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The case for legal technique: A tentative map for legal mobilization

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Abstract

In an apparently paradoxical or contradictory way, our new century seems to show two trends: on the one hand, an increasingly informal, disorganized, oftentimes violent spate of uprisings, and on the other hand, a growing exploitation of legal strategies. Given these developments, how do we rethink the relationship between social struggles and law? This article employs a casuistic approach in order to explore current modes of interconnections between law and society. It argues that law is that language that through the institution of norms gives shape to the world of social relations. Through this same language, law performs actions in this world that it institutes through its categories. This piece also proposes a technical understanding of the concept of legal mobilization and argues that the innovative use of legal technique (rather than a political grammar) and the institutions of social cooperation could be seen as elements that re-describe and re-signify legal mobilization.

Key words

Social movements; transformation of dispute; strategy of rupture; legal mobilization; common goods

Resumen

De forma aparentemente paradójica o contradictoria, nuestro nuevo siglo parece mostrar dos tendencias: por un lado, una oleada de levantamientos cada vez más informales, desorganizados y, a menudo, violentos; y, por otro lado, una creciente explotación de las estrategias jurídicas. Teniendo en cuenta esta evolución, ¿cómo repensar la relación entre las luchas sociales y el derecho? Este artículo emplea un enfoque casuístico para explorar los modos actuales de interconexión entre el derecho y la sociedad. Sostiene que el derecho es el lenguaje que, a través de la institución de las normas, da forma al mundo de las relaciones sociales. A través de este mismo lenguaje, el derecho realiza acciones en este mundo que instituye a través de sus categorías. Este artículo también propone una comprensión técnica del concepto de movilización jurídica y argumenta que el uso innovador de la técnica jurídica (en lugar de una

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gramática política) y las instituciones de cooperación social podrían verse como elementos que redescriben y resignifican la movilización jurídica.

Palabras clave

Movimientos sociales; transformación de disputas; estrategia de ruptura; movilización jurídica; bienes comunes

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1. How to rethink the relationship between social movements and law

The concept of social movement comes from the social sciences and not from the legal field. For this reason, first of all, it is necessary to seek a definition and an analytic framework in political sociology rather than in legal studies, toward which we will turn subsequently. Several different definitions are provided by social movement scholars. According to Melucci (1982, 19), a social movement is a collective action involving the breakage of the limits of the system's compatibility and thus manifesting a conflict. By "conflict" Diani and Della Porta "mean an oppositional relationship between actors who seek control of the same stake – be it political, economic, or cultural power – and in the process make negative claims on each other – i.e., demands which, if realized, would damage the interests of the other actors" (Della Porta and Diani 2006, 21; see Tilly 1978, Touraine 1981, 80–84, quoted by authors). Social movements' actions, especially if compared with institutional politics, have been described as forms of "contentious politics" (Tilly and Tarrow 2006).

In general, social movements can be seen as actors involved in different forms of conflict to advance social change. It is worth recalling that social movements' potential for change may be directed in several ways, being either progressive or reactionary. Nevertheless, the conservative aspect can be no less confrontational, especially when contrasted with a progressive social conjuncture. Both faces keep a conflictual nature: social movements embody and liberate an irrepressible confrontational element.

This understanding is based on a wide and comprehensive conception of social movements which consider them as "distinct social process[es], consisting of the mechanisms through which actors engaged in collective action:

- are involved in conflictual relations with clearly identified opponents;
- are linked by dense informal networks;
- share a distinct collective identity (Della Porta and Diani 2006, 20)

Before questioning the use of a concept such as that of the social movement for the purposes of this piece, we will try to identify the words through which legal language might include the social phenomenon of movements even if it might not take it into explicit consideration. Indeed, it is through the legal coordinates that we wonder whether the specific concept of social movement does narrow this field of knowledge rather than widen our experimental possibilities.

The latter seems to be the case. One might refer to how several struggles spreading in recent years have been trying to reconsider the role of social movements in the making of constitutional charters (Chiaramonte 2018). The concept of social movement is not usually present in either constitutions or legal codes. There have been many battles to make the recognition of social movements explicit. However, as it is always the case in juridical matters, it is necessary to look at legal words more accurately. Indeed, from a juridical point of view, it is not entirely correct to say that something is not considered or guaranteed simply because it is not explicitly mentioned.

Law is a social form that feeds on a series of interpretative criteria, perhaps the most important of which can be described as an evolutionary criterion. For instance, in the Italian Constitutional charter, there is a broad expression that also allows for social

movements to be included. Article 2 of that Constitution recognizes the so-called "social formations" (my literal translation) – the language, a bit old, is that of the 1940s. If we look at the official translation it is written that: "The Republic recognizes and guarantees the inviolable human rights, be it as an individual or in *social groups* expressing their personality, and it requests the performance of the unalterable duty to social, economic, and political solidarity" (italics are mine).

