

## CHAPTER 8



# The Rule of Which Law?

## The Use of Legal Language in the Rhetoric of the *anni di piombo*\*

*Eleanor Spaventa*

In this chapter, I will focus on an instrumental use of certain key legal concepts during the early stage of left-wing terrorist activity in the 1970s, in order to highlight how legal language is appropriated by all the main actors: the state, the terrorists and the victims themselves. These three main actors all do this in different ways, but to achieve the same end: they use legal concepts to transform subjective statements into objective, and even moral, truths. In this sense, the use of legal rhetoric can be seen both as the meeting ground and as the ground where a symbolic battle is fought. The way these three actors use legal language reflect some of the tensions which profoundly divided Italy during the *anni di piombo*.

The entire debate is always tainted by legal rhetoric: the state is at once created by, and creator of, law; the state cannot exist without the law, and the law cannot exist without the state — whatever form each of those entities takes. It is therefore natural that the attack on the state should be perceived as an attack against the law, specifically *lo stato di diritto* (the ‘rule of law’).<sup>1</sup> Needless to say, any state, any organization, would have difficulties recognizing as an interlocutor someone who is not playing according to the rules of the game, of its game; and the Italian state in the 1970s relied heavily on legal notions, as well as political ones, to justify the response given to those who placed themselves outside its boundaries, be those moral or legal. This instrumental use of legal rhetoric is not exclusive to the state: the Brigate Rosse (BR), as well as at least some of their prisoners (first Mario Sossi and later Aldo Moro), also used legal language to reinforce their claims. Those claims cannot, however, by their very definition, be reconciled. Political tension is therefore replayed as well as exemplified in the clash of legal rhetoric. It is for this reason that an investigation into the way legal rhetoric is appropriated by different actors might be useful, although of course such an investigation also begs the broader, and unanswerable, question as to whether the law can ever be perceived in an apolitical fashion (which of course is not to say that the law cannot be enforced in a non-political fashion). What is obvious, and to a certain extent accepted, is that law plays a predominant role both in the fight against the state, and in the fight against terror; the law plays a predominant part in providing some

sort of justification for the actions taken, be they subversive or defensive. Thus the law is used to provide some sort of normative justification for a political action, in the attempt to catapult the debate from a subjective moral ground to an objectified legal ground. In other words, legal rhetoric is used as an instrument to demonstrate, support, and universalize the rightness of one's action beyond the realm of political debate, which necessarily always stems from a partisan perspective where the result follows only if the premise is accepted.

In order to illustrate these points, I will start by analysing the kidnapping of Judge Mario Sossi through his published diary,<sup>2</sup> and then turn to the rhetoric used by the terrorists and the state. It is important to stress that Sossi's diary was written between 1978 and 1979, four years after the kidnapping took place and, not by coincidence, in the aftermath of the Moro case. Thus, Sossi's account has a narrative significance, subjective rather than objective in nature. And, as with any subjective account it is tainted by both a political stand and a possible re-interpretation of what happened; and yet, such re-interpretation is by no means hidden: Sossi's embellishments of his own character as well as his political views appear more than evident throughout the book.

### The Sossi *affaire*: instrumental use of language by the victim

Judge Mario Sossi, kidnapped in April 1974, was targeted by the BR for two main reasons. More generally, the BR perceived him to be a reactionary judge who instrumentally used the legal system to prosecute left-wing activists, including students and actors, amongst them the future Nobel Prize winner Dario Fo. But, more importantly, Sossi had been targeted because of his role as public prosecutor in the trial of the Gruppo XXII Ottobre, a terrorist organization of communist inspiration. During the course of one '*esproprio proletario*' (the jargon term for a robbery in the service of the cause) a member of the group, Mario Rossi, shot and killed a delivery man. By pure chance, the shooting was photographed by a student who was trying out his new camera and as a result, the group, including Rossi, was prosecuted and convicted. Judge Sossi, acting as prosecutor, demanded that the maximum sentence be administered and, consequently, Mario Rossi was given to a life sentence.

