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UNDECIDABILITIES AND LAW

THE COIMBRA JOURNAL FOR LEGAL STUDIES

Justice as Translation and Counter-storytelling

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Justice as Translation and Counter-storytelling

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Undecidabilities and Law – The Coimbra Journal for Legal Studies (ULCJ)
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In a time highlighted by the quest for the Master Algorithm, several major juridically relevant societal problems resist significantly the predetermination of a unique solution and open a huge spectrum of perspectives and operatories. The title Undecidabilities suggests directly this resistance (as we know, in computation complexity theory, an undecidable problem is the one for which "it is proved to be impossible to construct an algorithm to a correct yes-or-no answer"!), whilst simultaneously considering the permanent renovation of the questions and the plurality of answers which those problems allow, which means considering the instability of cultural and linguistic contexts (justifying a permanent attention to differences, if not différances, as well as to authentic "clauses of nonclausure").

Each volume of our Journal will be dedicated to one of these societal problems and this context of resistance to unique languages and solutions, seriously taken in a reflective horizon that crosses dogmatic and meta-dogmatic legal discourses with the challenges of extra-legal perspectives and approaches.

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Editorial

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Editorial

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ABSTRACT

This editorial identifies the thematic core of the third volume of Undecidabilities and Law, which, concerning the challenges (and claims) of juridically relevant Justice, confronts two different (irreducible) assimilation modes: translation and counter-storytelling. It also considers the specificity of this volume, which, under the sign of exceptionality, departs from some of the rules that support the other volumes.

KEYWORDS

Narrative, paradigm of translation, tertium comparationis, marginalised identities, community-building counter-storytelling

The third volume of Undecidabilities and Law "takes place" under the sign of exception, an exception that we believe is nevertheless justified and productive. For the first time, we have a special issue based on a colloquium (Justice as Translation and Counter-storytelling, Coimbra, May 26th to 28th 2022[1]), which is thus illuminated by the precious and unrepeatable moment

[1] This Colloquium was jointly organized by UCILeR (Instituto Jurídico da Faculdade de Direito da Universidade de Coimbra—University of Coimbra Institute for Legal Research) , ISLL (Italian Society for Law and Literature) and ATFD (Associação Portuguesa de Teoria do Direito, Filosofia do Direito e Filosofia Social, the Portuguese section of IVR). The scientific and Organizational Committee included Carla Faralli, Maria Paola Mittica, Alessandro Serpe, J M Aroso Linhares, Inês Godinho, Ana Margarida Gaudêncio, Luís Meneses do Vale and Brisa Paim Duarte. See https://www.uc.pt/en/fduc/university-of-coimbra-institute-for-legal-research-uciler/agenda-ij/justice-as-translation-and-counter-storytelling/

that this meeting allowed — even if the final outcome is intended to be less a faithful reconstruction of what happened (of what was then effectively said and discussed) than the testimony of the dialogue and intertwined research that its unforgettable occasio set in motion (and that the following rewriting of the chapters corroborates). It is the strength of this very special context (or succession of contexts) that justifies, for example, maintaining in its entirety the moving intervention with which James Boyd White, speaking albeit remotely from the other margin of the Atlantic, privileged us at the opening of this meeting (see, infra, Introductory Note). And it is also the same felicitous irresistible strength that (making an exception to our editorial practices and conventions) legitimizes that, in the proposed sequence of chapters, we not only combine and superimpose distinct registers and filters (interweaving invited keynote speeches and selected reviewed call-answers), but also and very especially welcome, with the plurality of unmistakable voices, an effective plurality of linguistic expressions (without daring the betrayal with which translations always wound us). Could it be otherwise (with regard respectively to French and Italian) when the interlocutors involved are called François Ost and Carla Faralli? And when the researched thematic core, whilst referring to the (specifically juridical) claims of Justice, is composed of a stimulating counterpoint between translation and counter-storytelling?

In a well-known passage from The Narrative Paradigm, Walter Fisher actually argues that "narrative rationality", since it "celebrates human beings" as "storytellers", should be treated as an "attempt to recapture Aristotle's concept of phronesis". It is this central topos in the contemporary rehabilitation of practical thinking (projected in Law's specific practical world) that our Colloquium and our special issue claim to explore, whilst paying attention to the plurality of approaches it allows. The anticipated counterpoint does not actually do more than distinguishing between two polarized assimilation modes.

1) On one hand we have the so-called paradigm of translation, not only in the general version that we owe to MacIntyre's communitarian narrativism — exploring the possibilities of dialogue between traditions (notwithstanding the impossibility of an equidistant tertium comparationis) — but also in the specific projections that James Boyd White (justice as translation) and François Ost (le droit comme traduction) exemplarily open: the first highlighting a kind of a permanent movement (from ordinary language to

legal language, and from legal language back to ordinary language) —whilst exploring narrative as the archetypal form of praxis and practical thinking and whilst conceiving of Law as "a set of occasions and opportunities for the creation of meaning" ("a rather fragile piece of our culture, requiring those who live with it to remake it constantly, over and over") —, the second autonomizing three indispensable thematic cores and the exercises in translation that they demand, namely, the one which is required by the plural network of (national and international, state and non-state) legal orders, the one which the judge's modus operandi (interconnecting the world of practical controversies and legal materials) manifests and, last but not least, the one which this same judge develops whilst assuming his/her role as third ("le tiers qui triangule le différend opposant les parties [et qui traduit] (…) leurs discours dans le langage de la loi commune") — without forgetting that this thirdness (also as a fonction tièrce "internalized by legal subjects") is precisely the feature which distinguishes Law, its discourses and practices (Le droit ou l'empire du tiers).

2) On the other hand, we have the blossoming of a wide range of discourses on marginalised identities (sometimes even on marginalised bodies), the core of which is undoubtedly composed of narrative outsider jurisprudences and community-building counterstorytelling (to use the well-known formulae proposed respectively by Mari J. Matsuda and Richard Delgado). This remarkable multiplication of perspectives and academic fields (going from Feminist Jurisprudences to Critical Philosophy of Race and from LGBT-GNCcrits to Postcolonial Legal Theory) — which were opened up with the so-called third Critical Legal Scholar's generation and go on developing a search for community or communities flowing out in the experience of incommensurable forms of life (involving gender, race, sexual orientation, economic condition, social status, practical-cultural and geopolitical provenance, health, mental and physical disability, etc) — pose certainly specific problems —concerning the "standards" which should be used to evaluate the different uses of narrative resources (and the merits of the final outcome), the challenges of intersectionality or intersectional persons (overlapping diverse identities), as well as the risk of transforming more or less persuasive counterstories into stereotyped narratives (with characters and roles that are implacably pre-determined). They offer however also an unique opportunity to discuss Law's and legal theory's claims to comparability. Is in fact the fragmentation of meanings, semantic values and performative

models provoked (or aggravated) by those approaches compatible with the claim for an integrating context (and its tertium comparationis) or does, on the contrary, this fragmentation (in its narrative intelligibility) prevent or frustrate the attempt to recognise an authentic inter-discourse and, with this, the aspiration to treat law as the "empire" of thirdness?

What follows is actually an (explicit or implicit) exploration of both these lines of development and their internal possibilities, when not a direct consideration of their reciprocal intertwinement and their dialectical tensions.

Thematic core

Introductory Note

James Boyd White[1]

University of Michigan Law School

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ABSTRACT

This Introductory Note highlights the thematic core of "Justice as Translation and Counter-storytelling", whilst exploring the corresponding "sophisticators" (*translation* and *narrative*). Even though acknowledging their differences, it concludes that they should be understood as creative forms of life (ways of challenging literal-mindedness), that are simultaneously necessary and impossible.

KEYWORDS

Translation – Narrative – Forms of Life – Necessity – Impossibility

It is a great honor to speak to you at the beginning of this important conference. I certainly wish I could greet all of you in person, especially my old friends.

I have just a couple of things to say. The first is that to have a conference focused on both translation and narrative seems to me inspired. These are obviously very different forms of expression, but they are both ways of challenging simplistic ways of thinking and talking. In particular they both resist what might be called literal-mindedness, the idea that one can simply say what one thinks and others should understand it perfectly. When well understood both narrative and translation are what might be called, if I may invent a term, 'sophisticators.'

One thing translation and narrative share is that they are both realms where it is obvious that there can be no single standard by which a work can be understood, or measured, or judged. When you read a great novel you admire what is done, but you also know that the story might have been told very differently and perhaps equally well. Every page is the embodiment of

[1] The written version of this Introduction was finished on November 5th 2022.

choices that might be replaced. Likewise, when you read a good translation and admire it, you also know that it might have been done differently, in every aspect, but equally well. There is no one right way for a person to tell (or write) a story or to translate a passage from one language to another.

The significance of this is that both forms of expression insist that human expression is at its heart creative. When we chat with our child on the way to school, we do it differently every day. It is up to us.

Of course to say that expressions are creative is not to say that they are automatically interesting or thoughtful or original. There are bad translations and bad novels, and bad ways of talking to our child, as well as good ones. We must read them and judge them as fairly as we can and then be prepared to explain or defend our judgment, even to ourselves. In doing this we know that here too there is no one right answer; our judgments are our own responsibility, and we must try to make them as soundly as we can.

Another way to put the connection between narrative and translation is to say that both of them are at once necessary and impossible. Whether we know it or not we are always telling stories to ourselves and others—in our work, in our social life, in our most causal conversations, as well as in our published work. It is impossible not to tell stories. We have to. But to tell them perfectly is impossible. Think how you would tell another person what you had for breakfast this morning. If you try it you will see that there will be immediate difficulties—about vocabulary, audience, sequencing, timing, and meaning—each of which could be resolved in many ways. And think how differently your spouse might tell the story of the same breakfast! Every story is told anew.

Much the same thing is true of translation. We have to do it and we cannot, except in a deeply tentative way, especially when we realize that the practice of interpretation is itself a form of translation. For whenever anyone speaks to us, even in our own language, we have to try to understand what they are saying and that will often take the form of putting it in other terms. Or think of what happens when something is said in another language that we want to carry over to our own. We know this cannot be done without changing the meaning of what is said. We will add to what is not there; we will fail to express all that is there; our translation will necessarily twist and change the original. Within the same language the same thing is true of interpretation: in our statement of what something means we will necessarily add and subtract meaning. Like the translation, the interpretation is a new text with its own meaning.

So we have to tell stories and we have to make translations. They are necessary to social life.. But they are impossible, in the sense that one cannot tell a perfect story or make perfect translation; but that very fact means that they are creative at their heart, and thus far more interesting and important than utterances that claim they have done the job without a flaw. The bad news is really good news.

Let me just add one thing, as a lawyer: that the ability to tell our stories well in the law—our competing narratives—and to translate well the authorities that speak to us—the statutes, constitutions, established practices, earlier cases—is essential to the realization of justice itself.

If you think about a trial, its very fabric is the story of the plaintiff, the answering story of the defendant, the regulation of the ways in which those stories can be told in court and then criticized and answered. The winner is the one whose story is believed. This whole process is creative in the extreme: limited but creative.

At the same time lawyers and judges are faced with authoritative texts—statutes, regulations, prior cases, contracts—that are uncertain and contestable in significance, and must therefore must be interpreted, and that is a species of translation.

Justice is the goal of law, its deepest concern, and the way it is attained is by the deeply creative and necessarily imperfect practice of narrative and translation.

So let me welcome you to a conference in which you will constantly be thinking and talking about these two forms of life, translation and narrative, both necessary, both impossible.

Au plus près du "différend" :

tiers et traduction intérieurs

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SOMMAIRE

Ce colloque pose la question radicale de notre temps : la diffraction sociale et culturelle actuelle, la revendication identitaire des minorités, la mise en avant systématique du « droit à la différence » ne discréditent-elles pas définitivement les grandes entreprises de médiation collective que sont le droit et la traduction – autrement dit, l'empire de la norme qui fait lien, et l'emprise du langage qui assure la reconnaissance ?

Mon *constat* est celui de l'isomorphie de ces mises en question ; mon *intuition* est celle d'une pareille isomorphie des manières dont il convient de les prendre au sérieux et de les traiter (les traiter, c'est-à-dire les assumer, et non les résoudre comme si on pouvait les dissoudre); mon *souhait* est de tenir le plus longtemps possible les deux bouts de la question : ne rien lâcher quant à la nécessité de la médiation et de la traduction tant du langage que du droit, tout en me tenant au plus près du « différend ». Comment donc faire droit aux revendications du particulier, et en même temps plaider en faveur des ressources médiatrices – mieux innovatrices – du langage et des valeurs à prétention générale ? Comment penser un jeu à somme positive ? Comment imaginer un dispositif social à « propriété émergente » où le tout est plus grand que la somme des parties ?

Introduction

Ce colloque pose la question radicale de notre temps : la diffraction sociale et culturelle actuelle, la revendication identitaire des minorités, la mise en avant systématique du « droit à la différence » ne discréditent-elles pas définitivement les grandes entreprises de médiation collective que sont le droit et la traduction - autrement dit, l'empire de la norme qui fait lien, et l'emprise du langage qui assure la reconnaissance ? Plus profondément encore : n'emportent-elles pas avec elles l'idéal de l'universel et l'espoir de quelque chose comme une raison commune ?

De tous côtés s'élèvent effet le soupçon, et bientôt le reproche, de la violence (d'autant plus forte que souvent inconsciente et implicite) de ces discours,

entreprises et institutions de médiation. Comme si l'authenticité ne se situait qu'au niveau du particulier, comme si le bien ne se déployait qu'au plan du singulier – au-delà règnerait l'imposture et commencerait l'exploitation.

Voilà le « spectateur impartial » d'Adam Smith, gage pourtant de mise à distance des passions et de distanciement des biais cognitifs et affectifs qui obscurcissent le jugement, victime d'une sorte de « ruse de la déraison », taxé de complicité objective avec la partie la plus forte. Comment prétendre tenir la balance égale, si les poids sont truqués et l'échelle de comparaison non signifiante pour une des parties ?

Voilà les traductions, même les plus méritantes et les mieux intentionnées, soupçonnées de traîtrise, quand elles ne sont pas réputées impossibles ou tout simplement interdites au nom de l'intégrité de la langue ou du message « source ».

Voilà les normes juridiques, censées régler les conflits en les rapportant à des principes communs, disqualifiées au titre d'instruments de violence légale, censées aggraver le « différend » qui oppose des protagonistes qui, ne participant pas au même monde, n'ont en partage ni langage, ni valeurs communs.

Voilà enfin l'universel, idéal séculaire des spiritualités et des codes, moraux comme scientifiques, démonétisé au profit des monnaies particulières – alors que, à l'heure des réseaux sociaux, les convictions l'emportent sur les arguments et les émotions sur les faits – comme si l'idée même de tension collective vers une vérité partagée et des valeurs communes était renvoyée aux naïvetés de l'histoire.

Mon constat est celui de l'isomorphie de ces mises en question ; mon intuition est celle d'une pareille isomorphie des manières dont il convient de les prendre au sérieux et de les traiter (les traiter, c'est-à-dire les assumer, et non les résoudre comme si on pouvait les dissoudre); mon souhait est de tenir le plus longtemps possible les deux bouts de la question : ne rien lâcher quant à la nécessité de la médiation et de la traduction tant du langage que du droit, tout en me tenant au plus près du « différend ». Comment donc, sans immédiatement être taxé de superficialité, ou pire, rangé dans le camp des imposteurs, faire droit aux revendications du particulier, et en même temps plaider en faveur des ressources médiatrices – mieux innovatrices – du langage et des valeurs à prétention générale ? Comment penser un jeu à somme positive ? Comment imaginer un dispositif social à « propriété émergente » où le tout est plus grand que la somme des parties ?

Les travaux que j'ai menés, d'une part sur les fonctions médiatrices et traductrices du langage, et, d'autre part, sur le droit comme « empire du tiers » pourraient-ils me mettre sur la voie ?

Peut-être, si je rappelle que cette pensée de la traduction s'origine dans une revalorisation du mythe de Babel ; à l'encontre de la vulgate en cette matière, je rappelle en effet que l'échec du langage unique est une bénédiction et non une malédiction : voilà les hommes ramenés à leur dispersion naturelle, ce qui ne les détourne pas de l'échange pour autant, mais les voue à la traduction, qui est tension vers (la langue) de l'autre, sans renoncer à la mienne pour autant.

Peut-être aussi, si je rappelle, cette fois du côté du droit, que le tiers dont je parle, n'est pas le tiers absolu, une puissance empirique qui s'imposerait à la manière du *Léviathan* de Hobbes ; il n'est pas une troisième personne dotée de dimensions fabuleuses, mais, au contraire, une fraction – un tiers – qui signale un écart, un travail du négatif, une fonction symbolique de distanciation suivie de reconnaissance, qui opère en chacun des sujets de droit.

Dans les deux cas, échange langagier et normatif, le constat de départ est celui d'une dispersion – le projet de la tour a échoué et les individus ne sont pas assujettis au droit (ils ne sont pas sujets *du* droit, encore moins du souverain ou du tiers absolu), ils sont sujets *de* droit, c'est-à-dire, susceptibles de droit, capables de s'élever à la pratique de l'échange juridique.

Dans les deux cas, se tenir au plus près du différent consiste alors à prendre acte de cette division de principe (au double sens de division de départ et de condition divisée) : la condition langagière est marquée par la multiplicité, et le régime juridique est, d'un bout à l'autre, traversé par le conflit. Mais on doit aussitôt rappeler également qu'un langage purement privé est tout simplement un contresens et qu'une norme qui ne vaudrait que pour moi seul n'est plus une norme du tout. Il faut bien alors que l'échange s'accommode de cette double limite : il est à la fois nécessaire, et, en un sens, toujours voué à l'échec, au moins partiel. Comment alors penser la condition de Sisyphe sans désespérer ?

Suggestion : pluraliser les identités qui se font face, relativiser les différences qui les opposent. Montrer comment mon vouloir dire est imparfait, mon expression hésitante, combien mon discours, comme celui de l'autre qui me fait face, « laisse à désirer ». Faire passer la faille au sein des discours que nous tenons chacun en propre, désigner les éléments d'étrangeté, de lacune et d'incohérence au sein de nos idiomes. Rapporter mon langage (et celui de l'autre) à d'autres formes d'expression possibles, qui le bousculeront et le renforceront à la fois. Autrement dit : souligner la nécessité de quelque

chose comme une traduction intérieure, un travail de médiation, un effort d'innovation, une recherche de médiation à l'oeuvre au sein de chacun de nos propres discours.

Et, du côté du droit, mettre en doute les certitudes doctrinales et dogmatiques, reconduire sans cesse le travail d'application des textes en faisant droit à la singularité des cas, réinterroger les arbitrages législatifs en vigueur au regard de l'évolution des sociétés. Autrement dit : faire place au travail de distanciation opéré par le tiers intérieur. Ce qui signifie, quant à la revendication de « mon droit », la référence à une formulation générale susceptible de s'appliquer à l'autre aussi (s'il était placé dans la même situation que moi, reconnaitrais-je le bien-fondé de ses prétentions ?). Sans cesse soumettre la norme (la loi et mon droit subjectif) à l'exigence d'une solution « émergente », d'une « plus-value normative » - faire jouer une transcendance qui ne rime pas avec violence, mais plutôt avec exigence.

Dans les deux cas, langage et droit, la pluralité et le conflit principiels (à l'origine et toujours présents) ne découragent pas l'échange pour autant : on veut dire le désir de communiquer, le besoin d'ajuster les prétentions rivales. La condition langagière, comme le lien de droit, supposent la tension constante entre ces deux pôles ; et leur mise en tension productive implique discussion et reformulation de chacune des identités en présence - on veut dire : la prétention du dire d'un côté, désormais travaillée par la nécessité de la traduction intralinguistique ; et, du côté juridique, la mise en cause de la prétention au bon droit (mon bon droit) discutée au regard des exigences du tiers intériorisé.

Trois parties jalonnent cet exercice : la première creuse l'intuition de la « traduction intérieure », intralinguistique (A), la deuxième propose un détour par un universel revisité : un universel à construire, réitératif et contextuel (B), la troisième approfondit la figure d'un tiers qui opère au sein du sujet de droit lui-même (C). Une conclusion, sous la forme de trois défis, rappellera, qu'en définitive, on ne traduit que l'intraduisible, on ne compare que l'incomparable, et on ne régule que le conflictuel.

A. La traduction, une opération d'abord interne à la langue.

Les débats les plus importants relatifs à la définition de « traduction » se nouent autour de la question de savoir s'il faut s'en tenir à une signification

étroite (traduction *inter*-linguistique, du français à l'anglais par exemple) ou s'il faut opter pour une signification large (traduction *intra*-linguistique, du français au français). Certes, il ne convient pas de nier les spécificités de la traduction « au sens propre », entre les langues, et de dissoudre ses particularités dans une théorie générale des échanges linguistiques, voire symboliques. Il reste que l'usage métaphorique commun de « traduction » révèle une vérité profonde : une traduction en cache une autre. La traduction « large » englobe, précède et suit la traduction restreinte ; il serait tout simplement impossible de « traduire » au sens propre du terme, si la langue d'accueil n'était pas, d'abord et surtout, capable de « se traduire », en s'ouvrant à cet autre qui l'interpelle du dehors mais la travaille aussi du-dedeans.

C'est à Fr. Schleiermacher et à son fameux discours du 24 juin 1813 à l'Académie royale des sciences de Berlin, *Des différentes méthodes du traduire*, qu'on peut faire remonter la première, et la plus vigoureuse, formulation de la prévalence de la traduction au sens large (traduction-reformulation). « Nous n'avons pas besoin de sortir du domaine d'*une* seule langue pour rencontrer le même phénomène » [de traduction], écrit-il, d'entrée de jeu (Schleiermacher 1999, 31). Quatre raisons au moins soutiennent cette affirmation liminaire. D'une part, les dialectes des diverses souches d'un même peuple sont déjà « des langues différentes exigeant souvent une transposition orale complète » ; ensuite il s'agira d'opérer des reformulations entre « des contemporains qui ne sont pas séparés par le dialecte et qui appartiennent à des classes populaires différentes » ; mieux même : « nous avons souvent besoin de traduire le discours d'une autre personne, tout à fait semblable à nous, mais dont la sensibilité et le tempérament sont différents » ; et enfin ce dernier pas : « nous devons nous-mêmes traduire parfois nos propres discours au bout de quelques temps si nous voulons de nouveau nous les approprier convenablement » (Schleiermacher 1999, 31-33).

Plusieurs autres arguments militent en faveur de l'inéluctabilité de la traduction intra-linguistique.

Et d'abord ceci : sommes-nous si assurés de savoir ce qu'est *une* langue, pour soutenir, comme le fait la théorie restreinte, que la traduction n'a pas cours au sein de la langue, mais seulement aux frontières qui la séparent des autres langues ? Précisément, en quoi consistent les frontières de *la* langue ? A partir de quel moment existe-t-elle comme langue ? Et quand disparaît-elle ?

Quel est le niveau de cohérence et de spécificité nécessaires pour lui assurer le statut de langue autonome, à part entière ?[1]

Il faut noter d'abord que toute langue, surtout quand elle est beaucoup parlée et en beaucoup d'endroits, est fortement métissée. Alain Rey, responsable de la publication du *Robert*, le dit sans détours : «le français est multiple, divers, métisssé (...) son lexique est un mille-feuilles» (Rey 2007, 278 et 300). Autrement dit, l'identité des langues est à la fois présomptive et construite : ce sont des «palimpsestes», observe Denis Thouard[2].

Il faut relever encore que les langues n'arrêtent pas de se transformer, ce qui, du reste, est la condition de leur maintien en vie : « une langue dure aussi longtemps qu'elle change », écrit D. Heller Roazen, et, à l'inverse, on reconnaît une langue morte « à ceci qu'on n'a pas le droit d'y faire des fautes » (Heller Roazen 2007, 74). Les glissements sont graduels et parfois très lents ; point ici de cataclysme comparable à l'engloutissement soudain de l'Atlantide. À quel moment précis, l'hébreu s'est-il par exemple transformé en araméen ou le latin classique en cette langue qu'un jour on a appelé l'italien ? Même disparue et transformée en une ou plusieurs autres, il arrive aussi qu'une langue se prolonge, plus ou moins ouvertement, dans sa ou ses survivantes. Aussi chacune de nos langues est-elle composée de strates successives, disposées comme des couches géologiques et qui témoignent ainsi de la force passée des parlers qui l'ont engendrée. Des traces multiples d'idiomes divers parcourent nos langues usuelles ; les unes sont très anciennes, souvenirs lointains de langues disparues ; les autres au contraire sont des emprunts récents, témoins des rapports de force qui ne cessent de s'établir sur le marché des langues. Parfois même une langue est tellement marquée par une autre qu'on peut douter de son existence spécifique : les langues créoles et les pidgins en sont des exemples. Et il faudrait dire encore le babil enfantin à son origine, ainsi que les onomatopées et le langage dont nous nous servons pour parler aux animaux à ses confins : autant d'indices d'une langue « autre » (plus universelle ? souvenir d'une langue perdue ?) qui borde la nôtre. Peut-être alors faut-il conclure, à la suite de D. Heller Roazen : « en ce sens, nulle langue n'est véritablement maternelle, pas même celle de

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[1] J. Sallis (2002, 47) pose la question et en déduit qu'il est difficile, voire impossible de distinguer sens large et sens étroit de la traduction.

[2] Thouard 2007, 30. L'auteur ajoute même que " les langues diffèrent plus en elles-mêmes qu'entre elles".

la mère » (Heller Roazen 2007, 177)[3]. On mesure combien il est illusoire et réducteur, dans ces conditions, de prétendre distinguer nettement l'intérieur et l'extérieur de la langue et de limiter les opérations de change traductif aux seules transactions opérées aux frontières.

Qu'il faille traduire, en permanence, au sein de son propre idiome en atteste aussi ce fait de langue que le propos sensé se révèle toujours capable de réflexivité. On veut dire : capable de prendre distance de lui-même, de parler de lui-même, de s'auto-qualifier, d'user de guillemets. Les logiciens ont beaucoup contribué à l'élucidation de cette propriété remarquable en distinguant « langage objet » et « métalangage », distinction sans laquelle aucun discours scientifique ne serait possible. Mais le propos doit être élargi et il nous faut sans doute reconnaître que cette distinction des niveaux de discours, accompagnée de la capacité d'un regard « méta » et donc d'une traduction, caractérise le discours sensé en général. A l'inverse, l'incapacité de cette auto-distanciation caractérise sans doute le discours délirant, qui est une parole unidimensionnelle, totalement impliquée.

Dans un petit livre fascinant, *Le monolinguisme de l'autre*, Jacques Derrida confère à cette distance qui se creuse au sein de la langue – trace ou relais de métalangage – une radicalité proprement constitutive – et ce dans un rapport essentiel avec la nécessité de traduire (Derrida 1996). Tout commence par une plainte ou un grief au ton autobiographique. Pour un enfant juif franco-maghrébin, le français est nécessairement « la langue de l'autre », celle du maître, du colon. Cette langue n'est pas maternelle, elle n'est parlée par aucun de ses ancêtres, et ne lui laisse même pas le refuge d'une langue communautaire de repli (tel le yiddish pour les Juifs de l'Europe de l'Est). Le voilà donc contraint de parler une langue – une seule – dont il est en même temps privé ou exclu : « je n'ai qu'une langue, ce n'est pas la mienne » (Derrida 1996, 13). Mais l'enfant s'avisera bientôt que, quoi qu'il en ait, et en dépit de son arrogance politico-linguistique, le maître non plus n'habite pas vraiment sa langue. Personne, en fait, ne s'approprie réellement sa langue ; personne ne l'habite totalement, personne « ne possède en propre, naturellement, ce qu'il appelle pourtant sa langue » (Derrida 1996, 45). D'où

[3] Heller Roazen 2007, 177; les considérations précédentes sont empruntées aux pages 47 à 97.

ce second axiome : « on ne parle jamais une seule langue » : pour le maître aussi, la langue est celle de l'autre.

Ce constat débouche sur une possible universalisation de la situation d'aliénation de la victime, et entraîne son changement de signe. Car si la langue n'est vraiment maternelle pour personne, si l'aliénation est partagée, alors l' « autre » de la langue pourrait bien, plutôt que d'asservir et d'assigner à résidence dans un langage clos, libérer au contraire les possibilités du dire en y ménageant des « effets » ou des « relais de métalangage », impliquant « traduction » de ce que pourrait être le « mirage d'une autre langue » (Derrida 1996, 42).

La condition commune d'aliénation linguistique (être condamné à parler une langue dont on est cependant privé) – une aliénation généralisée et structurelle, on l'aura noté – débouche donc sur cette situation inédite : « être jeté dans la traduction absolue » : une traduction « sans pôle de référence, sans langue originaire, sans langue de départ » (Derrida 1996, 117). Parler, écrire, serait donc, en ce sens originaire et radical : traduire. Le locuteur, dès lors qu'il s'évade, ne serait-ce qu'un peu, de la prison de son monolinguisme, s'érige en inventeur d'une langue qui reste à écrire. Dans le souvenir d'une « avant-première langue » qui n'est plus, qui n'a jamais été, mais dont il est le traducteur en langue d'arrivée. Il parle, ce locuteur, pour raviver la mémoire de cet événement qui n'a pas eu lieu mais fait trace dans le langage qui s'invente aujourd'hui. Voilà pourquoi *une* langue n'existe pas ; si elle parle, ne serait-ce qu'un peu, alors elle est soulevée par l'écho de cette « *toute autre* avant-première langue » dont nous sommes, même monolingues, les infatigables traducteurs (Derrida 1996, 123). Du moins lorsque nous parlons et ne nous bornons pas au solipsisme et à la morne répétition du même. « La langue est à l'autre, venue de l'autre, *la* venue de l'autre » (Derrida 1996, 127).

Notre thèse de la prévalence de la traduction-reformulation en reçoit la confirmation la plus nette : dire c'est traduire.

> Le thème de la langue « de l'autre », d'une langue provenant de l'autre, traversée par l'autre et son manque appelle quelques considérations inspirées par la psychanalyse. Sans entrer dans une technicité superflue, on rappellera que, pour Freud et Lacan, l'instance de l'inconscient, « structuré comme un langage », se développe de l'incapacité où se trouve le sujet de se dire tout entier dans le langage. Dès lors que la toute-puissance de la voie imaginaire lui est fermée, qui lui aurait permis de coïncider totalement

avec lui-même dans une parole sans défaut, et que le voilà condamné au symbolique, l'homme s'expérimente divisé et confus – voué à l'échange langagier toujours en reste. De ce reste, l'inconscient se fait le réceptacle et l'écho, renvoyant les « confuses paroles » de cette vérité du sujet qui n'arrive pas à se dire directement. Comme « le maître dont l'oracle est à Delphes qui ne dit (*legei*), ni ne cache (*kruptei*), mais signifie (*sémainei*) » (Héraclite, fragment 93), le discours inconscient demande à être traduit. On sait que ce déchiffrement des rêves, des lapsus, des traits d'esprit et autres actes manqués est une tâche virtuellement infinie précisément parce que, en son principe, cette parole est marquée du signe du manque et du ratage. Mais c'est aussi parce qu'il y a non coïncidence du sujet et de son dire que la parole peut se développer et l'interlocution se risquer. Il est très significatif qu'Emile Benvéniste ait jugé bon d'inscrire le fragment d'Héraclite que nous venons de nous rappeler en conclusion de son grand ouvrage de linguistique : signifier, concluait-il, est « l'attribut que nous mettons au cœur le plus profond du langage » (Benveniste 1974, 229).

Ce sentiment que la langue vient à manquer ne s'éprouve pas seulement dans la douleur de la victime du différend. Il est aussi à la source du geste poétique, qui le transforme en énergie créatrice. « Les mots que j'emploie », disait Paul Claudel, « sont les mots de tous les jours, et ce ne sont pas les mêmes ! ». Mais souvent le poète va plus loin, et, comme l'écrivait Mallarmé « donne un sens plus pur aux mots de la tribu. Vigile à la frontière de l'indicible, le poète ramène des mers lointaines, des trésors qui bientôt vont ébranler le continent de nos certitudes. Exilé de l'intérieur, immigrant du verbe, il fait figure d'étranger – vaguement suspect comme ces dramaturges que Platon entendait tenir en marge de la cité. Il sait bien, lui, la vérité du propos de Derrida que nous rapportions plus haut : « on ne parle jamais *une* langue ». Il est, à la fracture des mots, l'Hermès traducteur de cette « avant-première langue » dont le souvenir pourtant perdu insiste et parfois réveille des échos inconnus au sein de nos parlers quotidiens comme la résonance d'une musique prénatale.

Ces considérations relatives à l'inéluctabilité de la traduction intralinguistique et à la non-coïncidence de mon langage avec lui-même, sucitent d'importantes questions éthiques. La tentation est grande, et mille fois avérée dans l'histoire, de traiter le locuteur d'un autre idiome de « barbare » : celui

qui balbutie comme un nourrisson, baragouine comme un simplet, émet des borborygmes comme un animal. Un autre totalement autre, sans commune mesure avec le moi et le nous, et bientôt une menace à écarter ou éliminer. Ou alors, dans le meilleur des cas, l'autre est saisi sans identité propre, simple page blanche vouée à l'assimilation ; sujet sans langage, comme les indiens que Colomb envoyait en Espagne « pour qu'ils apprennent à parler » (Todorov 1982, 43).

La difficulté est immense, dans ces conditions, de considérer l'autre à la fois dans la commune humanité qu'il partage avec moi *et* dans sa différence spécifique**.** Raymond Aron le souligne : « La reconnaissance de l'humanité en tout homme a pour conséquence immédiate la reconnaissance de la pluralité humaine. L'homme est l'être qui parle, mais il y a des milliers de langues. Quiconque a oublié un de ces deux termes retombe dans la barbarie ».

Sans doute, mais quel rapport avec la thèse, ici défendue, de la prévalence de la traduction intralinguale ? C'est que, pensons-nous, le programme tracé par Aron n'a pas la moindre chance de se réaliser si le locuteur ne saisit pas que, dans une certaine mesure au moins, il est, lui aussi, étranger à sa langue, parce que, très fondamentalement, il ne s'appartient jamais totalement à lui-même. « Je est un autre », ou, mieux encore, comme l'écrit Paul Ricœur, « soi-même comme un autre ». Non pas le « comme » de la simple comparaison ; aucun être raisonnable n'ignore en effet que l'autre est, lui aussi un « je » aux yeux duquel j'apparais comme un autre. Non, le « comme » présente ici le sens fort d'une implication : « l'ipséité du soi-même implique l'altérité à un degré si intime que l'une ne se laisse pas penser sans l'autre, que l'une passe plutôt dans l'autre » (Ricoeur 1990, 14). C'est « en tant qu'autre » que le sujet assume son propre et tisse son ipséité (à ne pas confondre avec la « mêmete » qui se définit par des critères plus extérieurs et plus fixes : l'identité de l'état civil).

De soi à soi se creuse donc une altérité qui tout à la fois devrait rendre l'autre lui-même moins étranger, et interdire au locuteur toute prétention de maîtrise absolue de la langue qu'il manie comme du discours qu'il profère.

Schleiermacher encore a fait à ce sujet des observations d'une grande profondeur. « Étranger » (*fremd*) ne désigne pas simplement ce qui est extérieur à la nation (*ausländisch*), explique-t-il. Alors que le terme *Aus-länder* connote cette extériorité, *Fremder* en est dépourvu et se définit par rapport à ce qui est propre. En ce sens, est étranger ce qui se distingue de ce qui m'est propre (*das Eigene*), de sorte que je peux aussi être étranger à moi-même. La conscience

que quelque chose échappe à l'appropriation, le sentiment d'étrangeté est, dès lors, une dimension constitutive de l'humain. Mais Schleiermacher ne s'en tient pas à ce constat qui pourrait déboucher sur une forme d'intraduisibilité des consciences ; au contraire, le sentiment d'étrangeté ou pour l'étranger, qui est aussi une forme de respect à son égard (*Achtung für das fremde*), autorise d'entrevoir une communauté d'interlocution. Cette « commune étrangeté » laisse à penser que des points de rapprochement existent qui donnent son sens à l'activité de parler et de traduire[4].

À l'inverse, un individu ou un peuple qui ne s'accommode pas de son autre intérieur, de sa mixité constitutive, de son hybridation langagière pourrait bien finir par exporter son purisme interne à l'extérieur et réduire l'étranger – le vrai (*Ausländer*), en soumission. L'année 1492 est exemplative de ce phénomène pour l'Espagne. N'est-ce pas au cours de cette même année que le pays « répudie son Autre intérieur en remportant la victoire sur les Maures dans l'ultime bataille de Grenade et en forçant les juifs à quitter son territoire » et aussi « qu'il découvre [et soumet, ajouterons-nous] son Autre extérieur, toute cette Amérique qui deviendra latine » (Todorov 1982, 67).

Une éthique de la traduction

Quelle est donc la visée de la perspective traductrice ? Nous dirons d'un mot : dégager une troisième voie, celle d'un espace de sens partagé, entre le langage (la pensée) unique d'une part – l'espéranto du *globish* ou du *globalais*[5], par exemple – et le repli sur les idiomes singuliers de l'autre. Entre la Charybde de l'omnitraduisibilité proclamée par un langage dominant qui croit tout pouvoir absorber dans sa mêmeté, et le Scylla de l'intraduisible ombrageux derrière lequel se réfugient des langues (cultures, communautés) jalouses de leur spécificité, la traduction vise à se frayer un chemin. Renvoyant dos à dos ces deux versions opposées, mais finalement solidaires, du soliloque qui se décline tantôt comme l'aveuglement hégémonique du même, tantôt comme l'exacerbation farouche de l'autre, manquant dans les deux cas la médiation de l'autre intérieur (et son corrélat dialectique : le même extérieur) qui seule est en mesure, croyons-nous, d'assurer la relance du discours.

[4] Sur tout ceci, cf. Chr. Berner, *Glossaire*, in Schleiermacher 1999, 119-120.

[5] Sur le « globalais », cf. F. Nies 2005, 247.

La traduction responsable : recevoir l'autre en tant qu'autre

Mais alors, en quoi consiste la visée éthique de la traduction ? Nous dirons d'un mot : reconnaître, et bientôt recevoir, l'autre en tant qu'autre (Berman 1999a, 74). L'autre « en tant qu'autre » et non comme simple décalque de soi, *alter ego* : un autre qui se signale d'abord par son étrangeté et sa différence. Mais cet autre est aussi « reconnu » : identifié comme quelqu'un de différent sans doute, mais aussi comme une personne familière dont une connaissance préalable m'autorise aussi à *me* reconnaître en lui, à retrouver la sorte d'interpellation que l' « autre intérieur » n'a cessé de m'adresser. En cela la traduction est l'exercice d'une responsabilité, elle *répond* à l'interpellation de l'autre (White 1990, 100). Ce qui implique la patience d'un apprentissage et l'acceptation du risque d'un dépaysement parfois radical : le langage que l'autre m'adresse peut être inaudible et dérangeant ; dans les deux cas il suppose un décentrement. Dès ce moment, le locuteur-traducteur est engagé dans un jeu dont il pressent qu'il ne le laissera par indemne : par le mouvement de l'interlocution, des positions respectives se déplacent et chacun consent à des transformations imprévues de son point de vue. Notamment, sans abandonner pour autant sa langue propre, le traducteur fait bientôt l'expérience des limites de celle-ci : en accueillant quelque chose de la langue de « l'autre en tant qu'autre », il se désapproprie du point de vue de surplomb que tend à conférer la maîtrise de n'importe quelle langue ou nationalité. Comme s'il partait en quête de quelque chose de plus juste ou de plus vrai dans l'espace que creuse maintenant l'inter-langues et que chacune d'entre elles tendait de saisir à sa manière.

Comme si, à l'instigation de cette parole « autre », quelque chose s'était ébranlé dans ma parole propre, comme si des virtualités s'y réveillaient et que la faille intime tracée par l' « autre intérieur » ouvrait maintenant la voie à un monde supérieur hier encore simplement soupçonné. Du « sens » se construit ainsi qui se définit précisément par la manière de plus-value qu'il apporte au déjà-connu, par le saut qu'il réalise au-delà de la maîtrise du même.

Bien entendu, il n'en va pas nécessairement ainsi dans la pratique. L'expérience historique n'est pas avare de « traductions annexionnist**es** », comme celles que Rome pratiquait à l'égard de la Grèce, qui relevaient plus du pillage culturel que de l'ouverture à l'étranger. Parfois aussi l'intérêt pour l'autre se cantonne à la fascination pour l'exotique qui n'entraîne guère plus que

des satisfactions esthétiques. Souvent aussi nous partons à la découverte de l'étranger à l'aide de ce que U. Eco appelle « nos livres de référence », de sorte que nous projetons sur lui des attentes déjà déterminées par nos représentations et valorisations préalables (Eco 1995, 37 s.).

L'hospitalité langagière

L'ouverture à l'autre en tant qu'autre est donc une entreprise pour le moins délicate. Dira-t-on qu'elle se signale par un impératif catégorique de fidélité ? On sait la récurrence de cette exigence dans la littérature relative à la traduction ; on n'ignore pas non plus le soupçon permanent de « trahison » qui pèse sur le traducteur. Certes, l'échange traductif ne s'accommode pas d'un détournement volontaire de signification, ni de « mauvaise foi » dans la restitution des significations. Il reste que l'insistance unilatérale sur l'obligation de fidélité risquerait de faire passer à côté de l'essentiel. Sans même évoquer ici les débats techniques relatifs à la traduction, qui conduisent déjà à relativiser beaucoup cette exigence, on soulignera qu'une conception trop statique de la fidélité pourrait bien relever encore d'une logique tautologique du « même » dont nous avons précisément pris congé. Au-delà du modèle représentationniste et de ses exigences de stricte conformité, nous avons évoqué plutôt une logique de plus-value induite par des traductions créatrices.

C'est dès lors la valeur d'hospitalité, plus que celle de fidélité, qui nous paraît représenter le cœur de l'éthique traductrice. Le traducteur s'invite en langue étrangère et s'installe dans l'œuvre qu'il s'apprête à traduire, avant de l'accueillir à son tour au sein de sa propre culture : « pour comprendre l'autre, il ne faut pas se l'annexer mais devenir son hôte » (Steiner 1978, 364; Ricoeur 2001, 135). Un hôte qui, en langue française à tout le moins, vise indistinctement celui qui reçoit et celui qui est reçu. Oscillation bienvenue du lexique, heureuse hésitation de la langue, qui, en ne décidant pas de qui reçoit et de qui donne, suggère l'idée que c'est de l'échange lui-même que surgit la plus-value. Comme si l'hôte accueillant était déjà, par la réversibilité virtuelle des positions, dans la position de l'hôte reçu – exactement comme, tout à l'heure, l'autre et le même, l'autre intérieur et le même extérieur, échangeaient leurs positions respectives.

B. Construire un universel réitératif, contextuel et potentiel

Ces considérations relatives à l'éthique de la traduiction, éclairent utilement le soupçon qui frappe aujourd'hui les visées de l'universel. Dira-t-on, en effet, qu'en insistant de la sorte sur la valeur d'hospitalité plutôt que sur la traditionnelle fidélité attendue de la traduction, et en valorisant l'accueil de l'autre et de l'étranger plutôt que l'affirmation du même, on fait preuve d'une complaisance excessive à l'endroit du différent, du singulier, de l'inédit et qu'on s'interdit par là même tout accès à l'universel – seul terrain sur lequel pourrait se dégager une norme éthico-politique moderne, c'est-à-dire susceptible de généralisation ? Au plan de la philosophie politique n'aurait-on pas ainsi définitivement abandonné le terrain aux éthiques communautaristes, toutes plus ou moins enfermées dans les limites de leurs traditions respectives ?

Il devrait être possible d'écarter ces objections en rappelant que nos analyses ont été menées de bout en bout sous l'égide de la dialectique : il s'agissait de penser les conditions d'une médiation de l'autre et du même par la double entremise de l' « autre intérieur » et du « même extérieur », chiasme auquel rendait justice une traduction « hospitalière » et donc créatrice. On ne croit donc pas avoir cédé quelque chose des aspirations essentielles du même, et, notamment, de sa légitime prétention à l'universalisation de sa position. Il reste néanmoins qu'en dialectisant cette position, en montrant tout ce qu'elle doit à l'interpellation de l'autre, on est conduit à penser en d'autres termes l'universel lui-même.

Il s'agirait de penser les conditions sinon d'un universel a priori, du moins d'une visée d'universel, une *universalisation* construite à partir d'une multitude de points de vue différents. On ne postulerait plus une perspective de surplomb, on ne s'installerait plus dans un mirador transcendantal du haut duquel il s'agirait de délivrer des bons et des mauvais points en assignant à chacun sa place sur une échelle d'excellence ou de vérité. On ne prétendrait plus occuper un point de vue privilégié (une « position originelle » à la Rawls, par exemple), on ne se référerait plus à une loi surplombante (un tribunal de la raison, ou de l'histoire, ou de la nature), mais on chercherait, une fois encore, à remonter le rocher de Sisyphe (on viserait à une forme d'universalisation) sans jamais perdre de vue la gravité qui rattache la pierre (et nous avec elle) à un sol toujours particulier.

M. Walzer emprunte cette voie en distinguant, à côté de ce qu'il appelle l' « universalisme de surplomb » – référé à des règles générales, des critères

abstraits, des arguments rationnels, et, de manière générale, une vérité dominante, conquérante et messianique – un autre universalisme qu'il qualifie de « réitératif ». Celui-ci ne présuppose pas une loi unique et un seul peuple élu, mais considère, au contraire, qu'à sa manière chaque peuple fait l'expérience de sa libération et propose sa version de la justice. Ainsi, à travers leurs coutumes, leurs sentiments, leurs expériences, au bénéfice de leur propre créativité, ces différents peuples livrent une version différenciée de l'universalisme prétendu. Là, on postulait un universel englobant, ici on « réitère » des versions partielles et toujours inachevées d'un universel en projet. Mais, quelle que soit la variété des réponses données, il nous est cependant loisible de leur reconnaître un « air de famille » : de façon inductive et tolérante nous apprenons à identifier chez autrui les prétentions à la moralité, les aspirations à l'universalité, et cette reconnaissance est elle-même un progrès décisif dans la voie de la moralité. Comme dans la pratique traductive où nous partons toujours de notre propre langue, ici aussi « nous nous tenons où nous sommes et nous apprenons de nos rencontres avec d'autres. C'est que nous n'avons pas de point de vue privilégié : les prétentions que nous élevons, ils les élèvent aussi (…). Mais c'est une action morale que de reconnaître l'altérité de cette manière » (Walzer 1992, 129).

Et tout comme, tout à l'heure, dans la dialectique de l'autre et du même, il s'agissait, pour le moi, de « re-connaître » l'étranger à partir de la figure de « l'autre intérieur », de même s'agit-il ici de « reconnaître » une forme transcendante d'aspiration morale dans les prétentions qu'élève l'autre individu ou l'autre peuple : chacun à sa manière « ré-itère » une histoire de libération. Mais c'est chaque fois de l'intérieur de notre raison et dans les limites de notre tradition que nous apprenons à identifier les valeurs et les raisons produites dans d'autres univers moraux et que nous faisons l'expérience de la reconnaissance mutuelle. Ce n'est pas à dire pour autant que toutes les morales soient d'égale valeur ; des critères d'évaluation sont établis, mais ils demandent eux aussi à être « réitérés », faute d'une perspective absolument englobante (Walzer 1992, 133). De ce point de vue, la seule loi surplombante qui s'impose est celle da la reconnaissance mutuelle qui nous engage dans l'activité permanente de la réitération. Point ici d'Hercule délivrant les oracles d'une langue parfaite synthétisant toutes les autres, seulement Hermès traducteur[6].

[6] Sur le rejet d'Hercule, cf. Walzer 1996, 29.

C'est un « universel caché » (Hassner 1992, 102 s.) et « contextuel » (Ricoeur 1990, 329 s.) qui se laisse ainsi pressentir ; on ne le vise, dans chaque cas, qu'à partir de guises particulières, sans pour autant céder aux facilités d'un relativisme culturel généralisé (qui n'est jamais que l'indifférence aux différences). En langage kantien, il s'agit d'exercer ici non le jugement *déterminant* qui va de l'universel au particulier, mais bien plutôt un jugement *réfléchissant* qui emprunte le chemin inverse. Ce dernier, à l'œuvre notamment dans le jugement esthétique, fait appel aux notions de « validité exemplaire » et de « sens commun » : « je sens que mon expérience particulière me dépasse, je fais le pari qu'autrui éprouve une expérience correspondante, qu'il existe un sens commun du beau et du sublime que nous ne pouvons pas démontrer, mais que nous ne pouvons pas ne pas postuler si nous voulons être fidèle à la qualité de notre expérience elle-même[7]. De ce point de vue, le jugement réfléchissant présente deux caractéristiques remarquables pour une éthique de la traduction : d'une part il présuppose, grâce au jeu de l'imagination (au § 40 de la *Critique de la faculté de juger*, Kant parle d'un « mode de pensée élargie »), la capacité de se représenter une chose absente, mais également de se mettre à la place de n'importe quel autre être humain, proche ou lointain ; d'autre part, grâce à la pointe prophétique dont il est porteur, le jugement réfléchissant présente une forte faculté heuristique d'anticipation de l'avenir : laissant entrevoir le but, il est aussi l'instrument qui provoque la mise en route. Opérateur de sens, il ne se contente pas, comme le jugement déterminant propre à l'entendement, de déduire, de façon finalement tautologique, les prédicats du sujet (X est Y), mais, en creusant les virtualités du particulier (*cette* chose est belle, *cet* événement est significatif), il dégage la voie pour un nouvel universel possible.

Ricœur évoque, quant à lui, une dialectique nécessaire entre argumentations et convictions. Sans doute la modernité nous a-t-elle appris à confronter nos traditions au tribunal de la critique et à leur faire subir l'épreuve de la fondation argumentée en raison (universelle) ; mais, sous peine de verser dans l'abstraction la plus formelle et de perdre tout enracinement concret, cet exercice ne s'opère jamais dans le milieu aseptisé d'un laboratoire moral (la « position originelle sous voile d'ignorance » de Rawls, la « situation idéale de parole » de Habermas) : c'est à partir de nos convictions et de nos

[7] Hassner 1992, 112. Pour la discussion de ce modèle kantien par H. Arendt (*Juger. Sur la philosophie politique de Kant*, Paris, Seuil, 1991), cf. Ricoeur 1995, 143 s.

engagements et, ajoutera-t-on, grâce à elles – qu'un accès à l'universel peut se laisser entrevoir[8]. On ne parle plus, dans ces conditions, d'*un* universel, mais « d'universels en contexte, d'universels potentiels ou inchoatifs » (Ricoeur 1990, 336): l'horizon de visées multiples entrevues à partir de convictions particulières, appelées néanmoins à dépasser le dogmatisme routinier ou violent des conventions, par le jeu de la discussion et de la reconnaissance de convictions alternatives, tantôt convergentes, tantôt rivales.

Ce programme éthique, dont la traduction offre le modèle le plus achevé, est à mille lieux de l'éclectisme de survol qu'autorise aujourd'hui la mondialisation du village planétaire. A l'opposé du point de vue de Sirius qu'elle suscite – l'illusion de tout englober qui se ramène en définitive à une manière de zapping idéologique ou de brouet culturel, le dialogue traductif n'échappe pas à l'épreuve de l'étranger.

C. Régulation juridique et tiers intérieur.

En réponse à la question de savoir ce qui spécifie le passage au droit, ce qui distingue l'empire du droit de celui de la force, ou même d'autres formes de normativité, je réponds, dans un livre récent : le droit institue le tiers (OST 2021).

Un tiers qui demande cependant à être soigneusement compris, car, contrairement à une inclination de la pensée, il ne se ramène ni à une instance absolue, ni à un personnage empirique. Il est fraction (principe actif de distanciation) plutôt qu'entité pleine (1) ; il est la mise en œuvre d'une fonction (fonction symbolique de reconnaissance commune en référence à un principe supérieur) plutôt que personnage empirique (2) ; il est le produit d'un mouvement de dédoublement intérieur (*tiercéisation*) plutôt qu'imposition extérieure (3), il est, en somme, une « auto-transcendance », qui fait que si le sujet se réfère à une instance supérieure, c'est à partir de ses propres ressources (4).

1. Je commence donc par relever que le terme « tiers » peut s'entendre en deux sens distincts : soit une troisième personne quelconque, soit une fraction

[8] Ricoeur 1990, 329 ; cf. aussi les études 3 à 5 de I D, Ricoeur 1995, 71 à 143.

(le tiers d'un budget, par exemple). Envisagé dans le premier sens, le tiers s'entend du troisième individu, l'entité qui, dans une série indéfinie, vient entre le deuxième et le quatrième – rien de particulier à cet égard : le tiers revêt un sens ordinal et vise un X à part entière. Envisagé comme fraction, en revanche, le tiers s'entend d'un principe de séparation affectant n'importe quel chiffre de la série, qui devient dès lors tiers (autre) à lui-même. Cette fois on glisse vers une fonction non triviale, d'ordre symbolique (séparation et liaison) : ainsi D. Salas, parlant de la justice, préfère la qualifier de « tiers pouvoir » plutôt que de « troisième pouvoir », comme on le fait d'habitude, dans la mesure où « elle inscrit la référence des normes dans toutes les sphères de la vie collective ». Exprimant la présence instituée du peuple dans l'organisation même de l'Etat, « elle ouvre un écart symbolique entre le représentant et le représenté et introduit l'arbitrage du droit »[9].

2. l faut ensuite souligner le caractère abstrait et virtuel de ce tiers : il s'agit bien de la construction d'une *fonction* tierce, d'élaboration d'une perspective normative et non d'identification d'un personnage ou d'une instance empirique. Il importe donc de ne pas confondre la fonction de ce grand tiers symbolique avec un tiers empirique, aussi important fut-il **; ainsi, par exemple, le fameux** *Tiers état* que Sieyes entendait mobiliser dans sa célèbre brochure (Sieyes 2002). Dans ce pamphlet publié en 1789, Sieyes **décrit le Tiers état (les** vint cinq millions de citoyens distincts de la noblesse et du clergé) comme le « grand corps des citoyens », une « nation complète », mais aujourd'hui encore entravé et opprimé. Il est un « rien » qui aspire à devenir « tout » (67) ; pour cela, il doit se réunir à part des deux autres corps, se constituer en Assemblée nationale et adopter une constitution. Délibérant sur les intérêts de la nation, il écrira la loi commune, par opposition au clergé et à la noblesse qui s'accrochent à leurs privilèges particuliers. On voit bien que le Tiers est ici considéré comme une entité réelle, parfaitement identifiable, appelé à exprimer une volonté concrète : une classe sociale assimilée à la nation entière, et non une entité symbolique exerçant une fonction abstraite. Son nom lui vient de la circonstance, contingente, qu'il est arrivé troisième sur la scène politique, après la noblesse et le clergé. Et son ambition est de prendre la place du Tout, et certainement pas d'une fraction de celui-ci.

[9] En ce sens, D. Salas 2012, 172.

3. Ce tiers est le produit d'un mouvement qu'on peut qualifier de «*tiercéisation* » **:** processus par lequel un sujet, un « je », un « tu », intègrent progressivement un point de vue tiers (celui de l' autre extérieur, de n'importe quel autre), et, se décentrant ainsi, ne serait-ce qu'un peu, amorce un écart à l'égard de lui-même (dédoublement), et intègre quelque chose du point de vue de l'autre (hybridation). Ainsi, ce tiers, ne reste pas étranger au sujet, comme une puissance de surplomb édifiante ou menaçante. C'est de l'intérieur qu'il opère, et telle est à la fois la condition de son succès et la meilleure antidote au danger, déjà souligné, du « tiers absolu » ; à la fois partiellement produit par chacun et intériorisé par chacun, le tiers se dissémine.

Le tiers se pluralise, et le sujet se dédouble : ainsi de l'individu devenant citoyen dans *Le contrat social* de Rousseau[10], de la masse révolutionnaire devenant la nation souveraine signant la *Déclaration d'indépendance* des Etats-Unis (le fameux *We the people…*)[11], du corps naturel du roi s'élevant à la dignité de son corps mystique dans la théorie médiévale des *Deux corps du roi* qui se laïcise et fonde aujourd'hui encore la légitimité des institutions, y compris républicaines (Kantorowicz 1984).

Bien entendu, on pourrait soutenir que cette intériorisation de la fonction tierce signale tout simplement le comble de l'aliénation de l'individu : l'identification du sujet au Chef , comme dans le frontispice du *Léviathan* de Hobbes où le corps souverain en majesté contient la myriade des corps de ses sujets fondus en lui. Ce risque d'aliénation est réel et nous le gardons toujours en vue en parlant de « tiers absolu » ; mais, ici, c'est une alternative positive et émancipatoire que nous visons, quelque chose comme l'image inversée du *Léviathan* : non plus les petits sujets dissous dans la figure du souverain, mais, à l'inverse, la fonction tierce opérant au cœur de chaque sujet. Ce serait, en somme – si du moins on voulait bien lui donner toute sa

[10] Rousseau 1972, 77. Un remarquable dédoublement s'observe ici, comme chaque fois que se réalise une forme d'auto-transcendance : l'individu (indexé sur ses intérêts particuliers) s'élève à la condition de citoyen (inspiré par l'intérêt général) et sa volonté particulière se hisse au niveau de la volonté générale; la même transformation s'observe au plan collectif, de sorte que la multitude s'associe en peuple souverain. Dans ces conditions, il n'est ni faux, ni invalide sur le plan juridique, de soutenir que « chacun contracte avec lui-même »; chacun, en effet, contracte avec lui-même, mais sous deux états différents : la condition de particulier et celle de membre du tout. Il ne s'agit plus, comme chez Hobbes, de s'assujettir à un tiers tout-puissant avec lequel on n'a même pas contracté, mais de participer activement à une totalité qui tout à la fois vous dépasse, vous intègre et pourtant procède de vous. Le souverain qui produit le pacte est à la fois intérieur et extérieur à chaque contractant. Dans ces conditions, il n'y a plus de contradiction à soutenir qu' « on obéit avec liberté ».

[11] Pour un commentaire, cf. Derrida 1984.

profondeur – la réalisation de l'adage populaire *jamais deux sans trois* : le tiers opérant au sein du « je » et du « tu », médiatisant leur dyade, pluralisant jusqu'au sujet lui-même[12].

Ainsi dédoublé, le sujet de droit bénéficie de la personnalité juridique ; celle-ci, comme l'indique son étymologie latine (*persona*), est une masque symbolique exprimant le rôle et le statut qui sont ceux dont bénéficie désormais l'individu sur la scène juridique : une égale reconnaissance de sa dignité intrinsèque (accompagnée de droits et de devoirs) et un écran qui préserve les singularités de son individualité concrète (en droit pénal notamment où l'on juge un acte ou un comportement et non l'identité d'une personne)[13].

4. Cet arrachement prend la forme paradoxale d'un « saut par-dessus ses propres épaules » - on l'exprimera à l'aide d'un nouveau néologisme : « auto-transcendance - soit la référence à une instance extérieure (transcendante) à partir d'une position immanente ; ou encore : la mobilisation d'une instance hétéronome à partir des ressources de l'autonomie du sujet. D'aucuns pourraient à nouveau se gausser et rappeler l'aventure du baron de Münchausen qui croyait se sortir du marais où il s'enlisait en se tirant pas les cheveux. C'est pourtant un tel paradoxe que la constitution du social donne à voir : une constitution paradoxale en forme de « hiérarchie enchevêtrée » ou de « boucle étrange », comme disent les théoriciens des systèmes (Hofstadter 1985, 112) ; un mouvement qui semble suivre l'étrange parcours d'une bande de Möbius, qui, de l'intérieur conduit à l'extérieur et y ramène; un ruban sans fin et doté d'un seul bord, dont la torsade qui lui est imprimée dissout l'idée même d'intérieur et d'extérieur.

L'histoire livre nombre d'illustrations de cet effet paradoxal dont l'importance n'échappera à personne : si les sociétés ne se soutiennent que de se référer à un tiers qui les dépasse et les fédère, c'est pourtant de leurs propres ressources qu'elles en tirent la représentation. Ce « grand » tiers, qui se donne pour indisponible tant au pouvoir qu'aux individus, est néanmoins le

[12] G. Simmel (1999) parle de «socialisation de l'intérieur » à propos du rapport du couple au désir d'enfant ; certes l'enfant né représente un tiers concret, mais l'ouverture du couple à l'enfant à naître induit une nouvelle logique marquée par la « socialisation de l'intérieur », signe de l'action de la « fonction tierce ».

