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Editorial Preface to This Volume

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THE FORMAL BASES OF LAW

BY

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EDITORIAL PREFACE TO THIS VOLUME

By Joseph H. Drake [1]

I. *The Author and the Translator.*

Giorgio Del Vecchio (born at Bologna, August 26, 1878) studied at the universities of Genoa, Rome and Berlin, obtaining in the University of Genoa his doctor's degree in the philosophy of law. In the year 1903 he was nominated professor of that subject in the University of Ferrara, where he began his teaching with the discourse "Right and Human Personality in the History of Thought." He occupied that chair till the end of 1906, giving also a course of lectures as docent in the University of Bologna during the years 1905 and 1906. In 1906 he was nominated for the professorate of the philosophy of law in the University of Sassari and remained there until the end of 1909. To this period belong, among others, the dissertation on "The Phenomenon of War and the Idea of Peace," which was read originally at the University of Sassari as an inaugural address of an academic year.

In 1909 Del Vecchio was called to teach in the University of Messina, which at that time was being re-established after the fatal earthquake of 1908. He was appointed in the first group of professors who offered themselves for the work of reconstruction, which had at that time a high moral and civil significance. From Messina, Del Vecchio returned finally at the beginning

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of the year 1911. In this year he was nominated professor in the University of Bologna. He began his teaching in this university, where he still teaches, with the discourse "Upon Positivity as a Quality of Law."

Del Vecchio has participated in various international scientific congresses. Among others was the International Congress of Philosophy at Heidelberg, in the year 1908, reading there an article, "Upon the Conception of a Science of Universal Comparative Law." This has been published in Italian, German, French, Spanish, Portuguese and Roumanian. He belonged from the beginning to the "International Vereinigung für Rechts- und Wirtschaftsphilosophie" of Berlin, and represented Italy in the honorable council of that society. He likewise was a member from the beginning of the "Society of J. J. Rousseau," in Geneva, and he has had similar share in many scientific bodies, *e. g.*, "The Academy of Science of the Institute of Bologna," "The Accademia Peloritana of Messina," and others. He has the title of Professor Honorarius of the University of Ferrara, and is Corresponding Member of the National Committee for the History of the Italian Renaissance.

Several of his works have had the purpose, aside from that of translation, of communication to a foreign academy, as for example, the essay "Upon the Theory of the Social Contract" which was presented by the philosopher Emile Boutroux to the Institute of France (Académie des Sciences Morales et Politiques) at the sitting of July 20, 1907.

The translation presented in this volume in three parts was published in Italian in three separate volumes: the first appearing in 1905, under the title of "The Philosophical Presuppositions of the Idea of Law"; the second, in 1906, under the title of "The Concept of Law"; the third, in 1908, under the title of "The Concept of Nature

and the Principle of Law." "The Formal Bases of Law" has been chosen as the title for these combined volumes which form one connected work.[2]

[2] The other published works of the author are:

1. "L'evoluzione dell' ospitalità" (in "Rivista italiana di Sociologia," A. VI, Fasc. II–III). Roma, 1902.
2. Giordano Bruno (in "Rivista ligure," A. XXIV, Fasc. III). Genova, 1902.
3. "Il sentimento giuridico" (in "Rivista italiana per le scienze giuridiche," Vol. XXXIII, Fasc. III). Torino, 1902. Seconda edizione, 1908.
4. "L'etica evoluzionista." Nota critica (in "Rivista italiana di Sociologia," A. VI, Fasc. V–VI). Roma, 1903.
5. "La Dichiarazione dei diritti dell' uomo e del cittadino nella rivoluzione francese." Genova, 1903.
6. "Diritto e personalità umana nella storia del pensiero" (in "Rivista di Filosofia e scienze affini," A. VI, Vol. I, N. 3). Bologna, 1904.
7. "Il comunismo giuridico del Fichte." Nota critica (in "Rivista italiana di Sociologia," A. IX, Fasc. 1). Roma, 1905.
8. "Su la teoria del contratto sociale." Bologna, 1906.
9. "Sull' idea di una scienza del diritto universale comparato" (in "Bericht über den III Internationalen Kongress für Philosophie"), Heidelberg, 1909. Seconda edizione, Torino, 1909.
10. "Un punto controverso nella storia delle dottrine politiche." Nota critica (in "Rivista italiana di Sociologia," A. XIII, Fasc. V–VI). Roma, 1909.
11. "Il fenomeno della guerra e l'idea della pace." Sassari, 1909. Seconda edizione (in "Rivista di diritto internazionale," A. V, Fasc. I–II), Torino, 1911.
12. "Tra il Burlamachi e il Rousseau." Nota critica (in "Cultura contemporanea," A. II, N. 4). Ortona a Mare, 1910.
13. "La comunicabilità del diritto e le idee del Vico" (in "La Critica," A. IX, Fasc. I). Trani, 1911.
14. "Sulla positività come carattere del diritto" (in "Rivista di Filosofia," A. III, Fasc. I). Modena, 1911.
15. "Sui caratteri fondamentali della filosofia politica del Rousseau" (in "Rivista ligure," A. XXXIX, Fasc. V). Genova, 1912. Terza edizione, 1914.

