7.
ETHICS IN THE FIELD OF LAW
Some reflections

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7.1. Interior adhesion to norms

Since the dawn of the Enlightenment and the affirmation of German idealism, the legal universe has been inhabited by a plurality of intermediate instances between the citizen (subject) and the State (sovereign), permitting the law to adapt itself and be flexible enough to identify the rights and wrongs of a particular case, trying to identify in the concrete resolution of single conflicts the general principles raised by legal systems to the status of norm *erga omnes*. This complex movement, which had also ensured harmony between the particularity of the communes and the power, *in universum*, of the Empire, by passing from the private profile to the public law one, not only enabled the great season of European common law to flourish, but also resulted in an effort to adapt the formal principle of the obligation to respect norms to the need for the highest possible degree of inner adhesion to them. Indeed, this is the lesson generally shared with the philosophy and sociology of law, whereby the efficiency of a legal system depends to a high degree on the interiorisation of its precepts by the subjects to which it addresses itself (Weber, 1922).

In this context, canon law had supplied European juridical culture with support of primary importance, if not with a role model. In the nomopoietic projection of a shared religious experience, a declared and convinced adhesion to a system of values placed at a higher level in the metajuridical sphere becomes the prerequisite for the interiorisation and the observation of behaviours guided or influenced by the cogency of the law (Weber, 1922; Durkheim, 1893).

So law takes on an importance only insofar as it mirrors another, spiritual reality, without which it can but reveal the flimsiness and aridity of its architectures. This is the awareness that leads Cino of Pistoia, principal figure of that alliance between poetry and law which made medieval juridical science so great, to confess that human laws are all «useless and vain, without yours that is inscribed in the heart» (Zaccagnini, 1915, p. 13), almost as if he were confiding directly with the divinity. If this so, it means that there is a hidden force which supports

and legitimizes adherence to the norm: this derives not from the balancing of interests sanctioned by a command, but from the conviction that this order is justice borne by a higher principal.

So, since the inception of canon law there has a close tie between morality and law, without, what is still more admirable, any loss of the purely technical content of *jus Ecclesiae* or blurring of the distinctions between these two aspects. Indeed, thanks to a kind of retaliation law, it is actually the most distinguished scholars of canon law that point to this pole star: that is to say the peremptory and absolutely lay distinction between the inner and the external tribunal, an end achieved as early as the XII century thanks to the work of Graziano (Caputo, 1987).

It is in inner tribunal that relations between God and man are regulated, that infra-subjective conflicts addressing the moral sphere are rooted and resolved; it is in the external tribunal that strictly juridical solutions are found, capable of sacrificing one interest to another and inter-subjective conflicts are resolved. It is in this distinction that Western history grounds its ability to generate a high degree of independence from the dominion of the sacred, whilst at the same time maintaining a bond between the moral and the legal profile of behaviour, guided by the intimate conviction of belonging to two cities, both God's and man's.

7.2. Law and Justice

Throughout the long centuries of Western Christianity, using the law to obtain justice has been a prerequisite and acquired conviction of all legal systems. In the secular sphere, the purpose represented by the temporal *supremum bonum* temporale of the citizen contained that sort of divine spark to which San Tommaso, following in the footsteps of Aristotle, referred when speaking of man as a social animal: as far as the Church was concerned, the law was always one level below the commandment of charity in the resolution of conflicts within the community of believers.

Anway, it was clear that the sphere of law was not self-referential but that it was open to definition only in relation to the values of the metajuridical world of Justice.

Traditionally, the Law does not say exactly what justice is. As far as the Church is concerned, the source of justice is God. This guarantees an almost immutable concept of distinction between just and unjust, whereas the state has a political idea of justice, which by its very nature is changeable. Over a long period of time, this has certainly not prevented many concurrent aspects, interacting and coinciding and to no small degree with criteria proclaimed by the Catholic Church, from forging a secular, albeit changeable, idea of justice according to the religion and the culture with which European peoples gradually came into contact.

