

ROBOT JUDGE: A PHILOSOPHICAL-LEGAL PERSPECTIVE

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- **ABSTRACT:** This essay reflects on the impact of artificial intelligence on the law, aiming to avoid the polarisation between ‘tech optimists’ and ‘tech pessimists’. Through the thought experiment of a justice system administered by robot judges, it explores the profound transformations that automated decision-making could bring about in the nature of law itself. The analysis focuses on two key themes: the tension between law and justice, and the choice between two models of the rule of law. It suggests that adopting the ‘robot judge’ should not be viewed solely in terms of system efficiency; rather, the shift in the system’s centre of gravity towards a formal model of the rule of law and the role of the judge as ‘guardian’ of the law must also be considered.
- **KEYWORDS:** Ai and law; predictive justice, Rule of Law; legal interpretation, legal certainty; Judge robot.

JUIZ ROBÔ: UMA PERSPECTIVA FILOSÓFICO-JURÍDICA

- **RESUMO:** Este ensaio reflete sobre o impacto da inteligência artificial no direito, buscando evitar a polarização entre “otimistas tecnológicos” e “pessimistas tecnológicos”. Por meio do experimento mental de um sistema de justiça administrado por juízes robôs, explora as profundas transformações que a tomada de decisão automatizada pode acarretar na própria natureza do direito. A análise concentra-se em dois temas centrais: a tensão entre direito e justiça e a escolha entre dois modelos de Estado de Direito. Sustenta-se que a adoção do “juiz robô” não deve ser compreendida apenas em termos de eficiência do sistema; ao contrário, deve-se considerar também o deslocamento do centro de gravidade do sistema em direção a um modelo formal de Estado de Direito e o papel do juiz como “guardião” da lei.
- **PALAVRAS-CHAVE:** IA e direito; justiça preditiva; Estado de Direito; interpretação jurídica; segurança jurídica; juiz robô.



1. Introduction

When it comes to AI, people's attitudes tend to be polarized. Adapting a famous distinction made by Umberto Eco to our case, the world is divided into "apocalypticists," who believe that AI will lead to the extinction of the human race, and "integratists," who place all their hopes for the magnificent and progressive future of humanity in new technologies (see Santosuosso & Sartor, 2022, 1760). (cfr. Santosuosso & Sartor, 2022, 1760).

Salvatore Amato (2020, 91-99) identifies, in a more subtle way, three possible attitudes towards artificial intelligence. The first attitude is embodied by the "techno-optimists":

The natural evolution that led to the emergence of homo sapiens will be 'artificially' completed with the creation of homo technologicus, capable, through scientific development, of overcoming those physical limits and cultural barriers that today seem insurmountable.

Then there are the 'techno-pessimists', who believe that: 'Human beings will be subjugated, just as we have subjugated all intellectually inferior species, or they will become superfluous within evolutionary mechanisms that will no longer depend on their will'. Finally, there are the 'techno-skeptics', who believe that:

Artificial intelligence will never be able to model moods or emotions because they depend on hormones and neuromodulators that cannot be reproduced mechanically. Carbon is not silicon, and therefore the immateriality of thought, feelings, and consciousness can never derive from the connection of particles of matter¹ (*Our translation*).

Personally, I believe it is prudent to adopt a middle ground and evaluate the pros and cons of using AI in the legal field on a case-by-case basis. In his highly successful book *Tomorrow's Lawyers*, author Richard Susskind (2017, xvii), who can certainly be counted among the techno-optimists, writes in the introduction:

1 Original text: «L'intelligenza artificiale non sarà mai in grado di modellare gli stati d'animo, o le emozioni, perché dipendono dagli ormoni e dai neuromodulatori che non sono riproducibili meccanicamente. Il carbonio non è il silicio e quindi l'immaterialità del pensiero, dei sentimenti e della coscienza non potrà mai derivare dalla connessione di particelle di materia».

Tomorrow's legal world, as predicted and described here, bears little resemblance to that of the past. Legal institutions and lawyers are at a crossroads, I claim, and will change more radically in less than two decades than they have over the last two centuries. If you are a young lawyer, this revolution will happen on your watch² (Our translation).

Now, although I am not a young jurist, I shall confine myself to observing that almost ten years have already passed since this prophecy, and it seems to me that we are still very far from the legal revolution predicted by Susskind. In short: prudence!

