Oñati Socio-Legal Series (ISSN: 2079-5971)
Oñati International Institute for the Sociology of Law
Avenida Universidad, 8 – Apdo. 28
20560 Oñati – Gipuzkoa – Spain
Tel. (+34) 943 783064 / opo@iisj.net / https://opo.iisj.net

Law and cognition: On some issues and developments

OÑATI SOCIO-LEGAL SERIES VOLUME 16, ISSUE 2 (2026), 635-662: A COLLOQUIUM AT THE INTERSECTION OF LAW, SOCIETY, AND COGNITION: INTEGRATING SOCIOLOGICAL AND PHILOSOPHICAL PARADIGMS WITH THE COGNITIVE SCIENCES
DOI LINK:HTTPS://DOI.ORG/10.35295/OSLS.IISL.2314
RECEIVED28 MARCH 2025, ACCEPTED 24 FEBRUARY 2026, VERSION OF RECORD PUBLISHED 1 APRIL 2026

GIOVANNI BOMBELLI*

Abstract

This paper explores the role played by the wide area of the "cognitive", especially understood as "common sense", within the legal experience in order to show some aspects of law as well as of the political-institutional sphere. The analysis of the complex semantic area widely related to the "cognitive" highlights its multiple dimensions, with particular regard to the social knowledge, the concept of common sense, the presuppositional horizon, the notions of belief, the idea of trust and the psychological dimension. Moving from this methodological framework, the attention focuses on the "law in action", that is to say on two levels underlying the conceptual circle composed by the cognitive horizon, the legal experience and the common sense: on the one hand the structure of the legal order and, on the other hand, the political-institutional dimension. In this way, the analysis allows to think about the possibility to rethink the concept of law in order to build up a multifactorial or integrated model of law encompassing the outcomes provided by other theoretical approaches.

Key words

Law; cognition; common sense

Resumen

Este artículo explora el papel que juega el amplio ámbito de lo "cognitivo", especialmente entendido como "sentido común", dentro de la experiencia jurídica, con el fin de mostrar algunos aspectos tanto del derecho como del ámbito político-institucional. El análisis del área semántica compleja ampliamente relacionada con lo "cognitivo" pone de relieve sus múltiples dimensiones, con especial atención al conocimiento social, el concepto de sentido común, el horizonte presuposicional, las nociones de creencia, la idea de confianza y la dimensión psicológica. Partiendo de este

* Giovanni Bombelli, Catholic University of the Sacred Heart (Milan, Italy). Email: giovanni.bombelli@unicatt.it, ORCID https://orcid.org/0000-0003-0486-9902

marco metodológico, la atención se centra en el "derecho en acción", es decir, en dos niveles subyacentes al círculo conceptual compuesto por el horizonte cognitivo, la experiencia jurídica y el sentido común: por un lado, la estructura del orden jurídico y, por otro, la dimensión político-institucional. De esta manera, el análisis permite pensar en la posibilidad de repensar el concepto de derecho para construir un modelo de derecho multifactorial o integrado que abarque los resultados proporcionados por otros enfoques teóricos.

Palabras clave

Derecho; cognición; sentido común

Table of contents

1. Fundamental thesis

The analysis of the "cognitive dimension" should be placed within the crisis of a specific model of law, which dates back at least to the first half of the last century. Within this historical passage the philosophical-legal debate somehow has underestimated the horizon belonging to the "cognitive" dimension broadly understood (the complexity of this category will be deepened throughout the present contribution).

From this point of view, the relation between the normative dimension (i.e., in a generic sense: law, rules, institutions) and the cognitive-epistemic framework, both in terms of rulemaking and of following-rule, seems very articulated. Nevertheless, it has been frequently and traditionally conceived as a sort of absolute opposition between two independent dimensions. On the one hand the autonomous area of the "normative (i.e. deontic)" side, on the other hand the level of the "cognitive" considered as a sort of its integration. In this way, the first dimension should be structurally related to the "ought", whereas the second one is grounded in the realm of the "being".

This paper defends the following thesis.

The concept of law or, more generally, the notion of normativity are not entirely derivable from the cognitive background: in other words, law (i.e., the legal experience) involves a theoretical formalization as well as a series of historical contextualizations. At the same time, it cannot be conceived, elaborated and applied independently from the cognitive horizon. In this way, the idea is to explore the role played by the wide area of the "cognitive", especially understood as "common sense", in order to show some of its aspects within the legal and political-institutional experience and finally to think about an integrated/multifactorial model of law.

2. On the semantic nebulosity of the concept of "cognitive"

On a closer view the concept of "cognitive" looks very complex and controversial.

It implies an hybrid semantic area encompassing different definitions of "cognitive" developed by philosophy (for instance Stout 2018), by cognitive sciences (National Academies of Sciences, Engineering, and Medicine2018), by psychology (Yolles and Fink 2021), by sociology of law (Cominelli 2018 for a "cognitive sociology") and sometimes by the legal theory (Jori 2010 discusses the notion of "common sense" but he never establishes a relation with the cognitive dimension: later I will discuss the notion of common sense differently from Jori's perspective): the outcome is a nebulous concept of "cognitive".

In the following pages, the contribution will focus on this controversial framework by decomposing its structured dimension in order to draw a sort of geography of the cognitive level: the goal is to highlight the forms and the "semantic networks" underlying the "cognitive".

In this way, we can distinguish six different levels in some way closely related to each other: a) "cognitive" as a form of (social) "knowledge"; b) "cognitive" as "common sense"; c)"cognitive" as a presuppositional horizon; d) "cognitive" as belief; e) "cognitive as "trust" and f) "cognitive" as psychological dimension (not psychologism).

Let's consider distinctly these levels (for a general overview let me also refer to Bombelli 2022, 2023 and 2025: these works are to be understood in conceptual continuity with this paper, and they develop some of the issues here discussed).

2.1. "Cognitive" as a form of (social) "knowledge"

We can start by referring to the basic or traditional notion of "cognitive".

It involves a series of learning processes somehow clarified by (and belonging to) the classical and modern "cognitivism". According to a possible definition, the "cognitive horizon" entails the development of a series of intrapsychic dispositions-processes provided by the social relations.

For instance, the point is deepened within Lev Vygotsky's perspective (Vygotsky 1929, 1978): it is a good example of the cognitive processes understood like "social-based knowledge". In particular, moving from the analysis of the cultural development of the child, the Russian scholar syntesizes the results of his theoretical and experimental approach as follows:

> When we investigate the highest functions of behaviour which are composed of complicated internal processes, we find that this method tends in the course of the experiments to call into being the very process of formation of the highest forms of behaviour, instead of investigating the function already formed in its developed stage. […] When we connect the complicated activity with the external one, making the child choose and spread cards for the purpose of memorizing […] we thereby create an objective series of reactions, functionally connected with the internal activity and serving as a starting point of objective investigation. (Vygotsky 1929, 432)

Moving from this approach (about it, Wertsch 1985, Kozulin 1990, Van der Veer and Valsiner 1991) the cognitive area is to be understood as the output of different social interactions and it should be conceived as closely related to the "knowledge" (i.e., reason and language) shared within a society. In other words, these interactions are based on a complex and epistemic process of "internalisation" of the cultural tools paradigmatically demostrated by the childhood development of the cognitive abilities deeply investigated by Vygotsky (see also Vygotsky 1978).

Synthetically, the dimension of "cognitive" should be considered as a set of socially shared capabilities, which is implemented by the intersection among different factors. In this way, the relation between "mind" and "society" as well as the connection between "thinking" and "language" take shape.

2.2. "Cognitive" as "common sense"

Along these lines, we can consider the cognitive dimension as "common sense" (Bombelli 2017, chapter 1 including the critical references).

This topic implies a long and rich theoretical line, which dates back to some fundamental intuitions developed by Giambattista Vico (a discussion in Schaeffer 2019; about Vico's outlook: Zanetti 2011) and characterizes some of the main philosophical-legal perspectives of the contemporary debate (for instance Fuller 1965: see Heritier 2025 about a comparison between Vico and Fuller).

Anyway, in this paper it was not possible to deepen the abovementioned conceptual frameworks. From a close perspective, the focus will be placed on different clues belonging both to some Wittgenstein's intuitions, especially concerning the crucial idea of "certainty" (Wittgenstein 1969-1974), and to H. L. A. Hart with particular regard to his notions of *acceptance* and *rule of recognition* (Hart 1961/1994).

Wittgenstein's approach, which critically dates back to some ideas developed by G.E. Moore, relies on the pivotal role conferred to the concept of "language-game" (*Sprachspiel*) and on the pair common sense-certainty. According to Wittgenstein, within the language-game shared by a social context there is a *continuum* between the horizon of the common sense underlying the daily experience and the "cognitive" dimension, which the Austrian scholar synthesizes through the notion of "certainty".

