Essays

Rethinking the Juridical System. Systematic Approach, Systemic Approach and Interpretation of Law

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Abstract

The juridical system is not the essence of the things, it is an artificial organisation of elements, following a certain idea. It is conceived to settle conflicts, in order to find the solution that is more consistent with that original idea. In the juridical perspective, the logical coherency of the system becomes the necessary guarantee for non-arbitrary decisions. The present work is aimed at verifying this thesis, through the diachronic analysis of some juridical system models, also taking into account the systemic approach.

I. Thesis

'The idea of an abstract structure, coherently based at the root of a history or of a development, cannot be detached from the idea of the model. This idea is more related to the level of invention than to the level of discovery. Therefore, the word "system" embodies ideals of knowledge, and allows to formulate a complex of hypothesis about the real. At the same time it denotes the stake in the most disparate conflicts – both scientific and political conflicts – concerning the intellectual and practical control of the real'.[1]

The system is not the essence of the thing, but is the artificial organization of some elements following a certain idea. It is conceived to settle conflicts, in order to find the solution that is more consistent with that original idea. In the perspective of jurists, 'the value of the "internal" juridical system as a logical and deductive system properly lies in its pretended capacity of producing juridical rules which guide the application of law. The concrete decisions take the form of logical and systematical

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[1] I. Prigogine and I. Stengers, 'Sistema' *Enciclopedia* (Torino: Einaudi, 1981), XII, 1023. See also S. Jensen, *Systemtheorie* (Stuttgart: Kohlhammer, 1983), 9: 'there is no system in the reality (...) systems are architecture of our reason'.

deductions'.[2] The logical coherency of the system becomes a necessary guarantee for non-arbitrary decisions.

The present work is aimed at verifying this premise, through the (rapid) diachronic analysis of some models of juridical systems, starting from the French codification, as the moment in which the law began to be considered as an autonomous system.[3] My analysis will be properly conducted at the level of models of the system historically proposed and politically (and/or ideologically) justified. So, I will consider the way in which those systems/models have been historically represented, but it is obvious that the real dynamics of power and the corresponding hierarchies of the sources of law are hardly ever coherent with these representations. The thread of my research will be the relationship between the system and the interpretative processes, conceiving this relationship as the moment that connects the creation of the law to the application of the law itself – that is the moment in which the 'law in the books' becomes 'law in action'.

II. The System as a Model to Settle Conflicts

The relation between law and system officially originated as a solution to the necessity to organise juridical material: to guarantee its knowability, to guarantee its logical foundation.[4] A law systematically organised is a law which can be known and coherently applied. Furthermore, it is a law which removes the political choice and places it outside of (or before) the juridical.[5]

[2] F. Modugno, 'Sistema giuridico' *Enciclopedia del dir*itto (Roma, Treccani, 1993), XXIX, 3. The idea of the law as an instrument to settle conflicts is quite common, above all in common law countries. In these areas, 'law is always conceived as a judge while in civil law countries often coincides with the State': G. Tarello, 'Introduzione', in L.M. Friedman ed, *Il sistema giuridico nella prospettiva delle scienze sociali* (Bologna: Il Mulino, 1978), 10 (original edition: *The Legal System. A Social Science Perspective* (New York: Russel Sage Foundation, 1975)). In this sense, we can affirm that every juridical decision (of the judge, of the administration, of the parliament) properly is the solution of a contrast between different claims.

[3] Following A.J. Arnaud, *Essai d'analyse structurale du code civil français: la règle du jeu dans la paix bourgeoise* (Paris: LGDJ, 1973), Italian edition by F. Caroccia, *Il codice civile nella pace borghese. Saggio di analisi strutturale del codice civile francese* (Napoli: Edizioni Scientifiche Italiane, 2005), 191-192.

[4] Several studies are being conducted about the relationship between law and the system. For a first approach, see M.G. Losano, *Sistema e struttura nel diritto, I. Dalle origini alla scuola storica* (Milano: Giuffrè, 2002; 1st ed, Torino: 1968); as well as F. Modugno, n 2 above, 2.

[5] 'The systematic concept of the law allows to conceive the research of the law as a merely cognitive process, which ignores the creative dimension. The existence of a system with a practical relevance resolves the problem of the policy of law and of the implementation

Only from the beginning of the XIX century the aspiration to the order interlaced with the conscience (although so far vague) of the interpretative dimension of the law,[6] and with the need to deny, or in any case to control, this dimension. This is especially true in certain countries, where the freedom of the interpreter is related to risk of arbitrariness.

Such a notion of the system is not limited to satisfying the legal knowability and to ensuring the global normative coherency. In addition, it also goes so far as to select the sources of law in every country: the construction of the system becomes the basis of a certain way of conceiving the interpretation of the law (that is the law). So, the system enters in the political and institutional space, where it proposes a particular representation of that space.[7]

It is necessary, at this point, to clarify what exactly I mean when I say the juridical system is fundamentally an instrument to settle conflict, following a certain ideology. The risk of misunderstanding is very high. Thus, I will say immediately that I do not intend to propose the image of the substitution – imposed from above (from a more or less occult, more or less legitimate power) – of one model for another, of one ideology for another one. However, it is true that 'the juridical system in its entirety, and in the long term, exactly reflects the distribution of power in society'.[8] In this sense, the juridical system is really the output, or the mirror, of a particular way to conceive a balance of power (in other words of a particular ideology). It is also true, in my opinion, that every juridical rule (every norm) is the solution of a conflict, in which the claim, or the interest, of the majority inevitably prevails, but in which also (in general) the action of the minority leaves its trace.[9] Thus, it is not the research of the 'implicit ideology of the norms as an ideology of the social victorious forces',[10] but

of the law by separating them clearly. Juridical science and the jurisprudence are made politically unsuspecting': D. Grimm, 'Review of W. Canaris, Systemdenken' *Archiv für die civilistische Praxis* 171. Bd., 268 (1971).

[6] 'Modern doctrines of interpretation move from two big schools of jurisprudence, which flourished at the beginning of the XIX century: the French Exegetical School and the German Historical School': G. Tarello, 'Orientamenti analitico-linguistici e teoria dell'interpretazione giuridica' *Rivista trimestrale di diritto e procedura civile*, 9 (1971).

[7] Ibid 9-10. The author emphasises the strong ideological significance of the operations both of Exegetical and Historical schools. The German Historical School, in particular, would use the term 'interpretation' 'in order to conceal the distinction between description of a reality and propaganda for a method'.

[8] G. Tarello, 'Introduzione' n 2 above, 16.

[9] L.M. Friedman, n 2 above, 498: 'In whole systems of rules, judicial, or legislative, or both, it is much less likely that one side totally prevails and another loses out. The legal system will probably reflect all social forces in proportion to their influence and power'.

[10] G. Tarello, 'Introduzione' n 2 above, 16.

it is the attempt to make the current balance of power more transparent, regarding every single decision.

