Malebolge

From the Sense of Justice to Juridical Feeling

Arianna Alpini*

Abstract

During the pandemic the moral demands of human beings have been disappointed by the law because the emergency has imposed many restrictions on rights, especially on freedom of assembly and association to the point of preventing assistance to family members in hospital and during funeral rites. This situation has reproposed the question regarding the separation between law and morality which recalls the relationships between feeling and law. Italian doctrine has studied the topic assuming the juridical relevance of feeling when it conforms to social conscience. Considering some of the most important approaches on the relationships between feeling and law, this paper attempts to prove that the relevance of feelings is not based on social recognition but depends on its impact on experience. Feeling is a source of knowledge in concrete human life, and consequently, feelings are always relevant legal matters.

I. The Juridical Vocation of Awareness. 'Living Law' and Effectiveness

Many years ago, the Italian philosopher Giorgio del Vecchio wrote an essay entitled 'Il sentimento giuridico', 'Juridical Feeling', which was published in 1902.[1] Basing his theory on Aristotelian philosophy, he analyses what distinguishes human beings from animals, namely the moral sense of justice such as awareness data.[2] In reality, the law can be considered historically only insofar as the awareness has a juridical vocation. The Author underlines that Roman jurists consider the sense of justice a fundamental principle of natural law. The foundation of this principle, on the one hand, was identified in 'pure reason', on the other, it was a requirement of 'will'. However, the intuition of justice was achieved through accumulated experience which in the Author's view derives from the empirical historical conditions. Indeed, law and human personality are mutually dependent as are their empirical conditions of development.

* Associate Professor of Private Law, University of Macerata.

[1] G. Del Vecchio, *Il sentimento giuridico* (Torino: Fratelli Bocca Editori, 1902), 3-4.

[2] G. Di Martino ed, *Ristretto del "De origine juris civilis" di Gian Vincenzo Gravina* (Reggio Calabria: La Città del Sole, 2006), passim. See A. Smith, *The Theory of moral sentiments* (1759), in E. Lecaldano ed, translated by S. Di Pietro (Milano: BUR, 2019), passim. It is interesting to note that Adam Smith believes that what distinguishes the human being is the inclination to barter and exchange goods even non-economic. See also D. Hume, *Treatise of Human Nature* (London, 1739), in E. Mistretta, and E. Lecaldano eds, translated by A. Carlini (Bari: Universale Laterza, 1987), passim.

However, the idea of justice does not arise from these elements.[3]

The reflection on the juridical relevance of feeling is certainly connected to the study of human nature and social relations.[4] The early 20th century Legal Realists in the United States rebelled against the prevalent idea of law as a science, a concept steeped in the unrealistic notions of scientific objectivity that then prevailed.[5] The study of emotion in many disciplines was starved at the roots during that period, as was the recognition of emotion in law.[6]

A new concept assumed relevance for the first time in the sociological doctrine: the 'living law'.[7] According to this approach, the law takes shape within social reality assigning legal value to socially relevant facts or relationships. Norms are created by social recognition despite not being formally valid, since they are devoid of legally established sources. Against this backdrop, the regulatory effect was given by a series of facts about which the lawyers had to identify the relationship between cause and effect.

Whereas the doctrine on institutional effectiveness considers an institution valid when it is affirmed in society and its function is put into practice: its

[3] G. Del Vecchio, n 1 above.

[4] See, among many authors, W.T. Blackstone, 'Law and Morality: the Hart-Dworkin Debate and an Alternative' *Archiv für Rechts und Sozialphilosophie*, 77-95 (1979); H.L.A. Hart, *Diritto, morale e libertà*, translated by G. Gavazzi ed (Acireale: Bonanno, 1968), 97; J. Raz, 'The Problem about the Nature of Law' *University of Western Ontario Law Review*, 21, 217-218 (1983); D. Lyons, *Ethics and the Rule of Law* (Cambridge: Cambridge University Press, 1984), 37; H. Kelsen, *Law and Morality, Essays* in *Legal and Moral Philosophy,* in O. Weinberger ed (Dordrecht: Reidel, 1973), 83; J. Habermas, *Fatti e norme*, in L. Ceppa ed (Milano: Laterza, 1996), 136; R. Alexy, *Teoria dell'argomentazione giuridica*, in M. La Torre ed (Milano: Giuffrè, 1998), 170; F. Ferrara, *Trattato di diritto civile italiano* (Napoli: Edizioni Scientifiche Italiane, 1987), 26; N. Bobbio, *Essere e dover essere nella scienza giuridica*, in Id, *Studi per una teoria generale del diritto* (Torino: Giappichelli, 1970), 157-158; G. Tarello, 'Sulla teoria (generale) del diritto', in Id, *Cultura giuridica e politica del diritto* (Bologna: il Mulino, 1988), 391-399; F. Viola, 'La teoria della separazione tra diritto e morale', in Id, *Il diritto come pratica sociale* (Milano: Giuffrè, 1990), 71.

[5] T.A. Maroney, 'Law and Emotion: A Proposed Taxonomy of an Emerging Field' *Law and Human Behavior*, 30, 119-142 (2006); Id, 'A Field Evolves: Introduction to the Special Section on Law and Emotion' *Emotion Review*, 8, 1, 3-7 (2016); R. West, 'Law's Sentiments', in S.A. Bandes, J.L. Madeira, K. Temple and E.K. White eds, *Research Handbook on Law and Emotion* (Cheltenham: Edward Elgar Publishing, 2021) available at https://tinyurl.com/48f7dtce (last visited 30 June 2022). See A. Smith, *The Theory of Moral Sentiments* n 2 above; B.N. Cardozo, 'The Nature of the Judicial Process' *Michigan Law Review*, 20, 6, 688-690 (1921); O.W. Holmes, 'The Path of the Law' *Harvard Law Review*, 110, 5, 991-1009 (1997); R.A. Posner, *Utilitarianism, Economics, and Social Theory, The Economics of Justice* (Cambridge: Harvard University Press, 1981), 48-87. Posner's conception is buttressed by Holmes's classic depiction of the 'bad man' who cares for nothing but himself as the subject of law's authority, and central to its definition. See also R.A. Epstein, 'Unconscionability: A Critical Reappraisal' *Journal of Law and Economics*, 18, 2, 293-316 (1975).

