

FROM LEGAL CONSTRAINT TO LEGAL OBLIGATION

di

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Abstract:

L'articolo di J. Frivaldszky affronta il delicato problema del rapporto fra diritto e forza. Lo fa anzitutto in riferimento alle teorie positivistiche di Jhering e Kelsen che, seppur in modo differente, fanno dipendere i diritti soggettivi dalla loro previsione normativa e quindi dalla possibilità di essere fatti valere con la forza. Esamina poi le teorie di Benjamin, Vattimo e Derrida, per i quali il diritto «non è fondato sulla giustizia, ma sulla forza». Prende in considerazione infine il pensiero giusnaturalistico di Cotta che rovescia quest'ultima soluzione in favore di un diritto che trae «la propria giustificazione dall'oggettiva giustizia dei rapporti intersoggettivi».

It seems that according to Jhering, litigation rather than obedience to law is the *ordinary* way of legal efficacy (just as Kelsen, otherwise a critic of Jhering, writes that subjective rights exist only through the right of action, guaranteed by objective law). The parties, Jhering assumes, are not willing to provide the right that is due to the Other, and therefore law can be effective in private relations only by way of *enforcement* or rather *coercion through litigation*. In the absence of coercion, *violence* and lawlessness would prevail, as people would try to enforce their unlawful interests – i.e. those not protected by law – in unlawful ways. According to Jhering's conception, however, the parties – due to their egoism – cannot really know what the due right of the Other is, nor do they want to attribute it to him or her, since everyone seeks to promote his or her own interest. It is only the fear from litigation that may force them to obey the law from themselves.¹ In this perspective, subjective rights are *constantly* violated, and due to their *existence as claims*, their *obligatory*, normative character becomes manifest only if they are *violated*. Thus, enforcement through litigation becomes the regular way of legal efficacy. This new conception, not very widespread before, became dominant in 20th-century private law. It may be worth noting that in the classical Greek view, it was better to suffer than to commit injustice.²

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¹ RUDOLF VON JHERING: *Der Kampf um's Recht*. Frankfurt am Main - Berlin: Propyläen Verlag, 1992. 109-110.

² FRANCESCO D'AGOSTINO: *Il diritto come problema teologico*. Torino: G. Giappichelli Editore, 1995. 63. Cfr. „It bids us remember benefits rather than injuries, and benefits received rather than benefits conferred; to be patient when we are wronged;” ARISTOTLE: *Rhetoric*. 1374b. Plato: *Gorgias* 469c.

This altruistic idea attests to an underlying conception of justice as virtue, which implies that justice has to be exerted and indeed searched for through constant and enduring efforts. Jhering, in turn, explicitly departs from this tradition, saying that the first rule is 'not to tolerate injustice' while 'not to commit it' comes second only.³ This conception, however, may hide the danger that obsessed with the self-interested enforcement of rights, the one focusing excessively on his or her own rights may violate the right of the other.

According to Kelsen, a subjective right in an individual sense (i.e. as the 'individualisation' of the legal norm) exists only if the objective law grants the right of action for the case of injury – if the obligation provided by objective law is not fulfilled. In this case, legal consequence as sanction – the essential element of all kinds of law *qua* 'order of constraint' – is bound to the action of the holder of the right, to the declaration of his or her intent.⁴ Thus, the subjective right appears in Kelsen's 'pure theory of law' only when violated, or rather only in the form of an *action* allowed by objective law, through the declaration of the will to bring the case to the court. This is how the *'plaintiff puts in motion the coercive machinery of law'*⁵ – to use the words of Kelsen –, by initiating the legal process, which is to result in a judgement containing an 'individual norm', typically a sanction.⁶ In a somewhat similar vein, Jhering thinks that the subjective right is a 'qualified' interest protected by state law, which becomes a right by virtue of its being protected by objective law. Yet in order to become effective, it also has to be enforced through a process. Moreover, according to Jhering, it is not so much legal protection by the state that makes an interest become a right, but its actual enforcement through litigation.

