THE CONCEPT OF "LEGAL ORDER" AND "LEGAL SYSTEM" BETWEEN PRINCIPLES AND GENERAL CLAUSES IN THE POST-MODERN ERA: A PHILOSOPHICAL APPROACH.

GIACOMO CIPRIANI [†]

"Why ruin a good story with the truth?" [1]

Chapters:

1) The idea of legal system: starting from T. Hobbes; 2) Some preliminary considerations on the role of logic in the construction of the legal system; 3) Principles and general clauses: some semantic aspects; 4) The Crisis of the Legal System. Two Case Studies: One Italian (on Principles) and One German (on General Clauses); 5) The Legal "System" from a gnoseological, epistemological and ontological perspective; 6) The problem of the completeness of the legal system read from general clauses and principles; 7) Is ordering law a narrative activity?

[†] Giacomo Cipriani is Ph.D. candidate at the University "*Magna Graecia*" of Catanzaro and Teaching Assistant in Philosophy of Law and Legal Methodology at the Catholic University of Milan. Emails: giacomo.cipriani@studenti.unicz.it, giacomo.cipriani@unicatt.it.

[1] This phrase, which I later discovered belonged to an american journalist, was said to me by one of my dearest friends and fellow PhD colleague, Riccardo Aquilini, to whom I owe much of my academic journey. One evening, during a heated discussion about the possibility of applying a special provision on civil liability for damage resulting from hazardous activities, contained in a law regulating financial matters, Riccardo argued—logically impeccable—that such a provision could be applied to a recent news case, the details of which I no longer remember. Just before conceding that he was right, I decided to check the text of the provision out of personal scruple. I then discovered that the provision in question, which Riccardo considered applicable to the case we were discussing, had been declared unconstitutional by the Constitutional Court seven years earlier. When I pointed this out to him, he replied with the following words: *"Why ruin a good story with the truth?"* From this amusing event, I began to reflect on the role that narratives play within the law. In addition, this work, whose defects are to be attributed exclusively to the author, is also inspired by what I learned through attending the Chair of Philosophy of Law of Professor Giovanni Bombelli, as well as through participation in the various initiatives organized by the latter at the Catholic University of the Sacred Heart, in Milan. I would also like to thank Benjamin Newman, Santiago Garcia Jaramillo and Amith Singh for the feedback I received during the 17th Cornell Law School Graduate Inter-University Conference, which helped me to reformulate some parts of this work.

The concept of "legal order" and "legal system"

A methodological premise

This work consists (or at least aims to consist) of a *pars destruens*, in which the idea that law is a system is criticized, and a *pars construens*, in which an alternative conception of legal order is proposed (one that accounts for the presence of principles and general clauses). I will proceed as follows. First, I will illustrate the concept of system, highlighting its historical significance (ch. 1-2). A historical reference seems, in fact, necessary, even though the discussion is framed in an explicitly philosophical perspective. After all, the idea of a "legal system" belongs to the legal-philosophical debate of the last century and, in my view, finds fertile ground in the political and cultural climate of the late nineteenth and twentieth centuries.

After briefly illustrating the semantic peculiarity of principles and general clauses, which I believe justifies the proposed reflection on the concept of legal order (ch. 3), I will then present two case studies (ch. 4), which serve precisely to show how, over the course of the twentieth century, jurists began to engaged with the presence of principles and general clauses—previously confined to the margins of "legal practice"—and to problematize, as a result, the notion of a legal system rooted in Kelsenian theory.

Next, I will attempt to clarify, from a strictly philosophical perspective, what the term system entails, as well as the feature that makes any set a true system: namely, self-referentiality. I will argue, therefore, that law cannot be considered a self-referential system—from a gnoseological, epistemological, and ontological standpoint—due to the presence of general clauses and principles (ch. 5).

Moreover, the very idea of a legal system—again examined through the lens of general clauses and principles—will be subjected to further critique, starting from the observation that such provisions reveal a genuine gap in the system's internal rationality, a gap that cannot be resolved "from within". This second critique to the concept of legal system is developed in a separate chapter (ch. 6) from the previous one, for two reasons: (1) it pertains to the domain of legal theory rather than strictly philosophical inquiry; and (2) it requires a slightly greater burden of demonstration. Finally, I will attempt to show that the collapse of self-referentiality entails the loss of coherence within the legal system, understood as the common foundation of validity for legal norms. As a result, an alternative criterion is proposed (ch. 7): that of consistency, which

appears to be a more appropriate means of organizing legal discourse, without falling into the logical fallacy of coherence. I will argue, in conclusion, that while consistency may offer a useful standard, it also requires a *shift* in how we conceive of the legal order—what could be described as an *epistemological shift*—towards understanding the unity of the legal system as a narrative construct.

Of course, this map should be understood as indicative: for instance, references to the concept of legal gaps—fully addressed in Chapter 6—can already be found in Chapters 2 and 4. However, such overlap is inevitable in light of the work's underlying unity. Nevertheless, the author hopes that the conceptual cores remain distinguishable, while at the same time allowing the reader to grasp the logical connections between the various parts of the study.

1. The idea of legal system: starting from T. Hobbes

The idea of law as a system represents a *topos* of legal debate in the past century. Indeed, the possibility of configuring law in axiomatic terms aligns with the epistemology adopted by the Linguistic Turn, which, in turn, borrowed from the hard sciences the idea of assigning a central role to formalized language in philosophical inquiry. Despite the twentieth-century prominence of the triad law-language-system, as Gadamer also notes[2], the origins of this approach date back to legal modernity. Specifically, for Hobbes, the social contract already had a linguistic-conventional nature[3]; therefore, if the contract is language and if it constitutes the foundation of law, also law has a linguistic nature. From this premise, the Hobbesian system consider law as a coherent set of commands, where everything not regulated by the civil law is subject to a "decree of concession" that closes the system and ensures internal coherence through interpretation guided by the *ratio legis*.[4]

Turning to the contemporary scenario, despite the attention that jurists from the continental legal tradition devote to the idea of law as a system, the considerations that follow apply equally to common law systems. Indeed, the concepts of "legal order" and "legal system" pertain to the general theory of law and concern conceptual relations between deontic statutes, which are

[2] See the interview *Il cammino della filosofia. Cartesio, Leibniz e l'Illuminismo*, available online.
[3] G. BOMBELLI*, Diritto, linguaggio e "sistema": a proposito di Hobbes e Leibniz,* in *Diritto e linguaggio,* edited by P. PERRI E S. ZORZETTO, Edizioni ETS, Pisa, 2015 pp. 47-68; T. Hobbes, *Leviathan*, edited by E. CURLEY, Hackett Publishing Company, Indianapolis/Cambridge, 1994, p. 218-220.
[4] T. HOBBES, *ult. op. cit*., pp. 438, 468-470.

therefore indifferent to the judicial organization of a given country. After all, the universality of legal theory has already been highlightened by Joseph Raz.[5]

Consider that, more than two centuries ago, Bentham asserted that laws are necessarily internally connected, not only in their formal and deontic relations but also in their normative content[6]. More recently, Peter Birks[7] has also criticized the lack of systematicity in common law. According to the famous author, this deficiency should not be attributed to the structure of common law itself but rather to a shortcoming of jurists. Birks attempted to reduce the civil law doctrines of common law to a rational order through an abstracting process aimed at revealing the framework of implicit concepts. He regarded this work as a form of logical and value-neutral mapping. Once completed, this map would provide legal practitioners with a framework from which to derive solutions to legal problems.

2. Some preliminary considerations on the role of logic in the construction of the legal system

That said, I think that general clauses and principles challenge all those legal theories that represent law as a logically unitary structure, endowed with its own rationality and capable of self-integration through purely logical processes (and, therefore, impermeable to value-laden perspectives).

These theories are characterized by an overlap between the concept of order and that of system. The *system*, which is the repository of a long philosophical tradition, was conceptualized by 19th-century German *Pandektistik*. The idea is that law can be represented as a set of concepts interconnected by logical relations. The system would be realized through the work of jurists, who analyze the implicit logical connections within the legal material and then organize it according to specific schemes: subject-object, genus-species, rule-exception, legal case-legal situation-legal event.

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[5] J. RAZ, *Between Authority and Interpretation. On the Theory of Law and Practical Reason,* Oxford University Press, Oxford, 2009, p. 91.

[6] See J. BENTHAM, *Of the Limits of the Penal Branch of Jurisprudence (Collected Works),* edited by P. SCHOFIELD, Clarendon Press, Oxford, 2010, p. 2I., according to whom: *"The idea of a law, meaning a single but entire law, is inseparably connected to that of a complete body of laws: so that what a law is and what the contents of a complete body of laws are, are questions of which neither can be answered without the other. A body of laws is a piece of a vast and complicated mechanism, of which no part can be fully explained without the rest."*

[7] P. BIRKS, *Introduction*, in ID., *English Private Law*, Oxford University Press, Oxford, 2000, vol. I, pp. xxxv-li.

Even Kelsen continued the idea of law as a logical system until the 1960s edition of the *Reine Rechtslehre*. According to Kelsen, the purpose of law is something distinct from law itself, which would constitute a logical structure, independent of its own purpose[8]. On an epistemological level, this translates into the idea that the only possible order for a social science such as law is that of formal logic, which is inherently systematic[9]. Using the words of the Prague theorist himself, law would constitute a "*system of legal norms*."[10]

It can immediately be anticipated that Kelsen's position is a product of the 19th-century methodological positivism, which sought to study law as an object separate (and separable) from social reality.

As confirmation of this, in a 1960 edition of *The Pure Theory of Law*, Kelsen admits the possibility of applying logical principles (such as the principle of non-contradiction and rules of inference[11]) to legal propositions. This very idea finds its roots *in a certain* interpretation of Savigny's thought. His philosophy is characterized by an internal tension between the vitalistic component that, according to Savigny, animates the law, and the configuration of a *scientia iuris*[12]. The German scholar, based from Hegelian philosophy, believed that there was an ethical-legal order whose realization was the task of jurists. This order of principles, immanent to the law, could not be entirely intuited and positivized by the legislator. Indeed, positive law would merely represent a historical and culturally variable manifestation of these principles, which, in contrast, would express the "*potentiality*" of legal orders, necessary to prevent an order from becoming trapped within the very historicity in which it is situated.