[13] A l'encontre des prétentions de groupes minoritaires exigeant reconnaissance de leurs spécificités les plus intimes, on peut soutenir que ce voile-écran de la personnalité juridique, conférant à tous des droits égaux, confère une meilleure protection de leur existence personnelle.

produit de leur histoire, du moins en régime démocratique. A l'inverse, c'est le propre des totalitarismes, comme l'a montré H. Arendt, de se réclamer de lois-supra humaines : les lois de l'histoire dans le cas du stalinisme, les lois de la nature (supériorité raciale prétendue, espace vital) dans le cas du nazisme. Ici on est présence non d'une loi à laquelle on consent, mais d'une loi à laquelle on se plie ; ou, plus justement encore, c'est la loi elle-même, loi de la nature ou loi de l'histoire, qui prétend faire plier la réalité afin qu'elle lui corresponde (Arendt 2002, 820).

Ainsi conçue, la fonction tierce qui caractérise le droit est à la hauteur de notre question de départ ; traiter la tension entre nécessaire échange (interaction sociale) collectif et prise en compte des singularités individuelles. Le lien normatif qu'il établit procède des individus eux-mêmes, et donc du heurt de leurs intérêts et visions du monde et reste exposé en permanence à la remise en cause. Opérateur symbolique de séparation-réunion, dissociation-reconnaissance, ce tiers juridique qui fait lien procède de la division sociale et jamais ne s'en détourne.

Trois défis en guise de conclusion.

On se propose, en guise de conclusion, de formuler trois défis qui sont autant de réponses possibles aux questions soulevées dans cette contribution : en définitive, on ne compare que l'incomparable, on ne traduit que l'intraduisible, et on ne régule que ce qui est conflictuel.

1. On ne compare que l'incomparable.

Certes toute comparaison est hasardeuse, parfois forcée, souvent superficielle. Faut-il, pour autant renoncer à cette activité qui est à la base de l'intelligence du monde (*inter-ligere* : relier le même et l'autre, passer du connu à l'inconnu), faut-il abandonner la partie et se ranger à l'adage populaire selon lequel « on ne compare que ce qui est comparable » ? Devrait-on succomber, dans l'entreprise comparatiste, à une objection préjudicielle du même genre que celle que nous avons discutée dans le champ de la traduction : « on ne traduit que ce qui est traduisible » ? L'esprit se rebiffe devant cette sorte de paresse conformiste, et on suivrait plutôt l'injonction en forme de

programme, aussi provocant que stimulant, de l'essai de l'héléniste Marcel Detienne : *Comparer l'incomparable* (Detienne 2000). S'en tenir à ce qui est d'ores et déjà comparable, demande-t-il, n'est-ce pas s'enfermer dans les « lieux communs » de l'opinion, faire bon marché des différences qui séparent toujours les objets, et se dissimuler le caractère nécessairement construit de la comparaison opérée ? N'est-ce pas aussi préserver, comme un dépôt sacré, le caractère « incomparable » (au sens épistémologique mais aussi normatif) de « son » objet de prédilection (telle la « Grèce éternelle » des historiens, que brocarde Detienne pour leur hostilité aux comparaisons anthropologiques) ? Des expressions comme « miracle grec », « génie national », « exception française » ne fonctionnent-elles pas, à cet égard, comme des tabous destinés à préserver l'intégrité d'une culture à l'encontre du sacrilège comparatif (très proche, à bien des égards, de l'interdiction de traduire qui accompagnait les textes sacrés) ?

Detienne a raison : c'est en multipliant les « dissonances cognitives », par des rapprochements audacieux et une approche contrastive, que surgiront les traits différentiels et que le savoir progressera. On expérimentera donc, on construira des comparables, on fera varier les données, on confrontera joyeusement Grecs et Iroquois, on monnaiera les catégories du sens commun. L'art de « monnayer », écrit Detienne (Detienne 2000, 47 s.), retrouvant ainsi la métaphore monétaire souvent utilisée pour la traduction ; l'art de ne pas prendre les données pour « argent comptant », mais les évaluer, les faire circuler, les échanger, pour leur faire produire quelque intérêt.

Cette comparaison différentielle conduit à placer les textes à comparer dans un rapport non-hiérarchique, en se gardant de jugements de valeurs implicites sur la qualité des cultures confrontées - on sait que de telles évaluations se glissent aisément dans un certain historicisme qu'accompagnent les notions de progrès, d'influence et de dépendance. Detienne souligne encore la portée éthique d'une comparaison qui, en se portant sans préjugé au devant de l'autre, suscite en même temps un regard critique sur sa propre tradition (Detienne 2000, 59). Nous disions, quant à nous, que la traduction, mieux encore que de faire apparaître l'autre comme « alter ego » a cet effet bienvenu de faire surgir l'autre en nous (« soi-même comme un autre »).

Au cœur de cette démarche comparatiste, comme le notait Ricœur pour la traduction, se fait valoir la nécessité de construire les comparables : forger un axe de comparaison assez pertinent et robuste pour, tout à la fois, faire ressortir et le trait commun perçu et les différences à exploiter.

2. On ne traduit que l'intraduisible

Oui la traduction est une activité paradoxale, à la fois nécessaire et impossible ; oui, elle est une opération toujours inachevée et insatisfaisante, oui, l'essentiel reste intraduisible. Et si, pourtant l'intraduisible était la condition de la traduction ?

Humboldt consacra quinze années de sa vie, paraît-il, à traduire l'*Agamemnon* d'Eschyle. Ce qui ne l'empêcha pas de débuter sa Préface pas ces mots : « Un tel poème est intraduisible» (*unübersetzbar*)... et de déclarer, une page plus loin « cela ne doit pourtant pas nous dissuader de traduire» (Humboldt 2000, 33 et 35).

Dans ces conditions, l'intraduisible, c'est, comme l'écrit B. Cassin, ce qu'on n'arrête pas de (ne pas) traduire (Cassin 1989, 999).

A l'instar de la « catastrophe» de Babel, l'intraduisible est la chance et non la malédiction de la traduction. Il est le signe de ce que, dans le discours, quelque chose « résiste», et donc innove ; il annonce une parole, et pas seulement la communication d'une information. «Dans la traduction, on doit parvenir jusqu'à l'intraduisible», écrivait Goethe[14]. Mieux même : d'une certaine façon , la traduction ne commence qu'avec la conscience de l'intraduisible; avant cela il n'y a que transposition spontanée, substitution non problématique, tranquille déroulement du cercle herméneutique de la connivence linguistique et culturelle.

De ce point de vue, on peut soutenir, sans provocation, que l'intraduisible est la condition de possibilité de la traduction; mais aussi sa condition d'impossibilité et donc l'assurance de son échec - ce qui, à tout prendre, est la meilleure garantie de sa poursuite. Car si la traduction devait réussir totalement, le spectre de la langue unique referait surface et les tours, à nouveau vacilleraient...

3. On ne régule que ce qui est conflictuel.

Certes, le droit fait violence, appuyé qu'il est sur la force publique dont Max Weber disait qu'elle était une forme de « violence légitime ». Certes, le jugement s'inscrit sur fond de « différend » et ne peut prétendre à une

[14] Cité par A. Berman 1999b, 97.

forme aboutie d'impartialité. Mais c'est sa condition même de n'opérer que sur fond de conflit, de trancher entre prétentions opposées et d'ajuster des poids inégaux. Le conflit, disions-nous, est l'objet, l'enjeu et la nature même du droit. Les mesures qu'il adopte restent elles-mêmes l'objet de controverses nouvelles et de combats recommencés. On ne pacifie que ce qui est conflictuel, on ne régule que ce qui est irrégulier, l'équerre de la norme ne s'applique qu'à des formes inclinées. Et c'est à chaque instant que l'orientation de l'équerre elle-même est rediscutée. Il n'y a qu'au paradis que règne l'*agapè* et que s'accordent toutes les prétentions ; aussi le droit n'y est-il plus nécessaire.

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Narration as a threshold in the search for meaning[1]

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ABSTRACT

How can a narration that has been moved by an artistic sensibility contribute to the understanding of the work of the jurist? The chosen narrative in response to the question is from literature and revolves around a page by Musil from *The Man Without Qualities*, in which Musil talks about man's need to give a narrative order to his life. As we shall see, this order is made up of a quality crossing Aesthetics. By making dialogue from this page by Musil with two works by Kiefer, we will try to show as the artistic way can be useful for the jurist to extend his/her sensibility and imagination.

KEYWORDS

Narration; Musil; Kiefer; Aesthetics; Threshold; Sense; Sensibility; Feeling; Legal Education; Measure

1. I would like to start with a fairly, simple, question, at least in its formulation: how can a narration that has been moved by an artistic sensibility contribute to the *understanding* … to the *search for sense* in the work of the jurist?

This question is valid for any work of art, in the fields of literature, music, figurative art or cinema. What is important is to point out that every work of art is a form, and every form contains a sense that we can assume through

[1] This short article re-proposes my speech on the occasion of the conference "Justice as Translation and Counter-storytelling" held in Coimbra March 31st to April 2nd, 2022. I would like to thank the Law Institute of the University of Coimbra, and particularly Prof. José Manuel Aroso Linhares for his exquisite hospitality. In these few pages I wanted to maintain the colloquial tone that characterized that important experience.

a narrative. In the present contribute, the narrative I chose in response to this question is from literature and it revolves around a page by Musil from *The Man Without Qualities*, in which Musil thinks about man's need to give a narrative order to his life.

As we shall see, this order is made up of a very special quality…

Allow me to anticipate this quality referring to a picture by Anselm Kiefer named *Die Deutsche Heilslinie* (*The German line of salvation*).[2]

In that picture a man stands in front of an endless space, full of shadows. Everything is fluid, not very defined. Everything is in motion. There is no path, no certainty… but the man doesn't look back and slowly walks into this landscape.

The size of the painting and the proportion between the work and people who approach it are also important. It almost seems that there is a chance for people to get into the picture and follow the man painted by Kiefer. The impact of this work is very strong indeed.[3]

After our reading of Musil, at the end of these few pages, I will come back to Kiefer to comment another work of him and that complete why I proposed this picture.

2. But let's begin by reading three passages from Musil's page:

> As one of the apparently detached and abstract thoughts, which so often in his life acquired an immediate value, it occurred to him that the law of this life, to which oppressed people aspire by dreaming of simplicity, is none other than that of the narrative order, that normal order which consists in being able to say: "After this happened something else occurred". What reassures us is the simple succession, the reducing to one dimension - as a mathematician would say - the oppressive variety of life; picking up the thread, that famous thread of the story of which the thread of life is also made, through everything that has happened in time and space!

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[2] *Die Deutsche Heilslinie* by Kiefer is a work completed in 2013. The dimensions of the painting are 380 x 1100 cm. Conceived as a part of the permanent installation *The Seven Heavenly Palaces*, this work is visible in Pirelli HangarBicocca, Milan (https://pirellihangarbicocca.org). To see an image of it visit https://artsandculture.google.com/asset/die-deutsche-heilslinie-anselm-kiefer/OAHW-sbM-M7vGBA?hl=it.

[3] Just by way of example, see the photo available online at https://www.flickr.com/photos/tabomago/49242265157.

> Blessed is he who can say "when", "before" and "after that"! He may have experienced sad events, he may have writhed with pain, but as soon as he is able to report the events in their order of succession, he feels so good as if the sun were warming his body.
> [...]
> In the fundamental relationship with themselves, almost all people are storytellers. [4]

We can start from this point. Musil writes "Almost all people are storytellers", but what kind of storytellers and stories is he referring to? Musil says that narration is used by man to give a "complete" meaning to his experience, to "give order to his existence".

Ricoeur seems to echo him when he says that the narrative serves to re-configure our lived time, which otherwise would be elusive and incomprehensible. First, therefore, we can say that people are storytellers because they give meaning and form to their lives through the formulation of stories.

Narration however is not a process that concerns only the individual sphere, and this leads to a second consideration, namely that narration cannot disregard a relational dimension and/or its reference to a social context.

The cultural psychologists who have dealt with storytelling in the last thirty years explain it very well, distinguishing between paradigmatic thinking, which is assigned to scientific reasoning, and narrative thinking, which emerges, not only in the early stages of cognitive development, but which comes from the interaction with each other along the entire life and is completely addressed to the social. Telling and sharing stories about themselves and others is, for these scholars, the most natural way in which people organize knowledge and build – formulate – life in common. In this sense Jerome Bruner (2002) says that he doubts that collective life would be possible were it not for the human ability to organize and communicate experience in a narrative form.

On their part, the sociologists who deal with narration reinforce this reasoning by arguing that the community itself is "in itself" "storytelling" and it is narrative because it comes about thanks to the "sharing" of individual stories that are able to merge into a "shareable" story.

[4] The English translation of this page is mine. See the original text in Musil (1930, I, 650).

However, it doesn't mean that we are talking about an irenic community. As Jedlowski (2000, 2009) warns, even if the social bond is based on sharing the story, it is also exposed to crisis, which can break out at any moment. The story, for this scholar, is like the gift in the meaning that Marcel Mauss elaborated: a "gift that binds" and, precisely because it is characterized "by a mutual obligation", the story maintains an ambiguous nature, because while it is free, at the same time it imposes the exchange. In short, we can say that narrative is the gift that works for the life in common, or it is also the *munus* of *communitas* – (*communitas*, in Latin, we remember, is made up of *munus* and cum). Therefore, this gift doesn't save, can't protect from conflict in an absolute way, and it's obvious: each individual, each group, culture or subculture ... "each" owns and claims their own story ... inevitably the fracture of the social bond is always ready to emerge ...

The point that interests us, in any case, is that narrative, as long as it is shared, is a "form" through which storytellers can mediate their meanings and contain excess of each individual giving form to an understandable and sustainable "limit". In other words, we can say that narrative becomes a space in which the otherness can find its balance, and it is always ready to be rewritten, reformulated, when it ceases to make sense or to exercise its ordering function.

Through the lens of the category of narrative, therefore, we can but observe our life in common as a context that continually breaks down and recomposes itself, through narrative combinations, forms, of which we are at times storytellers and at other characters, but in which – and it is the most important – we find our reference to a common – shareable - sense.

By this way we come to a third consideration. If this is the dimension of our social existence, the juridical dimension cannot be alien to it and Robert Cover is still the scholar who expressed this idea best of all. In his well-known *Nomos and Narration*, Cover writes:

> We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. The world we inhabit is a nomos, that is, a normative universe. No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every Constitution there is an epic, for each Decalogue a scripture. Once understood in the context of the narratives that give it meaning, the law becomes not merely a system of rules to be observed, but a world in which we live. (Cover 1983, 4)

The basic thesis by Cover is that this universe, this *nomos*, is formed by the narratives that constitute the context of reality of our experience, and that the "sense" that these stories retain is useful as an "orientation", a "direction", a "guide" to behaviour. The idea is that this nomos is "order", in meanings and values, which translates into rules.

Once established that the law is also part of a narrative context, the real problem is then to understand how a legal story can be that narrative – that form able to configure that limit: that understandable and sustainable "limit" we were talking about. In other words: How a legal form can mediate a useful narrative to life in common, to *communitas*, how a legal form can be that *munus* of life in common!

So, let's go back to our literary page and see how Musil's "narration" can help us.

3. Describing the narrative order that "almost all people" yearn for, Musil specifies that the narration, starting from the epic, is more often than not "an experienced perspective shortening of thought". Man's ability to reduce to one dimension the oppressive variety of life… through an ordered narrative is not, probably, the kind of narrative that interests him. Let's read:

> The traveller can have a pleasant walk, along the main road in torrential rain, or can moan with his feet in the snow, at twenty degrees below zero: the reader gets nothing but a feeling of well-being, and it would be difficult to understand if the eternal trick of epic, with which even the nannies calm their little ones, this experienced perspective shortening of intelligence, was not already part of life. […]
>
> They like the ordered series of facts because it is like a necessity, and thanks to the impression that life has "a course" they feel somehow protected in the midst of chaos.
>
> The novel has benefited from this.[5]

[5] The English translation of this page is mine. See the original text in Musil (1930, I, 650).

Here, it becomes clear that Musil wants to criticize the novel because it is the perfect model of an ordered narrative and proof of this is people's disaffection towards poetry, that he notices:

> They don't like lyrics, or only from time to time, and if in the thread of life some "why" or "in order that" becomes entangled in it, they execrate any reflection that goes beyond that.

We can imagine that, for Musil, people don't like poetry for the obvious reasons that poetry is mysterious, cryptic, stretched to infinity... because it doesn't give certainty!

By this way, using an *a contrario* argument in his considerations, Musil introduces poetry to approach what cannot be ordered or foreseen. But not only. He specifies the need to move away from a narrative characterized by a "short thought", to tap into a different thought which, like that of poetry, is capable of conceiving "long thoughts"[6]: longer than the ordered meaning of a concluded, paradigmatic narrative.

And he saves us in that "almost" all people ... because, although Musil says that the shortening of thought is part of human life, in the sense that it is something "experienced" and in a certain way "necessary", he's advancing the idea too that people can also use this other thought – the long thought – to search also for a different sense and narrative that "go further".

But for what kind of search?

If this is like that of the poetic search, Musil is suggesting approaching a different way of conceiving knowledge: a search for sense that goes beyond the Positivism of traditional scientific thought and in which the Aesthetics approach consists…

He seems to tell us that the "sense" is not only the product of an interpretation of conventional codes of signification, but also depends on "feeling" – "sensation" and "sentiment", even if the results of this understanding cannot be made explicit or ordered. Therefore, if, on the one hand, we must not stop using our rational resources, our scientific categories, on the other hand, adopting the Aesthetics approach, we could learn to push knowledge also into the sphere of the "sensitive" and "affective" understanding.

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[6] "Long thoughts" is an expression coined by Bauman to introduce an ethical way of thinking (Bauman & Donskis 2013).

In brief, if we allow our thought to expand itself, to be also a "thought that feels", we could access what remains also in the shadow of the sense and accept this shadow as a constitutive dimension of our possibility to understanding. In this way we could avoid abstracting ourselves from that "chaos" we fear, which, in the end, is merely the reality of human life, and give a sense and a form also to the living which we are unable to dominate and foresee.

But not only. We could access, through the Aesthetics approach, that is like the poetic approach, what remains in the silence of the word, and of the form.

Jean-Luc Nancy (1997) says that if we understand, if somehow we have access to a "threshold" of meaning, this happens poetically.

The most important is to have the awareness that our narratives, these forms, are just "thresholds": that the meaning we can find in them can be ordered just in part.

Most of all, thanks to this sensibility, we can assume that we stay always in a condition of limit.

4. Let's read now how Musil concludes his page:

> And Urlich realized that he had lost that primitive epic to which private life still holds firm, although publicly everything has already become non-narrative and no longer follows a "thread" but extends itself to an endless surface.[7]

Perception of a vast, infinite world beyond ordered forms, beyond known habits; sense of bewilderment; awareness of the need for a limit, knowing that a closed narrative is completely fictitious… Musil gives us an example of a "search for meaning" which finds a complete artistic expression. It includes everything: reasoning, feeling, sensation. We can say that it's a perfect example of Aesthetics approach. But it's not so surprising. Like every artist, Musil "poetically accesses a threshold of sense".

The point for us is to understand if living this threshold can be of great value for the jurist too!

So then. How to answer our initial question restarting from here?

[7] The English translation of this page is mine. See the original text in Musil (1930, I, 650).

First.

As we have seen, suggesting other ways of understanding, artistic narration can show the jurist how to find, "in a wider exposition of himself", the "common – shareable – sense" also through sensibility.

In this perspective, the Aesthetics approach allow the jurist to learn: that there is always a part of the sense in the forms beyond conventional codes; that legal rules, legal decisions also contain some shadows, and not always these are negatives; that in the legal word the silence can be an instrument of power working to exclude different voices, but, at the same time it can offer a possibility to listen to excluded voices from law or public speech.

Justice is shrouded in the silence, recites a fragment by Solon (Noussia 2010, 108)[8]

Second.

Adopting the Aesthetics approach, we can learn to stay in the "space of the threshold", with the awareness of inhabiting a limit, because we know that we can understand this part of meaning only by feeling without pretending to get certainty, but at the same time without giving up the possibility of understanding in the widest way.

This means for a capable jurist to proceed in the hard search for measure, which is the first aim of law and justice.

The capable jurist – in assonance with the notion of "homme capable" by Ricoeur– should elaborate legal forms that can accomplish that tale – that useful narrative to the life in common which ultimately law obeys – including reasoning, feeling, sensation: legal forms that can truly be like works of art, when they flow from the same awareness and confidence with the limit that artists have.

Third.

Our work consists of helping the jurist to integrate "with art" his scientific approach in order to learn to "feel" and to "tell" the most appropriate

[8] Solon's texts have traditionally been analysed as sources for investigations in history and political philosophy. Only recently have they been studied from the standpoint of their poetics. See M. Noussia-Fantuzzi (2010). On the original relationship between law and poetry in protohistoric Greek culture, see Mittica (2015).

measure. At this end artistic and humanistic education are fundamental, starting from our programs at Law schools.

I think, and this convention is an important example, that we are doing many things, but a further effort in my opinion should be go in the sign of the Legal Aesthetics.

An Aesthetics approach doesn't consist of studying history of art, or in the analytic exam of a work to discover canons, special codes, symbols or languages, or the intentions of its author: Aesthetics pertains to sensitive knowledge. Certainly, knowing the history of a work can be useful, but most of all we must established a direct, personal relationship with the work, that moves from an affective tension. If we enter into a real relationship with it, something happens: the work happens because it comes back to life thanks to our perception of it, and at the same time also we happen, in a new way, thanks to this movement.

We happen because we "feel" and understand something we have not conceived before, because we can see something we have not seen before. And thanks to this spontaneous approach we can extend our sensibility and imagination. I mean that the jurist, through this kind of experience, can train his comprehension at something unconceived, perhaps unusual, or also subversive: something that offers him a possibility to understand that part of sense in the forms that remains in the shadow… and by this way – I repeat – he can elaborate the most right measure.

More than a theory, the Aesthetics approach consists of an experience that gives to the jurist a possibility to elaborate new sense, new forms. But it cannot be improvised. We must learn to prepare ourselves for the aesthetic experience. The Aesthetics approach needs "attention", "time", "silence", an open posture to allow the sense to emerge.

5. I would like to conclude by introducing to you another work by Kiefer that seems to me a good exercise to make explicit what I intend. Its title is *Alchemie*.[9]

[9] *Alchemie* is a painting by Kiefer completed in 2012. The dimensions of the painting are 660 x 1140 x 40 cm. The work consists of two side-by-side canvases. The element that connects the canvases is external and is a scale. Like *Die Deutsche Heilslinie* it is a part of the permanent installation *The Seven Heavenly Palaces* in Pirelli Hangar Bicocca, Milan. To see an image of it visit https://artsandculture.google.com/asset/alchemie-anselm-kiefer/fAGSqJ3vxWqhAA?hl=it.

Which narrative emerges in *Alchemie*? Is there a sense that remains in its shadow, and we can feel, establishing a relationship with this work?

Our exercise consists of understanding if we can go further the immediate sense that this image by Kiefer gives us.

Let's make a preliminary consideration. We are jurists, not art historians or critics. So, we can or cannot know Kiefer and his works. It's not a problem. We must approach the picture just as we are. But we know that our education leads us to point out all that refers to law and justice. It's normal: it's what we can expect from us, but this is also fine.

Let's look at what might be a first impression. Our attention is focused entirely on the scales. The scales are the most original metaphor of justice, in its most original meaning of measure. It seems to us that the composition of the scene makes it essential. Its sense seems concluded in a concept of justice as fundamental, original, dimension of life, even before men. Something supernatural in close connection with nature.

But let's take the time we need, and let's go back to looking at the work. In staying in front of the work another dimension becomes prevailing. It is that of the silence. The work is full of silence, and it's the silence that is also within us because our attention is becoming wider.

Looking again we notice that the scales, certainly the metaphor of justice in our perception dictated by legal culture, are detached from the canvas. Maybe a threshold?

It's just a sensation, but let's stay here, in this threshold, let's have the perception of this opening working, to give us tension… Probably we need time, but in the end, we could see more: we could happen and then the form could reveal us something wider.

I can tell only what I have seen, just my experience. The scales seem to me to open a threshold allowing me to conceive a land to be sown, as a metaphor of the world that men must continually build. In this land, the possibility of measure is an alchemy of various elements: what is measurable – the seeds in the scales, and what is immeasurable – the seeds that fall from the sky.

This *alchemy* is the secret of law and justice "shrouded in the silence" – in what remains silent of the word. The possibility of measure is in the perfect balance that this form could inspire in a jurist.

But I see also the great human work of ploughing the fields. In the grand scheme of things, fields are completely ploughed, in an ordered way. This means to me that a lot of hard work is needed to do justice: a work that

contemplates all human abilities and resources: rationality, technique, but also sensitivity and imagination.

I think, and I really conclude, that the work of capable jurist consists of this hard ploughing and our charge is to continue to nourish the humanistic component of legal education.

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Dante's Political Narratives

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ABSTRACT

This contribution investigates Dante's work by putting it under the lens of law and the legal literature that has taken an interest in his reflections. The essay is divided into three parts: the first part discusses some legal writing on Dante's work; in the second part, I analyze some passages of the Monarchia in which Dante's imperial vision emerges; in the third part, I discuss the three political cantos of the Commedia in which Dante deals with the municipal, national and universal dimensions of political action. I will argue that the political Dante does not reach the intellectual heights of Dante the poet, and that his conceptions of politics and law are contradictory and remain within the context of medieval culture.

KEYWORD

Dante, Monarchia, Commedia, law, literature, polyphony

SUMMARY

Dante Alighieri is a poet of universal value, the father of the Italian language and a genius of his time; his work reflects the tormented events of an adventurous and troubled life. His political exile, condemnation to death, and separation from his beloved Florence have strongly marked his literature. But alongside Dante's poetic genius, was there also a political or legal theorist?

This contribution investigates Dante's work by putting it under the lens of law and the legal literature that has taken an interest in his reflections. The essay is divided into three parts: the first part discusses some recent legal writing on Alighieri's work; in the second part, I analyze some passages of the *Monarchia* in which Dante's imperial vision emerges; in the third part, I

discuss the three political cantos of the Comedy in which Dante deals with the municipal, national and universal dimensions of political action.

The contribution intends to answer three fundamental questions: is Dante a compelling legal and political thinker? What kind of political vision does Dante articulate: realist, utopian or theological? Does Dante cross the frontier into political modernity?

I. Legal Literature on Dante

Among the innumerable studies of literary criticism, Justin Steinberg's 2013 publication, *Dante and the Limits of the Law*, made a great splash. It purported to be the first comprehensive study of the underlying legal structure of Dante's *Divine Comedy*[1].

Steinberg argued that:

> "Dante's literary-theoretical framework is simultaneously and manifestly a legal one. His engagement with the law is most evident in the *Commedia*, where he imagines the afterlife as a highly regulated administrative body - complete with an elaborate network of local laws, hierarchical jurisdictions, and rationalized punishments and rewards. […] Unlike his contemporary Cino da Pistoia, it is improbable that Dante had any formal training in civil and canon law, and his sporadic references to specific legal texts are concentrated in doctrinal works such as *Convivio* and *Monarchia*. On the other hand, as a convicted criminal and former public official, Dante was immersed in the legal culture of his day, and the *Commedia* is permeated with contemporary juridical rituals of everyday experience: deterrent and retributive punishment; testimony and confession; litigation and sentencing; special privileges, grants, and immunities; amnesties and pardons; and a variety of forms of oaths and pacts. These enactments of the life of the law - not his explicit citations of legal doctrine - represent the poet's most profound statements about law and justice." (Steinberg 2013, 1-2).

[1] Steinberg 2013, 175: "There is no comprehensive study of Dante and the law".

Steinberg sees Dante as interested in describing the phenomena that revolve around the law and the imaginative conditions that make it effective. The concept of exception is central, however understood in a medieval jurisprudential sense rather than a modern, political one. Interested in the role of discretion, both in art and in law, Dante tries to identify the boundaries of the law. Steinberg explores notions that he sees as contiguous to law: *Infamy* which lies beneath law; the *Arbitrium* beyond the law; the *Privilegium* above the law and the *Pactum* next to the law:

> "Dante seeks in the *Commedia* to restore the common values, exemplary narratives, and disciplining practices that exist at the boundaries of the law. His poem is meant to occupy the interstices between law and life, to provide the moral and aesthetic preconditions necessary for the law to thrive. […] Dante understood that compliance with the law depended more on an imaginative attachment to the ideal of an universal 'imperador' (emperor) who 'in tutte le parti impera (rules in all parts; *Inf.* 1.124, 127) than in actual force." (Steinberg 2013, 5).

While Dante scholars have concentrated mainly on the idea of justice, they have generally neglected the more specifically legal thought in Dante. This could be because Dante's legal ideas are not very original, not very relevant and often apodictic and/or contradictory. But to admit this would mean relativizing the image of the divine poet, something that Dante scholars are generally reluctant to do. They have therefore preferred to analyze the fragments of Dante's work in which he deals with legal phenomena to exalt their virtues, rooted in their assumption that Dante can do no wrong!

In this contribution, I would like to argue instead that, while Dante is a giant of Italian and medieval literature, a universal and eternal poet, his ideas about politics and law are not very innovative, coherent or precise.

In arguing for a measured approach to Dante as a legal and political thinker, I am building on doubts authoritatively expressed by Ernst Kantorowicz in asking:

> "but who would care in any event to label Dante, the judge of the dead and the quick, a jurist?" (Kantorowicz 1966, 453).

Sceptical of a juridification of Dante's work, Kantorowicz nonetheless closed his monumental work on medieval political theology and the rise of the abstract modern state with a chapter dedicated to him:

> "the image that Dante gave of the prince and the [...] monarch reflects the conception of a royalty centered on man and of a purely human *Dignitas* that without Dante would not have existed or that in any case would not have emerged in his time. Every Dante interpretation is destined to remain fragmentary, while Dante is complex in itself." (Kantorowicz 1966, 454).

According to Kantorowicz, Dante was a genius with something to say about everything, even the legal tradition. And it is precisely the relationship between legal sources and Dante's work that Italian scholars have coined a "legal Dantism", a branch of research into the

> "intimate relationship that unites Dante's work to the sense of law and the legal language of his time, so that we can speak of a legal dimension of his moral and literary world and even of a manifest simultaneity of the theoretical-literary structure of his work with a sapiential nature and open to the most varied interferences of the common law".[2]

A leading exponent of legal Dantism is Diego Quaglioni, who edited the new edition of the Monarchia, and argued that

> "in Dante, the language of law, which he uses and reshapes as an expression of a flawless and redemptive "rule of reason", is distinctly imprinted in Dante's political lexicon."[3]

This idea that has been pushed further by another prominent legal Dantist, Claudia Di Fonzo, who argues that

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[2] D. Quaglioni 2022, 113: "Un'intima relazione unisce l'opera di Dante al senso del diritto e al linguaggio giuridico del suo tempo, sicché si può parlare di una dimensione giuridica del suo mondo morale e letterario e finanche di una manifesta simultaneità della struttura teoretico-letteraria della sua opera con la natura sapienziale e aperta alle interferenze più varie del diritto comune".

[3] D. Quaglioni 2022, 121: "in Dante la lingua del diritto, di cui egli si serve e che egli riplasma come espressione di una indefettibile «regola di ragione» e della sua funzione eminentemente salvifica, e' impressa nel lessico politico di Dante come un'impronta distintamente leggibile."

> "the *Commedia* [...] is also the greatest legal fiction in the history of Italian literature which, following the tradition of the *partimen* of the troubadours, serves to pass judgment on ancient and recent history and to make Dante into an anti-Pilate. These are the phases of the great trial held 'out of this world'…, in the presence of God as judge, Christ and Mary as defense attorneys".[4]

The origins of contemporary legal Dantism can actually be traced back to the first publication of one of the greatest legal minds of the twentieth century, Hans Kelsen. In 1905, at the age of 23, he published "*Die Staatslehre des Dante Alighieri*", an original book in which he investigated the literary culture of law in the work of a medieval poet. Although advised against taking this path by his academic superiors, the young Kelsen began his career in public law with a work that would have completely opposite characteristics to the later scientific production for which he would be renowned. The title is curious: the "*Staatslehre*" is a typical German expression indicating the theory of the State; *Lehre* is a lemma that expresses the conjunction of academic teaching and consolidated theory, *Staat* is obviously a modern word, introduced into the political and legal lexicon of modernity by Machiavelli and therefore unknown to Dante in its political meaning (Dante uses the noun "stato" only in sense of condition, never meaning a noun that indicates a political community established permanently in a given territory).

Kelsen's first book was published twice in Italy, once in 1974 and then again in 2017. In the absence of an English translation, it is interesting to note the publication of a Portuguese translation in 2021, mainly due to the Brazilian legal academy's fascination for Kelsen (who made an important contribution to the draft of the Brazilian constitution of 1933).

Why, we may ask, was Kelsen so attracted to Dante's poetry? What does Dante, a man of the Italian Renaissance, have in common with Kelsen, a Jew from Prague, who taught in Cologne, Zurich and Berkeley? I believe that the answer lies in three directions: 1) the experience of political exile - Dante

[4] Di Fonzo 2019, 35-36: "La *Commedia* [...] è anche la più grande finzione giuridica della storia della letteratura italiana che, nel solco della tradizione dei *partimen* dei trovatori, serve a dare un giudizio sulla storia antica e recente e a rendere Dante un anti-Pilato. Sono gli atti del grande processo celebrato 'fuori dal mondo' (la formula è di Cesare Segre), nei confronti del mondo e della storia esperita da Dante per conoscenza e per esperienza, al cospetto di Dio giudice, essendo Cristo e Maria avvocati difensori". See also: Di Fonzo 2023.

was expelled from Florence, and Kelsen fled European racial persecution; 2) a common nostalgic and universalistic vision - Dante idealized the Holy Roman Empire, and Kelsen the Austro-Hungarian one; 3) a deep desire for harmony, a negative evaluation of conflict and a religious aspiration towards the unity of creation and of the cultural world.

Kelsen argued that no one before him had critically examined Dante's legal doctrine:

> "For a more in-depth understanding of Dante's political position, the general doctrine of the State according to the Poet, which underlies it, has not been systematically exposed from a legal point of view or examined in a sufficiently critical manner so far."[5]

Kelsen does not idealize Dante; he sees an author fighting against two sides of himself, one a medieval scholastic thinker, the other a Renaissance humanist:

> "Dante's doctrine of the state is the most excellent expression of medieval doctrine and at the same time - at least in many points - its overcoming. And it is for this reason that Dante's doctrine of the State arouses our interest, for the fact that in it Dante, a medieval man of the Scholastica, fights against Dante, a modern man of the Renaissance. And it is also what makes us understand and excuse some obscurity and inconsistency of the Poet's doctrine."[6]

Kelsen seems attracted precisely by the fact that Dante's political thought, unlike his poetry, has been basically ignored:

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[5] Kelsen 2017, 17: "Dennoch ist die für das tiefere Verständnis der poloitischen Stellung Dantes grundlegende, allgemeine Staatsdktrin des Dichters von juristischer Seite bisher noch nicht systematisch dargestellt oder genügend kritisch unetrsucht worden. Diese Lücke auszufüllen, hat sich vorliegende Arbeit zur Aufgabe gesetzt."

[6] Kelsen 2017, 2: "Denn abgesehen davon, dass die vornehmlich staats-theoretischen Problemen gewidmete Schrift des Dichters "Über die Weltmonarchie" änliche Publikationen ihrer Zeit sichtlich übertrifft, ist die Staatslehre Dantes der vorzügliehste Ausdruck der mittelalterlichen Doktrin und dabei, – in vielen Punkten wenigstens, – zugleich deren Überwindung. Darum ist uns auche die Staatslehre Dantes so interessant, weil in ihr der mittelalterliche Scholastiker und der moderne Renaissancemensch Dante miteinander ringen! Und das ist es auch, was uns manche Unklarheit und Inkonsequenz in der Leher des Dichters verstehen und verzeihen lässt"

> "Dante political philosopher occupies a prominent place among all the public law thinkers of his time. [...] We have already shown what new and rich ideas of the future are in his doctrine and we have seen how Dante fought against the concepts and prejudices of his time, how he took care to overcome the Middle Ages and to advance new ideals. However, he was not fully victorious in this struggle, and this is the reason why his doctrine of the state exercised so little influence in the following era."[7]

Kelsen's overall evaluation of the political Dante is ambivalent: on the one hand, Dante struck him as an inaccurate and contradictory political thinker; on the other hand, Kelsen considered him to be a prophet of some fundamental concepts of modernity, above all the unity of the sovereign:

> "Outdated in its foundations, it constitutes the latest expression of the sterile idea of world empire! The modern elements it contains are very poorly formulated, having been expressed too early to constitute the decisive starting point for a new and vigorous process. In the field of the doctrine of the State, Dante only signifies the dawn of the Renaissance, which in its meridian height will yield a Machiavelli and a Bodin."[8]

For Kelsen, Dante anticipates legal and political modernity. But does Dante cross the frontier of modernity? To answer this question, let us now leave the literature on Dante and turn directly to Dante's literature. After all, as Italo Calvino reminds us, "a classic is a work that incessantly stirs up a dust of criticism, but always shakes it off." (Calvino, 1986). Following this suggestion, let's turn to Dante's texts themselves, starting with his most specifically political book: the *Monarchia*.

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[7] Kelsen 2017, 157: "Daß aber dennoch der Staatsphilosoph Dante unter allen Publizisten seiner Zeit einen hervorragenden Platz einnimmt, ist sicher [...] Was sich an neuen, kommenden Ideen in seiner Lehre gefunden hat, haben wir gezeigt, und dabei gesehen, wie mächtig Dante mit den Begriffen und Vorurteilen seiner Zeit gerungen hat, wie er überall bemüht war, das Mittelalter zu überwinden, neuen Idealen sich entgegenzuarbeiten. Doch weil er in diesem Kampfe nicht völlig Sieger geblieben ist, darum hat auch seine Staatslehre in der Folgezeit so wenig Einfluß geübt."

[8] Kelsen 2017, 158: "In ihren Grundlagen veraltet, bildet sie den letzten Aus- druck eines nicht mehr lebensfähigen unfruchtbaren Gedankens: des Weltkaisertums! Die modernen Elemente aber, die sie ent- hält, sind teils viel zu wenig klar und präzise gefaßt, teils zu früh ausgesprochen, als daß sie den festen Ausgangspunkt einer neuen starken Entwicklung hätten bilden können. Auf dem Gebiete der Staatslehre bedeutet Dante nur das Frührot der Renaissance, die in ihrer Mittagshöhe einen Machiavelli, einen Bodin gereift hat".

II. The *Monarchia*

The *Monarchia*, is Dante's most political text.[9] Concerning power and law, it is written in Latin, the institutional language of his time. Dante's main intention was to reinforce the fragile autonomy of the Holy Roman Empire vis a vis the Roman Catholic Church. To do this, Dante argues against the hierocrats and the curialists, who of course would have subordinated the Imperial power to the Papal one.

It is therefore not surprising that the book was very provocative for its time; in fact, it was publicly burnt and inserted in 1559 in the Index of books prohibited by the Catholic Church. It would remain there until 1881 when, in the anti-clerical Risorgimento era it was finally reauthorized. In this work, Dante draws inspiration mainly from Aristotle and Cicero in describing the ideal structure of the Empire: it has the shape of the pyramid. Perhaps this is one of the reasons why Hans Kelsen was attracted to it.

Commentators have interpreted this work differently. According to Kelsen, it expresses a nostalgic utopia of the universal Empire. According to others, it is a "work of thought and doctrine, and its style is neither ideological nor utopian, but paradoxically realistic."[10] Still others see it as an analysis of the theological and metaphysical foundations of political power (Monateri 2017, 7-15).

In the first book Dante equates the concept of Empire to that of Monarchy; in his vision, the commanding sovereign must necessarily be unitary. From the patriarchal conception of the family, whose head must be only one man, the eldest, Dante ascends analogically to the conception of the village as a community held together by the command of a single head, then to the city, equally governed by a single man, up to the kingdom, which can only be ruled by a single man. For Dante, therefore, the Monarchy is not one form of government among others, but the only one that is appropriate and necessary for the universal good. *Unum oportet esse qui regulet et regat*:

> If we consider the household, whose end is to teach its members to live rightly, there is need for one called the *pater-familias,* or for some one

[9] A new Italian edition edited by Diego Quaglioni has recently been published: Dante, *Monarchia*, Milano, 2021.

[10] Quaglioni 2021, LXXI: "opera di pensiero e di dottrina, e la sua cifra non è né ideologica né utopica, ma paradossalemente realistica".

> holding his place, to direct and govern, according to the Philosopher when he says, "Every household is ruled by its eldest." It is for him, as Homer says, to guide and make laws for those dwelling with him. From this arises the proverbial curse, "May you have an equal in your house."
> If we consider the village, whose aim is adequate protection of persons and property, there is again needed for governing the rest either one chosen for them by another, or one risen to prëeminence from among themselves by their consent; otherwise, they not only obtain no mutual support, but sometimes the whole community is destroyed by many striving for first place.
> Again, if we consider the city, whose end is to insure comfort and sufficiency in life, there is need for undivided rule in rightly directed governments, and in those wrongly directed as well; else the end of civil life is missed, and the city ceases to be what it was.
> Finally, if we consider the individual kingdom, whose end is that of the city with greater promise of tranquillity, there must be one king to direct and govern. If not, not only the inhabitants of the kingdom fail of their end, but the kingdom lapses into ruin, in agreement with that word of infallible truth, "Every kingdom divided against itself is brought to desolation."
> If, then, this is true of these instances, and of all things ordained for a single end, it is true of the statement assumed above.
> We are now agreed that the whole human race is ordered for one end, as already shown. It is meet, therefore, that the leader and lord be one, and that he be called Monarch, or Emperor. Thus it becomes obvious that for the well-being of the world there is needed a Monarchy, or Empire. (Alighieri, 1904, M. I, V, 5-10).

It is important to underline how Dante uses the terms Empire, Monarchy and jurisdiction as synonyms, thus articulating a specifically jurisdictional vision of the structure of political power. Significant is the use of the term *politia* to name the constitution, or the form of government, and of the lemma *politizante*, used in a derogatory sense to name the corrupt forms of exercising power. Certainly Dante cannot be considered a democratic thinker. For him, like Aristotle and Cicero, democracy is a deviant, corrupt regime:

> Only if a Monarch rules can the human race exist for its own sake; only if a Monarch rules can the crooked policies be straightened, namely de-

> mocracies, oligarchies, and tyrannies which force mankind into slavery, as he sees who goes among them, and under which kings, aristocrats called the best men, and zealots of popular liberty play at politics.[11]

To his contempt for the democratic form of government Dante adds a purely formal appreciation of legal pluralism. He values the existence of different legislative powers as responding to the need to reflect different lived realities. But he subordinates this pluralism to the ultimate need for the singularity and superiority of the imperial power:

> Nations, kingdoms, and cities have individual conditions which must be governed by different laws. For law is the directive principle of life. The Scythians, living beyond the seventh clime, suffering great inequality of days and nights, and oppressed by a degree of cold almost intolerable, need laws other than the Garamantes, dwelling under the equinoctial circle, who have their days always of equal length with their nights, and because of the unbearable heat of the air cannot endure the useless burden of clothing.[12]

We have seen how Dante articulates a jurisdictional conception of the Empire, but what is his conception of law? It seems to me that his answer to the question "*quid est ius?*" is not clear: the law derives directly from the mind of God, precluding any distinction between the divine will that wills the good and the human will that organizes power. Dante thus denies the possibility of the existence of an unjust law: a law can only be either valid or not:

> From these things it is plain that inasmuch as Right is good, it dwells primarily in the mind of God; and as according to the words, "What was made was in Him life," everything in the mind of God is God, and as God especially wills what is characteristic of Himself, it follows that God wills

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[11] Alighieri 1904, M. I, XII, 9: Genus humanum solum imperante Monarcha sui et non alterius gratia est: tunc enim solum politie diriguntur oblique – democratie scilicet, oligarchie atque tyramnides – que in servitutem cogunt genus humanum, ut patet discurrenti per omnes, et politizant reges, aristocratici quos optimates vocant, et populi libertatis zelatores; quia cum Monarcha maxime diligat homines, ut iam tactum est, vult omnes homines bonos fieri: quod esse non potest apud oblique politizantes.

[12] Alighieri 1904, M. I, XIV, 5–7.

> Right according as it is in Him. And since with God the will and the thing willed are the same, it follows further that the divine will is Right itself. And the further consequence of this is, that Right is nothing other than likeness to the divine will. Hence whatever is not consonant with divine will is not right, and whatever is consonant with divine will is right.[13]
>
> So to ask whether something is done with Right, although the words differ, is the same as to ask whether it is done according to the will of God. Let this therefore base our argument, that whatever God wills in human society must be accepted as right, true, and pure.[14]

To the theological conception which plants the foundation of law in God's will, Dante adds a providentialist interpretation of the rise and consolidation of the Roman Empire. For Dante, the Roman people are the true chosen people, as they were guided by the will to pursue the collective good through the law:

> So it is clear that whoever contemplates the good of the state contemplates the end of Right. If, therefore, the Romans had in view the good of the state, the assertion is true that they had in view the end of Right. That in subduing the world the Roman people had in view the aforesaid good, their deeds declare.[15]
>
> We behold them as a nation holy, pious, and full of glory, putting aside all avarice, which is ever adverse to the general welfare, cherishing universal peace and liberty, and disregarding private profit to guard the public weal of humanity. Rightly was it written, then, that "The Roman Empire takes its rise in the fountain of pity."[16]

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[13] Alighieri 1904, M. II, II, 4: Ex hiis iam liquet quod ius, cum sit bonum, per prius in mente Dei est; et, cum omne quod in mente Dei est sit Deus, iuxta illud «Quod factum est in ipso vita erat», et Deus maxime se ipsum velit, sequitur quod ius a Deo, prout in eo est, sit volitum. Et cum voluntas et volitum in Deo sit idem, sequitur ulterius quod divina voluntas sit ipsum ius.

[14] Alighieri 1904, M. II, II, 5, 6: Et iterum ex hoc sequitur quod ius in rebus nichil est aliud quam similitudo divine voluntatis; unde fit quod quicquid divine voluntati non consonat, ipsum ius esse non possit, et quicquid divine voluntati est consonum, ius ipsum sit.

[15] Alighieri 1904, M. II, V, 18: Declarata igitur duo sunt; quorum unum est, quod quicunque bonum rei publice intendit finem iuris intendit: aliud est, quod romanus populus subiciendo sibi orbem bonum publicum intendit.

[16] Alighieri 1904, M. II, V, 19: Nunc arguatur ad propositum sic: quicunque finem iuris intendit cum iure graditur; romanus populus subiciendo sibi orbem finem iuris intendit, ut manifeste per superiora in isto

In the third book of the *Monarchia*, the contradictions of Dante's political thought intensify: to his uncertain notion of what human law is, Dante adds an unspecified concept of human right, against which the political power is simply unable to act, even if it wanted to. The Empire can do no wrong! We can see that the idea of a "constitutionalist" Dante is anti-historical and unsupported by the text: for Dante, the Monarch cannot act contrary to the law, otherwise the unity of the universal political community would disintegrate:

> Moreover, as the Church has its own foundation, so has the Empire its own. The foundation of the Church is Christ, as the Apostle writes to the Corinthians: "Other foundation can no man lay than that is laid, which is Jesus Christ." He is the rock on which the Church is founded, but the foundation of the Empire is human Right.[17]

> Now I say that as the Church cannot act contrary to its foundation, but must be supported thereby, according to that verse of the *Canticles:* "Who is she that cometh up from the desert, abounding in delights, leaning on her beloved?" so the Empire cannot act in conflict with human Right. Therefore the Empire may not destroy itself, for, should it do so, it would act in conflict with human Right.[18]

For Dante, the Empire consists in the unity of the universal monarchy. The pluralism of local legal systems is legitimate only in so far as it is subordinated to the superiority of the unitary command of the sovereign. In no case is it possible for the Empire to disintegrate:

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capitulo est probatum: ergo romanus populus subiciendo sibi orbem cum iure hoc fecit, et per consequens de iure sibi ascivit Imperii dignitatem.

[17] Alighieri 1904, M. III, X, 7: Preterea, sicut Ecclesia suum habet fundamentum, sic et Imperium suum. Nam Ecclesie fundamentum Cristus est; unde Apostolus *ad Corinthios*: «Fundamentum aliud nemo potest ponere preter id quod positum est, quod est Cristus Iesus». Ipse est petra super quam hedificata est Ecclesia. Imperii vero fundamentum ius humanum est.

[18] Alighieri 1904, M. III, X, 8: Modo dico quod, sicut Ecclesie fundamento suo contrariari non licet, sed debet semper inniti super illud iuxta illud *Canticorum* «Que est ista, que ascendit de deserto delitiis affluens, innixa super dilectum?», sic et Imperio licitum non est contra ius humanum aliquid facere. Sed contra ius humanum esset, si se ipsum Imperium destrueret: ergo Imperio se ipsum destruere non licet.

> Inasmuch as the Empire consists in the indivisibility of universal Monarchy, and inasmuch as an apportionment of the Empire would destroy it, it is evident that division is not allowed to him who discharges imperial duty. And it is proved, from what has been previously said, that to destroy the Empire would be contrary to human Right.[19]

Dante's distinction between the origin of the spiritual power of the Church and the foundation of the temporal power of the Empire rests upon a legal and jurisdictional conception of the Empire:

> Besides, every jurisdiction exists prior to its judge, since the judge is ordained for the jurisdiction, and not conversely. As the Empire is a jurisdiction embracing in its circuit the administration of justice in all temporal things, so it is prior to its judge, who is Emperor; and the Emperor is ordained for it, and not conversely. Clearly the Emperor, as Emperor, cannot alter the Empire, for from it he receives his being and state.[20]

After having built an organic conception of the jurisdictional pyramid of imperial power in order to claim its autonomy from the Church, Dante takes a surprising U-turn at the end to conclude that the Empire must be subordinate to the Pope!

> Wherefore let Caesar honor Peter as a first-born son should honor his father, so that, refulgent with the light of paternal grace, he may illumine with greater radiance the earthly sphere over which he has been set by Him who alone is Ruler of all things spiritual and temporal.[21]

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[19] Alighieri 1904, M. III, X, 9: Cum ergo scindere Imperium esset destruere ipsum, consistente Imperio in unitate Monarchie universalis, manifestum est quod Imperii auctoritate fungenti scindere Imperium non licet. Quod autem destruere Imperium sit contra ius humanum, ex superioribus est manifestum.

[20] Alighieri 1904, M. III, X, 10: Preterea, omnis iurisdictio prior est suo iudice: iudex enim ad iurisdictionem ordinatur, et non e converso; sed Imperium est iurisdictio omnem temporalem iurisdictionem ambitu suo comprehendens: ergo ipsa est prior suo iudice, qui est Imperator, quia ad ipsam Imperator est ordinatus, et non e converso.

[21] Alighieri 1904, M. III, XVI, 18: Illa igitur reverentia Cesar utatur ad Petrum qua primogenitus filius debet uti ad patrem: ut luce paterne gratie illustratus virtuosius orbem terre irradiet, cui ab Illo solo prefectus est, qui est omnium spiritualium et temporalium gubernator.

The *Monarchia* therefore ends with a dramatic twist, an unexpected and inexplicable reversal of the all the arguments made up to that point. But to the internal contradictions of the political thought that Dante expresses in Latin, are added the very different theses that he articulates in the Italian of the *Commedia*, to which we now turn.

III. The *Commedia*

Dante develops a specifically political theme in the sixth canto: in Hell he addresses the city, in Purgatory Italy, in Paradise the universal Empire. The whole poem is aimed, in its historical and prophetic aspect, at the denunciation of civil and ecclesiastical corruption, and these cantos appear as one of the backbones of the larger narrative.

The political canto of Hell is located in the third circle, where the sin of gluttony is punished. After the sad solemnity of the canto of Limbo and the high and tragic tone of Francesca's story, this canto establishes the direct, concrete and realistic style that will later characterize the Inferno. In addition to mythical characters and legendary heroes, here we also encounter humble, ordinary men. Among these is Ciacco, with whom Dante establishes a familiar dialogue on the tragic political condition of Florence, the divided city.

It is no small matter that Dante entrusts to the modest citizen Ciacco, symbol of the small and weak man, with judging the great and the powerful. For the first time in the poem, a prophetic reference to Dante's sad exile appears here. Dante asks him where are the great citizens of the past generation, those who were dedicated to the wise political work of civic virtue? Have they been saved or damned?

Ciacco's curt reply - *Ei son tra l'anime più nere* - confronts us with the profound gap in values between the earthly and the eternal perspective at the heart of the whole poem.

Various interpretations have been offered to Ciacco's answer to the question of whether there are any righteous citizens left in the city: *Giusti son due, e non vi sono intesi*. According to some, this verse should be interpreted to mean that there are really only two honest people left, everyone else being corrupt; according to others, this must be understood in the sense that two factions faced each other, both of which considered themselves to be on the right side, and for this reason they did not find an agreement, or no one listened

to them (Alighieri 1983, 95). Finally, Claudia Di Fonzo, a leading exponent of Italian legal Dantism, argues that Ciacco is referring to the opposition between two conceptions of justice, or rather the tension between positive law and natural law. (Di Fonzo 2010.) This (over?) interpretation imagines a constitutionalist Dante who, in my opinion, finds little confirmation in Dante's political thought, as expressed in the *Monarchia*:

> I answered him: "Ciacco, your suffering
> so weights on me that I am forced to weep;
> but tell me, if you know, what end awaits
> the citizens of that divided city;
> is any just man there? Tell me the reason
> why it has been assailed by so much schism."
> And he to me: "After long controversy,
> they'll come to blood; the party of the woods
> will chase the other out with much offense.
> But then, within three suns, they too must fall;
> at which the other party will prevail,
> using the power of one who tacks his sails.
> This party will hold high its head for long
> and heap great weights upon its enemies,
> however much they weep indignantly.
> Two men are just, but no one listens to them.
> Three sparks that set on fire every heart
> are envy, pride, and avariciousness."[22]

[22] English translation used: https://digitaldante.columbia.edu/dante/divine-comedy/
INFERNO, VI, 58-63:
Io li rispuosi: «Ciacco, il tuo affanno
mi pesa sì, ch'a lagrimar mi 'nvita;
ma dimmi, se tu sai, a che verranno
li cittadin de la città partita;
s'alcun v'è giusto; e dimmi la cagione
per che l' ha tanta discordia assalita».
E quelli a me: «Dopo lunga tencione
verranno al sangue, e la parte selvaggia
caccerà l'altra con molta offensione.
Poi appresso convien che questa caggia

In the sixth canto of *Purgatorio* Dante meets the troubadour Sordello da Goito, widely known for his texts of political and civil exhortation against the powerful of the world. Dante sees in Sordello an ideal representative of a counsellor to earthly authorities . Between the two poetic giants of Virgil and himself, Dante charges this character of his own age with describing the state of Italy's corruption and decadence:

> Ah, abject Italy, you inn of sorrows,
> you ship without a helmsman in harsh seas,
> no queen of provinces but of bordellos!
> That noble soul had such enthusiasm:
> his city's sweet name was enough for him
> to welcome—there—his fellow—citizen;
> But those who are alive within you now
> can't live without their warring—even those
> whom one same wall and one same moat enclose
> gnaw at each other. Squalid Italy,
> search round your shores and then look inland—see
> if any part of you delight in peace.
> What use was there in a Justinian's
> mending your bridle, when the saddle's empty?
> Indeed, were there no reins, your shame were less.
> Ah you—who if you understood what God
> ordained, would then attend to things devout
> and in the saddle surely would allow
> Caesar to sit—see how this beast turns fierce
> because there are no spurs that would correct it,
> since you have laid your hands upon the bit![23]

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infra tre soli, e che l'altra sormonti
con la forza di tal che testé piaggia.
Alte terrà lungo tempo le fronti,
tenendo l'altra sotto gravi pesi,
come che di ciò pianga o che n'aonti.
Giusti son due, e non vi sono intesi;
superbia, invidia e avarizia sono
le tre faville c' hanno i cuori accesi».

[23] PURGATORIO, VI, 76-96:

We note that Dante, through Sordello, complains about the state of corruption in which Italy finds itself, testified by the split between formal legality and effective validity of the laws:

> Che val perché ti racconciasse il freno
> Iustinïano, se la sella è vòta?

What is the use of Justinian's legal code if there is no one who enforces it? The positive validity of the codified law is irrelevant if there are no authorities endowed with the legitimacy and strength to guarantee its observance. The horse racing metaphor is also relevant here: the state is compared to a horse, and the Emperor to the rider. This metaphor had already been employed by Dante in *Convivio* IV, ix 10, where the horse was understood as the will of man:

> Thus we might say of the Emperor, if we were to describe his office with an image, that he is the one who rides in the saddle of the human will. How this horse pricks across the plain without a rider is more than evident,

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Ahi serva Italia, di dolore ostello,
nave sanza nocchiere in gran tempesta,
non donna di province, ma bordello!

Quell' anima gentil fu così presta,
sol per lo dolce suon de la sua terra,
di fare al cittadin suo quivi festa;

e ora in te non stanno sanza guerra
li vivi tuoi, e l'un l'altro si rode

di quei ch'un muro e una fossa serra.

Cerca, misera, intorno da le prode
le tue marine, e poi ti guarda in seno,
s'alcuna parte in te di pace gode.

Che val perché ti racconciasse il freno
Iustinïano, se la sella è vòta?
Sanz'esso fora la vergogna meno.

Ahi gente che dovresti esser devota,
e lasciar seder Cesare in la sella,
se bene intendi ciò che Dio ti nota,
guarda come esta fiera è fatta fella
per non esser corretta da li sproni,
poi che ponesti mano a la predella.

especially in wretched Italy, which has been left with no means whatsoever to govern herself.[24]

The "empty saddle" is a metaphor that indicates that the horse/Empire has no rider/Emperor: the throne of the Roman Empire was considered vacant since the death of Frederick II, after which the three emperors elected later in Germany - Rudolf of Habsburg, Adolf of Nassau and Albert of Austria - were never crowned in Rome.[25]

Sordello also complains that the presence of a codified body of law that is not effectively applied increases Italy's shame as the homeland of a legal culture that tramples on itself. One could forgive a barbarous people, unaware of laws and legal culture in the first place. But Italy should know better.

Sordello's invective moves from Italy to the Church, specifically to the popes and cardinals who should devote themselves to the things of God and leave the care of temporal things to the emperor, according to the teaching of Scripture ("what God ordained"). Here Dante confirms the vision of the division of powers between the Empire and the Church that he previously articulated in Monarchia III, xii-xiv.

In this passage, Dante also puts forward a dark vision of human nature: the law serves to contain man's negative instincts, like a "brake" or the bridle that the knight uses to control his otherwise wild horse. This pessimistic vision is also found in canto XVI of Purgatory:

Therefore, one needed law to serve as curb;
a ruler, too, was needed, one who could
discern at least the tower of the true city.
The laws exist, but who applies them now?
No one—the shepherd who precedes his flock
can chew the cud but does not have cleft hooves;[26]

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[24] https://digitaldante.columbia.edu/text/library/the-convivio/book-04/#09. The same image in *Monarchia* III, xv 9.

[25] v. *Convivio* IV, iii 6: "Here it should be observed that Frederick of Swabia, the last of the Roman emperors (the last, I say, up to the present time, in spite of the fact that Rudolf, Adolf, and Albert were elected after the death of Frederick and his descendants)". https://digitaldante.columbia.edu/text/library/the-convivio/book-04/#09

[26] PURGATORIO XVI, 94-99:

Onde convenne legge per fren porre;

convenne rege aver, che discernesse

Shortly afterwards Dante articulates a new conception of politics, and of the relationship between the temporal sphere of Empire and the spiritual one of the Church, that is decidedly antithetical to the positions he had supported in the Monarchy. In the central canto of the poem (it is in fact the fiftieth), Dante articulates his political theory within his discussion of wrath, the passion that pits men against each other; in fact, the wrathful are blinded by a very dense smoke, just as the smoke of anger had blinded their mind. In the dark, like a blind man, Dante leans on Virgil and meets Marco di Lombardia, a court man known for his wisdom.

> For Rome, which made the world good, used to have
> two suns; and they made visible two paths—
> the world's path and the pathway that is God's.
> Each has eclipsed the other; now the sword
> has joined the shepherd's crook; the two together
> must of necessity result in evil,[27]

While in the finale of *Monarchia* Dante had theorized a subordination of imperial power to papal power, here he articulates a very different conception of the proper separation between the two powers: they ought to be equal and independent of each other. Here we see the blindness of Dante scholars who posit a coherence in Dante's political reflections from the *Monarchia* to the *Commedia*, which is simply not grounded in the text.

