"TOPICALITY" AND "OUTDATEDNESS" OF THE CODES: THE LAW AND ITS GREAT CHALLENGES

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§1. Possible "outdated" aspects of codification: the aspiration for uniqueness

The complex and epochal work of codification in its long elaboration and historical event, finally concentrated in the *Corpus Iuris Civilis*, offers us the possibility of autonomous reflections on the subject.

More specifically, the idea is to try to compare this legal and civil horizon that came from the past - a *past* that, in reality, has in any case had a different impact[1] on the following centuries, even within modernity itself - with the dominant legal-political manifestations in the contemporary scenario, reasoning, for ideas, around a certain current*/non-current axis of reference*, referred to the very work of codification.

In this regard, our ideas can start from a peculiar assumption, namely that Justinian's codification should be interpreted - in addition to its many, more analytical technical aspects, seen specifically - as a great *exercise in vision*, as a general action more comprehensively understood: that is, the *vision* of an entire, thousand-year history reconstructed on its various levels, from the legal to the political-civil in the broadest sense, which presupposed, in order to be realized, an extraordinary "exercise" capable of integrating and coordinating this endless historical and cultural heritage. Knowing how to bring together the many threads of their own legal and civil history required, for those new coders, the adoption and development of a great capacity for "vision" to be understood as an awareness of complexity, first of all, but also its possibility of translating into

[1] S. SCHIPANI, *Le vie dei codici civili*, op. cit., but also the two important volumes of SOLIDORO MARUOTTI, *La tradizione romanistica nel diritto europeo*, op. cit.,

a *coherent set of parts* coherently united together. But it is precisely on this more general aspect attributed to the great late antique codification that a first food for reflection can also emerge, in its comparison with the contemporary socio-political and legal environment, since it is precisely in the aforementioned claim to compose a coherent set of parts by the ancient codification that one can guess an element, so to speak, "critical". This element, which is somewhat predominant in the design of Giustini's codes, is his central claim to uniqueness, that uniqueness pursued and rediscovered as a fundamental mission that characterizes his enterprise. As Schipani rightly points out, the primary intention of the codes was that of a unification of the legislative and juridical material, of a reduction of the many rights of the people to a single right - certain, definitive, decisive. Such an operation, marked by multiple noble implications and a real, great political and civil vision, in comparison with modern perspectives, however, also seems to suffer from a strong autocratic and imperial ascendancy, which in fact was really at work in the strong intention and control of the entire codification enterprise by Justinian.

From this point of view, the project of Corpus *Iuris* signals its belonging, in addition to a rich legal tradition and a long civil history, also and perhaps above all to the largely absolutist will of the imperial figure, who perhaps precisely in this intention of definitive *synthesis* of legal history, of a *reduction to the single* of the multiple models of legislation and law seems to resonate, it seems to be able to be reflected, in what we could define as an "empathetic" model with its own prerogatives of vertical domination, recognizable in Justinian's vision also on the military, political and religious level. In fact, the emperor pursued the path of "reunification" in the various areas of his domain, in which the "reunion of the ius" worked in parallel with the dreamed reunion of the empire, as well as a rediscovered unifying religious peace. Now this perspective, so peculiar to that historical epoch that was in fact rather distant, and in many respects so specific to that imperial phase that began at least with Theodosius II and matured with the great emperor who codified, really seems very far from the prerogatives of contemporary civilization and in general of the history of recent centuries, in which, at least on the level of intentions, a *liberal-democratic culture of universal suffrage has been imposed,* it is a so-called "rule of law" in which the power of a single person should be banished, any absolutist or even only top-down solution to social and political life.

Therefore, the aspect so central to the codes, constituted by their capacity for *legal unification*, alongside the parallel aspiration to position themselves as definitive, and which probably constituted in the context of their drafting and publication a characteristic lived in a positive way to the perception of the time, cannot resonate as well in today's sensibility, since it is now marked by coexistence with the multiplicity and dynamism of both relationships, both of the judgments and of the legal and moral guidelines themselves.

Evidently, in the imperial world, pursuing a single model could be an acceptable perspective, the search for "*totality*" was a positive value in itself; But in today's context, chasing a "*totality*", looking for a definitive solution, appears to be a risk. In truth, we understand this danger all the more during this more specific era: in which a tendency of supranational government has already been taking shape for some decades, well witnessed today by the European Union, for example, and whose propensity to overlap with national legislations does not always seem appreciable, gradually imposing a certain "uniform law", a "single norm" to be lowered above, it would seem, of the same local parliamentary legislative elaborations. In this sense, therefore, it could even be said that a certain tendency to codify actors in the large international and supranational institutions has returned, but, if the "universal" intention of civil integration is appreciable, a feeling of danger also emerges, that of a *unicizing* drift and in its own way vertical, which descends from these international institutions on entire states, legislations, traditions, specific choices and local customs. The risk that, under the sign of "uniformity" and regulatory uniformity, an excessive devolution to the *global* compromises and too compresses the needs of the *local*, observed in this case on a political and legal level.