III. The Origins: The French Model

In 1804, the *Code Napoléon* represented the first experiment in order to implement the abstract model of the juridical system.

The completeness and the self-sufficiency of the law are assumed.[11]

Consequently, if the law (or even better the sequence of the juridical norms) does not provide the prompt solution for a case, the interpreter will not give up. The system becomes the instrument through which the juridical order guarantees its own survival and makes it possible to resort to the grammatical interpretation, or the logical interpretation, or the extensive interpretation. This theoretical model requires a strong political will, which guarantees a particular social organisation, following new schemes for new values. The law, the codes, the *systems* of the code are instruments for implementing this model.[12]

The judge does not create law for the simple reason that he cannot do it. He applies the political will (converted in the legislator's command) in an apparently neutral way, within a universe that does not know the void. The fullness of the law (that is the completeness of the juridical system, the absence of juridical gaps) prevents the judge from taking the place of the political power in its activity of law-making.[13] It is precisely for this

[11] The relationship between judges and the legislator, which characterises this model, is perfectly described in the preparatory works of the code civil. On 4 ventose Year XI (February 23, 1803) (23 February 1803), when Portalis presents the draft of the Preliminary Title of the Code ('De la publication, des effets et de l'application des lois en général'), he expressly admits that the idea of a perfect and complete code is a mere illusion: '*C'est une sage prévoyance de penser qu'on ne peut tout prévoir* (...) *il est donc nécessairement une foule de circonstances dans lesquelles un juge se trouve sans loi. Il faut donc laisser alors au juge la faculté de suppléer à la loi par les lumières de la droiture et du bon sens*'. Then, in the face of the protests following his words, he worns: '*nous raisonnons comme si les législateurs étaient des dieux, et comme si les juges n'étaient pas même des hommes*'. The solution is given: '*mais en laissant à l'exercice du ministère du juge toute la latitude convenable, nous lui rappelons les bornes qui dérivent de la nature même de son pouvoir* (...) *une loi est un acte de souveraineté, une décision n'est qu'un acte de juridiction ou de magistrature*': P.A. Fenet, *Recueil complet des travaux préparatoires du Code civil, VI* (Paris: Videcoq, 1836), 358-361. See also Arts 4 and 5 of the Code.

[12] As A.J. Arnaud, *Essai* n 3 above, has demonstrated.

[13] The system is always complete given that what is not disciplined is simply irrelevant from a juridical point of view: there are cases in which 'juridical norms don't exist and should not exist': S. Romano, *Osservazioni sulla completezza dell'ordinamento statale*, VII (Modena: Pubblicazioni della Facoltà di Giurisprudenza della Regia Università di Modena, 1925), 11, now in Id, *Lo Stato moderno e la sua crisi* (Milano: Giuffrè, 1969), 173.

reason that the analogical process will be historically structured as a process aimed to fill the residual spaces, in the twofold premise of the absence of a norm directly related to the case and, at the same time, of the existence, *inside the system*, of norms or principles which could be adapted to – which could cover – the case in question.[14]

There is no coincidence between system and interpretation here. These two terms are situated in two parallel planes, in a model where the system is a necessary precondition to the interpretation, but the interpretation is totally unnecessary to the existence of the system. The interpretation is not necessary, when the text of the norm is sufficiently clear (the clarity of the norm becomes – historically necessary – a guarantee against the abuses). However, if there remains a doubt, the interpreter can always make a decision without betraying the theoretical model: he can use logical connections which link legal rules to each other, or he can expand the semantic horizon of a certain word.[15]

The system guarantees the success of this operation. It guarantees the coherent and reciprocal connection of the norms and, at the same time, the possibility of finding the principle (first of all, the logical principle) – the ultimate reason which gives global coherence to those norms. In other words, it is always possible to find a solution for any particular case inside the system. That is, the system prevents the interpreter (the judge) from occupying the void, or getting out of the system itself, from breaking its homogeneity by arbitrary decisions, with the risk of betraying the original political project.

IV. The German Model: '*Das einzige Geschäft des Richters ist eine reine logische Interpretation*'[16]

The German approach to the juridical system confirms and improves the French model, but it presents some relevant differences.

Legal interpretation is always an activity aimed at explaining (not at

[14] N. Bobbio, 'Analogia' *Novissimo Digesto Italiano* (Torino: UTET, 1974), I, 601, 602.

[15] Reference to the concrete case, in the Exegetical approach, is only aimed to confirm the truth of the system. The analysis of judicial decisions is the mere repetition of the descriptive part of the articles of the code, rather than the assessment of real situations, in order to explore the possible sense of a norm: see G. Tarello, 'Orientamenti' n 6 above, 11-12.

[16] 'The only task of the judges is a purely logical interpretation': F.C. von Savigny, *Juristische Methodenlehre* (Marburg: 1802/1803), edited by G. Wesenberg, under the title *Juristische Methodenlehre, nach der Ausarbeitung des Jakob Grimm* (Stuttgart: Koehler, 1951).

creating) juridical reality.[17] The self-sufficiency and the completeness of the system are confirmed: the system is constructed through a deductive logical process.

However, if the Exegetical School identified the system with the code and the code with the law itself, the German historical school brakes the banks of the codified text. The system is designed as a wider and more complex reality, giving logical coherence to the ' "real" discipline of juridical relationships'.[18]

The German system is a 'perfect organic unity': the task of the jurists is to discover the connections, which reciprocally link all juridical elements in a coherent whole.

Interpretation becomes a necessary tool not only for the knowledge of the law,[19] but also for the construction (thus, for the existence) of the system itself. It is a necessary step, which opens the road for new research and elaborations: this research and elaborations are the authentic dimension of the juridical science.[20]

Law becomes a productive science: the jurists create because they know the internal legal structure. However, the product of this creative activity properly marks the boundary line of the juridical experience. It is not a case of the XIX century being opened by the arrival of the system of the *civil code*, and closed by the construction of the system of the BGB. The BGB was an elegant, sophisticated structure. However, it was created by the jurists *for* the jurists – that is, destined to make law a technical science, which could only have been known by the few who possessed its technical instruments. The system was born as a model aimed at making knowable the sources of law and at controlling their application; it becomes a scientific instrument, which could (only) be understood and, more importantly, controlled by the same priests that had created this system.

The ideological significance of this operation is self-evident. To say that the interpretation is a scientific work means that all studies of juridical phenomena conducted by non-jurists are anti-scientific; it means to reserve the elaboration of the juridical organisation to a specific professional and social class, establishing the primacy of the doctrine and the ancillary role

[17] 'The law was considered a reality which preexists the interpretation, and the interpretation was the process of recovering the real sense of that preexistent reality': G. Tarello, 'Orientamenti' n 6 above, 10.

[18] Ibid 10.

