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THE ROLE OF FRATERNITY IN LAW
A COMPARATIVE LEGAL APPROACH

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ROUTLEDGE

PREFACE

This book interests all those who ask themselves questions about the law that are different from those regarding the formal correctness of its production, interpretation and application, or different from the type of interests that individual norms protect. It attempts in fact to verify which values – other than that of pure and simple order – can give law meaning and a purpose to achieve. In light of these values, one could verify not only the appropriateness of individual abstract norms, but also the quality of their functioning in the concrete realm of human relations. It is clear that the study of such values, which should be recognized in the various cultures and suitable to guide relationships in a global world, requires a certain anthropological conception of the human being. Although this point is examined in the book only episodically, it seems that the single contributions, beyond the more or less marginal differences between the authors, presuppose a personalistic concept, at least in the sense of assuming that human beings recognize their own identity and development only through relationships with other persons. Such relationships can also normally be configured within legal forms, which give law the distinct characteristic of relationality, enhanced by the fact that law presents itself as a communication addressed to individual members, conveyed by the group or groups to which they belong.

Throughout the course of human history, two values – liberty and equality – have strongly influenced the quality of human relations and their legal governance, presenting themselves in certain places and epochs as the main objectives, that law has had to attain. In modern times, they have been proposed with particular energy and effectiveness ever since the French Revolution, which, maybe with less energy and certainly with less effectiveness, added fraternity (which also bears a long social and legal history, effectively beyond the relationships of kinship). This premise would be sufficient to stimulate reflections on the possibility of giving such concept concreteness even in the legal field. But there is more.

Since the end of the last worldwide conflict, fraternity has been cited in several constitutional charters (such as those in France, Portugal, Brazil, etc.), while others (such as those in Italy, Spain and in the Charter of Fundamental Rights of the European Union) refer to the value of solidarity,

which is similar – albeit not identical – to fraternity; above all, it has been indicated as the supreme regulatory criterion of interhuman relationships by the representatives of the States that approved the Universal Declaration of the Rights of Man (Article 1) on 10 December 1948. The enormous bellicose catastrophe that involved most of the planet's population gave rise to the need for a new proclamation of human rights and a criterion that would determine its use and respect. The nexus between fraternity and human rights is important, also to avoid that fraternity be called upon as a value of a restricted group, with the intention of excluding those not belonging to it. In fact, perhaps not by chance, numerous constitutions (such as that of Belgium, Finland, Ireland and the German fundamental law), avoid the term and prefer calling attention to human dignity and the rights that descend from it. Now, the Universal Declaration of 1948 shows that there is no contradiction between these two orientations and that the concept of fraternity, if understood in the universal sense, and not a specific one, indeed comprises respect for dignity and for the human rights of every person. But wouldn't it have been sufficient to recall the equality among persons to do so? Which broader points of view present the concepts of fraternity, or solidarity, or others similar to them, such as the more recent "proximity"?

The contributions in this book attempt to provide some responses: first of all, such values, guiding each subject in a positive approach toward another person, independently of the type of human and legal rapport that involves them, could contribute to give effectiveness to the respect for each other's dignity (while, e.g., the fact that the other in this moment is my adversary or has wronged me can create doubts as to whether I must consider him or her an equal to me). From these values, in fact, the conviction can be drawn that in every single human being all of humanity dwells. In the second place, the above-cited values, even when they cannot sustain the existence of a "right of fraternity" or "of solidarity" for every legal system, would be sufficient to justify the so-called rights with widespread ownership (or "third generation" human rights), such as those of peace, development, healthy environment, etc. These are clearly duties and responsibilities that bear on the public authorities, but also on every single person, and that protect interests not belonging only to current generations, but also to future ones. According to another thesis sustained herein, then, only fraternity would be able to give concreteness and continuity to the value of "sustainability", extending it from the economic and environmental spheres to embrace the entire system of human relations in a defined place. Indeed, it could be sustained, with a viewpoint to be thoroughly explored, that it is the relationship between persons itself – instead of their respective

interests – that constitutes the true object of legal protection; the group one belongs to would therefore be conceivable as a network of relationships, to the point that even the principle of legality should be interpreted in a substantive way, as if it were aiming to guarantee a solicitous coexistence towards every person. In such a context, fraternity would constitute an appeal to keep in mind the differences and identities of individuals and smaller groups in a balanced way. While other observations are more tied to positive data of individual legal systems (above all the French, Italian and Brazilian Constitutions, or the criminal system – referring to reflections based on the Italian one), it is worth noting a problem that is the subject of discussion in common law countries: whether liability can result from the duty of *alterum non laedere* upon anyone who, recognizing a dangerous situation and being able to intervene to help, did not do so, when damage is caused to the person in such situation.