The evolutionary interpretative criterion allows us to modify a perspective that we have taken for granted until now. Here we have talked about the role of social movements, which are, so to speak, already organized, "specialized" forms of contestation of an existing social condition. Admittedly, however, the legal view that refers to social groups rather than to something as specific as a social movement can broaden our understanding of what is at stake. After all, we should not only consider those social struggles that have already assumed the shape of a social movement, as we have previously defined it through the formulas coined by sociology.

The reference to social groups allows for a much broader reading of the various and diverse forms of social struggle that can intersect with and make use of the law. What might seem to be an obstacle on the surface – that is, the non-explicit recognition of social movements as bottom-up forces weaving legal relationships – could also be seen from a different angle. In other words, it could be observed that "social formations" may be broader than social movements' structures as previously outlined. It is worth returning to the concept of social movement; we may wonder whether, due to its theoretical structures, that concept includes or excludes certain forms of social struggle at the same time.

An example might clarify this point. If we look at the set of tactics that Partha Chatterjee refers to in *The Politics of the Governed. Reflections on Popular Politics in Most of the World*, we do not necessarily recognize social movements' repertoire as defined by sociology. Instead of the well-known "contentious politics" theorized by eminent social movements scholars, he proposes to take into consideration "popular politics" and not only in India but in "most of the world".

On the one hand, Chatterjee's account offers a varied composition of forms of struggle among which law is no less central than protest in the streets. This is particularly relevant because a considerable lack in sociological studies lies in recognizing the role of law as an instrument for advancing the social struggle.

"We know well that movements often use legal strategies, as the civil rights movement did in the United States even before the 1950s; and we know that legal frameworks affect movement strategies and outcomes" – Tarrow (2012, 22), the eminent social movements scholar, underlines – "but these are empirical observations: we have no general theory that accounts for the relations between social movements, the courts, and legal systems". In a similar vein, Barkan writes in reference to cases of criminalization that "criminal prosecutions and trials are normal events" for social movements "and often have important consequences for the struggle between social movements and their opponents" (Barkan 2003, 3), but they seem to disappear before the eyes of socio-legal scholars.

On the contrary, current movements' practices demonstrate the crucial relevance of legal strategies. The approach towards law is complex: people, protestors, activists, and their lawyers tend to consider law as a resource to fight injustice (Rajagopal 2005). They consider law as an advantageous instrument to obtain the protection of their rights and see litigation as "a source of institutional and symbolic leverage against opponents", that may help to achieve media coverage and so to publicly denounce abuses (McCann 2006). In any case, in a rather post-ideological manner, current social movements do not deny the affirmative potential of legal resources but exploit every possible means to pursue their aims. As Chatterjee (2004) notes, the most exploited classes employ every potentially beneficial resource to advance their basic needs. Social struggles certainly cannot do without such a powerful resource as the law to oppose the neoliberal logic of exploitation of things and people.

On the other hand, the new vocabulary that the Indian scholar promotes is in line with recent "informal" political forms arising worldwide. One may think of the case of riots that in the last decade have led to innovative research on forms of social antagonism. The renewed interest in these gestures lies in the fact that they seem to have no place among politically motivated actions – as they might not claim anything – but at the same time, it is hard to ignore their political relevance (Chiaramonte and Senaldi 2018). Again, the disorganized form of the uprisings does not leave much room for the conceptualization that takes the name of "social movements".

That theorization keeps its importance: indeed, it is important to remember that within political sociology a rethinking of that analytic framework has been taking place. An ongoing debate wonders what we can consider to be a social movement – given current rather disorganized forms of struggles – and to what extent that set of definitions need to be "updated". After all, as in the definition given by Tilly (2015, 41), collective actions are broadly understood as "the ways that people act together in pursuit of shared interests".

What is important for the purpose of this piece is to connect legal forms to social struggles seen independently of their formal organization. In an apparently paradoxical or contradictory way, our new century seems to show two trends: on the one hand, an increasingly informal, disorganized, oftentimes violent spate of uprisings, and on the other hand, a growing exploitation of legal strategies.

Indeed, forms of legal mobilization seem to deny a narrow conception of social movements. Today it rather seems that the expression of popular political forms can produce a "normativity of the governed" (Spanò 2017). And, the very channels of law may facilitate the formation of social groups made of non-preexisting subjectivities, which come to the fore precisely while making a common cause (the classic example of this dynamic would be that of class action).

Classically, the political nature of an action would be assigned to a sufficiently clear claim made by a recognizable social group. The instrumental logic of rationality has been traditionally applied to political action. A gesture would be political as long as it sets a goal, that is, on the condition that it is comprehensible according to given power relations.

This perspective may sound clearer if we take into consideration the category of political violence.

Both as a means of domination and as an instrument of liberation, violence would be political only if it displays a direct relationship with power (Rebughini 2011). In fact, if political violence comes from unauthorized forces, it is interpreted as directed towards authority in order to challenge it. Not dissimilarly, if it comes from authorized forces, it is understood as if it were directed towards those people who challenge it with the aim of subduing them.

Such an interpretation, which might remain valid in some cases, can hardly explain widespread phenomena such as riots, which seem to lack public claims and rather exhibit an *événementiel* character (Tomasello 2015, 167). Hence, one can argue that riots and uprisings can be qualified as political actions, even though those who participate in them do not make public claims, but "limit themselves" to exhibiting their bodies and exercising their violence against the symbols of capitalism (banks, supermarkets, SUVs, etc.).

