



# elementary experience and law

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# **Elementary Experience and Law**

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## Note on the English Edition

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Paolo Carozza

This small book is in an important sense a paradox. On the one hand it represents an experiment, a risk, because it treads new and uncertain ground. Beginning the project at the invitation of the Foundation for Subsidiarity, it was far from self-evident that connecting law and elementary experience made sense and could bear fruit. None of us had considered before, in any serious or sustained way and even less in a public form through our scholarly work, what the idea of elementary experience could contribute to our understanding of law and of human rights. Even after the series of seminars that generated these texts, it seems that the new questions raised far outnumber any settled conclusions. And yet, on the other hand, the path followed thus far has itself brought about the conviction in us that something interesting and worth pursuing has begun. Both in the dialogues among the various authors here, and even more in the reactions and discussions that it has provoked among a wide range of colleagues across different disciplines, from different cultures, and having sharply different philosophical and anthropological premises, a lively and very wide range of interest has emerged. One could say that this shared labor has itself become a generative experience in which we have discovered something worthwhile, something worth following further even in the recognition of our uncertainty about where it may lead. “The journey to truth is an experience,” to borrow the title of one of Giussani’s books.<sup>1</sup>

It is for this latter reason that we considered it important to make the work available also in English. To write or to translate anything in English that uses the work of Luigi Giussani is a challenging proposition, however. Even in Italian his words and ideas stretch the limits of our conventional language, precisely because he himself lived such an intense and profound relationship with all of reality that he was constantly using words in new ways (or even more, in old ways that returned to their origins), to try to express the existential weight of things. The style is evocative more than expository, and does not easily translate into a language, English, that tends toward the pragmatic and the indicative. And so a text like this must try to bridge the fascinating but distinctive style of Giussani and the discourses of law (where language is everything, and precision and common meaning are essential to its functionality) and of academics. If the English edition succeeds in doing so, it is due not just to the merits of the Italian original, but also to the fine and dedicated work of translation done by Mariangela Sullivan, to whom we are greatly indebted.

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<sup>1</sup> Luigi Giussani, *The Journey to Truth Is an Experience* (McGill Queens Univ Press, 2006).

## Preface

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Julián Carrón

“I couldn’t care less about the proof for the existence of God. But, like Monod, I have this stone in the pit of my stomach: I can’t accept the idea that the executioner and his victim disappear together into the void.” (*Corriere della Sera*, June 6, 2011). These words of philosopher Paolo Rossi shine a spotlight on the crossroads before which law finds itself today.

The crossroads is visible when someone poses the most simple of questions (and yet the one that is most frightening to jurists): “Why does man obey the rule of law?” For fear of punishment? Or for its correspondence to the need for justice? The first answer fails to remove that weight in the pit of our stomachs, which we all share with Professor Rossi.

The legal positivism that dominates today will never be able to satisfy this objection. The reason is simple: the need for justice that we find all around us, and that we discover inside ourselves, makes no allowances for ideologies of any stripe. This need may appear small compared to the vast bibliography attempting to shore up the currently fashionable concept of justice. But the need alone is enough to defeat all its detractors, all those who wanted and continue to want to silence the issue, because it constitutes an insuperable obstacle upon which their will to power shatters.

The elementary experience of every human being, that no power in this world – not with any of the tools at its disposal – has ever been able to eradicate, is the point of departure chosen by the authors of this book. Each reader can verify the ability of elementary experience (the phrase Fr. Giussani used in his most famous work, *The Religious Sense*) to illuminate the unanswered questions driving the current debate surrounding law and the definition of new rights.

Inside each one of us is the elementary experience of a *need for justice*, which is the most powerful levee against each new affront of power, and which constitutes a precious weapon for addressing the cutting-edge debate about human rights. Indeed, the theorem “more rights, more justice,” is promptly snuffed out by the elementary experience of any human being. Just as all the ideologies were not enough to remove the stone from the pit of Professor Rossi’s stomach, nor does the proliferation of rights automatically result in a superior experience of justice. No human effort – even the most noble and intense – can succeed in satisfying the need for justice. Just recognizing that it is an infinite and inexhaustible need is enough to show that every human attempt to satisfy it is Promethean.

The essays making up this book reveal that law finds itself at a crossroads that is more anthropological than juridical. Indeed one’s concept of law flows directly from one’s concept of humanity. For this reason it seems to me entirely appropriate that the authors have refused to reduce elementary experience to doctrine or other abstract

formulas to be imposed mechanically upon reality. Only an individual capable of feeling one's own elementary experience alive within herself can make a valuable contribution to the debate that will lead us through this crossroads in the right direction. This task requires each of us to commit our full loyalty to our elementary experience. Are we willing to make the commitment?



## Introduction

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Andrea Simoncini

The essays collected in this volume were born as a cycle of lectures organized by the *Fondazione per la Sussidiarietà* (Foundation for Subsidiarity)<sup>1</sup> as part of the annual seminar that it dedicates to a theme of cultural significance (“Seminario d’impostazione culturale”).

The chosen theme, *Elementary Experience and Law*, calls for two introductory clarifications: one regarding the content, and the other the method of the work.

### The Content

For those already familiar with the notion of “elementary experience”<sup>2</sup> as it was coined by Fr. Luigi Giussani, it may seem to strike an unusual chord in combination with the phenomenon of *law*.

However, it was clear from our first reflections on this topic that it is not primarily about juxtaposing contrasting ideas. Rather, to repeat the words of Julián Carrón in his preface, it is about verifying “the ability of *elementary experience* ... to illuminate the unanswered questions driving the current debate surrounding law and the definition of new rights.”<sup>3</sup>

The four authors of this book are united less by our previous scholarship in this area than by the attempt each of us has made to use our *own* elementary experience as a concrete way to understand a certain fact – the law – which is usually the object of our academic research.

The proposed hypothesis of elementary experience is not taken up as a sort of new theory, which will miraculously solve problems and resolve dilemmas. It is proposed instead as a critical factor in the analysis, a catalyst able to re-launch a thrilling journey into a body of knowledge we thought we already knew.

It was in this way that my contribution to this book came about, as well as that of Marta Cartabia and the dialogue between Lorenza Violini and Paolo Carozza. All of us are law professors at various universities (the first

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<sup>1</sup> The *Foundation for Subsidiarity* was founded in 2002 in Milan from the initiative of a group of academics, cultural figures and entrepreneurs, as a place of research, training and dissemination of cultural, social and economic themes, with reference to the principle of subsidiarity, which gives priority to initiatives born from “the grassroots” – from people and social groups – and puts their work at the service of the common good. ([www.sussidiarieta.net](http://www.sussidiarieta.net))

<sup>2</sup> See the first chapter in the present volume.

<sup>3</sup> See Preface in present volume (emphasis added).

three Italian, and the fourth American). Marta Cartabia and I have dealt, respectively, with the two fundamental coordinates by which the juridical phenomenon is mapped today: *law* and *rights*.

*Law* is the system ordering the society in which we live. This order can be produced artificially, by whoever holds the power; or it can be generated from the ground up, from society itself and its network of relationships.

*Rights* are an expression of that irrepressible call for justice, which demands that the irreducible existence of human dignity be recognized in every person.

Following the essays on law and rights is a conversation between Violini and Carozza, conceived as a “dialogue between two worlds.” The legal tradition of Europe on the one side, and that of North America on the other, provide two different ways to respond to the same need, through two legal cultures that share powerful common roots.

## The Method

Choosing authors and topics did not settle the question of *how* to approach the work. But at that point in the project’s development another unusual circumstance came into play, which took a role in shaping the approach: before being written in final form, each piece was presented publically, to an attentive audience. In this forum, the ideas we proposed became the starting point for keen and passionate dialogue. And rather than end with the original event, this discussion took the form of an ongoing seminar hosted by the Foundation for Subsidiarity. This allowed the authors to delve more deeply into their chosen topics, adding new facets and developing unexplored dimensions.

Therefore, the book you have in front of you doesn’t simply offer the original work presented at the seminar, but is the product of extended reflection and dialogue. As such it is a demonstration of the challenge from which we all started: that rather than expound a theory, we should try to use our own elementary experience to understand the central problems of law today.

The first sign that the tool of elementary experience has been used correctly is the discovery of the cognitive value of *encounter*: Knowledge does not come from imposing a predetermined yardstick upon reality; it is born from the resounding impact that other people and things have on us. This impact makes dialogue so much more than a dialectic (which is only carried out to affirm the superiority of a position); instead it becomes a path, a knowledge *through friendship*.

For this reason I cannot close this introduction without offering our gratitude collectively (because to do it individually would require too much space) to all the friends – professors, doctoral candidates, researchers, students, and listeners – who shared, discussed, objected and, in a word, accepted the challenge that this volume proposes.

Special thanks are due, *in primis*, to the Foundation for Subsidiarity, which not only devised, but also sustained this project by its active support.



## Chapter 1

# Elementary experience and law: A “persistent” question

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Andrea Simoncini

Before exploring the possible implications of the relationship between *elementary experience* and *law*, it is important to clarify the basic terms of the problem.

First we’ll consider what is meant by the concept of *elementary experience*.

### 1. Elementary Experience

This concept emerges again and again in the thought and writings of Fr. Luigi Giussani,<sup>1</sup> and it is not my intention here to summarize all its usages into a complete and exhaustive definition.

I will limit myself, therefore, to the description that appears in the book *The Religious Sense*:

What constitutes this original, elementary experience? It can be described as a complex of needs and ‘evidences’ which accompany us as we come face to face with all that exists. Nature thrusts man into a universal comparison with himself, with others, with things, and furnishes him with a complex of original needs and ‘evidences’ which are tools for that encounter. So original are these needs or these ‘evidences’ that everything man does or says depends on them.

These needs can be given many names. They can be summarized with different expressions (for example, the need for happiness, the need for truth, for justice, etc.). They are like a spark igniting the human motor. Prior to them, there is no movement or human dynamism. Any personal affirmation, from the most banal and ordinary to the most reflected upon and rich in consequences, can be based solely on this nucleus of original needs. [...]

An Eskimo mother, a mother from Tierra del Fuego, and a Japanese mother all give birth to human beings, recognizable as such both by their exterior aspects and their *interior stamp*. Thus, when they will say “I,” they will use this expression to refer to a multiplicity of elements derived from diverse

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<sup>1</sup> Monsignor Luigi Giussani (1922-2005) was the founder of the Catholic ecclesial movement Communion and Liberation, recognized by the Holy See and present in over eighty countries in the world. He was a professor of the Università Cattolica del Sacro Cuore in Milan, Italy. In 1995 he was awarded the International Catholic Culture Prize. His works are available in fifteen languages and include (inter alia) the trilogy *The Religious Sense*, *At the Origin of the Christian Claim*, and *Why The Church?*; and the volume *The Risk of Education*. A useful research tool is the website [www.scritti.luigigiussani.org](http://www.scritti.luigigiussani.org), where it is possible to find all Fr. Giussani’s published works.

histories, traditions, and circumstances; but undoubtedly when they say “I” they will also use this term to indicate an inner countenance, a “heart” as the Bible would say, which is the same in each of them, even if translated in the most diverse ways.

I identify this *heart* with what I have called elementary experience; that is, it is something that tends to indicate totally the original impetus with which the human being reaches out to reality, seeking to become one with it. He does this by fulfilling a project that dictates to reality itself the ideal image that stimulates him from within. [...]

The need for goodness, justice, truth, and happiness constitutes man’s ultimate identity, the profound energy with which men in all ages and of all races approach everything, enabling them to an exchange, of not only things, but also ideas, and transmit riches to each other over the distance of centuries. We are stirred as we read passages written thousands of years ago by ancient poets, and we sense that their works apply to the present in a way that our day-to-day relations do not. If there is an experience of human maturity, it is precisely this possibility of placing ourselves in the past, of approaching the past as if it were near, a part of ourselves. Why is this possible? Because this elementary experience, as we stated, is substantially the same in everyone, even if it will then be determined, translated, and realized in very different ways – so different, in fact, that they may seem opposed.<sup>2</sup>

So elementary experience is defined as a “complex of *needs* and ‘*evidences*’” – which in the biblical narrative was denoted by the word “heart.”

It’s an original, inherent criterion which humans have called by many names, but which can be summed up as a nucleus of ‘evidences’ (that is, findings) and needs that are *inherent* to the person. And Giussani proposes examples of the needs that make up the heart: those of *happiness, truth, goodness, and justice*.

These findings and needs characterize what is *human* in each one of us. They are what we knowingly refer to or, even more frequently, what we unconsciously presuppose, when we say “I” as part of a serious discussion.

This admittedly cursory reconstruction suffices at least to clarify what, in my opinion, elementary experience is *not*:

The concept of elementary experience is not a new *anthropological theory*, in the sense that it is not conceived as a (more or less novel) rethinking of what humanity *either must or ought to be*. Nor is it a set of moral principles intended to guide human conduct.

It is not by accident that it is presented as a *species* of the *genus* “experience.” It therefore concerns above all the relationship between the self and reality; it consists more of experimentation than of speculation (though it cannot

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<sup>2</sup> Luigi Giussani, *The Religious Sense*. (Montreal: McGill-Queen’s University Press, 1997), 7-10.

be reduced to experimentation alone).<sup>3</sup>

To be more precise, Fr. Giussani describes a trajectory in which elementary experience intervenes as an *inherent criterion for evaluating our own human experience*.

If this elementary experience, internal to every human person, were not the point of reference, the only possible alternative would be to formulate a standard from the outside, resulting in a distorted evaluation, “*alienated*” from our humanity.

Interestingly, on more than one occasion Fr. Giussani used the concept of “law” as a possible facet of elementary experience. One such usage appears in the middle of chapter ten of *The Religious Sense*, in which he poses the question of how to craft the ultimate questions of humanity. He responds in the following way:

How can this complex, yet simple, this enormously rich experience of the human heart – which is the heart of the human person and, therefore, of nature, the cosmos – how can it become vivid, how can it come alive? How can it become powerful? In the “*impact*” with the real. The only condition for being truly and faithfully religious, the formula for the journey to the meaning of reality is to live always the real intensely.<sup>4</sup>

And right at the end of the same chapter Fr. Giussani cites the passage from St. Paul that is traditionally considered the foundation of the Christian doctrine of *natural law*:

For when the Gentiles who do not have the law by nature observe the prescriptions of the law, they are a law for themselves even though they do not have the law. They show that the demands of the law are written in their hearts, while their conscience also bears witness and their conflicting thoughts accuse or even defend them.<sup>5</sup>

- a. From this consideration derives a first important consequence of the relationship between the notions of elementary experience and other related phenomena, which Di Martino correctly observed in one of his contributions to the debate on multiculturalism:

Culture is never universal because it is always particular (although every culture has an in-

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<sup>3</sup> “[E]xperience implies understanding the meaning of things.” *Ibid*, 6.

<sup>4</sup> *Ibid*, 108.

<sup>5</sup> Romans 2: 14-15. *The New American Bible* (Mission Hills, Calif. : Benziger Pub. Co. ,1988)

; G. Griesez, ‘Christian Moral Principle’s, *The Way of the Lord Jesus*, available at <http://www.twotlj.org> “1. According to St. Paul, even the Gentiles find the requirements of morality which conscience discerns written in their hearts. Although Gentiles do not have the law divinely revealed to the Jews, they naturally do have this given standard of conduct (see Rom 2,14-16) 2. The Church calls these naturally known principles ‘natural law’. They are *natural* in the sense that they are not humanly enacted but are objective principles which originate in human nature.”

trinsic vocation to offer itself as universal). What is universal is the *human*.

What we actually and inherently have in common with the other does not belong to the realm of values, norms, and worldviews. Rather, our commonality is found at that primary, irreducible threshold, which reveals itself in the encounter between different incarnate and historically-bound subjects, and which we have called “human.”<sup>6</sup>

To put it differently: the concept of elementary experience is not reducible to any particular theory, to a universal anthropological vision, or to a generalized idea of humanity. It is something anterior to both theory and culture, and inheres in the human being as a *fact* – as the factual impact with reality.

This of course is not to suggest that elementary experience isn’t *translated* inevitably into judgments, theories, hypotheses, and values. The different views of the world are born from this common, elementary structure, and are not, like it, universal, but vary one from the other.

Therefore even as it is evident that an Eskimo, a European, and an African are all different one from the other, it is also evident all are identifiable as *human persons*. In this way, the *same humanity* is expressed in different forms.

Understanding this structure is particularly conducive to dialogue, in that it is founded on the common identity that allows us to truly understand our differences.

- b. A second consequence is also deducible from this premise, and was already made clear in the passages cited above: there is a nexus between *elementary experience* and *nature*.

It is nature that thrusts the human being into a comparison with all other things, “furnishing” her with this “tool” for the universal confrontation.<sup>7</sup> It must be stressed, however, that elementary experience is not wholly synonymous with nature itself.<sup>8</sup> It is more along the lines of nature *in action*: it is that dynamic aspect of humanity that emerges when humankind enters into a relationship with reality, and expresses itself in a series of fundamental questions and ‘evidences.’

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<sup>6</sup> C. Di Martino, “L’incontro e l’emergenza dell’umano,” in J. Prades (Ed.), *All’originale della diversità: Le sfide del multiculturalismo*, (Milano: Guerini e Associati, 2008), 95.

<sup>7</sup> Luigi Giussani, *The Religious Sense*. (Montreal: McGill-Queen’s University Press, 1997), 7.

<sup>8</sup> A recent publication on the religious sense in Giussani, edited by Massimo Borghesi, makes this point nicely [G.B. Montini e L. Giussani, *Sul senso religioso*, (Milano: Rizzoli, 2009). In the second version of the text of *The Religious Sense* (L. Giussani, *Il senso religioso*, Fonte Seniores, (Milano: G.I.A.C., 1958), the second edition to come out after the first appeared in 1957), the first chapter – entitled ‘Origin of the religious sense’ – is dedicated to precisely this question of the relationship between the religious sense and nature (the chapter was later republished with the title ‘Antefatto’ in the volume L. Giussani, *L’autocoscienza del cosmo*, (Milano: BUR, 2000). The chapter was elaborated upon in greater depth by Fr. Giussani in successive editions (1966 and 1988), and eventually took on its definitive title: ‘Il fondo della questione’ (Luigi Giussano, *Il Senso Religioso*, (Milano, Jaca Book, 1966)).

Why are these two points relevant to our inquiry?

Because *law* is nothing more than a form of *politics*,<sup>9</sup> and therefore also a form of culture (as Fr. Giussani pointed out, citing John Paul II in his UNESCO address in 1980).<sup>10</sup>

In and of itself, law represents only one aspect of the most general worldview expressed by an organized society.

Law, as is laid out more clearly later on, expresses nothing more than a certain structure of relationships among people, and, therefore, it is one of the characteristic aspects of the different human cultures. To return to our earlier example, the law of the Eskimos is not the same as that of Africans or that of Europeans.

For this reason, *the concept of elementary experience must not be confused with a new theory of law, be it natural or universal*. Nor is it possible to use elementary experience to infer a new catalogue of universal rights and obligations.

Di Martino explains: “We have to avoid the short circuit between the list of fundamental rights and the universal structure of experience. The irreducibility of the latter, continuously sought after by reason in an indomitable attentiveness to experience, necessarily demands a critical vigilance, even in the face of so-called universal rights.”<sup>11</sup>

It can be said that rights are not universal, but the *human* is; and the meaning of *human* here is not based on the abstract definition of some “absolute” anthropology. The *human* emerges in experience, and more precisely in elementary experience.

Therefore it would be incorrect to approach the notion of elementary experience in order to seek within it a definition – albeit a more correct one – of human rights and obligations. It is more helpful instead to consider the phenomenon of *law* starting from the notion of *elementary experience*.

More precisely, the task is this: to take under consideration the sociological phenomenon that is law – which is one of the factors that characterizes the human experience – and to measure it against the standard of elementary experience.

In this sense, the notion of elementary experiences provides not a theory to be executed and applied, but rather a fitting explanation (a useful underlying *reason*) for understanding behavior of human beings that would be otherwise indecipherable.

Therefore you cannot mechanically deduce an “*ought*,” or a set of ethical principles, from elementary experience, even if such determinations are necessary (and even in a certain sense inevitable).

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<sup>9</sup> This denomination is used here in the general sense of the word, which describes phenomena typical of a *polis*.

<sup>10</sup> L. Giussani, *L'io il potere e le opere. Contributi da un'esperienza*, (Milano, Marietti, 2000), 165.

<sup>11</sup> C. Di Martino, *L'incontro e l'emergenza dell'umano*, 100.

What elementary experience makes possible is a comparison of itself with all the different judgments and proposals of morality, allowing us to adhere to those which correspond to it.

## 2. Law

The other term that calls for preliminary clarification is “law.”

To understand the relationship between the concept of elementary experience and the social phenomenon of the law, it is necessary to start with the question, “what is law?” and then see what role elementary experience plays in *understanding* it.

In other words, we need to ask ourselves if that complex of needs and evidences that we have called *elementary experience* can illuminate the essence of a phenomenon like law, or if it instead plays an external role, or a successive one (of the moral or political sort<sup>12</sup>), in defining the objectives of a particular juridical structure, or the tests of its acceptability.

To respond to this line of questioning, we begin, as outlined above, with the question: “What is law?”

The question is not a banal one, and its answer is not obvious.

A page on this question from one of the most important jurists for contemporary legal theory, H.L.A. Hart, always seemed to me to be telling: “Few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange, and even paradoxical ways as the question ‘What is law?’ [...] No vast literature is dedicated to answering the questions ‘What is chemistry?’ or ‘What is medicine?’, as it is to the question ‘What is law?’

No one has thought it illuminating or important to insist that medicine is ‘what doctors do...’, or ‘a prediction of what doctors will do’... Yet in the case of law, things which at first sight look as strange as these have often been said, and not only said but urged with eloquence and passion, as if they were revelations of truths about law, long obscured by gross misrepresentations of its essential nature.”<sup>13</sup>

It is with this thought, on a page entitled “Persistent Questions,” that Hart opens one of his most important books, The Concept of Law. It identifies in a very clear and direct way the problem that confronts every contemporary legal scholar in facing the object of his study.

At a societal level law is an extremely complex phenomenon. On a broad spectrum of themes and approaches it can range anywhere from philosophy to politics, from morality to professional ethics.

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<sup>12</sup> The term political here refers to choice or orientation with regard to the communal life of a *polis*.

<sup>13</sup> H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> ed (Oxford: Clarendon Press, 1994), 1.



Unlike the other social science disciplines, law is at once a social science and a *profession*. Consider, for example, the role of lawyers and judges, which is today the topic of heated political debate.

Politicians, public administrators, legal professionals, university professors, philosophers, sociologists, and so on all deal with the topic of law, and each develops her own point of view.