It is evident that jurists can give concreteness to the value of fraternity or to those values similar to it in many ways, but they are difficult, and require *in primis* real-life examples of such values and a social consensus around them, which naturally will be able to grow to the same extent that an adequate cultural foundation will spread it. The same is true regarding the international community, which despite the Declaration of 1948 and despite the opening of it to subjects who are different than the single state entities and more sensitive in recognizing universal values, is still conditioned on the interests of the States and on the power politics that derives from them. Nonetheless, the emergence of the concept of unity of the "human family" (as expressions such as "crimes against humanity" and "common heritage of mankind" demonstrate), as holders of common interests that are superior to those of different state entities, gives reason to hope.

Just as interesting as those contributions noted above are two others, which, instead of referring to more or less recognized values, to be implemented in the various legal systems (including the international one), propose a model of theoretical analysis of the individual legal relationships with an initial and still generic application to contractual relationships. Here the key word, more than that of "fraternity", is "justice", but it does not imply a theory of justice. It is assumed that the objective of the law is to promote the creation of "just" rapports and that this objective, at least in private law, is also the aim of the parties. The evaluation of the individual rapport should take the following into consideration: the model of the relationship in social practices; the norms that regulate the rapports (or the "legal model"); the conduct of the parties involved in implementing it; and its result, with its greater or lesser degree of justice (whatever is meant by

this term). Naturally, the result will depend – to a greater or lesser degree – on the first three aspects and in turn will influence subsequent social practices, and, if the result is widespread, will also influence the regulatory system. The insertion of fraternity/solidarity into this scheme can occur at the levels of social practices, of norms and of the conduct of the parties. Assuming that the insertion has occurred in the first or the last of the three above-cited aspects, and assuming that the result of justice is more satisfying than in other cases, lessons for the progress of law could be drawn.

Such scheme of analysis, immediately applicable by a judge in the common law (while the continental judge must disentangle the normative constraints within his or her own legal system), allows detecting empirical data from which jurists can evaluate their importance, to reflect further, but above all the scheme allows them to grasp the relevance of the single instances of individual conduct in forming the relationships that characterize the social reference group. It also allows following the transformation of practices into real and true customs and to provoke, either directly or through a formal authoritative source, changes in the law; in essence, it highlights the nexus between the way members of a group behave and the entire group, overcoming their tendential separation in the legal discourse. These observations are not without effect on the conception of fraternity or of the values similar to it, because the scheme indicated offers a way to measure its implementation and diffusion, foreshadowing an affirmation and development of these values that is not very dissimilar to that which, in the realm of private law, has occurred through "good faith", starting with Roman Law up through the modern codifications.

It goes without saying that all the perspectives and the themes indicated can inspire further studies and even lively debates, which is indeed the purpose of a book such as this one.

Prof. Fausto Goria

INTRODUCTION*

Anyone approaching a new line of research must delineate areas and set objectives to reach, starting from a cultural horizon. But for the jurist, who today must face normative systems on the one hand and a *plurality of cultures* or *plural cultures* on the other, it is not a question of retracing furrows already plowed, but rather delving into paths less often traveled and not without uncertainties. Research can present unprecedented perspectives, especially if one thinks of the multitude of ever-present and recurring questions. In the legal field, *space* and *time* have constituted "allied" categories in the search for knowledge, and are considered necessary methodological premises. Space and time establish the reading of history and the interpretation of events; they trace paths, giving life also to legal instruments within legal systems. For example, customary law finds its legal significance through the passage of time: it requires a repeated behavior, undertaken in observance of a rule, for a certain period of time within a certain community.

And yet, today, paradigms and acquired certainties seem to lose their importance, while *virtual* reality seems to redefine spaces and relationships that are able to consume themselves in an instant without time, and place themselves in every place and in no place. At the same time, it is technology in its present sphere of dominance, which affects categories that have always marked the traditional sequence of the past, present and future for humanity, typical of time read in a historical way. Nowadays – it is worth noting – the same "technology renders time insignificant: the past is nothing but technically obsolete, the future is technically perfected". Results are reached and dissolve, to conclude: "Technology is ahistorical, because the world that it produces is artificial, but so invasive that it substitutes the real one". [1]

Methodology changes also in the research that faces new challenges: it is not just a matter of starting today from a path already traveled in the history of humanity, but one of knowing how to glean from current events that are usually described as "signs" of a changing world.

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* The normative references contained in the Italian essays refer to the legislation in force at the time of the original edition.

[1] *See* F.P. CASAVOLA, *"Innovazione ed Etica",* Lectio Magistralis (unpublished text), p. 40 *et seq.* (on the occasion of the Inauguration of the AY 2007-2008, Università degli studi del Sannio).

It becomes difficult to reconstruct the key to reading the complexities and uncertainties, contradictions and renewed expectations for individuals and peoples. Faced with "powers" and "knowledge" that science itself and the progress of technology bring about, today it is necessary to allow oneself to be asked questions that may be original, without neglecting, however, those that are more noted in the legal field, namely: *justice and legality*.

If, in this regard, the object of the jurist's analysis is usually a legal system and the rules dictated through it for the purposes of coexistence, the age of globalization poses further and unusual challenges.[2] On the one hand, the observer faces a horizon without borders, which thus lies beyond the confines of states; on the other hand, new "frontiers" emerge, delineated by technology towards perspectives that are increasingly disturbing for the *humanity* of mankind. The image of a complex society appears, in which confrontation seeks reconciliation between *interdependence*, which is itself a paradigm of ties between persons – and multiple unceasing conflicts.

