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THE FORCE OF LAW AS A SOCIAL PROBLEM

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In this paper, the author aims to respond to the urgings in the book "The Force of Law" by Frederick Schauer breaking from the paradigm of analytical jurisprudence, insofar as the University of Virginia philosopher states having found sociological bases for his own logical/reconstructive architecture. The author, on the one hand, intend to develop a critique of Schauer's approach that is not merely theoretical, but sociological as well; on another hand, Hart's thesis on force in law—strongly criticized by contemporary analytical philosophers—is not therefore rebuffed by sociological analysis but somehow finds confirmation. In a nutshell, whether the use of force is sociologically necessary to control isolated resistance to the rules shared by the majority, or to reinforce a law, that aims to trigger necessary social change, but such a strong limitation of human freedom must be justified; and this legitimacy can only derive from the need for Justice.

INTRODUCTION

Frederick Schauer's book entitled *The Force of Law* allows us to return to a recurring theme in positivist legal theory: whether law can in some way be attributed to commands that social actors are forced to obey out of fear of

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punishment. The American law philosopher is apparently taking part in a debate entirely within the analytical current of legal theory[1], showing its difficulty in reaching a comprehensive definition of "law". Schauer's main target is the theory of L. H. Hart, who, as he sees it, is guilty of having underestimated the importance of force and coercion in the explanation of the very nature of law, based on the essentially empirical supposition that many people obey the law just because it is the law, and not because of what the law can do to them if they disobey.[2] If this belief is true, and thus if unforced legal guidance is widespread, then legal coercion is best understood as the state's efforts to control its minority of disobedient outliers rather than being the characteristic that explains what law means and does for the majority of the population.

Actually, what Hart stresses in his work is that the effectiveness of law rests upon the consensus that the majority of the population accords it, while the fear of the resort to force plays a merely residual role: it only influences the behaviour of a minority that does not spontaneously recognize the law and the importance of its functions[3].

I. THE FORCE OF LAW

Schauer's *The Force of Law* opens and closes with the same statement: "Law makes us do things we do not want to do" and revolves around the same empirical observation: Law makes the difference when it is necessary to keep citizens or public officials from acting or deciding in their own special interests or through reliance on their own capacity for judgment[4]. The law, for example, is binding upon judges, depriving them of room for discretion, because most of them would not know how to govern this power

[1] H. L. A. HART, THE CONCEPT OF LAW (Oxford: Oxford University Press 1961); N. MACCORMICK, H. L. A. HART 55—57 (Stanford: Stamford University Press 1981); M. D. BAYLES, HART'S LEGAL PHILOSOPY. AN EXAMINATION 45 (Dordrecht: Kluver Academic Publishers 1992); R. N. MOLES, DEFINITION AND RULES IN LEGAL THEORY. A REASSESSMENT OF H. L. A. HART AND THE POSITIVIST TRADITION 99 (Oxford: Basil Blackwell 1987).

[2] One of the main features of Hart's most important work (*The Concept of Law*) is precisely the claim that "the concept of legal obligation could be understood independently of coercion" as outlined by N. LACEY, A LIFE OF H. L. A. HART. THE NIGHTMARE AND THE NOBLE DREAM 192 (Oxford: Oxford University Press 2004).

[3] N. Stavropoulos, *Words and Obligations* in L. D. D'ALMEIDA, J. EDWARDS & A. DOLCETTI (eds.), READING H. L. A. HART'S THE CONCEPT OF LAW 130 (Oxford: Hart Publisching 2013); M. MARTIN, THE LEGAL PHILOSOPHY OF H. L. A. HART. A CRITICAL APPRAISAL 39 (Philadephia: Temple University Press 1987); P. Soper, *The Obligation to Obey the Law* in R. GAVISON (ED.) ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY. THE INFLUENCE OF H. L. A. HART 140 (Oxford: Claredon Press 1987).

[4] F. SCHAUER, THE FORCE OF LAW 28 (Harvard: Harvard University Press 2015).

well; it is therefore best to bind them to standardized decisions. Both citizens and public officials including judges rely on their capacity for judgment but often overestimate their actual abilities, and confuse their interests with their duties. This, in substance, is the reason why, for Shauer, coercion in law is so "ubiquitous", and it is why coercion may be the feature that, probabilistically even if not logically, distinguishes law from other norm systems and from numerous other mechanisms of social organization.

In the final chapter, dedicated to the differentiation of law, Schauer admits that the efforts by analytical philosophers to specify a definition of law, to identify its essential elements, or to grasp its nature, have not yielded satisfactory results, and, for the same reasons, it is impossible to maintain that coercion can on its own define law, or be considered a constituent element of law. The American philosopher appears to wish to pursue an apparently less ambitious objective: given the observation of the ubiquity, the omnipresence, of the use of force in the legal system, it cannot be denied that coercion is part of the differential elements of law, which is to say, those characteristics that go towards making law and the legal system a sector of society different from other systems that, too, are based on authority or preordained to take decisions.

Beyond these prudent statements, however, Schauer's final chapter maintains a different thesis: that law is a tool that can, in the abstract, be used to achieve many different goals, but, in a complex society like today's, its specialization has suited it to doing one thing in particular. To be sure, to use the American philosopher's analogy, we can find a way to drive a nail with a screwdriver, but it is best to use a hammer for this purpose. And as Schauer's argues, law serves and serves well for one thing alone: to get people to do what they would not spontaneously do if they were to follow their own nature; the anthropology of Schauer and his teachers is in essence pessimistic: homo homni lupus. Law can be used to regulate a community of saints, but that would be a useless waste of energy. Law can be used at the service of promotional purposes, educational purposes, economic purposes, and so on, but other social systems can surely better perform these functions, each of which corresponds to the legitimate objectives of States. Law intervenes when it is necessary, in a non-metaphorical sense, to have one's hand on the trigger, because one of the functions that law may perform better than other institutions is constraint. But it would be more precise to say "the only function" because the essay offers no glimpse of any other function as suited to the characteristics of law as that of forcing those receiving commands to do something other than what they would do in a world without legal norms. Coercion is what, in the final analysis,

justifies every other feature peculiar to the legal system.

To be sure, Schauer lists many elements of differentiation in the legal system (sociological differentiation, procedural differentiation, methodological differentiation, and source differentiation), but these are not placed on the same level; in fact, they find their explanation in the need to permit precisely that controlled use of force which is the function that better than any other would be suited to law.

Schauer's argument is quite strong, raising great interest not only for philosophers but above all for sociologists of law, to whom the author devotes much attention. The first question regards the empirical element underlying the reflection: is coercion truly an element omnipresent in the historical experiences of law and above all in contemporary law? Going beyond this first question, we wonder whether, empirically, the element of coercion characterizes the legal system exclusively, or also other normative systems or social systems that, in a complex society, we would tend not to consider law.

As to the first query, we find no empirical datum substantiating the affirmation that coercion is omnipresent, ubiquitous, and pervasive. Schauer's reasoning, then, rests upon neither sociological foundations nor empirical observations: the ubiquity of coercion is obtained from a negative anthropology, a profoundly pessimistic vision of humankind's faculties that is scientifically unproved and likely unprovable. This seems to me to be a very weak element of the argument, from the sociological/legal standpoint, because what ought to be the object of demonstration is presented as evident and scientifically proven. On the other hand, this point is sociologically relevant, and suggests the need to bridge a gap of this kind through research and empirical studies.

To the second query, Schauer provides a traditional response, so to speak. Law is distinguished from other infra-state, super-state, or anti-juridical normative systems because it is closely connected with the State's political organization. Law, then, is the system of norms in which coercion is omnipresent, and that exercises the function of forcing citizens and public officials to take decisions that are far from their natural inclinations (seeing to their self-interest) and are not based on their own capacity for judgment. Lastly, law belongs to the State because only the State holds the de facto monopoly on the legitimate use of force, in which legitimacy (of the use of force) coincides neither with consensus (Hart) nor with a system of authorizations (Kelsen), but with the effectiveness that sovereignty confers

to the legal command[5]. In this sense, from Schauer's point of view law is, by definition, a creature of the municipal nation-state, so thinking of the rule systems of the Mafia and the American Contract Bridge League as law is a "metaphorical and not a literal exercise"[6].

