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The dark side of law 'in context': *ex parte populi* law as a new paradigm*

O lado oculto do direito 'em contexto': o direito *ex parte populi* como novo paradigma

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Abstract

My strategy is to define the 'dark side' of law by contrast, starting from its 'light side'. It seems to me that the latter can only be defined from what has been called the 'logicist-positivist paradigm' that identifies the clarity of law with the certainty of the judicial decision deduced from norms, assumed to have a clear meaning. This paradigm is based on the identity between normative text and norm, which has been commonly considered implausible by legal philosophers, but perhaps we could say by jurists, over the last seventy years. Nevertheless, the paradigm continues to be handed down and considered the framework for reflections on law. I argue, referring to Kuhn's conception of a paradigm, that this is because the legal-philosophical thought of recent decades has been unable to develop an alternative paradigm, and I suggest that this is because the logicist-positivist paradigm appears inextricably linked to the liberal-democratic structuring of our legal systems: a law-making judge fundamentally denies the rule of the people through the legislature. As a starting point for the elaboration of a new paradigm, I propose a conception of law that is no longer regulative of people's behaviour, but of public power. In it, the judiciary emerges as the interlocutor to whom one turns to transform the private troubles of marginalised and socially abandoned citizens into legal problems. I argue that this conception is able to recover, in the current context, the fundamental values of 'democratic societies'.

Keywords: legal enlightenment; norm; judiciary; paradigm; personal troubles.

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Resumo

Minha estratégia é definir o "lado oculto" do Direito por contraste, começando por seu "lado claro". Parece-me que este último só pode ser definido a partir do que se tem chamado de "paradigma logicista-positivista" que identifica a clareza do direito com a certeza da decisão judicial deduzida de normas, assumidas como tendo um significado claro. Esse paradigma é baseado na identidade entre texto normativo e norma, que tem sido comumente considerada implausível pelos filósofos do direito, mas talvez pudéssemos dizer pelos juristas, nos últimos setenta anos. No entanto, o paradigma continua a ser transmitido e considerado o marco para reflexões sobre o direito. Argumento, referindo-me à concepção de paradigma de Kuhn, que isso ocorre porque o pensamento jurídico-filosófico das últimas décadas foi incapaz de desenvolver um paradigma alternativo; e sugiro que isso ocorre porque o paradigma logicista-positivista aparece inextricavelmente ligado à estruturação liberal-democrática de nossos sistemas jurídicos: um juiz legislador nega fundamentalmente o governo do povo por meio do Legislativo. Como ponto de partida para a elaboração de um novo paradigma, proponho uma concepção de direito que não é mais reguladora do comportamento das pessoas, mas do poder público. Neste o Judiciário surge como o interlocutor a quem se recorre para transformar os problemas privados de cidadãos marginalizados e socialmente abandonados em problemas jurídicos. Argumento que essa concepção é capaz de recuperar, no contexto atual, os valores fundamentais das 'sociedades democráticas'.

Palavras-chave: iluminismo jurídico; norma; judiciário; paradigma; problemas pessoais.

Introduction

I will attempt to define what can be understood by the 'dark side' of law *per oppositionem*, starting from the elaboration of a hypothesis that defines the contours of its other side, the 'clear side'. I will argue that, even today, the idea of the clarity of law is linked to what Pietro Costa (1995) has called the 'logicist-positivist paradigm'. A paradigm that emerged in the cultural climate of late 19th century positivism, in the wake of the successes of the physical-natural sciences. This paradigm, which developed in a sophisticated manner in the neo-positivist climate in the first half of the 20th century, is articulated from the idea that any discourse about knowledge must be a scientific discourse, i.e. empirically verifiable, organised in rigorous logical-demonstrative terms.

Having chosen this strategy to define the 'clear side' of law, I will analyse this notion by performing an operation that I would call *law in context.* I will look at the political, cultural and social context in which it was born and then developed, in order to understand the role

that this notion plays in our conceptions not only of law, but also of politics and society. This operation seems to me necessary in order to explain the reasons for the persistence of the clear/dark dichotomy and the paradigm that generates it, even though Costa, almost thirty years ago, spoke of its now evident and decades-long crisis.

To begin with, I cannot refrain from noting two aspects of the concept of the 'dark side'. First, the 'Enlightenment' origin of the opposition that defines it is striking: the notion of the 'dark side' harkens back to the idea of a dark period for legal discourse, uninterrupted by the Renaissance and lasting until the eighteenth century, in which law was something incomprehensible, an esoteric practice from which the initiates, the jurists, derived unpredictable and therefore arbitrary rules that were completely incomprehensible to the citizens (in Italian literature, the Manzonian lawyer Azzeccagarbugli is emblematic of this idea right from his very name). This image of law and jurists is contrasted with the age of the 'Enlightenment' which, by definition, provides clarity: it draws a law as clear as Euclidean geometry, a law that arrives at logically verifiable conclusions from (self-)evident data. As is well known, this dichotomy has been disputed for decades, both in terms of its historical validity and in terms of its representation of the concept of law.

The other aspect that deserves immediate emphasis is that, unlike the Enlightenment narrative, the clear/dark dichotomy, referring to two sides of the law, does not express the idea of a succession, of a dark *age* followed by a 'clear' one. The idea of the 'dark *side*' implies the coexistence of darkness and light, a law with two sides: a clear side and a dark side that may not be able to be clarified but rather, like the face of the moon that we cannot see, is destined to remain dark, as optics teaches us, precisely because there is a side that is lightened. In other words, it conveys the idea that law is 'ontologically' a kind of double-faced Janus.

'Clear' law as a guarantor of freedom and autonomy

Among the many possible examples of theorising that show how the idea of 'clear' law is linked to the logicist-positivist paradigm, I choose Joseph Raz's (1979) essay 'The Rule of Law and Its Virtue', because it seems to me very representative of how the Enlightenment approach is still taken for granted, assumed as a model, today, albeit with many caveats and *warnings*[2].

Raz starts from the truism that *if* law is an instrument to guide the actions of individuals, they must be enabled to comply with its rules. Law must have such characteristics as to enable individuals to know it and to obey it (Raz 1979, 213). From this truism Raz derives eight characteristics of the *rule of law*. Some of them concern the legal system, which, in order to be able to guide the actions of individuals, must contain general, public, stable and *clear* rules. Legislators are supposed to make regulatory provisions: 1) written in a technically perfect manner; 2) adequately publicised (promulgation of laws); 3) not retroactive, especially when they provide for sanctions and penalties: *nulla poena sine lege*; 4) readable

[2] Some of these *warnings* were incorporated by Raz himself (1990) in his later reflections.

and understandable; 5) not contradictory but reasonable and logical; 6) capable of taking into account the needs and limitations of citizens, without demanding the impossible; 7) stable over time; 8) collected in an organic manner to promote understanding of what they require.

Raz also dwells on individual rules, which he recognises as an essential part of a system of government, arguing that they must conform to general rules: *the verifiability of this conformity is the element that qualifies the law as 'clear'*. It is no coincidence that the other requirements of the *rule of law* that Raz (1979, 218) identifies concern "the legal machinery of enforcing the law" which "should not deprive it of its ability to guide through distorted enforcement" but, on the contrary, must be "capable of supervising conformity to the rule of law and provide effective remedies in cases of deviation from it".

In this second set of requirements, Raz includes the independence of the judiciary, the subordination of criminal prosecution to the law, easy access to justice and judicial control not only of administrative acts but also of laws, hence a strict constitutional system. He also emphasises the need for the organisation of the judiciary to be characterised by "open and fair hearing" and "absence of bias" to ensure the correct application of the law (Raz 1979, 217).

It is evident that such a notion of the *rule of law*, which focuses on the value and function of the clarity of law, is influenced by the 'Fullerian' conception of law. The requirements (non-retroactivity, clarity, publicity, etc.), that Lon Fuller considers constitutive of the intrinsic morality of law, are transformed by Raz into functional requirements: they are presented as *qualities of* law, as characteristics that are to some extent logically (or teleologically) necessary for it to fulfil its task and guide the behaviour of subjects. Raz (1979, 223) argues that law does not necessarily meet Fuller's requirements, but when it does, it is configured as a *rule of law*, i.e. as a legal system that is 'virtuous' because it is effective (Raz 1979, 225).

