METHOD IN CONSTITUTIONAL THEORY
BETWEEN NATURE AND ARTEFACT

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Abstract

The aim of the work is to provide an analysis of the problem of method in constitutionalist theory, in order to demonstrate advantages for a systemic reconstruction and the risks of a view that makes any coordinated reading pathological.

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1. The problem of Method

It was said that one should not talk about Method in public law because it is practice and operation, art before science, technique before dogma[1]. That may be. But the fact that Method is experience does not exclude that it is as thinkable, intelligible, and sayable as the latter. Nor can one get rid of the problem of Method by not mentioning it. Only who moves from the idea of a 'nature of things', of law as a natural given, rationale of and in things - nature of facts, hence, empirical as an entity - can argue that «sciences that deal with their methodologies are sick sciences»[2]. This conclusion is unacceptable, however, if law is not natural or, at least, not

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[1] V. E. ORLANDO, *I criteri tecnici per la ricostruzione giuridica del diritto pubblico. Contributo alla storia del diritto pubblico italiano nell'ultimo quarantennio (1885-1925)* (1925), 20.

[2] G. RADBRUCH, *Introduzione alla scienza del diritto* (1961), 360.

natural in its determinism and necessity. And that is not the law posited by a Written Constitution, which is the legislative deliberation, intentional and conscious, of a constituent power, representative of the people. Which is constructivism, artefact and beginning of what was not there before: rule of law and not instance of law. But if one does not presuppose the existence of a perfect order in nature - an order of the Is, according to the categories of scholasticism, making things and intellect adequate, where things hold measure and ordering in themselves - every attempt at knowing the Is, putting order in the disorder, should hypothesise the distinction - which does not necessarily mean separation - between fact and value, between the Is of a phenomenon and the Ought of a rule. The possibility of an order should be the methodological premise of the rational solution of a problem. On the opposite side, Method is useless for those who, *à la* Feyerabend, are not afraid of absolute chaos. But the jurist cannot afford anarchy: law is, at least, something different from anarchy and chaos, because it moves in a linear direction, aiming towards an order, an ordering, and its science cannot be disordered, unless annihilating its subject, which is a compulsion, transcendent or immanent, towards order.

Excluding that it would be pointless, to talk about Method in law, to do method-o-logy is, however, difficult, because it implies self-reflection, a reflection on one's own action. It helps self-reflecting that the discourse on Method in law is timeless because Method, in the Cartesian sense, does not teach what truth is, but, etymologically, what the 'way', *hodòs*, is, to be followed to reach the goal, the orientation instrument to be used in the search for, and in the knowledge of, the reality of law. And the method of human knowing is universal as it discovers how «all things that can be the subject of human knowledge follow each other in the same way»[3] .

In turn, the idea of a universal *mathesis* in the things for which a certain order or measure is predictable - universal in the sense of a common epistemological methodology to the various branches of knowledge, proceeding by schemes and categories in the search for truth - opens up the idea that the discourse on the Method of law is peculiar compared with method in sciences, but is not a closed, original and self-sufficient discourse: the rules of law are made, constructed, by humans for humans and are knowable and

[3] DESCARTES, *Discorso sul metodo* (2022), 123.

recognisable by them. Law is not a technique or not only a social technique. Law springs from humans, and has its 'source' in human reality, which is both individual and social. Every idea of law, therefore, presupposes a vision of humankind, made of biological and social stratifications, of which we must say something that (does not coincide but) is compatible with what we know. This does not mean that the jurist - and the constitutionalist in particular - is an anthropologist, because there is no symmetry between anthropology and law. It is true that humans are the subject and object of positive law: thus, that the irenicism of the law of trust is founded on the vision of the good, prudent man, holding an innate sense of truth and justice, and who doesn't need the whole of it; or, on the contrary, that the person who is honest in himself is the anarchic man, who doesn't need the law, because he can live honestly without or outside it; or, again, that the heteronomy and coercion of the law are founded on the pessimistic anthropology of the evil man, who is deprived of an intrinsic morality or possesses a negative morality. As Schmitt wrote, «there is [...] no anthropology that is not politically relevant»[4] . But this is too little, too general and too descriptive for a jurist of positive law, such as a constitutionalist, who, because of that, must investigate what person the Constitution establishes and regulates and derive normative consequences from it. Nor does this mean to prescribe, in the name of a common belonging to the world of humans, the integration, accumulation, hybridisation or, even less so, the interdisciplinarity[5] and comparison of 'disciplines', law and the other social sciences, such as - to limit ourselves to the closest ones to constitutional law - political science, history, sociology, anthropology, praxis and so on; or even the hard sciences, in search of a synthetic and non-analytical knowledge. One may also speak of a dialogue between constitutional law and other sciences, but dia-logue presupposes a pre-existing separation.

With the aim to avoid meaningless generalities and, at the same time, messy details, fragmentation into ever smaller pieces with the loss of any direction in research, rather means to identify the matrix, the structure, that conditions law as a constructed

[4] C. SCHMITT, *Il concetto di 'politico'. Testo del 1932 con una premessa e tre corollari*, in ID., *Le categorie del 'politico'. Saggi di teoria politica*, edited by G. MIGLIO-P. SCHIERA (1972), 144.

[5] On which the objections raised by N. BOBBIO, *Diritto e scienze sociali,* in ID., *Dalla struttura alla funzione. Nuovi studi di teoria generale del diritto* (2007), 44 ff.

reality, as an artefact where constructivism is allied to materialism. It means to identify the invariants, the intrinsic structural laws, of humans and the social facts pertaining to them, such as law and in particular public law, and the forms of their knowledge, which - for their common subject, the human world - should present affinities, analogies.

Law is a human reality, but humans are of body and spirit. There dwell the two elements, domains, primary qualities of reality, from which everything moves, the threads for a knowing subject not to get lost in the labyrinths of knowledge: *res extensa* and *res cogitans*, which can be rewritten in the great division between phenomenon and noumenon, sensible experience and intellect, known thing and knowing subject, objectivism and subjectivism, senses and reason, nature and culture, materialism and idealism, realism and normativism, facts and values, and, ultimately, in the dualism of 'Is' and 'Ought'. In the beginning, that was the Christian opposition, first Pauline and then Augustinian, between the law of the flesh, of the body, and the law of the mind, of the spirit.

At the bottom of it all, in search of elementary concepts, insusceptible of further analysis, this is the binary matrix to access the knowledge of law, which is produced by humans for humans. But if person is made of body and spirit, his unity postulates some form of relationship, be it the pineal gland or a more articulated capacity of the neurobiological structure to condition emotions, feelings, thoughts, and language or, in the opposite direction, the priority of the spirit, understood as substance in its own right, over the body. And, if law is a human construction, its outcome is the overcoming of dualism between reality and thought, *res extensa* and *res cogitans*. The problem is to determine the direction of the relationship.

This is not surprising. In every *Methodenstreit*, starting by the historical debate on Method in social sciences and any other that followed, the struggle has always been played between the dualist opposition - body/mind, matter/spirit, history/form, nature/culture, fact/norm and so on - and their unity. That is, the struggle over methodological issues is a consequence of different interpretations of the world and the human, the source of law. The dispute is over the nature of subjects.

2. Method and subject

The problem is gnoseological because it is ontological.

The discourse on the Method of law is not the same as on its subject: one is a discourse on law, a meta-discourse, a discourse on the how, the other is on the what, a bit like the relationship between meta-language and language-object. They are distinct, but not separate. There is disagreement on the method, on the way to knowledge of law, because there is no shared 'concept' of law[6], although there could be disagreement on the method even if there was agreement on the concept of law. Disagreeing on what law is increases the chances of disagreeing on its method. But without an ontology there is no gnoseology, although with an ontology there can be more than one gnoseology. From which follows that the epistemological discourse on Method does not coincide with the ontological discourse on what law is, which pertains to the theoretical subject, but conditions it. Thus, the eternal opposition, which runs through law, between body and spirit, materialism and idealism, Is and Ought, mortgages its method.

More precisely, in the general theory of law, the position and solution of the epistemological problems in the interpretation and application of law, in the practical, judicial reasoning, and so on, depend on the way the ontological status *of* law is posed and questioned, on what makes a rule law, hence, on the dispute over the subject, divided between Is and Ought, fact and value, the sensible experience and its form/norm. After which, the positive jurist should verify which solution is compatible with the parameters of the current law, in order for the method to be true and valid. That is, in the specifics of positive constitutional law, how the subject, the existing constitutional 'document', conditions the form of its knowledge, understanding, interpretation, application and so on.