That said, the *fil rouge* connecting Savigny's reflections to those of Kelsen lies in the influence that Savigny's methodology appears to have had on Kelsen, even though Kelsen did not believe in the existence of a metaphysical order underlying the law.

Savigny believes that the jurist would have the task of going back to the root of any normative material, thus discovering the organic principle immanent in it, and then extracting what is

[8]H. KELSEN, *Reine Rechtslehere*, Leipzig und Wien, 1934 p. 33.
[9] For a different view see G. Sucar, J.C. Herrán, *Legal System and Legal Order*, in M. Sellers, S. Kirste, *Encyclopedia of the Philosophy of Law and Social Philosophy*. Springer, Dordrecht, 2023.
[10] H. KELSEN, *op. cit*, p. 93.
[11] H, KELSEN, *op. cit.,* p. 91; ID., *General Theory of Law and State*, Russel & Russel, New York, 1961, p. 406.
[12] F. KARL VON SAVIGNY, *La Ciencia del derecho*, Editorial Losada, Buenos Aires, 1949, *passim.*

still vital from what is now dead and belongs only to history. In other words, Savigny entrusted the problem of the evolution of the legal system to the jurist's own rationality. In order for the law to reproduce itself solely through the elements of which it is composed, it requires self-reference, which is only possible by invoking science and integrating it into the development of law itself.

From Savigny to Kelsen, this has been a constant element in the history of Western legal thought, which, not by chance, assigns to the system of science the role of legitimizing and grounding the law itself.

Although Kelsen himself would later retract the possibility of applying logical principles[13] to the law, the relationship between law and logic has always held a certain fascination for some currents of legal philosophy. In particular, a segment of the analytic tradition, following the path of the logical neopositivism of the Vienna circle (*Wiener Kreis)*[14], holds that the legal order is articulated through a series of linguistic statements to which the principles of logic can be applied. This view suggests that either all norms or the vast majority of them can be represented within a system, understood—using the words of the Italian philosopher Francesco Gentile—as a "legal geometry."[15]

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[13] H. KELSEN, *Derogation, «Essays in Jurisprudence in Honor of Roscoe Pound»*. Prepared by the American Society for Legal History, edited by R. A. NEWIMAN, The Bobbs-Merrill Go., Inc., Indianapolis-New York, 1962, pp. 339-61; ID., *Recht und Logik,* in *Forum*, n. 142/1965, pp. 421-425.

[14] Overlooking the concrete implications, one may consider, merely to illustrate the point, the methodological approach of Alf Ross, according to whom the philosophy of law is not a theory at all but a method and this method being logical analysis. For Ross, philosophy is the logic of science, and its object is the language of science (*cf.* A. ROSS, *On Law and Justice*, University of California Press, Berkeley and Los Angeles, 1959, pp. 26 *et seq.*). A paradigmatic example of this view is found in C.F. VON GERBER, *Grundzüge eines Systems des deutschen Staatsrechts*, Verlag von Bernhard Tauchnitz, Leipzig, 1865, p. 97. See also E. EHRLICH, *Montesquieu and Sociological Jurisprudence*, in *Harvard Law Review*, 29 (1915/16), pp. 267-278. Even though in a sociological sense of the concept of system, Hart also operates from a systemic vision of law or, at the very least, must do so in methodological terms. The English author, too, cannot dispense with systemic closure to subsume all law under the well-known *rule of recognition*. In particular, Hart defends his conception of law as a system through two main strategies: 1. The conceptualization of so-called secondary rules, which are further divided into rules of recognition, change, and adjudication. This conceptual framework is instrumental in ensuring the system's capacity for self-reproduction (the importance of self-reproduction for a system will be discussed later). 2. The establishment of two minimum conditions necessary and sufficient for the existence of any legal system. On the one hand, there must be rules of conduct that are valid according to the definitive criteria of validity within the order. On the other hand, the officials of the order must effectively accept the rules of recognition, which establish the criteria of legal validity, as well as the rules of change and adjudication, as common and public criteria of official conduct. Despite partial differences, much of what has been stated also applies to the Oxford variant.

[15] F. GENTILE, *Filosofia del diritto. Le lezioni del quarantesimo anno raccolte dagli allievi,* Edizioni Scientifiche Italiane, Napoli, 2017, pp. 27.

Lastly, the idea of a legal geometry has been proposed by Luigi Ferrajoli[16] which seems influenced by Carnap's thought[17] that the physicalist perspective could provide scientists with the procedures that can preside over the formation of a rigorous and coherent language. Ferrajoli's words are reported below:

"I will speak only briefly about the axiomatic method I have adopted in constructing the theory, although the very use of this method represents the most distinctive and striking aspect of the theory and has required the longest and most arduous work. According to this method, no concept is admitted into the theory unless it has been defined through other theoretical terms based on previously established formation rules, and no thesis is acceptable unless it has been demonstrated starting from other theses of the theory, based on transformation rules that are also pre-established. To avoid an infinite regress, some concepts are therefore assumed as undefined in the form of primitives, and some theses are assumed as undemonstrated in the form of postulates or definitions."[18]

In this regard, one of the key areas in which analytic-logical and hermeneutic perspectives[19] confront each other is that of *legal gaps*. Concerning this issue, the logicians advocate for the use of legal logic, understood as a series of logical-syntactic operations that the interpreter performs on the text in order to derive new law from positivized law (that is the law enacted by an authority)[20]. Why is it necessary to resort to legal logic to solve the problem of legal gaps? Consider the issue itself: legal gaps consist in the impossibility of qualifying a certain behavior in deontic terms, meaning that it remains both permitted and not permitted. This results in the legal order being unable to classify all possible behaviors, thereby rendering it incomplete.[21]

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[16] See L. FERRAJOLI, *Principia Iuris. Teoria del diritto y de la democracia*, 3 voll., Trotta, Madrid, 2011.
[17] R. CARNAP, *Der logische Aufbau der Welt*, Weltkreis, Berlin, 1928
[18] L. FERRAJOLI, *Per una rifondazione epistemologica della teoria del diritto* in *Assiomatica del Normativo. Filosofia Critica del Diritto in Luigi Ferrajoli*, edited by P. DI LUCIA, LED, Milano, 2011, p. 15 (translated by myself).
[19] On the difference between these two conceptions, see R. DWORKIN, *Justice in Robes*, Harvard University Press, Cambridge, 2008.
[20] The references to the concept of *positivized law* that will follow in this paper are to be understood in the sense of law coming directly from an authority, meaning the latter concept in the manner of Scott Shapiro, that is, as "*offices*" which, in the author's thought, would represent *abstract structures of control*. Cf. S. SHAPIRO, *Legality*, Belknapp Press, Cambridge 2011.
[21] The problem of completeness appears to be downplayed by Raz, another great theorist of law as a system. In his work *The Concept of a Legal System*, Oxford University Press, Oxford, 1970, the author dedicates virtually no significant space to the issue of completeness. On the contrary, he seems to suggest that the concept of a system can be examined independently of the problem of its completeness.

The concept of "legal order" and "legal system"

In response to the problem of incompleteness, the legalist theory, which equates law with legislation, has proposed various solutions aimed at resolving the issue without involving judicial discretion. One initial set of responses consists in the conceptual denial of the very idea of a legal gap[22]. Assuming that the legal order is closed[23], legalist approaches, consistent with their "systemic" vision of the law, believe that it exists of a closure norm.

Among the various ways of conceiving such a norm, the most interesting is certainly the one according to which everything that is not expressly prohibited is implicitly permitted. Such a norm has the effect of closing the legal order: by virtue of it, every possible conduct is legally qualified, as it either falls or under the domain of a specific expressed norm that prohibits it or, in the absence of such a norm, under the domain of a general norm that permits it. Although politically appealing, this perspective raises several theoretical issues.

The exclusive general norm is by no means a necessary truth, a tautology, insofar as it is true in every possible legal order, as some claim, but rather a principle that is positively established and/or implicit only in certain orders and/or only in certain sectors of law, while it does not apply in other orders and/or other sectors. We can say that the general norm applies only in certain *liberal* legal orders. For example, [24], Article 5 of the *Déclaration des droits de l'homme et du citoyen* of August 26, 1789, still in force in France, states: "Everything that is not prohibited by law cannot be prevented, and no one can be compelled to do what is not mandated by law." However, not all legal orders contain a similar norm. In many legal orders, including the one currently in force in Italy—see Article 25, paragraph 2, of the Constitution, and Article 1 of the Penal Code—the exclusive general norm is expressly established only within the realm of criminal law, where the principle *nullum crimen, nulla poena, sine lege* applies. Conversely, in civil law, many legal orders, including, again, the Italian one—Article 12 of the preliminary legal provisions of the Civil Code—rather include an inclusive general norm, that is, the principle that authorizes the judge to extend legal norms by analogy.

[22] A similar theorization is that of the *empty legal space* proposed by Santi Romano in *L'Ordinamento giuridico*, Quodlibet, Macerata, 2018, as well as by K. BERGBOHM in *Jurisprudenz und Rechtsphilosophie; kritische Abhandlungen*, Duncker & Humblot, Leipzig, 1892, where he discusses the concept of *Rechtsleerer Raum*.
[23] A.G. CONTE, *Dècision, complètude, cloture*, in CH. PERELMAN (ed.), *Le probléme des lacunes en droit*, Bruxelles, 1968.
[24] These examples are taken from R. GUASTINI, *Filosofia del diritto positivo. Lezioni*, edited by V. VELLUZZI, Giappichelli, Torino, 2017, p.168.

Finally, considering lawful what is not explicitly qualified corresponds to creating a norm of the type: "*Behavior X is permitted until the moment when its prohibition is prohibited*."[25] This constitutes an undue appropriation of a domain reserved for the legislator rather than an ontological necessity of law as a system. As a consequence, even legalists must acknowledge the existence of legal gaps and the futility of attempts to deny them. Therefore, the legalist resorts to logicism. That's because, through logicism, legalist believe they can solve the problem of legal gaps without introducing the judge's political evaluations, thus preserving the purity of legal knowledge. Summarizing, legalist theory holds that law is a system of norms and that, through the technique of analytical decomposition and synthetic recomposition, all legal gaps can be resolved. The application of a value-free method would preserve the completeness and purity of law, without requiring the intervention of the judge's personal or political evaluations. The idea, therefore, is that the legislator's reference to general clauses and principles signals a legal gap (and thus, more precisely, a flaw in the legal-logical perspective) that cannot be remedied either through direct legislative intervention or through the deductive creation of new law based on pre-existing law. This impossibility arises from the fact that such a gap does not concern the mere absence of a textual provision but rather a deficiency in the internal rationality of the system.