For Raz, as for nineteenth-century German and French liberals, the *rule of law*, insofar as it appeals to the principle of legality and legal certainty, has a negative function: it prevents the exercise of arbitrary power. For nineteenth-century European liberals, as is well known, the threatened good was citizens' freedom, and the threat came from the executive power, which had to be prevented from acting arbitrarily: the law was seen as the form of exercise of power that best protected citizens' freedom. For Raz, on the other hand, it is individuals' autonomy that is under threat: "their right to control their future", their ability to 'plan and plot' their lives. Fuller (1969, 162), too, argued that respect for legal morality "involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his faults". And conversely, "every departure from the principles of the law's inner morality is an affront to man's dignity as a responsible agent". For Raz, the arbitrary power that threatens the autonomy, and thus the dignity of individuals is not only executive power, a theme at the heart of the nineteenth-century construction of the notion of the rule of law, but also legislative power, as shown by the inclusion of constitutional review among the elements that make the law clear. It is precisely the control of constitutionality that seems to emerge as the guarantor of the breadth of individuals' sphere of freedom. This aspect is not particularly addressed (and even less problematised) by Raz, who, in line with nineteenth-century thinking, focuses on the level of legislation, arguing that law inevitably limits the freedom of individuals, but if it is not 'clear',

it also limits their autonomy and thus their dignity: "the *rule of law* is designed to minimize the danger created by the law itself [...] the law may be unstable, *obscure*, retrospective, etc., and thus infringe people's freedom and dignity. The *rule of law* is designed to prevent this danger" (Raz 1979, 224, italics mine).

The *rule of law* does not preclude violations of human dignity, "but deliberate violation of the *rule of law* violates human dignity" because it leads to insecurity and the frustration of expectations (Raz 1979, 221-2). The *rule of law* ensures respect for human dignity only in that it guarantees that individuals are treated as persons capable of 'autonomy'. In other words, Raz argues that a 'clear' law is inherent in a minimum of protection of individual autonomy: it can characterise regulatory systems inspired by the most diverse ideals and pursuing the most varied ends, with the sole exception of a system that refuses to regard individuals as autonomous beings. It is precisely in virtue of these considerations that the Israeli philosopher maintains that requirements such as generality, abstractness, publicity, and equal application are, *ex parte principis*, technically essential qualities for the effective guidance of behaviour, whatever the direction of that behaviour, but are also highly desirable *ex parte populi*, because they constitute an indispensable precondition for the autonomy of individuals and thus for respect for their dignity (Palombella 2006, 157).

In line with the Enlightenment tradition, for Raz the crux of the problem of legal clarity, and thus of respect for individual dignity, is the transition from the statutory text to individual decisions. Once the requirements of clarity of legal texts have been met, through their careful drafting, the obscurity of the law as it affects the lives of individuals can only depend on the 'application' phase, on the jurists who are called upon to give social reality to the 'clear' texts, first and foremost the judges. It is no coincidence that the legal Enlightenment, on the one hand, promoted the ideal of a legal system based on codification, that is, on the rational, organic and complete arrangement of normative texts, and, on the other hand, demanded that normative 'data', rigorously objective, be removed, except in extraordinary cases, from the reworking and reconstructive activity of interpreters.

Clear law as the essential pivot of a democratic order

Between the second half of the eighteenth century and the nineteenth century, the conviction took shape that there is a virtuous circle between state sovereignty, (general) law and freedom, a conviction that grew stronger as the principle of popular sovereignty took hold. The pivotal point of this virtuous circle is a combination of the Lockean idea that the limits imposed by law on individual liberty are wanted by the rational self of the person whose liberty is regulated (Santoro 1999, 226-86), and Rousseau's idea of the general will, according to which the body politic, by definition, never intends to harm the freedom of one of its members. This 'democratic' ideology is combined with Montesquieu's aristocratic ideology based on the tripartite division of powers and in which the judicial power is in fact configured as a 'null power' (Montesquieu 1748, Book XI Chap. III): judges must be the 'mouth of the law'. These two ideologies are mutually reinforcing, giving rise to a legislation-centred ideal of

political organisation that I have elsewhere called the 'Rousseau-Montesquieu' conception of the rule of law (Santoro 2008, 220 and 9-11). The pivot of this conception is the Parliament, which is seen as the sovereign body by virtue of its connection to the electoral body, while judges are seen as the faithful executors of the will of the legislature (and thus, ultimately, of the people).

The judge is configured as the defender of the law: a fundamental, indeed 'sacred', but not 'political' role. Any activism on his part is configured as an attack on the process of transforming the will of the people into law[3] . His role must be *politically* 'null and void' because he *lacks* democratic legitimacy. A judge who arrogates to himself the power to define the 'norm' is guilty of a real breach of the institutional balance based on the division of functions between the three powers. As Rousseau wrote (1762, Eng. trans. 107), the judiciary

> should have no share in either legislative or executive power; but this very fact makes its own power the greater: for, *while it can do nothing*, it can prevent anything from being done. It is more sacred and more revered, as the defender of the laws, than the prince who executes them, or than the Sovereign which ordains them (italics mine).

Law shapes the plan (constructed by politics) that the bureaucratic and judicial apparatus must implement. Continental doctrines of the rule of law are configured according to the scheme of the relationship between theory and practice in the light of which Western thought has traditionally conceived human action. According to this scheme, the intellect, politics (!), conceives the ideal form (law) and then entrusts the will – an 'iron will' that 'breaks down obstacles' – with the task of transforming the project into concrete actions: the judiciary as well as the executive are the arms and hands of this will.

This conception finds its most perfect expression in the idea of law famously developed by John Austin, which was not by chance chosen as the point of reference for legal positivism, according to which the norm is the command of the sovereign supported by sanction. The legitimacy of this notion is all the greater when the sovereign who gives the command takes on democratic characteristics: the parliament elected by the people defines the plan, and the sanction serves to overcome the obstacles to its realisation, to the realisation of the will of the sovereign people. The legislature, hopefully a democratically elected parliament, 'makes policy' and produces the 'norms', judges have no normative power, they must apply the norms produced by the legislature.

The separation of law and politics is, along with the prohibition of individual or retroactive norms, one of the three pillars on which the myths of predictable law, seen as an orderer of citizens' lives, and of effective law, as Raz puts it, rest. In order for an individual to be able to behave as the law requires and to anticipate the reactions of the state, the rule must clearly indicate what behaviour is to be performed and thus be in force at the time of the act itself.

[3] We probably owe the most radical formulation of this doctrine to Robespierre: "The statement that law is created by the courts […] must be expelled from our language. In a State which has a constitution and a legislature, the jurisprudence of the law courts consists only in the law" (*Archives parlementaires*, I series, vol. XX, p. 516, cited in Neumann (1939, 114). These theses led to the issuing of the decrees of 16 and 24 August 1790 that established the *référé législatif* system. According to this system, the interpreter had to refer cases that he considered doubtful due to a lacuna in the legal system or the obscurity of the law to the legislator for a clear rule.

This constraint makes the prohibition obvious for the judge to 'produce' norms instead of 'applying' existing ones: the norm produced by the judge is a norm for the individual case and, as Jeremy Bentham (1970, 184-195) argued in his critique of judge-made law, is a retroactive norm.

Clear law and the law/politics dichotomy

In its ruthless critique of the *ordo iuris medievalis*, considered the realm of esotericism and the arbitrariness of jurists, the Enlightenment, while reversing the relationship between the two entities, carried the clear separation between law and politics, proper to pre-modern law, into the conceptual arsenal of modern jurists, allowing twentieth-century positivism to take it for granted.

In pre-modern societies, law was not seen as something that could be produced: its legitimacy and strength, in a word its validity, derived from the fact that it was seen either as a very ancient custom or as a divine creation. The validity of the law was based on the fact that it was not a social product, or at least not of the society whose life it was supposed to regulate: every society found the law already established and considered it immutable. It did not need to be created or decreed, but simply known. Law, at least in its fundamental elements, was superior to political power; it was not for politics to determine its content. Law regulated and legitimised the use of force, but it was not the product of social action, it was not the work of human agency, it was merely an object of knowledge.