As can be seen, this is a very important issue but also rich in potential levels of interpretation, and which has recently been involving various disciplines of study and animating a certain intellectual debate, for example in Europe, but whose origin for various aspects can be identified precisely in the "great vision" of *Corpus Iuris* in its tendency towards universalism, but also connected with a certain absolutist risk, and belonging, at least as a great original model of sensitivity and "total" vision of law - a risk more subtly insinuated, perhaps, today, in the context in full evolution of States in the global era. We will return for a few jokes to this peculiar dilemma, but in the meantime we can recognize that the prevailing aspect in the ancient

codification that Schipani summarizes when he says it is an operation in which "everything is included", as *written*, and as *certain*, appears far from the contemporary vision of law and the State.

In comparison with modernity, this propensity appears to be a *potential problem*, rather than a solution - rather, the contemporary perspective reveals a fundamental direction towards an idea of legislation - and constitution - that is always dynamic, open, evolutionary. The ability *to constantly question* oneself, also on a legal and constitutional level, appears to be a founding and essential fact of modern systems, a kind of cornerstone of contemporary democratic society, especially in its most clarified intentions and ideal manifestations.

§2. The other side of coding

On the other hand, if certain "absolutist" reflexes may seem connected to the "definitive/definitive" universalism of the Codes, however, it is also necessary to note in them an aspect of different tenor, and with a different tone of interpretation, which we can assume and evaluate with renewed interest. In fact, we have seen how in the Justinian codes something very different from a pure absolutist devolution also acts more subtly: that is, a conception of codification as a synergy between the social partners, between the emperor, the jurists but also, at the base, the people themselves, as Schipani also pointed out, especially when considering the *Institutiones* and their spirit, so central to the definitive system of *Constantinopolitan codification*. There seems to be something ancestral and profound in this propensity, which defines the work of the codes in the sense of a kind of "*social contract*", of a renewed pact of the social life of the ancient world. We can then see here a different value in action connected to the act of codification, generated in its own *vision* - the one already referred to as a perspective of privileged reading, at the beginning of these *Conclusions* - following which the recovery of jurisprudential knowledge and a new foundation of the law of the entire company seem to have taken place through a double movement, on the one hand of reality, extensive *civil involvement* in the elaboration, at different collective and sapiential levels, of the technical and interpretative drafting of the Codes, on the other hand through an even more extensive and deeply conceived recovery of Roman culture, in some ways of its own long and complex history.

In fact, there is a non-secondary atmosphere of civic "belonging" in the codes, which seems above all to bring it back to a certain "democratic" spirit, or perhaps better to a certain community involvement, to a sharing in the sense of citizenship, and in a profound belonging to the identity of the *civitas*. From this point of view, then, the *exercise of vision* carried out by the ancient Codes could offer something significant and important even today, since in it, alongside the pre-eminent ownership of imperial protection, there is actually also affirmed, more or less in parallel, a great capacity for *authentic* involvement of the entire social body, as well as to draw on its own history that has come from the centuries; we could say, affirming in this way a virtuous attitude of affirmation horizontally of the legislative and civil project, and not only vertically of its decisions. The Codes wanted to recover the entire active spirit in the law of Rome, if not even the archetypal element of equality and collective valorization in some respects, far out, if not against, any intention of arbitrary supremacy of class, race, people, economic census. This, then, appears today more than ever to be a value to be recovered not only present in the Codices, but in fact characterizing their spirit in its heart, in which in reality it wanted to find an effective and precise arrangement of the entire legacy of the juridical and civil culture of Roman history, therefore also its venerable already republican tradition: this is attested by the evaluated jurists themselves, recovered and elected by the arrangement of the new Codes. We can therefore affirm that such a spirit and capacity for vision, so convinced of the need for self-knowledge and, where possible, also for the recovery of one's entire history, instead appears in the present time as a great positive value, because such an attitude can offer itself in antithetical terms to some negative qualities of contemporary society, which often seems to function under the sign instead of *forgetting*, so the loss of memory and one's own history often asserts itself today as a widespread way of being.

