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MASSIMO LA TORRE O CONCEITO POLÍTICO DO DIREITO: NOTAS SOBRE *IL DIRITTO CONTRO SE STESSO: SAGGIO SUL POSITIVISMO GIURIDICO E LA SUA CRISI*, FIRENZE, OLSCHKI, 2020

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Abstract: At face level, *Il diritto contro se stesso* is a reconstruction of the fundamental trends of legal theory from the second half of the 20th century. It is that, and magnificently so, but not merely that. Before anything else, it is a reaffirmation of Massimo La Torre's own concept of law as permeated by a political philosophy – one I would venture to name a republican political philosophy. This text approaches that concept taking into account other approaches, in particular Ronald Dworkin's.

Keywords: Constitutive concept of law, internal point of view, Massimo La Torre, Ronald Dworkin.

Resumo: Facialmente, *Il diritto contro se stesso* é uma reconstrução das linhas fundamentais da teoria do direito na segunda metade do século XX. É isso, e magnificamente, mas não apenas isso. Antes de mais, trata-se de uma reafirmação do conceito de direito de Massimo La Torre, o qual se encontra conexo com uma filosofia política, a qual se pode dizer republicana. Este texto aborda esse conceito, tendo em conta outras abordagens, em particular a de Ronald Dworkin.

Palavras-chave: Conceito constitutivo de direito, ponto de vista interno, Massimo La Torre, Ronald Dworkin.

At face level, *Il diritto contro se stesso* is a reconstruction of the fundamental trends of legal theory from the second half of the 20th century. It is that, and magnificently so, but not merely that. Before anything else, it is a reaffirmation of Massimo La Torre's own concept of law as permeated by a political philosophy – one I would venture to name a republican political philosophy.

Indeed, for La Torre, law is political in a very profound sense. According to him, the concept of law one adopts will depend on one's conception of political community. In his words, “the community that adopts a concept of law as a command by an invincible and indivisible power is not equivalent to a community that stands on a concept of law as a cornerstone of its demand for justice, nor are their members”¹.

In this fundamental link between law and the political, between one's concept of law and one's conception of political community (and of citizenship) one rediscovers a fundamental theme of La Torre's thought. I would emotionally refer to his *Messina come metafora e luogo idealtipico della politica*² (an eloquent affirmation of his concept of the political). And I would partially refer to his *Hannah Arendt and the Concept of Law*³.

According to La Torre, law is either prescriptive or constitutive. If it is prescriptive (or understood as prescriptive), it does not constitute citizenship nor depends on citizens but turns them instead into alienated subjects. Contrariwise, if law is constitutive, it defines a realm in which citizenship is possible, one in which therefore the pursuit of justice can occur through the commitment of citizens.

It is from this fundamental standpoint that La Torre sets out on his journey. In the many dialogues (and sometimes quarrels) that take place along the way, he persistently tries to demonstrate that law is either constitutive or is not law. That is, any understanding of law that is prescriptive (or covers for prescriptivism) is doomed to set law against itself.

Given his point of departure, one would imagine that La Torre would select as his most congenial *compagnon de route* an author such as Ronald Dworkin. One is not disappointed in that (more on this later). But before concentrating on Dworkin, it is important to focus on those selected by La Torre as his main opponents, which are positivists of all stripes.

Very interestingly, La Torre rarely engages with his opponents as mere opponents. The point rather is that those who have “set law against itself” may perhaps – and against themselves – helped to refute a prescriptive concept of law. That is most clear regarding the treatment of Hart, in whose work La Torre finds above

1. M. LA TORRE, *Il diritto contro se stesso. Saggio sul positivismo giuridico e la sua crisi*, Firenze, Olschki, 2020, p. XII.

2. See M. LA TORRE, *Messina come metafora e luogo idealtipico della politica*, Soveria Mannelli, Rubettino Editore, 2000.

3. See M. LA TORRE, “Hannah Arendt and the Concept of Law: Against the Tradition”, in K. AMBOS *et al.*, *Eichmann in Jerusalem – 50 Years After: An Interdisciplinary Approach*, Berlin, Duncker & Humblot, 2012, pp. 39 ff.

all – and considering the centrality of the “internal point of view” – “a certain malaise or embarrassment in the management of the traditional imperativistic, formalistic and descriptivist categories of ordinary positivism”⁴.

Turning positivists against themselves – in order not to turn law against itself – is La Torre’s most characteristic argumentative strategy. It appears in its most evident form regarding those who are designated as the “defenders of the orthodoxy”, namely Joseph Raz⁵. La Torre’s critique of Raz centers on the strange detachment of the latter’s “philosophical” concept of law from the practice of law (and thus from the reflexivity of those who engage in that practice). For La Torre, a concept of “law” thus detached cannot be but a non-concept of law. That unless one endorses a scholastic “essentialism” in which knowledge of “things themselves” depends on one’s own imposing conception of corresponding concepts, something that Hart’s hermeneutical approach would never countenance.

I highlight this critique of Raz since it implies two aspects in which one confirms that for La Torre, law is fundamentally linked to citizenship, moreover to the citizens’ pursuit of justice. Firstly, the inseparability of the concept of law from the practice of law marks the inseparability of “law” from the reflexivity of those (i.e. citizens) who engage in the corresponding practice – that is, it marks the inseparability of law from true citizenship, which is the exact opposite of unreflective subjection. Secondly, the inessentiality of law marks its dynamism, its definability (or indefinability) as a pursuit that is not fixed or determined from the start but requires instead a constant engagement.