[6] As US Supreme Court Justice Benjamin Cardozo wrote in *The Nature of the Judicial Process*, n 5 above: 'Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge'.

[7] E. Earlich, *I fondamenti della sociologia del diritto* (Milano: Giuffrè, 1976, A. Febbrajo ed), passim.

legitimacy derives from the effectiveness of its power.[8]

Both institutional effectiveness and sociological doctrine have been criticized by normativism and natural law. Institutional effectiveness is criticized because it refers exclusively to the institution and excludes the norms[9] whereas sociological doctrine reduces the fact to a natural phenomenon governed by the law of causality irrespective of the assessment of compliance with the legal system.[10]

A critical account of this comparison brings to the fore that the meaning of the legal rule is not derived from written provisions but results from the interpretation by the jurist in a given historical moment.[11] Accordingly, the understanding and application of the norms are never neutral or creative but depend on the meaning that flows from social conscience at a given time.[12] If the interpretation of a written provision is consolidated in the jurisprudence with the written text remaining the same, the meaning of the norm will be modified.[13]

In this regard, the norm is legal if accepted by society and applied by the judge. It follows that the 'effectiveness' becomes an essential requirement of legality.[14] The law changes continuously with social changes, so the content of the norm is not given by the letter of the written provision (text) but by the 'spirit' that drives the norm.[15] The concept of 'living law' seems different from the original approach. This 'living law' or 'effective law' flows from the concrete judicial application, which represents the criterion of social acceptance.[16]

[8] S. Romano, *L'ordinamento giuridico* (Firenze: Sansoni, 1977), 49.

[9] P. Piovani, 'Effettività (principio di)' *Enciclopedia del diritto* (Milano: Giuffrè, 1965), 14, 430; C.M. Bianca, 'Ex facto oritur ius' *Rivista di diritto civile*, I, 787, (1995).

[10] In this order of phenomena the legal norm as regulatory effect dependent on a judgment has no place: E. Ehrlich, n 7 above, 106. See H. Kelsen, *Lineamenti di dottrina pura del diritto* (Torino: Einaudi, 2nd ed, 2000), 5

[11] P. Calamandrei, 'Discorso sulla Costituzione agli studenti di Milano del 26 gennaio 1955', observed: 'the Constitutionis not a machine which, once set in motion, will keep moving on its own. The Constitution is a piece of paper, if I let it fall it does not move: in order to let it move one needs to add fuel every day; one needs to add commitment, spirit, desire to keep these promises, a sense of one's own responsibility', available at https://tinyurl.com/mr44kkcb (last visited 30 June 2022). See E. Betti, *Interpretazione della legge e degli atti giuridici (teoria generale e dogmatica*) (Milano: Giuffrè, 1949), 3.

[12] C.M. Bianca, 'Il principio di effettività come fondamento della norma di diritto positivo' *Estudios de Derecho Civil en honor al profesor Castan Tobeñas* (Pamplona: Edizioni Università di Navarra, 1969), II, 61; Id, *Ex facto oritur ius* n 9 above.

[13] On the juridical - not political - nature of the constitutional norm and its place within the theory of the sources of law, see P. Perlingieri, 'Constitutional Norms and Civil Law Relationships' *The Italian Law Journal*, 1, 17, (2017); P. Femia, 'La via normativa, Pietro Perlingieri e i valori costituzionali', in G. Alpa e F. Macario eds, *Diritto civile del Novecento: scuole, luoghi e giuristi* (Milano: Giuffré, 2019), 359.

[14] See recently G. Vettori, *Effettività fra legge e diritto* (Milano: Giuffè, 2021), passim.

[15] V. Frosini, *La lettera e lo spirito della legge* (Milano: Giuffrè, 1994), 3 and 137; L. Mortara, 'La lotta per l'uguaglianza (prolusione al corso di diritto costituzionale nell'anno accademico 1888-1889)' *Quaderni fiorentini*, 19, 145-160 (1990).

[16] 'Living law' consists in the 'orientation firmly consolidated in the jurisprudence', such that the norm, as interpreted by the Court of Legitimacy and the judges of merit, 'now lives in the system in such a deep-rooted way that it is difficult to envisage a change in the system without the intervention of

II. Social Conscience and the Legal System

According to the above considerations, the effective content of the norm depends on the feeling that enlivens the social conscience. Therefore, the living dimension of a norm takes into account the sense of society. Consequently, the feeling has been translated into a specific interest that the legal system deems worthy of protection and qualifies it as its aim.

However, from this point of view, the feeling is not a fact since the result does not have any juridical effects.[17] The feeling does not modify the juridical situations or the external reality, since it remains in our psyche. Whereas when the feeling is expressed because an individual externalizes it, the feeling turns into behaviour and the effect is related to a conduct, not to a sentiment.[18] Considering that human feelings satisfy the needs of every individual, doctrine believes human interest in feeling can be legally protected if it is associated with an interest worthy of protection.

The consciousness gives value to the phenomena of external reality by the emotional process of feeling, but this value is merely personal. The legal system does not consider the sentiment of love relevant because the feeling does not involve the law and the individual cannot be forced to love another.

To sum up, the emotional process has an impact on the content of the rules only if the individual feeling is a social one, thus the social conscience changes 'the effective dimension of positive law'.