In this way, "common sense" can be understood as a sort of cognitive machine involving a structured "system" of beliefs. For instance:

> All testing, all confirmation and disconfirmation of a hypothesis takes place already within a system. And this system is not a more or less arbitrary and doubtful point of departure for all our arguments: no, it belongs to the essence of what we call an argument. The system is not so much the point of departure, as the element in which arguments have their life. (Wittgenstein1969-1974, § 105; see also §§ 103-105)

This dimension is grounded in the nexus between totality and learning rules (Wittgenstein1969-1974: "We do not learn the practice of making empirical judgments by learning rules: we are taught *judgments* and their connexion with other judgments. A *totality* of judgments is made plausible to us", § 140, emphases in the text) and entails the concept of "system":

> Our knowledge forms an enormous system. And only within this system has a particular bit the value we give it. […] I am taught that under *such* circumstances *this* happens. It has been discovered by making the experiment a few times. Not that would prove anything to us, if it weren't that this experience was surrounded by others which combine with it to form a system. Thus, people did not make experiments just about falling bodies but also about air resistance and all sorts of other things. But in the end I rely on these experiences, or on the reports of them, I feel no scruples about ordering my own activities in accordance with them. – But hasn't this trust also proved itself? So far as I can judge – yes. (Wittgenstein1969-1974, §§ 410 and 603)

The result is a sort of conceptual circle. In light of the crucial and basic horizon drawn by the "language-game", the common-sense propositions stand for (i.e., build up) a horizon of "certainty" that belongs to the language-game itself. You should notice that this certainty, or better the "cognitive" side of the certainty, plays as a mental state and stands for everyone who participates in the language-game in order to create the conditions of the common sense: beliefs, trust, implicit knowledge and so on (see also Coliva 2003; about the notion of "trust" see *infra* § 2.5).

Along these lines, Hart's concepts of "acceptance" and "rule of recognition" are to be considered. Firstly, the English scholar keeps together the two categories of "obedience" (related to the citizens) and "acceptance" (regarding the officials):

> The assertion that a legal system exists is […] a Janus-faced statement looking both towards obedience by ordinary citizens and to the acceptance by officials of secondary rules as critical common standards of official behavior. [This duality is] the reflection of

> the composite character of a legal system as compared with a simpler decentralized pre-legal form of social structure which consists only of primary rules. (Hart 1994, 117)

Secondly, in this way the "rule of recognition" takes shape:

> The simplest form of remedy for the *uncertainty* of the regime of primary rules is the introduction of what we shall call a 'rule of recognition'. This will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts. The existence of such a role of recognition may take any of a huge variety of forms, simple or complex [i.e. written document and so on] […]. [T]he foundations of a legal system consist of the situation in which the majority of a social group habitually obey the orders backed by threats of the sovereign person or persons, who themselves habitually obey no one. This social situation is, for this theory, both a necessary and a sufficient condition of the existence of law […]. [T]he rule of recogniton exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact. (Hart 1961/1994, 94-110, emphasis in the text)

The point for us is the cognitive profile underlying both the concepts, which in some way can be synthesized through the notion of "internal point of view" and its relation with the dimension of the common sense.

In other words, in light of the "descriptive sociology" elaborated by the English scholar the relevance conferred to the internal point of view as the practical attitude of rule acceptance plays a crucial role. More precisely, this process both entails a close relation with the cognitive dimension (also conceptualized as common sense with regard to an epistemic horizon grounded in a system of beliefs) and encompasses the complex role played by the rule of recognition (Shiner 1992, 178, Shapiro 2006, Reid 2014,Rodriguez-Blanco 2014, 77 and chapter 5; Bombelli 2017, 101, n. 27).

In a synthetic manner: regardless of the different conceptual starting points, the clues provided by the perspectives just discussed (Wittgenstein and Hart) allow us to consider a more complex horizon. On a closer view, the "common sense" entails an implicit dimension: a sort of "borderline" and "twilight zone", which refers to a pre-condition of law also in order to make the legal reasoning possible (see infra the following paragraphs). From an epistemological point of view, can we talk about an unitarian notion of "objectivity" (or a "unified theory of the method": Antiseri 1981) encompassing rules, values and facts within a cognitive background based on a "common sense"? Does this perspective imply Hegel's sentence "the night in which all cows are black"?

Two further remarks are to be added for better contextualizing the framework just drawn.

The first one concerns the relevance of the rhetoric tradition especially in light of its strong nexus with the horizon of the "common sense", which can be compared to the classical notion of *endoxa*. The "rediscovery" of their pivotal role should be appreciated not only about the legal reasoning, but also with regard to the scientific discourse (Pera and Shea 1992, Cattani 1994) and highlights the wide projection of the role played by the "common sense" (i.e., the cognitive dimension) beyond the legal sphere. From this point of view, in the last decades we can grasp the revival of the contrast between "hard sciences" and "humanities" (i.e., "facts" vs. "rules-values"), in some way due also to

Perelman's rehabilitation of rhetoric (Perelman and Olbrechts-Tyteca 1958; see also the close polarization between rhetoric and logic proposed in Preti 1968).

The second remark concerns the epistemological debate developed within the philosophy of science. It has emphasized the "distance" between scientific knowledge and "reality": more precisely, the scientific knowledge is based on patterns of intersubjective agreements (i.e. common sense?) belonging both to the history of the research field (i.e., basic assumptions, categories, technical language, procedures) and to a pattern of certainty, which is characterized by the approximation to the truth in light of scattered epistemic horizons (according to the principle *obscurum per obscurius* elaborated within quantum physics: Popper 1935/1959, Kuhn 1962, Agazzi 2014). The point obviously involves the theoretical horizon of the falsificationism and the reflection on the paradigms of truth extensively discussed within the philosophy of science in the second half of the last century.

2.3. "Cognitive" as a "presuppositional horizon"

Starting from the previous framework, we can more strictly focus on law by paying attention to some clues emerging from the opaque sphere "underlying" the legal experience.

In this way, two references closely related to each other are to be deepened: the category of *Annahme* (= logical presupposition) and the "presuppositional perspective".

The first point was originally discussed within the phenomenological debate.

Starting at least from Husserl's approach, the category of *Annahme* was developed especially by Alexius Meinong (1902/1977). By criticizing some Husserl's premises, Meinong conceptualizes this category in a logical-categorical direction with particular attention to gnoseology: in other words, *Annahme* as a condition of knowledge. Anyway, the specific legal interpretation of this dimension was suggested, for instance, by France Veber (2004) and later rethought also in a more philosophical-legal perspective (Raspa 2012; for a wider contextualization, Bombelli 2017, 71-72, especially footnote n. 124): it moves from the crucial intuition concerning the possibility to understand the idea of "law" (normativity) only in light of mental or categorical tools based on theoretical presumptions.

The second aspect refers to some contemporary positions, which are oriented to emphasize the categorical dimension underlying the law and, more precisely, the presuppositional level.

We can paradigmatically consider Bertea (2019) in light of his attention about the theory of law and the political obligation. By rediscussing the empirical and formal pattern of legal obligation, the author highlights the set of logical premises related to the legal experience.

Moving from the idea that "legal obligation is an instantiation of the wider genus we call obligation" (Bertea 2019, 349), the "presuppositional interpretation" implies a particular pattern of "legal obligation": in fact, it is "moulded in a specific conception", into which "substantive views and arguments are built[and]carry certain conceptual complications, and from which practical consequences can also be derived" (Bertea 2019, 350).

The decisive point is the particular nature of the "presuppositional horizon".

Similarly to the common sense and to the dimension of beliefs (*infra* the following paragraph), it should be considered a mix of substantive elements and theoretical (i.e. implicit) assumptions: this twofold conceptual framework can give rise to theoretical implications and to practical reflexes.

2.4. "Cognitive" as "belief"

Along these lines, we can consider the idea of "cognitive" as belief.

Within the contemporary philosophical-legal debate there are many references to the category of "cognitive" as "belief". The attention is to be paid to some points underlying different positions, which belong both to the classical philosophical-legal theory (Max Weber, Hans Kelsen) and to some voices of the current legal, philosophical and sociological debate.

As regards Max Weber we focus on a fundamental issue: the legitimation of power.

As it is well known, according to the German scholar there are three types of legitimation:

> The validity of the claims to legitimacy may be based on: 1. Rational grounds[*rationalen*] — resting on a belief [*auf dem Glauben*]in the legality of enacted rules and the right of those elevated to authority under such rules to issue commands (legal authority). (Weber 1922/1978, 215; see also Marra 2022)

The point for us is that Weber theorizes a sort of "rational belief": in other words, he discusses the possibility to combine two dimensions, "rationality" *and* "belief", which are traditionally divided by the philosophical-legal theory (about Weber's position see also *infra* the paragraph 2.5).

