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Iconomy: Law and its Representation

1. Iconomy: representation and thought

Aesthetic of law is a subject that can be investigated from several points of view; it is a way of approaching law, which is not easily drained, nor limited to a unitary definition.

As far as I am concerned, I intensely pursued aesthetic of law with reference to the form *in* and *of* law: such formativity that Luigi Pareyson's aesthetic allowed me to find, both in law and in his life.

However, in this occasion, I would like to evoke that kind of itinerary[2] and in doing so, I prefer to choose another perspective: by using the adjacent and parallel road of representation that brings to the thought, to the idea that lays behind. Albeit immediately warning that I will just limit myself to point out suggestions, more than anything else, by summarizing this with iconomy: *nomos* through representation, *immago*.

An etymological observation, to me, appears to be immediately suggestive: the word *icon*, which is the root for the word *iconomy*, derives from Greek εἰκών-όνος and its perfect infinitive *εἴκέναι* means *to be similar* – so that by thinking about the manhood as made in the image of God (*immago Dei*), i.e. being *similar* to God – but it also means *to appear*. And *εἰκόνα* means, therefore, *image*.

Iconomy is, then, a neologism that I propose in the meaning of a reflection on the perception of image, on the representation of law[3].

But why this choice? For sure, I acknowledge the structural formativity and aesthetic of law traced by Pareyson, but I also refer to my old love for icons, and to my old passion for images and works of art on law. Interests, those ones, that are even reinforced and, in a certain way, also rediscovered, thanks to a recent contribution by Peter Goodrich, *Visiocracy. On the future of legal emblems*[4].

In his study, Goodrich begins with an experiment, which took place at New York University, aiming at analyzing the influence of the situation, intended as the

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2 I briefly recapped the itinerary in the recent paper *Estetica del diritto. Formatività, morfologia ed ermeneutica della giuridicità* i.e. "Aesthetic of law. Formativity, morphology and hermeneutics of lawfulness" presented at the ISLL Congress *La vita nelle forme. Il diritto e le altre arti* (*Life in forms. Law and the other arts*). Urbino, July 3-4, 2014.

3 P. Heritier has been writing on this issue in the process of elaborating a sort of aesthetic of law inspired by Legendre and Di Robilant, *Estetica giuridica*, 2 vols. Giappichelli, Torino 2012.

4 The Italian translation, carried out by P. Heritier appeared in *Il diritto tra testo e immagine,* cured by C. Faralli, V. Gigliotti, P. Heritier, M.P. Mittica, Mimesis, Milano-Udine 2014, p. 15 ff.

physical scene, the location where actions take place, on the way of acting, and in particular by investigating it within the legal domain[5].

The outcome of this experiment was to find out that "in the theatre of justice and truth, something can be glimpsed by reason and taken to the written page". The result is not to be taken superficially, Goodrich himself has pointed out the essential questions: "What did the students see in the use of robes and official suites, or in the use of Latin, in elevations, in rites and emblems? Why did the noticeable ornaments and accidental elements of the judiciary presence did have an effect on their perception of the legal authority and on their comprehension of justice and trial?"[6].

It would seem that through those images, those symbolizations, the sense of law (meant as the weight of law) would be more present and pressing, and it would result more visible, and I could shorten it up by saying: *nomos* would be more present. *Present through image*.

Because, in the end, those symbolizations are external and formal elements: icons, images, representations; but what do they represent? Law, justice, *nomos*.

The theme for an iconomy is then caught. A sort of return of form in law, against the trivial synonymic reduction to formalism.

We are therefore moving towards a counter-modern direction, if I can say so[7]. In modernity we see the word/image separation taking place and becoming prominent (in law, but not only in law); the rational/perceptive separation (in law, but not only in law). And those two dichotomies that are brought about, are themselves generating and giving qualification both to law and aesthetic.

From one point of view, we can think to the idea of law, fomented by codification: "Law is everything: statute is the whole law", the legalism motto, the formalism[8]; *auctoritas non veritas facit legem*, so to speak with the words of Hobbes.

From the other, this brings to our minds the re-thinking of aesthetics that took place through recovering aisthesis[9], recovering sensibleness and location, *atmospherology*[10], just to quote Tonino Griffero.

Iconomy finds in those tracts its own premises. From thinking by definitions, according to the model of clear and distinct ideas, to "thinking by images", as I say to recall Vercellone and Breidbach[11].