The kidnapping of Judge Sossi represented an escalation in the level of seriousness of BR activities. Amongst the captors was '*il laureato*' (as Sossi called him), Alberto Franceschini, one of the historical leaders of the BR. Judge Sossi's kidnapping bears some resemblance to the Moro kidnapping. As in that case, Sossi was tried by the BR; and as in that case, the state adopted the '*linea della fermezza*', the '*hard line*' according to which it would refuse to enter into any negotiation with the terrorists, even going as far as to try to impose a media blackout. But unlike the Moro case, the Sossi kidnapping did not lead to the murder of Judge Sossi, who was freed after thirty-five days of captivity. What is particularly interesting about the liberation of Judge Sossi is the way it was achieved: Sossi was freed thanks to the intervention of the Genoa Corte d'Assise d'Appello;<sup>3</sup> the law was manipulated to achieve a result that could not be achieved through political discourse.

### Trials of victims and perpetrators

After the BR conducted their trial of Judge Sossi they demanded the liberation of eight members of the Gruppo XXII Ottobre in exchange for his life. According to his diary, it was when the BR made this demand that Sossi truly began to despair for his life. Sossi knew all too well that the state would not negotiate with the terrorists and would refuse an exchange of prisoners. For this reason, according to his diary, Sossi started thinking about ways in which he could address his situation. As we shall see, Sossi achieves his liberation by means of a skilful use of language: he starts from a moral premise, only to arrive at a legal imperative, and to eventually find in a perverse application of the law the solution to his problems. This dynamic can be seen in a message to the newspapers written in the early stages of his captivity:

Lo Stato [...] ha il *dovere morale* di tutelare me, e con me i miei cari, riparando così almeno in parte alle proprie gravi omissioni. La legge prevede la possibilità di attuare, oggi per ieri, tale doverosa tutela. Non intendo pagare gli altrui errori. Lo Stato, che ho sempre servito, ora, tutelando me, tutela se stesso e *adempie a un preciso obbligo giuridico e morale*.<sup>4</sup>

[The State has the *moral duty* to care for me, and by caring for me to care for my family, so as to, at least in part, remedy its own serious omissions. The law provides for the possibility to comply, nunc pro tunc, with that duty of care. The State, which I have always served, by now taking care of me, takes care of itself and complies with a specific *legal and moral duty*.]

As can be seen, starting from a moral premise Sossi comes to imply a legal duty of the state. In order to strengthen his request, he transforms a moral duty into a legal duty and, by doing so, he suggests that there is but one solution to his case, which is not open to discussion. Sossi in effect rebuts the premise according to which, if a legal duty exists, then the state cannot but abide by that duty. The hard line on non-negotiation espoused by the state was justified by the premise that any negotiation would have weakened the state and compromised the rule of law, *lo stato di diritto*, upon which the state is founded. The very idea of the rule of law, even in its most minimal definition, is that all are subject to the law: if the state had accepted negotiation with the terrorists, then it would have allowed for a fracture in its own system by exempting some people (the convicted terrorists of the Gruppo XXII Ottobre) from the reach of the law. However, in his letter to the newspaper Sossi rebuts this presumption. If the state has a legal duty to act then not to act would in itself be a breach of the rule of law, as all are bound by law — and especially the state. At this stage Sossi had not yet devised the plan that would eventually lead to his liberation. He simply thought that the appropriate course of action was to proceed to a ‘colossale retata’, a mass prosecution against left-wing sympathizers so that those people could be used as a bargaining tool to free him and save his life.

However, he soon realized that the state, in the form of the political establishment, was unwilling to negotiate under any circumstances with the terrorists. According to his diary, it is when he was shown the newspapers that he realized that he needed to find an alternative solution:

Come posso trovare una soluzione che, *senza compromettere il prestigio dello Stato*, induca i brigatisti a lasciarmi libero? Una soluzione della quale, ‘dopo’, io non debba pentirmi? [...] Da questo momento mi mostrerò con loro estremamente polemico nei confronti dell’esecutivo, dirò loro che hanno ragione, quando parlano male [del ministro dell’interno] Taviani, gli suggerirò di *lasciar perdere il governo e di trattare solo con la magistratura*. O meglio: che scelgano loro con chi trattare, ma operino, preventivamente, una *netta distinzione tra i due poteri dello Stato*.<sup>5</sup>

[How can I find a solution which, *without compromising the State’s prestige*, will persuade the terrorists to set me free? A solution which I shall not, ‘afterwards’, regret? [...] From now on I will appear extremely polemical to them [the terrorists] with regard to the executive; I will tell them that they are right when they insult Taviani [the Home Secretary]; I will suggest that *they forget about the State and negotiate only with the judiciary*. Or better: let them choose with whom to negotiate, but they should first draw *a firm distinction between the two powers of the State*.]

