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Sommario: 1. Kelsenian paradigms. – 2. Law, Life and its Immunization. – 3. Confidence an credit: disappointment and bona fides. – 4. An anthropology of diffidence? Excess and values.

1. Kelsenian paradigms.

In a renowned passage of the NichomacheanEthichs, friendship is qualified as the'bond of the state' so that 'lawgivers seem to set more store by it than they do by justice'.Indeed'if men are friends, there is no need of justice between them; whereas merely to be just is not enough,a feeling of friendship also is necessary'[01].

Far from being a reductionist (or irenic) declaration about a world of the origins whose decay cannot be but testified, the ambivalent tie between φιλία and δικαιοσύνη described by Aristotle introduces us to a dimension where the *eudaemonia* of the *polis* was ingrained onto the friendship of its members. In this sense, the idea of justice was entirely absorbed into the idea of friendship insofar the pursue of the happy and virtuous life (εὐδαιμονία) took a conceptual prevalence in the view of the realization a of a 'just life'.

Indeed, the ancient world did not entrustjustice with a primary functionalized role towards the regulation, control and government of the social sphereand the relationships between members of the *polis*. It wasφιλία itself that, more than justice, was charged with the political aim of ensuring the unity of the community.Symmetrically, justice came into play as remedy to the lack of friendship and as a remedy where something – the φιλία – was missing in the polis.

01'**καὶφίλωνμὲνὄντωνοὐδὲνδεῖδικαιοσύνης**, **δίκαιοιδ᾽ὄντες προσδέονταιφιλίας**, **καὶτῶνδ ικαίωντὸμάλισταφιλικὸνεἶναιδοκεῖ**', Aristotle, *Nichomachean Ethics*, Book VIII, para 1155a (25).My translation.

It is worth noting that this remedial nature attached to the notion of justice had already emergedin Anaximander's reflection on the ultimacy essence of Being, as conveyed in the well-known fragmentpreserved by Simplicius of Cilicia in his De Physica (24,13)[02], where the relationship between Law and Life is – probably for the first time in Western history – incisively problematized. The fragment has been extensively commented[03], however what is interesting to our purpose is the fact thatAnaximander advancesthere an ontological concept of justice, whereδίκη (justice) and ἀδικία (injustice) are related to the sense of the Being. He describesindeed the coming into existenceof the reality (τάὄντα) as the product ofthe separation from an original condition of infinity (*apeiron*) and the fate of τάὄνταas the return to such originaccording to necessity (κατὰτὸχρεών) and according to time.

Such entities that have come into existence - and are doomed to return to the origin lying in the *apeiron* -, adds Anaximander, must pay each other the price of their injustice ('didònaidikentesadikìas'). Essential to note, the injustice lies exactly in their very separation from the *apeiron*. Hence, the same event of coming into existence represents a (the) form of ἀδικία andseparation is ἀδικία because it produces an alteration of the order of nature as an act against nature (φύσις). If there isundoubtedly at show an ontological dimension in this – the tragedy of Life as product of separation from an original unity[04] -such fault of separation that burdens the living entities and therefore the law that governs Life as destined to death –'didònaidikentesadikìas' calls also into play the mundane dimension of relations between entities (τάὄντα)and thereforethe application of penalties for readdressing the wrongs arising from alteration of the order of nature due to unjust behaviors of men against other men.

The source of thenecessity to pay penalty and be judged for their injustice – both for the fracture ofthe original unity and for the misbehaving of the entities– is said by Anaximander stemming from ἀρχή. It is in the ἀρχή, thus, that lies the distinction betweenjustice (δίκη) and injustice (ἀδικία) and it is precisely there that, when looking at the sense of ἀρχή,the core of the interrelation between Law and Life opens up in all its tangibility.

*Arché*conveying indeed both the meaning of 'origin', 'first principle' and of 'command' is-

02'[Anaximander] declared beginning (first principle) of everything the *apeiron*, using for the first time this name for thearché [...]. And the source of coming-to-be for existing things is that into which destruction, too, happens. According to necessity [**κατὰτὸχρεών**]; for they pay penalty [**διδόναιδίκην**] and retribution to each other for their injustice [**τῆςἀδικίας**] according to the assessment of Time', translation by G.S. KIRK, J.E. RAVEN, M. SCHOFIELD, *The Presocratic Philosophers: A Critical History with a Selection of Texts*, Cambridge, 1983, 117-121.

03 The fragment has been subject to intense interpretations. Among others, famous are those provided by M. HEIDEGGER, *Locuzione di Anassimandro*, in ID.,*Holzwege. Sentierierrantinella selva*, Milano, 2002, 321 ff.; F. NIETZSCHE, *La philosophie à l'époquetragique des Grecs*, Paris, 1990, 24 ff.; J. DERIDDA, *Specters of Marx: The State of the Debt, the Work of Mourning and the New International*, New York-London, 1982.

04 E. RESTA, *Il diritto vivente*, Bari, 2008, 24.

suedby an authority[05],the impulse for 'didònaidikentesadikìas' can be said coming from ἀρχή intended as origin or from ἀρχή intended as command? When justice refers to the application of penalties by a judge in retribution to a violation,surely the sense of ἀρχή as command is elicited: but has this commandits foundational ἀρχή in another command by an authority or in the ἀρχήcontemplated as the origin of the Being[06]?

More than a mere speculative question, the problemgoes through the sense of the western experience of the Law, forcinganyinvestigationabout the principles of Lawintothis fundamental ambiguity: either it is the Being (*ta onta*, the things intended as Nature, Life) that is the ultimate source of legal experience or legal experienceis the effect of a command by an authority,whose ought-to-be shall necessary find a sound justification.

This sense of the inquiry about the juridicity of the legal experience has fully reached modernity – through different passages that cannot be pieced together in full here[07] -which is still entirely within the paradigm.In this perspective, Kelsen's reflection aboutthe Sollen as atheoretical 'ursprünglicheKategorie'[08] is to a certain extent the tragic, and probably the most sophisticated, attempt to set a conclusive possibility on the self-positing of the Law and its difference from the mere force of the Being. The intrinsic tragedy of Kelsen's normativism[09] closely resembles then the tragedy of the loss of foundation experienced by sovereignty, observed by Benjamin through the lenses of the German Trauspiels[10],– where a King can say 'Ich kan und will' and have it answered 'Ihrköntnicht und must nichtwollen'[11] –: and it is no coincidence that Benjamin's studies have also interested the connection between Law and Life[12].

A cursory identification of the complexity of issuesbehindthe Kelsenianfunctioning of the Grundnorm (at least as elaborated in the 1934 edition of the Reine Rechtslehre) isthereforea needed crossing point to define the theoretical background against which the following paragraphs shall necessarily develop.