Schauer's system is therefore to a great degree ascribable to *imperativism* because, as in Bentham and Austin, law is explicitly presented as a species of coercive rules marked by the threat of punishment with which obedience to law is obtained. Schauer is also imperativist on the most important point: what gives the force of law to the legal command, and allows legal coercion to be distinguished from social coercion, is its connection with State bodies—a connection not based on an authorization, but rooted in sovereign power. The force of law is conferred by a de facto power exercised by the authority: "Whose commands are owed habitual obedience but who owed obedience to no one?"[7] and therefore the coercion exercised by such social organizations as the National Football League, the Marylebone Cricket Club, the World Trade Organization and even the Mafia, is indistinguishable from that exercised by the Magistracy, by the Police, by public officials, and by the Army, except for one factual element: social organizations of the former type are subject to the sovereign power of the State, while the latter use force precisely on the basis of the State's sovereign power.

Schauer's position is certainly consistent: by reducing law to the exercise of sovereign power, it expunges any appreciable difference between legal duty and coercion, and thus the ubiquitous presence of the latter becomes a sign both of power and of the force of law. However, as we shall illustrate below, any distinction or relevance in the distinction between a legal system and mere domination disappears.

II. WHY COERCION IN THE LEGAL SYSTEM IS A PROBLEM?

If the above paragraph is, as I think, the best argument in support of the

[5] For Kelsen, as is known, a prescription has a juridical nature only if it originates from an authority attributed the power to establish or apply it, and that draws its power from a higher juridical level in turn authorized by a level that is higher in its own turn, in a formal chain of delegations of power that compose a characteristic construction by degrees of the legal system. H. KELSEN, PURE DOCTRINE OF LAW (Clark: The Lawbook Exchance 2005).

[6] Schauer quotes, among others, John Rawls: "[Political] power is always coercive power backed up by the government's use of sanctions, for government alone has the authority to use force in upholding its laws." J. RAWLS, POLITICAL LIBERALISM 136 (New York: Columbia University Press 1993).

[7] J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 164 (Cambridge: Cambridge University Press [1832] 1995).

thesis of coercion as the force of law, I'll try to criticize it from a sociological and legal standpoint. I will hereby try and summarize my reflections regarding three themes appearing in his dissertation, each characterized by a paradox.

The first theme is the syntactic ambiguity of the term "differentiation", used throughout the text, and perhaps also across all of Prof. Schauer's work. After all, the author himself pointed out that "the law (or, more precisely *the legal system*), is different from the military, from medicine, and, perhaps more controversially, from finance and from politics and from public policy".

However, if, as noted by Schauer, "there are many reasons to distinguish the law from the legal system", there are as many good reasons to distinguish between the differentiation of law and the "systematic" differentiation of law. In other words, when approaching the differentiation of law from systems theory, we are forced to acknowledge an unbridgeable distinction between the legal system and its surrounding environment; we can avoid the resulting theoretical paradox, if we instead consider the differentiation of law, if we consider the differentiation of law as a series of processes related to individual interactions, which, in practice, have differentiated themselves from one another over time.

The question we pose is therefore the following: On the one hand, does the differentiation of the phenomenon of law from the processes of interaction present in society lead to identifying coercion as a salient element? On the other, by considering law as a specialized social system, does this lead to considering coercion as an essential element of differentiation? By translating Schauer's hypothesis into a hypothesis scientifically disprovable based on empirical data, we may, in the final analysis, wonder whether the function of law—not the only function, but the main one—is to induce a State's citizens, like public officials, to do what they would not wish to do spontaneously, and this is thanks to the capacity for intimidation and coercion inherent to legal commands.

The second theme is the hypothesis of "legal pluralism", also found throughout Schauer's essay, or, more specifically, the uncertainty brought about by a normative pluralism, which could lead to the association of social phenomena that may be very different, yet still hard to distinguish clearly. As the author explicates:

"In many respects, after all, the law of the Mafia, as just posited, and as with the rules of the National Football League, the rules of the Marylebone Cricket Club, and the rules of the World Trade Organization, contains primary and secondary rules, rules of recognition, and internalization by

members and officials alike. Thus, the only thing that makes using the word 'law' in these contexts metaphorical and not literal is precisely the connection with the political state."[8]

Legal pluralism poses many theoretical difficulties, and one of these is surely the possibility in its extreme versions, like that of Italian jurist and legal theorist Santi Romani of assigning the force of law to the rules produced by any social organization even the lesser ones that set limited objectives, or criminal ones, which is to say those that, from the State's perspective, are in conflict with legality[9].

The problem takes on an even greater direction if, in following the imperativists, we were to assign decisive importance to coercive power that is unauthorized but exercised on the basis of the State's sovereign power. From this perspective, the State would be characterized exclusively for holding a de facto power greater than that of the other organizations competing with the State in the same social space for regulating the citizens' lives. If this were the case, it would become difficult to tell the State's doings apart from those of a gang of criminals.

In this regard, the opinion expressed by Prof. Schauer is, truth be told, especially poised:

> In equating law with coercion, the threat of punishment or some other "evil" Austin was simply wrong. Law does much else besides control, threaten, punish, and sanction, and law does not always need coercion to do what it can do. But the fact that coercion is not all of law, nor definitional of law, is not to say that it is none of law, or an unimportant part of law. To relegate to the side-lines of theoretical interest the coercive aspect of law is perverse. And thus to adopt a conception of the philosophy of law that facilitates such relegation is even more so.[10]

In fact, anyone who spends time in Courts, or may have studied the impact of the law on people, will possess a specific, and perhaps disquieting awareness of the harsh and merciless power which can be evoked by the law, and the disturbing violence that can ravage a person's life when a judge or public official, with all of their decisions' coercive power, emits a dictum, which is then enforced.

The close connection between the magistrates' authority and coercive power has been evident since ancient times. For example, we can recall Roman law and the fear that the population must have felt at the sight of

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[8] F. SCHAUER, THE FORCE OF LAW, at 160.
[9] M. LA TORRE, LAW AS INSTITUTION (New York: Springer 2010).
[10] F. SCHAUER, THE FORCE OF LAW, at 162.

fasces[11]. It is in fact renowned that the lictores[12] showed off the fasces in public to bestow them with a symbolic meaning; however, these also had a practical use: the canes were used to flog offenders on the spot, and, similarly, the axe was used both to execute capital punishments, and, by the lictores' guard, as a weapon to defend magistrates.

The degree of the Magistrate's imperium was symbolized by the number of lictores who escorted him; nonetheless, it should not be forgotten that the axe, as a symbol of utmost coercion and of the power of life and death, was only exhibited in the fasces outside of the Pomerium, the sacred boundaries of the city of Rome, as within these no one other than the dictator could sentence to death a Roman citizen[13].

For that matter, Schauer's discourse leads to the uncovering of another paradox. In fact, if the element of Force is emphasized, and the State is identified as the subject holding a monopoly over the legitimate use of said Force, it is the State, which fails to distinguish itself from a criminal gang, rather than the other way around. The issue here is not the supposed lawfulness of the Mafia, but rather the foundation of the legitimacy with which the State resorts to the use of force. Schauer's uncertainty is indubitably relevant, as we recall Hart's statement that "Law surely is not the gunman situation writ large, and legal order is surely not to be thus simply identified with compulsion". But why? Is the provocative question put forward by the North American philosopher?

In my opinion, a convincing answer to this query is necessary in order to lay the foundations of a legal pluralism able to distinguish between state law and non-state law, between the law and other normative phenomena (i.e. rules), and between the law and the Mafia. However, referring to the law's "connection with the political state" would not be a solution, but rather an integral part of the problem.