The Enlightenment taught us that this was a fiction, which we can call 'ideological' in the Marxian sense of the term. As Hobbes points out in the *Dialogue between a Philosopher and a Student of the Common Law of England*, pre-modern law was for a long time a law essentially produced by jurists, but this substantive connotation was paradoxically based on a belief that contradicted it. Jurists did not formally create law, they declared it. Their power rested on their exclusive knowledge of the law, on their ability to derive all its implications. If they had made rules on any basis other than their *sapientia*, they would have undermined their legitimacy.

With the rise of the modern state, the positivisation of law radically changed, indeed overturned, the relationship between law and politics. This, however, did not affect the dogma that the legal system is merely an object of knowledge for jurists; on the contrary, it reinforced it. The dogma and ideological vice of the extraneousness of law to politics was thus perpetuated.

With the emergence of the modern state, law became positivised, it ceased to be conceived as the product of immemorial custom or transcendental order, but as the product of decisions made and to be made. It became something that is deliberately constructed and that can be deliberately changed or even reconstructed from scratch. It was conceived as something that is produced by conscious human activity, aimed at establishing the rules of coexistence. Nevertheless, as in the Middle Ages, the work of jurists remained confined to the cognitive sphere and excluded from political activity. This was done by drawing a clear distinction

between the sphere of the production of law and that of its application. Politics produces law and is flanked by 'legal science', where 'science', first with the Enlightenment connotation and then with the positivist connotation that this term has acquired in modernity, indicates a sphere that exclusively comprises purely cognitive actions – one must know the norm, produced by politics, under which the concrete case is to be subsumed – the result of which is binding and verifiable (as with all cognitive actions of the true sciences!).

If, therefore, the radical change in the nature of law reverses the previous hierarchy, 'legal' action still does not enter the sphere of politics: there are no decisions to be made within the legal system, because it is politics that decides what is legally valid. Politics necessarily transcends law, since it is itself that produces it. For modern jurists, as for their medieval counterparts, law was merely an object of knowledge, not something they produce.

'Scientificity' as a bulwark of the liberal-democratic order

The Rousseau-Montesquieu model is articulated on the basis of the purely cognitive character of judicial activity: the judge is called upon exclusively to ascertain the facts laid down by law, according to rules established by the law itself. The service required of him is one of mere cognition: the ascertainment of what is predetermined by law. The fact that the judge does not overstep this task is considered by the Enlightenment to be the foundation of legal certainty and of equality before the law, and the guarantee of freedom against arbitrariness. Today, as we have seen, it is also considered the guarantee that citizens' lives will be governed by democratic decisions and as the basis of respect for their autonomy and hence their dignity.

Legal science is a 'science' because the rules can and must be applied by the various decision-makers according to strictly logical procedures. The personality of the decision-maker is irrelevant to the resolution of the dispute: judges decide correctly when nothing outside the rules influences their decision. Law is made up of norms (laid down in statutes or, at most, derived from precedents) that are applied to facts in order to decide legal disputes. Underlying the logicist-positivist paradigm is a clear distinction between the jurist (the 'scientist' who studies the law) and the law, which is not produced daily in the courts, as legal realists claim, but exists before the courts begin their work: when the law is produced by the courts, we are in the dark area because we cannot control the mechanisms of its production.

The idea of the clarity of law is modelled on the Cartesian idea that all human beings are innately endowed with reason, thanks to which it is possible to wipe the slate clean of socially acquired beliefs and habits. The method of knowledge, based on intuition and deduction, outlines the rules of reasoning: analysis, synthesis, enumeration. Natural human reason is removed from all contingency and produces certain knowledge. It is configured not as a means of exercising power over nature, but as an instrument for gaining freedom against the power of the stronger. This conception underlies the idea of progress: knowledge as the emancipation of human beings from the oppression of a power that keeps knowledge for itself. Scientific 'truth' has above all a liberating power (Neumann 1957, 201 ff).

Within this framework, legal interpretation can only be a mere knowledge of pre-established norms and thus a scientific enterprise (hence the term 'legal sciences' that stands out in the names of many Italian departments), and must leave no room for the idea that it can lead to the production of norms (and thus a political enterprise).

The jurist, like the natural scientist, is faced with an object, law (institutions, laws, customs, the will of the sovereign, etc.), already given, defined, closed in itself: "an object that has the same compelling 'objectivity', I would say naturalness, as the world. The jurist's cognitive operation is born 'after', it is exercised over a 'reality' already constituted, waiting only to be fully represented" (Costa 1995, 17). The jurist's work must meet the standards of descriptiveness, value-freedom, strict consequentiality, objectivity and impersonality. Legal knowledge must be configured as a 'scientific' discourse, that is, it must not be marked by elements that are in any way traceable to the sphere of passions, interests and ideologies and, more generally, of subjectivity. Only when it is 'scientific', i.e. free from any 'impure' material, can legal discourse be taken as productive of 'truth' or, which is the same thing, of 'law'.

The discourse of jurists bases its claim to 'seriousness' exclusively on its claim to the logical rigour of argumentative procedures, to the 'purely' descriptive, value-free character of the utterances of which it is composed. The role of legal interpretation is to interrogate the law as it is expressed in normative texts, to see what solution they 'impose' on the case proposed to the judge. The operation is a logical one and should therefore present no difficulty other than that of ascertaining the rule to be applied.

The 'dark side' of the scientific nature of legal decision-making

As Costa (1995, 7-8) points out, identifying the logical-demonstrative procedure, 'scientificity', as the basis of the claim to the seriousness of jurists' utterances, of judicial decisions, makes the role of interpretation problematic. Nevertheless, interpretation is considered "a constitutive operation of legal experience, at least for societies whose normative organisation depends, at least in part, on reference to written legal texts". Indeed, interpretation implies the idea that the meaning of normative texts is anything but self-evident. The 'interpreters', the lawyer, the notary, the judge, the civil servant, interrogate the normative texts 'as such', but they do so "starting from a specific situation, a transgressive act, a conflictual interaction [...] in order to propose (impose) a hypothesis for resolving the conflict". It is obvious that "if interpretation proceeds (and cannot but proceed) by reading the legal-authoritative texts starting from the subjectivity of the interpreter and the socio-institutional context in which he or she operates, if, in short, it 'rewrites' the interpreted texts for the 'here and now' of the present", it comes into conflict with what Costa calls the "form of the content", with the cognitive-cultural characteristics of the discourse of legal knowledge.

More or less tacitly, probably because an explicit rejection of interpretation would have seemed unthinkable, the Enlightenment legal project in its early days set out to replace interpretation with subsumption and the legal syllogism. Cesare Beccaria's famous lines (1764, Eng. trans. 14) on legal syllogism are the clearest expression of this attempt consistent

with the figure of a 'powerless power' interpreter, a mere 'scientific' instrument of law: "In every criminal cause the judge should reason syllogistically. The major should be the general law; the minor the conformity of the action, or its opposition to the laws; the conclusion, liberty or punishment. If the judge be obliged by the imperfection of the laws, or chuses to make any other, or more syllogisms than this, it will be an introduction to uncertainty."

The idea of an unambiguous rule under which to subsume an equally unambiguous fact, an equally unambiguous action, remains in the background, almost as a point towards which interpretation must asymptotically tend in order to dissolve itself and become a scientific enterprise. Keeping the legal syllogism in the background serves the logicist-positivist paradigm to preserve the space of hermeneutics in legal activity and, at the same time, to devise a strategy to contain its 'subversive potentialities'. Costa (1995, 8-9) effectively summarises the points at which this strategy is articulated:

> a) the emphasis on legal knowledge as general and abstract knowledge; b) the relegation of hermeneutics to *scientia inferior*, or at least the attribution of a propaedeutic and sectorial role to it; c) the idea of the transparency of the text and of interpretation as the enucleation of the 'true' meaning of the text; d) correspondingly, the minimisation of the role of subjectivity in the interpretive process; e) the belief in the autonomy (self-sufficiency, completeness, non-contradiction) of legislative texts and of the 'declarative' character of interpretation; f) the thesis of the logical-syllogistic character of the interpretation and judicial application of law; g) the rigid hierarchisation of the various components of legal experience, which places the *Professorenrecht* at the top and presents the world of legal practice as rigidly dependent on it.