In this framework – innovative for every categorization and significant in its impact on the life of peoples and communities – the law, in its own essence, also "finds" new frontiers and fields to plough. Crossing the confines drawn throughout history, today, even juridical space is redesigned by the global economy itself, which requires new rules and "forms" of cohabitation, in an exchange between individuals and peoples. This new scenario cannot be entrusted solely to the solutions inherent to governance; it demands a "path" that weaves between normative systems and cultures, between principles and rules, between goals reached and "new" needs that arise in the relationships between persons and within humankind.

Indeed, today's challenges intertwine stories of individuals and populations, with which the law seems to be affected by a profound crisis and by a lack of effectiveness.[3] And yet, its force appears to be quite penetrating, if

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[2] A.J. ARNAUD, *Le sfide della globalizzazione alla modernità giuridica*, in M. VOGLIOTTI (ed.), *Saggi sulla globalizzazione giuridica e il pluralismo normativo*, Giappichelli, Torino, 2013, p. 77 *et seq.*, poses the question not only regarding the nature of law itself, but also that of a new content of its general principles, in an age in which "the market tends to substitute the person at the center of every social regulation": p. 80. For an investigation on the "ridge" between law and economy, which reexamines, in a planetary version, a "new *lex mercatoria*" with a normative function regarding "*societas mercatorum* or business community", or, a society without State, *see* F. GALGANO, *Lex mercatoria*, il Mulino, Bologna, 5th ed., 2010, p. 248 *et seq.*; *cf.* further and successive observations on globalization and universality of the law, *id.*, p. 273 *et seq.*

[3] Analogous observations, related to "judicial remedies", are expressed by F. STELLA, *Giustizia e modernità. La protezione dell'innocente e la tutela delle vittime*, III ed., Giuffrè, Milano, 2003, p. XIV, and specifically referring to criminal law, p. 577 *et seq.*

it is measured by the numerous sources of normative production:[4] from Constitutions to laws, primary and secondary sources, EU and international sources – which nonetheless are unable to overcome the evident inability of the law to resolve the many conflicts and open issues.

It would appear, on the one hand, that the very sense of law as a rule of life and co-existence, able to orient the various forms of cohabitation, has been lost in time; on the other hand, that the world has been "reduced" to a so-called "global village" recalls the timeless relevance of the dictates of Art. 1 of the Universal Declaration of Human Rights. In its Preamble, the "human family" forms the backdrop of the enunciation of Article 1 of the Declaration of 1948: "All human beings are born free and equal in dignity and rights […] and should act towards one another in a spirit of brotherhood".[5]

And almost as if crossing an ideal bridge between the past and the present, we find a few words written on a legal manifesto already in 1868, words that appear to perhaps be a countertrend, but almost waiting for a response: "Humanism knocks at the courthouse doors [...]: equality and liberty [...] fertilize a third (concept) [...] fraternity between individuals and between peoples, which, from the ideal and religious field, starts seeping

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With regard to the "principle of responsibility", the author also underlines the capacity to "*forge new paradigms of lifestyles*" (emphasis in original) as a "remedy".

[4] P. GROSSI, *Globalizzazione, diritto, scienza giuridica,* in *Foro it.*, 2002, *see* pp. 151 *et seq.*, emphasizing that, if the sources and subjects that produce laws are many, "re-privatization of large areas of the legal planet" is the further consequence, alongside *legal pluralism,* at p. 157. National law, which Kelsen described in his theorization, would be compared today with the "law of globalization", deprived of its *purity*, but equipped with *effectiveness*, this time measured with regard to economic interests of the operators, *ibid.* The praxis, which creates the law to serve needs strictly connected to the market, contributes to the substitution of the image that is typical of the "authoritarian" normative system – represented by a *pyramid* – with that of the *network*, indicating a system of rules "on the same level, one linked to the other by a relationship of reciprocal interconnection": *id.*, p. 159 *et seq*. Criticisms regarding "*criminal by-laws",* which, having lost their oneness, are challenged by a "networking system", inducing a "*change of paradigm* between the system of rules and a system of principles": C.E. PALIERO, *Il diritto liquido. Pensieri post-delmasiani sulla dialettica delle fonti penali*, in *Riv. it. dir. proc. pen.*, 2014, in particular, p. 1108 *et seq.* and, *id.*, the conclusions, p. 1129 *et seq.*

[5] *Cf.* observations made in an international perspective by M. AQUINI, *Fraternità e diritti umani*, in A.M. BAGGIO (ed.), *Il principio dimenticato la fraternità nella riflessione politologica contemporanea*, Città Nuova, Roma, 2007, p. 251 *et seq.*, and V. BUONOMO, *Vincoli relazionali e modello di fraternità nel diritto della Comunità internazionale*, *id.*, p. 227 *et seq.* For a necessary re-reading of *solidarity*, proposed in light of the *Declarations*, in the age of globalization, *cf.* A. SUPIOT, *Homo juridicus*, Seuil, Paris, 2005, Italian translation B.X. Rodríguez, *Homo juridicus. Saggio sulla funzione antropologica del Diritto*, Bruno Mondadori, Milano, 2006, p. 240 *et seq.*

into the political and legal field".[6] Even in past eras, law seems thus to be seeking new avenues or to be looking "beyond" established principles or traditions to become an effective instrument of coexistence.