[19] Ibid 13: '(Law) always requests an intellectual apprehension, hence it must always be submitted to the interpretation of the juridical science'.

[20] F. Viola, 'R. von Jhering e la conoscenza del diritto', in F. Viola, V. Villa and M. Urso eds, *Interpretazione e applicazione del diritto tra scienza e politica* (Palermo: CELUP, 1974), 24.

of the jurisprudence; it means to affirm the irrelevance of the aims belonging to the legal interpretation and to the social class of the interpreters, excluding the possibility of a widespread control.[21]

The definitive rift between juridical and social systems (or, if preferred, between *Sollen* and *Sein*) is fixed. The German systematic approach isolates the law: the 'Is' is forced into artificial schemes, in order to dialogue with the 'Ought'. Reality in itself does not have a juridical significance: the concrete social relationships can be considered and classified only if reduced into these schemes.[22] Interpretation is necessary to retrace the links between these schemes, to retrace the will of the legislator inside the law, following a rigorous process which reflects, with its logical coherence, the logical coherence of the system.[23] When Savigny constructs for the first time the interpretative process as an ordered application of a precise sequence of predetermined criteria,[24] he precludes the interpreter from every possible evaluative space, from every consideration of a reality which could be different from the juridical one.[25] Thereafter, with the Pandectistic school, law definitively becomes a logical product, axiologically neutral, which ignores any connection to external elements of the system and to its consequences in social reality.[26]

Nevertheless, the system and its interpretation are not yet reciprocally necessary. The system confers scientific dimension to the interpretative process, allowing the verification of the interpretative result following logical principles (thus, it allows the control of both the legislator and the interpreter itself). At the same time, absence of law becomes a possible scenario. But, the system prevents that this absence becomes a legal vacuum:

[21] G. Tarello, 'Orientamenti' n 6 above, 12-14.

[22] See F. Viola, 'R. von Jhering' n 20 above, 26: 'All that was already in the Savigny's theory and, above all, in his doctrine of juridical institution as a typical entity existing above the concrete social relationship'.

[23] '*Rekonstruktion des dem Gesetz innewohnenden Gedankens*': F.C. von Savigny, *Sistema del diritto romano attuale* (1840-1849), V. Scialoja ed, (Torino: Utet, 1886), I, § 33, 220-224.

[24] Ibid. Savigny lists the grammatical, logical, historical and finally systematic canons. This latter is referred 'to the deep connection which links all institutes and all juridical rules in a big whole', following the project 'which was in the mind of the legislator' (§ 33). It should be noted that Savigny introduces this reference to the 'mind of the legislator' immediately after excluding reasons of law from valid interpretative canons.

[25] '(...) in fact, he clearly wants that will of the legislators does not interfere with juridical science': G. Tarello, 'Orientamenti' n 6 above, 13.

[26] F. Modugno, n 2 above, 4. The same opinion is expressed by sociologists: see J. Carbonnier, *Sociologie juridique* (Paris: PUF, 1978), 347.

the gap can always be filled through a set of interpretative instruments, or, at least, through the analogy (which is conceived as a distinct step).[27]

The system is, at the same time, the precondition and the product of the interpretation; but the interpretation is not sufficient for the system.

V. From the Myth of the Legislator to the Myth of the Judge: The System, the Space, the Time

The jurist of the XX century inherited from the XIX century a model, with two possible variants (the French legislative one, and the German doctrinal one), neither of which was able to dialogue with the new world.

The XIX century-system is a system intrinsically atemporal: the chronological dimension does not belong to it. It is composed of norms, or institutions, supposed to last for forever. The juridical norm is created to aspire to be eternal: 'law goes against the time'.[28]

The XIX century system, though, is a system strongly characterised from a spatial point of view.[29] The territory of the State is the material limit of the validity of the norms – that is, limiting the efficacy of the system which organises these norms. Law and the model of system fully coincide with each other. In this sense, the system is *excluding*, since the being of a juridical system in the space excludes the existence of extra-systemic norms and/or different juridical systems in the same space.

The ideological model is the bourgeois liberalism. In this theoretical model 'the social order (is) the natural result of the encounter of the individual economic forces in the market'. Law can be limited to 'guarantee every producer the same formal freedom',[30] within a horizon where the stable will of the legislator guarantees property, private autonomy,

[27] Ibid 603. Analogy is expressly mentioned in the Italian and Austrian civil code, while it does not appear either in the French or German code. Notwithstanding that, Norberto Bobbio clearly affirms that also in these last systems analogical process is not only logically possible, but also juridically valid, since it is a condition of existence and of the functioning of the system.

[28] A. Longo, *Tempo e interpretazione della Costituzione*, draft text. The author explains: 'Why? Because law is a canon. Law cannot be contaminated with the flow, with the change. Norm must oppose the change. It is crystallised, it is always the same'.

[29] 'It once was easier to ignore the law. Law was a space (…). Power was: occupy the space (…). The game of the new law was completed, when law gained the hegemony over communications produced in national spaces': P. Femia, 'Il giorno prima. Comune, insorgenza dei diritti, sovversione infrasistemica', in VVAA eds, *Il diritto del comune. Crisi della sovranità, proprietà e nuovi poteri costituenti* (Verona: Ombre Corte, 2012), § 2.

[30] L. Mengoni, 'Problema e sistema nella controversia sul metodo giuridico' *Jus*, 6 (1976).

juridical subjectivity. The conflict is settled formally, ensuring its players the parity of the starting conditions.

Since the beginning of the 'short century',[31] these three elements have been questioned. The system resists: it is perfected, in its sophisticated Kelsenian version, or it is transformed, changing its function and consequently its symbolic (*rectius* ideological) meaning.

We know the relevance of Jhering's theories in that transformation.

With Jhering, the 'exterior' system becomes 'internal'.[32] It is no longer a mere deductive logical sequence starting from rational principles, but a construction which reflects the internal structure of juridical matter, allowing its evolution. Jhering distinguished the structure of law from its function, and pointed out that that function influences the structure. Hence, the teleological analysis becomes necessary: for these reasons, Jhering is considered as the author who signed 'the transition from the constructionism to the juridical sociologism, that is, in fact, from the XIX to the XX century'.[33]

The social dimension of the law is (re)discovered.[34] The life beyond the form, we could say: at the beginning of the XX century, the jurist has the awareness of the finitude of his world, but he is still hoping for immortality. Judges come to his aid; jurisprudence becomes 'the element that conciliates he necessary stability and cohesion of juridical principles

[31] As it is known, this expression is usually used in order to define the XX century (in particular, the period between the years 1914 and 1991). See for example E. Hobswam, *The Age of Extremes: The Short Twentieth Century, 1914-1991* (London: Michael Joseph, 1994).