While Kelsen's 'pure' theory of law suggests that subjective rights are made perceptible through the actual use of the possibility to make claims based on objective law, i.e. making actions which eventually lead to the imposing of sanction, for Jhering it is the interests protected by the law and enforced through litigation that qualify as real rights. Kelsen's criticism on Jhering notwithstanding, one may note that his conception hardly differs from that developed by Jhering in his celebrated *The Struggle for Law*. The only difference is that *behind* the aim and indeed value of the righteousness and lawfulness enforced through litigation, Jhering seems to suggest, there are the interests protected by law *in a right way*. Moreover, in a historical perspective, he thinks that certain 'oppressed rights' have to be enforced even *against* positive law. Thus, his conception of subjective right includes some kind of an – ambivalent – material concept of law.

³ JHERING (1992) op. cit. 109.

⁴ HANS KELSEN: *Teoria generale del diritto e dello Stato*. Etas, 2000. 82-83.

⁵ „*In so doing the plaintiff puts in motion the coercive machinery of law.*” HANS KELSEN: *General Theory of Law and State*. Union, New Jersey: The Lawbook Exchange, 1999. 82.

⁶ KELSEN (1999) op. cit. 87.

In his view, the interest protected by the law and enforced through litigation is the guarantee of the integrity and the rule of law, while lack of enforcement contributes to the rule of violence and lawlessness. Yet the notion of fighting for interests 'not yet' protected by law, i.e. for 'presumed rights', implies a moralising political understanding of 'rights'. This may be due to the fact that Jhering did not formulate or develop a legal philosophy of rights. As Kelsen shows, such a conception of subjective rights preceding objective law has a political-ideological character.

Jhering focuses on the 'protection by law', which leads to the consequence that any interest can be protected as a subjective right by objective law, independently of its 'subjective' or 'legal' nature in a substantive sense. For an interest to qualify as subjective right or to be denied this, i.e. to provide or deny legal protection of an interest, whatever its actual content, the only necessary condition is the political intent, i.e. parliamentary majority.

Yet from this perspective, subjective rights can be created not only through new legislation, but also by way of a creative interpretation of law. In the 'struggle for rights', even interests of non-human beings, claimed to be rights, can gain protection through test suits. It seems that, sociologically speaking, the *actio* has now become a conceptual element of subjective right, and whatever interest is protected and enforced by law, is considered subjective right. This conception, however, may be used to obstruct valid legislation as well. Given all this, it is small wonder that Derrida associates – following Walter Benjamin – (positive) law with coercion as opposed to justice,⁷ while his comrades of the *Critical Legal Studies* make use of the possibility to make law through political litigation. This situation is partly due to the fact that Jhering, who has had a great influence in the United States, focused on objective law as protected and enforced by the state rather than the philosophical examination of subjective rights and legal interests, while he referred the definition and protection of interests to the domain of political action. The 'sense of law' (*Rechtsgefühl*), which occurs so often in *The Struggle for Law*, is not only the lawyers' capability of determining what is due to each of the parties, but it also has a strong moral and political-ideological charge. The content of this can hardly be defined in legal terms any more, and it tends to escape the lawyers' competence, too.

In the positivist theory of Jhering,⁸ *violence* does not withdraw after having brought about the law, but remains in the concentrated form of *legal constraint*,⁹ sometimes even coming to the fore and overshadowing law as its correlate.

⁷ JACQUES DERRIDA: *Forza di legge*. Il „fondamento mistico dell'autorità". Torino: Bollati Boringhieri, 2003. (*Force de loi*. Le "Fondement mystique de l'autorité", Paris: Galilée, 1994.)

⁸ GUIDO FASSÒ: *Storia della filosofia del diritto*. III, Ottocento e Novecento. Roma-Bari: Editori Laterza, 2007. 192.

⁹ RUDOLPH VON JHERING: *Der Zweck im Recht I*, Leipzig: Breitkopf & Härtel, 1884. 246.