We can moreover assert that the law calls upon and engages everyone.

Everyday life, in fact, outlines itself in a thick network of relationships, gestures and behaviors that put people either into reciprocal connections, or links between persons and institutions, which have legal relevance per se: familial relationships are lived and governed by law; contractual relationships are installed through purchases; services are used based on contributions paid to the State; means of transportation that imply observation of rules are used; employment relationships are constituted and governed by norms, and so on.[7]

Legality enters therefore in everyday relationships, regardless of a conscious awareness of its presence, and the law "lives" through the intertwining of real-life conduct in that which becomes "juridical experience". In this regard, it is understandable how much has been written about the law itself because of its foundation: it is activity that is expressed as a relationship, a set of rapports between individuals who are able, by their nature, to affect and modify the real world, a communion through the diversity of interests and purposes of every single life.[8] Reciprocity, the essence of legal relations, in which rights and duties are placed as correlative terms,[9] thus

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[6] P. ELLERO, *Manifesto dell'*Archivio giuridico, in *Arch. giur.*, I, 1, 1868, p. 7; in the cited text, equality and liberty are defined as *negative* concepts, while fraternity is *positive*. The topics that follow in the text – it seems dutiful to premise – constitute a deeper analysis of the themes addressed in international conventions and seminars, according to a methodology enriched by dialogue and discussion between jurists of different backgrounds and legal traditions on the various continents.

[7] On the everyday context of relations and the law, *see* G. ALPA, *Istituzioni di diritto privato*, Utet, Torino, 1994, p. 49 *et seq.*, observations found in ID., *Manuale di diritto privato*, IX ed., Wolters Kluwer-Cedam, Padova, 2015, p. 3 *et seq.*

[8] *See*, in a broader perspective, G. CAPOGRASSI, *Analisi dell'esperienza comune*, in ID., *Opere*, vol. II, Giuffrè, Milano, 1959, p. 127 and *supra*, p. 115, where he specifies "a relationship […] that presupposes the recognition of the other person – whoever it is – is truly a relationship"; ID., *L'esperienza giuridica nella storia*, in *Opere*, cit., vol. III (posthumous and unpublished writings), in particular, p. 296. Even if in another perspective, we can recall the conceptual analysis carried out on the term "*Recht",* referring to the legal system as a system of human conduct, where – it is argued – "it is the reciprocal behavior of men that constitutes the subject of this regulation" – H. KELSEN, *La dottrina pura del diritto* (Ital. translation M.G. Losano), Einaudi, Torino, 1975, p. 44 (original title *Reine Rechtslehre*, Franz Deuticke, Wien, 1960).

[9] *See* N. BOBBIO, "I diritti dell'uomo oggi", Interview (14/6/1991) of Norberto Bobbio, consultable at the site *www.emsf.rai.it*. Placing us in the perspective of humanity, some of the words recalled by this philosopher in this interview can shed new light also

calls for further reflection. Scholarly writings – even faced with the apparent conclusion of any discussion on the law – today still reflect on the *juridical experience*, placing the world of human conduct and relationships, as well as the world of norms, into a single and even vaster world. The very observation of the norms, in their general scope aimed at everyone, is reread as "solidaristic recognition", in keeping with a legal system that falls within "the *relationality* typical of the human experience".[10] But today's complexity broadens the horizon. The existential essence traceable to those "human rights" recognized at the constitutional level not only nationally but also universally, seems to find confirmation in the "humanitarian need to protect the *human person* as such".[11] If their protection is a shared task,

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on the contents of reciprocity: "Today the rights of man – he emphasizes – constitute a new worldwide ethos".

[10] *See* G. FORTI, *"Paradigmi distributivi" e scelte di tutela nella riforma penale-societaria. Un'analisi critica*, in *Riv. it. dir. proc. pen*., 2009, p. 1628 *et seq.*, and *id.,* bibliography at note 98. For the observations in the immediately previous text, R. ORESTANO, *'Diritto'. Incontri e scontri*, il Mulino, Bologna, 1981, pp. 505 *et seq.* and 552 *et seq.* Interesting notes also emerge in the analysis carried out by G. COSI, *Legge, diritto, giustizia. Un percorso nell'esperienza giuridica*, Giappichelli, Torino, 2013, p. 111 *et seq.*, where the author looks at the path from the myth to the ancient images of Greek culture. The *normative experience* is traced through the meaning of key-words. Among these, *dike* and *aidòs*, concepts that, read "in hendiadys form", take on a peculiar value: the first would offer the *guarantee* of a condition of *reciprocity*, whereas the second, expression of a "*relational* […] sentiment, aimed at involving the 'other'", is connected, because of the value of its content, to "the realm of the intersubjective experience, which he likens to an existential behavior of recognition of the 'other'".