Kelsen devises the condition of possibility of the legal system inthe Grundnorm as the hypothetical foundation ('hypothetischenGrundlage' or 'Voraussetzung' (prerequisite))

05L. Rocci, *Vocabolario greco-italiano*, Roma, 2024, *ad vocem*"**ἀρχή**".

06 And we can replace Life with Nature, without modifying the terms of the discussion.

07T. Hobbes,*Leviathan, sive, De materia, forma, &potestatecivitatisecclesiasticae et civilis*, Amsterdam, 1668, 133,«sedAuctoritas non VeritasfacitLegem», version available at https://archive.org/details/leviathansivedem00hobb/page/132/mode/2up.

08H.Kelsen, *Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze*, Tübingen,1923, 40.

09 B. de Giovanni, *Kelsen e Schmitt oltre il Novecento*, Napoli, 2018, 70 ff. where the Author highlights the need to free the reading of Kelsenian theory from the adherence to a strict positivism.

10 W. Benjamin, *The Origin of the German Trauerspiel*, (H. Eiland trans.), Cambridge, 2019, 68 ff.

11 C. Stieler (Filodor), *Trauer – Lust und Misch-Spiele*, Jena, 1665, I, 1.

12Reference is to W. Benjamin, *Towards the Critique of Violence*, Redwood City, 2021.

of the legal system. Far from being superficially identified with the Constitution[13]the Grundnorm is – in Kelsen's systematic theory – the transcendental condition in a normative shape that enables us to perceive the laying down of a system of rules and commands as Law and not as the mere factual evidence of an actual set of commands that retain its validity as a fact, indifferent to any legal justification[14].

The purpose of the Grundnorm is to provide the conditions for the justification of the Law (or better of a system of norms) as Law (i.e. that systems of norms understood in its juridicity). This follows from the circumstance that, in Kelsen's view, an empirical fact-cannot provide *per se* the justification for the duty to obey command without depriving the Law of its sense of selected source of binding social behaviors (i.e. of the ought-to-be). Hence, we cannot legitimize the rule punishing theft with jail because it has been sanctioned by the Parliament through a law, because this is a fact (a resolution by the Parliament), nor can we affirm we have a duty to abide Parliament's laws because so it is provided for by the Constitution since, again, this a fact. But the same logic also applies to the Constitution and to the question of why we must abide by it, with the additional degree of embarrassment given by the fact that regardless of whether we answer the above-mentioned question by invoking the effectiveness rule (we obey since the Constitution is effective) or the social contract theory, we are again resolving the origin of the ought-to-be in a fact.

However, placing/identifying the origin of a legal system in a fact (a factual power of whatever nature) would be tantamount – pushing the reasoning to the extreme –to assume the impossibility of Law as such[15]. The reduction of the Law to a factual production is indeed the denial of the Law as a science and as an autonomous object of thought (of 'thinking a thing' as it is in itself according to the Kantian paradigm): not just because the Law of Facts is a logical non-sense but because if the commencement of juridicity is found in a fact, any fact (or power) can be a legitimate antecedent of legal

13 The distinction between the Grundnorm and the Constitution emerges plainly in Kelsen's writings where it is clearly excluded the co-inclusion of the Grundnorm and the positive law (cfr. H. KELSEN, *Reine Rechtslehre*, Tübingen, 2008, 67: 'Sie gilt, da sienichtimRechtsverfahrenerzeugtwird, nichtals positive Rechtsnorm, istnichtgesetzt'), a position entirely justified by Kelsen's neo-kantism. See T.C. HOPTON, *Grundnorm and Constitution: The Legitimacy of Politics*, in*McGill Law Journal*, 24, 1978,72-91.

14 As it would be in the 'gunman's situation' consequential to Austinian command theory as elaborated in J. AUSTIN, *The Province of Jurisprudence Determined*, (1832), W.E.Rumble (ed.), Cambridge, 1995, p. 21 ff.; cfr. also H.L. HART, *Positivism and the Separation of Law and Morals*, in *Harvard Law Review*, 1958, p. 602 ff.

15 T. GAZZOLO, *Introduzione a Cos'è la dottrina pura del diritto*, Milano, 2019, 49. An interesting reference is made to the possibility puzzle as elaborated by Scott Shapiro: it is the problem concerning the possibility to affirm the existence of the Law as distinct from mere power, i.e. from the command which is binding *de* facto, due to the use (or the threat to use) of force. Indeed, if a norm (N1) is valid only as laid down by a legitimate power, which has the right to create norms according to a different norm (N2), which legitimizes such power. Nonetheless, in order for N2 to exist, again it has been created by a legitimate power, legitimized in this sense by a different norm N3: thus proceeding, however, the risk is to proceed with a *regressusin infinitum*.

validity, depending on its ability to impose.

In Kelsenian terms, to save the possibility of the Law as Ding in sich means preventing that its Sollen (ought-to-be) is derived from any Sein (to be) and, on the opposite, it is rooted on a pure Sollen[16], whose form is the Grundnorm. Although this can sound – to a certain extent – familiar to the reader, the radical paradoxality of Kelsen's Grundnorm lies exactly in its position of guarantor of the division between Sollen and Sein. If, as said, the Sollen cannot be derived from any Sein, it follows that the Grundnorm itself cannot be a Sein and, therefore, that the Grundnorm cannot be 'a norm that exists as a fact, as something given (laid down), as the fact of the[existence of the] Law'[17]. In order to guarantee the conceivability (Denkbarkeit) of the Law, the Grundnorm must be a pure Sollen, without factual existence (i.e. without any relation to the Sein), a pure Sollen that has no Sein.

Kelsen is of course aware that such a solution comes at the cost of dividing reality into an irreconcilable duality (Sollen/Sein) and this could, perhaps, be the reason of such a great part of the ambiguous intellectual relationships he had with Plato'stheoretica-lefforts towards the reconciliation of duality[18].To put it differently, the attainability of a sound foundation for the Law is subject to an irremediable separation from the Sein (from the Being, from Life). The inquiryabout the ἀρχή of the Law excludes both the ἀρχή as command and the ἀρχή as principle of the Being and leads to an [un-]found[able] un-[related to]-existent[ce] and absent (in the literal meaning of lacking-in-existence) ἀρχή that is the pure Sollen. This separation from Life (Sein) and the powerless foundation of the Sollen is the tragedy of the Law as it has beendelivered to us by Kelsen and still represents the Gordian knot which calls and challenges the legal science to an answer. The framework of problems it gives rise to is the thinking box jurists are forced to move within: it questions the reversibility of the norms-facts dichotomy (certain characteristics of DAOs through blockchain technologyshow a trend in favour preference of

16 It is interesting to note that also the thought of Kelsen's accomplice and rival Carl Schmitt is undermined/affected by the same problem. Carl Schmitt's decisionism is not the praise of political decision as act of power (Macht) that founds legality and, therefore, of a Sein over a Sollen. It is sufficient to refer to the passage in Der Wert des Staates und die Bedeutung des Einzelnen, 'what the supreme power is, however, is not determined on the basis of a fact, but on the basis of an evaluation, thus in accordance with the criteria of a legal assessment [...] Mere factual power cannot at any point rises to a justification without presupposing a norm on the basis of which such justification is legitimised'. Schmitt's efforts are therefore devoted to capture the act of power within the Law and to re-affirm, in a different sense, the Sollen over the Sein, nonetheless following apath totally opposite to Kelsen's. See G. AGAMBEN, *Stato di eccezione: Homo Sacer*, Torino, 2003, particularly 14 ff, 71 ff.;M. CROCE, A. SALVATORE, *Cos'è lo stato di eccezione*, Milano, 2022;C. SCHMITT, *Teologiapolitica*, in ID. *Le categorie del "politico"*, Bologna, 1972, 33 ff.