Especially, when the most uncontrolled and unregulated tendencies of the financial market are asserted in it, which sometimes seem to be unrestrained or limited for their interests and traffic, and therefore often "pressing" against the modern constitutions themselves and their constraints of social and protective inspiration; as it happens, evidently, when in the current time we observe the evolutions of the so-called "neoliberalism". The example of tradition, the authentic dedication to the values of its entire history assumed in its many cultural differences and declinations, really seem to be essential and certainly quite topical values

that an undertaking conceived in the name of the Codifications can still offer us. It could be said, therefore, that in this aspect the other side of the legislative universalism chosen by the Codes is revealed in all this, marked by a sincere open adoption of shared values, and with a strong idea of equality and protection at its center.

Codification, therefore, as an imperial work, in an authentic bond between the government and the people, which, in this way, posits itself, albeit in its own way, as a value that can be pursued today more than ever; and all the more so, when we see how such an "authentic link" between the governmental spheres and society - today, often, "consumerist" - appears to have been largely fractured at the present time. This peculiar aspect that can be found in the codifications - seen, as mentioned, in their most intimate revelation as an "exercise in vision" - we can therefore fully appreciate and also acquire, because in it the powerful nucleus of a real civil belonging resonates with evidence, where late ancient society still recognized itself, and which found in law a zone, probably, of greater "social communication" between groups, powers, classes.

But this devolution to an integrative universalism and transversal to classes and peoples seems to be revealed in the Codes also in a further and far from trivial aspect, namely what emerges in the last chapter of the fundamental study, already considered several times, by Aldo Schiavone, in which a fascinating - but also pervasive - intuition emerges, namely that in Roman juridical history starting from the late Republican era, then matured and taken up again by the great jurists of the Severian era, a dynamic of acceptance in the *Roman Ius* of the sensitivity linked to *natural law* has in fact been established, through an evolution that, however, never managed to mature in that ancient world of Rome. As Schiavone explains, the strong rooting of Roman legal custom prevailed in a practice aimed at the private, where a certain "social ethics" could not really develop to the end, in the prevalence, as Schiavone himself says, "of property" instead of "of contract". It is important, however, from this perspective to collect the fundamental *tension* at stake, and capable as such of offering an additional value, still useful in the situation of today's world: in fact, inherited from Ciceronian thought up to the jurists of the imperial era such as Gaius, Ulpian or Papinian, the tension between *natural reason* - Gaius - and positive law was consummated in ancient centuries, between *natural equity* – Ulpiano – and the fatality of history, between the search for a *just order* and the concrete case of the reality of human inequalities. Faced with

the great question of slavery, for example, the recognition of a potentially higher law of nature emerged on several occasions, all the more necessary and evident as the situation of relations between peoples became more complex, as the imperial state expanded, as well as more complex responses were demanded in the face of the political-economic crisis of the time and, properly, to the *disproportionality* that this new civil entity now seemed to manifest during such a historical phase. The thinkers of law were therefore able to accept, above all else - of any contingency and specific reason, or historically inherited - a *tension* directed towards a *higher ethics*, consequently cultivating the idea of a *natural equity* through which, therefore, to obtain or try to achieve a *just order*, conceived not in disproportion, but according *to measure*.

Here, this pending tension between *abstraction* and *possibility*, between the theoretical isolation of law and the ethical necessity of its practical realization, seems in turn to be something exemplary, even for the contemporary era. In which, in fact, more and more juridical cultivation finds outside its domains, indeed, a reign of *disproportionality* in reality and social relations, in political practices and in scientific and knowledge evolutions, and where values such as equity, just order, collective interest or the recognition of strong inequalities often seem to be mercilessly overtaken by this dizzying reality, continuous transformation. It is the *tension itself*, probably, that offers itself from that ancient juridical context as a very significant experience for us, a tension, which seems to have been combined at that time also with a desire, with a peculiar desire - that of rearranging the imbalance and disorder of the world, and which, however, now as then, under renewed and much more complex challenges, He returns again in front of the law. A great, unprecedented challenge, where the call to natural law finds itself having to rethink if not face, even today, many ideological and conceptual tears that would like, by definition, to go even *beyond nature itself*, and as such. The lesson to be deduced by following Schiavone's reflection is, consequently, precisely the one not followed, to the end, by ancient jurisprudence, namely the need to get out of one's theoretical isolation on the part of men of law, and inevitably try to take sides by courageously entering into the civil discussion, and to affect it.

