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Rethinking Emilio Betti, the anti-Gadamer

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Rethinking Emilio Betti, the anti-Gadamer*

Emilio Betti staked out an original theory that made interpretation (anciently named ›hermeneutics‹) the key to explaining the legal phenomenon. In his mature work, *General Theory of Interpretation* (*Teoria generale dell'interpretazione*, I–II, 1955, hereinafter GTI), he expanded this idea into a wide-ranging theory that made hermeneutics a general method that not only blurred the line between individual legal disciplines but also between law and other human sciences. Law, in this view, is a spiritual creation encoded in perceptible and objective forms that are transmitted over time. It follows that its complex architecture can be known and explained, as it is in the nature of the legal phenomenon to be written in the language of hermeneutics. Despite the theory's philosophical significance and the subsequent debates that involved, among others, Hans-Georg Gadamer and Franz Wieacker, it failed to be accepted by mainstream scholarship and Betti came to be remembered as an outsider, a solitary figure, isolated and misunderstood, a dreamer, even the last Romantic. To put it bluntly, why?

This issue, traditionally addressed by Betti studies, is also dealt with in this book, but with such forthright clarity and original results as to make the volume a substantial advance and a fundamental rethinking of Betti. Edited by Antonio Banfi, Massimo Brutti and Emanuele Stolfi, this book collects thirteen essays delivered at a conference marking the 50th anniversary of Betti's death in 1968. While the contributions address a wide variety of interdisciplinary concerns implied by Betti's wide-ranging theory, sometimes with considerable attention to detail, to this reviewer the book's major thrust lies in three arguments.

The first relates to Betti's relationship to Fascism. Massimo Brutti's contribution takes us to the years from the fall of Fascism (1943) to the publication of the *General Theory of Interpretation*

(1955). Betti's personal story was woven into that political context. He was not a bystander but an enthusiastic supporter of the Fascist regime, initially removed from teaching in 1945 but reinstated to a university position the year after. This experience left perceptible marks on his work. One is a clear principle of objectivity that gave life to his theory of interpretation. What Betti proposed seemingly arose from his revulsion of political discord: he responded to the corrosive power of war propaganda with truth-seeking and a concern for how to achieve a correct understanding of human communication (Brutti 59, GTI 87). Betti's interpretive theory also implies an appeal to tolerance, as understanding goes hand in hand with dialogue and a sensitivity to circumstances. Another mark is apparent in Betti's references to a distinctive European consciousness. He believed in a European spiritual core based on a common cultural stock (Cervati) that was now threatened by both Anglo-American utilitarianism and Soviet materialism. By shifting the emphasis from an author in isolation to his historical context, Betti appears as part of a larger experience in which his personal story is interwoven with the story of a generation that lived through the tragic decades of the rise of totalitarianisms and World War II.

The volume's second main thrust relates to Betti's theory of interpretation. When Betti presented his theory in embryonic form in 1927, he started from a question that could be phrased as ›how we can hope to understand the legal past in the present time?‹ He proposed to reconcile the two opposite ends of juristic experience: historical tradition and the legal system, or in his parlance, ›Roman law and present-day dogmatics‹. However, he added an important proviso. He spoke of dogmatics without paying attention to the work of the post-Pandectists of his day. While the latter studied legal systems *per se*, Betti postulated the

* ANTONIO BANFI, EMANUELE STOLFI, MASSIMO BRUTTI (eds.), *Dall'esegesi giuridica alla teoria dell'interpretazione: Emilio Betti (1890–1968)*, Rome: Roma TrE-Press 2020, 329 p., ISBN 979-12-80060-21-1

historical dimension of the conceptual framework (dogmatics) by which legal systems work (Zaccaria, Nitsch, Petrillo). According to him, historical (legal) experience, encoded in historical texts, would remain silent without a conceptual framework that makes unfamiliar factual experience intelligible according to familiar categories, which Betti called representative forms (Nitsch). By fitting facts into pre-existing patterns of interpretation and explanation, these representative forms give meaning to historical data that would otherwise be lost. An important corollary is that knowledge is not a passive reception but an active process of the production of meaning, which operates with the assistance of forms and concepts. Moreover, such a conceptual framework (following G. B. Vico's ›maker's knowledge‹ principle) is ›made‹, hence postulating the historicity of both subject and object.