5 In particular, some Law students, divided in two groups, were given a case to discuss: the first group was hosted in a courtroom and asked to follow procedural/ritual rules, the second one was invited to present the case in an informal setting and in a makeshift auditorium. The registered outcome was that the first group revealed itself more incline to respect authority, legitimacy and justice than the second one.

6 *Ibidem*, p. 17.

7 And with all the specifications and details that should be taken into account when considering the theme of modernity. See B.Romano, *Relazione e diritto tra moderno e postmonderno*, Giappichelli, Torino 2013. See also the proceedings of the Conference on *Mito moderno e modernità senza assoluto. I. L'altra filosofia*, cured by D. Cananzi, E. Rocca, Giappichelli, Torino 2014.

8 On the point it is still thoughtful and contemporary L. Lombardi Vallauri analysis in *Corso di filosofia del diritto*, Giuffrè, Milano 2007, p. 29 ff.

9 See the important contribution by M. Ferraris, *Estetica razionale*, Cortina, Milano 2011.

10 T. Grifffero, *Atmosferologia. Estetica degli spazi emozionali,* Laterza, Roma-Bari 2010.

11 Cf. F. Vercellone, O. Breidbach, *Pensare per immagini*, Mimesis, Udine 2010.

Because image is structurally defined, but it is not in itself a definition; it is fixed, but it cannot be fixed in one unique meaning.

Thinking by images, through iconomy, becomes a thinking not by definitions: and therefore, instead of the neverending (but in the end maybe also useless) progression of the several "what is it?", there is a different thinking, according to symbolization parameters.

I am deeply persuaded that Robert Jacob is right in observing that "*il ne suffit pas que justice soit rendue, il faut encore qu'elle donne à partager la convention qu'elle l'est. L'être et le pareître lui sont également indispensables*" (Engl. "*it is not enough that justice is made, it is also necessary that it is made to share the agreement that constitutes it. Being and appearing are equally and reciprocally required*"). And such operation iconomically not only restores the centrality of form and forms in law, but also it also makes it clear that a content, when deprived of a formal manifestation, is lacking one *substancial* meaningful aspect of law. Thus, Jacobs continues: "*l'institution qui n'aurait de la justice que les forms serait parodie, sans doute. Mais inversement, celle qui ne serait qu'effective, qui, tout en observant une éthique rigoreuse et sachant se faire obéir, négligerait les apparences, celle-là affaibilirait dangereusement la confiance qui fait venir à elle la demande et accepter ses decisions. Une justice qui ne réussit pas à passer pour telle manqué en quelque façon à sa mission de régulation sociale*"[12] (En. *the institution taking just the formalities of justice will undoubtedly be defined as parody. However, on the contrary, the effective one, which by rigorously observing ethics is just arrogantly asking for obedience, will disguise appearance and dangerously will abuse the confidence behind the act of recurring to justice and accepting its decisions. A justice that does not succeed in doing this would be somehow failing its mission of social regulation*).

Again, our iconomic question is back: on the representation of law and justice.

The perception of the one, the law, is a direct consequence of the perception of the other, justice. As it is generally known, there was a shift in the perception of justice – and thus of law – from divine to human. Justice as the goddess of traditional iconology, with her symbols: the sword and the scale is only one (but not the only one) image.

One crucial element is power. A sort of power coming from above, from supernatural: and therefore something which is received and not created, or, nevertheless, something that is not discretional and requires certain conditions.

Fig. 1 Detail of the frontispiece calcography signed "G. van der Gouwen sculpsit", from Vol. I of *Corpus juris civilis*, Editio nova, Amsterdam: sumptibus Societatis, 1681.

12 R. Jacob, *Immages de la justice*, Le Léopard d'Or, Paris 1994, p. 9.

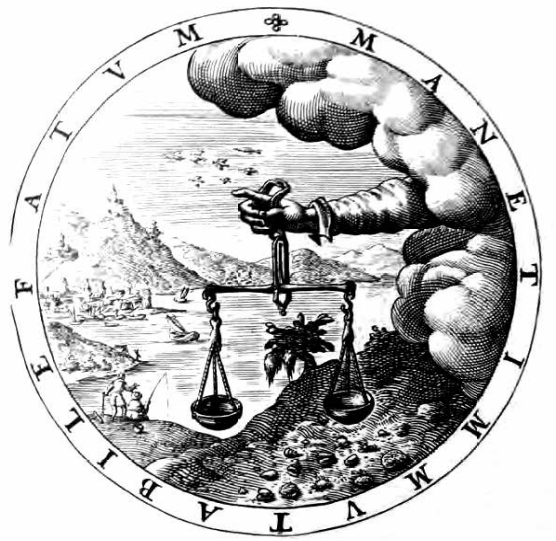

Fig. 2 G. Rollenhagen, *Nucleus emblematum selectissimorum* (Cologne: Jasonium, 1611) emblem 83. Image taken from P. Goodrich, *Legal Emblems and the Art of Law, Cambridge*, Cambridge Press, 2014, p. 18.