17 T. GAZZOLO, *op. cit.*, 54.

18 See, by way of example, his reflections in H. KELSEN, *La giustiziaplatonica* (G. RIDOLFI transl.), in *Diacronia*, 2019, 257-295.

facts as source of legitimation)[19], the same capability of the Law to work as system of regulation of social behaviors – it would not have been necessarily so[20], surely it was not so in Islamic civilization[21]– and the alleged universality of Law's expressed values (the discussion over human rights is a blatant example thereof)[22], all intricate questions that we can simply hint at here.

2. Law, Life and its Immunization.

If Kelsen's doctrine of Law probably provides aconclusive theorization of the problematic interaction between Law and Life, it is worth noting that the latter has been also recently read through the lenses of the 'immunitarian' paradigm, in a sense that offers some perspectives on the immunatarian use of the Law.

The category of immunization has a recent tradition in socio-philosophical critical studies –it has been a central figure in Luhmann's SozialeSysteme: Grundrißeinerallgemeinen Theorie and it has been extensively employed by Derrida in his Auto-immunités, suicides réels et symboliques – nonetheless we owe to the contribution of Italian philosophy a careful exploration of its internal tensions and the recognition of the immunitary-communitaryhermeneutics as projection of the self-representation of modernity.

Working on the semantics of the shared element of the *munus* (cum-mun-is – in-mun-is)[23], such theoryprovides the first systematic elaboration of the im-munitary paradigm in contrastive symmetry with the concept of com-munity.*Munus* conveys indeed the ambivalent meanings of *onus* (burden), *officium* (obligation, duty and public service) and *donum* (gift) that can be traced in the expressions *munuscapere* (taking an office and therefore assuming a duty, an obligation to service) and *munificus* (i.e. the person who *munusfacit*, acts generously (gives freely), but at the same time the person who is subject to taxation (has a duty to give)). The sense of the counterintuitive affinity between gift and duty (what should be more constraint-free than a gift?) reveals the peculiar nature of *munus*as *donum*'distinguished by its obligatory character, implied by its root mei-, which denotes exchange'[24].

Munus appears, then, as an intense form of *donum* that obliges the receiver to respond, to reciprocate the gift and being grate-ful, ri-conoscente, i.e. in the position of ac-

19See O. Borgogno,*Making decentralized autonomous organizations (DAOs) fit for legal life: mind the gap*, in *Questionidi Economia e Finanza*, Banca d'Italia "Occasional Papers", October 2022.

20A. Schiavone, *Ius. L'invenzione del diritto in Occidente*, 2017, Torino, 5 ff.

21The Islamic civilization, indeed, is an example of legal normativity derived from the interpretation of sacred (divine, and therefore, "immutable", text). See W. Hallaq,*Sharia: Theory, Practice, Transformations*, Cambridge, 2009.

22 A.A. An Na'im, *Decolonizing Human Right*, Cambridge, 2021, *passim*

23 The semantic implications of the latin word *munus* are masterly described by E. Benveniste, *Il vocabolariodelleistituzioniindoeuropee*, II, *Potere, diritto, religione*, Torino, 2001, 71 ff.

24 R. Esposito, *Communitas. The Origin and Destiny of Community*, Redwood City, 2009, 4.

knowledging that he unequivocally 'owes' something because he has been beneficiary of something. Curiously, remnants of this obligatory nature of the gift can also be found in the Italian Civil Code whereby Art. 437 states that the donee is obliged to alimentary obligations towards the donor and Art. 800 affirms the possibility to revoke a donation due to ingratitude of the donee. It could be probably useful for the jurists a reading of Simmel's suggestions on the Charakterindelebilis of the gratitude and its related binding capacity[25].

The binding nature of the *munus* lies in a place of intersection of social, anthropological and political dimensions[26], however are its political connotations that support our understanding of the Law-Life binary model. The cum of the *munus* in the community is – according to Esposito's theory –the debt or obligation of gift-giving that each individual has towards other individuals at the origin of every community, the founding relation where we are obliged to give (first of all the experience of our existence) to others and therefore to exist, ex-stare, being outside the boundaries of our identity and exposing our self. This reciprocal donation on individual identity is a challenge to the in-divisibility of the in-dividual (which is exactly what cannot be divided) since it is both a systematic depénse[27] and the pure exposition of the Life. The communitas is the place where we create a bridge towards the other (the reciprocal *munus* of the mutual exposition of the single lives), that brings us closer to the other but distances us from ourselves. In doing so, we expose ourselves to the risk of the annulment of our identity, our certainties and, ultimately, our life. In the community we risk losing ourselves and it is precisely here that the immunization intervenes as a form of dispensation (*dispensatio*) from such an obligation, with the aim of de-potentiating the expropriating features of communitas (in-munitas being the negative of cum-munitas)[28].

The category of *immunitas* becomes a key hermeneutical tool for addressing the process of modernization starting from the relation Hobbes establishes between *conser-*

25 G. Simmel, *Dankbarkeit. Ein soziologischerVersuch*, available at https://tinyurl.com/mpn2vatn, specially where he recognizes gratitude with a social bindingness even higher than Untreue (infidelity), since if eintatsächlichesAnderswerden der Individuen (the becoming-others of the personality of individuals) makes ourTreulosigkeit (lack of fidelity) not entirely blameworthy because we are no longer the same who entered into the relationship, such a relief does not occur when our feeling of gratitude is extinguished (wennunserDankbarkeitsgefühlerlischt) because gratitude seems to dwell in a point that is not subject to changes (Dieses scheint in einemPunkte in unszuwohnen, der sichnichtwandelndarf). This peculiar indissolubility of gratitude (EigentümlichUnlösbare der Dankbarkeit), points out Simmel, is related to the freedom of the gift (Freheit der Gabe) which is lacking in the morally necessary counter-gift (Gegengabe).