In other words, the impossibility of referring to the rationality inherent in law (which must be considered as a typical assumption of rationalistic metaphysics) implies that the interpreter cannot fill the gap through the development of a perspective internal to the law itself[26]. The objective of this paper will be to propose a concept of "order" for law that is alternative to that of the system and that takes into account the presence, in every postmodern legal order, of general clauses and principles.

3. Principles and general clauses: some semantic aspects

In the debate concerning the theory of norms, there has been, for a couple of years now, a certain fervor in the search for a distinguishing criterion between the concepts of general clauses and principles. It seems that the only point on which jurists agree concerns the

[25] G. GÉNY, *La notion du droit positif à la veille du XX siècle,* in *Revue international de l'enseignement,* 1901, pp. 15-33.

[26]It is a question of deciding by means of an *axiological development of command*, according to the expression of P. HECK, *Begriffsbildung und Interessenjurisprudenz*, J. C. B. Mohr, Paul Siebeck, Tübingen, 1932, p.1.

amplitude of the interpretative margin available to the interpreter. In the opinion of the present writer (and not only[27]), the problematic aspect of this way of conducting the inquiry lies in how the question is posed, namely, in the search for a so-called "strong" distinction. It appears decidedly more fruitful to conduct the research not so much on the basis of a supposed ontological difference between the two concepts, but rather based on the analysis of the semantics of such legal propositions.

Obviously, the starting point of such an inquiry is stipulative in nature: it is conventionally decided to attribute the status of a principle to one legal proposition and the status of a general clause to another legal proposition, and, from this choice, the investigation is carried out. As a principle, let us consider the phrase: "*Personal freedom is inviolable*[28]*,"* and as a general clause, the phrase: "*A contract must be performed in good faith."*[29]

Setting aside the axiological question[30], it seems that the difference concerns the margin of evaluativeness (the so-called *weak distinction*) with which the two legal propositions are formulated: in the first case, the phrases "freedom," "personal," and "inviolable" certainly have an evaluative margin, but it is still possible to establish an internal relationship between the predicates that links the concept to the object, which, despite the variety of possible personal choices and the changing situations, somehow fixes the limits and the choice of the interpreter.

In the second case, however, the evaluative margin is much greater (consider, for example, the notions of *unjust* in relation to *damage* and *good* in relation to *faith*). As will be discussed, any limitations on the margin of choice do not derive from an internal relationship within the predicate but rather from:

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[27] V. VELLUZZI, *Le clausole generali. Semantica e politica del diritto*, Giuffrè, Milano, 2001, p. 74.

[28] Example taken from art. 13 of the Italian Constitution but which, even with different formulations, can be found in various constitutional texts.

[29] An example that will also come in handy later. For a classification of this clause in contract law, see D. D'ALVIA, *From Public Law to Private Law: The Remarkable Story of bona fides* in M. HEIDEMANN, J. LEE (edited by), *The Future of the Commercial Contract in Scholarship and Law Reform*, Springer, Dorotcher, 2018.

[30] It is understood that principles can also be identified on the basis of their function as axiological foundations with respect to certain groups of norms (sometimes, even of all norms). It is curious to note that principles do not need, in turn, a further axiological foundation: they are self-justifying.

1. The use, for application purposes, of social standards that have been consolidated over time. Social standards represent the historical concretization of the social values to which the general clauses refer[31];

2. The application of the reasonableness filter and the comparison with other legal concepts;

3. The relationship existing between the evaluative syntagm and another predicate: this relationship (which is not internal but external to the predicate) makes the evaluative phrase function as a *functional word*, that is, one that serves to judge the function performed by another, reducing the margin of choice of the speaker. In the present cases, the word "*unjust*" is placed in function of "*damage"* and the word "*good*" is placed in relation to "*faith*". Consider also the example of a *knife*: regardless of the speaker's preferences, a knife that does not cut at all will never be a *good knife.*[32]

4. The Crisis of the Legal System. Two Case Studies: One Italian (on Principles) and One German (on General Clauses)

Before delving into the core of the issue, it may be useful to present two judicial cases—namely, the Italian Constitutional Court's ruling no. 1 of 1956 and the "dispute over revaluations" in 1920s Germany—from which emerges the crisis of law as a logically ordered structure. In fact, starting from the second half of the twentieth century, there has been a

[31] In reality, it emerges from the linguistic uses of jurists that the reference to standards also applies to principles. On the relationship between general clauses and social standards, the literature is endless, see (also for further bibliographical references), K. ENGISCH, *Einführung in das juristische Denken,* J.C.B. Mohr (Paul Siebeck), Tübingen, 1956, *passim* as well as F. SCHAUER, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning*, Harvard University Press, Cambridge, 2009, pp. 245-258. The general clauses do not refer directly to social standards, but these are guiding criteria that testify to the social experience of values. The connection between general clauses, social values, and social standards stems from the fact that, at least in law, values are knowable through historical experience. A judge does not have the philosophical expertise required for value judgments, nor is he legitimized as such. It should be noted that social standards do not exhaust the meaning of general clauses, since they have value as a "symptom" of a certain value: through the reasonableness test, the judge exercises the function of criticism of social standards: Jurists, in justificatory reasoning based on general clauses, should not consider *what the average person does,* but rather *what the average person believes they ought to do*. In other words, the aim should be to identify an ethical-social rule rather than a mere regularity of behaviors. Moreover, reference to standards helps make legal decisions more "calculable."

[32] The phrase "good" was used by R. Hare as an example to criticize the neonaturalist theory of P. Foot. Cf. R.M. HARE, *Freedom and Reason*, Oxford University Press, London 1963. The example of the good knife, on the other hand, is from Foot herself, cf. P. FOOT, *Goodness and Choice* in *Aristotelian Society Supplementary,* Vol. 35, no. 1 (1961).

gradual increase in the use of general clauses—particularly the clause of good faith—as well as principles by judges.[33]

Beginning with the Italian case[34], just remember that the Italian Constitution came into force on January 1, 1948, but the Constitutional Court only became operational in 1956. From 1948 to 1956, the judicial review of constitutionality was entrusted to ordinary judges (as also established by the Constitution). In practice, ordinary judges rarely exercised this form of review, for a simple reason: the Supreme Court of Cassation, in a ruling dated February 7, 1948, held that a distinction should be made among constitutional norms between those that are *prescriptive*, precise, and binding—therefore immediately susceptible to judicial application in assessing the validity of prior laws as well as in triggering the unconstitutionality of subsequent incompatible laws—and *programmatic* norms, which were addressed solely to the legislator and not applicable by ordinary judges. This way of conceiving the constitutional text was based on an assumption that could have been theoretically acceptable if understood as distinguishing between primary and secondary norms. However, in this specific case, it was used to justify a particular political (rather than legal) conception of the notion of legal order. Without delving into the core of this issue[35], what is relevant here is to highlight how this interpretative solution was inspired by the late nineteenth-century ideology that sought to expunge all axiological evaluations from the concept of legal order, which programmatic norms inherently entail.

The Court of Cassation, in the aforementioned sentence, interpreted Article 25 of the Constitution—which establishes the principle of non-retroactivity of criminal norms unfavourable to the accused—as a mere political principle binding only for future legislators, without allowing the norm to repeal previous incompatible norms. This type of norms, typically indeterminate in formulation, could only serve as interpretative criteria for the ordinary judge.

[33] The dispute over re-evaluations can be considered a precursor to this phenomenon.
[34] Cf. M. CARTABIA, N. LUPO, *The Constitution of Italy. A Contextual Analysis,* Hart Publishing, Oxford, 2022.
[35] See J.J. MORESO*, An Italian Path to Legal Positivism: Ferrajoli's* Garantismo in *The Cambridge Companion to Legal Positivism*. edited by T. SPAAK, P. MINDUS, Cambridge University Press, Cambridge, 2021, pp. 606-624.

As previously mentioned, such an approach was functional in ensuring the systematic closure of the law, conceiving the only possible hierarchical relationships between norms as strictly logical relations of validity, either in a formal sense (as per Kelsen[36]) or a material sense (as per Merkl[37]), and in any case, excluding the possibility of an axiological hierarchy. This latter type of hierarchy, which typically exists between axiologically superior principles and rules, requires an integrative (rather than merely interpretative) effort by the interpreter, who is has to construct the hierarchy[38]. That problem arises because, in the case of principles, the hierarchical relationship will not concern the principle itself but rather the norm derived by the interpreter through the concretization of the principle. This norm is considered unexpressed, as it is not deductively derived from the principle's text. Indeed, due to their evaluative semantics, principles and general clauses require a process of concretization[39] by the interpreter. Concretization refers to a delegation by the legislator to determine, at least in part, the meaning of the proposition. The interpreter, starting from the text, must first construct its meaning (S1) and then apply S1 syllogistically to the specific case (F1). In other words, this corresponds to the well-known distinction between external justification (the attribution and, in part, the creation of meaning for evaluative phrases) and internal justification (the application of the constructed norm to the concrete case)[40].

In fact, when assessing the conformity of a legal proposition with respect to a principle, one does not engage in a merely descriptive activity concerning the order but rather in a prescriptive activity that involves an evaluation by the interpreter that focuses not so much on how the law actually is but rather on how the law ought to be. An example from Riccardo Guastini can help clarify this concept[41].

