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## Philosophy of Law. Eighth Edition, 1952. By Giorgio Del Vecchio. General Principles of Law. By Giorgio Del Vecchio.

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## BOOK REVIEW

PHILOSOPHY OF LAW. Eighth Edition, 1952. By Giorgio Del Vecchio. Translated by Thomas Owen Martin. Washington: The Catholic University of America Press, 1953. Pp. xxiv, 474.

GENERAL PRINCIPLES OF LAW. By Giorgio Del Vecchio. Translated by Felix Forte. Introduction by Roscoe Pound. Boston: Boston University Press, 1956. Pp. x, 111.

Before entering a discussion on the two books, this reviewer is compelled to confess that the impression that he himself is to blame for the delay in reviewing the first-mentioned book is correct. However, much as he deplores the fact, he was given the chance by such a delay to combine with an evaluation of the *Philosophy of Law* the reading of the *General Principles*. This latter book facilitates and supplements a full understanding of the illustrious author's philosophy of law.

### I

In his volume, *Philosophy of Law*, the author separates a very short "Introduction" and a substantial "History of Philosophy of Law" from a "Systematic Treatise" on the theory of law. The "Treatise" and the "History" each embrace approximately half of the volume. Thus, in treating as large a subject as the history of philosophy of law in two hundred twenty pages it was inevitable that the author had to be rather selective in his treatment of the great thinkers and schools. Modern representatives of legal philosophy except John Stuart Mill and Herbert Spencer are little more than mentioned. The more detailed treatment of the Italians therefore constitutes an exception. Although the substantial part of the "Treatise" deals analytically with the concept of law, and is concerned with the formal approach to law and not with the evaluation of its content, John Austin and his works appear only as names (p. 200). Austin's approach is not directly opposed to the author's.

The treatment of the theory of law is more detailed. In its first section this part of the book deals, if I might mention only the more important topics, with the concept of law, the relations between law and morals, and the concepts of law in the objective sense with respect to subjective rights. In addition, there is a discussion on the sources of law, of society in general and the State in particular, and finally of the relations between Law and State. The second section is devoted to a critical-historical investigation into the origin and evolution of law. It is followed in the last (third) section by an examination of the concept of justice in various theories. These theories are, on the one hand, the skeptical and empirical-historical doctrines which deny an absolute concept of justice and, on

the other hand, their opposites such as the theological ones. A subsection attempts to further our insight into the theory of Utilitarianism. The book concludes with the author's approach to a metaphysical or teleological conception (in contrast to a merely causal conception) of nature, particularly the nature of man. The author believes that such a conception "permits us to perceive and evaluate the most profound and intimate harmonies in the order of reality and in the development of its manifestations." He rejects the idea of determinism since human actions cannot be adjudged as natural phenomena which, as such, baffle any evaluating judgment. In contrast, the idea of liberty is looked upon by the author as the fundamental basis; for "the very law of causality emanates from the consciousness, the absolute primacy of the ego." In other words, man is an "autonomous being," able to perceive and also to evaluate the intimate harmonies in the order of reality.

The Kantian influence upon Del Vecchio's philosophy can be seen particularly also in his theory of law as it is presented in the first section of the "Systematic Treatise." Kant had emphasized the external character of the actions to which law refers. The author admits that law refers only to "actions," but for him the internal side of an action must not be overlooked. This term is used by him to point to the moment of "will"; he means the motives out of which an external action is put into operation. We might ask whether motives are essential to the idea of law as such. In my view, Kant's approach, an approach which in this part of the world coincides with that of Oliver Wendell Holmes, is correct. For Kant, and, perhaps independently of him, for Holmes, motives have significance in the forum of the law only as far as the law takes cognizance of them.

For the author, an ethical principle translates itself in a double order of evaluation, a moral and a legal one. However, this attempt to find a major concept to include both moral and legal rules, lacks convincing argumentation. On the one hand the author adopts the Kantian differentiation between legal and moral norms and, therefore, between legal and moral duties. With regard to the principles of morality the author admits (p. 264) that "the selection of the act to be accomplished and the exclusion of those others (actions) which would be physically possible" is left to the individual alone which means that such selection depends on his own moral evaluation. This power of the individual to choose, so strongly presented by Kant, is called by Del Vecchio the subjective consideration of operation.

On the other hand, if we turn to the legal side, we find that the test for the "incompatibility between action and action" is not an inner, subjective, moral evaluation. It is the objective norms, imposed by others, that are the competent authority which directs an individual's action. These norms are quite independent of the individual's inclination to follow them.