The third element is the role of force (understood as coercion).

Schauer's essay causes us to wonder whether it is true, as in Austin's times and let us do not forget that he was born in the late 1700s, more than two centuries ago that "one of the functions that law may perform better

[11] Fasces (from the Latin word fascis, meaning "bundle") symbolize summary power and jurisdiction, and/or "strength through unity". The traditional Roman fasces consisted of a bundle of birch rods, tied together with a red ribbon into a cylinder, and including an axe amongst the rods.

[12] The lictor, derived from the Latin ligare (to bind), was a member of a special class of Roman civil servant, with special tasks of attending and guarding magistrates of the Roman Republic and Empire who held imperium. The origin of the tradition of lictores goes back to the time when Rome was a kingdom, perhaps acquired from their Etruscan neighbours.

[13] Dictator: 24 lictores outside of the Pomerium and 12 inside; Consul: 12 lictores (as the former Rex); Proconsul: 11 lictores; Magister equitum: 6 lictores; Praetor: 6 lictores, 2 inside the Pomerium; Propraetor: 5 lictores; Aediles curules: 2 lictores.

than other institutions is constraint"; whether this is still true in a world where the state's power is challenged by other transnational entities, and a world where, almost fifty years after the societal revolutions of 1968, obedience is no longer a virtue. This leads us to the third and last paradox, presented as a provocative conclusion: Are force and justice an oxymoron?

These are, without a doubt, topics that would require a much deeper exploration than what can be achieved in this essay. Nonetheless, I will use the figure of speech of the paradox to try and express as clearly as possible my point of view.

III. THE DIFFERENTIATION OF THE LEGAL SYSTEM

As Niklas Luhmann explained, the "difference" which constitutes the foundation of systems theory is a distinction, specifically the distinction between the system and the environment. In systemic terms, the differentiation process reproduces this original difference; likewise, the legal system uses autopoietic processes to continuously reaffirm its distinction from the non-legal environment (more so the social than the natural one). "The paradox which is thus excluded is the unit of this difference, in other words, the world. Systems theory must therefore renounce the provision of knowledge regarding the world" [14]. In his posthumous work, *Organisation und Entscheidung*, this great German sociologist explained with incomparable clarity the theoretical reasoning why in modern society, understood as a *social system*, it is unconceivable to know and act having as a sensorial horizon the *Mundus*[15]. Luhmann stated that systematic sociology complies with the rule of referring all observations to a system or its environment; at the first instance it is the observer, the researcher, who defines what the system is which instructions, roles, and subsystems belong to the system under analysis. From this viewpoint, everything else is "the environment". In the sake of coherence there is therefore a necessity to identify a system of reference, and such a decision should be, and can only be taken contingently. What Luhmann describes as autopoietic systems are "organizations"; yet, from the viewpoint of modern

[14] N. LUHMANN, ORGANISATION UND ENTSCHEIDUNG, It. Trans: ORGANIZZAZIONE E DECISIONE, 42 (Milano: Bruno Mondadori [2000] 2005).

[15] It is of utmost importance that structural-functionalism theory aims to provide multi-contextual descriptions, rather than actual knowledge of the world. Consequent to this premise, organizations may be described as autopoietic systems; this is because organizations will always produce and reproduce within themselves a difference, which—within the systemic context—is the difference between the system and the environment. Furthermore, the concept of autopoiesis itself claims that any observer which might employ it presumes that said difference is produced within the system itself, and reproduced through the system's own processes.

sociology, society itself is described as an autopoietic system.

The paradox that most characterizes sociology, which appeared in modern times, is that despite the evident belonging of social relations to the World, the conditions for the knowability of the social reality impose the denial of the unity between the society and its environment, a unity referred to in ancient times as *Mundus*.

In strictly non-luhmannian terms, the *autopoietic* closure of social systems indicates that sociology has aimed to explain every aspect of humans' lives as a social construct, with no reference to the realities external to society itself. Whereas from a simplistic or reductionist sociological viewpoint this aspect is taken for granted, within functional-structuralism theory it is not whatsoever; however, as Luhmann lucidly wrote, at the very most this paradox needs to be kept out of systems theory, for the latter to maintain its coherence. This will prevent the paradox from deflagrating and compromising the theory from within.

When analysing the systematic differentiation of the law from a historical perspective, the coming of modern times—through the support of sociology, in other words, the science of modernity—has hampered the possibility to presume that social norms and laws are not a simple human artefact, but rather have an underlying *natural character* that they depend on "the nature of things", and in order to be legitimate they must implement justice. However, this is not due to a change in humans or their nature, but rather due—with the appearance of human sciences, above all of sociology—to a new theoretical framework. Said framework excluded the unity of humans' sensitive experiences, and presumed the possibility to see the world as a unit. Within this empirical unit, the "social system" has been contrasted with the environment, not so much its reality but rather its knowability[16].

Modernity has for centuries characterized Western societies, where "the new" and "manufactured" have always had to prevail over what was bequeathed through "tradition", and where the self-sustaining development process has always seemed to confirm the limitless ability to self-create and self-transform; nevertheless, as Alain Touraine reminded us, modernity can only claim its existence based on the recognition and safeguarding of the existence of non-social foundations of the social order, and recognize the importance bestowed upon reason as a universal pre-social element.

This universalism, which incorporates the idea of human rights, does

[16] The issue of social construction has indubitably prevailed during the past century, and has characterized 20th century sociology. Nonetheless, throughout thousands of years of the history of thought, neither the underlying elements of natural law, nor schools of thought regarding systematic closure have come to lack: at most they have been perceived as paradoxes, or limits to social thought.

not, in fact, belong to the notion of society as developed by social thought. Moreover, thanks to its clear connection with the natural law viewpoint of the world order, it breaks the autopoietic cycle, and brings back into the human reality, which is no longer entirely social, the paradox of the world as a unit. Therefore, in early modernity, the essence of social organization is anchored onto non-social, or pre-social, and universalistic principles[17].

Leaving the paradox does not mean denying the differentiation, but rather placing it within a different epistemic field. Let us offer two alternatives: the first is to consider, following the footsteps of Lon L. Fuller, the differentiation of law as a specialization process for certain processes of social interaction; the second is to consider law as a social system, operatively open and therefore capable of communicating and developing functions that are intertwined with other functions typical of other systems. In this paragraph, I develop an internal critique of Schauer's reasoning, since he, too, refers to Fuller whom he lists among his teachers and to the functionalist paradigm of the functional differentiation of social systems.

A. The Distinctive Features of Legal Interaction

In this regard, I would like to refer to Lon L. Fuller's observations, who highlighted how in modern society, "various processes that contribute to social ordering" have progressively differentiated themselves, such as: legislation, adjudication, administrative direction, mediation, contractual agreement, and customary law[18].

According to the American philosopher, "even in modern societies these forms are interrelated in various complex ways and at times tend to shade into one another. In primitive society, I would suggest, they appear in still more mixed and muted forms; generally, any scruple about blending or mixing them seems to be absent, perhaps because they are simply not perceived as separate processes"[19].

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[17] A. TOURAINE, NEW PARADIGM FOR UNDERSTANDING TODAY'S WORLD 40 (Cambrige: Polity Press [2005] 2007).

[18] L. L. Fuller, *Mediation—Its Forms and Functions*, 44 CAL. L. REV. 305—339 (1970-1971).

[19] "Something of the ambiguity of the social processes by which primitive societies are ordered is suggested in Barton's famous study of the Ifugao monkalun or 'go-between'. Barton refers to the parties who invoke the monkalun's office as 'litigants'; the services rendered by the monkalun himself are described as follows: The office of the monkalun is the most important one to be found in Ifugao society. The monkalun is a whole court, completely equipped, in embryo. He is judge, prosecuting and defending counsel, and the court record. His duty and his interest are for a peaceful settlement... To the end of peaceful settlement he exhausts every art of Ifugao diplomacy. He wheedles, coaxes, flatters, threatens, drives, scolds, insinuates […]. The monkalun has no authority. All he can do is to act as a peace making go-between. His only power is in his art of persuasion, his tact and his skilful playing on human emotions and motives". *Ibid*, at 338.