Some of the publications above mentioned have been translated

The translator of the present volume, JOHN LISLE, is a graduate of the College and the Law School of the University of Pennsylvania, and a practitioner at the Philadelphia Bar. He is also the translator of the works of Miraglia and Vanni in the present series, and of Calisse's "History of Italian Law," in the Continental Legal History Series.

II. *The Formal Bases of Law.*

In paraphrase of a hackneyed apothegm, it may be well said that the thinking man is incurably philosophical. This desire to attain the final reason of things begins at the dawn of self-consciousness in the individual. Most of us as college boys experienced this intoxicating philosophic impulse, and the elevation of temperature consequent thereon brought with it an uplift of the spirit that some of us mistook for the birth of a new intellectual life. Then we felt we had reached, or at least were in sight of, an answer to Pilate's question, "What is truth?" The essence of things, the ultimate reality, was whatever for our time was the latest style of the "absolute," — that something which the thinking man could not help thinking, which was true for all times and in every place. This philosophic reality, which was with Plato ἰδέα, with Aristotle οὐσία, with Kant the "Ding an Sich," with Hegel the "absolute," appears in Roman law as "jus naturale," in medieval jurisprudence as the law of nature, and in later juristic thinking as the law of reason. With each successive emergence of this fundamental concept we seem to have reached the longed for

into various foreign languages: German, Spanish, French, Portuguese, Dutch and Roumanian. "Sulla positività come carattere del diritto" has been translated into English under the title of "Positive Right" (cf. "Law Magazine and Review," vol. XXXVIII, N. 368, May, 1913.)

finality. But on closer examination we find what is apparently only the old idea in a new garb, and in our disappointment we say we will have none of it; philosophy may be valuable as mental gymnastics, but brings nothing to aid in the solution of the practical problems of being or of doing.

This philosophic nihilism was characteristic of the best English juristic thought of the last half of the past century. The insufficiency of Benthamism and later types of English utilitarianism as an answer to the basic question of philosophy was plainly recognized, but the belief in experience as the only source and test of truth remained. Nevertheless an aggregate of individual experiences, no matter how large, can lead us only to the general, not to the universal, and it is some form of the universal that the eternal question calls for. Thus are we thrown back again on the something that transcends experience, that which exists prior to experience and which makes it possible. "Juridical thought is anterior to its concrete realization in law," (cf. § 104, in fine) and to the study of this transcendental concept the juridical thinkers of the present century have again turned.

Early in his treatment of the subject, Del Vecchio tells us that "necessity and universality are elements foreign to experience but understandable by reason" (§52), and to reason must we turn for an answer to the philosophic query. This universal element is what he calls the logical form, "forma dat esse rei," (§55, in fine) and this logical form, he says, "gives essence not existence." (§ 56.) In this assertion that form is the essence, we have apparently a reversion to the use of form as equivalent to the Aristotelian absolute (οὐσία), and as it is in this sense that the title of our translation uses the phrase "formal bases" as a paraphrase of "I presupposti