From another perspective, emotion shapes law and law needs to get emotion right in order to function well. Likewise, law revolves around and sculpts emotional experience, both individual and collective. Feeling and especially love should acquire legal and political relevance to build a foundation for every legal instrument. This approach removes any separation between law and morality, consequently, the law becomes sensitive to feeling and love is subject to the law.[19]

Stefano Rodotà represented the problematic relationship between law and love. He points out that the right of love cannot be denied by legal arguments, otherwise freedom and dignity would be repudiated.[20] At the same time, the

the legislator or this Court', Corte costituzionale 21 November 1997 no 350 available at giurcost.org. See T. Ascarelli, 'Giurisprudenza costituzionale e teoria dell'interpretazione' *Rivista di Diritto Processuale*, 352 (1957). On the teaching of Ascarelli see C. Crea, 'What is to be done? Tullio Ascarelli on the Theory of Legal Interpretation' *The Italian Law Journal,* 1, 2, 18 (2015). See also G.B. Vico, *De uno universi iuris principio et fine uno* (Napoli, 1720), in P. Cristofolini ed, *Opere giuridiche* (Firenze, 1974), 283, who defines the Roman praetor of ancient times as '*viva legis XII Tabularum vox*'.

[17] C.M. Bianca, 'Il diritto del minore all'amore dei nonni' *Rivista di Diritto Civile*, II, 155-156 (2006).

[18] A. Falzea, 'Fatto di sentimento' in Id, *Voci di teoria generale del diritto* (Milano: Giuffrè, 1978), 556.

[19] For a reconnaissance of the topic, D. Shavell, 'Law versus Morality as Regulators of Conduct' *American Law and Economics Review*, 4, 2, 227- 257 (2002). See also H.L.A. Hart, 'Positivism and the Separation of Law and Morals' *Harvard Law Review*, 71, 4, 593-594 (1958).

[20] See P. Femia, 'Discriminazione (divieto di)', *Enciclopedia del Diritto, I tematici*, I, in G.

duty of love should correspond to the right of love, but this implication is unacceptable. In this regard, the court argues that even as the sentiment of love is missing in the couple, the spiritual element to coexistence is still possible.[21]

With reference to dilemma, it is necessary to consider the common elements and the differences between law and love. Both law and love are connected to human dimensions of social relationships and rationality. Nevertheless, there would seem to be a need for clarification about what is meant by rationality. Love is sentiment and sentiment appears to be very far from rational, but the distance can be shortened if we replace rationality with intellect or awareness.

Love and law, however, have many different characteristic features. Love is free and spontaneous and cannot be forbidden. It is private given that it is not relevant to society and is addressed to a specific individual without the need to use formal procedures. On the other hand, the law is public and general and since it is oriented towards society, it needs coercive power and formal procedures to be effective.

Accordingly, law and love are incompatible; they cannot be merged, otherwise, both law and love would have to change identity.

III. Love in the Public Sphere. Law and Emotions

These remarks are not sufficient to argue the incompatibility between law and love. The incompatibility depends, in fact, on the meaning we attribute to love and to law.

It is a common perception that law and love are opposites. Law is exemplified by rules, regulation, predictability and heteronomy while love by emotion, unpredictability, freedom and autonomy. However, these associations are the source of much misunderstanding about the role of law in society. In Bankowski's view, a better approach is to see law and love as interdependent, unable to function without each other.[22] Love prevents the law from becoming blind to individual needs and thus facilitates justice, and it also operates to keep society

D'Amico ed (Milano: Giuffrè, 2021), 8. The Author argues that 'the choice in love is not removed from the assessment of equality, because it is free (unquestionable); on the contrary: it is free (unquestionable), because here equality does not count'.

[21] S. Rodotà, 'Diritto d'amore' *Politica del diritto*, 3, 354 (2014).

[22] Z. Bańkowski, *Living Lawfully: Love in Law and Law in Love* (London: Kluwer Academic, 2001), passim. To illustrate how law and love should operate together, Bańkowski uses the analogy of marriage and love. Like law and love, marriage and love are often seen as opposites. Marriage is depicted as heteronomous, predictable routine while love is spontaneous, creative and autonomous: Bańkowski relies on Luhmann for this point. Luhmann claims that Love is spontaneous, in the present, uncoupled from external relations, contingent and a matter of fate, not interested in the future, not bound by duty or obligation, consumes everything, thematises everything. Marriage, on the other hand, is interested in the future or the eternal, as something that reduces spontaneity, calms passion, routinises love, stabilises love. See N. Luhmann, *Love As Passion: The Codification of Passion*, translated by J. Gaines and D.L. Jones (Redwood City: Stanford University Press, 1998).

beyond and above mere rule obedience. Love is the vehicle that fulfils needs and provides welfare and justice to individual circumstances. It is linked to an internal sense of what is right. What love achieves over the discourse of rights is an ability to 'feel' the conditions that motivate the law to act.[23]

In the same perspective, Simone Weil claims that love is a means by which human beings recognise the existence of each other as 'the organ of existence'.[24] The primary function of love is to give us a sense of the other as something to value.

Scholars argue that a better conception of love for Bankowski's argument is to consider friendship love, *philia*.[25] According to Aristotle, this is a type of friendship based on the love for goodness. In this kind of love, friends love each other for what they are, not for what they can get from each other, and only morally virtuous people can enter into this type of relationship. Friendship love goes beyond a relationship between two people, it is the model of society, and is linked to civic harmony, civic duty, morality and justice.

From this point of view, Blatterer considers that friendship is embedded in all of the values of liberal democracies such as freedom of association, autonomy, equality, trust, respect and justice, and he claims that friendship embodies the public norms and ideals we associate with politically, economically and socially mature societies.[26]

The connection of friendship with the political, with ideas of decency and justice moves friendship love into the public sphere. Friendship creates a feeling of what is right, and it can create a model of goodwill for others without any reference to religion, faith and belief.