[6] On the disagreement on the method and on the concept of law in constitutionalist doctrine, after AA.VV., *Il metodo nella scienza del diritto costituzionale* (1996), recently see monografich works by G. ZAGREBELSKY, *Tempi difficili per la Costituzione. Gli smarrimenti dei costituzionalisti* (2023) and M. LUCIANI, *Ogni cosa al suo posto. Certezza del diritto e separazione dei poteri nella riflessione costituzionalistica* (2023), as well as *La Lettera*, 06/2023, *Sul ruolo dell'AIC*, in *AIC* (2023).

3. On dualism

At the root of the struggle over the Method of law there is the conceptual polarisation between Is and Ought: the two poles, debated and fought over, around which everything has always revolved, against the contingencies. It is an elementary, archetypal, and symbolic polarity, which constantly marks the whole humankind and each individual man.

Net of all the reorientations, hybridisations, and conversions of the dualism between mind and body, spirit and matter, heaven and earth, «the Scylla and Charybdis of the theory of law»[7] remain normativism and realism, the normative and factual nature of law, its validity and effectiveness, the artefact and the life, the juridical ought-to-be and the natural being. We do not mean that all theories of the concept of law stay, in a Manichean way, on the one or the other side: many are cut across by tensions and relations between thought and life, normativity and nature. What we mean, instead, is that, roughly speaking, in the 'concepts' of law, drawing on archaeology, on the science of foundations, of typical ideal schemes, either pole always prevails as the 'climate', the Is and the Ought. Thus law either stays on the side of thought, of ideas created by the spirit, that is of the *norms,* or on the side of the reality of matter, a phenomenon produced by the body, that is on the side of *facts.* We will not reconstruct the individual theories, but will take advantage of them, as parasites do, to define the general terms of the question of Method and to show that normativity is natural and the body conscientises itself, it gets normed.

All the theories of law that revolve around the norm/form, the law 'posited' and its 'system', the jurisprudence of concepts, dogmas, and so on, tend towards the Ought. The Method is the formal logic, the analytical knowledge, which draws concepts, constructions, principles from the norms of positive law to interpret it and the phenomenon of reality. Thus, it builds abstract, logically and intrinsically coherent, systems, excluding individual and social life from the form/norm, the Is from the Ought. A certain circularity is evident: the system is made to derive from certain axioms, whose validity is proven by the system. The way reason is given in legal reasoning is the Aristotelian syllogism. Life, being, substance, remain outside. But to the very extent it does not depend on the Is, on the reality, the Ought, which is idealism and

[7] H.L.A. HART, *Il concetto di diritto* (2002), 173.

formalism, makes law all-powerful: if it is empty of being, if it is nothing, if it is founded on emptiness, it can do everything. It is prescription, artefact, constructivism, and government. Not accommodation of (nor adaptation to) reality: it is the basis of the hyperbole of law that modifies everything.

The most accomplished, closed, independent, self-sufficient, empty and, therefore, powerful system, is the one constructed by the Pure Theory of Law, which, after all, with our categories, combining normativism and transcendentalism, is a secularised spirit. It is the normativity of the norm[8], from which the concepts that serve legal science are derived by generalisation and abstraction. Its subject is positive law, known - against the imperativist theories of law - as norm, which tells an Ought and not an Is. The method of legal science is cognitive, logical-formal, it is thought made of legal provisions that enunciate, from an external point of view, the prescription of what ought-to-be and make the legal norm known as norm, as ought-to-be without effective reality. The *pure* theory of *positive* law is, therefore, a method of normative knowledge of the 'reality' of law, whose specific form of existence is its validity, a category of thought and not a being, but a reality of nature. This separates clearly, purely, law from natural and social facts, which are always natural facts, the rule of law from the fact of law, the noumenon, which is only interesting for science, from the phenomenon, which is 'experiential' but on which no value judgement can be made. The same fact can be understood sociologically *or* legally: the sociological point of view of social relations says nothing to law and vice versa. Social reality and law are independent spheres, that is normality, which is a-juridical sociality, is mute to normativity and vice versa: they are external to one another. There is no normativity in normality, there is no Ought in the Is, and Ought has therefore no Is[9].

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[8] We take up the nomological normativity thesis of S.L. PAULSON, *A 'Justified Normativity' Thesis in Hans Kelsen's Pure Theory of Law? Rejoinders to Robert Alexy and Joseph Raz*, in M. KLATT (ed.), *Institutionalised Reason. The Jurisprudence of Robert Alexy* (2012), 61 ff.

[9] The is–ought problem, sometimes referred to as Hume's law or Hume's Guillotine, is a philosophical problem closely related to the fact-value distinction in epistemology. The passage is summed up in the slogan 'No-Ought-From-I'. According to the Hume's law, there is a significant difference between positive (or descriptive) statements (about what is) and prescriptive or normative statements (about what ought to be). It was articulated by the Scottish philosopher and historian David Hume in Book III, Part I, Section I of his work,

It is true that in Kelsen there are concessions to *Wirklichkeit*: the effectiveness of the system 'in its broad outlines' is, in fact, a condition for the validity of the norm, which can only be preached of something that exists, that is posited, applied and in force. Force, that is, is a condition of validity, of the value of the fact; or, at least, the norm, the Ought, has some relation to its realisation, its effectiveness. But it is left that law is norm in the precise sense that it is not perceivable by the senses; for the purposes of the validity of a norm it does not matter that it is observed, but that it needs (ought) to. Human conduct is not of interest in itself, in its Is, in its present, past or future reality, but in its Ought, in its having to happen, by virtue of a norm that prescribes the ought to be of the law (and not the being 'something' due). In short, what matters for Kelsen is the ought-to-be of the norm, the form of the Ought and not, as in the philosophy of values, the being of the ought-to-be, the translation from this to that. Even more, he privileges the normativity of the norm up to the point of eliminating the ontological, existential question of what law is.

More precisely, he converts the epistemological function of the 'categories' into an ontological function, constitutive of the normativity of law. There are prerequisites, or *a priori*, logical-transcendental, concepts that epistemologically ground law, because they constitute it by ordering it, attributing the objective sense of what ought to be to the act concretely willed by humans. But there is no essence (political, moral, etc.) of law: what matters is only the how, the mode of knowing what law is and it is precisely because of the epistemological function of the *a priori* category. Legal science, with its provisions, describes, ascertains, records, but does not create, the posited law, or rather the 'fact' of the posited law in effective reality, which depends on political authority. However, it produces, (neo)kantianly, validity: hence, the legal provision determines the juridicity of the law, because what it knows, by producing it, is the Ought of the law. In fact, like for the Neo-Kantian gnoseology, knowledge constitutes, ontologically, its own subject, so that the conditions of the norm are the conditions for its knowledge: in this case, the juridical provision, although referring to a posited norm, to the fact of a given norm, in a certain sense precedes the norm, because it determines it as norm and,

A Treatise of Human Nature (1739). A similar view is defended by G.E. Moore's naturalistic fallacy.

therefore, as the subject of its own knowledge. If that is the case, the Pure Theory is indeed knowledge of law, but, for this very reason, it is ontology of law: Method is the set of pure logical categories, deprived of empirical content, that make law possible because they experience the legal norm as a form of Ought. Therefore, law is its method in the most proper sense: the *hodòs,* the way, the procedure, which determines the goal.

Analytical doctrines take us close to the point. There too, law is its concept, its construction made by jurists. In a similar way to positivism and normativism, what matters is *how* law is and not *what* it is, meaning this in the sense of ontologism with an essentialist flavour, as a supposed and, thus, metaphysical nature or substance of law. For the same reason, the marginalisation of the ontological question conditions the method of knowledge of law as a discourse. Analytical philosophy of law studies it as language, as its linguistic use. If law is a posited norm, linguistic statement, the knowledge of that law is purification or critique of language and, thus, knowledge of its production; it is theory of sources that precedes the theory of interpretation. Again, if law is the position of a linguistic statement, Ought without Is, the textualist option or, at any rate, the dominance of norm over fact, is methodologically coherent. But since it cultivates the claim of objectively analysing the ideologies and interpretative methods (all of them) employed by jurists and judges, it does not need its own Method, because what it says is always verifiable in terms of correspondence to its empirical object. It reduces the discourse *on* law to a, more or less life-sized, map of it, thus eliminating both the ontological and epistemological questions.

But «there are no closed systems, and there never have been. The illusion that logic is a closed system has been encouraged by writing», which a sense of cognitive closure belongs to[10]. And so, the opening up of law, the escape from itself, from the juridicity of law, has followed, simplifying, two paths, upwards and downwards. Both lead in an opposite direction to the self-referentiality of law: they superimpose or juxtapose to the given of positive law a theoretical model, drawn from ideas or realities that are separate from, at least, positive law, on which they impose their own normative constructions. They do not logically describe the concepts built by legal norms but build the concepts to interpret the

[10] Thus W.J. ONG, *Oralità e scrittura. Le tecnologie della parola* (2014), 232.

law in force, drawing them at times from above, at times from below[11]. In the first direction, the transcendental Ought returns transcendent, after its emancipation in the modern; in the second direction it stays, to varying degrees and gradations, as Is, the fact. Consequently, the Method of law yields to abstract thought or to concrete life, depending on the direction of the opening.