Let's start with a point that everyone can agree on: technology is a tool and can be used for good or evil. A knife, for example, can be used to cut bread or slit people's throats. The same applies to the use of artificial intelligence in the legal field. We evaluate each case individually.

However, this essay does not aim to take a position on this or that current use of artificial intelligence in the legal field, but rather to offer some scattered thoughts based on the thought experiment of justice administered autonomously by robot judges.

This is a thought experiment because the replacement of human judges by robot judges is not on the horizon and, I would say, is not even desired by enthusiasts of the use of AI in the legal field. Amedeo Santosuosso and Giovanni Sartor (2022, 1779) observe

[...] that: 'machines do not take the place of humans, unless it is humans themselves who shirk their duties, conferring an unfortunate auctoritas on machines, either by law (i.e., by providing for the legal effectiveness of automatic prediction) or even just de facto (by passively adapting to such prediction)³ (Our translation).

The interesting aspect of this consideration is the conclusion. The replacement of human judges with robot judges can take place surreptitiously, to the extent that human judges uncritically accept the predictions of machines. This is already happening, and some rulings by the Criminal Cassation Court have sanctioned the use of AI

2 Original text: «Il mondo del diritto di domani, come previsto e descritto qui, avrà ben poco in comune con quello del passato. Le istituzioni giuridiche e i giuristi si trovano a un bivio [...] e cambieranno in modo più radicale in meno di due decenni di quanto abbiano fatto negli ultimi due secoli. Se sei un giovane giurista, questa rivoluzione avverrà sotto i tuoi occhi».

3 Original text: «le macchine non prendono il posto degli umani, a meno che non siano proprio gli umani a sottrarsi ai propri compiti, conferendo una malaugurata auctoritas alle macchine, di diritto (cioè prevedendo l'efficacia giuridica della predizione automatica) o anche solo di fatto (adeguandosi passivamente a tale predizione)».

by judges to write rulings or parts of them. In its recent resolution of October 8, 2025, the CSM⁴, while acknowledging the inevitability of technological evolution, takes a very clear stance against the indiscriminate use of AI in the decision-making process. A few days ago, it was reported that the Court of Cassation overturned a ruling by the Court of Appeal of Turin on the grounds that many of the precedents cited in the latter ruling were incorrect or even invented (so-called hallucinations) (Danovi 2025). This is nothing particularly new: in the *Mata v. Avianca Airlines* case⁵, heard before a New York State court in 2019, the lawyers of Mr. Mata, who was struck by an airplane door, sought damages from Avianca Airlines, producing non-existent precedents favorable to their client, found thanks to ChatGPT (Barberis 2024, 21).

Tania Sourdin (2018, 1115) observes, perhaps with a touch more pessimism than previous authors, that:

Whilst developments in “Judge AI” or “Judicial AI” are in their infancy, there are indicators that it will become more relevant and there are already developments, although somewhat unpopular, to introduce Judge AI in relation to some categories of dispute⁶ (*Our translation*).

There is no denying that certainty is a crucial value in law and that the ability to predict future decisions is a significant aspect of this value. Within certain limits, AI can certainly play an important role in relation to prediction. The 2018 European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and their environment, drawn up by the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe, establishes five principles that must guide the use of AI in the judicial sphere: 1) respect for fundamental rights; 2) prohibition of discrimination against individuals or groups of individuals; 3) guaranteeing data quality and security; 4) the principle of transparency, impartiality, and fairness; 5) the principle of “controlled” use.

4 Cfr. Cass. Pen. n. 34481/2025 e Cass. Pen. n. 25455/2025. In particolare, nella sentenza n. 34481/2025 si afferma: «Ora, non v'è dubbio che l'uso di strumenti informatici agevola, sul piano pratico, la redazione dei provvedimenti giudiziari ma al contempo aumenta il rischio (oggi esponenzialmente incrementato dall'irrompere sulla scena della intelligenza artificiale) che il giudice attinga “aliunde” gli argomenti del suo decidere, abdicando al dovere di apportare il suo ineliminabile ed insostituibile momento valutativo e facendo venir meno l'in sé del suo essere terzo ed imparziale».

5 *Mata vs. Avianca, Inc.*, Jun 22 2023, 678 F. Supp. 3d 443 (S.D.N.Y. 2023).

6 Original text: «Sebbene gli sviluppi relativi al giudice-robot o al robot giudiziario siano ancora agli inizi, vi sono indizi che la decisione giudiziaria automatizzata diventerà più rilevante e vi sono già sviluppi, sebbene piuttosto impopolari, volti a introdurre il giudice robot in relazione ad alcune categorie di controversie».

