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In Search of Virgil: The Journey of an Accidental Lawyer¹

“Three are the men with whom I live a little while every day: they are Pascal, Montesquieu and Rousseau” (from a letter of Alexis de Tocqueville to Louis de Kergorlay, November 10, 1836).

1. “Constitutions and steam-boats of vapour”: Croce’s

History of Europe

“If I were asked to name the chief event in my life, I should say my father’s library”: Borges’ words, but they could equally have been my own. In that collection of books, a prominent part was reserved to the works of Benedetto Croce (1866 – 1952), the most influential and respected Italian public intellectual in the first half of the XX century; a man to whom Gramsci referred as a “secular pope”.

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In 1932 – in the middle of the Fascist era – Croce wrote a short “History of Europe in the 19th century”, from the death of Napoleon to the First World War. This book was an important eulogy to freedom in a time – for Italy – of tyrannical oppression. Croce quoted Byron’s “Don Juan”: “Mankind just now seemed wrapt in meditation/on constitutions and steam-boats of vapour”. He observed that in the 19th century “there were longings for many things: for juridical guarantees, for participation in administration and government by means of new and revised representative systems; for various associations of citizens for special economic, social, and political purposes; for open discussion of ideas and interests in the press; and for ‘constitutions’, as people said at the time”. During this period, the liberal ideal triumphed as a “religion”.

Croce’s *plaidoyer* for liberty was made with reference to ideals rather than institutions, and did not take note of the fact that the triumph of constitutions had gone hand in hand with the

success of nationalism (a relation that was later to become the source of many problems). But from this book I learned that history matters; that to achieve an independent nation, and to introduce basic legal guarantees, much sweat and blood is necessary; that constitutionalism is crucial to the balancing of ancient and modern liberties; and that these issues can neither be studied nor understood without looking beyond the history of each individual nation.

2. **Hegemony and Coercion: Gramsci's *Prison Notebooks***

Like Croce, Antonio Gramsci (1891 – 1937), a political leader, was an opponent of Mussolini. And yet he also felt the need to write what he called an “anti-Croce”.

In one of his prison notebooks, “Notes on Machiavelli, on politics and on the modern State” (1949), Gramsci expounded his theory of the State and of law: “[...] the everyday concept of State

is one-sided [...]; by state should be understood not only the apparatus of government, but also the ‘private’ apparatus of ‘hegemony’ or civil society”; and, on the question of the law: “this concept will have to be extended to include those activities which are at present classified as ‘legally neutral’, and which belong to the domain of civil society; the latter operates without ‘sanctions’ or compulsory ‘obligations’, but nevertheless exerts a collective pressure and obtains objective results in the form of an evolution of customs, ways of thinking and acting, morality, etc”.

Gramsci adopted a considerably broader concept of the State and of law than is the norm, founded on hegemony (a process of moral and intellectual leadership aimed at gaining the consent and support of civil society within a polity), opposed to coercion. Croce’s historical fresco called the attention of the reader to the higher law, to the constitution; the emphasis of Gramsci’s analysis was rather on the lower-level – but by no means less important –

elements of government: bureaucracy, by-laws, directives, policies.

My reading of Gramsci led me to distrust declarations and principles, and to look rather for the real practice of public bodies; to try to understand the often contradictory roles of different departments of government, which combine leadership and the search for consensus with organized coercion and even violence. The legacy of Fascism is, of course, of particular importance in this context; and thus I was brought to the study of the history of Fascist institutions.

3. **“Der nationale Staat”**: Mann’s *Doctor Faustus*

Croce’s *History of Europe* was dedicated to Thomas Mann (1875 – 1955). Some fifteen years later, towards the end of the Nazi period, Mann wrote *Doctor Faustus*, during which – as we know from his *Story of a Novel* – he read Croce’s *History*.

Mann wrote that *Doctor Faustus* was the “novel of my age, disguised as the story of an artist”; and that the passages on Hell could not be understood in isolation from the dark underworld of the Gestapo. When he was finishing his book, news of the discovery of the concentration camps and of the crematories reached the world. And he added: “for those of us who experienced what in Germany is called *der nationale Staat* nothing was surprising, nothing unbelievable”.