The attempt to insert love and feelings into the public discourse represents the reaction to legal positivism. This is an example of contributing to an emotional discourse in contrast to modern positivism which continues to operate inside the paradigm that law and morality are and ought to be separate from one another. Critical jurisprudence, as part of the post-modern tradition, challenges meta-narratives and subverts the dominant paradigm, in so doing it makes room for alternative ways to understand law.[27]

However, the dominant view is that law in liberal legal regimes not only has

[23] Bańkowski makes a distinction between legality that includes love, and legalism which constitutes a blind obedience to rules: see Z. Bańkowski, 'Law, Love and Legality' *International Journal for the Semiotics of Law*, 14, 2, 199 (2001).

[24] L. De Maeyer, 'Love between Two Poems: The Imagination, Love and Literature in Simone Weil', in M. De Kesel and A.H. Poirters eds, *Mysticism and/as Love Theory* (Leuven: Peeters Publishers, 2021), 167-176.

[25] R. Grossi, 'Which Love in Law? Zenon Bankowski and the Meaning of love' *Law and Love* 34, 1, 2016 available at https://tinyurl.com/mpts3u8b (last visited 30 June 2022).

[26] H. Blatterer, *Everyday Friendships: Intimacy as Freedom in a Complex World* (Londra: Palgrave, 2014), passim. See S. Chiba, 'Hannah Arendt on Love and the Political: Love, Friendship and Citizenship' *The Review of Politics*, 57, 3, 522 (1995).

[27] See R. Grossi, 'Challenges for the Study of Law and Emotion' *Emotion Review*, 13, 636 (2016).

no need for moral sentiments, but that our liberal legalism creates us, or recreates us, as basically unsentimental subjects: 'un-empathic regarding the inner lives of others and unsympathetic to their suffering'.[28]

In this respect Robin West wonders:[29]

> 'what is the relation of law, in liberal legal societies such as our own, to what Adam Smith[30] called our 'moral sentiments', by which he meant, our capacity for empathic knowledge of the subjective lives of others, and our sympathetic inclination to take on their subjective suffering as our own? Does our law, and the legal culture it fosters, depend foundationally upon the existence of those moral sentiments, or does it rest, rather, on nothing but our self-regarding instincts, intuitions, and ambitions? And relatedly, does law nullify or dullen moral sentiments, or does it protect or nurture them?'

The Author claims that law protecting individuals against the potential violence of others is as much a definitional aspect of law in liberal states as law which coerces. When law protects human beings, it creates space for the development of moral sentiments in a number of ways. Consequently, there is more room not only for equality but also for a fully moral human life, enriched by passion, attachment, intimacy, and community and 'it should not be surprising, if this is right, that the protection of law is a condition of moral sentiments'.[31]

IV. The Fact of Feeling

Feeling was taken into account in the General Theory of Law.[32]

[28] R. West, n 5 above.

[29] A. Smith, n 2 above; P. Gabel, 'A Critique of Rights: The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves' *Texas Law Review*, 62, 8, 1563-1601 (1984); P. Gabel, *The Desire for Mutual Recognition: Social Movements and the Dissolution of the False Self* (London: Routledge, 2018), passim; R.A. Posner, n 5 above; O. W. Holmes, n 5 above; R. Epstein, n 5 above; R.E. Barnett, 'Contract Is Not Promise; Contract is Consent' *Georgetown Law Faculty Publications and Other Works*, 615 (2011), available at https://tinyurl.com/2ddnmmsw (last visited 30 June 2022).

[30] A. Smith, n 2 above.

[31] R. West, n 5 above.

[32] According to Adolf Merkel, 'Elemente der allgemeinen Rechtslehre', in Id, *Gesammelte Abhandlungen aus dem Gebiet der allgemeinen Rechtslehre und des Strafrechts*, (Strasburgo: Erste Hälfte, 1899), Legal Theory of Law (*allgemeine Rechtslehre*) aims to determine and systemize the fundamental legal concepts through the general principles analysis related to different branches in the legal system. This is considered the juridical cultural result of the post-Kantian jurisprudence, Pandectism and Analytical jurisprudence of John Austin: G. Fassò, *Storia della filosofia del diritto*, *Ottocento e Novecento*, C. Faralli ed, (Roma-Bari: Laterza, 2005), passim. Kelsen's theory, 'Pure Theory of Law', is premised upon the basic assumption that the law resides in legal rules which are completely autonomous from morality and others human fields. If in the continental European tradition juridical positivism is characterized by rationalism and formalism, in the Anlo-American tradition it is based on the articulation of the 'is-ought problem' posed by Davide Hume: see P.

Following the traditional subdivision, the Italian jurist Angelo Falzea inserted the facts of feeling within the facts of conscience which also include the facts of knowledge and the facts of will.[33] The Author refers to the general notion of interest that leads to a general category of value and to the relationship between right and value. From this point of view, feeling is the organ through which individual consciousness relates to values. However, the legal principle is that a feeling, even when it detects as a matter of individual consciousness, it does so to the extent that it is connected to a non-individual fact, but to a way of social feeling and to an emotional atmosphere socially diffused in more or less large environments by an entire community.

Social values emerge from certain emotional atmospheres and between the socially lived value and the individual feeling there is not only an immediate and internal relationship but also an external one. In the latter case, feeling becomes the theme of an evaluation that is carried out from the outside beyond the individuals who are experiencing the existing emotional atmosphere and from the visual angle of the values of a different group. The evaluation contained in the feelings of certain people becomes the subject of another evaluation contained in the way of feeling, or in any case, in the system of values of other people or communities. Therefore, by virtue of this 'second-degree assessment', every feeling is likely to be evaluated in relation to that system of values which is a legal order.