He then talked to Franceschini about his idea. This is how Sossi recalls his dialogue with Franceschini:

Non è con il governo che dovete trattare, ma solo con la magistratura. E’ solo dalla magistratura che potete sperare di ottenere qualcosa. Dovete fare una scelta precisa. Se decidete di trattare con la magistratura, non potete più trattare con il potere politico, dovete *escluderlo*.<sup>6</sup>

[It is not with the Government that you should negotiate, but only with the judiciary. It is only from the judiciary that you can hope to obtain something. You have to make a precise choice. If you decide to negotiate with the judiciary, you can negotiate no longer with the political power, you have to *exclude it*.]

As we can see, there is a change of emphasis between the way Sossi first recalls his idea and the way he then recalls his dialogue with Franceschini, just a few sentences afterwards. In the first quotation his wording seems to be almost drawn from a constitutional textbook (‘che scelgano loro con chi trattare, ma operino, preventivamente, una *netta distinzione tra i due poteri dello Stato*’), in the sense of outlining the separation between judiciary and executive which lies at the heart of many democracies, and of the Italian constitutional system. However, in the second quote he *counterposes* the two powers, he asks Franceschini to make a choice, an *either/or*, as if these two powers were not complementing each other as separate powers of a unitary system, but rather as if they were opposing each other, as if they were powers in conflict with one another. The terrorists can *either* enter into a dialogue with the judiciary, *or* enter into an (unsuccessful) dialogue with the political powers — they cannot negotiate with both.

The way Sossi recalls both his thoughts and his conversation with Franceschini might well not be accurate. However, that fact is not particularly relevant in analyzing the rhetoric used by the judge, by an emanation of the state. Sossi is suggesting the use of *one* of the powers of the state in direct opposition to *another* power of the state. In doing so he is using legal rhetoric *against* the state, fragmenting that unity which is crucial to any constitutional understanding of the state itself.

Sossi then suggests the instrumental use of the judiciary to achieve his freedom.

In a dialogue with Franceschini he reasons as follows: the Gruppo XXII Ottobre had been convicted following a ruling of the Corte d'Assise, upheld by the Genoa Corte d'Assise d'Appello; however, that ruling was not yet definitive since an appeal was pending before the Corte di Cassazione.<sup>7</sup> Sossi then manipulates the situation to his advantage by suggesting that the Corte d'Assise d'Appello was the body responsible for the terrorists' captivity since it, not the Government, had upheld the ruling of the Corte d'Assise. Therefore, he argued, it was not for the executive to release the terrorists, but for the Corte d'Assise d'Appello. For this reason, the terrorists should interact only with the judiciary, and through their lawyers, present a plea for conditional release of the detainees, relying on the provisions of the so-called 'legge Valpreda'.<sup>8</sup>

The 'Valpreda law' was a piece of legislation which had been adopted following the arrest of Pietro Valpreda, an anarchist who had been investigated and was awaiting trial for the Piazza Fontana massacre. Even before his trial, it became evident that he was innocent. However, according to the law as it stood he could not be released pending trial, despite the fact that sufficient evidence had been gathered to indicate that he had been wrongly charged. To remedy this state of affairs, parliament enacted legislation providing for the possibility of provisional release pending trial.<sup>9</sup> Sossi thus suggested that the terrorists rely on the Valpreda legislation in order to obtain provisional release, since that legislation provided for the possibility of release not only pending trial, but also pending 'final conviction'. As the case of the Gruppo XXII Ottobre was pending before the Corte di Cassazione, the Valpreda law was applicable. The terrorists' lawyers never put forward such a plea; however, Sossi's family decided to propose the plea themselves.