Let us suppose a case in which a legislator has not taken into account a difference that, in the interpreter's judgment, appears to be "relevant" between two classes of cases and has established the same legal discipline for both, so that the same legal consequence is applied

[36] H. KELSEN, *Théorie pure du droit,* Dalloz, Paris, 1962, titre V.
[37] A. MERKL, *Rechtsnorm und Rechtsordnung*, Julius Springer, Wien, 1931.
[38] R. GUASTINI, *Defeasibility, axiological gaps, and interpretation* in *The Logic of Legal Requirements: Essays on Defeasibility*, edited by J.F. BELTRÁN & G.B. RATTI, Oxford University Press, Oxford, 2012.
[39] R. ALEXY, *Theorie der Grundrechte*, Suhrkamp, Frankfurt am Main, 1985.
[40] V. VELLUZZI, *Le clausole generali. Semantica e politica del diritto*, Giuffrè, Milano, 2010, pp. 81 ss; J. WRÓBLEWSKI, *The Judicial Application of Law,* Springer, Dordrecht, 1992.
[41] R. GUASTINI, *Filosofia del diritto positivo*, cit., p. 163.

to substantially different cases. For instance, the legislator has granted a tax benefit to businesses without distinguishing, within the category of "businesses," between two subclasses: "large" businesses and "small" businesses. Suppose that, in the interpreter's view, these two classes are substantially different and therefore require different legal disciplines. In this case, a *differentiating norm* that would represent the concretization in the case at hand of the principle of equality is absent (in the light of which different cases must be treated differently, for example, Article 3, paragraph 1 of the Italian Constitution).

The idea that jurists could participate in the creation of law through the concretization of principles was incompatible with the configuration of law as a system. This is because hierarchical relationships in the first two senses (formal and substantive validity) were to be found, not created by the interpreter. A system, to be such, must be capable of self-integration through purely logical, non-evaluative processes. Indeed, the only principles admitted by systemic logic are dogmatic principles (for example, the principle of causality in property transfers), as these are obtained—or, more precisely, are assumed to be obtained—by abstraction from classes of cases. More specifically, they function as major premises, in the form of apodictic syllogisms, for decision rules within broader or narrower categories of cases.[42]

Turning now to the Dispute of Revaluations, it is necessary to preface the discussion by noting that, during the war, Germany had deliberately increased inflation significantly in order to finance military expenditures, a decision that led to disastrous consequences. As a result, once the war had ended, the value of the mark collapsed, harming consumers who had, in good faith, relied on the previous *status quo* when determining the economic value of the contracts they had entered into.

Consequently, judicial authorities were faced with an overwhelming demand for contractual justice of a "substantive" nature, one that would allow derogations from the written agreements in order to adjust the value of contractual performances to hyperinflation. How could the contractual provisions and even the monetary law itself—which established the

[42] I deduce the distinction between *structural* principles and *ideological* principles from M. VAN HOECKE, *The Use of Unwritten Principles by Court*s, in, *Practical Reason and Legal Application,* edited by H.J. KOCHE, U. NEUMANN, in *"ARSP",* Supplement 53, Franz Steiner Verlag, Stuttgart, 1994, p. 131.

nominalist principle according to which "one mark is worth one mark"—be overridden? In response to this issue, German judges applied a provision of the BGB that had until then played only a marginal role: paragraph 242, which states that "*the debtor is obliged to perform in the manner required by good faith, considering customary business practices*." From that moment on, German judges recognized the full potential of the good faith clause, which, for the first time, was applied to the extent of derogation a specific legislative provision and even contractual agreements themselves.

In other words, even among jurists, the notion of the individual as fully capable of foreseeing and managing all risks—an idea rooted in the rationalistic elaboration of seventeenth-century modernity and incorporated in the legal codes of the time—was called into question. There was, therefore, a certain reluctance in private law to integrate contracts with external elements such as the good faith clause[43]. Thus, interpreting the good faith clause as directly applicable to private legal relationships implies accepting that such relationships may be supplemented through an external legislative act. In the case of the application of the good faith clause, this occurs by filtering social value[44]. This can be understood as a form of "non-authoritarian heteronomy."

On the other hand, if the law itself did not impose it, why should the debtor perform the obligation in good faith, especially when doing so might make performance even more burdensome?

The decision of the German courts marked a turning point from the theoretical assumptions of *Pandektistik*, which had contributed to laying the theoretical foundations of legal positivism. In fact, it is precisely positivism (in the sense of methodology) that exhibits a strong aversion to any attempt to integrate law with metalegal considerations, to which the principle of good faith also refers. Indeed, the reference to a value-oriented dimension inherent in good faith could have undermined the systemic logic of *Pandektistik*. This explains the well-known reluctance of *Pandektistik* towards general clauses: consider, for example, that the civil law scholar Hedemann distinguished between issues *truly crucial for the State*

[43] Cf. C. CASTRONOVO, *L'avventura delle clausole generali*, in *Rivista critica di Diritto Privato*, 1986, p. 29.
[44] See H. P. HAFERKAMP, *"Byzantinum!". Bona fides between Rome and Twentieh-Century Germany* in *Roman Law and the Idea of Europe*, edited by K. TUORI, H. BJORKUND, London, 2019.

(in which cases the application of a general clause could be reserved) and *the rest of the legal order*.[45] These words suggest that, in the view of the time, general clauses were seen as something external to the concept of the legal order—as if the judge were legitimized to assume the role of the legislator only and exclusively to ensure the survival of the State, thereby stepping outside the legal order.

Good faith, like all general clauses, refers to *extra legem* criteria, which, by being incorporated into a legal proposition, operate *intra ius*.[46] Since such an evaluation is value-oriented, the outcome of interpretation cannot be assessed in logical terms, with a judgment of truth or falsehood; rather, it can only be evaluated in terms of *plausibility*, a category that underlies value judgments, which are provisional truths.

5. The legal "system" from a gnoseological, epistemological and ontological perspective.

If we accept that the concept of order (and therefore also that of system) consists of norms rather than legal propositions—considering the former as the result of interpretation and the latter as the textual starting point[47]—it becomes more difficult to separate the theory of legal order from the theory of interpretation. Consequently, the issue arises because the semantics with which principles and general clauses are formulated prevent the legal prescription from being deduced from the text of the disposition; rather, it must be created by the interpreter through reference to social value and standards. This is not only interpretation but also creation. The fact that a principle or a general clause can be concretized in various ways, potentially antithetical and not predetermined *ex ante*, makes it impossible to identify all the elements that compose any legal system: one cannot determine which norms belong to the

[45] J. W. HEDEMANN, *Die Flucht in die Generalklauseln: eine Gefahr für Recht und Staat,* Mohr, Tubingen, 1933. Even P. Birks condemned the good faith clause as detrimental to the legal system, asserting that its interpretation was merely the result of judicial intuition. See P. BIRKS, *Equity in the Modern Law: An Exercise in Taxonomy*, in *University of Western Australia Law Review*.

[46] See also F. RAMACCI, *Introduzione all'analisi del linguaggio legislativo penale*, Giuffrè, Milan, 1970, p. 171, where it is stated: *"The reference to the extralegal world is what, in any case, makes the message of law meaningful and comprehensible."*

[47] R. GUASTINI, *Interpretative statements*, in E. GÀRZON VALDÉS *et al., Normative systems in Legal and Moral Theory,* Duncker & Humblot, Berlin, 199, pp. 279 ss; C.E.E. BULYGIN, *Essays in Legal Philosophy*, OUP Oxford, 2015, pp. 324 ss., J. RAZ, *The concept of a Legal System*, The Clarendon press, Oxford, 1970, cap. VIII.

system and which do not. On the other hand, the prior determination of its constituent elements should be an indispensable objective for any system.

As mentioned, self-referentiality constitutes the necessary characteristic for a system to be considered as such, as it enables the system to develop its own internal rationality. Again, thanks to self-referentiality, all the elements of the system are *identified* (if you look at the system at a given historical moment) and *identifiable* (if you look at how the system will be at a given historical moment). Some topics for a critique of the concept of self-referentiality from a gnoseological, epistemological and finally ontological perspective will be proposed below.

The latter concept consists in defining an element of the system solely by referring to other elements internal to the system itself. After all, it is precisely through self-reference that the system generates its own boundaries and maintains its autonomy. If, from an epistemological point of view, linguistic reelaboration[48] makes the existence of a system possible, as will be said shortly, from a gnoseological perspective[49], on the other hand, it is precisely the autonomy between one system and another that ensures that an observer, distinguishing the relative boundaries, *can know* the systems.[50] As far as we are concerned, starting from the perspective of general clauses and principles, we must ask ourselves whether there is a boundary between law and politics, because the reference to social value implies access to

[48] On the semantic level, this concerns the theory of the *administered legal language* developed by Mario Jori in M. JORI, *Definizioni giuridiche e pragmatica*, in P. COMANDUCCI, R. GUASTINI (eds.), *Analisi e diritto*, 1995, pp. 109–144. The administered language is a general pragmatic category explicitly referred to modern legal language, centered on legislation and connected to a particular view of law as something that comes from above, from a legislator or other issuing authority, and produced through an intentionally normative activity, rather than as something that comes from below, for instance from custom or case law, through an activity whose primary aims are different from the issuing of general norms. Naturally, not every historical law is administered language — customary law, for example, is not.

[49] Although the terms *gnoseology* and *epistemology* are often used as synonyms, in this paper gnoseology is understood as that branch of philosophy which investigates the relationship between the knowing subject and the known object, with the aim of determining what is actually knowable. The claim advanced here is that law, conceived as a system, is not in itself knowable, since the presence of general clauses and principles — which inevitably refer back to systems of political values — entails that, in knowing the legal order, one necessarily also comes to know the political order.
Epistemology, by contrast, essentially consists in a meta-methodological study, that is, an analysis having as its object the methodology employed within a particular branch of knowledge, with the purpose of clarifying the status of the assertions thereby produced. Naturally, this does not exclude the possibility of acquiring knowledge even when such knowledge is the result of an epistemologically invalid process. See J. NAVARRO, D. PINO, *The boundaries of gnoseology* in *Philosophical Studies,* (2024).

[50] N. LUHMANN, *Soziale Systeme: Grundriß einer allgemeinen Theorie*. Suhrkamp Verlag, Frankfurt am Main, 1984, p. 632.

other horizons of meaning, such as politics, economics, and, more generally, engagement with comprehensive doctrines[51] that animate the social context[52].

Moreover, the "self-referential" nature of the system primarily lies in the autonomy with which the legal system reprocesses the other natural languages to which it refers. In this reprocessing, the legal system indeed makes use of the language of other (sub)systems and their sciences; however, when such language is transposed from the external domain to the legal domain, it undergoes a re-transcription that detaches it from its original meaning and assigns it the specific sense of the legal context in which it is used. Any information conveyed by the terms of a language is reproduced in a new and autonomous way within the language into which these terms are transposed, so that interference produces no other effect than the simultaneity of the two communicative events[53].