Falzea's considerations highlight the necessity of the law to objectify feeling through a process of abstraction that sets aside the concreteness of the assessment. Feeling belongs to the individual but behaviour is evaluated according to the common feeling.[34] Law is not only what is shared but is also promotional,[35] trying to change the existing legal order. The interpreter must be able to grasp what changes.

In this regard, the analyses developed by Adam Smith on human conduct

Sirena, *Introduction to Private Law* (2nd ed, Bologna: il Mulino, 2020), 138. The Theory of Law has found new elements of development in analytical philosophy which affected jurists, in particular Norberto Bobbio who brought to light the insufficiency of a merely structural theory of law. According to the Author, the theory of law, unlike the philosophy of law, draws from the conceptual problems that arise within the juridical experience: C. Faralli ed, *Argomenti di teoria del diritto* (Torino: Giappichelli, 2016), 12-13. See, also, P. Perlingieri, 'Scuole civilistiche e dibattito ideologico: introduzione allo studio del diritto privato in Italia' *Rivista del diritto civile*, I, 405-406 (1978); on the relationship between law and ideology for methodological purposes: F. Dal Pozzo, *L'ideologia come modo di conoscenza e di relazione* (Milano: Giuffré, 1977), 274-275.

[33] A. Falzea, n 18 above, 547.

[34] 'The good sense was there but it was hidden for fear of common sense': on the differences between 'common sense' and 'good sense', see A. Manzoni, *I promessi sposi*, in V. Jacomuzzi and A. Dughera eds (Torino: Petrini, 2010); F. Festi, *Buon senso*, in *Le parole del diritto*, Scritti in onore di Carlo Castronovo (Napoli: Jovene Editore, 2018), 139. See, G. Perlingieri, *Profili applicativi della ragionevolezza nel diritto civile* (Napoli: Edizioni Scientifiche Italiane, 2015), 20.

[35] See N. Bobbio, 'Sulla funzione promozionale del diritto' *Rivista trimestrale di diritto processuale civile*, 1313 (1969); S. Cotta, *Diritto, persona, mondo umano* (Torino: Giappichelli, 1989), 187.

and in particular on the role of the imagination are paradigmatic. It is not the task of the imagination to give an account of the structure of our habitual experiences, but rather to develop, in a more creative way, to the point of finding explanations to reconstitute a new order.[36]

In Smith's view the imagination is not the ground of 'common sense' but is the source of the great innovations of philosophy and astronomy. The 'imperative spectator' is none other than human consciousness: Smith attaches importance to the 'second degree assessment' operating within rather than outside of the individual. He does not identify motivation for moral conduct with vanity for public success but distinguishes the pursuit of approval with the pursuit of being worthy of approval.[37]

The focus moves to the potential of the human being and therefore to the potential of the legal order.

V. Knowledge and Experience

Observation of reality shows that it is very difficult and hazardous to identify social consciousness. In this regard Giovanni Perlingieri[38] argues that

> 'the idea that, for purposes of interpreting and applying the law, a 'sufficiently large consensus' is needed recalls totalitarian regimes and the degeneration of 'social consensus'. Fascism and communism built their strength on common sense. To rely on social conscience means introducing evaluation elements of uncertainty and arbitrariness. This is fundamentally because of two factors. First, it is not always easy to ascertain which is, at a particular moment in time, the orientation of a given community. Second, it remains an open question to ascertain whether or not the adjudicator has to rely on prevalent interpretation or on that of a part of the community which may be considered as more observant and circumspect. Furthermore, in a multi-cultural society, it is naïve to pretend to identify, with certainty, social conscience'.

In reality, it observes, on the one hand, homologation and, on the other, disorientation. It is more correct to refer to many individual consciousnesses than to consider social consciousness. The content of the norms derives from legal interpretation not dependant on social recognition, but on the reference of values belonging to culture expressed in the Italian legal system by the fundamental principles of the Constitution. However, these principles represent

[36] A. Smith, n 2 above, 19.

[37] ibid 45.

[38] G. Perlingieri, 'Reasonableness and Balancing in Recent Interpretation by the Italian Constitutional Court' *The Italian Law Journal*, 4, 2, 441 (2018) and Id, 'Sul criterio di ragionevolezza' *Annali SISDiC*, 1, (2017), 25.

not only the yardstick of comparison for every individual expression, but also for the interpretation of the 'effective positive law', that is to say, norms with direct effect also in civil law relationships.[39] In this process, it is not social consciousness that works but rather the consciousness of an interpreter.[40]

The doctrine assumes that feeling is consciousness of value and knowledge is consciousness of truth; consequently, feeling and knowledge are two different perspectives.[41] Nevertheless, without feeling it is impossible to experience the moral values. The impulse to the continuous evolution of values is given by feelings that can change the jurisprudence. The sentiment of fatherly love modified the value of dignified life through moral principles despite the lack of a specific law.[42]

Through feeling, human beings can experience life; therefore, feeling is inserted in the cognitive process aimed at interpreting the needs and interests of the individual and to promoting new applications of constitutional principles, able to satisfy them in the most comprehensive way.

According to Giuseppe Capograssi the science of law, which falls into the concrete experience of human reality, is a process of individualization. The science of law embodies the '*individuationis* principle' and from this point of view, the legal interpretation achieves a specific meaning:

> 'to discover the whole in the single position, to grasp the single position as a determination of the whole, of unity in the face of particularity and the fragmentation of the single commands'.[43]

VI. The Contemporary Sense of Justice

Love and sentiments are connected both to justice and to knowledge. The sources of knowledge are perceptions and thinking. Human beings are not

[39] On this issue, see the effective in-depth analysis by P. Perlingieri, 'Constitutional Norms and Civil Law Relationships' *Italian Law Journal*, 1, 17 (2015).