As a result, the Corte d'Assise d'Appello ordered the provisional release of the detainees;<sup>10</sup> such a release was, however, conditional upon Sossi's own release. It was obvious, even for those less accustomed to the nuances of the criminal legal system, that an *ordinanza* of this type could not be in conformity with legislation: the application of criminal law cannot be conditional upon external and unrelated circumstances. And it is likely that the court judges were fully aware that the *ordinanza* would and could not have taken effect. What is relevant for our purposes is that the Corte d'Assise d'Appello decided to use the law in an instrumental manner in order to achieve a result that should have been achieved through either political or legislative means.

The Corte d'Assise d'Appello was reacting to state inaction. Once again, a moral standpoint — that everything should be done to spare an innocent life — is transposed into legal discourse, in order to give it not so much a stronger moral basis, but rather the possibility of concrete execution. Indeed, it could be argued that, by allowing for a purely instrumental use of the law, the Court acted in clear conflict with the rule of law. It is not surprising then that the Corte di Cassazione should declare the *ordinanza* a 'legally non-existent' act, because 'abnorme', *ultra vires*, clearly beyond the jurisdiction of the Court of Appeal.<sup>11</sup> The language used by the Corte di Cassazione deserves some attention. The possibility that an act could be declared legally non-existent had been put forward by scholars; however, this was, as far as I am aware, the first time that such a doctrine was endorsed

by the Corte di Cassazione, and the very use of this doctrine assumes a different significance if seen from the viewpoint of rhetoric and narrative. If the *ordinanza* of the Corte di Appello had never existed, then the fracture created by such an act could easily be recomposed, and the separation of powers (powers held separate, i.e., in a *unitary* state) could be reinstated. If the act was ‘non-existent’, then the fracture never occurred.

The Sossi case is a very interesting illustration of the use of legal rhetoric and language by the state, in the form of the judiciary (both in the person of Sossi and of the Corte d’Assise d’Appello), *against* the state. Furthermore, Judge Sossi, a person who, in his role, should have been one of the main guarantors of the state’s legitimacy, helps the terrorists in articulating their standpoint against the state. It is to the terrorists’ rhetoric that we shall now turn our attention.

### Terrorist language

In the Sossi case we have seen how legal language was used instrumentally *against* the state; in the case of the terrorists, on the other hand, the use of legal language highlights the tensions inherent in conducting an armed revolution, the aim of which is to subvert the state and its core values. Some of the values to be subverted, and especially the idea of rule of law, due process and so on, are also values which are very much part of the terrorists’ own heritage, and which therefore unsurprisingly tend to re-emerge in the terrorists’ own rhetoric. The terrorists, those who might have been expected to disregard any legal discourse, as the legal system cannot but be identified with the state, adopt legal language to ground themselves in the context in which they are operating. In this way, legal rhetoric might be used — even if not entirely consciously — in an attempt to provide some legitimacy, legitimacy which might be gained by adopting categories which are heritage of the system that the terrorists aim to displace and destroy. This very tension has been acknowledged by Mario Moretti in his interview with Rossana Rossanda and Carla Mosca.<sup>12</sup> At a certain stage, the interviewers point out, that ‘ti opponi allo stato con i suoi mezzi, quelli che denunci. Gli somigli, l’ostaggio ridotto a niente, la ‘prigione’ del popolo, gli interrogatori’ [You oppose the state using its own means, those same means that you criticise. You resemble it [the State], the hostage reduced to a non-person, the “people’s prison”, the interrogations.]. To which Moretti answers:

Eh sì, questa è la terminologia che usiamo. Delle BR accetto tutto, anche quel che critico, nel bene come nel male, ma quel linguaggio no. ‘Nomina sunt consequentia rerum’, dice il filosofo, ma quelle parole *non ci esprimono*, ci *falsificano*. Non siamo quello. Le abbiamo mutate dai codici *ma non indicano le stesse cose*. [...] Prigione del popolo, interrogatorio, processo non esprimono una pratica sociale decente. Ma non abbiamo altri mezzi, né *altre parole*.<sup>13</sup>

[Yes, this is the terminology we use. Of the BR I accept everything, the good and the bad things, and even those things that I criticise, but I do not accept that language. *Nomina sunt consequentia rerum*, as the philosopher says, but those words do not represent us, they falsify us. We are not that. We have taken those words from the [legal] code, but *they do not indicate the same things*. People’s prison, interrogation, trial do not express an adequate social practice. But we have no other means, *no other words*.]