## BOOK REVIEW

But Dr. Del Vecchio looks at both morality and law as emanations of an ethical principle, that is, a system of coherent norms, deduced from that principle. Naturally he cannot deny that there might be a discrepancy between moral and legal duties. He calls such a situation a confusion between different ethical systems. Accordingly, there are two different systems. I do not believe that by calling them by the same name ("ethical") their subordination to one major category can be proven.

However, Del Vecchio's attitude is consistent with his fundamental theory of law. He emphasizes that the "notion of law" is a universal or unitary one which can be understood as a formal concept only. The formal nature of the concept is contrasted to the content. By this approach the content, necessarily being joined always with the form, supplies only "a contingent and accidental element" (p. 252). Consequently, "the content of juridical reality cannot serve as a basis for a differentiation of law." (p. 250) This may explain his rejection of the idea of natural law as a universal; because an ideal law, as in his view natural law is, constitutes, as he says, a system of law which must be placed alongside of other systems of law which exist. (p. 248) Also such an ideal law is a determination of justice whereas, according to the author's doctrine, law as a universal can be only a formal, merely logical, concept which "does not tell us at all what is the meaning of any affirmation of just or unjust." (p. 251) As a result, the significance of law as a "universal" lies in its supplying merely the possibility of evaluation. The evaluation itself can be found only in a particular legal system.

Now we have reached the point at which we can understand why the formal definition of law gave rise to the author's formulation of an ethical principle from which the legal norms as well as the moral norms are deduced. From the standpoint of pure logic little objection can be raised against this doctrine. However, on the one hand the evaluation itself must be interpreted, as we have seen, in terms of each particular legal system. On the other hand, the author himself considers, in Hegelian fashion, a legal system as a product of a continuous development of ideas which, however progressing, operate, with varying contents, differently in various societies.

I fear that such an abstract definition of law would leave the determination of the objectives aimed at by the law-giver completely to the latter. Neither Kant's universal of law, based on freedom, nor Stammler's "just law" or Bentham's "greatest good of the greatest number"—to mention only a few important doctrines which do not eliminate certain references to aims and ends—would supply any test for the "juridicity" in the sense given to it by the author.

It was perhaps this apprehension of the boundlessness inherent in his

definition of law which motivated the author to eliminate from the definition of that universal, any reference to the State as law giver. Later on we find expressions and discussions concerning the State and its relation to Law. Thus, it is said that the State is the "center of the juridical arrangement" (p. 295), that "the law emanates from the State" (p. 341), and that the "state is the subject of that arrangement." (p. 345). True, at the last mentioned page the author adds the words "in a positively constituted juridical order." But, we may ask whether any legal order could be imagined without the State.<sup>1</sup> On p. 359 we find the remark that "the State exists essentially in the juridical order," a statement which is followed on p. 371 by the definition of the State as "only an ideal point of convergence to which must be referred all the juridical determinations which pertain to a system." To a student of analytical jurisprudence this sounds like the reasoning of the Pure Theory of Law, particularly Hans Kelsen's conception of the State as the personification of the legal order constituting a legal community.

If, as the author admits, the State is the "subject of the juridical order," that is, the entity from which "the command, an imperative which the law always implies, emanates," then, we have to ascribe to that entity that which is called "sovereignty". It seems to this reviewer that the author in denying sovereignty (in the juridical sense) to all legal communities does not explain why the regulation of a primitive community is devoid of the equality of law. The requirements listed by the author for statehood are those established in the present international law. It is one thing to ascribe sovereignty to every community regulating the life of its members (see Maine's *Early History of Institutions* 382 (7th ed.), and it is an entirely different matter not to regard every legal order constituting a legal community, particularly a primitive one, as a State. (See Kelsen's *Principles of International Law*, p. 101).

Naturally, in such a short space as is granted to a reviewer, only a very few points were chosen out of the wealth of problems so brilliantly and provocatively investigated by Del Vecchio, one of the outstanding legal philosophers of our time. Any reader can, like this reviewer, pick out a few points here and there the treatment of which stimulated, as the whole content of the book, his special curiosity but left him still not completely convinced.

## II

The other book does not deal with such a large subject as the first one. Its content turns on a particular problem of legislative interpretation. Judge

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1. The author defines positive law as the system of law which regulates the life of a people at the particular time. His illustrations of non-positive law such as a pending bill or a law which had been repealed are not convincing. (p. 305). They lack among other things "coercibility" that is an elemental quality "which is proper to law alone." (p. 279).

## BOOK REVIEW

Felix Forte, to whom we are indebted for the translation, mentions in his forward that Dean Roscoe Pound had suggested that the book be translated from Italian to English. We have to be grateful for the suggestion and for the compliance therewith.