[40] A. Alpini, 'The "Equitable Dimension" of Constitutional Legality' *Annali SISDiC*, 3, 8 (2019): 'The primacy of values allows the rigid separation between ethics and law to be removed. Indeed, it cannot be denied that moral principles are incorporated and live within the law, even if they are a part thereof, by way of interpretation and application. This implies the adoption of forms of reasoning that require not only intelligence, but also sentiment: the humanity of the legal order, which includes the enigmatic and complex dimension of the existence of the human being, attracts the attention of the lawyer, by urging his sensibility'.

[41] A. Falzea, n 18 above, 552.

[42] See, for instance, Corte di Cassazione 16 October 2007 no 21748, *Il Civilista*, 10, 23 (2010). In keeping with the personalistic principle that animates our Constitution, 'which sees in the human person an ethical value in itself, prohibits any instrumentalization of the same for no purpose and conceives solidarity and social intervention according to the person and his/her development and not vice versa and looks at the human person's limit in reference to the individual at any time of his/her life and in the entirety of his/her person, in consideration of a bundle of ethical, religious, cultural and philosophical convictions that orient his/her volitional determinations'.

[43] G. Capograssi, *Il problema della scienza del diritto* (Milano: Giuffrè, 1962), 15, 173-174; Id, *La vita etica*, in F. Mercadante ed (Milano: Bompiani, 2008), passim.

satisfied merely to refer the perceptions to the concept using thinking, but they relate them also to their particular subjectivity. The expression of this individual relationship is feeling.[44]

Feelings usually include love, but it cannot be regarded in the same way as the other sentiments. It is linked to the will and to making things good for other people. Feelings and love move acts and make decisions, but sentiments could also be negative, able to hinder the free development of the human personality.

Feeling sets law in motion focusing on one side or on another and love functions to find the balance between the opposite sentiments. Consequently, sentiments and love affect the interpretation process of facts and norms. Justice can be reviewed as a human process of knowledge of which the judgement is a synthesis, setting a balance point between opposite sentiments.[45] Law translates feelings into interests, but freedom, equality and solidarity, that express moral values, are in effect feelings and legal norms simultaneously.[46] The separation between moral and law appears unlikely.[47] The sense of justice moves from perceptions to concepts and evolves through the experience. Feeling is the means whereby concepts gain concrete life.[48] For these reasons, it may be specified that the sense of justice does not belong only to 'will' or only to 'reason', because will and reason are not separated in the human cognitive process.

> 'Were we merely thinking and perceiving human beings, our whole life would flow along in monotonous indifference. Were we simply able to know ourselves as selves, we should be indifferent to ourselves. It is only because we experience self-feeling with self-knowledge, and pleasure and pain with the perception of objects, that we live as individual beings whose existence is not limited to the conceptual relations between us and the rest of the world, but who have besides this a particular value for ourselves'.[49]

Contemporary justice is primarily an existential and anthropological question closely linked with human dignity and freedom.[50]

[44] R. Steiner, *Die Philosophie der Freiheit*, translated by I. Bavastro (Milano: Editrice Antroposofica, 2007), 64.

[45] P. Calamandrei, *Processo e democrazia. Le conferenze messicane di Piero Calamandrei*, in E. Bindi, T. Groppi, G. Milani and A. Pisaneschi eds (Pisa: Pacini Giuridica, 2019), especially 58, 61-62.

[46] P. Perlingieri, 'Legal principles and Values' *Italian Law Journal*, 3, 1, 125 (2017).

[47] J. Waldron, 'Judges as moral reasoners' *International Journal of Constitutional Law*, 7, 1, 2-24 (2009), and Id, 'Refining the question about judges' moral capacity' *International Journal of Constitutional Law*, 7, 1, 69-82 (2009); F. Viola, 'Quando il diritto diventa morale' *Ethics and Politics*, 22, 3, 437-444 (2018).

[48] R. Steiner, n 44 above.

[49] ibid, compare D. Hume, n 2 above, who famously held that reason alone can never be a motive to any action of the will, an again that reason alone can never produce any action, or give rise to volition.

[50] S. Rodotà, La rivoluzione della dignità (Napoli: Laterza, 2013), passim; P. Perlingieri, La personalità umana nell'ordinamento giuridico (Napoli: Edizioni Scientifiche Italiane, 1972), passim; Id, La persona e i suoi diritti. Problemi del diritto civile (Napoli: Edizioni Scientifiche Italiane, 2005),

Luigi Mengoni argues that the labour law represented the definitive anthropology of modern law, whereas Art 1 of the Italian Constitution founds the legal system on labour. According to this approach, work gives dignity to each individual.[51] However, the human being is worthy from birth, and he/she is worthy even if limited in working skills or differently abled, because dignity is linked to the value of the human being in itself. In this regard, Pietro Perlingieri considers that a human being and dignity cannot be separated.[52]

Although dignity is the most important value of our system, its significance is debated because of the ambiguity.[53]

When God created the individual, He said:

> 'nec certam sedem, nec propriam faciem, quae munera tute optaveris, ea, pro voto, pro tua sententia, habeas et possideas.'[54]

With these words, Giovanni Pico della Mirandola depicted the individual in the *De hominis dignitate* as a free entity and the concept of dignity is given by freedom. The human capacity to orient and drive the will toward a purpose, expresses human evolution and the need to motivate relationships between individuals and between individuals and things. Motivation is necessary for human beings because only what is evident to the consciousness can be recognised by the individual.

From this perspective there emerges a new link between dignity and labour.