[32] The scientific work of R. von Jhering is usually distinguished in two phases. The first one was marked by the first edition of the *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* (1852-1865), 10. Auf., Darmstadt: 1968), and coincided with the birth of the Begriffjurisprudenz. The second phase was marked by the publication of *Lo scopo nel diritto* (1877) (Italian version edited by M.G. Losano, Torino: Einaudi, 1972), and coincided with the development of the *Interessenjurisprudenz* and the *Freirechtsbewegung*: see M.G. Losano, *Sistema e struttura del diritto* n 4 above, 216-219.

[33] Ibid 217.

[34] It is necessary to remember the contribution of Gény, Saleilles, Duguit, in this process. They confer a decisional power to the interpreter (to the judge), opening the way for a reflection about (new) social purposes to which law must respond. The system resists and remains orderly, logical, coherent and self-sufficient. But it is the result, not the premise of the interpretation. See, in particular, F. Gény, *Méthode d'interprétation et sources en droit privé positif* (Paris, 1st ed, 1899; Paris: F. Pichon et Durand-Auzias, 2nd ed, 1919), with preface by R. Saleilles; Id, *Science et technique en droit privé positif,* 4 voll (Paris: Sociètè du Recueil Sirey, 1914-1915 and 1921-1924); Id, *Méthode d'interprétation et sources en droit privé positif* (Paris: A. Chevalier-Marescq, 1899), fn 81 bis. More recently, Ph. Jestaz, 'Une image française de la loi et du juge', in Y. Blais ed, *François Gény. Mythe et réalités, 1899-1999* (Paris: éd. Blais, Dalloz et Bruylant, 2000; now Paris: Dalloz, 2005), 37.

and evolution of rules … in order to adapt them to the requirements of life'.[35] The judge acts as the Socratic *δαίμων*: he connects the metaphysical world of the juridical system to the earthly world of the facts of life.[36]

The notion of the system irreversibly changes: 'the XX century does not ask the theory of law for an instrument to organise a disorderly set of rules: it asks for help to decide concrete cases'.[37]

The context requires it. Facing increasingly frequent and rapid political, economic, social changes, law should organise and rethink itself, in order to provide adequate responses. The juridical science becomes necessary to give judges concrete tools in order to solve concrete problems in concrete cases, rather than to make laws knowable or logically coherent. The abandonment of the rule in its literal wording becomes legitimate.

The system is transformed according to the new ideology. Jurisprudence is the cornerstone of this new model: the myth of the omnipotence of the legislator gets irremediably resized out of the matter. If the reality changes, law also must change: the judges are the instrument of this transformation.[38] The traditional model required a rigid contraposition between the political and interpretative step, between the production of the law (*legis latio*) and the application of the law (*legis executio*), giving the legislator only the function of production.[39] Although, between the end of the XIX and the beginning of the XX century, conflict settlement becomes an operation

[35] See A.J. Arnaud, *Critique de la raison juridique. 1, Où va la sociologie du droit?* (Paris: LGDJ, 1981), about the role of Raymond Saleilles in the foundation of the sociology of the law.

[36] L. Duguit, *Les transformations générales du droit privé depuis le code Napoléon* (Paris: Alcan, 1912), 6-9: '*Le système juridique civiliste était d'ordre métaphysique; le système nouveau qui s'élabore est d'ordre réaliste*'.

[37] From a 'system to know' we move on to a 'system to do': M.G. Losano, *Sistema e struttura nel diritto* (Milano: Giuffrè, 2002), in particular 'Introduzione' to vol 2 (*II: Il Novecento*), and to vol 3 (*III: Dal Novecento alla postmodernità*). Losano adopts the distinction, proposed by N. Luhmann, between 'systems of concepts' and 'systems of actions': see N. Luhmann, *Rechtssystem und Rechtsdogmatik* (Stuttgart: Verlag W. Kohlhammer, 1974), Italian translation by A. Febbrajo, *Sistema giuridico e dogmatica giuridica* (Bologna: Il Mulino, 1978).

[38] This does not involve a value judgment on the models concerned. To say that conceptual interpretation is more conservative and interpretation in the light of social aims and interests is more progressive, does not mean to give a value judgment. 'Conservative' and 'progressive' are used in this context in their descriptive sense: N. Bobbio, *Giusnaturalismo e positivismo giuridico* (Milano: Comunità, 1965; now Roma-Bari: Laterza, 2011), 77-79.

[39] See B. Windscheid, *Die Aufgabe der Rechtswissenschaft, in Gesammelte Reden und Abhandlungen* (Leipzig: Duncker, 1904), in particular § 14. Law is 'the decision adopted by the State', based on the pursuing reasons and purposes, while application of law merely is 'the result of a sum, in which factors are juridical concepts'.

to be performed on a case by case basis, in light of the data concretely available for the interpreter.

But opening a social dimension of the law means returning the law to its own historical dimension. Instances of solidarity do not deny the territorial dimension of the law.[40] However, the only 'chance of survival for law is to distinguish the notion of law from the notion of positive law, to make it something wider, a scientific discipline able to adapt itself to historical changes'.[41] Through the judicial interpretation, law now deals with history.

Interpretation and the system are not the same thing, but interpretation *is necessary* for the survival of the system.

VI. Legal Certainty or Justice (in Individual Cases)?

The nineteenth century is a Janus-faced creature. It forces the jurist to choose between the natural aspiration of the law in accordance with its logical and systematical dimension, and the authentic historical and changeable structure of the reality.[42]

At the theoretical level, the ideological battle is entirely focussed on the question of the sources of law. We are dealing with the political problem of creating norms (*legal certainty*, which entrusts to the legislator the definition of the idea of justice; or *justice*, concretely implemented by judges in each individual case).[43]

But history humiliates law and deprives it of all alternatives, showing that research of the legal reason (and law itself) could become a blind and uncontrolled implementation of the political power. The totalitarianisms leave, as their legacy, the fall of the illusion that laws, or judges, can do something.

The solution is the awareness of the interpretative question: the problem shifts from the law itself to the way in which law is interpreted (and applied).[44] The juridical solution is not exact, or true. It is simply reasonable,

[40] See P. Femia, 'Il giorno' n 29 above, § 5: 'the French solidarism of Léon Duguit is building on persons (not on subjectivities) (…); it changes, but does not deny the State'.

[41] R. Saleilles, 'Le code civil et la méthode historique', in *Livre du Centenaire du code civil* (Paris: Société des études législatives, 1904), I, 127.

[42] P. Grossi, 'Pagina introduttiva' *Quaderni fiorentini per la storia del pensiero giuridico*, 1 (1973).

[43] F. Modugno, n 2 above, 13.