In his introduction Dean Pound calls Dr. Del Vecchio a leader of the right wing of the Neo-Kantians because within that group of noted philosophers whose doctrines are based on Kant's idealistic theory of knowledge, Del Vecchio "turned to a moral criticism allied to the traditional theory in giving us a natural law." But, we may ask, what is Del Vecchio's natural law?

Dr. Del Vecchio's point of departure is in the direction given in a few civil codes to the dispensers of justice to decide the case according to the "principles of natural justice" or "the general principles of law." However, the resort to these methods can be had only, as the codes demand, after the methods of literal and logical interpretation and the recourse to statutory analogy have not led to a satisfactory determination of the case. It was the Austrian Civil Code of 1811, sec. 7, which, in that way, referred to the principles of natural justice. Influenced by this Code, Art. 3 of the former Italian Codice Civile of 1865 directed the interpreter, in a similar way, to decide the case after all the other ways of finding a decision fail, according to "the general principles of law."

It is true that the draftsmen of the Austrian Code who had been brought up with the doctrines of the great writers of natural law of the 17th and 18th centuries, regarded the quoted words as a reference to those theories. They believed that the natural law theories of their knowledge presented a "Code of Reason" which is of universal significance. However, the true meaning of that reference to "principles of natural justice" cannot be taken from those doctrines. The "law in action," to use Roscoe Pound's excellent term, that is, the unanimous interpretation by the jurists of the code, should tell us what the rule means. The Austrian jurists have considered the above mentioned direction of sec. 7<sup>2</sup> as an authorization for the interpreter to decide the case according to what the lawgiver would have laid down as a rule if such a case had occurred to his mind.<sup>3</sup> This does not mean that the interpreter is given the role of lawmaker. It does mean that he has to proceed in accordance with the whole spirit of the Code, that is in accordance with the general principles underlying the codification.<sup>4</sup>

However, the author believes that the reference to general principles of law means "a reference to the supreme truth of *law in general*, that is, a reference to

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2. For the wording of sec. 7 and its interpretation, reference may be made to this reviewer's study *On Interpretative Theories: A Comparative Study in Legislation*, 27 Texas L. Rev. 312 (1949), particularly pp. 316-319.

3. See Pisko in I Klauß's *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch*, Civil Code 147 (1st ed. 1933).

4. It is characteristic that the present Italian Code of 1942, Art. 12, speaks "of general principles of the legal order of the State." (Emphasis added.) Doctor Del Vecchio arguing in the whole book for a natural-law interpretation, is therefore, not pleased with the wording of Art. 12. See p. 7, at note 3.

those logical and ethical elements in the law which are common to virtually all peoples because they are both rational and human."

If a case has to be decided by the International Court of Justice, the author's view would have an indisputable basis. Article 38(1) (c) of the present Statute regarding the Court provides that subsidiarily the Court has to resort to the "general principles of law recognized by the civilized nations." This reference has been taken over verbatim from the Statute (sec. 38) of 1920 concerning the Permanent Court of International Justice. However, I did not find any reference to this Statute in the book and I would suggest that the next edition should include a discussion of that interesting provision.

A sharp distinction nevertheless must be drawn between that approach of Del Vecchio to a natural law and those doctrines which proceed upon the idea of a transcendental natural law. As I see it, the concept of "natural law" is for the author synonymous with "general doctrines of the law, which are dominant in the thought of a certain time." (p. 34). These general doctrines "correspond to a truly scientific tradition" and "are intimately connected with the very genesis of the laws *in force*." (Emphasis added.) This approach to natural law may be seen also from his description of the essential elements of the natural law theories in Chapter V of the book. According to the author the essential elements are "equal liberty," or "juridical equality" on the one hand and, on the other, "limitations of personal rights only by law." These are conceptions which had been significantly formulated by Locke. Similarly, the author's reference to the "general will," which means for him the "rational necessity" for basing the idea of government on the consent of the governed, that is, the author's conception of the "social contract" as the basis for a government of law, goes back to Locke. Dr. Del Vecchio identifies correctly such an idea of government with the conception of the *Rechtsstaat* or, in Judge Forte's translation, the Law-State. This conception has primarily been used by the German representatives of liberalism in the second and third quarters of the nineteenth century. It goes back to the natural law theories of the eighteenth century. The conception points to the limitation placed upon government by law which has to be binding equally upon citizens and government.

These fundamental ideas are certainly reflected in the present legal systems of the western world. One will, therefore, heartily agree with Del Vecchio's expression that these doctrines "have penetrated substantially *our* positive legislation." (Emphasis added.)