Kelsen's perspective addresses the same issue. Unlike Weber, the scholar of Prague calls into question the sociological and psychological approach to the legal categories and, in particular, the idea of "State" (Kelsen 1924). By discussing the "social psychology" and Freud's mass theory, Kelsen highlights the complex psychological level composed of different strata (beliefs?) underlying the construction of the category of "State".

On the one hand, Kelsen appreciates Freud's work in light of its capacity to dismantle the mystical-theological approach relating to law and to unveil the psychological-biological dimension of the political-institutional level. On the other hand, according to Kelsen this theoretical effort should be regarded only as an introduction to a more critically mature pattern of law: in other words, a theory of law.

With regard to other levels of the legal experience, Guido Calabresi's position (Calabresi 1985) offers further interesting clues. Starting from the world of the common law, the American scholar pays particular attention to the private and tort law and emphasizes the role of "ideals, beliefs and attitudes" (conceived as "gifts of the evil deity") within the "law in action". Calabresi emphasizes the "background knowledge" connected to the legal experience: according to the American scholar, "we will have to make a decision with respect to ideals, beliefs and attitudes, on the extent to which we wish to encourage them or discourage them as 'unreasonable' choices, as undesirable acceptances of the gift of the evil deity" (Calabresi 1985, 9).

In this way, the relation between the logical conditions of the legal reasoning (i.e. the idea of "reasonableness") and behaviors becomes clear: "Ought we say that what is 'reasonable' behavior is independent of belief systems, or is «reasonableness» itself affected by what a person's beliefs and ideals are?" (Calabresi 1985, 18). The analysis of the wide horizon related to the "beliefs of a reasonable person" (Calabresi 1985, chapter 3), including the balancing role played by the Constitution, allows Calabresi to highlight the following point:

> what is deemed unreasonable behavior, no less than who is the cheapest avoider of a cost, depends on the valuations put on acts, activities, and beliefs by the whole of our law and not on some objective or scientific notion. That is why beliefs do count in the calculus – at least sometimes. One equally can conclude that concepts, like reasonableness, also depend on whom our law wishes to burden. (Calabresi 1985, 69)

This approach entails also the exam of the space belonging to the moral world and to the emotions (Calabresi 1985, chapter 4). The final point elicits a precise stance:

> We may wish our law to shape our tastes so that some attitudes and beliefs are undermined […]. We define our law, even our ordinary run-of-the-mill tort law, so those emotions and moralism that are somehow unworthy in the long run will be undercut […]. We may not wish to be a society which discourages non-establishment beliefs. The melting pot society […] should not melt or homogenize all sorts of different faiths into one set of innocuous semisecular established attitudes. Conversely […] we are quite ready to burden the holders of other widely held attitudes because we think this allocation will result in a reduction in short-term emotional costs, without making the society, as a whole, worse for having such beliefs diminished. (Calabresi 1985,84-86)

Calabresi is well aware of the conflictual nature of the ideals and beliefs (Calabresi 1985, chapter 5), also in terms of "tragic choices" (Calabresi-Bobbitt 1978), but reaches the following conclusion:

> Beliefs, ideals, and attitudes are an integral part of our law. Whether based on current creeds, secularized version of past faiths, or non-religious beliefs, they shape what is expected and what seems reasonable in the most diverse sections of our law. Their role in any given area of law is determined both by the needs and functions of that area and its relationships (the gravitational pulls on it and from it) with the rest of the law. Each part of law must not only achieve relatively specific functions, but also must answer to a key aspect or our sense of justice: the need to be reasonably consistent with the requirements of other parts of the law. (Calabresi 1985, 115)

Through the analysis of the "tort law" and its "deity's gift" (i.e., "our desire to reduce the risk to lives as much as possible, but to do so without burdening those whom other areas of law tell us should not be disfavored", Calabresi 1985,115) Calabresi highlights the decisive role of the Constitution, but he does not remove the conflict among beliefs and the consequent necessity to manage "uneasy compromises" (Calabresi 1985,116). In conclusion, the American scholar summarizes:

> if at all possible, we must honestly and openly find ways that will allow such deeply held convictions to survive in tension with each other, all recognized as part of our law and all looking toward a day (which may never come) when the conflict can be resolved and they all may be consistently upheld. We must do this not because we all should

> wish to adhere to all of them, but because it is the only way we can be the society our constitutional ideals ask us to be. (Calabresi 1985, 117)

As above mentioned Calabresi's approach concerns the private law and the tort law. That's why it is very useful: the perspective proposed by the American scholar encompasses the social or collective level related to the legal decisions including their philosophical horizon (the subtitle of his book published in 1985 is "private law perspectives on a public law problem").

These remarks introduce to some relevant voices of the contemporary sociological/philosophical debate, in particular Ronald Dworkin, Jules Coleman and Michael Bratman, wherein we can find some peculiar "cognitive" horizons (on these orientations let me refer to Bombelli 2017, chapter 2).

Through a re-reading of Hart's perspective, Dworkin (especially Dworkin 1977, 1986) focuses on three points closely related to each other.

Firstly, according to the American philosopher all the social contexts are characterized by a horizon of beliefs or assumptions, which involves a system of "principles" (i.e. standard-principles, according to the distinction between "rules" and "principles" drawn by Dworkin) involving a common sense. It is closely related to the moral dimension, especially for building up the legal order on a seamless web and in order to guarantee its integrity inspired to the Dworkinian pair "community as integrity-law as integrity".

Secondly, this epistemic apparatus is structurally implicit and relatively indeterminable. Being the holding point of the legal system a form of integrity, it is always to be shaped at the institutional level: that is to say, in a constitutional perspective as well as through the jurisdictional dimension (also in light of Dworkin's thesis of the "one right answer": Dworkin 1977 and 1986).

Thirdly, the framework of the standards-principle is intertwined with social practices and develops within a homogeneous social context or community: in this way, the pair epistemic dimension-social context is the *conditio sine qua non* for defining a specific legal and political context.

Finally, in analogy with the Hartian notion of "rule of recognition" this conceptual nucleus is structurally questionable and "open". In fact, its implicit nature involves an ongoing interpretive activity, which is developed through the constitutional level and the jurisdictional intervention.

In conclusion, Dworkin's framework entails a cognitive pattern of law, which is grounded in a sort of "background knowledge" underlying the legal experience as well as its political projection. By using the lexicon adopted by Dworkin: "Our concept of law is furnished […] by rough agreement across the field of further controversy that law provides a justification *in principle* for official coercion" (Dworkin 1986, 109-110, emphasis in the text).

Within the post-Hartian debate, Jules Coleman (2001) pays attention to the connection between law and the cognitive dimension. In light of the polarity inclusive/exclusive positivism belonging to the contemporary philosophical-legal scenario and through a pragmatic perspective, the American scholar focuses on the role played by the

"principles" (i.e. the dimension of "morality" according to a peculiar Anglophone acceptation) as regards the conditions of existence of law, the nexus between legal rule and behaviors and, finally, the presumptions of the legitimate authority involving the relation law-moral reasons.

In light of these issues, Coleman rethinks the Hartian rule of recognition and the concept of internal point of view. In particular, Coleman emphasizes a pattern of law as a "practice" and, more precisely, as a coordination-convergence activity: this perspective raises the question concerning its conditions of possibility. They are related to the world of "intentions" and "expectations" and the entire framework can be articulated through the theory of agency called *Shared Cooperative Activity* (SCA) and developed by Michael Bratman (see later).

On a closer view, Coleman's model of legal pragmatism involves a complex pattern of law.

It is based on the pair "fact" (i.e., the convergence of behaviors)-"mental states": these sets of beliefs and assumptions are the unavoidable conditions of possibility of law.

Moving from the "separability thesis" grounded in the distinction between conditions of validity and factual assumptions of law (i.e., social fact thesis), Coleman theorizes the circular relations among those are involved into the activity governed by the revisited rule of recognition: in other words, its "content" is defined according to the typologies, nature and authoritative resources of a system. In light of this rethinking of the circle law-morality encompassing the role of the common sense, and different from Joseph Raz's approach (Raz 1979), the relation law-authority takes the shape of a "conceptual truth".

Along these lines we can consider the just mentioned Michael Bratman's*Shared Cooperative Activity* (SCA). It is a pattern of collective agency and social behavior involving the circle among mutual responsiveness, commitment to the joint activity as well as to a mutual support. SCA does not concern directly law: it is based on the role played by the planning agents and by their beliefs (Bratman 1987, 1992, 1993, 1999, 2007), which are synthesized by the concept of "background frameworks".

Bratman moves from the idea that the social actors are to be considered planning agents: the material "fact" grounded in the set of behaviors is closely connected to the "plans of action" underlying the individual and collective choices. In other words, the social actors are purposive and embedded agents: in light of the triangle "reflection-planning-framework" they can pursue and achieve their goals.

From this point of view, the role of the pair intentions-beliefs can be appreciated.