The best official example of this tension between the use of legal rhetoric and the aims of the *lotta armata*, is the fifth communication released by the BR during the Sossi kidnap, which was probably composed in direct response to Sossi's discussions with Franceschini. The communication started with an attack on the then Home Secretary, Taviani, linking him to arms trafficking (which Sossi was investigating at the time of his kidnap), which ended thus:

NON TRATTIAMO CON I DELINQUENTI.

È il momento in cui ciascuno si deve assumere le sue responsabilità. Spetta alla magistratura concedere la libertà provvisoria agli otto compagni del 'XXII Ottobre'. Nella fase attuale è la Corte di Appello di Genova che deve decidere. In uno 'stato di diritto', fondato sulla separazione dei poteri, il governo non può minimamente interferire.

Spetta alla magistratura decidere se rendersi complice o meno della volontà criminale del ministro dell'interno.<sup>14</sup>

[WE WILL NOT NEGOTIATE WITH CRIMINALS.

Now is the time when everyone has to accept their own responsibilities. It is for the *judiciary* to grant provisional freedom to the comrades of 'XXII Ottobre'. At this time, it is the Court of Appeal which has to decide. In a State governed by the 'rule of law', founded upon the separation of powers, the executive cannot interfere.

It is for the judiciary to decide whether or not to make themselves accomplices to the criminal will of the Home Secretary.]

Two things are worth pointing out in relation to this *comunicato*. First of all — and this appears clearly from the text — the BR rely on a notion, the rule of law, which characterizes the very system they want to abolish. In other words, they use a legal discourse both substantially and formally: substantially when they demand judicial rather than political action; formally, in relying on the rule of law to justify such a request. It is *for the judiciary*, they say, and only the judiciary, to decide whether the prisoners should be freed. The executive cannot interfere — it would be *illegal*, they almost say, for the government to interfere.

Secondly, it is clear that the BR are not only adopting and using Sossi's trick to end the deadlock, but also his more personal views. The reference to the 'volontà criminale' of the Home Secretary is in this respect interesting. What are the BR referring to? Despite appearances, they cannot be referring to the decision to imprison the members of the Gruppo XXII Ottobre as that, of course, was the outcome of a judicial trial. Therefore they must be referring to the Home Secretary's decision, which was shared also by the executive and by Parliament (the legislature), to refuse any form of dialogue with the captors.

But even leaving aside the Sossi case, legal language and rhetoric influence, and are incorporated into, the terrorists' own rhetoric. Consider their obsession with trying their prisoners, with the *processo* that inevitably and predictably results in the *condanna*. Why use this sort of legal discourse, when Moretti himself admits that should they have succeeded in their project, should have they succeeded in overthrowing the state, then in their system imprisonment without trial would have been justified? Why this inconsistency? It seems clear that there is a desire to be recognized as fair in the expression of their arbitrium. But it is a legal rhetoric, a legal



language to which they resort in order to do so: the state's language. Or consider the terrorists' statements to the effect that they considered themselves bound by the Geneva Convention on prisoners of war when treating their hostages;<sup>15</sup> and that they wanted to be so treated before the Italian courts. Here we see the use of a legal discourse, however incorrect, for the pursuit of a political aim. The terrorists would have been worse off had Italy decided to apply the Geneva Convention rather than ordinary criminal law, since the former is less generous than the latter. But the Geneva Convention applies not only to traditional inter-state conflicts, but also to 'armed conflicts not of an international character'.<sup>16</sup> And the application of the Geneva Convention would have meant the very recognition of the 'state of internal conflict' which was sought by the terrorists.