Beyond these extreme cases – rioters, after all, do not employ legal mobilization – there is an infinite series of counter-conducts and resistances that constitute everyday political actions of the governed: making Chatterjee's lexicon our own, we may call it *political society*. Its political actions and legal mobilizations speak for themselves. Hence, a genuine materialist commitment would allow us to explore the procedures, disjointed yet determined, that animate the social world, without assuming the preexistence of a (classical) political subjectivity.

In the last few years, several different struggles from *Occupy Wall Street* to the *Indignados* to the North African and Mediterranean "springs" have focused on the "reinvention of procedures and spaces of the joint decision" (Amendola 2016, 81; my translation). It is a question of imagining the production of a new transnational political space in a concrete and radically new way: techniques of collective decision-making, moments of experimentation of self-government and autonomy, practices of reinvention of the relationship between institutions and subjects in line with the radical transformation of the subjectivities we are going through (Amendola 2016, 71–72). This piece proposes a theoretical approach and a tentative map of these "irregular" interconnections between social struggles and different legal strategies.

2. Which came first, society or law?

The way in which contentious politics has been taken up and translated in the legal field is that of "social change". According to Friedman, the change pursued by a social movement arises outside of the legal system, that is, in the social world, and can either act in the legal system only or pass through the legal system while also generating change in the social world. Therefore, legal change in its most essential aspects would follow social change and depend on it (Friedman 1975, 439–440). According to his socio-historical approach, social struggles play an indispensable role and their claims may determine a legal change which, in turn, produces a significant change in society (Friedman 1975, 450).

On closer inspection, Friedman's argument risks placing the social matter and the juridical form as separate elements, among which will prevail one or the other according to ideological positions. Classically, a legal scholar would argue that the law moves before society whereas a law and society scholar would argue the opposite, namely that society comes logically before its legal inscription.

In other words, the way socio-legal studies have been posing the question might sound like: Which came first, society or law? This mechanical logic may mean that the question is ill posed. And legal institutionalism may serve to complicate this simplistic and fallacious theory of the relationship between social matter and legal form[1]. If we take societal dynamics seriously, we may recognize that the dichotomy between social and legal change is still attached to an ideological positioning: social life is intended as a spontaneous composition, essentially nonformalized, as if it were a life without any form. On the contrary, the legal field would be the place of formalization, of the models, of the structure that struggles to respond to societal movements.

This is not the place for a disquisition on such an important issue. But it is worth saying that such a relationship is way too important for law and society studies to be left unanswered or poorly developed. Perhaps because of this underlying difficulty, contemporary studies of law and society involving social movements offer many fragments but little theoretical framework. At the same time, a positive change of perspective has occurred: one may notice that there has been a shift from broad and too vague questions about power and social reproduction or change to mid-range, perhaps case-based approaches that look at a set of empirical situations. In that Marxist or post-Marxist literature, law is always considered equal to power, whereas its technical ability is not taken into account. The logic of the founding myth finally gives way to a relational dimension in which clear-cut dichotomies are avoided.

"Questions about the relationship between legal mobilization and social change have marked the field since the early classics" whereas today, as in every other field of knowledge, there has been a greater specialization that has oriented socio-legal issues in a more detailed sense, e.g., towards "the conditions under which social actors engage in legal mobilization, the types of legal consciousness that lead to legal mobilization, and the kinds of legal frames that are most effective at challenging powerful elites" (Lehoucq and Taylor 2020, 168).

3. The transformation of disputes through the Algerian case

To approach a more concrete sociolegal interpretation, let us illustrate an empirical case and draw out its theoretical implications. A case-based approach may bring us closer to the dynamic and extraordinary singularity of the case and, at the same time, for this very reason, it might better illuminate the norm (Foucault 1983) and the ordinary (Thomas 2005).

[1] In particular, Cesarini Sforza redraws this connection arguing that law is not the formal guise that descends from above to shape the social life, but an immanent craft that is the indistinction between life and form. See Cesarini Sforza (2018) and in particular, the afterword by Michele Spanò. For Santi Romano this connection remained extrinsic: legal norms would inform material acts, thus imposing *ex post* coercively or in any case *from above* a formal substance. See Romano (2018) and in particular, the afterword by Mariano Croce.

This case was selected for its capacity to show the connection between broader social and political aspects and the structures of judicial procedures. We refer to a political trial, or rather the strategy of a political trial. The following is a classic example because it sheds light on the political nature of the forms of criminalization and the criminal trial, thus confirming the correctness and the need for an antiformalist attitude towards the law exemplified by the law and society tradition. The strategy of the political trial can probably be seen as the most radical and comprehensive example of the relationship between political claims and legal structure. Let us briefly tell and reread this historical case through the categories of the sociology of law.