This kind of forced coexistence is probably why we speak of the 'dark side' of law, rather than of the dross of the legal decision-making process that needs to be eliminated. After some three centuries, we have come to accept that certain interpretative processes that cannot be attributed to science are destined to remain part of the law. The idea that law is a kind of double-faced Janus has been accepted.

What we might call 'the problem of interpretation' is the corollary of a larger problem. The logicist-positivist paradigm, exemplified by Beccaria's legal syllogism, assumes that judges (and other organs of the state), jurists in general, work with, interpret, 'norms' rather than normative texts. However, jurists have known for decades, as Uberto Scarpelli (1985, II 170), who certainly cannot be suspected of antipathy towards the logical-formal approach to law, points out, that

> norms do not exist: they do not exist as entities in themselves, independent of interpretative procedures. A norm is merely the end point of an interpretive procedure, and it cannot be expressed except by entrusting it to an utterance or a set of utterances, which in turn must be reinterpreted by those who wish to understand its meaning and find the norm.

Since the middle of the last century, the whole spectrum of different legal philosophical positions, from Kelsen[4] to Olivecrona, has agreed that we cannot distinguish between the moment when a political authority creates the norm, which coincides with the moment when the normative text is drafted, and the moment when a judicial authority is entrusted with its application: the judicial authority creates the norm by interpreting the text.

The supposed recipients of norms are in fact their authors: judges are the recipients of 'normative texts' and, precisely because of their institutional role, the producers of norms. A large number of political decisions, those that are made every day in courtrooms, are therefore entrusted to non-politically accountable bodies that create 'retroactive' rules, while the politically accountable bodies do not have the power to produce norms, only normative texts. This is the realistic picture, from the point of view of both political and legal realism, of the separation of powers. In the words of Giovanni Tarello (1976-77, 936), written about half a century ago:

> it is scientifically unreasonable and didactically inappropriate to identify *in limine* the notion of 'norm' with that of 'legislative text', because this conceals the empirical fact that different actors, at different times or simultaneously, for different purposes or pursuing the same ends by different means, identify different and possibly conflicting norms in the same legislative texts.

As Riccardo Guastini observes, starting from this quotation by Tarello, once a normative text has been produced at the political level (but judgments are also normative texts once we no longer consider them as conclusions implicit in the premises of the legal syllogism) and has entered into force and become law, it acquires a life independent of its political origin, an autonomous existence. It becomes precisely a text. After the sunset of the idea that begins with the Platonic theory of language and finds its latest formulation in the neo-positivist one, according to which language is made up of terms that each have a certain empirical correspondence, a normative text, like all texts, is open to the interpretations of its readers (Santoro 2008, ch. IV). Jurists do not interpret 'norms', as they often claim and as law professors just as often teach, but formulations of norms, utterances that express norms. This misuse of language not only appears erroneous, but also has a precise ideological function. As Guastini (2011, 9) points out, it "creates the false impression that the meaning of normative texts (i.e. the norms themselves) is entirely predetermined for interpretation, so that interpreters need only take note of it". In other words, this lexical usage perpetuates the idea that the interpreter's activity is constrained, scientific, and therefore not creative. It perpetuates the myth that the 'political' moment of the creation of norms can be distinguished from the 'legal' moment of their application. The persistence of this mystification clearly stems from the observation that to accept as 'obvious' that norms are not produced by legislators but by officials, by judges, who find themselves using normative texts, is to undermine the foundations not only of the logicist-positivist paradigm, but also of the liberal-

[4] "No individual norm, as a positive norm, simply emanates from a general legal norm [...] as the particular from the general, but only in so far as such an individual norm has been created by the law-applying organs" (Kelsen 1945, 401).

democratic paradigm articulated since the eighteenth century on the basis of the Montesquieu-Rousseau model.

The importance of the 'paradigm' heuristic tool

In order to define the clear side of law, I have taken up Costa's reconstruction of the 'logicist-positivist paradigm' as a tool for framing the legal theories of the last two centuries, not only for its persuasive and heuristic power, but also for its use of the conceptual tool of 'paradigm', which seems to me essential for contextualising the persistence of the idea of a 'dark side' of law.

As is well known, the notion of 'paradigm' was elaborated by Thomas S. Kuhn in his famous text, *The Structure of Scientific Revolutions*. In Kuhn's words (1970, viii), paradigms are "universally recognized scientific achievements that for a time provide model problems and solutions to a community of practitioners". The model they provide represents the stabilisation, through historical and personal accidents mixed with observations and experiences, of one of the "incommensurable ways of seeing the world and of practicing science in it" (Kuhn 1970, 4). Kuhn's notion of paradigm has entered the conceptual armoury of the sociology of knowledge to denote the set of beliefs, values, cultural assumptions, political tools and legal instruments that constitute the cognitive and value *status quo* in a society at a given historical period.

The point that I think is heuristically important for the analysis of the dark side of law is that, as emerges from this brief presentation and as Kuhn explicitly emphasises, paradigms constitute conceptual boxes into which nature is forced, and through the use of which "the scientific community knows what the world is like" (Kuhn 1970, 5). Thanks to paradigms, members of a community learn to see the same things when confronted with the same stimuli (Kuhn 1970). Thanks to paradigms, the terms of the language of different fields of research are based on concrete examples: nature and words are learned at the same time, knowledge is learned by doing science, i.e. in practice, rather than in theory (Kuhn 1970, 191). As the sociology of science (especially David Bloor and Bruno Latour) has argued, starting from Kuhn's theses, the social and cultural context plays a decisive role in defining the results of scientific research.

The scientific community is made up of people who have specialised in a field of research. They have received similar education and training, they have assimilated the same technical literature during their training, and from this *codified literature* they have learned the boundaries of their field of research. Scientific research is made possible by the fact that individual experience takes place within a context of shared assumptions, criteria, goals and meanings that society provides for the individual mind and that are reinforced by communication through collective patterns of thought (Fleck 1980). Therefore, 'scientific' knowledge is not the knowledge of a reality that everyone can experience or learn for themselves, but is the result of the most solid theories and the most learned reflections. Knowledge is therefore possible before experience, through the culture that makes experience

possible. Alongside the experience of the physical world there is a theoretical component of knowledge, which is a social component, which is a necessary part of truth (Bloor 1976).

Ultimately, the gist of Kuhn's argument is that paradigms allow what Ludwig Wittgenstein called 'grammatical inquiry' in §90 of his *Philosophical Investigations*:

> We feel as if we had to *see right into* phenomena: yet our investigation is directed not towards *phenomena*, but rather, as one might say, towards the '*possibilities*' of phenomena. What that means is that we call to mind the *kinds of statement* that we make about phenomena. So too, Augustine calls to mind the different statements that are made about the duration of events, about their being past, present or future. (These are, of course, not *philosophical* statements about time, the past, the present and the future.)
>
> Our inquiry is therefore a grammatical one. And this inquiry sheds light on our problem by clearing misunderstandings away. Misunderstandings concerning the use of words, brought about, among other things, by certain analogies between the forms of expression in different regions of our language. – Some of them can be removed by substituting one form of expression for another; this may be called 'analysing' our forms of expression, for sometimes this procedure resembles taking a thing apart.

In other words, if we interpret the scientific enterprise in the light of the paradigm concept, it emerges as 'a cultural enterprise', i.e. as an enterprise driven and made possible by meanings created in specific contexts by specific groups, giving rise to specific cultures.

Paradigms, insofar as they are shared by the scientific community over a period of time, are essential for the development of what Kuhn calls 'normal science', i.e. research activity aimed not at producing fundamental novelties, but at increasing the scope of knowledge and methodological precision through the 'solution of puzzles' (Kuhn 1970, 35-6). It therefore seems obvious that a paradigm provides the criteria for choosing which problems to address within the scientific community, and the rhetorical tools for qualifying certain problems that appear to challenge the paradigm, as secondary and marginal, or even metaphysical and unscientific. The scientific community naturally seeks to defend the assumptions that define its 'grammatical inquiry' and allow it to develop its activity, and often minimises, marginalises, or excludes those issues that would lead it to modify them. The paradigm operates a filter of acceptable problems, it defends the community and its work from important problems that cannot be reduced to the form of a puzzle, because they cannot be formulated with the technical and conceptual tools provided by the paradigm itself (Kuhn 1970, 37).