If the SCA model is based on the trinomial "mutual responsiveness, commitment to the joint activity e commitment to mutual support", the criterium related to the "commitment to the joint activity" necessarily and "typically involves, in part, *an intention in favor of the joint activity*" (Bratman 1999, 96, emphases in the text). In other words, SCA entails that "each agent intends that the group performs in accordance with subplans that mesh", considering that we have "a number of *more or less* articulated ideas about central features of our agency" (Bratman 2007, 50, emphases added). Within this approach the reference to notions as "common knowledge" (i.e. common sense?) as well

as the space conferred to the concept of commitment to mutual support highlight the role of the intentions and beliefs and, at the same time, their internal problematicity (with particular regard to the Anglophone and questionable meaning/acceptance or sense of "intentionality").

These passages can be deepened also in light of the horizon related to the background frameworks, which involve the decisive role played by the cross-temporal coordination and by the temporally extended goals. Both these elements are based on the common sense, in light of the complex intersection between the explicit level and the implicit degree underlying each typology of background frameworks.

For instance, the background frameworks implemented by the "shared policies" are able to "bring with them associated demands for consistency, coherence, and stability". In other words, "the ground of these demands includes[…]general concerns with coordination and organization over time and interpersonally": in this way,"[j]oining a group[…]may sometimes involve (*perhaps, implicit*)promises to participate in certain shared policies about what to treat as justifying in relevant shared contexts" (Bratman 2007, 303 for both the quotations, emphases in the text).

Moving from this framework, the idea of "core case" (i.e., a "mutual interdependence between the intentions of each concerning what is to be treated as justifying"; Bratman 2007, 303 and ff.; see also 306) implies a certain form of "common sense" grounded in a "judgement" and then in a form of belief. Beyond the problem concerning the extension of this scheme to the legal experience, the critical point entails the meaning and the role of the "shared valuing": it cannot be reduced to a mere convergence, but implies a further level ("shared" is not the same of "common"). Bratman underlines "[the] *broad and important commonality* that is captured by the conditions of the core case" (Bratman 2007, 307-308, emphases added), but the decisive point concerns the nexus between the shared values and the individual sphere (i.e. the concept of "will") also in order to precise the legal nature of the obligation.

On the one hand, in light of the SCA the reciprocal cooperation makes the development of the shared intentions possible. On the other hand, there are no entitlements and obligations for the involved actors: properly SCA does not imply a "normative consequence", but only promises and mutual expectations (*a fortiori* without sanction).

In conclusion. The SCA creates only functional bonds but no (legal) obligation or (legal) coercion. It emphasizes the legal sphere as a social practice, including its epistemic level and the contextual conditions (i.e. common knowledge), but does not encompass the peculiar traits of law. In this way, the idea of cooperation cannot be assimilated to the common horizon, which is to be understood as logically prior to the social actors. Furthermore, other aspects are to be remarked: beyond the relevant disappearance of the symbolic dimension, the cooperative binding differs from the *vinculum iuris* and the epistemic transparency of the cooperation should not be compared to the "rule of recognition".

To summarize.

Regardless the different starting points and some critical aspects, within these perspectives a complex approach to law takes shape. It elicits a close relation between

law and the cognitive horizon: that is to say, the wide and frequently implicit semantic area belonging to the common sense, which involves beliefs and assumptions.

2.5. "Cognitive" as "trust"

According to a conceptual continuity, the topic of "belief" entails the dimension of the "trust" and crosses different levels encompassing a wide theoretical debate (including the philosophical-legal dimension). From this point of view, Weber's perspective on belief can be further developed also with regard to the idea of "trust" and, in this way, we can also consider some clues belonging to Niklas Luhmann and to the Italian debate (but we should also remember the clue offered by Calabresi).

Throughout his masterpiece *Economy and Society* (Weber 1922/1978), Weber examines in depth many aspects of the concept of "trust" (*Vertrauen*), with particular regard to its different roles (Weber 1922/1978, 325, 351, 377-378, 676-678, 681, 831, 838, 854, 855, 899, 993, 1139, 1197, 1273, 1423, 1559-1561).

Only two paradigmatic references.

The first one concerns the charismatic authority:

> In the case of charismatic authority, it is the charismatically qualified leader as such who is obeyed by virtue of personal trust in his revelation, his heroism or his exemplary qualities so far as they fall within the scope of the individual's belief in his charisma. (Weber 1922/1978, 216; see also 242)

The second one regards the democratic (i.e. demagogic and plebiscitary) model:

> Active mass democratization means that the political leader is no longer proclaimed a candidate because he has proved himself in a circle of *honoratiores*, then becoming a leader because of his parliamentary accomplishments, but that he gains the trust and the faith of the masses in him and his power with the means of mass demagogy. (Weber 1922/1978, 1451)

Beyond the different topics, these short quotations demonstrates that the *lato sensu* cognitive dimension (i.e., here understood as "trust") stands in the middle of the Weberian theory and confirms its theoretical complexity.

Luhmann also moves from a sociological point of view but according to a different perspective.

In light of the trinomial trust/risk/complexity (Luhmann 1979/2000), the German scholar understands the idea of "trust" in a functionalist view. In other words, the concept of "trust" implies a "risky investment": the goal is the reduction of the complexity.

More precisely, Luhmann points out:

> Wir können das Problem des Vertrauens nunmehr bestimmter fassen als Problem der *riskanten Vorleistung* […]. Ein Fall von Vertrauen liegt nur dann vor, wenn die vertrauensvolle Erwartung bei einer Entscheidung den Ausschlag gibt […]. Vertrauen bezieht sich also stes auf eine kritische Alternative, in der Schaden beim Vertrauensbruch größer sein kann als der Vorteil, der aus dem Vertrauenserweis gezogen wird […]. Vertrauen reflektiert Kontingenz, Hoffnung eliminiert Kontingenz […]. Vertrauen kann auch unbedacht, leichtsinnig, routinemäßig erwiesen werden und erfordert insbesondere dann keinen unnötigen Bewußtseinsaufwand, wenn die Erwartungen nahezu sicher sind […]. Vertrauen geht stufenlos über in

> Kontinuitätserwartungen, die ohne reflexion wie feste Gleitschienen dem täglichen Erleben zugrundegelegt werden. (Luhmann 1979/2000, 27-29, emphases in the text)

Along these lines, Luhmann argues around the concept of "rationality of trust" (similarly to Weber's idea of "rationality of belief") with the following conclusion:

> Vertrauen reduziert soziale Komplexität dadurch, daβ es vorhandene Informationen überzieht und Verhaltenserwartungen generalisiert, indem es fehlende Information durch eine intern garantierte Sicherheit ersetzt. (Luhmann 1979/2000, 112-126)

The point is paramount, especially in light of the general functionalist perspective developed by the German scholar: Luhmann recognizes the role played by the cognitive horizon (i.e. common sense) also in light of a functionalist-deterministic perspective.

Within the recent Italian debate, it is to be considered the perspective proposed by Greco 2021.

According to Greco, we should reconsider the basement of the modern idea of law. Only by abandoning the Hobbesian pre-condition (Greco 2021, chapter 2), which is grounded in a conflictual pattern of social relations, it is possible to rediscover the relevance of the "trust" and the *lato sensu* cognitive horizon within the conceptualization of law.

In this way, the extension of the cognitive area (including the dimension of the "trust") allows us to highlight the "roots" of law and, in particular, its hidden background. In other words, according to the Italian scholar it is necessary to trespass the vertical pattern of law dating back to the origins of the modernity and to access a horizontal paradigm of legal sphere (Greco 2021, chapters 4 and 6).

Starting from this conceptual framework, as suggested in this contribution it is necessary to enlarge the concept of "cognitive level". It encompasses a wide horizon of inclinations/attitudes including the idea of "trust" and should be understood also as an epistemological dimension.

The point can be clarified by considering the continuum trust/legal justification. The processes of legal justification necessarily involve the epistemological level: to justify (i.e., to legitimize) means to bring arguments and reasons in order to adopt a decision. In this way, when the cognitive level is considered in its epistemological scope (i.e. as a set of elements related to the formation of arguments and reasons) it is also relevant in an expressively epistemological key with regard to the configuration/implementation of the dynamics of justification (see also the previous and next references to the category of "reasonableness").

2.6. "Cognitive" as "psychological dimension" (not psychologism)

Moving from these remarks, the relation between the psychological dimension and law should be reconsidered. Although it has sometimes been criticized, the role played by the "psychological" dimension should not be underestimated. It is necessary to underline two points.

Firstly, this perspective doesn't imply to abandon the theory of law or to merge law and psychology. The issue is to re-examine the space of the mental processes related to the decision-making (including the *proprium* of the legal decision): that is to say, not only the

argumentative (i.e. justifying) level normally investigated by the theory of law, but also the complex "black box" underlying the decision.