And this makes it clear that justice has always been represented as a goddess, as somehow supernatural in any case. Why, then, does someone have the power to act on others? By divine command, or, even better, by delegation, by designation.

Fig. 3 *Christ delegates spiritual and secular powers to the pope and to the emperor.* Decree of Gratianus with glossa by Barthélémy de Brescia. Image taken from R. Jacob, *Immages de la justice*, plate IV.

As this wonderful image shows, God delegates, exactly by giving the two swords, representing the two powers, both to the pope and to the emperor, which are therefore commonly bound by the same decree, the same very text. Another image taken from the Decree of Gratianus.

Fig. 4 Spiritual and secular powers invested by statute. Decree of Gratianus with glossa by Barthélémy de Brescia. Image taken from R. Jacob, *Immages de la justice*, plate I.

Justice then is secularized, highlighting the sings of its power, not related any more to divinity, but belonging to humanity, as a human business. That is how Giotto represents it in the Cappella degli Scrovegni: so much human to justify a specular representation of injustice.

Fig. 5 Giotto, *Justice*, 1306, Cappella degli Scrovegni, Padua.
Fig. 6 Giotto, *Injustice*, 1306, Cappella degli Scrovegni, Padua.

Human, overly human, so much human that it can be characterized by transforming its symbols in parody: as in the renown drawing by Brant.

Fig: 7 S. Brant, Xylography taken from *The ship of fools*, Basel, 1497.

Here, the veiled Justice appears to be actually blind and uselessly formal, made sightless to the real needs by a clown-demon.

The idea – even though mentioned by several authors[13] – of re-building the entire story of law through its representing images[14] would be very evocative; but it is not the journey I would like to take, at least, not in this time and place. It would certainly require to go way back in the past and to dig out in such direction.

I prefer, instead, to turn my eye to the future and offer some iconomic suggestions; to see what comes out for today's and tomorrow's law[15]. To do this means to work on the idea of Jacob: justice must also be perceived as such, and on the idea of Goodrich: on the infrastructure that *con-figures* justice.

Representation, form and formalization, in law act to let the foundations be perceivable, the foundations represented by the delegating authority in Fig. no.

13 Neither first, nor last, also F. Galgano *Le insidie del linguaggio giuridico. Saggio sulle metafore nel diritto,* Il Mulino, Bologna 2010.

14 On the issue, cf. P. Goodrich, *Legal Emblems and the Art of Law*, Cambridge, Cambridge Press 2014, forthcoming Italian translation by P. Heritier, Milano 2015.

15 Of particular interest, classical works, such as the studies by Cesare Ripa, on which recently see A. G. Conte, *Cesare Ripa. Icone della giustizia,* in "Rivista internazionale di filosofia del diritto", 2012, n. 1, p. 109 ff.

3. And the *foundation* lays in the light and it entails the light of equality, that light showing under the same law, the one detected in Fig. no. 4. And equality is exemplified by impartiality of justice, not arbitrary, nor contingent, which connects the non-disposability of Fig. no. 2 with the structure of Fig. no. 1.

And all these considerations compel us to meditate.

It has to make us ponder why the students of the first group at New York University felt more granted, more protected; they felt the weight of law more than the students of the other group.

However this poses again the issue of positive and natural law in aesthetic terms[16], i.e. if law and justice exist by nature or by haphazard.

2. Aesthetics (of representation) of law

Here we are, again, but under different terms. Not those naïve deriving from positivism, nor those from natural law.

In the end, the parody of justice by Brant, a natural law all consisting of form, with sword and scale, but unable to see, and, instead, fouled by reality and by the perception of reality, is easily associated to another parody, by Nast, which reproduces the ability of inventing reality, beyond the connection to facts, with what simply (and I do not say *naturally*) is. In a post-modern fashion and following the thesis "there are no facts, only interpretations"[17].