26M. Mauss,*Essai sur le don. Forme et raison de l'échange dans les sociétés primitives*, 1923-1924, 90 ff., available at https://anthropomada.com/bibliotheque/Marcel-MAUSS-Essai-sur-le-don.pdf.; J.L.Nancy, *Cosa resta dellagratuità?*, Sesto San Giovanni, 2018.

27 In Bataillianterms, seeG. Bataille, *La notion de depénse*, in *Critique sociale*, 1933.

28 R. Esposito, T Campbell, *The Immunization Paradigm*, in *Diacritics*, n. 2, 2006, 26.

*vatio vitae*and subordination to a constitutive sovereign power[29], where Life is the state of generalized conflict, and the institution of a sovereign power is the immunization of the community from a threatened return to conflict. Protecting the possibility of Life implies the separation of Life from itself, through social mechanisms that set their foundations outside andin-relation-to Life. The Kelsenian problematic separation of Law and Life comes back under a different light: Law is possible if separated from Life and, in turn, Life is possible if separated from itself through Law. To be possible Law must be separated by facts and facts, to survive, from facts.

Hence, the play of immunization directly involves the Law as a patrolling border power against the mingling force of the community. On a first level, the dispensatory role of the Law operates by means of the transformation of the described original condition of generalized obligation ('Un homme, considéréenlui-même, a seulement des devoirs, parmilesquels se trouventcertains devoirs enverslui-même'[30]) into the primary position of individual (fundamental) rights, thus re-appropriating the individual of the expropriation of his ex-istence ('La notion de droit estliée a celle de partage, d'échange, de quantité. Elle a quelque chose de commercial [...] Le droit ne se soutient que sur un ton de revendication'[31]) and setting the consequentialdistinction of the 'mine' and 'thine'[32].An indicator of the metamorphosis is already in Ulpian's quotation 'Publicum ius estquod ad statum rei Romanaespectat, privatum quod ad singulorumutilitatem'[33], where the great Roman legal tradition put *publicum* and *privatum* on the same footing highlighting their point of contact in the pursue – one of the *res publica* the other of the individuals – of the *utilitas* (utili-tas, as derived from the past participle of uti (*usus*)) i.e. the consumption (*usura*) and the use (*usus*) that come from appropriability of the reality.Precisely because what most characterizes both public and private is their shared derivation from processes of subtraction of the cum-munis and the cum-munitas, a privative origin conceptually underlies them, where the public subtracts to allocate to a *populus*while the private does so by allocating to the individual[34].

On the other hand, the interaction between immunization and Law operates deeply in the linguistic field through a constant osmosis, translation andbetrayal of concepts taken from the realm of Life and transposed into allegedly equivalent legal terms. This

29 T. Hobbes, *Leviathan, sive, De materia, forma, &potestatecivitatisecclesiasticae et civilis*, cit., 66 ff.

30 S. Weil, *L'enracinement Prélude à une déclaration des devoirs envers l'être humain*, Paris, 1949, 6.

31 S. Weil, ***Écrits de Londres et dernières lettres***, Paris, 1957, 22.

32T. Hobbes, *Leviathan. The Matter, Form and Power of a Commonwealth. Ecclesiastical and Civil*, London, 1651, Ch. 13, para 13.

33Digesto 1,1,1, 2-3.

34The divide of the legal conceptual field into public and private has its missing guest exactly in the 'common'. This should be probably a starting point for any reflection about a legal theory of the commons.

semantic effort – which is, in general, greatly overlooked – leaves several footprints in the system of private law and produces an interactive communication between the cognitive and the normative spheres (or, better said, between the worlds of Life and Law) that is able to offer a perspective about the ways Law achieves its rationalization of reality, and the reductionist outcomes jurists should be aware of. In this, the self-reflexivity of the legal language shows the necessary transition, intrinsic to the functionality of the legal systems, from the self-representation of the reality to the logic-formalistic self-representation of the Law. There, the constructivist power of the legal language goes hand in hand with its hidden paradoxes.

3. Confidence an credit: disappointment and *bona fides*.

In one of the Scènes de la vie Parisienne, in a city of Paris where the great theatre of daily life shows 'la bataille incessante qui s'y livre entre les créanciers et les débiteurs'[35], a journalist tells a colleague 'une vérité pécuniaire que je n'ai vue écrite nulle part [...]. Le débiteur est plus fort que le créancier'[36].

The novel takes place in the midst of the Monarchy of July, in a Nation in which the bourgeoisie was consolidating its position of dominance and that was experiencing a hasty development of commerce and finance, a crowd of businessmen and speculators traded in credit, staged false bankruptcies and accumulated capitals to the cry of 'enrichissez vous'. Contracts, credit, time and confidence in the market were the features around which the game between creditor was played.

To a long-term view, this world appears to be the accomplished evolution of a history which has its background in a peculiar kind of φιλίανομικὴ (a legal friendship based on utility (διὰτὸχρήσιμον)), entered into by means of explicit covenants (*synàllagma*), more liberal in nature since while fixing the elements of the exchange (καθ' ὁμολογίανδὲτίἀντὶτίνος) grant a delay in time for the execution (ἐλευθεριωτέραεἰςχρόνον)[37]. In these agreements, the departure from the model of the immediate exchange hides, between the lines, a spirit of friendship (φιλικὸν) insofar as it is a bet by the creditor on the timely future performance of the debtor. The creditor's expectation is therefore grounded on good faith and confidence on the counterparty (κατὰπίστιν/*fides*): consequently, Aristotle clarifies, there is no possibility to sue him in case of non-performance, since those who make agreements based on good faith must take the risk of unfulfillment of the promise[38]. The lack of a legal protection tells about an environment in which granting time and placing confidence (time and good faith are, after all, the core of any creditor-debtor relation) are the tip of a genealogy of social relations where faith and confidence were means for creating social ties and hierarchies more than legal relation-

35 H DE BALZAC, *Esquisse d'Homme d'affaires d'après nature*, Paris, 1853, 129.

36 H. DE BALZAC, *La Maison Nucingen*, Paris, 1874, 50.

37 ARISTOTLE, *Nichomachean Ethics*, *cit.*, para 1167b, para 20-25.

38 ARISTOTLE, *Nichomachean Ethics*, *cit.*, para 1167b, para 30-35.

ships.

Fides, indeed, as recurring in Latin expressions *fides est mihi apud aliquem or fidem habere alicui* has layers of meaning not entirely overlapping with the sense of faith/trust: *fides est mihi apud aliquem* means to be held in very high esteem, i.e. having credit-credibility with someone, and the *fides* is a possession (*mihi est*) of something that I receive from a third party I come in contact with. *Fides* is granted to me as the opening up of the other towards me[39]. This opening up creates social bonds but at same time incorporates risks.