VII. Paradigm of Labour in Human Evolution

Originally, the social dimension was linked to a spiritual experience that was based on obedience. This element was spontaneous and founded on devotion and veneration. Obedience to the divine will and supernatural presence in nature constituted the foundation of social life. Nature regulated human behaviour; individuals belonged to a social group through blood relations and the body belonged to the gods through the bloodline. In this way, humans

passim; P. Grossi, Il diritto civile in Italia tra moderno e postmoderno dal monismo legalistico al pluralismo giuridico (Milano: Giuffrè, 2021), 88-99.

[51] L. Mengoni, 'Fondata sul lavoro', in M. Napoli ed, *Costituzione, lavoro, pluralismo sociale* (Milano: Vita e pensiero, 1998), passim; see T. Groppi, 'Fondata sul lavoro. Origini, significato, attualità della scelta dei costituenti' *Rivista Trimestrale di Diritto Pubblico*, 3, 665-686 (2012); P. Grossi, *Il diritto civile in Italia fra moderno e postmoderno* (Milano: Giuffré Francis Lefebvre, 2021), 99.

[52] P. Perlingieri, n 46 above, 125; Id, 'La "grande dicotomia" diritto positivo-diritto naturale', in Id, *L'ordinamento vigente e i suoi valori* (Napoli: Edizioni Scientifiche Italiane, 2006), 553-562, and Id, 'Interpretazione e legalità', in P. Sirena ed, *Oltre il «positivismo giuridico» in onore di Angelo Falzea* (Napoli: Edizioni Scientifiche Italiane, 2012), 87-94.

[53] C. Mazzoni, *Quale dignità. Il lungo viaggio di una idea* (Verona: Olschki, 2019), passim.

[54] G. Pico della Mirandola, *De Hominis dignitate*, in E. Garin ed (Pisa: Edizioni della Normale, 2012), 5.

entered the supernatural order, but individual being did not have an important role. In this period, the concept of individual will, which is the foundation of labour, had not yet been developed. Gradually natural instinct became extinct and the relationship with the divinity took place through the mediation of the intellect. The form with which a human being enters into relation with the divinity is the moral law that derives from God.

The authority can be thought of in the same way as the law since a human being expresses his individuality through the intellect and the producing of utensils. The principle of authority organized society according to a hierarchical order where the role of the individual depended on his/her relationship with law. The Divine was no longer to manifest itself in nature but in the individual being through the law, so the sphere of law took effect in society. The evolution of consciousness corresponds to a departure from nature via the evolution of the utensil. In fact, making utensils projects the individual will towards a goal (*telos*) which can be considered the core definition of labour. If we look at the Bible, we notice that law is an emanation of spiritual experience. Hellenic-Roman culture switches from divine law to human law: human beings become *cives* and organize society through the law.[55] The legal sphere represents relationships both between individuals and with things, however individual evolution is also represented by the full development of utensils and by military organization. Human beings are revealed in terms of individuality in the political sphere under the law.

In the modern era, we observe the passage from the Iron Age to the age of the machine. Working relationships change completely, the individual is emancipated from the religious and political sphere and the foundation of transcendent experience is no longer the principle of obedience but the principle of freedom. While the law is dominated by the conflict between principles of authority and freedom, the economy moves away from law and begins to prevail. Labour is increasingly assimilated to goods and considered in terms of performance, not in relation to human motivation. The market power vigorously proposes a 'mercantile axiology', according to which there is no distinction between goods and values, as everything has a price. Technical development and capitalism put morality into the 'free' cultural life, which is now considered as disconnected from experience and separated from law. The

[55] J. Gordley, *The Jurists. A critical History* (Oxford: Oxford University Press, 2016), passim; R. Orestano, *Introduzione allo studio del diritto romano* (Bologna: il Mulino, 1987), passim; A. Padoa-Schioppa, *A history of law in Europe. From the Early Middle Ages to the Twentieth Century* (Cambridge: Cambridge University Press, 2017); H.P. Glenn, 'Tradition in Religion and Law, *Journal of Law and Religion* 25, 2, 503-504 (2009-2010); M. Marchesiello, 'Dignità umana e funzione antropologica del diritto nel pensiero di Stefano Rodotà (in margine a Vivere la democrazia)' *Politica del diritto*, 4, 741-766 (2018); F. Dei, 'Riconquistare Foucault. Il potere, la cultura e lo spazio dell'antropologia' *Etnografia e ricerca qualitativa*, 1, 98-110 (2021). See also M. Heidegger, *Kant e il problema della metafisica*, transleited by M.E. Reina (Bari: Laterza, 1981), 181-182; S. Cotta, n 35 above, 157.

consequence is that 'the impulses offered by morality have been replaced by those of the economy, and these are then transformed into law'.[56]

VIII. Law and a New Anthropological Question

The concepts that moved individuals and peoples are the natural history of morality. The principles which constitute the foundations of a legal order are concepts which have been defined by the will of the individual.

The sense of justice arises from feelings and comes from individual conscience through moral intuition. The feeling is the means whereby concepts gain concrete life. However, feelings move through the thought process. As soon as a person's conduct rises above the sphere of the satisfaction of purely animal desires, motives are always shaped by thoughts. Love, pity, and patriotism are motives of action which cannot be analysed away into cold concepts of the understanding. It is said that here the heart and the soul, hold sway but the heart and the soul create no motives but presuppose them.

> 'Pity enters my heart when the thought of a person who arouses pity has appeared in my consciousness. The way to the heart is through the head. Love is no exception. It depends on the thoughts we form of the loved one. And the more we idealize the loved one in our thoughts, the more blessed is our love. Here, too, thought is the father of feeling. It is said that love makes us blind to the failings of the loved one. But the opposite view can be taken, namely that it is precisely for the good points that love opens the eyes. Many pass by these good points without noticing them. One, however, perceives them, and just because he does, love awakens in his soul. What else has he done except perceive what hundreds have failed to see? Love is not theirs, because they lack the perception'.[57]

Against this background the fact of feeling would be reconsidered within the process of knowledge. If we let feelings express themselves in law, then we would have new legal concepts.[58] A jurist is called upon to know human beings and from this point of view law is a new anthropological question. The sense of justice is not a mere perception or fact without effect, but it is the impulse to research new links between concepts able to exploit the potential of the principles and the legal order.[59]

[56] A. Alpini, n 40 above, 80-81.