### The use of legal rhetoric by the state

In considering the use of legal rhetoric by the state we enter into a territory where discussion within legal scholarship has been copious, and therefore I shall be brief, limiting myself to explaining the terms of the debate, and to providing a few examples taken from the *anni di piombo*. It is well known, and it has been mentioned above, that in dealing with both the Sossi and the Moro kidnappings, the state adopted a 'linea della fermezza', a firm 'no negotiation' approach. In defending this view, political power relied heavily on the idea of rule of law or *stato di diritto*, and references to the rule of law are abundant in narrative about the *anni di piombo*. It is therefore worth looking more closely at what rule of law actually means.

The rule of law is one of the most difficult concepts in legal theory. However we can identify two meanings which, broadly speaking, can be given to this elusive concept. The narrower and simplistic definition of rule of law is that 'everyone is bound by law', including the state and all its emanations.<sup>17</sup> In this sense the 'law rules' and the state is founded upon the principle of legality. Here, the rule of law acts as a limit upon the discretion of the ruling class, be this a Parliamentary legislature or even a tyrant, in the sense of imposing upon everyone, even on the ruling class, the duty to respect the law. This *formal* view, however, tells us nothing about the *content* of legislation. For example, dictatorships often abide by the rule of law in its formal sense — all that the dictator has to do is to change the legislation.

However, when we refer to the rule of law, *lo stato di diritto*, in common discourse, we do so in a prescriptive, rather than just a formalistic sense. In other words we point at some quality that the legislation must possess for it to be consistent with the rule of law. In this sense, the rule of law imposes a broader constraint on the legislature: the legislation must not only be adopted following the appropriate procedures, but it must also possess some given qualities, so that it is not perceived as being arbitrary, so that it is consistent with our understanding of fairness. For instance, legislation in breach of the principle of equality would, in contemporary liberal democracies, be seen as inconsistent with the rule of law. And here the problems start, since those inherent qualities which are considered pre-conditions for the rule to be consistent with a substantive idea of rule of law must be identified. In those states with a written constitution this is done to a certain extent within the constitution itself,



which identifies the basic values upon which the state is founded. However, the constitution in itself does not solve the problem of which qualities must be possessed by the legislation in order to comply with a substantive idea of rule of law, since the Constitution itself is a positive act, a legislative act which is open to change and interpretation. It is then a matter of debate whether the very notion of the rule of law, in its qualitative meaning, can ever be apolitical, if we use the term apolitical loosely to indicate the result of a wider debate and discourse which is occurring in a given society. In other words, it is debatable whether there can be an absolute independent moral quality with which legislation must conform.

The elusiveness of the concept of the rule of law and the tension between the two meanings becomes visible in relation to the debate about terrorism, be it the debate about the *anni di piombo* or the debate about religious terrorism which has characterized the political scene in recent years. In relation to the *anni di piombo*, the Italian state relied on the rule of law to justify its decision not to negotiate with the terrorists: all are bound by law and there is no possibility of suspending criminal law in special cases, as to do so would effectively mean that the law applies to *nearly* everyone but not to all. Therefore legal rhetoric is used here as a shield to provide a justification for what is, at the end of the day, a *political* decision. The use of legal concepts, of a formal notion of rule of law, catapults a political decision into an ostensibly objective framework, meaning that it cannot be counteracted with moral or political arguments. A very good example of this instrumental use of law to avoid adopting a political/moral approach is again to be found in relation to the Sossi case. The wife of Mario Sossi, clearly worried for her husband's life, pleaded unsuccessfully with several members of the Government, as well as with the President of the Republic. Eventually, she wrote to Amintore Fanfani, then President of the Democrazia Cristiana (DC). Her telegram, published in the newspapers, was sent just few days before the referendum on the abolition of the divorce legislation. In her message Grazia Sossi wrote:

Nel momento in cui vostra eccellenza è massimamente impegnata nella battaglia per salvare l'unità della famiglia, la prego caldamente di intervenire per compiere ogni tentativo affinché la mia famiglia non venga distrutta.<sup>18</sup>

[At a time when you, Sir, are heavily engaged in the battle to safeguard the unity of the family, I beg you to intervene to make all possible attempts to ensure that my family is not destroyed.]