The upward opening is an aspiration to the infinite, to perfection, to transcendence (not to transcendental logic), to the theological-political discourse, to the system-as-crystal, with an «open door to transcendence», as opposed to the «system of needs»[12], which is the lower part, closed, empirically and materialistically immanent, of that order. But the method of political theology, or «the methodological connection of the theological and political prerequisites of thought»[13], cannot be the method of the law made and knowable by people. Theology does not speak of people but of God: it follows that in political theology there is always something unexplained and inexplicable, because there is neither a speculative nor a scientific-experimental explanation of God, who is unknowable. But the scientist, whether natural or social, cannot say that something is unknowable, cannot resort to the abyss, which is unfathomable, elusive, and therefore explains nothing.

Conversely, it is a secularisation of theological transcendence the opening of law to the 'substances', the exemplary universals, the universal (and sometimes innate) ideas of good, justice, truth, to the world of values and to models of virtue and wisdom in social and political coexistence. These are typical theses of legal moralism, the interpretivist or interpretive theories, in the background of which lies, variously articulated, the connection between law and morality. They still belong to the order of prescriptive discourse, but here the Ought is moral, whereas in positivism and normativism it is juridical. Indeed, here, in its extreme version, it is juridical because it is moral, while there it is juridical because it is not moral. Their essence is a certain methodological absoluteness because they imply, at bottom, moral and political absolutes, even when declined in the pluralist sense of 'open' societies. Their cipher is the principle of the One-Good.

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[11] They are, however, at least incomplete theories where they do not understand the form and choice underlying positive law.

[12] C. SCHMITT, *Il concetto di 'politico'*, cit. at 4, 150-1.

[13] *Ibid*, 149.

On the opposite side, on the edge of Fact against Idea, the openness of the closed system is downwards, it is referred to immanence, to the life of people in flesh and blood, to the «carnality of existence»[14], to situation, to the vital flow of experience, to the 'living whole', *Lebens Ganzes*, to the concreteness, contingency and historicity of reality proper to the world of people, made of reason but also of senses; to the individual case, concrete and unrepeatable with respect to the general, abstract and regular norm/form. Forgiving the simplification, this is somehow a discourse that combines pragmatism as juridical philosophy of creative action, with radical empiricism, juridical realism, jurisprudence of interests, jus-liberalism, and the casuistic, synthetic, phenomenological, and hermeneutic law. These are hardly ever forms of superficially and reductionistically materialist or sensist realism. Rather, they are doctrines that reject the idea of law as a product of pure reason, of an *a priori* independent and separate from the being, with further sub-distinctions or nuances in the openness of law to the becoming of life, to human nature, which the biological given pertains to; but also to culture and living in society, depending on whether we prefer body or spirit, the physical needs and biological data as foundations of our mental capacities, or the operations of conscience, at times individual, at times social, and with them, the human ideas of justice, constant and recurrent throughout history, as supreme criterion of thinking and acting. Though with all these distinctions, in disclosing law to the facts of the world of people, hence to people, to their experience of reality, which brings with it its own Ought, its own deontology, a conceptualisation of doing, a normativity of the real, the Method that is left is topical-problematic thinking[15]. Compared with logical-systematic thinking, this is dominated by the concrete case, by the inventory, common sense, equity, justice as proportion, measure, and reciprocity, by induction from particular facts against deduction from general principles, by the controversial logic of the probable, reasonable and preferable, by teleological argumentation

[14] P. GROSSI, *La Costituzione italiana quale espressione di un tempo giuridico post-moderno*, 3 Riv. trim. dir. pubbl. 621 (2013).

[15] On the origin of the topical method in (seventeenth-century) English legal science H.J. BERMAN, *Law and Revolution II. The Impact of the Protestant Reformations on the Western Legal Tradition* (2003), 204 ff.

against the self-referentiality of law and formal logic, and so on[16] . If systemic law *is*, ontologically, its provisions and theory of sources, problematic law *is* norms and theory of interpretation. With hermeneutics, in fact, law is the norm in the making of the concrete case, it occurs, is produced in its application, it is its own realisation. From which it follows that knowledge of law is inseparable from the study of how it is applied, it is the theory of interpretation and judicial praxis/practice, of the experience of living law. Simplifying, the rule emerges from the encounter between *quaestio iuris* and *quaestio facti*, where the fact, which is not the mere case of the norm, holds qualities that 'problematise' the norm. In hermeneutics, the scientific validity of law does not derive from its conformity to an *a priori*, but depends on the moment of application, on the *performances* of interpretative hypotheses. The truthfulness of a norm is not an attribute of it, an uncontroversial property already given, but is made, created in the becoming of the case. Thus, it is confirmed that the ontological question of what law is, (be it, analytically, a 'concept'' or hermeneutically, a 'practice'), determines the epistemological question, related to how law is understood. If law *is* - in the ontological, but not metaphysical sense - its own becoming a norm, if it *is* the application of norms to concrete cases, if it *is* the point of incidence and co-determination of fact and norm, where the norm is determined with the fact, then the re-evaluation of practical action logically follows. And, with it, of the jurisprudence that makes (and does not say) the law, i.e., of the judicial creation of law against the phonographic theory of the judicial function, as well as the prioritisation of application over understanding, of application as constitutive of understanding. Unlike analytical thinking, however, the hermeneutic one needs a method, because law is not an already given subject, which can be described and known from the outside, but is, in fact, constructed by the interpreter: therefore, the method builds the law-subject and, to that extent, makes legal rules defectible. In turn, to continue with polar oppositions, it is a less powerful law than the one that stays on the side of the idea, of the norm: it is a law linked to the fact, to the existing, somehow latent, contained and conditioned in it. It is close to the spontaneous order of things, with a prevalence of the

[16] These are the methodological consequences that S. NICCOLAI, *Principi del diritto, principi della convivenza. Uno studio sulle* regulae iuris (2022), *passim*, rigorously draws from the openness of law to human life, more precisely from the individual, moral, concrete foundation of the reality of law.

descriptive moment over the prescriptive one. Therefore, it cannot do everything: it is a somehow misoneistic law, which recognises but does not govern the reality that pre-exists it and, taking it to an extreme, preserves everything.

Law that contaminates itself with existence, that is, ontologically, on the side of being, is less powerful than the artefact, than 'productive' law, but is more real. This is proven by its rendering in exception and necessity, out of the normality of the norm. It goes without saying that we are talking about Schmitt and Romano's institutionalism, where the relationship, constitutive of law, between the 'Is' and the 'Ought' is not, for different reasons, dualism. Both, in different ways, differentiate *Sein* and *Sollen,* but do not separate them. In both, openness to life, to fact, enters into law and precedes the rule or, in any case, the law is not independent of social reality. Methodologically, it follows that the meaning of rule requires knowledge of the concrete fact.

In Schmitt, the norm is not factual, it is not the undecidability between life and law, the point where fact is law and law is fact; but the norm is derived from its application to concrete circumstances, to an event, to the situation. It is the law of the situation. It reintroduces substance, fact, hence exception, which means subjective freedom of decision[17]. For Schmitt, being is the pre- and immanent condition of normativity. In fact, in a state of exception, the suspension of the effectiveness of a norm does not reveal force, violence or arbitrariness, but that every norm «presupposes a normal situation»[18]. In contrast with Kelsen's Is-Ought dichotomy, he means that «the normality of concrete situation», the Is, is not «merely an external presupposition», but «an essential, internal, juridical character of the validity of a norm», of the Ought. Therefore, he refers it to law, up to the point of saying that it is «a normative definition of the norm itself» and that, on the contrary, «a pure norm, unrelated to a situation or a type, would be something legally non-existent»[19] .

[17] And the transition in Schmitt from the decisionism to the institutionalism and, in particular, to the concrete order thinking is not to be considered as a rupture, but as a continuity. In fact, even in this context, the decision-making process continues to appear as the only way to produce spatial and juridical order.
[18] C. SCHMITT, *Il concetto di 'politico',* cit. at 4, 130.
[19] C. SCHMITT, *I tre tipi di pensiero giuridico*, in ID., *Le categorie del 'politico'*, cit. at 4, 260.