Fiduciary mechanisms cannot be detached, in the first place, from power dynamics, as Nietzsche acutely observed in his Genealogy of Morality, because promising and capacity to keep promises produce an actual awareness of power and freedom, of conforming the future to his own words. Hence a sentiment of superiority and mastery over everybody who does not have the prerogative to promise and to answer to himself (to make future aligned to his words) and the creation of standard of values according to which others are respected or despised based on their ability to be trusted[40].*Fides* gives then rise to social asymmetries between those who have the power (*potestas*) to make promises and be trusted and 'the febrile whippets'[41] who promise without that prerogative, who are excluded by circuits of social reputability and that, therefore, need a guarantor of their words, a *patronus* who can support their weak promises.

Additionally, the fiduciary investment – or better the disclosure that confidence on the other originates – is constitutively exposed to the risk of disappointment. Trusting on the ability to keep promises is a cognitive bet whose outcome is necessarily unknown. How much is my trust (*fides*) worth when I experience the weakness of a confidence based on pure words? Are social systems able to bear the burdens of cognitive expectations when disappointment becomes routinary? If it is in the nature of man to quarrel for diffidence[42] the *fides* – which undoubtedly promotes social ties – may concurrently jeopardize the stability of the social environment and replicate a general state of conflict.

The *debitorumperfidia* (per-fides, diversion from the *fides*) returns to be the scene of the fight described at the beginningof this paper and, even more worryingly, exhibits a seductive mimical reproducibility. It vehiculates adisruptive potentialon thesocial or-

39 E. Benveniste, *Il vocabolario delle istituzioni indoeuropee*, Torino, 2001, 85.

40 F.W. Nietzsche, *On the Genealogy of Morality*, Cambridge, 2006, 36.

41F.W. Nietzsche,*ibi*.

42 T. Hobbes, *Leviathan. The Matter, Form and Power of a Commonwealth. Ecclesiastical and Civil, cit*.

der requiring a *sanctio* of the *fides*by means of a*gravipoena*[43].Hence intervenes a semantic shift which, through the sanctioning of the *fides*, determining an appropriation of the latter by the language of the Law.Itreproduces the *fides* introducing a duty to act according to *fides bona*, granting a legal action to address its protection – the *bonae fidei iudicia* are likely to emerge from the edict of the *praetor peregrinus* who had jurisdiction over disputes between Roman citizens and non-Romans[44] and this is not without significance because it highlights the two-way relationship the Roman civilization establishes between Law and civitas where the *polis* is, on the contrary, community of men bound by virtues[45]- and differentiating between *bona fides* and *mala fides*. The scission of the unity of the fides into*bona fides* and *mala fides*is the tangible mark of this appropriation, since it realizes its permutation into the binary code of the Law (rights/obligations, prohibited/allowed, tort/damage, subject/object et cet.) where the identification of a code of conduct is aimed at the repression of its violation. The evident outcome of the process is that the contracting party is no longer left unanswered if the expectations created κατὰπίστινare unfulfilled. The bet on the other's capability to keep their promises, the burden of risk of the fiduciary investment on the relation[-ship], are replaced by the normative expectation that my counterparty shall act in good faith. The cognitive expectation of the conformity of behaviors and promises (their performativity), always on the verge of being disappointed in facts, is protected against such disappointment by reiterating the *fides* normatively.

The logic of the *suum cuique tribuere* will guarantee that a violation of the *fides* will be dealt with by a judge who will put the faithful party in the position it would have been in had the violation not occurred. The *fictio* of the Law shapes therefore reality incorporating the possibility of disappointment and taking charge of its destabilizing potential. This shall occur by granting a re-storation (or better a re-muneration) which is nothing more than that Anaximandrean mechanism of *didònaidikentesadikìas*. Such accounting game is a form of immunization of Life (and it im-munizes exactly because it re-munerates): however, the juridification of the *fides*, its incorporation in a rule, inevitably translates it into something else[46]. The remunerative logic of the Law betrays indeed the constitutive nature of the *fides* as creative force able to originate openings to otherness as a way of generating new worlds of possibility in the same moment in which it regularizes the need to be diffident. The *bona fides* enforced by the law discharges from debt, it saves the relationship but at the same time closes the doors on it, interrupts

43AULOGELLIO, *Noctes Atticae*, 20.1.41 'Hanc autem fidemmaioresnostri non modo in officiorum vicibus, sed in negotiorum quoque contractibussanxeruntmaximeque in pecuniaemutuaticaeusuatquecommercio: adimienimputaveruntsubsidium hoc inopiaetemporariae, quo communis omnium vita indiget, siperfidiadebitorum sine gravipoenaeluderet'.

44M. J. SCHERMAIER, *Bona fides in Roman contract law*, in R. Zimmermann, S. Whittaker (eds.), *Good faith in European contract law*,Cambridge, 2000, 63–92.

45G. CRIFÒ,*Civis: la cittadinanza tra antico e moderno*, Bari, 2005, 60 ff.

46 E. RESTA, *Le regole della fiducia*, Bari, 2008, 69.

any circularity in the circuit of the *fides*, which likewise the gift lives from the absence of any guarantee for the donor (and for the *fides*-giver) that he will be reciprocated.

There is a platonic game in this – and it has been duly pointed out – related to the ambivalent connection of writing and memory narrated in the Phaedrus, where Socrates criticizes writing for weakening the necessity and power of memory. The duty to act in good faith provided for by the Law requires us to remember good faith because we have forgotten the *fides* as the molding form of our being, and by symbolizing it, it represents its absence (the lack of faith). Or, in other words, the duty of good faith mandates the *koinonìaagathon*due to the fact that it is forced to keep and limit the pervasiveness of the*koinonìakakòn*[47].

But there is also more than this. When the good faith rule – being it a principle or a 'general clause'[48] – requires both parties to safeguard the utility of the other party within the limits of an appreciable sacrifice we are fully inside a semantic definitively detached from the original sense of the *fides*. The paradigm of utility introduces a language of measurements, a sentiment of balance and wise adjustments, totally diverted from the primigenial layer of meaning *fides* carries with. The *fides* is granted (let's imagine the faith in God) measureless, in an unlimited way, it is not calculable *ex ante* and cannot be subject to calculation being a total reliance on someone else, inclusive of the likeliness of his future absence. A calculable *fides*, therefore,simply incorporates its difference from itself.

The contrastive projection of the Law on the mechanisms of the *fides* tells of a powerful dynamic that, of course, is not isolated. A comparable example can also be provided by solidarity that is indeed strictly related to the notion of good faith. As fundamental constitutional value, solidarity has been progressively included in the legal discourse as a regulatory principle, source of obligations, parameter for the interpretation of norms[49].

