LEXICON PHILOSOPHICUM
International Journal for the History of Texts and Ideas
ILIESI CNR

GIANLUCA SADUN BORDONI

SOME NOTES ON LAW, REASON AND MORAL SENTIMENT IN THE KANTIAN LECTURES ON NATURAL LAW*

ABSTRACT: Kant's juridical thought enjoys renewed attention and his reading on Natural Law provides for a better possible understanding of it, with the emergence of the crucial distinction between laws of nature and laws of freedom, and the difference of freedom and morality from simple rationality and moral sentiment.

KEYWORDS: Nature; Law; Freedom; Reason; Morality

Kant's lectures on Natural Law[1] do not only offer a contribution to the Kantian philology, but also extend a better understanding of Kant's

* This work was originally presented as a paper at the XXVII World Congress of the International Association for the Philosophy of Law and Social Philosophy, Washington, DC, 27 July-1 August 2015, on the subject of *Law, Reason and Emotion*. Kant's works are cited according to the volume and page of the Akademie-Ausgabe.

[1] The first critical edition of these lectures has been published in the following volumes: H. Delfosse-N. Hinske-G. Sadun Bordoni, *Kant-Index*, Band 30, Teilband I: *Einleitung des Naturrechts Feyerabend*, Stuttgart, Frommann-Holzboog, 2010; Teilband II: *Abhandlung des Naturrecht Feyerabend: Text und Hauptindex*, 2014; Teilband III: *Abhandlung des Naturrechts Feyerabend: Konkordanz und Sonderindices*, 2014. Cf. the German-Italian edition: I. Kant, *Lezioni sul diritto naturale*, edited by N. Hinske and G. Sadun Bordoni, Milano, Bompiani, 2016. This edition constitutes the basis for numerous translations which are about to be published, beginning with the American one, by Rauscher, forthcoming in the Cambridge Edition of the Works of Kant. See F. Rauscher's review, on the *Kant Review*, 17 (2), 2012, p. 357-365.

ISSN 2283-7833
http://lexicon.cnr.it

juridical thought and its evolution in a moment in which this thought is at the center of a renewed attention. Indeed, there is no doubt that the perspective of the Kantian normativity (equidistant from both utilitarianism and metaphysical-theological ethics) enjoyed a resurgence in recent decades, a renewal of its important philosophical role. From Rawls and Habermas onwards the renewed centrality of Kant in the philosophical-juridical and political debate is an established fact.

The importance of these lectures, known as *Naturrecht Feyerabend*, which precede *The Doctrine of Right* by 13 years, stems especially from the fact that they were delivered while Kant was completing the *Groundwork of the Metaphysics of Morals* and while he was preparing the writing *What is Enlightenment?*. These constitute therefore a 'laboratory' of essential topics of Kant's moral and juridical philosophy and contain precedents of later writings, not only of the *Doctrine of Right* but also of *Perpetual Peace*. But the importance is not only historical. Through these lectures, which until now were almost unknown, it is possible to highlight essential topics of Kantian thought, beginning with the idea that the old natural law theory confuses laws of nature and laws of freedom, and that principles of law and morals cannot be based on either simple rationality or on the so-called 'moral sentiment'.

Here I will omit philological considerations and refer to the aforementioned critical edition of the *Naturrecht Feyerabend*. The problem that I would like to discuss is how a different approach to the legal thought of Kant, including its evolution and based upon the manuscript legacy and lectures, can improve our comprehension of it and in particular can help us to better understand Kant's relationship with the tradition of natural law.

On this topic there are two preconceptions that should be criticized: 1) The first is that Kant's legal thought is a 'senile' product of secondary interest and essentially foreign to the 'critical' philosophy. This judgment dates back to Schopenhauer and was not set aside by the Neo-kantianism at the end of the nineteenth century, nor by contemporary thinkers who were very interested in Kant's practical thinking, such as Hannah Arendt. 2) The second preconception is that Kant's theses, regarding ethical and legal topics, represent a radical break with the tradition of natural law. This thesis goes back to Gustav Hugo, also Kant's great admirer, and therefore is

linked to the foundation of the historical school of Jurisprudence, from which derives the first historiographical elaboration of Hugo's theses.[2]

Regarding the first point, the analysis of the remaining manuscripts and lectures show how the main theses of Kant's ethical-legal thought had already been defined many years before publication, in 1793, of the script *On the Common Saying*, which contains its first articulated exposition, and of the *Metaphysics of Morals* in 1797. This can be observed by examining, first of all, the so-called *Bemerkungen*, the lectures on ethics of the Seventies, and especially the lectures on natural law known as *Naturrecht Feyerabend* (1784), where the critical discussion of the traditional natural law is widely present. Kant's main criticism concerns the absence of a distinction between laws of nature and laws of freedom, and that only in the latter could be found the basis of right (AA, XXVII, 1322). In *Naturrecht Feyerabend* the concept of the right is defined as: "Right is that restriction of freedom according to which it can coexist with every other freedom according to a universal rule" (AA, XXVII, 1320). This classical Kantian definition clearly shows the continuity of his legal thought: it is already present in the *Reflections* of the Sixties,[3] it is clearly expressed with reference to Rousseau, in the *Bemerkungen*,[4] and it is foreshadowed in a couple of passages of the *Critique of Pure Reason*,[5] with known reference to the platonic republic.