From this follows that the Schmittian state of exception is not the formless life that suspends law, but a state of law. The decision is not normative but belongs to the juridical: it does not produce a norm, but «a normal structuring of life relations» to which the norm applies[20]. Thus, social normality in Schmitt is juridical, but it is pre-normative in the sense that normativity is not possible without an 'ordered' normality, created by the decision. In the end, normality founds normativity, and the decision is the foundation of validity of the norm. Then, if one looks at the conservative state of exception, the needed actions for the re-establishment of the legal order «will always have to be de facto measures [...]». Nor could it be otherwise, if one considers that the state of exception follows the logic of 'circumstances', which «calls for finding the appropriate means to obtain a concrete result in the concrete case»[21]. Law pertains to existence, emerges from the event, and rules, because it follows, the concrete situation that has arisen, and adheres to it.

Santi Romano's is also a thought of necessity and exception because hazard, circumstances, social life, empirics, and history count. Precisely because, in the search for the 'essence' of law, Romano's direction, contrary to Kelsen's, is «to ascend from the sphere of Ought to that of Is»[22]: institutionalism can deal with the real, hence with the a-nomaly. Necessity and effectiveness hold together. The immanence of law in the being makes it adaptable to the «condition of things that [...] cannot be regulated by previously established norms»[23]. Here we must recall Romano's sense of necessity that becomes law and *ex facto oritur ius*, to clarify the relationship between fact and law that lives in his institutionalism, in an institution that is concrete order, law, and mortgages its method.

In his anti-voluntarism, Santi Romano looks to society, to the sociality of law, to the legal system as form of society, to the social reality that spontaneously produces normativity, but always staying on the side of law, within law: it is not the law that is

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[20] C. SCHMITT, *Teologia politica: Quattro capitoli sulla dottrina della sovranità*, in ID., *Le categorie del 'politico'*, cit. at 4, 34 and 39.

[21] C. SCHMITT, *La dittatura. Dalle origini dell'idea moderna di sovranità alla lotta di classe proletaria* (1975), 213; similar argument articulated in ID., *Dottrina della costituzione* (1984), 156-7.

[22] S. ROMANO, *Diritto e morale,* in ID., *Frammenti di un dizionario giuridico* (1947), 70.

[23] S. ROMANO, *Sui decreti-legge e lo stato d'assedio in occasione del terremoto di Messina e di Reggio Calabria*, 1 Riv. Dir. cost. e amm. 260 (1909).

reduced to fact, fact of law, legitimation of the existing, or exercise of power - therefore, to a vacuum of law - but fact is law, the fact exists for the law, it is 'legal reality'[24], where the law is real, not fake, but it is not fact. It may be that in Romano's interweaving the gap of normativity and factuality is not well understood, nor is how one goes from 'Is' to 'Ought', how the fact becomes law, norm, how the normativity of the fact or the factuality of the norm are produced. Romano writes that the State «exists because it exists, and is a legal entity because it exists and from the moment it has life. Its origin is not a process regulated by legal norms: it is [...] a fact»[25].

Unlike decisionism, the social power, the normality of the power relationships, which produces the legal order, is meta-legal. But that fact for Romano is social ordering, which is not an antecedent, but is the identity of law: «there is because there is and when there is but as already law»[26]. For sure Romano is not a sociologist, he does not confuse the conditions of existence and thinkability: law is the pattern of thinkability, and transformation, of the social practices that lie beneath the rule. It almost seems as if the law, retrospectively, legalises the fact as its own foundation, which is therefore never, in and of itself, the origin of and for the law; this, on the contrary, in a certain sense, self-founds its own juridicity because constitutes that fact as its own foundation, hence as law.

However, he does not resort, with a flight forward, to the retrospective logic of the anterior future, whereby the origin is the goal, life becomes law, that is, the organisation that is institution/order/law, materially exceeds the norm, but is not formless, is not natural life, pure matter, bare life, being: indeed it is already formed, structured, limited, where the form of life, without violating Hume's law, is already moulded of normativity, of immanent ought to social practice and the form is full of life.

The Method of a doctrine that opens to the meta-normative, but does not reduce validity to effectiveness, comes by itself. The openness of juridical normativity to the flow of life, to events, to a certain spontaneity of the nature of things, to normality, implies in Romano a devaluation of written law, of the intentional

[24] According to the self-qualification of its realism contained in S. ROMANO, *Realtà giuridica*, in ID., *Frammenti di un dizionario giuridico*, cit. at 22, 204 ff.
[25] S. ROMANO, *L'ordinamento giuridico* (2018), 55-6.
[26] S. ROMANO, *Diritto e morale,* cit. at 22, 69.

deliberation of the legislator as «the beginning of law»[27]; in favour of the customary, oral, involuntary, unconscious law, which does not constitute the norm *ex nihilo,* but establishes it by recognising, discovering, 'inventing', a reality that pre-exists it. At the same time, however, the juridical point of view from which he looks at reality, which is always a bit of artefact, Ought, 'second nature'[28], does not lead Romano to hermeneutics, or to an anti-formalist theory of interpretation as art of continuous, anarchic experimentation that dissolves the theory of sources, or to a casuistic jurisprudence with a synthetic method against the conceptual jurisprudence with an analytical method, but to their coexistence in the jurisprudence of physics and metaphysics[29]. Thus, to a cognitive theory of interpretation that must limit itself to the «simple cognition of the law in force», which is reflected in the intellect of those who want to know it as in a mirror[30], and is anti-normativist in the sense we have said: it admits an evolutionary interpretation of the whole legal system, but, with regard to the individual rule considered separately from the legal system as a whole, considers the (written) law as «matter, not soul»[31]. He is on the side of the letter and not of the spirit[32].

What is demonstrated is that the dispute over Method is always a dispute over the subject, law as fact or norm, as 'Is' or 'Ought', and over the forms of the relationship, or unrelation, between the two.

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[27] S. ROMANO, *L'ordinamento giuridico,* cit. at 25, 79. This is also true, against all appearances, for constitutional law, so much so as to say that the constitutional charter, 'except in the very special case that it represents the epilogue of a revolutionary conclusion, can only have the task proper to all laws, of collecting and declaring the law as it has slowly and spontaneously come into being'.

[28] In the sense in which R. ESPOSITO discusses it, *Vitam instituere. Genealogia dell'istituzione* (2023), 130 ss.

[29] S. ROMANO, *Diritto (funzione del)*, in ID., *Frammenti,* cit. at 22, 86.

[30] S. ROMANO, *Interpretazione evolutiva*, in ID., *Frammenti*, cit. at 22, 119-20.

[31] *Ibid*, 123.

[32] An exception, however, is the concession that Santi Romano made to the spirit and, with it, to a 'second degree' interpretation in public law, against the permanent favour for the letter in private law, in ID., *L'interpretazione delle leggi di diritto pubblico,* Filangieri 241 ff. (1899), now in ID., *Scritti minori* (1950), *passim.*

4. Natural normativity and impossible law

The cards are reshuffled if one poses the ontological question differently and abandons the archetypal Is-Ought polarity. There is distinction, but no separation. The solution is natural normativity, which bridges the rift between nature and culture.

We do not mean to strike the right balance between concept and life, nor to follow the trail, always ready to be beaten, of equidistance of a constitutional theory that avoids an excess of realism and descriptiveness, dissolving itself in the political-sociological science, and an excess of normativism and prescriptiveness that, though allowing the cultivation of methodological purity, leads it to unreality. Here we aim at elaborating on the idea of the end of any dualistic perspective of the matter.

The source of law as a social fact is the person. But the 'nature' of human nature is problematic. It has always been split between biological and cultural profile, biological data, and mental faculties, Is and Ought, leading to a dissolution of the very idea of human nature. In short, in human nature, the dissociation between body and mind, which underlies all the dualisms that have mortgaged modernity, is reopened in an infinite number of regressions. In the first direction, law is determined by the reality of matter, produced by unmodifiable biological-natural data, by the 'physical'. It is a manifestation of naturalistic materialism. There are no metaphysical ideas of justice, there is no good person, individual as moral agent, with a conscience, but human strength, naked life, the biological invariant as an innate pattern. In the other direction, law is in the individual conscience, that is, in a kind of soul separate from the body, in the irreducible mind to body, and is determined by the universal regularities of human subjectivity. It presupposes ideas of good, true, just, which constitute the invariants, the universal constants of what is law, which is law because of an innate dutifulness, because of an internal morality embedded in the conscience of people or socially, culturally, and historically acquired, in the declination of the historicist idealism. In any case, there is contiguity between law and morality, because law is a substance - not an arbitrary and conventional construct - of which a person is originally capable, by culture, as a moral subject. The consequence is the moral reading of the law.