If we turn to the core of Betti's idea of interpretation, we see that its main feature was a resolute concern with objectivity. To understand the legal past, the purely historical cannot be separated from the formal (dogmatics). And because the process of knowing is filtered through forms of representation, such an approach dismisses the primacy of facts affirmed by positivism, but without falling into subjectivism. The purpose of Betti's theory was to restore the autonomy of law in its historical dimension.

This appeal to objectivity divided Betti from Gadamer (Zaccaria, Petrillo, Vargiu). Starting from different premises, Gadamer broadened the province of interpretation to embrace the whole human condition. To Gadamer, humans are situated in a flow of memories and experiences continuously re-appropriated: living is interpreting. However, objectivity is missing in this picture, and it is precisely to its disappearance that Betti (and Wieacker) reacted, protesting that historical knowledge should not be tainted by implicit or subconscious assumptions. Betti believed that an objective reality existed and was knowable through forms of representation. In private law, for example, according to one of his well-known formulations, interpretation addressed not *voluntas* but the *declaratio voluntatis* (Banfi). To Betti, interpretation is a process to grasp meaning, not a mode of being.

If we turn to the sources that support Betti's methodological project, it should be noted that, though he did use authors clearly steeped in

romantic idealism (e.g. Hartmann, Schleiermacher and Humboldt), Betti worked out his position from a broader background. His ideas of representative forms and of a triadic cognitive process was drawn from Charles Peirce (GTI 27, 79), and other sources point in the direction of Ernst Cassirer's *Philosophy of symbolic forms* (1923). This observation would be of little importance without at the same time noting that those sources had been used by Hermann Kantorowicz for his ground-breaking *Definition of law* (1939). This observation (and others that could be easily drawn from Betti's sources) strongly suggest that Betti should be seen not as an epigone of 19th-century romanticism, but as the proponent of an intellectual project that was in touch with contemporary and forward-looking debates on a dialogue between law, linguistic philosophy, semiotics and science.

Thirdly, in his introductory essay, Italo Birocchi raises the question whether there is ›a place for a new hermeneutics for the open normative regimes of the globalisation age‹. Three features of Betti's hermeneutics to be gleaned from the present book point to a positive answer:

i) Interdisciplinarity: it seems that one of the traits of the 21st century has been to refute one of the fundamental claims voiced during the 20th century, namely, to separate law and its autonomous rational foundation from politics and morality. Authors as diverse as Kantorowicz, Kelsen and Hart reacted to the clash of ideologies of their time with their determination to place the law on a rational islet to keep it separate from a sea of moral or political relativism. Today, however, we are more open to accepting that law's normativity cannot be established without first confronting a broader normativity that encompasses plural statements of various sorts: legal, moral, political and aesthetic, to name but a few. Betti believed in an interdisciplinary perspective: in his mind, knowing the law is a cognitive pursuit that transcends the purely legal.

ii) Objectivity: today, having dismissed post-modern scepticism about the truth-content of language, we are more inclined to reconsider the forms by which the legal phenomenon can be objectively known. It is precisely Betti's denial of Gadamer's hermeneutical philosophy that makes his position attractive.

iii) Conceptual pragmatism: there is a growing awareness that the legal conceptual framework has a historical or pragmatic nature, which in turn

demands an appropriate epistemology. Betti's reference to the ›maker's knowledge‹ tradition, currently revived by the philosophy of information, indicates a fertile path of research that begins from the question originally asked by Betti in 1927: how

can we hope to understand the legal past in the present time?