Thus the relationship between morality and law became the keystone of the entire system, acting as a powerful guarantee in accrediting the inner adhesion of each subject of the law to the norms even prior to obliging them to submit to the law, thus constituting the basis for a common idea of justice (Senn, 1927).

Within this framework, the previous references to the Enlightenment and to German idealism imply two principles of subversion of the pre-existing order: the idea, firstly, of founding the law on a principle of quality rather than on the idea of diversity which had thus far nourished not only *jus Ecclesiae* but the entire social order; and the conviction, secondly, whereby subjectivity is identified with the State – just as being is identified with thought – are the propositions destined to place the relationship between morality and law in a greatly different light (Fassò, 1970).

The idea of equality gives rise to a general and abstract legal system: in other words, a code; the idealistic conception of the absolute State fosters the idea that there can be no intermediary between citizen and State, the law becoming the command which alone can legitimately demand obedience from everyone without distinction.

Within this evolutionary line, the Law ends up by separating from its metajuridical ground of reference to become an abstract paradigm, no longer the embodiment of anthropology of reference in normative terms.

An inner adhesion to the norm and coincidence of moral and juridical profiles no longer appear necessary, since these are substituted by the power that the State exercises in having the law respected which derives from itself alone.

Justice in its turn loses is status as a value superordinated to the legal system, to become invoked as a value within the system. It is politics which, from case to case, decides what it is right to pursue through the emanation of norms. Not infrequently do the inspirational principles of the legal system end up coinciding with the idea of justice. One need only recall how the idea of legal equality is still often naively confused with the idea of justice.

7.3. Law as science and science as power

In the afore-mentioned transition, which draws on the final outcomes of secularization, the State, until the XVIII century, ends up by embodying the metaphysical idea of an absolute which was next to the throne of God. The advent of totalitarianism is announced, in the juridical universe, by the affirmation of that pure theory of law, albeit influenced originally by Kantian thought, which culminated in the work of Hans Kelsen (1960). Here the State justifies its own existence and the legal system which emanates from this has the reflected force to impose itself, without deriving its own originality from any other body. In this dogmatic purity, where one breathes so rarified an air that it seems to be formalin, law tends to be isolated from history, on the one hand, and, on the other, from any horizon of values, defining itself as a science capable of organically structuring the commands of the State and of dispensing to the citizens, subjects of its empire, both its own sanctions and the services it delivers and controls.

It is in this kind of laboratory culture, where dogmatic construction, rather than juridical construction, is the real driving force, that law is not only com-

pletely separated from morality (to such a degree that those Nazis responsible for mass extermination could say «we only obeyed orders») but also gradually becomes self-referential. The law is transormed from being an essential for seeking and realizing justice to being an end in itself, preoccupied in an almost obsessive manner with its own foundations (Kelsen, 1960).

Between the nineteenth and twentieth centuries, juridical knowledge and culture become a science to all effects, articulated in branches and subdivided into specializations which become increasingly detailed and exacting in an attempt to include an ever more urgent present in a network of largely historical institutions. This science becomes indispensable to the construction of the State, beginning with the definition of that theory of the sources that lends it legitimacy and strength. The power of law thus becomes «constitutive» and then «constitutional», and generally entrusts to the timeless words engraved in the Preamble of a Constitution that moral dimension by which the theory if its sources will coherently be expected to inspire when emanating norms. As the penetrating thinker Niklas Luhmann believes (Luhmann, 1981), the adaptation of the legal structure to an evolving reality thus reveals, the vocation of the law to favour the evolution of democratic power, which is power nevertheless: this fact characterises the profile of a science which is no longer functional to the idea of justice but to the need to guarantee its own privileged position in the construction of new equilibrium, at an ever increasing pace. Until just a few decades ago, the legal sphere was the emanation of a powerful scientific idea which has now been definitively dismissed both in general terms, by philosophy, and in specific terms by its ethical partitions. This science of law, aware of its own strength, was thus able to dialogue on equal ground with politics, which, concerning itself with both, continued to draw upon the principle of responsibility grounded in the idea of imputability which despite a long process of emancipation underpins the conception of *actio humana* elaborated by San Tommaso [1].

