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Philosophy of Law

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BOOK REVIEWS

PHILOSOPHY OF LAW, by *Giorgio Del Vecchio*, translated by Thomas Owen Martin. The Catholic University of America Press, Washington, D. C., 1953. Pp. xxiii-461. \$6.50, cloth.

Reviewed by

WILLIAM F. CAHILL*

Professor Del Vecchio's lectures on the Philosophy of Law are here published for the first time in English. Even before 1930, when the first printed edition appeared in Italian, the lectures circulated widely and spread everywhere the fame of their author. They have since been translated into eight other languages. The author's reputation for broad inquiry, acute analysis and clarity of exposition will be further enhanced by the present lucid and graceful translation.

The introduction describes the concept and functions of Philosophy of Law, indicates its relations to other sciences, and outlines its methods. In this brilliantly succinct essay, one cannot fail to perceive a mind whose breadth and profundity returns always to that disciplined harmony which is the hallmark of integrated education.

The body of the work has two major divisions. The first of these comprises over two hundred pages devoted to a summary history of the Philosophy of Law. The expositions of the teachings of the Greek philosophers, of Grotius, Hobbes, Thomasius, Rousseau, and Kant, are especially notable, as well for the accuracy of their material as for the clear precision of their expression. The studies on St. Thomas Aquinas and Suarez are the best work of the author in

his appraisal of Catholic writers. Yet, even in these essays, and particularly in that on St. Thomas, there is to be desired a better application of the author's acknowledged powers. His neglect to present, either in this historical or in the later doctrinal section, even a summary of the work of the Fathers of the Church who adapted and developed the natural law doctrines of the Roman jurists, seems a serious omission. Nor is it a mere oversight, for he says "only in the age of the Renaissance . . . was the classic doctrine reaffirmed according to which Law is derived from human nature independently of Theology".¹ That the classical doctrine never went beyond human nature, and that the Fathers and Scholastics made all depend on premises of revelation, are implications which the author does not attempt to justify. No indication is made of the contributions of Gratian and other medieval writers to the development of the doctrine on custom as a source of law. Bracton is not even named, and we feel he should be, both for his recognized doctrinal contributions and for his enormous influence upon the development of law in the English-speaking countries. The presentation of modern writers on the Philosophy of Law includes a useful list of names of writers and their works. For the nations other than Italy, there is little more.

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¹ DEL VECCHIO, PHILOSOPHY OF LAW 46 (8th ed., Martin transl. 1953).

The second major division of the work is the "Systematic Treatise." It begins with a section in which consideration is given to the concept of law — a section so well organized as to be most interesting and instructive. The careful reader will note, however, that all absolute concepts, that of justice included, are made to depend upon the Kantian postulate of *a priori* ideas.² While the importance of motive in determining the juridical quality of acts is well demonstrated, the author goes too far when he extends the field of law to all human actions, even internal ones.³

The treatment of the origins and historical evolution of law in the second section of the "Systematic Treatise" covers only twenty-four pages. The consequently compendious quality of its statements leaves much room for distinctions, qualifications, additions and positive emendations, if the reader is to form an objective view of these problems.

In the last section of the "Systematic Treatise," on the rational foundation of law, Del Vecchio discusses the chief adversaries of his position, and presents his own views on "human nature as foundation of law." To nearly everything he says of natural law, and of its relation to positive law, we can assent.⁴ As an "absolutist," he rejects

the jurisprudential philosophies of Skepticism, Empirical Realism, the Historical School, and Utilitarianism.

From his statement of the ultimate rational basis of law, that law is an "*a priori* form of the spirit," we dissent. Moderate realism, asserting that experience is the ultimate basis of all ideas — that the intellect abstracts the universal from the particular which is known by experience, cannot accept any ideas as innate.⁵

Del Vecchio calls "theologians"⁶ all those who trace a necessary relation between God and the law. For him, the "theologist" point of view has two forms: it identifies law with the will of the divinity, or it postulates a divine reason which determines what is just — that determination is adopted by the divine will and must be accepted by men. He is not satisfied that either is truly rational, for the first prescind from reason, and the second offends by invoking reason in reference to the divinity which "is, by definition, absolute and superior to reason, consequently it must be accepted only as such, thanks to faith." This view, that the existence and nature of God are not knowable by reason is, of course, contrary to Thomistic philosophy and even to Catholic doctrine. It has its philosophical root in the Kantian view that the principle of causality is valid only in the world of phenomena.⁷

It is true that much of Del Vecchio's philosophy of law, when it descends to more

(1952); see also Book Note (3d ed.), 10 APOLLINARIS 301 (1937).