*Law* refers both to the rules regulating the condo in which I live and to the United Nations Charter; *law* governs the purchase of vegetables from the green grocer and where I can park my car; the trial of a corrupt politician is *law*, and so were the hearings on discontinuing the treatment of Terry Schiavo and Eluana Englaro.

What commonalities link examples that differ so much one from the other?

Not being a political or moral philosopher myself, let alone a philosopher of law or an expert on legal theory, the responses I propose come out of reflections on the studies I have conducted over the years on “positive law,” and on constitutional law in particular.

*a. The lethal risk for knowledge: preconception*

One of the greatest American Protestant Theologians, Reinhold Niebuhr, summarized in a wonderful expression the deadly obstacle to a true knowledge. He said, “nothing is so incredible as the answer to an unasked question”<sup>14</sup> – as if to say “it’s really impossible to discover what you think you’ve already discovered.”

In other words, what makes the adventure of knowledge totally meaningless and shuts any kind of reasonable openness of our mind to the external reality, is *prejudice*: the certainty of having already reached a sufficient knowledge of something that any further effort or change is practically impossible. Very often we assimilate preconceptions through a process of social and cultural *osmosis*; so they aren’t even consciously admitted, but are sort of “built-in” interpretive schemes we find within ourselves, without any clear idea of how they were produced or by whom. On the contrary – as Niebuhr stated, echoed by Hart- only a really open and persistent *question* can “energize” our reason to engage that endless work that is our “knowledge,” our journey - always approximate - towards the truth (or at least towards a more comprehensive account of what is in front of our eyes).

I think that the issue we are discussing here (“what is law”) is full of prejudices.

Law, legislation, and politics, are “facts” before they are ideas, very concrete and tangible things, capable of deeply affecting our lives and our freedom; for this very simple reason we all tend to have – implicitly or explicitly – a distinct *idea* of these “facts”. My point is that, many times this “*idea*” could be a *prejudice*, more than a rational reflection upon our own experience of it. I will start with one of the most widespread of these prejudices

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<sup>14</sup> R. Niebuhr, *The Nature and Destiny of Man. A Christian interpretation*, Vol. II (London: Nisbet & Co, 1943), 6.

*b. A first preconception: the law is the “state”*

A very common pre-judgment about law essentially has to do with *power*, in particular with what legal scholars refer to as *public power*. This includes the state or the established authorities – in short, the institutions qualified to make legitimate use of force.

“The *law* presupposes the State,” is the opening sentence of an Italian textbook on private law from the nineteen twenties.<sup>15</sup>

Mary Ann Glendon<sup>16</sup> recently referred to an idea from one of the most renowned American Jurists, Oliver Wendell Holmes Jr., who – during roughly the same time period – asserted that law was nothing more than the prediction of whether or not a person would do a certain act, and whether he would be punished by a judge.

*The law* – according to the well-known definition by the great American jurist – *is nothing more than the prediction (the prophecy) of the decisions of judges.*

Another great theorist of this particular idea of law is John Austin (and it is principally against Austin that Hart, his successor as Chair of Jurisprudence at Oxford, pits himself in the book cited above). For Austin law was nothing more than “the command issued by the sovereign.”

Today the sovereign is the state: public power legitimated by democracy. It was G.F.W. Hegel who theoretically founded this relationship between *law* and *state*.

Giuseppe Capograssi,<sup>17</sup> one of the greatest Italian philosophers and legal scholars, summarized with great clarity the reasons for the success of this formula more than seventy years ago:

It is undeniable that the idea persistently maintained by legal doctrine until some time ago, that the law is only the rule emanated and applied by the State, provided us a clear and precise concept.

This concept had the unique quality of providing a precise definition of law; it gave certainty to law, and to the rules that needed to be obeyed. The simplicity that reduced law to the rules of the State dispensed with all research, and readily and neatly furnished the object of every line of inquiry in the field. After the uncertainty of earlier times, during which widely different sets of laws met and fought with each other, this was true progress: in a single glance, so to speak, it took in all the law of the day.

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<sup>15</sup> V. Simoncelli, *Istituzioni di diritto privato italiano*, (Rome: Athenaeum, 1921), 1.

<sup>16</sup> M.A. Glendon, ‘Esperienza elementare e diritto naturale’, in A. Savorana (ed.), *La conoscenza è sempre un avvenimento*, (Milano: Mondadori Università, 2009).

<sup>17</sup> For a good summary of Capograssi’s thought and his context, see P. Grossi, ‘Uno storico del diritto in colloquio con Capograssi,’ *Rivista internazionale di filosofia del diritto*, n. 1 (2006): 13 et-seq.

It was enough to look from the viewpoint of the State and keep a focus on the State’s courts, and suddenly every uncertainty was wiped away.<sup>18</sup>

The reduction of all law to the process of *lawmaking* therefore had the primary advantage of simplifying everything.

Statism, be it German-Hegelian or French-Jacobin, always has as its common denominator this sense of intolerance for society, understood as difference, as diversity, as particularity, and at the end, as “chaos”.

As the scholarship of Paolo Grossi<sup>19</sup> makes clear, the great French codification of the civil law was a potent ideological tool by which the liberal state fulfilled its dream of eliminating the “ancien régime” of status and privilege.

Under this conception, the main guarantor of equality is the existence of *law* – the rule of law, general and abstract, destined to count for all (the famous motto that dominates all Italian courtrooms: “The law is equal for all”).

Coupled by chance with the historical rise of the liberal state, the idea that the state has a monopoly on the creation of law gained widespread diffusion both in academic circles and in the popular imagination of the dominant culture, with two significant consequences.

First, that the law is simply the will of that new sovereign (more or less democratically elected), the modern state, is today a widely accepted preconception, propagated above all in the lecture halls of universities.

Second, the state’s claim of monopoly over the lawmaking seems to have become the only workable model of “public authority,” and the only effective yardstick for understanding the actions of public actors separate from the state.

Today public actors separate from the state – for example regional or local authorities and independent authorities, or states within federations, as in the USA – have widespread difficulties in producing truly “subsidiarian” regulatory policies, that is, regulations in which civil society’s capacity for self-regulation is emphasized. At the same time there is a general tendency to recreate forms of “local-centralism” or “technocratic centralism,” which is perhaps worse than the form of the centralized state. All of this occurs because the heavy, ideological tradition of the “state as paradigm of public action” appears to be the only currently available model for interventions by the public authorities. In other words, very often today we do not really perceive a “qualitative” difference between the regulations of the central state and those of the local authorities. On the contrary, apart from the difference in scale, they are quite similar.

The bottom line is that this equation (law = state), quite apart from its theoretical limitations, gets into trou-

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<sup>18</sup> G. Capograssi, *Studi sull’esperienza giuridica*, (Roma: Maglione, 1932), 1.

<sup>19</sup> For a synthesis of Paolo Grossi’s legal analysis about the making of European legal thought, see P. Grossi, *A History of European Law*, (Oxford: John Wiley & Sons, 2010).

ble when applied in real life.

As Capograssi went on to say, the state is just *one* of the makers of law, and

law is an essential element of *every* human organization, and therefore not only of the state, which is just one of these organizations. In fact, the organizations which exist on the social plane produce law, and this law is in force within their respective spheres. In short, at the very heart of the legal system of the state, a fundamental part of the experience is brought about by private will, which takes it upon itself to resolve life's practical problems with the liberal and often rebellious creation of legal norms.<sup>20</sup>

It is enough to think for a moment of current events like the steady rise of supra-national, legal-political organizations, or the globalization of economic trends, or, more simply, the birth of information technology networks. All of these are real and irresistible phenomena, which have radically relativized the monopolistic claim of states in the process of making and implementing law.

Law today comes from a multitude of sources, among which the state seems to be taking an increasingly backseat role.

A very interesting note on this point appears in the encyclical *Caritas in Veritate*, where Pope Benedict XVI points out with great realism that, on the one hand, "Both wisdom and prudence suggest not being too precipitous in declaring the demise of the state. In terms of the resolution of the current crisis, the state's role seems destined to grow, as it regains many of its competences."

But on the other hand, "[t]he State does not need to have identical characteristics everywhere: the support aimed at strengthening weak constitutional systems can easily be accompanied by the development of other political players, of a cultural, social, territorial or religious nature, alongside the State" (para. 41).

These pontifical teachings contain a powerful cultural innovation that flies in the face of the pre-judgment mentioned above.

First, the state no longer provides the *only model*, and at the same time can no longer be considered the only wielder of political authority. Other political actors (of cultural, social, territorial, or religious nature) exist alongside it. This necessary "pluralization" of political authority entails the birth of new forms of representation of the *polis* (new forms of politics), and the rethinking of classical forms like the "party system."<sup>21</sup>

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<sup>20</sup> G. Capograssi, *Studi sull'esperienza giuridica*, 2.

<sup>21</sup> This is another theme addressed by Benedict XVI, in his famous talk "not held" at Sapienza University of Rome in 2008: "The point in question is: how can a juridical body of norms be established that serves as an ordering of freedom, of human dignity and human rights? This is the issue with which we are grappling today in the democratic processes that form opinion, the issue which also causes us to be anxious about the future of humanity. In my opinion, Jürgen Habermas articulates a vast consensus of contemporary thought when he says that the legitimacy of a constitutional charter, as a basis for what is legal, derives from two sources: from the equal participation of all citizens in the political process and from the reasonable manner in which political disputes are resolved. With regard to this 'reasonable manner', he notes that it cannot simply be a fight for arithmeti-

*c. A different point of departure: legal experience*

Any inquiry in the field of law departs from one’s immediate legal experience. That is to say from legal experience as it exists, as it is perceived and judged by the collective conscience, and to the degree that it enters into concrete human communities as a practical element by the practical action of the living individual.

This immediate reality, in which the individual lives and achieves the goals of her life, gives rise to all the questions that thought proposes: one could say that, whether analysis be scientific or philosophical, its only object is to understand this reality, unravel and dissect it into its component parts, and comprehend it in its entirety. There is a series of questions that all have law as their object because of the existence of this given [...].

Although these considerations are obvious, they always bear repeating: it is absolutely necessary never to lose sight of this truth, fundamental as all common truths are: that *the law lives and exists in common experience, as legal experience, which is realized in the ordinary action of the individual*. It is necessary never to lose sight this simple truth because it constitutes the one and only basis for the work of reflective thought.<sup>22</sup>

The alternative point of departure I suggest, is human action, the behavior of the individual person and that of the collective: it is here that we should look, in the first place.

To do so we ask ourselves the same question that belongs to all learning: *why?*

Why do people behave in *that* way? *What* explains such behavior? What *reason* can be adopted as a motive behind that specific act or that particular omission?

*c. Law: reasons to act*

The law suggests, above all, a reason for people to act in a certain way.

Italian professor Francesco Viola captured this point very well when he wrote that “[l]egal rules must be

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cal majorities, but must have the character of a ‘process of argumentation sensitive to the truth’ (*wahrheitssensibles Argumentationsverfahren*). The point is well made, but it is far from easy to put it into practice politically. The representatives of that public ‘process of argumentation’ are – as we know – principally political parties, inasmuch as these are responsible for the formation of political will. *De facto*, they will always aim to achieve majorities and hence will almost inevitably attend to interests that they promise to satisfy, even though these interests are often particular and do not truly serve the whole. Sensitivity to the truth is repeatedly subordinated to sensitivity to interests. I find it significant that Habermas speaks of sensitivity to the truth as a necessary element of the process of political argument, thereby reintroducing the concept of truth into philosophical and political debate.” The full text from the address that Pope Benedict XVI would have given in the course of his visit to Sapienza University in Rome, scheduled for January 17, 2008 and later cancelled, can be found under the category of speeches for that date at [www.vatican.va](http://www.vatican.va).

<sup>22</sup> G. Capograssi, *Studi sull’esperienza giuridica*, 19.

considered a set of reasons to carry out certain actions or to refrain from them.”<sup>23</sup>

From these preliminary observations we can deduce the two *structural principles* of the legal phenomenon: reason and liberty.

First of all, reason:

The very soul of a rule is reason. Every real and proper rule is a rule of reason. Obviously they don't often deal with incontrovertible or absolute reasons,<sup>24</sup> but rather with reasons that urge action of one kind and not another, that are practical, probable, controvertible, and not infrequently tied to opportunity and convenience.<sup>25</sup>

Without reason there is no conscious action. Law intends to influence people's actions by giving them adequate reasons; therefore counting on – or “betting on” – the ability of people to reason.

A sign that says “Keep off the grass; trespassers will be fined \$500” provides its readers with a *certain* reason to do a *certain* prescribed behavior. This reason could prove entirely useless if I, for my own moral, ecological, or philosophical motives, would never trample this (or any other) grass.

In this example, my behavior would be determined by other reasons (norms), but in effect would be the same behavior requested by the sign.

All of this presumes, however, that an actor is capable, at least in theory, of using reason.

This presumption is so important that legal rules actually require a minimum of mental awareness (the civil law concept of the *capacity to act* – Article 2 of the Italian Civil Code<sup>26</sup> – and its parallel in the criminal law *the capacity to intend and desire* – Article 85 of the Italian Penal Code<sup>27</sup> –, are nothing more than expressions of this structural principle).

Now to look at the second structural principle, liberty: “If law is a guideline for human action, inasmuch as it

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<sup>23</sup> F. Viola, G. Zaccaria, *Le ragioni del diritto*, (Bologna, Il Mulino, 2003), 15. There are *instrumental* reasons to act (e.g. “I work in order to make money”), and there are *ultimate* reasons to act (“I make money in order to care for my sister, who is ill”). These ultimate reasons constitute the basic human goods, and from these spring the so-called neo-classical theories of natural law (for a synthesis of this perspective, see R.P. George, *In Defense of Natural Law*, (Oxford: Oxford University Press, 2001).

<sup>24</sup> Unlike the reasons, for example, which underlie the moral or “natural” law (that is, “ultimate” and conclusive reasons).

<sup>25</sup> F. Viola, G. Zaccaria, *Le ragioni del diritto*, 16.

<sup>26</sup> Italian Civil Code. According to which “upon reaching the age of majority one acquires the requisite capacity to perform all acts for which a specific age is not mandated.”

<sup>27</sup> Italian Civil Code. According to which “no one may be punished for an act which the law has made a crime if, at the moment in which he committed it, he was not responsible. A person is responsible when he or she has the capacity to intend and to desire.”



prescribes a certain way to do things, this implies that more than one action is possible, since if there were only one way to do something, then the prescription would be superfluous. To allow for a normative rule, a given behavior must be neither necessary nor impossible. No norm can obstruct a necessary behavior, nor render possible an impossible act. In fact, under the criminal law an act *compelled by necessity* is not punishable (Art. 54 of the Penal Code).<sup>28</sup>

In the words of the Latin maxim, *ad impossibilia nemo tenetur*. Returning to our example of the grass, suppose that instead of putting up a sign, the local authority had surrounded the patch of grass with a towering, insurmountable fence<sup>29</sup> (maybe even an electrified one). The normative regulation “keep off the grass” would have become entirely useless and unreasonable (in contrast with its structural character in the first example), since it would now be forbidding an act that no one could carry out, and which, therefore, would be useless to forbid.<sup>30</sup>

In conclusion, law is an optimal litmus test: an indicator of how humankind uses its reason and its liberty.

### 3. The relationship between elementary experience and law

After cursorily tracing some of the external characteristics of the legal phenomenon, we return to the question: what relationship exists between elementary experience and law? In what sense is the first necessary for understanding the second?

We have seen that elementary experience can’t be considered a “re-shaping” of natural law theory (which, to avoid any misunderstanding, is neither incomplete nor in need of shoring up<sup>31</sup>). Likewise it is not interchangeable with a list of moral or political prescriptions and imperatives that can be translated into law.

We have also seen that law, considered as part of human experience, cannot be reduced to a method of social regulation in the hands of the actor who (temporarily) holds public power. Instead it is a deeper expression of some

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<sup>28</sup> F. Viola, G. Zaccaria, *Le ragioni del diritto*, 15.

<sup>29</sup> *Ibid.* .

<sup>30</sup> It is precisely for this reason that law, as mentioned above, is a phenomenon that is *typically* and *exclusively* human. Consider for example *ethology*, which study the behavior of animals. These fields attest that many animals arrange themselves according to well-defined social organization that is highly hierarchical, in which it is possible to see a marked obedience to organizational rules (think of ants, bees, wolves, schools of fish, flocks of migratory birds, etc.). The similarity is so clear that we not infrequently use legal terminology to define certain elements of similar-looking forms of organization (think of the “queen” bee, or the “commanding positions” within a wolf pack). Nonetheless, we would never call these orderings *legal*, precisely because they lack these two elementary characteristics: liberty and reason. The adherence of animals to these rules is neither free nor reasonable; these social structures (the pack, the anthill, the beehive, the flock, etc.), when and if they influence the behavior of animals, do so in a deterministic way, as a law of nature (a “natural law” of the chemical-biological sort). They are rules which cannot be avoided (apart from accidents and pathological misbehavior), and which not conformed to in response to a voluntary decision. Animals lack sufficiently developed levels of self-awareness and understanding of the relationship with reality, which could be comparable to human rationality.

<sup>31</sup> For a good introduction to natural law theory and its present-day relevance, see J. Finnis, (ed.) *Natural Law*, Volume I and II, (New York: New York University Press, 1991).

of the reasons that motivate human behavior, and in this function it inevitably involves reason and liberty.

I believe that the crucial contribution elementary experience has to offer to the study of the legal phenomenon is in the fact that it permits us to unravel and understand a substantial aspect of the phenomenon itself, an aspect that often proves uncomfortable to so-called “positive” law scholars (like myself).

It helps us respond to the crucial question: why do people adhere to the rules of law? Why obey law at all?<sup>32</sup>

The *observance* of the rule of law is, in fact, part of the legal phenomenon itself and is not an external consequence. It is that which legal scholars call the “effectiveness” of the legal system: a norm in the legal sense requires social recognition of its “obligatory-ness,” and this distinguishes legal norms from the rules of other normative orders.

As Karl Marx once astutely observed: most subjects believe they are subjects because the king is King. They fail to realize that in reality the king is King because they are subjects.

One of Hart’s most important contributions is the idea that a form of social recognition is required in order for law to exist – a *social norm* (of recognition) which itself is not legal, which pushes people to submit to the rule of law.

And it is precisely on the plane of this effectiveness or social recognition that the structure we have called “elementary experience” seems to me to play a central role in explaining the adherence of human beings to the reasons of law.

*a. Why do we obey (the law)?*

It is well known that the theories that dominate the contemporary scene on this point are of essentially utilitarian or economic pedigree.

Another common platitude, as widespread as the statist prejudice discussed above, is the belief that the mechanism by which law succeeds in determining human behavior is the threat of punishment (“if you kill,” or “if you commit fraud,” I’ll “put you in prison”).

This mechanism calls to mind the training of animals founded on the pairing of reactionary reflexes: pleasure-permitted/pain-prohibited.

To passively accept this platitude would be to say that, on a psychological level, every successful juridical civilization in human history was founded (solely) on *fear*.

Yet this theory, in the first place, fails to explain people’s conformity to all those norms and rules – of which

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<sup>32</sup> On this point refer to A. Simoncini, ‘Il diritto naturale ed il disorientamento del giurista moderno,’ in R.P. George, *Il diritto naturale nell’eta’ del pluralismo*, (Torino: Lindau, 2011).

there are very many<sup>33</sup> – which do not carry a punishment.

In addition it can be used to legitimate any tyranny, and any inhumane rule against which, throughout ancient and recent history, people have often rebelled, even at the risk of being subjected to that very force.

There are some who hold that at the base of law is the *factual* force of social convention and habit. True as it may be that the role of effective social adherence to a system of legal rules is extremely important, can this external collective force *alone* determine the observance of law? Is it only the pressure of the collective and its habits on the individual that effectively orients her behavior?

This kind of motivation too, if generalized, would have the effect of legitimizing any custom or social norm, even a deviant or unacceptable one.

But the reality is that the motive for which people obey the law cannot itself be legal; the proposition “you must obey the law” – the *grundnorm*, to use the expression of another famous jurist, Hans Kelsen – is *not* a legal norm, and so must have a different link to the human conscience.

Despite the fact that today this is the dominant trend of theoretical-philosophical thought, law cannot reasonably be *self-founding*.

This would be like thinking that the compulsoriness of all legal rules in Italy is provided by Article 54 of the Italian Constitution, which states: “All citizens have the duty to be loyal to the Republic and to obey the Constitution and the laws.”

If this article truly were solely responsible for our obedience to the Constitution and the laws, would we have to conclude that, if the Parliament decided, in a bizarre mood (and in recent times it seems there is no limit to the imagination), to abrogate it, immediately all the other legal rules in force today would lose their power? Would our society be once again thrust into primordial chaos or the state of nature?

It is evident that the laws would continue to be obeyed and applied (or disobeyed and misapplied, in equal measure...) just as they were before, and just as they are today in those legal orders that do not contain in their constitutions (if they have any) articles similar to Italian Article 54.

As I said, however, this question is particularly uncomfortable for so-called positive law scholars, who, to avoid crossing into new and different territory, try in different ways to provide intra-legal answers, so to speak, that is, answers coming only from within the law. This follows the famous prescription of Bobbio that “there is no jurisprudence outside of the rule and the ruled, and all that which is prior to the rule... does not belong to the research of the jurist.” According to the founder of the analytical branch of Italian legal theory, the task of the jurist is the analysis of language,

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<sup>33</sup> Think of all the norms of an organizational nature for which no punishment attaches to the behavior of the actor.

and “more precisely of that particular language used by the legislator to express normative propositions.”<sup>34</sup>

But this answer, when tested against the facts, proves entirely unsatisfying, precisely because it is not really a response, but rather the simple denial of the question.

This merits reflection: I have the impression that reality is much more stubborn than theories, and that people will continue to form an idea of what is right or convenient long before they read the civil code or official statutes.

So much so that, until a certain critical sense is completely destroyed or altered, you will still hear the spontaneous statement, with regard to some law or other legal order: “But it’s unfair!”

I believe that in order to treat such a delicate subject we must return to the origin of the “legal phenomenon,” and it is at *that* level that the notion of elementary experience can play a decisive role.

We have already said – echoing Viola – that a legal norm operates by suggesting a reason to act; it cannot, therefore, produce its effect, or achieve its goals, without first *passing through* the reason and the will of the human subjects who live in that legal order.

In this “appropriation” the determinative factor is the conviction that (note the distinction here) *not* the individual rule, but the *legal order on the whole*, responds to a criteria of “justice.” That is, of *proportion* between the limits it imposes, and the interests it pursues.