We can be further enlightened by the following remarks:

> What appear to us as hopelessly confusing ambiguities of role, were probably not perceived as such either by the occupant of the role or by those subject to his ministrations. In analysing the social processes of primitive societies this often makes it an exercise in futility, as Gluckman has cogently observed, to try to sort out those processes that deserve to be called "law"[20].

Setting aside a rigorously systematic viewpoint, we should follow Fuller's suggestion to approach the law and its institutions as other "forms of social ordering and dispute-settlement". Within the social processes that have determined their evolution, said forms have progressively separated in practice, thereby developing distinctive, yet non-exclusive functions, and have found social field within which their application has been more appropriate and effective.

This process of differentiation has resulted directly from individual interaction, without needing to postulate that every form of social organization is necessarily an expression of the State's authority, or a projection of society as an anthropomorphic reality. Legal institutions within modern societies are nothing other than "distinctive interactional processes".

This way of posing the problem of force of law is of particular use for developing a critique of Shauer's hypotheses.

The processes of legislation, adjudication, administrative direction, mediation, contractual agreement, and customary law characterize all human societies, both pre-modern and modern, with the not unimportant difference that in "primitive" societies, according to Fuller, they appear in mixed and confused forms, and in general, there seems to be no scruple at all about fusing or blending them; this is simply because "they are not perceived as separate processes." In modern societies, the structural differentiation and the specialization of structures has made it possible to perceive each of these processes as distinct from and autonomous of the other, but also and above all in complex and we shall say post-modern societies, these forms are clandestinely interrelated, and at times tend to blend into one another.

Fuller's critique, then, is fixed upon the formalist and monistic tendency to describe legislation, jurisdiction, and administrative management not as characteristic processes of interaction, but to present them, prescriptively, as unidirectional ways of exercising the State's power. To the contrary, in Fuller's theoretical construction of law, the contract, for example, is constructed as a source of "law" and of social order in and of

[20] *Ibidem.*

itself, and not as something that "derives" its entire meaning from the recognition that the State's law endows upon contractual autonomy, or, from a common law perspective, from the fact that the State's judges are prepared to enforce them[21]. In the same way, custom does not become worthy of attention only when courts recognize it, thus converting it into "law", but as an autonomous source of subjective rights and legal norms. Fuller's theory of law is then, properly speaking, a pluralist theory[22], and therefore open to analysis of the facts and social relationships capable of constituting the legal system[23].

It should come as no surprise to find, among the nine processes of societal order, themes that are ordinarily not strictly held in common in the discussion of legal or sociological issues. In fact, what Fuller intended to stress was not only the presence of multiple processes that, in general terms, teleologically contribute towards giving order to society; he meant to identify the function inherent to each of them, and the forms inherent to each process, that are such as to make them structurally unsuited to "colonizing" certain social fields, and that, to the contrary, suit them to regulating others.

Actually, each social process is placed at a midway point on an imaginary continuum, a continuous line at the extremes of which are the two basic forms (and in a certain sense, ideal/typical forms) of societal order and performs functions in addition to that main function; this forces the researcher to take many parameters into consideration in order to comparatively assess the effectiveness of each process in pursuing its function, and thus in contributing to the purpose of social order. The two basic forms, or principles of societal order, are "organization for common purposes" and "organization for reciprocity", drawn from the theoretical elaboration of classical sociology of organization (Barnard): the existence of purposes common to the members of the community will favour social organizations like community relations in small groups, charitable

[21] In Italy, this perspective was vigorously sustained in recent years, in the Milan school of sociology of law, by Professor Morris Ghezzi (1951-2017), who went as far as to base the very legitimacy of the legal system on respect for agreements freely subscribed to, making the contract the first and fundamental source of law; M. L. GHEZZI, LE CENERI DEL DIRITTO 89 (Milano: Mimesis 2007).

[22] Morris Ghezzi continues with the classical theories of the pluralism of legal systems and of the institution, and in his most recent works critically reconstructs the sources of law in light of pluralistic theory (and examines its link with the theories and practises of political pluralism present in the Italian and European constitutional experience; GHEZZI M. L., LA SCIENZA DEL DUBBIO. VOLTI E TEMI DI SOCIOLOGIA DEL DIRITTO 300 (Milano: Mimesis 2007).

[23] M. A. Quiroz Vitale, *Giurisdizione, mediazione e decisione amministrativa. Il contributo di Lon L. Fuller all'analisi strutturale e funzionale del fenomeno giuridico*, in ID (ed.) DIRITTO, IL DONO DI EPIMETEO (Milano: Mimesis 2014).

endeavours, free associations, political parties, and trade unions, and as the formal profiles of organizations grow, we encounter nations and States that may be considered non-voluntary associations. When individuals pursue ends that are different but not clearly in conflict with one another, they will be led to regulate their objectives through contracts in the private sphere, or through treaties in the public sphere, in such a way that each may obtain from the other what he or she needs, to the extent to which the other is willing, in a "*do ut des*" relationship, to sacrifice one's own in order to obtain what one is willing to offer. Organization by reciprocity is best applied in exchange relationships that result in the enrichment of all the parties involved, and corresponds roughly to the market economy and to rational action oriented towards the body of economic actors.[24]

Actually, an analysis of the historical, social, and anthropological evolution of law, like Fuller's, leads to results opposite to Schauer's which, in describing law as a tool of social action that, in one-way form, allows the State's power to coerce the will of the citizens and of public officials, making them do what they would not do in the absence of the intimidation power of force, appears to be a reductive argument without confirmation in historical and anthropological terms.

B. The Functions of Law in an Open Social System

The structural/functional perspective has revealed the peculiarities of the legal system in modern societies, whose level of complexity exceeds the limits of individual interactions; this different key of interpretation is not incompatible with that expressed in the previous point, albeit changing the perspective and the level of analysis. Indeed, while the founder of functionalism, Talcott Parsons, described law by highlighting its role of social control, all the same the prime function of the legal system is of the "interpretative" type, while the problem of punishment is resolved in a wholly different way. In his seminal 1962 essay *The Law and Social Control*, Parsons points out how the political system and the legal system are intimately linked, and punishment is specifically a service of the political system in comparison with the legal one: the mechanisms that exercise constraint are generally represented, in modern societies, by state bodies that have a "special political nature", and it is clear that various

[24] However, the respect implicit in this form of social organization for the choices and preferences of the other are a valid antidote for the totalitarian and liberty-killing drifts which, to the contrary, were affirmed in the twentieth century through state ethics and the imposition of the "common good"; Fuller L. L., *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 362 (1978-1979).

societies, marked by a different legal culture, find a variety of coordination mechanisms so that the legal system may make use of the state institutions that mete out penalties[25].

In Roman Law, to continue in the example made above, that politics was at the service of law was not only symbolized, but tangibly expressed by the service performed by the lictors who escorted the Magistrate when he had to *iuris dicere*, and the greater the number of lictors bearing the rods and axes, the greater was the degree of the *imperium*. But the lictors were not jurists, nor were law administered by them; the lictors were an expression of the political will of the Republic to impose respect for law (*ius)* which, however, was then—and is today—something other than coercion.

It is thus clear that punishment and coercion, in a structuralist/functionalist vision, are a "spurious" function, dependent upon the inputs of the political system, but certainly not ubiquitous or immanent to the legal system in the sense given to this term by Schauer, or characteristic of it.

Another master of structuralism/functionalism took into consideration the problem of law's function, providing a balanced response to the hypothesis that law performs its prime function when it has to require those receiving commands to do what they would not like.