[11] On this point, and regarding certain specific issues, allow us to mention the increasingly timely debate that has emerged between the "progress of technology" and "technological scientism [...] the current form of the desire for power". In this context, L. MENGONI, *Diritto e tecnica*, in *Riv. trim. dir. proc. civ.*, 2001, p. 7 *et seq.*, indicates within the constitutional principles, which are the expression of fundamental rights, "elementary principles of the legal system", as such equipped with an acquired legal nature. This would lead to a new 'validity': positive law would establish "in an objective order […] substantive values", superseding contemporaneously a validity anchored to mere "procedural legality". If therefore, the author affirms, the Constitution recognizes certain values as "ideal objectivities" and translates them into "*legally* binding principles on the legislative power", it also intervenes to correct – through the principle of solidarity "the original individualism in the theory of human rights".

Such perspective, necessarily placed within the ambit of the Italian legal system, but which could easily broaden its scope, is also taken up by N. LIPARI, *Luigi Mengoni ovvero la dogmatica dei valori*, in *Riv. trim. dir. proc. civ.*, 2002, p. 1108 *et seq.*, to emphasize a double peculiarity: on the one hand, the possibility of overcoming a "self-referential" technique, thus conferring an essentially measured dimension on the individual; on the other hand, in regaining the law as a value, a desirable "effectiveness of the principle of solidarity" necessary for a "multicultural" legal system, *see* p. 1110 *et seq.* Moreover, in verifying today's current value of the Universal Declaration of 1948,

this commonality would further confirm that human rights are as such part of the common heritage of humanity. This category of rights therefore does not seem distant from that thought of as *common goods*. Indeed, according to a recent analysis, common goods would constitute "a normative criterion for taking action and a foundational value of which human rights are an integral part", even to the point of creating a union between "commonality" and "universality". [12] The two of them, in this interpretation, allow and bring about the relationships between individuals and cultures, which in their diversity also include the indispensable component *responsibility*.

If this is the case, the course of this research challenges first of all the jurist to confront a situation of two-fold complexity: the first aspect reflects a conflictuality that, within our coexistence, norms are unable per se to contain; the second is generated by "daily births and deaths" of norms at the most diverse levels. It is today's vision of law – or the most recent, at least in the tradition of civil law – described "without destination", without a "where" or "why", and almost an "inexorable" reading, which – in the Weberian "polytheism of values" – reduces the law itself to a "production of norms", consigned to the "solitude of human will". [13]

The observer, in a sort of "legal disenchantment", thus perceives a law that today would be at the point of sharing the arbitrariness of will itself, an instrumentality aimed at purposes and interests that entail conflicts between conceptions of different worlds, while the "indifference" for its

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A. CASSESE, *I diritti umani nel mondo contemporaneo*, VII ed., Laterza, Roma-Bari, 2002, p. 77 *et seq.*, identifies a new *ethos* in human rights, whose basis would lie in a "generous desire to *unify the world*", constituting at the same time an attempt to indicate "values (respect for the dignity of the human person)" and "*disvalue* (the negation of that dignity)": *id*, pp. 80 and 87.

[12] *See* M. ZANICHELLI, *Diritti umani e bene comune*, in *Bene comune fondamenti e pratiche*, ed. F. BOTTURI-A. CAMPODONICO, Vita e Pensiero, Milano, 2014, respectively, pp. 149 and 152 *et seq.* If today the entire problem, at various levels, is addressed in the dimension of *multiculturalism*, it is noticed how the translation of the cultural element in a legal-institutional key poses problematic issues by virtue of an identity, within a State: *see* observations made by V. BUONOMO, *La tutela dei diritti dell'uomo strumento dell'integrazione europea*, in V. BUONOMO, A. CAPECCI, *L'Europa e la dignità dell'uomo diritti umani e filosofia*, Città Nuova, Roma, 2014, p. 13 *et seq.*, and in particular, p. 99. And it is with regard to this point that the author emphasizes without hesitation that the function of granting "protection to human dignity and a service toward the common good" is attributable to the state itself.

[13] Such expressions contribute today to describe a right that is uniquely "folded up" in itself, whose rationality becomes "the rationality of this absolute solitude": *see* N. IRTI, *Nichilismo giuridico*, I ed., Laterza, Roma-Bari, 2004, p. V *et seq.* and, for the citations of this text, *id* pp. 8 and 22. Some notations have been previously developed by the author under the title *Nichilismo e metodo giuridico*, in *Riv. trim. dir. proc. civ.*, 2002, p. 1159 *et seq.*

normative contents would tend toward a "*cult of the form*". Nihilism and formalism are melded, and through its "*procedures",* the law – like technology – "constructs its own artificiality", [14] until it expresses itself as the single or collective "desire for power". The result is a law that is no longer only "positive" but "im-posing" with the force of the legal norm: one technology among the other technologies, a "product" that – as such – "is no longer necessary to know the truth". [15]