Although vague, these principles undoubtedly point to the right path to follow and reassure us that judges will always be human, even with the help of AI.⁷

However, imagining a dystopian future inhabited by robot judges allows us to reflect on the law in general and to imagine some of the current dangers associated with automated prediction.

2. Law vs. justice, or law & justice?

Ronald Dworkin (2010, 4) begins *Justice in the Robe* with an anecdote:

When Oliver Wendell Holmes was an Associate Justice of the Supreme Court he gave the young Learned Hand a lift in his carriage as Holmes made his way to the Court. Hand got out at his destination, waved after the departing carriage, and called out merrily: ‘Do justice, Justice!’⁸ (*Our translation*).

Holmes stopped the carriage, had the driver reverse, and returned to the surprised Hand. ‘That’s not my job!’ he said, leaning out of the window. Then the carriage turned and drove off, taking Holmes to his work: presumably, that of not doing justice.” Now, although Dworkin’s concluding remark is undoubtedly ungenerous to Judge Holmes, the anecdote presents us with a conception of law that considers it to be distinctly different, if not opposed, to justice. Holmes embodies a “modern” conception of law that places the legislator at the center of the legal experience rather than the judge or interpreter—who are required to exercise interpretive self-restraint—and links the legal experience to the principle of authority (Shapiro 2007, 29-31).

This idea of law is defended, in its purest form, by Rudolf von Jhering (2024; 127-149; cf. Luciani 2018) in *The Struggle for Law*. There, for example, he considers Portia’s interpretative device in Shakespeare’s *The Merchant of Venice*, which saves Antonio and deceives Shylock, as a way of making law (which for Jhering coincides with legislation) succumb to the demands of justice.

7 Cfr. anche Regolamento (UE) 2024/1689, in particolare il *considerando* n. 61 e la legge n. 132 del 2025, in particolare l’art. 15.

8 Original text: «Una volta Oliver Wendell Holmes, mentre andava in carrozza alla Corte Suprema di cui era giudice associato, dette un passaggio al giovane Learned Hand. Questi scese alla propria destinazione e, salutando la carrozza che ripartiva, urlò allegramente: “Fa’ giustizia, giudice!”».



“I demand the law.” With these four words, the poet defined the true relationship between subjective and objective law and defined the importance of the struggle for justice in a way that no philosopher of law could have done more effectively. With these words, the case suddenly changed from Shylock’s legal claim to a matter concerning the law of Venice. (...) It is no longer the Jew who demands his pound of flesh, it is the law of Venice itself that knocks on the door of the court: for his right and the right of Venice are one and the same; together with his right, the latter also falls. (Jhering 2024, 135, italics in the original)⁹ (Our translation).

A corollary of this model of law is a formalistic conception of legal interpretation, according to which the meaning of legal provisions is unambiguous and pre-exists interpretative activity. This understanding of the role of interpretation in the legal sphere is well represented by the notion of “perfect syllogism” developed by Cesare Beccaria (2001, 9):

In every crime, the judge must make a perfect syllogism; the major premise must be the general law; the minor premise, the action in accordance with or contrary to the law; the conclusion, freedom or punishment. When the judge is forced or wishes to make even two syllogisms, the door to uncertainty is opened. There is nothing more dangerous than the common axiom that one must consult the spirit of the law. This is a broken dam against the torrent of opinions¹⁰.

This conception of law is based on a specific ideological choice that considers the certainty and protection of citizens’ expectations as the main, if not the only, *raison d’être* of law.

The “modern” conception of law is contrasted by another, typical of contemporary constitutionalism, which inextricably links law, morality, and justice from a conceptual point of view. A literary example comes to the aid of a conception of law that undoubtedly attributes to the judge the mandate to do justice and that inextricably

9 Original text: “Io chiedo la legge”. Con queste quattro parole il poeta ha definito il vero rapporto del diritto in senso soggettivo con quello in senso oggettivo e ha definito l’importanza della lotta per il diritto in un modo che nessun filosofo del diritto avrebbe potuto fare in maniera più efficace. Con queste parole la causa è diventata, tutt’in una volta, da una esigenza giuridica di Shylock una questione che concerne il diritto di Venezia. (...) Non è più l’ebreo che esige la sua libbra di carne, è la legge di Venezia stessa, che bussa alla porta del tribunale: poiché il suo diritto e il diritto di Venezia sono una cosa sola; insieme con il suo diritto cade anche il secondo. (Jhering 2024, 135, corsivo nell’originale).