These political reflections culminate in the sixth canto of Paradise, where Dante meets Emperor Justinian who, inspired by the Holy Spirit, codified Roman law, trimming the excess a contradictory legal system that had grown

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de la vera cittade almen la torre.
Le leggi son, ma chi pon mano ad esse?
Nullo, però che 'l pastor che procede,
rugumar può, ma non ha l'unghie fesse;

[27] PURGATORIO XVI, 106–111:

Soleva Roma, che 'l buon mondo feo,
due soli aver, che l'una e l'altra strada
facean vedere, e del mondo e di Deo.
L'un l'altro ha spento; ed è giunta la spada
col pasturale, e l'un con l'altro insieme
per viva forza mal convien che vada

out of all proportion. While in the sixth canto of Inferno the attention was directed to the city, and in the fifth canto of Purgatory to the nation, in the sixth canto of Paradise Dante takes in the entire expanse of the Empire in which the two parties - Guelphs and Ghibellines - battle in the name of that sign (the imperial eagle) which should be the bearer of peace in the world. Paradise outlines God's will for the Roman Empire: first of all to establish the conditions of peace in which Christ was to be born and that universal institution which would give legitimacy to his death sentence as the redeemer of all mankind, and then to guard that political unity of the world in which the Church was to expand:

> After Constantine had turned the Eagle
> counter to heaven's course, the course it took
> behind the ancient one who wed Lavinia,
> one hundred and one hundred years and more,
> the bird of God remained near Europe's borders,
> close to the peaks from which it first emerged;
> beneath the shadow of the sacred wings,
> it ruled the world, from hand to hand, until
> that governing—changing—became my task.
> Caesar I was and am Justinian,
> who, through the will of Primal Love I feel,
> removed the vain and needless from the laws.[28]

[28] PARADISO, VI, 1-12:
Poscia che Costantin l'aquila volse
contr'al corso del ciel, ch'ella seguio
dietro a l'antico che Lavina tolse,
cento e cent'anni e più l'uccel di Dio
ne lo stremo d'Europa si ritenne,
vicino a' monti de' quai prima uscìo;
e sotto l'ombra de le sacre penne
governò 'l mondo lì di mano in mano,
e, sì cangiando, in su la mia pervenne.
Cesare fui e son Iustinïano,
che, per voler del primo amor ch'i' sento,
d'entro le leggi trassi il troppo e 'l vano.

The sixth canto of Paradise also contains a passage that illuminates Dante's conception of the relationship between unity and plurality. Justinian answers the question relating to the relationship between the plurality of blessed souls present in Paradise and their different distance from God: how is it possible that, finding themselves in different positions with respect to God, they are equally blessed?

> Differing voices join to sound sweet music;
> so do the different orders in our life
> render sweet harmony among these spheres.[29]

Dante uses the analogy of polyphonic music, in which the diversity of voices produces sweet notes. In the same way, the different degrees of bliss produce a sweet harmony in heaven. Dante recalls singing with many voices as an example for the harmonization of different things, and he defines it with the adjective *dolce*. The sweetness represents the spiritual concord of souls which he sees as the dominant note of the celestial homeland.

IV. Conclusions

In this paper I have discussed the most recent contributions of literary criticism to understanding Dante's political and legal thought, and then analyzed the most relevant passages of his work in order to highlight its fundamental lack of coherence. The fact that Dante is an eternal poetic genius does not necessarily make him a refined modern political or legal thinker! Undoubtedly, the *Commedia* is a masterpiece that paves the way for modernity, putting the subjective experience of the narrator in the foreground. As Henriette Karam astutely observed:

> "The Divine Comedy inaugurates a new poetic expression and its combination of elements of Christian philosophy and classical art constituted

[29] PARADISO VI,124-126:
Diverse voci fanno dolci note;
così diversi scanni in nostra vita
rendon dolce armonia tra queste rote

> the first step towards the humanist thought that will impose itself in the Renaissance and on which modernity is based, which has discursive and diegetics that have contributed to the formation of the modern novel, especially as regards its narrative instance, from which derives its status as a forerunner of the 'narratives of the self', both due to the presence of a narrator-protagonist, and due to the fact that , for the first time in Western literature, we are offered the concept that human perception occupies a central position in the representation of the world".[30]

However, the fact that Dante inaugurated poetic modernity does not imply that he anticipated political or legal modernity. In the *Monarchia* he articulates a thought that is neither democratic nor constitutional, but simply reactionary, all turned back towards the glories of ancient Rome and nostalgic for the unity of power of the Holy Roman Empire.

But the properly medieval nature of Dante's political thought is measured in his formal conception of polyphony[31]: just as the plurality of local legal systems is tolerated in the Monarchy only as harmonized with the superiority of the imperial command, so the plurality of souls in Paradise is subordinated to the vision of the only narrator subject: Dante himself.

To find the first hints of political modernity in Italian literature it is necessary to wait for 1351 and Giovanni Boccaccio's *Decameron*, where the narration is articulated by a collective of ten people, seven women and three men, who make possible the passage from the medieval monarchy of the unique narrator to the radical polyphony of modern republicanism[32].

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[30] Karam, 2020, 135: "a *Divina Commedia* inaugura uma nova expressão poética e a sua combinação de elementos da filosofia cristã e da arte claássica constituíram o primeiro passo em direção ao pensamento humanista que irá se impor no Renascimento e no qual se funda a modernidade, que ela apresenta características discursivas e diegéticas que colaboraram para a formação do romance moderno, sobretudo no que se refere à sua instância narrativa, da qual deriva o seu estatuto de precursora das "narrativas do eu", tanto pela presença de um narrador-protagonista quanto pelo fato de que, pela primeira vez na literatura ocidental, nos é oferecida a concepcão de que a percepcão humana ocupa uma posição central na representação do mundo".

[31] For the relationship between polyphony and law see Axt, Trindade, 2018.

[32] I have developed this argument in Vespaziani, 2018.

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Unpacking care and virtue from narrative ethics

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ABSTRACT

The present research deals with the concepts of care and virtue, by emphasizing the branch of studies known as the ethics of care and the neo-Aristotelian virtue ethics seen as narrative ethics. In the first part, I explore the essential features of "care" with special regard to the early works of Mayeroff, Ruddick, Gilligan and Noddings. The second part focuses on the interest in the concept of virtue sparkled within Analytic philosophy after a long period of neglect, by referring briefly to the inquiries of Anscombe, Geach and Foot. The main focus will be, however, upon MacIntyre's view on virtue. In the wake of Aristotle's concept of virtues as moral excellences MacIntyre argued for a down-to-earth approach to moral agency and moral decision-making. In the last part of the work, I will unpack care and virtue from both narrative ethics by identifying some possible areas of dis/agreements. A special emphasis will be laid on the narrativity underpinning both views.

KEYWORDS

care; care ethics; virtue; virtue ethics; neo-Aristotelian virtue ethics: narrativity; narrative ethics

1. On the (early) ethics of care

I start with a preliminary remark. To provide an overarching definition of care is not a simple matter. I will not enter into the analysis of the concept of "care" flourished within the philosophy of Martin Heidegger. As well known, in his *Sein und Zeit* (1927) Heidegger had explained "care" (*die Sorge*) in existentialist terms of essential structure of existence. Likewise, Michel Foucault's sophisticated philosophical reflections on the concept of "self-care", whose roots are to be found in Greek philosophy – *epimeleia heautou* – do not fall within the scope of the present inquiry.

Let's return to the ethics of care. Despite its young age and the indeterminate boundaries for what is categorized as "care", this concept has come

into being as a subject for fascinating as well as philosophically intricate discussions. Care has been given much attention and gained significance in many and various scientific contexts – from moral psychology and moral philosophy to political and legal theory, from sociology, pedagogy to health care research – raising a number of controversial questions (Serpe 2019; Serpe 2023).

Scattered early reflections on "care" emerge from *On Caring* (1971), a booklet written by the philosopher Milton Mayeroff. In this "lovely little book" – as described by Noddings (1984, 9) – Mayeroff claimed that "to care for another person, in the most significant sense, is to help him grow and actualize himself" (Mayeroff 1971, 1). For Mayeroff, care is not a product, rather a "process, a way of relating to someone that involves development" (Mayeroff 1971, 22). Care is, therefore, a process where the one-caring experiences the other "as having potentialities and the need to grow" (Mayeroff 1971, 4). Mayeroff claims that the experience of the other is an extension of the self, an experience free from obligations contradistinguished by a convergence "between what I feel I am supposed to do and what I want to do" (Mayeroff 1971, 6). Hence, feelings, reason and action interact in such a way to form the basic pattern of caring. In Mayeroff's view, caring is nourished by a number of Christian notions: devotion; knowledge; patience; trust; humility; hope; courage (Mayeroff 1971, 5-20). These features stress that *caring* is a living process ontologically based on relationship. Mayeroff rejects the abstractness of human relationships. Individualistic autonomy, the being "free as a bird" is depicted by him in terms of responsibility, liberation and self-actualization achieved through the care of the other.

Sara Ruddick's main work, *Maternal thinking: towards a politics of peace*, 1989 – a work which eludes academic classification and a ready categorisation – is an extension, in its contents, of her *Maternal thinking*, an essay dated back to 1980. This latter essay may be considered as the first manifesto of female distinctive reasoning. It should be noted that for Ruddick "*maternal*" is a non-biological but a social category. For this reason, "maternal" may be also acquirable by men through "kinds of working and caring with others" (Ruddick 1980, 346) – although it would assume in men forms radically different then in women due to diverse biological and value reasons.

Ruddick's essay shows how the experience of motherhood characterised by a commitment aimed at preserving life and promoting the growth of a child, manifests a distinct "female morality", alternative to patriarchally

dominant traditions in moral philosophy. Three demands identify, in general, the practice of motherhood: preservation, growth and social acceptability. Each demand, individually considered, can conflict with another demand developing "degenerative forms". For instance, preservation "can turn into the fierce desire to foster one's own children's growth whatever the cost to other children" (Ruddick 1980, 354).

Central to the structure of maternal thinking is, for Ruddick, the interplay between a capability, "*attention*" and a virtue, "*love*". This conjunction of terms enables to "invigorate preservation and enable growth" (Ruddick 1980, 357). In the construction of her concept "attentive love", Ruddick takes inspiration from the philosophies of Simone Weil and Iris Murdoch. Indeed, while "attention" points to the intellectual capacity of knowledge, "love" evokes the size of the attachment and detachment. Mother's "*attentive love*" is the core of mothering: through the "the patient, loving eyes of attention" (Ruddick 1980, 357-358) mothers do not objectivise but watch, listen and adjust to the needs of their children, thus fostering their autonomy and independence. Attentive love is the underlying regulating principle of maternal work within private domain. Indeed, it cannot be restricted to a certain exclusive parameter of motherhood. By displaying a caring response to the world's needs, attentive love constitutes the linchpin around which a feminist contention over pacifism and non-violence may revolve.

Another prominent contribution to the feminist moral philosophy was carried out by Carol Gilligan in her seminal work *In a Different Voice* (1982). According to Gilligan, care is *the* female moral voice differing from the dominant male voice of justice. By linking moral psychology to moral philosophy, she focused on the question of how moral development psychology rests on gender differences. The contrast between the two distinct *voices* of care and justice exemplifies two opposite moral frameworks: care ethics and justice ethics. Gilligan holds that the former is characterized by the images of relationships and contexts, while the latter by the ideals of reason and abstractness.

It bears noting that Gilligan's studies took place in the context of a lively debate which arose in connection with the researches on moral development conducted by psychologist Lawrence Kohlberg. His theory of stages of moral development is founded on an individualised and rights-based approach. Inspired by the Kantian concepts of moral autonomy and reason, Kohlberg hold that a moral action could be explained with reference to levels and

stages of moral development. He elaborated a theory of six stages of moral judgment. He explained that while adolescent males score at stage four (The 'law and order orientation') — characterised by a higher level of abstraction —females tend to stop at stage three (The 'interpersonal concordance or 'good boy-nice girl' orientation') – characterized by the good behaviour of pleasing or helping others and win acceptance (Kohlberg, Kramer 1969, 100-103; Kohlberg 1976).

For Gilligan, the crux of the matter was not an alleged female moral inferiority, rather a female distinct moral voice due to two different modes of experiences which are neither comparable nor subordinated to the moral modes developed by males. Gilligan highlighted the central role played by the interconnection of responsibility and care in women's moral reasoning – both reflecting the women's mode of thinking of the self and the conceptions of morality (Gilligan 2003, 24-63). Hence, she argued in favour of an expansion of developmental morality that could include the different feminine voice. In the famous hypothetical case Heinz dilemma elaborated by Kohlberg – if in order to save his ill wife's life Heinz should steal a drug which he could not afford (Kohlberg, Kramer 1969, 109-111) – the two adolescents, Jake and Amy, approached differently in finding a solution. For Kohlberg, the reasons purported by the two adolescences portrayed a gendered moral development linked to people's age growth. For Gilligan, instead, the different solutions proposed by the two adolescences reflected a different mode of moral reasoning: while Jake solved the dilemma through the application of abstract principles and with the means of logic deductions, Amy prioritised care, responsibilities and relationships (Gilligan 1979, 442).

Through her researches on women's psychological moral development, Gilligan paved the way for developing and ethics based on female contextual reasoning. Nevertheless, we owe to Noddings the philosophical foundations for care ethics. Noddings clearly returned to and was partly inspired by Gilligan and Ruddick in the view that in moral reasoning women encompass a great sensitivity to contexts and considerations of care.

Noddings went much further Mayeroff's assumptions that care for a person consists solely of helping her grow and actualize. Noddings holds that caring relations are both ontologically basic and ethically basic. By ontologically basic relation, she meant that recognising human encounter and affective response is a basic fact of human existence (Noddings 1984, 4). But in order for a relation to be ethically caring, caring must be completed as both parts

(the one-caring and the cared for) contribute to the relation. Caring relations, for Noddings, – require "*engrossment* and *motivational displacement* on the part of the one-caring and a form of responsiveness or reciprocity on the part of the cared-for" (Noddings 1984, 150). Noddings' engrossment is not comparable to Mayeroff's concept of devotion, nor is it empathy. Engrossment involves a duality consisting in receiving the other into oneself, "see and feel with the other" (Noddings 1984, 30). Caring relations are more than an exchange of feelings: a motivational displacement is also required as it is the way through which the one-caring's reality is transformed by the reality of the other.

Noddings holds that our natural and ethical obligation of caring are confined to a present relation or, at least, to a potential relation with a dynamic potential for growth and reciprocity. If no possibility of completion occours, then no caring relation will be possible. Unlike sentimentalists like Hume whose morality was rooted in an internal sense or feeling, and Kant who identified the ethical with the duty out of feelings and love, Noddings placed the source of ethical behaviour in the twin sentiments: natural caring and ethical caring. Natural caring is the feeling of "I must" prior to any consideration arising directly and responding to an initial impulse with an act of commitment. It follows that moral statements cannot be justified by virtue of abstract principles, neither by pure sentiments, nor by mere facts: they arise from *caring attitudes* which are rationally built upon natural caring.

Likewise with respect to the lack of concern for moral justification, the ethics of care proves to be an alternative not only to Utilitarianism and Kantianism, but also to sentimentalism. Making a moral judgment is neither to merely comply with abstract principles, nor merely to express sentiments of approval or disapproval – even though Noddings' view of care as engrossment is rooted into the emotional relational attachment between two parts. In emphasising the role of emotions, caring and personal narratives, Noddings continued in the same vein of Gilligan.

2. Sparkles of virtue ethics within Analytic philosophy

As evinced until now, in illuminating the moral relevance of attitudes, relations and contexts, and consequently the failings of a universal morality in the form of abstract and detached rules applicable across space and time

insusceptible to particular context, the ethics of care has marked a breakthrough. But in this last regard, the ethics of care was not the first and only in this pursuit. After a long period of neglect, the interest in the concept of virtue re-flourished within Analytic philosophy. Virtue ethics also counteracted the dominant moral orientations represented by Utilitarianism and Kantianism which prioritize, respectively, consequences of action and moral rules to the detriment of character, attitudes and relationships with others. In this section, I shall briefly touch the revival of virtue ethics as depicted by the moral philosophers Elisabeth Anscombe, Peter Geach and Philippa Foot.

A very peculiar line joins these three philosophers – some of whom were especially inspired by the philosophy of Wittgenstein. Anscombe's *Modern moral philosophy* (1958) is considered the manifesto of the contemporary revival of virtue ethics. In this essay, she focused on the uses of the language of 'virtue' in the light of the underlying intentions, motives and reasons. Her opening words sounded even prophetic: "[…] it is not profitable for us at the present to do moral philosophy; that should be laid aside at any rate until we have an adequate philosophy of psychology, in which we are conspicuously lacking" (Anscombe 1958, 1). The lack of an adequate *philosophy of psychology* makes the concepts of moral obligation and moral duty nothing but "*derivatives from survivals*" of ancient ethical concepts. Here, Anscombe especially referred to the 'harmful' English philosophy –from Hume to Bentham, from Mill to Sidgwick – but what she actually meant by "*philosophy of psychology*" is difficult to grasp as "pure" *psychology* was deliberately expelled as discipline from the realm of sciences by Wittgenstein. However, only about twenty years after Anscombe's prophetic words a 'new' moral philosophy – in the wake of Gilligan's developmental moral *psychology* – began to take its first steps.

Anscombe claimed that Aristotle's philosophy could provide very little elucidation as to the modern mode of understanding moral notions. For understanding reasons and intentions underlying moral actions, "a positive account of justice as virtue" (Anscombe 1958, 5) would be required. However, an inquiry of this sort should not be carried out, for Anscombe, by moral philosophy as it would consist in a conceptual analysis. Moreover, modern moral philosophy had neglected the central elements of the Aristotelian ethics – the role of dispositions or virtues – by replacing them with deontic terms such as "should" and "ought".

In Geach's manuscript *The virtues* (1977), philosophy of religion and philosophical theology are inextricably merged. Why do men need virtue?

In answering this question, Geach explores the concept of "needs" in Aristotelian terms. A need is – to use his words – "a necessity for the attainment of and end" (Geach 1977, 9). In contrast with Utilitarianism and Kantianism, Geach's perspective is theologically legalist insofar as it relates to the close connection between human needs and traditional virtues. Hence, he identifies seven main virtues: three are theological (faith, hope, charity) and four are cardinal virtues (prudence, temperance, justice, courage). According to him, theological virtues require a specific justification of a man's end as the end is intrinsic to human divine nature: *faith* is "assent to a dogma given by authority" (Geach 1977, 37), while *hope* is a means for general salvation throughout his life-journey; *charity* is – according to the doctrine of Trinity – what God *is* and not has, since "for God's sake – Geach claims – we must have charity towards our fellow-men" (Geach 1977, 86). Rather something else are the cardinal virtues. They are virtues needed by men when carrying out cooperative activities without deflections and with perseverance (Geach 1977, 16). Let's take the virtue of prudence as example. Driven by the prudence, the man of providence is able of correctly detecting cut-off points in the description of an action (for instance: as "an act of blasphemy"; "act of perjury", "act of adultery", and so on).

Geach's theological view is both descriptive and normative. In being so, it falls into the vicious circle that what is described as good (or virtuous) is such as conformed to the theological model of good (or virtuous). Hence, the goodness (or the virtuousness) of an action is deduced from the fact of conforming to such a model.

In line with von Wright's approach on virtue (von Wright 1963) – both in the need to combine semantics sophistication with the analytical anti-metaphysical theorising – is Foot's view on virtue. Her essay *Virtues and vices* dates back to 1978 and includes a thorough analysis of the concept of virtue. Firstly, she illuminates the linguistic discrepancy between Aristotle' and Aquinas' terminology (*aretê* /*virtus*; *aretai ethikai*/*virtutes morales*) and the discrepancy between their terminology and our own (Foot 2002, 2). Moreover, Aristotle's differentiation between virtues entails, for Foot, a series of complex moral considerations regarding the relation between virtue and the will, the difference between wisdom and art, ends and skills (Foot 2002, 5-7). Especially interesting are her contentions on the ameliorative function of virtues – contentions based on a keen analysis of Aristotle's theory of virtue and Aquinas' theology. She writes that: "[virtues] are corrective – each

one standing at a point at which there is some temptation to be resisted or deficiency of motivation to be made good" (Foot 2002, 8).

Anscombe, Geach and Foot were not the only allies in the remarkable revival of Analytic philosophy in the second half of the last century along the Aristotelian doctrine of virtue. The list goes on to include Iris Murdoch, Stuart Hampshire, Rosalind Hurthouse. Nevertheless, within the contemporary renewed interest in Aristotelian virtue ethics, Alasdir MacIntyre's manuscript, *After virtue* (1981), has been hailed as one of the most influential and successful virtue-centred project of reviving the Aristotelian moral and political philosophy. MacIntyre's neo-Aristotelianism is the hallmark of a number of criticisms against the "disquieting suggestion" (MacIntyre 2007, 1) of the "predecessor culture and the Enlightenment project of justifying morality" (MacIntyre 2007, 36). His critique of moral and political liberalism through the lenses of Aristotelian ethics has stimulated academic debate launching a challenge – like for the ethics of care – to "modern moral philosophy".

3. Briefly on Aristotle's virtue ethics

Before we dwell on MacIntyre' neo-Aristotelianism, I shall touch here briefly some key aspects of Aristotle's virtue ethics contained in his seminal work *Nicomachean Ethics*.

Differently from involuntary actions which are those carried out "under compulsion or owing to ignorance" (Aristotle 1999, 33), voluntary actions are, for Aristotle, those we deliberate and choose. Choice is not "appetite or anger or wish or a kind of opinion" (Aristotle 1999, 36) but it is voluntary – although the "voluntary" extends more than "choice" (a child's action, for instance, is voluntary but not necessarily chosen). Choice concerns *means* and since it regards things that are in our power to act, it involves a rational principle through which we deliberate. The *end* is what we wish for. As a specific human desire, wish may concern things that could in no way be in our power or not be brought about by our own efforts: "there may be a wish even for impossibles, e.g., for immortality" (Aristotle 1999, 37). Aristotle claims that "the exercise of virtues is concerned with means" (Aristotle 1999, 40): virtue (*aretê*) is, as well as vice, in our own power to act or not to act.

Aristotle's inquiry on virtues is strictly connected to his theory of soul. Moral virtues are about a man's character (virtues of character): although

men are by nature prone to them, they come about a result of habit (*ethike*, from *ethos*). Intellectual virtues (scientific knowledge, artistic or technical knowledge, intuitive reason, practical wisdom, philosophic wisdom) are virtues of thought as belonging to the rational part of our soul. The birth and growth of intellectual virtues depend upon teaching, thereby they reveal and develop with time and experience. Virtues are intimately linked to the internal attitudes of our soul: passions, faculties (of being capable of feeling), states of character. Aristotle defines virtues as "states of character" (Aristotle 1999, 26)[1], or moral habit. As states of character, virtues are of a certain kind. "Every virtue or excellence – he claims – both brings into good condition the thing of which it is the excellence and makes the work of that thing be done well" (Aristotle 1999, 26).

As to the specific nature of virtue, virtue is a mean or an *intermediate state* between the opposed vices of excess and deficiency. It is noteworthy that for Aristotle, the "*intermediate state*" is not the result of an arithmetical proportion, rather it is a relatively to us state of character "which is neither too much nor too little" (Aristotle 1999, 26). Courage is, for instance, a mean or an intermediate state between the two excesses or vices rashness and cowardice. Hence, virtues are: "states of character concerned with choice, lying in a mean […] relative to us, this being determined by a rational principle, and by that principle by which the man of practical wisdom [*phrónesis*] would determine it" (Aristotle 1999, 27-28). A virtuous man displays behaviour patterns in accordance with practical wisdom along with moral virtues. Aristotle explains it by saying that: "virtue makes us aim at the right mark, and practical wisdom makes us take the right means" (Aristotle 1999, 103).

Therefore, although the philosophical wisdom [*sophía*] is the highest intellectual virtue, practical wisdom serves as a guide for the achievement of virtuous actions. As the *ergon* (function) of a man is to live a life at its best, practical wisdom is the virtue guiding us towards happiness (*eudaimonia*): "Happiness – Aristotle notes – is activity in accordance with virtue" (Aristotle 1999, 173).

[1] In this regard, it is noteworthy that the Greek word for *state of character*, *hèxis* turned into Latin *habitus*. A definition of *héxis/habitus* – thereafter adopted by Aquinas whose concept of *synderesis* as innate, natural habit, was inspired by Aristotle's *habit* – is provided by Aristotle in his *The Metaphysics*. In this work he wrote that: "habit is called disposition, conformably to which that which is disposed is well or ill disposed, and this either essentially, or with relation to another. Thus, health is a certain habit; for it is a disposition of this kind. Further still: it is called habit, if it is a portion of a disposition of this kind. Hence also the virtue of parts is a certain habit" (Aristotle 1801, 134).

4. Ethics of care and Aristotelian virtue ethics. Areas of dis/agreements

Care ethics and Aristotelian virtue ethics share some areas of agreements. The purpose of this paper is not to provide a comprehensive picture of care ethics and virtue ethics, rather to reflect upon the (early) concept of care and the concept of virtue as core concepts – which has gained significance within these contemporary narrative ethics – in the light of some communalities such as, for instance, the underpinning *ontological* and *ethical* grounds.

As we have seen, care ethics is foundationally grounded on relational *ontology*: human nature is conceived as relational and depending in contrast with the dominant moral views depicting human nature as atomistic, rational, abstract and unencumbered. Mayeroff's view on care was based on the ontological assumption that the relationships are part of every human being (Mayeroff 1971, 42-43). Gilligan's research in moral developmental psychology offers an image of the "network of relationships" between interdependent individuals and the self is portrayed in dynamic interaction with the other within a relational context. Noddings plainly admitted that not the individual, rather relations are *ontologically basic* and that a caring relation involves "engrossment and motivational displacement". In the same vein, other care ethicists shared a relational ontology. Noddings recognises dependency as the moral core of any relation, while Ruddick illuminates the living model of maternal work as a particular kind of relationship.

The *relational ontology* of care ethics displays in *moral particularism*. In contrast with moral views grounding moral obligation in abstract principles or in a quantified notion of utility, for *these* care ethicists obligation derive from relations. Noddings advocates a very narrow notion of "*sameness*" in defence of the irreducibly contextual peculiarities of each concrete relation. In so doing, she stands against the principle of universalizability or hierarchies of principles and needs[2].

[2] In describing the nature of social relationship Noddings' strict contextualism is mitigated by the image of "concentric circles of caring" in which she distinguishes an inner circle of caring relations (others are encountered as intimates and proximate) from the outward circle of caring relations (others are not yet encountered). This image gives rise to Noddings' acknowledgement of ethical obligation to strangers (Noddings 1984, 46).

The core of particularism in Aristotelian virtue ethics is noticeable from within the specific nature of virtue as intermediate state between excess and deficiency and a relatively to us state of character. Therefore, the virtuous action is context dependent. Even though particularism is ingrained in his ethics, not every action is context dependent: some actions, like adultery and murder, are bad in themselves. This resonates, for instance, with Geach's inquiry on necessary theological virtues or with Foot's notion of natural goodness (Foot 2001).

In Aristotelian virtue ethics emotions play a direct role in decision-making as emotions are embedded into the virtues of character. As outlined before, the virtues are concerned with the character traits of things and of men and they are of a special kind: they constitute an *excellence* of character. Moral evaluations derive from such character traits, not from a conformity to universal maxims in Kantian terms. Virtues are rooted in our natural disposition (*hexis*) to think, to feel and to act. In this regard, when exploring true friendship (*philia*) as an essential part of "good life", Aristotle sheds light on the level of emotions shared by friends in experiencing life together. "Perfect friendship is the friendship of men who are good, and alike in virtue; for those wish well alike to each other qua good, and they are themselves. Now those who wish well to their friends for their sake are most truly friends […] And such a friendship is as might be expected permanent, since there meet in it all the qualities that friends should have […] and to a friendship of good man all the qualities we have named belong in virtue of the nature of the friends themselves; for in this kind of friendship the other qualities are also alike in both friends, and that which is good without qualification is also without qualification pleasant, and these are the most lovable qualities. Love and friendship therefore are found most and in their best form between such men" (Aristotle 1999, 130).

Similarly, caring relations are built up and develop on emotions which, in turn, are sources of moral obligations. In the vital role assigned to emotions, care ethics is in strident contrast with both Utilitarianism and Kantianism. As we have seen before, Gilligan's image of the "network of relationships" (Gilligan 2003, 17) between interdependent individuals relies upon attentiveness and emotional responding. In Mayeroff's view, *devotion* lies at the heart of caring, as a paradigm of caring relation. As "an integral part of friendship" devotion consists in committing oneself entirely into the experience of the other, in "helping the other grow" (Mayeroff 1971, 3) and in feeling "needed

"by it for that growing" (Mayeroff 1971, 6). Devotion supports the obligations of caring. In this regard, Mayeroff writes that: "Obligations that derive from devotion are a constituent element in caring, and I do not experience them as forced on me or as necessary evils; there is a convergence between what I feel I am supposed to do and what I want to do" (Mayeroff 1971, 6). Similarly, Noddings incorporates emotions in the moral realm. While "motivational displacement" revolves around the mode of consciousness, *engrossment* is characteristically a sort of attention that manifests in "receiving the other into myself, see and feel with the other" (Noddings 1984, 33).

Despite these points of affinity, Aristotelian virtue ethics is ontologically entrenched in the individual. It is true that care ethicists use a "virtue glossary" with suitable key-terms such as "virtue", "flourishing", "excellences". Nevertheless, the subsumption of care ethics under virtue ethics has been a consistent point of contention. Indeed, while virtue ethics focuses on the individual dispositional traits of virtue, the ethics of care assigns a primary role to caring relations. In Noddings, the strenuous defence against the irreducibility of care is conceptually linked to her rejection of universalism and abstractism. For her, to reduce care into virtue is to reduce care to an abstract category portrayed by the image of a holy man living abstemiously on the top of a mountain. It's probably a little too much capturing the concept of virtue through such a bizarre image of a hermit in solitude and contemplation, but it makes the idea of strong reluctance.

Divergences between the two moral orientations increase if we bring into focus the feminine and feminist core characteristic of care ethics. For care ethicists, Utilitarianism and Kantianism are grounded in masculine experience exemplifying the traditional male thinking in terms of autonomy, rights and justice. In this last regard, care ethics stresses that virtue ethics "has characteristically seen the virtues – in Held's words – as incorporated in various traditions or traditional communities. In contrast, the ethics of care as a feminist ethic is wary of existing traditions and traditional communities […] Individual egalitarian families are still surrounded by inegalitarian social and cultural influences" (Held 2006, 19). Aristotle's misogynist and sexist belief in male's superiority (and natural slavery) stands as a sharp contrast with the (feminine) soul of care ethics.

It is also true that care ethics has often been charged of being too conservatively female-oriented: in the attempt of rescuing female "voices" and experiences, care ethics has been considered vulnerable to the risk of essen-

tialism[3]. Nevertheless, care ethics' alleged essentialism is something entirely different from the sexism inherent in Aristotle's natural philosophy. Held couldn't have put it any better: "The traditional Man of Virtue may be almost as haunted by his patriarchal past as the Man of Reason" (Held 2006, 20).

Aristotle's first systematic explanation of woman's inferiority goes back to his treatise on biology *De Generatione Animalium* (Generation of animals) where he offered a rational explanation of the biological male superiority based on the assumption that heat is central in the reproduction of animals. In particular, he claims that it is the male semen to give quality and nutriment to the female eggs, through heat and concoction. Hence, the more heat an animal enables to produce the more developed it will be. Through his theory of reproduction, Aristotle proves that women's inferiority is based on women's lack of heat compared to men. Female semen resembles and looks like blood and this is due to their biological incapability to transform it through the infusion of heat (Aristotle 1943a, 88-95). Males contribute to the excellence to future generation, while females only provide material necessary for the foetus development. This is due to the "proximate motive cause" to which belong the *logos* and the Form", that is "better and more divine in its nature than the Matter" (Aristotle 1943a, 131-133). For Aristotle, males are the (active) efficient cause, while females are the (passive) material cause. Aristotle applied his biology of sex to determine each gender's role in society. He believed also that only men, by being endowed with rationality and strength, could receive an education and hold responsible positions of power. On the contrary, irrationality and weakness were characteristic of women's imperfection and lack of authority. Such imperfection reflected their incapability for abstract reasoning with the consequence, for them, to be assigned only to the domestic sphere. For Aristotle (1943b, 76), according to nature "the freeman rules over the slave after another manner from that in which the male rules over the female, or the man over the child; although the parts of the soul are present in all of them, they are present in different degrees. For the slave has not deliberative faculty at all; the woman has, but

[3] I cannot address this issue here. I shall only mention that early care ethicists have been blamed to strengthen traditional sexist stereotypes by (also) failing in investigating the ways in which women differ one from another. In the light of such criticism, some care ethicists endeavoured to improve some complicated shortcomings. Against this background, it is probably no coincidence that the title of Noddings' manuscript was changed from *Caring. A feminine approach to ethics and moral education* (1984) to *Caring. A relational approach to ethics and moral education* (2013).

it is without authority […]". The same applies to moral virtue: they belong to all of them, but, as Aristotle says, "only in such manner and degree as is required by each for the fulfilment of his duty" (77). Therefore, "the courage and justice of a man and of a woman, are not, as Socrates maintained, the same; the courage of a man is shown on commanding, of a woman in obeying" (77). And this is, for Aristotle, true for all other virtues.

5. Unpacking care and virtue from narrative ethics

In this final section, I will set out how care ethics and neo-Aristotelian virtue ethics share some areas of agreements, though remaining distinct normative frameworks for the different underpinned ontology. Narrativity identifies a converging point between the two moral views. Here, MacIntyre's neo-Aristotelianism comes into the picture. In being a viable alternative to traditional Utilitarianism and Kantianism, the ethics of care and the neo-Aristotelian virtue ethics display – though at different levels – an intersubjective sensitivity in considering humans as subjects embedded in particular relations who make sense of themselves and the others. Moreover, both ethics explore moral practices of ethical nourishment and cultivation. This specific common aspect gives reasons for supporting the notion that *narrativity* imbues both ethics: narrative ethicists deal more with stories flowing from experience than objective facts, more with particular contexts than abstract rules and principles of justice.

As we have seen, the aspects of caring outlined by Mayeroff reflect the Christian narrative of love and compassion fully embodying the narrative of life as a precious gift. Mayeroff's philosophical perspective on caring displays a narrative model of interpreting caring relations. Motherhood and moral thinking are intertwined in Ruddick's perspective: the intellectual and emotional conceptual elements of "attentive love" convey a sense of vulnerability and narrativity in human experience. In Gilligan's researches on moral psychological development "the experience of women's relationship" is shaped on relational ontology. "Since the imagery of relationships shapes the narrative of human development – she says – the inclusion of women, by changing that imagery, implies a change in the entire account" (Gilligan 2003, 25). In Heinz-dilemma, the young Amy resolves the moral dilemma not as a mathematical equation, rather in the light of a "narrative of relationships

that extends over time" (Gilligan 2003, 28). Amy's reasoning is guided by the core principles of narrative care ethics. A narrative care ethics is grounded on a dynamic process of interaction based on the capability of the self of establishing and maintaining relationships of mutual dependence and care.

In the same wake, Noddings' care ethics turns towards narrative, pluralistic and contextualised experiences of relations. Noddings' conceptual nucleus of care as engrossment is entrenched in the emotional relational attachment between the two parts. In emphasising the role of emotions and sentiments, moral attitudes and natural caring, personal stories and specific narratives, Noddings, as Gilligan, overrules the notion of universalizability by embracing a narrative relational approach. This is evident when Noddings refers to Nietzsche's concept of *sameness* in order to reject abstractism by claiming the uniqueness of each concrete situation (Noddings 1984, 84-86).

MacIntyre advances a narrative approach to moral philosophy by identifying his framework with the ethical and political philosophy of Aristotle. In his view narrativity is a crucial concept for understanding the self and the structure and the meaning of in-relation human lives. Narrative is entrenched in human nature as human nature is narrative.

In order to overcome the morality's current state of crisis, MacIntyre laid the basis for a renewed ethical Aristotelianism and ancient Greek culture. He holds that heroic virtues were the pivotal points around which the heroic society revolved. Greek narratives, such as *Iliad*, displayed the moral background of heroic societies. As an example, MacIntyre argued that for properly understand the virtue of courage "is not just to understand how it may be exhibited in character, but also what place it can have in a certain kind of enacted story" (MacIntyre 2007, 125). Differently from the concept of self in modern philosophy, the self in the heroic societies is not detached from a particular context. The individual is embedded within the polis and is morally responsible for her freely chosen actions before the local community with whom she shares the same tradition. MacIntyre holds that the exercise of the heroic virtues "requires both a particular kind of human being and a particular kind of social structure" (MacIntyre 2007, 126). The heroic narratives represent a form of society with a moral structure shaped on the interconnection among a *particular* conception of each individual's social role, a *particular* conception of excellences or virtue with which each individual fulfils her social role, and a *particular* conception of human vulnerability to death and destiny.

What modernity lacks is, for MacIntrye "a concept of a self whose unity resides in the unity of a narrative which links birth to life to death as narrative beginning to middle to end" (MacIntyre 2007, 205). Narratives are embodied in each single life and are constitutive of the human being. Human acts are defined by the correlation with tradition while the intelligibility of an action is conceived in a narrative sequence. Therefore, living out the form of narrative is inappropriate for understanding the actions of others. From a narrative perspective, the exercise of virtue is tightly bound with the human identity and the search for "the good". "The unity of a human life is the unity of a narrative quest" – he writes – and the search for "the good" cannot be achieved independently from the society we live in: "the possession of an historical identity and the possession of a social identity coincide" (MacIntyre 2007, 221).

In conclusion, one may question if our *full* identities as individualised units of narratives require to be accounted for in order for our actions to be intelligibly conceived or only some *specific* components are required, or, again, if all our actions need to be set in a unified narrative sequence at all. The picture grows more complicated when one asks what "the good" is made of, or how much of "the good" is required in order for an action to be intelligibly conceived. The indeterminacy of this notion involves the question of the relationship between the individual's own moral identity and her being member of a local community.

MacIntyre readily claims that membership "does not entail that the self has to accept the moral limitations of the particularity of those forms of community" (MacIntyre 2007, 221). But at the same time, he admits that although the particularity needs to move on, there would be "an illusion with painful consequences" (MacIntyre 2007, 221) to refer to universal maxims and principles in order to reform the traditions. Now we are on the horns of a dilemma: if no appeal to universal principles is possible, then no rational criticism may take place; and if no rational criticism may take place, then what conception of good should we adopt in order to move on, namely what virtues would be necessary for the searching of a "good life"?

MacIntyre's narrative approach is in line with care ethics insofar as it considers humans as narrative beings morally interacting within narrative contexts. Nevertheless, the remaining point of disagreement relates to the fact that for MacIntyre the "narrative units" pursuit and contribute to the common good of the community of which the "narrative units" are

members by the exercise of virtue. But virtues are aimed at sustaining and constructing local forms of community. This is not true of care ethics. The practice of care is neither subsumed within a determined community nor sustains specific cultures or traditions. For MacIntyre the way out of the darkness of current philosophy, is the construction of virtuous local forms of community within which – he argues – civility and the intellectual and moral life can be sustained.

One final consideration. For MacIntyre, historical identity intertwines with social identity, and the exercise of virtues is for the purpose of sustaining and continuing the inherited traditions. In a chaotically globalised crowded world as our own, how long would it take before such local narrative communities will crumble to pieces? Again, this is not true of care ethics. Care ethicists do not purse the dream of forming local communities of care. Quite the opposite, indeed: care is not to be considered a merely private expression of interiority detached from the public practices, rather it is to be included in a more overall political phenomenology. The concept of care has undergone a complex and profound evolution as to its application to the public realm (Serpe 2024). Joan Tronto's contribution may be taken as a pioneering in having laid the foundation for further political development of care ethics in a democratic direction (Tronto 1993). In her own way, Noddings had moved in the same direction of Tronto when questioning the normative force of care as far as the relational inclusion with distant others, such as groups, institutions, states are concerned. Moreover, Held's reflections on the world violence (Held 2004; Held 2006) and Fiona Robinson's view of expanding the transformative critical ethics of care at global level must be seen from a similar perspective (Robinson 1999; 2013). Indeed, the evolution of care concept and the overcoming of the distinction between private and public were apparent to some extent in Ruddick's *Maternal Thinking*, where she explored how motherhood could response to public issues and conflict resolution. The list of care ethicists moving in this direction is far from complete.

In virtue of a wider care-concept application, a vast amount of scientific literature has become widespread in other research contexts giving rise to significant implications in the fields of women's rights, labour law, political citizenship, welfare policy, international relations, global political economy. Delving into these issues would lead into a broader debate which would move us well beyond the scope of the present research.

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The Black Women's Literary Renaissance

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ABSTRACT

Starting in the mid-1970s, black women came fully into the realization that their oppression was owed to several intersecting factors (what Kimberle Crenshaw identified as intersectionality). And with that appreciation, they began to forcefully assert themselves in light of the specificity of their multifaceted condition and identity, to that end availing themselves of a range of tools, among which those of Law as Narrative (as detailed in Robert Cover's essay "Nomos and Narrative"), enabling them to better describe their experience.

KEYWORDS

Law as Narrative; Black Women; Intersectionality

1. In un celebre saggio del 1983, *Nomos and Narrative*, G. Robert Cover (1943-1986) sostiene che il mondo che abitiamo è un *nomos*, ovvero un universo normativo. Di questo universo le istituzioni formali del diritto, le regole o i principi di giustizia, ma anche le regole informali dell'ordine sociale, costituiscono solo una parte. La grande parte del *nomos* è formato dalle narrazioni che la nostra immaginazione proietta sulla realtà materiale e che rappresentano il contesto della nostra esperienza, narrazioni che realizzano un ordine di senso strutturandosi in storie che individuano principi e valori. Nessuna regola o prescrizione giuridica può esistere al di fuori di una narrazione che la colloca in uno spazio di significato. "Una volta compreso nel contesto delle narrazioni che gli attribuiscono significato – conclude Cover – il diritto diventa non

soltanto un sistema di regole da osservare ma un mondo nel quale viviamo" (Cover 1983-1984, 4-68). Detto sinteticamente il mondo della vita umana è un *nomos*, vale a dire un universo normativo formato dalle narrazioni che costituiscono il contesto di realtà della nostra esperienza.

Le riflessioni di Cover vanno viste nel quadro degli studi di psicologia cognitiva e culturale, di cui Jerome Bruner (1915-2016) è stato maestro indiscusso.

Per gli psicologi culturali – in estrema sintesi – esistono due forme di pensiero: il pensiero *paradigmatico* e il pensiero *narrativo*.

Il pensiero paradigmatico governa in generale il ragionamento scientifico: procede per astrazioni e generalizzazioni e tende all'elaborazione di modelli e categorie astratte.

Il pensiero narrativo trova, invece, il proprio campo di applicazione nel mondo sociale, facendo riferimento a fatti, persone e circostanze particolari.

Prima quindi che si manifesti la capacità di sviluppare un pensiero astratto, utile ad accostare con metodo scientifico il contesto della vita, lo sviluppo cognitivo si affida al pensiero narrativo ed è attraverso l'elaborazione di racconti che l'essere umano comincia a rapportarsi con l'altro da sé e a conferire senso al mondo intorno a sé.

La vita collettiva sarebbe possibile se non fosse per la capacità umana di organizzare e comunicare l'esperienza in forma narrativa (Bruner 1991, 2002).

Nella prospettiva degli psicologi culturali, in altre parole, raccontare storie su se stessi e sugli altri è il modo più naturale e precoce con cui gli uomini organizzano l'esperienza e la conoscenza.

I sociologi che si occupano di narrazione rafforzano queste tesi sostenendo che la comunità stessa è di per se narrativa, in quanto si realizzerebbe grazie alla messa in comune di storie individuali disposte a confluire in un racconto condiviso.

Secondo Paolo Jedlowski, che si è occupato a lungo di sociologia delle narrazioni, il racconto è come il dono – il "dono che lega", (*communitas* da *munus e cum*): esso tende a rinsaldare legami esistenti e/o a crearne di nuovi, in virtù della sua qualità di obbligazione fondata sulla reciprocità. Una comunità si realizza attraverso racconti comuni, frutto di adattamento tra contenuti diversi. Le comunità narrative sono organismi in continuo movimento: "comunità lasche, di per sé instabili e dai confini mobili" (Jedlowski 2000)[1].

[1] Per approfondimenti si veda Mittica, 2010, 14-23.

Con riferimento al diritto la narrazione può riguardare la costruzione di un provvedimento legislativo ad opera del legislatore o la ricostruzione di fatti nell'ambito di processi o altre attività applicative. Nei contenuti di una legge si riversano le rappresentazioni che provengono da un tessuto di storia tipico della comunità narrativa di riferimento; nei processi i giudici ricostruiscono una storia sulla base delle narrazioni di testimoni e avvocati.

Il diritto in ultima analisi è, nel suo insieme, frutto di narrazioni al pari di qualunque altro prodotto culturale e per diritto si intende non solo il diritto positivizzato, ma anche quel complesso di pratiche, usi, consuetudini, valori che sono alla base delle istituzioni giuridiche.

La prospettiva narrativa permette inoltre di dare voce alle minoranze escluse dalla partecipazione alla produzione giuridica: è in grado di descrivere l'esperienza della discriminazione, di identificare una "voce diversa" e di rivelare l'aspettativa di gruppi che le storie ufficiali raccontate dal diritto non prendono in considerazione.

> "Storie, parabole, cronache e racconti – scrive Richard Delgado, teorico della differenza razziale e di Diritto e letteratura – sono potenti mezzi per la distruzione della struttura mentale, vale a dire il coacervo di presupposizioni, opinioni prevalenti e interpretazioni condivise che costituiscono il *background* entro cui si svolge il discorso giuridico e politico" (Delgado 1989).

Al racconto sono attribuite molteplici funzioni: da un lato è considerato capace di dare il giusto rilievo a forme di conoscenza perdute nelle storie "ufficiali", è un mezzo per conoscere un mondo culturale diverso, che può essere descritto solo da chi ha vissuto sulla propria pelle la discriminazione di razza e/o di genere; dall'altro lato gli viene attribuito un importante ruolo psicologico per le minoranze: spesso le vittime di discriminazione soffrono in silenzio e il racconto può dare voce a questi silenzi, unendo la gente che soffre nell'impegno attivista. La narrazione identifica la discriminazione e la definisce per poterla combattere. Non meno importante la funzione decostruttiva, alla Derrida: la società costruisce se stessa attraverso una serie di taciti accordi, realizzati con immagini, rappresentazioni, racconti e scritti da cui traggono origine pregiudizi e stereotipi. Il passaggio a specifiche esperienze personali non solo sfata pregiudizi e stereotipi ma consente di

mettere a nudo le strutture egemoniche e gli interessi di coloro che stanno al potere[2].

Robin West[3], femminista e esponente di Diritto e letteratura, sostiene che la letteratura è fondamentale nella costruzione etica e politica della comunità, in quanto la sensibilità letteraria è strumento per esplorare la vita e far conoscere ciò che può essere celato alla razionalità: la letteratura aiuta a capire gli altri, le loro pene e le loro gioie e rende migliori. "Dobbiamo battere e ribattere sulle nostre storie personali" – ella scrive – "finché non faremo capire un semplice punto: la storia e la descrizione fenomenologica maschile del diritto non corrispondono alla storia reale e alla fenomenologia femminile" (West 1988a, 172).

2. Tra le scrittrici che, seguendo il monito di Robin West, hanno combinato teoria e pratica femminista e letteratura (di vario genere: romanzi, saggi, drammi, poesie), particolarmente rilevante il contributo delle donne nere, che, pur non costituendo una vera e propria corrente, fanno parte del cosiddetto "rinascimento delle donne nere".

Negli anni Settanta si è sviluppata una "seconda ondata", il cosiddetto femminismo della differenza: per evitare la distorsione rimproverata alla cultura maschile, le teoriche femministe sostengono che è necessario contestualizzare il soggetto femminile, valorizzando le differenze di classe, di cultura, di religione fra le donne, evitando di assumere come "punto di vista delle donne" quello della donna bianca, occidentale, eterosessuale, di classe media, laica o di religione cristiana. Questa nuova consapevolezza fu inizialmente il frutto delle obiezioni delle femministe nere, ebree o omosessuali, che sottolineavano la loro difficoltà nel riconoscersi negli interessi della donna così come difesi e sostenuti dal femminismo bianco eterosessuale.

A partire dalla seconda metà degli anni Settanta le donne *black*, presa coscienza della molteplicità degli aspetti dell'oppressione che le affligge, cominciano a rivendicare con forza la specificità della loro condizione. Il primo pronunciamento teorico e politico delle femministe nere è la dichiarazione del 1978 del collettivo *Combahee River*, nato a Boston nel 1974 su iniziativa di Barbara Smith, che aveva partecipato al primo incontro della *National Black Feminist Organization* a New York nel 1973. La denominazione

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[2] Cfr.Ewick Silbey 2003, 1328-72; 1995, 197-226; 1998.

[3] Cfr. anche West 1985, 145-211; 1988b, 867-78.

del collettivo fa riferimento alla località in cui nel 1863, durante la Guerra Civile Americana, i soldati di colore avevano liberato 750 schiavi, grazie ad un'audace azione di guerriglia di Harriet Tubman, militante abolizionista nera, che il collettivo intendeva ricordare e rivendicarne l'eredità.

> "La sintesi generale della nostra politica" – si legge nella dichiarazione del 1978 "può riassumersi così: siamo attivamente impegnate nella lotta contro l'oppressione razzista, sessista, eterosessista e di classe. A tal proposito noi ci proponiamo di sviluppare un'analisi e una pratica basate sulla certezza secondo cui i principali sistemi di oppressione siano tutti interrelati. La sintesi di questi sistemi di oppressione crea le condizioni entro le quali viviamo. In quanto donne nere, noi vediamo il femminismo nero come un movimento politico indispensabile per combattere il sistema molteplice e simultaneo delle singole forme di oppressione che si scaglia contro le donne di colore" (Cavarero, Restaino, 2002, 59).

L'idea di simultaneità dell'oppressie porta alla creazione del concetto di intersezionalità[4], coniato da Kimberle Crenshaw, che la definisce l'oppressione determinata da una combinazione di forme di discriminazioni diverse che insieme producono un risultato unico e distinto da quello che le singole forme di discriminazione produrrebbero da sole. Ella utilizza una B maiuscola nell'usare la parola *black*, per sottolineare che i neri e tutte le minoranze costituiscono gruppi culturali specifici e come tali necessitano di essere indicati da un nome proprio, in quanto l'identità razziale non deve essere considerata solo il colore della pigmentazione della pelle, ma un'eredità, un'esperienza, un'identità culturale personale (Crenschaw 1989, 141-67; 1991 1241–99).

Kimberle Crenshaw sostiene che le femministe nere hanno difficoltà ad accettare completamente i discorsi sia delle femministe bianche, in quanto le donne di colore sono "ignorate" e talvolta "escluse" dalle femministe bianche che sostengono di parlare a nome di tutte le donne, sia dei teorici per lo più maschi della differenza razziale per il carattere di intersezione della loro identità e per la complessa situazione provocata dalle forze combinate di razzismo e sessismo nelle loro vite. "Un problema persistente – afferma ancora

[4] Sul tema della intersezionalità cfr. Bello 2020.

Crenshaw – con cui si confrontano le donne nere nelle costruzioni dominanti di politica identitaria è il fatto che le concezioni dominanti di razzismo e sessismo rendono praticamente impossibile rappresentare la nostra situazione in modo che articolino a pieno la nostra condizione di subordinazione come donne nere", "né politica di liberazione nera né la teoria femminista possono ignorare le esperienze di intersezione di coloro che i movimenti rivendicano come loro rispettivi membri costituenti" (Crenschaw 1989 e 1991).

Tra le esponenti di quello che viene definito Black Women's Literary Renaissance, a mero titolo esemplificativo mi soffermerò brevemente su Alice Walker, Toni Morrison e Audre Lorde, perché più note anche in Europa.

Alice Walker (1944), ultima di otto figli di un mezzadro e di una cameriera, è nata in un villaggio rurale di neri in Georgia, nel profondo sud degli Stati Uniti. Nonostante le leggi che limitavano l'istruzione dei neri venne fatta studiare, e grazie a varie borse di studio si è laureata nel 1965. Durante gli anni di studio comincia a interessarsi al movimento per i diritti civili, anche grazie all'incontro ad Atlanta con Martin Luther King, e ne diviene successivamente un'attivista. Nel 1982 ha pubblicato il romanzo *Il colore viola*, sua opera più famosa, che cominciò a scrivere a otto anni prendendo spunto dalle storie raccontatele dal nonno. Vi si narra la storia di una giovane donna di colore che combatte contro la cultura bianca razzista e al contempo contro quella nera patriarcale. Il libro ha ricevuto il premio Pulitzer e l'American Book Awards, da esso è stato tratto l'omonimo film diretto da Steven Spielberg nel 1985 e un musical rappresentato a Broadway nel 2005. La Walker ha scritto molti altri romanzi, raccolte di racconti e poesie, tutti focalizzati sulle lotte dei neri, specialmente donne, contro una società razzista, sessista e violenta, nonché sul ruolo delle donne di colore nella storia e nella cultura.

Toni Morrison (1931-2019), seconda di quattro fratelli di una famiglia di operaia originari dell'Alabama, poi trasferitesi nell'Ohio, si laurea in letteratura inglese nel 1953 e a partire dagli anni Settanta comincia a scrivere romanzi, tutti molto apprezzati, tanto da valerle il Premio Nobel per la letteratura nel 1993, per aver dato vita "a un aspetto essenziale della realtà americana" – come si legge nella motivazione – "in romanzi caratterizzati da forza visionaria e spessore poetico". Tra questi forse il più noto è *Amatissima*, Premio Pulitzer 1988, in cui si narra la storia, tratta da un caso vero, di una schiava fuggiasca che preferisce uccidere la figlia piuttosto che farle vivere le tremende condizioni di schiavitù. Il romanzo è il primo della cosiddetta

"trilogia dantesca", cui sono seguiti *Jazz* e *Paradise*, che costituiscono ciascuno l'affresco d un'epoca della storia Afro-Americana: *Jazz*, il fermento degli anni '20; *Paradise*, il movimento per i diritti civili.

Audre Lorde (1934-1992), ultima di tre figlie di una famiglia di origine caraibica nasce ad Harlem dove frequenta le scuole parrocchiali e nel 1959 si laureò lavorando come bibliotecaria. È riconosciuta leader del movimento a difesa delle donne, degli omosessuali e per l'eguaglianza dei diritti civili, non solo con riferimento alle donne nere, che sono le sue interlocutrici privilegiate, ma di tutte le minoranze, minacciate dalla deumanizzazione attuata da un sistema orientato al profitto anziché alla soddisfazione dei bisogni umani. È autrice soprattutto di poesie (sono state pubblicate be undici raccolte), ma anche di saggi. La poesia per la Lorde è il veicolo privilegiato per costruire connessioni tra il proprio sentire e la propria esperienza, per trasformare il silenzio in azione. Per le donne, ella scrive, la poesia non è un lusso, "uno sterile gioco stilistico", ma una "necessità vitale": è fatica e scoperta, affermazione di speranze e sogni "per la sopravvivenza e il cambiamento". Nel 1990 viene nominata New York State Poet, prima donna e prima persona di colore.

L'incontro tra Teoria giuridica femminista (o più ampiamente Teoria giuridica delle differenze, per comprendere anche la Teoria della differenza razziale) e Diritto e letteratura, negli ultimi decenni è stato nel complesso molto fecondo. Il punto d'incontro è rappresentato dalla concezione del linguaggio come dimensione fondamentale della vita in comune: il diritto è una forma di linguaggio che cela gli interessi di chi ha il potere e che va quindi decostruito. Partendo da ciò Diritto e letteratura si è aperta a nuove metodologie e nuove direttrici di ricerca (quali il *Law as Narrative*), che si sono affiancate all'approccio classico basato sui "grandi libri", risalente a inizio Novecento. Le teoriche giuridiche femministe, a loro volta, attraverso queste nuove metodologie, sono riuscite a parlare direttamente dell'esperienza delle donne, cogliendo e descrivendo la complessità dell'oppressione di genere e/o di razza e offrendo proposte per una riforma del diritto.

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Law as an exclusive or inclusive normativity and discourse:

prescriptive contents, juridical narratives, and translation frames in gender issues

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ABSTRACT

Regarding law as a necessarily exclusive and/or inclusive *discourse*, and the juridical text as a specific narrative expression of certain fractional *form(s) of life*, the continuously required translation of the meaning(s) and intention(s) of each word within it allows for innumerable different possibilities, according to the interpretive communities *in presence* and to the different identities they assume and express. Conceiving, therefore, the *meanings* of law and of the juridical materials and the intentions of legal thinking as multipolar conglomerates of partial convictions and understandings. Exemplarily, some contemporary *Feminist Jurisprudences* and *LGBT-GNCcrits*, as derivations of the so-called third *Critical Legal Scholar's* generation, in militant empowering sights, face law as an originally and intentionally *exclusive* normativity and discourse. Involving specific *identity deflections* in the definition of *juridical intersubjectivity*, and in the meaning, intent, and content of law, in order to get the *recognition* of some partially affirmed *inclusive* normativity and discourse. And, therefore, requiring specific *juridical narratives,* and *translation frames*, within *prescriptive contents,* both *substantively* – in the answers offered by law to *gender* problems and to subjects of different *gender identity* – and *linguistically* – in the concomitantly mobilised vocabulary and interpretation. Which offer new components and delimitations to the notion of *subject of law*, transferring the core of the discussion on the meaning(s) and content(s) of law from *comparability* and *tertiality* to *incomparability* and *singularity*... Drawing alternative *images*, and distinct *statements*, on *identity* and *difference*, beyond *equality*, as intrinsic features of law – *subjectively*, in the meaning and structure of the concept of *juridical person*, and, *objectively*, in the meaning and structure of *juridical normativity* and *discourse*.

«D'où vient que ce monde a toujours appartenu aux hommes
et que seulement aujourd'hui les choses commencent à changer?»

Simone de Beauvoir,
Le Deuxième Sexe,
1949, Gallimard, 1966, 22

1. Exclusive and inclusive discourses as *forms of life* narratives and the law

Almost a century ago, in 1928, Virginia Woolf affirmed, in her *A Room of One's Own* (an extended essay by Virginia Woolf, first published in September 1929, based on two lectures Woolf delivered in October 1928 at Newnham College and Girton College, women's constituent colleges at the University of Cambridge), that « (…) a woman must have money and a room of her own if she is to write fiction; and that, as you will see, leaves the great problem of the true nature of woman and the true nature of fiction unsolved». In fact, the narratives of different *forms of life* based on gender relations and diversity lay on culturally traditional and civilizationally structural distinctions between men and women. Such a binary reference has allowed for the multiplication of references on the visions and practices of the world depending on the gender perspective. Which may have also inspired Simone de Beauvoir, in 1949, to write: "Mais une question se pose aussitôt: comment toute cette histoire a-t-elle commencé? On comprend que la dualité des sexes comme toute dualité se soit traduite par un conflit. On comprend que si l'un des deux réussissait à imposer sa supériorité, celle-ci devait s'établir comme absolue. Il reste à expliquer que ce soit l'homme qui ait gagné au départ. Il semble que les femmes auraient pu remporter la victoire ; ou la lutte aurait pu ne jamais se résoudre. D'où vient que ce monde a toujours appartenu aux hommes et que seulement aujourd'hui les choses commencent à changer? Ce changement est-il un bien? Amènera-t-il ou non un égal partage du monde entre hommes et femmes?" (Simone de Beauvoir, *Le Deuxième Sexe*, 1949, Gallimard, 1966, 22). Actually, as Judith Butler also asserted (Judith Butler, *Gender Trouble*, 1990), the *gender trouble* is still very present in our societies, representing the difficulties in understanding and in dialogue between the different genders – firstly in the binary sense, but today with plural significations.

In this communication, titled «Law as an exclusive or inclusive normativity and discourse: prescriptive contents, juridical narratives, and translation frames in gender issues», I propose a discussion on the normative composition of law and on its discursive expressions – in their intrinsic *exclusiveness* and *inclusiveness* –, then exposed in three nuclear questions: (1) what are and which are juridical prescriptive contents, (2) how are they expressed through juridical narratives – and whether these are instrumental or aim references, and (3) which translation frames shall/must be mobilised to *make sense* of those contents.