At base, the conviction that the laws must be obeyed comes from a judgment that it is good to obey the law, and not necessarily for my immediate gain, but because I believe that the rules are, more or less, reasonable and proportionate.

Francesco Viola summarized this when he recognized that, in reality, “the reasons for which law exists in all human societies are *moral*.”<sup>35</sup>

People obey the law because, at base and in its entirety, they believe it corresponds to a need for *justice*, that it is proportionate to the aim of providing adequate reasons to organize people in a cooperative and non-hostile way, and that it favors the full development of each individual.

This does not mean that we cannot think, deeply and seriously, that a given rule or regulation is unjust. It is the existence of the legal system in its entirety that is thought to be an indispensable condition for one’s own good and a necessity proportionate to the dignity and utility of human beings.

If you will permit a trivial example: we all consider it impossible – because it would be “unjust” – to play

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<sup>34</sup> For a recent discussion of this position of Bobbio, see M. Vogliotti, *Tra fatto e diritto: oltre la modernità giuridica*, (Torino: Giappichelli, 2007).

<sup>35</sup> F. Viola, G. Zaccaria, *Le ragioni del diritto*.

football without a set of rules and a referee. But this doesn’t necessarily mean that we consider every single rule or referee’s decision right.

If it were not this way, if it did not exist – that is, this last link to the need for *justice*, which constitutes, as we have seen, one of the expressive forms of the human being’s elementary experience – we could not explain why law changes with society and culture. Those changes are testimony to humanity’s attempts – ever imperfect and evolving – to align the rules of living together in society with a certain “ideal image that stimulates us from within.”<sup>36</sup>

I would like to be clear on this point: I don’t think that before obeying any single law or rule, a citizen necessarily thinks about his ultimate destiny, or about the complex of needs that make up his heart. And I am also convinced that many laws and rules today are profoundly unjust, and therefore must be changed.

What I would like to highlight is that, precisely by virtue of that impetus that connotes the deepest part of human experience, a person is capable of understanding that the existence of a legal system in its entirety (concomitant with the existence of limits on the individual’s own liberty) is an indispensable condition for the human good, and is a necessity proportionate to the dignity and the utility of the person.

To be even more clear, if there were no structure of needs like the one we have been referring to by the term “elementary experience,” a phenomenon like law would not be possible; indeed, elementary experience helps us to understand the reason behind a phenomenon like the observance of law in a more complete and persuasive way than other legal theories.

The other side of the coin is obvious, however.

Precisely because this practical need for justice exists at the base of human obedience, and precisely because this experience is characterized not only by “needs” but also by “evidences,” it is at the same time a point of reference for that system. Therefore it permits us over time to align ever more closely the existent with the ideal, and to correct it where it is considered to be inadequate.

On the one hand, elementary experience gives us an explanation for the collective obedience to law; but on the other hand, it is also the deep reason for the inevitably approximate and evolutionary nature of every legal system.

A very interesting argument along this line of reasoning is found in the recent speech Pope Benedict XVI delivered in the Bundestag in Berlin.

On that occasion the Pope openly addressed the fundamental question “how do we recognize what is right”? And his answer was somehow astonishing.

“How do we recognize what is right? In history, systems of law have almost always been based on religion:

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<sup>36</sup> Luigi Giussani, *The Religious Sense*. (Montreal: McGill-Queen’s University Press, 1997), 9.

decisions regarding what was to be lawful among men were taken with reference to the divinity.

Unlike other great religions, Christianity has never proposed a revealed law to the state and to society, that is to say a juridical order derived from revelation. Instead, it has pointed to nature and reason as the true sources of law – and to the harmony of objective and subjective reason, which naturally presupposes that both spheres are rooted in the creative reason of God”<sup>37</sup>.

The words of the Pope, spoken to the members of the German Parliament, a secular institution, reveal the contribution of the Christian experience to the foundation of the European Legal Tradition. And the most interesting point is that the Pope did not speak as a religious leader or as the defender of certain moral or theological doctrine (if so, how could it be interesting, or even permissible, for a non-Catholic to listen to him?); rather he moved from the position of the head (literally the “super-visor” “epì-skopè” in Greek) of a community of people, of a *societas*, that has a bi-millennarian experience of social and political life and of interaction with the other forms of human societal organizations in history.

Therefore his proposal to find the answer to the human quest for a just legal system is not to translate religious or moral teachings into law, but to correctly use our reason to understand nature.

We could say that “elementary experience” coincides precisely with the open and “not-reduced” use of reason in front of nature that is recalled by Pope Benedict. As we said at the beginning, it is a certain way of experiencing reality, whose trajectory does not stop with taking the measurement of reality, but goes deeper, to the origin of needs, to question reality itself.

#### *b. Elementary experience as a foundation for dialogue*

When the relationship between elementary experience and law is understood in this way, it seems to me that it can in some way suggest an approach to the provocative challenge which then-Cardinal Ratzinger mentioned in his famous dialogue with Jürgen Habermas: “The natural law has remained (especially in the Catholic Church) the key issue in dialogues with secular society and with other communities of faith in order to appeal to the reason we share in common and to seek the basis for a consensus about ethical principles of law in a secular, pluralistic society. *Unfortunately, this instrument has become blunt. Accordingly, I do not intend to appeal to it for supporting this conversation.*”<sup>38</sup>

What can we use as leverage in this dialogue?

The notion of elementary experience can effectively define the boundaries of a favorable terrain on which to dialogue with whomever puts himself or herself in a sincere relationship with reality.

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<sup>37</sup> Pope Benedict the XVI, *The Listening Heart Reflections on the Foundations of Law*, Apostolic Journey to Germany, September 22-25, 2011, available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/speeches/2011/september/documents/hf\\_ben-xvi\\_spe\\_20110922\\_reichstag-berlin\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/speeches/2011/september/documents/hf_ben-xvi_spe_20110922_reichstag-berlin_en.html)

<sup>38</sup> Ratzinger, Joseph and Jürgen Habermas. *Dialectics of Secularization: On Reason and Religion*, (San Francisco: Ignatius Press, 2006), 69. Emphasis added.



While the theme of natural law would seem to presuppose an understanding of *nature* on which today it is very hard to find real consensus, the notion of *elementary experience*, that, as we have seen, represents a sort of expressive form of human nature in its concrete impact on reality, can create inroads to discussion.

In support of this hypothesis I would like to cite an author who today would seem very far from this setting, but who in 2003 wrote thoughts on this theme that merit thought and attention.

Gustavo Zagrebelsky, in his dialogue on justice with Cardinal Carlo Maria Martini, published in 2003,<sup>39</sup> wonders about the idea of justice, and in the first part of his analysis, he dismantles with great efficacy and lucidity every modern and contemporary attempt to find an objective definition of justice.

But here is what he goes on to say:

“Is justice really just an empty word? Or if not, is it only a mask?

If it were, what would it mean to exist? *Remota iustitia*, what can we say about states except that they are *magna latrocinia*?<sup>40</sup>

This cannot be; it can never be this way.

We feel very deeply that the hunger and the thirst for justice, of which the Sermon on the Mount speaks for everyone, and not only for believers in Christ (Mt 5,6) are not merely empty words, nor an incitement to divide ourselves in the name of political ideologies.

If justice is snuffed out, or more properly, if the hope of justice is snuffed out – and not only the selfish hope of justice for oneself – then all existence is shaken from its foundations. *Remota iustitia* (“if justice is not respected”), mental turmoil, and suicide are the very concrete consequences that await sensitive spirits facing total impotence and the irreparably broken feeling of justice.

The hope of justice is a condition of existence [...].

So what? Are we simply driven by our human nature to desire what does not exist?

Wouldn’t the lack of a condition for existence be a terrible condemnation, and a great injustice in itself?

Is there no escape besides that of looking away and dulling our sensitivity? In other words, embracing the solution that the ideological powers that govern our consciences invite us daily to adopt?

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<sup>39</sup> C.M. Martini, G. Zagrebelsky, *La domanda di giustizia*, (Torino: Einaudi, 2003).

<sup>40</sup> *Ibid*, paraphrasing Augustine, *De Civitate Dei*, IV, 4: “If justice is not respected, what are States besides great bands of robbers?”

Perhaps the origin of this fallacy is in the speculative nature of attempts to understand justice [...].

Perhaps we can say that justice is a need that suggests personal experience: the experience of justice itself, or more properly, the experience of the aspiration to justice that comes from the experience of injustice and the pain associated with it.

If we cannot arrange a formula for justice that can harmonize all these factors, it is much easier – as long as we avoid deviant consciences – to detect the injustice inherent in the exploitation of human beings by other human beings.

It is easier to ignore it when it is a remote thing, and much more difficult to remain insensitive once we have entered into immediate contact.

If we begin from an ideological (speculative) base, the only possible result is division. But if we take experience as a starting point, even as a negative – like suffering as an experience of *in-justice* – this fundamental structure emerges, permitting us to (to use the emblematic verb of Zagrebelsky) *convenire, come together*.

#### **4. Working hypotheses derived from the relationship between elementary experience and law**

I would like to propose four areas of issues and working hypotheses that the relationship between elementary experience and law can suggest as a basis for dialogue, or as a critique of the existing order.

These four areas are not entirely distinct one from the other, and in certain cases they overlap, but I chose to distinguish them for reasons of clarity and thematic consistency.

##### *a. Law and the multicultural context*

This is undoubtedly one of the most radical challenges facing law today, and more generally facing the organized forms of human co-existence (*convivenza*).

Precisely because law – as we have said – is inevitably connected to a certain conception of humanity and of the world, it cannot remain indifferent to the fact that today these conceptions are both increasingly diverse, and increasingly in contact with one another.

Everyone lives immersed in a particular culture, and therefore, in a particular legal-political system as well. What happens when these different cultures come into contact?

This topic and its implications for elementary experience have been dealt with in numerous works, among

which the projects coordinated by Javier Prades<sup>41</sup> and Marta Cartabia<sup>42</sup> are worth mentioning.

A good departure point – as Di Martino observed – requires us to distinguish between multiculturalism as a *fact* (the “fact of pluralism,” to borrow a term from Rawls<sup>43</sup>) and multiculturalism as a *philosophical-political orientation*.

While the *multicultural context* (that is, members of different cultures sharing the same territory or social area) has existed forever, *multiculturalism* is only *one* of these cultures (one among many).

*Multiculturalism*, understood as a cultural option, is based on a two-fold theoretical premise: “a) it turns individualities into ethno-cultural, collective identities, imagining culture as something compact, perfectly defined, and impenetrable; b) it asserts the absolute otherness and incomparability of cultures, which makes each one unique and different from all the others, intrinsically self-referential, irreducibly idiomatic; the values, moral norms, and habits that characterize them have a self-sufficient sensibleness, but they cannot be appraised by means of categories drawn from external cultural universes.”<sup>44</sup>

Upon close reflection, the postulated two-fold model expresses an option that is not only contemporary, but that had already sunk its roots in the last century.

Even so controversial a figure as Leo Strauss, in retracing the main factors that characterize the present-day mentality, has identified “historicism” of Nietzschean origins as fundamental. He uses the term to refer to the application of the historical method to knowledge, with the consequence that no conclusion can be said to be true in itself or true for all people. Every definition must be “historicized,” that is, related to its *interpretive horizon*, and as such is unknowable.

Accordingly: “the only standards that remained were of purely subjective character, standards that had no longer support than a free choice of the individual. No objective criterion henceforth allowed the distinction between good and bad choices. Historicism culminated in nihilism: the attempt to make man absolutely at home in this world ended in man’s becoming absolutely homeless.”<sup>45</sup>

*Multiculturalism* assumes the impossibility of an encounter precisely because it negates this fundamental structure that permits human beings – no matter that they are different, or how different they are – to recognize themselves nonetheless as human beings.

Now, the interesting point that emerges from these reflections is that multiculturalism proposes the incommensurability between different cultures as an assumption, an assertion that is not demonstrated or proved, but that

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<sup>41</sup> In J. Prades, (ed.) *All’origine della diversità. Le sfide del multiculturalismo*.

<sup>42</sup> M. Cartabia, *I diritti in azione*, (Bologna: Il Mulino, 2007).

<sup>43</sup> J. Rawls, *Political Liberalism*, (New York: Columbia University Press, 1993).

<sup>44</sup> C. Di Martino, *L’incontro e l’emergenza dell’umano*.

<sup>45</sup> L. Strauss, *Natural Right and History*, (Chicago: The University of Chicago Press, 1953).

is nevertheless taken as true in order to justify a preexisting position, especially in the world of politics.

With nothing in common, and no element of structure between the different cultures, it is completely impossible to think of a policy of integration understood as the recognition of a common value which must be obeyed. Multicultural policies end up becoming mere policies of division, of parceling out of spaces (in the material/territorial or the immaterial/cultural sense), in which each group lives shut up in its diversity.

In this vein it could be interesting to explore a perspective that begins with experience rather than given assumptions.

We could summarize this alternative hypothesis in this way: the most impressive demonstration of the baselessness of the multiculturalist assumption – according to which different cultures cannot meet one another – is that in history these encounters have in fact occurred. In fact, our entire civil and political history is the history of these encounters.

If we think of the most recent historical period, following World War II, law – especially constitutional and international law – is a great testimony to how encounters between political cultures, religions, and different ethnic groups were possible.

To this reflection I will add only two cases, but there are many others that could be studied and referred to.

First, the approval of the Universal Declaration of Human Rights in 1948.

About the events surrounding the approval, and in particular about how an encounter – the unthinkable encounter! – between different cultures and religious and military powers, came about to bring to life a document destined to indelibly mark the democratic transition of countries all over the world in the second half of the twentieth century, I will limit myself only to refer readers to the work of Mary Ann Glendon, and to her book [A World Made New](#).

Another emblematic example is the birth, during the same years, of the Constitution of the Republic of Italy. In this case too, the basis of the constituent pact was “compromise,” but a noble one.

In March of 1947, Togliatti, head of the communist delegation to the Constituent Assembly said: “What is a compromise? The honorable colleagues that made use of this expression probably did so in a derogatory sense. But this word in itself does not have a derogatory meaning [...]. In reality, we did not look for a compromise with derogatory means [...]. It would be better to say that we have tried to reach unity. That is, we have tried to identify what could serve as common ground on which to merge the different ideological and political current – common ground solid enough on which to build a Constitution (that is, a new regime, a new state), and ample enough to go beyond even those that could be contingent political agreements...”<sup>46</sup>

What is the nucleus of this compromise?

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<sup>46</sup> Assemblea Costituente (Constituent Assembly), 11 March 1947, from E. Cheli, *Costituzione e sviluppo delle istituzioni in Italia*, (Bologna: Il Mulino, 1980), 40.

As an example of this, let us consider – from among the many episodes – the discussion of September 9, 1946 in the First Subcommittee of the Constituent Assembly.

The protagonists of this vivacious and animated discussion (La Pira, Dossetti, Lucifero, Marchesi, Basso, Togliatti) were as different (in the cultural, religious, and political senses of the word) as one could possibly imagine. The ideological-political distance that in that moment divided La Pira (a faithful Catholic) and Togliatti (a Soviet-Union-oriented communist) was certainly unfathomable compared to that which divides even the bitterest of dissenters on the contemporary Italian political scene.

The problem, and not one of little import, was whether or not to furnish the Constitution with a catalogue of fundamental rights. The discussion began with a speech by La Pira, who was immediately and bitterly attacked for his ideological (namely, Catholic) “characterization.” Dossetti proposed a compromise. What basis could the parties find for a final agreement?

Once again the representative of Togliatti describes the point. A critical and divisive point, according to the constituent of the Italian Communist Party, seems to be “the relationship between the person and the State. [...] one cannot see why we should differ [...]. The State is a historical phenomenon in its own right [...] that at a certain moment must vanish; while it would be absurd to think that the human person will vanish. (*Togliatti*) is also in agreement that the more advanced a political, economic, or social regime is, the more it assures the development of the human character. He and the honorable Dossetti could disagree on the definition of human character; but he (*Togliatti*) admits that the goal of assuring a more ample and free development of the human person can be pointed to as the goal of a democratic regime [...]. Since it begins from a common political experience, even if not from a common ideological experience, this – in his estimation – offers common ground.”<sup>47</sup>

The substantive point (note, it is not just *procedural*) on which the common ground is found is that which Dossetti later summarized in his famous agenda: “a) the substantive precedence of the human person over the State, b) the necessary sociability of all people, c) the existence of the fundamental rights of people and communities prior to any concession on the part of the “state.”

It is most interesting here to ask “how,” in which way this common ground was found, given that the starting premises were so distant. This is a thread of further reflection which I suggest, but do not claim to bring to completion.

A useful point comes directly out of this assertion by Togliatti: “you begin with a *common political experience*” and not from an ideology.

It reechoes the argument put forward by Zagrebelsky: if we start from “speculation” about justice, there is no way forward; but if we start from the concrete *human experience* of injustice, this allows us to “*convenire*” – *come together*.

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<sup>47</sup> Assemblea Costituente, Prima Sottocommissione (Constituent Assembly, First Subcommittee), 9 September 1946, from *Ibid*.

It is highly likely that when Togliatti spoke of this common “political experience,” he spoke of the concrete experimentation of what it meant for a state to be the “owner” of rights (fascism in Italy and other totalitarian forms of government in Europe in those years had, to put it one way, *forced* the impact of people with a political reality that was in-human) and this common experience of inhumanity facilitated the emergence of a structuring character *that existed and exists* (and was therefore not created by history!).

Giuseppe Capograssi is one of the minds that knew how to read most lucidly the legal experience in force in those years, depicting the panorama of law the “day after” with dramatically realistic tones, after the totalitarian catastrophe.<sup>48</sup>

It is precisely this condition that most sharply revealed the ultimate structure of the political experience.

Returning, then, to our general theme, these – and others – are cases in which the assumption of multiculturalism did not prove to be true: differences did not remain incommensurable, but had a place in forming a constructive dialogue.

What controverts the *historicist* premise (in the Strausian sense) is history itself: the fact that in history itself *inclusive* compromises have existed – that is, compromises in which one side has not excluded the other.

The purpose of an *inclusive* agreement is to assure the conditions by which, in the future, differences may remain; and though they will obviously evolve with contact and reciprocal dialogue, they are not eliminated.

The only party that cannot be admitted to such an agreement is the one that will not admit others.

The point is that agreement did not occur on the basis of a procedural presupposition, but by recognizing some fixed points taken from the common political experience.

This explains why the DNA of the post-totalitarian constitutional orders was *pluralism*, not *multiculturalism*.<sup>49</sup> But this, as I said above, is just a starting point. From here we must further explore the many questions which remain open.

The temptation, in its different forms, is still basically the historicist one pointed out by Strauss.

A first question on which to reflect is: must we confine to the history of these catastrophes the birth of a dialogue that was *pluri-cultural* instead of *multicultural*? Or still worse, must we hope that they happen again to achieve similar effects?

The answer is certainly no, for the simple reason that, if this were the case, it would be like saying that it was history that produced these needs. Experience demonstrates, however, that reality is only the way in which they awake and become alive.

So can we really say that they are *dated* phenomena? That is, can we say that they are historically determined

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<sup>48</sup> G. Capograssi, “Il diritto dopo la catastrofe”, *Jus*, Vol. II (1950): 177-207.

<sup>49</sup> According to the definition used herein.



and circumscribed? This is another thread of further exploration. Should we bring that agreement back under consideration today? And that compromise? Why? From many positions, this seems to be the promising road.

Doubtless in the organizational part of these documents – written more than sixty years ago – there are many aspects that bear revision. But with regard to the *substantial* part, the common ground and shared values, can we today add a point of agreement and compromise that is any higher and more inclusive than that? Who can reasonably feel excluded by an agreement that is founded on the pre-existence of the person in relation to the state?

There is an approach today that heavily devalues the first part of our Constitution (inversely proportional to the effective interpretation, *ut magis valeat*, that is used instead on other constitutional charters characterized by markedly individualistic-bourgeois structuring<sup>50</sup>), which aims to make the value of the constitutional agreement on rights more flexible.

It is important to realize that the presupposition of *pluralism* is the opposite of that of *multiculturalism* (at least by the definition of that phenomenon used here). The cultural assumption of *pluralism* is that common ground exists and is *prior* to law, while that of *multiculturalism* denies this possibility, asserting that the commonality is due only to law and its procedures.

In the relativistic-multicultural approach, there is no unity anterior to law, but the pluralistic constitutions were born as assertions of precisely the opposite: there *is* something prior to law.

This idea makes it possible to read the same text (be it the Italian Constitution or the UN Universal Declaration of Rights) with a “pre-comprehension” that respects its pluralist origins, or with one that surreptitiously substitutes the multicultural framework for the pluralist one.

The effects of the implementation of these two visions are, obviously, opposite.

A first symptom of this hermeneutical substitution is the reduction of the nature of the constituent agreement to mere “procedural accord;” or the push to make law (constitutional or at other levels) completely overlap with the judicial reading of it, which is an inevitably “creative” action, influenced by the dominant cultural orientations.

All these phenomena are not to be demonized in a reactionary way, but to be understood in their origins and consequences.

Finally, this line of research could perhaps permit an evaluation of the most radical objection to the theory of fundamental rights, which was laid out so clearly by Alasdair McIntyre (and recently taken up by John Milbank<sup>51</sup>).

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<sup>50</sup> An entertaining *excusatio non petita* is found in the title of a recently published article, which – after asserting the sameness of homosexual and heterosexual families – completely deprives Art. 29 of the Italian Constitution of its normative content (which speaks of “family, natural society founded on marriage”), passing it off “as a non-evaluative interpretation of Art. 29” (*sic!*), R. Bin, ‘Per una lettera non svalutativa dell’art. 29,’ *Forum dei Quaderni Costituzionali*, available at [http://www.forum-costituzionale.it/site/images/stories/pdf/documenti\\_forum/paper/0195\\_bin.pdf](http://www.forum-costituzionale.it/site/images/stories/pdf/documenti_forum/paper/0195_bin.pdf).

<sup>51</sup> J. Milbank, ‘Against Human Rights: Liberty in the Western Tradition,’ *Oxford Journal Law Review* 1, Vol. 1, (2012): 203-234.

According to the University of Notre Dame philosopher, human rights and natural rights are no more than a “fiction” created by the “Enlightenment project of discovering an independent rational justification for morality.”<sup>52</sup> Accordingly, the category of human or natural rights was formulated in the eighteenth century, under the assumption that they “attach equally to all individuals, whatever their sex, race, religion, talents or deserts, and to provide a ground for a variety of particular moral stances.”<sup>53</sup>

“There are no such rights, and belief in them is one with belief in witches and in unicorns. [...]. Natural or human rights then are fictions – just as is utility – but fictions with highly specific properties:” their most beneficial property is that they “purport to provide us with an objective and impersonal criterion.”<sup>54</sup>

The rationalist natural law at the base of the liberal revolutions provides a perfect answer to this degenerative description. But (and this is the hypothesis that I am proposing) the breaking point in the twentieth century – the impact of the totalitarian catastrophe, and the devastation wrought by states founded for the purpose of protecting (in the Enlightenment way) the “rights of the citizen” – allowed a return to the *ancient* structure of moral reasoning (to return to the thesis of McIntyre).