10 Original text: «In ogni delitto si deve far dal Giudice un sillogismo perfetto; la maggiore dev’essere la Legge generale; la minore, l’azione conforme, o nò alla Legge; la conseguenza, la libertà, o la pena. Quando il Giudice sia costretto, o voglia fare anche soli due sillogismi, si apre la porta all’incertezza. Non vi è cosa più pericolosa di quell’assioma comune, che bisogna consultare lo spirito della Legge. Questo è un argine rotto al torrente delle opinioni».



links law and justice. In *Porte aperte*, Leonardo Sciascia (2021) recounts the story of a judge—a “small judge,” as the author describes him from the outset—who, at the end of the 1930s, in the midst of the Fascist period, finds himself having to judge a triple murderer and having to deal with the possibility of imposing the death penalty, which was then provided for by law, even though he is deeply opposed to this punishment for moral reasons. The most trivial way of presenting the conflict is to place law and morality in opposition to each other and to confront the judge with the choice of whether to remain faithful to his role and, therefore, to the law, or to his moral convictions. However, this reconstruction distorts the reality of the facts and prevents us from grasping the much more complex and articulated link that exists between law and morality.

The “little judge” approaches the case from a legal point of view, but is also guided by his moral conviction that the death penalty is never justifiable. And so, considering that one of the victims was a prince of the bar and that this fact had led many lawyers to refuse to defend the defendant, the judge was surprised that the court-appointed lawyer had not requested a retrial. Furthermore, the way in which the events had unfolded and the defendant’s sometimes contradictory and hallucinatory account should have led the defense, according to our judge, to request that the defendant undergo a psychiatric evaluation:

So why, when the defendant managed to find a lawyer he trusted, as they say, did the latter not move to invoke a measure of “legitimate suspicion,” that is, that the trial be transferred to a Court of Assizes far from Palermo? And why, assuming it was too late to request “legitimate suspicion,” was a psychiatric evaluation not requested for the defendant at the beginning of the trial? In the appeal to the Court of Cassation, lawyer Ungaro would later say: “It should be noted that the defense attorneys never requested a psychiatric evaluation during the trial, clearly demonstrating that they themselves were convinced that the defendant had always retained his full capacity to understand and act.” A good argument by the opposing lawyer, but one that is not valid in explaining the forgetfulness or omission of such an obvious, elementary request in a trial of this kind. Whatever opinion the lawyer may have in his heart about the defendant he has agreed to defend, his duty is precisely to defend him with all the means available to him under the law. (Sciascia 2021, 46-47)¹¹ (*Our translation*).

11 Original text: «E come mai, dunque, quando l'imputato riuscì a trovare l'avvocato, come si suol dire, di fiducia, costui non si mosse a invocare un provvedimento di “legittima suspicione”, e cioè che il processo venisse trasferito a una Corte d'Assise lontana da Palermo? E come mai, ammettendo si fosse in ritardo per chiedere la “legittima



The judge also justifies his refusal to impose the death penalty in such a way as not to betray his role as a judge and jurist:

I mean: I am convinced that I have done my duty as a man and as a judge; I am convinced that I have worked, technically, with the legal arguments, as best as I could... the main argument would have been that of mental illness; lacking that, I replaced it by assuming that the three murders were part of a single criminal plan... Now I think with horror about what will happen... Fear: that is what I feel. (Sciascia 2021, 89)¹² (Our translation).

The model of contemporary constitutional law essentially reevaluates Porzia's strategy: "The conflict between the pact and a moral imperative that condemns it is not resolved revolutionarily by denying the pact; it is, some would say, circumvented through interpretation" (Ascarelli 1955, 763)¹³.

According to this model, law is a social practice, characterized mainly by exercises in interpreting indeterminate provisions in light of the principles and moral values incorporated in the law or with which, in any case, the law must grapple because they are the "values" appropriate to the case to be decided.

The law must be seen as a social practice endowed with some moral value. This conception of law presupposes the ability to make moral judgments and balance moral judgments, which require the exercise of broad discretion on the part of the interpreter.