We can, however, deconstruct the dualist opposition between body and spirit, nature and culture, physics and metaphysics, the

biological and the mental, because there is no dualism between brain and mind. From neurosciences and cognitive sciences, filtered through the philosophy of mind, we gather that there is a biological-physical explanation of the innate mental capacities and a natural history of human morality - and, with it, of the typical freedom of an individual. Mental operations can be distinguished from the natural world under a logical point of view, not an ontological one: reducing the matter to the bone, what happens, inside the body, is the evolution of the psychical from the inside of the physical through the neural network[33]. Thus the foundation of the mind and of all the mental, emotional, conscientious, logical and linguistic faculties of the people lie in their unmodifiable biological data: in the inner workings of the body, in the activity of the brain, neither in a separate entity, be it the soul of metaphysics or the I think of transcendental idealism, nor in historical-cultural variables, which dissolve human nature into contingent cultural, historical and social products of marked plasticity. This discourse leads us to say that at the source of law, as a conscious and intentional act, there are the natural needs of people, their bodies, sensations, and passions, which, however, are always intermingled, polemically, with the reason, which for a person is as natural. There are sensations, such as the feeling of body, pain and pleasure, which are facts, but, through the nervous system, reach the consciousness and intellect and become emotions, feelings and ideas, feelings of feelings, and then, by abstraction, embody the idea of pain or pleasure. Thus, in the regulation of the body, in the search for homeostatic balance, one moves from ontology to deontology, from the 'Is' to 'Ought' of an action aimed at procuring pleasure or avoiding pain. The next step transforms, evolutionarily, the 'feeling' of pain or pleasure in an individual's body into good or bad, right or wrong, in the individual's spirit, in the mind that 'conscientises' the body. Without the innate elements of pleasure and pain and their conscientization, one cannot access the next level of the construction of the concepts of good and evil, or at «the cultural and reasoned construction of what *is to* be considered good or evil, in relation to the good and evil that derives from it»[34]. In this sense, normativity is natural. A person is not a legal body, but is the

[33] One benefits from the neuroscience studies of A. DAMASIO, *Looking for Spinoza. Joy, Sorrow and the Feeling Brain* (2023) and ID., *Self Comes to Mind. Constructing the Conscious Brain* (2010), *passim*.

[34] A. DAMASIO, *Looking for Spinoza,* cit. at 33, 178.

unity of body and mind, biology and thought, nature and norm. The leap occurs in the transition from individual to society, to the idea of pain and pleasure (or good and evil) of the many rather than the single. But law and public, community ethics always move from flesh and blood people, thus in a certain way they can also be reconnected to innate elementary structures, to biological data. They were born from these, just as the community grows from a set of individuals, of natural bodies: as an intentional moment of a natural unintentional evolution. It is, then, reasonable that biological imperatives and neurobiological dispositions are common to all the people and have contributed to causing and structuring the social situation and cultural instruments. A natural history of the human social contract and an evolutionary explanation of interdependence and cooperation, of which morality and law are 'specific' forms, in the biologically proper sense, can be hypothesised at the bottom of the most basic cognitive strategy of community organisation. But since a community of people is not macro-anthropic, to understand the social conduct of people in complex communities, and the ontology and social deontology that follows the natural, corporeal one, it is necessary to add the artefact to natural evolution, the 'reason' of the rules set out and accepted by those same people to establish what is good and bad for all. To the homeostatic regulation aimed at the balance of the individual body, we add mechanisms and devices protecting the homeostatic balance of the body of the community, i.e., the legal universals that support and substantiate the forms of social and political coexistence. In this sense, normativity is artificial. The body of the community is a legal organisation.

This is neither reductionism to the feeling of the body nor transcendentality, even less transcendence. Imputation has a background of natural causality. Law, like morality, is determined, at least in part, biologically: the biological substratum limits the possible options, which are many but finite. Thus, not all rights are possible, but only those that correspond to a deontology, which is not given without ontology, to the good and evil felt, perceived, qualified, by the person, unitarily considered as body and spirit[35].

[35] Clues on 'impossible law', starting from Reinach's 'essential connections', in F. DE VECCHI, *Strutture a priori e leggi essenziali dell'ontologia sociale e giuridica di Adolf Reinach*, in ID. (ed.), *Eidetica del diritto e ontologia sociale. Il realismo di Adolph Reinach* (2012), 125, because "we cannot invent social and legal entities 'at will'. In fact, there are laws founding social and juridical reality that impose inescapable limits

At the root of law there is something pre-linguistic, pre-verbal, biological, but the individual always has a choice in the spectrum of what is determined for the human species: it is always a bit of spirit. It is always repetition and difference. The oxymoronic concept of 'natural history' pertains to human nature[36]: human nature, invariant, implies variability of experience, but contingent phenomena are revealing icons of the biological invariance of human species, and the variable is a sign of the invariant, like the social of the biological. A purely neurobiological explanation of the origin of law is therefore not conceivable, because law is not a first reality, a 'natural reality', a corporeal one, but normativity never loses its natural basis. It is a 'second nature', a set of artificial, variable forms, translating invariable impulses, coming from the biological constitution of individuals; where the form breaks the world of the immediate and natural determination of living matter. Thus, the idea of natural normativity subtracts law, on the one hand, from the anti-scientificity and metaphysics of innate ideas, which, as such, have no foundation, and, at the same time, from the arbitrariness of infinite conventions, according to the intuition of naturalistic-evolutionist theories; and on the other hand, from naturalistic determinism, according to the contribution of critical thought and hermeneutics. Translated, the rule is not the fact, brute matter, but is not separable from it to the point of becoming abstract thought.

It is somehow the same movement that runs through linguistics, which, split between the body of language, «biological invariant»[37] and conventionality, idea, artefact, between the biological and the cultural, has discovered the impossible languages, against the behaviourist and culturalist conception of language. This is not surprising, because law is language and language is normative. But here one does not evoke linguistics in an analytical sense, that knowledge of law is analysis of language, logical analysis. We evoke it because there too, the idea of self-

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and conditions on our actions: these are a priori laws, that is, laws that have not been created by us, on the basis of our free will, but exist independently of our will'.

[36] In the conceptualisation elaborated by P. VIRNO, *Quando il verbo si fa carne. Linguaggio e natura umana* (2003), 143 ff.

[37] On whose side stood, as is well known, the cognitive science of Noam Chomsky: here suffice the historical, 'missed', dialogue with Foucault's critical thought in N. CHOMSKY, M. FOUCAULT, *Della natura umana. Invariante biologico e potere politico* (2008).

sufficiency, self-referentiality and originality of linguistics, of languages as infinite, arbitrary, cultural and conventional combinations, artificially constructed systems, is opposed by the idea that impossible languages exist[38]. We still do not know how much and how the structure of language is determined by the architecture and neurobiological functioning of the brain. What, however, seems to be established is that natural languages are not the result of intentionality, of arbitrary conventions or historical and cultural contexts, but have a natural, biological explanation. Artefact and convention determine the meaning and combinations of sounds/words and attributed meanings, but not the structure, the body, of a language. «The 'boundaries of Babel' exist and are traced in our flesh, in the neurophysiological and neuroanatomical structure of our brain»[39] . This calls into question the thesis that reality is only known through the linguistic filter and that different languages correspond to different visions of reality. Methodologically, it follows that linguistics is not pure, self-sufficient, and original, because it depends on neurosciences, just as language depends on the brain and neurobiological structure.

The existence of a biological sub-structure of language, which is the first institutional fact, is consistent with the social ontology that founds - without exhausting - all institutional facts, such as law, the social practice of law, on a material, physical or biological, substratum, that is not socially constructed as a form of *status* function, on which collective intentionality acts[40]. More precisely, the social ontology is the translation of the individual's natural normativity into the communitarian dimension. It thinks of law differently from the way both analytics and continentals think of it: law is neither just a concept, into which the former group converts it, because it has an ontological consistency; nor is it just its practice, or concretisation, as the latter group re-ontologises it. Law is not only matter/body or only idea/spirit. Law is qualification, collective assignment of quality, to a fact, to a matter that 'counts as' in a context. It is an institutional fact, the subject of a collective

[38] The idea is argued and demonstrated by A. MORO, *Le lingue impossibili* (2017); ID., *I confini di Babele. Il cervello e il mistero delle lingue impossibili* (2015).
[39] A. MORO, *Breve storia del verbo essere* (2010), 267.
[40] Against the underivability of *res cogitans* from *res extensa*, of spirit from matter, according to the biological naturalism of J.R. SEARLE's philosophy of mind, *The Construction of Social Reality* (1995); ID., *The Mystery of Consciousness* (1997); ID., *Mind. A Brief Introduction* (2004).

practice of recognition, that qualifies, attributes quality, value and, therefore, normativity to brute facts. Thus, the legislative fact is not a natural fact, which exists in itself, but an institutional fact, constituted *by* and *for* the law: a text, a document, has 'value' of law by virtue of a juridical title, of a qualification, a function, such that the existence of law depends on the rule that, by regulating it, constitutes it. In the limited sense of 'disguising' facts, law is a fiction[41]. It is artificial, because it is a thought matter, but is not false, imagined, invented, or arbitrary. Law qualifies and constitutes institutions and social facts, abstracts them from their singularities, makes anything count as something, and transfigures the Is in the perspective of the Ought, without making them unreal. Artificialism is not an enemy of social ontology: to the material basis, to the brute fact the socially created normative component is added, and stratified. But the qualification is always quality, *nomen*, of something that pre-exists in the real world. Ought is distinct and different from Is, but - Kelsen would disagree - there is no Ought without Is. Law is never a *fiat*, an original theological creation from nil, but is always derived from something existing, from a being, from life, from the concrete matter of human things. *Something*, some physical, material, documentary entity, must always exist for a function to be imposed upon it. The world of institutions is part of the physical world and there are no institutional facts without brute, pre-interpretative facts. In ontological terms, against the dualism between mind and body or the idealistic and, on the opposite side, materialistic monism, the mind is always already a body and the physical and neurobiological element is the causal substratum of the mental one. The flesh is itself *lógos*. The brain 'causes' the mind and the mental representation exists, the ideal is real. Without going as far as radical empiricism *à la* James, where thoughts are made of the same substance things are made of, there is no «metaphysical abyss» between them[42].