1.1. juridical prescriptive contents

Law is mostly concerned with the prescription of action in society. Which involves that one of the first questions to pose when willing to determine what *the law* is certainly is the question about who creates the law and to whom it is created. The western civilizational context as traditionally accomplished the hierarchical structure of a patriarchal society – which indicates that the society, and law within it, should be constructed by men to men. The critical issue is, then, what does the word *men* mean. What is, then, at stake is the etymology and the semiotics of the signs mobilised in the society and, within it, in law, to signify the member of the human species as *the* subject of law. If this word means the male specimen of humankind, then we have the context of the problems to be stated here – as if the universal reference to the humankind elements would have as its paradigm the male reference.

In fact, nowadays, *discourses* on gender pluralism still oscillate between *radical exclusivism* and *radical inclusivism* – in which the relevance of gender goes far beyond the *sameness* or *difference* between men and women. That is, on the one hand, presenting universalizing assimilation proposals, therefore, potentially excluding, of hegemonic intention – independently from the gender identity of the subjects. And, on the other hand, stating inclusive proposals, often as a compensatory reflection, aiming at the integration of the supposedly excluded subjects and discourses – thus, specifically concerned with the gender identity of the subjects involved. Several of these latter proposals assume a position of radical recognition, of complete and assumed absence of aggregating elements of intersubjective practices. While both often fail to appeal to a discourse of tolerance, omnipotent and omniscient, like the *philosopher's stone*... As if the entire cultural construction which generates intersubjectivity and juridicity could now be seen only as a reflection of the macroscopically (a)criticism, spraying society in a growing movement towards individuality. And as if, in a eventually compensatory counterpoint, there were voluntarily (even individualistically sustained…) agreed, and/or (re)converted, (post-modern) community-densifying aggregations, in microscopically substantialized forms of life – in the limit (and paradoxically) inhibiting individuality… –, of human and trans-human communities – in assimilations of and/or with other forms of life and/or other forms of intelligence. Thus, the borders of personal (inter)subjectivity are surpassed, as human and axiologically rooted and (or, at least…) communicatively consti-

tuted, and/or displacing the problematic core of the discussion of meaning(s) and content(s) of the category of *subject of law* as a tool of understanding.

1.2. juridical narratives

The juridical discourse is most of times formally independent of gender reference. Of course, this statement is to be waived when gender issues and specific references on gender questions are at stake. Knowing that the historical narrative concerning law and the juridical language were mostly posed from a male perspective, as its paradigm, it should be now emphasised that we move nowadays – due to a strong discussion and critique – to a great change at this point. There are several examples – for instance, on criminal law, distinguishing men and women and other gender expressions as crime victims, and labour law, looking for levelling the roles of motherhood and fatherhood and in familiar assistance. Of course, law in action is not simply the mirror of law in action. Certainly, the main oxymoron of law in this field is that *equality* and *isonomy* as a normative intention of law and the corresponding discourse.

Law is, in fact, an intrinsically exclusive and inclusive normative order. Each determination implies, both substantially and linguistically, the inclusion of the references to be considered legal or illegal, valid or invalid, fair or unfair… The reality clipping which law selects as a relevant question requires a pre-reflexive exercise on its fact contours and intentionality. Such a discriminatory function of law produces several direct effects in gender, race and ethnic questions. The adjectives *exclusive* and *inclusive* are narratively mobilised to express the essentially definitional nature of law, signifying the use of categorical vocabulary, with words expressing meanings that delineate the margins of signification to a specific set of admissible meanings.

In a semiotic analysis, the narratively constitutive meanings of words are delimitations of admissible and non-admissible meanings. That is, of course, a way of valuing the words in a legal text, in their natural polysemy. And go on developing a search for community or communities flowing out in the experience of incommensurable *forms of life* (involving gender, race, sexual orientation, economic condition, social status, practical-cultural and geo-political provenance, health, mental and physical disability, etc – Heilbrun/Resnik (1990)). Regarding law as a necessarily exclusive or inclusive *discourse*, and the juridical text as a specific narrative expression of certain fractional

form(s) of life, within the continuously required *cultural translation*, according to the interpretive communities *in presence* (Nussbaum/LaCroix (2013)).

1.3. translation frames

The translation of legal terms is a widely discussed problem nowadays, much more widely than the first stage of feminist translation, as emerged in Quebec, in the late 1970s and early 1980s, proposing a *political praxis* and an *interdisciplinary framework* for the study of the links between *translation politics* and *gender politics* (Castro/Ergun 2017, 1). In the words of Olga Castro and Emek Ergun, «(…) our definition of feminisms is not only in the plural, but also intersectional and interconnectionist—it highlights simultaneously the interlocking nature of local and global systems of oppression, as well as the cross-border interdependence of discourses and movements of resistance against oppression» (Castro/Ergun 2017, 2).

The translation frames need to make sense of juridical normativity require a totally re-understanding of the use of language, and, perhaps, a new language.

2. *Recognition, identity deflections* and *juridical inter-subjectivity* in partially affirmed *exclusive* and *inclusive* normativity and discourse

Juridically recognizing all, or, at least, most of *identity deflections*, requires questioning the definition of *juridical intersubjectivity*, and of the intent and content of law, in its foundations, in order to get the *recognition* of some partially affirmed *inclusive* normativity and discourse. And, therefore, requiring specific *juridical narratives,* and *translation frames*, within *prescriptive contents,* both *substantively* – in the answers offered by law to *gender* problems and to subjects of different *gender identity* – and *linguistically* – in the concomitantly mobilised vocabulary and interpretation. Which offer new components and delimitations to the notion of *subject of law*, transferring the core of the discussion on the meaning(s) and content(s) of law from *comparability* and *tertiality* to *incomparability* and *singularity*… Drawing alternative *images*, and distinct *statements*, on *identity* and *difference*, beyond *equality*, as intrinsic features of law – *subjectively*, in the meaning and

structure of the concept of *juridical person*, and, *objectively*, in the meaning and structure of *juridical normativity* and *discourse*.

The clash between liberal intersubjectivity and communitarian intersubjectivity is mostly founded in critical manifestations – expressly assumed as such – of the specific balance – this one also in multiple nuanced ramifications – of the relationship between the individual and society, in its particular autonomy and free attachment, on the one hand, and, on the other hand, between the individual and the community. However, other possibilities of understanding this balance emerge, such as, considering, for example, Amitai Etzioni, regarding the individual and the community as mutually constitutive. And, in this sense, if the subject is not limited or totally absorbed by the belonging to a community, but complementary – not exclusively – conditioned by it, it is even possible to be simultaneously a member of different communities[1]. With the foundation of community values residing not presupposing religion nor the idea of natural law, nor any other anthropological morally based values, due to their vulnerability, but in an axiology based on human nature and on a human condition culturally sculptured[2]. And considering the warning offered, for example, by Robert Booth Fowler, about the determination of the denotation of community – distinguishing as main conceptions of community those of "communities of ideas", "communities of crisis" and "communities of memory", although immediately referring to the possibility of other compositions[3] –, namely regarding the danger of diluting the individual in the community as a whole, and of the *tyranny of the community*, advocating the need for an "*exis-*

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[1] «I argue that the relationship between the individual and the community is more nuanced than the simple opposition of the individual versus the overarching collectives generally posited by liberals. Essentially, I assume as the cornerstone of this discussion that individuals and communities are constitutive of one another, and their relationship is, at one and the same time, mutually supportive and tensed». (Etzioni 1995, 16-17. See *ibidem*, 18). «People are at one and the same time members of several communities such as those at work and at home. They can do use these multimemberships (...) to protect themselves from excessive pressure by any one community.» (Etzioni 1995, 25).

[2] See Etzioni (1995), 28-34. «As I see it, human nature is universal; we are – men and women, black, brown, yellow, white, and so on – all basically the same under all the layers that cultures foster and impose on us.» (Etzioni 1995, 33).

[3] «I argue that community in American political thought at present engages three kinds of community: (1) communities of ideas: for example, the participatory democratic and republican models, (2) communities of crisis: for example, the earth community born of the environmental crisis, and (3) communities of memory: for example, religious and traditional ideas of community.
These categories are not exhaustive of contemporary intellectual views. Yet they include principal conceptions of community today and suggest how far from consensus we are on what community means». (Fowler 1995, 88, referring to Fowler 1991).

tential watchfullness" to avoid it[4]. A sense of community which Fowler himself affirms distinct from that of "communities of practice", presented by Charles Anderson, and, supposedly, still according to Fowler, from that proposed by Alasdair MacIntyre[5] – positioning the former in a pragmatic liberalism, and, thus, in a nuanced version of liberalism, in which the collective dimension assumes a decisive role in the construction of the subject[6], and the latter presenting crucial nuances of construction which demand a strict differentiation, both in terms of the notion of *community* and of *communitarian*.

Despite the liberal critiques of collectivization, the communitarian perspectives present, at least in their mitigated versions, the possibility of an effective confrontation between the subject and the community, admitting an intermediate position, in which the "community individual" claims to be not only in but also before the community to which he belongs[7], and as a person and not just as an individual, since keeping the *distinctiveness*[8]. And this despite the multiple critiques to such a construction of intersubjectivity, highlighting from the outset Jeremy Waldron's proposal, in a cosmopolitan alternative, starting from a specific notion of ethnic community, espousing the multiplicity of valuations which constitute the individual – now as a «cosmopolitan self»[9] –, not giving it a single solid cultural structure as an essential basis, so, unlike Kymlicka, rather shaping it as the result of different influences and experiences[10]. Indeed, if, in the proposals of the *ethics of*

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4 «(...) there is no sure protection from tyranny in any publicly constituted community (...). My counsel is to continue exploring what structures and attitudes may help, but community must always be approached, advanced, and limited by what I call *existential watchfulness*.

(...) From this perspective, community is an aspiration, one to be nourished, but not an ideal likely to be fully realized (...)» (Fowler 1995, 94).

5 See Fowler (1995), 291, n. 2, and 88, referring to Anderson (1990) and MacIntyre (1981).

6 See Anderson (1990), 1-6 («Introduction: Practical Political Reason», 1-13), 17-18, 35-38 (2. «Liberal Principles and the Performance of Enterprise», 17-44), 53 (3. «The Community of Practice and Inquiry», 45-55).

7 Considering the meaning followed by Amitai Etzioni: «(...) the communitarian individual is very much an individual. She is an individual who does not stand as an isolate but as a being emerging out of a dense social ground.» (Elshtain 1995, 108).

8 «The implicated self is also a particular self, with its own claims to individuality and autonomy. But this is the autonomy of selfhood, not of unfettered or ungoverned choice. (...) Rather, self-determination is the freedom to find one's proper place within a moral order, not outside it. (...) (...) persons are at once socially constituted and self-determining». (Selznick 1995, 125).

9 «It is 'community' in the sense of *ethnic* community: a particular people sharing a heritage of custom, ritual, and way of life that is in some real or imagined sense immemorial, being referred back to a shared history and shared provenance or homeland. This is the sense of 'community' implicated in nineteenth- and twentieth-century nationalism.» (Waldron 1995, 96).

10 See Waldron (1995), 105, referring to Kymlicka (1989). «(...) membership in a particular community,

duties – including utilitarian ethics and Kantian ethics –, the existence of a duty-obligation results from the requirement of a rule, law or principle, in any domain, as in the case of morals, and in that of law, for the *ethics of virtues* this determination, at the moral level, the *ought-to-be*, comes from a supra-human entity, thus establishing the distinction between morality and law starting from a historical review of the emergence of the idea of "moral obligation"[11].

Understanding subjectivity, and intersubjectivity itself, requires rethinking the notions of value, person, man, woman, child, family, citizen, all of these increasingly under discussion. Is the reference to *man* to be understood today as describing a member of the human species, and, thus, as *the human being*? Is he/she the *homo ludens*, as a ideally subject in a welfare society, in a society which dominates technology – or which is dominated by technology…? (Fennema 2007, 415-418; Somerville 2009, 157 ff.; Nunes 2003, 120; Neves 1998-1999, 72, 38-39; Neves 1995, 331-336). The most common answer may possibly be the following: each subject will be whatever he/she (or other) wishes… Identity issues multiply and pulverize the discourses, in the speech acts that embody them – if we can say it with John L. Austin –, in their locutionary, illocutionary and perlocutionary expressions, in the *places of speech* from which they emanate (in the analysis of the French-influenced discourse, presented by several authors, such as Bourdieu, Foucault and Butler).

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defined by its identification with a single cultural frame or matrix, has none of the importance that Kymlicka claims it does. We need cultural meanings, but we do not need homogeneous cultural frameworks.» (Waldron 1995, 108).

[11] Following the proposal presented by Daniel Statman: «I will sometimes use 'Duty Ethics (de)' to refer to all non-ve theories, including both utilitarianism and Kantianism. This way of dividing the camps in contemporary ethics might seem odd, in particular the piling together of utilitarianism and Kantianism. Yet these two approaches do share some essential characteristics, all of which are denied by ve: that all human beings are bound by some universal *duties* (…); that moral reasoning is a matter of applying *principles*; and that the value of the virtues is derivative from the notion of the right and of the good.» (Statman 1997, 3). See also Nussbaum 1998, 259-261; Nussbaum 1999; MacIntyre 1998, 285-291.

3. The specific contemporary juridical concerns of *Feminist Jurisprudences* and *LGBT-GNCcrits*: prescriptive contents, juridical narratives, and translation frames in gender issues

Exemplarily, some contemporary *Feminist Jurisprudences* and *LGBT-GNC-crits* (Gay, Bisexual, Transgender and Gender Non-conforming Critical Studies)[12], as derivations of the so-called third *Critical Legal Scholar's* generation, in militant empowering sights, face law as an originally and intentionally *exclusive* normativity and discourse. In a militant empowering discourse, law is, then, presented as an originally and intentionally exclusive normativity and discourse. Which implies to recognize several proposals settled on post-structuralist gender de/constructionism(s), as Nina Lykke assumes: «While the Lacanian feminist definition of gender as language and sign drew on a structuralist framework, another important contribution to language and discourse-oriented feminist gender de/constructionism and its critique of biological determinism is inspired by poststructuralist language theory and, in particular, by the deconstructive method of French language philosopher Jacques Derrida (…).» (Lykke 2010, 100.)

Poststructural perceptions of the issues under discussions often regard social and juridical relations as if the cultural construction of juridicity could be seen only as an echo of a macroscopical, hegemonic set of convictions, stated against microscopical minority assertions. And, therefore, look for a compensatory assertion – both descriptively and normatively –, laid on the irreducibility and incomparability of the subjects. Accentuating the cleavage that sets apart, in an eventual counterpoint, a presupposed majority against multiple presupposed minorities, uncommensurably distinct, perpetuating the impossibility of harmonisation. As if these identity references and mechanisms could be integrated as compensatory community-densifying aggregations, creating clusters, that is, communities within communities, based on some identity statement. And, so, to what now concerns, proposing gender as an irreducible diversity feature, ineluctably separating subjects according to the biological and/or cultural characteristics that shape them. And, thus, stating a situation of difficult or even impossible dialogue. If the juridical

[12] On this topic, see, as an essential reference, Linhares (2021).

valuation of socially interfering behaviours (or the materially underlying meaning of them) does nor reside any more in the axis of relativisation and comparability of subjects, it is not only a change in the positioning of the defining line of juridical intersubjectivity that it will be at stake, but an effective change of the meaning, intent and content of law itself, opening a radically new space to substantialise and delimitate what, after all, signifies *to be* a subject of law and *who is* a subject of law.

Undoubtfully, the discussions of the *LGBT-GNCcrits*, concerning the problems of social acceptance of the diverse sexual identity and orientation are now producing their expected effect, leading to the contemporary improvement of public policy and legislation on LGBTI+ anti-discrimination. This involves the acknowledgment that the problems of gender equality and of gender diversity – specifically to be taken, theoretically and practically, as two different kinds of problems – expose the vulnerability of the subjects involved in what concerns their identity, requiring careful consideration. Some practical examples may illustrate these questions: the words *woman* and *mother* may bring some identity problems when the subject to be designated does not recognize himself as such – himself, herself or some other word-*sign* that must be used, considering the wide difference of susceptibilities in the locutionary situation. This signals that the risk to hurt the convictions of each and every person through words is very high, indicating that effectively the cultural expressions are now be at stake and under new revision. It is actually proposed by some perspectives that the solution to the divergences on these issues could be at the *gender-neutral legal language*. This presupposes considering the vocabular characterisation of the legal discourse as the mirror image of the assumption of identity affirmation. In fact, law should then take one of the following points of view: 1) law should not consider the gender differences, requiring that it would keep away from those identity references, and, so, avoid the distinctions based on gender differences, which go far beyond the binary feminine and masculine references; or 2) law should consider and distinguish all, or, at least, most of those distinctions, and, then, specify every identity feature. Of course, in several fields of law the gender presupposition is not at stake, at least at a first glance – this could perhaps be said to property law and commercial law, for instance. But it is not necessarily so: in fact, the experience shows that in some cases the fact that the contract subject is a man or a women, or any other non-binary person, changes *de facto* what should not be relevant *de jure*. And, besides, in several other fields, law is directly concerned with different features of the subjects in

relationships, such as, for instance, the *pregnant woman*, or the *mother*, and, I must say, the *father*, whilst considered by law under the concept of *workers*.

4. Law as an exclusive and inclusive normative content and intention, within a specific structure and mobilising a specialised vocabulary and discourse

All that has been said represents, more than supposing a matter of *minorities*, exposing a shift in the understandings of *intersubjectivity*, and in the *role of law*… Actually, claiming for equality, in any normative order, and specifically within law, from the point of view of the identity category that is the supposed cause of exclusion, as a way to construct a counter-narrative, should not concede keeping on the cleavage that such a narrative aims to abolish.

Law states a specific kind of regulation to different positions of subjects towards each other. But law is not everywhere intersubjectivity, and, where it is, it is no only, and not at first, a discourse. Law is, actually, first of all, a normative content and intention within a specific structure, mobilising a specialised vocabulary and discourse. It is under these conditions, then, that the matter of discourse shall be considered. So, the matter is much wider than to discuss: (1) what is the gender of words in different languages – for instance, the word *world* is a masculine one in most of the western languages, but it is a feminine word in German – *die Welt* –, for instance; (2) what is the dominant gender for plural words considering people – mostly composed by masculine plural expressions; (3) and then, more specifically, what are the prevailing gender of the words mobilised in the legal discourse – for instance, the reference to the subject of law as the creditor, the taxpayer, the victim, the defendant, using the masculine predominantly… We may argue that these references do not constitute true criteria of inclusiveness or exclusiveness. That's a point I would like to emphasise. But it cannot be forgotten that their uses do. And this is the main point. If the vocabulary changes, as an instrument or a reflection of a cultural and civilizational change, then it will produce the effects of undoing the traditional hierarchical structure of patriarchal society. But if only the vocabulary changes, then everything remains at stake. The matter of gender is a very deeply open wound in our civilization.

The specific narrative expressions of juridical texts represent certain fractional *forms of life*, whilst clippings of and judgments on reality. The continuously required translation of the meaning(s) and of the intention(s) of each word within it allows for innumerable different possibilities, according to the interpretive theories adopted and the interpretive communities, and also to the different identities they assume and express. But the juridical materials – whether criteria or principles – are not reducible to their texts. It is, then, theoretically and practically reductive to keep on presupposing the reification of the meaning of the normative texts and the narratives they constitute, thus crystalising the meaning of words in law in their etymological and linguistic frames, whilst not disconsidering their normative intention or strictly conveiving them always as determined by some *exclusiveness bias*. But it would be reductive too, to conceive the *meanings* of law and of the juridical materials and the intentions of legal thinking as *inclusive* multipolar conglomerates of partial convictions and understandings.

To state the *problem of law*, today, however, involves giving law a *materially autonomous foundational matrix*, representing a cultural aggregation sense and a civilizational structure, in the light of *material-axiological foundations*[13]. This does not involve to forcibly propose a supposedly *normal* notion of *normality*. What I mean by such an autonomy is the presentation of a translation frame which may allow for the consideration of each subject's diversity in what concerns law. Which is to realise that not every field of intersubjectivity is juridically relevant: and, therefore, that some of the gender convictions and demands are crucially ideological and political, which does not imply directly that they should have juridical relevance. That is to say that all this depends on what is the space conferred to law in each culture. The juridification of every relationship and of every movement of the subjects will activate the pulverisation of rules, proposing that when there is no rule literal correspondence there is no juridical protection – and, so, going back to the formal positivims' convictions whilst affirming to be doing exactly the opposite.

Such a *translation frame's* assimilation, both narratively and normatively, requires joining the material densification of a *principle of translation* –

[13] See Neves (2002a), 9-21. «(...) o direito é só uma resposta *possível* para um problema *necessário* – e daí as suas alternativas. Isto, porque o direito apenas surgirá, enquanto tal, se se verificarem certas condições e essas condições – ou algumas delas – não são de verificação necessária». (Neves 2002b, 839). See also Neves (1985/1986, 1998, 2012).

following the ethical projection given to it by James Boyd White («Translation as I am now defining it is thus the art of facing the impossible, of confronting unbridgeable discontinuities between texts, between languages, and between people. As such it has an ethical as well as an intellectual dimension. It recognizes the other – the composer of the original text – as a center of meaning apart from oneself. It requires one to discover both the value of the other's language and the limits of one's own. Good translation thus proceeds not by the motives of dominance or acquisition, but by respect». (White, 1990, 257)[14]. Which does not represent a mere establishment of formal conditions for dialogue –, aiming to achieve not a formal-procedural compossibility of different procedures with contradictory assumptions; it actually represents a substantial assimilation in the light of the principles of mutual respect and cooperation. As a response both to attempts at radical universalization and to the antagonistic assertions of radical particularization.

The effective *recognition of difference* through law will, thus, imply, from the outset, on a pre-juridical stage – even a trans-juridical one (firstly, ethical…) –, admitting the other as different, on a first level, in order to, on a second level, decide on the basis of the position to be taken in the face of such difference. Therefore, recognition must be envisaged as crucial feature in the fundamental substantiation of intersubjectivity. And implying the exigence of being assumed as reciprocal recognition, in this condition and contingency. Which will also imply, in this understanding, a relationship that conforms *recognition* as a *translation*. And, thus, as a set of practices capable of constituting a standard (standard) of justice, in the awareness of the impossibility of fully understanding the other[15].

[14] «Translation as I am now defining it is thus the art of facing the impossible, of confronting unbridgeable discontinuities between texts, between languages, and between people. As such it has an ethical as well as an intellectual dimension. It recognizes the other – the composer of the original text – as a center of meaning apart from oneself. It requires one to discover both the value of the other's language and the limits of one's own. Good translation thus proceeds not by the motives of dominance or acquisition, but by respect». (White 1990, 257).

[15] «(…) the activity I call "translation" – making texts in response to others while recognizing the impossibility of full comprehension or reproduction – becomes a set of practices that can serve as an ethical and political model for the law and, beyond it, as a standard of justice». (White 1990, 258). «Translation is thus a species of what in the opening chapter I called "integration": putting two things together in such a way as to make a third, a new thing with a meaning of its own». – (White 1990, 263, 3-4).

As Ramona Vijeyarasa recently wrote (Vijeyarasa 2021, 4): «Regardless of its limitations, the law remains a powerful tool – one which may *reflect* a changed society, or which may *help* to change society (Revel and Vapnek 2020, p. 110). The law determines how society functions; it can shift norms and set new trends. Law shapes how people live (Vijeyarasa 2019, p. 276). The powerful potential of the law to legislate better, and with women in mind, invites us to revisit the law as a solution to gender inequality».

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The Pluralism of *Identities* as a Challenge to Law's and Legal Theory's Claim to *Comparability*

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ABSTRACT

The aim of this paper is to discuss the impact that a critical-reflexive experience of marginalized identities and *forms of life*—opening the path to a plural ensemble of *outsider jurisprudence(s)* and their *particular* (*incommensurable) ways of* storytelling — may have in our understanding of law as a specific practical-cultural *way* of creating and institutionalizing communitarian meanings. Should this impact be reduced to a contingent prescriptive statutory assimilation of plausible answers? Should not instead this impact be reconstituted under the possibilities of Fish's *interpretative communities*, or, in alternative, as an opportunity (explored in the "thematic level" of Greimassian semiotics) to confront different "narrative typifications of action" (Jackson) and the corresponding *sociolects*? Doesn't this experience of the margins impose however a more drastic reflexive challenge? I would say it does, not only as a possibility to discuss the impact of *narrative rationality* in law's construction of meaning (in counterpoint with other types of rationality), but also as an opportunity to discuss law's and legal theory's *claims to comparability*, which means returning to Duncan Kennedy and to the specific gaping wounds that *Feminist Jurisprudence(s)*, *Critical Race Theory*, *Lesbian, Gay and Transgender Legal Studies* or *Postcolonial Law Theory* opened in *Critical Legal Studies*.

KEYWORDS

juridical comparability; counterstorytelling; Robin West. Critical Legal Studies; Outside Jurisprudences; narrative; universalization; identity-based theories; FemCrits

I. Introduction

This chapter presupposes a diagnosis that I have already summarized in the first issue of *Undecidabilities and Law* (Linhares 2021: 13 ff., 18-21).

Such a diagnosis concerns the so-called discourses on *marginalised identities* (sometimes even on *marginalised bodies*[1]) which in the last quarter of a century have vigorously challenged (if not *wounded*) Legal Theory — not only when we consider its *traditional* paths but also when we identify its *critical* developments (including, *et pour cause*, the main trend of *Critical Legal Studies*). Using the well-known formulae proposed respectively by Mari J. Matsuda and Richard Delgado (Matsuda 1989: 2320 ff.; Delgado 2000: 60 ff.), we can in fact say that the core of those discourses is exemplarily composed of narrative *outsider* jurisprudences and *community-building counterstorytelling* (one of the thematic poles of this third special issue).

With the purpose of ensuring the coherence of the reflective path that follows, even at the risk of repeating some sections of the previous *exposition*, I will thus return to that diagnosis, which concerns a remarkable multiplication of perspectives (and academic fields) and which is, first and foremost, an exercise in *acknowledging*… and *recognising*: as if we were simply testifying to the *search* for community or communities (if not explicitly *forms of life*) in which all those narratives heterogeneously participate.

Let us begin with the well-known *fronts* that, whilst denouncing the *masculine identity* and/or *colour blindness* embraced both by *liberal* theorists and *critical scholars*, have significantly parted from the main trend of *Critical Legal Studies*: I mean certainly *Feminist Jurisprudences* and *Critical Race Theories*. The current blossoming of identity-based theories has in fact immediately to do with a process of internal differentiation (and subdivision) affecting these two *fronts*: whereas *FemCrits* contribute however to this multiplication simply by exploring the infinite possibilities of their own *cultural*, *radical* and *postmodern* paths[2], *RaceCrits* intervene decisively here on one hand by strengthening the specificities (if not the autonomy) of their basic

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[1] The *International Journal for the Semiotics of Law* has recently proposed a special issue with the title *(Re)imagining the Law. Marginalised Bodie /Indigenous Spaces* (Ben Hightower, Kirsten Anker 2016).

[2] Whereas *symmetrical* liberal feminism (with its assumed commitment to formal equality of rights) occupies a position which seems fundamentally external to these identity-centered discourses, the same happens to some extent — albeit for different reasons (concerning the concept of *gender* as artifact and the need to overcome the power of stereotypes) — with certain eloquent voices included in the *postmodern* trend. In order to *map* the main possibilities involved in those different paths, it is productive to conjugate (and overlap!) the exemplarily distinct syntheses proposed by Gary Minda (1995: 128-148), Sarah Elsuni (2006: 163-185), Katharine T. Bartlett (2000: pp. 266-302) and Gerald Postema [2011: 213 ff., 217-220 ("Law as Patriarchy"), 240-257 ("Oppression, Objectivity and Law")], not forgetting the absolutely indispensable "Jurisprudence and Gender", by Robin West (whose *mapping* will be used *infra*).

"sub-disciplines" (African-American, Chicano(a)-Latino(a), Asian-American, Indian or Tribal *Legal Studies*)[3], on the other hand by claiming (and projecting) an authentically globalized (and inter-disciplinarily conceived) *Critical Philosophy of Race*[4].

This diagnosis would, however, be incomplete if we failed to venture beyond these established fronts to consider the explosion of other (irreducible) *identities* (and the corresponding promises of community-*experience* and community-*visée*). I mean certainly the identities explored by *LGBT-GNCcrits* (*Gay, Bisexual, Transgender and Gender Non-conforming Critical Studies*)[5], as well as those constructed by *TWAIL* (*Third World Approaches to International Law*) and its "re-imagination of the law of nations"[6], and by *Postcolonial Legal Theory* (inventing the Fourth World as a certain *South of the North*[7] or reconstituting- "the epistemologies of the global South" as the cultural legacy interrupted by colonialism[8]). All this in addition to the possibilities of the so-called *New Social Movements* going from the Brazilian *Landless Workers Movement* (MST) to the globalized *#MeToo,* which reconstruct the identities of the *homeless* and *landless* throughout the world, whilst also considering the specific conditions of disabled people, refugees, asylum seekers and sexual violence survivors[9].

Simple allusion to this process of division and subdivision is, for its part, sufficient to enable us to understand that it is very difficult to conceive of (far less be in a position to reconstitute) all these "community"-promises (of gender, colour, sexual orientation, economic condition, social status, geopolitical territory or practical-cultural memory), even when simply invoked *in fieri* (as emergent possibilities for new perspectives-*subject*) as closed (*watertight*) *ways of life*. The intertwining and overlapping that inevitably interrelates them when we consider their legal relevance is, however, less an opportunity

[3] Concerning the discussion of the Black-and-White binary paradigm, see Deliovsky/ Kitossa, (2013: 158-181), Robert A Williams Jr (1997: 741 ff.) and the indispensable ensemble of essays proposed by Delgado/ Stefancic 2000 (part X: "Beyond the Black-White Binary").

[4] This means certainly moving beyond the parochial ground that made Critical Race possible: see Robert Bernasconi 2011: 551 ff.

[5] A diagnosis of current problems and possibilities is proposed by Adler Libby (2009). See also Elvia R. Arriola (1994: 103-143).

[6] See the indispensable Makau W. Mutua (2000: 31 ff.). See also B.S. Chimni (2006: 3-27).

[7] The words are by Amar Bhatia (2012).

[8] To say it with Boaventura Sousa Santos (2014).

[9] See the complementary diagnoses proposed by B. Rajagopal (2000) and Maria da Glória Gohn (2008).

to recreate a coherent whole than (paradoxically?) an openness to new divisions. Why? On the one hand, undoubtedly because significant possibilities for connection (or at least overlapping) are due to the (more or less) *external* influence of transversal (much broader and not necessarily critical) *interdisciplinary perspectives*, concerned not only with the positive-explicative and normative treatment of *legal pluralism* and the corresponding models (involving so different paths as those explored by Teubner and Boaventura Sousa Santos), but also with the possibilities of narrative as the archetypal form of practical rationality (which includes "humanistic" movements such as *Law and Literature, Law and Music, Law and Performance, Law and Image, Law and film, Law and Emotions,* and *Law and Culture*) — perspectives which (on account of their internal complexity and the heterogeneity of the leading voices) certainly generate new *foci of incommensurability*, if not new academic thematic specifications (such as *Feminist Literary Criticism*[10], *Race and Cinema*[11] and the *Queer Politics of Emotions*[12]). On the other hand, it is because storytelling in itself, experiencing the "multidimensionality of oppressions" ("what happens when an individual (…) is both gay and Native American, or both female and black?"[13])[14], faces the permanent challenges of *intersectionality* or *"intersectional" persons*[15]. These challenges are certainly an opportunity to examine the "combination" ("in various settings") of "race, sex, class, national origin, and sexual orientation" (and of fighting against race or gender or class *essentialism*(s)[16]), but also an inescapable source of subdivision (generating academic fields such as *Critical Race Feminism*[17],

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[10] See exemplarily Ian Ward 1995: 119 ff. ("Law, Literature and Feminism"), 119-124 ("Feminist Literary Criticism: an Overview").

[11] An indispensable ensemble of essays is proposed in Daniel Bernardi (ed.) 2007.

[12] See exemplarily Leslie J. Moran (2004) and the essays by Martha Nussbaum and Chesire Calhoum included in Susan A. Bandes (ed.) 1999: Nussbaum (1999: 17 ff.), Calhoum (1999: 217 ff.).

[13] Delgado/ Stefancic 2001: 51.

[14] What happens (we could exemplarily add!) when an individual living in the Third World is simultaneously female, lesbian and homeless?

[15] Delgado/ Stefancic 2001: 51. For a development, see the essays collected by Richard Delgado and Jean Stefancic (Ed.), 2000, 249-287 (part VII: "Race, Sex, Class, and their Intersections"), not forgetting the indispensable Kate Crenshaw (1989).

[16] "[A]ntiessentalism raises such questions as whether the concerns of women of color are capable of being addressed adequately within the women's movement, or whether Hispanics and African Americans stand on similar footings with respect to the struggle for racial equality. Are black Americans one group, or several?" (Delgado 1993: 742-743). An indispensable development concerning CRT is proposed in Richard Delgado and Jean Stefancic (ed.) 2000: 289-319 (part VIII, "Essentialism and anti-essentialism").

[17] See Adrien Katherine Wing (ed.), 2003.

Black Queer Studies[18] and *LGBT International Law Theory*, eventually with the promise of a specific *TWAIL*[19]).

The notes which follow do not claim to reconstitute this astonishing *vertigo* of hyper-specialized critical possibilities and its precious mass of data, far less to discuss which "standards" should be used to evaluate the merits of their contributions (and to distinguish between their voices, especially when they use narrative resources)[20]. The aim of this essay is instead to reflect globally on the impact (or the *levels* or *platforms* of the impact) that these proposals — in their narrative intelligibility[21] and, as such, as exemplary attempts to find (or capture) the fundamental "atom of community"[22] — may have on our contemporary experience of law (and the corresponding discourses). This leads me to distinguish three plausible levels or platforms of *interference*, the first one involving a dogmatic perspective [II.], the other two justifying meta-dogmatic (differentiated) approaches [III. and IV.].

II. The impact of identity-based discourses on a dogmatic-prescriptive (contingent) level

This first level considers the amount of new *data* as an immediate opportunity to rethink or re-evaluate the legal relevance of specific problems[23] and to propose or prescribe plausible answers. It is a level or platform which combines a legal dogmatic (doctrinaire) assimilation of emerging (increasingly specific) *quaestiones* with an explicit conversion of the corresponding answers (as tentative theories or practical-normative criteria) into effective *authoritarian* solutions, objectified in precedents and statutes. Given its programmatic

[18] See E. Patrick Johnson, Mae G. Henderson (ed.) 2005.

[19] See exemplarily Manuela Picq and Markus Thiel (ed.) 2015.

[20] About these "friendly and unfriendly (...) calls for standards" concerned with the "evaluation of outsider narrative scholarship", see explicitly Delgado 1993: 746-753, 756-760.

[21] This certainly means introducing a simplifying device. We shall however abstract from the differing weight that storytelling has in this huge number of proposals (which is considerably greater in *Critical Race Theory*).

[22] Delgado 1993: 743.

[23] Obviously problems involving those identities, such as discrimination against pregnant women, pornography, sexual harassment, same-sex marriage, homophobic victimization, racial discrimination, postcolonial survival of *subalternity*, etc.

anticipation of the future and the immediate political-ideological dimension of the corresponding *policy*, this latter kind of authoritarian response plays a very significant role here, giving this level its decisive character. It is as if we were measuring the impact of outsider jurisprudences by explicitly considering the contingent prescriptive answers (depending on a legislative *voluntas*) that their particular diagnosis (or their singular view) of the problems generates (without excluding instructive *negative* attention to the political *resistances* they provoke and the corresponding arguments). More precisely, it is as if we were considering the identity-based *counterstories* (and the problems they explore) as an opportunity (more or less extensively grasped) to sustain a *new* Politics of Law or a new branch of Politics of Law, the distinctive feature of which would be an explicit sensitivity and responsiveness to the pluralism of the margins (i.e. "to the lives as experienced under law by the most marginalized among us[24]").

However, the understanding of this sensitivity (and its voluntaristic contingent pursuit) admits at least two different configurations:

(a) a *pragmatic reformist* one, which may be exemplified using Libby Adler's distributive *decisionism* ("driving toward commitment to tangible law reform tasks"[25]);
(b) a *deconstructive/reconstructive* one which, following Derrida, may be identified as considering the "interminable" process of "juridico-politicization" as it is (and has been) constantly pursued beyond its "identified territories" (i.e. opening up "areas" that "at first can seem like secondary and marginal")[26].

The first of these configurations presupposes the absence of any plausible "meta-theory" to justify the use of *cost/benefit analysis* and to defend a contextualized (local) consideration of people living *in the margins* (a consideration which may be able to generate law reform proposals as a kind of realistic ensemble of "dispersed" possibilities)[27]. The second faces the challenges of *otherness* by defending an ethic of unconditional and unlimited respect for

[24] Adler 2011: 1.
[25] Adler 2011:.11.
[26] Derrida 1992: 28-29. We should not forget that this text has been first presented and published in English...
[27] Adler 2011:18

singularity whilst simultaneously accepting the burden of an unavoidable *aporia* — corresponding to the abstract typification (or violent synchronic *thematization*) of the concrete problems, but also to the conclusion that each "advance in politicization obliges one to reconsider, and so to reinterpret the very foundations of law such as they had previously been calculated or delimited"[28].

III. The impact of identity-based discourses on a meta-dogmatic (interpretative) level

The second level is already a meta-dogmatic one, exposing us to a kind of a global "protestant" *understanding* of legal materials (in the same sense that Levinson identifies the plural and heterogeneous "protestant" belief in the "real" Constitution[29]), or, more accurately, exposing us — whenever *reasoning about law* and (in particular!) whenever *reasoning according to law* (i.e. whenever identifying *valid law* and settling legal disputes)[30] — to the challenge of *incorporating* the tools of understanding, if not explicit canons (canonical narratives and canonical examples) formed in different settings or situations (or addressing different audiences). This means presupposing a constitutively reciprocal intertwinement (if not an authentic dialogue) between *communities of jurists* and *communities of non-jurists* — it being certain that the former offer a relatively limited number of possibilities, distributed amongst the different "professional" arenas[31] (judges, lawyers, academics) or the different steps of (dogmatic and metadogmatic) legal discourses, and the latter allow (or promise) an indefatigable subdivision of *perspectives* and *ways of life* (confronting the "silences in the law" as "virtual absences of noise"[32], with the voices of those who live in the margins). Whenever *reasoning about law* and *reasoning according to law*: I would insist on these two different (albeit complementary) paths. The second path, which focuses on judicial lawmaking, emerges both when one considers the

[28] Derrida 1992: 28.

[29] "A protestant view of Court's authority (...) assuming the legitimacy of individualized (or at least non-hierarchical communal) interpretation" (Levinson 1988: 29)

[30] The formulations are obviously by Raz 2009: 376-379 ("The Autonomy of Legal Reasoning").

[31] In the sense justified by Fish (1999).

[32] The words are by Randall Kennedy (2000: 219).

specific (and relatively restricted) possibilities of the so-called *"discrete and insular minority" model* — as a device for constitutional interpretation, if not directly as the exercise of "an antimajoritarian check" on "legislative powers" (associated with the duty to defend "social groups that can be visibly identified"[33])[34] — and when one critically explores the global (and unlimited) argument for indeterminacy (or, more precisely, a "strong" *indeterminacy* or *undecidibility thesis*, if not an authentic "strong" *rule-scepticism*) — which means confronting the problem of the "conflict" or "polarity" or "gap" that opposes ""the law"" (or the "common perception of "the law"") with the politically progressive treatment of concrete controversies (sensitive to its unrepeatable singular *hierarchies*), a problem continually recognized in critical thinking and clearly expressed in Duncan Kennedy's understanding of judicial *discretion* as strategic behaviour[35]. Whereas the second path represents a relatively well-explored *topos*, the first does not seem to be so obviously and consciously pursued. The most common (more or less explicit) response to this path is perhaps the one which emerges from a concretely contextualized concurrence of different orders or different constructions and reproductions of legality[36], i.e. a response that emerges from an assumed legal pluralism (or a pluralist *source thesis*)[37]. However, another view of *plurality* (including, among other contributions, those which distinguish *outside jurisprudences*) seems possible, given its direct link to the problem of *identifying* and *determining* valid law. This view treats the identity-based movements or groups as recognizable *interpretative communities*[38] and/or plausible *sociolects* (if not *communications sociales restraints*, as opposed to *communications sociales généralisées*[39]) whose practices and discourses

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[33] To say it with Arriola (1994: 111).

[34] See also Robin West, distinguishing the "adjudicated constitution" and the "legislated constitution" (West 2009: 79-91).

[35] We shouldn't however ignore the distance that separates the understanding of *HIWTCO* in the early "Freedom and Constraint in Adjudication: a Critical Phenomenology" (directly quoted in the text) [in Boyle (ed.) 1992: 45, 46, 86] from the exploration of strategic interpretation developed in "Strategizing Strategic Behavior in Legal Interpretation" (Duncan Kennedy 1996: 785 ff.) , an essay which is the basis of chapter 8 in *A Critique of Adjudication (fin de siècle)* (D. Kennedy 1997: 180 ff.).

[36] Such as the concurrence that, from (under) the perspective of a concrete legal dispute about property rights, opposes for example State Law with Favelas Law, or State Law with Landless Workers' order...

[37] In order to clarify the possibilities of what we may call the *"new"" legal pluralism*, see the collection of essays proposed by A. C. Wolkmer, Veras Neto and Ivone Lixa (2010).

[38] Naturally in the sense that Stanley Fish's *pragmatic conventionalism* proposes: see exemplarily the exploration of this category developed in "Change" (Fish 1989: 141 ff.).

[39] The formulae are evidently by Greimas (1976: 45 ff., 53-60).

provide heterogeneous ways of problem-determining and problem-solving, whilst constructing incommensurable codes and canons and stabilizing them (on a certain "thematic level") as unmistakable "narrative typifications of action"[40] — so that it may be possible to determine these communities and narrative canons as contextual elements of *legal reality* — in the certainty that the experience of *law in action* which identifies this *reality* is here unambiguously inscribed within the practices of an open, multi-dimensional *legal system* and, moreover, is treated as an authentic *stratum* (among the *strata*) of this *system*[41].

IV. The impact of identity-based discourses on a meta-dogmatic legal theoretical level (concerning the possibility of inter-discourse and the claim to comparability, if not universalizability)

Presupposing the problems and possibilities opened up by the previous levels, the third level takes the impact of outsider jurisprudences to its most significant meta-dogmatic consequences. Once again, two core issues must be considered.

1. The role of narrative rationality

The first issue is less specific since it corresponds to an impact that could also easily be claimed by the so-called *humanistic discourses* (and by those that lie within the full range of its spectrum and, as such, extend far beyond the possibilities and intentions of the discourses of *marginalized identities*). If this issue has to do with the role of narrative rationality in counterpoint (and frequently in confrontation) with other types of theoretical or practical rationality commonly attributed to legal discourses, it may, in fact, be recognized that defending a *narrative mode of speaking* (or defending *institutional situations* in which the corresponding *performance* may be justified

[40] In order to clarify this concept see Jackson [1995: 154 ff. (8)].

[41] I allude here to the specific conception (and experience) of the *legal system* proposed by Castanheira Ne*ves' jursiprudentialism* (Neves 1995: 7881, 152157, 188196, 278283; Neves 1995a: 95 ff.)

as indispensable) is here invariably associated with the need to do justice to the plurality of languages or codes that must be taken into consideration, if not with the heterogeneity of the elements and the multilayeredness and incommensurability of the discursive practices involved in legally relevant concrete disputes — particularly in terms of disputes that wound us as authentic *différends* (which is certainly the case when two different identities clash and this difference is not sustained and/or compensated by an effective "double consciousness"[42]). More precisely, this defence and the need to reflect on it (developing the possibilities of narrative theory) seem inseparable here from the challenge to legal theory to consider (if not critically reproduce and denounce) the convergence of all these elements and discourses in specific individual or local *events* (which would not be intelligible without the more or less persuasive coherence-generating *ultima verba* that storytelling imposes). It may, in fact, be said that this challenge opens a "window onto ignored or alternative realities"[43] whilst simultaneously confirming the unique (trans-pragmatic) strength (or at least the incomparably less fragile nature) of the narrative genre and its microscopic homogenizing organization of time[44].

2. The argument about comparability (if not *universality–universalizability*) regarding legal subjects

The second issue is certainly much more specific but, given the complexity (and even the reversibility) of the arguments and counterarguments involved (and the changing dimensions with which they overlap), it is particularly difficult to formulate it globally and even more difficult to synthesize it convincingly. The core of the question has, in fact, to do with the way in which *identity-based approaches* interfere with (and integrate into) the practices and discourses they reconstitute and rethink (which are virtually all those that share the *signifier* "law"). Is the fragmentation of meanings and semantic values and also performative models (provoked or aggravated by those approaches) compatible with the claim for an integrating context? Is the impact of this experience of fragmentation —on account of the unavoidable

[42] The words are by Delgado/ Stefancic (2001:.39–42). See also Alpana Roy (2008: 318 ff.)

[43] See Delgado/ Stefancic 2001: 39.

[44] In the sense that Lyotard helps us to recognize [Lyotard 1983: 218 (nº 219)]

incommensurability of the perspectives-*visées* determined by genre, race, sexual orientation, poverty, geopolitical provenience, health, mental and physical disability, health, etc. — that of preventing or frustrating the attempt to recognise an authentic *inter-discourse* and, with this, the aspiration to treat *law* as the intentional context and practical-historical correlate of this attempt? More specifically, do *outsider jurisprudences* cross the threshold that deprives law and legal discourses (and the practical circle they constitute) of a plausible claim to (or vocation for) *comparability* relating to the status of legal subjects? Do the *discourses of the margins* allow us going beyond the level where narrative *identities* impose separate perspectives in order to recognize the possibility or the pertinence of reconstituting (either from an internal or an external perspective) the normative centre of autonomies-rights and responsibilities-duties that is (or should be) globally attributed to each subject as a *party* in a practical legal controversy? In other words, is the celebration of narrative incommensurability — whilst renouncing to the relevance of a successful experience of universalizability (*relativizing* the involved subjects) or to the corresponding *tertium comparationis* — still compatible with the significance (or the productivity) of an inter-discursive reference to the *status* or *dignity* of *sui juris* — the latter certainly not as a self-subsistent *hypostasis* but as a specific, historically determined, practical-cultural *artefactus* (inseparable from the claims of *audiatur et altera pars*)?

Given the wide spectrum of discourses and proposals that must be taken into consideration, a categorical global answer is certainly impossible. I will try, however, to allude to the problems involved, concentrating on the exemplary scission introduced into *Critical Legal Studies* (more than forty years ago!) by the emergence of *FemCrits*…

2.1. Understanding the *scission*

In order to understand the plural dimensions involved in this scission, Robin West's well-known *Jurisprudence and Gender* (1988: 1-72) is certainly still an indispensable *guide*.

1) First of all, her essay proposes a successful systematization of *differences* which, notwithstanding the recent proliferation of perspectives, seems still capable of offering both a productive *structuring map* for *Feminist Jurisprudences* and a stimulating constructive exemplum to all other

outsider jurisprudences. The need to *identify* the two "camps" of "masculine jurisprudence" ("liberal legalism" and "critical legal theory"[45]) as divergent accounts of a common "separation thesis" (offering subjective experiences of masculinity justified by the *celebration of autonomy* and the *longing for community,* respectively), as well as the need to distinguish between the "two" camps of "feminist jurisprudence" (*cultural* and *radical*), contrasting their "accounts" of "subjective lives" as two different interpretations of a common "connection thesis" (the first valuing "intimacy", the second "integrity" or "individuation")[46], in fact determine an analytical outcome (an analytical web!) which may be recognized as a challenge (and mobilized as a tool) in all emergent *identity-based theories*. It is as if these theories have had to impose themselves (i.e. had to justify their autonomy as academic fields or interpretive communities) fighting on a dual front against the traditional ("official") and critical ("unofficial") dominant trends and this has not only meant internally reproducing (in an implacable game of correspondences) the *binomial tension* justified by those trends, but also, and mainly, attributing *en bloc* to them (or to the "common ground" which they share) a kind of constitutive label (identifying masculine, heterosexual or homophobic *visées*, but also *white race*, *northern hemisphere*, *First World* and even *landowner* or *homeowner* constructions…) — a label which the new external *binomial opposition* will necessarily incorporate as one of its poles (the one which plays the dominant role). For the identitarian theories in question this certainly also means accepting (more or less a-problematically) that the place of an autonomous *discourse of the margins* depends constitutively on the totalizing distribution imposed by the latter binomial (and its logic of dominance and subordination) — a dependency that is not problematized even when the theory in question accepts (as is often the case) that the exercise of *labelling* should avoid the risk of *essentialist* simplification.

2) Robin West's essay is also exemplary on account of her specific proposal for a constructive *continuum* between "feminist" and "humanist" jurisprudences (the latter taken seriously as a "genuinely ungendered jurisprudence"),

[45] "One deriving from the tradition of Western liberal political philosophy, the other deriving from the radical philosophical ideas underlying the critical legal studies movement": to say it with Martha Nussbaum (2008: 985).

[46] West 1988: 4-44 ("Masculine Jurisprudence and Feminist Theory").

envisaging a "post-patriarchal" (although not an "androgynous") "world" and, as such, demanding an explicit transformation or overcoming of "masculine jurisprudence"[47] (a *conversion* which will certainly be much easier when the masculine trend is already a critical one). The *exemplum* that interests us here has however less to do with the characterization of this "jurisprudence 'unmodified' " (as an alternative to the typical *cultural* and *radical* feminist trends), than with the way in which this deliberately "utopian" vision, presupposing the inadequacy of law's cultural metadogmatic *artefacta* (namely those concerning the mask of *sui juris* and the corresponding claim of *dignity as rank or status*[48]), establishes (defends) an ethics of unconditional celebration of "differences between people" and infinite respect for "all forms of life" (recognizing "life affirming values generated by all forms of being")[49]. This ethics is presented in fact as if it should be directly responsible for the construction of *the* "goals", namely the goals that "law and politics" (or "law as politics"), as ongoing exercise(s) in *voluntas-potestas* (helped by a dogmatic reconstruction[50]), instrumentally pursue. Independently of the developments that will enrich Robin West's proposal (namely those which explore the counterpoints between the "economic man" and the "literary woman"[51], the masculine "ethics of justice" and the feminine "ethics of care"[52]), the reflexive experience achieved with *Jurisprudence and Gender* may, in fact, be mobilized to try (to risk?) a global answer to one of our key questions: are the discourses of the margins necessarily incompatible with an authentic *inter-discourse*? The answer is a negative one: they are not. It is however indispensable to add that — given the basic binomial opposition from which these outside jurisprudences are built up[53], and, more significantly, the presupposition and treatment of law as an instrumental institutionalization (compatible with any material response justified through legitimate or legitimised power) — the possibilities of this inter-discourse

[47] West 1988: 58 ff. ("Feminist Jurisprudence"), 71-72.

[48] In the sense that Waldron helps us to recognize: see *infra*, note 86.

[49] West 1988: 72. Martha Nussbaum critiques the limits of these formulae (2008: 986).

[50] A dogmatic reconstruction that is more or less conscious of its "utopian" or "apologist" political side: see West 1988: 71.

[51] West 1993: 251-264 (Chapter 5: "Economic Man and Literary Woman: One Contrast").

[52] West 1997: 22 ff. (chapter 1). West dialogues here with the well-known proposals of Carol Gilligam and Nel Nodding considering the "oppositional virtues" of justice and care (35-36).

[53] An opposition which enables West to argue that "men's narrative story and phenomenological description of law is not women's story and phenomenology of law" (West 1988: 65).

are necessarily sought out and pursued *beyond law* (assimilating material intentions from ethics, political ideology, philosophy and aesthetics), if not by explicitly denouncing the impossibility (the ideological mystification) of a coherent (unity-generating) i*nternal* perspective (and its development as a genuine *collaborative* praxis[54]).

3) This brings us to a third exemplary mobilization of Robin West's essay, namely the way in which she identifies *masculine jurisprudence* (and its *separation thesis*) with modern jurisprudence and the rule of law — directly, if considering its *official* story (celebrating autonomy), and also indirectly in recognising its *unofficial critical* story, notwithstanding the proclaimed scepticism and "longing for attachment or connection" that distinguishes the latter ("the values that flow from women's material potential for physical connection are not recognized as values by the Rule of Law, and the dangers attendant to that state (…), [which are] separation [and] invasion-intrusion (…), are not recognized as dangers by the Rule of Law…"[55]). Why can we see here an example that is extensible to all identitarian scholars? The answer is simple: the dialectics between dominant and subordinated, centre and periphery, core and margins (and sometimes also between inner majority and outside minorities) which sustain the binomials of *identitarian jurisprudences* not only a-problematically presuppose that law's cultural answer to the problem of *life in common* (or at least law's *de-constructible* answer to the institutionalization of social order) is reducible to one of its historical cycles or stages — the modern cycle, more or less reconstructed retrospectively through the *Enlightenment vision* or 19th century *formalistic* consolidation — but also (drastically) displace or decentre the acquisitions of this cycle, considering only its political-ideological features (or the simplifying assimilation that these features pragmatically demand). It is as if we were condemned to reducing the Western construction of an autonomous *sui juris* to *contractualist tradition*[56] — the tradition which invented the "individual

[54] In the sense of Dworkin's *collaborative interpretation*. One should in fact pay attention to the way how Dworkin denounces the effective (even tough not to be confessed) overlapping of *explanatory interpretation* and *collaborative interpretation* in *CLS*: "[I]f the proper goal of a demystifying explanatory interpretation is radically to change opinion and practice, then it might best achieve this by wearing collaborative clothing…" (Dworkin 2011: 144).

[55] West 1988: 58.

[56] Sometimes even to *contractarian tradition*, closer to Hobbes than to Rousseau or Kant.

as materially separate from the rest of human life" and justified *societas* as the *artefactus* simultaneously capable of granting its "discrete" *socii* the "upside" of this separation (identified with "autonomy, freedom and equality") whilst protecting them from its "downside" (identified with "vulnerability" and the danger of "annihilation")[57] — and also as if we should inevitably confound the institutionalization of this autonomy with the defence of a *formal* (*a-teleological*) *non interference* in the "materiality" of choice-*Willkür* ("my ends are my ends" and "I can form my own conception of the good life, and pursue it…"[58]), if not with the political-ideological legacy of the 19th century *Demo-Liberal State*…

2.2. *Hearing* Duncan Kennedy: *opening* a Pandora's box?

However, in order to understand the possibility and limits of the *non-juridical* "inter-discursive" treatment of *identities* that the *discourses of the margins* seem able to admit (exemplarily identified in Robin West's proposal for *jurisprudence unmodified*), we must still *hear* the arguments of *mainstream Crits* (those who inhabit the "inner-circle" of "progressive" masculine, white, heterosexual, first word "scholarship"[59]!). I would simplify these arguments by invoking two basic (although not always explicit) critiques and the way in which they denounce an intrinsic constructive *contradiction* that attacks *outsider jurisprudences*, whilst also considering the possibility of a conciliatory integrative (politically correct?[60]) solution. The indispensable *guide* is here Duncan Kennedy's *ultra-theory* (as an expansively eloquent development of a *left/mpp project* justifying a *post-rights perspective*[61])[62].

The critical arguments are, in fact, very-well known and concern two risks or dangers that *identitarian scholars* have presumably reintroduced into the critical tradition, the first relating to an a-problematic hypertrophy of the *language of rights* (extending beyond the mere programmatic intention

[57] West 1988: 7, 9, 19.

[58] West 1988:.6.

[59] To say it with Arriola (1994:105, note 6).

[60] "In many ways, Kennedy's work is a model of political correctness…" (Joanne Conaghan 2001: 727).

[61] D. Kennedy 1997: 1-19, 265-296, 339-376.

[62] If we had mobilized Unger's *super-theory*, the answer would certainly be a significantly different one. About the differences that separate these two critical "agendas" (*super-theory* versus *ultra-theory*), see Altman 1990: 164-181.

of "law reform"[63]), and the second concerning the temptation of a "totalizing" dogmatic discourse (favoured by the use of *binomial masks*)[64]. These are risks and dangers whose probability determines that the fragmentation that has been opened up (or at least aggravated) by the *third* generation or stage of critical scholars[65] (even when trying to avoid *essentialism*[66]) cannot be understood as the promised advance to a new stage of unconditional respect for *singularity*, but rather as a remarkable retrogression. Possibly a surprisingly *contradictory* retrogression in terms of the importance attributed to *narrative genre* or to the constitutive (*non-heuristic* role) that this genre plays in a huge number of outsider discourses, I would add. This question involves in fact considering the additional risk of transforming more or less persuasive *counterstories* into stereotyped narratives, with characters and roles that are implacably pre-determined[67] .

What about the conciliatory solution? We may recognize it in Kennedy's *Critique of Adjudication*, albeit less as a global position on identity doctrines than a direct exemplary response to *FemCrits* (a response which could, however, easily be generalised to include these doctrines). In fact, this conciliatory solution has to do exclusively with a very simple qualification: without ignoring gender issues (and even making significant "efforts"[68] to integrate them into his own critique), Kennedy treats feminism as *ideology* and tries to "locate" it in relation to other possible ideologies (in an ensemble of possibilities which are parochially dominated by the core *liberalism/conservatism*)[69]. It is worth emphasising the implications of this exercise in qualification: on the one hand, feminism is presented as a "universalization project of an ideological intelligentsia"[70] whilst, on the other hand, it

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[63] D. Kennedy 1997: 327 ff. ("The internal disintegration of left rights rhetoric").

[64] About the rejection of a "totalizing theory" (and its claim to "rightness") assumed by Kennedy's *pink theory*, see exemplarily D. Kennedy 1997: 265-296, 339-376.

[65] *Third* according to Minda's reconstruction (1995:123 ff.). Reserving a place for an initial *neo-Marxist* trend, Frankenberg distinguishes *four* stages (corresponding the *fourth* to the explosion of *FemCrits*, *RaceCrits*, etc) [Frankenberg 2006: 101 ff.].

[66] On account of a more fluid understanding of sexual orientation (and its construction), *GayCrits* would be perhaps the group less vulnerable to the binominal dynamics and its stereotyped constructions.

[67] As if one excluded the possibility of a concrete microscopic situation where the *capillarity* of *powers* and *resistances* (in a genuine Foucauldian sense) would attribute the subordinated position to a certain straight, healthy, white, protestant, middle or upper class's, first world's male...

[68] J. Conaghan 2001: 723, 725 ff. ("The Gender Dimension in Kennedy's *Critique*").

[69] D. Kennedy 1997: 39 ff, 187 ff., 258-263.

[70] D. Kennedy 1997: 39, combined with pp. 56-57 ("Liberalism capitalized").

is incorporated (as a kind of "subideology") into the "liberal camp"[71]. The first implication presupposes an explicit understanding of *universalization* (assimilating, through Habermas' concept of "practical reason", the Kantian legacy[72]!), to the extent that it deprives the *identity-conformation* of its autonomous relevance (reducing it to the simple consciousness, common to all ideologies, of acting ""for" a group with interests that conflict with those of other groups"[73]). The second celebrates an authentic inter-discourse and, with it, the integrant mediation of an extended horizon. This is not only the horizon which, in an initial step, is offered by liberal ideology, but one which aggregates (or overlaps) this ideology with conservatism to recognize the "larger unit" or "centre" that may be called "liberalism capitalized" (i.e. the "abstract normative" core which is "made up of the theoretical commitments that liberals and conservative share")[74]. It is as if feminism has found its place whilst assimilating a globally shared legacy ("including rights, majority rule, rule of law, Judeo-Christian morality" and even "regulated market"[75]) which, paradoxically, is precisely the legacy that its community-generating interpretation denounces as irretrievably *masculine*!