This does not occur in the case of principles and general clauses, where, on the contrary, the language in which principles and general clauses are formulated does not undergo reprocessing but, in turn, reprocesses the legal language in which other legal propositions are formulated. This is what happens in the processes of *constitutionalization*[54] of legal orders, where Constitutional Courts customarily issue *interpretative rulings*[55] (as they are called in Italy). Through such rulings, the Court manipulate the meaning of legal propositions,

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[51] The concept of a *comprehensive doctrine* should be understood in the Rawlsian sense, namely as an exercise of theoretical reason that covers, in a more or less coherent and organic manner, the most important religious, philosophical, and moral aspects of human life. It organizes and characterizes recognized values in such a way that they are compatible with one another and express an intelligible worldview. See J. RAWLS, *Political Liberalism*, Columbia University Press, New York, 1993, pp. 55 ff.

[52] It follows that, from a conceptual point of view, it is impossible to know a legal system that contains general clauses and principles: every attempt to acquire knowledge of it simultaneously entails knowledge of both a legal system and a political system. By contrast, if such a particular type of provision — whose semantics is intrinsically evaluative — did not exist, it would be, at least in the abstract, possible to know the legal system *as such* (and not also the political system). This is because the "classical" provisions, namely those not consisting in general clauses and principles, are composed of descriptive terms that possess a certain core of meaning, which as such is understood without recourse to ethical-political criteria. For a more detailed discussion of the gnoseology of legal concepts (in the present case, for example, of the concept of "legal order"), see: Z. DENIKINA, A. DENINKIN, *On the Demarcation of Philosophical and Juridical Legal Metatheory*, in *Amazonia Investiga*, Vol. 9, Núm. 25, 2020, pp. 251-255; I. N. GRAZIN, *Reflections on the Philosophy of Law. Part One: Levels of Legal Being – A Note on the Ontology of Law*, in *Notre Dame Law Review*, Vol. 64 (1989), pp. 285-297.

[53] M. BARCELLONA, *Diritto Sistema e Senso. Nomos e Poiesis. L'interpretazione del diritto come autoriproduzione del sistema giuridico,* II, Giappichelli, Torino, 1996, p. 83.

[54] That expression is from R. GUASTINI, V. CHAMPEIL-DESPLATS, *Leçons de théorie constitutionnelle*, Dalloz, Paris, 2010.

[55] V. BARSOTTI, P. G. CAROZZA, M. CARTABIA, *Italian Constitutional Justice in Global Context*, Oxford University press, Oxford, 2015.

selecting, among the various possible interpretations of a given legal proposition, those more coherent from an axiological perspective with constitutional principles, sometimes even engaging in genuine creative acts: that is, assigning to that legal proposition a meaning that, however, cannot be deductively inferred from the text[56]. These examples illustrate how the natural (and evaluative) language of principles serves the function of manipulating legal language. In short, in this case, it is the technical-legal language that is reprocessed and reconfigured in its meanings according to the natural language of principles.

Finally, the issue of self-referentiality must be understood in light of what was stated at the outset regarding the relationship between the concept of the legal order and the legal system. The *Pandectist* idea that the legal system is capable of self-reproduction through logical-deductive reasoning without jurists needing to "add anything" to it is, in reality, functional to ensuring the system's closure in the Luhmannian sense. This stems from the desire to shield law from contamination with other fields of knowledge (always adopting Luhmann's terminology, one would refer to other systems).

It seems that the idea of law as a system *endowed with its own logic*, impermeable to the external world, responds to a sociological rather than a legal need to simplify social reality rather than constituting a *logical postulate* of law itself. In fact, this operation aims to configure law as a rule that determines its own creation, allowing for the coexistence of the "polytheism of values" through a society unified under the aegis of law. To unite and separate at the same time, to maintain the possibility of division and atomization of society conceived as a society of independent individuals, while simultaneously achieving its unification within the safeguard of legal form and logic.[57] Therefore, the systemic dimension of law does not pertain to the ontology of law but responds to social needs that are external to the law itself.

6. The problem of the completeness of the legal system read from general clauses and principles.

The point now is to understand what the phrase "legal order" means and why principles and general clauses push scholars to abandon any systematic vision of a logical-legalist nature. In

[56] This occurs based on the principle of conservation of legal acts.
[57] F. CASA, *Epistemologia e metodologia giuridica dopo al fine della modernità*, Rubettino, Soveria Mannelli, 2020 *passim*

fact, if it is true that law cannot avoid providing an answer, whether positive or negative, to every question of justice posed to it, due to the principle of *non liquet*, then it must encompass all cases that can hypothetically arise. And if it is equally true that law is only the normative expression of some authority[58] (a necessary assumption of the legalist conception), then positivized law[59] should be able to regulate every case of life.

The problem, therefore, arises from the idea that there is no law outside the positivized law. This idea forces the supporters of the legalist conception to deal with a typical situation in law: the (aforementioned) gap, namely the lack of a legal proposition that allows one to understand whether a given conduct is permitted or not. In the case of a gap, it is not possible to attribute a deontic status to such behavior. Unlike antinomies[60], where this impossibility derives from the presence in the legal order of two legal propositions that regulate the case in an antithetical manner and can be resolved through the criteria of legal logic, in the case of gaps, a distinction can be made between improper gaps—where the legal proposition is only apparently missing, but in reality, like an antinomy, legal logic provides the solution, for example through analogy or extensive interpretation—and another type of gaps that are "deeper."

Following the line of those who believe that law can complete itself through logic, the response would be purely logical operations by which new law can be derived from the positivized law. In this way, every gap can be resolved through logic and, consequently, law would be nothing more than a series of statements linked by logical connections[61]. Legal-logicism thus corresponds to one of the expedients of legalist theories to fill gaps. Through legal logic, it is possible to create further law from the positivized one without requiring metalegal evaluations and thereby preserving law from contamination with other sciences, in an attempt to render it an ahistorical discipline.

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[58] See footnote n. 17.
[59] *Positivized law* has to be understood as specified in footnote n. 17.
[60] A. NORRIE, *Closure or critique: new directions in legal theory*, Edinburgh University Press, Edinburgh, 1993; E.G. MÁYNEZ, *Some considerations on the problem of antinomies in the law*, in *Archiv für Rechts- und Sozialphilosophie,* Vol. 49 (1963), pp. 1-14.
[61] V. R. WALKER, *Discovering the Logic of Legal Reasoning* in *Hofstra Law Review*, Vol. 35, 2007, pp. 1-19 and H. PRAKKEN, G. SARTOR, *Law and logic: A review from an argumentation perspective,* Vol. 227, 2015, pp. 214-245.

That said, this idea can be problematized. In fact, the impossibility of filling all gaps through the use of legal logic appears clear even to the legislator, as in certain circumstances, they deem it necessary to use terms such as good faith, which refer to social value, extraneous to legal logic. The legislator resorts to good faith because they are aware that in that specific case, law—in its Weberian sense of *formal law*—is inadequate to provide a model of conduct: or, to use Hart's language, there is no principle of action (a *guidance*) that can be derived from the norm[62]. Consequently, the inability of formal law to provide an answer to such situations translates into a gap that cannot be filled through logicist operations that derive new legal propositions from the positivized law but only through reference to extralegal concepts.

This other type of gap, which drives the legislator to use principles and general clauses, arises from an incompleteness of the positivized law from the perspective of the overall rationality[63]: a principle derivable from the legal order that is suitable for regulating the concrete case is missing; for this reason, it is necessary to invoke values that are "outside."[64] A gap in the overall rationality of the system of positivized law could be resolved in two ways: either through an intervention by the legislator, who, based on their political evaluation[65], creates a new statute, or through an intervention by the judge, who is entrusted by a legal proposition with the task of carrying out the same political evaluation. In this case, it is the reference to principles or general clauses that obliges the interpreter to perform this operation. In both cases, the problem of the gap is resolved through a political evaluation (where "political" is to be understood in the broad sense as axiological): when it is a political evaluation by the judge, it is clear how this compels a reconsideration of the boundary between the interpretation of law and political evaluation.

In the case of principles and general clauses, the starting point of interpretation is not the text, as the positivist model of subsumption teaches, but rather the case—*real* in the context of jurisprudence or *hypothetical* in the context of legal doctrine—and thus the problem or set of problems that it entails. It follows, therefore, that legal interpretation, like historical

[62] H. HART, *The concept of law*, Clarendon Press, Oxford, 1961, p. 159.
[63] L. LOMBARDI VALLAURI, *op. cit.*, p. 32 speaks of "static" gaps.
[64] IBID., p. 39 the author captures with a very effective sentence the impossibility of legalism to encompass and resolve the totality of cases*: "Legalism would be as absurd as the enterprise of making a map as large as the territory to be described".*
[65] Taking up the case of the dispute over valuations, the German legislator could have, through a law, stipulated that the value of contractual performances be reassessed according to a specific calculation.

interpretation (while acknowledging the difference in purpose between the jurist and the historian), has the circular structure of question and answer: in other words, the text cannot be interpreted through the methods of linguistic analysis alone but only when it is placed in relation to a practical decision-making problem formulated by the interpreter.[66]

Now, if it is true that principles and general clauses cannot be understood unless the question they seek to answer has been identified, the interpreter must inevitably introduce into the hermeneutic horizon those broad evaluations of legal policy—namely, ethical, economic, sociological considerations, etc.—which the deductive jurisprudential method would seek to exclude as matters falling within the exclusive competence of the legislator.

Such evaluations are carried out based on what, in the general theory of hermeneutics, is referred to as the interpreter's "*pre-understanding*"[67] which is shaped by their education, their (also economic and political) culture. All these elements condition the understanding of the text and what the text is capable of communicating regarding the normative meaning of the fact upon which a decision is to be made.[68] What emerges—and will be discussed shortly—is a concept of the legal order as "functional, evolutionary, and formally structured," where interpreters enable such development[69]. In light of this, the law tends to be completed through the work of jurists, who take into account the various extra-legal doctrines that arise within society. [70]

In conclusion, social norms that emerge outside the legal order but are invoked through the principles and general clauses *intra ius* do not conform, being forms of *factual validity*, to the criteria governing validity (axiotic metarules[71]) that ensure the closure of the legal system[72].