Article 2 of the Constitution of the Italian Republic and Art.s 80 and 22 TFUE prescribes the fulfillment of'the fundamental duties of political, economic and social solidarity'. That solidarity is a value promoted by our Constitution is, of course, an extremely important fact. However, if we try to investigate the scope of the duty of solidarity, we end up wrapped into a net of intricated questions. Can there really exist a duty of solidarity? Can solidarity be the object of a duty? Now, if solidarity is gratuitousness to its maximum extent – service without exchange, offer of favor, pure grace outside any logic of exchange – can we be obliged to act on the basis of solidarity? The answer is both yes and no.

It is no if we overemphasize the role of the Law in pursuing solidarity: we cannot rely

47 E. Resta,*ibi*, 71.

48 P. Femia, *Princípi e clausole generali. Tre livelli di indistinzione*, Napoli, 2021, 17 ff.

49 See P. Perlingieri, *Il diritto civile nella legalità costituzionale*, II, *Fonti e Interpretazione*, Napoli, 2020, 159 ff.

on the Law to achieve solidarity. It is yes, if we take seriously the solidarity provided for by the Law as normative catalyst on the cognitive field. The normative solidarity shall therefore be subject to a careful balancing exercise with respect to other constitutional values and shall act, for example, as measure of supplementation of the contract and of the obligations of the parties. Nonetheless, it will be a distant relative of the solidarity as a pure act of giving,which lives of its dé-mesure[50].

Simultaneously, the normative notion of solidarity shall operate a selection, case by case, of its the possible recipients. Not only the quantitative content of my solidarity, but also the question with respect to whom my duty of solidarity must be performed shall be addressed. Does the duty of solidarity bind me towards my debtor and towards my creditor? Does it operate towards future generations? Do I have a duty of solidarity towards beggars?The Law does carry out a selective procedure not simply for making solidarity predictable – by framing the conditions according to which I have to act in compliance with the duty of solidarity – but more importantly for the reason that a generalized duty of solidarity cannot be borne by societies. The latter would be as expropriative as the *munus* and, in this sense, a duty of solidarity is a form of im-munization. Still, when solidarity is normatively re-processed in a content and subject oriented form, the one who is called to act in accordance with the duty of solidarity is deprived of the spontaneous element animating it: solidarity has its Grund precisely when nothing is due (and, therefore, cannot be a duty).

Again, the philosophic puzzlement lies in the contiguity of the exercise by the Law of a calculative and allocative logic in the name of an idea of justice that is *per se* beyond all calculability and, therefore, the constitutive inadequacy of the Law with respect to the effective achievement/attainment of justice, inadequacywhich is nonetheless, in turn, the condition of possibility of the Law[51].

4. An anthropology of diffidence? Excess and values.

The discourse elaborated so far is neither a repetition of the rhetoric on the rationalization of the modernity and the Weberian Entzauberungof which Law is a part[52] nor, at the same time, a para-positivism somewhat declined in a Hobbesian anthropology.

The mere acceptance of an anthropology of diffidence, the idea that the Law exists to affirm a duty to operate according to good faith or a duty of solidarity (and the catalogue could be as long as possible) since we produce in our societies dishonesty or egoism – better said the idea that if we were *agathoi*the Law would be needless – could be a conclusive one, nonetheless it would not be correct, if read in compliance with the

50 G. BATAILLE, *La Part maudite. Essai d'économie générale. La Consumation*,in ID., ***Œuvres complètes***, VII, Paris, 1976, 35ff. ; ID., *La notion de dépense*, in***Œuvres*** *complètes*, I, Paris, 1970, 302ff.

51J. DERIDDA, *Forza di legge*, Torino, 2004, 64.

52 M. WEBER, *The Sociology of Religion*, Boston, 1993.

Kelsenian paradigm mentioned at the beginning.

This essentially for two reasons, which can be summarized as follows. The first one, which can be to some extent self-evident, is a consequence of the circumstance that if we derive the Law from the fact that diffidence is the condition of the mutual interrelation as experienced in the Sein, this reiterates the short-circuit logic of putting Sein and Sollen in the inverse position. At another level of reflection, however, the logic of diffidence as a primigenial condition of the Law represents only a shift of the problem to a different degree of abstraction. Why a society in which mistrust is widespread should agree on finding a cure for such illness in the transformation of cognitive expectations into normative expectations? This would be equivalent to the reiteration of a cognitive expectation, this time on the capability of the Institutions, entrusted with the power to fulfill normative expectations, of performing their role. A society of distrustful individualsshould exit their condition by an act of trust (and, therefore, entrusting), and it is not easy to see how from mistrust trust could originate.

The negative anthropology has also been recently challenged with the aim of reversing the elements of the question, and particularly trying to imagine trust (*fides*) and legal duties (obligations) not along the line of a mutual exclusion but asco-implied terms – mutually determined – of a circular social device[53]. The inclination to be (legally) bound would be theoretically and practically unable to rise (would be destitute of dynamism) if not supported by a sense of trust towards other members of the social fabric, while legal duties would provide the reinforcing vestment of the trust. Law and fides, therefore, share a co-belonging to the same horizontal plane of interindividual relations. In short, the aim is to avoid an interpretation of the Law as the place of the institutionalized ban of the trust (*fides*), questioning, in this sense, thatthe Law is thereto force us to do what we would not want to do or what we would not do spontaneously[54].

In doing so, nonetheless, the discourse runs into some shortcomings. Indeed, the correspondence between the Law and trust is built through an argumentative path that however replicates the remedial-retributive logic behind the functioning of the Law[55]. This seems emerging in a quote from Jhering purported at stressing the dynamic of the flow from the fiduciary sphere to the legal sphere, namely the passage in the Law as a Means to an End where the jurist affirms that our whole life is a working together for common purposes, 'in which everyone in acting for others acts also for himself, and in acting for himself acts also for others'[56]. The excerpt, let it be said in passing un-

53 T. Greco, *La legge della fiducia*, Bari, 2021, 76.

54 T. Greco,*La legge della fiducia*, cit.,90.

55 I'm aware that here it is provided a substantial reductionist version of the Author's thought, by far more articulated and extremely compelling, whose overall position can be agreed upon. However, it is here highlighted a specific passage in the general texture of his theory which enables to shed a light on the structure of the discourse developed in the previous paragraphs.

56 R. von Jhering, *Law as a Means to an End*, Boston, 1913, 67.

doubtedly showing an influence of the reflections held by Scottish moral philosophy in the XVIII century, has the function – if it has been able to fairly get the point of the Author – to show the immanence of the *fides* (or better of the fiduciary investment, which however is not the same) to the Law insofar *i*) the primary level of confidence felt by individuals is not situated on the effectiveness of the sanction but on the reciprocal expectation that the prescribed behavior will be performed (and, therefore, that the right will find its equivalent in the corresponding duty), reasoning otherwise there would be no sense in mutually binding; *ii*) the feeling of dutifulness in conforming the behaviors to legal obligations and prohibitions derives from the sense of solidarity individuals naturally perceive in horizontal relationships; *iii*) individuals' self-interests also push to abide legal prescriptions, being the realization of their interestsalso depending on the fact that others do respect the Law, therefore everyone respecting the Law, everyone's interests is coordinated and reinforced.