In historical experience, anomalies are never understood as refutations of the existing paradigm, no matter how much it is in crisis. Once paradigm status has been achieved, a scientific theory is only considered inadequate if there is a valid alternative. This means that the decision to abandon a paradigm is based on more than a comparison of the theory with the world: the adoption of a new paradigm is based on a comparison between paradigms, as well as between paradigms and the natural world (Kuhn 1970, 77). The crisis occurs when problems that normal science regards as puzzles are seen from another point of view, as counterfactuals, and for this another paradigm is needed, an alternative grammatical inquiry.

It is only by defining a new paradigm that the 'cultural' rather than the 'natural' dimension of the scientific enterprise is revealed. It is only in the face of conflict, of a different hypothesis, that the cultural dimension of structures, taxonomies, paradigms, becomes clear:

> it is only *when* there is a dispute, *as long as it lasts*, and *depending* on the strength exerted by dissenters that words such as 'culture', 'paradigm' or 'society' may receive a precise meaning. […] In other words, no one lives in a 'culture', shares a 'paradigm', or belongs to a 'society' *before* he or she clashes with others (Latour 1987, 201).

In these times of conflict, there are two worlds[5], the world of a 'traditional' scientific community and the world of others. Knowledge and society are not two separate realms: when 'the world of others' is established, the framework, the paradigm, within which scientific work is done changes, because a revolution has transformed the scientific imagination with which it is perceived and known. With the scientific revolution, the problems that science sets for itself and the criteria by which the problems are considered acceptable change (Kuhn 1970, 6).

Applying these considerations to legal discourse, it is not surprising that, for more than a century now, the logicist-positivist paradigm has coexisted with the problem of interpretation and that, despite the theories and the everyday experience of every legal practitioner, law continues to be thought of as a world in which the data are not normative texts but norms. In other words, it is not surprising that the legal community continues to focus on, and thus to transmit, a 'grammatical inquiry' that 'makes one see texts as norms'. The identification between text and norm is the result of an interpretative, or hermeneutic, explanation of the signs, representations, signifiers and images they produce, it is a 'construction', i.e. a "systematic unpacking of the conceptual world" (Geertz 1983, 22) in which jurists live. The identification between text and norm is, as I wrote earlier, only 'erroneous' in the light of a different 'grammatical inquiry'. It is only in the light of a different paradigm, as Guastini writes, that the impression is 'false' "that the meaning of normative texts (i.e. norms proper) is entirely pre-constituted for interpretation, so that interpreters would only have to take cognisance of it".

To be provocative, one could say that 'the dark side of law' is a creation of the positivist logicist paradigm: how to get from the normative text to the norm is a problem that will remain obscure until it is addressed from a paradigm that no longer identifies text and norm. Only the distinction between normative texts and the norms that jurists, judges, derive from them opens up the space for research, inevitably sociological (cf. Latour 2004), on how this actually happens and on the elaboration of shared criteria that guide this transition. It will

[5] Ann Swidler's distinction between 'settled' and 'unsettled' lives can be recalled to analyse the situation in which members of a particular sector find themselves in these periods. For Swidler, this distinction stems from the role of culture in sustaining existing action strategies and in constructing new ones. She defines 'settled' as a life lived within a social environment in which "culture is intimately integrated with action" and "it is most difficult to disentangle what is uniquely 'cultural,' because culture and structural circumstance seem to reinforce each other". Societies and periods cease to be 'settled' when the repertoire of traditional cognitive and strategic resources is challenged by the emergence of new paradigms. 'Unsettled periods' are described as those in which "explicit, articulated, highly organized meaning systems […] *establish* new styles or strategies of action" (Swidler 1986, 278).

certainly be impossible to clarify the dark side of law as long as one maintains, as Herbert Hart (1961, 140) does in *The Concept of Law,* polemicising with the American realists, that if words are not given at least a core of self-evident meaning so that they can at least partially bind the interpreters, one is condemned to live in a world without principles, a world in which there is no difference between law and the threat of the armed bandit, a Hobbesian world in which the only criterion is force. Paradoxically, the dark side of law is created by the abolition of its existence, by the fact that jurists attached to the logicist-positivist paradigm still regret the legal syllogism and hope that artificial intelligence will make it possible to finally overcome the need for interpretation by glossing over problems such as: How do I formulate premises? How do I know that *this* and not *that* is the relevant syllogism? etc.

We have certainly been confronted for decades with the symptoms that Kuhn identifies as prodromes of a paradigm shift (norms that no longer work, certainties that become less certain, various theories that emerge) but no alternative paradigm has emerged that would allow a 'scientific revolution', allow one to modify the 'grammatical inquiry' of jurists. As I have said, we have various 'grammatical inquiries', often developed within the legal discourse itself, sometimes surviving the advent of the logicist-positivist paradigm, or imported from the paradigms of the scientific communities devoted to other knowledge[6]. These grammatical outlooks have long revealed inconsistencies in the logicist-positivist paradigm, but have not yet been able to coalesce into a new alternative paradigm.

I believe that the description of the logicist-positivist paradigm that I have tried to give, especially its connection with what I have called the Montesquieu-Rousseau model, helps to explain this *impasse*.

As Roberto Mangabeira Unger (1975, 92) has pointed out, rejecting the logicist-formalist paradigm as "a naive illusion" risks shattering the liberal-democratic order as we have idealised it in recent decades: "the destruction of formalism brings in its wake the ruin of all other liberal doctrines of adjudication". Indeed, as I have tried to show, logical formalism seems to be a legal doctrine inextricably linked to the central elements of the liberal-democratic tradition of the nineteenth and twentieth centuries.

Over the years, the democratic legitimisation of political power, of the sovereign legislator, has become the bulwark of the myth of the politics-law dichotomy: if the judge created the norm, the democratic character of the system would be lost. The boundary between politics and law, the scientific and therefore non-discretionary nature, of the production of the individual norm, has tacitly become the pivot of the democratic connotation of our systems. The scientific nature of the derivation of individual norms from general norms ensures that the political opinions of judges, which may not be supported by the majority or may even be personal idiosyncrasies, remain irrelevant to the rules that govern the lives of individual citizens, to the resolution of disputes between them or between them and the state. The fact that legal knowledge is 'scientific' also guarantees equality[7]: it guarantees that any interpreter will arrive at the same conclusions, just as any mathematician will arrive at the same result if

[6] This is particularly true of hermeneutics, which draws on a long tradition of knowledge about texts and, as I will argue, of the conception of the social actor.
[7] In this sense, most recently, ruling 110/2023 of the Italian Constitutional Court.

he performs a calculation correctly. The rules that citizens are asked to respect or whose violation is sanctioned will therefore not depend on who is judging, they will always be the same, and this will be controllable by everyone: anyone with the necessary knowledge will be able to determine whether the rule has been correctly interpreted, and therefore the use of force is really legitimate, i.e. in accordance with the will of the people, or whether the law has not been interpreted, but rather created, and therefore the use of force is arbitrary, betraying the will of the people as expressed by Parliament and creating unequal treatment.

Problems with the logicist-positivist paradigm

I believe that the first point to be addressed to overcome the impasse is the incongruity of the Enlightenment-inspired separation of law and politics. Enlightenment theorists followed by German jurists in the second half of the nineteenth century emphasised in particular the need for the state to be bound by the laws it had enacted. In their eyes, in fact, political power was strongly characterised by the tendency to remove all obstacles to the achievement of its goals. The separation of politics and law was seen as a means of at least preventing political power from changing the law along the way according to its own wishes. The separation between law making and law application is primarily intended to ensure that the courts are not subject to political influence in the course of their work. It is left to the political system as the only legitimate way of directing judicial activity to enact or amend the general rules that judges must apply, but it is absolutely prohibited from intervening in pending cases. The political power may repeal or amend the legal text, but as long as it leaves it in force, it has no way of controlling its application.