It is then defined, as before mentioned, in the lectures of the Eighties, before appearing practically unchanged, in the writings of the Nineties, *On the Common Saying*[6] and *Metaphysik der Sitten*, whose Universal Principle of Right states "Eine jede Handlung ist Recht, die oder nach deren Maxime die Freiheit der Willkür eines jeden mit jedermanns Freiheit nach einem

[2] Cf. O. von Gierke, *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorie*, Breslau, Koebner, 1880. F. Wieacker, *A History of Private Law in Europe*, Oxford, Clarendon Press, 2000.

[3] Cf. e.g. Refl. 6596 (AA, XIX, 101): "Alle Handlung des Rechts ist ein *maximum* der freyen Willkühr, wenn sie gegenseitig genommen wird".

[4] *Actio spectata secundum voluntatem hominum communem si sibimet ipsi contradicat est externe moraliter impossibilis (illibitum)* [...] *Contradiceret hominum voluntas sibimet ipsi si vellent quod ex voluntate communi abhorrerent* (AA, XX, 161).

[5] "Eine Verfassung von der größten menschlichen Freiheit nach Gesetzen, welche machen, daß jedes Freiheit mit der andern ihrer zusammen bestehen kann, [...]ist doch wenigstens eine nothwendige Idee, die man nicht bloß im ersten Entwurfe einer Staatsverfassung, sondern auch bei allen Gesetzen zum Grunde legen muß" (AA, III, 247-8).

[6] "Recht ist die Einschränkung der Freiheit eines jeden auf die Bedingung ihrer Zusammenstimmung mit der Freiheit von jedermann, in so fern diese nach einem allgemeinen Gesetze möglich ist" (AA, VIII, 289-90).

allgemeinen Gesetze zusammen bestehen kann" ("Any action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law": AA, VI, 230; transl. M. Gregor).

From this example of great importance, it can be understood how Kant's legal thought took shape early on, and how it is independent from the 'critical turning point', which only concerns the development of theoretical thought. This surely does not negate that the critical turning point had played an important role also in the deepening of the Kantian moral thought (suffice to mention the solution of the Third Antinomy which shows how the contrast between nature and freedom could be resolved). But it shows that the development of Kant's thought, in the moral area, is understood better as a continuous development and deepening than in terms of a radical break. Regarding the legal thought in particular, Ritter was the first to suggest its early formation. But from this correct premise, he drew the (in my assessement) incorrect conclusion that the Kantian legal thought is fully within the classical tradition of natural law theory.[7] Instead, I argue that the early emergence of the distinction between laws of nature and laws of freedom, around which Kant criticizes the natural law theory, shows that Kant's departure from this tradition had been developed early as well.[8]

As regards the second point, it is important to notice that this doubtlessly radical criticism does not imply the complete abandonment of the natural law theory, but rather its transformation. In *Idea for a Universal History from a Cosmopolitan Point of View*, also published in 1784, Kant first applied his ethic-legal view to the world of history claiming that the transcendental basis of right must find full realization in history in a "vollkommen gerechte bürgerliche Verfassung" ("perfectly just civil constitution": AA, VIII, 22). Such civil constitution will be indicated in the *Contest of Faculties*, as a "naturrechtliche Verfassung" ("constitution founded on natural law": AA, VII, 87). And it is generally clear, as stated by Kant in *Rechtslehre*, that "under a civil constitution the statutory laws obtaining in this condition cannot infringe upon natural right (ie: that

[7] Cf. C. Ritter, *Der Rechtsgedanke Kants nach den frühen Quellen*, Frankurt a.M., Klostermann, 1971.

[8] For an extended analysis, I refer to my *Leggi della natura e leggi della libertà. Kant e il giusnaturalismo*, to be soon published in the acts of the 15th International Colloquium of the Istituto per il Lessico Intellettuale Europeo e Storia delle Idee of the CNR, on the subject of *Nomos and Lex*.

right which can be derived from a priori principles for a civil constitution)" (AA, VI, 256; transl. M. Gregor). The promotion of freedom – the only innate right – is the end of the right, which also represents the realization of the intrinsic value of the world.[9]

We will now briefly examine how this position reflects on the specific topic of this paper. The very meaning of freedom explains why, in the Kantian perspective, right cannot be based on moral sentiment, not even on simple reason. At the beginning, Kant was influenced by Hutcheson and by the theory of moral sentiment. However, Kant's mature position is that sentiment cannot be the basis of a universally valid moral obligation, since moral obligation in its turn cannot depend on such a variable element. What we call moral sentiment is rather a *consequence* of moral law, and not its foundation.