§3. Autonomy *versus* heteronomy: the art of jurisprudence as a model of critical independence

Dwelling once again on codification in its address dedicated to one's own history and memory, jurisprudential and political, we can actually understand a further level of value, which can be assumed to our consciousness as moderns. It is a reflection maintained for almost the entire course of this research, linked to the pedagogical dimension of law and its codifications: well, it will be necessary to recognize within them a real, authentic properly *pedagogical action*, unfolded over the entire civil life of one's time, and projected as a model of knowledge for the centuries to come and the following generations. But with regard to this, it should above all be understood that, through the virtuous attendance of the codification intention, late antique society seems to have established itself as a privileged path, so to speak, of *systematic self-formative application*, because it was forced, through a targeted and in-depth study of law, to cultivate itself in the *ars* jurisprudence and knowledge of the laws. This devolution to law, recovered after a period of serious abandonment, thus determined a peculiar cognitive attitude, precisely capable through the *ius* of placing itself in a valuable *self-formative* and *systematic condition*, that is, knowing how to cultivate and improve oneself through such a mission of knowledge, both theoretical and practical.

The special socio-cultural value should therefore be noted, also because this systematic adoption of the *ius* was not limited to a simple passive acquisition of notions coming from tradition, but was achieved through the difficult work of selecting materials, and even more so through their *remeditated election* and new recruitment, as a privileged civil and legal path in its own functional arrangement of social life. The *functionality* itself, as such, attests to this effort, which was therefore not only aimed at an appreciable cult of the past and tradition, but even if not above all at a work of reflection and *re-meditation* that was anything but secondary, in its important intellectual exercise as well as in its civic commitment.

As such an example of *civil self-formation*, capable of study but also of re-elaboration at the same time, the topical moment of ancient codifications is therefore revealed in this peculiar aspect as significant as it is current, because it places an exercise of *living knowledge* at the center of

the social pact and civil cultivation, imbuing it with high wisdom the common collective education.

But at this point a further significant aspect emerges on this line of reflection, namely the non-trivial position of importance assumed by jurisprudential knowledge in its assumption, so central, promoted by the codification enterprise. In this reliance on the knowledge of jurists, in fact, a special consideration and validation of an art of interpretation and thought is affirmed in parallel, where the late ancient world was able to recognize the ability to process judgment and the techniques of response as a level of decisive value for a just civil life. Here, this recognition of an art such as jurisprudence seems to restore a high vision in the social relationship between politics, economy and "cultural capital", a vision where the deep and meditated knowledge - typical of men of law - is assumed, recognized in a preeminent position of prestige, and taken as a model of its new civic orientation. The importance of such an assumption of value must be emphasized, because it gives us back a political action capable of placing at its center not the pure pursuit of domination and economic or military supremacy, but an *art*, a disposition of the spirit, a patrimony of knowledge: how much more urgent then today, when we see the strong risk of a pure orientation of public affairs in an economic and business sense, if not purely lobbyistic, parallel to a progressive devaluation of humanistic knowledge, culture, and the critical elaboration of thought itself. But it is precisely the peculiar gift of critical *exercise* of thought that characterizes the profile of jurists and their specific model of knowledge: therefore, this central assumption of value of theirs in the ancient enterprise of the Codes should, in turn, be adequately recognized and recovered also for the present time, in which it seems necessary in fact to regain a fair role of value in the exercise of applied interpretation, to a distinction based both on the profound competence of knowledge and on the acute capacity of judgment - a mode of distinction worthy of the most attentive minds, "*prudentes*" in the oldest and broadest sense of the word.

In such an exercise of judgment and of the "capital of knowledge" represented by the art of jurisprudence, another decisive value is affirmed, namely its indispensable formation and affirmation within the exclusive perimeter of an *autonomy* of interpretation itself and of the *corresponding* individuality in-game call. In this way, authentically recovering the art of jurisprudence means in itself also recovering a decisive space reserved for the autonomy of interpretation as such, and therefore a crucial space for

the exercise of freedom of judgment, expression and thought itself. The importance of such a condition is great, in a society in which preserving spaces of authentic autonomy is a decisive prerequisite for its functioning, if the factor of freedom is still to make sense.

On closer inspection, this disregards the premise we would call a state constitutional, perhaps at the level of the forms considered democratic: but in reality, we understand that it is precisely a legal autonomy that can authentically guarantee one a "continuity of contact" with a certain exercise of freedom itself, which does not appear to be taken for granted even in the so-called "democracies".

Whether and to what extent in modern democracies there is a space for a real autonomy of the juridical is certainly a great question, outside the scope of these freer final meditations, but certainly it is the example that came from ancient codifications, in which, not only, as we said, the figure of the jurist assumed a significant centralitywith his entire historical transmission of knowledge, but also and above all he reserved a high value of consideration for his special attitude towards *choice* and judgment, that is, towards his position as *critical knowledge*, every time, capable of interpreting situations - something, then, which in itself, in its own constitution, guaranteed a possibility of choice *every time* it could be interpreted, *interpreting again*, and therefore a possible space of action left open for the implementation of freedom. All this thus attests to an important value, which not only from the codifications but from a large part of the ancient age and from the tradition of Romanity comes down to us preciously, called to preserve in the most credible way this autonomy of the juridical understood, however, especially, in the free autonomy and possibility of interpretation: a dimension that is by no means taken for granted, as we have already said, because the power of interest lobbies can "inhibit" today more than ever the autonomy of the jurist, alongside the state apparatuses often assumed as a space for clientele, and the often unidirectional "narrative" pressures of the parallel apparatuses of communication and mass media, which are also able to condition, if not acquire a certain discourse, and position, evidently, of the legal world within itself.