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[66]K. LARENZ , C. W. CANARIS, *Methodenlehre der Rechtswissenschaft*, Springer-Lehrbuch, Berlin, 1995; L. MENGONI, *Problema e sistema nella controversia sul metodo giuridico,* in *Jus*, 1976, p. 3 ss.
[67] H.G. GADAMER, *Truth and method,* Continuum, New York, 1994.
[68] J. ESSER, *Vorverständnis und Methodenwahl in der Rechtsfindung*. Mohr Siebeck, Tübingen, 1970.
[69] M. BARCELLONA, *Diritto, sistema e senso: Lineamenti di una teoria giuridica sistemica*, I, Giappichelli, Torino, 1996, p. 13.
[70] G. TEUBNER, *Recht als autopoietisches System*, Suhrkamp, Frankfurt am Main, 1989.
[71] The idea is that there exist deontic statuses whose validity is not determined by norms (*axiotic metarules*). Validity is to be understood in the sense of syntactic validity (referring to the proposition) and, above all, systemic validity, meaning validity in relation to other norms. For the concept of *axiotic metarules*, see P. DI LUCIA, *Towards a Sigmatics of the Word 'Norm': An Ontological Turn in the Semiotics of the Normative*, in *International Journal of Semiotics of Law*, no. 36, pp. 83–104, 2023; G.H. VON WRIGHT, *Norm and Action*, Routledge & Kegan Paul, London, 1963, p. 197.
[72] The reference is to A.G. Conte's theory of the closure of the normative order. See A.G. Conte, *Deontico vs. dianoetico* (1986), in A.G. CONTE, *Filosofia del linguaggio normativo. II. Studi 1982-1994*, Giappichelli, Turin, 1995, pp. 347-354.

The behavioral standards referred to by the good faith clause are grounded not so much on the conventional validity attributed by their relationship with other norms, but rather on a more flexible—albeit not entirely undefined—notion of *fairness*[73]. This results in legal order incorporating general clauses such as good faith not being entirely dynamic in the Kelsenian sense, that is, characterized solely by formal validity criteria[74]. Finally, configuring an "open" legal order is possible only by overcoming the idea of "system" as a product of transcendent reason, typical of Kantian ethical formalism. By virtue of this openness, value-based perspectives external to systemic logic become legally intelligible only when interpreted within the framework of legal dogmatics.[75]

On the other hand, axiomatic metarules are nothing more than a technique for closing the system by attempting to establish an overall *coherence*[76] among all the norms of the legal order. This involves identifying hypothetical metarules in relation to which all the norms of the legal order are mere *specifications*[77]. However, principles are the product of different political ideologies, with the consequence that it is impossible to find a common axiological foundation from which principles can be considered as specifications[78]. Moreover, general clauses are norms of judicial formation, meaning that they are created *ad hoc* for a specific case. If one considers what was previously stated regarding the fact that such clauses arise from a systemic rationality gap, it would be incongruous to regard them as "specifications" of other norms or, in any case, to derive their validity from the metanorms that close the system.

Therefore, due to the presence of principles and general clauses, neither a value (in the sense of a value-based metarule) from which all other provisions can be regarded as its specification nor a single ultimate and supreme metanorm to which all others can be formally linked exists[79].

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[73] The reference is to the concept of *Sittliche Rechtheit* introduced by A. Reinach. See A. REINACH, J. CROSBY, *The Apriori Foundations of the Civil Law: Along with the lecture "Concerning Phenomenology"*, De Gruyter, Berlin-Boston, 2012. Consider also Dworkin's idea that legal principles cannot be identified based on the pedigree of the rule of recognition. See R. DWORKIN, *Taking Rights Seriously*, op. cit.

[74] M. TROPER, *Pour una théorie juridique de l'Etat,* coll. « Léviathan », 1994, PUF, Paris, 1994.

[75] E. BULYGIN, *Legal Dogmatics and the Systematization of Law*, in *Rechtstheorie*, n. 10/1986.

[76] N. MAC CORMICK, *Coherence in Legal Justification* in *Theory of Legal Science*, edited by A. PECZENICK, Springer, Dordrecht, 1984.

[77] See N. MAC CORMICK*, Legal Reasoning and Legal Theory*, Oxford University Press, Oxford, 1994 (1978), pp. 179 ff.

[78] See the idea of "one right answer", R. DWORKIN, A *matter of principle,* London, 1984.

[79] Indeed, J. Raz, consistently with his systemic view of law, asserts that a legal system should include provisions formulated without deviating too much from the ordinary concept of a legal norm. It is clear, from the continuation of his

7. Is ordering law a narrative activity?

At this point, one may legitimately ask whether incorporating the extra-normative evaluations made by judges in their interpretative activity into the concept of legal order necessarily entails renouncing the very idea of legal order. Indeed, general clauses and principles may allow a plurality of contradictory social value (and consequently social standards) to permeate the legal order, potentially leading to judicial decisions so absurd as to undermine the unity of the order itself.

Consistency has been proposed as a criterion for legal order, as it demands less than cohesion, which is typical of system. Consistency consists merely in the absence of logical or axiological contradictions among norms. However, it must be noted that

1. The norms within a legal order have been enacted at different times, under different circumstances, and by various legislative authorities, each of which pursued its own political vision—often conflicting with that of other authorities. These norms are not consistent, nor could they be. Furthermore, general principles and clauses, since they are not formulated through a case-based technique, tend to contradict one another, as they may embody diametrically opposed values depending on the applicable social standards. Therefore, antinomies exist in every legal order. Moreover, such antinomies undoubtedly require resolution (due to the principles of equality and legal certainty), which is why every legal order includes criteria for resolving them. However, the existence of these criteria does not imply that the legal order enjoys general consistency—it merely implies that it can be rendered consistent. These are two entirely different things. The absence of antinomies and the possibility of resolving them are not pre-established facts preceding legal dogmatics (interpretation); rather, they are the result of legal scholars' dogmatic work.

reasoning, that the author refers to rules structured in a fact-effect relationship (in Raz's terminology, borrowed from Bentham: "situation-act"). The consequence is that, from this perspective, principles and general clauses do not align with this idea of system. Moreover, an additional argument explains the "difficult" relationship between Raz's concept of a legal system and principles or general clauses: according to Raz, the content of a legal provision should be easily identifiable by the interpreter and, therefore, simple to understand. This, once again, seems to confirm a certain preference for legal provisions conceived in their Kelsenian structure, as well as the idea of interpretation as a mechanical act. See J. RAZ, op. cit., p. 199,202 ff.

2. Additionally, no jurist has ever sought to render the entire legal order consistent; at most, jurists strive to achieve consistency within those groups of norms that are of particular interest to them. [80]

The consequence is that from an empirical standpoint, no jurist has ever rendered the entire legal order consistent; thus, the law is never entirely consistent and, as a result, law cannot be definitively regarded as "a legal order." There exists, however, a tendency among jurists to render the law consistent through their daily argumentative work—a tendency that can be described as a genuine "struggle for legal order." In other words, the idea of law as a legal order influences the argumentative constructions of jurists to such an extent that there seems to be an *intrinsic demand for order*[81] within legal work. At the same time, the order does not pertain to the ontological structure of law; more precisely, from an empirical perspective, we do not know whether law is a legal order, as no one has ever demonstrated it. But stating that jurists struggle to order the law despite never being able to achieve a static condition of order is paradoxical. If, in *static* terms, the legal order does not exist, does legal ordering activity still make sense? (this claim for legal order could be conceptualized as legal order in a *dynamic* sense) In other words, how can the sub-orders created by jurists be justified if no macro-order exists? The problem arises to the extent that jurists tend to expand, as much as possible, the sub-orders they create, sometimes recalling the sub-orders created by other jurists through the grouping of other norms and aspiring to create sub-orders that are ever closer to realizing a macro-order. This expansive tendency of sub-orders holds such importance in the work of jurists that, often, the very quality of doctrinal writings is measured by the breadth of the sub-orders created: the more a jurist manages to render his or her legal constructions coherent with the greatest possible number of norms, the more highly the work will be regarded by the community of jurists. Frequently, even within legal schools of thought, which take shape inside the Law Schools, the role of young scholars is precisely to broaden the conceptions of order elaborated by their Mentors expanding them as far as possible,

[80] C. E. ALCHOURRÓN, & E. BULYGIN, *Normative Systems*, Springer-Verlag, New York, 1971; C.E. ALCHOURRÓN, *Systematization and Change in the Science of Law,* in "*Rechstheorie*", Beiheft 10, Berlin, Duncker & Humblot, 1986. Alchourrón and Bulygin's theory shows that jurists, in order to reach the solution to a case, select certain statements that they consider relevant for some reason and then proceed to interpret, systematize, and organize them.

[81] In this essay, we limit ourselves to noting, without investigating its causes, and therefore from a perspective of descriptive metajurisprudence, that such an interpretive argument exists in the practice of jurists. See J.M. PÉREZ BERMEJO, *Coherencia y sistema jurídico*, Marcial Pons, Madrid-Barcelona, 2006.

including through comparison with new laws, new cases, or new doctrines opposed to their own.