[57] R. Steiner, n 44 above.

[58] Accordingly, with Salvatore Pugliatti, legal certainty is not the result of mechanical repetition, but the result of trust in the virtue and knowledge of the interpreter committed to the right solution of the concrete case without prejudice and concessions.

[59] See Tribunale penale di Pisa 17 February 2022 and Giudice di Pace di Frosinone 29 July 2020 both available at www.altalex.com, which have criticized the government's practice of lockdown.

IX. Final Remarks

During the pandemic the moral demands of human beings have been disappointed by the law because the emergency has imposed many restrictions on rights, especially on the freedom of assembly and association to the point of preventing assistance to family members in hospital and during funeral rites.[60] Whereas the emergent situation seems to be incarnated in the 'new normality', the jurist feels the need to reflect again on the existential dimension of the human being and in so doing he turns to the history of human evolution.[61]

Human nature is characterized by a dual vocation: for justice and for exchanging goods.[62] Both these tendencies, developed over the centuries, are linked to the human will to act towards a purpose. Human evolution through the use of utensils demonstrates precisely this tendency by labour: the labour force lies in the motivation of the human being.[63]

The sense of justice, as commonly understood, corresponds to the cultural level acquired as a behavioural foundation of coexistence. The juridical feeling, on the other hand, is the perception felt and thought, the motivation of human action.

Consequently, juridical feeling represents a 'living impulse' of the sense of justice.[64]

In the face of the contemporary sense of justice, which presupposes the protection of the particular value of the human being, dignity, there is the

Tribunale amministrativo regionale Lazio-Roma decreto 2 February 2022 no 726 and Tribunale amministrativo regionale Lazio-Roma decreto 14 February 2022 no 919, both available at www.giustizia-amministrativa.it, which have challenged the mandatory vaccination. They have also doubted the legitimacy of the suspension from work and remuneration: on this topic, see especially, Consiglio di Giustizia amministrativa della Sicilia 22 March 2022 no 351 and Tribunale amministrativo regionale della Lombardia-Milano 14 February 2022 no 192, both available at www.altalex.com.

[60] See M. Stronati, 'Il mutuo soccorso tra storia e storiografia, ovvero ripensare il diritto di associazione' *Giornale di Storia costituzionale*, I, 285 (2020). On the change of direction in legal discourse see, also, M. Meccarelli et al, 'I diritti umani tra esigenze emancipatorie e logiche di dominio', in M. Meccarelli, P. Palchetti and C. Sotis eds, *Il lato oscuro dei Diritti umani. Esigenze emancipatorie e logiche di dominio nella tutela giuridica dell'individuo* (Madrid: Universidad Carlos III de Madrid, 2014), 9-10; L. Lacché, 'Il tempo e i tempi della Costituzione', in G. Brunelli and G. Cazzetta eds, *Dalla Costituzione "inattuata" alla Costituzione "inattuale"? Potere costituente e riforme costituzionali nell'Italia repubblicana,* Materiali dell'Incontro di studio, Ferrara 24-25 Gennaio 2013 (Milano: Giuffré, 2013), 381.

[61] A. Watson, 'Society and Legal change' (Edinburgh: Scottish Academic Press, 1977); L. Lacché, 'Sulla vocazione del giurista italiano. Scienza giuridica, canone eclettico e Italian style tra '800 e '900' *Rivista italiana per le scienze giuridiche*, 4, 233 (2015); P. Grossi, n 51 above, 61.

[62] A. Smith, n 2 above; R. Steiner, *I capisaldi dell'economia*, translated by I. Bavastro (Milano: Editrice Antroposofica, 1982), 26.

[63] T. Groppi, n 51 above. In this regard, see the reasoning of Tribunale amministrativo regionale Lazio-Roma decreto 2 February 2022 no 726, n 59 above.

[64] On the constant return of natural law see H. Welred, *Diritto naturale e giustizia materiale*, in G. De Stefano ed (Milano: Giuffrè, 1965), 383. However, here we intend to manifest the need for a serious anthropological reflection on law.

juridical feeling that, assigning the widest moral autonomy to the juridical vocation of human conscience calls for the right to guarantee the motivation of human action.[65]

Scholars would be well advised to follow Jemolo's invitation to rediscover the deep sense of law in order to orient themselves towards a feeling of good and evil.[66] In this regard, it would seem really beneficial for human evolution to follow the 'philosophy in law'[67] which emerges from the above considerations and which may be summarised by the following provocation: human dignity does not tolerate exceptions not even by the law.

[65] Today the personal reasons acquire legal relevance thanks to the activity of judges both in the context of the contract (see, for example, the 'concrete cause') and in the context of the communion as a criterion for the assignment of indivisible goods: see A. Alpini, 'La preferenza nell'assegnazione del bene indivisibile: il criterio dell'interesse prevalente. Il nuovo orientamento della Corte di cassazione sull'interpretazione dell'art. 720 c.c.' *Diritto delle Successioni e della Famiglia*, 2, 678-689 (2017).

[66] L. Lacché, n 60 above, 262. The Author highlights the vocation of the Italian jurist to mediate the historical approach with the comparative one.

[67] P. Perlingieri, Il diritto civile nella legalità costituzionale secondo il sistema italo-europeo delle fonti, I, Metodi e tecniche (Napoli: Edizioni Scientifiche Italiane, 2020), 9.