Now, regardless of whether one is a techno-optimist or a techno-pessimist, it is easy to assume that a robot judge would be more comfortable with a law that is determined and separate from morality than with a law that is compromised by morality and with legal reasoning that is not independent of practical reasoning in general.

suspensione", al cominciare del processo dibattimentale non fu chiesta per l'imputato la perizia psichiatrica? Nel ricorso in Cassazione, dirà poi l'avvocato Ungaro: "va tenuto presente che i difensori, durante il dibattimento, mai avanzarono richiesta di perizia psichiatrica, dando evidente prova che essi per primi erano sicuri che l'imputato aveva sempre conservata intatta la capacità di intendere e di volere". Buona argomentazione di avvocato avversario: ma effettivamente non valida a spiegare la dimenticanza o l'omissione di un'istanza così ovvia, così elementare, in un processo di quel tipo. Quale che sia il giudizio che l'avvocato nutre in pectore nei riguardi dell'imputato che ha accettato di difendere, il suo dovere è appunto quello di difenderlo con tutti i mezzi che la legge gli consente. (Sciascia 2021, 46-47)».

12 Original text: «Voglio dire: sono convinto di aver fatto il mio dovere di uomo e di giudice; sono convinto di aver lavorato, tecnicamente, con gli argomenti giuridici, come meglio non si poteva... l'argomento principe sarebbe stato quello dell'infermità mentale; mancandomi, l'ho surrogato assumendo i tre omicidi nella continuità di un unico disegno criminale... Ora penso con orrore a quello che accadrà... Paura: ecco quello che sento. (Sciascia 2021, 89)».

13 Original text: «Il contrasto tra il patto e un'esigenza morale che lo condanna non viene risolto rivoluzionariamente negando il patto; viene, direbbe qualcuno, aggirato attraverso l'interpretazione».



This means that the greater predictive power that AI can guarantee does not come at no cost but presupposes a certain indifference to assessments of the moral correctness of the law. It is good to be aware of this and to decide with full knowledge of the facts whether we are willing to pay this cost. In the words of Carlo Vittorio Giabardo (2020, on-line):

The law exists in a balance between certainty (which presupposes immutability) and the need for adaptation (which, by definition, involves evolution and therefore uncertainty). This is one of the many paradoxes of the law, one of the enigmas that characterize its functioning. This eternal problem can also be expressed as a dilemma between the need for certainty and the need for justice¹⁴ (*Our translation*).

It is up to us to decide whether what matters most to us is certainty or justice.

In the following paragraph, the characteristics of a legal system more inclined toward certainty and of one more inclined toward justice will be examined, respectively. In the subsequent paragraph, two models of judges will be distinguished in conclusion.

3. Two models of the Rule of Law

The concept of the Rule of Law (hereinafter referred to as RoL) has four characteristics that are worth clarifying. It is a concept that is: 1) indeterminate; 2) controversial; 3) endowed with a positive aura; and 4) expansive in nature.

Its indeterminacy requires that any discussion of the RoL be preceded by an analysis proposing an explanatory definition of the concept. Without this effort at conceptual clarification, there is a risk of dialogue between deaf ears. The expression RoL is used to denote different things.

The fact that RoL is a controversial notion means that we are faced with one of those concepts that Ronald Dworkin defines as 'interpretative' (see Waldron 2002). This means, among other things, that every proposed definition is the result of evaluative and ideological choices and aims to prevail over all others. Proposing a definition of RoL implies taking a position among a range of alternatives. This means that

14 Original text: «Il diritto vive in bilico tra la certezza (che presuppone l'immutabilità) e il bisogno di adattamento (che comporta, per definizione, evoluzione e quindi incertezza). È questo uno dei molteplici paradossi del diritto, uno degli enigmi che ne caratterizzano il funzionamento. Questo eterno problema può anche essere declinato come dilemma tra l'esigenza di certezza e quella di giustizia».

every statement about RoL is ambivalent. It represents, at the same time, an answer to the question ‘what is RoL?’ and to the question ‘how should RoL be understood?’. These two questions cannot be clearly separated from each other.

Jeremy Waldron (2008, 3) states that “The Rule of Law is one of the most important political ideals of our time.” The positive aura surrounding the RoL makes discussions about this notion easy prey to emotions, with the risk that such discussions become steeped in rhetoric. This aspect is also noted by Gerald Postema (2022, 17):

While [the RoL] enjoys a halo of legitimacy, it imposes irritating constraints on those who exercise power and necessitates compromises with other political goals. Consequently, it is vulnerable to capture and rhetorical abuse by those who would retain its halo and minimize its costs. Political ideals with this kind of scope, power, and visibility cannot escape controversy, not just at the periphery but also at its core.