The DC's fight against divorce then becomes a useful weapon in the Sossi family's hands. Fanfani, in his speech in 'defence' of the family could therefore not ignore Grazia Sossi's plea; he stated:

Occorre cercare nelle leggi la soluzione per salvare Sossi. [...] la difesa completa della famiglia richiede la tutela più severa e tempestiva della sicurezza pubblica. [...] Anche nel caso che dilania una famiglia genovese, offende la magistratura, *irride la legge*, provoca lo Stato democratico, la via d'uscita resta *quella del rispetto delle leggi*, attingendo a *tutto ciò che possono dare* per restituire la libertà a un cittadino [...], per non aggiungere un'altra tappa alla strada pericolosa sulla quale ci hanno inoltrato *troppe norme permissive, troppe facili interpretazioni di esse, troppe dimenticanze dei doveri* che sempre accompagnano i diritti.<sup>19</sup>

[We need to find a legal solution to save Sossi. The complete defence of the family requires the strictest and speediest safeguard from public security. Even in the context of events that are devastating a family from Genoa, events that offend the judiciary, *jeer at the law*, and insult the democratic state, the means of exit remains *that of respect of the law*. One must draw from *all that the law can do* to return his freedom to a citizen; one must avoid taking even a single further step along the dangerous path of *permissive regulation and too liberal interpretation of those regulations*, the path of forgetting that duties always accompany rights.]

Fanfani's speech is interesting not only from a political viewpoint. In his speech he is relying on a legal argument to defeat the other legal argument upon which the political establishment has relied in order to justify inaction. If the political establishment relied on legal notions, such as the rule of law, to justify what was, essentially, a political decision, Fanfani advocated the use of the law to save Sossi's life, in defiance of previous statements. But, this instrumental use of legal language by experienced politicians is not in itself surprising. What is interesting about Fanfani's speech is the inherent conflict and tension in his use of legal rhetoric; because as Fanfani is advocating using the law to free Judge Sossi, he is also advocating a tougher use of the law against terrorists and, most likely, against their sympathizers. So on the one hand Fanfani advocated what could be termed a twisted, if not altogether illegal, use of the law, i.e., a very lax interpretation of the relevant provisions which clearly went against the very spirit of such legislation; on the other hand, he also advocated a very strict interpretation of existing legislation against the perpetrators. So legal rhetoric is seen to suit any purpose. Using legal language everything and its opposite can be said, even in the same sentence, as if to suggest that the law were in the eye of the beholder.

At the same time as the state was heavily relying on the concept of the rule of law to justify its unwillingness to negotiate with the terrorists, it also enacted a series of special measures, starting with the 'legge Reale', which repealed the Valpreda law and extended the powers of the police, and then proceeded to the anti-terrorism legislation enacted in 1978. In these cases the state relies on the defence of the democratic state as a justification for emergency legislation; in doing so, however, the state embraces a very limited, formalistic view of the rule of law, which deprives the expression of any meaningful significance.

So in the state-led debate about terrorism, be it defensive (i.e. no negotiation with the terrorists) or offensive (i.e., when the state enacts special legislation to counteract the real or perceived terrorist threat), the idea of rule of law is used also to avoid a more wide-ranging moral and political debate. In the former case, that debate is avoided by simply relying on the legal notion to justify inaction; in the latter case, by relying on the need to defend the state from a threat by disposing of the very values which are at the core of a substantive, and therefore meaningful, use of the concept of the rule of law.

I would like to conclude with a quotation from the first letter sent by Aldo Moro to Francesco Cossiga, which serves as a good example of those tensions:

la dottrina per la quale il rapimento non deve recare vantaggi [for the kid-nappers], discutibile già nei casi comuni, dove il danno del rapito è estremamente

probabile, non regge in circostanze politiche, dove si provocano danni sicuri e incalcolabili non solo alla persona, ma allo Stato. Il sacrificio degli innocenti in nome di un *astratto principio di legalità*, mentre un indiscutibile stato di necessità dovrebbe indurre a salvarli, è inammissibile.<sup>20</sup>

[The doctrine according to which kidnapping should not lead to any advantages [for the hostage takers] — debatable even in relation to ordinary cases where injury to the kidnapped person is very likely — does not hold in political circumstances. In this case the damage, certain and incommensurable, is inflicted not only upon the individual, but also upon the State. The sacrifice of an innocent in the name of an *abstract principle of legality*, when an unquestionable state of necessity should lead to saving that individual, is inadmissible.]