The law, which even in its necessary objectification requires *form*, now would no longer use it "*at the service of its content*", but rather as its "*essence*;" and in the constant *production* of norms, in the absence of a "*purpose*", it is in the form that "*chaos* [...] *finds constraints and order".* [16] Thus the "*assertion"* of the law [... is reread as] the *desire"* and affirms itself: "The law, by now separated from cosmic order and divine knowledge, throws itself into the arms of earthly desire, which drags it from nothing and push it back to nothing. Tying itself to the finiteness of time, law expresses all the possibilities of the being and of the non-being". [17] The phenomenon we are talking about is also placed and "reread" today in the broader horizon redrawn by an economy where "business [...] does not tolerate boundaries. The places are no longer decisive; what counts is the "*everywhere*" of producing and of exchanging […]. Relationships lose every concrete and specific individuality […] and respond only to criteria of calculations and quantity". Production and exchange, profit and consumption delineate in the "space" of the markets in the "*everywhere",* where globalization "forces the law [...] to build a new world order". [18]

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[14] *See* N. IRTI, *Nichilismo giuridico*, cited *supra*, pp. 26 and 34 (emphasis in the original).

[15] *See* N. IRTI, *Nichilismo giuridico*, cited *supra*, p. VI and p. 36. Regarding the "diverse forms of the desire for power", placed in that world of technology to which even the law would belong, *see id.*, p. 38 *et seq.*

[16] This reflection, which appears implacable in its reading that emphasizes even the "loss", or "absence" of unity and of purpose in the law, broadens its horizon in other pages that the author would identify as *"Nichilismo giuridico II"*: *see* N. IRTI, *Il salvagente della forma*, Laterza, Roma-Bari, 2007, in particular – for the citations of this text – *id.*, p. VI *et seq.* and p. 10 *et seq.* (emphasis in orig.).

[17] *See* N. IRTI, *Il salvagente della forma*, cited *supra*, pp. 9 and 13, where the author observes how the "*truth* of the divine message" has replaced "the *validity* of the procedure". He explains that it is precisely in re-proposing – *id.*, p. 12 – that formula that reduces the law to a form of "desire for power": "If the rooms of the sky are empty, if gods and nature remain silent, then the law, consigning itself to the human will, is an uninterrupted act of being born and dying".

[18] In various writings of the author, the "inexorable" connection between law and economy emerges, reexamined recently, according to what is cited in the text, by N. IRTI, *S-confinatezza*, in E. DOLCINI-C.E. PALIERO (ed.), *Studi in onore di Giorgio Marinucci*, vol. III,

Thus, the law, within its borders inside the legal systems of the states, has marked the states' "historic identity" and men's individuality with the ownership of their own rights. Now in the "*co-extension*" of the law to an economic scope, it also "abandons its birth land" and in the new frontiers it confronts itself with "artificiality" as the "*meeting point between law and techno-economy*". [19]

New "areas" therefore and new "questions" open themselves to a "beyond" with respect to a defined space and time. If, in fact, the horizon delineated seems to reach nihilism as its "landfall", in the assertion of a past that does not return and a future without horizons, it becomes inevitable to interrogate ourselves on our being "here" and "now". The path is the same as that of humanity, where each man lives alongside another man, thus opening a further dimension in which the jurists' questions "dialogue" with the claims and expectations of responses to the needs of today's men. If this is the case, then the law, constituted by man and for man, enters per se into the life of humanity and, breaching the embankments of a system that could appear to be "closed" within its "wall" of norms, instead, opens its capacity to "substantiate" every formalism to "weave" relationships between persons at every latitude. [20] The method, therefore, with which even

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Parte speciale del diritto penale e legislazione speciale. Diritto processuale penale. Diritto, storia e società, Giuffrè, Milano, 2006, p. 2925 *et seq.*, and in particular, pp. 2929 *et seq.* and 2933.

[19] *See* N. IRTI, *S-confinatezza*, cited *supra*, p. 2932 (emphasis in orig.). On the definition of the market as "*locus artificialis* and not *naturalis*", *see* V. BUONOCORE, *Impresa, mercati finanziari,* Governance, in *Competitività dei mercati finanziari e interessi protetti. Il pendolo del diritto americano e le prospettive del diritto italiano*, ed. C. AMATUCCI-V. BUONOCORE, in *Quaderni giur. comm.*, 2008, n. 320, p. 188 *et seq.*

[20] Also in the ambit of observations made by N. IRTI, *Il salvagente della forma*, cited *supra*, p. 83, there are references in daily life to "concrete and determined relationships". The image of *law* with a controversial essence persists: "*positivity*", which constitutes its predicate in that law is placed by men for other men, marks, indeed, its "*humanity*", but at the same time also its "*artificiality*" – *see* N. IRTI, *L'uso giuridico della natura*, Laterza, Roma-Bari, 2013, p. VII *et seq.* (emphasis orig.).