[44] '(…) in the modern European juridical culture, every application of the laws (or, as it is too often said, of 'norms') presupposes or implies the interpretation of the laws themselves. There are no jurists, today, who thinks that it could be possible (…) to apply

in light of the available arguments. The interpretative activity is no longer a logical but a semantic operation.[45]

The next step is the construction of a complex model, balancing both dogmatic and problematic approaches. The topic is not conceived as a technique to make decisions, but rather to make hypotheses of rational solutions, while the dogmatic is necessary to verify the coherence of these solutions with the system.[46] System and the problem coexist. The former is aimed at controlling the juridical material 'beyond its immediate givenness', in order to make it 'concretely usable';[47] the latter one is aimed at preventing 'the processes of conceptual hardening of the legal system'.[48]

In this way, the ancient theme of the control over the interpretative activity re-emerges. The tragic experiences of the twentieth century have shown that the logical coherence of the decision does not give sufficient guarantees. The new solution is the verification of the conditions on which the interpreter bases his choice. The possibility of evaluating the premises – both factual and legal – of the decision is the condition to making the norm adequate to social reality. The possibility of understanding this evaluation makes these premises rational (in the sense of the reasonableness).[49]

We must still define the criteria that make this evaluation possible.[50] The solution, which identifies them not only in the law but also in the extra-legislative context, allows the definitive opening of the system to the society – that is, the transformation from the law as an autonomous and isolated system to the law as a system which constitutes, among other systems, society. It signs the birth of law as a sub-system of the Social System.

a law without interpretation, that is, without giving it a significance': G. Tarello, 'Orientamenti' n 6 above, 5.

[45] See, at least, H.G. Gadamer, *Wahrheit und Methode* (Tübingen: Mohr, 1960), and in G. Vattimo ed, *Verità e metodo* (Milano: Bompiani, 2001); C. Perelman, 'Le raisonnement juridique' *Les Etudes philosophiques*, 133-141 (1965), now in Id, *Diritto, Morale e Filosofia* (Napoli: Guida, 1973), 147-156; Id, 'Le raisonnement juridique et la logique déontique', in Id, *Etudes de logique juridique*, 4 (Bruxelles: Bruylant, 1970), 133; and T. Viehweg, *Topik und Jurisprudenz* (München: Beck, 1953), and in G. Crifò ed, *Topica e giurisprudenza* (Milano: Giuffrè, 1962).

[46] L. Mengoni, n 30 above, 33.

[47] N. Luhmann, *Sistema* n 37 above, 45.

[48] L. Mengoni, n 30 above, 38.

[49] F. Modugno, n 2 above, 9.

[50] It is obvious that it is impossible, here, to speak about the legislative or extra-legislative basis of the evaluative process, about principles, about the connection between principles and norms. On these topics, see, eg, the works of J. Esser, in particular *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (Tübingen: Mohr, 1956).

VII. One System, No System, a Hundred Thousand Systems

The end of the twentieth century coincides with the end of illusions.

Law loses its immortal condition. It is no longer a body of universal institutions, but a contingent product of a certain equilibrium of powers. It is fragile and changeable as any human equilibrium.

Law loses its own territoriality. It no longer has any defined spatial dimension. It still remains a more or less ordered set of rules, but these rules don't have any place; they are produced by different subjects at different levels. The *When* replaces the *Where*: the time of the law materialises and aims at replacing its space. We imagined a law without time in order to control the space. Instead, we produced a law inexorably linked to a time (and so to an end), but devoid of any spaces, or more exactly lost in space.

Law, finally, loses its rationality. Legal interpretation needs a leap of faith. In order to interpret, in order to force the judge to overcome the ambiguity of norms or the legal vacuum, it is necessary to recognise the legislator as a *reasonable* subject.[51] However, since the second half of the twentieth century, the faith on the legislator's rationality declines, confronting the proliferation of rules that often contradict each other.

How could the system survive all of this?

For jurists, the juridical system fundamentally remains the hope for an organised and logically coherent set of dispositions and institutions. It aims to be rational, linked to a territory which defines its limit of validity (civil law systems, common law systems) and based on the idea of legal stability (given that stability is the essential condition for predictability, and thus for legal certainty).[52] But a system as such does not coincide anymore with law. It is necessary also to take into account all juridical rules produced outside the system (for example, foreign sentences, standard

[51] N. Bobbio, 'Analogia' n 14 above, 603.

[52] See the definition of the juridical system proposed by J. Carbonnier, n 26 above, 346-347: '*Pour la sociologie du droit,* (…) *un système juridique* (…) *c'est pratiquement un droit national* (…) *ou* (…) *c'est le droit d'une société globale. Partout où la sociologie constate l'existence d'une société globale,* (…) *il est permis de postuler la présence d'un système juridique correspondant.* (…) *Il faut avoir égard à l'idée que (l'idée de système) recouvre, qui est une idée importante: savoir, qu'un droit est un ensemble, que ses éléments composants* (…) *sont liés entre eux par des rapports nécessaires*'. It is obvious that common law systems are considered systems in this first sense: in his work, Carbonnier himself quotes R. David, *Les grands systèmes de droit contemporains* (Paris: Dalloz, 1964). As it is known, the question was specifically studied by T. Parsons (in particular, 'On Building Social System Theory: A Personal History' 99(4) *Daedalus (The Making of Modern Science: Biographical Studies)*, 826, 868 (1970)). Parsons reached the conclusion that, if one assumes a definition of the juridical system as a deductive logical system, common law could be qualified as a system. In fact, it is also possible to find in common law the logical connection which links norms to the principles, although with an inductive, not deductive reasoning, from particular to general.

clauses in globalised markets). If law becomes the mirror of the complexity of the reality, the jurists can simply accept that, trying to keep that complexity up with the system. Law and the system separate again. However, law must keep aiming at the system, *ad infinitum*, in order to survive – in order to make sense –.[53]

For the philosophers (or for the sociologists), the system becomes a mechanism that processes social data. It becomes a system of communications, which translates into juridical language all languages, instances and interests, coming from the infinite other subsystems of the System. The system develops strategies in order to reduce environmental complexity; it entirely coincides with law, or, even better, law, in its entirety, is a system.[54] But such a process of translation of all extra-systemic (extra-juridical) logics into a juridical language requires reflecting on the possibility of ensuring that extra-systemic logics (extra-juridical logics) take over at the juridical system, becoming sources of the law themselves. Once again, the problem of controlling the law-making process is perceived as essential.

At this point, the question is if, in the juridical world, the systemic approach actually is something new, compared to the systematic approach.[55] In other words, how compatible are these two models? The Luhmann theory attempts to answer this question.[56] Niklas Luhmann distinguishes three phases within the evolution of the concept of the system. In the first phase, the classical notion of the system is represented through the contraposition between the parts and the whole, where the whole is something more than its parts. However, the reason for this partial non-coincidence of the whole and its parts is not explained. Consequently, a first

[53] 'The juridical system exists only to offer legal certainty (or if preferred: to reduce the complexity of the problem of acknowledging the legitimate power). It is an (imperfect) organisation of certainties, a (necessary) machine to protect power from the infinite discussion about its legitimacy (...). All that is not certain achieves a juridical dimension through the structural junction with this organisation of certainties': P. Femia, 'Benito Cereno in Bucovina', in A. Febbrajo and F. Gambino eds, *Il diritto frammentato* (Milano: Giuffrè, 2013), 92.