In concrete terms, this means that people tend to unite under the banner of the RoL without realizing that they are defending different, if not antithetical, conceptions of this notion. It is the same phenomenon that characterizes discourse on human rights. We are all fans of human rights, only to then divide furiously over the meaning of equality or what the correct balance is in the event of a conflict between rights.

Finally, RoL has an expansive force. Like a phagocytic cell, it tends to incorporate (or at least merge with and/or overlap with) other notions—law, human rights, democracy, freedom—thus increasing its scope and, with it, the opportunities for misunderstanding (Waldron 2004, 319). The fundamental error, accurately identified by Joseph Raz, is that the RoL is often equated with the Rule of good law (Raz 1979, 210): “Not uncommonly when a political ideal captures the imagination of large numbers of people, its name becomes a slogan used by supporters of ideals which bear little or no relation to the one it originally designated”.

All conceptions of the RoL can be traced back to two models that differ in their interpretation of the alternative between the Rule of men and the RoL (see also Tamanaha 2004, 91-113): the “Enlightenment model” and the “contemporary constitutionalism model.”

The first model identifies certain characteristics of law, mainly formal ones, which make it possible to limit the arbitrary power of rulers. In this first version, the RoL would be both a way of organizing power and a guarantee for those subject to that power.



A famous summary of this model is offered by Friedrich von Hayek (2006, 75-76) when he defends the ideal of the sovereignty of law:

Stripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge.

The best-known version of this model is probably that proposed by Lon Fuller. According to this author, in order for the law to pursue its purpose—which is to govern the conduct of individuals while protecting their freedom and dignity—certain mistakes must be avoided:

The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: 2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; 3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; 4) a failure to make rules understandable; 5) the enactment of contradictory rules or 6) rules that require conduct beyond the powers of the affected party; 7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, 8) a failure of congruence between the rules as announced and their actual administration (Fuller 1969, 39; Waldron 2010).

Fuller believes that the fulfillment of these eight desiderata and, in particular, the absence of contradictions and congruence have “greater affinity” with what is morally good rather than with what is evil. Herbert Hart (1994, 207) is less optimistic than Fuller; he is convinced that this conception of RoL “is unfortunately compatible with very great iniquity”.

A conception of RoL similar to Fuller’s, but in line with Hart’s latter observation, is proposed by Raz (1979). In short, for Raz, the RoL is an ideal that has more or less the characteristics identified by Fuller, but, unlike Fuller, Raz denies the coincidence between law and RoL; for Fuller, in fact, if a legal system does not respect its inner morality in any way, it is not only a bad legal system but it is not a legal system at all. On the contrary, for Raz, a legal system can radically disregard the formal characteristics



identified by Fuller and still remain a legal system. Furthermore, the presence of these characteristics does not guarantee that the law does not radically violate certain moral values or that it adequately protects the dignity of individuals.

The primary function of law is to guide human conduct. The rule of law ensures that this task is carried out efficiently and also that the arbitrary use of power is curbed and, as Hayek observes, individual freedom is protected. To use Raz's famous analogy (1979, 225), just as a knife is used to cut, law is used to direct behavior; a sharp knife cuts better than a blunt knife, and a law that respects the ideal of the RoL guides behavior more efficiently than a law that does not respect it. As already mentioned, however, a sharp knife can be used to cut bread or a human throat, and in the same way, a law that respects the ideal of the RoL can protect human rights and human dignity or trample on both. Even if we concede that the Enlightenment RoL always protects individual freedom as a clear and certain right that allows individuals to know in advance what the consequences of their behavior will be, it remains true that a law that complies with the Enlightenment RoL can be profoundly immoral.

In any case, RoL understood in this sense treats those subject to the rules as adults, in the sense that it aims to influence human behavior in an open and non-surreptitious way, leaving individuals themselves the choice of whether or not to follow the rules, *ex ante* the consequence of their decision. The communicative attitude through which norms influence behavior implies that rulers recognize individuals as responsible agents capable of autonomous choices. In this way, rulers show respect for those they govern (Celano 2013, 198). To better understand this observation, it is sufficient to note the differences between a prescription and other forms of constraints on behavior, such as preference manipulation and symbolic influence. Preference manipulation imposes a constraint on someone's behavior by influencing their desires and preferences through various means—drugs, hypnotic practices, and so on. This kind of restriction of freedom of action nullifies the power of choice of the individuals involved. Furthermore, preference manipulation is an insidious means of influencing the behavior of others because it acts “behind the backs” of those who are subjected to it. Those who are victims of preference manipulation believe they are free when they are not. Similarly, those who are subject to symbolic influence do not make any choices, but merely engage in mechanical behavior produced by the power of suggestion exerted by the symbol. Ultimately, behavior or attitudes induced by symbolic influence are very similar to the movement of the knee when stimulated by a doctor's hammer.