The *pedagogy of the Codes*, then, reveals itself precisely in its strong devolution to the art of jurisprudence, as a true "social program" of extensive public and private teaching of legal knowledge but also of significant *enhancement of interpretative autonomy*, albeit reserved for a social island, that of the jurists and their space of thought and practice.

In this way, such a *pedagogy*, then as now, can preserve a precious area, marked by a certain *critical autonomy* in society called upon to face any, albeit possible, derivative in the sense of the *heteronomy of domination* coming from any position - political, military, health, communicative, financial... That he should impose it.

§4. **The *responsibility* of interpretation and the *"automated"* ius**

This observation can therefore very well accompany us to consider the scenario that is currently emerging, in which the easy way of a certain "automation" of choices, judgments, calculations in many social spheres seems to impose itself more and more, under the suggestive push of the computing powers of processing: a process of technological modernity to be kept under control in its evolutions, and of which, above all, the easy drift, so to speak, of more or less passive reliance on the "machine", that is, on the calculation and then on the choice made directly by the new "*digital computer machine*", must be questioned. The decision-making power of artificial intelligence appears as a kind of "toy country" where judgment, understanding, and then *de-deciding* by humans can be "spared", leaving this always tiring path to computer automation. A "technological spectacle" at the end of which, most likely, a real *collective de-responsibility of human society could turn out to be the result* , leaving - almost without realizing it - from any ethical constraint according to a *principle of responsibility*, which can be called into question on serious indications, for example, of an important contemporary thinker such as Hans Jonas. At such a delicate point, then, it is precisely the most subtle lesson coming from the Codes, and from their implicit and explicit cultivation of jurisprudential criticism, that can come a fundamental indication: that of a unique peculiarity of *the capacity for human interpretation*, as well as of its inescapable condition of *autonomy* in judgment and in the elaboration of its criticism; and with it, again, the force of *individual responsibility is* also unavoidable, and coincides with the very exercise of the "response", of the applied interpretation.

Dimensions such as those of *flexibility* and *adaptability*, connected by definition to human judgment, to its ability to elaborate considering the many contextual and environmental factors, prove to be decisive factors,

therefore, in this complex phase in which the shadow of a certain "technological ius" seems to be looming, if not of an unprecedented 'ius informatico'. In this regard, a recent intervention[2] by Danilo Ceccarelli Morolli, committed to reasoning precisely around the great question *I. A. - Human intelligence*, can offer a significant contribution. The Italian scholar, in this enlightening test of reflection, goes back to the famous statement of Celsus, which went down in history as the essence synthesis of the legal task, precisely outlined by the ancient jurist as "*ars boni et aequi*", an expression whose *semantic significance* - as Ceccarelli Morolli defines it - can directly refer to the "ontological essence" of law: *But if law is an art of good and fair, how does it relate, as such, to the advent of new technologies*? What is at stake, for the scholar, is *the very centrality of human judgment*, what we have summarized just above in the autonomy-heteronomy dialectic of jurisprudential interpretation, which is being questioned today: according to Ceccarelli Morolli, *it is a matter of understanding more deeply first of all the very concept of "equity"* therefore going back to the definition given by Aristotle, who maintained that the call into question of *equity* was to be fully related to justice and taken into account the *concrete case*, since it was necessary in the application action precisely to mitigate the rigidity *in the abstract* of norms and laws. Human intervention, therefore, is already in itself involved in the exercise of the first principle of the legal art, fairness *so* inextricably linked to the concreteness of cases and to the contextuality, even the most complex, of individual situations. On the other hand, for Ceccarelli Morolli the other basic principle of law, the *bonum*, constitutes the very end to which legal activity as such should tend, as a "*north star that orients the interpreter and the operator of the law*" in their action and thus "render justice".