In any case, it seems that where the link to original human experience is lost, the prophecy of McIntyre in 1981 proves to be ever more relevant and true.

#### *b. The sustainability of democracy*

Another area of inquiry that could be interesting to pursue, and for the most part retraces and overlaps with some of the premises laid out in the preceding section, is the evolution of the *democratic* principle.

Democracy today is at risk<sup>55</sup>. More precisely, we are today faced with the clear problem of the “sustainability”<sup>56</sup> of democracy itself.

The notion of *sustainability* implies the hope that a certain resource (be it the atmosphere and wealth of a country, the balance of a budget, or touristic activity) can exist on into the future. We can say that the use of a resource or a good is “sustainable” if it does not destroy the resource or good itself, but permits its transmission to future generations by respecting its “reproduction capacity.”

Applying the notion of *sustainability* to *democracy* the question that presents itself is: under what conditions

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<sup>52</sup> This expression refers generally to the book by Alisdair MacIntyre. *After Virtue*. 3<sup>rd</sup> Ed., (Notre Dame: University of Notre Dame Press, 2007).

<sup>53</sup> *Ibid.* at 69.

<sup>54</sup> *Ibid.* at 69-70.

<sup>55</sup> See, for example, ‘Democracy Index 2011 Democracy Under Stress’, Economist Intelligence Unit, *The Economist* (2011) available at ([www.eiu.com](http://www.eiu.com))

<sup>56</sup> M. Cartabia, A. Simoncini, (ed). *La sostenibilità della democrazia nel XXI Secolo*. (Bologna, Il Mulino, 2009).

can the democracy in which we live today be preserved and handed down to future generations? In what way can the democratic procedure avoid irreversibly consuming the values that it stands for? How can democracy not lead to its own *suicide*?

Can democracy’s conquest be considered definitive and irreversible? Or can there be a usage of democracy that ends up withering it from the roots and, in the long run, risks bringing the entire thing down?

These questions may seem anachronistic: today democracy seems to be definitively affirmed at a global level as the winning governmental regime.

As was written recently by Morlino and Magen:

While in 1974 [...] the number of democracies on the planet stood at a mere 39, at the end of 2006, out of 193 independent countries, 123 ranked as electoral democracies. Thus, for the first time in human history, democracy had become not only a universal aspiration, but the predominant form of government in the world, and the only form enjoying broad international legitimacy.<sup>57</sup>

It may seem counterintuitive, therefore, to pose a question about the future of a phenomenon that appears to be in the prime of its success.

The impression, however, is that hidden beneath the equal (democratic) label are regimes that differ so greatly one from the other that Morlino and Magen highlight how, in reality today:

the distinction between non-democracy and democracy could be conceptualized in terms of gradations, rather than as a dichotomy, and that in reality there always existed a grey area between non-democratic stable regimes of different sorts and consolidated, liberal democracy, was already evident to political comparativists in the late 1960s and later. The magnitude and spectrum of that grey area, however, have both greatly expanded since the advent of the “third wave” of democratization in 1974 [...]. One of the most striking characteristics of the third wave, particularly its late period in the 1990s, has been the unprecedented growth in the number of hybrid regimes: political regimes that adopt the form of electoral democracy (with regular, seemingly or actually competitive, elections), but fail to fulfill the substantive content of consolidated, liberal democracy.<sup>58</sup>

In short, if it is true that an ever-growing number of political regimes in the world self-identify as democratic, this does not mean that the substance corresponds to the form.

This empirical reality, therefore, inevitably asks the question again: when a regime is *substantially* democratic, what qualifications will allow us to affirm, although dealing in the grey areas, that we are closer to one side or another of the choice. Does the overwhelming diffusion of the democratic model correspond to its victory in substantial terms?

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<sup>57</sup> A. Magen, L. Morlino, (eds). *International Actors, Democratizations and the Rule of Law: Anchoring Democracy?* (New York: Routledge, 2008), 1. References omitted.

<sup>58</sup> *Ibid.*, 4 -5. References omitted.

There are at least two ways to understand democracy.

- a. There is an essentially *procedural* idea according to which (the utopia of direct or totalitarian democracy having faded) democracy is basically the application of the majoritarian method of decision-making, by which in a social group the majority decides.
- b. There is a *substantial* idea of democracy, which expresses an arrangement of relationships among people that starts from the idea that every person is endowed with equal dignity and worth. For this reason the communal life cannot but involve people in full engagement with and active respect for that dignity.

Now, the first notion of democracy failed with the totalitarianism of the 20<sup>th</sup> century. As Hannah Arendt so astutely charged:

The crimes against human rights, which have become a specialty of totalitarian regimes, can always be justified by the pretext that right is equivalent to being good or useful for the whole in distinction to its parts. (Hitler's motto that "right is what is good for the German people" is only the vulgarized form of a conception of law which can be found everywhere, and which, in practice will remain ineffectual only so long as older traditions that are still effective in the constitutions prevent this). [...] For it is quite conceivable, and even within the realm of practical political possibilities, that one day a highly organized and mechanized humanity will conclude quite democratically – namely by majority decision – that for humanity as a whole it would be better to liquidate certain parts thereof.<sup>59</sup>

Even more impressive is the reflection with which the author closes her consideration of the terrible possibility that, "democratically, that is by majority," humanity decides to erase differences: "Here, in the problems of factual reality, we are confronted with one of the oldest perplexities of political philosophy [...] which long ago caused Plato to say: 'not man, but a god, must be the measure of all things.'"<sup>60</sup>

This is why it is absolutely untrue that the decision that has the most votes is always the most *just*, in the legal sense of the term. In fact, to cite the famous opinion of Justice Robert Jackson of the United States Supreme Court:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.<sup>61</sup>

Facing this uncertain valuation concerning the future of the democratic principle, I think that some observa-

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<sup>59</sup> Arendt, Hannah. *The Origins of Totalitarianism*, (New York: Harvest, 1973), 298-299.

<sup>60</sup> *Ibid.* at 299.

<sup>61</sup> From the famous case involving compulsory flag salute: *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 639 (1943).

tions on the concept of *democracy* proposed by Fr. Giussani, based on his idea of elementary experience, can offer an interesting working hypothesis.<sup>62</sup>

Giussani defines the ideal of democracy in substantive terms:

as the need for well-defined, proper relationships between persons and groups. More particularly, the starting point for a true democracy is the natural human need for co-existence that may help the person to affirm himself or herself and for “social” relationships that do not obstruct the growth of the personality.

The principle of democracy is therefore the meaning of man ‘in his very being;’ to consider, respect, and affirm man “because he is.”<sup>63</sup>

From this position it follows that:

in its spirit, democracy is not primarily a social technique or a fixed mechanism of external relationships. There is a temptation to reduce democratic co-existence to mere external order or behavior. When this happens respect for the other tends to become basic indifference.

The spirit of a genuine democracy instead moves each one to have an active respect for the other, in a correspondence that tends to affirm the other’s values and freedom. The kind of interpersonal relationship that democracy tends to establish could be called *dialogue*.<sup>64</sup>

Here it becomes evident that there is a clear connection between the “natural,” elementary idea of man – of which we have spoken – and the nature of democracy. Democracy is, in the first place, an insuppressible *need* for the purpose of making relationships between people *proportionate* to the dignity of each one, and in this way providing the occasion for the *flourishing* of human development instead of being an obstacle to it.

On the one hand, this point gives rise to the idea of *dialogue* as a crucial engine of democracy, founded on *active respect* towards the other, and not on *indifference* (indifference that is expressed so well by the cynic-relativist background that today seems to be the only possible basis on which to construct a democratic system).

On the other, an ideal emerges of human co-existence understood as *communion between various ideologically engaged freedoms*, shared life guaranteed by the common “Constitution.”

The criterion for human co-existence must affirm man ‘inasmuch as he is,’ and so the concrete idea of earthly society will be to affirm a ‘communion’ among the various ideologically engaged freedoms. The contract that regulates life in society (“Constitution”) must try to give ever more perfect

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<sup>62</sup> Luigi Giussani. *The Journey to Truth Is an Experience*, (Quebec City: McGill-Queens Press, 2006).

<sup>63</sup> *Ibid.* at 128.

<sup>64</sup> *Ibid.*

norms that assure people of co-existence as communion and educate them accordingly.<sup>65</sup>

Allow me to hit on another point. Concerning the specific contribution that Christianity can bring to this democratic foundation of civil co-existence, Giussani proposes a particularly keen and engaging idea:

Christians are particularly disposed and sensitive to this value, precisely because they are educated in affirming charity as the only law of existence; for this the ideal of every action is communion with the other and the affirmation of the other's reality "because he is."

But only in Christian charity does this affirmation find its true expression, since in Christian charity the ultimate motive for that respect for people is made clear. The ultimate motive cannot be only the fact that "a man is a man;" the ultimate motive of my respect for someone else must be something that concerns my origins and my destiny, my good, my salvation; it must be something that corresponds perfectly with my end: something that can enter into definitive communion with me.<sup>66</sup>

So the Christian does not have an ethical or deontological supremacy with regard to the perception of the value of democracy (by which Christians could grasp better than others the value of democracy, being better oriented to act according to honest and correct ethical canons regarding others).

Instead, the Christian experience makes it easier to realize *why* human beings feel a *need* (rather than an abstract rule – the *eunomia* of the Greeks) to be treated and to treat others with respect for human dignity.

The Christian experience allows us to give a name to this factor that pushes people to that "active respect" for the other: it is called God.

The ultimate motive is the mystery of God, in His essence (Trinity) and in His historical manifestation (Kingdom of God). I must actively respect the other (love), because the other belongs to the mystery of the Kingdom of God; I must approach the other almost with the same religiosity with which I approach the Sacrament, because the other is a part of God's plan, and the mystery of God is a mystery of good that is beyond my control.

Without this basis, the affirmation of the person as the ultimate true criterion of social life cannot be sustained and nourished, but will collapse and once again become insidiously and violently ambiguous.<sup>67</sup>

The guideline that comes from this conception of democracy with respect to the government of public power is, once again, *pluralism*.

A government of the *res publica* that draws inspiration from the Christian concept of co-exis-

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<sup>65</sup> *Ibid.* at 129.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.* at 129-130.

tence will have pluralism as its ideal. In other words, the fabric of social life will render possible the existence and development of all efforts of human expression. To realize this pluralistic co-existence implies grave problems. Pluralism is an ideal directive for this world. We must, however, commit ourselves to it without fear.<sup>68</sup>

So we see the reechoing theme: the affirmation of *pluralism* as a *constitutional* directive and the critique of that position (which can be called *multiculturalist* or *relativist*) by which the relationship between different cultures can only be founded on *doubt* about each of them.

For Christians, democracy is co-existence; in other words the acknowledgement that one's life implies the existence of the other; and the instrument of this co-existence is dialogue. But dialogue is to propose to others what I am living, and to take note of what others are living, out of respect for their humanity, and out of love of them; it does not at all way a doubt in oneself or a compromise.<sup>69</sup>

In conclusion, the hint at *elementary experience* once again emerges as a *fact* (the *humanity* that exists in every person) and as a common question, which different ideologies are attempts – different attempts – to give an answer.

Openness to dialogue, therefore, means the ability to take as a starting point those problems to which the other's ideology or our Christianity proposes solutions, because what is common to different ideologies is the humanity of the men and women who carry those ideologies as banners of hope or as an answer.<sup>70</sup>

### *c. Law and rights*

The relationship between elementary experience and law can help illuminate another broad area of study, made up of the effects of the *individualist* devolution that characterizes contemporary society.

Let me begin with the recognition recently proposed by Julián Carrón of the current state of the human condition:

Individualism is an age-old temptation to solve problems your own way, involving the relationship between your own good and that of others, the tension between the 'I' and the community. The fact that we don't live alone, but are always within a community, forces us to decide continually the way of facing this paradox.

We're called to live this challenge in a cultural context in which the response to this tension

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<sup>68</sup> *Ibid.* at 130.

<sup>69</sup> *Ibid.* at 131.

<sup>70</sup> *Ibid.* at 132.



seems obvious: individualism. In a nutshell, I have a better shot at reaching my own good if I exclude consideration of others. Not only that, but the individualist sees in the other a threat to his attainment of happiness, as in the saying that defines the attitude of this mentality: *homo homini lupus*.<sup>71</sup>

### 1) "Insatiable" rights<sup>72</sup>

A first effect of this approach is the dislocation of the legal phenomenon, which manifests itself by separating the aspect of *claim* within a right from that of *obligation*.

The right becomes merely – to borrow from the title of an important book by Bruno Leoni – an *individual claim*.<sup>73</sup>

The legal panorama today is ever more densely populated by *absolute* claims; that is, claims that are not paired with a corresponding obligation on the part of the claim holder, but that are only an absolute requirement of non-interference on the part of all others.

The law is used to *artificially* obtain that which nature does not allow: that a person can cut herself off completely from others.

If we look closely, the character that unites certain impassioned legal debates of the present day on the themes of *biopolitics* (the beginning and end of life, the manipulation of human genetics, etc.) is the reduction of the *person* (relationship) to the *individual* (claim), and of the role of law to an instrument of this artificial reduction.

It is truly ironic that in the democratic age, the only available paradigm for defining the subject appears to be the absolute sovereign of Hobbes – the Leviathan – the only “person” endowed with absolute power.

In this way a new version of the “progressive” utopia is created, according to which the exponential growth of new individual rights gives the illusion of the advent of a more just world. The equation “more rights = more justice” can be, in part, the concrete face of contemporary individualism – a face, however, that shows evident limits, as the recent research of Marta Cartabia makes clear.<sup>74</sup>

This type of “totalitarian” transformation of right into absolute power – in the sense of *ab-soluta* (from the Latin *ab solvo*, *free from*, *untethered from*) has as a consequence the *sanctification* of the principle of *self-determination*, even at the cost of going against real-world evidence.

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<sup>71</sup> Carrón, Julián, ‘Your Work is a Good for All’. *Notes from a talk at the General Assembly of the Companionship of Works*, Assago, Italy, on November 22, 2009, available at *Traces*, <http://www.traces-cl.com/2009E/12/yourworkisa.html>), point 2.

<sup>72</sup> L. Antonini (ed), *Il Traffico dei Diritti Insaziabili*, (Milano: Rubettino, 2007).

<sup>73</sup> Bruno Leoni, ‘Law as individual claim’, in *Freedom and Law*. (Princeton: D. Van Nostrand Company, 1961).

<sup>74</sup> Marta Cartabia, . *The Age of “New Rights”* Straus Institute Working Paper, No. 3/10, (2009-2010) available at <http://www.nyustra.org/pubs/0910/marta-cartabia.html>

Think, for example, of the essential ideological nucleus of the battle in the so-called “Englaro case”:<sup>75</sup> the attempt was openly to apply “self-determination” even to the condition of people who cannot, for objective reasons, make “autonomous self-determinations” (being incapable of both intent and desire). They did this by creating an abnormal legal fiction in which the decision of one person in place of another’s becomes “self”-determination!

The following passage from Chesterton is of pressing relevance today:

The ultimate authority, they say, is in will, not in reason. The supreme point is not why a man demands a thing, but the fact that he does demand it. ... They say that choice is itself the divine thing. ... a man does not act for his happiness, but from his will. He does not say, ‘Jam will make me happy,’ but ‘I want jam.’ And in all this others follow him with yet greater enthusiasm.<sup>76</sup>

## 2) The transformation of “equality” into “nondiscrimination”

A further consequence of this anthropological distortion is the progressive substitution of the principle of non-discrimination for that of equality.

The principle of equality, pillar of the western legal tradition, originated as the guideline that dictates the equal treatment of equal situations, and the different treatment of different situations.

In this sense, the principle of equality has always gone hand in hand with the principle of reasonableness, at the base of which legal differentiation is never an evil in itself, but only when it is *unreasonable*, when there is no (good) legal reason for differentiating between two persons or two situations.

This is the reason that many battles for rights (especially for civil rights) have been, so far, battles to affirm *diversity* against standardization, asking for different rules for those who were different.

The absolutization of right as demand has coincided in recent years with the emergence of a version that is entirely indifferent to the principle of equality; it has been understood as *prohibition* of differentiation, even among situations that are objectively different.

However, if the point is *self-determination*, understood in the way it is used in the preceding paragraph, it is enough that a person *desires* a certain status, and she creates the right to obtain it.

The voluntarist principle of antidiscrimination – notwithstanding appearances – greatly weakens the requirement of *reasonableness*, holding that any differentiation is *per se* unreasonable, evading as a consequence any serious investigation of the facts.

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<sup>75</sup> Different judicial decisions took part in this story. The last and most important, taking place in the highest possible court for cases of this kind was on October 17, 2007. Corte di Cassazione, N.21748/07. For a brief summary of the case, see S. Moratti, ‘The Englaro case: withdrawal of treatment in Italy from a patient in a permanent vegetative state in Italy’, *Cambridge Quarterly of Healthcare Ethics* 19, Vol. 3 (2010), 372-80.

<sup>76</sup> G.K. Chesterton, *Orthodoxy*. (Chicago: Moody Publishers, 2009), 60-61.

To cite one of the most controversial themes, consider the battle to recognize homosexual unions as marriage.

Marriage (as a civil law act<sup>77</sup> - obviously we will not consider any evaluation at the religious or canonical level) is a heterosexual union devised as a commitment that is basically stable and basically ordered towards procreation, or to the reception and education of children.

This explains Article 143 of the Italian Civil Code, which attributes to the spouses – at the same time – rights and obligations that are *reciprocal*: loyalty, assistance (both moral and material), cooperation, cohabitation, contribution to household expenses, and the care, instruction, and education of children.

Can this paradigm (this legal description of the fact) be considered equal to that of a homosexual couple that does not reciprocally assume all of these obligations? I want to stress that this question does not in any way suggest, as a legal matter, a ban or devaluation of the formation of homosexual couples. It is only a question about the paradigm.

Under discussion is only the reasonableness of treating different situations in the same way under the law.

Regardless of the sex of the persons involved, can the legal condition of two persons who mutually assume the obligations of loyalty, assistance (moral and material), collaboration, cohabitation, contribution to household expenses, and the care, instruction, and education of children, be considered equal, on the social and legal plane, to a pair that does not assume all of these obligations? Once again this evaluation does not imply any strictly moral, or ethical-philosophical judgment of these choices, but is exclusively a judgment in terms of social and legal reasoning.

At base, is it possible to trace a difference between two work colleagues who share an apartment and a family? Or between either of those and two elderly sisters who live together?

In any case, norms like the ones that the Italian Constitution dedicates to the protection of the family founded on marriage, or to special benefits for large families, are explicable on the legal level of rational consideration. These regulations are inevitably interpreted in a way that devalues them (if not sets them completely aside) by those who today hold supreme the principle of *nondiscrimination* – in the reductionist sense illustrated above – over that of *equality*.

### 3) The “overinflation” of the state

It is evident that in this panorama, populated by insatiable rights and “absolutized” differences, *conflict* is the normal way of having relationships, and the most pressing social question becomes that of regulation and security. Everyone searches for an entity to manage the social conflict: “You can see just how mistaken this approach is by the increasingly strong and urgent calls for more rules. The more the other is conceived of as a potential enemy, the more there arises the need for external intervention to manage conflicts. This is the paradox of modernity: the more

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<sup>77</sup> Italian Codice civile, Art. 143 et-seq.

it encourages individualism, the more it is forced to multiply the rules to restrain the “wolf” lurking in each of us. The egregious failure of this approach is before the eyes of all today, notwithstanding the attempts to hide it. There will never be enough rules to tame wolves.”<sup>78</sup>

As the Pope realistically observed in his encyclical *Caritas in Veritate*, today there is a new demand for “state” and for “state regulation.”

The paradoxical fact is that this is occurring at precisely the moment in which the state itself (as we saw above) is progressively losing its monopoly on the production of legal rules<sup>79</sup> (see, for example, Marta Cartabia’s chapter in this volume).

This situation produces two effects on which we should linger, but which here we can only mention briefly as a possible line of deeper inquiry:

- First, within state powers, we see the central engine of the system shift from *legislative* power to *executive* and, above all, *judicial* power;
- Second, within legislative law, we see the emphasis laid increasingly on *criminal* law and policing.

#### 4) *The paradox of law as new “morality”*

One final observation. The western legal tradition – as Berman teaches<sup>80</sup> – comes from the presumption that law has been freed from morality. The legal order cannot be exchanged with the moral order; both the normative systems must preserve mutual liberty and autonomy.

The principle of the separation of church and state sanctions the neutrality of state rules with respect to different moral or religious options. Now, in the present condition, in which individualism dominates in the forms we have mentioned, a strange paradox arises. On the one hand, many people hold, consistently with the western tradition, that the moral and religious spheres must remain rigidly separate. They condemn as unjustified meddling, for example, any political judgment coming from moral or religious authorities like the Catholic Church. But many also (and often they are the same people) claim that law, the product of the institutional state, is the new *morality*.

*Legality*, a principle created to limit the action of the state, has been transformed into an *ethical* value, the only parameter for judging individual behavior. Morality, then, cannot dictate rules to law, but law can become the new morality.

The “constitutional patriotism” of Habermas and the “constitutional morality” of Dworkin move in this direc-

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<sup>78</sup> Carrón, Julián. ‘Your Work is a Good for All’, point 2.

<sup>79</sup> Consider the two convergent phenomena of the “contractualization” of public legal rules, on the one hand, and the “over-nationalization” of the same legal rules, on the other.

<sup>80</sup> Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition*. (Cambridge: Harvard University Press, 1983).

tion. As Böckenförde so accurately pointed out: “law can normatively sustain and protect rules of life and preexisting ethical attitudes [...] but it cannot create out of nothing, with a normative provision, a missing ethical conscience, or safeguard ethical rules that are in the course of disaggregating. Legal rules must find in their recipients – that is, in society itself – the foundation that sustains them; they do not want to live by their coerciveness alone.”<sup>81</sup>

Law appears to be the only way to resolve conflicts between humans who conceive of themselves as “individuals,” like the “Hobbesian wolves,” described by Carrón.

In one of his recent books Mauro Magatti recalls the stupor of Alexis de Tocqueville when, during his famous journey in America, he is struck by the fact that the Americans had decided to ban the drinking of alcoholic beverages in public places by a simple agreement. Had they been French – Tocqueville astutely observed – they would have asked the state to regulate bars and taverns.

