COMMENT

MAIN TRENDS OF ITALIAN LEGAL PHILOSOPHY*

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I

The philosophical reflection on law has followed a rather steady course in Italy since the Middle Ages. The scholastic reflection on law (or still better—laws) centered around the problem of natural law and, having its organic exposition in Aquinas' systematization, went side by side with the secular theories of Marsilius of Padua, who elaborated a conception of law as an expression of State will. As to the mediaeval jurists, natural law was discussed (even though often rather naively) by the glossators; the problems of the legal method and the characteristics of law engaged much attention by the commentators. In the "civil philosophy" of humanism and renaissance, a prominent place belongs to problems of justice, to the relations between law and morals, and to the end of laws.

From the second half of the sixteenth century to the eighteenth century, we do not find in Italy anything comparable with the systematic research and doctrines on natural law that flourished in the other parts of Europe due especially to the work of the Spanish catholic school (ranging from Vitoria to Suarez) and of the so-called lay school of natural law (ranging from Grotius to the younger Fichte). However, in the eighteenth century a striking revival of legal-philosophical studies took place in Italy. Only two authors (whose renown abroad is inversely proportional to their philosophical significance) need be mentioned here—Giambattista Vico and Cesare Beccaria, in whom the main tendencies of this revival are embodied.

With Vico's two chief works, *Diritto universale* (1720-1721) and *Principi di una Scienza nuova* (1725-1730), a clearly speculative trend, centered on the problem of the relations between truth and history, is asserting itself. In this general philosophical frame, Vico considers the problem of law, striving to understand and to explain the relation between positive law established in the course of history and the ideal (eternal) law as well as the relation between natural law and history. As compared with what was studied in the same period by the natural law school, this is quite a new

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problem. Instead of trying to establish a rational *a priori* legal system, Vico is concerned with discovering the nature and the meaning of law through the study and the understanding of its historical manifestations. By means of the interpretation of the historical development of legal systems, he aims at establishing the nature and the "truth" of the law. "Natural" law and "historical" law, far from being in opposition to each other, imply and throw light on each other; the latter is in fact the result of a human activity that depends upon and reveals the former.

In contrast, Beccaria in his famous book, *Dei delitti e delle pene* (1762), expresses, characteristically, the practical tendency and the reformative purpose of renewed Italian legal philosophy of the Italian enlightenment. The philosophical basis of his work is weak and unsound because of its eclecticism. But his genuine enthusiasm for social reforms and his strong power of persuasion asserted themselves, as the immediate success of his small book all over the world has testified. Both theoretical weakness and the strength of the practical impact characterizing Beccaria's philosophy reveal that the "deontopractice" preoccupation prevails over the epistemological concern in this brand of legal philosophy, which aims at the transformation of law rather than at the understanding of law.

Although the lawyers in Italy in the first half of the nineteenth century were no longer interested in legal philosophy, the philosophical reflection did not wane altogether in this period. The codification of law (accompanied by the mythical trust in a complete and perfect code) banned from the existing legal systems and their operation every recourse to natural law. The activity of lawyers became thus limited to a pure and strict exegesis of positive norms. Nothing arose in Italy that could be compared with the German Historical School which, under Savigny's influence, put a speculative imprint on the contemporary German legal theories. Those who did address themselves to some extent to fundamental problems of law were philosophers, though most of them remained on the plane of a rather irresolute eclecticism.

Against this rather dismal background, Antonio Rosmini shines forth in the first half of the nineteenth century. In his system of legal philosophy, a new life is given to the natural-law problematics centered on the notion of the human being considered as a source of activities, especially of the legal activity. In the view of this liberal-catholic priest, the human being was not to be conceived as an abstraction but was to be considered in the totality and complexity of his possibilities of action and existential relations.

In the second half of the century, the influence of positivism produced a decline of legal philosophy, which then gave way to a legal sociology inspired by the thought of the French philosopher, Auguste Comte. Nevertheless, in the most important Italian positivist philosopher, Roberto Ardigò, we find again, closely connected with the idea of justice, the old notion of natural law. This notion imports for him *that* system of "social ideals" which gives rise to positive law and fosters its development. Though enclosed in a positivistic (and sociological) frame, the central problems of legal

philosophy (*viz.* the foundation of positive law and the determination of its limits) did not wholly disappear from the Italian cultural stage.