If those premises are correct, Betti certainly has something interesting to tell us. ■

Christoph Schönberger

Weimarer Grenzüberschreitungen*

Der hundertste Geburtstag der Weimarer Reichsverfassung hat eine Fülle wissenschaftlicher Bilanzliteratur hervorgebracht. In diesen Zusammenhang gehört auch der vorliegende Sammelband, dessen Beiträge auf eine von den Herausgebern veranstaltete Tagung in Weimar im April 2019 zurückgehen. Für die deutschen Beiträger wird dabei zumeist das Konzept verfolgt, die Hauptbeiträge jüngerer Autorinnen und Autoren zu übertragen, die dann von älteren Wissenschaftlern kommentiert werden.

Mit »Weimar international« widmet sich der Band einer thematischen Nische, die in der Jubiläumsliteratur ansonsten nur vereinzelt eine Rolle gespielt hat.¹ Ausweislich der Einleitung der Herausgeber verstehen diese die »internationale« Dimension der Weimarer Reichsverfassung in erster Linie als Analyse von Rezeptionsprozessen in zwei Richtungen: der Rezeption ausländischer Vorbilder in der Weimarer Reichsverfassung einerseits, der Rezeption der Weimarer Reichsverfassung im Ausland andererseits (3 f.). Diesen Rezeptionsprozessen sind denn auch die meisten Beiträge des Bandes gewidmet.

Mit dieser Fokussierung auf Rezeptionsprozesse ist allerdings eine gewisse Beschränkung des Themenfelds verbunden. Vieles, was zur »internationalen« Dimension der Weimarer Reichsverfassung

gehört, gerät auf diese Weise nur am Rande oder gar nicht in den Blick. Augenfällig ist das zunächst für den völkerrechtlichen Kontext der Weimarer Verfassungsschöpfung. Die Herausgeber heben zwar die Bedeutung des Versailler Vertrags für die Arbeit der Nationalversammlung hervor (6), diese wird im Band aber nicht näher behandelt. Ebenso wenig geht es dem Band in der großen Mehrheit seiner Beiträge darum, das Weimarer Verfassungswerk durch die vergleichende Analyse der zeitgenössischen Verfassungen und Verfassungsentwicklungen anderer europäischer Staaten besser zu verstehen.² Denn die Analyse von Rezeptionsprozessen ist selbstverständlich nicht gleichbedeutend mit einer umfassenden vergleichenden Einordnung der deutschen Verfassungsgebung des Jahres 1919.

Glücklicherweise wird die Konzentration auf Rezeptionsvorgänge jedoch am Anfang des Bandes gleich zweimal durchbrochen. Dies geschieht zunächst durch den hervorragenden Überblicksbeitrag von Jana Osterkamp, der das Weimarer Verfassungswerk als Teil einer europäischen »Verfassungswelle« nach dem Ersten Weltkrieg versteht und durch den Kommentar von Rainer Wahl anregend ergänzt wird. Aus der Konkursmasse der zusammengebrochenen multinationalen Imperien Österreich-Ungarn, Osmanisches Reich und Russ-

* THOMAS KLEINLEIN, CHRISTOPH OHLER (Hg.), Weimar international. Kontext und Rezeption der Verfassung von 1919, Tübingen: Mohr Siebeck 2020, VIII + 269 S., ISBN 978-3-16-158877-8

1 Siehe aber: EWALD WIEDERIN, Die Weimarer Reichsverfassung im internationalen Kontext, in: HORST DREIER, CHRISTIAN WALDHOFF (Hg.),

Das Wagnis der Demokratie: Eine Anatomie der Weimarer Reichsverfassung, München 2018, 45–64; CHRISTOPH SCHÖNBERGER, Zwischen Versailler Vertrag und europäischer Verfassungswelle: Die Weimarer Verfassung im internationalen Kontext, in: HORST DREIER, CHRISTIAN WALDHOFF (Hg.), Weimars Verfassung. Eine Bilanz nach 100 Jahren,

Göttingen 2020, 75–86, sowie die Beiträge zu »Translating Weimar« in: Rg 27 (2019) 175–230.

2 Dazu aber bereits CHRISTOPH GUSY (Hg.), Demokratie in der Krise. Europa in der Zwischenkriegszeit, Baden-Baden 2008.