The decision on the Crucifix handed down by a section of the European Court of Human Rights (and then overturned by the Grand Chamber), aside from the other legal problems it presents, perfectly expresses the (ideologically secular, *laïque*) idea because of which the principle of separation of church and state does not express “active respect” for all different moral and religious orientations. Rather than lay out the conditions that favor true dialogue, through the *fiction* of “neutrality,” it imposes on everybody a *certain* idea of public morality.<sup>82</sup>

#### *d. The principle of subsidiarity and charity*

Finally, returning to the point of departure of *elementary experience* and *law*, it seems to me that this relationship also casts an interesting light with respect to the principle that is reasonably considered the central value in a social and institutional system that aims to defend the original value of the person in her relationships even with legal institutions: the principle of subsidiarity.

On this topic too we will begin with some thoughts from Julián Carrón and Giussani:

In order to respond adequately to our problem, the point of departure is elementary experience, which each of us can loyally trace in ourselves: “In the face of pain and need, every man of good will immediately takes action, shows himself capable of generosity.”

But this natural sentiment of generosity cannot last without adequate reasons: ‘Solidarity is an instinctive characteristic of the nature of man (a little or a lot); however, it does not make history, create a work, as long as it remains an emotion or a reactive response to an emotion; and an

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<sup>81</sup> E.W. Böckenförde, *La scuola storica e il problema della storicità del diritto*, in M. Borghesi, “I presupposti non politici della democrazia: Böckenförde e Habermas,” in M. Cartabia, A. Simoncini, *La sostenibilità della democrazia*.

<sup>82</sup> For a summary of issues on the topic of “neutrality” and secularism, see, Marta Cartabia. *The Challenges of “New Rights” and Militant Secularism*, unpublished communication to the XVII Plenary Session of the Pontifical Academy of Social Science, (Rome 2011).

emotion does not build.’<sup>83</sup>

We have to be aware that, considered abstractly, the principle of subsidiarity can bring about profoundly contradictory effects.

If, indeed, this principle stands for the proposition that the state, or any public authority for that matter, should not improperly substitute itself for the autonomous initiative of society, this presupposes that a society *exists* and feels the responsibility to respond to its own needs. The principle of subsidiarity, therefore, assumes a vibrant society.

When this does not occur<sup>84</sup> the same principle ends in legitimizing the action of the state before societies that are “dulled” or without working energy.

There is, then, something that comes before the principle of subsidiarity, and it is the value that, when we are faced with a need, provokes not recrimination or demands (“what is the state doing about it?”), but instead our own responsibility (“what can *I* do? what can we do about it?”).

This principle, in the Christian tradition, is called “charity” and, in translation into the language of our legal culture, the principle of “solidarity.”

[E]lementary experience shows that the other is perceived as a good, so much so that solidarity goes into action, to the point of generating a people that responds to the need. For this reason, we feel the need to draw together to be supported in our initial impetus.”<sup>85</sup>

Today all eyes are on the radical crisis that is striking the management systems of public policies throughout the world. The twentieth century ended with the political collapse, prior to the economic one, of many state systems that found legitimacy in massive and unsustainable public spending.

The risk is that, faced with the downfall of the “welfare state,” the only alternative is mere reaffirmation of the “dominion” of purely private interests.

To put it another way, during the last decades – largely in Europe – we considered “social rights” mainly as the individual claim to state services (healthcare, education, social security, employment etc.); if we consider “social rights” in this way, the effect of the present deep financial crisis of the states is the practical “extinction” of this kind of rights. Public authorities have no more money to pay those services.

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<sup>83</sup> Julián Carrón, ‘Your Work is a Good for All’, point 3. The internal quotations are from, Luigi Giussani *L’avvenimento cristiano* [The Christian Event], (Milan: Bur, 2003), 81-83.

<sup>84</sup> For an interesting example, see 44° *Rapporto Censis 2010*, published on December 3, 2010, available at [www.censis.it](http://www.censis.it), which describes an Italy characterized by a “dulled society: [...] behavior that is indifferent, cynical, passively adaptive, imprisoned by media influences, condemned to the present without the depth of memory or future;” we must “return to desire [...] a call to a revival of desire, individual and collective, to go beyond self-referential subjectivity, to defeat the nihilism of generalized indifference. To return to desire is the civil virtue necessary to reactivate the dynamic of a society that is too sated and too dulled.”

<sup>85</sup> Julián Carrón, ‘Your Work is a Good for All’, point 3.

The alternative is to re-consider “social rights” as “rights to relations” – what they literally mean: indeed health care, education, social security, and employment are all first and foremost person-to-person relationships.

Therefore, the most humanly and economically sustainable alternative in this situation is that civil society reactivate its own circuits of responsibility and solidarity.

It will be a future for our welfare, only if civil society will again start to take care of its collective needs, not ineluctably devolving them to either the state or the profit sector.

But in order for this to happen, we must realistically begin again from the original need that puts our solidarity “into action” to the point of “generating a people.”

Once again, the genetic point of a real social undertaking is an original – *elementary* – factor. And it must be so if the principle of subsidiarity is to be capable of working effectively.



## Chapter 2

# Legal traditions in dialogue: Elementary experience tested by diversity

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Paolo Carozza and Lorenza Violini

This dialogue is an attempt to bring to the table a series of themes that come from the interaction between scholars of law and the notion of elementary experience discussed in the preceding chapter. It builds upon the themes suggested by Andrea Simoncini, and in it we have positioned two great legal traditions of our age face-to-face: the tradition of Continental Europe on the one hand, and that of America, descendent of the *common law* system, on the other. The hypothesis suggested in the first essay is that, since there is a common human structure of needs and evidences to which people respond differently, it is possible to understand diversity for what it truly is (that is, without claiming it does not exist). This common structure also provides an ideal way to better understand the originality of the individual.

In order to do this we must start from a common fact: that is, the existence of a structure of evidences and needs that all people have in common. Fr. Julián Carrón describes it in this way: “The need for justice is a question identified with humanity, with the person. Justice would be impossible without the perspective of a beyond, of an answer that is beyond the existential, demonstrable method. If the hypotheses of a beyond were eliminated, that need would be unnaturally suffocated.”<sup>1</sup> Though it can take on different names and different shapes, this questioning structure is what indelibly characterizes every human being, from the Eskimo to the African, from the European to the American. Law is an attempt to respond to this need.

The intent of these reflections is to create dialogue using the two great legal traditions of continental Europe and America, to find within them those common elements that are at the base of every true dialogue – dialogue that is not afraid of the confrontation between differences.

## 1. A matter of method

*Lorenza Violini:* To relate elementary experience, as described by Fr. Giussani, to legal experience, creates *in primis* a question of method, which aims to broaden the perspective on the legal phenomenon.

On both sides of the ocean, we are attracted by this phenomenon as an instrument that is revelatory both of the structure of the person, and of what it means to live together. Incidental to this phenomenon is the element of *rationality*, that is, the drive to resolve in a rational way controversial problems that are characterized by conflicting interests, all of which present themselves as worthy of protection. To propose elementary experience as a method for knowing the law is evocative because it permits us to regard this phenomenon from an unusual angle, with fresh

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<sup>1</sup> Julián Carrón, “Feriti torniamo a Cristo,” *La Repubblica*, April 4, 2010, available at <http://www.ilsussidiario.net/News/Cronaca/2010/4/4/PASQUA-Julian-Carron-su-Repubblica-Feriti-torniamo-a-Cristo/77269/>

attention and sensitivity to understanding what is authentically human about the law.

Elementary experience is also useful as an approach to the contents of legal experience, contents defined by a pull toward justice, toward finding just relationships between the different individuals and groups within a given social order (*ordinamento*). The elementary experience of justice, in other words, moves us to consider law not only for the rationality of proffered solutions, but also for their contents. These should be measured against the great question of justice, which evokes feelings and experiences that are not definable down to every detail, but are open to otherness and novelty.

This same need for justice also reveals the precariousness, the preliminary nature, of its fulfillment within a purely legal scheme. There is a tension between the two: I feel a sense of justice, but I don't see anything great when I consider legal experience, which, taken as a whole, manifests the push to create just human relationships (or ones that are less unjust than those based on force alone). I must immediately recognize that the idea of justice is not fully satisfied by the experience I see.

In short, in my view, bringing the theme of elementary experience into the discussion of the legal phenomenon has both methodological value and concrete content. It is useful to distinguish these two. Certainly I am more interested in the latter, but we cannot ignore the fact that when we apply the law, at base we do so to see if it works – that is, if it regulates in a rational and coherent way a certain bundle of social relationships. And we use it as a tool to reach a goal. Being a tool, law demonstrates how human beings in action forge their instruments from the starting point of their fundamental questions; the tool itself, therefore, reveals the nature of these questions.

I would like to recall a passage written by Fr. Giussani in *L'autocoscienza del cosmo*, in which he addresses the theme of “dialogue.” It has interesting implications for dialogue, because it opens up a floor for discussion with everyone. In general today we face conceptions of law, justice, and fundamental rights that are at the opposite pole from our own way of thinking. The legal culture that dominates Italy and the rest of Western culture today is powerfully opposed to the conception of law as instrumental – a conception that is open to discussions of justice and morality. So how can we, an Italian and an American scholar, enter into relationship with this diversity, a diversity that is significantly more radical than the diversity of our two legal traditions that we are comparing here?

The text by Giussani says that dialogue is rendered possible because

no difference reaches the point of eliminating an ultimate identity of ultimate criteria. In the ultimate criteria there is an ultimate identity: an infinite, immeasurable desire for completeness and love. [...] Those who are used to affirming what is singular or belongs to them will always make the mistake of seeing society and the world as – how can I put it – ‘granular.’ But it's a different story for someone who has the tendency to be open toward the other, being persuaded or understanding that there is nothing so ‘other’ that it does not consist in the first place of something in common with myself.<sup>2</sup>

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<sup>2</sup> Luigi Giussani, *L'autocoscienza del cosmo*, (Milan: BUR, 2000), 44.

*Paolo Carozza:* One way to verify the proposals that were put forth in the preceding chapter on elementary experience and law is by contrasting certain themes as they appear in America and in Europe. In other words, the question is whether or not elementary experience aids in the understanding of law, and therefore it is necessary to recall the premises put forth by Simoncini in his introduction to the topic.

The first premise is that elementary experience should not be thought of as a new “theory of law.” It does not concern speculation about the foundations of law, or about human nature as a theoretical principle or an abstraction. Instead I believe it can provide a course of study that opens itself up to certain questions. It can serve as a tool for examining the phenomenon of law, to reflect from some distance on the meaning of this human practice, this social phenomenon. Above all it can serve as a tool that reveals what very different contexts have in common. Because if it is true that elementary experience is ultimately tied to law, then we should be able to verify that beneath their differences, legal experiences, systems, and traditions share the fact that they attempt to respond to similar human needs that are structurally present in persons of different ages, times, geographical areas, and etc.

The second premise is that elementary experience can aid in arriving at a more precise description of a certain “fact,” the phenomenon of law. That is, to discover where it comes from, how it works, what characteristics it has, and also to test the value of laws and the legal phenomenon. Elementary experience not only claims to explain law, but also declares that law responds to certain questions and needs, and therefore it can gauge the phenomenon of law in a concrete example. It can explain that the law intends to be a response to certain needs, and therefore can evaluate whether it does in fact respond to them or not.

I find very interesting the hypothesis that elementary experience allows us to understand the variety of human experiences, while at the same time to identify what these experiences have in common. What unites them? From the point of view of a scholar of comparative law, this is an indispensable point of departure, because it reveals how the exercise of comparing legal systems is very frequently reduced to one of two practices. The first is *relativism*: we do things this way; in Africa they do things differently because they are different. The issue is handled like this until the way they do things in Africa is no longer even interesting, or more accurately, is no longer interesting *for me*. The second temptation is a *hegemonic* model of law. A model that gives relevance *only to what I, as an American (or European) do*; and since things work better where we are, others must adjust to follow our model. The Soviet Union falls and the first response is to send in lawyers to recreate the American legal system in Siberia. To start from the premise of elementary experience allows us to think about law both in its generality and also in examples of its applications to specific circumstances, without reducing it to either relativism or hegemony.

If in the course of our inquiry elementary experience proves useful for a method of comparison that puts into evidence the diversity of legal experience, while at the same time successfully identifying the common point that gives rise to our attempts – always made with a healthy irony – to achieve a concrete expression of justice, then this would be the confirmation of the initial hypothesis.

Naturally the questions we are raising require more extensive treatment than we can give them here. Still, we can explore the suggestion that elementary experience offers us an interesting and useful way to transcend the his-

torical and structural differences present in the distinct traditions, taking into account three issues that over which legal scholars on opposite sides of the Atlantic are regularly divided: the sources and sovereignty of law; the nature and significance of rights; and the role of the jurist.

## 2. The *I-in-action* and the reasonableness of law: Against the modern state as the only source of rules

*Carozza*: We are reflecting not only on something “elementary” (or “original,” or “primitive,” to use the various terms that Giussani employed to describe the same thing), but also on “experience,” which here includes arriving at a judgment about the meaning of things. An act – the making of a judgment – never settled for good and all, but always in motion, dynamic and dependent on the engagement of the self-awareness of the person with the reality that faces him or her. As Giussani explains, immediately after introducing the concept of elementary experience in *The Religious Sense*, it demands an “I-in-action,” engaged with life. So to undertake an investigation of the relationship between law and elementary experience, it is necessary to reflect dynamically on what we do with law and through law, and on what law has to do with our lives. This means thinking of the phenomenon of law from the point of view of someone who is engaged with it as a social practice, and looks within it for reasons – good reasons – to act. Seen from this perspective the relationship between elementary experience and law suggests some interesting parallels with the development of Anglo-Saxon philosophy of law, in particular with the stream of thought introduced by H.L.A. Hart. Over the past sixty years a very important development occurred both in American legal theory in general, and in the Anglo-American tradition, which seems very different from what was happening in Europe. Nevertheless, the fact that Simoncini identified Hart as a point of departure may indicate something deeper that is shared by our different legal traditions. For us, in America, Hart represents the modification of the theory of positive law. He proposes recasting positive law and the concept of the sovereignty of law, or the force of law, on a much more sociological and less formal base. And therefore, even if he is a positivist like Kelsen, in a certain sense he is completely anti-Kelsenian: it is not in the first place the formality of the rule, but the fact – that is, the sociological observation that a certain practice (that takes the name of “law”) is accepted and enacted by society, by a community. Hart manages to do this by introducing the idea of the *internal point of view*: a citizen – a judge or someone else – must ask herself what reasons law gives her for acting in a certain way. The internal point of view marked a decisive turning point, which has allowed us to rethink the foundations and functioning of law. And it is interesting to note that attentiveness to elementary experience leads us to value the importance of the internal point of view as essential for understanding how law works in the life of each individual, precisely because it means to take seriously the “I-in-action.” In other words, the hypothesis of elementary experience helps us to understand why this Anglo-Saxon turning point is also important for Kelsenian Europe.

Here we can take another step, to consider the *natural law*. It was one of Hart’s first students, John Finnis, who reintroduced natural law to us in a serious way, in the classical sense of the Romans and of Aquinas, as a valid, present-day approach that is important for understanding law. Finnis accomplished this using Hart, building on the foundation of the method proposed by his teacher (the relationship between these two great contemporary jurists

is a wonderful story on a human level, because it was Hart – the positivist teacher – who impressed upon his student the importance of bringing to fruition a project on natural law). Finnis succeeds in expressing the classical tradition with freshness because he grasps the methodological importance of the internal point of view and expands upon it. According to Finnis, once we recognize that the perspective of an *I-in-action* is essential to understand the functioning of law, we must delve in deeply to ask ourselves not only what interior reasons we have for obeying the law, but also what “good” reasons are, or what reasons correspond to my full human flourishing (the good, that which makes me happy). So Finnis is important, beyond any discussions we could have on the metaphysical aspects of his theory of natural law, because he reconciles the positivism of Hart with a classical theory of natural law. To study the phenomenon of law beginning from the hypothesis of elementary experience leans toward the same unity, because it leads us to perceive the correspondence between law and the profoundly reasonable needs of an *I-in-action*, of a human engaged with life. Therefore this first point, dealing at the theoretical level with the American experience of law and with legal thought over the past sixty years, corresponds in a very clear way to the proposal to use elementary experience as a tool for studying and working in the law. And this breaks down the division between the two legal cultures.

Here we can take yet another step. If elementary experience really leads us to evaluate the authoritativeness of law from the point of view of a person engaged with life – in American or in Europe, or in any of the legal cultures of the world – then the first preconception to unmask and reject is the pretext that the law *is* the state. Here too the initial impression is often that the divergence between the American and continental European legal cultures is significant. Although the American tradition is complex and contains varied currents of thought, including a relatively more statist strain, there is no doubt that in the legal culture that has historically dominated, and that can be traced back to the Medieval period, the law is not the state and cannot be identified with the state. Rather, law *precedes* the state and serves as a limit on the state. In a certain (strictly theoretical) sense, one could even say that, legally, in the American tradition, the state does not exist in the sense in which that word and concept are used in the European legal systems. A few examples will serve to explain. In Italy a course in constitutional law generally begins with the theory of the state; in America this is not so, because there is no theory of the state (that is, it does not exist in legal thought; rather it is a matter of political philosophy). Where does an American course on constitutional law begin? It begins with the first case in which a justice of the Supreme Court applied the Constitution against a law passed by Congress. Starting with a *concrete* case the question becomes how the constitutional structure is used by a judge to control the limits of the law. From a practical angle, we can confirm that the state does not exist for the American federalist tradition. Already from its inception, the federal state is the state in which the idea of sovereignty is not united and cannot be united. The Constitution is founded precisely on the idea of fragmenting sovereignty to a nearly infinite degree. For example, there are more than 800 different police forces in the United States, that are not subordinate to a single common authority. Therefore it is more difficult to conceive of the state as the monopolist of the use of coercive force. These are small examples, and not laid out in depth, but they contain a great truth: the legal phenomenon does not depend on the state; it is independent from and anterior to the state. The state responds to the legal phenomenon; it does not generate it. To see law through the lens of elementary experience, as Simoncini proposes, confirms that this is not simply an arcane and original curiosity typical of North America, but instead represents an important point of common ground.

*Violini*: I approach first theme raised by Carozza – what is law and what are its foundations – with a degree of caution, because legal scholars today are a great deal behind in terms of philosophical reflection. We are the last residue of Kantian thought, and we are therefore bound to the distinction between “is” and “ought” as two levels that must in some way intersect. Therefore we continue to think that everything is structured upon the will of the individual in pursuit of his or her goals. I say this based upon the serious questions that both drive our field, and undermine the voluntarist framework that continues to dominate it: it suffices to note the challenges placed before us by multiculturalism and democratic, pluralist society, which shatter our traditional frameworks. We are culturally Kantian; in the field of law we continue to reason in terms of *ought*, and the obligatory nature of ought requires explanation. Hart alone does not resolve this problem; that is, it is not enough to reduce everything to “is,” because law is not *just* sociology. It is characterized by a specific, inherent feature, normativity, that needs to be explained in some other way. An utterance can be, phenomenologically, a mere utterance; but then in the case of law, in some way, it must assume the characteristic that is binding force. The common feeling in civil law countries is that binding force is derived from the state, which has a monopoly on the use of force. But this does not completely explain the phenomenon of the individual’s relationship to the rule, so much so that many rules are peacefully disregarded without ramifications imposed by the authorities. This entails a “variation” of normativity, that can be detected only *ex post* and therefore cannot be a part of the ontology of the rule. For this reason the internal point of view is as interesting as it is completely ignored by our legal tradition: just think of what we teach and how we teach it. We typically begin with Article 1 of the *Disposizioni sulla legge in generale* preceding the Italian Civil Code; the *Disposizioni* say something about our sources, but no longer reflect the reality of our contemporary system of sources.<sup>3</sup>

One might ask: what exactly is law then? For me, as for every positive law scholar, this question deals with matters partly outside the ambit of everyday research, but it is unavoidable in the debates that currently characterize the legal field in general, and constitutional law in particular. I am referring to the issues brought up by developments in the bioethical and biolegal fields, which ultimately negate the normativity of legislative choices. This negation is made to assert what Francesco Viola called the “constitutionalization of the conscience,” which implies that whatever I think and believe becomes normative for everyone else. So even in the legal culture an exaggerated subjectivism takes root, involving citizens and, above all, judges who are willing to twist the meaning of the rules to affirm their own values and principles.

Internal point of view, constitutionalization of conscience, and elementary experience seem to share a common thread of subjectivity, which plays out differently according to the three ways of reasoning. In the first case, the individual is a fundamental element for guaranteeing the effectiveness of the law. The constitutionalization of conscience is the extreme peak of subjectivism, while elementary experience denotes what all humans have in common: the lowest objective common denominator, the non-subjective element that belongs to humanity in general and to law in particular. Legal experience by nature refutes subjectivism, since it claims to have a force capable of imposing itself even against the individual will. Now, to relate elementary experience, as it is described in the writings of Fr.

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<sup>3</sup> Italian Civil Code. Art. 1 *Indicazione delle fonti*: “Sono fonti del diritto: 1) le leggi (Cost. 70 e seguenti, 117, 138; prel. Cod. Civ. 2, 10 e seguenti); 2) i regolamenti (prel. Cod. Civ. 3 e seguenti); 3) [Abrogated]; 4) gli usi (prel. Cod. Civ. 8 e seguenti).”



Giussani, to legal experience, should lead precisely to the opposite of subjectivism, since elementary experience is conceived as a unifying element, typifying the human person as such, even though it is completely “internal” to the subjective dimension.

Now, keeping elementary experience in the background as a point of entry, as a horizon to move within, to introduce for a jurist in the continental tradition the theme of the internal point of view, that makes a proposition equipped with normativity into a norm, shatters many of the frameworks of reasoning to which we are bound. The European jurist is not only bound to the idea of the state; she is attached to it in a visceral way, and entirely unable to connect rules with anything but power. This clashes radically with the traditional European conception of law, Roman law, which exists regardless of the state, exactly as Carozza described it still existing in the Anglo-American tradition.

In Rome there was no state, but rather the *res publica*, the commonwealth, and the law came about as a rational solution to complex social problems, invented by experts in that art – it came about as an *actio* predisposed to bring about justice in new cases brought before judges. Codification – and with it the forced derivation of law from the state – is entirely different. Today we think ourselves incapable of doing without this element, which transforms a linguistic proposition into a normative one, because without it we wouldn’t be able to understand why we must obey. And if there is no punishment, why must we obey the law? There is no conception of another explanation; in short, without the idea of “public,” we simply don’t know how to explain law as a phenomenon endowed with normativity. We must understand why law turns into a code that a judge must apply. Because otherwise it is as though we stop at the surface. For this reason, the explanation offered by Hart fails to satisfy.