II

During the twentieth century, the intellectual gap between legal philosophers and lawyers becomes deeper and wider. While the importance of *philosophical* positivism was declining fast in Italy under the impact of neo-idealism, *legal* positivism (or the legal-technical school) has become most influential in our days; its crisis has begun only very recently. In the legal-positivist conception, there is a clear-cut separation of law and morals. The study of law is not supposed to go beyond the norms laid down by the law-maker: these norms constitute the given and ultimate horizon limiting the exegetic and systematizing work of legal science.

In its pursuit of a "pure" theory of law (as Hans Kelsen came to call it), Italian legal science, after having detached the concept of positive law completely from the idea of natural law, dissociates itself entirely from political ideas and social realities. The *Freirecht* ("free law") and "living law" movements that arose in Germany and in France at the turn of the century received only a faint echo in Italy.

There are rather different trends of thought within the dominant legal-technical school. Whilst most Italian jurists, following the teachings of the German normativist school, identify law merely with legal norms, which in turn are identified with *State norms*, Santi Romano, the founder of Italian institutionalism, propounded a social conception of law. He conceived of law not as a mere set of norms but, above all, as an "institution", or rather, as the organization of a social group. Romano's doctrine was therefore breaking the narrow State frame of Italian legal science; it opened to it the arresting perspective of the pluralism of legal systems above and beyond the State. Romano rejected nevertheless the sociological (as well as philosophical) overtures of Maurice Hauriou's institutionalism and held fast to the ideal of a "pure" or "purified" law.

Whether Italian legal science was concerned with State-origin law or with social-origin law, whether its approach was normativist or institutionalist, it has adhered generally to a strictly dogmatic and a rigidly formalistic conception of law. It has refused to take into account the human, historical, and social motivations of positive norms and institutions. These were accepted as unquestionable data, as dogmas, merely needing an *a posteriori* conceptualization and systematization. As a purely scientific approach, this theory would be less objectionable if it had not claimed that such a legal science can be perfectly self-sufficient and capable of providing a full answer to the problem or problems of law without any contribution from either social sciences or from philosophy.

The negative attitude of legal positivists towards philosophy and their claim that legal science alone is competent to define law appeared to leave no scope for the philosophical reflection on law. Nevertheless, a new and

lively interest in law arose among Italian philosophers. Under the leadership of Giorgio Del Vecchio, neo-Kantianism was the first to accept, at the beginning of the twentieth century, the positivist challenge and to claim for philosophy the responsibility of providing a concept of the law in terms which were not historically and nationally limited but which were universal. According to Del Vecchio, any inquiry into legal phenomena must imply the knowledge of that "ideal", of that "logical" and therefore universal "form" which permits one to classify a phenomenon as legal. Only philosophy can supply this universal and formal (in the Kantian sense) idea of law.

Neo-Kantianism has drawn attention to the *intersubjective relation* considered as the decisive characteristic of the legal phenomena. Whatever may be thought about the possibility of an *a priori* idea of law, it would be difficult to deny the justification of an inquiry into that characteristic of law which distinguishes it from any other human activity or phenomenon. The neo-Kantian notion of inter-subjective (bilateral and reciprocal) relation connects law with the typically relational structure of human conscience and points out the corresponding imperative-attributive connotation by which the legal relation is distinguished from the other types of relation.

Almost contemporaneously with the theory of Del Vecchio, the legal theories of Benedetto Croce and Giovanni Gentile appeared. These neo-Hegelian philosophers dominated Italian culture during the first half of the present century. Their legal doctrines gave a philosophical air to the discussion of law, unusual to it since the days of Rosmini. Though they did not exercise any marked influence on the thought of legal practitioners, they had a powerful and wide echo in the area of fundamental legal thought.