Between the years of guerrilla warfare (the first attack was in 1954) and the independence of Algeria from France (1962), several FLN (National Liberation Front) militants were defended by Jacques Vergès, himself a supporter of the Algerian armed struggle. He inaugurated the so-called defensive strategy of rupture about which he wrote the "cult classic book", *De la stratégie judiciaire* (1968).

"Rupture" means drastically breaking with the system set up and imposed by the colonizer, and implies the explicit exclusion of any type of "complicity" with the system, hence the non-recognition of the French court, considered as not entitled to judge Algerian citizens. Vergès' advocacy was openly anti-colonial, and defendants admitted to being guilty. They did not define themselves as innocent and did not ask for sentence reduction as in the ordinary "connivence advocacy". On the contrary, they recognized their actions as violent, although not terroristic – as in the accusation made against them by the French judges in Algiers. Deliberately, through the rupture strategy, the courtroom was turned into a political tribune.

The crucial character of such a defense consists of accusing the prosecution of the same offenses as the defendants. As explicitly pointed out by Vergès in the advocacy for the Gestapo member Klaus Barbie, the French State committed crimes against humanity as well, but in the colonial context.

In the political trial against FLN militants – Vergès argues – France intends to criminalize a movement of resistance, which arose as a result of, and response to, the massacres and tortures perpetrated by the French government since the conquest. The defendants are therefore anti-colonial freedom fighters. A highly coordinated media campaign publicized the political defense that had first detonated inside the courtroom. In international legal terms, one might say that there was room for reprisal: a deliberate violation of international norms in order to punish a sovereign state for having previously breached international law itself.

The strategy was successful. The mode of advocacy utilized the criteria of politics rather than the technical instruments offered by penal procedure. Djamila Bouhired, nationalist Algerian militant, was sentenced to death but pardoned and freed in response to public opinion and political pressure brought on by Vergès.

Interpreting this case in "classical" socio-legal terms means recognizing that the rupture strategy challenges the formalist *prototype of courts*. From an anti-formalist perspective, we can see some fundamental characteristics of this case that contradict the *law in books* perspective. Here we recognize the awareness that courts are political actors (Shapiro 1980, 1). This aspect is crucial in the advocacy invented by Vergès. In fact, he has taken

it to the extreme by not recognizing a court supposedly composed by "(1) an independent judge applying (2) pre-existing legal norms" (Shapiro 1980, 1). According to Vergès' advocacy, judges could not be independent, as they were French and colonizers; and the law applied was the colonial rule set up by the French and not by Algerians.

In particular, the strategy at stake could be described as the case of a *transformation of disputes*. As demonstrated by Mather and Yngvesson (1980–1981), a trial may be modified depending on three variables (language, audience, and participants) and may involve a "rephrasing in terms of a framework not previously accepted by the third part" (Mather and Yngvesson 1980–1981, 778). Let us elaborate on this process of *rephrasing (to be seen* as an *expansion* achieved through the specific use of *language*), the role of the *audience,* and that of *supporters* in order to show their sociolegal implications.

Law is that language that through the institution of norms gives shape to the world of social relations. Through this same language, law performs actions in this world that it institutes through its categories. At the same time, law must be viewed as a nominalist and constructivist technique, which is informed by words rather than unmovable notions or concepts. The words change their meaning according to the interpretations that from time to time are necessary for the resolution of a case that occurs in the world of social relations.

Through such a language the "borders" of a dispute are defined. A definition always implies choices and distinctions; in doing so, it necessarily creates and imposes limits. It means that there are "paradigms of argument" (Comaroff and Roberts 1977 quoted by Mather and Yngvesson): facts themselves have no language; on the contrary, they need to be organized and expressed. In the legal field, social facts should fit into categories previously set up by norms (Mather and Yngvesson 1980–1981, 780).

In the rupture strategy, language has played a fundamental role. Aware of its political nature, Vergès built and employed an *art* of language. Stitch by stitch, his *arguments* became paradigms of rupture. This is especially clear in the well-known trial against FLN militants where Djamila and five others were sentenced to death.

The trial took place in Algiers in a lynching atmosphere. During the first hearing Vergès asked the judge: "Your Honor, am I in a court of law or a murder plot?" (*Terror's Advocate*, 2007). Djamila had already been tortured and refused to give any information: "You know nothing about me, but you must know that if I'm ordered to place a bomb, I'll do it". This is the moment when Vergès employed the defence of rupture. He described it thusly: "When the judge says: 'You're French', the prisoner says: 'I'm Algerian'. The judge says: 'You're in a criminal conspiracy', the prisoner says: 'I'm in the resistance'. The judge says: 'You committed murder', he says: 'I executed a traitor'. From then on, no dialogue is possible" (*Terror's Advocate*, 2007).

In essence, instead of defending Djamila in the terms of the French legal system (through a defence of "connivance"), he approached the trial from the "outside".[2] He did not

[2] As he stated in an interview with *Der Spiegel*, "[t]he other French attorneys who had taken over the defence in Algiers tried to begin a dialogue with the military judges there. The judges saw the FLN as a criminal group. But the Algerian defendants saw their attacks as a necessary act of resistance. In other words, there was no consensus over the principles that were to be applied in reaching a verdict. For me, it meant that I

accept the *narrowing*, that is the existence itself of legal categories for classifying events, as those had been imposed by the colonial legal system. Hence, the consent, that is "the most fundamental device for maintaining the triad" (Shapiro 1980, 2) of the trial (defendants, prosecutors and judge), was rejected.