*Carozza*: An interesting clarification concerns the fact that in the Anglo-American tradition we do not use the term *normativity* to mean a law, that is a norm coming from the legislature. *Normativity* means that there is a moral foundation, a binding moral content. When we speak of *normative analysis* of law, it means that we are looking for that substantive content of the law that demands to be obeyed. And therefore the question of *normativity*, and of *why* the law must be obeyed establishes an observation of fact: it is true that Hart is not enough, and this is where Finnis comes in. He insisted that, despite the important questions his teacher raised about method, a further step is necessary to explain why this “norm” (in the European sense) gives me a good reason to act in one way and reject other options (that is, that *normativity* of law in the name of practical reason).

*Violini*: Until now we have explored the issue of two worlds that desire dialogue, but that differ on significant points. The next step is the addressing the relationship between law and the state. I have said that the European legal tradition is incapable of seeing a normative character unless the public power provides its stamp of approval and an expectation of punishment, therefore formally endorsing the law’s claim. It is not a subjective or a moral claim: it is a formal one. But what is interesting is that there *is* a claim at all. It means we must in some way account for an element other than the law, that gives meaning to the law: whether we look for it on the moral or the formal plane, a precondi-



tion must somehow exist that can be used to understand this phenomenon. It seems to me that the great fear of the post-constitutional West after the Second World War, the fear of identifying law with a moral or substantive content, derives from the experience of dictatorships that did exactly that. They infused rules with a content that was heavily moral, substantive, and value-based. Then the recovery of the formal value of law, and of the rigid constitution, came about during the post-constitutional period, as a way to reassert liberalism: there is no morality, but there are many moralities; these make up a single legal structure that embraces, reconciles, and balances them all.

The state in Europe has the function of guaranteeing pluralism and the plurality of human experience. In this sense and for this reason I found the definition of Giussani on the theme of dialogue to be extremely provocative, because it represents the possibility of imagining a common element, which is truly common, within the plurality of ideas and even religions.

### 3. From law to rights: abstractness and equality

*Violini*: Another interesting issue regards the positive law, that is, the enacted laws made up of statutes and rules. We can think of law and the state in the ways described above, but the comparison of the continental legal experience with the common law is really given substance by a look at the laws on the books. Here we must take the French Declaration of the Rights of Man and the Citizen as our starting point. It is well known that with it our sources of law underwent a most radical change. The previous system of authority was entirely founded on tradition and feudal pluralism. Then the irrational order of the authoritative hierarchy was completely overturned: the written law, which took a back seat to tradition, was placed at the top of the new power structure, as an element of rationalization of the legal experience. Therefore, the written law, which in the past was used to ratify custom (the Magna Carta was never changed because it was a restatement of customs, and had a higher prescriptive force than any attempt by the king to reaffirm his own rights against the rights of English nobles), becomes the fundamental legal experience instead. This is an obstacle that we have somehow never managed to overcome: the problematic issue is that the written law, produced by the French Parliament, which is at the heart of a centralized legal and bureaucratic system, is the only thing with power to define the content of rights. So we do not have a concept of rights as “original.” It could be that a Constitution recognizes them, but the crux of our legal experience is that Western people originally conceive of themselves as free to do anything, and see in the law the element of regulation of their free will. So the law ends up being the enemy of liberty and free will.

This understanding of law is a central point. We have to take stock of a conception of liberty as originally limitless, with a superfluous addition of rules that violates liberty by defining its boundaries. The Continental legal tradition frequently reasons along these lines. And because the law violates and limits total freedom of expression, since it is forbidden to harm another, that *other* becomes another violation of individual liberty. As a consequence, the *other*, like the law itself, is a potential enemy.

*Carozza*: The step proposed here by Lorenza Violini, from state and law to the theme of rights, is extremely evocative for the purpose of our reflection. The rights found in the American Constitution were introduced for a very precise reason that was completely different from the French example. They were introduced to protect the existence of those rights held to be fundamental by society *before* the Constitution. So they do not exist in the Constitution as something that emanated from the legislature in order to guarantee a certain equality or the existence of rights, which otherwise would not be real or material. Therefore we say that rights are what social groups consider to be fundamental for their life prior to the enacted law. These rights, which already exist and are considered fundamental by the community itself, act as a limit on the Constitution. So there is a precise idea of the relationship between Constitution, enacted law, and rights. From the American point of view the French model (and maybe the European one in general), in which rights are almost produced by the law, bears not only the mark, but the “original sin” of Rousseau: that is, it represents a vision of rights that is much less rooted in society itself, and consequently much more abstract.

Our American legal tradition tends to shun abstraction. I can offer a handful of examples that, though small, are loaded with significance. America has no concept of “legislator” in the European sense. In my course on comparative law, when students come across the word “legislator” in a passage by some European author, they ask me who this person is – if it is a man or a woman, with a name and a face; if he or she is young or old; how he or she came to be elected. Another example of a concept that not only does not exist, but that is almost impossible for an American to understand, is the idea of “juridical institute.” What is a “juridical institute?” It is a complex of rules united in a coherent and systematic way in order to regulate a particular social reality. Why don’t we have it in America? Because for an American this seems like an abstraction from the social reality, to which all rules, doctrines, and norms of law are supposed to respond. What happens (and I mean this, of course, from the American perspective) when we think in terms of juridical institutes? There is an abstraction from the social life that generated the need, a certain way of regulating social life. And so we resist – we don’t think in these terms. You can’t say: there is marriage and then there is the legal institution of marriage. According to our way of reasoning, marriage itself exists, and the law can then respond to what marriage is. Here is another example that may seem trivial, but is actually very revealing: in general, in legal systems within the Roman-German tradition, an individual cannot legally change her name. But in the common law systems, a person is free to change her name whenever and however she wants. In the American system, the only thing the judge does is to ask: “what is the purpose?” And if the purpose is not illegitimate, the judge simply recognizes the social fact. It is not the judge who changes the name; the name was changed by the person. This is a small example of the approach to the issue of rights found in our Constitution and our more general enacted laws. That is, normativity, the Constitution, and the bill of rights respond to a preexisting social reality that was neither created nor generated by the law.

Seen and evaluated from the perspective of elementary experience, it is interesting to note that the relationship between itself and law first demands concreteness in the way of seeing the needs of the person, and only afterwards puts in relief the problem of how the law responds to this original set of needs. I am not intending to say that the American tradition offers the solution. Nevertheless, it may be able to contribute a certain sensitivity to the

concrete needs of the person in society (we use the concepts and the language of rights to express these fundamental needs of human relationships) and the constitutional normativity that is used to express rights. In Rousseau's paradigm this method seems to be inverted.

*Violini:* We Europeans are surely defined by a certain "abstractness" in our definition of fundamental rights, which is justified on the basis of the need for equality. The positive law, on a dogmatic level, is conceived as general and abstract not because it is bad, but because it responds to a need that is just as elementary – that is, the need for a society that is regulated according to the principle of justice, which is to give each person his due without falling into the arbitrariness of each person developing his own criteria. Therefore, on the one hand we have the theme of abstraction, which often comes under fire even from European scholars (this theory of rights is no longer considered untouchable), and on the other hand emerges a strong demand for justice concerning the uniformity of treatment that descends from the principle of equality, and that is the attempt to create a social order that goes against a logic of privilege. I believe our legal doctrine today is unanimous in identifying an "abstract" idea in fundamental rights because that idea is based on an abstract idea of liberty (no one is born free and equal in rights – a look at a child suffices to illustrate the contrast with Rousseau). This is a point that has been acquired by our legal culture, from the Germans to the Americans, from the feminists to the Catholic world – all are turning a critical eye on this "abstract" idea of law/rights. But we should, at the same time, continue to think about how the de-abstraction of the idea of law is equally deferential to a principle as just as the principle of equality. I think today we are in good shape to consider nineteenth century classical liberalism – and therefore classical constitutionalism – and criticize the abstract idea of freedom (which is an idea of emancipation). We are poised to realize that legal experience is not completely accounted for in the written law (and here we could find real points of intersection, and the idea of legal experience is a good one because it shows the process, the steps, and that there is a social reality – which expresses itself in a given case – which the judge decides – which is then codified as necessary – and from there the phenomenon of interpretation begins all over again). I think our rather "ironic" attempt to take up the entire chain of critiques and re-read it in light of elementary experience is a journey worth making.

An interesting point of view, one of the things that I believe will need to be faced sooner or later, is how this elementary experience, which belongs to everyone, responds to the ever-present double need of, on the one hand, the maximum amount of personalization and, on the other, the maximum amount of universalization. And this combination of the universal with the particular, which is captured so well by elementary experience, is also translated into institutional terms.

*Carozza:* This is a very interesting and important point for the American legal tradition as well. In fact, it is not by accident that in our constitutional experience of the relationship between law, constitution, and written law, the hardest knot in our history has been the problem of inequality. So considering the constitutional protection of fundamental rights in American constitutional law, what is the great exception, evident and strong, to the model I spoke of earlier? The protection of minorities. In this area the system has failed. It has failed with regard to the needs for

individual and social justice. According to this exception, when we deal with the equality of individuals and social groups, the concept of rights is separated from political life, in both legal thought and public opinion. While the other rights are still a part of political life, the protection of minorities is more similar to the European model of protecting rights. This is a topic of enormous social relevance, which permeates both the Constitution and judicial application: “let’s remove it from political life in order to protect it.” Nevertheless the other rights remain present in social and political life. There is no contrast between politics and fundamental rights. Politics are conceived to give content to fundamental rights. In many places, Europe included, we see a common concern about the power of judges in the area of fundamental rights, because it threatens the political and social life of the democratic populace. But the counterbalance of equality nevertheless remains, and it seems to me that the reflection offered by Lorenza Violini, which links equality too to an elementary need for justice, helps us to understand why.

#### **4. Elementary experience in the work of the jurist**

*Carozza:* Even if, until now I have conducted this “comparative” reflection, as a way of verifying some of Simoncini’s proposals, there is yet another method of testing the idea of elementary experience, which cannot be undertaken by study alone, or even by a comparative approach to different experiences: you have to live. If experience is what it claims to be, to test it you need to participate in it, in the sense used by Thomas Aquinas: to participate in a good thing, in a virtue.

In my case, the most difficult situation I found myself in as a jurist was when I served as a member of the Inter-American Commission on Human Rights. How did we succeed to dialogue about fundamental rights in that context? We came from all over the Americas, representing all different ideologies: from the colleague who became a member of the Commission by the influence of Chavez, to the socialist and the secular Jew, to myself, a Catholic, whom some thought would be incapable of dialogue. But during the first set of sessions, after the debate on the first cases, some of them came to me to say: “Hey, you know, you’re very reasonable! We’re surprised!” This reasonableness and openness to encountering difference is the fruit of the education I received, which always insisted on the fact that to judge the true sense of things you must always push the question to the point of comparing it with elementary experience. In these cases, that means pushing to the point of looking sincerely at the claim of justice that you have before you.

You cannot stop at the point of ideological concepts or interpretation of a rule or treaty, when the problem you face is that a mother lost her son when the supporters of a dictator came and had him shot. She rightfully says: “I simply want justice.” What can we say amongst ourselves? At that point you set aside abstract discussions and speculation on human rights, and you respond. And when you see what comes of the response, you know whether or not it was adequate. If, for example, you went to Chaco and spoke with the representatives of an indigenous community that does not even have access to water, and one of them says: “This is an enormous injustice” (they were kicked out of their ancestral territories, and now are left without even enough land to plant food for their own consumption – to the extent that a baby who suffers from diarrhea today, dies tomorrow). Here, where there is a need to which to respond, is the response adequate? The recognition of elementary experience, on the one hand, allows us to give the

response; on the other hand, however, it *conditions* the response. That is, it makes clear that the response of law to the need for justice is always partial; it makes clear that the need for justice is never fully satisfied by law. And also that the contemporary claim of human rights, that they respond to every necessity or injustice, is a false claim. Therefore the necessity of rights, a justice based on rights, and the capacity to get along and to guarantee human rights (using international mechanisms of justice rather than just national ones) were all born as a response to a cry for justice. This fact allows us to recognize that the common good goes beyond what can be guaranteed by the idea of rights, especially in areas that deal with communities rather than individuals, and unity of interests rather than opposition of interests.

I want to conclude with a very concrete example, that turned out to be an enormous battle that lasted for my entire last year on the Inter-American Commission for Human Rights. We were trying to reach an agreement in order to write a report on the question of human rights and death in childbirth. Studies show a great injustice in the Americas: more than 50 thousand women a year die in childbirth, due to a lack of doctors and medicine – relatively simple issues to resolve. What was the response from a large segment of the human rights world? That the real problem was that the laws of this country did not allow for abortions that would prevent arrival at the point of childbirth. And so the protection of the mother's lives needed to be brought about by free access to abortion. But is this really a solution? 50 thousand women die, but at least 250 thousand children die during childbirth. But these go unmentioned? And what about the mothers who get to this point – do they want to be mothers or not? I want to use this example to say that to pay attention to human needs and to the evidence of an adequate response makes us realize that the analysis, or the model, or the paradigm of human rights is limited. They are important; they have an essential role in modern law, but they are limited. They are incapable of responding to the set of human needs that are too deep to be reduced to the opposition of my rights against yours, of my individual humanity against that of another individual.

*Violini:* I would just add one last consideration, to propose an object for reflection that comes from an idea I have been cultivating for a while. This idea consists in the fact that the social order (*ordinamento*) as such, on certain points and at certain times, expresses evidence of the need for justice that is the underlying reason for the order itself.

The maternity example evokes this idea, of responding to a need, denying it and idealizing the problem. And in other situations we run into the same logic. For example in wrongful life cases, where an individual comes into the world after doctors failed to diagnose a chromosomal malformation, which, properly diagnosed, could have led the parents to choose abortion. The French system has tried to say that a life itself can be considered an injury for which damages should be available in compensation.<sup>4</sup> This deals with an extreme logic of fundamental rights understood as the right to do anything: the individual has the right to do anything, even to refuse birth if she is sick and only be born if she is healthy. The social order itself finally came out against this game of pushing the individual's claim to

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<sup>4</sup> *Affare Perruche*: in this case the French *Cour de Cassation*'s finding that the sick boy was entitled to compensation for his life, in the same way as for an injury (cfr. Ass. Plen. No. 9, 17 novembre 2000) raised an extensive debate that concluded with the so-called *anti-Perruche* law in 2002 (law n. 303/2002 of 4 March 2002), which eliminates the possibility to get compensatory damages for the mere fact of having been born and therefore unravels the compensability for the injury of life itself.

do anything to the extreme: after the French court handed down its decision, civil society powerfully rebelled. In the first place there were no more doctors willing to do prenatal diagnosis because of the risk that, if an error were made, they would owe compensation in amounts that not even hospitals or insurance companies could sustain. In the second place, associations of parents of children with disabilities strongly protested, since the decision implied a grave ontological judgment. Lastly, Catholic families wondered if they would be excluded from receiving compensation because they are against abortion, and therefore the consequences of a botched diagnosis would not have the same value for them. When the violent claim that law is the response to everything is followed through to the end, the destruction of the social order is the inevitable risk. In fact, at that point France passed a law to settle the question, saying that the injury is non-compensable. So the law in this case was seen as a way to curtail the power of judges.

Transplants are another example. An extreme take on the right to self-determination asserts that a person can always do whatever she wants, up to the limit – irrelevant in many circumstances – of *neminem laedere* (do no harm). Let's say that one of our colleagues is hired in a lawsuit to remove a transplanted heart at the request of the patient, who claims he did not consent to an emergency transplant. This situation would put even the most fervent supporter of self-determination at a momentary loss. There is always a point at which the need for justice, which underlies the legal order, emerges.<sup>5</sup>

Or say that, in England, which is under a libertarian system, a young woman has made a living will indicating that she does not want blood transfusions on account of her being a Jehovah's Witness. When she is taken to a hospital, while her parents, who are also Jehovah's Witnesses, affirm their daughter's will to refuse blood transfusions, her boyfriend claims that she has, in fact, converted to Islam, and her will has changed. Faced with a similar situation, an English judge had to say: "If there is doubt, that doubt falls to be resolved in favour of the preservation of life."<sup>6</sup>

Sometimes there are moments within the concrete life of the social order that move the dialectic between the general need for justice and whatever the order itself proposes, and which also give us a capacity to evaluate and understand experience as such. This is a great impetus to explore the ways in which our elementary experience can be born out in reality and within the social order.

## 5. Conclusions

*Violini*: I would like to add one brief final point on the topic of reason. Reason is not only "practical reason," it is reason: in this concept there is a vanishing point in both the Western European experience and the American one. It deals with the confrontation between the legal reality and the reality of facts: here the individual case and the general

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<sup>5</sup> See Antonio Ruggeri, "Il testamento biologico e la cornice costituzionale," (26 April 2009) available at [http://www.forumcostituzionale.it/site/images/stories/pdf/documenti\\_forum/paper/0117\\_ruggeri.pdf](http://www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/paper/0117_ruggeri.pdf)

<sup>6</sup> *HE v. A Hospital nhs Trust*, [2003], EWHC Fam 1017, 2 lfr 408: here the English court ratified a precautionary principle in favor of life (of the preservation of life), under which if a doctor doubts that an advance healthcare directive is valid or up-to-date, she has the obligation to act as though it did not exist.



rule find an element in common. When you have to resolve a dispute, either there is a rational principle that justifies a given solution, or the solution sounds empirical, and so is just a matter of power, violence, and arbitrariness. For this reason it could be useful to revisit E.W. Böckenförde's famous talk on the role of the jurist.<sup>7</sup> His thought contained elements of German-style formalization, but at the same time had an intuition worthy of reflection, according to which in the work of a jurist there is always an element of knowledge of reality determined by reason (law, therefore, is understood as an instrument of knowledge). This allows us to take a further step, to understand the idea of reason to which we ourselves are beholden and which, as Fr. Giussani suggests, ultimately guides us back to the theme of elementary experience.

*Carozza*: The usefulness of this dialogue is not founded on the prevalence of one tradition over the other, or the superiority of one over the other, but on the hypothesis that both rest on an underlying criterion. This is what allows us to say: "There are certain things worth evaluating, understanding, and appreciating notwithstanding the fact that the system also has its flaws." The elements I have tried to cull from the American common law tradition are at the same time under attack from other historical and political currents. Modern life weighs on the common law. We all live in bureaucratic-administrative states; there is everywhere a crisis of legitimacy of the law. So, to return to the hypothesis of the usefulness of elementary experience, one of the ways it can be expressed is with a phrase by Alasdair MacIntyre, with which he attempts to define a living tradition. According to MacIntyre, it is not simply a catalogue with a certain well-settled content, but is, above all, an argument, a discussion, a dialogue whose object is "what goods does this tradition offer that are worth continuing?"<sup>8</sup> This gives us a criterion for entering the tradition and saying "good, here is something that we should really try to preserve and use to grow; but we can see that this other thing is taking us away from a full 'human flourishing.'" This is a project for America and Europe alike, because it represents a need that belongs to every epoch, and all the more to the modern one, because of the crises we face on many fronts.

I would like to conclude with a question. What generates the law? Where does it come from? A recent work by political scientist and philosopher Seyla Benhabib discusses the communities that generate the law. It is on them that we must focus our attention. There are certain human relationships that generate the law. Elementary experience, in my opinion, leads us to examine these, and then eventually also to recognize that we have a need for a certain formality: the state. Is the state necessary? Yes, otherwise there would be no legal system to answer the needs of the person. But all this only comes long after the question: "What generates the law?" And what generates the law is something that has long been recognized – it is not something new. Justinian said: AAll law is made for the sake of human beings,<sup>9</sup> and his Institutes affirmed that Aknowledge of law amounts to little if it overlooks the persons for

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<sup>7</sup> E.W. Böckenförde, "L'Ethos dei giuristi" (inaugural lecture given at the start of the academic year at the Università Cattolica del Sacro Cuore, Milan, November 3, 2009).

<sup>8</sup> Alasdair MacIntyre, *After Virtue* (Notre Dame: University of Notre Dame Press, 1981), 207.

<sup>9</sup> Justinian, *Digest* 1.5.2, cited in John Finnis, 'The Priority of Persons', in *OXFORD ESSAYS IN JURISPRUDENCE*, FOURTH SERIES 1, 1 (Jeremy Horder ed., Oxford University Press 2000).



whose sake law is made.<sup>10</sup> If elementary experience helps us in some way, it is because it compels us to return to the question of what the destiny of law is, and where it comes from.

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<sup>10</sup> Justinian, *Institutes* 1.2.12, cited in John Finnis, *The Priority of Persons*, in *OXFORD ESSAYS IN JURISPRUDENCE*, FOURTH SERIES 1, 1 (Jeremy Horder ed., Oxford University Press 2000).

## Chapter 3

# Elementary experience, the need for justice, and human rights

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Marta Cartabia

### Introduction

In the previous chapters of this book it has already been pointed out why the idea of elementary experience - as conceived and described by Fr. Giussani in a theological and anthropological context - might be a powerful resource in the field of legal research. In this chapter I would like to testify to its particular importance in the field of human rights. A number of the most puzzling problems emerging in the contemporary practice of human rights can be better understood if we include elementary experience - with its evidences and longing for truth, justice, love, and happiness<sup>1</sup> – as a factor of legal reasoning, without overlooking the specificity of content, method, language, and interpretive rules of the legal perspective, all of which demand strict observance. If, without disregarding its important characteristics, we immerse ourselves deeply in legal research, then elementary experience becomes an indispensable “vanishing point,” whereby every legal component finds its true meaning and appropriate place. In particular in the field of human rights – which are situated at the extreme edges of the legal system, where legal regulations are tightly entangled with the raw material of human problems, social life and concrete circumstances – elementary experience as conceived and described by Fr. Luigi Giussani offers a decisive contribution toward a reasonable, albeit approximate and perfectible, ordering of the most complex and controversial legal problems of our day.

In the following pages, I will attempt to illustrate how elementary experience can play a role with regard to two fundamental sets of questions, both having to do with human rights. Between the two will be a bridge, which points to certain errors that are lying in wait, whose existence is important to highlight.

The first set of questions for which elementary experience is crucial has to do with the debate regarding the universality of human rights and the challenges of cultural relativism.

The bridge between the two has to do with the risk of betraying the originality of elementary experience and of suffocating its potential, reducing it to just another attempt to identify a group of universal principles and values.

The second set of questions has to do with the relationship between the infinite need for justice that inhabits the heart of every person and the multiplication and absolutization of individual rights, which have characterized Western legal culture in recent years.

