The Ever Changing Legal Dimension and the Controversial Notions of Law and Science

ORLANDO ROSELLI


1. THE APPARENT PARADOX OF THE DIFFICULTY TO DEFINE WHAT THE LAW IS

An apparent paradox characterises the work of the jurist: the difficulty of defining the object of his investigation. The most difficult question to find an answer for is precisely what is the law.

To understand the nature of the legal dimension, it is necessary to begin with an awareness of that very paradox and the difficulty it brings with it.

For a long time, the dominant legal culture, in particular, in civil law countries, aspired to give a definitive reply to this question: the presumption of the certainty of the law and the completeness of the legal order appeared to be features of the legal dimension that could not be renounced; these are objectives that can be pursued, according to this approach, attributing the monopoly of law-making to the State and reducing the role of the jurist to that of a simple commentator of the legislator’s intent.

* The Author is full professor of Istituzioni di diritto pubblico, University of Florence (Italy).

The Italian language version of this article will be published in the volume: O. ROSSELLI, Lezioni sulle trasformazioni della dimensione giuridica, Napoli, ESI, forthcoming.


2 For a critique of this claim, see, for this purpose, the great number of scientific works by P. GROSSI, in particular, Assolutismo giuridico e diritto privato, Milano, Giuffré, 1998, and Mitologie giuridiche della modernità, Milano, Giuffré, 2001.
The foundation and prevalence of such a concept do not have anything to do with the presumed ontological characteristics of the law but rather with its functionality to political-institutional unification processes (understood as a reduction) in national legal orders.

For this purpose, ‘legal science’ has, indeed, elaborated refined theoretical constructions, but they are often based on prevarication: the presumption being their result expression of the only law imaginable\(^3\), rather than of a very concrete historical process.

In this way, every dominant concept of law has become, in ‘psychology’ not only that of the jurist but collectively, the Law.

This presumption seems to be at the base of the explanations of great theorists who come from a very different cultural approach. These involve concepts of the law that continue according to ideological instead of scientific schemata: that is, the law is what enters into a predefined theoretical schema.

Presuming once and for all to define an a-temporal legal concept has, in this way, lead to the elaboration of refined theories of extraordinary internal consistency but weak (and furthermore: resistant) in grasping the perennial changing of the social dimension.

Frequently, ‘legal science’ has ended up moving forward by means of great dichotomies: natural law/positive law; common law/positive law; private law/public law and by adhering to one of two opposing poles relegated to the mere fact that all of this is not attributable to it\(^4\). In this way, yet again, an abstract consistency of legal concepts is preserved at the expense of the heterogeneous, plural, multiform, real representation of legal regulation.