In fact, today there is an unprecedented phenomenon also in terms of legal elaboration, which outlines on the horizon a sort of new disciplinary field in which the logics of computing power should meet with the forms of law, and defined by the neologism "Cybernetics". The forms of this new disciplinary field of Cybernetics are manifested in the various logical-computer applications currently under development, of which we recognize

[2] D. CECCARELLI MOROLLII, *Il concetto di 'limite' nel diritto (romano). Brief* reflections, published in "Rome and America. Diritto romano comune online", N.1-2023, pp. 81-82. It can be consulted at https://www.romaeamerica.it/2023/07/11/danilo-ceccarelli-morolli-il-concetto-di-limite-nel-diritto-romano-brevi-riflessioni/

above all the most specific declinations: *predictive analysis systems***,** i.e. the use of algorithms capable of offering statistics relating to the legal data of lawsuits and disputes and thus offering possible preventive tools; legal *tech* tools, i.e. web platforms that can offer automated legal services, such as contracts, legal advice or bureaucratic paperwork; predictive justice systems, i.e. real "solutions entrusted to the computer" which can suggest judgments to judges after a rapid computer analysis-comparison, carried out by *machine learning algorithms* on data and jurisprudential precedents.

As can be seen, a scenario in great evolution, within which, however, the risk that we have noted above is already evident, that of a devolution not to *human interpretation* but to *the automation of computer systems* and artificial intelligence; moreover, the case of the Compas system has already become controversial, which has brought out an orientation in its evaluations that is anything but satisfactory or in itself "neutral"; also because It will have to be reiterated in reality that, in spite of everything, the heritage of the *databases* processed by computer intelligence come in any case from original content produced by human beings, and therefore distinguished as such by the inevitable partiality of human actions themselves.

But above all, as Ceccarelli Morolli reasons, it is evidently inappropriate to attribute to computer equipment the weight of what must be recognized as a real *ars*, that is, the right itself: that specific *capacity for interpretation* that we have seen characterize the jurisprudential identity in its essence, and aimed at understanding the rules through a flexible and contextualized application of them. As the scholar says, law is an art of "***weighing ethical principles and balancing the interests at stake***", and its representatives must therefore "feel" it intuitively, rationally and emotionally when they are called upon to apply it, citing the contribution of François Gény[3].

Therefore, the possibility, although useful in terms of consulting databases and storing cases with the support of computer science, excludes at the same time an exclusive or in itself central use of artificial intelligence in legal work, because its realization within the exquisitely human judgment and interpretation can only remain decisive within it.

Above all, within an *exclusive and decisive human responsibility*, recalling in this precisely the thought of Jonas, when the German

[3] F. GÉNY, *Metodo di interpretazione e fonti del diritto privato positivo*, edited by G. Tarello, UTET, Turin 1955

philosopher reiterated the fact that "*man is the only being who has the responsibility of being*".

The aid of algorithmic "intelligences", therefore, must be placed in the order of what it really constitutes, that is, an *instrument*, an *instrumentum* simply at the disposal of human decision-making, as is already the case with so many instruments, "prostheses" that the history of humanity has put to its use. So that the dilemma will have to be overcome, so to speak, by returning to the very basis of the two conceptions, the *instrumental* and the *critical-interpretative*, and consequently by noting the inevitability of the latter in the substantial management of the former.

This seems to be the only logically viable way: the risk, otherwise, is that of a "*dehumanization*" of justice, with automated decisions that would not adequately take into account the specificities of each concrete case, the social and cultural context in which it is inserted, the emotions and values that come into play each time.

If law is "art", in fact, that is, an expression of human *creativity* and judgment, it is legitimate to ask whether algorithms can ever replace man in his elaboration and application, being certainly neither a real art nor a real interpretation capable of originality.

Ultimately, artificial intelligence can be a valid ally of the jurist, but it can never completely replace him. Law, as the "*art of good and fair*", requires a *humane and contextualized approach*, which knows how to balance the need for certainty and predictability with the flexibility and adaptability necessary, as mentioned, to guarantee justice in a constantly changing world. It may be useful, in this regard, to report directly the somewhat pertinent considerations on all this by Jonas himself, taken from a stimulating volume entitled *On the Edge of the Abyss*[4], and structured on the model of the interview. When the discussion comes to the topic of "computer machines", the thinker offers this enlightening starting point, according to which modern information technology constitutes "a mechanical activity performed first by a living being and then by a machine", whereas the possibility of attributing something similar to human critical awareness to it is completely misleading, because "whoever seriously considers this hypothesis compares first of all calculation to thought and then thought to consciousness". In fact, you need to understand this aspect well:

[4] H. JONAS, *On the Edge of the Abyss. Conversations on the relationship between man and nature,* Einaudi, Turin 2000

"That the automaton can become, through the execution of tasks, itself alive, acquiring a psyche with its own will is nothing but unbridled speculation", (...) "Just as sensitivity cannot be ascribed to a thermostat because it is sensitive to external stimuli, neither do we have reason to ascribe thought to a mechanical process because, predisposed by us to do so, it operates in a corresponding way to thought."[5]

Jonas, therefore, distinguishes calculation from *thought*, as well as thought itself to consciousness: the work of the computer thus reveals itself for what it is, that is, an operation of calculation capable of carrying out with great diligence the necessary mechanical steps of a process - but, in reality, this same operation is destined to be always assumed by an act of consciousness, from a consciousness that, alone, gives its meaning.