Is this, however, a convincing conciliation, if not domestication? Apparently, it may be said that it is. Kennedy's *ultra-theory* allow us in fact to consider all these implications from a microscopic contingent unity-giving perspective and this perspective is the one we acknowledge in *adjudication* (i.e. in the argumentative tissue that *judicial law making,* in its *decision-situation*, is able to produce): after all, "ideologies are themselves just 'texts' that the individual judge will have to interpret before he or she can decide what is 'required' by his or her presupposed political commitment"[76]. This last point is, however, a troubling (reversible) one, since it highlights the importance of the "common ground" shared by *identity-based jurisprudences* and *critical ultra-theory,* as if these movements represented only two plausible steps (or flights) in a continuous vertiginous staircase, i.e. two distinct levels of accentuation of a common basic attitude towards the *significant* law or the discursive practices that use this *significant*. Both critiques in fact

[71] D. Kennedy 1997: 189.
[72] D. Kennedy 1997: 382, note 1.
[73] D. Kennedy 1997: 39, 41 ff. ("Ideology is universalization of group interests").
[74] D. Kennedy 1997: 56-57.
[75] D. Kennedy 1997: 56
[76] D. Kennedy 1997: 187-188

explore a constitutive identification between law and politics, both denounce the claim to a unified *signifier* (associable with law and legal theory, if not directly with the dignity of *sui juris*) as an ideological mystification, and both presuppose that this claim is reducible to (and deconstructible as) a specific resource of modern *formalism* or *normativism* (and its invention and interpretation of the rule of law). As if this were not enough, even the flaws (or retrogressions) attributed to *identity-based narrative approaches* seem to *wound* (even though with a less visible impact) the *mainstream* progressive critique. Doesn't the polarisation of ideologies persistently presupposed by Kennedy (opposing first *individualism* and *altruism*[77], then *conservatism* and *liberalism*[78]) inexorably anticipate the totalizing dynamic offered by *identity-generated* and *identity-generating* binomials (notwithstanding the constant appeals to a flexible strategic microscopic adjudication)? Yet, if this is the case, should we not conclude that the enthusiastic anti-totalizing and anti-theoretical defence of singularity justified by *ultra-theory* comes dangerously close to exhausting itself in a purely rhetorical celebration of the *political judge*'s *decisionism*? Is the discretion attributed to this *praxis of adjudication* not invariably determined as an ideological choice between two strategies, a dominant one and an alternative critical one — the first tending towards the conservative reproduction of "entrenched divisions and hierarchies"[79] (covered by the *formalist* mask) and the second committed to the progressive microscopic "moderation" and dismantling of these "divisions"[80]? We can indeed recognize that once *the* Pandora's box that celebrates the *partiality* of the *political judge* has been opened, it can never be closed, nor can the resulting *chain reactions* be halted — which also implies that the only choice left to legal meta-discourse seems to be to resist, as persuasively as possible, the seductions of the unlimited vertigo or, more precisely, the choice that creates (with varying degrees of conviction, although often in total *good faith*) an effective appearance of resisting. Unless this meta-discursive reconstruction rejects, from the outset, the "motto" *law is politics*…

[77] D. Kennedy 1976: 1713 ff.

[78] D. Kennedy 1997: 46 ff.

[79] See Roberto Mangabeira Unger 1996: 163.

[80] About the "relational" concept of *hierarchy*, see Kennedy 1992: 427 ff.

V. Conclusions

A few words will suffice to sum up the previous *route* or *routes*. confirming, on the one hand, the undisputable importance of the current identity-based discourses *whenever we consider the two first levels* of relevance (dogmatic-prescriptive and methodological-interpretative) —i.e. when we mobilize the diagnoses of problems and contextual factors that these levels admit [*supra*, II. and III.] —, whilst recognising, on the other hand, that the impact considered on the *third level* concerns internally the legacy of *CLS* and should not be separated from the discussion of the possibilities and limits of its specific *(left) oppositionism* (this one as a specific assimilation of a more general philosophical-cultural critical theory)[81] [*supra*, IV.].

Regarding the arguments and counter-arguments that we have just introduced and very specially regarding the vertigo of *ideologies* and *identities* that a common understanding of *law as politics* (and/or a shared image of the *judge as ideologist)* unavoidably imposes [*supra*, IV:2.2.], what does this last accentuation mean? Does it mean recognizing, with Postema, that "by century's end, the critical dynamic of the *CLS* jurisprudential movement had largely been spent"[82]? Certainly not, just as it does not mean subscribing to the lapidary conclusion by Günter Frankenberg (highlighting the implacable conversion of *assumed ideologies* into *narrated identities*): "Are *CLS* dead? They live: *FemCrits*, Race*Crits, LatCrits, Intel, Postcolonial Theory, Nail, Twail…*"[83]. Beyond recognizing that the *trunk* of *CLSs* (with the leading voices of Unger, Kennedy and Balkin) preserves today its eloquent visibility — appearing very far from hidden by the proliferation of its (more or less direct) *branches* — it certainly means arguing that it is perfectly possible (if not desirable) to ascribe relevance to the diagnosis of problems and to the reconstitution of contexts explored on the first two levels —so that it may be possible to *listen* attentively to the contributions of narrative outsider jurisprudences

[81] This oppositionism represents in fact an extraordinarily fecund overlapping of heterogeneous *traces*, linking *radical legal realism* and *Deconstruction as philosophy*, aggregating data from interpretative sociology and psychoanalysis, using models from phenomenology and narrative semiotics, constructing arguments following Marx and Foucault and, last but not least, reuniting pragmatic strategic rhetoric and the commitments of a *radical ethic of alterity*. An attentive discussion of this heterogeneity is proposed by Ana Margarida Gaudêncio (2011). See also the synthesis that I propose in Linhares 2016.

[82] See Gerald Postema 2011: 258.

[83] "Die *CLS* sind tot? Es leben: *FemCrits*, Race*Crits, LatCrits*..." (Frankenberg 2006: 101).

and its responsive testimony of contemporary plurality) [*supra*, II. and III.] —, without succumbing to the political-ideological functionalization of legal discourses recognized on the third level [*supra*, IV.].

One of the alternatives to this understanding – the one which I defend! -- is to preserve the *claim to comparability* (and the *universalization* it involves) as a distinctive feature of the *practical world of law*, whilst simultaneously (and without any paradox!) recognizing the practical-cultural specificity of this law as a *non-universal* autonomous *way of life*. This means considering a *certain* law or a *certain* practice of law — a certain response to the problem of *common life* — which, as a specific way of creating communitarian meanings (irreducible, as such, to other plausible constructions of *praxis* and practical rationality and certainly also to other forms of collective identity), is significantly *inscribed* in the deployment of what may be called the *Idea of Europe* (or the *heritage* of Western Text)[84]. This full historical-cultural contextualization of law's acquisitions, providing the opportunity to make the dynamic of these acquisitions correspond to an effective *argument of continuity*, forces us in fact to *return* to a specific *artefactus*, the invention of which is certainly due to the Roman *rise of the jurists*[85]. This *artefactus* is

[84] This is one of the most fruitful and challenging lessons of Castanheira Neves's philosophy of law: see, in particular, two key essays — "Coordenadas de uma reflexão sobre o problema universal do direito ou as condições da emergência do direito como direito" and "O problema da universalidade do direito ou o direito hoje, na diferença e no encontro humano-dialogante das culturas", both of them now included in Neves 2008: 9 ff., 101 ff..

[85] More directly and specifically to a certain structural element essential to this controversy. I refer here to the element which concerns the *position of the subjects-parties* in relation to the situation-*event* and the dogmatically presupposed context-*order*. We may, as a matter of fact, argue that the identity of the masks of *rights and duties* — masks that, as practical and cultural artefacts, are constitutively *assumed* (*buckled*!) by those subjects — depends on the *chance* and the *legitimacy* (which is also an institutionally consecrated *opportunity*) that such subjects have to consider *the same concrete situation* and to invoke *the same dogmatically enforced context-order*, building, expressing or defending *distinct* nuclear understandings of *the masks* in question and of the reciprocal connections that *inter-subjectively* relate them. This observation is less trivial than it sounds. In this possibility and the opportunity for *attention* or care that it institutionalizes (opening up a process of assimilation-treatment and submitting this to a *contradictory* dynamics), we should, in fact, acknowledge two basic (foundational) dimensions which help us to understand the experience of the problem-controversy and the recognition of the subject-person as two genetically *indistinguishable* components — to the point where perhaps we can say that it is this inseparability that provides us with the key to differentiating or autonomising that experience (of the problem) and this recognition (of the subject) in terms of their *strict juridical relevance* (identifying the meaning and limits that the *practical world* of law imposes on them). Which basic dimensions are these? *On the one hand*, the dimension which corresponds to the reciprocal *pragmatic respect* between the subject-parties (and to this *pragmatic respect* as a requirement for *hearing the other* and his or her arguments) and, *on the other hand*, the dimension which, mobilizing a promise of univocity and comparability, enables these arguments (and also the impartial

indeed the *case-controversy*: seriously taken as *prius* and as perspective of a *new* practical world, culminating as such in the experience of a unique, microscopically conceived, experience of comparability-*tribuere* (assured not only by the adjudicator-*third* but also by the *tertium comparationis* of a coherent *corpus* of *warrants* and *criteria*). It is in fact this experience which opens the path to an unmistakable process of *fight for recognition*. Why unmistakable? Certainly because concerned with the institutionalization of an experience of *dignitas*, which (with the unsuspected help of Waldron), we may say genuinely or intrinsically juridical (an "intrinsic", *non-contingent*, "legal idea"[86]): as the *dignity* of *rank* or *status* of an autonomous and responsible (inter-subjectively *relativized*) *subject-person*… who, invoking (implicitly or explicitly) the same order of *warrants* and *criteria* and addressing himself simultaneously to the other party and to the impartial third, demands a hearing, i.e. expects a rationally *judicative* treatment of the controversy. This is, however, another *story*, certainly to be told (and retold) in other contexts and stages[87].

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third's *adjudication*) to be taken seriously as plausible situated experimentations or realizations of a certain context-*order* (of common *warrants* and *criteria*) — a context which will later be significantly identified with the objectivation of a *legal system*.

[86] Waldron 2012, 2015.

[87] See the syntheses proposed in Linhares 2016a, 2020, 2021, 2022.

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Phenomenology of Art and Narrative in Hannah Arendt:

Redemption and Understanding for Law and Literature

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ABSTRACT

Hannah Arendt's aesthetic reflections have not been largely considered in Law and Literature (1), contrary to her contributions to political theory and philosophy. This article seeks to give an approach to the phenomenology of art developed by Arendt to apply it to Law and Literature. For this (2) I describe what this theory consists of, focusing the analysis on the notion of a work of art whose characteristics (permanence and uselessness) and functions (visibility and anticipation) are intertwined with two types of narrative: first, the narrative for redemption (3), based on which Arendt redeems the defeated in history and, second, narration for understanding (4), which seeks to morally engage the reader in social phenomena. To highlight the use of both forms of narration, I pay attention to the use of Proust *In Search of Lost Time* in Arendt's work, regarding the redemption of the Jewish outcast, and to the analysis of a story by Günter Anders entitled *Die beweinte Zukunft* (1961), based on which I present the concept of understanding developed by Arendt, but led to concern for the current climate crisis.

I conclude (5) with some projections and criticisms that show that Arendt's phenomenology and her use of the narrative can be used in Law and Literature to reflect on the great problems of contemporary times.

KEYWORDS

Phenomenology of art – work of art – narrative for redemption – narrative for understanding

1. Hannah Arendt and Law and Literature: political theory and philosophy, yes; art, no.

The influential work of Hannah Arendt (1906-1975) has been analyzed from various points of view (Blume, Boll and Gross 2022). In the case of Law and Literature, she is frequently cited for her contributions to political theory or philosophy. A cursory review of these works reveals that they cover Arendt's

ideas on citizenship (Koegler, Reddig, and Stierstorfer 2022), power (Morín 2022), the space of appearance (Arancibia 2022a), the beginning (Arancibia 2022b), evil and violence (Abreu and Narváez 2022), the victims (Douglas 2014), totalitarianism (Weisberg 1991), the Holocaust (Beebee 2012), (Ruiz 2014), (Murav 2008) and her reading of Kafka (Ost 2006), (Fersini 2018), among many others. This situation contrasts with what happens with her theoretical reflections on art since they have not found a prominent place in Law and Literature. We can appreciate this in general works in our field of studies. If we open the 2017 book *New Directions in Law and Literature* we have to scroll our gaze to the bibliography to find that she is cited, yes, but as editor of the works of Walter Benjamin and then, in the general bibliography, *The Human Condition* is named, but without context (Anker and Meyler 2017, 382). The same occurs in *A Critical Introduction to Law and Literature* from 2007, where she is mentioned in passing in the introduction... regarding the importance of walls in classical Greece (Dolin 2007, 6). In the most recent book *Derecho y Literatura. Persiana Americana*, a single reference to forgiveness is made (Caballero and Jiménez 2022, 159) and in the case of the presentation of the *Revista Peruana de Derecho y Literatura*, it speaks, in passing, of the commemoration of the centenary of her birth (Torres 2006, 23). The only one who vindicates her figure and analogizes her interdisciplinary effort with what happens in Law and Literature is Ian Ward in his *Law and Literature. Possibilities and perspectives* of 1995, where he says: "Heidegger and Heideggerians such as Derrida, Arendt or Marcuse have advocated precisely the 'cross-disciplinary' study, or 'Ciceronian unity', which law and literature scholars such as James Boyd White have advocated" (Ward 1995, 149), but that's all. As we can see, her ideas on aesthetics are not a fundamental part of the corpus to consider when writing in Law and Literature, as is the case with Richard Posner, Martha Nussbaum, and James Boyd White, among others.

If we now look at specialized articles, we will see that few works take into account her considerations on art and culture. Among them we can name those who refer to their impressions of culture (García Cívico 2018), aesthetic judgment (Arancibia 2023), (Binder 2008), and narration (Minow 1996). This last article is the only one we could find on the important theme of narrative in Arendt, applied to Law and Literature.

For all the above, and because of what has been investigated, we can affirm that not enough attention has been paid to her theorizing about art

in Law and Literature studies. This is strange since there is a narrative twist in legal studies that could take advantage of Arendt's contributions on the matter (Brooks and Gewirtz 1996). Indeed, the philosopher of law, Cristina Sánchez Muñoz, names Arendt as part of a current of renewal in the social sciences that focuses its methodology on narrative and places it alongside references in Law and Literature such as Richard Posner and Martha Nussbaum (Sanchez 2007, 228). We are interested in exploring the place in which Sánchez situates her. To do this, we will use, first, two studies that address Arendt's phenomenology of art (Birulés and Fuster 2014) and (Bosch 2021). When describing this theory, we will highlight its elements and the functions associated with the narrative, which will give us the two ways in which it is used in her work.

2. Permanence and uselessness of the work of art: brief phenomenology

Hannah Arendt was never characterized as a dogmatic thinker, neither in terms of her ideas nor in terms of her methodology. To elaborate on her work, she used the most diverse disciplines: political theory, philosophy, sociology, and art, among others. As for the latter, literature appears in several of its texts. In this sense, she uses it to characterize the Jewish outcast based on the work of Marcel Proust or to describe colonialism based on the work of Joseph Conrad. The examples are multiple and show the value that she assigns to art for the development of her work. As Birulés and Fuster affirm, art adds depth and concreteness to their analysis (Birulés and Fuster 2014, 17). On the other hand, Arendt used the narrative as a form of her essay writing. Her way of narrating the origins of totalitarianism, without going any further, corresponds to what she calls her "old-fashioned story-telling" (Arendt 1962a, 10). Lastly, and more generally, the aesthetic dimension is central to her reflection. Her theory of action is based on the intersections between aesthetic and political phenomena. I will expand on the latter first and then on the narrative (3) and (4).

Even though our philosopher does not elaborate a systematic on art, she does deploy a phenomenological theory that relates art, *vita active,* and temporality. This theory is mainly exposed in *The Human Condition* (1958) and the essay "The crisis in culture: its political and social meaning" (1960).

For Arendt, as for other thinkers, the great question of the human being is related to mortality and the way to overcome it. How to achieve immortality as finite beings? One of the concepts on which she reflects is the category of world. This concept, which is not comparable to Earth or nature, is related to what is found *among* human beings. It is what we arrive at when we are born and what we leave behind when we die. This world that will survive us has a character of permanence and durability which means that what is deposited in it also has those characteristics. Starting from the world, for example, we can think of a civilization, that is, that set of customs, ideas, culture, and knowledge, to which human beings give shape and that will survive us once we have left the planet. To endow our experience on Earth with the world, then, human beings develop activities and found institutions that defy time. On the other hand, we manufacture objects based on which we satisfy our vital, work, cultural, and entertainment needs. Both the activities, the institutions, and the objects that we create have the intention of going beyond contingency, allowing the coexistence of mortal and diverse beings to be stabilized. Within these activities and permanent institutions, we find politics, history, philosophy, and art. Regarding the latter, Arendt pays special attention to the cultural object called a work of art (Bosch 2021, 30).

In the chapter entitled "The permanence of the world and the work of art" of *The Human Condition* and in the essay "The crisis in culture: its political and social meaning", Arendt establishes two fundamental characteristics to call a work a work of art. The first is its permanence and the second is its uselessness (Arendt 1998, 167). Regarding their permanence, since they are objects made by humans, they become the most mundane of all, sharing space with other objects, such as furniture. In this sense, its durability is material, but more importantly, it is immaterial, since it is the quintessence of civilization, "the lasting testimony of the spirit which animated it" (Arendt 1961b, 201). About its uselessness, the work of art has this characteristic because it is not made for consumption, to satisfy biological needs, but instead embodies human thought, that individual self that is released in the work of art.

Permanence and uselessness are opposed to the discourse of consumption in mass societies like ours, where entertainment is the value by which human works are measured. The work of art, a cultural product par excellence, exceeds consumption, becomes immortal, and in doing so eternalizes the human being. Says Arendt: "It is as though worldly stability had become

transparent in the permanence of art, so that a premonition of immortality… something immortal achieved by mortal hands, has become tangibly present, to shine and to be seen, to sound and to be heard, to speak and to be read" (Arendt 1998, 168). The human being brings to the materiality of the world a work that is born from him but becomes independent to be appreciated by others. The place where works of art materialize is in books, paintings, records, films, and all material objects that, since they are not intended for consumption, survive for current and future generations.

In Arendt's thought, literature fulfills different functions, but two can be highlighted: making groups excluded from society visible and anticipating the development of social phenomena (Arendt 1961b, 199-200). Both functions are not developed by Arendt, but by two scholars of her work: Seyla Benhabib and Lisa Disch. They shape the two ways in which Arendt writes her work: narrative for redemption and narrative for understanding.

3. Narrative for Redemption: The Pearl Diver

We previously said that Arendt had described her way of writing history as storytelling. As is known, Arendt pointed out that after the crimes of the Nazis, the thread of tradition had been cut and it was not possible to continue narrating the past, the present, and the future based on the culture that had given rise to the most terrible events of the 20th century (Arendt 1961a, 14). Arendt got around this problem by resorting to storytelling. Based on this, she was able to do two things: on the one hand, she found a way to understand the past and, on the other, she was able to relieve those voices that history had silenced. To do this, she resorted to a metaphor from Walter Benjamin: that of the pearl diver.

Walter Benjamin (1892-1940), like Arendt, had to find new ways of coping with his understanding of lived reality. In his case, he resorted to the use of quotes and fragments since they maintained hope for the future from the past. They were bits of the past that we could bring up today, intact from the terrible context in which they were used. Arendt discusses these images of Benjamin in her essay on the author in the book *Men in Dark Times*. There she says that Benjamin occupies these thought fragments that have a double function: "interrupt the flow of presentation with transcendent force…and at the same time concentrate within themselves that which is presented"

(Arendt 1995, 194). This idea refers to Benjamin's collecting activity, based on which Arendt believes she sees a strong aesthetic foundation. The collector, says our theoretician, accumulates things that, as children know, are useless because they have value in themselves. The art of collecting things is useless because the use made of the things that are the object of the collection is useless. In this sense and going back to what we said about the work of art, it is revealed as permanent and useless, because at the bottom of it, we find no trace of its function. The work of art is self-sufficient and does not serve a specific purpose. The same happens with the collector's passion that neutralizes the functionality of things by grouping them around art, subtracting their ability to be consumed. This is its beauty in the Kantian sense: it is the disinterested delight that the Königsberg philosopher alluded to. The collector takes a transcendental step to be able to face reality: he obtains from the past a pearl, a jewel, a work of art that, separated from its context, he must clean to remove from it everything typical of it. Finding the thread of tradition already broken, it is only possible to dig into its ruins to find the shining pieces.

Benjamin undertook his work as a collector not only accumulating books but also gathering various quotes in his notebooks. There an 18th-century love poem and a clipping from the daily newspaper could coexist peacefully. Arendt points out that Benjamin achieved this that the fragments "illustrated one another and were able to prove their *raison d'être* in a free-floating state, as it were" (202). All the quotes and fragments float with each other in the sea of culture and the citizen's job is to find them, take them in their hands, compare them, and fish them out. Arendt titles the third part of her essay on Benjamin as "The pearl diver" and quotes an excerpt from Shakespeare's *The Tempest*: "Full fathom five thy father lies, / Of his bones are coral made, / Those are pearls that were his eyes. // Nothing of him that doth fade / But doth suffer a sea-change / Into something rich and strange" (193). We have seen how Benjamin's logic analyzed by Arendt operates: we can obtain from tradition what still shines like pearls. Those pearls can be fragments and quotes of works buried by the weight of history. What else can we get from those pearls? As if this paper were a meta-fishing, Seyhla Benhabib takes Arendt's ideas (which, in turn, takes them from Benjamin) to configure what she calls: a redemptive narrative.

In her article "Hannah Arendt and the Redemptive Power of Narrative" (1990), Benhabib establishes that the storytelling practiced by Arendt al-

lows her to discover, under layers of sediment, those pearls that have been silenced under the rubble of history (Benhabib 1990, 171). The narrative for Arendt, says Benhabib, is a fundamental human activity and the form she uses is that of the pearl diver. In the specific case of the work under analysis, Benhabib focuses on the disappearance of the individual under the Nazi machinery, studied by Arendt in her *The Origins of Totalitarianism*. In Arendt's monumental work of 1951, we find the breaking point regarding the death of the juridical subject, the moral subject, and individuality. Benhabib says that the death of the juridical subject is analyzed by Arendt in the section "Imperialism", where she deals with the paradox contained in the conception of the nation-state and the universal rights of the human being when confronted with the structure of totalitarianism. Arendt traces its roots to the case of the Boers in the South African colonization, pointing out that mere humanity was not a sufficient guarantee for the juridical status that enabled one to be a subject of rights. The death of the juridical subject is signed with the minority treaties after the First World War that create millions of homeless, nationless, and displaced people. The juridical subject becomes a "superfluous" human being. The murder of the moral person, for its part, accompanies the above-mentioned death. Anti-Semitic prejudice plays a special role in this process, for the Jews are blamed for the death of the Son of God. This produces in the Jewish population the idea that they carry a vice, an essence, which is undeniable. Finally, looking at the concentration camps, we find the disappearance of individuality. It is the mass that replaces the individual thus considered, leaving the person in a condition of solitude. As there are no references to hold on to, no words to grasp, no identities to anchor oneself to, there is a disappearance of the person in the mass. How does Arendt rehabilitate the disappeared person? Using literature.

In her study, Arendt observes that although the past is fragmented and we cannot turn to tradition, we still need to make sense of what has happened, that is, the past. To do so, she resorts to the narrative. Actions only live in the narratives of those who perform them and in the narratives of those who understand, interpret, and remember them, says Arendt. Therefore, storytelling is a fundamental human activity. And what guides the storyteller? The search for the pearls of history. How do we make the disappeared subject appear under the layers of sediment? One avenue to explore is literature. To illuminate the death of the moral subject, she turns to the work of Marcel

Proust. In chapter 3, "The Jew and Society", Arendt dwells on the consideration that society had of the Jew as the bearer of a vice (Jewishness) which, contrary to what might be thought, generated attraction in the Parisian salons of the early twentieth century. It produced this because the figure of the monster, of the exotic, made it possible for the bourgeoisie to entertain themselves and take a break from their usual tedium. The problem is that Jews had to lead a double life where an attribute such as that of the Jew, which is a national one, had to seek recognition only as a private attribute, subject to the fallacious admiration of the bourgeois class. The individual had to hide. To illustrate this, our thinker turns to Marcel Proust's *In Search of Lost Time*, because there she finds the categories of pariah and assimilated Jew, central images for her work. There we can see how the Jew is accepted as a human being who moves between vice and crime, what ways he must follow to conform to high society, and the outcome of such actions. To exemplify the point, Arendt resorts to the character of monsieur de Charlus from *Sodom and Gomorrah*. He, a homosexual, who had formerly been tolerated, "notwithstanding his vice," for his personal charm and old name, now rose to social heights. "He, says Arendt, no longer needed to lead a double life and hide his dubious acquaintances, but was encouraged to bring them into the fashionable houses". Topics of conversation that he formerly would have avoided—love, beauty, jealousy—that would lead somebody to suspect his anomaly, were now welcomed avidly given the experience, strange, secret, refined, and monstrous upon which he founded his views (Arendt 1962b, 81). Something very similar happened to the Jews. Individual exceptions, says Arendt, ennobled Jews, had been tolerated and even welcomed in the society of the Second Empire, but now Jews as such were becoming increasingly popular. In both cases, society was far from being prompted by a revision of prejudices. They did not doubt that gay people were "criminals" or that Jews were "traitors"; they only revised their attitude toward crime and treason. That is the thing that Proust narrates in a magnificent way.

Why does Arendt turn to Proust to explain this issue? She sees in the French writer someone who has poured himself into the literary work. Someone who has seen and lived reality in a way that, later, when translating it into a novel, can enrich our vision of events. With this, it contributes so that Arendt, as a pearl diver, can redeem "the memory of the dead, the defeated and vanquished by making present to us once more their failed hopes, their untrodden paths, and unfulfilled dreams" (Benhabib 1990, 196).

4. Narrative for understanding: without the sea, there are no pearls

We said that Arendt's ideas can be used in Law and Literature in two ways: as a redemptive narrative and as a narrative for understanding. Let us look at the latter.

What in the last century moved Arendt to try to delimit the elements that gave shape to totalitarianism, were the concentration camps, that is, the total disappearance, not only of the juridical and moral subject, but of human individuality that becomes superfluous. What event marks today our becoming as a species? Among others, it seems that the one that stands above all others is climate change. It has been said by specialists that this is the greatest threat to our life and that we are the first generation to experience the possibility of extinction of our species. The rivers are drying up, the rain is not falling, and the sun is raising the temperature day by day. The curious thing about this phenomenon is that there is no sense of emergency. "The lack of a sense of emergency, Heidegger explained, "is greatest where self-certainty has become unsurpassable, where everything is held to be calculable, and especially where it has been decided, with no previous questioning, who we are and what we are supposed to do." (Heidegger 2012, 99) What to do? Try to understand the phenomenon. Understanding, for Arendt, was the source of her philosophical work, synthesized in the phrase: "What is important for me is to understand" (Arendt 2013, 9). What was understanding for Arendt? She referred to it on several occasions, but there is one that is useful for what we are proposing. In the preface to the first edition of *The Origins of Totalitarianism,* she points out that understanding means: "... to examine and consciously bear the burden that our century has placed upon us - and not to deny its existence or meekly submit to its weight. Understanding, in short, means an attentive and unpremeditated confrontation with reality, a resistance to it, whatever it may be." (Arendt 1962b, viii). It is about assuming the challenge of looking at the problems of our era profoundly, without seeking artificial or superfluous solutions. Responsibility to the world, that is, to that permanent and stable place of which works of art are a part, was for Arendt her driving force of life. If previously we said that she had adopted a philological method to analyze events, now we can say that she gave rise to a comprehensive method, that is, one that uses different approaches to achieve its goal. In her book *Hannah Arendt and the Limits of Philosophy*

published in 1994, Lisa Disch delved into the analysis of this narrative form, this method, in the chapter titled "More Truth Than Fact".

In this text, Disch says that in a society where the social abstractions of social theory and social science sometimes mask real conflicts, "a good narrative can reveal the assumptions hidden in seemingly neutral arguments and challenge them." (Disch 1996, 106). The time we live in, a predominantly virtual one, between *fake news*, openly biased YouTube channels, malicious tweets, and where each person is an Instagram account, forces us to redouble our efforts to understand the magnitude of the real (not virtual) crisis we are experiencing. Arendt could not reflect on climate change, but she did write down some ideas about culture and the consumer society that can help us develop the idea.

In the first part of this writing, we said that every work of art had two characteristics: its permanence and uselessness. Arendt detects that there is a philistinism in contemporary times that leads to consider the work of art merely as entertainment. This causes the work to be consumed, therefore, destroyed. She says: "The point is that a consumers' society cannot possibly know how to take care of a world and the things which belong exclusively to the space of worldly appearances, because its central attitude toward all objects, the attitude of consumption, spells ruin to everything it touches" (Arendt 1961b, 211). Everything that falls under the hands of the consumer society is treated in the same way: as an object that must be used for something, as a means to an end. According to Arendt, the consumer society cannot reach a high degree of culture only with the passage of time and education. In this sense, there is a pessimism of Arendt that leads her to disbelieve in a change of course in the world. But at the same time, she says that today the "Only ones who still believe in the world are the artists—the duration of the work of art reflects the enduring character of the world. They can't afford alienation from the world" (Arendt 1997, 142). If this is the case, then a narrative for understanding may be a good way to explore the crisis we are going through. Lisa Disch said that the term storytelling is not defined by Arendt, but upon reading her work, she observes that there is a way of narrating that seeks to understand events when there are no already stable categories (Disch 1996, 108). In the absence of these stable categories, the sources that our thinker uses are varied and literature can be a good way to anticipate certain events. To highlight how narrative can be shaped for understanding, we will analyze a short story by Günther Anders called

Die beweinte Zukunft (1961) ("The Mourned Future") that deals with the construction of Noah's ark.

If we follow the way of conceiving the Christian apocalypse, we find a sense of inevitability. The end that it announces cannot fail to happen, because it is supposed to be brought about by an imperious necessity, followed by salvation. But today, in secular societies, we know the theme of the end, outside any religious horizon of salvation as a desperate catastrophe of the mundane, the domestic, the valued, the signifier, and the operable. In short: it is inevitable and there is no salvation. But the message can be sent in another way and we can commit ourselves as human beings to a change in the course of the world. We can think of the biblical story of Noah. There he is described as the only righteous man left on Earth. That is why God decides to spare him from the flood with which he will sweep away human wickedness. And to save himself and his children, he warns him one hundred and twenty years in advance. Genesis makes no mention of the interval between God's threat and the construction of the ark. Günther Anders imagines Noah's angst during that time. In *Die beweinte Zukunft* Noah is the protagonist and he tries to open the eyes of his contemporaries. The first interesting aspect of the story is that it brings us into the subjectivity of the character, who here is no longer the silent builder of the ark of the biblical story, but a tormented and tragic figure. He pursues his contemporaries to tell them what is to come, but they mock and humiliate him (Anders 1981, 15). Noah is not content with this and puts on a performance to persuade his peers: he then appears in the street pretending to be in mourning: prostrate, dressed in rags, and with his head covered in ashes. He wants to teach them a lesson: "Und durch Schrecken zur Einsicht bringen. Und durch Einsicht zum Handeln" (16). He seeks to involve them in becoming aware of the future that awaits them so that they can act. It is necessary, then, to understand a phenomenon to be able to act accordingly. The anticipation to which Arendt referred when we talked about the functions of literature, takes on a pronounced turn in this story by Anders, since the story itself deals with how to foresee the catastrophe, the extinction. In this sense, Disch points out that the narrative for understanding, as Arendt uses it, can "morally commit us" (Disch 1996, 109). The story understood in this way, can "represent a dilemma as contingent and unprecedented", stimulating the reader's "critical thinking" (110). Anders' story places us in front of the most relevant existential dilemma and yet the characters in the story ignore Noah. They approach him and ask

him all kinds of superfluous questions. They ask him about his mortuary attire and think that someone close to him has died. Noah continually tells them no, until at one point he tells them that he is mourning the many who have died. They ask him when that happened, and he answers: "It happened tomorrow" (20). To the bewilderment of the public, he explains that the flood will come and end everything we know. He asks them if they even know what that means. As they remain silent, he tells them: "There will be no difference…between those who cry and those who are cried…" (22) He says to them that they have to wake up, because "the day after tomorrow will be too late" (2. 3). In the face of concern from his neighbors and once his mission has been accomplished, he says: "The show is over." (24). In the days that followed the performance, Noah was visited by his neighbors who helped him build the ark.

This story of Anders shows us what it would be like the day after tomorrow when there's nothing and no one left. The temporal space that Noah opens is extensive and recalls the possibility of thinking of those who will come after us, when we are no longer on Earth, that is, after the flood, after the end of the world. And, seen from that time frame, everything that exists today will be as if it never existed. No more world, no more objects of art, no more mankind. In that sense, knowing that no one will weep for you, that no one will say the prayer over your grave, that no one will remember you because there will be no one to pray and remember: this thought has the power to terrify the lazy, since not having someone to remember you and mourn you is equivalent to never having been there, to never having appeared on this world.

Understanding this issue, and confronting it, is a way of taking a stand and committing to changing the course of the world.

5. Conclusions

In this last part, I will first present the conclusions and projections of the research and, then, the criticisms that can be made to the aesthetic approaches of the analyzed work of Arendt.

Regarding the conclusions and projections, I think that just as in Law there is a critique of legal positivism, in the social sciences Hannah Arendt was an enemy of positivist methods of dealing with research (Sánchez 2003, 23).

Her philological and comprehensive method prevented her from being tied to barriers that would allow her to access knowledge. For this reason, all her essays and works are full of references that come from art. But as we argue throughout this text, this was not only a way of exemplifying phenomena, but it became something deeper: she found a way to narrate and to narrate to herself the past, the present, and the future. I think that her contributions in terms of aesthetics have the same value as her findings in political theory or general philosophy and can be used in Law and Literature.

For this, it was necessary to describe her phenomenology of art, since it contains powerful signals about what the world we have created means, the civilization in which we live, the value of things *per se,* and how, within it, the work of art it situates itself and produces its effects. These disquisitions often escape the Law because it seeks knowledge's usefulness, ignoring reflections that exceed it. In this sense, I have exemplified the two forms of Arendt's narrative based on the crisis of the individual today. On the one hand, I am referring to the criticisms that exist around the universal subject of Law, and, on the other hand, I am referring to the existential threat in which we find ourselves because of climate change. Both put the notion of the legal subject of the Enlightenment to the test and put us in tension. As former Dean of Harvard Law School and cited author of storytelling and Arendt, Martha Minow, puts it: "Like Arendt, I find myself struggling with the limits of Enlightenment universalism, or what some call political liberalism , given the historical events of the twentieth century. In the name of universalism, particular groups have been oppressed; in the name of Enlightenment rationality, particular groups have been exterminated. At the same time, as more recent history suggests, the war of all against all is a likely result of a revival of particularisms" (Minow 1996, 34). The author describes in a good way the tension that we currently live on between particularisms and the universal subject. We must add the danger of death that humanity is experiencing today. The law cannot be absent from both discussions, and I wanted to demonstrate how, in the first case, we can approach the story of the victims, those subjects that have been excluded from the universal subject, through the portrait that is made of the Jew in the work of Proust. The reflections that Arendt makes on the novel can be updated today to what has been known for some time as "identity politics". Thinking about the projections of the narrative for redemption, we can cross this issue with the experiences of LGBTQIA+ groups, feminism, or native peoples.

If we see it from the narrative for understanding, the issue of climate change places us on the edges of what we know as the reason for the West. The crisis is so deep that it removes the beliefs and ideas we have accumulated for centuries and makes us need all the intellectual tools to understand what is happening. Anders' story reflects this concern and highlights the permanence of the world and the anticipation of literature that Arendt outlined in her writing on culture.

As for the criticisms, merely as an example, I think that one of them may be that Arendt's vision of the consumer society is pessimistic and conservative. Her argument that this society spells ruin on everything that it touches, can be refuted if we consider that there is literature that indicates that consumption is an emancipatory experience that produces equality in people, erasing their status signs (Peña 2020, 96). The question to ask would be whether it is possible to separate the sphere of art from the consumer experience.

In the same sense, her vision of high and low culture (or entertainment) has been called into question in postmodernity (Huyssen 1986). The ideas of beauty and uselessness that support Arendt's theorization about art and works of art can be defended from the postmodern attack if it is considered that there is some criterion to establish what can be understood as a cultural object and what No. Arendt fixes it on the permanence of the object through the centuries.

Lastly, and without intending to exhaust the possible set of criticisms, Facundo Vega finds out that there is an inconsistency in the way of thinking about the work of art as a product of *homo faber* since this is treated in Arendt's work as one that acts based on to means and ends, a procedure with which the work of art would not be related (Vega 2018, 370). Vega himself points out that the answer to this criticism may be given by Arendt's consideration of the action as exempt from the said procedure and by its unpredictable nature. Arendt's aesthetic work offers intriguing insights into the intersections of law, art, and politics, which are relevant to the study of Law and Literature. However, it is important to address any objections that may arise, including those raised here.

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Law as Literature in International Law

The importance of Narrative and Language in the creation of *jus cogens* norms

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ABSTRACT

We propose to reflect on the importance of narrative and language in international law as active elements of creation. To this end, we will rely on the *law as literature* methodological approach, demonstrating that importance in the light of the creation of binding force in *jus cogens* norms.

KEYWORDS

International Law; Narrative; Language; Law as Literature.

1. Introduction

Today's jurists often note the crisis that is raging in international law, marked by the replacement of bilateral dynamics by multilateral ones, as well as by the loss of sovereignty of its main subjects. Aware of the proposals that have emerged in this framework, admittedly instigated by the recovery of a strong practical thinking, we propose to reflect on the importance of narrative and language in international law as active elements of creation, aggregation, and linkage. In this precise sense, we will rely on the *law and literature movement*, especially on the methodological vein *law as literature*,

demonstrating that importance considering the creation of binding force in *jus cogens* norms.

Precisely because this is so, we have decided to divide the work into four critical-reflexive moments.

In a first moment, we will carry out a framing that will allow us to modestly identify the main ideas of the *law and literature movement*, focusing on the *law as literature* methodological vein, following the need of context and experience as intelligibility data inseparable from law. Reference will be made, as is required, to the individuality of law and literature as autonomous domains of knowledge with room for difference and approximation.

In a second moment, we shall explore the importance of *the linguistic turn* for the recognition of that autonomy and for the end of the exclusivity of theoretical reason and the priority of practical reason. Within this framework, the demand for rationality in judgment-decision-making will be considered and, specifically, the pertinence of a narrative rationality.

In a third moment, we will propose the importance of language and narrative in law, concretely in international law, as elements of creation, aggregation, and linkage. In this context, we will meditate on the current crisis of international law and the role of language and narrative in the proposed solutions presented by the doctrine. Seeking to prove the theoretical analysis undertaken, we will demonstrate the important role that narrative and language have in the construction of binding force in *jus cogens* norms, namely through the analysis of a concrete case – the birth of the right of self-determination of peoples.

Finally, by critically reflecting on some legal materials concerning the case study, we will consider the relevance of a requirement of narrative rationality in the judgment-decision, considering Bernard Jackson's (1985) proposal and Castanheira Neves' (2003) critical view.

Thus, we judge our motivations to have been duly clarified, certainly inserted in a concrete domain of law, but no less sincere in their effort to defend the *law and literature movement*, as perfectly adequate – and necessary (!) – to the understanding of the referents of meaning of our temporality and to the dynamization and consolidation of the "juridical as juridical" in its declared subsistence.

2. *Law as Literature*

2.1. *Law and Literature*

Let us begin by pointing out what seems clear to us: the *law and literature movement* is, in itself, an alternative proposal. Its construction is as solid as the energetic debate that sustains it, and this debate is as lively as the conviction that the truth – or what is a project-solution for the truth of our time (temporality...) – is being reached. Thus, it is repeated *ad aeternum*: "Law and Literature is becoming increasingly serious" (Ward 1993a, 43).

It is erroneous, therefore, to limit the movement to the fight against formalism, reducing it – almost – to a simple consequence, condemning it – perhaps – to the ephemerality of passage. Nor does it satisfy any pretension of revolution, pointing to an irresistible force, similar to the idea of *fatum*, as an ineluctable overcoming. In fact, a prudent look would be more appropriate, meditating the debate with attention, and taking advantage of what is concrete about it.

We are undoubtedly in a peculiar historical moment. Between what we have been and what we will be, we oscillate in a present that seems distant and diluted. The firmness of the concreteness of thought is a distant echo. The consistency of reason an abstract idea. Legal discourse, indeed, can be distinguished with difficulty from a myriad of distinct expressions. The "practical-normative reflection", as Aroso Linhares (2004) wrote, assumes a certain "fragmentation", "incommunicability"... and even "esotericism" (Linhares 2004, 90-93). To that exact extent, it is difficult for us to understand the boundary-line that distinguishes autonomy from isolation, practical rationality from casuistry. In short, a balanced sense of community escapes us.

In this precise sense, the role of the *law and literature movement* should be to create meaning as a recovery of essential lessons present in literary classics – *law in literature* – or a methodological dilucidation of the possibility of applying literary criticism techniques to legal texts – *law as literature* (Ward 1993b, 329-330).

But not entirely. The problem also seems to lie in a certain internal need for formal systematization – as if we were more concerned with the movement's organization than with its many uses. It is true that we can see the movement's benefits in that organization, but not in the practical and concrete way that we felt was necessary. Following Gary Minda's (1995) argument,

specifically on this issue, the schematic subdivisions depart from the practical and theoretical contributions of the movement (Minda 1995, 150-151).

Strictly speaking, the author expressly referred to the case of the subdivision – "legal humanism" in the 1970s; "hermeneutics" in the '80s; "narrative" – through feminist theory and critical race theory – in the '90s" – led by Julie Stone Peters (2005). Nevertheless, it confirmed the overcoming of the *law in literature/law as literature* dichotomy, reinforcing Richard Weisberg's (2016) reasoning (also specifically on this issue): it "no longer needs to hold sway" (Weisberg 2016, 40).

In fact, although we well understand the distinction drawn by Julie Stone Peters (2005), and in that sense our work would fit into the *Law as Literature* vein – not so much as a result of marginalized identities, but no doubt following the importance attributed to "narrative rationality" – we lean more towards a critique of these systematic divisions.

Truly, since the late 1990s, there has been an attempt to describe the movement by numerous authors – and from different sources (Weisberg 2016, 38-39; Buescu,Trabuco & Ribeiro 2010, 5-9). The merits of this attempt are not in any way questioned. Quite the contrary, we are perfectly aware of the benefits that systematization allows in these undertakings, as well as of the need for them in order to define the movement in question. It is only considered that insistence on this schematic mode may to some extent limit the research work by demarcating academic thinking into static categories. Indeed, it "no longer needs to hold sway" (Weisberg 2016, 40).

2.2. *Law as Literature*

Focusing especially on the framework of what may be called *law as literature*, let us begin by saying that the substantial difference between literary texts and legal texts is perhaps that the former allows us a certain particular experience with the text, bringing us closer to its language through the dialogue we conduct with the unique and individual conscience of the narrator, while the latter distance us from the start by means of a maestro-language. Translated: a language whose objective will be the clear and harmonious conduction of the multiple behaviors of the community, assuming itself as its ineffable voice, representative not of an individual discourse, but of several uniformed speeches.

The autonomy of law is, therefore, in the autonomy of its own language. That is to say, there is a standardization of community commitments through the

use of legal language, and law does not cease to contain the narratives of the community in the form of those assumed and institutionalized agreements.

To that exact extent, the law is truly like literature and recognizing it cannot seriously mean a lessening of its autonomy. In fact, the legislator does not use words with a linguistic-grammatical literary/common sense, but with a legal sense of its own that will be presented as an extra-textual referential function (Neves 2003, 23-24 and 382). The normative intention alluded expresses a determined and "transfactual" axiological foundation in which "a validity is established, simultaneously requirement and modus of distance and tension of "should-be" before the action and reality that a judgment, a critical discourse of judicial reasoning, is called upon to assume and realize" (Neves 2003, 371).

Indeed, legal language has a specific intentionality, which is normative, and literary language has a specific intentionality, which is aesthetic (Silva 1990, 29). From this it follows that legal language, like literary language, is a language within language – therefore with a distinct semiotic circle. And we must then distinguish between language as a "set of signs, born from social life, which men use for the expression and communication of their ideas or feelings; expression of thoughts and feelings through words" (Machado 1981, 472) from the "set of words proper to a craft or activity" (Machado 1981, 472). The result of this exercise will demonstrate with convincing reasoning that there is a separation between law and literature as distinct and autonomous fields of knowledge.

But please note: the very fact that they start from and of language – a motive inseparable from *the linguistic turn* – is reason enough to make plausible an interdisciplinary relationship between the two fields of knowledge. Even more: reason to reflect on the space of narrativity in the methodological exercise.

3. Approaching the Humanities

3.1. *The Linguistic Turn*

Because of its manifest importance for a reasonable understanding of the express autonomy of legal discourse, but also to better frame the pertinence of the allusion to language and narrative, let us briefly consider *the linguistic turn*.

In that effort, we shall be guided by Castanheira Neves (2003), in *O Actual Problema Metodológico da Interpretação Jurídica – I*, where, based on Richard

Rorty's (1967) essays in *The Linguist Turn: Essays in Philosophical Method*, the author explains in exemplary fashion what may be called a reconceptualization of the very nature of philosophy, with the ideation of the implications that flow from it (Neves 2003).

Primo conspectu, and in summary, the author notes that a radical turn towards language has taken place. Better said: living at this time the "third age of philosophy", we have moved from an "age of being" – Ancient and Middle Ages – to an "age of consciousness" – Modern Age until the analysis of language – to an "age of language". Consequently, the referent of meaning is no longer placed in knowing what the object is or how we know the object; rather, it is necessary that we speak of it (Neves 2003, 116-119).

At first, when language was proposed as a referent, its "constitutive-significant" autonomy was advocated and linguistic analysis ("the logical and intentional signification of a language") was seen as imperative – the rationality was analytic-linguistic as a result of the primacy of the logical interest (Neves 2003, 121-122). However, as Castanheira Neves (2003) explains, this moment was followed by another one – contemporary –, in which there is a new understanding of the problem of signification through the clear acknowledgement of the plurality of languages, rejecting, therefore, scientific language as "the only valid form of meaningful language" (Neves 2003, 123); assuming the importance of pragmatics and specifically of the concrete situations of signification for the understanding of language – of languages! – as "forms of life" (Neves 2003, 125); and legitimizing, from an "analytical perspective" (Neves 2003, 127), the "ethical discourse" (Neves 2003, 127) – "the value-oriented and normative languages and discourses" (Neves 2003, 127). Thus, theoretical reason was no longer exclusive, but captured the "transcendental-constitutive priority of practical reason" (Neves 2003, 123-127).

On the other hand, if the crisis of modern axiomatic reason, based on a subject-object relationship, opened the way to the "transcendental-constitutive priority of practical reason", based on a subject-subject relationship: truth is a practical truth (Neves 2003, 134-135). And it will be a practical rationality that will respond to the specific demand for rationality of the methodological exercise. In this way, following Pinto Bronze, it must be asked: a demand "(of what...) reason?" (Bronze 2020, 113).

Indeed, as Aroso Linhares (2010) explains, considering the Aristotelian intellectual virtues, once the domain of *episteme-techné* or *techné-episteme*

was overcome, the possibility of reinventing its balance "as a major experience of plurality" opened up, very specifically reformulating the challenge of *phronêsis* (Linhares 2010, 28).

The humanistic interdisciplinary facet considered here presents the challenge of the possibilities "of na autonomous praxis-*prattein* and its rationality types" (Linhares 2010, 27). Also, at issue here is whether the approach to the humanities, which enables various conceptions in which law relates in an interdisciplinary manner as part of the world of letters, lightens us any incompleteness (Linhares 2010, 23).

3.2. Narrative Rationality

Having arrived here, as a modality of practical rationality, we chose to develop the pertinence of narrative rationality in the methodological exercise, considering the importance of narrative and language in law.

Narrative rationality acts in the domain of the humanities, in the domain of the "world of life". It is then up to us to know to what extent narrative rationality – "the story that is told, the facts that are narrated" – is pertinent – in the methodological exercise (Bronze 2020, 163).

In the last chapter of this research, we will have the opportunity to elucidate this question more adequately in the light of a concrete case and specifically considering Bernard Jackson's proposal and Castanheira Neves' critical view. For now, it would be more prudent to state the meaning of narrative as a "verbal or written account of certain facts and events" (Machado 1981, 524), which immediately clarifies a common presence in law and literature. The latter as an "irreducibly plural – singular – form of modeling and exchanging meanings outside signification, a domain in which signs refer to the infinite" [Silva, Martins & Gonçalves (Org.) 2011, 17]. The former as a historically determined order of signification, a domain in which signs refer as much as possible to an intended certainty. Surely this is so – regardless of the defense of a continuity perspective of law and the natural referents of individual meaning that are noted in literary works.

Thus, when we propose *law as literature in international law*, we assume the substantial differences that distinguish the fields of knowledge, but also the structural points that bring them together. We assume, therefore, the importance of narrative and language in the creation of law. And we interrogate, consequently, the relationship of narrativity with the judgment-decision itself.

4. Importance of Narrative and Language in the creation of binding force of *jus cogens* norms.

Having announced the importance of narrative and language in the creation of law, it is necessary to delimit the scope of the investigation, pointing out the domain of law that we will investigate and the specific case in question. We have chosen, in fact, a meditative look at international law, demonstrating the importance of narrative and language in the creation of binding force of *jus cogens* norms. In this precise sense, we will begin with a brief reflection on the state of the art of international law considering the importance of narrative and language (4.1.); we will move on to illustrate the creation of binding force of *jus cogens* norms, using the example of the upholding of the right of self-determination of peoples as a *jus cogens* norm and, once again, revealing the importance of narrative and language in this defense (4. 2.); finally, taking this example into consideration and moving on to the fourth part of the investigation, we will reflect on the legal materials in question, demonstrating that in the decisional judgment a methodological requirement of rationality is resorted to, that is not narrative, notwithstanding the demonstrated importance of narrative and language in law (5.).

4.1. International Law, Narrative and Language

Currently, looking critically and reflexively at the state of the art of international law, we notice how the classic questions, related to the criticism of the lack of efficiency and systematization, are joined by questions marked by the emergence of new protagonists – such as multinational companies, international organizations, international private associations, and citizens. We often write about the possibility of replacing a Westphalian model, based on bilateral and multilateral dynamics between states, with a global governance model, based on transnational dynamics. And between the universality that is sought and the complexity of real cases, proposals for solutions have emerged in the doctrine that seek to create effective universality – *ad exemplum*, a global administrative law or global constitutional law – based on the gradual realization of certain principles in concrete cases.

In the argumentation invoked, the importance given to language used in cases is clear, precisely as a way of gradual realization of objectified principles. Critics, on the other hand, emphasize the demoliberal nature of these pro-

posals, repeatedly recalling the real differences between the various cultures of the world and accusing a narrative of imposing the democratic rule of law.

Without going too deeply into the subject, we would just like to underline the implicit recognition of the importance of narrative and language in these proposals, as powerful means of gradually creating binding force in the international legal framework. In fact, invoking the ontological identification between being and language in the Heideggerian sense, we can affirm narrative as the great expression of the creator-self and repeat with many authors: human life is structured through recourse to narrative, the plot created justifies the past and projects the future, and in this almost-written sense the guiding foundations of human action are created.

The relationship of language and narrative with law is thus a given. To point it out is only to recognize the inextricable link between man, society, and law. To explore it is to contemplate the way in which narratives and counter-narratives influence legal materials, pondering the strong influence they have on the concrete realization of law.

But not only. It means capturing these circumstances keeping in mind the possibility of the sedimentation of stronger narratives in the collective spirit to the detriment of others. It is to be shrewd enough to notice the following: ("Is the Plot an inevitable, universal, human concept? Is it a model of our mind's structure?" – as Dieter Axt asked Peter Brooks. The latter agreed and added:) "law makes its own narrative constructs" (Axt 2020, 326). *Ultima analysis*, is to understand the fluidity with which these stories and counter-stories converge, building upon each other and coexisting globally. For even if conflict exists, and it does, we know it to be remarkable in the art of strengthening structural narratives and creating other ones.

For example, Monica Hakimi (2017), in *The Work of International Law*, aptly portrays the importance of conflict in international law, arguing that there is an "insurmountable limit" whose systematic violation leads to the collapse of the system: the principle of prohibition of the threat or use of force (Hakimi 2017, 1-46). In other words, we can say that there is a structural narrative under which the United Nations was created – peacekeeping (Pereira 2018, 91) – by systematically violating the imperative norm that sustains it, one leads to the collapse of the U.N. system. But the violation itself will always be supported by other narratives that are intended to be sedimented.

Finally, if we consider the creation of the United Nations, we can reasonably state: there are in these conceptions of the spirit new and unknown realities

that coalesce with other already sedimented interests. Conferences for the discussion of legal materials are a perfect example of this circumstance. Let us think of the importance attached to the language of the United Nations Charter. Let us remember the arguments put forward at the Dumbarton Oaks (1944) and San Francisco (1945) Conferences (Musgrave 1997, 67). Without doubt, it was in the shadow of a strong narrative, that the U.N. system as we know it was created. But not only that. Through the abstract-precision of the language, the Charter was able to be adapted to new circumstances and other smaller narratives. What we succeed in meaning is: binding force in international law, created from a narrative shared by the Great Powers. In a word, without the elements that we are studying, international law, us we know it, would not exist today.

4.2. Construction of *jus cogens* norms: a case study

Not diminishing the copious doctrinal discussion that this topic usually generates, but quite certain that this is not the intended angle of this investigation, we have decided to be guided by the conclusions presented – under the terms of the Report of the United Nations Commission on International Law – in Geneva, in the year 2019. Indeed, peremptory norms of general international law are those that are accepted and recognized by the international community of states as a whole and whose derogation is only permitted by subsequent norms of the same character. They reflect and protect fundamental values of the international community and are hierarchically superior to others, as well as universally applicable. Customary law is the most common basis for their creation – law whose widespread practice is accepted as law. But not only this. General principles and treaty provisions may also serve as a basis for their creation [Report of the International Law Commission (A/74/10) 2019, 142-144].

What is especially interesting is that its identification as such requires the acceptance and recognition of a large majority of states, and to that extent depends entirely on states, but considers the overall comprehensive context: "other actors may be relevant in providing context and for assessing acceptance and recognition by the International community of States" [Report of the International Law Commission (A/74/10) 2019, 142-144].The reason why this is, is because of the need to establish the narrative. To borrow Peter Brooks' acquiescence, "law makes its own narrative constructs" (Axt 2020, 326).

Let us demonstrate what we have been arguing through a concrete case.

To do so, we must begin by putting forward the forms of proof that exist to identify acceptance and recognition of peremptory norms of international law: they are multiple. Although there is no exhaustive list, we can list some of them: public statements by representatives of States; doctrinal pronouncements; diplomatic correspondence; resolutions adopted by international organizations. Around these, a narrative is institutionally concretized.

As an example: the right of self-determination of peoples. We can trace the beginning of this narrative back to the ideas that were at the origin of the English, American and French revolutions, present – for example – in the works of John Locke (2020) and Jean Jacques Rousseau (1999) (we refer to the works *Two Treatises on Civil Government* and *The Social Contract*, respectively); legally materialized – for example – in the *American Declaration of Independence of 1776* (National Archives, 2022) and in the *Déclaration des Droits de l'Homme et du Citoyen* (Conseil Constitutionnel, 2022).

The defense of popular sovereignty, as proposed by those authors, would become 19th century nationalism (especially present – for example – in the ideas of Fustel de Coulanges – the defense that a people should only belong to a State by its free will – and Mancini – architect of the principle of nationalities: each nation with its own characteristics would have the natural right to become an independent State) (Tesón 2016, 210).

At the beginning of the 20th century, US President Woodrow Wilson and Soviet leader Vladimir Lenin would irreversibly introduce self-determination of peoples in their speeches as a political principle – very strategically marking the agenda of the century (Lopes 1999, 235-238; Lenin 1977, 143-156). Consequently, formal recognition of the political principle by the Council of the League of Nations would not be long in coming, paradigmatically in the case of the Aaland Islands [Report "Of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands questions" (October 1920)].

At the end of World War II, on October 24, 1945, the United Nations Charter came into force and, in its scope as a multilateral treaty with a universal character, created doubts about the existence or not of a right to self-determination of peoples. The doctrine said no – although it recognized the existence of a legal principle (Pereira 2018, 92). Nevertheless, due to the strategic ambiguity of the language used, it was determined that the United Nations Charter was open to the eventual recognition of a right.

In fact, this is what happened, the increase in international pressure in this direction determined the *de jure* recognition as a result of the adoption of crucial General Assembly Resolutions [Declaration on the Granting of Independence to Colonial Countries and Peoples (14 December 1960); Declaration of Principles of International Law on Friendly Relations and Cooperation among States (24 October 1970)]; the support demonstrated by the International Court of Justice [Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (1971); Advisory Opinion on Western Sahara (1975)]; the content of the first article of the two 1966 United Nations Human Rights Conventions [International Covenant on Civil and Political Rights (16 December 1996); International Covenant on Economic, Social and Cultural Rights (16 December 1996)] and statements made by government representatives on the occasion of their respective adoptions (Cassese 1986, 133-134; Hannum 1993, 31).

Therefore, it seems clear to us the contribution of the narrative of liberation of peoples, as assumed by the United States and the Soviet Union and disseminated by the Liberation Movements, to the recognition of the right of self-determination of peoples – and its construction as a *jus cogens* norm – under the terms of article 53 of the Vienna Convention on the Law of Treaties, signed on May 23, 1969 (Pereira 2018, 41). In the same way, the language that was used in the different legal materials proved to be extremely important as an institutional opening to temporality contingencies.

5. A Demand for Narrative Rationality?

5.1. Reflection on the case study

Considering the example mentioned, the importance of narrative and language in the creation of law and, more specifically, the importance of narrative and language in the creation of binding force of *jus cogens* norms, it is necessary to refer again to the methodological problem we face. The problem, in its simplicity, is this: what relevance should be given to a narrative rationality?

As for the importance of narrative rationality in the field of law, we will say that it is particularly from events and actions that the problem is posed, but not

with events and actions that it is justified, *ad exemplum*, in the concrete creation of *jus cogens* norms. The fact is that in the concrete realization of law we convoke values, principles, and rights. This is the comprehensive and grounding framework of the decision-making process, and the coherence that will be sought to be established will always be normative Let us say, following Castanheira Neves: "the two universes are different, and so are the two discourses" (Neves 2003, 410).

Notwithstanding, it is necessary to concretize the matters through specific examples, and, continuing with the case study, if we check the reasoning used by the International Commission of Jurists entrusted by the Council of the League of Nations with the task of providing an advisory opinion on the legal aspects of the Aaland Islands case, we can see the diplomatic way in which they refer to the principle of self-determination of peoples as a political principle, not part of the Covenant of the League of Nations [Report "Of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands questions" (October 1920)]. In other words, the rationality informing the decisional judgment is indisputably normative.

However, despite the impossibility of confusing narrative coherence "in its own rationality or its specific noetics and intentionality" (Neves 2003, 401) with the ultimate sense of validity of legal decisions, the latter determined by a "normative axiological sense of juricidity" (Neves 2003, 401), it is necessary to recognize narrative argumentation in the determination of the facts of the case in question (Neves 2003): "In order to answer this question, the principal historical facts marking the development of the political and legal position of Finland and of the Islands must be examined" [Report "Of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands questions" (October 1920), 3] – reads the opinion, precisely before the narration of the facts begins, from the Finnish Constitution of 1809 to the plebiscite of 1919.

Therefore, the ultimate meaning-basis of validity of legal decisions is axiologically normative and juridical, and the coherence that is constituted is normative. However, let us note an essential point. If the legal opinion we have used as an example denies the existence of a legal principle of self-determination of peoples, it recognizes the importance of the political principle in the thought of the time – "although the principle of self-determination of peoples plays an important part in modern political thought" [Report

"Of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands questions" (October 1920), 3]. Moreover, for the first time, the possibility of self-determination of peoples in cases where alternative measures were ineffective was considered – "Under such circumstances, the principle of self-determination of peoples may be called into play" [Report "Of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands questions" (October 1920), 4]. One notes, therefore, a poietic opening of the law to contingencies, in which – while not abdicating normative coherence, provided by the discourse and by the materials convened – the importance of narrative and language is clear, just as it would be clear later in the "construction" of the right of self-determination of peoples as a *jus cogens* norm.

Still another example is the text of the United Nations Charter, whose linguistic ambiguity, as identified by Hans Kelsen and Rosalyn Higgins (Kelsen 2008, 52-53; Higgins 1994, 111-112), although not determining the *de jure* recognition of a right of self-determination of peoples, would pave the way for that to happen. So much so that the legal materials that followed, such as the opinions of the International Court of Justice that we have highlighted, did not fail to mention the United Nations Charter as a foundational text for the judgment woven [I.C.J. Reports, 1975, 23 (54); I.C.J. Reports, 1971, 19 (52)].