Djamila was condemned to capital punishment anyway. Surprisingly, when she heard the death sentence, she laughed. The position taken by the militants left the judges speechless. A judge expressed his astonishment by saying: "Don't laugh, Miss, it's serious". Revolutionary struggle detonated like a bomb that illuminated the unspeakable atrocities of colonization – and this took place inside a courtroom. Like a boomerang, criminalization became a weapon of public accusation employed by the militant defendants against a system of oppression and exploitation.[3]

However, this unprecedented transformation of the language and strategy of the legal dispute could not remain within the courtroom. That court had maintained its structure by declaring the accused guilty and it had sentenced the "terrorists" to death. Vergès experiments with another strategy: "[T]he only way now to save the prisoners, is to activate French and international public opinion". Through the linguistic process activated inside the courtroom, Vergès managed to modify the common label attributed to the defendants. Instead of calling them "terrorists", he used the word "freedom fighters". This shift constituted the base on which the public opinion could have been involved.

In fact, the transformation of the dispute achieved through *expansion by an audience* is primarily based on "channels of communication". They are relevant "since the control over those channels influences the extent to which a wider audience can be mobilized" (Mather and Yngvesson 1980–1981, 810). As a result, the public arena was enlarged. The spectators multiplied all over the world. As Vergès expected, the dispute was transformed and the courtroom turned into a political tribune, where the judges were accused of the same crimes perpetrated by defendants and the "eyes of the world" focused on it.

The role of supporters as well as *the social context of disputing* should also be taken into consideration. As we have seen up to now, the Algerian struggle was supported by Vergès. On the whole, Vergès did not claim any general achievement of rights. His action can hardly be considered a classical practice of *cause lawyering*, according to which lawyers' advocacy is for rights of all kinds (Sarat and Scheingold 2005, Halliday *et al.* 2007, 3). He defined himself as an anti-colonialist individual but he did not create any sort of social movement or provoke any type of trials in order to carry forward a campaign.

At the same time, Vergès was not involved in *political lawyering* if we define it as "the capacity and willingness of legal professions to mobilize on behalf of political liberalism" (Halliday *et al.* 2007, 3). However, once he was assigned to defend FLN members, his advocacy was based on the respect of the due process: first of all, the right to a fair trial.

had to shift the events to outside the courtroom and win over public opinion for the defendants" (Der Spiegel 2008).

[3] There are parallels between this strategy and the Black Panther courtroom strategies: see Wilderson 2011.

Nevertheless, he was a strong supporter of the Algerian struggle, not only professionally but also personally. The lawyer can be a political agent (Barzilai 2007, 247) and Vergès was not only aware of it but claimed this position.

His strategy, however, could not have been so relevant if the social context had not been strongly in favor of the anticolonial struggle. In that historical period, a defense of rupture turned out to be an extraordinarily fitting and beneficial weapon for the purposes of the Algerian people. The positive final result is now a historical fact.

4. The case for legal technique

We had left the debate on legal mobilization pending. Instead, we have shown a concrete case in which the transformation of the dispute is at work, and we have employed it as a way to approach the sociolegal perspective on the relationship between law and movements broadly understood. In this context we have preferred to abandon excessively vague questions concerning social and legal change/reproduction, and we have rather evaluated what emerges from a historical case of political trial.

We identified the rupture strategy as the prototype of a transformation of disputes, a fundamental sociolegal category. We may consider the Algerian case as one of the clearest examples of how a social struggle can make political use of the judicial space and radically change the fate of an anti-colonial struggle. But can this case be seen as a case of legal mobilization?

We could pursue the hypothesis that this case is a case of radical legal mobilization in which many conditions that are usually analyzed separately seem implicated at once: a special type of cause lawyering, a favorable political moment, perhaps agreeable juries, political/legal opportunities etc. (In short, we will focus on these typical characteristics of legal mobilization).

However, we could also opt not to consider it as a case of legal mobilization. After all, only on the condition of stretching the basic features of legal mobilization might the extraordinary Algerian case fit this category. The main reason why it is difficult to consider the political trial as a modality of legal mobilization is that it is not promoted by activists (or informal social groups) or activist lawyers.