In this connection mention must also be made of the author's remarks on the limits placed upon the application of analogy and of the general principles of law. This is, as he puts it in terms derived from the idea of a government limited by rules of law, or, as the book calls it, of the "law-state":

## BOOK REVIEW

"Where the problem of individual versus public rights is not involved, the law, though remaining inviolable, allows itself to be superseded, or better integrated by recourse not only to analogy but also to the general principles of law."

One must not overlook that whenever the author out of his great wealth of ideas feels the necessity to rest his reasoning upon positive rules, he takes them from his national (Italian) law. As most of the European legal systems, so is the Italian one based on legislation, the codes. For the purposes of this book, the author referred particularly to the introductory part of the Italian Civil Code of 1865, which dealt with "the application of the (statutory) rules in general."<sup>5</sup> Article 4 of this part of the Code of 1865 prohibited the application of rules pertaining to "penal law" or of those laws which "restrict the free exercise of rights," to cases which are not expressly embraced by those rules and laws. According to the author this prohibition points to all the laws which imply acts of administrative agencies. Consequently, the prohibition denies government the power to limit the liberty of individuals except in cases expressly covered by law. To say this is to accentuate the word "expressly."<sup>6</sup> There is, of course, deeply imbedded in our system of the law the idea that, to quote from Chief Justice John Marshall, "it is the legislature, not the court, which is to define a crime, and ordain its punishment."<sup>7</sup>

However, aside from this limitation, legal analogy was the force which created the bulk of our common law, and the common law, also in this regard, has not drawn a dividing line between private and public law.

It has also been in the field of public law, a field growing in significance from decade to decade, that our courts have looked at the directional character of general principles of law. To illustrate: when in recent years a question of racial discrimination practiced by a railroad brotherhood reached the Supreme Court, the Court directed the issuance of an injunction against the enforcement of a discriminatory collective agreement. The Court derived its conclusion that the power of the brotherhood is limited so as to forbid any discrimination against any members of the Craft, from a principle of general application. Said the Court, "The representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to discriminate against the rights of those for whom it legislates."<sup>8</sup>

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5. Also this part of the Code has been supplanted in 1942 by another one. See note 4 *supra*.

6. The present Italian Statute of 1942 excludes the resort to analogy only as to penal statutes and as to those regulative acts which provide for exceptions from general rules. Let us recall, however, that, as mentioned elsewhere in this review, ultimate resort can be had only to general principles of the Italian legal system.

7. *United States v. Wiltberger*, 5 Wheat. 76, 95-6 (U.S. 1820).

8. *Steele v. Louisville and Nashville Railway Co.*, 323 U.S. 192 (1944).

## BUFFALO LAW REVIEW

If the reader of this review should receive the impression that the courts have held that an ultimate resort to the general principles of law is only justified where the protection of the individual from a violation of his interests by the holder of power is at issue, the impression would be false. Not statutory provision, but holdings based on general principles have led the courts to deny an individual protection against public authorities in situations in which he would enjoy such a protection with respect to dealings with other private individuals or corporations. Again an example: the government has been held not to be estopped from denying the binding effect of actions taken by its officers or agents, in the same situations, a private party, for instance an insurance company, would have been barred from such a denial by the theory of estoppel.<sup>9</sup>

Thus, it bespeaks the liveliness of the discussion in Del Vecchio's great contribution to jurisprudence that it invites the reader to comparative considerations.

The author is well aware of the significance of other factors than the pure legal rules, for the decision of a case. He quotes from the well-known work of the noted Italian scholar Vivante on commercial law: "The nature of the facts although not manifest either in a law or custom, may constitute in itself a source of law and direct the decision of the judges." Dr. Del Vecchio describes this weighing of the individual fact situation, which determines the equilibrium in the relation between the parties, as the process of equity in the broad sense (I would say in the Aristotelian sense). It is nothing else than a process of evaluation of the particular fact situation. And one may add that it is an evaluation which takes its clues from the actual feelings and demands of the community, as Oliver Wendell Holmes put it. It might be a question of semantics to give such societally and traditionally inspired considerations the name of natural law. For me it has rather the touch of juristic realism.

Jurisprudence owes Dr. Del Vecchio a great debt. Admirably free from any bias or predilection, a genuine philosopher has in these two books as in all his former works, made lasting contributions to jurisprudence. It is his firm belief that "the particularity of laws compels consideration of the universal of law in general, and that consideration of the universal is philosophy." All readers of these books will heartily subscribe to these words.

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9. See e.g., *Federal Crop Ins. v. Merrill*, 332 U.S. 380 (1948).