Thus the neo-Hegelians greatly enlivened the discussion on certain aspects of law. Their concern with the problem of law is understandable in view of the fact that Hegel's *Philosophie des Rechts* is one of the main pillars of his system, in which law has an important and autonomous role in the dialectical development of human spirit. It must, nevertheless, be observed that the main effort of Italian neo-Hegelians was directed to a complete denial of the autonomy of law. By this they deviated from the orthodox Hegelian line. According to Croce, law was wholly reducible to the economic and utilitarian activity; according to Gentile, it was absorbed in the unity of the moral act. The rejuvenation of Italian legal philosophy is due precisely to this radical denial of the autonomy of legal activity.

This is not a paradox. The negative result produced by the idealistic analysis of law produced a very strong reaction among professional legal philosophers. They vigorously emphasized the necessity of widening the scope of their research by including in the object of their studies other human realities so that this research would not lose its substance. As a consequence, subtle debates were conducted on whether law could be truly and effectively reduced to economy or to morals. These debates were not purely academic and unproductive: through a patient and meticulous analysis of legal phenomena, they contributed to putting the relevant aspects in the proper light.

The neo-idealists, though denying to law every autonomy, did nevertheless relegate it to an essential activity of the spirit, this activity being one of economy or morals. Accordingly they did not call for the abolition of the legal norms or institutions or for the diminution of their status, as other philosophers did. They strove to discover the nature of the so-called law, which they considered to be hidden under "the solemn cover of a simple word". In a certain sense, therefore, norms and institutions resumed their full value; for through their specific and variable forms their value re-emerged in the perduring human activity, economic or moral.

The Italian neo-Hegelians raised again the important problem of the dependence of legal norms on historical development. Notwithstanding their basic differences, neo-Kantianism and neo-Hegelianism did strive in the same direction and had a decisive influence on the revival of the reflective thought on law. Both neo-Kantianism and neo-Hegelianism posed these important questions: What type of *activity* is the legal activity? What is the essential structure of the legal activity?

Thus a new perspective was opening up for legal philosophy in Italy: its task was no longer conceived to be limited to the comparison of different types of norms—moral, legal, and social—in order to establish their similarities and dissimilarities on the ground of their paradigmatic formulation. Instead, it was considered first of all to be necessary to identify the source and the structure of the legal activity (even if its autonomy was denied, as it was by the idealists). So legal philosophy recovered a solid ground where it could take roots and unfold itself.

In overstressing somewhat certain elements of the problem in the light of later developments, it may even be said that under the cover of a debate on the idea of law, a way was opened to a phenomenological research on law. This research has a link with a similar inquiry which was later started in other European countries. The emphasis placed by idealists on the true nature of legal activity and by Del Vecchio on the basic intersubjective structure of law was instrumental in the establishment of this link.

In the above described vigorous revival of legal philosophy, what was the place of the notion of natural law, a notion which during so many centuries had been the peculiar subject matter of legal philosophy? If legal systems had wholly discarded it, philosophy was divided on the matter. Neo-Hegelians were sharply opposed to it. Though deeply diverging as far as political ideas were concerned, Croce and Gentile did agree in denying the very possibility of natural law. Their radical historicism could not accommodate it, since the activity of the spirit was considered by them to have its only norm and measure in itself, in a will that is always new or self-renewing, in a will embodied in history. Though actually a liberal, Croce did not hesitate to ridicule the "deceiving seductions" of fundamental human rights. Gentile, a protagonist of the "ethical State", could not accept limits to the State will, which he considered as the historical expression of the concrete moral will.

The Italian neo-Kantianism followed another path. It led progressively to the resumption of the conception of natural law, along its specific lines, of course. Having considered the intersubjective relation as the basic legal structure, the human person became for neo-Kantianism a "logical" presupposition of the law, since without it intersubjective relations, and consequently law, would not even be conceivable. On the other hand, the Kantian principle that a human person must always be considered as an end and never as a means established a deontological limit to positive law.