Yet, the effect of the extreme case of the FLN lies precisely in the successful transformation of the political trial from a criminal trial against the militants into a political arena ultimately in their favor: as if they mobilized the law (even if not in the first place). Therefore, a further crucial question would be: is there room today for such a transformation of the dispute? (see Christodoulidis 2009, Bhandar 2012).[4]

[4] A similar question was posed by Michel Foucault (1981) – in the preface to the second edition of *De la stratégie judiciaire* – when he asked Vergès whether or not his strategy might constitute a theory. His suggestion was to construct it. Following that path, Christodoulidis (2009, 25) argues that we should build the theory of rupture on a meta-level. He writes: "The aim of this meta-level engagement with law, and with the resources of constitutionalism in particular, would aim to ensure that law structures and withdraws from social fields appropriately to the redress of disadvantage, disempowerment and injustice. And how is political action to lift itself to the meta-level? The answer that I have suggested in this paper is: through militant attention to the points of tension upon which the management of consensus depends, and the introduction of a 'heterogeneity' or incongruence capable of generating and sustaining itself against the

Through another case, we will now intend to show the complexity of *law in practice* and answer this question, while advancing the conceptual construction of legal mobilization. Let us start, as in the Algerian case, from a context of criminalization of protest, although now in a non-colonial context.

I refer to the Italian social struggle against the Trans Adriatic Pipeline (TAP), a multinational infrastructure project for the transport of natural gas from Azerbaijan to Europe with an undersea section in the coast of Salento (Apulia). The No TAP movement is in the frontline against this megaproject.

Demonstrations have attracted thousands of participants since 2017. The enclosure of spaces was accompanied by a militarization of portions of land to make room for the construction site. Street confrontations between protestors and police were characterized by well documented violent repression. Eventually, in the summer of 2017, the criminalization of the protest began: a march of a thousand people in Lecce was denounced as an unauthorized demonstration. A few months later, a prefectural order denied access to the whole area adjacent to the TAP site and consequently forced activists to abandon the eight-month permanent *presidio*. By doing so, activists were essentially forbidden to demonstrate in the only area where it made sense to protest, namely the area adjacent to the TAP site. At the same time, preventive measures against No Tap activists also began (e.g., by means of expulsion warrants).

There have already been 67 convictions and it is likely that this is only an initial phase. There was no room for any radical defense strategy during the criminal trials against demonstrators and, for the aforementioned reasons, it is hard to even consider this case as legal mobilization. It is rather an ordinary way to use the legal system by the judicial field.

There was no radical militant transformation of the dispute. And for obvious reasons. The context is not that of gross violations, although police brutality has been proved and there are 19 people (some of whom work for the TAP company) who are under investigation for illegally dumping polluting elements, leading to the consequent contamination of soil and the aquifer.

What did the activists come up with? Their "trick" helps us illuminate how the contemporary solution to the "historical" transformation of the dispute takes the guise of a legal technique rather than socio-political, "external" forms.

A part of the No TAP movement has gathered in an associative form. This association also includes those among the activists who are accused in criminal trials. As a spokesperson of the movement says in an interview, the Tumulti association – (in English: "riots" or "uprisings") – "represents the 'institutional' part of the movement as well as a tool to manage repression (it is similar to a committee of defendants but which does not only involve them) and deals also with the management (…) of the resistance fund for which the association was born" (Serena Fiorentino, quoted in Agenzia Stampa CARC 2019).

management of consensus and the order of representation that it serves. It is these moments of the 'strategic', played out at level and meta-level, that I have called strategies of rupture".

In other words, a set of defendants chose to use the law strategically, namely to form an association. But there is more. The constitution of this association – already in itself a legal technique employed by the movement – serves a further step. A group of activists and lawyers started a lawsuit – which began with the complaint of some local mayors and then with the broad participation of the No TAP movement – against the TAP mega-project, on the basis of some serious shortcomings in terms of administrative law (authorizations, environmental impact, etc.).

In this trial, as in all the others, there is the possibility for an association to enter the proceeding as a civil party. It is necessary for the association to be recognized by the judge as a social formation that has a clear interest in that specific lawsuit, which must result from the association's statute. This was the case of the association Tumulti which joined that criminal proceeding as a civil party seeking damages (costituzione di parte civile) and takes an active part in questions and objections before the judge.

Here, instead of a transformation of the same dispute, we can see that the disputes become two: on the one hand we have a broad criminalization process with its criminal trials, and on the other hand we see a lawsuit set up against the TAP company in which the defendants of the other criminal proceeding take an active role in the guise of an association. In addition, one may notice the original mode through which the supposedly informal social group took the form of an association legally recognized in order to play its role in the legal field. This innovative use of legal technique (rather than a political grammar) and the institutions of social cooperation (such as the association) could be seen as elements that re-describe and re-signify legal mobilization.

5. A tentative map for legal mobilization

What is legal mobilization? Until now we have taken the meaning of this notion for granted. Admittedly, it is by no means a clearly understood term. As Lehoucq and Taylor show, there is a wide range of different meanings that the socio-legal literature has attributed to the concept of legal mobilization.

> Social movements have increasingly incorporated legal strategies into their repertoires of contention. Yet, both sociolegal and social movement scholarship lack a systematic and theoretically coherent way to conceptualize legal mobilization. In fact, scholars disagree (sometimes in fundamental ways) about what constitutes legal mobilization, which has resulted in conceptual slippage around how the term is used. (Lehoucq and Taylor 2020, 166)

Today it is the technique that must be placed under scrutiny. Law is a performative language. It is not equal to power, although there is certainly no lack of intertwining with power relations. But first of all, current modes of legal mobilization employ legal technique and can therefore be better understood if we isolate it.