The relation between constraint and law does not correspond to the contemporary conception of the rule of law (*Herrschaft des Rechts*), in which legal constraint/violence (*Gewalt*) accompanies law as its correlate. Quite on the contrary, in the conception of 'law as the politics of constraint' (*das Recht als Politik der Gewalt*) it is the law that accompanies constraint, with the latter retaining its position – Jhering writes.¹⁰ Sometimes it happens even at the present stage of legal development, he adds, that by revolting against valid law, violence creates new law.¹¹ Yet as the criticism of Derrida in his *Force of Law* as well as his – albeit unsuccessful – attempts to contrast and replace law understood as violence with justice have shown that attributing such weight to constraint in law can mislead legal thinking, in terms of both the legitimation and ideological critique of law as formulated in this paradigm. It is not direct 'violence' but *legal constraint*¹² which is the necessary element of positive law, whereas the *normativity* of legal rules is based on legal *validity* rather than constraint.¹³ Jhering does not, however, distinguish consequently between 'violence' and 'constraint'¹⁴ – this seems deliberate –, which shifts the element of efficiency through constraint to the domain of legal validity. Therefore, if someone thinks the norms enforced are substantially unjust, he or she can shout 'violence' and fight against the law currently in force in the conscience of being 'right'.

Today, conceptions associating law with violence seem to become increasingly popular. Dating back to the age of Rudolf von Jhering,¹⁵ they experience a real renaissance in the wake of Walter Benjamin,¹⁶ in the works of authors such as Jacques Derrida¹⁷ or Gianni Vattimo.¹⁸

Following Walter Benjamin – as well as Marx and Nietzsche –, Vattimo and Derrida argue that law is not *founded* on justice,¹⁹ as it originates from violence. Law is the codification of the violence of an original oppressive relation. By its 'force', i.e. constraint, law enforces, maintains and reproduces this relation.

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¹⁰ JHERING (1884) op. cit. 249-250.

¹¹ JHERING (1884) op. cit. 250.

¹² Cfr. SIMONE REGAZZONI: *La decostruzione del politico*. Undici tesi su Derrida. Genova: Il melangolo, 2006. 365-366.

¹³ REGINALDO M. PIZZORNI: *Il fondamento etico-religioso del diritto secondo San Tommaso D'Aquino*. Milano: Massimo, 1989. 78.

¹⁴ Cfr. JHERING (1884) op. cit. 253-254.

¹⁵ Cfr. ALBERTO DONATI: *Giusnaturalismo e diritto europeo*, human rights e Grundrechte. Milano: Giuffrè, 2002. 153-155.

¹⁶ WALTER BENJAMIN: Critique of Violence. trans. Edmund Jephcott, eds Marcus Bullock and Michael Jennings, In *Selected Writings* Volume I, Cambridge: Harvard University Press, 1999.

¹⁷ DERRIDA (1994) op. cit.

¹⁸ GIANNI VATTIMO: Fare giustizia del diritto. In JACQUES DERRIDA-GIANNI VATTIMO (a cura di): *Diritto, giustizia e interpretazione*. Roma - Bari: Laterza, 1998. 286-290.

¹⁹ VATTIMO (1998) op. cit. 285. Cfr. MARIO BARCELLONA: *Critica del nichilismo giuridico*. Torino: G. Giappichelli Editore, 2006. 102-103. Cfr. GUGLIELMO SINISCALCHI: *Normalità di norme*. Bari: Cacucci Editore, 2007. 80-81.

Deconstruction, as a means of philosophical-political intervention, means here deconstructing the 'violent hierarchies' of the classical 'oppositions' of legal philosophy – based on metaphysics – or the reversal of their hierarchy.²⁰ Those exerting a deconstructive justice seek to critically deconstruct and reverse the allegedly 'violent' oppositions underlying to institutions and relations considered by classical legal philosophy as based on natural law. From a postmodernist perspective, these relations appear as unjust and their reversal should happen through a deconstructive interpretation of law, turning this latter into *justice*.²¹ In the politico-legal practice of postmodernism, this may mean e.g. the use of political litigation in order to achieve these aims. Yet making law political in the name of deconstructive justice may also raise the question of the *legal* justification of such a conception of law and justice. This question, however, cannot be properly answered in terms of legal philosophy by a deconstructive reading: its answer will be one of moral or political philosophy at the best. In the case of postmodernist authors, an argument based on metaphysics or natural law is out of question. In Derrida's works, however, deconstruction as justice has a moral dimension open to the Other, and this opens the way towards justice as a relation of recognition, in which the existence of the Other invites to exert justice.²² One may also note that the 'moral recognition of the Other'²³ is a central element of Michel Rosenfeld's idiosyncratic 'deconstructionist' philosophy of law, too.