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[41] M. SPANÒ-M. VALLERANI, *Come se. Le politiche della finzione giuridica*, in Y. THOMAS, Fictio legis (2015), 95.

[42] J.R. SEARLE, *Mind,* cit. at 40, 105. Schmitt is horrified: to the individualist objection that «before anything else can be spoken of there must be a concrete, flesh-and-blood man», he opposes «the irreconcilability of the abstract and the concrete», «the logical error of letting empirical «assumptions» decide on value», «the error of the crudest materialism, for which the brain is «more important» than thought, since without the brain there is no thought» (C. SCHMITT, *Il valore dello Stato e il significato dell'individuo* (2013), 92, with emphasis added).

As a result, the relationship between fact and norm must be of distinction, not of separation. The norm is the qualification of a fact, with that bit of abstraction, symbolism, and dematerialisation that it implies. But for law, things of real life, whether natural or social, do not disappear, nor become pure human artefacts. In the world of law, events, facts, things, exist as material substrate, but do not (pre)exist legally unless they are named, codified, translated, and qualified. Things exist juridically, in and for law, by virtue of a name, of a qualification that establishes them: here constructivism is allied with materialism, not with idealism, in the sense that matter exists for law through a form, but that form presupposes that the 'thing in itself' exists, is not an 'eternal phantom'[43] and produces powerful real effects.

For law, however, there is no form *and* reality, because form is real and not fake, and the reality of law is the shaping of life, its organisation, qualification, and classification[44]. Law is real because it is never fact: if it were, it would not be given as law. It is neither pure idea nor pure matter, neither perfect, accomplished form or formless life, neither pure nor practical reason. On the first side stand, in different ways, positivism, normativism and political theology, on the second the realism, hermeneutics, the organicism of *Volksgeist*, institutionalism, and so on[45]. But there is no choice between substance and form: in people and in the facts of people there is no separation between the physical order and the mental order because the former is known by and for the latter, but the latter is conditioned, if not mortgaged, by the former. There is no opposition between formalism and realism. This is why we never know whether Kelsen or others were formalists and/or realists: because law is always the quality of a fact. The life of law, its reality, is a constructed, qualified, and codified matter.

Let us draw the consequences of Method in law.

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[43] Reconverting B. CROCE, *Teoria e storia della storiografia* (1947), 44-5.

[44] R. BIN, *Orlando* reloaded*?*, in F. CORTESE, C. CARUSO, S. ROSSI (eds.), *Alla ricerca del metodo nel diritto pubblico* (2020), 396 ff.

[45] It is always complicated to draw up lists and taxonomies. There are overlaps. Thus positivism, from a certain point of view, is realist, as is legal dogmatics and historicism, in the sense of *positum*. Thus, again, the Pure Theory of Law has been drawn now on the side of being, of reality, of empiricism, of efficacy, now on the side of what ought to be, of form, of idea, of validity: there could be a reconciliation because what 'ought' is the 'is' of law, its reality or nature, and the Pure Theory knows positive law and not ideal law. There remains roughly the opposition between form and life.

If law is a 'thing' in the sense of social ontology, then it is body *and* mind, fact *and* value, despite their binary, immune, dualistic opposition. Thus, understanding law means knowing 'something' and not just a concept. It implies - against the closure and abstraction of pure doctrine - that at the origin of law - and origin is a matter that pertains to law - there are always people and concrete human facts, with their unity of body and thought. It also implies that the norms themselves are willed and placed by people for the needs of people, that law is not independent of natural and social reality but 'emerges' from it through the artefact of rules laid down and accepted by flesh and blood people living in societies, the attribution of which may be different but not unrelated to natural causality. It implies - against the transcendent openness of political theology - that a real people exists, whose reality, however, is not transcendent but is the same of the law that establishes how those people decide as a single unit, as a community, attributing to a fact the representative value of the collectivity that binds them all. It implies - against the materialistic and reductionist openness of law to factuality - that law is the quality, the *status*, the value of a social fact, its 'form' and thus it is the thought of freedom, of the possibility and, therefore, of the dutifulness of human behaviours and not of their naturalistic determination.

This does not translate into the prescription of a syncretic method, into the contamination of knowings, which confuses and mixes empirical-experimental forms of knowledge, such as natural sciences, sociology, political science, history, etc., with the logical-idealistic knowledge of law, into a method that confuses factuality and ideality of law. Instead, it prescribes a method that 'knows' that subject, in the very sense of being the means of that knowledge and, therefore, accesses the idea of law as a sustained (and permitted) form by the material, real structure of the person, by the sensations of the individual body that reach the conscience and reason and determine the elaboration of intelligent norms of social conduct.

From an epistemological point of view this means, to make it clear, that the neurosciences, evolutionary theories, philosophy of mind, linguistic studies and so on, are not parallel studies to law, but means of knowledge: they run through it, they complement it. It is consistent with the theory of knowledge that originates from two fundamental sources: the receptivity of representations, the intuitions, and the knowledge gained by means of those representations, the concepts. Without sentience, no object would

be given to us, and without intellect, no object would be thought. Thoughts without content are empty, intuitions without concepts are blind, vulgarising the *Critique of Pure Reason* somewhat. It is equally necessary to make one's concepts sensible and one's intuitions intelligible. The intellect can intuit nothing, and the senses can think nothing. Only from their union can knowledge arise. And union is the relationship between body and spirit, brain and mind; it is the unity of the person. For this very reason, it is a particular instance of the idea of a universal *mathesis*, of a universal structure of knowledge of the facts concerning people - and law is a fact of people, thought but real - whose unique substance is a *continuum* between the constant neuro-biological structure and the ideal component, constructed, amendable, conventional and somewhat arbitrary; between being and ought-to-be.

5. The Constitutional Law method of a representative and popular government

The discourse on the Method of Constitutional Law in a positive system is, however, compared to the general theory of law and to constitutional theory. It is more concrete, sensitive, 'experimentable' and verifiable: it does not concern a concept of law and Constitution, although it presupposes them, and its science is knowledge of the law in force, posited, and of the dogmatic discourse on that law.

From this follows that the method of positive dogmatics is different and poses different questions from the method of general theory or, *a fortiori*, of the philosophy of law, whether this holds that its subject is the concept of law, derived from the use of the term in the discourses of jurists, or it ontologises its subject in the interpretation and application of law, in the judicial practice of the concrete case. It is not a question of taking the stance, in constitutional theory, arbitrarily and partisanly of Ought versus Is, of idea against empirical reality, of legislative as opposed to jurisprudential or sapiential enunciation, of provision as distinct from norm, of grounds instead of propositions of law according to Dworkin, or *vice versa*. It is not about dealing with Method speculatively, deducing it from a philosophical system or model of science rather than another. In fact, seen from the point of view of the positive jurist, the method of constitutional law, while not

neutral, is not free, because it is mortgaged by the decision that grounds positive law.

In short, the Method of Constitutional Law does not depend on a concept (or, within a concept, on a conception) of law. But means depend on content and, if content is positive law, the foundation of validity of posited law indicates the direction of the relationship between method and subject: the subject is not (in this case may not be, unless compromising the foundation of validity of posited law) produced by the thought, by the method, in Neo-Kantian sense, nor decided by the knowing subject in hermeneutic sense, but the former conditions the latter or, in any case, the Method is not indifferent to the subject[46] .

The subject determines the Method, which must not only be true, but valid and true. And if it is not valid, it is not even true. The legitimation of the method of positive law can, in fact, only derive from the principle of validity of positive law, not from the truthfulness of the arguments of this or that general theory. Put differently, to avoid its ungroundedness in the system laid down, the method of knowledge and understanding of law must be conditioned by the principle of validity of the written, self-founding Constitution, deliberated intentionally by a representative assembly and amendable only with a predetermined form (and not by life, individual or social conscience, or the spirit of times) as well as by the legislative acts derived from that Constitution.