### 1. Multiculturalism, universality of human rights, and cultural relativism

It is now well-recognized that the pervasive universal invocation of the concept of human rights promoted by

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<sup>1</sup> Luigi Giussani, *Religious Sense*, especially chapters 1, 4, 5, and 11.

international institutions is accompanied by a variety of different ideas about the meaning and scope of them within the plurality of the traditions of the human family. To give a few examples, alongside the Universal declaration of Human Rights, other regional declarations of rights have been approved over the years, each with the intent of expressing the specific traditions typical of the different areas of the world – The African Charter of Human and Peoples' Rights and the Arab Charter of Human Rights, for instance. The tension between the universality of human rights and particularities of cultural traditions is part of the debate on multiculturalism, a debate that dominated legal scholarship at the end of the last century.<sup>2</sup>

For several decades this tension has lain silent, because the constitutional protection of fundamental rights and the international protection of human rights developed along parallel lines, without interfering with each other. At the end of the 20<sup>th</sup> century, however, a number of factors crumbled the “wall of separation” between constitutional and international rights, and contamination became inevitable. That was the moment when the tension between universality and specificity within the context of human rights was made clear.

One of the principal scenes within which this tension emerged, was the European unification process,<sup>3</sup> which sought to foster at once a profound respect for the national constitutional identities of the Member States, together with the consolidation of a single European *jus commune*. “Unity in diversity,” was the chosen motto of the European Union at the time of the tentative constitutionalization – which never succeeded – at the turn of the century. The tension between national particularities and the push for unification showed most clearly on the topic of common individual rights for the entire continent. The writing and ratification process of the Human Rights Charter by the European Union summarizes all the tensions.

At a more general level, the process of globalization developed late in the 20<sup>th</sup> century eventually also affected the legal realm, and individual rights, which had been jealously guarded within national boundaries for almost the entire second half of the twentieth century, gradually became increasingly exposed to external international influences.<sup>4</sup>

In this changing historical context, the constitutional debate was marked by tensions and contradictions, caused by the shift of the epicenter of protection of individual rights from the national state to the international arena.

Until recently, notwithstanding the existence of international charters and declarations of human rights, the

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<sup>2</sup> See Javier Prades, (ed.), *All'origine della diversità*, (Milan: Guerini e Associati, 2008).

<sup>3</sup> For more developments of my reflection on this topic see Marta Cartabia, ed., *I diritti in azione*, (Bologna: Il Mulino, 2007), and especially in the first chapter “L'ora dei diritti fondamentali nell'Unione Europea,” at 13-66, as well as “El diálogo entre los tribunals a la hora del activismo constitucional del Tribunal de Justicia,” *Revista española de derecho europeo*, (Madrid 2007): 199-236; “Europe and rights: taking dialogue seriously,” *European Constitutional Law Review*, Vo. 5, Issue 01, February 2009, Cambridge University Press: 5-31.

<sup>4</sup> A wider analysis of mine on this topic can be found in “Dal patriottismo costituzionale all'universalità dei diritti umani,” in Accademia Nazionale dei Lincei (ed.), *La Costituzione ieri e oggi*, (Roma: Bardi, 2009), 173-208; and “L'universalità dei diritti umani nell'età dei nuovi diritti,” *Quaderni costituzionali*, (2009): 537-568.

protection of rights was a game played exclusively at the national level. Not only were the tools for protecting rights more effective compared to the weak international remedies, but more importantly it was thought that the bill of rights contained in every constitutional text was an expression of the culture and the self-identity of each respective people. Jürgen Habermas's famous expression "constitutional patriotism" (*Verfassungspatriotismus*) nicely captures the attitude that dominated constitutionalism during the second half of the twentieth century: to each country its own rights and constitutional values.

Guaranteeing the fundamental rights enshrined in the national Constitutions against every possible manipulation or abuse on the part of internal and external powers certainly aimed toward the goal of putting the human person and human dignity at the center of public life; but it also furthered, at the same time, the political and cultural objective of preserving the identity of the *polis* – an identity rooted in history and in the tradition of the people, and expressed in their foundational act: the Constitution itself. Until the mid-nineties of the last century some scholars reasoned based on the idea of the "sovereignty of constitutional values,"<sup>5</sup> alluding to the idea that the true identity of each people – and therefore its sovereignty as well – was condensed into the national constitutional charters.

With the crumbling of the Berlin wall and the emergence of globalization the challenges involved with human rights were effectively relocated to the supranational, international, or global spheres. This move took full advantage of tools that had been around already since the end of the Second World War, in particular at the level of the Council of Europe and the United Nations, but which had remained semi-paralyzed by the precarious balance of global politics. One of the aspects – and I would argue not a secondary one – of the crisis of the national state manifested itself in precisely this area of the globalization of human rights.<sup>6</sup>

On the other hand, however, coinciding with this evident shift of individual rights toward international institutions, rich critiques of the universality of rights cropped up – replete with not a little contradiction – in the name of cultural relativism.<sup>7</sup> The two movements cannot coherently coexist, because one can fortify the international protection of individual rights, inasmuch as one believes that they substantially express universal aspirations or goods that must be recognized by all people. Historically, while the weight of international rights institutions grew heavier in practice, at the same time critiques of the universality of rights were gaining strength in theoretical and philosophical thought – a form of cultural relativism for the legal sphere. In this way, even the legal world faithfully reflects the unresolved tensions typical of post-modernity: on the one hand the powerful thrust toward globalization; on the other the consolidation of relativism as the dominant cultural form.

The post-modern critique in large part sees human rights institutions as instruments of western imperialism that would universally impose a particular culture – the western one – on all the peoples around the world. At

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<sup>5</sup> G. Silvestri, "La parabola della sovranità. Ascesa, declino e trasfigurazione di un concetto," *Rivista di diritto costituzionale*, (Torino: G. Giappichelli, 1996), 3 et-seq.

<sup>6</sup> A. Cassese, *I Diritti Umani Oggi*, (Roma-Bari: Laterza, 2009).

<sup>7</sup> From the extraordinarily extensive literature on this point, see the debate between J. Habermas and Ch. Taylor, *Multiculturalismo – lotte per il riconoscimento*, (Milano: Feltrinelli, 2002).

the end of the day, the goal of relativism is western imperialism that – in pertinent part to our topic here – under the seductive cloak of human rights would suffocate every cultural expression that cannot be reduced to the culture that has developed on the two sides of the Atlantic.

The contemporary era is marked, therefore, by contradictory thrusts, which unleash a strong tension in the area of human rights: the universality of rights appears at once as an inextinguishable need, and as the target of a forceful attack, perpetrated in the name of the relativism of all cultures, which dominates the contemporary mentality.

So, the legal culture finds itself facing an alternative which would in any case lead to unacceptable and unconvincing outcomes.

- a. Those who worked from the relativistic assumption, under which nothing is truly universal, had to coherently conclude that human rights are the expression of a particular culture, of a western ilk, to the point of questioning the very foundations of the universal protection of rights.
- b. Those who rejected the relativistic framework and defended the universal value of human rights, tended to give uncritical support to all the actual practices of international institutions.

The first option has generated some radical criticisms of human rights. These could not be invoked to limit or oppose the extremely inhumane practices that are widespread in many countries even today like, for example, the conditions substantially amounting to slavery for many workers in some Asian countries; population control by the state; polygamy; torture; female genital mutilation; the atrocious punishments imposed in some states, or the death penalty. From a relativistic view, all these practices, which overtly contradict even the most basic human rights, can be justified inasmuch as they express a particular cultural tradition.

But the second option – which has won out in the end – becomes no more convincing than the first from the moment that it leads to an uncritical acceptance of the actions of international human rights institutions. These, in the meantime, have gone about defending a hyper-individualist and libertarian culture throughout all the world, based on three pillars: liberty, understood as individual autonomy and self-determination; equality, understood as non-discrimination; and the neutral role of legal institutions.

The actual practice of human rights has become detached from its original roots, which were emblematically enshrined in the Universal Declaration of Human Rights in 1948, and has sometimes functioned as the amplifier of a cultural option pleasing to an elite minority that dominates in the West.<sup>8</sup> The panoply of individual rights has become incessantly denser, and has fed on a growing number of “new rights” – among which, for example, the rights to be born and not be born, the right to die, the right to homosexual marriage, the right to have a child, the rights of children, and etc. A not unimportant role in this overproduction of rights was played by the rhetoric of non-discrim-

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<sup>8</sup> Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse*, (New York: Maxwell Macmillan, 1991).

ination based on sex, gender, race, opinion, age, and disability.

The more the number of rights grows the more their universal character is under threat: as we move beyond the hard core of human rights and into the most recent developments of them that have been added over time, we find numerous ambiguities and contradictions. The consensus at the center shades into disagreements at the extremes, especially on those questions that touch upon the profound meaning and destiny of human life. So the relativistic critiques of human rights were fueled by the expansion of the practice of human rights.

The sweeping wind of cultural relativism has brought to light some unresolved controversies about the foundation of human rights that had remained buried for decades. Human rights are not a coherent idea, but represent the intersection of a variety of different traditions, which have at the bottom contradicting premises. As Mary Ann Glendon recalls in her famous book about the Universal Declaration of Human Rights,<sup>9</sup> quoting a famous phrase by Jacques Martain: the fathers of the declaration agreed on the rights, “but on condition that no one asks why.”

The relativistic critique of human rights has brought us before an “all or nothing” set of alternatives that are not at all convincing: either accept the human rights project *in toto*, or challenge it at its very roots.

However, the talk delivered by Pope Benedict XVI to the United Nations on the occasion of the sixtieth anniversary of the Universal Declaration of Human Rights<sup>10</sup> explored a different course: it defended the original project, but without sparing a long list of critiques of the way the practice of human rights has been developed. These denunciations range from that of individualism, to the excesses of legal positivism, to the proliferation of rights, among others.

The problem is *how* do we get to a more shared conception of human rights? Can we rely on the rule of consensus in the field of the protection of human rights, a rule that leaves in the hands of the majority the decision of what basic goods are worth protecting by law?

In the face of this puzzle, the idea of elementary experience might help under many points of view. I will isolate two of the most important ones.

### *Universality and particularity*

Above all, elementary experience is helpful in clarifying the relationship between specific cultures and the universality of human experience. The concept of elementary experience preserves both of these facets in coexistence. It seems to me that Fr. Giussani always emphasized that it is from within a given tradition, a given culture, a given religious experience that a person can come to recognize that innate patrimony that pertains to every other human being. In order to recognize what belongs to every human, we must follow our own identity to its depths,

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<sup>9</sup> Mary Ann Glendon, *A World Made New* (New York: Random House, 2002).

<sup>10</sup> Pope Benedict XVI, Speech to the United Nations, 18 April 2008; see on this topic Mary Ann Glendon, “Giustizia e diritti umani,” in *O Protagonisti o Nessuno*, (Milan: Mondadori Education, 2009); and J.H.H. Weiler, ‘Giustizia e Diritti Umani’. Convegno. 27 August 2008. Transcript available at (<http://www.meetingrimini.org/default.asp?id=673&item=4594>).

and not to try to artificially abstract ourselves from it. Let's take a look back at one of the passages in which Giussani makes this explicit:

An Eskimo mother, a mother from Tierra del Fuego, and a Japanese mother all give birth to human beings, recognizable as such both by their exterior aspects and their *interior stamp*. Thus, when they will say "I," they will use this expression to refer to a multiplicity of elements derived from diverse histories, traditions, and circumstances; but undoubtedly when they say "I" they will also use this term to indicate an inner countenance, a "heart" as the Bible would say, which is the same in each of them, even if translated in the most diverse ways.<sup>11</sup>

And further on, on the topic of dialogue with the culture of the past and with the history of the great ancient and modern civilizations, Giussani is even more explicit: "[...] this elementary experience ... is substantially the same in everybody, even if it will then be determined, translated, and realized in very different ways – so different, in fact, that they may seem opposite."<sup>12</sup>

A "heart" which is "the same in each of them, even if translated in the most diverse ways;" an "elementary experience the same in everybody, even if then realized in very different, even opposite ways:" universality and particularity do not cancel each other out by proximity, but rather coexist in the individual living in time. Indeed, we could not recognize the universal in every person if we did not start from that person's specific characteristics. Beginning from a given culture – Eskimo, Japanese, Western, South American, etc. – we can recognize what there is of the universal in each of us. A cultural expression is not a part of the universal – as such it cannot communicate with other parts that are distinct from itself – but a fragment,<sup>13</sup> through which the universal can be approached.

The same thing goes for human rights: they contain at once a *universal dimension* and a *historical dimension*, in which are reflected the deepest tradition and consciousness of each people. Rooted in the value of the dignity of the person, the idea of human rights necessarily contains a *universal dimension*. Rooted in the specific moral, religious, linguistic, and political characteristics of each people, the concrete application of these rights is carried out under the flags of particularity and pluralism.<sup>14</sup> Particularity and universality are not mutually exclusive, but can coexist: what can seem divided in the abstract is, in actual fact, united in real human experience – inextricably united. As Martha Nussbaum would say, one enters into life with a culture, and in this way learns to communicate through a mother tongue. It is only by belonging to a given, particular culture that one can aspire to cosmopolitan citizenship.

Through a constant call to reason, which doesn't obligate us to distance ourselves from the culture in which we are

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<sup>11</sup> L. Giussani, *Religious Sense*, 7-10.

<sup>12</sup> L. Giussani, *Religious Sense*, 10.

<sup>13</sup> Thanks for this observation goes to Mauro Magatti, who spoke at a seminar on these issues in Milan on 5 March 2011.

<sup>14</sup> Paolo Carozza, "Uses and Misuses of Comparative Law in International Human Rights," *Notre Dame Law Review*, Vol 73, (1998): 1235 et-seq.; see also F. Viola, *Diritti dell'Uomo, Diritto Naturale, Etica Contemporanea*, (Torino: Giappichelli, 1989), 157 et-seq.; Martha Nussbaum, *Cultivating Humanity: A Classical Defense of Reform in Liberal Education*, (Massachusetts and London, Harvard University Press, 1997).



immersed, but rather calls upon reason to critically examine conventions and particular opinions in light of the most universal human needs and aspirations.<sup>15</sup> Similarly, we do not arrive at human rights by disregarding or making abstract our diverse positive historical and cultural experiences, but instead by remaining profoundly connected to them. The identification of universal human rights is a goal to conquer, or better, to re-conquer continuously,<sup>16</sup> through an incessant critical examination of individual cultural and historical experiences. Deductive logic and abstract speculation on universal values does not help, and renders human rights prey to subjective preferences and individual interpretations. What is universal is revealed in concreteness, and in the particular characteristics of different cultural expressions, critically examined in light of reason and of the criteria each person is given.

In this sense elementary experience indicates at once a content and a method: a content, because it tells of the existence of universal needs and evidences that unite the experience of every person, at whatever time and latitude he or she carries out her existence; a method because it indicates that one arrives at the recognition of these needs and evidences through the critical examination of one's own experience: a judgment on what is experienced.<sup>17</sup>

### *An elementary experience*

The second aspect of elementary experience, which help to face this tension between the historicity and universality of rights, is the adjective *elementary*. Surely when Giussani uses the adjective *elementary* he attributes to it a pregnant significance, alluding to something innate and original in every person. However, it seems to me that he also wanted to allude to something basic, something essential. In fact, when in chapter 11 of *The Religious Sense*<sup>18</sup> he describes the various manifestations of elementary experience, he identifies four fundamental needs: the need for truth, for justice, for happiness, and for love.

It is at this fundamental and basic level that we recognize the same experience in all human beings. And the more we get into specifics and corollaries, the more we see the terrain dominated by diversity.

This consideration shed light on another aspect of the contemporary practice of human rights, that of the incessant proliferation of new rights. The more we lengthen the list of new rights and specify particular aspects of them, the more we distance ourselves from that universal core that is due to every person. The more we lengthen the list, the more the charges of imposing a particular culture in the name of human rights seem to be confirmed by actual practice.

Incidentally, it is worth noting that very many authors, especially on the American front, are hoping, for different motives, for a return to the original rights of the second post-war period: from Michael Walzer and his distinc-

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<sup>15</sup> Nussbaum, *Cultivating Humanity*.

<sup>16</sup> Credit goes to Franco Viola and Alberto Savorana for their valuable contribution at the workshop in Milan on 5 March 2011, which made clear this point.

<sup>17</sup> Giussani, *Religious Sense*, ch. 1 para 3,4,5, pp. 7 et-seq.

<sup>18</sup> L. Giussani, *Religious Sense*, ch. 11 para 4, 113 et-seq..

tion between *thick* and *thin*<sup>19</sup> - which alludes to the distinction between a thin layer of common moral values and one that is thicker and more robust – to the *basic liberties* of Michael Ignatieff,<sup>20</sup> to the various forms of minimalism, which recognize an undue expansion of human rights in the actual practice of international institutions (like, for example, that recently noted by Charles Beitz<sup>21</sup>). Not infrequently, however, these minimalist approaches to human rights ends up looking back to the past, that is, to the protection of those civil and political liberties deriving from the liberal thought of the eighteenth century, at the expense of “second generation” social and economic rights typical of the social-democratic tradition, not to speak of the rights of the third and fourth generations. On the contrary, elementary experience is not to be confused with a neo-liberal ideology of rights, because it hints at a comprehensive understanding of human experience, taken in its essential structural elements.

When we touch upon issues that are basic, fundamental, and essential to every human being, the relativist discourse yields to the imperative to recognize and reaffirm the common patrimony of every person: no one would then be inclined to justify cannibalism, human sacrifice, torture, racial discrimination, etc. on the basis of “cultural justifications.” And contrariwise, many of the new human rights issues – discrimination based on gender and age, the rights of animals, the right to die, homosexual marriage, the right to have a child etc. – seem to be the options, preferences, or interests of a few liberal vanguards, which have no bearing on most people.

Elementary experience can help explain why within human rights practice we converge on a common core of shared issues, while we have different opinions on other topics. Moreover, as we will see later on, it suggests a method that allows us to single out from the human rights discourse what is universal and shareable. When human rights stick to the common core of human experience, they are more likely to obtain consensus; whereas when they move beyond it, they become all the more controversial.

A very sophisticated development of the catalogue of rights, like the one we have seen in recent years, brings about the enlargement of the aforementioned zones of tension between the universal dimension and the historical-culture dimension of rights. The more we distance ourselves from the core of elementary experience that is attributable to every human being, the deeper we go into the minefield of cultural options and historically conditioned choices. If we don’t want to compromise the very credibility of universal human rights, it is necessary to counter this tendency toward an inflationary use of rights, keeping in the scope of universal human rights only what belongs to the elementary experience of every human person.

### *A corollary*

The clarity that elementary experience lends to the relationship between universal and particular allows us to develop some observations on the specific issue of the relationship between institutions. In particular, in the

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<sup>19</sup> Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad?* (Notre Dame: University of Notre Dame Press, 1994).

<sup>20</sup> Michael Ignatieff, *Human Rights as Politics and Idolatry*, (Princeton: Princeton University Press, 2001), 9 et-seq.

<sup>21</sup> Charles R. Beitz, *The Idea of Human Rights*, (Oxford: Oxford University Press, 2009).

context of a clear centralizing movement, which tends to shift the center of gravity of the definition and protection of human rights toward international institutions (relegating national institutions to the role of mere executors of orientations developed somewhere else), elementary experience suggests preserving adequate space for cultural pluralism and for individual experiences – even local ones – as a place where tradition can be developed and tested. In a time when the connections between institutions – above all judicial institutions – are particularly developed, it is necessary to be vigilant so that the exchange of communication does not degenerate into a form of cultural or legal standardization. It is necessary that international institutions draw inspiration from the principle of subsidiarity that is inscribed in their DNA,<sup>22</sup> honing all the legal tools that allow the principle to work: from respect for the limits of their attributed powers, to the state margin of appreciation, to the various forms of institutional dialogue foreseen in treaties.

## 2. Elementary experience as a critical factor of the legal order

At this stage I would like to pinpoint the risk of misunderstanding the originality of the idea of elementary experience.

So far, we have come to ascertain that human rights, in addition to safeguarding the historicity and the variety of the different cultural modes, also postulate a level – an elementary level – of human experience in which one can recognize every human being, in every culture, in every epoch, and in any historical or cultural context. Now we have to make clear that elementary experience cannot be reduced to a minimal tablet of universally shared values or to some minimal moral or legal content that could muster up universal consensus. That is, something similar to that caricature of the classical natural law, as it is portrayed in the common vulgate of legal positivist critiques, which describe the natural law as a combination of moral and legal precepts that are derived by quasi-mechanical deduction from reflection on human nature. This disfigured image of the natural law<sup>23</sup> reduces it to a false duplication of the legal order: eternal and inflexible rules, insensitive to the changes of time and history.

This risk is due to the fact that legal scholars always tend to translate and secure reality into fixed legal rules. This inclination prompts us to ask ourselves what are the rights to be included, once and for all, in the elementary experience common to every man and woman on the globe. This road cannot be taken, because the question itself car-

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<sup>22</sup> I have specifically developed these ideas in “Unione europea, sussidiarietà e diritti fondamentali,” in P. Donati, ed., *Verso una società sussidiaria*, (Bologna: Bononia University Press, 2011), 121 et-seq. In this work the ideas of Paolo Carozza were of great help: “La sussidiarietà come principio strutturale dei diritti umani nel diritto internazionale,” in P.G. Grasso (ed.), *Europa e Costituzione*, (Napoli: Edizioni Scientifiche Italiane, 2005), 129 et-seq.

<sup>23</sup> F. Viola, “Una nuova teoria della legge naturale,” Introduction, in R.P. George, *Il diritto naturale nell’età di pluralismo*, A. Simoncini, (ed.), (Torino: Lindau, 2011), 11 et-seq. The literature on natural law and its relationship to positive law is endless. It is worth pointing out that there has been a resurgence of interest in this issue in recent years, after several decades of silence, at least on the European continent. The Catholic Church too has newly placed attention on this issue: see the document from the International Theological Commission, *In Search of Universal Ethic: A New Look at the Natural Law* (2009). available at [www.vatican.va](http://www.vatican.va) See also n. 255 of *Communio: International Catholic Review*, Vol. 35, no 3 (Fall 2008), which is entirely dedicated to “The Natural Law,” with contributions from both philosophers and jurists.

ries a methodological error. That it deals with an error and with a road holding little promise is easy to see from the fact that one of the unresolved (and perhaps irresolvable) problems is precisely that of the definition and contents of that intangible, universal nucleus of values, removed from the changeability of time and history. We can arrive at the point of recognizing their existence, but we don't arrive at the point of identifying their contents in a satisfying and enduring way. Even that extraordinary and unrepeatable undertaking that was the writing of the Universal Declaration of Human Rights is, in the words of its own authors, an "unfinished business,"<sup>24</sup> which fixed some points, with language that was necessarily broad and indeterminate, and which leaves a great deal of the finish work to interpreters.