7.4. Globalism of techno-science and fragmentation of the juridical universe

The acceleration undergone by our civilization after the Second World War has definitively brought to the forefront a new role of the techno-sciences, whose evolution has been determined by the needs of the world of mass production. Today, directives for investment in research come from industrial conglomerates; large enterprises, as final users, are now able to determine objectives which are useful for a science which – to quote Heidegger (1954, 1976) – is more accustomed to a calculative thought that a thinking thought. This movement is consolidated thanks to two decisive forces: one the one hand the power of the information network globalizes all contributions to the progress of know-

[1] San Tommaso, *Summa Theologica*, 1-2, q. 1, a. 1 ss.

ledge and at the same time pulverizes traditional market boundaries. On the other hand invested capital becomes increasingly anonymous and widespread, so fragmented as to make it impossible to trace its ownership. The acceleration of the system due to these strongly interdependent variables determines an upheaval of the previous situation, in which politics (and law) mapped out the direction for economics, technology and science. As far as the above-described trend is concerned, politics reveals all its limits and its incapacity to place itself at the head of what was once called a «system», which also tends increasingly to become a planetary and technical government of resources. This is illustrated by the present political misadventures of a Europe that is no longer able to face spontaneous change. Indeed, old-style politics proves to be totally inessential, if not obtrusive; a burden to be cast off, left to plummet into its sea of corruption and iniquity. The law, in this instance, reveals a double fragility: the increasingly evident crisis of the State is inevitably reflected in the gradual opalescence of the legal systems to which they give rise (Ferrajoli, 1997; Cassese, 2002); then the affirmation of supranational sources of production norms raises questions of connection (not to mention sovereignty and jurisdiction) which are far from being resolved (Cassese, 2006; Cerrutti, 2010). The fragmentation of the juridical universe seems to be further increased by the aforementioned dissociation of law and morality, exposing people-citizens to an undifferentiated opportunity for choice between behavioral models, in such a way as to integrate an ethical relativism which is far from including the profile of liberty; or at least the values of that liberty which the Western tradition had consigned into our hands (Ruffini, 1992).

Life and death, the phases of sexual and family life, under a private profile; the assumption of responsibility regarding conduct which affects the public dimension (for example the environment); the financial sphere of the universe of communications seem to be increasingly evasive terms, difficult to identify and demarcate from point of view of moral and juridical imputability. By dislocating decisional processes and collocating them in economic and technological centres, the post-industrial era in fact subtract them from the control of politics which, on the other hand, is no longer able to emanate legislation with a shared significance regarding areas which once fell unequivocably under its public jurisdiction: above all, to name just one example, that of the family and the beginning and end of life.

7.5. Progressive distance between inner and external tribunal: the spectacularisation of ethics and the crisis of the law

As described above, the separation between morality and law becomes not only total but necessitated. If the state (States) refuse to establish reasonable norms in spheres which it tends to «deregulate», simply leaving them for private individuals to resolve (in the field of criminal law, for example, the gradual reclassification of administrative offences or damages under private law, as well as a

whole series of behaviours which are still classified as crimes against the person or against property), how is it possible for citiziens/people to interiorize in the inner tribunal the contents of a norm belonging to the external tribunal which by definition renounces a moral grounding of its own? The distance between inner and external tribunal becomes inevitable, indeed, spectacular. The lack of coherence between conscience and behaviour becomes a kind of constant in both private and public daily life. Indeed, the representation in the mass media of a sort of comparative «market of moralities» becomes one of the favourite ingredients of *talk shows* and far-teached *trash* reviews which tend to invade and annihilate both the sphere of ethics and aesthetics, which are closely linked. And so the total disarticulation of interior universe – including (above all) the most mysterious layer represented by sexuality and its manifestations and, more generally, by that affective and sentimental intimacy that should remain inviolate – is on the other hand represented as a prime conquest of human self-determination. In this cannibalization of human sentiments which by virtue of its very obscenity is broadcast by the media circus, the ancient instruments of a culture which was aware of the dialectic between guilt and redemption return to fashion in a completely fashion.