Secondly, the focus on the psychological dimension should not be confused with a psychologist declination. On the contrary, by maintaining their different methodological approaches both psychology and the "cognitive sciences" can offer precious contributions in order to understand the legal sphere.

From this point of view, in general the question of the rule-following (and of the law-oriented behavior) sometimes is addressed through the reference to neuronal factors involving a peculiar notion of "cognitive law" (Arnaudo 2010) according to which the rule-following process and its cognitive profile should be assimilated to the neuronal sphere. In this way, but in a more specific orientation, we can grasp some theories aiming at exploring the role played by the brain structures as regards some levels of the cognitive sphere, for instance between the mass and the political behaviors (Allport 1947, Hatemi *et al.* 2010, Alford and Hibbing 2010, Hatemi and McDermott 2011, Alford *et al.* 2011, see also Bombelli 2021 and 2022b).

On a closer view, this perspective can be thought also in continuity with the classical tradition: for instance, is there a link between the doctrine of *endoxa* and the contemporary debate? About these questions, see also below the remarks about the legal realism and its possible reinterpretation.

3. Cognitive horizon, legal experience and common sense: some levels

The theoretical approach drawn in the previous pages seems very useful for understanding the practical dimension: the "law in action". From this point of view, we can synthesize the cognitive horizon in light of the following notion of "common sense": *a complex semantic area, which entails a "cognitive" dimension (properly defined: rationality) and a "implicit" level (as a condition of possibility of each social phenomenon). In this way, the "common sense" can be understood as a plexus composed of contextual dimension, beliefs (implicit dimension) and reflexive moment (categorical sphere and theoretical elaboration).*

Some short corollaries are to be added.

The definition is intentionally wide and articulated: it goes beyond the current debate related to the "common sense" understood according to an overly narrow cognitive meaning (*supra* par. 2). Furthermore, the definition takes into account a multifactorial (or "integrated") approach: from this point of view, the close distinction among philosophy of law, legal theory and sociology of law should (and could) be rediscussed also in light of the abovementioned Weber's perspective.

At this level, we can better appreciate the contribution provided by the sociology of law as well as by the legal realism as regards the concept of rule-following. From this point of view, it is possible to draw a theoretical continuity among Gabriel Tarde (1890, 1895), Leon Petrażicki (1908, 2011) Axel Hägerström (1953) and Alf Ross (1959): on this conceptual sequence see also Fittipaldi (2016) and Bombelli (2021). Both the orientations (sociology of law and legal realism) highlight in advance the complexity underlying the social behaviors as well as the peculiar nature of the decision-making later discussed also in the contemporary debate.

Let's consider the *continuum* Tarde-Petrażicki.

The French scholar emphasizes the relation between law and imitation: the former is to be understood as a "social regulation", the latter involves a complex repetition process (for instance: the fashion) based on logical and extra-logical factors strongly related to each other. By analysing a rich phenomenology, Tarde focuses on a psychological approach involving an instinctive imitation process, namely a sort of "sleepwalking" underlying the collective behaviors.

In this way, the social traffic is to be placed at the intersection among convergent and conflictual behaviors/beliefs due to some recursive processes of imitation and, at the same time, to horizons of belief. In conclusion, according to Tarde the pair imitation-repetition and its *lato sensu* emotive dimension allow people to enter the social life, which entails different outcomes in light of its grounding in a sort of evolutionist economy of innovation.

Petrażicki aims to draw a scientific approach to the social traffic in order to build up a theory of law in terms of "psycho-sociology" (Fittipaldi 2016, 443): the goal is to put "*into a special class all the phenomena of the human and animal mind which poses[a]bilateral passive-active nature and term them impulsions*" (Petrażicki 2011, 23, emphases in the text).

Starting from a very articulated pattern of "morality", according to the Polish scholar law plays an unavoidable role of functional control. Through this approach, it is possible to describe the "moral and legal impulsions" in terms of "legal rules" and to grasp their close relation with ethics: the concept of "ethical emotions" allows to understand the traditional categories of "command" and "prohibition" *as* "moral and legal fictions" (Fittipaldi 2016, 449 and 452). In this way, some classical concepts (i.e., "obligation", "law", "power", "norm") should be rethought in depth: in other words, the category of "norm" and, more generally, the "legal dimension" ultimately coincides with the notion of "normative belief" (Petrażicki 1908, 248).

Moving from this framework, we can better understand some relevant contributions provided within the legal realism, in particular by Axel Hägerström and Alf Ross (Bombelli 2021).

The first one focuses on the conceptual sequence "legal duty-system of law-will-legal machinery" (Hägerström 1953). According to the Swedish author, "legal duty cannot be defined by reference to any fact, but has a mystical basis, as is the case with right": that is to say "[l]egal duty means[…]an obligation in regard to a certain action which exists independently of any actual authority and which is crystallized out by legislation or other form of legal enactment" (Hägerström 1953, 8 and ff.). More precisely, the "psychological content" is the basis of the "law" (i.e. the category of "duty") and justifies the "system of law as a whole": it grounds in a "series of feelings, propagated by inheritance through thousands of years, which are attached to rules for the community […]" (Hägerström 1953, 15).

In this way, "the whole legal machinery works, driven by a mighty complex of feelings, which function independently of the views on what laws ought to be established" (Hägerström 1953,15), with the consequent reflexes about the notion of "legal disposition" and the circle "normative dimension-cognitive level" as well as the concept of "will". With regard to the last one, Hägerström calls into question the paradigm of law as a "system of imperatives or declarations of intention on the part of the legal

power": that is to say, "[if] a 'general will' is assumed, that will must be supposed to be either the will of all or a super-individual will" and, then, the concept of "will" as a logical condition to draw a theory of law (Hägerström 1953, 55, emphasis in the text).

Law should be considered a "legal machinery" based on a "series of feelings" in the sense of a social "mechanism" (Hägerström 1953, chapter 3 and 353 about the assimilation of the legislator to a driver: "when a genuine legal order exists, the social mechanism is so constructed that it functions immediately in accordance with certain actions on *his* part done in due forms", emphasis in the text): after all, "no constitution […] exists through the mighty will of either the people of an individual" (Hägerström 1953, 355).

Moving from a radical individualist perspective, the framework provided by Hägerström involves a sort of automatism between reactive behaviors (i.e. psychological-based behaviors) and legal dispositions implemented within a specific context. Moreover, this pattern of the legal obligation differs from Luhmann's functionalist approach (Luhmann 1993/2004) and, at the same time, it can be compared to some of the contemporary neuroscientific developments. Generally speaking, Hägerström's perspective confirms the superimposition between the deontic dimension and the descriptive level (Olivecrona 1971) belonging to the methodological approach developed by the legal realism, which involves the pair validity-effectiveness and an empirical-sociologist idea of law.

Alf Ross's framework (Ross 1959 and 1968; about his perspective Serpe 2017 and 2020) can be considered an organic development of the theory elaborated by Hägerström. Hägerström's framework encompasses some pivotal points: the notion of "psychological-conditioned obligation", the concept of "law as regularity" and the "game metaphor".

By rethinking the couple validity-effectiveness, the Danish scholar critically reshapes the idea of legal obligation (including Hägerström's perspective). In light of the distinction jurisprudence-jurisprudential problems, the syntagm "law" (better: "valid law") is to be understood as "the abstract set of normative ideas which serve as a scheme of interpretation for the phenomena of law in action, which again means that these norms are effectively followed […] because they are experienced and felt to be socially binding" (Ross 1959, 18; in addition footnote 2 and the § 8 as well as the chapters 2-3 about the role of the Courts in order to define the "national valid law").

The goal is to understand the nature of the rule-following: if the legal realism "finds the reality of law in psychological facts" (Ross 1959, 71), a norm is valid when "it it is accepted by popular legal consciousness" (Ross 1959, 71). From this point of view, "the cardinal objection to psychological realism" is the fact that "the legal consciousness is a concept of individual psychology": in fact, "by linking the concept of valid law to the individual legal consciousness, this branch of realism converts law into an individual phenomenon on a par with morality" (Ross 1959, 72) with the consequent difficulty to think about "a national law system" and "a national morality" (Ross 1959, 72).

In other words, Ross underlines the psychological dimension of law emphasized by Hägerström, but he more precisely focuses on the holding point of the legal order: the "effective" norm, that is to say, the norm actually applied or, in any case, the norm with

a reasonable expectation of applicability in jurisdiction. In this way, law is not to be understood as a "mechanism": on the contrary, the legal sphere involves a sort of habitual and binding circularity, which is enforced by the jurisdictional activity of the Courts.

This is the "game of law".

Through the metaphor of chess Ross highlights the circularity between two levels.