⁵ The view here criticized was expressed in the third Italian edition. See 10 APOLLINARIS 301 (1937).

⁶ Msgr. Graneris noted that Del Vecchio began, in the fifth Italian edition, to use the term "theologist" instead of "theological" to describe these points of view. 20 APOLLINARIS 148 (1947).

⁷ DEL VECCHIO, PHILOSOPHY OF LAW 432-433 (8th ed., Martin transl. 1953).

² DEL VECCHIO, *op. cit. supra* note 1, at 252-255.

³ DEL VECCHIO, *op. cit. supra* note 1, at 255-260. St. Thomas distinguishes thus: "... there is no virtue whose exercise the law cannot command. But human law does not prescribe *all the acts of all the virtues*." SUMMA THEOLOGICA I-II, q.96,a.3, c. (Emphasis added.) And the reason St. Thomas offers for this distinction is pregnant with implications "... to the political community, man is not ordained in the totality of his being nor in the totality of his resources." SUMMA THEOLOGICA I-II, q.21, a.4, ad 3.

⁴ See Graneris, Book Review (5th and 8th ed.), 20 APOLLINARIS 148 (1947), 25 APOLLINARIS 440

particular problems, is acceptable to the Thomist and the Catholic. Yet it would be erroneous to assume that his metaphysical absolutism has no influence in his evaluation of matters which may seem remote from criteriology and theodicy. When Del Vecchio discussed⁸ the problem of whether a man might ever, in any circumstances, dissimulate, he was led — by his metaphysically absolute commitment to truth — to deny that dissimulation is ever virtuous or even morally admissible. In a work⁹ which clearly manifested Del Vecchio's devotion to fascist theory,¹⁰ he discussed the need for a moral as well as a legal bond among the citizens of a state. And he described the moral bond in these terms: "an identity of wills, a true communion of minds, a single order of faith in the civil religion of the Fatherland." It seems that a metaphysical absolutist who is offended by postulates of divine reason as

⁸ DEL VECCHIO, *VERITA E INGANNO NELLA MORALE E NEL DIRITTO* (1947), Palazzini, Book Review, 20 APOLLINARIS 149 (1947). The work has been translated into English: *Truth and Untruth in Morals and Law* (Knease transl.) in *INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES, ESSAYS IN HONOR OF ROSCOE POUND* 143-166 (Sayre ed. 1947).

⁹ DEL VECCHIO, *SULLA STATUTALITA DEL DIRITTO* (1929), translated: *On the Statuality of Law*, 19 J. COMP. LEG. & INT'L L. (3d ser.) 1-20 (1937).

¹⁰ See Cicognani, Book Review, 3 APOLLINARIS 148 (1930).

the ultimate basis of law may find himself worshipping idols.

If we had in English an adequate literature of the Thomistic philosophy of law, the present work would be most welcome as illustrating interesting parallels erected upon a different epistemological foundation.¹¹ But in the confusion of views and expressions now prevailing in the English writings on natural law, one may be permitted to suggest that by seeming to promote alliances which are ambiguous,¹² natural law philosophers may impede rather than advance the development of jurisprudence on a sound philosophical basis.

¹¹ Of the eighth Italian edition Msgr. Graneris had only this to say: "There is no need for us to discuss the work of Del Vecchio, for its acceptance is evidenced by the frequency of successive editions. His doctrine is well known, and agrees with our own in many respects." 25 APOLLINARIS 440 (1952).

¹² The reviews of earlier Italian editions of Del Vecchio's *PHILOSOPHY OF LAW* and of his other works, pointed out the subjective character of his philosophical foundations. See Graneris, Book Review, *Del Vecchio, Die Gerechtigkeit*, 14 APOLLINARIS 463 (1941) [this work has been translated into English by Lady Guthrie: *DEL VECCHIO, JUSTICE* (1952)]; Book Note: *Lezioni di filosofia del diritto* (3d ed.), 10 APOLLINARIS 301 (1937). Msgr. Graneris pointed out the difficulties created by Del Vecchio's Kantian terminology even in matters where the author's doctrine seemed unexceptionable. Graneris, Book Review, *Del Vecchio, Lezioni di filosofia del diritto* (5th ed.), 20 APOLLINARIS 148 (1947).