In the *anni di piombo* legal rhetoric is appropriated by all the main actors, to achieve different and contrasting goals. The kidnapped person, the terrorists and the state all seem to meet in a semantic market place where meaning is negotiated and reinterpreted by the different actors. Legal rhetoric, and the manner of its use, can then be seen as a metaphor for the tensions and the divisions that characterize the broader political and moral discourse in those years.

\* I am grateful to Andrea Biondi for his valuable comments on an earlier version of this essay.

## Notes to Chapter 8

1. 'Stato di diritto' is usually equated with 'rule of law'; the two concepts are not identical (which is natural given that the British legal tradition is radically different from the continental tradition) but, for our purposes at any rate, *stato di diritto* can be translated in such a fashion. See *Lo Stato di Diritto: storia, teoria, critica*, ed. by P. Costa and D. Zolo (Milan: Feltrinelli, 2003), in particular D. Zolo, 'Teoria e Critica dello Stato di Diritto', pp. 17–88; P. Craig, 'Formal and Substantive Conceptions of the Rule of Law', *Public Law*, Autumn (1997), 467–87.
2. M. Sossi, *Nella prigione delle BR*, 5th edn (Milan: Cibra, 2004).
3. The Italian criminal justice system has three levels of trial courts: the Corte d'Assise is the first, the verdicts of which can be overturned by the second level Corte d'Assise d'Appello. The Corte Suprema di Cassazione is one of two forums of last resort (the Corte Costituzionale being the court of last resort with respect to the constitutionality of laws).
4. Sossi, p. 139; italics mine. I have provided translations of Italian quotations for the benefit of colleagues in the field of legal studies.
5. Ibid. p. 146; italics mine.
6. Ibid.
7. See note 3 for a summary explanation of the Italian court system.
8. Legge n. 773, 15 December 1972.
9. It is interesting to note how this legislation has been criticized because of its *ad hoc* nature: it is not possible in a state governed by the rule of law to change the rules of the game to serve a particular purpose. And in some circles a parallel has been drawn between the Valpreda law and the *ad hoc* laws enacted by the Berlusconi Government.
10. Ordinanza della Corte di Assise di Appello di Genova, 20 May 1974, in Sossi, p. 228; and also in footnote to Corte di Cassazione, Ordinanza 27 Maggio 1974, *Il Foro Italiano*, xcvi, part II-19, p. 257.
11. Corte di Cassazione, Ordinanza 27 Maggio 1974, p. 257.
12. Mario Moretti, C. Mosca and R. Rossanda, *Brigate Rosse: una storia italiana*, 3rd edn (Milan: Baldini e Castoldi, 2004).
13. Ibid., p. 67.

14. Sossi, p. 226; emphasis in the text.
15. 'Geneva Convention Relative to the Treatment of Prisoners of War', available at <<http://www.unhchr.ch/html/menu3/b/91.htm>> [accessed 1 June 2008]. Note that the Geneva Convention prohibits the taking of hostages.
16. Cf. Article 3, Geneva Convention.
17. See for example A. V. Dicey, *Introduction to the Law of the Constitution* (1885); the formal view of the rule of law is now not as simplistic as what is outlined above, and even in its formal meaning some substantive concepts are deemed to be essential for legislation to comply with the rule of law (e.g. equality and legal certainty). See J. Raz, 'The Rule of Law and its Virtue', *Law Quarterly Review*, 93 (1977), 195–211.
18. Sossi, p. 143.
19. Ibid., p. 240, note 20.
20. A. Moro, 'Lettera a Cossiga', in G. Bocca, *Moro, una tragedia italiana* (Milan: Bompiani, 1978), p. 41. This letter has been at the centre of a heated debate, in particular as to the sentence 'mi trovo sotto un dominio pieno ed incontrollato' [I find myself subject to a total and uncontained control], which led some, especially those in power, to argue that Moro's letter was dictated by his captors and could not be ascribed to him. Regardless of the position taken on this matter, I believe the language to be a further confirmation of the tensions in the use of legal rhetoric highlighted in this essay.