On the one hand, the empirical-psychological dimension (i.e. the effectiveness of the behaviors felt as due) and, on the other hand, the strategic-imitative nature of the rule-following. The judges play a key role: in light of a probabilistic judgment, they set off the validity of the legal norms in order to guarantee their enforceability. In this way, Ross elaborates a realistic-psychologically based pattern of law, which involves mimetic-adaptive processes connected to power relations: this paradigm entails a model of "legal norm" detached from the horizon of the validity and identified as a "social fact". In other words: "*a norm is a directive which stands in a relation of correspondence to social facts* […]. *[I]n the majority of cases the pattern of behaviour presented in the directive (s→b) is followed by the members of the society*" (Ross 1968, 82-83, emphases in the text; see also chapter 5).

To sum up. Starting from an anti-essentialist perspective, the legal realism aims to demystify the conceptualization of the legal categories through an empirical-observational approach and by emphasizing only some levels halfway between psychic-instinctual dimension and biological level. Hägerström's notion of "feelings" paradigmatically connotes a theoretical approach, which is shared also by Karl Olivecrona, Anders Vilhelm Lundstedt and Alf Ross as well as by some exponents of the north American legal realism.

Beyond their different conceptual premises, the sociological approach and the legal realism are characterized by a similar methodology, which grounds in the possibility to draw an "objective observation/analysis" of the social behaviors for finding out invariant factors.

This theoretical framework implies a double corollary.

Firstly, at a theoretical level it encompasses the philosophical topic concerning the "affective dimension" and, more generally, the pair emotion-reason. It is a decisive horizon, which dates back to some classical references (i.e. Aristotle: Bombelli 2018) and involves the rich contemporary theoretical debate on the cognitive role played by emotion.

Secondly, the connection between the legal realism (including some of its relation with sociology of law) and the neuroscientific research takes shape according to different directions (Zelazo 2003 and 2008, Churchland 2011, Brozek 2013 and 2019). Also in light of the abovementioned references (*supra* § 2.6: see also Bombelli 2021 and its critical references),two points are to be emphasized.

One the one hand, we can observe a methodological continuity. The neuroscientific approach seems to be able to make an "objective" (i.e. scientific) analysis possible, especially as regards the psycho-biological sphere variously theorized by the legal realism: that is is to say, a reactive system oriented to the creation of regular behaviors with legal relevance.

On the other hand, the goal is very different. The legal realism, especially its Scandinavian articulation, aims at drawing a theory of law (Alf Ross talks about "system of norms"), whereas the neuroscientific approach is not interested to explore the *proprium* of the legal experience as a whole: it relies on the registration-description of behaviors with a view of establishing mere correlations between "events" and "mental states" (in particular Kurek 2013 about the idea of belief).

In conclusion, we could talk about a "cognitive turn" for emphasizing a cultural-historical passage after the *linguistic turn* developed in the last century and the *affective turn* related to the current debate.

Without indulging in blurred methodological eclecticism, this approach seems the most appropriate way for understanding the "black box" and the "tools kit" behind the legal experience: the goal is the construction of a multifactorial or integrated model of law.

In light of this framework, some levels of the legal sphere involved by the complex cognitive dimension are to be radially emphasized according to their mutual relation: behavior, patterns of legal reasoning, origin of the norms and the idea of institution.

The implementation of behavioral standards, in particular the modern "rationalist" paradigm, entails the sharing of an anthropological paradigm involving a pattern of "cognitive capabilities". For instance, the framework developed by the Cartesian-Lockean anthropological image is a good example: it implies the construction of an agent-based model involving a symmetric scheme of rationality.

Secondly, the pair cognitive horizon-common sense (i.e., the common sense as a dimension of the cognitive level) characterizes also the patterns of the legal reasoning. In particular, the attention should be paid to the idea of "reasonableness", which marks the entire contemporary debate on argumentation (for instance Keating 2022). Regardless of the problematic distinction between "rationality"/"reasonableness", the point for us is the role played by the shared background within this horizon: it is closely related to a wide *spectrum* of theoretical and practical premises, which makes the legal argumentation possible.

Thirdly, the traditional question of "legal sources" is called into question, in particular the issue related to the origin of the norms. From this point of view, the role played by a *lato sensu* cognitive dimension elicits the rethinking of some legal sources, especially as regards the conceptual nature of the "customary law" (Perreau-Saussine and Murphy 2007, Bombelli and Heritier 2022-2024).

Finally, the theoretical pair cognition-common sense is to be highlighted also with regard to the institutional dimension. On a closer view, the point implies an articulated idea of "institution", which includes both the classical legal notion of "institution" and the institutional level underlying economics (Voigt 2019). For instance, the well-known debate concerning the category of "nudging" (Thaler and Sunstein 2008) highlights the role played by the cognitive factors and, at the same time, confirms their possible manipulation also in terms of libertarian paternalism.

4. Reflexes on "law in action"

The attention for the "cognitive" framework, or better the pair cognitive horizon-common sense, should be appreciated in light of the contemporary crisis of the liberal model.

In other words, only in the second half of the last century the implicit dimension, that is to say the cognitive and "unquestionable" plexus underlying the (neo)liberal paradigm (i.e. democracy, individual rights and so on), becomes clear. More precisely, the ongoing crisis or rethinking of the liberalism has entailed the rediscovery of its cognitive horizon, involving both some dimensions of the legal order and the architecture of the political-institutional level.

4.1. Legal order

The first level crosses some specific profiles of the legal order closely related to each other: private/civil law, administrative law and constitutional law.

With regard to the private law, beyond the just mentioned Calabresi's perspective we could focus on some insights elaborated by Irti (1986).

The Italian scholar discusses the sunset of the "liberalism narrative" and its reflexes on the conceptualization of the legal categories. According to his approach, the crisis of the epistemic premises of the liberal *Weltanschauung* (common sense?), which was grounded in a peculiar model of State and legal order, has determined a rediscussion of its legal-institutional milestones: the *Wertfreiheit* within the conceptualization of the legal validity, the category of "code" and some symbolic legal institutions (i.e. the category of "property"). In particular, the increasing implementation of legal micro-systems marks the ongoing sunset of the supposed isomorphism between society and law, which encompasses a specific pattern of legal rationality.

The administrative law is also affected by this epistemological transition. The logical and contextual conditions of the argumentation developed within the administrative field are in discussion: in particular, the point involves the idea of "rational" model and its projections, once again especially regarding the concept of "reasonableness" and the notion of "common sense" (paradigmatically, Travi 2023; see also the previous references about the conceptual circle justification-trust-cognitive). From this point of view, what is in question is the methodological approach: since the *Methodenstreit* developed at the end of the 19thcentury until to the epistemological scenario belonging to the last century, the philosophical-legal thinking focused on the "practical goal" of law and its unavoidable relation with the *topoi* and the "common sense" (Travi 2023, 17-18).

In this way, the question finally calls into question the constitutional roots of the State.

The Italian debate about the nature of the constitution, which traditionally involves the pair "formal Constitution"-"material Constitution" (Mortati 1940), raises the question of the foundation concerning the apparatus of the State and the decisive role played by the "common sense" with regard to the validity and the effectiveness of the Constitution. In this way, the point implies also the interpretation of the constitutional texture as demonstrated by the American debate about the teleological/originalist interpretation

(McGinnis and Rappaport 2013, Massa 2023), which can be understood as a discussion oriented to discover the "true" intention (common sense?) underlying the text.

4.2. Political institutional level

The abovementioned horizon involves the political-institutional models.

Moving from Weber's intuitions as well as from the perspectives drawn by Tarde and Petrażicki, also in light of their relation with some insights belonging to the neuroscientific analysis, two levels are to be remarked: the concept of "democracy" and the idea of "European Union".

As regards the first point, the analysis developed in the previous pages makes room for a perspective of "cognitive democracy". In this respect, someone has emphasized the unavoidable role played by a scattered range of beliefs and common sense (i.e. the *lato sensu* cognitive dimension) underlying the contemporary democracies in order to conceptualize the democratic apparatus according to a "cognitive" direction. In other words, a model of cognitive democracy (Gehring 1988, Farrell and Shalizi 2015, Bombelli 2020b) takes shape: more clearly, the attention focuses on the role played by the intersection among different factors placed between epistemic level (i.e. the range of beliefs) and the instinctive-neuronal dimension involved within the social behaviors.

From this point of view, the category of "populism" can be reconsidered.

Beyond its controversial meanings (Mudde and Rovira Kaltwasser 2017, Rovira Kaltwasser *et al*. 2017, Bombelli 2020a, 2022, 89-91), the notion of "populism" should be considered in light of the current massification contexts. The contemporary mass societies can become the functional breeding ground for emphasizing, controlling and radicalizing the most immediately instinctual components of the cognitive dimension (i.e., imitation, repetition and so on), which crosses the ordinary social behaviors especially within emergency contexts.

The issue involves all the political-institutional patterns, including the idea of European Union and, in particular, the question related to the cognitive plexus underlying the European identity. The attention should be paid to the relevance conferred to the *spectrum* of beliefs and to the common sense shared (or not) by the European citizens, both in order to implement the European "public space" (Morin and Ceruti 2013, Ferrajoli 2016) and for building up the European Union.