In this way, Del Vecchio's neo-Kantianism became somehow connected with the classical natural-law tradition, which was mainly represented by exponents of neo-Thomism. These had a point to their advantage: the positivist and historicist polemics were directed against natural law as a complete system, organically derived from "natural" reason and independent of history. Taking up Aquinas' ideas, neo-Thomists contended that, whilst such a conception could well fit into the secular iusnaturalism, it could not be associated with the classic natural-law tradition. This tradition had indeed never elaborated a "natural" code of law but had only formulated a limited number of "natural" legal *principles*, which admitted of different and evolutive applications. This more flexible conception of natural law allowed an opening of a historical perspective, which subsequently gained greatly in importance.

And yet, these iusnaturalist doctrines did not succeed in supplying a satisfactory explanation of a positive law as contrasted with natural law: Could the former be a mere error? Or could it be the result of an evil will? A too strictly rationalistic and conceptualistic presentation of natural law did not permit natural lawyers to acquire an adequate understanding of the complex relation between law and human existence.

The moral crisis brought about by totalitarian governments and by the Second World War produced a widespread revival of the natural-law doctrine in Italy as elsewhere. The paramount value of State laws and State sovereignty, and the consequent duty of the lawyer and the citizen to limit themselves to the strict application of, and obedience to, the positive norms, did not appear any longer as wholly acceptable. The new republican Constitution of Italy (1948) reflected the wide-spread recognition of a superior law limiting the will of the State. The new Constitution established a hierarchical order of legal norms and formulated, as a basis of this order, a set of individual and social rights and duties, supposed to be inviolable by positive legislation and protected by the constitutional control exercised by the Supreme Court. Yet, once the fundamental iusnaturalist requirement of these rights and duties was fully "positivised", the influence of the natural-law doctrine became gradually weaker, and the Italian legal philosophy came to face other problems.

III

The first element to be taken into account in the present Italian situation

is the re-emergence of legal positivism. The totalitarian system had produced a crisis of the basic positivist dogma according to which State law is to be considered as paramount and indisputable. But now, with a rigid constitution incorporating human rights and limiting the power of State authorities through a system of checks and balances, the positive norms could again be regarded with trust.

Under the influence of Kelsen's normativism (whose eminent Italian exponent is Norberto Bobbio), the post-war legal positivism has aimed above all at the determination of the nature and function of the so-called general theory of law, keystone of the different particular branches of legal science. To this general theory is assigned the purpose of defining, on the empirical basis of legal data, the formal fundamental legal categories (norm, order, sanction, organ, etc.) in order to elaborate the concept of law. The general theory thus purports to provide the practical lawyer with rationally and logically refined instruments required for his daily work.

It may be thought that the philosopher has nothing to object to such a general legal *science*, which rests, in fact, on the typically philosophical distinction and separation between the Is (in a factual and not in an ontological sense) and the Ought (in a historical-ideological sense), between facts and values, between law and justice. This distinction has a considerable bearing on legal philosophy. The general theory makes use of such a distinction in order to justify its own abstention from every value judgment on positive law and from every proposal of a *ius condendum*. It confines itself to the systemization of the law as it is (*ius conditum*). This means denying to legal philosophy every cognitive import; its only task would be the axiological criticism of the enacted law, that is, concern with problems of justice. In this neo-positivistic view, these problems could be considered only in an ideological perspective, since according to it the values have a subjective, emotive, and relative character, and are therefore to be postulated as a matter of free ideological option.

Apart from the doubt raised about the emotive and subjective character of values, it has been objected to the above thesis that a legal philosophy reduced to an ideology of justice could not be distinguished from a political philosophy (or ideology). After all, that was the very opinion held by thinkers of the Italian Enlightenment, including Beccaria. Legal "philosophy" was considered by them as a "science of legislation" (as Filangieri, forerunning Bentham, called it), as a political project of *ius condendum*.

And yet, hardly ever did the positive legal philosophy try to elaborate a concrete and detailed ideology of justice. Probably the legal positivists were restrained by their basic historicism, which made them afraid of being accused of that abstractness with which historicism always reproached the eighteenth century rationalistic projects. So it happened that the neo-positivist philosophers, though asserting in theory the ideological role of legal philosophy, did turn in fact to a formal analysis of the theories of justice and, more generally, to the study of legal logic and to the analysis of the language of lawyers.