Another key to understanding emerges however from considerations made by A. KAUFMANN, *Riflessioni preliminari su di una logica ed ontologia giuridica delle relazioni. Fondazione di una teoria personalista del diritto*, in F. ROMEO, *Analogia. Per un concetto relazionale di verità nel diritto*, Cedam, Padova, 1990, in particular, p. XXIII *et seq.* Interpreting the law's signals as "relationships", in that they are reciprocal rapports between norms and concrete cases, the author searches for a "constructing phenomenon" that has "a relational character" in them, and introduces "the problem [...] of the *ontology of the relationships*", as the "problem of reality", *see* p. XXIX. Instead, for a 'rereading' of "modern law" in – might we say – a 'reversed' perspective, in which it would be the "auto-referentiality", or "autonomy of the law to co-actively install a 'formal I' in the world in place of the 'real I'", thus changing and developing the "real relations" into "truly formal" ones, *see* M. BARCELLONA, *Critica del nichilismo giuridico*, Giappichelli, Torino, 2006, in particular, p. 250 *et seq.* and in the conclusions, p. 292 *et seq.*

this limited analysis will be carried out, will not adopt the norm as its only measure, but will try to explore, through the plurality of voices and contributions, also that component that constitutes the life itself of the law.

We begin to cross the boundaries between states and continents, but not because of the analysis of a widespread phenomenon such as globalization, but rather to seek a *paradigm* able to generate and define links between individuals and peoples. It is in this dimension that *fraternity* – defined at the end of the 1800s as a "positive concept" with respect to the 'negative' attribution ascribed instead to equality and liberty – can be "rethought" precisely beginning with the source that contains it: the Universal Declaration of Human Rights. The international perspective becomes inevitable as its framework. It verifies the importance of fraternity, as echoed in light of the 1988 Constitution of the Federative Republic of Brazil, where it is considered a "juridical category". Such perspective also promotes research on fraternity in light of the fundamental rights and of the guarantees that are traceable to the essence of democracy itself. In fact, the *Preamble* of Brazil's Constitution emphasizes the objective of its National Constituent Assembly to "institute a Democratic State, aimed at assuring the exercise of social and individual rights, freedom, security, wellbeing, development, equality and justice as supreme values of a fraternal society". However, *fraternity*, which necessarily finds a historic reference in the voices of various authors – almost as if reflecting a novelty and a *multiplicity* of contents for each of them – finds new and further areas of action and study in Brazil, regarding that "sustainability" that leads to the protection and inclusion of the *other*.

Thus, the new demands created by globalization could become the unprecedented opportunity for the jurist to follow new paths and to pursue new horizons of research. This area becomes inclusive and as such does not elude the fact that in the history of the last two centuries, a forgotten principle has appeared: *fraternity.* We must interrogate ourselves about this principle, also with regard to common-law models. If history, therefore – and this indeed will emerge from the analysis of the French Constitutions – delivers fraternity alongside the fundamental principles of freedom and equality, it must also challenge the jurist about fraternity's insuppressible demands, such as *justice*, which are unavoidable foundations for the rule of law, or *legality*.

In the pages that follow, this *excursus*, through the *focus* on certain legal systems, intends to ideally combine principles, codes and the normative-social fabric. It can also emphasize the "universal" component that *fraternity* conserves within itself. Having resurfaced in a lay context, but not having excluded its religious value, fraternity is almost depicted as a *necessarily*

relational paradigm, as a "bridge" between the plurality of cultures in the contemporary world, to which it offers space for a possible dialogue.[21]

In today's historic perspective, which seems to "constrain" men to establish relationships in all parts of the world, it becomes increasingly essential not only to have a "key to interpretation" that converts law into a new tool for coexistence, but also requires a paradigm capable of translating the "life of norms" into the "norms of life". If this is the case, no part of the legal system can be excluded. We allow ourselves to emphasize that not even criminal law, which marks illegal acts in the "pathology" of law itself, and is called upon to restore the violated rule with a stigmatization, can be left out. Wherever a transgression of a norm creates an *offender-victim* relationship by altering that rapport, the significance that the renewed relevance of fraternity might acquire in the search for new styles of life and coexistence could become even more important. The timelessness of these ideas can be drawn from rereading Hannah Arendt: "The past can be remembered, the future can be imagined, but it is in the present, in the *here* and *now* that […] we think and we act […]. It is in the present that men join together and form relationships, it is in the *here* and *now* that man, […] decides, from time to time, history, by provoking new events".[22]

In an ideal "bridge" between past and present, it could be asked: what is the meaning of fraternity, and where does its possible legal relevance lie? The answer might be sought in the considerations that belong to the history of humanity, starting with the *dignity* of every person. The centrality of fraternity, which is placed today in every "true" challenge of globalization, expresses an *otherness* that seems to be no longer measurable solely through *neminem laedere*, if it is true that dignity expresses the very social and relational constitutive dimension of the person.[23] It is not therefore on-

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[21] Regarding *fraternity* in its origin, scope and foundation, *see*, besides the contributions of the editor of the volume A.M. BAGGIO (ed.), *Il principio dimenticato*, cited *supra*, p. 5 *et seq.*, and A.M. BAGGIO, *La fraternità antagonista. L'interpretazione freudiana e la fondazione della società egualitaria e conflittuale*, in ID. (ed.), *Caino e i suoi fratelli: il fondamento relazionale nella politica e nel diritto*, Città Nuova, Roma, 2012, p. 19 *et seq.* To further emphasize what is said in the text, *see* also M.R. MANIERI, *Fraternità. Rilettura civile di un'idea che può cambiare il mondo*, Marsilio, Venezia, 2013, *passim*, where, in an age marked by "emptiness", from the "twilight of duty" and from the end of the great narrations, the author sets forth the advent of *civic fraternity*.