This thesis on the inessentiality of law separates La Torre not only from Joseph Raz (a defender of the positivist “orthodoxy”) but from natural lawyers who connect law to a specific moral substance, to a theory of the good or goods⁶. Unlike natural lawyers, the connection that La Torre establishes is not between law and a morality thus understood. It rather is – I repeat – a connection between law and the political, the latter being understood in exact opposite terms to Carl Schmitt’s. Indeed, La Torre’s concept of the political is centered on plural citizenship. Correspondingly, law is an engaged process, it is a collective pursuit of justice that both constitutes plural citizenship and depends on plural citizenship. Nothing, least of all “justice”, is defined or “decided” from the start.

In other words, law emerges as a demand and as a quest, not as a supposed substance or a pre-ordained end. What sustains its possibility or achievability is the engagement of participants in practical speech, through which shared and reasonable justifications can be achieved⁷. Coherently, the internal point of view of participants is the relevant perspective when striving for that achievement.

4. LA TORRE, *Il diritto*, pp. 7-8.

5. LA TORRE, *Il diritto*, pp. 115 ff.

6. Natural law is treated in chapter 6, LA TORRE, *Il diritto*, pp. 143 ff.

7. La Torre refuses a skeptical perspective “regarding the justification of practical (normative) discourse”, see LA TORRE, *Il diritto*, p. 114, 162 ff.

For La Torre, the internal point of view is an ethical-political point of view through which law (as both an *is* and an *ought*) can be achieved: to achieve law is to know law, i.e., to strive for law as a “demand for justice” of citizens, that through practical speech, is the proper way to know it. It is in this vein that Luigi Ferrajoli is criticized for his attempt to construct the internal point of view out of mere positive legality, even if positive legality is that of the constitutional state⁸.

It is regarding this latter aspect that I find it more difficult to accompany La Torre. Aren't we talking about a “view from nowhere”, to use Thomas Nagel's well-known expression? And from there, how can one reach somewhere?

This relates to a necessary discussion regarding Ronald Dworkin. In La Torre's reading, for Dworkin – differently from Ferrajoli – the relevant perspective is a “moral perspective”, a “moral point of view” which “in essence” corresponds to criteria of “reasonableness and universalization”. That is, Dworkin's “integrity” is understood as an “idiosyncratic” way of restating the relevance of general criteria of practical reason, which are supra-positive in essence and concord with the “idea of justice”. That, even if they can “already be found at work in the practice of law in a pre-reflexive and intuitive way”¹⁰.

I have a different understanding of Dworkin's “integrity”. From my perspective, to read positivity in its “best light” in accordance with integrity does not allow us to transcend positivity, not even in the name of justice. Indeed, for Dworkin, “law is...different from justice. Justice is a matter of the correct or best theory of moral and political rights, and anyone's conception of justice is his theory...of what these rights actually are. Law is a matter of which supposed rights supply a justification for using or withholding the collective force of the state because they are included in or implied by actual political decisions of the past”¹¹.

It is true that there are two dimensions in integrity, “fit” and “political morality”. However, in my reading, “political morality” itself does not correspond to criteria whose essence is transcendent to positivity. On the contrary, “political morality” is reconstructed from positivity, from the practice of law itself, to which it must “fit”. I should stress here that Dworkin uses the verb “to fit” also when referring to the second dimension of integrity (which adds to the first: “fit” properly said)¹².

I'm concentrating on *Law's Empire* and on *A Matter of Principle* and I admit Dworkin's later works (namely, *Justice in Robes* and *Justice for Hedgehogs*) will be much more congenial to La Torre's intransigent non-positivism than the earlier ones. Anyway, I'm raising this question since I believe there is more to it than a mere interpretative quarrel of uncertain results.

8. LA TORRE, *Il diritto*, pp. 208 ff.

9. See T. NAGEL, *The View from Nowhere*, Oxford, Oxford University Press, 1989.

10. NAGEL, *The View from Nowhere*, p. 18.

11. R. DWORKIN, *Law's Empire*, Cambridge Mass, Harvard University Press, 1986, p. 97.

12. In DWORKIN'S words, “the second dimension – the dimension of political morality – supposes that, if two justifications provide an equally good fit with the legal material, one nevertheless provides a better justification than the other if it is superior as a matter of political or moral theory; if, that is, it comes closer to capturing the rights that people in fact have”, see R. DWORKIN, *A Matter of Principle*, Cambridge Mass, Harvard University Press, 1985, p. 142.

From my perspective, if the practice of law is to be connected to the practice of citizenship (if it is to be understood in itself as *a* practice of citizenship), then it must be an integrating practice. I believe that, in Dworkin, there is a correspondence between integrity and the political integration of plural citizens: integrity allows for political integration since it demands consistency with a participated institutional practice (the practice of law)¹³. Very importantly, the latter does not depend on unshared conceptions of the good, *nor does it stand on unshared theories of justice* (that is precisely what makes it an integrating practice). However, that does not make it empty or vacuous: the practice of law does not correspond to an historical vacuum. For Dworkin, that practice, as reconstructed in accordance with the “actual political decisions from the past”, is the constitutive practice of an actual historical political community.

Can one say the same about the political community of citizens envisioned by La Torre? Can it be an actual community of citizens or is it necessarily an idealized community of reason? If that is the case, La Torre may be falling back into a philosophical, non-hermeneutical, concept of law. Indeed, thus understood, “law” may not really be accessible through the “internal point of view” of actual citizens. It may be as inaccessible to citizens as an “integrity” understood as totally detached from the “actual political decisions of the past”.

13. According to Dworkin, the “fora of principle” in which the practice of law takes place constitute a “superior kind of republican deliberation”, one in which citizens (as claimants in lawsuits, lawyers, *amicus curiae* or contributors to surrounding public discussions) are allowed to participate in a “genuinely deliberative and public spirited” way, see R. DWORKIN, *Freedom’s Law: The Moral Reading of the American Constitution*, Cambridge Mass, Harvard University Press, 1996, p. 30.