In this change of actual interests, it is easy to see a meaningful evolution from the pure and strict legal positivism to a symbiosis of legal positivism with the emotive doctrine of values and with analytical philosophy. We are therefore facing a typically philosophical and not merely scientific position, whose basic elements are: (*a*) the empirical and formal knowledge of law considered to pertain exclusively to legal science whose particular branches stem from its general theory; and (*b*) the analysis of the language of lawyers, the elaboration of a legal meta-language, and the logic of normative propositions considered to pertain to the domain of legal philosophy. Such a position is characterised by a clear and consistent formalistic line: whether or not law is scientifically or philosophically discussed, it is always considered in a strictly formal perspective.

However, this trend of thought lays itself open to serious criticism. When it asserts that the knowledge of law cannot go beyond the factuality of the enacted norms, it forgets that at their root there lies the incontestable reality of human activity expressed in the mode of law, which has to be analysed and understood. Neo-Hegelians and neo-Kantians had fully realized the necessity of this deeper study of law, which cannot be carried out by a general theory of law or by legal logic or by an ideological project of *ius condendum*. This is a task that exclusively pertains to the hermeneutics of human experience and existence, namely to philosophy.

This philosophical interest in the problem of law has been renewed by the so-called school of legal experience, which asserted itself, since the thirties, under the leading influence of Giuseppe Capograssi. Endowed with a deep historical sensitivity and connected with Vico's ideas, this trend considers law in its broader meaning as a "sign and symptom" of the human condition, as a permanent structure of existential activity in its different historical manifestations. Law is so rediscovered as an expression and a witness of history; its essentially human quality is an active experience which realises itself in creating those norms and institutions that are required by the needs of living relations and hence of life itself.

Human life indeed is not a natural flow impelled by a "vital energy" and inexorably determined but is a continuous commitment requiring discipline and regularity and therefore expressing itself *per formas*. So legal "forms" cannot be cut off from life and be considered merely in their abstract paradigms. A purely formal (and therefore formalistic) systematization of legal norms and institutions could not allow their full understanding since it disregards the historical roots and reasons of their existence in *that* form.

The conceptual and formal interpretation of law must cede its place to, and be integrated into, a comprehensive analysis of legal phenomena which would display their existential meaning. In this way, the most significant aspect of the neo-Hegelian doctrine, namely the attention directed to legal *activity*, is taken up again. On the other hand, the school of legal experience does not divorce legal philosophy from legal science; it does not overlook its relevance as neo-Hegelianism has done. By restoring to law its

essential feature of human phenomenon, the legal experience school restores a continuity of research between lawyers and legal philosophers. This offers the best opportunities for a full understanding of law.

On the other hand, such a phenomenological inquiry is not an end in itself. Amongst the historical variety of positive norms, legal phenomenology discovers the permanence not so much of concrete legal rules (*e.g.* the classic "natural laws") but rather the legal form in which they find their expression. An element too often forgotten (and sometimes rejected) by "pure" philosophers is so added to our knowledge of the human existential condition.

In this perspective, the analysis may even be pushed further, in order to grasp the whole structure of human existence. The gap between the basic ontological structure of man which marks him out as a relational being and the different and often clashing existential possibilities of action—the gap between the ontological and the ontic levels, seems to require and therefore to justify the presence of law. But such a research—which the author of this paper is presently pursuing—is still far from being accomplished.

It is obviously impossible to state briefly the conclusions that may be drawn from this rapid survey of Italian legal philosophy. Anyhow, it may be noted that formalism is more and more subjected to criticism even by legal practitioners. Under the impact of the technological civilisation, lawyers are no longer content with the mere exegesis of enacted norms. They claim at least some responsibility of interpreting, and translating into norms, the needs of today's society. It is not for the present writer to judge the soundness of such a claim. But it may be asserted that a philosophy of legal experience is equal to this claim, since it offers a realistic approach to the understanding of law in the full frame of existence.