Sergio Cotta criticises philosophical views identifying law and violence – e.g. those of Walter Benjamin or Sartre²⁴ –, and in several of his works he emphasises that from the perspective of legal philosophy, *constraint* supporting law is not violence,²⁵ as the law gains its legal *normativity* – which is granted by the power of constraint as a final recourse – and therefore its *justification* from the (objective) justice of interpersonal relations.²⁶ Cotta underlines that it is the 'normativity' of the legal rule, resulting from its validity, rather than its 'coercive power', which is due to its correspondence to justice. Thus, normativity of legal rules is provided by the intersubjective principles of justice.

Unlike Ricoeur²⁷, Derrida and Vattimo do not make use of the possibilities provided by the foremost principle of justice – and of law: the Golden Rule.

²⁰ JACQUES DERRIDA: *Positions*. Paris: Minuit, 1972. 56-67.

²¹ Cfr. JACQUES DERRIDA: *Diritto alla giustizia*. In JACQUES DERRIDA-GIANNI VATTIMO (a cura di) op. cit. 9-11; ALBERTO ANDRONICO: *La decostruzione come metodo*, Riflessi di Derrida nella teoria del diritto. Milano: Giuffrè, 2002. 5.

²² Cfr. DERRIDA (1998) op. cit. 26.

²³ MICHEL ROSENFELD: *Interpretazioni, il diritto fra etica e politica*. Bologna: Il Mulino, 2000. (*Just Interpretations, Law between Ethics and Politics*. Berkeley: University of California Press, 1998.) 45-48.

²⁴ SERGIO COTTA: *Diritto, persona, mondo umano*. Torino: G. Giappichelli Editore, 1989. 85. 88-92.

²⁵ COTTA (1989) op. cit. 83-93.

²⁶ SERGIO COTTA: *Giustificazione e obbligatorietà delle norme*. Milano: Giuffrè Editore, 1981. 152.

²⁷ PAUL RICOEUR: *Amore e giustizia*. Brescia: Morcelliana, 2000. 36-45.

It does not necessarily lead to analysing Kant, but it certainly opens the way towards a legal, i.e. *principle*-oriented ethics of intersubjectivity. This way, the 'violence' of *law* could be opposed not only to a postmodernist and – in a final analysis – subjective (ethical or political) and relativist conception of justice, but also to the legal relation, with its structural features of justice. In the case of Vattimo, no legal principles seem plausible since they do not refer to any natural or moral order, in which something could be legally (justly) due to someone. Vattimo also dismisses the concept of 'the due of the Other',²⁸ for no one is entitled to anything according to the criteria of justice or 'rightness'. If someone can claim something, or is punished according to the law, it is possible only because the criterion of legality was codified in positive law. This, however, is hardly anything else but efficient violence. What Derrida – who follows here Lévinas – means by justice²⁹ is, in turn, a radically individualising 'norm': its personalness brings it closer to friendship (charity) than to fairness.³⁰ Law, as well as the binding decision made according to it, is understood by Derrida and Vattimo as a closure violently interrupting the discourse of competing *interpretations* of justice.³¹

Considering the insights drawn by Italian legal philosophers (as G. Del Vecchio, S. Cotta³², B. Romano³³, A. Punzi³⁴, F. D'Agostino³⁵, P. Savarese³⁶), we may say that the legal relation is not originally an exclusive/oppressive and therefore violent one. It is, rather, a relation demanding that the Other and his or her rights be entirely and universally recognised. Law, then, gains its legal normativity according to whether it complies with the justice of this fundamental legal relation. A. Giuliani has shown that the inherent logic of legal procedure excludes *violence*,³⁷ and that it is not the *conflict* itself, but only its mere *possibility* which is a structural or archetypal part³⁸ of the legal relation.³⁹

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²⁸ GIANNI VATTIMO: *Nichilismo ed emancipazione*, etica, politica, diritto. Garzanti, 2003. 166.