In addressing this issue and thus wanting to seek an explanation for this tendency to unity which, however, does not have the metaphysical flavor of some neo-kantian constructions, *narrativist* theories may prove useful in preserving and justifying the various references jurists make to the concept of legal order[82]. The idea is that the unity of legal order is a narrative construction. In other words, if law, taken in itself, is not a legal order, this means that the narration of law as a legal order is not true: the truth *of* the narration does not exist. This does not mean, however, that some form of truth *within* the narration cannot exist. This second truth exists when narrative congruence is present. Therefore, if one wishes to think of law as a legal order, the discussion must shift to the domain of narrative logics, as these are the only logics that can transcend the fact that law is not, in itself, a legal order. The positive effects of such an epistemological shift could be these two:

1. Justifying the argumentative value of the reference to the "legal order" as invoked by jurists to justify the creation of their sub-orders. In fact, following the narrative logic, in order for the law to be considered a legal order, it is not necessary for a jurist to verify the axiological harmony of all the rules in force. This would be like saying: "In order to believe the fact that Sherlock Holmes lives at 221B Baker Street I demand that I be told the names and surnames of all the other inhabitants of the street". Obviously, in fact, no reader would imagine asking Arthur Conan Doyle that, in order to consider the story of Sherlock Holmes plausible, he is provided with the entire list of all the inhabitants of Baker Street, so, in the same way, if one accepts the idea that the legal unit is a narrative construct, it is not necessary to ask a jurist to order all the rules of the legal system to demonstrate the existence of the latter concept. In other words, it is a matter of abandoning the scientistic epistemological paradigm according to which knowing a subject (in our case, the subject would be the concept of a "legal order")

[82]W. TWINING, *Rethinking Evidence. Exploratory Essays*, 2nd ed., Cambridge 2006, p. 310, 334; F. OST, M. VAN DE KERCHOVE, *De la pyramide au réseau? Pour une théorie dialectique du droit*, Presses universitaires Saint-Louis, Bruxelles, 2002; F. OST, *Raconter la loi. Aux sources de l'imaginaire juridique*, Odile Jacob, Paris, 2004; D. KAHNEMAN, *Thinking, Fast and Slow*, Farrar, Straus and Giroux, New York, 2011, according to which: "even the *naïve* easily confuse the concepts of coherence, plausibility and probability".

amounts to classifying the subject and its constitutive elements[83] (in our case, listing its constitutive elements would amount to listing the rules that belong to it). On the other hand, however, it is possible to make this epistemological shift without having to provide a metaphysical justification: after all, the narrative dimension of the legal order is nothing other than a pragmatic meta-rule, within which, in a process always subject to revision and without an end, the concept of order is formed. In other words, even though this point would deserve to be the object of a separate analysis, we can say that this shift makes it possible to remain within an epistemology oriented exclusively toward the analysis of social facts, but which distinguishes—differently from the skeptical trajectory according to which the concept of legal order has no theoretical meaning—between contexts understood as mere sociological data (and, therefore, contingent) and contexts that are not occasional but structural and that cannot but be taken into consideration from a theoretical point of view.[84]

2. Conceptualizing the legal order as a narrative construction allows to visualize the relationships between norms as links of narrative congruence: such links are argumentative chains that connect the various parts of a narrative (in the case of law, the norms themselves). As will be further explained, understanding the relationships between norms in these terms makes it possible to account for the presence of provisions such as principles and general clauses in legal orders—provisions that, as already mentioned, are not connected to other norms through logical relations of validity.

From this perspective, let us reconsider the problem of gaps in the law. A narrative that aims to adhere to truth is willing to be incomplete (leaving the gaps intact) rather than add details; however, by doing so, it will not be a good narrative. Conversely, a good narrative is willing—if necessary to ensure internal consistency—to include details that do not correspond to an external datum of reality. In other words, from a narrative standpoint, it does not matter whether gaps exist at the ontological level of law; what matters is that they disappear (through a process of gap filling) within the narratives constructed by jurists. If we take legal order as

[83] This epistemological consideration is made by S.A. SMITH, *Taking Law Seriously* in *University of Toronto Law Journal,* (2000) 50, pp. 241-259.
[84] A.A. GONZAGA, A. LABRUNA, F. MAZON, C. MAZON, *Legal Pragmatism as a guide to new perspectives on the application of Law* in *Revista da Faculdade de Direito do Sul de Minas*, v. 40 n.1, 2024.

the object of analysis, it is irrelevant whether the legal order actually exists—what matters is that the narrative of law as a legal order makes sense and, consequently, has some degree of internal congruence, so that it may be considered a good narrative.

At first glance, one might assume that reducing law to narrative would confine the concept to a "psychologism" of jurists, as if each jurist simply imagined law as conceptually unified. This assumption, however, rests on a fundamental premise: the idea that narrative technique is conceptually distinct from argumentative technique. In other words, it assumes that narrating and arguing are two separate actions. On the one hand, there is narration, whose primary function is to represent events—not necessarily real. On the other, there is argumentation, traditionally regarded as one of the higher functions of language, typically employed to support a particular position (in legal contexts, to provide arguments *in favor* of a given interpretation). However, to understand the connection between argumentation and narration, consider an example from classical literature. In Book VIII of the Odyssey, which describes the three songs of Demodocus at the court of the Phaeacians, Odysseus offers the bard high praise at the end of his performance: "*Truly, you sing in order (*kata kosmon*) of the fate of the Achaeans*."[85] As observed by Stephen Halliwell, the "*order*" to which Odysseus refers does not merely indicate that Demodocus's song is "precise" in informing listeners about the actual sequence of events. Rather, it refers to an internal order within the performance itself. An order that makes the song, even before being pleasurable, communicable and comprehensible.[86]

This highlights the communicative dimension of narrative, according to which the act of narrating necessarily involves a relationship between the narrator and the audience. Such communicability is upheld by the *verisimilitude* of the narrative (which also serves to foster the audience's empathetic engagement). This *verisimilitude*, in turn, depends on the arguments provided by the narrator and is configured as a discursive meta-rule within which the narrative can take place. In other words, the narrator must construct the logical articulation of the story. This is because narration is nothing other than a human creation based on logical-

[85] M. SENNA, *Narrare ed argomentare: percorsi della verità nella Grecia antica* in *Testi e Linguaggi*, n. 6/2021.
[86] As confirmation, just think that the same term *epistamenōs* means both the ability to narrate with knowledge, and so, telling the truth, and "with art" in a stylistically appreciable way.

semiotic systems, aspiring to represent or imitate the everyday existence within a fictional scenario—not necessarily true, but necessarily *plausible*.[87]

Therefore, both narration and argumentation, despite their differences, can be placed within the realm of practical reasoning[88]. From the principles of practical reasoning, it is possible to derive methodological tools that clarify the meaning of narrative consistency and regulate legal narration, making it communicable. The narrator, just like the rhetorician, must provide reasons to ensure that what is narrated appears plausible. Plausibility depends on two factors: 1.) adherence to the linguistic conventions of a given community (in the case of the legal community, this means legal dogmatics) 2.) the reasonableness of the narrative's premises.

So, let's try to translate these two concepts into the legal field.

The use of dogmatic reasoning and the reasonableness test are fundamental elements of legal reasoning in general. However, when it comes to principles and general clauses, these tools take on an even more stringent role, as they help limit the interpreter's discretion. With regard to legal dogmatics, following the teachings of Robert Alexy (but also of the italian legal theorist Luigi Mengoni), there can be no doubt that legal dogmatics—that is, the construction of legal concepts through argumentative chains based on norm analysis—acts as a *constraint* on the interpreter[89]. Moreover, comparing an interpretative product with legal dogmatics serves as an *ex post* control mechanism, allowing the rejection of interpretative solutions that conflict with those derived from dogmatic reasoning. In fact, dogmatics makes legal narration more controllable, and easier to communicate, as legal dogmas represent widely shared

[87] Just as narration has an argumentative component intrinsic to it, argumentation, whatever it may be, also has an intrinsic narrative component. See J. B. WHITE, *Justice as Translation: An Essay in Cultural and Legal Criticism*, The University of Chicago Press. Chicago and London, 1990 and ID. *When Words Lose Their Meaning.* in *Atti del secondo convegno nazionale della Italian Society for Law and Literature* edited by M. PAOLA MITTICA, Ledizioni, Milano. pp. 27-46: "Since the text – whether it is an argument, a poem, or a work of history or philosophy – is always a reconstituion of the culture, it is necessarily about the culture, whether it idealizes it, ironically repudiates it, or elaborates its incoherences. The text is not a closed system but an artifact made by one mind and offered to another; it recreates the materials of the world for use in the world"

[88] Still within classical culture, the connection between narration and argumentation is captured by Cicero, who regarded the *argumentum* as a *plausible* idea used to persuade. Even more so, it is emphasized by Quintilian, who described argumentation as an "impure" form of reasoning, easily dramatizable, partaking simultaneously of the intellectual and the fictional, the logical and the narrative." See R. BARTHES, *L'ancienne rhétorique* in *Communications*, 1970, no. 16, pp. 172-223.

[89] See R. ALEXY *op. cit*., p. 201 where he states that the use of systematic-conceptual arguments *alongside* others, in particular general practical arguments, is necessary and rational.

concepts among jurists.[90] The controllability made possible by dogmatics is further confirmed by the fact that, in practice, jurists tend to adopt "*strengthened*" reasons to justify themselves in the event that the interpretative solutions adopted are incompatible with those deriving from dogmatic reasoning.

Regarding principles and general clauses, dogmatics, while it does not exhaust their applicative potential, consolidates within the legal order a set of application hypotheses already tested by experience and also facilitates the judge's task in future cases by providing him an evaluative model. However, while this reduces the risk that interpretative solutions may be absurd or contradictory, it may not be sufficient. Consider, for instance, what happened in the Revaluation dispute: good faith could justify a modification of the contractual obligations (if one adheres to the dogmatic concept of *rebus sic stantibus*), just as it could reinforce its binding nature (if one instead adheres to the dogmatic concept of *pacta sunt servanda*), without dogmatic reasoning offering a definitive solution.[91]

In this regard, reasonableness can serve as a useful reference. This concept should be understood as a virtue of practical reasoning, and therefore, of legal reasoning as well. What is obtained from the interpretation of a principle or a general clause, as noted, cannot be judged in terms of truth or falsehood—categories belonging to Cartesian formal logic. Instead, it can only be judged as reasonable or unreasonable, keeping in mind that reasonableness is context-dependent. To understand this, consider how people argue about what is reasonable in everyday conflicts. When a dispute is not resolved at the outset, the person claiming that an idea is reasonable is typically required to demonstrate its generalizability. However, this does not mean proving the general validity of the statement itself—since reasonableness often relies on exceptions ("unless...") [92]—but rather, proving

[90] The Italian scholar Mengoni and the German Canaris were among the first theorists of an "*open*" concept of legal order, according to which the jurist must be able to identify and integrate the value perspectives that gradually emerge within society and then compare them with the "internal" perspectives of the system of legal concepts. See L. MENGONI, "Interpretazione e nuova dogmatica" in *Sistema e problema*, cit., pp. 117-130, and C. W. CANARIS, *Systemdenken und Systembegriff in der Jurisprudenz. Entwickelt am Beispiel des deutschen Privatrechts*, Duncker & Humblot, Berlin, 1969.