[54] In a theoretical horizon where the systems theory is the condition for the definition of the juridical norm: eg, J. Raz, *Il concetto di sistema giuridico: un'introduzione alla teoria del sistema giuridico* (Bologna: Il Mulino, 1977); Id, *The Concept of a Legal System. An Introduction to the Theory of Legal System* (London: Oxford University Press, 1970).

[55] The question is posed by M.G. Losano, *Sistema e struttura nel diritto, III. Dal Novecento alla postmodernità* (Milano: Giuffrè, 2002), 223.

[56] Ibid 315-321, where Losano analyses the opinions expressed by Luhmann in *Rechtssoziologie* (Opladen: Westdeutscher Verlag, 3rd ed, 1987). About Luhmann, and particularly about the concept of subjective rights in the systemic theory, see also P. Guibentif, 'Rights in Niklas Luhmann's Systems Theory', in A. Febbrajo and G. Harste eds, *Law and Intersystemic Communication. Understanding 'Structural Coupling'* (London: Ashgate, 2013), 255.

'change of paradigm' (which is an evolution, not a contradiction of the first model) becomes historically and logically necessary: the system/environment distinction substitutes the parts/whole distinction. The system is influenced by the environment: it is now defined as a set of 'a more or less high number of system/environment differences'.[57] It was closed, it becomes open. In the third phase, the open system becomes self-referential. This last change of paradigm allows for conceiving the system as an organism, which changes itself through the binomial identity/difference (so, the question rises about the possibility of conciliating the systemic opening to the environment with its self-referential closure).[58]

Hence, we could affirm that there is an evolution, not a breakdown, from the systematic to the systemic approach. This is exactly the evolutionary itinerary, which separates the juridical and the sociological perspective. Jurists and sociologists are destined to work from different planes: the plane of validity for the jurists; the plane of efficacy for the sociologists. In the sociological perspective, the juridical system *exists*, it *is* the juridical reality: it is not its mere representation, nor a model (on the contrary, this was our initial thesis). The juridical system is not a whole, opposed to single parts, but a whole that relates to another wider whole (system/environment).[59] The jurists are bound by the interest, in the sense that they should assume that every norm corresponds to an interest which has already been selected by the legislator. At this level, the jurists can only take note of the legislator's choice. Their task is simply to give an order to the normative material, building the juridical system (dogmatic). On the contrary, at the general theory level, jurists are authorised to proceed through abstractions, building a scientific system (legal theory). In both cases, however, it is not the same phenomenon analysed by sociologists: it should be an error 'to consider these classification tools as if they were the legal system'.[60]

Legal dogmatics and legal theory are not deleted but confined to a particular logic which does not coincide with the systemic logic. After all, that is not so distant from the Kelsen point of view, when, tracing the difference between fact and law (between *Is* and *Ought*), he argued that 'sociologists observe the law from outside; jurists from inside'.[61]

[57] M.G. Losano, *Dal Novecento* n 55 above, 315.

[58] The answer of Luhmann is that the system of the law is open from an epistemological point of view and closed from a normative point of view: see N. Luhmann, *Rechtssoziologie* n 56 above. In the final part of the volume (Schluss: Rechtssystem und Rechtstheorie, 356-357), Luhmann clearly affirms: '*Das Rechtssystem ist ein normativ geschlossenes System (…) Zugleich ist das Rechtssystem ein kognitv offenes System*'.

[59] M.G. Losano, *Dal Novecento* n 55 above, 346.

[60] N. Luhmann, n 37 above, in particular 67.

[61] H. Kelsen, in M.G. Losano ed, *La dottrina pura del diritto* (Torino: Einaudi, 1966), 13-15.

Given this distinction, we have to respond to a second question. In which measure is systemic approach useful for the systematic model?[62]

My answer is that these two models are mutually complementary.[63] The systemic theory (perhaps) does not respond to the practical questions which jurists have to confront every day. But it has the virtue of giving them predictive capacity and a wider horizon.[64] The systemic theory forces the juridical system to reflect on the consequences of juridical decisions – that is, to reflect on its own function.

There is more.

If the apparently unavoidable condition of our existence as jurists is an infinite reproduction of the tragic and impossible choice between legal certainty and equity, the theory of systems, in its last version, seems to provide a way out. It proposes to go beyond the level of a merely descriptive analysis, trying to critically identify those social processes which could have the power to transform the current social order in order to build the 'just

[62] 'Hence, my impression is that law is useful for the supertheory; however, I don't think that supertheory is useful to the law' (M.G. Losano, *Dal Novecento* n 56 above, 339).

[63] P. Guibentif, *Foucault, Luhmann, Habermas, Bourdieu. Une génération repense le droit* (Paris: LGDJ, 2010).

[64] Juridical dogmatics is oriented to the input that is, to the past, to the juridical decision as it is (juridical positivism). On the contrary, sociology is oriented to the output that is, to the possible consequences of juridical decisions. Recent history of law is marked, according to Luhmann, by this constant tension between input and output: N. Luhmann, *Sistema* n 37 above, 59-63. The image of the scheme immission/emission (input/output) is relatively frequent within the literature about relationships between law and the social system. In the same period it was used, for example, by L.M. Friedman, n 2 above. This last author limits his research to the pretensions of the society regarding the law (input) and to the consequences that law produces in the society. To explain this idea, Losano uses the image of the law as a 'black box'. 'It is possible to study what the box receives from and transmits to the social environment, but the content of the box itself is unknown or intentionally ignored' (M.G. Losano, *Dal Novecento* n 55 above, 320). However, the risk precisely lies in the fact that the content of the black box is unknown. It is possible to accept the description of the system as a process answering to the request of complexity; however, it is necessary to advise that this is not a neutral process (that is: the juridical discourse is not a merely technical discourse). This is even more essential, since the Luhmannian system is an ontological (not epistemological) system. It is a system in which choices are able to modify the reality, but, at the same time, a system in which the will of the decision-maker (as a factor influencing the decision) is neutralised and the juridical rationality does not coincide with the ethical rationality (just/unjust). It is not an accident if the main accusation against systemic theory properly is that it transforms all into a technical question, removed from public control. In this perspective, see, for example, J. Habermas, 'Theorie der Gesellschaft oder Sozialtechnologie? Eine Auseinandersetzung mit Niklas Luhmann', in J. Habermas and N. Luhmann eds, *Theorie der Gesellschaft oder Sozialtechnologie. Was leistet die Systemforschung?* (Frankfurt: Suhrkamp, 1971), 142-290, in particular 145.

