to the legal system (see Ferrajoli 1989, 353) and is a "positivization of the law of reason" (Ferrajoli 2010, 2782); indeed, it is a substantivist version of the rule of law.

At this point nonpositivism finds itself facing a dramatic alternative,[23] for it must choose between embracing ideological legal positivism and opening the door to the claims of natural law.

Those who believe that the ethical substance of law is entirely contained in constitutional principles and is only waiting to be made explicit by deductive logic have to show they can avoid the ideological thesis that a law is just by virtue of its being constitutionally valid. But in effect nothing that is positive can escape the criticism of reason, and that also applies to constitutional principles, which are the positivization of fundamental values. Besides, if we recognize cognitivism *within* the legal system, then it will be difficult reject it *outside* the system. Hence natural law theory, seen as a rational search for a better way to protect human dignity, is a defence against ideological legal positivism. There are undoubtedly objective judgments on the violation or the protection of human dignity, and indeed positive law itself assumes as much.

By contrast, those who believe that the positivization of fundamental values does not imprison the meaning of those values or eliminate their prominence over the positive datum—thus asserting a role for ethical discourse in general—find it hard to continue on a path of support for legal positivism. Witness, for instance, the words of the Italian constitutionalist Gustavo Zagrebelsky: "In the presence of principles, social reality expresses values, and law is valid *as if* natural law were in force. Again, and this time for a reason connected to the law's very mode of operation and not as regards contents, law grounded in principles meets natural

[23] Ferrajoli prefers to speak of a "new legal positivism."

law" (Zagrebelsky 1992, 162; my translation), even though, incomprehensibly, he does not deem this a sufficient reason for abandoning legal positivism.

The only way to lay the ghost of natural law to rest is to deny that the problem of legal normativity truly belongs to legal theory, confining it to the outside, that is, to politics or morality (cf., e.g., Guastini 1996, 515), but in this way positivist theory remains incomplete as an explanation of law, as well as inert on the normative plane (see Gardner 2001).

4.6. The Open Texture of Practical Reason

In conclusion, nonpositivism has shown up some critical aspects of legal positivism, legitimizing the third revival of natural law as a search for just law internal to the framing of positive law and as a constitutive element of its positivity. We will now try to sum up these themes developed on the natural law approach.

1) A characteristic of constitutionalism is the positive existence of a *lex superior* standing above ordinary legislation. The problem is to define the normative status of this supra-statutory law, which places a constraint on the content of ordinary norms. Dworkin and Alexy regard these principles as structurally and qualitatively different from positive norm, but since the same principles bear on the interpretation and application of law, that recognition according to the positivist conception amounts to opening the door to morality in law (see Prieto Sanchís 1997). Hence legal positivism is forced to choose between working out a different theory of constitutional principles and openly declaring itself incompatible with constitutionalism (cf. Troper 1992, 37), the latter option being something frankly paradoxical, as a theory based on facts cannot then turn around and reject them.

2) The second characteristic, closely connected to the first one, consists in placing legal argumentation within moral argumentation. As noted, constitutional decisions often become a locus of moral evaluation when it is necessary to judge whether ordinary law is consistent with constitutional values, and these processes of reasoning are very similar to those typical of modern natural law theory. According to Atienza, "the approach to law as argumentation is committed to a minimum objectivism in ethics" (Atienza 2006, 53; my translation).[24]

3) The positivization of human rights not only does not do away with the need to search for nonpositive law but, on the contrary, makes that an even stronger need. Rights are not something original but are an ethico-legal reflection of values. Today the language of values has taken the place of that of natural law. Values are translated into reasons that ground the ascription or recognition of rights.

This does not entail a return to the philosophy of values. To be sure, this current had a major influence on legal philosophy at the time of Dilthey, the neo-Kantianism of the Baden school, and Scheler. But, as previously noticed (*supra*, 51),

[24] The Spanish original: "[...] el enfoque del Derecho como argumentación está comprometido con un objetivismo mínimo en materia de ética."

it became unyielding in the hands of Hartmann, for whom value is an absolute that exists in itself (*Ansichsein*), regardless of whether anyone recognizes it (cf. Hartmann 1949, 154). Consequently, no dialogue was possible between values and the facts of history—which was precisely the problem to be addressed. The urbanization of values, for the purpose of toning down their violent and conflicting character (cf. Schmitt 2011), was the objective of the movement to rehabilitate practical philosophy (cf. also Mengoni 1985).