Doctor Faustus is a reinterpretation of the Faust legend set in the first half of the 20th century. It is the story of a composer of extraordinary musical creativity, Adrian Leverkühn, related by his friend Serenus Zeitblom, in which the former sells his soul to the devil in exchange of twenty-four years of genius.

At the center of the novel there is a long dialogue between the composer and the devil. The latter appears to Leverkühn in Palestrina, while he is reading the pages on Mozart’s *Don Giovanni* in *Either/Or* by Kierkegaard. The devil, speaking

German (his “favoured language”) praises “[...] creative, genius-giving disease, disease that rides on high horse over all hindrances, and springs with drunken daring from peak to peak, [which] is a thousand times dearer to life than plodding healthiness”.

This “polyphonic” book is a work on the historic role of the German State, and it led me to a re-examination of the great German legal thought of the 19th century and the high regard in which it was held by the Italian public law school (illustrated by the latter’s subsequent Germanophilia), and to the study of German scholars such as Carl Friedrich Gerber, Paul Laband, Otto Mayer, Georg Jellinek, their *Staatsrecht* and their Italian followers.

4. **Liberty and Authority: Giannini’s *Lectures on Administrative Law***

The only book suggested to me by a university professor that is worth mentioning here is *Lectures on Administrative Law* (1950) by Massimo Severo Giannini (1915 – 2000). This was a Weberian work, rich in references and examples from history, sociology, and political science; it reversed many *idée reçues*, while teaching that the lawyer's motto must be *distingue frequenter*.

This book was founded on the assumption that administrative law is a system of legal rules interconnected with the general principles of the State, and that, therefore, an expert in the field must have a full understanding of the legal system in its entirety. It presented administrative law as based on the dialectic between the authority of the State and the liberty of the people, with each decision establishing a balance between the two poles. It was entirely new in its stern evaluation of the conditions prevailing within Italian institutions at the time.

Elsewhere I have compared Giannini's technique to cubism, in that he moved beyond the bounds of traditional single point perspective and examined legal institutions from different points of view. This book was for me a call to arms, to service in the forces of administrative law. It convinced me that a good lawyer must both have a firm grasp of the entire legal system and be able to cross disciplinary boundaries.

5. Democracy and Tyranny: Tocqueville's Correspondence with Kergorlay

Alexis de Tocqueville (1805 – 1859) was the first to signal the importance of administrative law, in his "Rapport" (1846) on a book by Macarel to the *Académie des sciences morales et politiques*. He maintained an intellectual discourse with Louis de Kergorlay that lasted for almost 30 years. They exchanged many letters relating to their emotions and their dreams, their

dissatisfactions and their pride, their marriages, their careers, their work. During the long elaboration of his texts, Tocqueville would present to his friend his main conclusions on the dilemmas of liberalism *vis-à-vis* democracy.

In 1835, the year in which the first *Démocratie en Amérique* was published, he wrote to de Kergorlay: “we are being carried away irresistibly by our laws and our mores towards an almost complete equality of conditions. Once conditions are equal, I confess that I no longer see any intermediaries between a democratic government (and by this word I do not mean a republic, but a state of society in which everyone more or less would take part in public affairs) and the government of one person ruling without any control.[...] I do not want the latter.[...] Therefore only the first choice remains. I hardly like it any better than the latter, but nevertheless I do prefer it to the latter [...]. Thus, of two evils I choose the lesser”.

Tocqueville had regard to facts only insofar as they shed light on the movement of ideas, linking them to principles; and he was relentlessly comparative in approach. I have never forgotten these two methodological lessons. Tocqueville taught me to combine the miniature and the fresco, to violate disciplinary boundaries, and to address the methodological problems involved in comparative scholarship.

6. **The Rule of Law and *Droit Administratif*: Dicey's *Law of the Constitution***

When Albert Venn Dicey (1835 – 1922) was a young student at Oxford, Tocqueville's *Democracy in America* was very popular. Dicey praised Tocqueville's genius and hoped to write a book that would be equally widely read. He later (1885) wrote his *Introduction to the Study of the Law of the Constitution*, a work of

great renown that founded his reputation as the major interpreter of the unwritten British constitution.