Before the process of calculation there is, therefore, always a *human instance* as *an education*, just as at the end of the same process there is an act of consciousness, an awakening, always equally human. Education first, and then consciousness, therefore open and close any process of meaning, thus forcing human consciousness itself to take responsibility. Consequently in this precise essential functioning there is the call into question and the specific function as such of jurisprudential knowledge, and any application of law endowed with meaning - under the double moral star of *aequum* and bonum - can only observe its rigorous logic.

§5. Knowledge of Measure and Limit: Towards a Proceduralist Commitment to Law

Thus resuming the thread of discourse carried out by these conclusions, it can be seen how the essence of jurisprudential identity, observed and reconstructed in this work in its Western birth in the heart of Roman civilization, can really - if included, precisely, in its most authentic essence - represent a fundamental device of equity and wisdom aimed at constituting a bulwark against any drift of *imbalance*, *disproportion* and in-discrimination, in its position, on the contrary, as the wisdom of *measure* and limit, those to be placed in opposition to the action of the uncontrollable processes of technological society, in all its possible contemporary variables.

[5] Ibid., pp. 45-48

Measure and *limit*, as such, represent the true profound dimensions to which to refer, today, those most pertinent to the role and function of legal thought and action.

However, it seems right to conclude by broadening, even outside the "giuscibernetic" problem, the horizon of the challenges that seem to arise in the complex framework of contemporary society, in the face of law. Disproportionality and *imbalance* can also be those that tend to be imposed, for example, by the security company, and by the info-electronic constraint to which the entire society of economic exchange could address, in the replacement of money with fully digital cards and payments. These are scenarios that are far from alien to the present moment, and in which many problems, inherent to the freedom of individuals, or their *privacy*, seem to emerge more and more effectively. The possibility of a[6] potentially oppressive control of technological apparatuses over the entire existence of people appears today truly tangible and evident, as does the insidious possibility of monitoring, profiling, action and data acquisition brought about by the use of *social media*[7] today. The spaces of communication, currently, seem to be a really uncontrolled territory, and the discussion remains open and quite intense in this regard; but already a certain path of answers seems to have been marked, for example by the fundamental contributions on the subject offered by Stefano Rodotà, about the historical regulation of *privacy*[8], and in general on the new relationship between the contemporary world and the context of rules[9]. It will be, from this conceptual magma always in motion, only perhaps here to detect a value, fixed precisely by the thought and regulation proposed by Rodotà, namely the task for the right to *protect the fragile parts of contemporary society*, which in reality are made up of the common population itself.

In fact, what seems to be most looming is precisely the imbalance between the omnipotence of information production and control systems in the *techno-digital* age and the infinite array of their common users, who do not really have access to their basic and substantial control. The issue of *privacy*, in fact, has been prepared entirely on the basis of this premise,

[6] D. LYON, *The culture of surveillance. How the Control Society Made Us All Controllers*, Luiss University Press, Rome 2020

[7] S. ZUBOFF, *The Capitalism of Surveillance*, Luiss University Press, Rome 2019

[8] S. RODOTA', *Tecnologie e diritti*, Il Mulino, Bologna 1995

[9] S. RODOTA', *La vita e le regole. Tra diritto e non diritto*, Feltrinelli, Milan 2009

namely the protection of the "digital citizen" from the immense power of Big Tech and its coils of insinuation and control even within the depths of the daily life of contemporary citizens.

The role of the contemporary jurist – and with it his legal training – therefore remains entirely valuable and, almost, we could then overturn the interpretation encountered in the previous chapters proposed by Schiavone, regarding the function, so to speak, of "exclusive custodians" by jurists in archaic republican Rome: a distinct and oligarchic caste, capable of "keeping under control" but in a precise sense of domination the parallel legislative production with a strong democratic trend line. The jurists, that is, "held in their hands" in a conservative sense the political-legislative dynamics of the laws. Today, in some respects, the risk seems to have become the opposite: the political and industrial spheres often transgress the constraints imposed by the jurisprudential measure. We can witness a double phenomenon: on the one hand, a certain "masking" of politics within a "legal skin", as has been seen in recent decades with international military invasion operations justified, in some way, by an alleged indication of equally alleged "international courts". Whose statute of neutrality and objectivity, from the beginning and for some time now, has been heavily questioned. On the other hand, we are witnessing an almost out-of-control "regulatory hyper-production", produced by liberal-democratic politics and a certain bureaucratic and administrative drift. A tangible phenomenon in the daily needs of citizens, for example in a country like Italy.