4) Another opportunity for natural law theory lies in the principle of reasonableness, which has become the reference point for the processes through which rights are balanced and for the argumentation typical of constitutional courts. If conflicts between fundamental rights are to find a solution that can be considered reasonable, judgments of suitability, necessity, and proportionality in the narrower sense, through which the principle of reasonableness finds expression, have to satisfy their claim to objectivity. Since these are evaluative judgments, a cognitivist perspective is required. Nor can it be objected that we are only talking about instrumental judgments about the means adopted, because at least the judgment of proportionality in a narrow sense also requires evaluating the goals pursued by the legislator, their importance, and the degree to which it is useful to achieve them. Balancing is not a mechanical or merely procedural operation but requires judgments of relevance and comparative weight.

The very principle of equality, which lies at the root of that of reasonableness, entails value judgments about the objective difference between the situations to be compared, and that in itself justifies the differential treatment of those situations. If practical evaluations cannot be regarded as objective, the whole enterprise of the constitutional state would have no rational basis.

That these moral evaluations are also subject to restrictions and constraints dictated by positive law does not make them incompatible with natural law theory understood in a narrow sense, which defends the presence of natural law within legal positivity itself.

5) Contemporary pluralism rejects the principle of authority and and asks that disagreements be settled on the basis of reason. The Hobbesian formula *Auctoritas non veritas facit legem* is incompatible with the constitutional state. The main task authority takes on is to make sure that the rules governing the practical discourse on which basis to choose among competing conceptions of life are practicable and complied with, and in this sense it turns out that authority can lo longer stand on its imperative role alone. The exercise of natural reason is brought into prominence, but it has to reckon with the limits and constraints of positive law.

6) Finally, the current debate on the universality of human rights sees a reconsideration of the natural law tradition. If human rights are universal, it is reasonable to search for a basis or justification of them in the traits common to all of humanity. This does not necessarily entail an appeal to human nature understood in a biological or teleological sense, but it certainly commits us to searching for and identifying values common to all humans. However, it remains an open question whether recognizing freedom also means recognizing human nature, since freedom is possible only among natural beings (see Spaemann 1994a, 79). On the other hand, denying the universality of human rights in every possible

expression and maintaining their relativistic particularism does not help to explain their origin or their present currency, but only their possible ideological use. It is no accident that studies in international legal philosophy are multiplying and cosmopolitan theories of law have been developing.

In conclusion, nonpositivism, as we have seen, offers three ways of seeing the connection between law and morality: that of integration, where law is distinguished from morality by the need to make practical discourse effective; that of the incorporation of law into social morality, which provides the basis for law's obligatoriness; and that of a full or partial absorption of morality into law, which thus takes on an internal moral value.

These three orientations come close to natural law theory in varying degrees but are not full-fledged natural law theories. This is so above all because of the widespread refusal to recognize "human nature" as having some role in legal theory. In place of natural law there is moral law, but in legal theory the latter is perceived as a foreign body. Legal theory seeks to defend itself with the separability thesis, but in so doing loses its full capacity to explain the legal phenomenon. The only option left is to forgo the full autonomy of legal theory, recognizing its dependence on political philosophy and moral philosophy.

Law has to have a dialogue with morality if it is to avoid collapsing into morality itself, just as politics has to have a dialogue with religion if is to avoid becoming a religion itself. Practical reason cannot be worked out in sectors entirely separate from one another (see Spaemann 1994b). In this way, however, the legacy the 20th century inherited from 19th-century legal science theory is seriously jeopardized, and new scenarios open up that are still very uncertain.

The third rebirth of natural law, as we have seen, is widespread, though it is quite incomplete relative to the ancient and modern tradition. But as theories change, so do traditions. As long as there is meaning to the distinction between just and unjust actions, and as long as something is recognized that is unchangeable in positive law, which by definition is changeable, then what enlivens natural law theories will always allow a new resurrection of them.

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