In William Evan's renowned essay *Law as an Instrument of Social Change,* the eminent legal sociologist emphasizes the existence of two competing correlations between the social and legal rules of the legal system: in one, law has an active nature, while it is passive in the other[26]. The passive nature is manifested in coding the customs, the moral norms, and the habits already deeply rooted in the social group of reference; the active one, on the other hand, aims to modify the behaviour and values prevailing in society. When a new law comes into existence, it always attracts a certain degree of opposition or resistance from its recipients. Quite shrewdly, Evan proposed distributing the human behaviour of resistance to new laws along a continuous line; at one end, we approach 0% which is to say full adherence to the normative model that makes it almost superfluous to codify the social custom; the opposite end, 100% opposition to the new law, makes law totally ineffective, and the new law risks undermining the very power of the political authority that emanated it. The function of law is mainly social control in the segment beneath the continuous line, in which resistance to

[25] T. Parsons, *The Law and Social Control* in W. EVAN (ed.), LAW AND SOCIOLOGY, EXPLORATORY ESSAYS (New York: The Free Press of Glencoe 1962).
[26] W. M. Evan, *Law as an Instrument of Social Change*, in A. W. GOULDNER & S. M. MILLER (eds.), APPLIED SOCIOLOGY (New York: The Free Pess 1965).

legal change as described by Evan is shown (Figure 1). Near the lower end (α = 0%), where adherence to the law takes place largely with the consensus of citizens, the limited cases of deviation or objection are overcome through reliance on coercion. But in the upper half of the continuum, can law change the behaviour of the many? Evan believed that law could, under certain conditions, overcome opposition to change by performing an educational function that is manifested mainly in the central segment (M) of the continuous line, in which resistance to change starts to grow progressively up to the maximum degree (β = 100%).

Figure 1 Continuum of the resistance to legal change.

Evan stresses the importance of the educational function because while law cannot determine voluntary acceptance by the recipients of the new rules, a situation occurs in which individuals are obliged to obey exclusively due to the threat of punishment. Evan implicitly maintains that the effectiveness of negative sanctions decreases with the increased divergence between the content of a new law and deeply rooted moral values, customs, and habits. Coercion is therefore essential in the segment of the continuum closest to extremity β, since the tension created between public behaviour and inner convictions encourages disobedience. But Evan's analysis is even more precise; as is known, he highlights seven characteristics that must accompany the emanation of new laws in order that compulsory may be converted voluntary acceptance; one of these is the presence of penalties. However, the North American sociologist also highlights the ineffectiveness of negative sanctions (fines or imprisonment) that determine momentary acquiescence without influencing acceptance of the content of legal rules, pointing to the appropriateness of resorting to incentives (or positive sanctions).

We may thus maintain, following Evan, that negative sanctions, those that exercise actual coercion, are of importance only when law diverges from the customs and habits deeply rooted in civil society; when law aims to induce a social change, negative sanctions may perform an albeit limited function, provided this function is accompanied by other fundamental structural elements (the source of law, its *ratio*, the presence of models that favour its acceptance, the use of the "time" factor, the example of public officials and of politicians, the protection of parties that would benefit from the new rules) upon which the success of law's educational function depends. Moreover, Parsons's observations allow us to grasp that the more

the effectiveness of law depends on negative sanctions, the more the legal system depends, in order to operate, on the political system, which can offer instruments and agents of coercion. The law in which coercion is omnipresent and essential, and plays an essential role in determining the legal characteristic of the rules of law, is therefore the special case of a legal system in which laws conflict with the community's customs and values, and the political system aims to achieve a social change without obtaining the consensus of the persons these rules address: This is the law of an authoritarian state.

IV. PLURALISM AND THE LEGAL PHENOMENON

After having reviewed the various elements: social, procedural, methodological, or concerning resources that contribute to the differentiation of law, the issue of legal pluralism violently emerges in Schauer's essay, as the author finally presents the idea of coercion. Nevertheless, the very use of force and the possibility to modify others' behaviour through coercion or threat of sanctions are typical characteristics of many dimensions of social life: it is particularly present, for example, in many voluntary associations (the National Football League, the Marylebone Cricket Club), supranational organizations (the WTO), and also in criminal organizations such as the Mafia.

In this paragraph, I develop an external critique of Schauer's theories, making reference to the theorists of legal pluralism, and offering an alternative approach to the American author's.

First of all, from a sociological point of view, pluralism is observable in every human society; this empirical evidence is oftentimes identified as "normative pluralism", as opposed to legal pluralism; nonetheless, this term is highly misleading, and the French sociologist, Georges Gurvitch's approach seems far more perspicuous[27]. Not only the State does not hold a monopoly over legal production, but it is also required to constantly confront itself, on a strictly legal level, with other social realities. Given these clarifications, according to the French sociologist it is the very "weave

[27] As Alberto Scerbo has observed, for Gurvitch "every community equipped with an active sociality, and bearing a positive value, normatively imposes upon itself to create its own legal regulation. Nevertheless, it should be noted that some groups with the above mentioned characteristics do not manage to develop a legal order, due to their provisional nature, their stability, or even the function they fulfil. In spite of this, there is truth in the claim regarding the plurality of legal orders, which shifts the attention away from a formal dimension, to a substantial one, and leads to a re-elaboration of the reflections on sovereignty, observable only from a legal viewpoint, rather than a political one, to achieve a visual shift in the field of spontaneous sociality"; A. SCERBO, ISTITUZIONALISMO GIURIDICO E PLURALISMO SOCIALE 125 (Soveria Mannelli: Rubettino 2008).

of social life" that can be characterized by an *effective underlying pluralism*: every society appears as a microcosm of social groups, which limit, fight, join, integrate and order each other within the overall social system[28].

According to Gurvitch, legal pluralism which he identifies within "the real life of law" is nothing more than a reflection of an effective underlying pluralism, which is empirically observed within the overall social system, and is therefore itself a fact. As Gurvitch writes, "Every group and every set is endowed with the effective ability to produce its own autonomous legal order, with a subsequent ability to regulate life within it. Groups and their subsets do not await the State's intervention to take part, as autonomous centres of legal production, in the complex weave of legal life where the various legal orders come to confront, fight, interpenetrate, balance and hierarchically order themselves in a most varied manner"[29].

Even the most recent developments in theoretical reflections on legal pluralism support these conclusions, as well as going further still. On the one hand, within post-modern society there is a plurality of legal orders, as well as a multiplicity of social actors who produce norms. As John Griffiths efficiently explained in his classic essay "What is legal pluralism?": "a situation of legal pluralism—the omnipresent normal situation in human society—is one in which law and legal institutions are not all subsumable within one 'system' but have their sources in the self-regulatory activities of all the multifarious social fields present, activities which may support, complement, ignore or frustrate one another, so that 'the law', which is actually effective on the ground floor of society, is the result of enormously complex, and, usually, in practice, unpredictable patterns of competition, interaction, negotiation, isolationism and the like"[30]; after all, the law is not only pluralistic in its *interior*, but also in terms of *external* regulatory complexes, such as religious rules, local customs, *etc*… In this regard comes Klaus Günther's warning:

> If we abandon the idea of an autonomous law, in order to focus on its inclusion or interpenetration with other regulatory systems, then the law will not only appear as "semi autonomous" in comparison to other regulatory complexes,

[28] Pluralism as a fact should be distinguished from pluralism *as a value*: the latter consists in a moral and legal ideal, which allows to harmonize plurality and unity, and is inseparable from the democratic principle. This dimension of political pluralism is intertwined with modern democracy, which is "founded on the principle of equivalence of personal and group values, and is achieved through variety within the unit, which means that the democratic ideal bears its foundations in the pluralistic ideal"; G. GURVITCH, LA DICHIARAZIONE DEI DIRITTI SOCIALI 62 (Soveria Mannelli: Rubettino [1946] 2004).

[29] *Ibid*, at 70.

[30] J. Griffiths, *What is Legal Pluralism?*, 24 JOURNAL OF LEGAL PLURALISM 39 (1986).

