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BOOKS REVIEWED

The Tradition of Natural Law: A Philosopher's Reflections. By Yves R. Simon. New York: Fordham University Press. 1965. Pp. xii, 194. \$5.00.

"The theory of natural law, attacked and rejected many times, always comes back with fresh energy."¹ So reads the opening sentence of this volume by the late Professor Simon. In our day, permeated with a positivistic and existentialistic challenge to the notion of a transcendent objective justice, the opposing idea of natural law has gained an increasing favor. That favor has been, regrettably, limited by the lack of clarity with which the relevance of natural law has been demonstrated. It is in the interest of furthering that demonstration that this book has been published and, fortunately, it succeeds well in so doing.

Professor Simon draws the critical distinction between philosophy and ideology, illuminating the transient and utilitarian character of the latter, e.g., as with the ideology justifying slavery, as distinguished from philosophy which entails an objectivity and timelessness foreign to ideological thought. Seen in this light, he contends that pragmatism, which professes to uphold theories that "work," is incapable of maintenance as a consistent philosophy rather than as a shifting ideology. In fact, as Professor Simon readily concedes, it is practically impossible to insulate philosophical thought from the influence of contemporary ideologies. The great Greek philosophers succeeded, more than any others, in objectively transcending the ideological particularities of their times. In our day, the natural law, which enjoys a vogue as a reaction to the success of positivism and existentialism, has itself certain overtones of an ideology. Professor Simon strongly criticizes the resultant tendency to apply the natural law indiscriminately in the solution of particular problems which are more properly referable for solution to the practical virtue of prudence. Such an over-application discredits the natural law and impedes the performance of its proper function, which, in his opinion, is to cause, as far as can practicably be done, the aspirations of society to coincide with truth. He accurately describes the related limitations of theoretical philosophers as practical statesmen, but concedes to the philosophers a role in the shaping of events through providing general standards for action.

Professor Simon next offers an exposition of certain elements in the history of natural law thought, touching upon Aristotle, the Stoics, the varieties of Scholasticism, and others. The varied uses to which natural law has been put are illustrated, among others, by the Renaissance humanists, who used it to justify resistance to the divine right of kings and the classical economists, who used it to support extreme individualism and laissez-faire. Simon, incidentally, treats socialism as a reaction against the individual naturalism of the classical economists. Today, the natural law is effectively used to counter contemporary racism and for a variety of other purposes as well.

In Chapter 3, Professor Simon deals well with such theoretical questions as the concept of nature; necessity and contingency; freedom of choice; the issue of the primacy between reason and will (which can contribute to the conflict between natural law and positivism); and the problem of God.

In the second half of the book, Professor Simon begins with a discussion of the definition of law and proceeds to treat the distinction between government by law and authoritarian government. He discusses the relative primacy of common good over private good, skillfully avoiding the pitfall of endorsing the utilitarian objective of "the greatest good of the greatest number."² He proceeds to a clear examination of

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1. Simon, *The Tradition of Natural Law* 3 (1965).
 2. *Id.* at 90.

the relation between positive law and natural law, demonstrating that a full understanding of the positive law leads to an awareness of a natural law. Firstly, because no one can ultimately escape the question of whether positive law is "just," as with totalitarian genocidal laws. Secondly, on what grounds is a positive law to be changed, if not, in some cases, because of a clash with an anterior natural law? Thirdly, the obligation to obey the law must ultimately depend either upon an antecedent law or sheer force and fear. Simon accurately states the issue as whether some, not all, things are right by nature, and concludes that "nothing would be right by enactment if some things were not right by nature."³

Approaching the critical issue of the knowability of the natural law, Professor Simon argues that the natural law is known by way of the unclear and incommunicable instinctive process of inclination before it is known by cognition. This is so because the natural law exists first in things before it exists in our minds. "There is an inclination in the honest conscience of a man trained in justice which makes him sensitive to the unjust even when he is completely unable to explain his judgment."⁴ Not only is this "sense of injustice"⁵ prior in time, but it can be prior in obligation: "When moral problems are considered on the completely concrete, practical level, on the level of the last word, as it were, that last word belongs to inclination."⁶ Ultimately, the apprehension of the natural law embodied in things leads one to a recognition of an Author of nature, i.e., of God. It is the natural law which underlies our obligation to obey such man-made rules as traffic regulations. But, Simon concludes, the obligation of the natural law, in turn, depends upon it being "an aspect of God."⁷

Recognizing the variations in natural law thought and the changing morality of similar acts committed under differing circumstances, Simon reemphasizes the necessity of prudential judgment in contingent and concrete situations. The different understandings of the natural law in various eras and places, is referable, thereupon, to the contingency of prudential judgments as well as to the progressive character of our knowledge of the natural law, i.e., man is learning progressively about the natural law just as he is learning about the laws of outer space. Finally, in assessing the future of the natural law, Simon emphasizes the importance of treating it with an historical approach and context. Reiterating that the central target of his book is the objection that "if there were such a thing as natural law, it would be known to all men at all times, in all societies, in an equal degree of perfection,"⁸ he expresses his confidence in the progressive improvement in our understanding of natural law and in the importance of that law in the promotion of social justice.