The point, however, is the symmetry this way assumed as mechanical heart of the interaction between *fides* and Law. If the sense of the *fides* is reduced to acting so to preserve others' expectations on our behaviors meanwhile trusting that the others will reciprocate, the latter becomes a moral *ex post* reinforcement already enshrined in the code of equivalence between rights and obligations established by the Law. It would work as a kind of superstructure: more so if it is charged with a utilitarian seduction ('my interest to the other's interest and vice versa', the ego-alter duality of Jhering's theory of egoism) because, this should be the case,*fides* would be entirely included in the operating scheme of the exchange and in the retributive rationale of the Law[57].

The semantic of the *fides*– and of solidarity too – does not live by equivalences, as it has been seen, but of dis-proportions. This is not a mere rhetorical device;on the contrary it is a mark of the semantic control Law exercises on disproportions originated by values (by Life).

Dis-proportion, indeed, can also be contiguous to dis-order, as Jhering himself narrates in a short but dense essay on the use of tipping. This social custom – which has in fact elements of contiguity with gift-giving – originates as a voluntary act of liberality (einevölligfreie Gabe), an *imitatio* of the salary, different from the latter because it cannot be the object of a legal claim, and different from a donation (Schenkung) since it is given as undue form of compensation (Vergütung) for the provision of services[58]. The jurist's eye discovers in the practice of tipping a malpractice (Unsitte) to be eradicated, inherently unproportionate and arbitrary, a veritable kingdom of the Chance. This is because tipping requires physical contact (*praesens praesenti dat*) and, therefore, is often given to someone different from the person making the service (in restaurants,

57 This does not mean that this kind of trust is not essential for the functioning of social institutions. From the perspective adopted in this paper, however, it should be avoid to attract trust within the logic paradigm of the Law.

58 R. VON JHERING, *Das Trinkgeld*, Braunschweig, 1889, 12.

not surely the cooks preparing the meal nor even the waiter serving the table but the headwaiter we pay the bill to), it is not commensurate with the effort (we can easily think of today's food riders), it has no parameter for the determination of its amount.

Not only this, tipping also hides a reaffirmation of social distances, that of the Aristocrat (today we would say of the movie or sport star) which is a manifestation of royal abundance[59]; it can be the sign of a humiliation for the beneficiary, a quasi-begging that devaluates him as person in need or as humble worker; on the other side, it can be a strategic tool in the hand of the same beneficiary, who can morally force (through gesture, through silent language) the giver – constrained by awe or shyness writes Jhering[60]– to eventually hand a tip against his will. Jhering focuses therefore on the moral repercussions of this practice, from its possible transformation into an effective and costly extortion to the subtle incitement to squander it elicits in the beneficiaries due to the asymmetry between the amount of money gained and the paucity of the activity required (again, the dis-proportion). It is the excess that lurks in informal transactions - which escape the regularity and enforceability of benefits imposed by Law - that worries Jhering and prompts him to call for their abolition (favoritism in the sphere of public offices is really distant from this?).

It is on the excess of passions and on the values formedthere (on Life), that the Law works semantically.

The Law produces semantic purifications (*Reinigungen*), and this is a process that must be taken in all its seriousness, indicative of the path undertook by modernity where the Law dwells a time without (pre-established) truth and marked by the logic of the de-cision. This is the outcome of the crisis of the *eudaimonìa* marking the break of the unity of the *polis* and the embodiment of a process of democratization forced by the plurality of the production of meanings – 'aliquid bonum esse judicare quia id conamur, volumus, appetimusatquecupimus'[61]- ; modern Law is pure artifice because it had to detach itself as much as possible from the turbulent nature of the living.

When the Law inscribes values in (and with) its codes it necessarily performs a transformation of the material. In this sense, legal language hasnormativized values. Values accommodated into legal texts, into Constitutions or supranational Charts, really become *pharmakeìa*similar to those that art imitates[62], imitations-replications, transla-

59R. VON JHERING, *ibi*, 25.

60 R. VON JHERING, *ibi*, 56.

61 B. SPINOZA, *Ethica*, III, propositio IX, scholium, available at https://www.thelatinlibrary.com/spinoza.ethica3.html.From another perspective, the seminal work by W.B. GALLIE, *Essentially Contested Concepts*, in*Proceedings of the Aristotelian Society*, Vol. 56, 1955 – 1956.

62 PLATO, *Cratilus*, 434 a b. On the platonicnotion of pharmakonsee E. RESTA, *La certezza e la speranza*

Saggio su diritto e violenza, Bari, 2007, 27 ff.

tions or attempts to translations, representations of an absent. Normativized values take hence the shape of principles[63]. On the one hand, therefore, if principles are normativized values, the panoply of counter-argumentation against the Drittwirkung loses most of its weight; on the other, enshrined into a text, principles bear the risk that any text carries with it, there is to say entering into a state of sacralization, turning into a corpus mortuum de-potentiated of innovative charges[64].

The linguistic appropriation of the Law is not, however, the consequence of the rise of rigid Constitutions, Constitutional Courts and supranational Charts; on the contrary, for all what said, it's its genetic code. Where situating values, then, and which relations with Law and its immunization tendency?

Values, then, are not within the Law but, at the same time, they are not outside (i.e. not part of another system different from the Law) since they are the otherness (alterity) to the Law[65].They are the other from the Law that is Life.

We can surely affirm that there is a certain amount of prevarication in the semantic control that the Law is forced to exercise on reality, also considering that it's Law itself that self-regulates its grammar, the relevant interpretation, and the ways for changing both[66]. Likewise, if legal language, as any language,is *légeintìkatàtinos*[67] it puts the content of its saying as an object in front of itself and insofar objectified, the thing said will reveal its poion (its quality(-ies)); however, the pre-assumptive nature of language leads to betray the essence of the thing said,precisely in order toallow that the act of saying could have a firm grip on reality[68].

Incisively, it has been observed that the linguistic appropriation protects a meaning of the thing said from any potential contingency or unpredictability at the price of fixing it into a linguistic structure (or better it applies to an *onoma* the legal *logos*[69])incapable of containing the tension originated by its excess of meaning[70]: and we have seen examples of this interaction in the paper. Such an excess, nonetheless, constantly

63On the distinction between principles and values R. Alexy, *Theorie der Grundrechte*, Frankfurt am Main, 1994,125 ff.