With respect to sociolegal literature, this stand implies a distinction between three frequently ambiguous or overlapping concepts: legal mobilization, legal consciousness, and legal framing. I agree with the complete formulation offered by Lehoucq and Taylor (2020, 168):

> We define legal mobilization as the use of law in an explicit, self-conscious way through the invocation of a formal institutional mechanism. This allows us to distinguish it from – while also placing it in relation to – legal consciousness and legal framing.

> Importantly, this definition of legal mobilization is not limited to the use of legal strategies by social movements. Although sociolegal scholars have been particularly interested in social movements, individual and other collective actors besides social movements also engage in legal mobilization.

The proposal is to see legal mobilization as that form of mobilization that uses the tools of law and is not limited to the expressive dimension implied in the concept of legal consciousness nor in that of so-called legal framing – the inclusion of legal features into collective action frames – although both cases may be intertwined with legal mobilization.

Let us sketch a tentative map of different modes of interconnections between "law" (and specifically: legal techniques) and society (social groups, or social movements broadly understood). As long as legal mobilization is understood in a technical sense, a number of different social elements can interact in that battle. Legal mobilization frequently implies cause lawyering, a favorable political moment, perhaps agreeable juries, political/legal opportunities etc. Let us attempt once again to see these components through a case-based approach.

Cause lawyering consists of a set of legal practices deployed by lawyers (usually involved in a social struggle) as a means for advancing the aims of a social movement. A globally renowned example of cause lawyering is provided by the LGBTQ+ movement, which has achieved great success at the international level thanks to the progressive endeavors of both social mobilization and lawyers' action. The US mobilization revealed that "litigation pursued by cause lawyers and individuals became one way to develop input into the direction and goals of the larger movement" (Sarat and Scheingold 2006, 96).

A favorable political moment is an additional crucial resource that facilitates the achievement of a social movement goals. The concept of political opportunity has been used to express this requisite for obtaining legal change (McAdam 1982). Of course, from a social and political context, mobilizations are the best tactics to employ for advancing their aims. It should not be underestimated that social movement actors get experience by selecting the best conditions for them to receive maximum support to their cause. This implies that they acquire legal skills and opportunity schemes, not just concerning politics but also legal and judicial convenience.

> It is no accident that LGBT rights advocates first asserted claims to marriage equality in state courts. Viewing the federal judiciary as largely hostile and seeing the Supreme Court as an especially dangerous venue, they sought more hospitable locations (…). They selected venues with not only potentially supportive judges and doctrine, but also favorable conditions outside the courts. Advocates chose states where elite support existed for LGBT rights, legislative progress undermined arguments against marriage equality, public opinion was becoming increasingly favorable to relationship recognition, and the state constitution was difficult to amend. In other words, they viewed courts in a way that maps onto the political opportunity structure. (NeJaime 2013, 901)

It is often fundamental to count on agreeable juries, which might gradually facilitate a "disruption through court" (Friedman 1975), that is a change that occurs through decision-making without changing legal norms, but nevertheless enhancing an evolutionary interpretation. The Italian LGBTQ+ movement demonstrates this.

Moreover, this case is particularly interesting because it has questioned the interpretation of some Italian civil law norms instead of aiming at a constitutional reform. In fact, the Italian Constitution has never provided for an explicit prohibition of same sex marriage. According to a millenary tradition, the diversity of sex between spouses constitutes an indispensable, if not minimal, element with regard to the existence of the very legal institution. In Roman Law the reference is to a natural condition. Hence, gay marriage would not be invalid but more radically non-existent (lacking the ability to create any legal effect). However, in 2012 the Italian Court of Cassation expressed a different interpretation: a same sex marriage was considered to exist although there is no normative disposal in the Italian legal system which allows it to be recognized; thus, the marriage between homosexuals would not produce legal effects.

In fact, what prevents the transcription of the gay marriage contract abroad is its non-recognition as an act of marriage in the Italian legal system. There is no rule that refers explicitly to the impossibility of a conjugal relationship between homosexuals, just as there is no provision that imposes the diversity of sex as an essential requirement; it is the combined interpretation of articles contained in the Italian civil code that suggests that where a rite is described (two people formally declare that they want to be *husband* and *wife*), a ban should be applied (two people who cannot biologically define themselves as husband and wife cannot marry). Admittedly, the ban is neither in the Constitution nor in the civil code nor in the special laws. Being an interpretative issue, the Court of Cassation eventually employed an evolutionary criterion.

This goal was reached through a structured strategy implemented by a group of activist lawyers. Affermazione Civile ("Civil affirmation") is the name of the Italian campaign for the recognition of same-sex marriages. Its method is based on finding couples willing to request the publication of their marriage. According to the Italian Civil Code (art. 98), if the registrar does not consider the proceedings valid, (s)he will refuse the publication. But, in so doing, (s)he has to authorize her/his decision with a certificate to be delivered to the parties. They then have the right to resort to a tribunal. This is the strategy planned by a network of lawyers called Rete Lenford, which takes charge of the appeal. The path of service begins before the legal phase, with support and attention in the explanation of the strategy (Chiaramonte 2012). In Italy, in 2016 civil unions have been provided for by law but same-sex marriages have not been.