This is the case of that emblematic place which the catholic culture named as the «confessional» and which represented, even in its physicality, the distinction between inner and external tribunal. It is certainly no coincidence that if the competitors in the well-known programme «Big Brother» ritually repair to the «confessional» to communicate, without being seen by the other participants, their own instincts, guilt, passions and pettiness, to a wide, anonymous public which will not be able to reconcile them with themselves, as traditionally the priest did in the shadowy discretion of a hassock. And so it is normal that there are some people, especially politicians, who mistake the law court for a confessional and on the other hand, begging pardon of the citizens and voters for possible failings of a moral order, as occurred in the Marrazzo case, or, viceversa, that they declassify alleged crime to mere morally reprehensible facts, as has occurred during investigations or procedures against men in public positions for sexual abuse or involvement of minors in affairs from which they should, be law, be extraneous. Such a spectacularisation of ethics can but be a prelude to its final liquidation; but the confusion between inner and external tribunal represented on a daily basis would seem to repropose, in another guise, an ancient barbarism, which will soon prevent us from distinguishing between one behaviour and another, judge a conduct as right or unjust, identify and defend, within an action or an omission, a value to be promoted or lack thereof to be censured. If the spectacularisation of ethics is but the prelude to its end, law must be in a state of deep crisis, cast loose from a metajuridical horizon and at the same time deprived of any principle of responsibility or the strength of which the nation state was interpreter until recently (Barbera, 2007).

7.6. Need for new syntheses

It is highly unlikely that there will be a return to the past, a sort of realignment between ethics and law: almost as if the reference to common metajuridical norms were a fact depending on an editorial technicality or, still less, on an act of faith in an unlikely destiny rather than the mature and conscious fruit of a culture – the Western one – which has been completely derailed from the tracks it has followed for more than two thousand years and which has constructed a picture of civilisation today, in its final dusk (Galimberti, 1999). In the meantime this has not been definitively substituted by the civilisation of technology, whose marvels we are aware of but not of the ethical implications for human lives. Hence we are wading through a largely unsounded deeps, where we glimpse and experience elements of deconstruction and crisis rather than proactive and constructive ones.

What we can certainly avoid is the application of old schemes to new realities, thus running the risk of employing obsolete tools which are now too distant from our own culture of origin. However, we can reflect upon and make decisions about some discriminators to which we intend to apply some reasoning in the future.

For example we might begin to understand whether or not in the new world diversity is a positive value to be sacrificed on the altar of a probably inevitable standardization, if dragged in the wake of a violent and thoughtless globalisation (Gius, 2004). If human government becomes global and supranational, norms and commands will no longer reflect their origins as metajuridical principles on a higher plane, but they will be nurtured by a mere calculation of convenience marketed as the fruit of ethical choices by the spectacularisation put on display by the media circus. If, on the other hand, the approach to a new world is capable of taking with it the wealth of our diversities – which with their narrations have been able to make sense of life – creating an ethical frame of reference with the associated and consequent creative capacity to draw from then those juridical universes known as legal systems – the orientation of our reasoning will follow other pole stars.

The principal challenge to be put to the test is in fact legislation on the origin and the end of life, the practice of sexuality and marriage: that is to say, those area where symbolic meanings become most relevant and which ambrace a mystery which makes up each of us: intrinsically diverse and not in the least equal to anyone else before the law.

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