Less well known is that, according to Kant, even reason cannot be the source of right and morality. The clarity with which this theme appears in the introduction to *Naturrecht Feyerabend* is one of the point of interest in these lectures on natural law. Man being an end in himself does not depend on reason, states Kant, but on freedom: "It would be possible for man to bring about through reason, without freedom, according to universal laws of nature, that which the animal brings about through instinct" (AA, XXVII, 1321-22). Reason, says Kant with great acuity, it might simply be something similar to animal instincts (as Hume had stated, and as many still consider today), which wouldn't attribute to man his incomparable dignity: "But freedom, only freedom means that we are ends in themselves". Freedom must however be limited, this is the essence of right. Since such a limitation cannot come from nature, freedom must limit itself, must be its own law.

Such theme is very clear in *Naturrecht Feyerabend* and it is also mentioned in the *Critique of Practical Reason*, which states that being an animal does not influence us to the point of not understanding that reason is not only a tool to satisfy the needs: "Denn im Werthe über die bloße Thierheit erhebt ihn das gar nicht, daß er Vernunft hat, wenn sie ihm nur zum Behuf desjenigen dienen soll, was bei Thieren der Instinct verrichtet" ("That he has reason does not in the least raise him in worth above mere

[9] Cf. *Vorlesung zur Moralphilosophie*, edited by W. Stark, Berlin-New York, W. de Gruyter, 2004, p. 177.

animality if reason serves only the purpose which, among animals, are taken care by instinct"; transl. L. W. Beck).[10]

On this basis, Kant traces in the *Metaphysiscs of Morals* the crucial distinction between 'being rational', Vernunftwesen, which we can only understand according to the incomparable property of freedom, and simply 'being reasonable', vernünftiges Wesen, that is, being in possession of reason, In fact, the possession of reason, "based on its theoretical faculties, it may also be a quality of a living being",[11] or in other words may be a 'disposition' which is simply natural (Naturanlage). In the latter case, in being rational, *animal rationale*, man would always be the means for general objectives of nature, and not an end in himself. The above argument confirms that, as Kant himself states in the *Critique of Practical Reason*, freedom is the cornerstone (Schlußstein) of his entire philosophy. It is well known that freedom, in the mature position of Kant, is a 'fact of reason', something that is undoubtedly witnessed by the moral law, despite the fact that the roots of our freedom are still unknown. This is not the proper occasion to discuss how this perspective, perhaps still today, might diminish the reductionist challenge of scientific determinism.

Finally, I would like to recall that Kant, through the critique of traditional natural law, affirms a distinction between laws of nature and laws of freedom, or 'moral laws', which lay the basis for ethics and right. Therefore, they don't depend neither upon sentiment nor upon simple reason, and go beyond the reductive definition of man as *animal rationale* and the ambiguous attempt to value beyond measure the uncertain and variable emotional world of man.

REFERENCES

Delfosse, Heinrich P.-Hinske, Norbert-Sadun Bordoni, Gianluca, *Kant-Index*, Band 30, Teilband I: *Einleitung des Naturrechts Feyerabend*, Stuttgart, Frommann-Holzboog, 2010; Teilband II: *Abhandlung des Naturrecht Feyerabend: Text und Hauptindex*, 2014; Teilband III: *Abhandlung des Naturrechts Feyerabend: Konkordanz und Sonderindices*, 2014.

Gierke von, Otto Friedrich, *Johannes Althusius und die Entwicklung der naturrechtlichen Staatstheorie*, Breslau, Koebner, 1880.

Kant, Immanuel, *Vorlesung zur Moralphilosophie*, edited by Werner Stark, Berlin-New York, W. de Gruyter, 2004.

[10] Cf. *Kritik der praktischen Vernunf*, AA, V, 61.
[11] Cf. *Metaphysik der Sitten*, AA, VI, 418.

Kant, Immanuel, *Lezioni sul diritto naturale*, edited by Norbert Hinske and Gianluca Sadun Bordoni, Milano, Bompiani, 2016.
Rauscher, Frederick, Review of H. Delfosse-N. Hinske-G. Sadun Bordoni, *Kant-Index*, Band 30, *Kant Review*, 17 (2), 2012, p. 357-365.
Ritter, Christian, *Der Rechtsgedanke Kants nach den frühen Quellen*, Frankurt a.M., Klostermann, 1971.
Wieacker, Franz, *A History of Private Law in Europe*, Oxford, Clarendon Press, 2000.

GIANLUCA SADUN BORDONI
Università degli Studi di Teramo
gsadunbordoni@unite.it