Thus, it is precisely because law is a field of knowledge that carries out from place to place, and because its maestro-language is a standardization of community commitments that are assumed as structural-narratives, that we should do our best to glimpse that prior which precedes legal crystallizations in its fundamental aspects. In other words, it is necessary to contemplate the narratives that precede this certain and determined narrative and accompany the open and systematic evolution that legal materials provide.

The use of the term "narrative" in this framework relates to how one might understand law, as we shall see, not to the defense that the realization of law constitutes a narrative realization.

5.2. The Relevance of Narrative Rationality

We have seen that there is no methodological requirement for narrative rationality. However, we have also seen the role of narrative and language

in the creation of law. We can then question to what extent the importance of those realizing elements, which has already been demonstrated, should be considered.

It seems to us that historical or fictional narrative must be understood as part of the world of life, as a characteristic and autonomous domain of reconstitution or creation of coherent plots. Since it is part of this world, it is not alien to law, as we have partly verified. However, as we have also verified through the case study, and as Castanheira Neves clarifies, if it is possible to speak of the "world of narrative" it is no less possible to speak of the "world of law" (Neves 2003, 402). When it comes to decision-making, it is this universe, in its specific legal-axiological-normative dimension, that is (and should be) methodologically considered, also as part of the world of life. Thus, the world of law touches reality, certainly touching the narratives through which reality is woven (is being woven...), but this does not mean that its concrete and rationalized realization does not constitute a self-declared subsistent autonomy.

Finally, when we wrote Law as Literature in International Law, we essentially intended to demonstrate the closeness of the domains, constituted, and reconstituted by being part of the world of life, "in the same way" (Neves 2003, 402) constituting and reconstituting reality. But also, to dilucidate, through a concrete example, the exact importance of narrative and language in decision-making, reflecting on the possibility of a "narrativization of normativity" (Neves 2003, 402). The conclusion we reach is that the fact that we can narratively/coherently structure the judgment-decisions, thus understanding them, does not imply a juridical-methodological "narrativization of normativity" (Neves 2003, 402), but a possible and specific understanding outside the "legal as legal" (Neves 2003, 402).

It then remains for us to answer one last question, which is to know whether the way in which we can effectively structure the judgments-decisions narratively/coherently might not lead us to believe in an internal narrative rationality of the judgment-decision, albeit subconscious. It doesn't. We inevitably return to the problem of the ultimate intentionality that informs the coherence-foundation of the judgment-decision. In any case, since it is not difficult to confuse the importance of narrative and language in the creation of law with a certain "narrative monism and reductivism", it is necessary to end this investigation by objectively dilapidating Castanheira Neves' critical opposition to what it was proposed by Bernard Jackson.

Bernard Jackson, inspired by Greimas' work, began by writing *Semiotics and Legal Theory* (1985), in which he proposed the application of the Greimasian method to legal texts. In 1988, he went on to study specifically "the adjudication of fact and law in court, and thereby shifting away from the semantics of the legal texts towards the pragmatics of decision-making" (Jackson 1990, 81). It is the book that results from this study, paradigmatically *Law, Fact and Narrative Coherence* (Jackson 1988), the one that especially concerns us.

However, the reference to Greimas is important, because it is from Greimasian semiotics that the distinction between "deep level of signification" (Jackson 1990, 82) and "surface level of manifestation" (Jackson 1990, 82) is drawn. It is proposed, in this difference, the existence of elementary structures of universal signification underlying all particular discourses. In effect, the "deep level of discourse" (Jackson 1990, 82) consists of the interaction between the syntagmatic axis, in its horizontality, and the paradigmatic axis, in its verticality – Greimasian semiotics is concerned with the identification of the "deep level" (Jackson 1990, 82) structures of signification that underlie the "surface level of manifestation" (Jackson 1990, 82). Thus, in those axes the semiotic-narrative level underlying any human action is affirmed: a basic narrative sequence consisting of goal-setting and recognition of performance or non-performance, where choices must be made within semiotic constraints of what can be substituted for something else. Starting from this Greimasian proposal, Jackson precisely argues that in the moments of practical legal decision-making "there would manifest not only a narrative structure, but also a rationality of narrative coherence" (Neves 2003, 405) – a proposal that Castanheira Neves (2003) critically opposes.

For Jackson (1988), inevitably, underlying the judgment-decision would be narrative models, determined, *ad exemplum*, in the pragmatics of courtroom interaction. Moreover, he admits the importance of "outside adjudication" discourses in the choice of "within adjudication" narrative paradigms (Jackson 1990, 95).

Methodologically, and considering the case study, this author's proposal is extremely pertinent. Moreover, it should be noted that narrative models are subconsciously found in the rules and in the facts, which are discursively constructed. Hence, the judgment-decision would inevitably have in "its rationality an implicit narrative coherence" (Neves 2003, 405).

Particularly on this issue, Castanheira Neves is clear: "the deliberate abandonment of the normative intentionality, of the axiological normativity

that differentiates law as law, condemns that intention to root failure in its attempt at narrative reduction" (Neves 2003, 406). In fact, as we have already mentioned, although he does not exclude narrative argumentation in the determination of facts, he teaches us that it is neither possible nor conceivable to replace the "normative" with the "descriptive", since before any "form of organization of human behavior" there are "normatively specific problems that presuppose an axiological-normative validity" (Neves 2003, 408). In sum, since law is methodologically rooted in problems[1], these require a rationality that can only be found in the domain specifically at issue, in its declared and subsisting autonomy.

6. Conclusion

It should be said that we have resignedly absorbed the space of normative coherence in law. When we analyzed legal materials, we saw the reduced role of narrative in the meaning-basis of the text, with a privileged place for the description of events, or rather, in the argumentative establishment of facts. Nevertheless, law is not an isolated domain. Because it is not, the before that precedes it, as well as the after that follows it, is indispensable. In fact, the narratives that are created in communities gain or lose momentum in the wake of legal materials. It is in this sense that we ponder the power of law as a creator of inevitably narrative constructions. It does not mean that legal instruments or concrete decisions are presented with narrative coherence – although we do not dismiss the importance of an interdisciplinary approach, for example in exegesis, as a complement to the jurist's training, and eventual richness of interpretation (after all, even if it would be of no use to law, in this confrontation there is the essential firming of legal thought which, in dynamic problematization, only grows stronger) –, what we intend to say is that, due to the ontological identification mentioned above between being and language and, symptomatically, due to the expression of the creator-self through narrative, it is in this narrative way that legal materials are absorbed. Indeed, to say "law makes its own narrative constructs" is to recognize the

[1] As mentioned by Pinto Bronze, in doctoral seminar, referring to Karl Popper and, very specifically, to the meeting between this philosopher and Ludwig Wittgenstein in Cambridge, portrayed in *The Wittgenstein Stirrer* (2001).

importance of narrative and language for the individual, for society, and thus – very much so – for law. In international law, and focusing on the importance of *jus cogens* norms, we can see them as holders or confirmers of the structural narratives, insofar as it is from convincing narratives – one might say, shared by most states – that they acquire binding force.

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Principles as Guiding Lights and the Performance Moments for stabilizing indigenous possessory rights in Brazil.

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ABSTRACT

This study proposes a methodological reflection on the problem raised in the Extraordinary Appeal 1.017.365/ SC, through which the Federal Supreme Court (Brazil) considers the definition of the legal-constitutional statute of the territories of traditional indigenous settlement as a matter of general repercussion. Is it possible to say that there is a conflict between two opposing narratives: traditionality *versus* temporality. To shed light on this issue, we count on Drucilla Cornell and her "Philosophy of the Limit". This philosophy provides a deconstructionist and diachronic analysis of the legal system by promoting the genealogical reconstruction of the problem and the hierarchical relations involved. According to Cornell, legal interpretation is both a discovery and an invention of the solution through the normative orientation of principles, which act as guiding lights. Principles help us to avoid paths that go against their intended purpose, which allows us to handle differences and disputes through the legal system. Despite that, there are several external complexities raised by the parties involved that draw attention to the "Performance Moments", which means the moments for the presentation of different arguments by the different actors involved (not only lawyers but also other interested third parties) to the audience(s), in a responsible way for the intended effects and sensitive to the impressions received. This is a clear allusion to the metaphor of "Law as Performance" developed by Sanford Levinson and Jack Balkin, though with some differences, as their developments focus on the performance of jurists, especially in the role of interpreter/judge. At the same time, the present work also seeks to explore the "responsibilities in performances" of the other actors involved.

KEYWORDS

Indigenous Possessory Rights; Philosophy of the Limit; Law as Performance; Traditionality; Timeframe.

Introduction

Considering the inevitability of living in society, in its plurality of conflicting values and notions of a good life, it is important to pay attention to the "rival narratives" that wish to legitimize themselves through Law. The

conflict of narratives that we face in this essay is about the different interpretations of the right to indigenous possession over traditionally occupied lands in the brazilian context, which is based on article 231 of the brazilian Federal Constitution of 1988.

On the one hand, there is the defense of the "original right thesis" or the "indigenous-born thesis", which recognizes that the right over land comes from the very condition of nativity relative to indigenous peoples. For this reason, the right to land is permanent, unavailable, imprescriptible, and necessary for the well-being of these communities, for their physical and cultural reproduction, and is not and cannot be limited by a matter of time.

On the other hand, there are landowners and rural producers who feel that they carry the country economically "on their shoulders" and, even in the face of the constitutional text, bet on the so-called "time frame thesis" so that only the indigenous communities settled on their lands since October 5 of 1988 can maintain their occupations, except in cases of proof of persistent dispossession and physical violence. This is because they fear that indigenous territories will "expand without limit," which would put their private properties at risk. For this reason, they believe that this is the only thesis capable of reconciling the various conflicting interests and bring about social peace.

This conflict, despite having always existed in the history of Brazil, is highlighted by the Extraordinary Appeal nº. 1.017.365/SC being judged by the Federal Supreme Court of Brazil, with two votes already given, both in opposing directions to each other. Nevertheless, we must remember the participation of the various stakeholders in the dispute in addition to state entities, which includes the non-governmental organizations involved that participate by providing their opinions. It is, therefore, beyond considering the colonial past of violence and discovering the principles of justice that it requires for the future yet-to-come, that is, for the invention of the decision, with the help of Drucilla Cornell in her deconstructivist and diachronic approach of the time of the legal system in the "Philosophy of the Limit". However, it is necessary to consider the performances involved, aimed at achieving its desired results through the mobilization of interpretative possibilities of the text in an appealing way to the audiences involved, which includes the contributions of Sanford Levinson and Jack M. Balkin specifically through the metaphor "Law as Performance", which intends to emphasize the responsibility of the interpreters before the affected audiences, allowing to identifying which interpretations manage to

be more responsible, for "what" and for "whom" exactly, without neglecting the demands of justice implicit in each one of them.

However, it is important to warn that this study is not intended to exhaust the formal and preliminary points of the legal action in question. The focus is on the debate around the material rights involved, which are essential for the strengthening and material cohesion of the Brazilian legal system, since there are thousands of demarcation procedures without a unified legal solution, which has already caused severe instability and conflict. So, it is crucial to carry out a documental investigation of the decisions and its oral arguments, that is, of the performances, as well as of the legal materials summoned for the problem, in a way that is related to the bibliographical review mentioned, through a dialectical approach that dialogues with different points of view in question.

1. The original case

> Article 231. Indians shall have their social organization, customs, languages, creeds and traditions recognized, as well as their original rights to the lands they traditionally occupy, it being incumbent upon the Union to demarcate them, protect and ensure respect for all of their property.
>
> Paragraph 1. Lands traditionally occupied by Indians are those on which they live on a permanent basis, those used for their productive activities, those indispensable to the preservation of the environmental resources necessary for their well-being and for their physical and cultural reproduction, according to their uses, customs and traditions.

The problem in question is being treated through the Extraordinary Appeal nº 1.017.365/Santa Catarina, which was unanimously submitted to the General Repercussion System because of the social, political, economic and legal relevance of the case, which significantly transcends the individual interests of the parties involved. For this reason, the Federal Supreme Court of Brazil, through the analysis of this appeal, will have to define the legal-constitutional status of the possession of areas of traditional indigenous settlement in the light of article 231 of the Brazilian Federal Constitution of 1988 (Brazil 2019, 1-28).

It is possible to say that the problem, in general terms, is divided between "two rival narratives": the so-called "timeframe thesis", which recognizes the right of indigenous peoples to claim lands only if they prove their occupation since before the enactment of the 1988 Constitution, or if they prove the existence of physical violence for its withdrawal. On the other hand, there is the so-called "original right thesis", or the "indigenous-born thesis", which recognizes that the right over land derives from the very condition of native people. In this sense, the right to land is permanent, indisposable and necessary for the well-being of native communities, for their physical and cultural reproduction, which cannot be limited by a matter of "time", even more so considering the past of violence non-erasable and recurrent in the history of Brazil.

That constitutional provision reads as follows:

> Paragraph 2. The lands traditionally occupied by Indians are intended for their permanent possession and they shall have the exclusive usufruct of the riches of the soil, the rivers and the lakes existing therein.
>
> Paragraph 3. Hydric resources, including energetic potentials, may only be exploited, and mineral riches in Indian land may only be prospected and mined with the authorization of the National Congress, after hearing the communities involved, and the participation in the results of such mining shall be ensured to them, as set forth by law.
>
> Paragraph 4. The lands referred to in this article are inalienable and indisposable and the rights thereto are not subject to limitation.
>
> Paragraph 5. The removal of Indian groups from their lands is forbidden, except ad referendum of the National Congress, in case of a catastrophe or an epidemic which represents a risk to their population, or in the interest of the sovereignty of the country, after decision by the National Congress, it being guaranteed that, under any circumstances, the return shall be immediate as soon as the risk ceases.
>
> Paragraph 6. Acts with a view to occupation, domain and possession of the lands referred to in this article or to the exploitation of the natural riches of the soil, rivers and lakes existing therein, are null and void, producing no legal

> effects, except in case of relevant public interest of the Union, as provided by a supplementary law and such nullity and voidness shall not create a right to indemnity or to sue the Union, except in what concerns improvements derived from occupation in good faith, in the manner prescribed by law.
>
> Paragraph 7. The provisions of article 174, paragraphs 3 and 4, shall not apply to Indian lands (Brazil 1988, official translation).

It is important to clarify that the specific case originates from a possessory conflict over an area occupied by indigenous peoples of the Xokleng ethnic group, which is part of the Reserva Biológica do Sassafrás, an integrated Conservation Unit managed by the Fundação de Amparo Tecnológico ao Meio Ambiente – FATMA (in nowadays named Instituto de Meio Ambiente de Santa Catarina). This foundation filed a repossession action against the Xokleng community, which was upheld in the first instance and confirmed in the second instance, essentially sustaining the understanding that there was no proof of the traditional nature of the occupation under the terms of art. 231 of the FC and that the lack of completion of the administrative demarcation process makes it impossible to recognize the traditional nature of indigenous occupation in a given area, which even intuitively seems quite unfair since the demarcation procedure is responsibility of the Union and should have been finalized 29 years ago, in accordance to the article 67 of the Temporary Constitutional Provisions Act (ADCT) (Brazil 1988).[1] In this sense, such judgments understood, in short, that what was happening was a disturbance of possession by the indigenous communities, considering that the Sassafras Biological Reserve was the one who had the legitimate occupation with the purpose of promoting environmental preservation (Brazil 2019) as if indigenous possession was not capable of promoting it.

Therefore, the Fundação Nacional do Índio (FUNAI) filed the Extraordinary Appeal against the confirmatory judgment issued by the Federal Regional Court of the 4th Region, pleading for its annulment or reform in order to enforce article 231 of the FC and accomplish the original right over traditionally occupied lands, as well as the principle of proportionality, given that the community occupies a relatively small portion of the territory.

1 Art. 67. The Union will complete the demarcation of indigenous lands within five years from the promulgation of the Constitution" (Brazil 1988).

2. The attempt through the "principles as guiding lights" of the "Philosophy of the Limit".

For the resolution of this case, I thought it would be possible to find solutions based on Drucilla Cornell's "Philosophy of the Limit" (1992), which, in its diachronic reading of justice, inspired by the deconstruction of Jacques Derrida, assumes the emancipatory commitment of groups marginalized by exposing the limits of the legal system, although still through the law, which summons its quasi-transcendence around a justice-to-come. Such a commitment requires, in practice, that the judge carry out a genealogical analysis of the relations of injustice present in the problem in question in order to deconstruct them. Such deconstruction implies a memory of the future-perhaps inclined towards the transformation of injustice relations.

The case under analysis takes us back to the Brazilian colonial past, established by the invasion of European peoples, slavery, exploitation, if not the decimation of native peoples, wars and the various deaths from diseases brought from the other continent. There is also the recent past of the military dictatorship, considering that the traditional indigenous way of life presented direct obstacles to the predatory developmental project. The "Figueiredo Report" (1967), considered the most important document denouncing such crimes, was found intact in 2013 after rumors that it had been set on fire. The document contains appalling reports of killings of entire tribes, torture, forced prostitution of Indian women, slave labor, human hunts, deliberate spread of disease, and donations of sugar laced with strychnine (Starling 2022). Not to mention the recent complaints about the increase in murders, invasions and rights violations during the pandemic period. The Conselho Indigenista Missionário – CIMI prepared a report called "Violence Against Indigenous Peoples" with data from 2020, the pandemic period, denouncing the increase in violent invasions by prospectors, land grabbers and loggers on indigenous lands and the duplication of territorial conflicts in this period (Conselho Indigenista Missionário 2020).

For these reasons, the justice implied in decision-making responsibility, for Cornell (1992, 111), relies on the process of discovering, in the past, the demanding appeals for transformation and emancipation, which involves a transforming invention that starts from the system and simultaneously breaks through it. It is, therefore, about embracing the aporias, impossibilities, the free and responsible search for justice to come for incomparable singularities, even within the limits of the thematizations offered in a legal system that

survives on comparisons; of deciding even in the face of undecidability; and the interruption of the search for justice because of the needs of the present (Derrida 1992, 22-28). But how to do all this exactly? Well, principles[2] play a very important role in this journey, considering that they are understood as contextual universal appeals that intend to synchronize the different conceptions of good present in society, acting as "the lights of a lighthouse" in the decision-making moment, since they are capable of initially preventing us from reaching completely wrong paths (Cornell 1992, 105-115).

In the present case, we cannot deny the lights of the suprapositive principle of self-determination of indigenous peoples, the principle of maximum effectiveness of constitutional norms, the principle of sustainability and its social dimension, the principle of preventing social retrocession, the principle of proportionality, the right to development and all fundamental rights, including the principle of human dignity, which implies for native peoples the right to their customs, languages and traditions, as well as the right to land based on the condition of original people and the traditional occupation, in the terms of art. 231 of the Federal Constitution, which consequently depends on the fundamental right to land demarcation.

The idea that such principles are universal appeals modulated in specific contexts, especially those arising from the injustices of colonization that have affected today's so-called 'developing countries', and that have resulted in similar appeals in their own constitutions, provides clues for the real construction of a transconstitutionalism, where different states can submit themselves to the same global normative order, contributing to the construction of an international community. This includes developed countries, despite not having experienced the wounds of colonization in their own territories, because it is reasonable for every person, every state, especially in light of the principle of solidarity, to recognize the common responsibility for the injustices arising from colonialism and the legitimacy of the universal appeals of indigenous peoples throughout the developing world. Such cohesion of appeals is what would underpin such transconstitutionalism,

[2] "A principle as I use here is not a rule, a least not as a force that literally pull us down the tracks and fully determine the act of interpretation. A principle is instead only a guiding light. It involves the appeal to enrichment of the "universal" within a particular nomos. We can think of a principle as the light that comes from the lighthouse, a light that guide us and prevent us from going in the wrong direction" (Cornell 1992, 105-106).

which should never stem from external imposition, but from endogenous and spontaneous initiatives that break their own boundaries and meet on equal footing and value, starting from a dynamic of recognition of identities and alterities among normative demands, which is only possible through dialogue (Neves 2017, 290-296).

However, on the side of rural landowners in disputed territories, there are also calls for principles, such as the principle of legal certainty, since their titles can be nullified, as well as for the right to private property. However, agribusiness representatives still call for "external complexities"[3], alleging possible catastrophic consequences for the country's economy if the "indigenous-born thesis" where accepted. According to the Instituto Mato-Grossense de Economia Agropecuária – (IMEA), a decision favorable to the thesis of the "originary right" would contribute to the loss of nine thousand jobs and almost two billion reais in annual revenue for the State, considering that indigenous ownership could expand unlimitedly (Agrosaber 2021). However, things aren't exactly like that due to the need to carry out an anthropological report to prove the relationship of the traditional occupation of the community under the terms of the 2º article of the Decree nº 1.775/1996[4] (which regulates the administrative procedure of demarcation of indigenous lands and other measures), as Judge Edson Fachin also points out in his vote (Brazil 2021, 109). However, even the reliability of the anthropological report is contested as a technical and scientific assessment capable of attesting the traditionality, given that the methods employed would allegedly tend to favor indigenous communities.

After these considerations, I concluded that my search for guiding principles would be able to prevent the taking of some very wrong paths, such as ignorance of original rights and essential conditions for indigenous fulfillment in our country, but which is still confronted with the right to property of the third and fourth generations of landowners, who may not have directly contributed to the history of violence against indigenous peoples in Brazil, which still leaves some issues.

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[3] In the sense used by Richard Posner, which concerns complex interactive systems from other areas of knowledge, present in concrete cases and which confront judges at the time of decision-making (Posner 2013, 1-9).

[4] Art. 2nd. "The demarcation of lands traditionally occupied by the indigenous people will be based on work carried out by an anthropologist with recognized qualifications, who will prepare, within a period established in the appointment ordinance issued by the head of the federal agency for assistance to the Indians, an anthropological identification study" (Brazil 1996, free translation).

3. The "Performance Moments"

To filter our possibilities, considering the various relevant social interests and the complexities that this problem calls for, which is confirmed by the entry of more than forty *amici curiae* who wish to contribute with information and opinions. It is important to pay attention to the "performance moments" of this judgment, in the sense of the metaphor elaborated by Sanford Levinson and Jack Balkin called "Law as Performance" (1998), in which Law is compared to an artistic and musical performance, instead of literature, because the interpretive activity assumes a triangular dynamic between the interpreter himself, the audience and the legal materials, in a chain of emission-reception of impressions that mutually influence and condition each other. It is about privileging the "law on action" to the detriment of the "law on books", considering that the responsibility of the interpreters-performers (judges, but also the representatives of the parties) is especially highlighted before the audience, which is who really tailors the performance, making it authentic and alive[5] (Balkin; Levinson 1999, 6-7). First of all, it's important to note that Sanford Levinson and Jack Balkin play a crucial role in developing normative and critical perspectives on the decisions of the US Supreme Court and the US Constitution. Additionally, we can't forget to mention the deconstructive element in Balkin's thought, which is commonly associated with the second generation of critical legal scholars. Balkin takes a microscopic approach to the interpretation of legal texts, seeking to promote a transcendent concept of justice. This is achieved through a transcendental deconstruction that is not unlimited in scope, but rather indefinite (Gaudêncio 2013, 34-35)[6]. It is,

[5] "The efficacy of their work often depends on acceptance by others: not only by other government officials, but by the people as a whole. The wise judge, like the wise director, understands the limitations and the interests of her co-performers and her audience and tailors her interpretations accordingly. Characterizing law as a performing art emphasizes something that tends to be neglected in comparisons between law and literature—the "audience" for legal performance. Like other performing arts, legal performance is more than the interpretation of a text by a performer: it involves a triangle of reciprocal influences between the creators of texts, the performers of texts, and the audiences affected by those performances." (Balkin; Levinson 1999, 6-7).

[6] "Nevertheless, our idea of justice is not infinite; it does not lack boundaries, even if these are not fully determined. For example, the value of justice is not the same thing as the value of beauty. If general normative concepts really had no limits, they would all be identical because there would be no way to distinguish them from each other. So, although our transcendent notion of justice is not specific enough to match any determinate example of justice or any determinate formula of justice, it is specific enough to be distinguished from other normative concepts. That is why it is indefinite but not infinite." (Balkin 1994, 30).

therefore, necessary to define the responsibilities of each one in the present case within limits textually and casuistically available. Therefore, it is about observing the impetus for the transformation of a situation of injustice through the reversibility of hierarchies, but not at any cost, since it is necessary to explore the textual limits, even if it implies mitigating the effects of an "offensive legal text" through performance strategies (Balkin; Levinson 1999, 35-46). However, what makes a performance authentic and alive? The one that corresponds to its own time, that makes sense for the historically situated community in its contemporaneity, including legal experts and lay people, both equally essential to model the performance according to its traditions, which is different from seeking the will of an author that manifested itself in a remote past. However, one cannot forget that in contemporary society there are severe clashes between the different notions of the good life, considering the plurality of groups that coexist discordantly. The case addressed in this essay manifests precisely one of these conflicts, considering the different *topoi*[7] that are in conflict. For this reason, performance always involves a dialogic negotiation between legal elites, popular performers, and the wider audience[8].

However, Balkin and Levinson, when developing their metaphor, focus too much on the figure of the interpreter-judge and forget the strategic role

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[7] The term "topoi" is used here in the sense given by Boaventura de Sousa Santos (1997, 23): "Topoi are the most comprehensive rhetorical commonplaces of a given culture. They function as argumentation premises that, because they are not discussed, given their evidence, make possible the production and exchange of arguments. Strong topoi become highly vulnerable and problematic when "used" in a different culture. The best that can happen to them is to be demoted from premises of argumentation to mere arguments. Understanding a given culture from the topoi of another culture can prove to be very difficult, if not impossible".

[8] "We believe that there are important lessons here for legal performance, and in particular legal performance of the Constitution. Constitutional interpretation—or what is the same thing, constitutional performance— takes place against both professional and popular understandings of the Constitution. Constitutional performance takes place within a tradition of constitutional interpretations. That tradition involves and requires both constitutional performers and constitutional audiences. Finally, the tradition changes over time, even though it may appear to its participants as a continuous whole. Just as each generation sees different things in canonical works of art, and performs them differently in accordance with that vision, so too each generation has its own Constitution and its own standards of constitutional performance. The performers and the audience for constitutional interpretation include both professionals and laypersons. The meaning of the Constitution is strongly shaped by the professional culture of legal performance: the attitudes of lawyers, judges, as well as the academic culture that trains them. However, the "authentic" meaning of the Constitution as an ongoing tradition—the sense of what it means to be faithful to the Constitution—is also deeply shaped by the understandings of the people who live under it. The meaning of the Constitution demands political acceptance by the people in each generation. That is why social movements shape the meaning of the Constitution even without official amendment: the performance of the Constitution is always a negotiation between legal elites, popular interpretaters, and the great audience of the American people." (Balkin; Levinson 1999, 34).

of other interpreters, lawyers and *amici curiae,* who have responsibilities directed towards their specific audience and who have direct interest in their own victory. However, this pragmatic and strategic aspect of performance cannot nullify the responsibilities before the Law itself in the mediation of human coexistence, which relies on the need to compare and synchronize the different demands, which puts in evidence another type of responsibility, the responsibility for personal relations in the Rule of Law itself. In this judgment, it is possible to identify many interpreters-performers, including the representatives of the parties, the amici curiae, the members of the Public Prosecutor's Office as inspectors of the Law, and the Judges who have voted so far: the Rapporteur Edson Fachin and the Judge Kássio Nunes Marques. Thus, the FUNAI attorney, the *amici curiae* representatives of the indigenous communities, and the Public Ministry assume direct responsibilities with the native peoples of Brazil, belonging to more than 300 different communities, possessing 274 languages. However, only 57% of these people live on officially recognized indigenous lands (Brazil 2010). For this reason, naturally, they defend the "indigenous-born thesis" or the "original right thesis", using the common justification that article 231, first paragraph, already unequivocally establishes the conditions for the right to land, with no established timeframe limit.

It is crucial to start with the analysis of the argument of the lawyer Bruna Maria Palhano Medeiros, representative of FUNAI, that in her oral argumentation clarified the duty of the autarchy to promote public policies and guarantee social, economic and cultural rights for the indigenous communities, regardless of the existence or not of demarcation procedure, considering that it is a public administration institution for the promotion of public policies. The autarchy is responsible for the degree of vulnerability of the community, which tends to be inversely proportional to the degree of regularization of the occupied land (Brazil 2021).

Continuing the discussion, Bruno Vinicius Batista Arruda, who represents the Federal Public Defender's Office, argues that the temporal framework thesis is not suitable for Brazil. This is because it approaches indigenous rights from a traditional private law perspective, which is not appropriate given that indigenous communities have a communal, rather than individual, relationship with the land. The right to indigeneity is an inherent and legitimate right in itself, which differs from a property right that has specific conditions that must be met. Such difference, according to him, is well marked in the

precedent of the "Raposa Serra do Sol" case (Petition 3388). Furthermore, it considers that the "indigenous-born thesis" is a natural right, pre-existing to the constitution itself, inherent to the community experience. The role of the constitution is only to give a status of fundamental right, appearing since the Federal Constitution of 1934 and which is still aggregated in the current constitution. The "temporal framework thesis", therefore, would be a denial of the constitutional normativity of all previous constitutions that approved such a right. Furthermore, it is argued that the temporal framework thesis overlooks the history of indigenous peoples, which has been marked by human rights violations, including those committed by the State. This perspective goes against international human rights standards, including those set by the Inter-American Court of Human Rights. The court has previously recognized communal property rights that encompass both material and spiritual elements, which must be fully enjoyed by the community and passed down to future generations. These rights are not subject to time limits (Brazil 2021).

Also, lawyer Rafael Modesto dos Santos, representative of the Xokleng community in Santa Catarina, points out that the community has already been the target of numerous violence and invasions[9], mentioning the assigned indigenous occupation land titles, which shall be considered null based on the 1988 Constitution, according to article 231, sixth paragraph, and in line with STF precedents, without margin to any restrictive interpretation. The lawyer also mentions that the Union is in debt due to the absence of land demarcation, which contributes to the scenario of instability and legal uncertainty regarding the rights of indigenous peoples. In addition, he declares that the thesis of the temporal framework would legalize all illicit acts committed until 1988 and clarifies that the claimed lands amount to only around 0.3% or even 1% of the States where the indigenous people are most populous, which in his words, it is insignificant. This directly contrasts with the argument that indigenous territories would expand without limits, thus violating the principle of proportionality. In continuity, the other representative of the

[9] The Xokleng people were hunted by "bugreiros". The hunters of indigenous people took their pairs of ears to the Santa Catarina Government, which paid for it. Then, there was the division of land. According to a "bugreiro" interviewed by the late Professor Silvio dos Santos, he said that cutting an indigenous person with a machete was like cutting a banana tree. According to the well-known "Figueredo Report" (1967), the same indigenous people were hunted, tied upside down and cut with a machete while still alive. From pubis to head. Also, dynamites were thrown at the villages, and the sugar was mixed with strychnine. That was the modus operandi, Your Excellency, to expel indigenous peoples from their lands [...]" (Brazil 2021).

Xokleng people, Professor Carlos Marés, says that the conflict between the "timeframe thesis" and the "original right thesis" has existed for a long time. The first represents an integrationist proposal to erase the indigenous culture and the second represents the recognition of their traditional way of life, which was truly embraced by the Constitution (Brazil 2021).

Moving on to the *amicus curiae*, starting with the indigenous lawyer Luiz Henrique Eloy Amado, representative of the Articulação dos Povos Indígenas do Brasil – APIB, who declared that the Brazilian Constitution is categorical in bringing the original right to traditionally occupied lands, with no temporal requirement for its categorization, but only of traditionality, considering how each people relates to its territory. The lawyer warns that over eight hundred demarcation procedures are pending completion and thousands of lawsuits questioning the demarcation of lands that have already been demarcated and ratified, with hundreds of indigenous communities camped in settlements. Amado also highlights that many indigenous communities were not occupying their lands on October 5, 1988 due to being expelled during the dictatorship with the approval of the State and its agents. Therefore, adopting the temporal framework disregards all the violations that indigenous peoples have faced. The demarcation of indigenous lands is a constitutional obligation of the state and not a matter of political discretion. Amado warns that until a decision is made, many indigenous communities are forced to live on the side of roads and on the edges of farms, waiting for a decision that will impact their right to life and self-determination. For these reasons, the temporal framework thesis is considered unconstitutional, and Amado argues for the adoption of the "indigenous-born thesis" instead. (Brazil 2021).

However, the lawyer Lethicia Guimarães, representative of the Xakribá people of Northern Minas Gerais, in addition to defending the "original right", she defends that indigenous communities cannot suffer the negative consequences of State failure to demarcate their land within the five-year period provided constitutionally (art. 67 of the ADCT). If the "timeframe" were the thesis adopted, more than a thousand people will be removed from their homes. The lawyer also draws attention to the history of the Xakriabá people, who in 1987 had their main leaders murdered in a massacre, including chief Rosalino Gomes and two other leaders, given that they claimed the entire territory of traditional occupation. However, the lawyer also denounces an indigenous school and a traditional medicine house that were set on fire in 2021 (Brazil 2021).

On the other hand, in defense of the thesis of the "temporal framework", one can clearly see a responsibility directed to the productive sector and private property in the country through a tautological defense of legal certainty. State's General Attorney, Alisson de Bom de Souza, begins his argument by reporting that in January 2009, there was an «invasion» of approximately one hundred indigenous people in an area owned by the Instituto de Meio Ambiente de Santa Catarina. The Attorney emphasizes that although the 1988 Constitution surpasses the integration guideline and is building the interaction paradigm, it cannot violate other equally relevant fundamental rights of Brazilian society that arise from the Constitution. In this sense, the relationship between the indigenous people and the land would depend on the traditional occupation, which is related to a timeframe, that is, the possession since October 5, 1988, or at least under physical or judicial dispute, according to precedents of the STF itself (the judgment of RE 219983 and the Appeal of the writ of mandamus 29542/DF), which expressly rejects the "indigenous theory", carrying out a so-called "systematic" interpretation of article 231 of the Federal Constitution and with "minimum retroactivity". However, the attorney still points out some requirements of the mentioned device for the recognition of the traditional indigenous possessory right, which would include: i) the temporal factor; ii) the economic factor; iii) the ecological factor; iv) the cultural or demographic factor, reinforcing collective responsibility for environmental preservation, including indigenous responsibility with environmental norms. Still, the representative emphasizes the need for the Union to demarcate the territory, and FUNAI is not responsible for carrying out such a procedure because its role is as an interested party (Brazil 2021).

Next, Izabel Vinchon Nogueira de Andrade, the General-Secretary for Litigation at the Federal Attorney General's Office (AGU), understands that the judgment of Petition 3388, the "Raposa Serra do Sol" case, is an important precedent about the indigenous possessory rights over their lands, although recognizing that it has no binding effect. She understands that its constraints (nineteen in all) are illuminating as legitimizing assumptions of the administrative procedure for the demarcation of indigenous lands, which was in the Opinion nº 01/2017 of the AGU, which was suspended by a preliminary decision of the Judge Rapporteur Edson Fachin. Therefore, in order to ensure legal certainty, the AGU understands the need to consider such conditions for the demarcation process, including the time frame along with traditionality, although it does not consider an "immemorial possession",

except for cases of recalcitrant dispossession by non-indigenous people. It is, therefore, a position that intends to balance the right to permanent indigenous possession of the lands they traditionally occupy with the right to private property. The reversal of the constitutional safeguards of the "Raposa da Serra do Sol" case, in this sense, would have the potential to cause legal uncertainty and even more instability for the demarcation processes. For this reason, such constitutional safeguards should be reaffirmed, in favor of social pacification. Furthermore, the representative points out that only with the conclusion of the demarcation procedure will the acts related to the recognition of non-indigenous occupations and the analysis and judgment of good faith in the construction of improvements will be initiated. It is only with the administrative homologation decision recognizing the demarcation that the original right will be perfected, according to the argument of the representative of the AGU (Brazil 2021).

It is also important to comment on the contributions of the Sociedade Rural Brasileira, participating as *amicus curiae*, in its very concern with the legal security of activities related to agribusiness, considering that the judgment of the case "Raposa Serra do Sol" brought the nineteen conditions that are being observed within the scope of these legal relations, therefore, a possible "jurisprudential turnout", that is, the change in jurisprudential understanding, would cause great instability in the most important brazilian productive sector (Brazil 2021).

In his vote, he discussed the history of policies aimed at exterminating indigenous peoples, which the State deemed necessary at different historical periods, including the Xokleng people. When discussing policies for protecting indigenous peoples, the judge referred to the influence of Auguste Comte and his social evolutionism during the early 20th century. Comte believed that indigenous communities were a "civilization in development" and should be protected from oppression so they could progress spontaneously to the industrial age. In response to this view, the "indigenous-born thesis" was developed, but it has created practical and legal challenges since private property is a fundamental element of capitalist societies. Any theory that questions this principle may lead to a reduction in investments and various conflicts. For this reason, the "timeframe thesis" in the judgment of Pet. 3388 (the "Raposa Serra do Sol" case) came to bring legal certainty and peace to the various conflicting interests. Still, in an extremely grammatical interpretation, the Judge points out that in article 231 of the brazilian Constitution the verb

"to occupy" is in the present tense of the indicative form, therefore, it was in the interest of the legislator to guarantee indigenous traditional possession only for that historical moment and not to a logical model for a future interpreter to adapt to the reality of each moment. It translates, therefore, into a responsibility for the original legislator, for the economic stability of the productive classes of the country and for the capitalist system in which we all live in, which perhaps is not exactly the role of a Judge (Brazil 2021).

However, ownership cannot be validated if based on a fundamental defect in its legal existence, as noted in the sixth paragraph of article 231, when determining the nullity and extinction of acts of occupation and/or exploitation of indigenous lands. The Judge Rapporteur of the case, Edson Fachin, in his vote, reinforces this understanding, excepting only the rights related to occupations in good faith, which include compensation for improvements. But it is important to start at the beginning, and the beginning of the argument of the rapporteur also rescues the history of the decimation of indigenous communities since colonial times, but also discusses the historical development of the recognition of the legitimacy of the indigenous occupation of their lands since 1660 with Álvaro Régio, passing through Land Laws nº 601/1850 and Decree 1318/1854 that already recognized the original right to indigenous possession. Furthermore, the rapporteur acknowledges the existence of the "original right" since the Brazilian Constitution of 1934. He highlights that the current Constitution of 1988 breaks away from the assimilationist paradigm and adopts a paradigm of recognition and encouragement of sociocultural pluralism and the right to exist as an indigenous person. That said, specifically on the consideration of the judgment of the "Raposa Serra do Sol" case and its nineteen conditions for the recognition of the right to possession, the judge speaks of the impossibility of generating binding effects, since the decision rendered in a class action is devoid of binding force in a technical sense, while sustaining moral and persuasive force. However, the Judge points out that even if there was binding force, there are sufficient reasons to overcome such an understanding, considering that the solution has lost its coherence and weakens the legal order, which authorizes reviewing the conditions of Petition 3388's judgment and the so-called "timeframe thesis". Specifically on the right to indigenous possession, Fachin recognizes that this is one of their fundamental rights, therefore, it is within the list of stony clauses, that prevents the reforming constituent power from promoting changes aimed at abolishing or hindering its exist-

ence, under the terms of art. 60, fourth paragraph, of the Brazilian Federal Constitution[10].

In addition, these communities are safeguarded by principles such as the prohibition of retrogression and insufficient protection, which are crucial for their survival. However, Fachin does not view the demarcation process as establishing the original right to indigenous possession. Instead, he regards it as a mere declaratory procedure that enables such a right, which is inherent, non-transferable, and inalienable under Article 231 of the Brazilian Constitution. He also notes that the nature of indigenous ownership is distinct from traditional civil ownership, as their connection to the land is fundamental to their physical and cultural existence and perpetuation. This perspective aligns with the principles of sustainability and environmental protection and does not depend on proof of dispossession or physical violence. Therefore, there is no need to speak of a "timeframe" for such recognition, as there is no way to extract it from the constitutional reading. However, it is necessary to carry out the anthropological report under the terms of Decree nº 1.776/1996, which is a fundamental element for demonstrating the traditional nature of the occupation, also considering that there may be a resizing of the land if there is non-compliance with the elements contained in article 231 of the Constitution of the Republic through the demarcation procedure. Finally, in a very forceful way, it determines that acts that have as their object the possession, domain or occupation of lands of traditional indigenous occupation are considered null, without the production of any legal effects, which is not a mystery considering the sixth paragraph of article 231, with the exception of improvements made in occupations in good faith, which authorize the right to compensation by the Union.

Final considerations

So who delivered the most authentic performance yet? Well, to achieve authenticity, interpretations of the law must be responsive to contemporary audiences, which involves negotiating different interests and promoting ma-

[10] Art. 60 § 4º The proposed amendment tending to abolish: I - the federative form of State; II - direct, secret, universal and periodic voting; III - the separation of Powers; IV - individual rights and guarantees (Brazil 1988).

terial justice while mitigating violent relationships. This task relies heavily on identifying legal principles that contextualize appeals for justice, and prioritizes fundamental rights for coexistence over a single group's political-economic agenda. In general, interpretations that prioritize the coexistence of people, and defend fundamental rights, are the most authentic, from the viewpoint of "Law as Performance". And what would those be? Now, the rights of indigenous peoples to their cultural and physical self-reproduction have long been present in the Brazilian legal system, despite their ineffectiveness through state policies.

However, the state options for violating human and fundamental rights do not invalidate the normativity of the original right for a land of traditional indigenous settlement.

The interpretative gymnastics of creating a "timeframe" for the restriction of such rights is something that does not have compatibility with Law, but only through with the finalists-economical attitude in favor of part of the productive sector of the country, considering that the conditions established in the precedent "Raposa Serra do Sol" were observing that specific case, not extending to all the others. Even if they were, it is not part of the legal justice to weaken the conditions for emancipation and dignity of persons, or even the direct violation of the principle of self-determination of indigenous peoples, in its fundamental aim of achieving essential equity.

In terms of the fundamental right to private property and legal certainty, it's not new in brazilian law that an invalid legal relationship doesn't become valid over time, as stated in article 169 of the Brazilian Civil Code. The principle of the imprescriptibility of indigenous possessory rights perfectly aligns with Article 231, which nullifies acts related to the occupation, domain, and possession of indigenous lands, as well as the exploitation of their natural resources. Although it may seem unfair to hold current landowners responsible for the actions of their ancestors, Brazilian law has a solution to address invalid legal relationships. The Union is held responsible and required to compensate bona fide non-indigenous landowners for any improvements made. Setting a "timeframe" for the establishment of the right to indigenous possession would ignore the history of past violence that has contributed to their rights. Instead, it's crucial to recognize that the demarcation procedure is declaratory and that the indigenous-born condition constitutes the right to indigenous possession. This right should not be confused with a civil possessory right and is fundamental to their human existence, belonging,

sustainability, and proportionality. Indigenous possessory rights are inalienable, imprescriptible, and irrevocable due to the principle of the prohibition of social retrogression, which safeguards fundamental rights.

These principles, as universal appeals modulated in specific contexts, particularly in countries that have suffered from the injustices of colonialism, demand solidarity from every state that adheres to the Rule of Law. They reinforce the possibility of building a transconstitutionalism based on endogenous, spontaneous, and dialogic initiatives among different states, starting from a dynamic of recognition of identities and alterities among normative appeals, which are rooted in different experiences of participation.

However, we cannot be naive to think that these principles will become effective magically just because they are fundamental rights described by the Brazilian Constitution. In reality, it is still up to the Union to decide whether or not to promote such public policies, as explicitly stated in the text of Article 231, Paragraph 6 of the Federal Constitution, which safeguards the relevant public interest of the Union for the use of the resources mentioned in the article. Consequently, the State's own responsibility was the most neglected. It treated the constitutional text as a mere symbolic device to appease the masses, but in the end, it weakened the Rule of Law, rendering the Constitution a project without a future.

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The Reconstitution Of Narratives By The Judge

Between Emotion And (Pratical) Reason

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ABSTRACT

The judiciary is not a charity house. But it can't be a lottery house either. When dealing with an applied social science (which is not – and cannot be - cartesian) the human factor will inevitably make a difference in the equation because people perceive the same situation differently, according to their own filters. The law, doctrine and jurisprudence could offer limits to this cognitive process, but end up being used (manipulated) later, just to justify what the subject-judge already wanted to do, simply deciding according to his own conscience. The ideal of justice is so discredited that the most modern courses revolve around persuasion (rhetoric) in court precisely because "in every head, a different sentence". That increase the adherents to the empire of the law. But as history has taught, extremes are dangerous. On the one hand, narcissistic judges, who simply do what they want, when they want. On the other hand, judges who do not print their identity in the decision, using only the law, the process in its rawness, forgetting the human factor. The judge can understand what cannot be written: emotions. But he is also a human being, so it is important that he perceives his own to remain in the place of external third party in the concrete realization of law. The intention, therefore, is to reverse the procedure so that it is heeded to legislative changes and contemporary jurisprudence, which should be followed by hierarchy, rather than anchoring itself in "diary-sentences" or "parchment-sentences".Therefore, practical rationality, by encouraging the judge to fit the law (previously studied) to the concrete case (analyzed later) inspires (self) control (emotionally) and allows adequate fundamentation. It is possible and urgent because people under jurisdiction deserves some legal certainty.

KEYWORDS

reconstitution of narratives; emotions; (practical) reason; storytelling; counterstorylelling.

1. Some people know how to communicate their ideas with a skill and confidence that increases their prestige, but this requires communication and oratory technique[1]. One of the most persuasive techniques results from the enormous power of narrative[2].

[1] GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. São Paulo: Saraiva. Tradução: Cristina Yamagami. P. 9 and 20.

[2] GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 10 and 59.

The word «persuade» is usually defined as «influencing someone to act, resorting to reason». Emotions are not included in the definition, but it is the emotional impact of stories that really influences because it is not possible to persuade only with logic[3]. At the point, Aristotle[4] classify the elements of persuasion into three categories: (i) *ethos (credibility* - achievements, titles, experiences, etc.), (ii) *logos* (evidence, logic, data and statistics) and (iii) *páthos* (emotional appeal).

Narratives, also called *storytelling*, are the best way to break the resistance to engage people inclined to disagree with their point of view (including judges, jurors, and other decision makers)[5]. To convince people to trust you, you should avoid anything too esoteric and disconnected from people's everyday lives[6]. Data, facts and analyses are important, but it also needs a narrative that leaves people connected to the point of being interested in what the speaker is defending[7].

Neuroscientists, psychologists and communication experts indicate that storytelling is a very effective way to connect emotionally because it can literally «synchronize» the speaker's mind with the minds of his listeners[8], making it possible to create much deeper connections than other modes of expression: «brain scans studies reveal that the stories stimulate and engage the human brain, helping the speaker connect with the audience and increasing the chances of her agreeing with the speaker's point of view»[9]. This is what Hasson[10] calls «brain-to-brain binding».

That is, the act of telling a story, can effectively planting ideas, thoughts and emotions in the brain of listeners[11] because the stories activate, in addition to the area of language, the sensory, visual and motor areas of the brain[12].

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3 GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 61; ANDERSON, Chris (2016). *TED Talks*: o guia oficial do TED para falar em público. Rio de Janeiro: Intrínseca, 1ª ed. Tradução: Donaldson Garschagen e Renata Guerra. P. 88 and 96.

4 *apud* GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 60-61.

5 GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 57.

6 GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 57.

7 GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 59.

8 GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 16.

9 GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 56.

10 *apud* GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 63.

11 *apud* GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 64.

12 GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 64.

Therefore, it is said that better communicators (or the most persuasive) are able to enter the listener's head and heart[13] – with logic and emotion.

Data and statistics are important to support the argument but need to be contextualized with emotional baggage[14] because an «emotionally charged event» (shock, surprise, fear, sadness, joy, admiration) is better processed, they persist longer in memory and are remembered more accurately than neutral memories, explains molecular scientist John Medina[15]. That is: «we are more likely to remember events that awaken our emotions than events that provoke a neutral response»[16]. Posner[17] differ "calm states" and "emotion states".

It is difficult finding a definition for the term "emotion". There isn´t a "widely accepted theory of emotion and many fundamental issues about the nature of emotion remain unresolved"[18]. Although, Bandes[19] infer one crucial point: "emotions have a cognitive aspect and its corollary that reasoning has an emotive aspect". In same way, Posner[20]: "emotions are usually stimulated by the world, either via the mediation of cognition or through a more primitive stimulus-response-like neurological mechanism"[21] that influence "what makes people perceive, feel, react, reason, and choose as they do"[22].

The core of this debate is the continual resistance (or neglect) in legal theory, "which generally subscribes to the formalistic belief that reason can be neatly separated from emotion"[23], raising "questions about the relationship between emotion and law"[24][25], but "emotions play an important role in many

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13 GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 18.

14 GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 179.

15 *apud* GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 164.

16 GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 165.

17 POSNER, Erik (2001). "Law and the Emotions" in *Georgetown Law Journal* 1977. Available at: «https://chicagounbound.uchicago.edu/journal_articles» (acedido em 20/04/2023). P. 1978.

18 POSNER, Erik (2001). "Law and the Emotions". P. 1979-1980.

19 BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements in *International Journal of Law in Context* in The University of Chicago Law Review: vol. 65, nº 2, pp. 361-412. Available at: «https://chicagounbound.uchicago.edu/uclrev/vol63/iss2/1/» (accessed on 20/04/2023). P. 366.

20 POSNER, Erik (2001). "Law and the Emotions". P. 1979-1980.

21 POSNER, Erik (2001). "Law and the Emotions". P. 1979-1980 and 1983.

22 BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 366-368.

23 POSNER, Erik (2001). "Law and the Emotions". P. 1977-1978.

24 MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective in *Emotional Review*, Vol. 6, No. 2, pp. 142-151. Available at: «https://doi.org/10.1177/1754073913491989» (accessed on 27/04/2023). P. 143.

25 POSNER, Erik (2001). "Law and the Emotions". P. 1977-1978.

areas of the law"[26] because in "some contexts the emotional coloring of a preference does have instrumental and normative consequences"[27].

Nussbaum[28] points out that reason has a dominant role in most philosophical studies on ethics, but one should give room for feelings and emotions, so the analysis of various motives, intentions and human dispositions would be part of the reflection, but which are usually underestimated: "these theorists want more recognition of 'non-rational' elements in our make-up, and they take emotions and desires to be such elements". As intend Posner[29], is important "clarifying the relationship between emotions and rational action by placing them in the rational choice framework".

In this sense, Nussbaum[30] suggests that (a) moral philosophy should be concerned as much with choice and action as with the agent; (b) that it should also be concerned with the motives, intentions and desires of this agent by establishing patterns of behavior that allow the perception of the subject by the motives and the habituality of the conduct and (c) therefore, glimpse patterns of conduct, emotions and the context of choice instead of neglecting them by attributing too much relevance to purely rational and isolated choices.

The goal is not to subdue reason, but to frame the passions (here understood as «emotions») in its critical work, which is not simple, given that the personality contains unconscious and ambivalent elements formed during childhood: «the adult experience of emotion involve foundations laid down much earlier in life (…). Early memories shadow later perceptions of objects; adult attachment-relations bear the trace of infantile love and hate»[31].

"Emotions shape the landscape of our mental and social lives"[32], they "shape our perceptions and reactions"[33] because "emotions are evaluative appraisals that ascribe high importance to things and people that lie outside

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[26] POSNER, Erik (2001). "Law and the Emotions". P. 1977.

[27] POSNER, Erik (2001). "Law and the Emotions". P. 1980-1981.

[28] NUSSBAUM, Martha (1999). "Virtue Ethics: A Misleading Category?", in *The Journal of Ethics*, vol. 3, n. 3, September, p. 163-201. P. 169.

[29] POSNER, Erik (2001). "Law and the Emotions". P. 1978-1979.

[30] NUSSBAUM, Martha (1999). "Virtue Ethics: A Misleading Category?". P. 169 and 174.

[31] NUSSBAUM, Martha (2004). "Review: Précis of "Upheavals of Thought"", in *Philosophy and Phenomenological Research*, Mar., 2004, Vol. 68, No. 2, pp. 443-449. Disponível em: «https://www.jstor.org/stable/40040691» (accessed on 27/04/2023). P. 444-445.

[32] NUSSBAUM, Martha (2004). Review: Précis of "Upheavals of Thought". P. 443.

[33] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 368.

the agent's own sphere of control"[34], that is "emotions involve focus on an object and beliefs about the object"[35]. It will not be given, in this work, to scrutinize the difference that Nussbaum makes about «emotions» and «feelings», «general» and «particular» emotions, and between «background» emotions and «situational» emotions[36] or even between "emotion" and "morality"[37][38].

(i) On the one hand, "these observations assume that people remain rational while under the influence of emotion"[39] what means "that people continue to act rationally while in an emotion state, even though they act differently from the way they do in the calm state"[40]: "during the emotion state people experience temporary variations in their preferences, abilities, and beliefs"[41]. This inconsistency makes emotional behavior seem irrational, "but it is important to see that a person in an emotion state does not act irrationally given his temporary preferences"[42], so it can´t be a simple excuse for a "emotional reaction"[43] because "is possible deliberate about the behavior and does not engage in reflexive action"[44].
(ii) In another view, "choices made under the influence of emotion reflect a person's well-being more accurately than choices made in the calm state"[45]: "in general, a person in an emotion state may be more, rather than less, perceptive about moral realities and physical threats"[46]. Then "emotions can enhance understanding"[47]. The problem "with this simple view is that many preferences are registered under the influence of the emotion or are inextricably tied up with an emotion state"[48] what can be an issue for institutional acts.

[34] NUSSBAUM, Martha (2004). Review: Précis of "Upheavals of Thought". P. 443.
[35] NUSSBAUM, Martha (2004). Review: Précis of "Upheavals of Thought". P. 443.
[36] NUSSBAUM, Martha (2004). Review: Précis of "Upheavals of Thought". P. 444.
[37] POSNER, Erik (2001). "Law and the Emotions". P. 1992.
[38] NUSSBAUM, Martha (2004). Review: Précis of "Upheavals of Thought". P. 447.
[39] POSNER, Erik (2001). "Law and the Emotions". P. 1981.
[40] POSNER, Erik (2001). "Law and the Emotions". P. 1981.
[41] POSNER, Erik (2001). "Law and the Emotions". P. 1981.
[42] POSNER, Erik (2001). "Law and the Emotions". P. 1981-1982.
[43] POSNER, Erik (2001). "Law and the Emotions". P. 1980.
[44] POSNER, Erik (2001). "Law and the Emotions". P. 1981.
[45] POSNER, Erik (2001). "Law and the Emotions". P. 2011 and 1984-1985.
[46] POSNER, Erik (2001). "Law and the Emotions". P. 2011-2012.
[47] MORAVCCSIK, J. M. E. (1982). Understanding and the Emotions. P. 224.
[48] POSNER, Erik (2001). "Law and the Emotions". P. 2010-2011.

As Bandes[49], the aim is demonstrated there are differences between reason and emotion so "the rule of law greatly overstates both the demarcation between the two and the possibility of keeping reasoning processes free of emotional variables" but "is not only impossible but also undesirable to factor emotion out of the reasoning process"[50]. So "emotion or passion do not always blind reason; on the contrary, they are at times indispensable aids to certain kinds of understanding (…)"[51].

(iii) The important point is that both "emotion-state preferences" and "calm-state preferences" cannot automatically be either ignored as defective because "emotional," or counted as "just preferences". "Both kinds of preferences must be evaluated"[52]. Despite classifying emotions as "objectual" and "non-objectual" in some cases reason guides the emotions, in other cases the conceptual dependency goes the other way. Seeing the complex interactions between reason and emotion[53] "in some cases emotions aid and supplement reason"[54] or, at least, should.

Accepting "that emotion cannot be factored out of the reasoning process"[55], we consider that law-emotional content is inevitable. Legal reasoning, although often portrayed as rational, in fact, "is driven by a different set of emotional variables, albeit an ancient set so ingrained in the law that its contingent nature has become invisible"[56]. Research has shown that emotion is necessary to practical reason[57]. So, the point for the judge is not eliminate of emotion[58] but be aware about the possibility (and necessity) of understand, accept and get better use of it.

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[49] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 368.

[50] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 368.

[51] MORAVCCSIK, J. M. E. (1982). Understanding and the Emotions. P. 218.

[52] POSNER, Erik (2001). "Law and the Emotions". P. 2012.

[53] MORAVCCSIK, J. M. E. (1982). Understanding and the Emotions, in *Dialectica*, 1982, Vol. 36, No. 2/3, pp. 207-224. Available at: «Understanding and the Emotions on JSTOR» (accessed on 27/04/2023). P. 208.

[54] MORAVCCSIK, J. M. E. (1982). Understanding and the Emotions. P. 207.

[55] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 369.

[56] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 369.

[57] MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 143-144.

[58] MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 144.

1.1 Since the brain was not made to process abstract concepts[59], with the technique of storytelling, the stories transform abstract concepts into concrete, exciting and tangible ideas[60]. The story presents information, explanations and, at the same time, build emotional connection. They illustrate, clarify and inspire[61]. Jonah Sachs[62] defines the stories as «a particular type of human communication designed to convince the audience of the storyteller's worldview».

Persuasion has even a deconstructive meaning, in order to convince the listener that their normal way of seeing the world is not at all correct, being better (re)build something else[63]. There is a powerful form of rational argumentation, known as «reduction to absurdity» or "reductio *ad absurdum*"[64] that deals «to take the opposite position to what you want to demonstrate and prove that it leads to a contradiction. If the opposite position is false, yours position is strengthened»[65].

The term «narratives» gained relevance in the procedural and probative contexts to the extent that the «stories» that are told in court are treated as «narratives»[66]. Hence why they can be associated with the so-called procedural storytelling[67]. In this sense, they strengthen the dialeticity of the process by the conflict between the hypothesis and the counterhypothesis (*idea fondamentale di contraddittorio)*[68].

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59 GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 168.

60 GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 72 and 82.

61 GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 90; ANDERSON, Chris (2016). *TED Talks*: o guia oficial do TED para falar em público. P. 75.

62 *apud* GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 79.

63 ANDERSON, Chris (2016). *TED Talks*: o guia oficial do TED para falar em público. P. 88.

64 NUSSBAUM, Martha C. (1995). "Poets as Judges: Judicial Rhetoric and the Literary Imagination", in *The University of Chicago Law Review*, Autumn, 1995, Vol. 62, No. 4, pp. 1477-1519. Available at: «https://www.jstor.org/stable/1600111?seq=1&cid=pdfreference#references_tab_contents» (accessed on 20/04/2023). P. 1485-1486.

65 ANDERSON, Chris (2016). *TED Talks*: o guia oficial do TED para falar em público. P. 92.

66 BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 382.

67 TARUFFO, Michele (2016). Uma simples verdade: o Juiz e a construção dos fatos. São Paulo: Marcial Pons. Tradução de: Vitor de Paula Ramos. P. 53; GALLO, Carmine (2018). *TED*: falar, convencer, emocionar. P. 57.

68 TARUFFO, Michele (1997). *Giudizio: processo, decisione*. Palermo: Convegno Internazionale sul tema «Il giudizio» organizzato dalla Facoltà di Lettere e Filosofia dell´Università di Palermo, pp. 793; LINHARES, José Manuel Aroso (2012). *Evidence (or Proof) as Law's Gaping Wound:* A Persistent False Aporia. Coimbra: Boletim da Faculdade de Direito da Universidade de Coimbra nº 88. P. 83; LINHARES, José Manuel Aroso (2001). *Entre a Reescrita Pós-moderna da Modernidade e o Tratamento Narrativo da Diferença ou a Prova como um Exercício de «Passagem» nos Limites da Juridicidade*: imagens e reflexos pré-metodológicos deste percurso). Coimbra: Coimbra Editora – Stvdia Ivridica 59. Diss. de

At the point, for Aristotle[69], the real is one, being contradictory the language, as a substitute for things. The direct and objective form is replaced by the «mediation of meaning» because it is understood that access to objects always occurs from a point of view[70]. In this sense, dialectics, as an art of contradictions, are useful in the exercise of the word, offering an efficient method of argumentation, confrontation of premises and opinions teaching us to discuss and dialogue, as a practice that integrates the set of relationships that men establish with each other[71].