> but the exchanges and dynamic interactions among the various orders and actors will also come to light (…) the law becomes a "force field", where actors negotiate among them the rules belonging to different fields and practices; in this negotiation, the actors interpret their intentions and interests also within the diverse "interpretative frameworks" underlying the external fields and practices. Conversely, the latter are also modified due to the pressure created by the negotiations carried out within the legal dimension. At this point, what is interesting about the law is no longer the system's static nature and the secondary rules of its transformation, but rather the continual process of negotiation of the collective legal bindings, which involves all levels, be they institutional or informal, as well as all the sectors of social regulation[31].

Why this happens should be researched, probably, within the far wider social phenomenon of the institutionalization of change[32], specifically in the asynchronic evolution of various social fields or contexts[33]; therefore, references to values and norms in modernity tend to diverge, and no longer converge towards a single point, as in traditional societies.

From a pluralistic viewpoint, the issue of differentiation of the law requires specific terms: in other words, to be able to distinguish every legal order, above all that of the State, from regulatory complexes that cannot be considered as part of the law.

The issue is definitely not a new one.

Among the many anecdotes of the adventurous life of Alexander the Great, Cicero, in *De Repubblica*[34], recounts the explorer's encounter with a pirate, after a small fleet of marauders had been defeated, and their leader

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[31] K. GÜNTHER, PLURALISMO GIURIDICO E CODICE UNIVERSALE DELLA LEGALITÀ 99 (Torino: Trauber 2010).

[32] A satisfying sociological theory should be able to explain "how" and "why" legal pluralism develops in the extreme modernity in which we have found ourselves living. The explanation we have put forward is, in summary, that social and legal pluralism can grow to such an extent only in a society which allows—or rather imposes—individual choices, because only through the assertion of elective action can it be hypothesized that social, individual or collective actors might dare to negotiate the rules of conduct of their own actions, and opt for other concurrent values, given that in traditional societies both the former and the latter were constant elements, as permanent as stars during nocturnal nautical navigation.

[33] Sousa Santos has also expressed himself with regards to the asynchronic aspect of legal experiences: "the analysis of legal pluralism reveals that, as subjects to the law, we live in different legally organized communities, within legal networks that are at times parallel and at times overlapping, at times complementary and at times opposing. Our social practice is, therefore, a configuration of laws. Each of these laws has its own space and time continuum. However, given that said continua are porous and free to interpretation, and given that different laws are not synchronized, the configuration of the legal acts that we implement in the various contexts of our social practice are often complex mixtures of discrepant legal conceptions, and of norms belonging to different generations, some old and some new, some emerging and some declining, some endemic and some imported, some experienced and some imposed" (B. Santos de Sousa, *Stato e diritto nella transizione post moderna. Per un nuovo senso comune giuridico*, 3 SOCIOLOGIA DEL DIRITTO 28 (1990).

[34] CICERO, DE REP. 3, 14, 24.

captured. The story goes that the emperor addressed his interlocutor asking what folly had him haunting the seas, andthe other replied: "I do the same as you, only you haunt the whole world; yet I am considered a pirate for I do it from a small vessel, and you a brave explorer as you lead a great fleet". The pirate's smug and paradoxical reply was appreciated and used by Augustine of Hippo in *De civitate dei*. After all, what are human societies and kingdoms, to the Christian thinker who must justify to himself and his contemporaries the crisis and decline of the Roman Empire? At the origin there are only small groups of individuals held together by one leader, and sharing a social pact which imposed the division of the benefits reaped from war and plunder, according to rules of convention [*imperio principis regitur, pacto societatis astringitur, placiti lege praeda dividitur*]. If a group of such savages grows due to the addition of other men perverted to the ownership of territories, the establishment of residences, occupying cities, and subjugating populations, this group "openly acquires the title of State [*regni nomen assumit*] which, in real terms, it is granted not so much for a reduction in the ambition to own, but rather due to a greater feeling of impunity [*quod eiam in manifesto confert non adempta cupiditas, sed addita impunitas*]"[35]. This passage by Augustine is disconcertingly current and of fine reasoning, and his interpretation is even further enlightened by his opening passage, where he overturns its meaning by introducing the opportunity to distinguish between the State and a criminal organization: "*Remota itaque iustitia, quid sunt regna nisi magna latrocinia? quia et latrocinia quid sunt nisi parva regna*?" He asks provocatively: If justice is not respected, what are States if not large criminal organizations? Likewise, what are criminal groups if not small States? The only distinctive element between the two human organizations, or institutions, is Justice; if in human societies this is not guaranteed, the political, military, and legal orders themselves would not be able to distinguish between the *pactum societatis* and any odd *pactum scaeleris*. Nonetheless, the hierarchical order between the *pactum societatis* and the *iustitia* has been interpreted diversely. With regards to a classical conception, such as, for example, the Augustinian one, the relationship between *Social order, justice and the law*, as was the title of Maurice Hauriou's brilliant dissertation, seems to be overturned; according to the French scholar, the law is defined as a kind of rule of conduct with a dual aim: the simultaneous realization of both order and justice. The two ends, however, are placed at different levels: "The objective of justice is the *aequum et bonum* of Paolo the roman jurist; it aims to establish among men,

[35] AUGUSTINE, DE CIVITATE DEI, Liber IV, IV.

both within social relations and in services, the greatest degree of equality possible in the sake of goodness. On the other hand, the social order, as the realization of an idea, (given that it depends on several other factors) aims to stabilize social assets. Thus … justice has more individualistic ends, whereas order has strictly social ones"; this reasoning led Hauriou to consider order as *prior* to justice, and, unlike the latter, absolutely necessary: "justice is a luxury that can, to some extent, be foregone". For the moment, we will set aside the definition of justice[36].

A similar reference to Justice is unsurprisingly found in Gurvitch's work:

> Every law is an attempt to implement one of the multiple facets of Justice in the most varied and diverse social settings, as long as they are able to guarantee, through their existence, some sort of validity for the thusly held rules. Every coercive system and every power, in order to be legitimate, must be founded upon a pre-existent law within the social reality that organizes them. State law is an island, whether big or small, in a vast ocean of legal orders of various natures[37].

Hence, this is the distinctive element of law from a pluralist viewpoint, both in the case of state and non-state law, and thus is its ideal function: the realization of Justice[38].

V. TOWARDS A SOCIOLOGY OF LAW AND JUSTICE

Another essential reflection on justice, very useful for the structuration of our hypothesis, comes, at the dawn of modern times, from Blaise Pascal, whose work is clearly influenced by Augustinian thought. In his widely renowned *Pensées*, specifically in number 310, Pascal claims that: "justice without force is impotent, and force without justice is tyrannical. Justice without force can be contradicted, because there are always the wicked, and force without justice is condemned. It is therefore necessary to join justice and force, ensuring that which is 'just is strong', and that which is 'strong is just'".

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[36] Also Renato Treves identified justice as the end of the law, despite the prudent and relativistic approach that, to this day, represents a warning, as well as an encouragement, to those who try to approach such a difficult topic: "The aim is to identify the ideal objective toward which the law is drawn, and to contribute to the establishment of a society oriented towards justice, leaving aside any pretence of exclusivity or absoluteness, and remaining within the field of relativism which presupposes common humanity and reciprocal comprehension." R. TREVES, SOCIOLOGIA DEL DIRITTO. ORIGINI, RICERCHE, PROBLEMI 324 (Torino: Einaudi 1987).

[37] G. GURVITCH, LA DICHIARAZIONE DEI DIRITTI SOCIALI, 62 at 70.

[38] I. A. Trujillo Perez, *Estado de derecho y practica de los derechos humanos*, 2 PERSONA Y DERECHO 161—180 (2015).

In this sense, the underlying characteristic of the state of law is that of implementing a legitimate force that is not separated from the ultimate end, which is justice.

In order to express this thought we could resort to a final paradox: if Pascal warned that: "not having been able to ensure that which is just is strong, it has been provided for that which is strong to be just", it is time to assert that "not having been able to ensure that which is strong is just, we are devoted to make that which is just also strong". In other words, what we can do as jurists is to reserve the name of the law to only those rules which pursue an ideal of justice. What does this commitment on the part of jurists concretely mean?