According to this liberal conception, the separation of law and politics has two sides: on the one hand, the legislature or the executive cannot intervene in the application of the law; on the other hand, the judiciary cannot itself establish the rules on the basis of which it decides. This second factor, which takes the form of the identification of text and norm, does not depend on the first; its affirmation has a purely ideological function. The Enlightenment approach confuses the separation between political and judicial bodies with that between politics and law. The identification of the two dyads is not based on the independence of the judiciary, but on its conception, *à la* Montesquieu, as a null power, as the mouth of the law, on the idea that the interpretation of normative texts is an activity with a binding outcome, a science.

Secondly, in order to overcome the stalemate in which we find ourselves, I think it is necessary to point out that the stability, or perhaps it would be more correct to say the 'naturalness', of the logicist-positivist paradigm does not only rest on certain conceptions of the political organisation of the community supported by liberal-democratic theory, which, as I have said, seem particularly difficult to challenge. It also rests on a conception of language and an anthropological model which, once we leave the field of legal studies, no longer seem to have the conditions of assertability that allow them to be considered 'serious utterances'.

In order to believe that language is semantically self-evident (or as a consequence of such a belief), one must believe that meanings are elements of language, that the mind is capable of grasping these meanings without problems, that language is an abstract system that pre-exists its use, and that its clarity does not depend on context and is therefore not obscured by a change of context. It is such beliefs that make it possible to argue that the meanings of words that are relevant in any legal case, are the meanings that language has as an abstract system and not the meanings that it can take on in a particular context.

Proponents of the logicist-positivist paradigm must also believe either that no element of individual subjectivity interferes with the clarity of language, or that, if something does interfere, it can and must be controlled by the individual himself: any personal desires can and must be set aside when engaging in the interpretation of a norm. The idea that words have a self-evident meaning has always been accompanied by a particular model of the social actor and the decision-making process that characterises it.

The legal actor postulated by the logicist-positivist paradigm is the one sketched by the emotivist theory between the nineteenth and twentieth centuries: it is an agent portrayed as a set of desires that must be constrained by something independent, such as rationality or the law, in order for his actions to be socially compatible and not purely selfish. This anthropological model has a long history. Elsewhere I have argued that its history coincides with that of modernity and that it has been the pivot around which the whole debate about the liberal order has revolved (Santoro 1999). The emotivist theory is nothing more than the ultimate conceptualisation of an anthropological model that, with Hobbes, Hume and (contradictorily) Locke, has been the tacit assumption of all liberal political-legal theory. It is "the philosophical image of a man as a static being who exists as an adult without ever having been a child" (Elias 1987, Eng. trans. 200), who is not transformed as he grows up and who is not subject to any process of socialisation, of internalisation of the norms and modes of behaviour proper to the community in which he lives. According to this anthropological model, norms, laws and principles are necessary constraints to keep the natural impulses (desires, prejudices and preconceptions) of individuals under control. The model is that of Ulysses who needs to be bound in order not to succumb to the sirens' lure and destroy himself. Responsible (rational) people are those who accept these constraints and use them as criteria for deciding how to behave. Irresponsible (irrational) people are those who reject them and let their personal preferences prevail.

Emotivism has adopted this anthropological model and passed it on to the various neo-positivist theories, which have made it the natural complement to the idea that the meaning of statements can be traced back to the meaning of the words that compose them. According to the emotivist doctrine, "all evaluative judgments and more specifically all moral judgments are nothing but expressions of preference, expressions of attitude or feeling, insofar as they are moral or evaluative in character". This doctrine dovetails perfectly with the neo-positivist doctrine[8] that "factual judgments are true or false; and in the realm of fact there are rational

[8] Emblematic is Carnap's characterisation of moral utterances as expressions of feelings or attitudes, in a "desperate attempt to find some status for them after his theory of meaning and his theory of science have expelled them from the realm of the factual and the descriptive" (MacIntyre 1984). One cannot then fail to mention the famous conclusion of Ludwig Wittgenstein's

criteria by means of which we may secure agreement as to what is true and what is false. But moral judgments, being expressions of attitude or feeling, are neither true nor false; and agreement in moral judgment is not to be secured by any rational method, for there are none" (MacIntyre 1984, 12). The idea that the agent, in learning a language, is not learning a 'form of life', to use the terminology of the second Wittgenstein, is the logical presupposition of the attempt to elaborate a fully formalised language. The very notion of 'paradigm' as elaborated by Kuhn is alien and incompatible with this model.

This combination, developed at the beginning of the twentieth century, between the emotivist model of the agent and the neo-positivist theory of meaning has profoundly conditioned the legal debate of the last century. Within this framework, it was not difficult to propose, in the Enlightenment tradition of the judge as the 'mouth of the law', a model of the jurist who, in order to do his job properly, has to put aside his feelings and make his decisions by accepting the norms as the 'bridles' of his will. The bridling of state power presupposes the bridling of the individual will of judges (as well as of officials). The hero of the Rousseau-Montesquieu conception is the judge who is confronted with an agent whose actions he despises, but whose actions he nevertheless gives reason to because the law, which he has carefully examined, requires him to do so. The hero is judge Ulysses, who accepts the abstract and neutral constraints that the law (the ship's post) places on his personal preferences. The conflict, then, is between personal preferences and legal rules, and this, whenever it arises, is but a manifestation of the great conflict between a civilised society and an anarchic society based on individual arbitrariness.

As Stanley Fish (1989, IX) points out, the difficulties that frighten Hart and other proponents of the logicist-positivist paradigm disappear when law is understood as a hermeneutic enterprise, when the notion of legal 'practice' is taken as central. The challenge of uncertainty appears in quite different terms if the interpretive work of the jurist is understood as an operation carried out in the context of a 'practice'. Operations that are part of a 'practice' (and all actions as actions are part of a practice) are performed automatically, in the sense that they do not involve explicit reflection on the socio-historical formations that serve as their context. Given a socio-historical formation, subjective projects and decisions do not depend on specific reflection on an all-encompassing and abstract theory, but are carried out with absolute naturalness (cf. Santoro 2008, ch. 4).

Steps towards a new paradigm for legal discourse: *ex parte populi* law as a discourse for turning private troubles into rights

As I have tried to show in section 1 by using italics, Raz takes as a given the idea that law has a regulatory function, and in light of this assumption, the requirements that make law an effective regulatory instrument *ex parte principis* turn out to be a fundamental benefit and guarantee *ex parte populi* as well, since they ensure respect for individual autonomy by

Tractatus, which, accepting the emotivist theory, excludes feelings from the very subjects about which one can speak meaningfully.

providing certainty about the sphere within which one can design one's actions, and thus about personal dignity.

As already mentioned, this approach depends on the view of law as a command of the sovereign with sanctions. This view, elaborated by Austin in *The Province of Jurisprudence Determined*, is considered as the cornerstone on which (democratic) legal positivism rests. As is well known, Austin's is a voluntarist conception of law: the 'command' expresses the will of a 'sovereign' and assumes that the 'sovereign' is able to impose a penalty if the behaviour it demands is not performed[9]. Once the political organisation has been freed from a pre-existing order and is seen as something that can be manipulated by the community, and the Hobbesian idea that the social order must necessarily be based on a Leviathan with a monopoly on the use of force has been incorporated, Austin's idea allows us to theorise the rule of law. Every society needs an absolute sovereign, but that sovereign's despotism can be exercised through the law, as the English jurist writes: "Nor would a political society escape from legal despotism" (Austin 1832, 268). 'Legal despotism' lends itself perfectly to grounding the myth, at once ancient and liberal, of the rule of laws as opposed to the rule of men, and at the same time, paradoxically, it is functional to that of the government of the people, the political sovereign.

The command of the democratic sovereign, "a sovereign number" in Austin's language (1832, 268), the Parliament, elected by the people, Rousseau's true holder of sovereignty, within the liberal-democratic institutional framework, defines the political project, the plan according to which society is to be organised. Once the plan is defined, the sanction serves to overcome the frictions that stand in the way of its realisation, the realisation of the will of the sovereign people. In this context, the characteristics that the law requires in order to be an effective instrument of regulation, *ex parte principis*, coincide with those that guarantee *ex parte populi*, if not freedom, for which it is necessary to respect the limits that constitutions impose on legislation, at least autonomy, understood as the space in which one can design one's own life, and, therefore, dignity.