Of course, the relationship between subject and method is always somewhat bi-directional, like the relationship between body and spirit, brain and mind: the cognitive process is never the analysis of an initial datum, but of the transition from a (more or less) indeterminate subject to a (more or less) determinate one, through a process of synthesis that never reaches completion. And it may be that juridical dogmatics, as a socially recognised and accepted juridical culture, has constituted its subject to some extent, which is therefore not exactly such. But in any case, Method in the knowledge of positive law pertains to something that has an

[46] This conclusion is compatible, in the general theory of law, with Bobbio's methodological positivism: as for the positivist method, «the discourse is very brief. Since science is either a-valutative or it is not science, the positivist method is purely and simply the scientific method, and therefore it is necessary to accept it if one wants to do legal science or theory of law: if one does not accept it, one does not do science, but philosophy or ideology of law»: N. BOBBIO, *Il positivismo giuridico* (1996), 245 ff.

existence of its own. Thus, who knows the positive constitutional law, whether paltry or opulent, and not the ideal one, should not autonomously be either normativist, or formalist, or realist, or interpretivist *à la* Dworkin, or casuist, or sceptic or else: they should be what the law to be known prescribes, otherwise they would not validly participate in that community of discourse.

Constitutional law is not unrelated to the Method in private law. The former arose from the latter, like a community from a set of individuals, flesh and blood people, so the two are not co-originated. Public law has different rules, because humans, with their will and judgement, with their unity of body and mind, exist in nature, while collectivities, more precisely human organisations, such as the State, are artificial, constituted by law. Public law is symbolic, representative, always refers to something that transcends the particular, the individual, just as the *ideal,* normative, general will transcends the *existing* particular wills. But it makes sense that the former cannot be given without the latter and that the method of knowing them is, roughly, the same.

More specifically, it is the Method of law of a representative and popular government. Here, the Constitution is also (if not exclusively) a form of law: it is constructivist and constituent power of a representative assembly of the people, hence it is Ought, beginning, and not Is, execution. It is a constitutive form. The legislation derived from it is, likewise, deliberated by the elected representatives of sovereign people: it is an extension within the order of the original constitutive form. It follows from Articles 1, 70 and 101 of the Italian Constitution that the 'value' of the legal rules, the representative form, in a popular government is the Subject and act of enforcement and execution, standing in a position of 'subjection', of what bears the law. The Constitution is not anarchic, it does not 'experiment': in Constitutional Law, unlike the general theory of law, statements must be distinguished according to their authors, where the statement which the jurisdictional act consists in says (does not make) the law and depends on the statement that makes (does not say) the law.

This implies that in the theory of constitutional law one does not 'decide', in theoretical terms, to do legal science in the Kelsenian sense, namely that the law theory, to be scientific, must be descriptive, ensuring the correspondence between the descriptive statement and what it describes, instead of prescriptive, constructive, and interpretative. One cannot stay, a *priori*, on the

side of a descriptive against a normative constitutional theory, precisely because the tension between law as it is and law as it should be concerns the concept or the conception of law and the general theories of it, but not positive law. And the science of law, if it must be about *that* law, should pertain to the necessary and sufficient conditions of truthfulness for a law provision, which, with respect to the law laid down by the legislator, can only be cognitive and not constitutive of the validity of provisions. Positive constitutional law prescribes that the discourse of the jurist be *on* law, cognitive, and not *of* law, normative or interpretative[47]. This is not, however, to legitimise the existing; rather, to introduce a further meta-linguistic level, a new meta-language that holds as subject the legislative and jurisprudential discourse *of* and *in* law, ordering and criticising it with respect to the positive parameter and to that extent, which is inherent to the neo-Kantian productivity of thought, somehow produces its own subject, while keeping a firm distinction between descriptive and prescriptive statements.

This is why the Method of constitutional law lays neither on the side of the analytics nor of the hermeneutics: not of the former, because positive law indicates which method is valid and which is not, and does not reduce the discourse on law to a, more or less life-sized, map of it; not of the latter, whose method is not admissible when positive law separates prescriptive from descriptive language depending on its author (legislator or judge) and places a discontinuity between the activity of describing and the subject to be described, that is, deliberated law. Against the analytics, the juridical science of positive constitutional law - without becoming politics of law[48] - is not only realisation and ascertainment of what legal practitioners do, but judgement, evaluation, whether what they do - in particular, what the legislator deliberates and what judges decide - is right or wrong, correct or incorrect, with respect to valid law, or positive constitutional law. Against the hermeneutics, constitutional science can criticise the law with

[47] I reject the hermeneutic thesis of G. ZACCARIA, *Comprensione del diritto, e non sul diritto*, 1 Riv. fil. dir. 125-6 (2015), which, however, preordained as it is to avoid the abstractionism of those who apply general conceptions from the outside to a specific field of human experience, pertains to general theory and not to historically and positively deliberated knowledge of the law.

[48] And it becomes the politics of law if criticism enters the space of legal indifference under positive law.

respect to the constitutional parameter and the solution of the concrete case, whereas in hermeneutic environments an external control on the correctness of interpretation is unthinkable, given that just law is its interpretation and application, the correspondence between the Ought of the rule and the Is of decided case.

It is not a valid argument against cognitive science of positive law the realistic observation that, when describing, an evaluation of the description is unavoidable and, therefore, describing how the law is always implies prescribing how the law should be, constructing it. It may be that the descriptive/prescriptive separation does not factually hold and that the theorist who knows law always formulates an interpretive theory, in the sense of normative[49]. But that fact says nothing about the tension to what ought to be.

Combining general theory and positive constitutional law, the methodological conclusion is as follows: we know law as a qualified fact, as *forma rei*, as matter and idea, as body and mind, as fact and value, as something that 'counts as' and we know it as positive, deliberated law of a representative and popular government. Law opens and leaves self-referentiality without flowing back into transcendence; at the same time, being opened on the side of immanence, of human nature and social facts, it emerges from the alternative between realism and normativism in solving the problems of constitutional law. That alternative pertains to the concepts of the general theory of law. If the Written Constitution as positive and enforced law bases its validity on a form/norm, that alternative is dissolved. But that is not a neurotic form, a nihilistic power, unrelated to matter and to the people, in flesh and blood, who have deliberated and accepted it: it is, indeed, a form of natural normativity.

6. The social ontology of the Written Constitution

The relation between life and norm gets more precise in the constitutional *document*, in the *writing* of Constitution[50]. It is word made flesh, in a certain sense.

[49] In this regard, see V. VILLA, *La metagiurisprudenza analitica e la dicotomia descrittivo/prescrittivo*, in AA.VV., *Studi in memoria di Giovanni Tarello* (1990), 617 ff.

[50] In defence of the *written Constitution* against the *unwritten Constitution*, of *constitutional textualism* against the *supplemental doctrine* and against

It is the written fixation of Constitution that leads to consider it as a law[51], in the specific sense of an act intentionally and deliberately posited by a legislative authority against the tradition and conservation, which is orality. The written Constitution is intentional, not 'evolved' or revealed. It is not law of nature, because it does not follow the 'nature of things': it does not arrange what a thing already is, what is realised and accomplished, but deliberately makes the thing subsist. It is Ought, destination, prescription and not Is, execution, realisation. It is law before being observed: indeed, it *is* law because it ought to be it. And the «written record of law» is necessary precisely «where, following a sudden change in power relations, there is no secure tradition and the articulation of power advocated by the legislator is called into question»[52] .

Surely, the humanist studies on the ancient world, notably Hebrew and Greek, have shown that the writing of law in its origin is conservative[53]. It is material support physically unaltered. But those same studies have proven how the written law overcame the ideology of immutability that it bore in-written and took the practical direction of innovation. They have revealed that writing is the cause (or the concomitant cause) of the conscious change of laws and that, in itself, the gesture of writing always evokes a crisis, a movement in progress; therefore, something new, with respect to what exists, to what is not written: otherwise, there would be no need for the 'making' of writing. What is more, writing is separate and distanced from the living experience, it is de-contextualised in the precise sense of being less immersed in the existential flux than the spoken word, which is present and immediate. But this distancing allows the written form to make logic, conceptualise, objectivise and order reality. And precisely because it is autonomous with respect to what exists, writing allows reality to change.

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compromising attempts to dissolve the former in the latter, T.C. GREY, *The Constitution as Scripture*, 37/1 *Stan. L. Rev.*, 1 ff. (1984).

[51] This is proven by the fact that, in constitutionalist doctrine, the criticism of the 'reduction' of the Constitution to law is at one with the devaluation of the writing of the text placed.