Don Lorenzo Milani, a great Italian pedagogue and clergyman, wrote "I cannot tell my youths that the only way to love the law is to obey it. I can only tell them that they will have to honour human laws by obeying them when they are just (when they give strength to the weak). When, on the other hand, they are not just (when they ratify the abuse of the strong), they shall fight for these laws to be changed"[39]. Also a famous, recently deceased philosopher of law, such as Enrico Opocher, a few years after the revolutions of 1968, observed that, in modern society, the more the social order tended to fraction itself, the more articulate the normative horizon appeared to be. Therefore,

> speaking of justice or injustice in a legal sense has no meaning, if not in relation to this or that legal order, and when one strives to place such a discourse on an unconditional level, one can be certain that such an "unconditionality" pertains either to an undeserved identification of legality as a homage to force as such, or to an ideological mystification which would tend to absolutise this or that legal order in a specific time of its existence. This will result in a vain attempt to subtract a social (and cultural) equilibrium from the relentless advance of history, or, likewise, from the condition of human existence and of freedom which expresses its insuppressible yet contradictory essence[40].

In light of these reflections, we shall not hesitate to answer that the Mafia's rules will never be able to rise up to the dignity of the law, because, even if such a criminal association were to extend and articulate itself to the point of controlling whole territories through force—as it seems to be happening in Italy—essentially, such a criminal organization could at most aim to stand to be an order of injustice, abuse, suppression, and the denial of

[39] Extract from *Documenti del processo di don Milani* (Documents from the trial of don Milani), Libreria Editrice Fiorentina, Firenze 37—38 (1991).
[40] E. Opocher, *Giustizia* (Justice), 19 *Enciclopedia del diritto* (ENCYCLOPEDIA OF THE LAW) (Milano: Giuffrè 1970).

human dignity. Likewise, it should be stated with equal firmness, that if a State, despite being recognized by the international order, betrayed the citizens' trust, denied fundamental freedoms, destroyed their rights, denied them their human respect and dignity—as has also happened in Italy when those despicable racial laws were approved—it could no longer be said that such a government would represent the state of law, nor would it be possible to credit those commands with the dignity of law, or the decisions based on said commands with the dignity of sentences. We therefore ask ourselves whether the "force" of the law does not reside in its ability to do justice, and whether this is not in fact what differentiates it from every other social process which aims to bring order to society.

The appeal to Justice takes on various meanings, the first and most radical of which is the criticism, founded upon an ethical conception of the relationships between citizens and the State of law and the use of coercion. An emblematic case of the capacity to critique law from the outside in the name of Justice was the last homily delivered by Bishop Oscar Romero, on 23 March 1980; in his speech, the prelate directly addressed the National Guard, which is to say those public officials who, on the basis of commands legally imparted by their hierarchical superiors, were massacring farmers in El Salvador:

> Brothers, you come from our own people. Why are you killing your own brother peasants? The order to kill must be subordinate to the law of God which says "Thou shalt not kill". No soldier is obliged to obey an order contrary to the law of God. No one has to obey an immoral law. It is high time you recovered your consciences and obeyed your consciences rather than a sinful order. The Church, the defender of the rights of God, of the Law of God, of human dignity, of the person, cannot remain silent before such an abomination. We want the government to face the fact that reforms are valueless if they are to be carried out at the cost of so much blood. In the name of God, therefore, and in the name of this suffering people, whose cries rise to heaven more loudly every day, I implore you, I beg you, I order you in the name of God: stop the repression!

On 24 March 1980, Monsignor Romero was assassinated.

This radical criticism that dramatically echoed Don Milani's warning has deep roots in Christian legal thought. Thomas Aquinas wrote: "Man is bound to obey secular princes in so far as this is required by order of justice". [dicendum quod principibus saecularibus in tantum homo obedire tenetur, in quantum ordo iustitiae requirit]. Wherefore if the prince's authority is not just but usurped, or if he commands what is unjust, his subjects are not bound to obey him, except perhaps accidentally, in order to avoid scandal or danger [Et ideo si non habeant iustum principatum sed usurpatum, vel si iniusta praecipiant, non tenentur eis subditi obedire, nisi

forte per accidens, propter vitandum scandalum vel periculum] (Summa Teol. [43463] II ª-IIae q. 104 a. 6 ad 3).

Let us not forget that the first Encyclical of Pope Emeritus Benedict XVI, entitled *Deus Caritas est*, significantly deals with the theme of the relationship between Justice and Charity. Starting from St. Augustine's famous sentence (a State which is not governed according to justice would be just a bunch of thieves: [Remota itaque iustitia quid sunt regna nisi magna latrocinia?]), Joseph Ratzinger wrote:

> The just ordering of society and the State is a central responsibility of politics […] The State may not impose religion, yet it must guarantee religious freedom and harmony between the followers of different religions. For her part, the Church, as the social expression of Christian faith, has a proper independence and is structured on the basis of her faith as a community which the State must recognize. The two spheres are distinct, yet always interrelated.

In this setting, turning to the Politics/Justice hendiadys, the pontiff affirmed that the Catholic Church's social doctrine argues starting from reason and natural law, which is to say starting from what is true to the nature of every human being; but it is politics that effects justice:

> "Justice is both the aim and the intrinsic criterion of all politics. Politics is more than a mere mechanism for defining the rules of public life: its origin and its goal are found in justice, which by its very nature has to do with ethics. The State must inevitably face the question of how justice can be achieved here and now. But this presupposes an even more radical question: what is justice? The problem is one of practical reason; but if reason is to be exercised properly, it must undergo constant purification, since it can never be completely free of the danger of a certain ethical blindness caused by the dazzling effect of power and special interests" (Deus Charitas est).

The construction of a just social and state order, which consists of *suum cuique tribuere*, is a historically determined duty that every human organization must face. A just society cannot be the work of the Church, but must be realized by politics. However, "the promotion of justice through efforts to bring about openness of mind and will to the demands of the common good is something which concerns the Church deeply".

This criticism, however much it lies outside, and thus at the boundary between ethics and the theory of law, completes it in that a definition of positive law built exclusively based on its constituent semantic elements is mute with respect to the content of the rules and commands; this aspect, which is a virtue for the theories of law that aim to underscore the separation between legal norms and moral ones, is not one for theorists who, like Fuller, have shown the relationship between normative settings that are often called

upon to regulate the same phenomena; even more clearly, sociologists of law have stressed how social norms, community customs, religious laws, and lay moral imperatives are to the same degree nomological and paraconsistent[41] coextensivities[42]; as we have seen, in fact, the simultaneous coexistence of other normative systems influences the degree of resistance to the application of law. To this, I add the obvious consideration, often neglected by the most refined thinkers that to those whom the laws address, their content is never a matter of indifference, and thus the statement that any content can be the object of legal rules (Kelsen) is not a virtue of theory, but a clear limitation, if we are to assign to the legal theory an interest that overcomes that of the restricted philosophical circles; Kelsensian theory, interpreted in a rigidly amoralist form, would lead to holding the order given to the Civil Guard to fire on the *campesinos* to be perfectly "legal" and effective, when the command is imparted by bodies delegated for this purpose in accordance with a system of authorizations dating back to the Constitution of the country that, for example, has given full powers to a dictator. In the perspective of Bentham and Austin, down to Schauer, the problem is not posed, also because sovereignty coincides with the *de facto* power of the State which, clearly, in its factual nature, must be affirmed at bayonet point.

But criticism in the name of Justice, also in terms outside of law, comes from Sociology as well, based on the teaching of Renato Treves who surely did not miss the possible criticality, on this point, of the theory of Kelsen, of whom he was a careful scholar and whom he disseminated in Italy.