filosofici" of the Italian, we may profitably tarry on some consideration of the philosophic as contrasted with the popular use of the word "form." That there is a necessity for some elucidation of this word is self-evident. Del Vecchio says (§ 81) "no word is understood in so many ways as the word form"; though he himself holds consistently to the one connotation, namely, that form is the metaphysical and "a priori" essence of law, and the word "formal" has its philosophic meaning which has prevailed from the time of Aristotle. But in this sense, meaning "essential," it is the direct antonym of the popular use of formal, namely, non-essential or superficial. In this use of the words "form" and "formal" Del Vecchio is harking back to the οὐσία of Aristotle. The concept οὐσία (etymologically our word essence), the ultimate truth of Aristotle's system, was the analogue of Plato's ἰδέα. The distinction between the two concepts is for our purpose unimportant. The philosophic element common to the two is that each is held to be a true absolute, a truth that comes to us by virtue of our common intelligence, that which every man must think as of necessity. The type of this sort of truth is of course the mathematical axiom, and in the history of philosophy prior to Plato and Aristotle we have a mathematical absolute, that of number, in the philosophy of Pythagoras. When Cicero clothed Greek philosophy in Roman dress, we find that he used the word "forma" as a translation of these Greek absolutes ("De Orat." 10. "has rerum *formas* appellat ἰδέας Plato easque gigni negat et ait semper *esse* ac ratione et intelligentia contineri").

Medieval philosophy coined two participles from the classical "esse," namely, "ens" which appears in "entity" and "essens" from which comes "essential." The word "essentia" is constantly used throughout the Middle

Ages as the equivalent of the Aristotelian οὐσία, and appears in modern Romance languages with the same meaning as in English. It seems therefore that the primitive meaning of "formal" was "essential," and this has been preserved in philosophic and juristic thinking, while the use of "formal" in the popular speech as the antonym of "essential" is a derivative meaning and has developed at a comparatively modern period.

III. *Philosophy and Practice.*

Pound has shown (22 Yale L. J. 114) how the struggle for better definition of law has resulted in continually widening the practical application of law. In like manner it may be shown that the constant broadening of the metaphysical bases of law has been accompanied by improvements in its practice, and to this purpose we may well address ourselves. Supposing then that the above lucubrations do embody the truth, the question naturally presents itself, what of it — "cui bono practico?" Of what avail is philosophic thinking, past or present, for the busy lawyer or the puzzled judge with his pragmatic demands for results?

The question is as old as man itself; and philosophy has been struggling — successfully we may assume — for an increasingly better answer to it from the time of Socrates and the Sophists. Justice, according to the Sophists, is dependent on a purely arbitrary subjectivity. What is just for you may be unjust for me. Right on one side the mountains becomes wrong on the other. "Yes," says Socrates, "but there is in the community the ideal of the ethically normal, to which all good citizens should attempt to conform." The laws of the State embody this ideal, and the just man is he who obeys the laws of his State. The inadequacy of the answer appears on its face. But it marks a great advance

over the negation opposed to it. Each of us is to strive for a common ideal, and knowledge of this ideal is to be attained only by individual effort. Government thus becomes self-government. The end of government is the welfare of all the citizens and a government of law and not of men is established.

Plato's service was mainly in his refinement and development of the doctrine of the "idea." This idea, or perfect image, of justice is to be found, not as with Socrates in the average man with all his imperfections, but in the perfect type of the ethical elect. Although this narrows the scope of the idea of justice it increases its intensity, and within this more select circle Plato "recognizes popular conviction, the collective sense of right, as the source of justice."

In Aristotle we come for the first time upon a fully developed theory of natural law. Man by his very nature is a social being and the combination of men in political bodies forms a natural social unit, the State. But the concept of State existed prior to its practical realization, just as the concept of the whole exists prior to its parts. This natural law is in Aristotle's theory of jurisprudence the equivalent of the οὐσία or essence of his metaphysic; that is to say, it is Aristotle's formulation of the philosophic absolute, the necessary and unconditioned basis of law. Where is the man of action who would deny that Aristotle's philosophic theories have been devoid of practical results? During the Middle Ages the law of nature, divine in origin, was the only bulwark for the protection of the nations against the arbitrary caprice of pope or emperor. In the hands of Grotius it became the basis of the Law of Nations. In a perverted form of a return to nature it was made the justification of all the excesses of the French Revolution, and one of its fundamental dogmas, that of equality,

has been incorporated in many modern declarations of independence and bills of right, which simply reiterate the Aristotelian principle that "justice is equality." Nor has this influence been confined to the field of politics and public law. Sir Frederick Pollock well says that the law of nature under its modern name of the Law of Reason is still "the prevailing ideal of which it would be hardly too much to say that it is the life of the modern Common Law."

Probably no one is disposed to question the practical results of the pseudo-philosophic theory of utility as promulgated by Bentham and elaborated by his followers among the later English Utilitarians. To be sure it can hardly be classified as a juristic philosophy. It is rather simply a theory of legislation. But as such it gave a unifying principle, philosophic in character as a striving for unity, which constituted the "vis a tergo" of the reform movement of the last century. However mechanical or even grotesque the theory of utility was from a philosophic standpoint, no one can deny that its application to practical politics has resulted in refashioning large sections of our English law so far as that can be accomplished through the instrumentality of legislation.