In this book, he wrote: “In many continental countries, and notably in France, there exists a scheme of administrative law – known to Frenchmen as *droit administratif* – which rests on ideas foreign to the fundamental assumptions of our English common law, and especially to what we have termed the rule of law”. Dicey concluded that *droit administratif* was “despotic in nature”. In his analysis of administrative law he referred to Tocqueville, who declared, in a letter to Blosseville in 1831, that he was unaware of the general principles of administrative law.

My research on Dicey brought me to study the revolution in government in Britain in the 19th century (which was overlooked by Dicey), the growth of administrative scholarship in France, the parallel developments of the two States, and the formation and development of administrative myths.

7. Judges and Scholars: *The Italian Style* by Merryman

While Dicey opened a deep chasm between the civil and common law traditions, John Henry Merryman (1920) built a bridge between them.

In 1965 and 1966, Merryman, a professor of comparative law at Stanford, wrote three seminal articles in the *Stanford Law Review*. Just as the French Tocqueville had discovered democracy in America some 150 years earlier, so the American Merryman observed a new “Italian Style” in Europe. He remarked that in Italy “[t]he net image of the judicial process is one of something mechanical and automatic, of slot machine jurisprudence”. “The most striking difference [from the United States] is the Italian relegation of the judge to inferior status”. He also, however, noted that “[...] the practice is sharply different from the folklore”. Building on the work of Ascarelli and Calamandrei, he found that

Italian judges did in fact employ their creative power. Two forces – according to Merryman – underpinned this creative role: the Constitution of 1948 and post-Fascist cultural renaissance of Italy. He concluded that “[t]he future would seem to hold an expanded role and greater prestige for Italian judges”.

Now, looking back, we must recognize that Merryman was able to foresee the future: certainly, nobody else was suggesting in the 1960s that the Italian judiciary would achieve the powerful status that it enjoys today.

Merryman’s articles taught me that different legal systems are often much less different than it is usually thought; moreover, he acted for me as an introduction to the American way of law, kindling such questions as: why is the role of judges no less important than that of legislators? Where should the balance lie between democracy and liberty, between the will of the people and legal guarantees, between majority and non-majoritarian institutions?

8. Legal Education Here and There: Goethe's *Poetry and Truth*

Towards the end of his life, Johann Wolfgang Goethe (1749 – 1832) wrote *Poetry and Truth – From My Own life*. This book is a chronicle of an education, full of wisdom and irony. It carries out Goethe's intention "to exhibit the man in relation to the features of his time, and to show to what extent they have opposed or favored his progress".

The book contains an interesting picture of legal education. Goethe relates that he left Leipzig to continue to study law in Strasburg. "It was not in Strasburg as in German universities where they try to educate jurists in the large and learned sense of the term. Here [...] all was really directed to the practical [...]". His teacher explained that he should not enquire how and when a law arose, or what was the internal and external occasion for it, or

how it had been altered by time and custom, or how it had been perverted by the false interpretation or distorted usage of the courts; rather, “[w]e enquire – he said – into that which exists at present: this we stamp firmly on our memory, that it may always be ready when we wish to employ it for the use and defense of our clients”.

Goethe added: “But since in this way all my own activity in the study was cut off – for I had no sense for any thing positive, but wished to have every thing explained historically, if not logically – I found for my powers a wider field”. He began attending courses in chemistry and anatomy.

This short account of legal education in the 18th century coincides with my own experience in the middle of the 20th. I was reinforced in my conclusion that law and institutions are unintelligible if they are not historically situated and logically related to each other.

9. **Putting Oneself Above the Law: *Diderot's Conversation of a Father with his Children***

In 1773, Denis Diderot (1713 – 1784) wrote a short dialogue on the danger of putting oneself above the law, in which five different stories are presented.

The most important of these concerns an old priest who had died leaving a considerable fortune. It was believed that, as he had left no will, a number of poor people were to benefit from the inheritance. The father of the title of the story, as the executor of the old priest's estate, found an old will in a disused box in which his fortune was bequeathed to a very rich person. Would he do better to throw the document into the flames or to follow the law?