²⁹ Cfr. DERRIDA (1998) op. cit. 23. 26. 31. 34.

³⁰ ALBERTO ANDRONICO: *La disfunzione del sistema*. Giustizia, alterità e giudizio in Jacques Derrida. Milano: Giuffrè Editore, 2006. 93; CATERINA RESTA: *L'evento dell'altro*. Etica e politica in Jacques Derrida. Torino: Bollati Boringhieri, 2003. 55-56; Cfr. LUIGI LOMBARDI VALLAURI: *Amicizia, carità, diritto*. Milano: Giuffrè Editore, 1974. 134-135.

³¹ BARCELONA op. cit. 215. VATTIMO (2003) op. cit. 171.

³² SERGIO COTTA: *Il diritto nell'esistenza*. Linee di ontogenomologia giuridica. Milano: Giuffrè Editore, 1991.

³³ BRUNO ROMANO: *Il riconoscimento come relazione giuridica fondamentale*. Roma: Bulzoni Editore, 1985; BRUNO ROMANO: *Sull'ortonomia del diritto*. Nove tesi su riconoscimento e diritto. Roma: Bulzoni Editore, 1996.

³⁴ ANTONIO PUNZI: *L'intersoggettività originaria*, La fondazione filosofica del diritto nel primo Fichte. Torino: G. Giappichelli Editore, 2000.

³⁵ FRANCESCO D'AGOSTINO: *Filosofia del diritto*. Torino: G. Giappichelli Editore, 1996.

³⁶ PAOLO SAVARESE: *Il diritto nella relazione*. Torino: G. Giappichelli Editore, 2000.

³⁷ ALESSANDRO GIULIANI: *La controversia*, contributo alla logica giuridica. Pavia: 1966. 158.

³⁸ Cfr. FRANCESCO D'AGOSTINO: *Bia*, violenza e giustizia nella filosofia e nella letteratura della Grecia antica. Milano: Giuffrè Editore, 1983.

³⁹ DOMENICO CORRADINI: *Filosofia del conflitto*. In *Il conflitto*, profili giuridici e politici, atti del XVIII congresso nazionale della società italiana di filosofia giuridica e politica, Anacapri, 4-6 giugno 1992, MAURIZIO BASCIU (a cura di): Milano: Giuffrè Editore, [Quaderni della Rivista Internazionale di Filosofia del Diritto] 1995. 19.

By the very nature of this relation, the conflict remains 'pending', and its actual emergence indicates a *pathological state* of the relation. In such a case, the relation has come to a crisis, yet the problem can be mastered with the help of legal rules, institutions and procedures, as long as it remains within the limits of law.⁴⁰ Law is obligatory *qua* pacifying.⁴¹ There are, to be sure, legal relations brought about by a pathological case, like extra-contractual or criminal liability. Yet these are no regular situations but *exceptions*, Corradini emphasises, as 'people's life is *not* a permanent wrongdoing to others'.⁴² Thus, whoever wants to abstract – falsely – the nature of the legal relation from criminal law, is not going to study its physiology but its pathology, just as Vattimo or Michel Foucault did.⁴³ Criminal law is an inventory of *sanctions*,⁴⁴ the domain of providing for and applying *coercion*. Criminal-law relations are characterised by the fact that they emerge through injuries. Yet if one gives the Other his or her due, or does not take it from him or her, then one will not get into such a relation. By willingly observing the norms and principles which have a *normative* legal power, one will behave in an obviously law-abiding way. As a conclusion, we may say that the normativity of law is not based on constraint, nor is it constraint that makes it efficient.

⁴⁰ CORRADINI op. cit. 20. 22.

⁴¹ D'AGOSTINO (1996) op. cit. 10.

⁴² CORRADINI op. cit. 20.

⁴³ CORRADINI op. cit. 21. VATTIMO (2003) op. cit. 163-171.

⁴⁴ CORRADINI op. cit. 21.