The metaphysics of law went out of style on the Continent as well as in England in the middle of the last century. Properly so, we must assume. Savigny was right and his opponents were wrong. A knowledge of the detail of the history of European law and a comparison with the laws of other places and periods was an essential prerequisite to any effort at unification of legal principles or of any attempt to arrive at the underlying philosophic meaning of law. But philosophy had her revenge even on the great Savigny. He drove out the form of natural law with an esoteric content which was

in style at the beginning of his century. But even before he had reached the end of his life, philosophy had reconstructed a new natural law with an historic content out of the materials gathered by him in the course of his brilliant historical reconstruction of Roman Law.

With the end of the last century there has come a revival of idealistic philosophy on the continent. This has in the main taken the form either of a movement back to Kant or of a revival and extension of Hegelianism. Del Vecchio is classed as a Neo-Kantian, and the every-day lawyer may ask of him (as he has of his predecessors) what contribution he has made to the practical betterment of our complex legal situation.

Kantian philosophy has been described by one of its modern critics as "the last great uprising of rationalism in general philosophy and of the doctrine of 'natural law' in legal philosophy." In the metaphysical system of Kant the "Ding an Sich" is the modern analogue of the οὐσία of Aristotle. Each is a formal concept existing independently of experience and prior to any realization in experience. Kant's system of natural law has been freed from the trammels of the classical theory of natural law and appears in its modern form of a law of reason.

It is from this concept that Del Vecchio starts. "The law of equality of the radii governs before the circle is drawn." "Whoever builds a house does not thereby make its concept." These two sentences from Chapter X of Part I of this work (§ 77 and § 75) give the basis of the Kantian theory of law upon which Del Vecchio builds. It is worthy of note that they both go back to classical antiquity. The first is even pre-Socratic, as it involves the concept of number, *i. e.*, mathematical truth, which was the Pythagorean absolute. The second is manifestly the Platonic ἰδέα. The house

of brick and mortar which appears before our eyes is not the real house. The true reality is the *idea* of house that exists, as Plato says, in the mind of the god. The circle that we draw is only a copy of the true reality which is the mathematical concept of curved and continuous line, each point of which is connected by radii of equal length with the central point. The formal basis of law — here "formal" equals "essential" — is not found by generalization from any number of positive laws, no matter how large, but is a true universal, existing prior to experience and not conditioned by it. Del Vecchio gets away from the old natural law over to the law of reason in his proposition (§ 195) that "the eternal seed of justice, the foundation of the idea of law is not furnished by nature considered as the complex or succession of empirical facts but by the essence (or nature) of man, which comprehends and transcends other nature and is in itself autonomous." "The principle of law is therefore deducible 'a priori' from the nature of man." (Cf. Pt. III, Chaps. IV, V, post.)

What then are the practical bearings of this Neo-Kantian philosophy of law? First and foremost it is to be noted that it is true, or at least it possesses more of truth than do the older natural law theories or than is to be found in the empirical and positive theories that it supplants. If it is true, we need hardly go further. The Lord's truth will take care of itself, and men may be trusted to find a practical use for it. But we need not stop with this. The advocates of positive law assert that the essence of law is force, namely, that it is an emanation of the sovereign power. The historical school would apparently confine us to the quietistic course. We may observe what law has been and is but can scarcely have an outlook for the future. We must simply wait on the slow processes of history. But in

contrast to both of these, "a conception which goes beyond the phenomenology and empirical determination of action and finds its principle and norm in the intelligible essence of man" (§ 192) relieves us, on the one hand, from the dominance of arbitrary force and, on the other, gives us a hopeful program for the future. Law is neither force simply nor growth simply, but law is right reason, existing in the nature of man himself, and this reasonable law is to be worked out in the experience of mankind by an intelligent prevision under the control of a directive purpose, innate in the reason of man.

Here is its practical message for us. Possibly it is not the best formulation of the philosophic reality. The caustic criticism of some of the Neo-Hegelians, including their great leader, Kohler, would deny any significance to it. But surely, as Pollock says, the law cannot afford to throw away any of its resources. Here we have a broader formulation of philosophic theories than is found in any of the juristic predecessors of the Neo-Kantians, and this theory can be used as a formal basis from which a practical advance may be made.