One problem in our law today is the widespread rejection of objective standards of judgment. In the dominance of a pragmatic positivism in the formulation of constitutional principles, in the ascendancy of the doctrine of selective obedience to law, in the growing automatic concession of rectitude to majority judgments, and in other respects as well, we can discern a subjectivism which, in its insubordinate rejection of higher restraints upon the transient judgments of our self-liberated intellects, is an unhealthy development. A growing awareness of natural law, not as a detailed manual of practical government but rather as a general standard evocative of a Creator, can serve us well if it reminds us of the less than infallible character of our own judgments

3. *Id.* at 118. (Emphasis omitted.)

4. *Id.* at 128.

5. See Cahn, *The Sense of Injustice: An Anthropocentric View of Law* (1949).

6. Simon, *op. cit.* supra note 1, at 129.

7. *Id.* at 139.

8. *Id.* at 161.

and of the need, occasionally at least, to recur to more enduring guidelines. An increased understanding of natural law can also provide an essential impetus toward the realization of social justice and equal opportunity as a fact. This volume will contribute to that understanding. Not all who accept the idea of natural law will agree with Professor Simon's analysis and judgments. And the book could have been improved by a more extensive and detailed discussion of the utility and limitations of natural law in the solution of social problems. But it is a sound book and one from which lawyers and students of jurisprudence can profit.

CHARLES E. RICE*

The Use of Experts by International Tribunals. By Gillian White. Syracuse: Syracuse University Press. 1965. Pp. xv, 259. \$3.95.

The current trend of international law scholarship minimizes the importance of the judicial process, emphasizes the primary authority of international agreements, and teaches the importance of customary law-making through the claims, responses and concessions of nations. The influential works of McDougal, Falk, and McWhinney, for example, suggest that, at least in the immediate future, international judicial tribunals are not likely to yield much significant international law. The International Court of Justice does very little, and nations are more willing to negotiate than litigate their differences.

Study of international tribunals persists, however, and this book reveals that conventional studies of the courts may yet be useful, if not exciting. Miss Gillian White's book, the fifth in a series devoted to procedural aspects of international law, demonstrates the careful training and incisive analysis characteristic of the best English legal training, but the book lacks the flair and controversy displayed in the previous volume of the series by Falk. If you are interested in the subject, this book should be read, but, if your international law interests are more general, it will supply useful details but no new insights.

The author makes a complete survey of the recently established international tribunal's use of non-judicial personnel in the fact-gathering process. Literature pertaining to the use of experts in municipal litigation is extensive, and it is surprising that Miss White's book is the first to make a systematic study of their use in international bodies. She first surveys, with courageous brevity, the use of experts by French, German, Italian, English, and United States' courts, and then compares the explicit authority for their use in international tribunals. The experience of the International Court of Justice, Conciliation Commissions, other tribunals under post-World War II treaties and in the European Community supplies the principal source material. An appendix includes a monograph on the Foreign Compensation Commission of the United Kingdom and on the Foreign Claims Settlement Commission of the United States. Here, the book relates to an earlier volume in the procedural series on international law by Richard Lillich of Syracuse Law School on international claims in domestic tribunals. A short chapter on the implied competence of judicial bodies to appoint experts not unexpectedly concludes that, generally, this is permissible.

The encyclopedic study of instances in which non-judicial personnel were selected

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to advise in the fact-gathering process reminds us that, if the truth is to be found, judges must call upon others in such matters as boundary disputes and issues of value and damages. Law training does not train us, moreover, in economics, accounting, surveying, and naval affairs. Perhaps the outstanding occasion in which the International Court of Justice called upon experts is in the *Corfu Channel* case. Officers of the Norwegian, Swedish and Dutch Navies were asked to assist the Court in determining factual questions involved in the British claims against Albania. Whether or not Albanian coast-watchers could see mine-laying operations in the adjacent waters where British destroyers were sailing, what kinds of mines were present, and how they might have been moored were among the vital technical issues preceding any discussion of liability. These questions involved naval secrets, and the officers selected were required to swear that they would "abstain from divulging or using, outside the Court, any secrets of a military or technical nature." To facilitate fact-gathering, the officers visited Albania and Yugoslavia, with consent of the host governments, although the latter refused to permit inspection of a naval repair installation. Now that we are beginning to think about international arms control and the need for internationally protected inspectors, the privileges and responsibilities of this twenty-year-old precedent become significant. Yugoslavia was obviously not reassured by the existence of the oath of secrecy, and one may sympathize with their misgivings. Would United States law honor a refusal of officers who hold useful intelligence information, on the ground that an oath taken before an international tribunal would be violated? Without legislation, I doubt it.

Miss White's book is a useful addition to international law literature, but it is hardly a profitable book for a beginner. If it lacks popularity, however, it is not the fault of the author, but the result of a world no longer deeply interested in fact-finding and dispute-settling by an independent judiciary.

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