Fig. 8 T. Nast, Stamps for milk to children, instead of milk 1876.

16 In the same direction, see also P. Heritier, *Estetica giudirica*, vol. II, cit., p. 142 ff.
17 F. Nietzsche, *Frammenti postumi*, 1885-1897, fr. 7.

The creative and constitutive capacity, here becomes, paradoxically, totally arbitrary. In the parody there is a piece of paper saying "this is a cow, by the act of the congress", and another "this is a lot, by the act of the architect", and yet another "this is a cow, by the act of the artist", and so on. It is not surprising, then, that someone hands a paper saying "this is milk" to a puppet, that some other paper defines "a true baby by decision of Congress".

Thus "there are no facts, only interpretations" assumes a normative twist: everything can be constituted, according to the principle that establishes the most naïve positivistic relativism.

However, mind that *foundation, equality* and *impartiality*, the qualifying elements of law, are completely excluded in this case.

And it is not a coincidence that precisely Nash is mentioned in Paolo Di Lucia preface to Searle's book *Making the Social World*[18]. Therefore, constitutive statements receive a strong *caveat* and, by looking for a proper meaning, an important step in their definition was set[19].

Very shortly – perhaps too shortly, I am aware – I can conclude these iconomic divagations.

The terms of the issue are on the table.

Image is representation. Of what? It brings together what is *similar between…* being *similar to…*, and therefore in analogy; but so what?

Does the great question appears to be not in the definitional terms of *quid*? Or perhaps it lays in those investigative ones sounding like: is there truth in law and in justice?

Foundation, equality and impartiality, in reality, show the space for truth in law and justice.

Nowadays there is an increasing attitude to think that the moment of law without truth has come, because – it is observed – the whole possible power is in the hand of the human being and in his will[20]. Everything can be justified and normalized.

However, in this sense, is Nash *caveat* ignored or not? Is it the striking foolishness that Brand perpetuated or not?

A justice that measures with the scale and enforces itself with the sword, but taking out the truth, what does have it to say about law? What do we grasp of law and of justice if everything can be constituted?

Blind justice is an unfair justice, blind is a law that proceeds by thinking of values just because they are shared and not by considering that they are shared just because they are values. A merely constitutive statement appears to be pointless when it ignores any qualifying and specifying facts, as correctly pointed out by Filippo Vassalli: the law, he says, "ends up necessarily in stating itself by reasoning, rather than by commands"[21].

In the journey that here and now I'm trying to follow, rather briefly, I leave behind the great question about truth, and I limit myself to close my discourse on the

18 P. Di Lucia, "Le due costitutività in John Searle", in J. Searle, *Creare il mondo sociale. La struttura della civiltà umana*, Cortina, Milano 2010, p. XIII.

19 G. Carcaterra, *Le norme costitutive*, Giappichelli, Torino 2014.

20 Recently, on the issue, N. Irti, *Diritto senza verità*, Laterza, Roma-Bari 2011.

21 F. Vassalli, *Della tutela dei diritti*, Roma 2014, p. 3.

elements that have been forming it, which are also able to open up a way towards the truthful reading of lawfulness.

Law does not exist if it is not qualified by a specifying structure, therefore it also differentiates from what is not law (e.g. the arbitrary exercise of reason) and it justifies the quarrelling over unfair content (e.g. unconstitutionality, unlawfulness, illegality of a disposition).

What iconomy claims to argue are the characters of impartiality, equality and foundation, i.e. the characters of the *fundamental legal structure*, of the aesthetic structure of law.

In law, constitutive statement is in itself instituting.

The act of institution is always "in the name of…" – also according to the considerations by Pierre Legendre[22] – thus highlighting equality for all, grounded on impartiality and required by the foundation of law itself. Hence, on the basis of such "order" representing the idea of a third place, the place of a constant turning back to foundations: a problematic and inexhaustible issue.

Legal endeavor is so much structurally and substantially represented by this constant coming back to its foundation, by actualizing, realizing it and interpreting it. It is, creatively, as a "creating conformativity"[23], as the act of *constituting into morphological*.

Constitutive statement, in that iconomic sense, is representing the capacity of law to make justice.

However, such a standpoint does not mean that law constitutes justice, but rather that it constantly constitutes a solid reference back to foundations, as a sort of beginning that continuously gathers (also hermeneutically) sense.