Even in the case of symbolic influence, the constraint on behavior escapes the perception of its victims.

The second model of RoL, historically older, originated in common law legal culture and was theorized by authors such as Edward Coke first and, later, Albert Dicey. Unlike the previous model, the latter does not focus on formal and procedural constraints on sovereign power; rather, according to this model, positive law is not limited to the law produced by sovereign power but is the result of the balance between the two elements of the pair, dating back to the medieval tradition, *gubernaculum/jurisdictio*. *Gubernaculum*, which is an expression of sovereign power, finds an insurmountable limit in the legal practice of reference, which is governed by its own principles which, in turn, express a true 'legal reason' whose priests are first and foremost judges and, secondarily, jurists. The characteristics of this model of RoL are well summarized by Mauro Barberis (2016, 17):

[...] the law par excellence for common lawyers has always been common law, produced not by Parliament with the intention of producing it, but by judges, as an unintended effect of resolving specific cases brought before them. At least since the nineteenth century, however, it has not been so much a question of individual judicial decisions—which are no less intentional than the laws of Parliament—as of the set of principles or *rationes decidendi* that can be derived from those decisions: a set which, as such, does not correspond to the intentions of individual judges or any other flesh-and-blood legislator¹⁵.

This model of RoL presupposes a) the existence of values and principles expressed by legal practice that cannot be changed (or, at least, cannot be changed by legislation) and b) cooperation between institutions, in particular between parliament and the courts.

With the transition from the modern state to the contemporary constitutional state, this second model has also been reevaluated by jurists and legal philosophers belonging to the civil law legal culture. This depends largely on the socio-institutional

15 Original text: «il diritto per antonomasia, per i *common lawyers*, è sempre stato il *common law*, prodotto non dal Parlamento con l'intenzione di produrlo, ma dai giudici, come effetto non intenzionale della soluzione dei casi concreti a loro sottoposti. Almeno a partire dall'Ottocento, peraltro, non si tratta tanto delle singole decisioni giudiziali – in sé, non meno intenzionali delle leggi del Parlamento – quanto del complesso dei principi o *rationes decidendi* ricavabili da tali decisioni: complesso che, come tale, non corrisponde alle intenzioni dei singoli giudici né di alcun altro legislatore in carne e ossa».

differences between these two forms of state. If sovereignty is the distinctive feature of the modern state, the “crisis of sovereignty” is probably that of the contemporary state (Ferrajoli 1997). After the end of World War II, the sovereignty of nation states was doubly limited. Internally, the sovereignty of parliament was denied through the introduction of rigid constitutions, i.e., constitutions that could only be amended through a more complicated procedure than that required for the formation of laws, and long constitutions, i.e., constitutions containing a declaration of rights. Externally, the end of the absolute sovereignty of states, which consisted in the *ius ad bellum*, was sanctioned by the birth of the UN and the promulgation of the Universal Declaration of Human Rights.

In short, if the nineteenth-century liberal state—the rule of law—recognizes as the only limits to state sovereignty the “procedures” that the legislator must respect in order to create valid law, the constitutional state adds to the procedural limits also ‘substantive’ limits of “content,” which prevent the established power from doing or deciding whatever it wants. In the constitutional state, the dialectic between *gubernaculum* and *jurisdictio* appears unavoidable.

In this case, the objective is not, as in the Enlightenment RoL, to protect individual freedom through a certain right, but to guarantee the moral correctness of the legal system through a flexible right produced not only by the legislative power but also by the judicial power. It is easy to see that these objectives are incompatible.