Some understand that its intends more «persuasion» (hastily instilled adhering) than «convincing» (agreement reflectedly obtained)[72]. Therefore, although aware of the criticisms of modern epistemology (*l'épistémologie moderne*) on the conception of the process as a narrative game (*gioco di narrazioni*) in which narratives would be used only as instruments of informative distortion, intended to provoke a favorable decision, serving only to convince the judge - modern concept of proof (*concezione moderna della prova*)[73], the technique of storytelling is defended here - *technique du récit* (*ars inventa disponendi*)[74] - as an authentic evidential element of an argumentatively structured rhetorical-prudential rationality[75].

Revisiting the confrontation of two traditions ("proof-argument [classical concept] / proof-procedure theoretic [modern concept]")[76], to the extent

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Pós-graduação [Doutorado] em Ciências Jurídico-Filosóficas. P. 595-596).

69 *apud* FERRAZ JUNIOR, Tercio Sampaio (2009). *Estudos de Filosofia do Direito*: reflexões sobre o Poder, a Liberdade, a Justiça e o Direito. São Paulo: Atlas, 3ª ed. P. 177.

70 STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? Porto Alegre: Livraria do Advogado, 6ª ed. P. 18; FERRAZ JUNIOR, Tercio Sampaio (2009). *Estudos de Filosofia do Direito*: reflexões sobre o Poder, a Liberdade, a Justiça e o Direito. P. 284; LINHARES, José Manuel Aroso (2001). *Entre a Reescrita Pós-moderna da Modernidade e o Tratamento Narrativo da Diferença ou a Prova como um Exercício de «Passagem» nos Limites da Juridicidade*: imagens e reflexos pré-metodológicos deste percurso. P. 321-322.

71 FERRAZ JUNIOR, Tercio Sampaio (2009). *Estudos de Filosofia do Direito*: reflexões sobre o Poder, a Liberdade, a Justiça e o Direito. P. 177; BRONZE, Fernando José (2012). *Analogias*. P. 17.

72 BRONZE, Fernando José (2012). *Analogias*. Coimbra: Coimbra Editora, 1ª ed. P. 84 e 93; TARUFFO, Michele (1997). *Giudizio: processo, decisione*. P. 796.

73 TARUFFO, Michele (2010). *Il Fatto e L´Interpretazione*. Pouso Alegre: Revista da Faculdade de Direito Sul de Minas, n. 26. P. 203; GIULIANI, Alessandro (1995). Le role du «fait» dans la controverse *In Archives de Philosophie du Droit*. Paris: Editions Dalloz, tome 39. P. 230; GIULIANI, Alessandro (19-??). *Il Declino Del Concetto «Classico» di* Prova. P. 235; LINHARES, José Manuel Aroso (2012). *Evidence (or Proof) as Law's Gaping Wound:* A Persistent False Aporia. P. 72.

74 GIULIANI, Alessandro (1995). Le role du «fait» dans la controverse *In Archives de Philosophie du Droit*. P. 234.

75 BRONZE, Fernando José (2012). *Analogias*. P. 121.

76 LINHARES, José Manuel Aroso (1988). *Regras de Experiência e Liberdade Objectiva do Juízo de Prova*:

that it makes reasonable judgment possible with regard to the action of men and their disputes[77], the *concezione classica della prova come argumentum*, linked to the techniques of a dialectical reason, especially by the currents that conceived judicial activity as reconstructive historiography, interested in the *problem of conoscere attraverso testimonianze*[78] and dissatisfied with the configuration of judicial reasoning as a syllogism, highlights the similarities between the activity of the judge and that of the historian: «*un tale movimento è servito a chiarire che il giudice, al pari dello storico, ha di fronte a sè il fatto non come una realtà già esistente, ma come qualcosa da ricostruire*»[79].

However, the narratives (inevitably) end up being symbolic representations *(rappresentazioni simboliche*) that communicate sensory knowledge[80], different subjects tell the same story differently[81]. Then, the trial turns out to be the result of the interpretation, at the end, by the judge, of a set of reports constructed and proposed by different subjects in different positions of the procedural sequence (own parties, their lawyers, witnesses, technical consultants or other intervening procedural subjects) (*soggettivamente polycentric*). Ultimately, the judge's narrative may be different from both, since he is not required to choose one of the versions provided by the parties.

"Each individual is situated in her own experience. Moreover, in order to interpret and understand that experience, each individual must filter it through the lens of her own point of view. (…) Thus, both the stories we hear and the stories we tell are shaped by who we are"[82]: we make sense of the world by transforming our experiences into stories "with familiar structures and conventions-plot, beginning and end, major and minor characters, heroes and villains, motives, a moral"[83].

convenções e limites de um possível modelo teorético. Coimbra: Separata do vol. XXXI do Suplemento ao Boletim da Faculdade de Direito. Diss. de Pós-graduação [Mestrado] em Ciências Jurídico-Filosóficas. P. 16.

77 MEYER, Michel; CARRILHO, Manuel Maria; TIMMERMANS, Benoît (2002). *História da Retórica*. Paria: Librairie Générale Française, 1ª ed. Tradução de: Maria Manuel Berjano. P. 46

78 (GIULIANI, 19-??, p. 233; LINHARES, José Manuel Aroso (1988). *Regras de Experiência e Liberdade Objectiva do Juízo de Prova*: convenções e limites de um possível modelo teorético. P. 12.

79 GIULIANI, Alessandro (19-??). *Il Declino Del Concetto «Classico» di* Prova. P. 235.

80 GIULIANI, Alessandro (1995). Le role du «fait» dans la controverse *In Archives de Philosophie du Droit*. P. 236; TARUFFO, Michele (2016). Uma simples verdade: o Juiz e a construção dos fatos. P. 73.

81 TARUFFO, Michele (2016). Uma simples verdade: o Juiz e a construção dos fatos. P. 63 and 135; BRONZE, Fernando José (2012). *Analogias*. P. 22.

82 BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 384.

83 BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 383.

Therefore, the procedural storytelling shows that stories are both necessary and dangerous[8485]. (i) They are necessary because they are the main instrument through which fragments of event information can be combined into a complex endowed with meaning[86]. "They provide useful ways of thinking about how we order and understand our experience"[87]. "It gives new information that helps provide a particularized context for decision making (…)"[88]. However, (ii) they are dangerous because they are "monolithic, unambiguous entities"[89] in the field of emotion theory that open paths to inaccuracy, variability, as well as manipulation; varying according to the point of view and interests of the subjects who count them at a certain time and in a given context. Dangers of incompleteness and incorrect reconstructions can lead to substantial errors in the final decision of the controversy[90]. Even a narratively good story (which seems normal, familiar, credible and therefore persuasive) is not necessarily true[91].

Despite the distinct context, our point is same as Bandes[92]: "a broader examination of the uses of narrative and emotion in legal processes", aware of the dangers but acknowledging that narrative, like empathy, can be a tool[93] because "emotions (their relation to judgment, their evaluative dimensions, their childhood history) in this way raises a definite group of normative questions and problems, and also offers a set of resources for their solution"[94].

Understanding that the past is the object of imaginative representation, because of the unwavering self-referentiality of language, what is suggested, is that the judge takes into account several elements for decision making as a contextualized evidential set (*filtrage du matériel probatoire*)[95], precisely to

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[84] TARUFFO, Michele (2016). Uma simples verdade: o Juiz e a construção dos fatos. P. 79 and 87; LINHARES, José Manuel Aroso (2001). *Entre a Reescrita Pós-moderna da Modernidade e o Tratamento Narrativo da Diferença ou a Prova como um Exercício de «Passagem» nos Limites da Juridicidade*: imagens e reflexos pré-metodológicos deste percurso. P. 316.

[85] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 410.

[86] TARUFFO, Michele (2016). Uma simples verdade: o Juiz e a construção dos fatos. P. 54.

[87] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 385.

[88] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 362.

[89] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 364.

[90] TARUFFO, Michele (2016). Uma simples verdade: o Juiz e a construção dos fatos. P. 55.

[91] TARUFFO, Michele (2016). Uma simples verdade: o Juiz e a construção dos fatos. P. 58 and 236.

[92] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 362-363.

[93] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 385 and 388.

[94] NUSSBAUM, Martha (2004). Review: Précis of "Upheavals of Thought". P. 448.

[95] GIULIANI, Alessandro (1995). Le role du «fait» dans la controverse *In Archives de Philosophie du Droit*. P. 236; LINHARES, José Manuel Aroso (2001). *Entre a Reescrita Pós-moderna da Modernidade e o Tratamento Narrativo da Diferença ou a Prova como um Exercício de «Passagem» nos Limites da*

not succumb into to extremes: to legislative objectivity (excessively technical and formalist) on the one hand, or to arbitrary and subjective freedom of evidential evaluation - «*la libertà di valutazione della prova da parte del giudice incominciò ad apparire proprio allora arbitraria e soggettiva*»[96], on the other.

In this sense, the judgment has at least two peculiarities: (a) complexity, both from the objective perspective (concatenations of events in time), and under the subjective prism (plurality of subjects in different legal situations)[97] - due to dialecticity, as demonstrated and (b) aspiration to rationality (*l'aspirae alla razionalità)*, as a reference to controllable criteria of logical and coherent application – «*decision making perché la formulazione di un giudizio di per sé implicail il ridavia a criteri visibili e controllabili*»[98], which is now analyzed.

2. The judge shall construct the last narrative (final decision or judgment) based on the evidence available, such as: a) the allegations made by the parties; (b) information from the process file, in particular witness statements, expert opinions, other documents[99]. This (re)construction (or reconstitution), as seen, should occur through the contextualized analysis of all the (available) elements mentioned above. Nevertheless, would the analysis of these proof (especially oral ones) be based on (c) the views provided by experience[100][101]? The judge must justify his decision, but it´s would be left to be discretionary? How and within what limits should the judge decision occur? It is therefore opportune to make some observations about the peculiarities of justification so that this activity can be defined as rational.

2.1 The positivism of modern epistemology aims to demonstrate a theoretic truth, based on criteria pre-written by the legislator[102]. For this solution, the legislator created, at first, the law and only then the judge applied it according to a pre-written method, ensuring the «scientific objectivity» and

Juridicidade: imagens e reflexos pré-metodológicos deste percurso. P. 37; LINHARES, José Manuel Aroso (2012). *Evidence (or Proof) as Law's Gaping Wound:* A Persistent False Aporia. P. 85.

96 GIULIANI, Alessandro (19-??). *Il Declino Del Concetto «Classico» di* Prova. P. 233-234.

97 TARUFFO, Michele (2016). Uma simples verdade: o Juiz e a construção dos fatos. P. 228.

98 TARUFFO, Michele (1997). *Giudizio: processo, decisione*. P. 800.

99 TARUFFO, Michele (2016). Uma simples verdade: o Juiz e a construção dos fatos. P. 234-237.

100 BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 134-135.

101 NUSSBAUM, Martha C. (1995). "Poets as Judges: Judicial Rhetoric and the Literary Imagination". P. 1506.

102 BRONZE, Fernando José (2012). *Analogias*. P. 98.

the «rationality» of the silogistic-subjunctive method is ensured[103]. It was thought that, in this way, the democratic principle, the principle of separation of powers and the (formal) rule of law would be protected.

However, although portion of the doctrine believes that law is a purely instrumental rationality, totalitarian regimes and atrocities committed under the pallium of law[104] have already taught that it should be more than technique or procedure[105]. Therefore, this pre-available system, insufficient, according to its various gaps, leads to the recognition of (intentional) limits and, thus, «the distance that between the abstraction and the generality of the criteria of concreteness and the singularity of the cases – confirmed the insodismable nature of the participation of the judge in the reconstitution of the current normativity»[106].

It is not possible, neglecting the concrete nature of the controversies, but the (necessary) mixture of objectivism and subjectivism[107] in the complex «act of judging» leans, at another extreme, to the conscience of the interpreter, as if the sentence stems from an «act of will» of the judge (judging according to his conscience or according to his personal understanding of the meaning of the law)[108], favoring, overmeasure, the use of psychological, political and ideological arguments in the interpretation (and application) of law[109].

Outdated either the phase in which the problem was defined in extremes the availability of the legislator (axiomatic-deductive) - "strict *logically formal operation*"[110] – sphere of pre-objective impositions, or, on the contrary, the one that refused any linkivity to these prescriptions (voluntaristic-intuitive) – "*finalistically determined choice" or "finalistic decision making*"[111] - replacing

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[103] BRONZE, Fernando José (2012). *Analogias*. P. 14.

[104] LINHARES, José Manuel Aroso (2001). *Entre a Reescrita Pós-moderna da Modernidade e o Tratamento Narrativo da Diferença ou a Prova como um Exercício de «Passagem» nos Limites da Juridicidade*: imagens e reflexos pré-metodológicos deste percurso. P. 60-63.

[105] STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 9.

[106] BRONZE, Fernando José (2012). *Analogias*. P. 15.

[107] STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 12.

[108] STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 18 and 20.

[109] STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 20 and 95; FERRAZ JUNIOR, Tercio Sampaio (2009*). Estudos de Filosofia do Direito*: reflexões sobre o Poder, a Liberdade, a Justiça e o Direito. P. 293.

[110] GAUDÊNCIO, Ana Margarida Simões (2019). "Jurisdictional Realization of Law" as Judicium: A Methodological Alternative, Beyond Deductive Application and Finalistic Decision *Int J Semiot Law* 33, 133–146. Available at: «https://doi.org/10.1007/s11196-019-09668-7» (accessed on 20/04/2023). P. 139.

[111] GAUDÊNCIO, Ana Margarida Simões (2019). "Jurisdictional Realization of Law" as Judicium: A Methodological Alternative, Beyond Deductive Application and Finalistic. P. 139.

one extreme by the other, it was affirmed that the best way would result from a «third way» between syllogistic determinism and irrational decisionism[112], "proposing a practical-normative comprehension of the *realization of law*"[113].

What guarantees non-arbitrariness? How to ensure controllability? "Is it possible to defend *deductivism* as the core claim of law's (and legal adjudication's) rational *identity* whilst simultaneously assuming the challenge of a genuinely practical argumentative thinking? (…)"[114]. The answer would be found in the understanding of legal thought as argumentative *topos*, according to the "*intersubjectively* significant"[115] subject/subject practical rationality[116][117].

At the point, to say that the argumentative-prudential line assumes the investigation-decision of proof/criteria means that the judgment does not need to be made according to predetermined rigid standards, it is possible to some malleability, reliving to the judge the important role of inserting the information received in the process, ensuring a simultaneously autonomous and integrated treatment of evidential materials[118].

This would be a «prudential consideration of concrete achievement, guided by an argumentatively convincing rationality» - (practice) rationality of reasoning[119] or "practical reasoning in law"[120] or "*concrete decision-making*

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[112] BRONZE, Fernando José (2012). *Analogias*. P. 12, 109 and 225; LINHARES, José Manuel Aroso (1988). *Regras de Experiência e Liberdade Objectiva do Juízo de Prova*: convenções e limites de um possível modelo teorético. P. 127-128.

[113] GAUDÊNCIO, Ana Margarida Simões (2019). "Jurisdictional Realization of Law" as Judicium: A Methodological Alternative, Beyond Deductive Application and Finalistic. P. 139.

[114] LINHARES, José Manuel Aroso (2019). The Rehabilitation of Practical Reasoning and the Persistence of Deductivism: An Impossible Challenge? *Int J Semiot Law* 33, 155–174 (2020). Available at: «https://doi.org/10.1007/s11196-019-09670-z» (accessed on 20/04/2023). P. 156.

[115] GAUDÊNCIO, Ana Margarida Simões (2019). "Jurisdictional Realization of Law" as Judicium: A Methodological Alternative, Beyond Deductive Application and Finalistic. P. 139-140.

[116] NEVES, António Castanheira (2013). "O direito como validade: a validade como categoria jurisprudencialista", in *Revista da Faculdade de Direito da Universidade Federal do Ceará*, jul/dez 2013, n.º 2, v. 34, p. 39-76 disponível em http://www.revistadireito.ufc.br/index.php/revdir/article/view/98 (acedido em 29/11/2019). P. 34-36 and 70-71.

[117] LINHARES, José Manuel Aroso (2019). The Rehabilitation of Practical Reasoning and the Persistence of Deductivism: An Impossible Challenge? P. 155.

[118] LINHARES, José Manuel Aroso (1988). *Regras de Experiência e Liberdade Objectiva do Juízo de Prova*: convenções e limites de um possível modelo teorético. P. 14.

[119] BRONZE, Fernando José (2012). *Analogias*. P. 16 and 161.

[120] LINHARES, José Manuel Aroso (2019). The Rehabilitation of Practical Reasoning and the Persistence of Deductivism: An Impossible Challenge? P. 155.

judgment (*juízo decisório*)"[121]: "the judgment to which this is alluded (…) intends authentically the dialectical-dialogically realized search, in a certain contextual framework and attentive to a certain concrete situation (…)"[122], developing a "concrete justification"[123] which is unavoidably corresponding uncertainties, if not indeterminations[124].

It would be assumed, that the «free motivated convincing» (also known as system of rational persuasion of proof) would be the best possible alternative as a «rationalized discretion»[125][126]. But often, it is only an alibi invoked for total discretion, which knows no limits or any element that binds its conviction *a priori*.

It is required to demonstrate the reasons behind the decision as the most appropriate interpretation of the right and the proofs by the pre-understood undertaking[127], but it is merely intuitive which boils down to the result of a «I want and command», translating mere choice of several choices stems from the author *voluntas*[128].

2.2 Streck[129] criticizes the mixing (or syncretism) of «irreconcilable and self-contradictory» paradigms, by which «free conviction» or «binding to the conscience of the judge» prevails with some caveat. In essence, prevail the (pessimistic) conclusion that the judge is not controllable and that, in fact, what they do is to shape their feelings and emotions about the case to the legal system, that is, «first he has the solution, then seeks the law to found it»[130].

The sentence is merely an «act of personal will» (of power)[131]. That is, the judge is obliged to motivate his decisions, but in fact, the motivation of

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[121] GAUDÊNCIO, Ana Margarida Simões (2019). "Jurisdictional Realization of Law" as Judicium: A Methodological Alternative, Beyond Deductive Application and Finalistic. P. 139-140.

[122] BRONZE, Fernando José (2012). *Analogias*. P. 16.

[123] LINHARES, José Manuel Aroso (2019). The Rehabilitation of Practical Reasoning and the Persistence of Deductivism: An Impossible Challenge? P. 156.

[124] LINHARES, José Manuel Aroso (2019). The Rehabilitation of Practical Reasoning and the Persistence of Deductivism: An Impossible Challenge? P. 156.

[125] STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 33; TARUFFO, Michele (2016). Uma simples verdade: o Juiz e a construção dos fatos. P. 251; LINHARES, José Manuel Aroso (1988). *Regras de Experiência e Liberdade Objectiva do Juízo de Prova*: convenções e limites de um possível modelo teorético. P. 272.

[126] TARUFFO, Michele (1997). *Giudizio: processo, decisione*. P. 797.

[127] STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 35 and pp. 116-118.

[128] BRONZE, Fernando José (2012). *Analogias*. P. 16 and 161.

[129] STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 40.

[130] STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 42.

[131] STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 43 and 46.

the sentence «is, as a rule, written at a time successive to the one in which the decision is formulated»[132]. It would be nothing more than a strategic discourse[133]: «the core of judgment hides conviction, convinced thinking, not method (motivation)»[134]. The possibility of meaning emerges from the dimension of significance not in a contemplative theoretical view, but instead in a shared world[135].

The meaning is anticipated and only then the (legal) methods of interpretation substantiate what (personally) he was already intended to do[136]: «we do not interpret to understand, we understand to interpret»[137]. Belittleling the democratic space built in the legality, doctrine and (updated) jurisprudence of the higher courts[138][139], «conscience, subjectivity, inquisitive system and discretionary power become variations of the same theme»[140], especially regarding to the so-called «judicature of the floor», object of this work.

The concept of democratic state of law rightly seeks to prevent public authorities from acting as they wish, but, with regard to judges, the intrinsic interpretative activity makes it difficult to define limits that avoid distorting the content of the law (or even the Constitution)[141] and assist in the analysis of (oral) evidence.

This definition is important because the interpretations they make, not ignoring the human condition of being-in-the-world, are given by their internal assumptions, with historical, political, social conditioning, etc.[142]. If there is no *a priori* element that link the judge's decision, the motivation becomes only an unnecessary formality, since he ends up choosing how he will decide. It is (the camouflaged turn of) unrestricted solipsism or subjectivism[143].

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132 TARUFFO, Michele (2016). Uma simples verdade: o Juiz e a construção dos fatos. P. 211.

133 LINHARES, José Manuel Aroso (2001). *Entre a Reescrita Pós-moderna da Modernidade e o Tratamento Narrativo da Diferença ou a Prova como um Exercício de «Passagem» nos Limites da Juridicidade*: imagens e reflexos pré-metodológicos deste percurso. P. 742.

134 FERRAZ JUNIOR, Tercio Sampaio (2009*). Estudos de Filosofia do Direito*: reflexões sobre o Poder, a Liberdade, a Justiça e o Direito. P. 293.

135 STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 111.

136 STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 84.

137 STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 99.

138 STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 21; BRONZE, Fernando José (2012). *Analogias*. P. 306.

139 NUSSBAUM, Martha C. (1995). "Poets as Judges: Judicial Rhetoric and the Literary Imagination". P. 1511.

140 STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 26.

141 STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 37.

142 STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 37.

143 STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 37 and 69.

This type of mixing, the result of the recognition that understanding the role of the judge is a complex subject[144], would thus be dependent on the role played by practical reason, derived from Aristotelian philosophy[145][146]. It is inevitable to accept that theoretical reason cannot be separated from the way we deal with the world (practical reason). Finally, there is no concept without practice[147], but Streck[148] says that it is of no use to replace theoretical reason with «practical reason» if, after all, it is not known what this means.

Hence, the question that remains is: each decision part (or establishes) a «zero degree of meaning»?[149] How to (re)reverse the order and first understand the (current) and (aprioristic) right-prescription ordering to culminate in the right-decision judicative (apotheortic) only then[150]? How we can control of the aforementioned intersubjectivity, that is, how to guarantee the specific practical rationality at issue here[151] since it is not possible to build «automative judges», immune to personality and the historicity[152], nor is it intended to block the process of humanization of man?[153][154]

Many surrenders: the interpretation of law is elongated from subjectivism stemming from a solipsistic practical reason and this «deviation» is impossible to be corrected[155]. So why do we continue to defend the argumentative-prudential line? Because, since the subject-object dimension can never replace

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144 STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 105.

145 STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 71.

146 NUSSBAUM, Martha C. (1995). "Poets as Judges: Judicial Rhetoric and the Literary Imagination". P. 1482.

147 STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 128.

148 STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 127.

149 STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 27.

150 BRONZE, Fernando José (2012). *Analogias*. P. 316.

151 BRONZE, Fernando José (2012). *Analogias*. P. 55; LINHARES, José Manuel Aroso (2001). *Entre a Reescrita Pós-moderna da Modernidade e o Tratamento Narrativo da Diferença ou a Prova como um Exercício de «Passagem» nos Limites da Juridicidade*: imagens e reflexos pré-metodológicos deste percurso. P. 202.

152 BRONZE, Fernando José (2012). *Analogias*. P. 36.

153 BRONZE, Fernando José (2012). *Analogias*. P. 32.

154 BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 371: But what does it mean to say that an attribute "interferes with judgment?" How is it possible to determine which are the fears, neuroses, prejudices, blind spots, and unsavory emotions that interfere with judgment, and which are the attributes and particular perspectives that make up each person's unique personality? How is it possible to determine which other perspectives should be taken into account, and how much weight to accord them? In Judith Resnik's words, "how can we tell the good bias from the bad?"' The enterprise founders without a normative principle to guide it.

155 STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 95.

communication in the subject-subject dimension[156], there is no other (legal) better solution. Those currently available, as already explained, imply a setback. How to decide (people's lives) is much more a responsibility than a power, what we do is illuminate a behavioral change of judges. But it is necessary to go beyond virtues[157], is important an authentic principle[158][159], according to the jurisprudentialist assumption[160] that rights result from principles, which in turn, are axiological commitments of a concrete society.

It happens that judge's actions are not isolated, but before the encounter with the other. The judge cannot depart from reality and isolate himself in a «parallel and fictitious world» to «judge well»[161]. Praxis is precisely the intersubjectivity that materially densifies the meeting of everyone in the world that we must share[162]. Life must be lived together. Bandes says that "personal experience, identification, compassion that flows for all sorts of reasons, articulated or unarticulated, will always influence decision-making"[163]. As

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156 LINHARES, José Manuel Aroso (1988). *Regras de Experiência e Liberdade Objectiva do Juízo de Prova*: convenções e limites de um possível modelo teorético. P. 297.

157 LINHARES, José Manuel Aroso (2001). *Entre a Reescrita Pós-moderna da Modernidade e o Tratamento Narrativo da Diferença ou a Prova como um Exercício de «Passagem» nos Limites da Juridicidade*: imagens e reflexos pré-metodológicos deste percurso. P. 203.

158 STRECK, Lenio Luiz (2017). O que é isto – decido conforme minha consciência? P. 116.

159 GAUDÊNCIO, Ana Margarida Simões (2019). "Jurisdictional Realization of Law" as Judicium: A Methodological Alternative, Beyond Deductive Application and Finalistic. P. 139: This *jurisprudentialist* option, axiologically-materially and practically-normatively outlined, is built from the *autonomous* reflection about practice that concerns law and the specifically legal content it mobilizes [37: 87–114, 106], with practical implications directly arising from the autonomization of *normative principles* and determining the understanding of the dialectical (re)construction of the *legal system* itself. This also means assuming directly the point of view of the *concrete judicative-deciding realization of the law* [30: 196–205], as a particular moment of reflection and articulation between *system* and *problem*, even between *problem*—the one stated in abstract in the foundations and criteria mobilized—and *problem* [30:155, 2: 139]1—the *concretum* that, spatio-temporally located, requires an answer from law—which will, in *space* and *time*, resist the *centrifugal* forces created, and *centripetally* connect the essential valuations that the law brings to the reality which challenges it [12: 91–103].

160 NEVES, António Castanheira (2012). *O 'jurisprudencialismo' – proposta de uma reconstituição crítica do sentido do direito*, in Nuno Manuel Morgadinho dos Santos Coelho/Antônio Sá da Silva (Org.), Teoria do Direito. Direito interrogado hoje – o Jurisprudencialismo: uma resposta possível? Estudos em homenagem ao Senhor Doutor António Castanheira Neves, Juspodivm/Faculdade Baiana de Direito, Salvador, p. 9-79.

161 TARUFFO, Michele (2016). Uma simples verdade: o Juiz e a construção dos fatos. P. 127.

162 BRONZE, Fernando José (2012). *Analogias*. P. 11; ARISTÓTELES (2018). *Ética a Nicómaco*. Lisboa: Quetzal Editores, 4º ed. reimpressa. Tradução, prefácio e notas de António de Castro Caeiro. P. 31; LINHARES, José Manuel Aroso (2001). *Entre a Reescrita Pós-moderna da Modernidade e o Tratamento Narrativo da Diferença ou a Prova como um Exercício de «Passagem» nos Limites da Juridicidade*: imagens e reflexos pré-metodológicos deste percurso. P. 293.

163 BANDES, Susan A. (2017). Compassion and the Rule of Law in *International Journal of Law in Context*. Available at: «https://www.researchgate.net/publication/311813929» (accessed on 20/04/2023). P. 23.

each one has their own story to tell[164], ′selective empathy′ is inevitable. More dangerous is lack of awareness of the limits of individual perspective (…)"[165].

Now, it is the judge who, intersubjectively conditioned, in a self-referential language[166], can think of the appropriation-assimilation of the other as an experience (constructive or deconstructive) of self-reformulation[167]. This means that he can take personal learning from people's stories[168]. He can get inspired, emotional and reflect so as not to go through the same situation. He can even understand the situation better. What he cannot is project in this third story his own frustrations, pains, traumas, or expectations as if deciding the fate of that story he was solving his own problems. Because this third story is his, but not about him. What he can't do is turn into part (or the lawyer of one of them) because he should still be third. He must be aware of his triggers or "stimulus"[169] or even "emotional disposition"[170].

There is no such thing as "emotionless baseline"[171]. No judge could be entirely dispassionate[172] but no judge wants to be seen as "soft", so they probably never gone to admit that were influenced by emotions. As we see, nothing can be done about that except that he admits for himself and try to deal with before sentence the case. The point, then, is to draw a certain limit in this complex of (institutionalized) relationships[173]. This limit is self-restraint[174][175]

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[164] NUSSBAUM, Martha C. (1995). "Poets as Judges: Judicial Rhetoric and the Literary Imagination". P. 1491-1493.

[165] BANDES, Susan A. (2009). Empathetic Judging and The Rule of Law in *Cardozo Law Review de Novo*, pp. 133-148. Available at: «http://cardozolawreview.com/index.php?option=com _content&view=article&id=111:bandes2009133&catid=19:empathyandjustice&Itemid=23» (accessed on 03/05/2023). P. 145.

[166] LINHARES, José Manuel Aroso (2001). *Entre a Reescrita Pós-moderna da Modernidade e o Tratamento Narrativo da Diferença ou a Prova como um Exercício de «Passagem» nos Limites da Juridicidade*: imagens e reflexos pré-metodológicos deste percurso. P. 76.

[167] LINHARES, José Manuel Aroso (2001). *Entre a Reescrita Pós-moderna da Modernidade e o Tratamento Narrativo da Diferença ou a Prova como um Exercício de «Passagem» nos Limites da Juridicidade*: imagens e reflexos pré-metodológicos deste percurso. P. 84.

[168] BANDES, Susan A. (2009). Empathetic Judging and The Rule of Law. P. 143.

[169] POSNER, Erik (2001). "Law and the Emotions". P. 1985.

[170] POSNER, Erik (2001). "Law and the Emotions". P. 1982.

[171] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 370.

[172] MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 144.

[173] ARISTÓTELES (2018). *Ética a Nicómaco*. P. 31.

[174] POSNER, Richard A. (2013). *Reflections on Judging*. England: Harvard University Press. P. 149.

[175] ARISTÓTELES (2018). *Ética a Nicómaco*. P. 167; LINHARES, José Manuel Aroso (2001). *Entre a Reescrita Pós-moderna da Modernidade e o Tratamento Narrativo da Diferença ou a Prova como um Exercício de «Passagem» nos Limites da Juridicidade*: imagens e reflexos pré-metodológicos deste percurso. P. 175-178.

or "self-awareness": "the ideal is not to shed all the attributes that encompass one's personality, but rather to become aware of and perhaps exercise some control over those that interfere with judgment"[176].

In resume, "judges have emotions. But what is crucial is what they do with these emotions"[177]. The point is "provides a useful framework for understanding how judges do, and should, manage the emotions they inevitably experience. To ask judges to be dispassionate is to ask them to engage in ′emotion regulation′ (…)"[178], not "emotion elimination"[179][180].

That means that "what judges can and should do is to learn to effectively manage - rather than eliminate - emotion", proposing "the emotionally well-regulated judge"[181] because (i) "judges are people, and people naturally feel emotions - particularly when exposed to emotionally vivid stimuli, as judges routinely are (…)"[182] and because (ii) "emotion regulation is particularly essential at work, where one is expected to feel and display emotion differently than in private life"[183].

Understood that "emotions are not merely instinctive and uncontrollable, but are also partially cognitive"[184][185][186], "the cognitive aspect allows emotions to evolve with exposure to new information and experiences" [187] being possible (i) to mitigate the limitations of one's own perspective and (ii) "consciously split off some of the factors-for example, blind spots, prejudices, and fears-

[176] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 371 and 146.
[177] MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 148.
[178] MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 143.
[179] MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 143.
[180] MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 147.
[181] MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 142.
[182] MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 142.
[183] MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 144-145.
[184] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 370-371.
[185] POSNER, Erik (2001). "Law and the Emotions". P. 1983.
[186] MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 148.
[187] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 370-371.

that inappropriately interfere with judgment"[188] or even (iii) take steps to modify emotional dispositions[189] [190] by avoiding conditions that activate them or through "behavior modification techniques"[191] or "emotion-regulation strategy" [192]. That means that people can cultivate their emotions[193]. That´s what Nussbaum[194] called "appropriately constrained emotion".

These are some examples of "regulation strategies"[195]: (a) Situation Selection - "judges may try to choose cases based on their predicted emotional impact"[196]; (b) Situation Modification – "whatever level of control a judge has over her docket, she may attempt to control how emotional situations unfold in her chambers and courtroom"[197], self-directed or shaping the emotions of others[198]; (c) Attentional Deployment – "if, as suggested earlier, many situations cannot be avoided or significantly modified, a judge might direct her attention only to those situational features that evoke a desired emotion"[199]; (d) Cognitive Change – "if the judge cannot avoid, alter, or ignore an emotionally salient situation, (…) one sort of cognitive-change strategy is to change one's appraisal of the stimulus"[200] - "adopting a professional attitude is a form of cognitive precommitment that can change how the mind processes stimuli (…)"[201]; (e) Response Modulation – "as the prior discussion suggests, not every emotional stimulus can be rethought. (…) While

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188 BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 370-371.

189 POSNER, Erik (2001). "Law and the Emotions". P. 1982.

190 POSNER, Erik (2001). "Law and the Emotions". P. 1978.

191 POSNER, Erik (2001). "Law and the Emotions". P. 1982.

192 MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 148.

193 POSNER, Erik (2001). "Law and the Emotions". P. 1985.

194 NUSSBAUM, Martha C. (1995). "Poets as Judges: Judicial Rhetoric and the Literary Imagination". P. 1480-1481.

195 MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 145.

196 MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 145.

197 MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 145.

198 MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 145-146.

199 MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 146.

200 MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 146.

201 MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 146.

it might be possible for the judge to recast that experience, its most likely interpretation (…)"[202]; (f) Emotional Disclosure – "describing an emotional episode to another person"[203] - "though thinking and talking about emotions does not generally lessen their intensity, it enhances self-knowledge (…)"[204].

Was discussed the relation between non-linguistic cognitions, social norms, and individual history establishing that emotions have a rich cognitive content at the expense of «blind forces that lack selectivity or intelligence"[205]. We assume "reason that is not self-sufficient and needs to be helped by emotion"[206]. "Perhaps if we had a complete theory of emotions, we might be able to single out ´emotional primitives´"[207].

From the assumption that (i) emotion is an inextricable part of legal discourse and that (ii) emotions are partially cognitive, and, therefore, educable is possible to ask if emotions are hierarchical and (in case of a positive answer) which or if emotions deserve the most weight in legal decision making. Which perspectives are the most desirable[208][209]?

2.3 At this point, we discussed "emotions" in general. Now, is important analyze some of them in particular. Exist such thing as "wrong emotions" or "less ´agreeable´ emotions"[210] or "simpler emotions", "not complex", "durable emotions", "higher emotions"[211]? "Is it possible to decide *which* emotions belong in the law"[212]? In the legal context certain emotions are appropriate[213]? It is understood that even «good emotions» should be analyzed with caution. To exemplify, let´s investigate these two emotions: "compassion"[214]

[202] MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 147.
[203] MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 147.
[204] MARONET, Terry A.; GROSS, James J. (2014). The Ideal of the Dispassionate Judge: An Emotion Regulation Perspective. P. 147-148.
[205] NUSSBAUM, Martha (2004). Review: Précis of "Upheavals of Thought". P. 445.
[206] MORAVCCSIK, J. M. E. (1982). Understanding and the Emotions. P. 220.
[207] MORAVCCSIK, J. M. E. (1982). Understanding and the Emotions. P. 217-218.
[208] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 370.
[209] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 393.
[210] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 371-372.
[211] POSNER, Erik (2001). "Law and the Emotions". P. 1991 and 1985-1986.
[212] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 371-372.
[213] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 389-390.
[214] NUSSBAUM, Martha (2004). Review: Précis of "Upheavals of Thought". P. 447.

and "empathy" in the role of storytelling in the legal process[215], focusing on legal questions[216].

The law can present itself as authoritative, emotionless, and inevitable, transcending passion, avoiding the stigma of "emotionalism". "Compassion, empathy, and mercy are marginalized as ′emotional′ and therefore inappropriate,' (…)"[217]. "Yet even a legal process devoid of such ′soft′ emotions as compassion or empathy is not emotionless; it is simply driven by other passions" [218].

"Emotion terminology is always slippery. These terms - compassion, empathy, sympathy, pity - have no fixed meaning"[219]. Compassion is addressed by Nussbaum[220] as «basic social emotion» and «a certain sort of reasoning»: «compassion is 'rational' in the descriptive sense in which the term is frequently used – that is, not merely impulsive, but involving thought or belief»[221]. Realizing the cognitive foundation of emotions, as stated earlier, treats compassion more than «the unintelligent (unthinking, nonreasoning) parts of our animal nature»[222].

Compassion was perceived by Nussbaum as an emotion related to the suffering of another person not with a tone of condescension and superiority, but because it understands that (a) it is not a trivial situation (*seriousness*), that (b) it was not caused by one's own fault, so that the suffering is not deserved (*fault*) and that (c) could be in that situation, paying attention to one's own vulnerability (*similar possibilities, empathetic identification*): "she makes sense of the suffering by recognizing that she might herself encounter such a reversal"[223].

Compassion can be understood as "the feeling that arises in witnessing another's suffering and that motivates a subsequent desire to help, including a call to action on the sufferer's behalf that is not an inherent component of empathy"[224].

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[215] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 363.
[216] POSNER, Erik (2001). "Law and the Emotions". P. 1991.
[217] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 388-389.
[218] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 368-369.
[219] BANDES, Susan A. (2017). Compassion and the Rule of Law in *International Journal of Law*. P. 4.
[220] NUSSBAUM, Martha (1996). "Compassion: The Basic Social Emotion", in *Social Philosophy and Policy*, vol. 3, n. 1, p. 28.
[221] NUSSBAUM, Martha (1996). "Compassion: The Basic Social Emotion". P. 30-31.
[222] NUSSBAUM, Martha (1996). "Compassion: The Basic Social Emotion". P. 47 and 53.
[223] NUSSBAUM, Martha (1996). "Compassion: The Basic Social Emotion". P. 35.
[224] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 5.

Although, Bandes[225] shows an interesting point: the invocation of compassion to justify law issues is troubling because it "implies that solutions to inequality and other injustices are a matter of charity, mercy, condescension and pity[226] rather than a matter of correcting wrongs and expanding rights"[227]. Is also important be "cautioned against a tendency to uncritically embrace compassion, sympathy and empathy as soft, merciful, and therefore a welcome antidote to the hardness of law"[228]. She proposes instead that "compassion's importance lies in its ability to illuminate for decision-makers what is at stake for the litigant"[229] being closely tied to humility: "both are reminders of human fallibility and of the limits of individual understanding"[230] and we agree.

In this way, if we consider compassion as a tool which could influence legal decision-making in a (limited) good way, instead of "make unauthorized exceptions to a rule"[231] that imply "unequal treatment depending on the luck of the draw, arbitrariness"[232] is possible reconcile compassion with the rule of law[233] and accept "compassion as a factor in judicial decision making"[234].

It is important to understand that "simply incorporating some of the language of empathy and compassion into the judicial vocabulary would enable a judge to face more directly the ´burden and pain of judging´"[235]. The main point is that they are legitimate tools.

Despite possible ambiguities, given the aforementioned difficulty of reaching a fixed meaning[236], it is now appropriate to distinguish «empathy"[237] which can be understood as: i) feeling the emotion of another; ii) understanding the experience or situation of another, by imagining oneself to be in the position of the other; iii) action brought about by experiencing the distress

[225] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 1.
[226] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 17.
[227] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 1.
[228] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 12-13.
[229] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 1.
[230] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 1-20.
[231] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 9.
[232] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 10.
[233] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 3 and 7-8.
[234] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 11-12.
[235] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 379.
[236] BANDES, Susan A. (2009). Empathetic Judging and The Rule of Law. P. 134.
[237] NUSSBAUM, Martha C. (1995). "Poets as Judges: Judicial Rhetoric and the Literary Imagination". P. 1486 and p. 1490-1491.

of another[238]; (iv) the facility to perceive the humanity of another person[239]; (v) "it calls for understanding the goals and intentions of others"[240]; (vi) "the capacity to feel 'with' another"[241], toward the powerless or the disenfranchised or not; (vii) "empathy allows us to put ourselves in the shoes of others—it allows a judge to see the perspective of all the litigants"[242]; (viii) "is the ability to take the perspective of another"; (ix) "is a capacity for understanding the desires, goals and intentions of others" [243]. Empathy does not require to act on behalf of any particular litigant, as a command to help [244] like compassion.

It said "that requires a desire to see things from the vantage point of another, but it is really about perspective taking"[245]. "The problems arise from selective empathy and from empathic inaccuracy (…) because judges are encouraged to believe in their own omniscience"[246] but they have prejudices: "whether this ought to qualify as putting oneself in another's shoes or simply as a (…) self-referential reflex is an interesting semantic question"[247].

It begs an important question: "to what extent *can* we truly feel another's pain, or even understand another's situation?"[248]. The effort to achieve imaginative understanding of others, "however well intentioned, is constrained by each individual's particular capabilities and limitations" [249], which conforms to self-referential experience[250]. The problem for the judge is "understand or experience the viewpoint most unlike his own"[251]. As judges should and inevitably exercise empathy, we are back to the importance that he recognizes his own limitations and blind spots, and try to correct them[252] to not affect decision-making[253].

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[238] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 373-374.
[239] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 374.
[240] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 18-19.
[241] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 18-19.
[242] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 7.
[243] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 4.
[244] BANDES, Susan A. (2009). Empathetic Judging and The Rule of Law. P. 136.
[245] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 4.
[246] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 18-19.
[247] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 400-401.
[248] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 375.
[249] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 375.
[250] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 375.
[251] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 376.
[252] BANDES, Susan A. (2009). Empathetic Judging and The Rule of Law. P. 135.
[253] BANDES, Susan A. (2009). Empathetic Judging and The Rule of Law. P. 135.

Bandes says that "empathy", by itself, is an instrumental concept[254], is a capacity, not an emotion like compassion[255]. Still, can also be a tool used to achieve a variety of ends[256]: "a judge uses empathy as a tool toward understanding conflicting claims, assisting the judge in understanding the litigant´s perspectives[257].

"Narrative and emotion are imbued with normative significance" [258] but neither "benign emotions such as empathy or compassion are always helpful or appropriate in the legal scenario[259][260] "with rich historical concreteness"[261]. They are important[262] in the context of judicial decisionmaking as tools, that can be used or not. They are (or can be) "one tool in the judicial toolbox"[263][264] as well as modesty, maturity, sense of proportion, balance, recognition of human limitations, sanity, prudence and sense of reality[265].

So, "recognizing the importance of the education of the sentiments, and the important roles that emotions play in our moral lives and our choices"[266], only when the judge can discern (and balance) his (institutional) autonomy with his (personal/emotional) vulnerability he will be able to accomplish this task. As technical legal reasoning, including prominently the consideration of precedent, should be subordinated to untethered emotions is necessary an institutional constraint[267], articulated by a normative principle[268][269].

The debate about *question-of-law in concrete* and the realization of law *by mediation*[270] emphasized "the differentiation of law both as a *normative*

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[254] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 382.
[255] BANDES, Susan A. (2009). Empathetic Judging and The Rule of Law. P. 136.
[256] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 379.
[257] BANDES, Susan A. (2009). Empathetic Judging and The Rule of Law. P. 137.
[258] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 364-364.
[259] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 365 and 389-390.
[260] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 371-372.
[261] NUSSBAUM, Martha C. (1995). "Poets as Judges: Judicial Rhetoric and the Literary Imagination". P. 1479-1480.
[262] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 364.
[263] BANDES, Susan A. (2009). Empathetic Judging and The Rule of Law. P. 137.
[264] BANDES, Susan A. (2017). Compassion and the Rule of Law. P. 15-16.
[265] BANDES, Susan A. (2009). Empathetic Judging and The Rule of Law. P. 137.
[266] MORAVCCSIK, J. M. E. (1982). Understanding and the Emotions. P. 224.
[267] NUSSBAUM, Martha C. (1995). "Poets as Judges: Judicial Rhetoric and the Literary Imagination". P. 1517.
[268] BANDES, Susan A. (1996). Empathy, Narrative, and Victim Impact Statements. P. 373.
[269] NUSSBAUM, Martha C. (1995). "Poets as Judges: Judicial Rhetoric and the Literary Imagination". P. 1483 and 1485.
[270] GAUDÊNCIO, Ana Margarida Simões (2019). "Jurisdictional Realization of Law" as Judicium: A Methodological Alternative, Beyond Deductive Application and Finalistic. P. 140.

discourse and as a specific *narrative*, and the nowadays concomitantly essential *inter-textuality*, on the one hand, and the perception of the *judicial judgment-judicium* as a *translation*, on the other"[271]. Such practical implications "in the effecting of the foundational *principles* in the legal system will reflect directly in - and will be determinant to - the subsequent discussion on the *normatively legal* relationship between *normative principle* and *legal (juridical) criterion*"[272][273][274].

Thus, with principles as fundamentals, and legal norms, precedents and dogmatic models as criteria, it is proposed a practical consonance between the principles, which are invoked as commitments and projects to be or to be-with-the-others, and the specific normative content of the realization of these commitments for the relation between *phronêsis*, prudence and narrativity. This is what the *Principle of Institutional Otherness* intends. We asked many questions and this principle do not intend to be a «magic wand» that solves all problems overnight. Nor is it an escape from reality in beautiful words. It is rather an authentic (intersubjectively) legal contribution that can be added to good legal practice (even if gradually). It has already been contextualized, now it is necessary to clarify its details. But it is really another time story.

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[271] GAUDÊNCIO, Ana Margarida Simões (2019). "Jurisdictional Realization of Law" as Judicium: A Methodological Alternative, Beyond Deductive Application and Finalistic. P. 140-141.

[272] GAUDÊNCIO, Ana Margarida Simões (2019). "Jurisdictional Realization of Law" as Judicium: A Methodological Alternative, Beyond Deductive Application and Finalistic. P. 140-141.

[273] GAUDÊNCIO, Ana Margarida Simões (2019). "Jurisdictional Realization of Law" as Judicium: A Methodological Alternative, Beyond Deductive Application and Finalistic. P. 141: This approach represents, hence, a model of *justice* in which there is a continuously constructing axiological horizon of reference of what should and what should not be *law*, which states the validity of juridical (*normative*) principles, criteria and decisions. And a model of *law* whose practical accomplishment consists in a practical and normative conception of the *realization of law*—not a deductive application nor a finalistic determined choice, but a *judicative decision*, involving *an axiologically founded juridical judgment* [36: 93–94, 3: 73–122, 6]—, whose context-*framework* consists of a *stratified legal system* before which the *juridically relevant controversy*— the concrete problem posed to law—emerges [30: 165–286]. So, the judicative resolution of the juridical controversy consists in a dialectical relation between *system* and *problem* [30: 155–157, 1, 2: 139, 3: 110–122].

[274] NUSSBAUM, Martha C. (1995). "Poets as Judges: Judicial Rhetoric and the Literary Imagination". P. 1483.

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Judges: officials, activists or mediators?

The *interpretive beacons* as a contribution to judicial rationality

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ABSTRACT

In legal systems there are interpretative openings and limits resulting from the bundling of internal factors, related do the judge, and external, related to the environment. The combination of these factors gives rise to a three-judge model: *officials-judges, activists-judges and mediators-judges*. Different methodological proposals seek ways to the correct answer or one capable of restricting *discretion*, with Ronald Dworkin's argument of principle and Castanheira Neves' methodical scheme as affirmative conceptions. With the intention of providing a contribution to the problem of interpretation and its limits, this paper takes the opposite path (negative conception), stipulating assumptions, which if exceeded lead to a legally irrational and, therefore, arbitrary decision. Such presuppositions are the *interpretative beacons* seen under the *objective-temporal* and *subjective-spatial* binomial that can serve as interpretative limit.

KEYWORDS

Theory of Law; Philosophy of Law; Legal Methodology; Legal interpretation; Limits; Hard and easy cases; Rationality.

1. Introduction

The concern with judicial arbitrariness occupies the minds of jurists and literary writers. In "The Process" by Franz Kafka (1982), Josef K. is prosecuted, without being able to defend himself or even being aware of the content of the accusation. The inevitability of arbitrariness torments him as he awaits the outcome, in the expectation of a vain justice. In the end, he is executed. Reality and fiction are confused when rationality moves away from the courts. Various methodologies aim to contain the excessive power, designing models and interpretative limits.

History has shaped *jurisdictio* in different ways[1]. While in primitive societies, the tribal chief combined the functions of legislator, judge, priest and military commander (Afonso 2004, 25), the modern conception of jurisdiction has its roots in the second half of the 17th century, driven by the separation of judicial and administrative functions, abandoning the paradigm of the judge-administrator, from 1790 onwards[2].

In the *common law* system, the magistrate is given the power to create the law, while in the *civil law* there is a clearer division between the judicial and legislative functions, especially from the 17th and 18th centuries. Above the tendency for synchronization between these two systems[3], generalizations in the treatment of the judicial function require contextualization[4]. The expression "judicial power" is rich in meanings, understanding it as the state function exercised by the judge (power) of pacifying conflicts (function), through the interpretation and application of the Law (activity).

Judicial interpretation finds openings and limits. Internal factors such as the magistrate's political, religious, cultural, social and even legal conceptions influence its form and content. External factors also stimulate them, such as current norms, the culture of the court and society. The conjunction of these factors results in three types of judges: *official, activists* or *mediators judges*.

Such conceptions are manifested in different legal systems and in the same court. The citizen is hostage to a *legal lottery*, whose conflict can be decided by any of these judges.

The dimension of judicial discretion will correspond to the sum of internal and external factors. In search of a judicial rationality, methodological currents systematize solutions, with emphasis on Dworkin's (2002, 182) "argument of principles"[5] and Neves's (1982, 200) "methodical scheme". These

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1 For example, in France, the Executive and the Judiciary are linked, with the President of the Republic entrusted with the role of "guaranteeing the independence of the Judiciary" (French Constitution, Article 64).

2 France, Law of 16-24 August 1790, Title III, art. 13: "Les fonctions judiciaires sont distinctes et demeureront toujours séparées des fonctions administratives. Les juges ne pourront, à peine de forfaiture, troubler, de quelque manière que ce soit, les opérations des corps administratifs, ni citer devant eux les administrateurs pour raison de leurs fonctions".

3 Thus, "several recent modifications that seem to be reducing the distance that separates English law and the 'Romano-Germanic family'" (CAENEGEM 2010, 1 – free translation).

4 In the same systemic family, profound differences can be found, such as the limits of the intervention of the Judiciary Power over the other Powers. For example, in civil law systems, Portuguese magistrates do not coerce the public administration in the implementation of public policies, unlike in Brazil.

5 Although Dworkin defends the law as "integrity" and "coherence", the arguments of politicies (public policies) are not to be confused with those of principles (community of principles).

affirmative conceptions define what would be (what is) a rational decision. On the other hand, there are also *negative conceptions* that seek a model of exclusion, defining what would not be (is not) a rational decision.

This paper intends to advance a *negative conception* model by investigating whether the *interpretative beacons* viewed under the binominal *objective-temporal* and *subjective-spatial* can serve as limits for the legal rationality.

The first part will address the issue of "how judges think"[6], focusing on interpretive openings and limits in dealing with hard cases. Reflections will be made on judicial discretion and rationality, confronting the affirmative conceptions of Dworkin (2002) and Neves (1982).

In the second part, the negative proposal of the *interpretative beacons* will be developed, demonstrating the limits outside which there is no rationality in the decision-making activity.

Two pillars are structural to the Rule of Law: a) temporality (manifested by legal certainty, represented by the non-retroactivity of normative commands), and; b) spatiality (inscribed as a protective factor for the individual, in a notion of alterity)[7].

Such legal materials are part of the "rule of law virtues" (predictability, stability, articulation with operators in other branches of the political-legal system, rationalization of discretion) (Linhares 2015, 1781-1783), which stand out in the axiological hierarchy. It will be examined whether both pillars serve as *interpretative beacons*.

The first *interpretative beacon* is *objective-temporal*. It refers to temporality to ensure legal certainty in the application of normative commands (objective), without retroactivity (temporal), regardless of their legislative or judicial origin.

The second is *subjective-spatial*. It is related to otherness, understood as protection of the juridical-civil personality of the citizens (subjective), in which their legal interrelationships (spatial) cannot be burdened discre-

[6] The title is inspired by the book "How Judges Think", in which Richard Posner finds two ways for the judge to resolve disputes: a) the subsumptive method for conventional cases, and; b) broad discretion, including the use of experiences, emotions and beliefs, for non-routine cases (POSNER 2010).

[7] They are common references in different conceptions. Whether due to the need to respect positive law or the transcendental limitations of natural law, legal certainty, predictability, the legal or voluntary creation of obligations are fundamental requirements in individual-State relations (NOVAIS 2018, 22-25).

tionarily in favor of others. Otherwise, the very essence of the democratic contractual-agreement is infringed.

In this work, the research will densify the theme of rationality in judicial decisions, developing the model of *interpretative beacons* (seen under the *objective-temporal* and *subjective-spatial* binomial).

The purpose is to argue that, in hard cases, the rationality of judicial discretion is lost when operating legal materials outside these limits. In the "wrong birth" case, an example of a hard case, the models by Dworkin (2002) and Neves (1982) allow for equally correct solutions to be reached. This work seeks to reduce the plurality of correct answers, defining as irrational (and therefore incorrect) those that violate the guidelines referred to.

2. How do judges think?

Inspired by the book "How Judges Think" by Posner (2010), some reflections emerge on the decision-making process and the judges' models. The intertwining of internal and external factors constitutes the legal system, with its interpretative openings and limits, defining how much discretion the judge has.

In the combination of these factors, three types of judges can be described: *official-judges, activist-judges* and *mediator-judges*. The former corresponds to judges linked to strict legality who seek the *mens legis*, in a reduced interpretative space. *Activist-judges* consider themselves legitimated to defend certain interests or people, resorting to elastic-extensive interpretations, with wide discretion. Finally, the *mediators-judge* exercise the role of mediation between the concrete case and the system[8].

The different ways judges think result in mixed judgments. Without express legislative rules, the interpreter uses existing legal materials to resolve the dispute. The search for legal rationality is the way to restrict interpretative arbitrariness and abuse, followed by Dworkin (2002) and Neves (1982) in their affirmative proposals.

[8] In this work, the notion of mediation as a conflict resolution method will not be developed, due to its conceptual distance from what is discussed here.

This paper presents a description of how judges decide and a prescription of how they should decide hard cases, in order to respect normative limits while ensuring that the decision is not irrational (negative conception).

2.1. Interpretative openings and limits

Deciding is an act of choice. Judicial decisions involve choices about the allegations to be examined, the facts to be considered (and proved) and the normative rule (laws and precedents) applicable.

The decision-making process can be rational or intuitive, prevailing one or the other system, depending on the subject (Bazerman 2014, 15). Objective parameters seek predictability and rationality in legal interpretation. The conciliation of these requirements with the two systems is obtained with the requirement of justification, aiming at a rational decision[9].

Legal interpretation supposes two paths: openness and control.

There are institutionalized interpretive openings (provided for in the legal system itself) and non-institutionalized ones (not provided for therein), giving the interpreter *interpretive windows* into the search for legal and even non-legal materials, such as morality[10], politics and culture. They function as "external interconnections" and "open the cases to *non-legal* arenas, involving the «economic», «political», «ecological», «ethical-religious» and scientific-technological systems»" (Linhares 2015, 1774). Once the *interpretative window* is open, it is necessary to control the interpreter, making him respect interpretative limits.

The *interpretive windows* and boundaries are formed and conditioned by several factors[11], classified as internal and external, and normative and meta-normative.

The internal factors are related to the subject-interpreter, his convictions, constraints, culture and values, from which the conscience about the open-

[9] "It is not intended that the normative legal statement stated, proposed or dictated as a sentence is only rational, but also that in the context of a current legal order it can be rationally grounded" (Alexy 2020, 189-190).

[10] An example is the duty of obedience of minors to their parents "in everything that is not illegal or immoral" (Portuguese CC, art. 128).

[11] Such factors correspond to different plans-perspectives of the problems of the jurisdiction (Neves 1998b, 2-4). Posner synthesizes some factors about judicial behavior: a) personal attitude of the magistrate; b) strategic; c) sociological; d) psychological; e) economical; f) organizational; g) pragmatic; h) phenomenological; i) legalism (Posner 2011, 31).

ings and interpretative limits is established. They manifest themselves in the "very constitutive moments" (Neves 1998b, 4) in the exercise of jurisdiction. Self-restraint is a form of limit (Afonso 2004, 87), even though there is "considerable variety in judges' interpretations of their own responsibilities" (Dworkin 2011, 143).

The judge's personal attitude, values, psychological profile, cognitive biases (Linhares 2015, 1781) and political, religious, and social conceptions influence interpretation. Thus, considering democracy as a relevant value, the interpreter tends to respect some interpretative limits, such as legality, the separation of powers and the search for the popular will.

External factors are legal, institutional and structural. The interweaving of these factors forms the archetype of the established legal system, composed of people, institutions and rules. External factors refer to the legal environment (such as political and interest group pressure), therefore. They can be subclassified into normative and institutional.

By external-normative factors, there are all kinds of normative acts, regardless of the organ of origin (legislative or judiciary[12]) and hierarchy (constitutional or infraconstitutional), including encompassing the rules of self-government and self-restraint of the judiciary (Afonso 2004, 87) ("statutory problem" – Neves 1998b, 3). In some domains, technical and management rules proliferate "to the detriment of classic legal rules and institutions" (Frydman 2018, 17).

External-institutional factors, on the other hand, refer to institutions dealing with aspects of their organization, composition and dynamics of their functioning ("structural problem" – Neves 1998b, 3).

The intertwining of all these factors builds legal systems, with all their vicissitudes, nuances and peculiarities[13]. Systems more akin to jusnaturalism allow decisions with more discretion, while positivists interpret the law more narrowly (Roosevelt 1999).

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[12] The openings are in the general rules existing in the legislation and in the precedents (Linhares 2016, 239).

[13] Despite the diversity of legal systems, it is possible to compare them, considering variables such as protection of human rights, interference in economic freedom and effectiveness of jurisdictional provision, such the The World Bank ranking (https://portugues.doingbusiness.org/pt/rankings – free translation).

In the common law, the judge can exercise more discretion (Linhares 2015)[14], since the indeterminacy of the legal material is wider[15]. Its interpretative possibilities are "pragmatically more extensive" (Linhares 2015, 1770), behaving as "pragmatic-political" (Linhares 2015, 1771).

In continental Europe, a model is adopted that inhibits:

> the judge from going beyond the defining limits of his functions, that is, that does not allow him to go beyond his duty to apply the law without the use of excessive creativity, safeguarding himself, from this form, the coherence between the jurisdictional functions and the Jacobin conceptions of democracy (Afonso 2004, 74-75).

In the relations between the powers, the legislature establishes political commitments and the judiciary exercises a counterweight, guaranteeing "respect for the fundamental values of the legal order and the law" (Linhares 2010, 474). The new judicial protagonism is characterized by the "confrontation with the political class and with other organs of sovereign power" (Santos, Marques, Pedroso 1995, 3).

The granting of decisional legitimacy does not necessarily confer political legitimacy[16], which derives from the democratic election, in rejection of aristocratic systems (Afonso 2004, 50). Consequently, in legal systems where judges are elected (and subject to impeachment based on the clause "during good behavior" – Afonso 2004, 141), more discretion is recognized in relation to judges on the European continent, in which their selection is made by public tender (Afonso 2004, 144). Even within the same system there are differences, as between English *judges* and *magistrates*.

There is a movement of approximation of both systems[17]. For example, the American Judge becomes "more vulnerable to formalism than a certain

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[14] Linhares 2015, 1769. Referring to American law, Dworkin highlights the importance of defining the extent to which "unelected judges should assume an authority to decide for themselves which of the semantically available interpretations of a controversial statute would produce the best law" (Dworkin 2011, 133).

[15] In common law systems, there is a certain normality with the exercise of political discretion in the "twilight zones", which is somewhat disturbing for judges on the European continent. (Kennedy 1997, 179).

[16] From the perspective of conventionalism: "judges must respect the legal conventions in force in their community, except in rare circumstances" (Dworkin 2007, 144-145).

[17] Neves 1982, 207. An interesting example is the adoption of American accounting standards by European companies, allowing them to be listed on the New York Stock Exchange. It is a trend of "global

pragmatic predestination would have us suppose" (Linhares, 2015, 1776). In any of these systems, the interpreter relies on hypothetical legal materials in search of binding legislative or jurisprudential criteria[18].