The conversation ends with a passage that I have often quoted in my works: “the child embraces his father, and in bidding him good-night whispers in his ear: ‘Strictly speaking, father,

there are no laws for the sage. All being open to exception, it is for him to judge the cases in which we ought to submit to them, or to throw them over'. 'I should not be sorry' – his father answers – 'if there were in the town one or two citizens like you; but nothing would induce me to live there, if they all thought in that way'.

Dilemmas like this come frequently to the fore in the constitutional courts. Such courts are, in principle, above the law, as they judge the law itself. They answer to a higher law, the Constitution; yet the Constitution is often silent, or open to interpretation. In such cases, judges must rely on general values, or on their own judgment; can we, therefore, infer that these judges are expected to be half lawyers, half sages, in contradiction of Diderot's conclusions?

10. **Free to Choose? Borges' *Garden of Forking Paths***

Jorge Luis Borges (1899 – 1986) inquired all his life into the nature of time, infinity, reality, identity. His 1941 collection of short stories entitled *The Garden of Forking Paths* is perhaps the most important work of Spanish-language fiction of the 20th century.

The first story in the volume concerns a Chinese man who acted as a spy for the Germans during the First World War; and, through this tale, the structure of an ancient Chinese novel is narrated. The spy kills a man by the name of Dr. Albert, who, before dying, reveals the secret of a mystery bequeathed by one Ts'ui Pên, a learned and famous man who had retired from a successful public life in China in order to write a novel and to construct a labyrinth “in which all men would become lost”. At his death, he left no labyrinth and a chaotic, unfinished novel. Albert’s discovery was that the novel was itself the labyrinth, as it described a world in which all possible outcomes of choices co-

exist simultaneously, each one creating an endlessly proliferating diversity of futures.

In this short story, Borges enquires into the nature of chance (the author of the novel was the spy's ancestor), strategy (the spy wants to kill Dr. Albert only in order to reveal to the German army the name of a city to attack) and complexity (the spy's ancestor designed a labyrinth in time, not in space; Borges designs a double labyrinth, with many ramifications, to mislead the reader). This ten-page story shakes the lawyer's faith in an established pattern of development, those simplistic conceptions by which rules prescribe and people obey. The reader becomes aware of all the possible choices we might make and of the many different paradigms that we can conceive in order to understand reality.

11.By Way of an Explanation...

The very diverse writings that I have presented here (research monographs, letters, novels, essays, and autobiographies, ranging from the late 18th to the middle of the 20th century) have much in common. The powerful minds of these ten authors embody an entire tradition of thought, with many ramifications, that traverses a wide variety of fields and pays scant regard to disciplinary boundaries. They are able to bring an external perspective to bear upon their own world, and therefore to compare more than one tradition, national and cultural.

Did I choose them, or simply happen upon them? Why and how did we meet? Was I aware of their significance, or was I attracted by them only because they amused me? Have I presented them here because I was conscious of their importance and their relevance to my work when I first read them, or because I see it now and have reconstructed a tradition, mixing remembrances and programs past and present?

The first reason for my choice is that I share Clemenceau's criticism of the students of the *École Polytechnique*: "they know everything there is to know, but nothing more". Put simply, I was in search of more than school, university, and my own cultural environment provided to me.

Another reason is my intellectual schizophrenia, combining the study of law and history. The first looks forward, the second back; and yet I firmly believe them to be indispensable complements. And I have tried more than once to confront the methodological problems of this relationship.

A third reason is that I have always been fascinated by the "many faces of realism"; as Putnam noted, reality reflects "both the way things are and our interests and assumptions about the way things are".

The last reason is that I was an accidental lawyer. By this I mean that I was not a lawyer by bent or inclination; I had no

intention to become either a judge, or a barrister, or a notary; and it was only later in life that I discovered the truth of Edmund Burke's observation that the study of law "renders men acute, inquisitive, dexterous, prompt in attack, ready in defense, full of resources". I was never, therefore, interested in limiting myself to "lawyer's law", and have always appreciated the perspectives of non-lawyers on the matter.

To conclude, some of these encounters were fortuitous, some planned, some simply a product of my time, but all were inspired by these standards. Were there alternative roads? Might I have replaced Croce with Hegel, Tocqueville with Montesquieu, Gramsci with Constant, Giannini with Forsthoff, Mann with Proust, Goethe with Stendhal, Diderot with Voltaire?