Today, the idea of a democratic legal despotism appears untenable. The first Hobbesian and later Austinian idea of the inevitability of a sovereign exercising his power by means of general, abstract laws has been seriously undermined, first and foremost by the advent of rigid constitutions after the Second World War. Jurists have gradually learned that, on the one hand, they do not define the spaces of the legislature with the syllogistic clarity with which they would like laws to define the spaces of freedom of citizens. On the other hand, constitutions have revived interpretation. In a constitutional system, every judge, before being the mouth of the law, is its judge, and this often means not only that he must decide whether the law should be repealed, but also that he must interpret it in a constitutionally oriented way. The fact that judges are called upon to perform this task contradicts the idea of univocal normative texts, the coincidence of norm and text: it implies that at least two norms can be derived from a text that are so different that one is constitutional and the other is not.

[9] "Superiority signifies might: the power of affecting others with evil or pain, and of forcing them, through fear of that evil, to fashion their conduct to one's wishes" (Austin 1832, 19).

The 'dark side of law', that of interpretation, thus acquires great centrality: it becomes fundamental to address how one moves from the constitutional text to the assessment of the constitutionality of norms derived from legislative texts. For decades now, constitutional interpretation has been established as an autonomous field of legal studies (distinct from statutory interpretation).

It therefore seems no coincidence that Hans Kelsen (1925), the first creator of a European constitutional court, the Austrian one, even before the era of rigid constitutions, overturned Austin's thesis by arguing that legal norms are not sanctioned by force, they are not based on force, but concern its use. Within a few decades, this view would be shared by the Scandinavian legal realists Karl Olivecrona (1939) and Alf Ross (1958, 34), according to whom

> a national law system is an integrated body of rules, determining the conditions under which physical force shall be exercised against a person; *the national law system sets up a machinery of public authorities (the courts and the executive agencies) whose function it is to order and carry out the exercise of force accordingly in specific cases*; or shorter: A national law system is the rules for the establishment and functioning of the State machinery of force (italics mine).

It is clear that this approach blurs the distinction between law and politics, removes the legislature's exclusive right to discourse on the use of force, and recognises that courts and administrative agencies order the manner in which force is used.

It is not only the advent of rigid constitutions that has undermined the idea of 'legislative despotism': the system of the Council of Europe, centred on the European Convention on Human Rights and the European Court of Human Rights, and the Union/Community (depending on how it has been named) with its institutional set-up, have profoundly changed the idea of the 'sovereign people' and made it implausible that it could exercise legal despotism[10]. In Europe, the affirmation of the primacy of Union law over national law requires domestic judges to disregard the latter when it conflicts with the former and, in cases of doubt, to give, or ask the Court of Justice to give, an interpretation of national law that is consistent with Union law. Conforming interpretation is also needed to adapt national legal texts to the case-law of the European Court of Human Rights. In this new context, the idea that courts exercise a 'null' power and the marginalisation of interpretation as an *inferior* science seem increasingly implausible and emerge as the dark side of law. To insist on them is to return to the same situation that the Enlightenment jurists railed against: to regard the judge as the mouth of the law conceals the power that the courts wield. In fact, no one today thinks of judges as the mouth of the law, yet we continue to transmit and use the logicist-positivist paradigm in our legal and political discussions. We continue to think of the law as the political plan drawn up by the democratic sovereign that the judiciary must execute, creating a series of rhetorical and argumentative short-circuits that end up undermining constitutional rights themselves.

[10] On the changing notion of sovereignty see D. Zolo, 'Sovranità', in *Enciclopedia Treccani*, https://www.treccani.it/enciclopedia/sovranita_%28Enciclopedia-Italiana%29/.

It should be borne in mind that it is not only at the legal level that the old idea of sovereignty appears untenable. It also seems implausible in the new global political framework. The worldwide interconnectedness that we call 'globalisation', the scope of the problems that are considered politically important, and the range of solutions that we think we need to adopt to deal with them, make the nineteenth-century concept of sovereignty almost laughable.

On the basis of these reflections, I propose some considerations on which to try to "construct a meta-discourse whose object is the construction of a discourse" (Costa 1986, 7) within which to think about law *ex parte populi*, abandoning the idea that its primary function is to regulate the behaviour of citizens and assuming instead that the primary role of law is to regulate the use of legitimate force.

In order to address the discussion of the legicentric-positivist paradigm, given its historical connection with the liberal democratic order, one must first note that the politico-legal concepts born with the Enlightenment have definitively entered into crisis with the end of the Short Century. Today, democratic procedures are no longer capable of reflecting the Rousseauian ideal: there is now a widespread perception that, as Joseph Schumpeter argued more than seventy years ago in *Capitalism, Socialism and Democracy*, participation in political life through parties, recourse to the instruments of direct democracy and political elections themselves are not instruments that guarantee the effective democratic character of our societies, but vestiges of a now obsolete reality that we insist on associating with the 'democratic' connotation of our systems. The institutions on which our social systems depend have in practice lost all connection with Enlightenment theorising: what we demand of these institutions is "essentially the ritualisation of social conflict, the postponement of violence, the reduction of fear" (Zolo 1987, 47). It is no coincidence that for several decades now the European Court of Human Rights has been shifting the focus of what it calls 'democratic societies' from the procedures for exercising popular sovereignty to respect for the rights enshrined in the European Convention on Human Rights.

If we take this context as a frame of reference, we get rid of the fear of abandoning the ideological myth that what the judge does is a scientific process with a bounded outcome, and we can finally discuss the space between texts and norms. If we get rid of Hart's prejudice and think that a judge who constructs the meaning of the text is not an attack on democracy, we can make visible the space of law, understood as the moment of production of the norm: a judicial space in which objectivity is impossible, the parameter of validity can only be intersubjective, and neutrality is nothing more than a virtue required of the individual judge. We can thematise the space in which the production of the 'norm' takes place, which is inevitably always particular, as a space of political decision, of the recognition of a thesis as assertable by the community of interpreters. The validity of this decision is entrusted to the persuasiveness recognised by this same community (Santoro 2008, 306-18). The validity of a judgement is ultimately determined, as in any research community, by the researchers, in our case the jurists, who recognise themselves in a paradigm: the arbitrary will of each of its members is made irrelevant not by the texts but by the community itself.

This *ex parte populi* observation should not appear threatening. In fact, for several decades now, courtrooms at all levels have been characterised as the places where the 'struggle for rights' occurs. That is to say, they have been characterised as a political space. If the debate about the use of legitimate force defines politics for Weber, 'struggle' describes, in his view, the subjective attitude of the people who engage in this collective action. Politics produces the decision about the use of legitimate force, and struggle is the appropriate form of participation in this decision-making process, which has an open-ended outcome. The political decision is the result of the struggle of the participants in political action: when the struggle takes place in the courts, its result is a judicial decision.

It is important to assess the paradigm shift that marks the transition from the 'struggle for law', as theorised by Rudolf von Jhering, to the 'struggle for rights': we move from the ordering conception of law that presents rights as the self-limitation of the state, the by-product of a legal despotism that defines an order articulated through rights, to a space in which a legal discourse is articulated that can act as an instrument of critique of the politico-legal system in order to have its claims recognised through law.

The 'struggle for rights' marks a field in which the judge ceases to be an instrument of order and assumes the role of adjudicator of the 'struggle'. In this struggle, rights officially become (as they have always essentially been) 'indexical' concepts: it is the struggle for rights through law, the legal proceduralisation of the conflict through which they are expressed, that defines and creates their content. The 'puzzle' of the relationship between 'legal despotism' and subjective rights finds a field in which to dissolve into multiple individual conflicts. In this new perspective, as Costa (2008, 402) writes, rights "evoke the judge for their determination, for their protection, for their capillary realisation. The judge, however, is not the holder of the 'null power' imagined by Montesquieu, but the protagonist of complex interpretative-evaluative procedures, of *policies that are* as essential to the overall functioning of the system as they are alien to the 'consensualist' procedures of democracy".