[22] A. PAPA, *Nati per incominciare. Vita e politica in Hannah Arendt*, Vita e Pensiero, Milano, 2011, p. 126.

[23] A recent study, starting with the question: "Why speak about fraternity?" investigates the topic with the possibility that the legal system could verify the scope of the legal principle and outlines the concept, *see*: J.M. SOUVIRÓN MORENILLA, *Notas sobre la fraternidad como principio político y jurídico*, in *Sophia Ricerche su i fondamenti e la correlazione dei saperi*, n. 1/2015, pp. 44-75.

ly restoring relevance to a "principle", rather it is a desire for its implementation, which can find its capacity to focus on others even in legal relationships. *Liberty*, moreover, inherent to dignity, is awaiting its implementation in equal opportunities for all, starting with that *first step,* which is the recognition of the *ego* of the other, in the reciprocity of rights and duties; *equality* must become *substantive*. And all this implicates *positive* and *active* behaviors. The law also therefore can contribute to this process, if it is true that its normativity is asked to translate the same principles of liberty and equality into effectiveness and full realization. But other paradigms are needed, so much so that even the *Libro Bianco* on the "future of the social model" (written in Italy in May 2009 – Ministry of Labor and Social Policy) introduces the following title in the detailed ministerial document: *culture of giving and sharing in reciprocity*.

Furthermore, *fraternity* itself, even facing these questions and following a path between oblivion and renewed memory, is not – it is noted – "something else with respect to the law, neither does it vest itself in another law, but perhaps it is the secret heart of law, which is as central to it as the solution to problems that appear to be connected to a planetary dimension". [24]

The following pages will try to delineate a path that is only possible to travel with others, especially when – due to its scope and complexity – the path encounters the world in the plurality of its components. International conventions and seminars on the theme of this research – perhaps "uncommon" for many – have over time given life to an open "laboratory" that compares a multiplicity of exchanges of ideas. To all of them, as "fellow travelers", goes my gratitude for sharing the research, conducted through the years and enriched by the dialogue in the most various national and international contexts.

On the horizon regarding justice, a new "anthropological paradigm […presents itself] in which equality becomes *fraternity*": F. D'AGOSTINO, *Di che cosa parliamo, quando parliamo di giustizia*, in ID. (ed.), *Valori giuridici fondamentali*, Aracne, Roma, 2010, p. 34 *et seq.* A different, well-established perspective emerges from the analysis of J. RAWLS, *A Theory of Justice* (Rev. Ed.), The Belknap Press of Harvard U.P., Cambridge, Massachusetts, 1999, in particular pp. 90-91, where "fraternity", in the context of the *Principles of Justice*, is introduced regarding the *difference principle*; on this point, *cf.* F. VIOLA, *La fraternità nel bene comune*, in *Persona y derecho*, 49/2003, p. 141 *et seq.* and *id.*, the conclusions of the author "at the roots of fraternity" also with a view of its complementarity with equality.

Moreover, not even economics seems to be excluded from the renewed findings on *fraternity*: *cf.* L. BRUNI, *L'ethos del mercato. Un'introduzione ai fondamenti antropologici e relazionali dell'economia*, Bruno Mondadori, Milano-Torino, 2010, where already in the conclusion of the Introduction, the author presents the *incipit*, as a "tragic, but decisive enterprise".

[24] *See* E. RESTA, *Il diritto fraterno*, Laterza, Roma-Bari (new ed.), 2005, p. V.

A particular "thank you" to Dr. Giovanni Caso, Magistrate of the Court of Cassation and to Attorney Maria Giovanna Rigatelli for the many occasions in which we have met and exchanged reciprocal and shared legal reflections, which comprise ideas about the practice and above all about life itself, so that these reflections became experiential sources of new analysis and further comprehension.

Today, with the publication of this book's English edition, our path appears to be leading us onward; indeed, it seems to formulate new challenges to meet.

In Europe, the French Constitutional Council recognized the constitutional value of the principle of *fraternité* in its recent decision of July 16, 2018 (DC No. 2018 – 717/718 QPC *Conseil Constitutionnel*).

In the international community, the strengthening of cooperation finds a more direct expression in the commitments that States have designated as *objectives* for their shared vision and common action, as expressed in the *Twelve Commitments* included in the *Declaration on the 75th Anniversary of the United Nations*, adopted by the Heads of State and Government on 21 September 2020.

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