What is universal is not definable once and for all, in the abstract – as though, given the idea of human nature or the idea of the person, we could deduce the universal rights and fix them forever – but it can be discovered in the living experience of each person.

If properly understood, elementary experience helps us avoid this unfruitful road. Indeed, elementary experience cannot be confused with a set of moral precepts. Nor is it a new theory of justice or natural law. Rather, it inheres in the human being, and hints at a *comprehensive*, though essential, understanding of human experience, and at a *dynamic* one. It is the evidence of our own infinite needs and desires, which define our nature and our "I," and which we run up against when thrust into a comparison between life and our heart. It refers to the human longing for the infinite that looms beyond any experience and that can be unmasked by looking at the "I-in-action", as Fr. Giussani suggests.<sup>25</sup> As an open-ended and lively event, elementary experience cannot be confused with a frozen list of rights or values; it refers to the essentials of human experience that are to be discovered, rather than deduced. It is subjective, in the sense of inhering always in an embodied "I", but it is not at all relativistic; it is objective, but it can only be encountered within the "I".

There are two essential aspects of elementary experience that should be stressed at this point.

The first regards the fact that elementary experience cannot be cut off from an "I". The universal human patrimony cannot be grasped without an "I" who carries it, who experiences it. It does not exist without the person, a real "I" who lives at a given latitude, in a certain historical age, in a determined social, political, and cultural context, who is woven into certain relationships, suffers from particular weaknesses, runs up against specific problems and circumstances. Elementary experience is an objective datum, but it cannot be abstracted in order to formulate a table of external values, or laws, or principles, or criteria. Legal scholars always tend to codify human life: it is their natural inclination, at least since the French Revolution and the Napoleonic Era on. But to try to define, or codify, or enumerate the contents of elementary experience is to arbitrarily misrepresent and reduce it, and finally to betray it.

The second aspect,<sup>26</sup> closely connected to the first, refers to the fact that what is universal is not first and fore-

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<sup>24</sup> Mary Ann Glendon, *Traditions in Turmoil: Essays on Law, Culture and Human Rights* (Sapientia Press, 2006).

<sup>25</sup> Giussani, *Religious Sense*, 35-36.

<sup>26</sup> On this point see also the article in this volume by Andrea Simoncini.

most rights and values, but the human – an elementary threshold of human experience. Speaking of multiculturalism, Carmine Di Martino puts it well: “We must at all cost maintain and put to work the distinction between universalism of rights and the universality of the human, avoid the short circuit between the list of fundamental rights and the universal structure of experience. It is necessary that the irreducibility of the latter, continually sought after and recognized by reason in an indomitable attention to experience, provoke a critical vigilance even in the face of so-called universal rights.”<sup>27</sup>

So elementary experience does not provide us with a new, different, minimal list of universal human rights or universally shared moral values, but calls onto the table an “I”, capable of subjecting even so-called universal rights and values to an incessant and inexhaustible critical assessment in light of innate criteria. We can say that the “I” herself is the external benchmark to the law, in light of which even the various components of the legal universe are subjected to an unending critical work.

Elementary experience emerges, to use an effective expression of Don Giussani, in the individual “engaged in that which he tries,”<sup>28</sup> and in the impact with reality that creates in the “I” the urgent need to weigh, judge, and evaluate – that is, to measure everything against the heart – with the innate criteria that make up the elementary experience of each person:

Reality, inasmuch as it emerges at the level of consciousness and starts a reaction, makes the person feel something, provokes a “trying” of something– we “try” in the sense of feeling, but it is not yet an experience [...]. It becomes experience when the “trying” is at the same time judged against the criteria of the heart: whether it is really true, whether it is really beautiful, whether it is really good, whether it is really happy. On the basis of these ultimate questions of the heart, these ultimate criteria of the heart, a person governs his life.<sup>29</sup>

And a little further down he says: “Every experience has a heart: the heart of the person.”<sup>30</sup>

To put it a different way: human rights propose themselves as ultimate principles of positive law, the paradigms and parameters of the validity of every other legal precept. But who can criticize human rights? Who redeems them from any possibility of error, from erroneous formulation, interpretation, and application? *Quis custodiet custodies?* And according to what criterion can they be evaluated? Faced with the extreme edge of legal experience we must either assume a position like Kelsen, imagining a *Grundnorm* (fundamental rule) to close the legal system, hypothetical and abstract, to protect the purity of the legal order and positive law from the contamination of human experience; or we must accept that even human rights – and, I daresay, human rights above all – by the function they

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<sup>27</sup> Carmine Di Martino, “Lincontro e l’emergenza dell’umano,” in Javier Prades, ed., *All’origine della diversità*, 85-103, in particular 100.

<sup>28</sup> Luigi Giussani, *Si può (veramente?!) vivere così?*, (Milano: Biblioteca Universale Rizzoli, 1996), 82-83.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.* at 83-84.

serve, at once foundational and at the same time closing of the entire global legal order, are subject to an inexhaustible critical examination, that cannot but be external to them.

The errors of the legal system ultimately cannot be resolved by adding new layers of supreme principles and superior legal values to the given order, but postulating an individual endowed with a criterion of judgment in him or herself: this leaves open the possibility of the correction of vice and error, in an incessant and ever improvable dynamism.

Even human rights, which are hardly debatable because of the overload of moral aura they evoke, are nothing more than legal tools that remain ever exposed to the risk of error, and as such they should not be excused from critical evaluation. The individual herself, with her expectation of justice, carries the criteria of judgment.

To better understand this deduction we could carry out some little experiments, for example by asking ourselves if we recognize ourselves in the image of the person that is presupposed by any one of the “new rights.” It does not take a fine jurist to realize that the actor behind these new rights is almost always reduced to “pure will:” I have the right to die because I want to die; I have the right to change sex because that’s what I want; I have the right to have a child because I want one. “*Volo, ergo sum*” seems to be the implicit definition of the “I” that dominates the common mentality. But does this pure will – abstract and isolated from every human relationship, and independent<sup>31</sup> of any circumstance – actually correspond to people’s real experience? Does this emphasis on individual will truly capture the complexity of our human experience, or does it constitute only an impoverished image of it?

It is clear from a careful reading of Giussani that elementary experience presents itself as a critical factor, a tool of comparison, the criterion of a critical reading of reality in general; and therefore – we might add – also of the legal order and its positive laws.

What constitutes this original, elementary experience? It can be described as a complex of needs and ‘evidences’ which accompany us as we come face to face with all that exists. Nature thrusts man into a universal comparison with himself, with others, with things, and furnishes him with a complex of original needs and ‘evidences’ which are tools for that encounter. So original are these needs or these ‘evidences’ that everything man does or says depends on them.<sup>32</sup>

And further on he describes the “I” engaged in an enduring “working hypothesis by filtering it through this *critical principle* which is inherent within us: elementary experience.”<sup>33</sup>

Elementary experience is described here as a critical factor or principle with which the individual sifts through *tradition* (from *tradere*, to transmit) and his or her values – that which is *transmitted* to him or her by other people.

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<sup>31</sup> This thought is laid out well in the work of M. Sandel, who critiques the philosophy of J. Rawls precisely on this point: Michael J. Sandel, *Liberalism and the Limits of Justice*, 2<sup>nd</sup> ed., (Cambridge: Cambridge University Press, 1998).

<sup>32</sup> L. Giussani, *Religious Sense*, 7-8.

<sup>33</sup> *Ibid.* at 38.



### 3. Rights and the need for justice.

Leaving behind the temptation to formulate a new, and equally arbitrary, catalogue of universal rights of a minimalist strain, the question can now address another feature of the contemporary practice of human rights: the implacable multiplication of individual rights that has marked legal experience toward the end of the 20<sup>th</sup> century and the first decade of the 21<sup>st</sup>.<sup>34</sup> Why and how did this unforeseen explosion of individual rights happen? Where does this need to multiply and absolutize individual rights, so typical of our day and age, come from? And then, what is the blind spot that is allowing rights, which in constitutionalism were always conceived as safeguards of the person against the use of power, to themselves mutate into instruments of power, in a new form of domination over people or of imposition of the interests of small and powerful groups?

Retracing the history of individual rights, which has ancient and multi-faceted roots, originating in the Medieval period, it is important to observe that at the origin of the charters and institutions of human rights of the contemporary era we find the experience of injustice which the events of the first half of the 20<sup>th</sup> century brought to the attention of the whole world. Never again could there be another Auschwitz. The common need to remediate and prevent the repetition of this kind of abuse of human beings by other human beings summoned the energy and understanding necessary to create institutions that could impede, or at least stem, the repetition of the great historical injustices and the denigration of the human person.

The *raison d'être* of such institutions is the remediation of injustice, which had been experienced in so scathing a way during those years. *Rights from wrongs*, to use the expression of Alan Dershowitz.<sup>35</sup> Therefore human rights and their institutions are rooted in the need for justice that inhabits the heart of every person, as Fr. Giussani always taught, and that reemerges in all its fullness in the face of the experience of injustice.<sup>36</sup>

There is a profound ideal at the root of human rights and their proliferation, that being the aspiration to justice, the attraction to justice that inhabits the human heart. Notwithstanding the fact that the legal positivism that has dominated European culture in recent centuries tried hard to show the law's total independence from justice – to the point of asserting with Kelsen<sup>37</sup> that to wonder about justice, even as a mere standard of evaluation, is always a disservice to the positive law – in reality the ultimate motor behind every legal act is the inexhaustible human hope for justice and the desire to oppose injustices<sup>38</sup>. The peaks of the legal order – the constitutions, the declarations of

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<sup>34</sup> The first results of this phase of work are collected in *The Age of New Rights*, at [www.nyustrauss.org](http://www.nyustrauss.org); and "In tema di 'nuovi diritti,'" in *Studi in onore di Franco Modugno*, (Napoli: ESI, 2011), 625-643.

<sup>35</sup> Alan Dershowitz, *Rights From Wrongs*, (New York: Basic Books, 2004), 81-96, 160.

<sup>36</sup> Many people take note of this innate dynamic within human experience: it is before the experience of injustice, felt in a scathing way even by children, that the need for justice is understood. See for example C.M. Martini and G. Zagrebelsky, *La Domanda di Giustizia*, (Torino: Einaudi, 2003), and more recently A. Sen, *The Idea of Justice*, (Harvard: The Belknap Press of Harvard University, 2009).

<sup>37</sup> H. Kelsen, *Lineamenti di Dottrina Pura del Diritto*, R. Treves (ed.), (Torino: Einaudi, 1967), 57-58.

<sup>38</sup> G. Zagrebelsky, *La legge e la sua giustizia* (Bologna: Il Mulino 2007).



rights, treaties with humanitarian content – unequivocally demonstrate the connection between the hope for justice and the positive law. The international institutions of human rights put themselves forward to act as defenders of justice, at the service of the human person and his dignity.

Human rights are so attractive because we see in them a promise of justice.

It is a high and noble hope that moves us toward justice, and it is an aspiration toward a destination that is never entirely capable of being grasped, a bit like the Severi's "elastic barrier," recalled by Fr. Giussani.<sup>39</sup>

The problematic knot at the base of the confusion surrounding the proliferation of human rights is rooted, I think, precisely in the insatiability of the need for justice. If rights are instruments of justice, it is easy to deceive yourself and imagine that the more emphasis is placed on human rights, the closer we come to our goal, that of a perfect justice. It is not hard to recognize that the activism of many international rights institutions is motivated by an impetus, certainly commendable in and of itself, toward a more just world. At base, it is the insatiable hunger and thirst for justice that pushes on toward the uncontainable expansion of human rights, and that today has two principal manifestations:

- a. the absolutization of rights, and
- b. the proliferation of rights.

Today we see a twofold tendency: on the one hand we see the spread of an individualistic-libertarian conception of rights that leads to the negation or removal of every form of limitation on subjective rights; on the other hand we see the continuous expansion of the list of individual rights. The two tendencies are deeply connected, as Fr. Julián Carrón has incisively described:<sup>40</sup> individualism, founded on the idea of the *homo homini lupus*, of which individual rights are the greatest expression,<sup>41</sup> leads to the multiplication of rules, because "there will never be enough rules to tame the wolves." The individualistic anthropological conception, implied within the libertarian vision of rights that is most successful today, is naturally accompanied by the multiplication of rules and rights. A person who believes she lives in a world of wolves, in which everyone is concerned only with his own individual interests, will need many tools of defense from the other, formalizing every aspiration and need in a right guaranteed by the legal system.

The absolutization and the multiplication of rights are two sides of the same coin, and both are produced by a poorly understood mobilization for a perfect justice. The intention is to realize a greater justice; but unfortunately (or fortunately) adding new rights and eliminating any limitations on their enjoyment, as the libertarian version of rights would have it, simply does not reach this goal.

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<sup>39</sup> Giussani, *Religious Sense*, 114.

<sup>40</sup> Carrón, 'Your Work', point 2.

<sup>41</sup> The history of human rights has been chronicled by many. Particularly useful is the recent volume of N. Wolterstorff, *Justice*, (Princeton: Princeton University Press, 2008).

This statement might be questioned<sup>42</sup> on the grounds that the expansion of rights is not necessarily rooted in an individualistic and libertarian anthropology. Some of the new rights, one might contend, implement a dignitarian rather than libertarian anthropology.

This critique would deserve a larger discussion. Here I can only reply by sketching a few remarks.

Whereas at a normative level one could assert that the new rights can be inspired either by a libertarian anthropology or by a dignitarian one, as a matter of fact, at the descriptive level, all new rights that have been recognized in recent years are meant to expand the autonomy of the individual, which is at the heart of libertarian culture. Within the practice of new rights, the multiplication of rights goes hand in hand with the libertarian culture.

This comes as no surprise. The libertarian anthropology requires the development of individual rights, whereas the dignitarian one draws from a richer variety of legal tools – rights, needs, faculties, duties – and is open to accepting limitations on individual claims for the common good.

To put it differently, although in theory new rights can also derive from a dignitarian vision of human life, today the multiplication of rights is an outcome of the dominant libertarian culture, which is intrinsically exposed to short-circuiting human needs and desires in the name of individual rights.

More rights are not without a price. Rights that are limitless in number and content are at risk of a utopian degeneration.

a. Concerning absolute rights, this degeneration was nicely described years ago by Mary Ann Glendon: «absoluteness is an illusion, and hardly a harmless one»<sup>43</sup>.

Here there is something that abstract logic cannot explain, but human experience can: “*Un droit porté trop loin devient une injustice*” (Voltaire). Today there is ample theoretical reflection on the so-called *abuse of individual rights*,<sup>44</sup> but nothing yet that seems able to affect or shed light on practice.

b. The same observation could be repeated in reference to the multiplication of the number of rights. In this case too the intention is the promotion of justice: the implied equation is *more rights = more justice*.

All the same, there are various reasons to doubt that justice is a matter of quantity: in this area progress by accumulation does not work.

In legal thought there are already many hints that warn against the all-too-easy equation *more rights = more justice*. There have been those who have cautioned that every new right enters into the overall balance with the old rights, and compresses their previous extent.<sup>45</sup> Others have placed the emphasis on practical problems: the greater

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<sup>42</sup> Credit for this important discussion goes to F. Modugno, Chamber of Deputies, Rome July 10th, 2012.

<sup>43</sup> Mary Glendon, *Rights Talk*, 45.

<sup>44</sup> See for example the collection of essays in A. Sajo (ed.), *Abuse: the Dark Side of Fundamental Rights*, (Utrecht: Eleven International Pub., 2006).

<sup>45</sup> Most recently this argument was put forward in M. Luciani, “Interprete della costituzione di fronte al rapporto fatto-valore.

the number of rights, the more numerous the controversies before the courts; already today the national and European courts have accumulated enormous backlogs – at the end of 2010 there were about 140,000 cases pending before the European Court of Strasbourg<sup>46</sup> – so they obviously hand down their decisions with years and years of delay. And as we know, justice delayed is justice denied.

Still others have placed the emphasis on the sustainability of rights and their concrete feasibility: rights cost,<sup>47</sup> and therefore like any other public decision they are subject to the limits and impacts derived from the scarcity of institutional, financial, and social resources. To lengthen the list of rights when the conditions needed to actuate them do not exist is to sell citizens an illusion and to raise expectations, which are then impossible to satisfy. And still others have observed that «the multiplication of right-defining rules has not reduced, but in fact augmented the risks of violations» and that we must acknowledge – with more than a few causes for concern – that a new threat to the rights of persons is growing: «the denial of rights in the name of rights is spreading».<sup>48</sup>

On the plane of empirical observation many acknowledge, therefore, that the pure multiplication of rights does not bring us nearer to our desired destination, but on the contrary has potential to shipwreck the entire enterprise. It deals with observations that in some way re-propose what the wisdom of the ancients has always passed on to us, and which is continually forgotten: *summum jus, summa iniuria*. Law taken to its extreme generates injustice. And we could go on: *fiat iustitia et pereat mundus* (and obviously, as it says in Amartya Sen's most recent book on justice, if the world perishes there is not much to celebrate).

This is why the most widespread iconography since antiquity represents justice as a woman holding a balance in hand – a balance of which the plates must be kept in equilibrium. The thrust toward justice is either intrinsically temperate, or it is not.

So recent and ancient experience teach us that the aspiration toward justice is constantly susceptible to paradox and to the risk of utopian degeneration, if it loses sight of the limits of human possibility – like Dante's Ulysses, who pushes himself beyond the columns of Hercules in an inadequate craft. The attraction to justice becomes hubris if we lose sight of the reality of the human condition – that is, it becomes an instrument of power by man against man. So it happens that, to stay in the realm of human rights, rather than serve the original goal of bulwarking the human person against the corruption of power, human rights themselves become – perhaps in good faith – instruments of power. Or they end up, perhaps inadvertently, promoting, in the name of human rights, the simple interests of the few most influential groups. As it was put recently, human rights are nothing but political instruments, one political

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Il testo costituzionale nella dimensione diacronica," *Diritto e società*, (2009): 1-26, especially 20 et-seq.

<sup>46</sup> European Court of Human Rights, *Analysis of Statistics 2010* (January 2011), available at [http://www.echr.coe.int/NR/rdonlyres/11CE0BB3-9386-48DC-B012-AB2C046FEC7C/0/STATS\\_EN\\_2011.PDF](http://www.echr.coe.int/NR/rdonlyres/11CE0BB3-9386-48DC-B012-AB2C046FEC7C/0/STATS_EN_2011.PDF)

<sup>47</sup> S. Holmes and C. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes*, (New York-London: WW Norton & C., 1999). There is already some talk of an actual "human rights market:" see U. Baxi, *The Future of Human Rights*, 3<sup>rd</sup> ed., (Oxford: Oxford University Press, 2008), 216 et-seq.

<sup>48</sup> G. Palombella, "The Abuse of Rights and the Rule of Law," in *Abuse*, 5.

strategy among the others, used by some groups to reach their objectives.<sup>49</sup>

Why this paradoxical effect, which seems to condemn the human attempts at justice to follow a parabolic trajectory, which outside a certain limit has a descending effect and cannot maintain constant progress by accretion? Elementary experience and the need for justice, as they were described in *The Religious Sense*, explain the deep and ultimate reason for this paradox: «Without the perspective of a beyond, justice is impossible»<sup>50</sup>

If we do not take into account the concept of limitation, that derives from the human condition, as part of our incessant and tireless work toward justice, every attempt to bring about a greater or more perfect justice degenerates into a form of power. If we forget that justice constitutes a destination that is always structurally, ontologically insatiable and outreaching, the project rots to man's detriment. If we neglect the infinite nature of the need for justice – as Fr. Julián Carrón reminds us<sup>51</sup> – every human response ends up being inadequate.

Highlighting the infinite nature of each person's need for justice and the limitedness of the responses coming from the positive law, I mean at once to emphasize the need for consciousness of the *limits* of every human response and the *potential* that flows from this consciousness.

1. The infinite breath of the human need for justice should above all foster prudence – *jurisprudence* – in the operation of law, deriving from the consciousness of the disproportion between the instrument we have in our hands and the destination we are trying to reach. “Whenever the humble sense of human thought's essential reformability is not understood ... philosophy becomes ideology.”<sup>52</sup>

This is what Benedict XVI means when he says,

[T]he kingdom of good will never be definitively established in this world. Anyone who promises the better world that is guaranteed to last forever is making a false promise ... If there were structures which could irrevocably guarantee a determined—good—state of the world, man's freedom would be denied, and hence they would not be good structures at all.<sup>53</sup>

To return to our topic, that of human rights and the institutions that defend and promote them, an awareness of the limits intrinsic to human attempts (compared with the infinite vastness of the desire for justice that inhabits the human heart), suggests prudence and modesty. Human rights certainly have a very important place in human

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<sup>49</sup> C. Bob, 'Introduction: Fighting for New Rights', in *The International*

*Struggle for New Human Rights*, (Philadelphia: University of Pennsylvania Press, 2009), 13 et-seq.

<sup>50</sup> Giussani, *Religious Sense*, 114.

<sup>51</sup> Julián Carrón, “Feriti torniamo a Cristo,” *La Repubblica*, April 4, 2010, available at <http://www.ilsussidiario.net/News/Cronaca/2010/4/4/PASQUA-Julian-Carron-su-Repubblica-Feriti-torniamo-a-Cristo/77269/>

<sup>52</sup> Giussani, *Religious Sense*, 51.

<sup>53</sup> Pope Benedict XVI, “Spe Salvi,” para. 24.

coexistence, but at the same time always a limited place. They are not capable of satisfying humanity's demand for justice and it is necessary on this issue to constantly renew the awareness of those who apply rights. In some measure a realistic and tempered approach to human rights, which guides them back to their original *raison d'être* as instruments of correction and prevention of injustice, is an approach that is aware of the "structural disproportion"<sup>54</sup> between human possibility and the extent of the need for justice that beats in the heart of every person.

2. On the other hand, we must not end by seeing the difference between law and justice as a problem. The difference between the short stride of law and the infinite need for justice serves not only to demonstrate the poverty of every human attempt, but can also become a resource. The structural disproportion between the infinite need for justice and the limited capabilities of the instruments of positive law generates a differential that can become potential: as happens in physics, a difference in potential generates movement, and therefore kinetic energy, when it acts on a particle capable of "feeling" the difference in potential. In other words, the disproportion between law and justice can generate tension, energy, and movement where there is an actor sensitive to this disproportion. An actor who is aware of this differential is an indomitable reformer – Giussani himself uses this word, "reformability" – ready to continually adjust the outcomes of her own work.

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<sup>54</sup> Giussani, *Religious Sense*, 49.

## Biographical Note

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