Treves first set out the Austrian legal philosopher's reservations on the "natural law" nature held to characterize the leading social/juridical theories, because in them, justice was to be considered an immanent property of the nature of things, or of human nature, that legal science ought to discover and develop in social reality. Treves, actually, turning Kelsen's critique to the positive, believes it is essential to develop a policy of law oriented towards identifying the values and social purposes within which law does not become an instrument of subjugation and violent coercion, but a tool for effecting social justice. However, this task is not entrusted to legal science, but to a different discipline: the sociology of the idea of justice. This critique, too, is presented as lying outside theory and legal science; however, the study and comparison of the values and ideals of justice leads to a critical assessment of the competing policies of law that may be

[41] F. MIRÓ QUESADA CANTUARIAS, APUNTES PARA UNA TEORIA DE LA RAZON (Lima: UNMSM 1963).
[42] C. PENNISI, ISTITUZIONI E CULTURA GIURIDICA (Torino: Giappichelli 1998).

implemented and translated into positive law. The sociology of the idea of justice makes it possible to comprehend how, for law itself, it is not the same thing to structure a certain type of order or another, or to give rise to just any form of social organization; but law specifically has its own purpose, because it aims at the creation of the most just social structure possible in a given historical moment, of course without renouncing a prudent *perspectivism* of values, which leads to affirming that the only viewpoint to be refused is the one of "dogma"—which is to say the one that claims to be the only true one[43].

Lastly, justice, according to a third, interesting perspective, is an integral part of the very definition of law. I believe that the critique by German philosopher Otfried Höffe merits particular attention, as it starts from the consideration of the political community as a second-tier social institution that limits the freedom of action of social actors while imposing itself, when needed, with force; however, the very use of coercion inherent to legal constraints poses a problem of legitimization[44]. Since it is to be recognized, as we have broadly argued in this essay, that coercion belongs not only to state institutions, but is also present in other infra-state and super-state organizations, it must be wondered whether the legal coercion implemented by state bodies is not greater than the others by way of fact—which is to say by effect of the power that sovereignty exercises—but can be called better than the others and thus legitimate. For Höffe, it is legal coercion itself that is called into question, and thus its legitimization through positive law is impossible: we will not be satisfied with ascertaining the legality of the orders imparted through a series of mandates originating from higher legal bodies. For example, in the case of the action by the Salvadoran army opening fire on the *campesinos*, it makes no sense to limit ourselves to observing that the army chief exercised the powers—conferred by martial law—to give the leader of the Army Division the assignment to capture the rebels, or that the firing squad that opened fire was following the orders of its superiors.

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[43] Treves cannot be understood unless we assume the theoretical position of Ortega y Gasset, for whom, as is known: "El error inveterado consistía en suponer que la realidad tenía por sí misma e independientemente del punto de vista que sobre ella se tomara una fisonomía propia. Pensando así, claro está, toda visión de ella desde un punto determinado no coincidiría con ese su aspecto absoluto y, por tanto, sería falsa. Pero es el caso que la realidad, como un paisaje, tiene infinitas perspectivas, todas ellas igualmente verídicas y auténticas. La sola perspectiva falsa es esa que pretende ser la única. Dicho de otra manera, lo falso es la utopía, la verdad no localizada, vista desde 'lugar ninguno'. El utopista—y esto ha sido en esencia el racionalismo—es el que más yerra porque es el hombre que no se conserva fiel a su punto de vista, que deserta de su puesto." J. ORTEGA Y GASSET, EL TEMA DE NUESTRO TIEMPO 152 (Madrid: Calpe 1923).

[44] O. HÖFFE, POLITICAL JUSTICE (Cambridge: Polity Press [1987] 1995).

Höffe's proposal is to assume the perspective of justice to verify the legitimacy as well as the legality of a coercive social order. We may observe a convergence between theoretical criticism and sociological criticism of law, because in both cases the same conclusion is that the guarantee of social order is not enough to legitimate the use of force by the political institution if this order is ensured to the detriment of interests of groups or particular individuals; nor is the social good enough to justify the use of law if it is pursued unilaterally to the entire benefit of certain groups or social classes to the detriment of others, or if it results in the benefit of the majority to the detriment of the oppressed minority. However, the use of force is legitimate to uphold the law that aims "by way of distribution to the advantage of each." Only in this case may it be said with Augustine that justice is respected and the State cannot be confused with a band of thieves.

The fertility of this critical approach, consistent with the studies of the sociology of justice, is confirmed [45] by the recent studies of the legal sociologist and philosopher Jiří Přibáň who, in analyzing the democratic deficit of European institutions, significantly wrote:

> In modern European history, political justice and its constitutive and limiting functions have traditionally been associated with the state and its constitution. The coercive powers of the state and any other political organisation require legitimacy through these functions of political justice. Political authority's coercion is not merely an execution of brute force. Power manifested in state sovereignty draws on legitimacy through the primary sovereignty of those subjected to it; that is, legal subjects of the democratic state with their basic rights and freedoms[46].

However, precisely this conception of legal policy is challenged by new, technocratic supranational structures such as those of the European Union, with regard to which Přibáň himself poses the rhetorical question as to: "whether principles and values of political justice have lost their legitimising force and whether the state and other local, supranational and global political organisations have become merely organisations of social steering and administration," reaching the conclusion that "One cannot imagine European society as a hierarchical unity of principles but only as a network of horizontally differentiated systems governed by their internal rationalities and communication codes. In this sense, the EU's political justice and/or its deficit are intrinsic parts of the political rationality of the

[45] J. Přibáň, *The Evolving Idea of Political Justice in the EU: From Substantive Deficits to the Systemic Contingency of European Society*, 198 in D. KOCHENOV, G. DE BÚRCA & A. WILLIAMS, EUROPE'S JUSTICE DEFICIT? (Oxford: Hart Publishing 2015).
[46] *Ibid*, at 209.

EU's political system. Political justice is part of the Union's political problems and not their solution"[47].

CONCLUSIONS

To conclude, if we suppose that coercion is what characterizes law with respect to other normative systems, we are led to consider that the force of law is therefore a factual and psychological element: the threat of using violence—which the political authorities direct towards the recipients of legal precepts to ensure adherence to them—and the fear this arouses.

In truth, coercion becomes a fundamental factor only when an autocratic political power aims to impose a legal change without concerning itself with the consensus of those whom the rules address; in these cases, law is the servant of a political power of dubious legitimacy. Even in a "Rechtsstaat", however, it is the force of the law that poses the greatest problems of legitimacy. When a law, to the contrary, shows its weakness, that is the absence of coercion, imposing itself by the capacity of persuasion of its authorities, by the influence of its arguments, by the authoritativeness of its makers and interpreters, law then appears more effective and independent of the political system. Coercion is effectively ubiquitous, but its intensity and significance change strongly depending on the point at which it is manifested on the imaginary continuous line that represents the degree of resistance to the rules of law (Figure 1).

In a sense, H. L. A. Hart was right when identified two characteristics of "duty-imposing rules" that prescribe conduct that are (or can be) in contrast to an actor's interest or wishes. First of all the presence of social pressure for conformity to them and correlative control over deviants; and, then, the existence of a general opinion about their necessity to the maintenance of social life (or some important feature of society)[48].

Our socio-legal analysis confirms that the use of force is rendered necessary to control isolated resistance to the rules shared by the majority, or the use of penalties serves to reinforce a law that aims to trigger social change, so radical a limitation of human freedom must be justified; and this legitimacy can only derive from the need for "justice". Justice means "restoring" to the weakest persons what they are entitled to, and what they would be denied without the impartial intervention of legal agents, in accordance with the procedures that each political institution has the primary task of establishing, thus demonstrating what sets it apart from a

[47] *Ibidem*.
[48] H. L. A. HART, THE CONCEPT OF LAW 84—85.

band of criminals. The purpose of justice characterizes not only the State's law, but also the legal norms of the other infra-state and super-state centres that generate law; but it does not characterize the criminal organizations that, in extreme cases, can show all the exterior traits of legal systems, while never pursuing a purpose of Justice.