The Algerian case subverted the trial and strengthened the social movement while the LGBT litigation explicitly promoted the trial to advance its needs. Here we may see the old trend in which external forces are employed in order to obtain change and the current one in which law becomes the "internal" means to force the status quo towards change.

There are cases in which legal mobilization can still be seen as legal in the technical sense but at the same it goes beyond litigation. A unique example of a social movement which preferred legislative advocacy rather than resorting to litigation is the Italian movement for the commons, a collective mobilization comprised of both jurists and activists. The issue of common goods has been raised by many intellectuals at the international level (Dardot and Laval 2019), perhaps taking strong inspiration from the well-known article by Naomi Klein: *Reclaiming the commons* (2001). Six years later, in Italy a challenging

experience of comprehensive rethinking of property law has taken place. An innovative theoretical reflection got unexpectedly blended with a radical practice of instituting common goods from below (Spanò 2013).

In 2007, a Commission on the Public Goods was appointed by the Italian Ministry of Justice to partially reform the Civil Code. The Commission was composed of a dozen Italian jurists. The sessions to discuss the reform were held in the large hall of a theater (Teatro Valle, Rome) that was previously abandoned and then occupied by a collective that defined that space as a common good. This building will provide the space for a juridical experiment that exploits private law rules to account for the social function of a place now defined as opened to the community (Bailey and Mattei 2013).

Occupants themselves succeeded in transforming the occupation of the Teatro Valle into a private law foundation, a legal form preventing the theater from being the subject of official complaints. In this case, strategic litigation was employed too: a broad legal mobilization promoted a radical renewal of private property and not just a reform: here the project was to include the commons as a third category – "a non-proprietary ownership" (Napoli 2015) – beyond public and private sectors (Marella 2012).

As we have seen in the case of the movement for the commons, legal mobilization can occur beyond litigation, although the latter is a privileged field for seeing legal praxis at work. There is more: the judicial venue also shows new modes of collective "subjectivation", as we saw in the case of the Tumulti association constituted as civil party in the trial against TAP corporation. This way, as mentioned several times, legal mobilization could offer social groups which differ from movements an innovative new arena.

A recent article drawing from political sociology, socio-legal studies and political science proposes a convincing panorama of the fragmented literature on activist litigation (McCammon and McGrath 2015), thus offering a comprehensive overview of the issues at stake. Here, social movement litigation is considered the essential form of legal mobilization and the focus is on the judicial arena as the main stage of activists' legal practices. It investigates the causes and the outcomes of social movement litigation and wonders how and why social movements' actors decide to enter the legal field and engage in strategic litigation, as well as to what extent these choices may be considered successful. McCammon and McGrath go beyond litigation and identify a set of conditions that positively contribute to the legal engagement of activists: rights consciousness – which at first blush might appear as individual but is mainly seen as a collective attitude – organizational resources, political and legal opportunities. Regarding the outcomes of social movement litigation, they propose to shed light on the role of previous judicial decisions, judicial attitudes, the crucial role played by activist lawyers and the legal tactic selected by them, possibly in coordination with social movements' actors – with special attention for "strategically choosing legal arenas and cases", "strategic legal framing" and "mobilizing networks of support".

6. Open questions

It might sound contradictory, but in the face of a more popular and conflictual politics that is less organized – in the guise of an institutionalized form – novel uses of the law

and legal mobilization, features of activism not seen till the turn of the new millennium, have emerged.

One could again ask whether, given the current informal forms of social struggles, a "right consciousness" phase, prior to the legal mobilization, is needed, and whether this understanding would reproduce the age-old and ill-posed question: which came first, law or society? In the classical socio-legal interpretation, in order for individuals to legally mobilize, they must conceptualize their grievances as a violation of individual rights that can be remedied (Milner 1986, Merry 1990). Is this still the case?

Who's the subject of the potential legal mobilization? And what if an a priori political subject is not to be found? What is the potential of a technique of collective subjectivation through legal means? In that case, shouldn't the individual of rights then be thought of anew? Isn't it precisely the individual nature of rights that constitutes a problem? What if law were a potential tool for building new institutions of social cooperation?

Mobilization today shows eminently technical characteristics. It seems difficult to see a transformation of disputes in the version of the "classic" political trial. And not because political trials do not exist today (Chiaramonte 2019). On the contrary, they are multiplying (Fiorentino and Chiaramonte 2019). Rather, the space of politics and representation gives way to a mediation of another kind, that is, a legal mediation. But law – not to be confused with power – is an instituting weapon that can also serve to counterattack.

As in the cases analyzed, particularly the trial against TAP and the movement for the commons, legal imagination can go a long way and be radical, not simply defensive or conservative. The numerous climate actions advancing around the globe demonstrate how legal mobilization is now an indispensable element of collective practices (Chiaramonte 2020) and diffuse interests of non-entitled collectives are emerging with their radical potency (Spanò 2020).

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