[52] H. HELLER, *Dottrina dello Stato* (1988), 415.

[53] G. CAMASSA, *Scrittura e mutamento delle leggi nel mondo antico. Dal Vicino Oriente alla Grecia di età arcaica e classica* (2011), *passim*.

Coherently, after the Revolutions of the 18th century, the 'making' of a law or Constitution, the act of writing a document that is law, has been the properly revolutionary act of a political community that, in representative form, freely decides its own destiny according to a conscious project. The written deliberation of a Constitution by the people gathered in assembly is, therefore, construction, normativity, abstraction, performativity and change; not immobility, recognition, nature, tradition, ascertainment, concreteness, repetition and preservation. The sequence that sums it all up is as follows: the established law, deliberated by the people who constitute a given political community, is writing and writing is artefact and change. It lies on the side of what ought to be.

But since there is no Ought without Is, it does not logically imply a devaluation of life, experience, and application, and, therefore, the sclerosis of the written Constitution. With a bit of approximation: if writing is reflexive and distancing, if it is not fixity, the Constitution will not only be the written one but, precisely because it is written, also the living Constitution, because/provided it is included in the written one. The life of the Constitution is precisely its writing. Unless the 'natural' purpose of *written Constitution*, and, with it, of the origin is to prevent change and fix its contents at the time of the Beginning, according to Justice Scalia's argument[54], the juridicity of the written constitutional document does not exclude *per se* that of the living, 'lived', Constitution.

It does not, however, prescribe the obliteration of the constitutional *charter* in the name of life and experience, or of the pretext, extra-text, and context. Paper, precisely because it is written, engraved, is integrated with its support, with the material entity, with the document that bears it and that comes before what is said about it, before the practices and interpretations. Paper is more fragile, more precarious, than stone or the skin of parchment, which could be engraved, erased and rewritten, but still has its own hardness, its own consistency.

This implies that the living Constitution, compatible with the written one and that recognises its vigour and validity, is the one that stays and must stay linked, intertwined, with the text[55]. Were

[54] According to the *new textualism* of A. SCALIA, *Common law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in ID., A *Matter of Interpretation. Federal Courts and the Law* (1997), 25.

[55] L. PALADIN, *Le fonti del diritto italiano* (1986), 143, justifies the validity of the

this not the case, it would lead to the prevalence of Is over Ought, of efficacy over validity. Borrowing from structuralist semiotics, albeit far from the neurobiological conditioning of language, one could say, with Roland Barthes, that textuality, the «pleasure of the text», holds its own *reality*.

Here is, then, the *writing* of the Constitution as an argument in favour of the letter and not of the spirit, evangelically and naturalistically the word that became flesh, the written thing and the visible text as a sign, not of the signified thought, of the provision and not of the norm. But the ontology of the written document, with the solidity of the inscription, of the material trace, is, more properly, a form of ontology of social facts[56] than a materialistic ontology; or, put differently, its materiality is of the order of the institution, it is institutional. Document derives from *doceo*, meaning that what it shows or represents is a fact. And a document is properly a 'thing' and not an 'object' because things do not exhaust themselves in the objective and materialistic dimension of objectivity: they are physical objects, connotated by their relationship with a subject and by irreducible properties to those of natural objects, such as amendability; but above all they necessarily presuppose conceptual schemes, because social objects exist only to the extent that some people think they do[57]. And, contrary to the distinction between sensibility and thought, intuitions and concepts, the real thing, which in the otherness of its datitude stands in front of us, 'against' us, only exists in the world of humans, who let it 'be' as such and, encountering it, experience

norms of only the living Constitution in solidarity with (and not separated from) the written Constitution, since «physiologically understood, the interpretive and applicative activity, in its very varied forms, cannot generate a Constitution squared, opposed and superimposed on the written Constitution».

[56] According to the theoretical proposal, indebted to Searle, of M. FERRARIS, *Documentalità. Perché è necessario lasciar tracce* (2010), *passim* and ID., *Manifesto del nuovo realismo* (2014), *passim*, whose enemies are numerous and well-equipped: Platonism, Kantian transcendentalism, Hegelian idealism, postmodern constructivist philosophies and hermeneutic scepticism.

[57] Shares the linguistic distinction drawn by Ferraris F. GALGANO, *Le insidie del linguaggio giuridico. Saggio sulle metafore nel diritto* (2010), 17, footnote 21. He shares it in substance, even though he discusses material, physical objects as things independent of our beliefs and "non-material things", "social things endowed with meaning", which - like language and law - have a material substratum but exist by virtue of shared beliefs, readings, and the meanings of material signs that are, therefore, other than matter, M. JORI, *Esistenze. Appunti di Metafisica giuridica* (2022), 38 ff.

themselves, as subjects[58]. Thus, things are social facts and, when referred to law, institutional facts. At the same time, documentality, or disposition as a thing, shuns hermeneutics, the Manichaeism of spirit, the collapse of ontology, of the sphere of being, of reality, onto epistemology, the sphere of knowing. The truthfulness of the thing, its dose of selfhood, is, in fact, a powerful antidote against the constitutiveness of the subject. In short, in the theory of social ontology, considering the disposition to be applied as a thing refers to a weak or moderate textualism, which relates interpretation to a text, an inscription, or to a letter, but opens the partiality of interpretation[59] without slipping into the sceptical drift of the spirit, of the living law.

«The life of things»[60], however, has the theoretical force to ground and justify a more decided ontology of the constitutional document. Surely this is not given in the separation of object and subject, neither as a mere presence nor as a pure symbol, because social and natural relations are interwoven in it. Things do not exist in nature but belong to the world of value. But the meanings that things enjoy, their surpluses of sense, «do not form an improper and extrinsic addition»[61]. In the language of the intentionality of the thing, there are no subjects that are «detached from the world» and added «a posteriori to the object»[62]. Things, precisely because they are not objects, are neither manipulable nor dominatable nor can they be instrumentalised by subjects who are such in relation only to objects but not to things. Rather, the thing «compels thought to inquire in a certain direction»[63], refers to contents that unfold and 'emerge' from the thing, which indicates how to make it speak for itself. It is the self-movement, the automatic development, of the thing, in which one must 'get lost' to express its essence, which can be summed up in the conclusion that «in grasping the thing, in

[58] On the question of the thing, in the sense of the compound word *Gegen-stand*, in Heidegger's critique of Kant, V. VITIELLO, *Immanuel Kant. L'architetto della Neuzeit. Dall'abisso della ragione il fondamento della morale e della religione* (2021), 360 ff.

[59] M. FERRARIS, *Documentalità,* cit. at 56, 236 ff.

[60] As reconstructed in the history of philosophy by R. BODEI, *La vita delle co*se (2014).

[61] *Ibid*, 13.

[62] *Ibid,* 37.

[63] *Ibid*, 15.

going beyond the mute object, thought lends voice to the «substance», to what it feeds on in understanding»[64].

In the theory of the interpretation of the Constitution/law, the ontological, 'concrete' objectivity of documentality serves as a theoretical bridge and an ideal model against the arbitrary subjectivity deprived of constraints of dependence on reality, on the thing. Santi Romano wrote that (written) law «is matter, not soul». The law is not its interpretation; the book, with Jabès, is not its commentary. The provision, the thing, the writing, do not collapse on the norm, the thought/idea, the voice. The written thing privileges the ontology of a text against the epistemology of a subject. Against De Maistre, what is essential is what is written. Just as, realistically, epistemology derives from ontology because there can be no knowledge without being, so the interpretation and application of the law comes after - logically and chronologically - the provision of law, the production of the thing, of the written sign that grounds and mortgages the norm, the thought, after the deliberation of what *matters as* a legislative fact. Returning to natural ontology, the mind is distinct from the brain, but first it is body, its biological substratum. And this theory of mind in utterance interpretation is not materialist or physicalist reductionism, because the thing is thought matter, therefore, there is interaction and hybridization between brain and mind. It is not ontological dualism, because there is no text and, detached, its meaning is signified as if it was something else[65]. The signifier, the thing, the fact, determines its own meaning, the thought, the norm, because it carries it within itself, it expresses it, it brings it out. The reality of law is the provision, which is constitutive of thought. Meaning is not a result created by the interpreter but is already contained in the objectified beginning of the text, it is - going back to the philosophy of mind - an 'emergent property' of it. It is not impressed with a theological movement, from above to below, but, on the contrary, it ascends from things. In naturalistic-evolutionary language, it is a form of 'emergentism'. In legal language, the provision is always already the norm.

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[64] *Ibid*, 17.

[65] Against ontological dualism between provision and norm, legislative enunciation and jurisprudential or sapiential enunciation, see M. LUCIANI, *Interpretazione conforme a Costituzione*, IX Enc. dir. 413 (2016).