Differences between common law and civil law define interpretive openings and limits. The "binomial easy cases / hard cases"[19] allows for a systematization of the subject, giving rise to "two other binomials — *legal treatment / non-legal treatment, application of the «law» / discretionary creation*" (Linhares 2015, 1765). For Atienza, a hard case is one in which: a) there is no consensus in the legal community on how to resolve it; b) it is not routine, nor is it a mechanical application of the law; c) it is not subject to decision weighing conflicting legal provisions, by means of deductive arguments; d) requires principled reasoning; e) necessarily involves moral judgments (Atienza 1997, 10).

The Neves jurisprudentialism repels this binomial. His methodical scheme does not allow for a Cartesian system of realization of the Law applicable indistinctly to any legal case. There are no abstract and previously adequate answers for the case, giving rise to the interpretive activity of the magistrate ("constitutively judicial mediation" – Neves 1982, 227-228), based on practical-axiological rationality ("intersubjective dialectic"). The available legal materials are used (norms, precedents, jurisdictional pre-judgments and dogmatic models), in order to limit the *voluntas* by the concrete decision-making judgment.

This jurisdictional law results from a "mix of legal law and judicial law" discussing "its normative limits" (Neves 1982, 229). The methodical scheme is based on the relationship between the case (problem) and the system, regardless of the complexity of the cause, paying attention to what is new. He understands that, in easy cases, the mechanical decision would not be the best methodology, as circumstances may require different treatment, and should experiment with the system. What may be suitable for one case may not be so for another.

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standard due to the primacy of the United States in the finance sector as in the related activity of analysis and financial evaluation" (Frydman, 2018, 66 – free translation).

[18] This is Posner's lesson mentioned in Linhares 2015, 1770.

[19] Several authors accept the binomial easy/hard cases, although using different terminology, as mentioned in Linhares 2010, 462 and 472). On the other hand, the relativity of this definition is not unknown, in which an easy case can be considered hard (or vice versa), depending on the "ideological strategist" operating in the case (Kennedy 1997, 166).

Dworkin (2002) also rejects such a binomial. He argues: a) the difficulty in knowing whether the case is hard or easy; b) application the Hercules method to both cases, with the evidence of the answers to the questions asked in the easy cases. Even in an easy case, such as respecting the speed limit on a highway, Dworkin (1999, 424) claims that:

> a person whose convictions about justice and equity were very different from ours might not find this question so easy; even if he ended up agreeing with our answer, he would insist that we were wrong for being so trusting. This explains why questions considered easy during a certain period become hard before becoming easy again - with the opposite answers.

However, in easy cases, discussions about justice and equity remain outside the legal debate of the concrete case, except in exceptional situations. Usually, the driver is fined for exceeding the limit, even if he disagrees, considers it unfair or not equitable. Only in specific (non-ordinary) situations can the exceptionality be invoked, such as proving that he was taking an injured person to the hospital. Judicial interpretation does not open the debate on the justice or morality of the easy question, already embodied in the legal norm, with no creative margin for the judge.

Two difficulties to the application of the logical-deductive method are listed. The first is the historical-cultural nature of Law, making entirely logical or rational explanations impossible (Cordeiro 1999, XVIII-XX). And the second is its limitation in the face of concrete cases, preventing the use of the subsumptive method in the following situations: vague and indeterminate norms; incompleteness of the system with *intra* and *extra-systematic* gaps; contradictions of principles, and finally; the existence of unfair or inconvenient solutions (Cordeiro 1999, CIII).

However, such difficulties do not permeate all cases. There are simple and routine cases that can be solved through mere objective parameters[20], including the use of artificial intelligence for decision automation[21]. Its inter-

[20] These are cases in which there are no legal phenomena that justify overcoming legalism, as recognized by Castanheira Neves: "Not that legalism is completely abandoned and does not remain a common reference and a mode of legality that is still concurrent or alternative, as we will see , but there are also many legal phenomena that need to be overcome, with direct repercussions on the tasks of the jurisdictional function" (Neves 1998b, 4 – free translation).

[21] This possibility is provided for in the European Charter of Ethics on the Use of Artificial Intelligence in

pretative limits are foreseen in the applied law itself. The norm is sufficient to find a solution for the easy and commonplace case[22]. Possible "under" and "over inclusive" situations of the standard (Schauer 1991, 30-34) would be exceptions.

In easy cases, the subsumptive method (deductive-formalist) can be applied, dispensing with interpretative density, with only one correct answer. They involve objective parameters, without (or with a reduced degree of) indetermination. Some examples: a) the deadline for offering the contestation; b) traffic fines for exceeding the speed limit; c) compensation for moral damages for flight delays[23]. In this and other common situations, once the factual framework has been established, the law must be applied, otherwise the interpretation will be *contra legem*. So it will be a arbitrary interpretation[24].

In increasingly common situations, the legislator creates *windows* for the interpreter to use secondary sources of law[25]. Legal law gives way to the nebulous area of political-law or even *emotion-law*. The law does not fit perfectly with the factual hypothesis. The major premise (normative prediction) does not meet the minor premise (the facts). The indeterminacy of general rules (Linhares 2016, 239) or incompleteness of the normative command[26]

Judicial Systems and their environment adopted by CEPEJ at its 31st plenary meeting.

[22] According to Hart, there will be "simple cases that are always occurring in similar contexts, to which the general expressions are clearly applicable" (HART 2007, 139).

[23] The question-and-answer method is sufficient to obtain the necessary information to judge these common cases. For example, ask: 1 – did the passenger have a ticket for the referred flight? 2 – the flight delay occurred for a justified reason (one can list the justified and unjustified reasons, outside of which the case may become hard); 3 – Was the delay longer than three hours? 4 – Did the airline provide any type of compensation? From the responses, it can be understood whether or not compensation is due and its quantum (European Union, EC Regulation 261/2004). This method is not useful when it involves subjectively verifiable issues, such as, for example, the constraints suffered by the flight delay, such as when the passenger was unable to attend his daughter's wedding. This would not be a common case.

[24] Portuguese legislation provides that the law is the immediate source of law (Portuguese CC, art. 1.º, 2). And it prohibits the trial by equity, except in exceptional situations authorized by law or by the agreement of the parties (Portuguese CC, article 4.º).

[25] Neves 1982, 212. Castanheira Neves mentions the extensive (gaps and openings) and intensive (normative indetermination, linguistic vagueness, etc) insufficiency of the systems, demanding "broad constitutive autonomy of problematic-decision mediation both in terms of invoked criteria and judicial possibilities" (Neves 1993, 71). Easy cases do not suffer from this inadequacy, and you are asked to disagree with the master on this point.

[26] The themes of gaps and legislative indetermination are different. There are criticisms of the use of the expression "gaps", as it is based on the assumption that there is a closed and sufficient system (proposed by the formalist methodology). Indeterminations, on the other hand, require the mediation of law with the determination of legal norms. A third theme is missing cases (for Karl Larenz this is not an interpretive problem). In the methodical scheme, the "centrality of analogy" in the judicial-decision making of law is highlighted (Bronze 2002, 304).

(legal or jurisprudential) or the complexity of the case demands an intense interpretive exercise, authorizing some discretion[27]. These are the hard cases.

In these cases, there is no way to know *a priori* which of the possible interpretations should prevail (Dworkin 1999, 306), justifying the interest in methodologies that, based on the use of elements of the legal system itself, lead the "decision-voluntary to a rationally determined judgment-judgment" (Linhares 2010, 472). Concerned with openings and interpretative limits, different proposals define parameters of rationality ("rationalizing criteria").

Admitting the plurality and equivalence of correct decisions does not mean that any decision is correct. There are decisions that will be incorrect, due to their unlawfulness, when extrapolating the interpretative limits.

Although the juridicist discourse is accepted as a decision-making method, the classification of the cases in easy or hard is the premise adopted. Depending on the complexity of the case, the decision-making method will be different (Linhares 2016, 242; Linhares 2017, 157), with a focus on the problem of resolving hard cases, based on Neves (1982)' methodical jurisprudentialist scheme and the search for *interpretative beacons* outside of which interpretation will be understood as non-rational[28].

In hard cases, pondering principles, some judges imprint their personal, moral and religious convictions in disregard of the legal system (Waldron 2018; Quirk 1995; Hirschl 2011, 121-137), guided by voluntarism (White 1985, 67). This distances them from self-subsistent rational criteria (Linhares 2012, 405). Rationality is the guarantee that prevents the use of principles as rhetorical artifacts to disguise and legitimize subjective and emotional arbitrariness[29].

According to the criterion adopted, there are different conceptions of judges[30], like those of Kennedy (1997), Dworkin (2002), Ost (1983) and Fuller (2002).

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[27] Hart 2013, 658. The performer "dives into an «open area» or an «empty slate» of discretionary possibilities" (Linhares 2010, 463).

[28] Such a task is inspired by the formulation of theories of justice from the perspective of deconstruction, as done in "The Philosophy of the Limit" by Drucilla Cornell. Based on the established theoretical framework, this work seeks a complementary path to the affirmative proposals of Dworkin and Castanheira Neves, investigating what is not (rational) instead of examining what is.

[29] Also recognizing the need for institutional remedies against subjectivism, Hart adds: "It is therefore understood that if what officials are to do is not rigidly determined by specific rules but a choice is left to them, they will choose responsibly having regard to their office and not indulge fancy or mere whim, though it may of course be that the system fails to provide a remedy if they do indulge their whim" (Hart 2013, 657).

[30] For other models, Orlando Afonso presents one, according to the intensity of independence and juris-

Kennedy (1997, 180-186) presents three kinds of judges: a) restricted activist (seeks the correct legal solution, based on an interpretative strategy); b) divider of differences (more passive than the previous one, controlled by ideology), and; c) bipolar (combines traits of the previous ones, acting liberal or conservative, depending on the case).

Dworkin (2002) portrays a model judge-philosopher who formulates theories about legislative intent and legal principles, endowed with qualities such as:

> superhuman ability, wisdom, patience and sagacity, whom I will call Hercules. I assume Hercules is a judge in some representative US jurisdiction. I consider that he accepts the main non-controversial rules that constitute and govern the law in his jurisdiction. In other words, he accepts that laws have the general power to create and extinguish legal rights, and that judges have a general duty to follow the previous decisions of their court or of superior courts whose rational foundation (rationale), as the jurists, applies to the case in court (Dworkin 2002, 165).

Ost (1983, 1-70) refers to three kinds of judges, inspired by the world of games and sports: a) Judge Jupiter (legalistic character and literal interpretation, in respect to the kelsenian positivist pyramid, coinciding the Law with the law); b) Judge Hercules (creator of the law, transforming generality and legal abstraction into concrete law, with social concern); c) Judge Hermes (makes use of hermeneutics, combining norms and values).

Fuller (2002) conceives five types of judges, according to their conduct: a) respect for the law, even if it is unjust, in the expectation of better solutions from the executive power (clemency to the accused); b) ampliative interpretation of the legal text, relativizing its rigor; c) considers emotional and rational factors inseparable, respecting the law and refusing to participate in unfair judgment; d) application of the law in its own terms, abstracting its personal conceptions; e) is based on common sense and the search for justice in the concrete case.

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prudential creativity: a) executing judge; b) delegated judge; c) guardian judge; d) political judge (Afonso 2004, 82).

In relation to interpretative openings and limits, resulting from the bundle of internal and external factors, a model can be designed with three kinds of judges: a) *officials-judges*; b) *activists-judges*, and; c) *mediators-judge*.

Officials-judges stick to the text of the law[31] or of the precedent, respecting it, in (re)strict formalist-interpretative activity, avoiding printing meta-legal conceptions in the jurisdictional decision. It is conceived as the "mouth of rational universality", (embodied in the law) (Linhares 2010), applying the subsumptive method, without exercising "ethical responsibility for community projection" (Neves 1998b, 43). The State must provide services to citizens, the reason for its existence being (Afonso 2004, 46). Replaces the notion of power with that of service (Duguit 1921). Their personal conceptions do not prevail over external factors, embodied in the legal environment, given by the institutions and rules in force.

Activists-judges assume the mission of fulfilling a political-economic-social agenda in the postmodern world. They free themselves from bureaucratic-administrative subordination, attributing a "political meaning" to their function (Afonso 2004, 46). Law assumes a pragmatic-functional dimension (Neves 1982, 249), reducing it to an instrument to pursue certain ends (material-functionalism). Discretion is admitted to a greater extent, relativizing the limits between law and politics, between judging and legislating (Linhares 2015, 1786) and between legal reasoning and common sense. The current rule is submitted to the magistrate's scrutiny, considering the law as a mere starting point[32]. *Activist-judges* can be classified as *activists-parents* or *activists-legislator*.

The *activists-parents judges* fulfill the function of protecting the party or certain right (*judge as politician*), incumbent on them to elastically interpret the text of the legal norm, to achieve their activism, getting involved in social causes, such as the protection of workers, minorities, animals, gender issues, relegating to the background the normative set, whose validity is conditioned to tutelary teleology. The *paternalistic judge* feels responsible for society,

[31] As imposed on Italian judges by the Constitution of the Italian Republic, art. 101: "La giustizia è amministrata in nome del popolo. I giudici sono soggetti loosening alla legge".

[32] Such a kind of judge is restricted in Portuguese law. Pragmatic-functional judgments about the inconvenience or injustice of the law do not authorize waiving its application (CC Português, art. 6º). There is an explicit obligation to judge and the duty of obedience to the law (idem, article 8), prohibiting the use of personal conceptions, but respecting the mens legislatoris (idem, article 9).

assuming the role of protecting those who, in his opinion, need a different treatment, as proclaimed by *Critical Legal Scholars*[33].

Judges-activists-legislators, on the other hand, see themselves as holders of political power, legitimated to co-create the legal system (*judge as legislator*). As political agents, they make decisions on behalf of the society they claim to represent, even when not directly chosen by it, acting as *oracles of justice*.

Finally, the *mediators-judges*[34] perform the normative-constitutive mediation between the legal system and the concrete case (Neves 1982, 200), in "judicative ponderation" (Neves 1982, 202). They start from the "concrete legal problem" (Neves 1982, 198), making use of the jurisprudentialist methodological scheme operated in normative dialectics by the "practical-prudential judgment" (Neves 1982, 200. 261). It seeks to reconcile internal and external factors, with the judge acting to enforce the law, without submitting to political influences, but with autonomy to resolve the specific case.

Mediators-judges distance themselves from *activists-judges*, because in "jurisdictional decision, a normative validity is always presupposed and intentionally invoked, which is not intended to be altered or replaced by another that is programmatically instituted, since the aim is only to affirm it, through a constitutive-concretizing determination, in the cases of its problematic realization" (Neves 1982, 202). Under the juridicist view, its interpretation finds limits in the legal system itself.

Depending on the type of judge (official, activist or mediator) there is a different relationship between internal and external factors, resulting in greater or lesser interpretative amplitude. The search for rationality permeates the three models, emerging affirmative conceptions (in search of the correct answer) and negative conceptions (demonstrating the incorrect answer).

2.2. The "justice" in the dock and the *interpretative guidelines*

This topic analyzes the solution of hard cases, confronting the methodological proposals of Dworkin (2002) and Neves (1982). In this sense, "justice" is put in the dock, subjected to an "inquisition" to be investigated

[33] For its supporters, the judicial decision "is not determined by previously established legal norms, but by social, political and ideological factors" (Lamego 2018, 177 – free translation).

[34] The expression does not refer to the notion of conflict mediation, as an alternative instrument to jurisdiction, in search of consensual, non-impositional solutions, in consideration of the culture of pacification and the function of public power itself to mediate the different interests of society.

when the openings and interpretative limits are rationally performed. Or, on the contrary, in what situations will it be legally irrational, introducing the argument of *interpretive boundaries*.

In ancient Roman law, the college of pontiffs held a monopoly on the *interpretatio iuris*, which consisted of knowledge of customary private law, *legis actiones* formulas and *actus legitimi*. They applied to the concrete case the "just" law that no one else had knowledge of. The Law of the XII Tables dismantles this monopoly, and private law becomes *ius scriptum*, with no more secrets about its content (Afonso 2004, 163-164). In the Middle Ages, law was based on the "will of God", interpreted by men.

With the French Revolution the creed of faith was replaced by creed in the law, losing "its divine origin to become a product of reason" (Afonso 2004, 166). The judicial function presupposes making several choices, in fact and in law, such as: a) which rule is applicable among those equally capable of regulating the case; b) what is its meaning; c) how to resolve a case without a directly applicable rule (Carnelutti 2000, 162).

For hard cases, an *interpretative window* opens, conferring the judge numerous possibilities that vary according to the model of judge. The exercise of discretion makes it possible to apply the interpreter's individual conceptions, based on "assumedly *non-legal*" intentions and references (Linhares 2010, 463). In the universe of interpretive practices, limits must be defined, otherwise broad judicial discretion is allowed, transforming it into a dictator-judge, absolute lord or monopolizing "oracle of justice".

Alexy's (2020) theory of principles opened *interpretive windows* to subjectivism, although his intention was precisely the opposite. His arguments against the indeterminacy of the law also apply to the precedent. A clash of principles can mean a clash of values (Linhares 2017, 93), allowing the interpreter to enter the "twilight zone" (Linhares 2016, 241) in which the relativization of values[35] finds no obstacle, in the postmodernist world[36].

There is a difference between rationality and legal rationality. Even if a judgment based on personal or political criteria is understood to be rational,

[35] Relativization occurs with the interpreter's values overcoming institutional values (Schauer 2009, 4).

[36] The growing multiplicity of understandings results from the relativist, denialist, irrational, liquid and empty postmodern world. The relativization of values and concepts further expands interpretive freedom, frustrating the expectation of predictability of the jurisdiction. Where would be the dividing line between interpreting and creating, if you can talk about it? Adapting Feyerabend, there is an interpretative MMA (Feyerabend 1977, 34 and 335).

even using legal materials, as is the case with the functionalist discourse, legal rationality presupposes judgment based on legal criteria and based on legal materials.

Rationality is the instrument of control of discretion[37]. The judge is a human being, endowed with will, priorities and thoughts. His judgment cannot be based simply on a political-ethical-ideological will. Individual voluntarism cannot serve as a source of law. Power is based on rational criteria (Weber 2011, 311)[38].

The *interpretative windows* correspond to limits, based on a rationality defined by abstract criteria (such as the proceduralist theory of Luhmann – Luhmann 1980), concrete (legitimation through results, such as the wealth maximization criterion), or even combining them.

Interpretive freedom is limited by the legal system itself, with the respect of legality, repelling "trans-legal standards" (diverging, on this point, from Dworkin), at least for systems based on civil law, in which the magistrate has no legislating power.

There is no guarantee of correctness or certainty in the interpretation based on moral criteria (Dworkin 2011, 125). Alludes to comparisons with interpretations of poems, films or songs (Dworkin 2011, 151-152). These are works of art, with purposes absolutely different from a legal norm, in which the interpreter is encouraged to seek a meaning of "second intentions". A work of art keeps secrets, unlike the legislator who seeks to be as clear as possible and the interpreter must be faithful to it. On the other hand, in clear legislative provisions, easily subsumed to easy cases, without moral incursions, the reason and certainty is the mere application of law.

In hard cases, interpretation involves subjectivity and uncertainty. For example, the one who commits an illicit act and causes damage responds civilly. What would an illicit act be? What is damage? In the specific case, was there any damage? These are questions of law and fact that require dialectics.

To admit discretion is to fall into the quick sands of the "Tyranny of values" (Schmitt 2010). This is because value conflicts are resolved with the imposition of a supposedly superior value on other supposedly inferior ones, based on a sentimental appropriation of the values of those who intend to

[37] The vocation of the judicium is to exorcise arbitrary force by appealing to reason (Neves 1998b, 1).

[38] The weakening of institutions corresponds to the strengthening of charismatic authorities, with public authority being recognized, as noted by Castanheira Neves (Neves 1982, 182).

impose justice (Schmitt 2010, 49). In this scenario, the "correctness" of the interpretation is a variable judgment according to the mental state of the people (Dworkin 2011, 129).

The level of discretion differs according to legal methodology. Formalist-legalist orientations treat the judicial function as declaratory of law (Chiovenda 1998, 8)[39], while those of a materialist-functionalist character hold the view that the magistrate is a co-creator of the Law. There are methodological proposals that recognize the role of discretion and those that, without prejudice to emphasizing the constitutive role of jurisdiction, assume a juridicist perspective (Dworkin 2002 and Neves 1982), rejecting it[40].

Contextualizing Dworkin's conception, three situations are envisaged: a) absence of discretion, as in the rule that establishes that the deadline for contestation is 30 days (CPC PT, art. 569.º); b) weak discretion, in which the interpreter starts from the legal text without going beyond it, such as identifying what would be an "illicit offense" or "threat of offense"[41]; c) strong discretion, in the hypothesis of a legislative gap and absence of similar cases[42].

The theory of principles causes indeterminacy and instability (Linhares 2012, 397), but gains juridicity when "they manifest themselves in bindingly institutionalized positive criteria" (Linhares 2012, 407; Linhares 2017, 159), without decisionism or voluntarism. With this, the interpretation is not totally open, being inserted in a historical-sociocultural context.

In jurisprudentialism, interpretation has an application function, being "always «a connection of *lex scripta* and *ius non scriptum*, by which only the true positive norm is constituted» (Esser), and the entire realization of law is a constitutive-integrating nomodynamic that cannot do without translegal and transpositive normative elements" (Neves 1982, 261).

Considering the risk of moving from an "*ateleological formalism* to a *teleologism of pure ends*", the juridicist proposal aims to overcome "the postulate of the self-subsistent determinability of materials (and, *a fortiori,* the logical-deductive intelligibility of the judgment)" (Linhares 2017, 156).

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[39] In a similar sense, Carnelutti: "The judge is *vox legis*, while *ius dicit* for the singular case, *declaring what the Law wants* (objective) *with respect to him*" (Carnelutti, 2000, 224 – free translation).

[40] For Aroso Linhares, the *discretion* is rejected when its use means a free choice of criteria without a legally effective binding (Linhares 2017, 159).

[41] Portuguese CC, art. 70.º, 1. The law protects individuals against any unlawful offense or threat of offense to their physical or moral personality.

[42] Portuguese CC, art. 10.º, 3. 3. In the absence of a similar case, the situation is resolved according to the norm that the interpreter himself would create, if he had to legislate within the spirit of the system.

Both Neves (1982) and Dworkin (2002) reject models built *a priori* for the subsumption or application of concepts in the complex reality of the cases, moving away from the positivist premise of fullness of the legal system. And, by rejecting functionalism and pragmatism, they agree with the autonomy of law in relation to social facts, which should be concretely realized according to its own principles and values.

They also have similar methods, divided into three phases: a) choice of the norm in the methodical scheme and the Dworkian pre-interpretation; b) the definition of the hypothetical normativity of legal criteria and Dworkin's interpretative moment, and; c) satisfaction of the demands of the concrete case (judicial decision) and Dworkin's post-interpretive moment. And they ensure legal rationality, legitimizing creative interpretation in situations of interpretive openings.

Your conceptions also differ, due to substantial differences. The methodical scheme consists in the realization of the law, through the dialectic realization of the system in the concrete case. It seeks to "provide a normative-legally 'just' solution (with practical-normative correctness) to the concrete case through a judgment that adequately mobilizes, or according to the requirements of that fairness, the legal normativity with its specific criterion" (Neves 2003, 443). It is not a question of a general model, with reference to other cases, but rather the adequacy of meaning to the specific case, in a form of practical adjustment *in concrete*.

In contrast, the Dworkian concept of law as integrity rejects the use of different criteria for similar cases, that is, it denies casuistry. It has a normative-hermeneutic bias, in search of the best theory between pragmatics and conventionalists. For Dworkin (2002), in the face of a new case, one should consider the socio-cultural practice as adequate criteria for the decision, like a "chain novel". He defends a decision-making model for all cases, as is clear in the following excerpt:

> The reader will now understand why I called our judge Hercules. It must construct a scheme of abstract and concrete principles which provides a coherent justification for all customary law precedents and, insofar as these are to be justified by principles, also a scheme which justifies constitutional and legislative provisions.[43]

[43] DWORKIN, 2002, p. 182.

For Neves (1982 and 1993) the conclusion will be rational[44] when it refers "to certain presuppositions, without abstracting the 'decisive mediator' (Neves 1982, 201-202), through a structured measurement of thought – when in this way it manifests its «reason for being». Therefore, we have the antithesis of «reason» in «intuition» and «emotion», as experiential attitudes without measurement by thought and its discourse and, therefore, also without foundation and justification assumptions – that is to say, without transsubjective or objective validity (or claim to validity)" (1993, 34-35 – free translation).

The discretion exercised with legal materials is legitimized in the canons of the Rule of Law[45] (juridicist proposal). Judicial interpretation is constrained by institutional and normative limits, even when it occurs without the mediation of legal norms. Therefore, the conception of discretion based on internal factors is rejected, which would be arbitrary and authoritarian, given the difficulties of its limitation[46], however much one seeks to frame the decision in a sphere of rationality[47].

From the standpoint of judging hard cases, the *official-judge* model starts from a mistaken premise: the completeness and unity of the system (Linhares 2010, 462). The normativist structure loses its imperativeness in the face of the indetermination of the norm in relation to the case, making the pure and simple subsumption, this one restricted to easy cases, unfeasible. Therefore, for hard cases, he will exercise his discretion, operating the legal materials and observing rationalizing criteria, being able to arrive at more than one correct answer.

The *activist judge* violates the duty of impartiality – the first attribute of the just judge (Afonso 2004, 65-66). With respect to opinions to the contrary (Taruffo 2006, 237), a judgment based on political criteria cannot even be considered legally rational, consisting of veritable anti-democratic discretion by the interpreter. In post-modern times, the path of institutional-legislative

[44] It presents a form of problematic-dialectical and argumentative practical rationality, based on the decision-making judgment of an axiological nature (Neves 1982, 250).

[45] Also in the autopoietic sense of the legal system, Drucilla: "The legal system, in other words, grounds of validity of its own propositions by turning back on itself" (Cornell 1992, 121).

[46] The impossibility of setting such limits is evidenced by the relativity of their definition (MacIntyre 1988, 393).

[47] It would be the situation of a magistrate condemning the defendant for not having sympathized with him, seeking a posteriori factual and legal grounds to justify his arbitrariness.

change is hampered by the empowerment of the *judge-activist*, strengthened with greater interpretative freedom. Similarly, Dworkin:

> As a conception of law, pragmatism does not stipulate which of these various notions of a good community are well-founded or attractive. It encourages judges to decide and act from their own point of view. It assumes that this practice will better serve the community – bringing it closer to what an impartial, just and happy society really is – than any other alternative program that requires consistency with decisions already made by other judges or the legislature (Dworkin 2007, 186)

In this "crisis of the judge", the "sense of regulatory references" is losing (Neves 1998b, 2). The *judge-activist* is trusted to be a bulwark on behalf of society, forgetting that he, too, can be captured by instrumental logic, like the legislator. The requirements of neutrality and impartiality serve to avoid their personal interest.

Justice is respect for the limits of the legal system (Cornell 1992, 143). Even if he disagrees with it, the magistrate must use the sources of law coming from the legal normative system, therefore. In this sense, Neves:

> It is not legal to call sources of law (certainly in the proper sense) any and all normative criteria mobilized in the concrete realization of the law, many of which come from other normative systems (thus, ethical, ethical-social, political-social criteria, etc.) and that, despite this mobilization, they cannot consider informing the content of the current law (Neves, 1982, 230 – free translation).

Judicial discretion is restricted by some rationalizing criteria, such as: a) the limits of the law itself (Neves, 1982, 269), to confer and delimit the legal openness, with vague expressions; b) the analogical judgments; c) the teleology of the rule; d) the arguments from principles; e) use of legal materials (*Critical Legal Scholars*).

Such criteria are not only a normative problem, but also relate to the model of judge. Does not guarantee a single correct answer[48], assuming

[48] Depending on the interpretive method, the results may be different, which is also possible even using the same methods (Dworkin 2011, 149).

this is possible[49]. This is troublesome to the party on a demand, submitted to a Kafkanian process, whose condemnation is in its mishap regardless of what is done.

The imprecision of interpretive limits can leave the law to the discretion of interpreters, reducing it to a word game, piling up principles and arguments while disguising emotions and arbitrary feelings. Limits are essential for the stability of the legal system, without which the Rule of Law itself is in jeopardy.

It is possible to determine the law and its materials through a "frame" or "border" (Linhares 2010, 460), despite the difficulty in establishing an objective-rational criterion for legal rationality, in view of the fallibility of the formalist-positivist conception and in view of the broad subjectivity of the functional-materialist methodology.

The affirmative conceptions aim to build methods that manage to restrict the magistrate's interpretative margin, preserving rationality (correct answer[50]). Neves mentions objective normative limits ("legally posited law always falls short of the historically and socially problematic domain") and intentional ("the realization of the law assumed a normatively material sense" – Neves 1998b, 8), guaranteed by the argumentation and justification (Neves 1993, 32-33).

In the "wrong birth" case (detailed in the next topic), an example of a hard case. The models by Dworkin and Neves lead to equally correct solutions. This work inverts the meaning, seeks to reduce the plurality of correct answers, defining as irrational (and therefore incorrect) those that violate the *interpretative beacons*.

The easy case is the one that has only one correct answer; but if there are alternatives, the case is hard. In fact, the rationality can be present in more than one correct answer, although some of them are better than others (Atienza 1997, 25-26). Therefore, for hard cases, there are correct and incorrect alternatives, the latter of which must be rejected. If it is hard to define which

[49] The correct answer is the one that gives greater value to historical, social and cultural practice, among the countless possible meanings, in the wake of the "chain novel thesis", sought by those who participate in the legal debate (Dworkin 2002, 444). Nevertheless, Dworkin recognizes the difficulty in claiming the truth in controversial cases (Dworkin 2011, 144-145).

[50] "If we cannot demand that government come up with the right answers about the rights of its citizens, we can at least require it to try. We can demand that you take rights seriously, that you follow a coherent theory about the nature of those rights, and that you act in accordance with your own convictions" (Dworkin 2002, 286).

of the correct ones should prevail, the incorrect one can be discarded from the plan, reducing uncertainty for the court.

Even "between" or "beyond" the easy and hard cases, such as Atienza's "tragic cases" (Atienza 1997, 13, 25-26), the model of interpretative benchmarks developed here presents a hypothesis to allow the identification of(s) incorrect(s) answer(s). It aims to guarantee the jurisdictional limits whose violation makes the decision irrational and, therefore, invalid as the solution of the case.

For Kant (undated), knowledge depends on some *a priori* conditions that are found in the subject to allow experience. Sensitivity connects objects to the subject. Sensations form the content of knowable experience. Before mental representation, the object is found in pure forms of intuition, consisting of two assumptions: time and space[51].

Considering time and space as conditions is a way of structuring thought that is equally valid for defining interpretive limits, albeit with some adjustments. We are not using such categories in the Kantian way[52], linked to a subject, but in order to be inspired by this way of thinking, in which time and space are unavoidable presuppositions.

The act of judging involves a double dimension: knowledge (matter of fact and law[53]) and legal (jurisdictional) experience – in which the law is constituted and manifests itself while it is realized (Neves 1982, 1982, 181 and 198).

The Rule of Law presupposes predictability, security and rationality for its citizens (*rule of law virtues*). Legal-democratic institutional normality requires rationality in public choices, eliminating "all arbitrariness in the activity of decision-makers" (Bronze 2012, 15). Disrupture of this order characterizes a regime of exception, without the possibility of *accountability*, in which the Powers become masters of themselves.

Irrational decisions dethrone core values of the Rule of Law, turning fundamental rights and guarantees into mere empty declarations. And the

[51] KANT undated, 43.

[52] For Kant, space would be a condition of possibility for external phenomena. Both consist of pure *a priori* intuition, not a concept (Kant undated, 45-46; 51).

[53] The question of fact involves determining the legal relevance of the concrete situation and proving the elements and effects of this relevance. The question of law, on the other hand, is distinguished in terms of abstract and concrete law (Neves 1993, 165).

citizen reduces the condition of slave of another's will, in flagrante *capitis diminutio*.

In the application of interpretive openings and limits, among the countless possible alternatives, one of them cannot be admitted: the one that does not fulfill the assumptions of time and space. The decision will be legally irrational when it retroacts to create obligations for people outside the legal (jurisprudential) or contractually defined hypotheses.

3. In search of a judicial rationality: *interpretative beacons* – a contribution

There is a plurality of rationality discourses. There is rationalization by outcome or political ideology; intersubjective rationality (practice–subject–subject); deconstructive rationality (Critical Legal Scholars); practical communitarian rationality (MacIntyre 1988); procedural rationality (Luhmann 1980); among others.

Some conceptions recognize intuition and its strength over logical reasoning, such as the Critical Legal Scholars that permit the open area judgment. Kennedy refers to the magistrate system, in which the solution is first defined and then elements to support it are sought in the system ("how I want to come out" - HIWTCO) (Linhares 2017, 39). The legal system is manipulated to fit the intuitive solution already found, attributing to the principles an ontological sense and validity of the legal system, although there is no explicit defense of the superimposition of intuition over the rationality.

Therefore, the question arises about how to guarantee the rationality of judicial decisions. Two conceptions present themselves. Those of a positive character, highlighting the models of Dworkin and Neves, finding legal rationality in the rigorous use of legal materials. And those of a negative character, object of this work.

Assuming the coexistence of rationally justifiable and, therefore, correct solutions, this paper intends to develop a proposal to exclude the incorrect answer, characterized as such when the *interpretative beacons* are exceeded.

The *interpretive beacons* are based on principles that can be compared to the light of a lighthouse: although it cannot be determined exactly what to follow, it serves to indicate when we are in the wrong direction. This is Cornell's position:

> A principle as I use it here is not a rule, at least not as a force that literally pulls us down the tracks and fully determines the act of interpretation. A principle is instead only a guiding light. It involves the appeal to and enrichment of the 'universal' within a particular nomos. We can think of a principle as the light that comes from the lighthouse, a light that guides us and prevents us from going in the wrong direction. A principle, however, cannot determine the exact route we must take in any particular case; it does not pretend that there is only one right answer. It can, however, serve to guide us, by indicating when we are going in the wrong direction. If a principle cannot give us one right answer, it can help us define what answers are wrong in the sense of being incompatible with its realization (Cornell 1992, 106).

The *interpretive beacons* work like this: they do not guarantee the correct answer, but they allow us to perceive when we are far from it.

As limits to interpretation, some principles overlap in the legal system, denoting a certain hierarchy. They are normative values and principles that serve as foundations-criteria for the realization of the law (Neves 1998, 155). The legal system is composed of strata, the first being formed by positive, transpositive and suprapositive principles.

The transpositive principles are associated with each specific dogmatic branch of law, such as criminal legality; private autonomy, and *res iudicata*. They include general clauses. They are part of the history of each branch of these rights and their suppression would undermine the Law itself. The suprapositive principles, on the other hand, are transversal to the entire domain of Law, being common to the domain of legality, ultimate principles associated with a constitutive dialectic of the person (Neves 1993, 71).

Two suprapositive principles stand out. One is predictability, embodied in legal certainty and non-retroactivity, related to time. And the other is alterity, denoting the right/obligation relationship of third parties, related to space. Both have the same axiological scaling as any other. They are fundamental pillars for the very existence of the Rule of Law, validating it.

The *interpretive guidelines* complement the interpretive control system. When respected, conclusions are rationally justifiable. Going beyond them, we have a legally irrational judgment that overflows the borders of the acceptable minimum.

For hard cases, abstract models – even if rational and logical – are unfeasible, as they do not cover the complexity of the case and completeness of the elements to be considered. However, such models are valid to exclude legally irrational conclusions, whose manipulation of legal materials proves to be arbitrary.

The *guidelines* are normative factors, found in the hierarchy of the system itself, which is sought to be argued in this work. They are not absolute and may yield to the defense of the Rule of Law itself. They become flexible in situations where their application puts the Rule of Law in jeopardy. It is a contradiction: the Rule of Law is relativized in order to preserve it. It would be self-defense. A part is sacrificed to preserve the whole.

Two *interpretative beacons* establish interpretative limits outside of which there is no legal rationality, but within which it is possible. They are time and space.

Take the case of "wrongful birth"[54]. This is a hard case, without express legal discipline, in which antagonistic decisions can be considered correct. Judging the claim valid or unfounded may be rationally justifiable, no matter how strange it may seem to the jurisdictional, whose legal uncertainty forms the scenario of an authentic Kafkanian process.

The Portuguese Supreme Court of Justice has judged the issue on three occasions. The first in 2001 (unanimous result)[55], decided that non-existence of the right to non-life. The second in 2013 (by majority)[56], in which Judge Pires de Rosa gave a dissenting opinion, supporting the right to non-existence. And in 2015[57], there was overruling, understanding that there is a "parents" ability to terminate the pregnancy and prevent its birth.

[54] It is one of the types of wrongful actions, alongside wrongful conception and wrongul life, in which the right to "non-existence" is discussed.

[55] Supreme Court of Justice, Process 01A1008, 1st Section, Rapporteur Pinto Monteiro, unanimous, decision of 19/06/2001.

[56] Supreme Court of Justice, Review Appeal No. 9434/06.6TBMTS.P1.S1, Rapporteur Ana Paula Boularot, 7th Section, judgment of 01/17/2013, by majority. Source: http://www.dgsi.pt/jstj.nsf/954f0ce6ad9dd8b980256b5f003fa814/e657efc25ebbdf3b80257af7003ca979?OpenDocument&Highlight=0.9434, accessed on 04/19/2021.

[57] Supreme Court of Justice (Portugal), Process: 1212/08.4TBBCL.G2.S1, Rapporteur Heldes Roque, 1st. Section, unanimous judgment on 03/12/2015 (revised).

The following legal materials used in the judgments were: a) constitutional principles[58]; b) infraconstitutional legislation[59]; c) morality[60]; d) analogical judgments, referring to euthanasia and suicide[61]; e) "legislative vacuum", exercising the faculty of deciding as if it were a legislator (judge as a legislator) (Portuguese CC, art. 10.º, 3).

From the analysis of internal factors (the judge's attitude) and external factors (legal and institutional provisions and the Portuguese legal environment), it can be seen that no political agenda was sought. The interpreter used elements of the normative system itself. The diversity of understanding is possible, given the indetermination, which does not mean that there is *a priori* irrationality. Therefore, the *mediator-judge* model prevailed.

In the three situations in which the issue was judged, it can be said that there was rationality, from the perspective of jurisprudentialism. Thus, there were three correct answers for the same case, although different from each other.

In particular, in the last judgment (2015) it appears that there was a change in case law to recognize the obligation to compensate the person causing the damage (doctor/laboratory), undermining the legal categories based on space and time, associated with the *rule of law virtues* (predictability and stability).

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[58] In the case of 2015, it was reasoned: "In this case, it is important to know whether the granting of compensation in these specific circumstances, the disabled birth of the minor perpetrator, constitutes legally reparable damage in view of our legal system, thus reaching the conclusion that after all, there may be a "right to non-life", which would jeopardize constitutional principles cf. art. 1, 24 and 25 of the CRP regarding the protection of the dignity, inviolability and integrity of human life, whether in terms of «being» or «non-being»" (Lisbon Court of Appeal, Process: 2101-11.0TVLSB .L1-8, Rapporteur Catarina Arêlo Manso, unanimous decision on 04/30/2015 (Appeal partially upheld).

[59] Portuguese Penal Code, art. 142, 1, "c": "1- It is not punishable to terminate a pregnancy carried out by a doctor, or under his direction, in an official or officially recognized health establishment and with the consent of the pregnant woman, when: (...)

[c)] There are solid reasons to foresee that the unborn child will suffer, in an incurable way, from a serious illness or congenital malformation, and it is carried out in the first 24 weeks of pregnancy, with the exception of situations of non-viable fetuses, in which case the interruption may be practiced at all times;".

[60] In the case of Becker v. Schwartz, the New York Court of Appeals ruled that resolving the issue is a mystery best left to philosophers and theologians (Janowski 1988, 47). In Portugal, in the case of 2015, it was decided that: "In the theory of the "wrongful birth action", a "wrongful life action" is accumulated, this one is rejected *in limine* because it is considered inadmissible the compensation for the personal damage of having been born (...)".

[61] "(...) and would lead us to question other parallel situations such as euthanasia and suicide, which would have different readings, thus reaching the conclusion that after all there may be a "right to non-life" ", which would call into question the structural constitutional principles enshrined in articles 1, 24 and 25 of the CRPortuguese, with regard to the protection of the dignity, inviolability and integrity of human life, whether in terms of "being", or in terms of «not being»" (excerpt from the vote given in the case of 2013).

This is because the decision creates a retroactive obligation (to compensate) (since at the time of the facts, case law understood the absence of the right to non-existence and, consequently, the obligation to compensate).

These two legal values validate the legal order (Neves 1982, 247), intrinsically linked to the rule of law virtues. They are constitutive principles of the Rule of Law, appearing as elements of its conception and operation, and of existence requirements, without which arbitration progresses.

Space and time constitute a priori categories of the legal system. All internal relationships and interrelationships with other systems develop in a spatial environment, occupying fractions of time. The attributes of predictability and legal security allied with respect for otherness legitimize rational-legal power from a Weberian perspective. They are also the origin of several other principles, such as legality, impersonality, the prohibition of a judge or an exception court, among others.

The discretion that rejects such attributes touches the constitutive core of the Rule of Law, threatening its rational-legal foundation, by admitting *ad hoc* and *ad hominen* decisions. These are decisions that go back to a consolidated past, making the present insecure and the future unpredictable, by creating obligations for subjects without express legal provision.

The judge does not have a map to know if the path is correct. But it is possible to know when you are on the wrong path. The reference point where the dividing line between correct and incorrect interpretations is defined is a very complex issue, whose solution is beyond the scope of this work.

For the time being, a contribution is sought in the sense that, among other incorrect answers, one of the criteria for defining them is the model of interpretive beacons. A retroactive interpretation that establishes obligations or removes rights, as indicated in the 2015 precedent, will be considered incorrect.

Thus, the *rule of law virtues* materialize with respect to the two *interpretative beacons*: objective-temporal (irretroactivity) and subjective-spatial (alterity), explored below.

3.1. Objective-temporal *beacon*

The first *interpretative beacon* is time. The relationship between time and law is too complex.

Legal situations are consolidated in the past, protected against normative innovations, whether legal or jurisprudential. There are normative limits

that are related to the temporal dynamics (Neves 1998b), such as the obsolescence of laws that arise in full and later lose their validity. These limits are assimilated by the criteria and foundations of the system, being linked to principles and subject to weighting.

In another sense, time also correlates with legal certainty, predictability, stability, business prosperity, family, social, business and administrative organization. Citizens cannot be surprised by a new regulation without having the opportunity to adapt to its command. For the same reason, a new interpretation or a new precedent must submit to the same principle. It is a basic element of the social contract.

The principle of legal certainty has three dimensions: stability of legal relations, predictability of state action and risk reduction (Canotilho, Mendes, Sarlet, Streck 2013, 231). It consists of the foundation of the power of rulers to found and create the law (Miranda 2005, 137).

If rules are created to govern past situations, there is no social peace or common good. The breakdown of this element undermines the very confidence of the State. The non-retroactive application of rules (normative, jurisdictional and administrative), is an objective requirement for validating the Rule of Law, related to the temporal aspect (Portuguese Civil Code, article 12). According to Canotilho (2003, 257):

> Man needs security to conduct, plan and shape his life autonomously and responsibly. For this reason, the principles of legal certainty and the protection of trust were considered from an early age as constitutive elements of the rule of law.
> (…)
> The **general principle of legal certainty** in a broad sense (covering, therefore, the idea of protection of trust) can be formulated as follows: the individual has the right to be able to trust that his acts or public decisions affect his rights, positions or legal relationships based on legal norms in force and valid by these legal acts left by the authorities based on these norms are linked to the legal effects specified and prescribed in the legal system.

Legal interpretation is limited by legal certainty. This is an *objective-temporal interpretive beacon*. As a supra-positive principle, it applies to criminal, tax and civil law, prohibiting, respectively, criminal classification, the

imposition of taxes and the creation of obligations based on past facts. The legally provided exceptions benefit the party, never hurting it.

The effects of the past cannot simply be erased or disregarded by a court decision. Judgment can apply to past facts, reaching its effects. But it cannot innovate, establishing that the party should have acted in a certain way, without normative clarity. The requirement of predictability requires that the rules in force at the time of the facts be applied. Irretroactivity consists of a timeless and universal principle[62].

This *ex-post-facto* clause is a guarantee of "fair warning" to individuals, restricting "governmental power" and "potentially vindictive arbitrary legislation"[63]; otherwise, basic principles of justice[64] and due process (Fuller 1964, 52) are offended. The application of the law in force at the time of the facts is meant to "to achieve the just result in the case in question"[65]. Individuals have the right to choose whether or not to behave in accordance with the laws[66].

When laws are created, people create expectations about the possible return given by the legal system to their actions. Retroactivity disturbs such expectations and actions, being "rarely defensible" and violates the "Rule of Law, that is, people's right to guide their behavior by previously and publicly established impartial rules. This violation undermines human autonomy by hampering people's ability to formulate plans and carry them out with respect for the rights of others" (Munzer 1982).

Although recognizing the difficulty in establishing absolutely untouchable *interpretative beacons*, their non-observance is only admitted in extremely exceptional cases, duly justified in situations of institutional abnormality. Its flexibility is only possible in the face of the defense of the Rule of Law itself.

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[62] The American Supreme Court decided that: "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal" (USA, Landgraf v. USI Film Prods. (92-757), 511 US 244 (1994).

[63] USA, Weaver v. Graham (1981) Supreme Court of the United States.

[64] As stated by Hart: "Dworkin makes another charge that judicial law-making is unjust and condemns it as a form of retroactive legislation or *ex post facto* law-making, which is, of course, regarded general, as unjust". Hart rejects such an objection for hard cases, "since these are cases which the law has left incompletely regulated and in which there is no known, clearly established state of law that justifies expectations" (Hart 2007, 339 – free translation).

[65] In the original: "Applying decision-time law on the 'right answer' conception is simply reaching the just result in the case at hand" (Roosevelt 1991).

[66] Mann, Patricia 2007. The American Constitution provides that no state may enact any ex post facto legislative act or law that impairs contractual obligations (US CONST, art. I, § 10).

Otherwise, the greater the weighting of moral and political principles, the less predictability, which leads to a sea of vagueness about these principles, opening to the infiltration of subjective elements.

Even in hard cases, the magistrate cannot "invent rights retroactively"[67]. Even less can obligations be invented retroactively.

Retroactivity is possible in some cases. Annulment actions, as well as decisions on constitutionality control, are intrinsically retroactive, deconstructing past situations. That's not what this is about. The object of the *interpretative beacon* of an objective-temporal character concerns the interpretation carried out in hard cases, whose normatization *in concrete* cannot burden the party or third parties.

In other words, retroactivity that burdens the party in a surprising and unpredictable way cannot be admitted. Otherwise, retroactive interpretation is possible, provided that no obligations are created for the party. Thus, for example, the judgment that the construction of a building in a certain area needs a specific environmental document is a valid one. It can be demanded from new builders and from those who have already built, as long as they are not punished for not having it previously (the obligation was non-existent).

In Hart (2007, 91), the impossibility of retroactivity affects primary norms more intensely than secondary norms. Primary norms concern the norms that govern rights, obligations, faculties, burdens, duties and other conduct of people. Secondary norms, on the other hand, have as object the norms themselves, establishing criteria for validity, effectiveness, application and interpretation of other norms.

With these premises defined, it would be possible to recognize retroactive homosexual marriage[68], since it involves primary rules of interest restricted to the parties, without encumbering third parties.

The solution of hard cases cannot retroact to harm third parties, due to the requirement of legal certainty, which is inevitable in the Rule of Law. However, when burdening no one, such a rule becomes flexible in view of

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[67] In Dworkin's words: "The judge still has the duty, even in hard cases, to find out what the rights of the parties are, and not to invent new rights retroactively" (Dworkin 2007, 128).

[68] Beswick 2020, 280. As another illustrative example, the author of this work, in the position of judge of the Court of Justice of the State of Roraima, upheld the request for rectification of the civil birth registration, authorizing the change of name of the party, including with retroactive effects for possible alteration of documents, such as the documents already produced (Brazil, TJRR, Judicial District of Boa Vista, 5th Civil Court, Process nº 0836886-31.2014.8.23.0010, sentence handed down on 04/25/2017).

the possible weighghing of principles in the case, leaving the courts to look "at the previous history of the rule in question, its purpose and effect"[69].

3.2. *Subjective-spatial beacon* (alterity)

In addition to the *objective-temporal interpretative beacon* (irretroactivity), there is the *subjective-spatial* (alterity).

This second guideline concerns the restriction of a subjective right, forbidding the one under a given jurisdiction to be surprised by normative innovations imposing a legal burden on it. People cannot be affected by interpretations, even less when they create obligations, burdens, responsibilities or any negative impact on the legal personality.

The interpretative limits have in perspective the man (microscopic) as the center of the legal order (axiological anthropology), recognizing his rights and duties, which cannot be arbitrarily imposed.

The relationship between subjects occurs in a given legal space. It is the environment in which objects influence the subject (Kant undated, 48). In this space, legal relationships are also formed and materialized, consisting of rights and duties. This *locus* is society, both the subject and the object of law.

Once reason is established as a Weberian instrument of domination, duties can only be attributed with transparency, predictability and honesty. At stake is the "*requirement of a foundation* for all claims that in intersubjectivity and in coexistence I address to others and that others address to me" (Neves 1998b, 33). Such rationality removes the imposition "of the mere will, power or prepotency of any of these members, but justifiable by their relative positions in this unit or common member. A normative meaning, in a word, that imposes a superior and independent justification of the simply individual positions of each one and that, as such, simultaneously and equally binds the members of the relationship" (Neves 1998, 78).

The postulate of the *ethical subject* "can only admit any position or claim with *validity*: with a foundation that does not detract from and rather satisfies dignity and equality, which before these validly justifies the position or claim" (Neves 1998b, 34). Therefore, otherness, seen as the possibility of reaching the other, depends on a foundation of validity to assign responsi-

[69] Chevron Oil Co. v. Huson, 404 US 97 (1971) and American Trucking Assn's v. Smith, 496 US 167, 179–86 (1990).

bilities, duties and obligations, and the Law cannot serve "as a mere social instrument of rationalization and satisfaction of interests or political-social objectives" (Neves 1998b, 34).

One's right ends where the other's right begins. This is a golden rule used in different contexts. John Stuart Mill holds that the actions of individuals should be limited only to prevent harm to other individuals (Mill 2003, 139). Former US Supreme Court Justice Oliver Wendel Holmes Jr. famously said: "my right to move my fist ends where your chin begins". This rule defines spatial limits to rights, with respect to alterity. What is right for one may not be right for another. Two rights cannot occupy the same space, although they can be reconciled/combined into a common denominator.

The legal personality consists of the spatial circumscription for the exercise of rights and obligations, conferred by the legal system. A clear, predictable, stable legal system is a prerequisite for validating the Rule of Law[70]. And this space is a limitation to the interpretative discretion, mainly in the examination of hard cases.

In exercising discretion, the magistrate cannot create obligations, responsibilities, burdens or any other kind of negative impact on the individual rights. The Rule of Law presupposes obligations only under legal provision, including in the sense of laying down what one can (should) or cannot do. You can reject the postulation of improving your legal situation, but you cannot make it worse.

One cannot lose sight of the fact that a Democratic State presupposes the observance of majority rule, in general. And that majority is manifested through the appropriate institutional channels. When the Judiciary exceeds the interpretative limits, it goes beyond its attributions, usurping the functions of the other powers, breaking the democratic supremacy. It attacks the Rule of Law and attacks what it should defend: legal and institutional normality.

The first two precedents of the Supreme Court Portuguese (2001 and 2013) about *wrongful birth* are in accordance with this limitation, as the claim was dismissed, denying the right to compensation. In other words, the *status quo* has not changed.

[70] "The World Justice Project" defines four universal principles in the construction of a concept of the rule of law, among which the following stand out: "2) clear, stable, public and fair laws that protect fundamental rights and guarantees" (Botero, Ponce 2011, 5).

In the case judged in 2015, the obligation to pay compensation was imposed on the doctor and the clinic, without there being a clear law on the issue. A new rule was created, in an unpredictable way, regulating legal situations that had already occurred, going beyond the limits of interpretative discretion. The coherence of the legal system was violated, creating responsibilities without the party being able to anticipate such a result.

In these judgments, the *judge-mediator* model prevailed. The way to solution the case was based on the dialectic between the system, with the handling of legal materials, and the problem presented (concrete case).

The relationship between individuals in a society is based on trust (Kronman 2009, 192) and in the pursuit of the common good. Aristotelian ethics is based on otherness and the right to a rational, predictable, institutionalized system that prevents the creation of irrational, unpredictable obligations by informal means. If there is a right to an orderly, rational, predictable system based on trust, there is no duty to act contrary to these dictates.

Even if Posner's pragmatic realism is used, the same criterion of protection of the right of the party is valid as an interpretative limit, with the use of the Pareto optimum:

> For POSNER, the challenge is fulfilled by specifying-overcoming the PARETO model (Pareto optimality/Pareto superiority), a model that, as we know, teaches us to recognize that a state P is superior to another state Q, if and only if, when verifying the transformation from P to Q, no individual is worse off than before and it is verified that at least one of them improves their situation (according to their own conception of well-being).
>
> As expected, exploiting the step offered by Nicholas KALDOR and John HICKS (Kaldor–Hicks efficiency) and their principle of potential compensation ("There are always winners and losers, a state of affairs is superior to another if the result of the transformation that connects them translates into a social compensation of the losers by the winners») (Linhares 2012, 23).

A state of affairs is superior to another when no individual is worse off than before and it is found that at least one of them, according to his own conception of well-being, improves his situation, according to the Pareto optimum.

In summary: the *subjective-spatial beacon* establishes a material requirement and another of a formal-procedural character. From a formal-procedural point of view, when judging a hard case, the parties are assured of the principles of contradictory and full defense. The argument of the other must be considered in the judicial decision. In addition, from a substantive point of view, the interpretation given to the merits of the controversy will be limited by the impossibility of creating retroactive obligations.

4. Conclusion

This paper makes a contribution to legal methodology, in the search for interpretative limits to judicial discretion. Among the different answers found by the interpreter/judge, a model of exclusion of incorrect answers is suggested, in view of their legal irrationality.

Rationality presupposes a legal system based on trust, predictability, and intersubjectivity. Emotional excesses and obscure criteria compose a scenario of arbitrariness. There are virtues to be respected in the Rule of Law (*rule of law virtues*).

Legal interpretation must be rational, developing within the interpretive openings and limits set in each legal system, based on the bundling of internal factors (related to the judge/interpreter) and external factors (related to the environment).

In the different legal systems, the preponderance of some or other factors can give rise to three types of judges: *officials, activists* and *mediators*. Each species does not necessarily represent a legal system and can even be found in the same court. Or the same judge embodying one representation or another, depending on the case or his state of mind (Dworkin 2011, 149).

In recent decades, many judges have exacerbated their interpretive role, as *activist judges* reportedly do, even for the easy cases. They have this tendency to grant themselves greater interpretative amplitudes, resulting in irrational decisions. Even official judges are faced with such breadth in hard cases. There is a need to discuss their limits. As a contribution, this work conceives the model of *interpretive beacons*.

The *interpretative beacons* are interpretative limits related to the supra-positive principles of Neves (1982), despite his rejection of abstract models

of interpretative legitimacy[71]. The beacons guide the interpreter's activity, within which several decision-making models can be used in search of the correct answer that is legally rational, even if more than one is admitted. However, outside of those beacons, rationality is violated, fulminating the judicial decision.

There are two *interpretive beacons*. Space and time are prerequisites for a legally rational conclusion. Both concepts are used under the objective and subjective aspects, respectively.

First, the *objective-temporal interpretative beacon* consists in limiting the interpreter's ability to consider the time factor, without the retroactivity of the innovative and unpredictable conclusion. On the other hand, the *subjective-spatial guideline* refers to the *locus* in which legal relations are developed, through legal relations between people.

This study sought to determine whether the *interpretative beacons* seen under the binomial[72] *objective-temporal* and *subjective-spatial* can serve (and, if so, in what dimension) as guarantee limits of legal rationality. We have concluded that this concept can be used in a complementary way to juridicist proposals.

The methods of Dworkin (argument of principles) and Neves (methodological scheme) are affirmative conceptions about how cases should be decided. The jurisprudentialist model was accepted, as it admits the multiplicity of correct answers, unlike the Dworkian "correct answer" model. The proposal of *interpretative beacons* intends to remove certain answers that violate the interpretative limits represented in the *objective-temporal* and *subjective-spatial* aspects. That's why it's a negative conception, demonstrating the borders outside which the decision suffers from irrationality.

The "easy cases / hard cases" binomial was adopted, as the decision-making method for each one of them was considered different. Many easy cases can be solved with the formalist method, with the subsumption of the fact to the norm, without permission for discretion, although *activist judges* exercise it in these situations.

[71] Castanheira Neves rejects abstract models of interpretative legitimation, arguing that the "foundation of legitimacy cannot itself be simply formal: legitimation always summons a presupposed material intention that is, indirectly or ultimately, also a foundation of validity" (Neves, 1982, 212 – free translation). However, it understands that it is possible to establish supra and transpositive interpretative limits.

[72] The word "binomial" is used with the meaning of complementation and not of opposition. The two beacons complement each other.

As for hard cases, even *official judges* will be faced with the interpretive windows through which the interpreter is legitimated to act, with the manipulation of legal materials. In this work, the juridicist proposal is adopted for the solution of hard cases, rejecting authentic discretion, understood as the handling of non-legal criteria to issue decisions in open areas.

The premises of jurisprudentialism are accepted, in the sense that the interpretative limits have in perspective the man (microscopic) as the center of the legal system (axiological anthropology), recognizing his rights and duties, not being able to impute them arbitrarily. And that the solution of the concrete case is based on the practical-legal rationality resulting from the "dialectic between system and problem in a judicial objective of normative realization" (Neves 1998b, 37), different from logical-deductive and instrumental-strategic rationales (Linhares 2010, 450).

The beacons model intends to be a contribution to this system, defining borders outside which the legal conclusion is understood as legally irrational, for violating fundamental pillars of law. It conceives them as interpretative limits through the *exclusion method*.

In the analysis of the three judgments of the Portuguese Supreme Court of Justice about wrongful birth, from the perspective of jurisprudentialism, there was rationality. There were three correct, although different, answers for the same case.

However, in the last of these judgments (2015) it appears that there was a change in case law to recognize the obligation to compensate the person causing the damage (doctor/laboratory), undermining the legal categories based on space and time, associated with the rule of law virtues (predictability and stability). This is because the decision creates a retroactive obligation (to compensate) (at the time of the facts, jurisprudence understood the legality of the act). This last judgment is considered irrational from the perspective of the interpretative guidelines, due to the discretion disregarding the attributes of predictability and legal security allied with respect for alterity, legitimizing the rational-legal power in the Weberian perspective, core elements of the Rule of Law.

The assumption of anthropological centrality is incompatible with the situations fictionally mentioned by Kafka but encountered in reality. The Rule of Law will be shattered if someday the person under jurisdiction hears something like: "I can't tell you, I can't tell you at all, that you are accused, or, to put it better, I don't know if you are. What is certain is that you are under arrest. This is all I know" (Kafka 1982, 17).

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Author Guidelines

1
Articles must be submitted in English.

2
Articles must contain up to 50.000 characters, including spaces and footnotes (excluding the bibliography), and must be preceded by up to 10 keywords and an abstract ("summary") with a maximum of 300 characters, including spaces, in which it should be easily recognizable the purpose, originality and relevance of the article and the research it presupposes. Footnotes should not exceed 300 characters.

3
Articles are submitted to a double-blind peer review procedure. Therefore, the texts must not contain any mention allowing the personal or professional identification of the author.

4
Articles must be submitted in Word format (.doc/.docx), inTimes New Roman, 12, with footnotes in Times New Roman, 10.

5
The texts should be single spaced; italics should be used instead of underlining (except for URL addresses); citations, figures and tables shall be inserted into the text, not at the end of the document as attachments; authors must consider and are responsible by all copyright law concerning the article, including figures and tables; the bibliographic citations and references must conform to the styles provided by APA Standards (American Psychological Association);

6
The articles shall be original and unpublished and shall not be simultaneously under review or waiting for publication by another publication.

7
Whilst submitting the articles, the authors shall introduce their identification (full name, affiliations, e-mail), the year when the article was written and the title of the article. ORCID identification is also highly recommended.

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