[91] The idea of reasonableness as an interpretative compass for general clauses originates from Salvatore Patti in ID. *Ragionevolezza e clausole generali*, Giuffrè, Milan, 2013. For the relationship between reasonableness, practical reasoning (and legal reasoning), see J. FINNIS, *Natural Law and Natural Rights*, Oxford University Press, Oxford, 2011 (1980), A. AARNIO, *The Rational as Reasonable. A Treatise on Legal Justification*, Reidel Publishing Company, Dordrecht, 1987.

[92] N. MAC CORMICK, *Defeasibility in Law and Logic*, in Z. BANKOWSKI, I. WHITE, U. HAHN (eds.), *Informatics and the Foundations of Legal Reasoning*, Kluwer, Dordrecht, 1995, pp. 99-117.

that the argumentative process leading to the conclusion is free from ideological bias[93] and, in this sense, generalizable.[94]

The idea of generalizability is based on a pre-legal dimension, rooted in the shared premises upon which a society is built: these are what John Rawls calls *principles* that specify the reasons we must have in common and publicly recognize as the foundations of social relations.[95] Reasonable reasoning, therefore, must reflect or at least not contradict these premises. A jurist seeking to be reasonable must engage with the competing ideologies present in society, ensuring that what it says minimizes the sacrifice of opposing perspectives that deserve equal consideration. Without this balance[96], the shared nature of those premises would collapse. This is precisely the function of balancing—a method initially developed for principles but equally applicable to general clauses, through which reflective equilibrium is guaranteed.[97] It is important to note that reasonableness does not lead to a single "correct" answer; however, at least, it makes dialogue possible between disputants with divergent value preferences. [98]

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[93] In this sense, also F. VIOLA, op. cit., p. 112, according to which: "the paths of reasonableness (practiced) are very different from the logic of political convenience and ideological choices."

[94]The idea of reasonableness as generalizability recalls the Kantian idea of the public use of reason. See R. PASQUARÈ, *On Kant's Concept of the Public Use of Reason: A Rehabilitation of Orality,* in *Estudos Kantianos*, v. 8, n. 1, p. 101-110, 2020.

[95] The fundamental Rawlsian principles are not to be confused with the social values discussed in the course of the paper. These principles perform the function of founding and justifying the social values that are instead a specification of them. The meaning of these fundamental principles can be grasped by referring to the category of common sense, i.e. a set of shared beliefs perceived as necessary that is located in a cognitive dimension between the cognitive sphere of the conscious and the unconscious. Cf. J.A. PEPE, *H.L.A. Hart: An Examination of His Common Sense Principle*, Pontifical University of St. Thomas, Rome, 1976; M.E. BRATMAN, *Shared Intention* in *Ethics*, 104, 1993, pp. 97-113. What emerges it the difference between *values* and *beliefs*.

[96]The idea that balancing is a technique suitable for achieving a reasonable statement stems from the fact that if it is true that reasonableness is grounded in the principles, even conflicting ones, that form the social substratum, then necessarily, when deciding to affirm a certain principle, one must try to minimize the sacrifice of the opposite principle as much as possible. Otherwise, there is a risk of betraying the idea, which underlies the concept of reasonableness, that it can represent principles of opposing views, as they constitute a certain social core. Cf. J. RAWLS, *The Idea of Public Reason Revisited*, in *Collected Papers*, Harvard UP, Cambridge, 1999, pp. 373-615.

[97]Certainly, balancing operates differently between principles and general clauses, as these two categories are characterized by a structural difference that has already been discussed throughout the work. As far as principles are concerned, reasonableness helps define the case law outlined in a manner that is entirely summarizing as per the provision. On the other hand, regarding general clauses, reasonableness aids the interpreter in performing the evaluative integration of the legal text. For further discussion on the discretion of judges in interpreting principles, see R. DWORKIN, *Taking Rights Seriously*, Duckworth, London, 1977.

[98] Also in this case, the figure of the *topoi* is borrowed from narrative world: think of literary *topoi*. In law, topical consists in the discovery and explanation of the metanormative premises on which the legal reasoning is based. See TH. VIEHWEG, *Topik und Jurisprudenz*, Beck, Muchen, 1974.

It can be concluded that, in legal argumentation, values do not offer definitive solutions to cases but serve as initial argumentative hypotheses which must be subjected to the scrutiny of reasonableness. This was precisely Hedemann's concern when he warned that judges were becoming heralds of ethics. Nonetheless, as previously mentioned, it seems impossible to detach law from its historical and value-based dimensions, particularly when dealing with principles and general clauses.

The filter of reasonableness ensures that a judge, in determining the meaning of a general clause or principle, does not passively reflect the established social standards of a particular group—an approach that would align with the perspective of an external observer. On the contrary, the judge must take on the role of an active participant in legal practice, personally engaging in the interpretative process to determine the meaning of the relevant legal expressions. Reasonableness serves to ensure a form of "axiological harmony"[99] between rules, principles, and general clauses.

Using again the perspective of legal epistemology, the consequence of this reasoning is the fragmentation of the legal *order* into *multiple* legal *orders*. This occurs both diachronically (as social values and social standards evolve, also the legal order evolves) and synchronically: if it is true that jurists create the legal order through their narratives, then it follows that each jurist constructs their own legal order. Consequently, conceptualizing law as an order is both an individual experience of the jurist and a social experience of the juristic community, which finds its foundation in the communicative circulation that involves the body of jurists. Indeed, there is a conceptual distinction between[100]:

1. A *normative-ordering activity*: the act of ordering (a part of) the law, carried out by an individual jurist;
2. a *normative-ordering practice*: the practice that consists of a plurality—both synchronic and diachronic—of ordering activities performed by jurists and interconnected in various ways.

[99] The expression is from G. B. RATTI, *La coerentizzazione dei sistemi giuridici*, in *Diritto e Questioni pubbliche*, n. 7/2007, p. 61.
[100] See P. CHIASSONI, *Diritto, argomentazione, decisione giusta: in margine alla civilistica analitica di Aurelio Gentili,* in *Diritto e Questioni Pubbliche*, n. 14/2014, p. 217.

The legal order can exist only as a *practice*, that is, as a set of ordering activities in which each jurist contributes by their own perspective. However, while dogmatic reasoning and the filter of reasonableness may facilitate the diffusion of such a practice, facilitating the agreement among jurists on what the connotations of the legal order are, this practice can never be definitively completed. There will never be an assembly of all Italian, French, German, or other jurists convened to perfectly coordinate all ordering activities and establish a definitive meaning for the *legal order*. This entails that, on the one hand, the legal order is not empirically verifiable; on the other hand, however, the countless references that jurists—from the Middle Ages[101] to the present—have made to this concept in their arguments, in some way, bring it into existence, furthermore, as mentioned before, the reference to the concept of legal order justifies the creation of sub-order by jurists and this has considerable practical value in making the legal argumentation more verifiable. This kind of existence belongs to the virtual-narrative dimension of the *plausible*: although Merlin the Wizard does not exist, the story of Merlin the Magician exists, which nevertheless has its own epistemological dignity.

The *normative-ordering practices*, just like narrative practices, cannot simply be reduced to a mere communicative exchange: telling something to someone means involving them in a personal elaboration or in stories from collective memory specifically directed at them[102]. According to Jedlowski[103], narration is a "gift" that depends on the willingness not only of the narrator but also of the listener. In the case of *normative-ordering practices*, such willingness is made possible by the shared foundational value premises between the narrator and the audience, as well as by the fact that the narration is carried out reasonably and in accordance with the linguistic conventions of the juristic community (the legal dogmas).

Indeed, as further evidence of how this practice takes the form of "a story that is shared by a community of speakers," one need only consider—perhaps especially in *civil law* systems—how a certain idea of law as *order* is passed down from professors to students in university

[101] See the concept of *ordo iuris*. Cf. A. SBRICCOLI, P. COSTA, M. FIORAVANTI, et al., *Ordo iuris storia e forme dell'esperienza giuridica,* Giuffrè, Milano, 2003.
[102] See also M. P. MITTICA, *Diritto* e *costruzione narrativa* in *Tigor*, no. 1/2010 and R. DWORKIN, *Law's Empire*, Belknapp Press, Cambridge (MA), 1986, pp. 228-238, who use narrative categories to explain the concept of law. Despite the shareability of Dworkin and Mittica's conclusions, this work limits itself to interpret the concept of legal order in a narrative key, without aspiring to explain the nature of law.
[103] P. JEDLOWSKI, *Il racconto come dimora. "Heimat" e le memorie d'Europa,* Bollati Boringhieri, Milano, 2009, p. 34.

classrooms. General clauses and principles, due to their reference to social value, serve as facilitators of communicative circulation, which, throughout the entire community of jurists, comes to be established between the legal order, on the one hand, and the "lifeworld,"[104] on the other. In addition, this particular type of norm reveals that the legal order is not a purely logical product but rather a *narrative-fictional construction*[105] that exists through the collective practice of jurists who:

1. share certain foundational values, without which the practice itself could not even be established;
2. employ the devices of classical rhetoric (just as rhetoricians and storytellers do) to ensure that the narrative is not *true*—in the sense of formal logic—but at the very least *plausible* (just think of the lawyer who has to convince the judge that his client's conduct was in *good faith*).

This essay concludes precisely where it should begin: attempting to answer the question—if what is commonly referred to as *legal order* is, in reality, a *normative-ordering practice*, what are the conditions that make such a practice possible? In other words, under what conditions (necessarily metajuridical) do we perceive and communicate law as an *order*?[106]

[104] J. HABERMAS, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, Suhrkamp, Frankfurt am Main, 1992, 96-97 e ff.

[105] The legal order consists only of a set of rules (not predetermined and not even predeterminable) which, when considered as a whole, should "*make sense*". C.f. N. MACCORMICK, *Legal reasoning and Legal Theory,* cit., p. 179.

[106] A possible approach to that problem is the one proposed by Giovanni Bombelli, who, in discussing the epistemological and cognitive foundations of legal practice, questions whether the concept of *common sense*, understood as a set of *beliefs* perceived as obligatory and shared inside a community, underlies the perception of law as *conceptually unified*. Cf. G. BOMBELLI, *Diritto, comportamenti e forme di "credenza",* Giappichelli, Torino, 2017.