64In this sense, it is interesting the parallelism pointed out between American constitutional originalism and Salafist methodology of interpretation (also to legal ends) of Islamic texts as forms of sacralized approach to legal texts, N. Sultany, *Religion and Constitutionalism: Lessons from American and Islamic Constitutionalism*, in *Emory International Law Review*, 2014, 348-424.

65 P.Femia, *Segni di valore*, in *Civilistica*, 2014, 4.

66N. Luhmann, *Politische Planung: Aufsätze zur Soziologie von Politik und Verwaltung*, Wiesbaden, 2007, 37 ff.

67Aristotle, *Organon*,I,*Categorie. Dell'interpretazione. Analitici Primi*, Torino, 227.

68 G. Agamben, *La cosa stessa*, in *Di-segno. La giustizia nel discorso*, Milano, 1984, 7.

69 If we follow the Platonic process of knowledge described in the famous seventh letter.

70 G. Diotallevi, *L'eccedenza*, in S. Anastasia, P. Gonnella (eds.), *I Paradossi del Diritto. Saggi in Omaggio a Eligio Resta*, Roma, 2019,62.

re-emerges, exercising all its blurring power on the legal discourse that, at its turns, tries to defend its boundaries. Despite this, the legal system – due to its existence as a system cognitively open[71]- cannot, as the Baron in the Threes, retire from the World and up there observing it as if it would not be part of it. And this is, more than theoretical or a prescriptive impossibility, it is an ontological one. Values, indeed, this lifeblood of the social systems, also vivify the legal system with the unremitting tension to which they subject formal legal structures in order to avoid that legal discourse ends up in being a tired vicious circle of discourses over discourses.

Values, however, enjoy the characteristic of not having a meaning but of being an excess of meanings. In this perspective, against any reductionism of a discourse centered on values to a ri-edition of the natural law, it should be noted that acknowledging the excess of meanings inherent to values is, at the same time, acknowledging that values are for this very reason unfounded. Values recognize themselves as unfounded and thus as a *skandalon*, a stumbling block that forcesthe Law to rediscover pensiveness (*Nachdenklichkeit*), there is to say a respite –time-break[72]– against the somewhat banal or formalistic answers that legal thinking can produce when it addresses events to endow them with a sense and a solution.

To be unfounded means, again, the lack of any derivative relationship from an ἀρχή, from both an origin and an act of command. Here lies the reason why the equivalence laid down between values and natural law shows its weaknesses, since it is exactly when natural law has been stripped of its ideological substrates that the process of democratization of values has emerged as a self-founding and never-ending proceeding arising from the experience of the communities[73].Similarly, the absence of any originative act of command provides an index that helps in revealing the misrepresentation underlying the Schmittian discourse on values[74], where the German jurist tries to point out the alleged authoritative features of values. Nonetheless, if values are relieved from any foundation, as a result they cannot but not be subject to any form of appropriation. Said differently, no one can ever have an authoritative power or an ultimate saying on veritable true meaning of a value, simply because such true meaning does not exist. The original nature of values has to do with their disruptive power on the present, exposing reality to an unlimited opening of meanings.Precisely, values are the outcome of a process of re-cognition: we, a community, recognizes certain values and recognition refers to a dimension of reciprocity in the communicative ecology between human beings that lies in the mere fact of existence and communication, therefore, in the mere

71 N. Luhmann, *Die Gesellschaft der Gesellschaft*, Frankfurt am Main, 1997, 120 ff.

72 H.Blumemberg, *Nachdenklichkeit, Jahrbuch der Deutsche Akademie für Sprache und Dichtung*,Heidelberg, 1980, 60.

73 J. Rancière, *Aux bords du politique*, Paris, 2004, 113-114.

74 Reference is clearly made to C. Schmitt,*Die Tyrannei der Werte*, Berlin, 1967. On Schmitt's work an extensive bibliography exists. Among the others, C. Galli, *Genealogia della politica. Carl Schmitt e la crisi del pensiero politico moderno*, Bologna, 2010.

fact of being part of that human community. Consequently, values cannot be imposed, or better, they can in fact be imposed (by a moral or political power, by an ideology), nonetheless such imposition will always be debatable and challenged through communication.

In lieu of a fixed horizon of meanings, organized or to be organized, there is instead a model of meanings as projections[75] tumultuously created in the channels of communication. Life, this laboratory of the values, if can no longer have a sense, itissense[76]exactly in the circulation of meanings provided by the relational ontology between beings; values are no meanings to be thought of, entertained, rehearsed, or doubted, as objectively given contents: they are ways of existing and for this reason they cannot be subject to any appropriation.Consequently, values are non-calculable, non-commensurable so much that I cannot, in principle, control the event of sense that happens in my relations with others; in fact, on the contraryl experience a radical passivity since'as origin of the sense of the world, the other is given to me precisely as demanding respect, as a self-originating source of valid claims'[77] (and meanings).

All the above challenges the legal thinking in acknowledging the metamorphosis the legal language creates, and to take into account all the traces that its appropriative power has put aside but not totally hidden. On the other hand, it is required that the legal thinking leaves aside all its autopoietic tendencies. It is not the Law that can realize values, nor it can pretend that the realization of values can have a place within the boundaries of the Law. It is a false representation believing that values insofar transmuted in principles are, in a certain sense, already achieved and, therefore, there are a given to us as an accomplished fact[78]. Conversely, once the logic distance between Law and values, once the surplus of meaning values are provided with and their entirely aporetic foundation are subject to a real appreciation, it becomes then possible to accept that solidarity, trust, dignity us are not are just concepts 'but modes of participation in the human community'[79]. Such awareness may help in overcoming the deresponsabilizing potential of the Law, to the extent we exclusivelyentrust it with the task of making said values living and, on the opposite, attribute to the Law all the relevant shortcomings, while it is onto us the responsibility for making them possible through acts of trust, a real Pascalian wager – here immunization is finally recognized and a space is open in its mechanism – not in order to set up other rules or other Law but as the other from rules

75J. Nancy, *The Sense of the World*, Minneapolis, 1993, 9.

76 J. Nancy, *ibi*.

77 B. Lueck, *Dignity at the limit: Jean-Luc Nancy on the possibility of incommensurable worth*, in*Continental Philosophy Review*,49, 2016, 321.

78 M. Ricca, *Il diritto o il Paradiso? Un dialogo con Tommaso Greco sulla generatività della fiducia e sul significato pro-fattivo del diritto*,in *CALUMET – interculturallaw and humanities review*, 2022, 106, 130.

79 G. Diotallevi, *L'eccedenza*, cit., 70.

and from the Law[80].

80 F. GARRITANO, *Aporie comunitarie: sino alla fine del mondo*, Milano, 1999, 26.