And in doing so, it has its own procedures, which grant equality and third-point perspective, by taking out the foundation and giving it each time a new and different sense. According to a beginning that, thus, has no end, but rather a beginning that is never *ex nihilo*.

In such terms, it looks interesting to go back – just to conclusively operate a recall – that morphology drawn by Frosini and proficiently put under discussion both by Cotta and Carcaterra.

Not starting *ex nihilo* is, in fact, connected to coming back to foundations, that is what happens when it comes to constituting in law. But so what? The Norm of action is the answer that Frosini gives, recalling Capograssi.

"Law is not practicity – he writes – it is, of course, action, but an action that is given by a structure: it has, therefore, received a practical expression or definition; *such* behavior is lawful (due or permitted), as far as it is *conformed* to an original form (in an ideal sense, not chronological), to a structure; i.e., an action is lawful because it reflects a *forma agendi*, because it is modeled, configured, profiled *ab*

22 P. Legendre, *Leçons I*, Fayard, Paris1998; and also *Della società come Testo*, Giappichelli Torino 2005.

23 E. Paresce, *La genesi ideale del diritto*, Guffrè, Milano 1955, p. 67.

intra by this exemplar action, paradigm, prototype, which is defined, regulated and stated by law"[24].

Form, intended just like Frosini meant, as structure, is what gives the essence of legality to experience.

This is a particularly relevant point, because it is through this action of in-forming, i.e. putting in a form, that law shapes itself. As Cotta observes, 'the law constitutively states the legal form of mankind and his/her actions' "*Forma dat esse rei*" in the words of St. Thomas, based on Aristotle: form is what makes a being what it actually is. That is to say, in our case – Cotta concludes –that form *qualifies action,* and this is what makes it *legal*"[25].

Such an aspect, always according to Cotta, is the distinctive and specifying character of law, the *socionomic* trait (as he calls it) of *being-in-society*[26].

Exactly in those terms – and Carcaterra was one of the first authors to use the expression "formativity" for law – the "idea of a 'formative' capacity (not merely 'formal') of law with relations to its contents" starts taking place; an idea that always includes the formal, intended as the act of constituting: "forming is not just to adequate [the law] to the object, nor simply to ask and wait for the object to modify accordingly; it is the act itself of modifying it, of giving it a new character, of creating for it a new dimension of existence. Precisely this aspect does make the law as a form of empowering human action"[27].

To constitute: but how so? Without limits? Or in absolute terms?

What is demonstrated in law is that for human beings the act of forming and of constituting is certainly free, but freedom – for humanity – is not unlimited: it finds the non-contradiction principle, for instance; it finds the structure of law itself, which is qualified on what is non-disposable.

In such terms, formativity, i.e. the structure of law, bears already some implicit contents.

In such terms, an iconomy appears to be an interesting point of view on legal reality.

In the end, I could conclude that what is not convincing in Brandt and Nast hypotheses is to put the structure into brackets (foundation, equality, impartiality).

Legality finds in structures its own fundamental structure, which allows to constantly bring the question back to foundations, but always by starting from structure, from something that has already been said, fundamental for something that yet is to be said: always in the name of… in the name of the indisputability of truth, of the indisputability of justice. In such terms, we can avoid both Brand and Nast results (a real danger for today's and tomorrow's law), shocking cases of corruption in law and of de-formed form, and structure.

24 V. Frosini, *La struttura del diritto*, Giuffrè, Milano 1971, p. 33.
25 S. Cotta, *Primi orientamenti di filosofia del diritto*, Giappichelli, Torino 1966, p. 99.
26 *Ibidem*, pp. 130, 139.
27 G. Carcaterra, *Le norme constitutive*, cit. p. 70.

Correctly I can state with Jacob, "it will be convenient to invent new forms"[28] to try to build a concrete reality in the "dream of justice" of today and tomorrow; but this is exactly related to the constitution of a justice that is always to reveal itself, to be the object of research, development and of actualization; it does not touch the invariant structure that specifies and qualifies law.

The space of genesis for legality is increasing in possibilities and importance; and this means not to archive the issues of impartiality, foundations, and equality. Everything can be invented, decided, chosen, but these elements that constitutes the fundamental structure of law (in any time and place) will never be misunderstood, at the risk of loosing the specificity of law.

And such an epilogue would have a prerequisite: deforming law, and not respecting its iconomy.

28 R. Jacob, *Images de la justice*, cit. p. 246.