5. Some conclusions: towards a multifactorial/integrated model of law?

In conclusion, two points are to be highlighted.

The first one is related to the *inescapable role* of the "common sense". "Common sense" is a "fact" as well as law is a "fact", including the conditions through which the legal sphere develops and can be elaborated. The abovementioned crisis of the liberalist horizon dating back to the recent past, with the transition from the modernity to the post-modernity, calls into question also some further fundamental legal categories: for instance, the idea of "causality" (from a theoretical notion of "causality" to a pragmatic-functionalist-contextual pattern of causation: Bombelli 2022a), as well as the concepts of "action", "time" and "space" and, more generally, the conceptual architecture underlying the modern theory of law.

The second point entails the "level of danger" related to the horizon of the common sense considered as an articulation of the cognitive dimension. This aspect entails the "legal moment (i.e. formalization)" of the social phenomena and consequently a necessary (and problematic) reshaping of the intentional and extensional borders of the "common sense" with regard to multiple dimensions of law: construction/deconstruction of the legal sources, criminal and procedural law, legitimation processes and so on. The question is: "who" (and "how" and "when") interprets the "common sense" within the democratic systems?

In this way, the nexus between the cognitive dimension (according to a wider meaning) and the "normative (legal) level" appears very fruitful and should be much more investigated. The unavoidable role played by the cognitive sphere and its theoretical complexity involves an extended approach to different areas of law: the theory of the sources (i.e., customary law), the legal reasoning, the circle normativity-validity-truth-effectiveness, the relation between the deontic level and the pragmatic dimension (Bombelli 2023) and, finally, the fundamental distinction between "theory" and "practice".

Through the present contribution some arguments have been offered in order to draw a multifactorial and integrated pattern of law: it could be understood as an updated approach for highlighting the complexity of the legal experience and its articulated dimensions.

References

Agazzi, E., 2014. *L'oggettività scientifica e i suoi contesti*. Milan: Bompiani.

Alford, J. R., and Hibbing, J. R., 2010. The ultimate source of political opinions: Genes and the environment. *In:* B. Norrander and C. Wilcox, eds., *Understanding Public Opinion*. Washington, DC: CQ Press, 175-195.

Alford, J. R., *et al*., 2011. The politics of mate choice. *The Journal of Politics* [online], *73*(2), 362-379. Available at: https://doi.org/10.1017/S0022381611000016

Allport, G. W., 1947. Scientific models and human morals. *Psychological Review* [online], *54*(4), 182-192. Available at: https://doi.org/10.1037/h0059200

Antiseri, D., 1981. *Teoria unificata del metodo*. Padua: Liviana.

Arnaudo, L., 2010. Diritto cognitivo. Prolegomeni a una ricerca. *Politica del diritto*, *61*(1),101-135.

Bertea, S., 2019. *A theory of legal obligation* [online]. New York: Cambridge University Press. Available at: https://doi.org/10.1017/9781108566216

Bombelli, G., 2017. *Diritto, comportamenti e forme di "credenza"*. Turin: Giappichelli.

Bombelli, G., 2018. Emotion and rationality in Aristotle's Model: From anthropology to politics. *In:* L. Huppes-Cluysenaer and N. M. M. S. Coelho, eds., *Aristotle on Emotion in Law and Politics* [online]. Cham: Springer, 53-89. Available at: https://doi.org/10.1007/978-3-319-66703-4_4

Bombelli, G., 2020a. Migrations and security. The problematic circularity "Philosophy, Law and Politics". *Revista de Estudios de Seguridad Internacional* [online], *6*(1), 1-17. Available at: https://doi.org/10.18847/1.11.2

Bombelli, G., 2020b. Sulla democrazia come modello esigente: soggetto, procedure e senso comune. *In:* C. Danani, ed., *Democrazia e verità. Tra degenerazione e rigenerazione*. Brescia: Morcelliana, 141-151.

Bombelli, G., 2021. Categorie giuridiche, giusrealismo e neuroscienze. Sulla nozione di rule-following. *Teoria e critica della regolazione sociale* [online], *1*(22), 73-102. Available at: https://www.mimesisjournals.com/ojs/index.php/tcrs/article/view/1335

Bombelli, G., 2022a. Causalità e diritto: paradigmi e alcune questioni teoriche. *Jus*, 1-2, 177-230.

Bombelli, G., 2022b. Cognitive Turn? Tra giuspositivismo e giuscognitivismo. Alcuni riflessi socio-giuridici. *Sociologia del diritto* [online], 1, 71-97. Available at: https://doi.org/10.3280/SD2022-001004

Bombelli, G., 2023. Normativity, truth, validity and effectiveness. Remarks starting from the horizon of the "Common Sense". *Phenomenology and Mind* [online], 24, 226-236. Available at: https://doi.org/10.17454/pam-2417

Bombelli, G., 2025. Il Rule of Law e il giurista cognitivo (ed etico), Riflessioni tra modernità e post-modernità. *In:* L. Corso, G. Barcellona and A. Scaravilli, eds., *Quali virtù per il rule of law? Prospettive di giuristi e filosofi.* Turin: Giappichelli, 203-223.

Bombelli, G., and Heritier, P., eds., 2022-2024. *I volti molteplici della consuetudine*. Milan/Udine: Mimesis (two volumes).

Bratman, M., 1987. *Intention, plans, and practical reason*. Cambridge, MA: Harvard University Press.

Bratman, M., 1992. Shared cooperative activity. *The Philosophical Review* [online], *101*(2), 327-341. Available at: https://doi.org/10.2307/2185537

Bratman, M., 1993. Shared intention. *Ethics* [online], 104, 97-113. Available at: https://doi.org/10.1086/293577

Bratman, M., 1999. *Faces of intention. Selected essays on intention and agency* [online]. Cambridge University Press. Available at: https://doi.org/10.1017/CBO9780511625190

Bratman, M., 2007. *Structures of agency*: *Essays* [online]. Oxford University Press. Available at: https://doi.org/10.1093/acprof:oso/9780195187717.001.0001

Brozek, B., 2013. *Rule-following: From imitation to the normative mind*. Krakow: Copernicus Center Press.

Brozek, B., 2019. *The legal mind: A new introduction to legal epistemology* [online]. New York: Cambridge University Press. Available at: https://doi.org/10.1017/9781108695084

Calabresi, G., 1985. *Ideals, beliefs, attitudes, and the law.* New York: Syracuse University Press.

Calabresi, G., and Bobbitt, P., 1978. *Tragic choices. The conflict society confronts in the allocation of tragically scarce resources.* New York: W.W. Norton & Co.

Cattani, A., 1994. *Forme dell'argomentare. Il ragionamento tra logica e retorica.* Padua: GB.

Churchland, P. S., 2011. *Braintrust. What neuroscience tells us about morality* [online]. Princeton/Oxford: Princeton University Press. Available at: https://doi.org/10.1515/9781400838080

Coleman, J., 2001. *The practice of principle. In defence of a pragmatist approach to legal theory.* Oxford University Press.

Coliva, A., 2003. *Moore e Wittgenstein. Scetticismo, certezza e senso commune*. Padua: Il Poligrafo.

Cominelli, L., 2018. *Cognition of the law: Toward a cognitive sociology* [online]. Cham: Springer. Available at: https://doi.org/10.1007/978-3-319-89348-8

Dworkin, R., 1977. *Taking rights seriously*. Cambridge, MA: Harvard University Press.

Dworkin, R., 1986. *Law's empire.* Cambridge, MA/London: Harvard University Press.

Farrell, H., and Shalizi, C. R., 2015. Pursuing cognitive democracy. *In:* D. Allen and J. S. Light, eds., *From voice to influence. Understanding citizenship in a digital age.* University of Chicago Press.

Ferrajoli, L., 2016. Eurotecnocrazia. Il suicidio dell'Unione europea. *Teoria politica. Nuova serie Annali* [online], *6*(6), 173-192. Available at: http://journals.openedition.org/tp/652

Fittipaldi, E., 2016. Leon Petrażicki's Theory of Law. *In:* E. Pattaro and C. Roversi, eds., *A Treatise of Legal Philosophy and General Jurisprudence* [online]. Cham: Springer, vol. 12, 443-503. Available at: https://doi.org/10.1007/978-94-007-1479-3_46

Fuller, L. 1965. *The Morality of Law.* New Haven/London: Yale University Press.

Gehring, T., 1988. The connection between democracy and cognitive processes in correctional education. *Journal of Correctional Education*, *39*(2), 62-29.

Greco, T., 2021. *La legge della fiducia. Alle radici del diritto.* Bari/Rome: Laterza.

Hägerström, A., 1953. *Inquiries into the nature of law and moral.* Uppsala: Almqvist & Wiksell.