At a time when, on the one hand, the era of faith in the mechanical application of the law is over and, on the other, ideologies as a critical resource, and state force as an instrument, can no longer be counted on to bring about radical change, law seems to present itself as the main institutional instrument for challenging the *status quo*. We are witnessing a drastic change, as Antoine Garapon (1996, 46) observes:

> where once justice was conceived as negative and punitive, today it is increasingly seen as positive and constructive. Where once the judicial institution used to lag behind the evolution of customs, today it brings with it the hope of change. Where once it was believed to be established, today it is seen as establishing.

Our societies are increasingly marked by the perception of the irrelevance of subjective participation in political-electoral competition and, even before that, of the difficulty of aggregating 'private troubles', of crossing the threshold that transforms an individual trouble into a political trouble. As Alexis de Tocqueville foresaw, the role of the judiciary proves to be essential to counter the risks of the tyranny of the majority, which are ontologically inherent

in democratic government[11] and are accentuated by a fact noted by John Kennet Galbraith (1992) more than thirty years ago. The rich, the well-off, have always existed, but they used to be a minority. Today, in affluent democracies, they have become the majority. This fact has gradually transformed the liberal democracies of the North-West into 'dictatorships of a contented class', which no longer has to defend its privileges by promoting social change: it can afford immobility and refuse to share resources with the new poor. In this context, the role of jurists is no longer to defend the values of the vanished aristocracy, the taste for order, the attachment to forms, conservatism, as Tocqueville thought, but to give access to rights to the excluded, the socially abandoned.

The claims of individuals on the fringes or outside corporatist networks, even when they concern political issues or diffuse interests, are more often expressed in legal terms rather than in ideological or general terms, and the claim to individual rights prevails over collective action. Those who call for judicial intervention feel that they are active, that they are in charge of their own destiny, and do not accept having to rely on collective struggle. We are faced with the judicialisation of political conflict, which stems from the individualisation of what is at stake and ends up reinforcing it by accelerating the translation of all claims and problems into legal terms.

As Saskia Sassen (2000) has noted, the judiciary has assumed a "strategic role", especially "when it comes to defending the rights of immigrants, refugees, and asylum seekers". The rules governing the entry of migrants into state communities are today the most striking expression of the conundrum of the liberal-democratic paradigm, which has its origins in Rousseau's and Kant's thesis that citizen-legislators are the conscious authors of the rules to which they subject themselves. Those who seek admission to a community, on the other hand, come up against its rules of inclusion and exclusion and "*per definitionem*, cannot be party to their articulation" (Benhabib 2004, 15).

Migrants are the most striking case because they are 'formally' excluded from democratic participation, but in the more than sixty years that have passed since Wright Mills (1959) called for the development of the sociological imagination needed to transform the private troubles of marginalised, socially abandoned subjects into political problems, the ability of these subjects to have a political impact has certainly diminished, has gone from very little to almost nothing in the perception of the vast majority of them. We are moving from the dictatorship of a contented class to the dictatorship of 'a frightened class', which completes, in forced stages, the transformation of democratic societies from societies characterised by the progressive "giving of economic and social power to the powerless" (Du Bois 1924, 138) to societies characterised by the progressive social and political exclusion of large sections of the population.

As evidenced by the fact that the courts of rights are often perceived as the courts of minorities, of the marginalised, migrants have set the standard: by resorting to the courts, all

[11] "I question whether democratic institutions could long be maintained; and I cannot believe that a republic could hope to exist at the present time, if the influence of lawyers in public business did not increase in proportion to the power of the people" (Tocqueville 1840, Eng. trans. Vol 1, 352-3).

those who feel dominated and excluded regain the comforting sense of being 'legal subjects'. As Garapon (1996, 45) observes

> justice seems to offer a more individual, closer, more permanent possibility of action than the classical, discontinuous and distant political representation. […]. In a courtroom, the outcome of the claim does not depend on the balance of power between two political entities – a trade union and the government, for example – but on the pugnacity of an individual who alone can bend the state, since the two are fictitiously put on an equal footing.

The fact that recourse to justice presents itself as a 'slingshot' capable of enabling David to wrestle with Goliath is an element that should not be underestimated in societies where fragmentation often makes it difficult to identify subjects who are in exactly the same condition and have the same specific interests, where individuals are often confronted with the interests of large economic corporations and large corporate agglomerations that exert a pervasive influence on the legislative process. For many individuals, access to justice appears to be one of the few elements of effective *empowerment* in a society where, as Danilo Zolo (1999, 23) has argued

> not only the satisfaction of social expectations, but the very protection of fundamental freedoms risks depending for each citizen not on his being a holder of citizenship rights, but on his potential for corporate affiliation. […] The incapacity for affiliation […] coincides with de facto (and sometimes de jure) exclusion from citizenship.

In this situation, law means, *à la* Kelsen, the possibility of turning to a judge to ask, *à la* Weber, for protection against state coercion. What seems relevant is 'justiciability', "the mere eventuality of the trial, the *eventus judicii*, not the actual trial, and still less the conviction" (Carbonnier 1978, 194). Justice is, in fact, first and foremost a 'scene' that allows the interests at stake, the social problems, to come to the fore, that allows certain categories of people to emerge from the darkness of social, economic or political marginality. It is the scene to which people turn to fix their fears, to identify their enemies and to give themselves hope[12]. Given the widespread perception of the impossibility of influencing the legislative process, the possibility of participating in it by expressing one's will no longer has an effective legitimising force, as Jürgen Habermas (1996) has observed. In this situation, for many people, access to the courts has increasingly come to mean "access to a process constructed in such a way as to justify the expectation of rationally acceptable outcomes", a process that only courtrooms seem to allow.

In this new framework, in which law is primarily not a regulatory modality but an instrument for the proceduralisation of conflict, the pre-existence of the legal norm invoked to appeal to the judge is of little relevance. As Tocqueville already noted, 'justiciability' is a phenomenon

[12] Garapon (1996, 44) observes that the judicial scene allows even liberal-democratic societies to represent themselves "in both senses of the word, to understand themselves and to stage themselves. It offers a world that is becoming obscure to itself, a society without projects, the opportunity to look itself in the face".

> universal, encompassing all recourse to the judge, even if it is not orderly and strategic, even if it is only complaint, clamour and dispute. [...] What is important is the intervention of a judge, of this third character, seen indifferently as an arbiter or state official, placed outside, to place doubt in the dispute of the litigants and finally to come out of the doubt with a decision (Carbonnier 1978, 194).

Conflict completely changes its connotations and its function: from a threat to the bonds of a society considered stable and cohesive, it becomes an instrument for the social integration of a society that is inexorably complex, plural and therefore frayed. There is, therefore, a clear need to find effective instruments that allow its proceduralisation: the courts seem to be the only places where this proceduralisation is possible. As Philippe Raynaud (1995, 25) points out in his analysis of minority appeals to the US Supreme Court, in societies characterised by great internal diversity, as the American one has been for decades and as the European ones are now, "it is not enough to be formally a citizen of the United States in order to be fully 'American'": judicial appeals are therefore made primarily to "make it known that this or that group, in its particularity, is part of the community".

In order to redefine the boundary between private troubles and public, or rather legal, troubles, the jurist has to do a different job from the one Mills asked sociologists to do: the jurist has to transform private troubles into claims that can be presented to a judge. In order to transform private troubles into legal problems, the legal practitioner must see the intertwining of powers (economic, social, physical, etc.) behind those troubles, and understand whether and how to activate a power that is autonomous with respect to the social stratification of power: namely, legal power. Indeed, as Weber taught us, legal power often serves to compensate for other social powers, bridging the 'power' gap that affects marginal individuals.

Combining Mauro Cappelletti's views on access to justice with Wright Mills' views on the 'sociological imagination', we lay the groundwork for defining the role that the 'juridical imagination', as Costa (1995) has called it, can play. For Cappelletti and Garth (1981), access to justice is not simply an individual right to be universalised, but an indicator that measures "continuing social development, involving a constant debate about how much access to provide and how much and what kind of justice should result". If Mills' 'sociological imagination' hoped to produce a language capable of enabling women and men to transform their 'personal troubles' into 'public problems', the 'juridical imagination' can produce a discourse capable of transforming the 'private troubles' of marginalised individuals into legal problems, into claims to be presented before a judge, thus allowing the fundamental values of 'democratic societies' to be recovered in the present context.

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