At this point, a clarification is necessary. The two models of RoL, precisely because they are models, exert a normative force: they outline an ideal, they do not “describe” what is. The preference for one or the other is therefore linked to reasons that can be traced back to the ideological-political sphere. On the other hand, it cannot be denied that, especially in the realm of practical rationality, the *zeitgeist* and changes in reality play a significant role in orienting choices in favor of certain worldviews over others. In short, this means that the prevalence of certain models over others depends at least in part on the ability of these models to interpret reality. This second model therefore deserves special attention precisely because it expresses the ideological substratum of contemporary law, even if, in recent years, demagoguery, populism, and the crisis of democracy have put both models of RoL in check.

It is conceivable that the robot judge could help revive the Enlightenment model of RoL.



4. Two models of judge

The two alternative models of RoL correspond to two alternative models of judge and jurist (Bobbio 2007).

The first model represents the judge as the “guardian” and custodian of a body of rules that already exists. According to this first model, the main activity of the jurist is interpretation. It should be noted that, according to this model, the activity of interpretation involves little or, if possible, no exercise of discretion on the part of the interpreter. The jurist-guardian is the result of ideological and political choices relating, in general, to the way of understanding the principle of legality, the relationship between powers, the authority of the state, and so on. It is a conception of legal knowledge that considers the latter as ancillary to political power. Significant in this regard are the words of Charles Demolombe, a 19th-century French jurist:

My motto, my profession of faith is also: texts first! I am publishing a Course on the Napoleonic Code: my aim is therefore to interpret and explain the Napoleonic Code itself, considered as living law, as applicable and binding law, and my preference for the dogmatic method will not prevent me from always taking the articles of the law themselves as my basis (Bobbio 1996, 83)¹⁶.

The second model represents the judge as the “creator” of law: the jurist is a full participant in legal practice and contributes to modifying, integrating, and transforming the legal system of reference. Bobbio argues that the main activity of the judge and jurist according to this model is the creation of law. In reality, even when jurists represent themselves as creators of law, their characteristic activity is always interpretative. What changes with respect to the first model is the attitude of jurists towards interpretation. In the first case, the jurist adopts an attitude of self-restraint, while in the second, he or she expands his or her discretion to the maximum through the use of principles, programmatic norms, and constitutionally oriented interpretation.

There are several variables that influence the prevalence of one model over another.

16 Original text: «Il mio motto, la mia professione di fede è altresì: *i testi prima di tutto!* Io pubblico un Corso di Codice Napoleone: ho dunque per scopo d'interpretare, di spiegare il Codice Napoleone stesso, considerato come legge vivente, come legge applicabile e obbligatoria, e la mia preferenza per il metodo dogmatico non mi impedirà di prendere sempre per base gli articoli stessi della legge».



The first variable is connected to the type of legal system within which the jurist operates (“institutional variable”). A legal system can be closed or open. It will be closed if it consists of a systematic body of rules that tend towards completeness, expressed in a specific language; it will be open if the rules are “fluid,” that is, indeterminate and constantly changing, and if “the jurist is assigned the task of collaborating with the legislator and the judge in the creation of new law” (Bobbio 2007, 36)¹⁷. The Enlightenment RoL can be depicted as a closed system, while the RoL of contemporary constitutionalism can be depicted as an open system.

The second variable depends on the general social situation (“social variable”). A society can be stable or in transformation depending on the lesser or greater influence of factors of change on existing cultural models.

The last variable stems from the conception of law prevailing among jurists and from the way in which the relationship between law and society is “calibrated” (“cultural variable”). Law can be seen as an autonomous and largely self-referential system, or as a subsystem of a global system, or as a superstructure of the social and economic structure in particular. It should be added that, if law is considered a subsystem of the social system, it becomes interesting to explore the role of law within society. In other words, it is interesting to understand whether law is at the center or on the margins of the social system.

It is difficult to deny that contemporary law is an open (I would say ‘wide open’) system, that society, also as a result of globalization, is constantly changing, and that law is increasingly understood as a reflection and a dependent variable of society. This implies that today’s model of judge is what Bobbio calls creative: ‘in this perspective, the main activity of the jurist is no longer the interpretation of a law already made but the search for a law to be made, in fieri, not so much the validation based on an analysis of the formal sources of law as it is, but the legitimization, based on the material principles of justice, of the law that must be’ (Bobbio 2007, 37-38).

However, the intense contemporary debate on predictive justice and robot judges is perhaps a sign that should not be overlooked of a reversal of the trend, which considers the demands of justice to be sacrificable on the altar of efficiency and certainty.

17 Original text: «al giurista viene attribuito il compito di collaborare insieme con il legislatore e col giudice all’opera di creazione del nuovo diritto».



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