Once again, therefore, the reference to the *sense of measure* that should guarantee legal wisdom, its very mode and raison d'être, could act as a moment of moderation by "calming" this often uncontrolled tendency. A paradoxical function, but perhaps not meaningless here to be called into question, of a right called to "moderate laws", or perhaps better an uncontrolled normative production; but in this way, in reality, perhaps decisively redetermining a policy of separation of powers and sensible applications relating to the different prerogatives by the social spheres in action.

On this path we then meet another great contemporary thinker, Jürgen Habermas, who in his *Facts and Norms*[10], for example, seems to deal with such an interweaving in a rather in-depth way: the German philosopher in fact recalls the problem of overcoming a pure "pragmatic

[10] J. HABERMAS, *Facts and norms. Contributions to a Discursive Theory of Law and Democracy,* Laterza, Rome-Bari 2013

model" of the production and application of regulations, caught in the present time very often dominating the political scene, civil and legislative of contemporary society. The so-called *criteria of efficiency*, as such, seem to have carried out a process that has seen them invade, starting from the purely *administrative sphere*, also the entire scaffolding and conception of the political sphere and its logic of management, but detaching themselves from what Habermas calls "conditions of legitimacy". However, this conception of purely functionalist politics and especially of law must be overcome, and propose in its place the frequentation of a new paradigm, the so-called *proceduralist paradigm*, in which the function of "opening the world" connected to the legal sphere is maintained and relaunched, as a continuous and further work of interpretation. The *proceduralist* paradigm is somehow connected to a *discursive theory of law*, through which the democratic rule of law opens up to communicative procedures and presuppositions capable of making possible a *discursive formation* of opinion and will[11].

In this type of horizon, a purely abstract conception of the law should therefore be overcome, convening an always open and always lively encounter between the legal public sphere and the arena of public debate at the center of social participation. A "pure fulfilment" of legislation that claims to be in a neutral position therefore no longer seems acceptable, whereas in the decision-making processes of governments, administrations, bureaucracies the criteria of efficiency will certainly have to be added more and more "legitimacy filters", which therefore knows how to combine pragmatic decisionism with a weighting of collective goods, in this following the inspiration and model of procedural law itself. In many respects, as can be seen, Habermas' complex philosophical reflection is probably one of the most stimulating horizons in which the political problem meets the juridical one, and through which we can glimpse sustainable and even possible answers to the real complexity of the socio-economic, cultural and more broadly anthropological horizon of our time, among those currently found in the context of philosophical and juridical discussion. This dissertation, far from exhausting the complex theme of the role of law in contemporary society, is proposed as a contribution to the reflection on this problem, starting from a genealogical perspective that has its roots in the *Corpus Iuris Civilis*. Through the diachronic analysis of the evolution of the

[11] Ibid., p.419

concept of codification, it was intended to highlight the tensions and continuities between the ancient ideal of a universal and immutable law and the needs of a world in continuous transformation, characterized by globalization, the digital revolution and the emergence of new forms of power. If the ambition of an all-encompassing and static law, an expression of an absolutist vision of power, appears today to be an illusion, the Roman juridical legacy nevertheless retains a paradigmatic value. The centrality of interpretation, the search for a balance between the universal and the particular, the formation of a jurist capable of autonomy of judgment and ethical responsibility, are essential elements for a law that aspires to be an instrument of justice and human promotion. The advent of new technologies and artificial intelligence, in particular, raises crucial questions, which challenge contemporary legal reflection. How do you combine the need for certainty and predictability with the flexibility and adaptability needed to meet the challenges of an ever-changing world? How can we preserve the centrality of human judgment and contextualized interpretation in the era of automation, avoiding the risks of a "dehumanization" of justice? How can we guarantee the protection of fundamental rights, such as privacy, in the face of the new forms of power that are asserting themselves in the infosphere? This investigation, therefore, despite its limitations, has tried to offer a contribution to these questions, drawing on contemporary philosophical thought and the reflections of jurists who have dedicated their work to the defense of rights in the digital age. While on the one hand it emphasizes the inescapable responsibility of man in the face of the consequences of technology, on the other hand it is hoped that a purely pragmatic model of law will be overcome, in favor of a proceduralist paradigm that promotes participation, public debate and the protection of citizens from new forms of power. Ultimately, law today is configured as an art of "weighing" and "balancing", an art that requires not only technical competence, but also ethical sensitivity and profound humanity. Only a law capable of combining tradition and innovation, certainty and flexibility, can be a valid tool for building a just and equitable society, up to the challenges of our time.