order'.[65] Along this itinerary, the critique of values (as a refuse of the traditional conflicts-settlement model and as a guarantee of 'differentiated spaces of social autonomy') and the critique of the State (as a recognition of the specific risks arising not only from the political level, but also from other social systems) become essential in the juridical dimension.[66]

In the same perspective, it is affirmed that rights 'don't exist *before* in an external place, from which the political must transfer them inside the law (through an extralegal constituent process), nor in an internal place, where jurists will have to look for them (building their nice arguments, weights and balances). Thus, rights are not outside (to claim) nor inside (to argue). They are *intrasystemic self-subversions*, breakpoints of the system that are not contained nor controlled *ex ante* by the system itself'.[67]

Justice is placed *inside* the legal system, as well as the political moment. Some authors come to represent this political moment not as an isolated system, but as an 'internal event of every system', which can implement 'a series of categorical redefinitions, changing the system from the inside'.[68]

This continuous process of categorical redefinition could allow the fight, against the destructive action of the powers, and prevents the use by dominant powers of the same categories in order to justify their own dominance.[69] The solution proposed is not to replace one model with another one, but to conceive a system that opens to differences and absorbs them.

VIII. Looking for the Answer

[65] A. Fischer-Lescano, 'La théorie des systèmes comme théorie critique' *Droit et Société*, 645-665 (2010). The author notes a parallelism between the Teubnerian idea of contradiction as driver for social development and the Hegelian dialectic. His perspective brings the Teubnerian version of the Systems theory closer to the critical Marxist tradition. Teubner himself inserts his theory into a wider theoretical perspective and admits that, in some aspects, this version of the systemic theory 'renews the classic theories of alienation'. He expressly quotes Foucault, Agamben, Lyotard, until Derrida: G. Teubner, 'La matrice anonima. Quando "privati" attori transnazionali violano i diritti dell'uomo' *Rivista critica del diritto privato*, 9, 17 (2006).

[66] A. Fischer-Lescano, n 65 above, 661.

[67] P. Femia, 'Il giorno' n 29 above, § 9, thinking about the concept of self-subversion proposed by G. Teubner, 'Selbstsubversive Gerechtigkeit: Kontingenz-oder Transzendenformel des Rechts?' *Zeitschrift für Rechtssoziologie*, 9 (2008).

[68] P. Femia, 'Il giorno' n 29 above, § 2. The same idea is confirmed and clarified by this Author in 'Benito' n 53 above, 102: 'Politics and society are not systems; they are transcendent functions, conditions for the existence of the systems and the quality of their performance'. On the contrary, Teubner considers politics as a system in itself: see, in particular, A. Fischer-Lescano and G. Teubner, *Verfassungsfragmente. Gesellschaftlicher Konstitutionalismus in der Globalisierung* (Berlin: Suhrkamp Verlag, 2012).

[69] P. Femia, 'Il giorno' n 29 above, § 11.

Is it possible, now, to find some answers?

In my opinion, there is no doubt that law and interpretation are equivalent. At least, it is necessary to take into account the interpretative dimension of the law. If one accepts this assumption, the system, both as a systematic and as a systemic construction, becomes a necessary element in the juridical scenario. Even if one does not share the idea of the intrinsic systematic nature of the law (and I actually think law does not have such a nature), the point is that juridical interpretation must be (also) systematic. The system is essential for the interpretation of the law, and so, for law. At the same time, the interpretative process becomes essential for the system. Legal interpretation changes its own identity: analogy is now assumed as a fundamental step, establishing a reciprocal dialogue between norms and principles, and ensuring to retrace the logical coherence of the norms.[70]

The system has not disappeared. It has reproduced itself and multiplied its functions.

It remains the only instrument known to jurists to slow the continuous flow of history (and of law, which is a part of history). The system still needs to reduce the complexity of the real, giving an order and a form to chaos. However, at the same time, it has a new and different meaning, which takes into account this complexity and communicates with it, turning social instances into juridical language. The systemic theory gives the jurist the suggestion of a system which responds to the call for justice by constantly transforming itself. Such a system constantly redefines, from the inside, the balancing values – that is, the binary codes at the basis of systemic operations. It is not rational in itself (and it is not in itself a source of law), but it is open to difference: 'order is the issue, not the substance of the law'.[71]

But – last question –, is the systemic approach still sufficient (as well as necessary), face to the above mentioned process of the gradual disconnection between law and its paradigmatic image?

The tragedy of law, its true limit, is its need to become practical norms. Law has to continuously and concretely define what is just, what is valid,

[70] N. Lipari, 'Morte e trasfigurazione dell'analogia', in G. Gabrielli et al eds, *Liber amicorum per Dieter Henrich* (Torino: Giappichelli, 2012), I, 36, 39. In the same volume, see also P. Rescigno, 'Tra ordinamento e sistema', 51. The utility of the distinction between interpretation and integration is therefore denied. In this process, analogy is not a solution for legal vacuum, but an expression and an instrument of cohesion of the system.

[71] P. Femia, 'Voltare le spalle al destino: sistema aperto o aperture sistematiche? Nota di lettura', in C.W. Canaris ed, *Pensiero sistematico e concetto di sistema nella giurisprudenza sviluppati sul modello del diritto privato tedesco* (Napoli: Edizioni Scientifiche Italiane, 2009), 190-192.

what is lawful. Conflict is the structural and ineluctable condition of a pluralist society.[72]

We come back to our initial thesis. For jurists, the system is not (it cannot be) the structure of the reality, but a model to settle conflicts. If one accepts such a premise, it becomes necessary to admit that, from the jurist's point of view, the traditional model leaves open a number of situations, in which the settlement of different interests or different claims is not ensured by the current tools (eg surrogate motherhood). However, the systems theory seems not to be the answer. It leaves the jurist alone with his old categories, desperately trying to give urgent solutions to new problems. Traditional paradigms gave him the illusion that he could manage the complexity, building different models for different ideologies (in the sense explained at the beginning of this article). On the contrary, the modern (maybe one could say postmodern) paradigm gives him the distressing consciousness that 'there is no dictator, but a network of subjects situated in a number of places of the social systems. And every subject works from the inside in order to corrupt the systems themselves. The dictatorship of the global age will be diffused and constitutional'.[73]

The systems theory traps the jurist in a scenario where the apparent absence of the system is a new model of system, having an opaque inspiring ideology. We are conscious, however, that the identification of this ideology is the unavoidable condition for a transparent selection of protecting situations.

Is it possible to find a different solution? Those who claim the constituent force of civil society[74] suggest to simply and definitively take note of the difficulty of this process of definition. This would be the premise 'to introduce in the system new discourses of invalidation (…) or validation (…)'. 'A multitude of subjects, conscious of the transnationality of fundamental rights' replaces traditional hierarchies and is opposed to global powers:[75] the

[72] J.G. Belley, *Conflit social et pluralisme juridique en sociologie du droit* (doctoral dissertation, Université de droit, d'économie et de sciences sociales de Paris, 1977): the key of the social life is not the order, which recalls integration and unity, but the conflict, which suggests plurality.