Hart, H., 1994. *The concept of law.* Oxford: Clarendon Press. (Originally published in 1961).

Hatemi, P. K., *et al*., 2010. Not by twins alone: Using the extended twin family design to investigate the genetic basis of political beliefs. *American Journal of Political Science* [online], *54*(3), 798-814. Available at: https://doi.org/10.1111/j.1540-5907.2010.00461.x

Hatemi, P., and McDermott, R., 2011, eds., 2011. *Man is by nature a political animal. Evolution, biology and politics* [online]. The University of Chicago Press. Available at: https://doi.org/10.7208/chicago/9780226319117.001.0001

Heritier, P., 2025. *Lo schermo del diritto.* Milan/Udine: Mimesis (four volumes).

Irti, N., 1986. *L'età della decodificazione.* Milan: Giuffrè.

Jori, M., 2010. *Del diritto inesistente. Saggio di meta giurisprudenza descrittiva.* Pisa: ETS.

Keating, G.C., 1922. *Reasonableness and risk: Right and responsibility in the law of torts.* New York: Oxford University Press.

Kelsen, H., 1924. The concept of the state and social psychology with special reference to Freud's Group Theory. *The International Journal of Psycho-Analysis*, 5, 1-38.

Kozulin, A., 1990. *Vygotsky's psychology: A biography of ideas*. Cambridge, MA: Harvard University Press.

Kuhn, T., 1962. *The structure of scientific revolutions*. Chicago University Press.

Kurek, L., 2013. Philosophical issues in the neuroscience of mindreading: The case of belief. *In:* J. Stelmach, B. Brozek and L. Kurek, eds., *Philosophy in neuroscience.* Krakow: Copernicus Center Press, 175-200.

Luhmann, N., 2000. *Trust and power.* Avon: Pitman Press. (Originally published in 1979).

Luhmann, N., 2004. *Law as a social system*. Oxford/New York: Oxford University Press. (Originally published in 1993).

Marra, R., 2022. *L'eredità di Max Weber. Cultura, diritto e realtà.* Bologna: Il Mulino.

Massa, M., 2023. *Minimalismo giudiziario. L'opzione per la moderazione nella giurisprudenza costituzionale.* Milan: Franco Angeli.

McGinnis, J., and Rappaport, M. B., 2013. *Originalism and the good Constitution* [online]. Cambridge, MA: Harvard University Press. Available at: https://doi.org/10.4159/harvard.9780674726260

Meinong, A., 1977. *Über Annahmen*. Graz: Akademische Druck. (Originally published in 1902).

Morin, E., and Ceruti, M., 2013. *La nostra Europa*. Milan: Cortina.

Mortati, C., 1940. *La Costituzione in senso materiale.* Milan: Giuffré.

Mudde, C., and Rovira Kaltwasser, C., 2017. *Populism. A very short introduction* [online]. New York: Oxford University Press. Available at: https://doi.org/10.1093/actrade/9780190234874.001.0001

National Academies of Sciences, Engineering, and Medicine. 2018. *Learning from the science of cognition and perception for decision making: Proceedings of a workshop* [online]. Washington, DC: The National Academies Press. Available at: https://doi.org/10.17226/25118

Olivecrona, K., 1971. *Law as fact*. London: Oxford University Press.

Pera, M., and Shea, W. R., 1992. *L'arte della persuasione scientifica.* Milan: Guerini e Associati.

Perelman, C., and Olbrechts-Tyteca, L., 1958. *Traité de l'argumentation. La nouvelle rhétorique.* Paris: Presses Universitaires de France.

Perreau-Saussine, A., and Murphy, J. B., eds., 2007. *The nature of customary law. Legal, historical and philosophical perspectives* [online]. Cambridge University Press. Available at: https://doi.org/10.1017/CBO9780511493744

Petrażicki L., 1908. *Vvedenie v izučenie prava i nravstvennosti. Osnovy Ėmocional' nojpsihologii* [Introduction to the investigation of law and morals: Foundation of the psychology of emotions]. Sankt Peterburg: Ėrlih.

Petrażicki, L., 2011. *Law and morality.* New Brunswick: Transactions.

Popper, K., 1959. *The logic of the scientific discovery*. London: Hutchinson.(Originally published in 1935).

Preti, G., 1968. *Retorica e logica. Le due culture.* Turin: Einaudi.

Raspa, V., 2012. *Sollen*. Il dover essere è un oggetto? *Rivista Internazionale di Filosofia del diritto,* (*89*)2,239-262.

Raz, J., 1979. *The authority of law. essays on law and morality* [online]. New York: Oxford University Press. Available at: https://doi.org/10.1093/acprof:oso/9780198253457.001.0001

Reid, C. J., 2014. Sovereignty and belief: Thoughts on H. L. A. Hart and the crisis in Iraq. *University of St. Thomas (Minnesota) Legal Studies Research Paper No. 14-42* [online]. Available at: https://ssrn.com/abstract=2528345

Rodriguez-Blanco, V., 2014. *Law and authority under the guise of the good.* Oxford: Hart.

Ross, A., 1959. *On law and justice.* Berkeley/Los Angeles: University of California Press.

Ross, A., 1968. *Directive and norms*. New York: Humanities Press.

Rovira Kaltwasser, C., *et al*., eds., 2017. *The handbook of populism* [online]. Oxford University Press. Available at: https://doi.org/10.1093/oxfordhb/9780198803560.001.0001

Schaeffer, J., 2019. *Giambattista Vico on natural law: Religion, rhetoric, and sensus communis* [online]. New York: Routledge. Available at: https://doi.org/10.4324/9780429201042

Serpe, A., 2017. I «credo» di Alf Ross. Scienza, democrazia, giustizia nelle pagine del "Demokrati, magt og ret". *Materiali per una storia della cultura giuridica*, 2, 421-448.

Serpe, A., 2020. *Il pensiero filosofico giuridico danese. Tra comunità democrazia e diritto.* Turin: Giappichelli.

Shapiro, S. J., 2006. *What is the internal point of view?* [online] Available at: https://law.yale.edu/sites/default/files/documents/pdf/Faculty/Shapiro_Internal_Point_of_View.pdf

Shiner, R. A., 1992. *Norm and nature. The movements of legal thought* [online]. Oxford: Clarendon Press. Available at: https://doi.org/10.1093/acprof:oso/9780198257196.001.0001

Stout, R., ed., 2018. *Process, action, and experience* [online]. Oxford/New York: Oxford University Press. Available at: https://doi.org/10.1093/oso/9780198777991.001.0001

Tarde, G., 1890. *Le lois de l'imitation: étude sociologique* [online]. Paris: Alcan. Available at: https://doi.org/10.2307/1411168

Tarde, G., 1895. *La logique sociale.* Paris: Alcan.

Thaler, R.H., and Sunstein, C.R., 2008. *Nudge: Improving decisions about health, wealth, and happiness.* New Haven: Yale University Press.

Travi, A., 2023. Il metodo nel diritto amministrativo e gli "altri saperi". *In:* A. Travi, *Scritti scelti*. Naples: Jovene, 1-18.

Van der Veer, R., and Valsiner, J., 1991. *Understanding Vygotsky. A quest for synthesis.* Oxford: Basil Blackwell.

Veber, F., 2004. *Die Natur des Sollens und sein Verhältnis zum Werte unter kritischer Würdigung namentlich der neusten einschlägigen Theorien zu untersuchen und das Ergebnis wo möglich den Grundproblemen der Ethik nutzbar zu machen.* Graz: Bad Radkersburg.

Voigt, S., 2019. *Institutional economics. An introduction* [online]. Cambridge University Press. Available at: https://doi.org/10.1017/9781108573719

Vygotski, L. S., 1929.The problem of the cultural development of the child II. *Journal of Genetic Psychology* [online], 36, 415-32. Available at: https://doi.org/10.1080/08856559.1929.10532201

Vygotski, L.S., 1978. *Mind in society: The development of higher psychological processes.* Cambridge, MA: Harvard University Press.

Weber, M., 1978. *Economy and society. An outline of interpretive sociology*. Los Angeles: University of California Press. (Originally published in 1922).

Wertsch, J. V., 1985. *Vygotsky and the social formation of mind*. Cambridge, MA/London: Harvard University Press.

Wittgenstein, L., 1969-1974. *On certainty.* Oxford: Basil Blackwell.

Yolles, M., and Fink, G., 2021. *A configuration approach to mindset agency theory: A formative trait psychology with affect, cognition and behavior.* Cambridge University Press.

Zanetti, G., 2011. *Vico eversivo*. Bologna: Il Mulino.

Zelazo, P. D., 2003. *The development of executive function in early childhood.* Boston/Oxford: Blackwell.

Zelazo, P. D., 2008. The development of rule use in childhood. *In:* S. A. Bunge and J. D. Wallis, eds., *Neuroscience of rule-guided behaviour.* Oxford University Press, 441-455.