[73] P. Femia, 'Il giorno' n 29 above, § 11.

[74] Ibid in particular § 7.

[75] P. Femia, 'Benito' n 53 above, 38, 65. It is impossible, now, to exhaustively report the debate on the Teubner proposal of the social constitutionalism. Thus, the short following bibliography is only a partial reference to the works inspiring this article: D. Sciulli, *Theory of Societal Constitutionalism* (Cambridge: Cambridge University Press, 1992); C. Thornhill, 'Niklas Luhmann and the Sociology of the Constitution' 10 *Journal of Classical Sociology*, 315-337 (2010); G. Teubner, *La cultura del diritto nell'epoca della globalizzazione. L'emergere delle costituzioni civili* (Roma: Armando Editore, 2005), edited by R. Prandini, who signs the afterword to the Italian edition, titled 'La "costituzione" del diritto nell'epoca della globalizzazione. Struttura della società-mondo e cultura del diritto

problem of the State is simply by-passed. 'Pre-social', 'pre-juridical' and 'pre-political' situations are transformed in 'technical rights', through 'self-preserving processes' which ignore the 'free decision' of the democratic legislator.[76] Thus, the law-making process is withdrawn from the choice between private/public monopoly. However, it is still subjected to 'public control and public debate': the 'development of reciprocal controls between the spontaneous and organised sphere' is the guarantee of transparency and democracy.[77]

This is a fascinating proposal. But it leads to two objections, at least. First, it always presupposes a political choice (that is, the identification of the ideology bringing to the positivisation of certain rights). Then, it can be admitted only from a perspective of the *claim*, not of the *exercise* of rights.[78] But the claim cannot be the structural (physiological) condition of the system, in my opinion.

I do not have, however, alternative answers: only the awareness that the research is not concluded.

IX. Conclusion

From the jurist's point of view, the discourse about the system essentially is a discourse about the problem of the sources of law –, that is, a

nell'opera di Gunther Teubner'; G. Teubner, 'Societal Constitutionalism without Politics? A Rejoinder' 20 *Social & Legal Studies*, 247-252 (2011); Id, *Nuovi conflitti costituzionali* (Milano: Mondadori, 2012. The second chapter of the original German edition is absent in the Italian version); Id, 'The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy' 31 *Law and Society*, 763-787 (1997), translated in Italy under the title 'I molteplici corpi del re: l'autodecostruzione della gerarchia del diritto', in Id, D*iritto policontestuale. Prospettive giuridiche della pluralizzazione dei mondi sociali* (Napoli: La città del sole, 1999), 71-112. In Italy, besides works of P. Femia and R. Prandini, see also L. Zampino, *Gunther Teubner e il costituzionalismo sociale. Diritto, globalizzazione, sistemi* (Torino: Giappichelli, 2012); G. Allegri, 'L'Europa al bivio. Un rompicapo per il costituzionalismo democratico e sociale', review of C. De Fiores, *L'Europa al bivio. Diritti e questione democratica nell'Unione al tempo della crisi* (Roma: Ediesse, 2012), available at http://www.diritticomparati.it/2013/01/leuropa-al-bivio-un-rompicapo-per-il-costituzionalismo-democratico-e-sociale.html (last visited 24 May 2016). For a critical approach, N. Irti, *Diritto senza verità* (Bari: Laterza, 2011); Id, 'Tramonto della sovranità e diffusione del potere', in A. Febbrajo and F. Gambino eds, *Il diritto frammentato* n 53 above, 3.

[76] G. Teubner, 'La matrice' n 65 above, 21-22.

[77] G. Teubner, *La cultura del diritto* n 75 above.

[78] In fact, with particular reference to the question of fundamental rights, Teubner admits: 'Justice of human rights can be formulated only in negative. It aspires to remove unjust, not to create just situations': G. Teubner, 'Ordinamenti frammentati e costituzioni sociali' Lectio Magistralis in occasion of the honoris causa degree, University of Macerata, 30 April 2009, now in *Rivista giuridica degli studenti dell'Università di Macerata*, 45, 57 (2010), and in A. Febbrajo and F. Gambino eds, *Il diritto frammentato* n 53 above. The same concept was already affirmed in Id, 'La matrice' n 65 above, in particular 36.

discourse about the construction of possible models able to govern conflict, or to ensure the political balance among different powers which constitute juridical reality.[79]

In pursuing the balance between legal certainty and justice, in searching for a model which could implement the idea of the justice itself, the jurist relies on the system, making different political choices. His only problem is to invent tools, which ensure the solidity of every choice, of every model, of every system, by removing possible interferences as anti-systemic (unconstitutional?) elements.

The construction of new theoretical models, aimed at reducing the level of the complexity of modern society, is not precluded. However, the political solution to the problem of the identification of the sources of law (that is, the political solution to the eternal problem of the power legitimacy) still remains undefined.[80] The current difficulty of the *juridical* building of a legal system entirely lies in the definition of the balance of powers – that is, in the definition of the processes (not only procedures) able to respond to the call for justice, or able to define the idea of justice itself.[81]

[79] It would be necessary to reflect on the problem of legal pluralism, about the exact meaning of the expression 'juridical rule': about the line between law and social phenomenon. All depends on the validity criterion adopted (the requirements for belonging to the system). This criterion could be the respect of a more or less fundamental norm (the Kelsenian Grundnorm); a set of normative criteria (N. Bobbio, 'Ancora sulle norme primarie e secondarie' *Rivista di filosofia*, 35 (1968), now in Id, *Studi per una teoria generale del diritto* (Torino: Giappichelli, 1970), in particular 186-187); the behaviour of certain institutions (the doctrinal criterion proposed by J. Raz, *Il concetto di sistema giuridico* n 54 above, 266); and so on. The list could be very long. In conclusion, we can simply recall the Ehrlich's research on legal pluralism (in particular E. Ehrlich, *Beiträge zur Theorie der Rechtsquellen, I, Das ius civile, ius publicum, ius privatum* (Berlin: Heymanns, 1902); more in general, Id, *Grundlegung der Soziologie des Rechts* (Berlin: Duncker & Humblot, 1913). See also A. Febbrajo, 'E. Ehrlich: dal diritto libero al diritto vivente' *Sociologia del diritto*, 137-159 (1982), a very important introduction to Ehrlich's theories).

[80] Where 'Politics is not a system, but an internal event of every system (law, economy, culture, health etc.)': P. Femia 'Il giorno' n 29 above, § 2.

[81] 'The formal concept of justice should not be refused and not even mocked. On the contrary, it should be present in every debate about the just and the unjust, since every juridical system, positive or natural, divine or human, must have it': N. Bobbio, *Giusnaturalismo* n 38 above, 21.