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# *Law's Practical Realization and the Challenges of Narration, Translation, Performance, and Imagination: A Symbolic Reassurance of "Juridical" Singularity?*

## 1. A moving territory: phantoms and re-imaginings

In order to make it possible to address some constitutive material aspects of the *methodological core* one can try to isolate and enhance within the microcosm(s) of contemporary law & literature and law & aesthetics proposals, it is necessary simultaneously to engage in a kind of resigned navigation over the turbulent deep sea of interdisciplinarity in which contemporary juridical discourse plunges, as a privileged example-experience in North-American context can teach us (Minda, 1995; Galanter & Edwards, 1997; Feldman, 2000). During her journey, the re-signed diver can only attempt to reach out, circumstantially "tame", and so connect validly (and temporarily) many itinerant voices representing the general quest for richer, "humanistic", and value-based lenses under which law's practical and cultural circumstance could potentially be re-elaborated and re-experienced.

This reinterpretation or even re-enactment of law's place is to be intentionally built from the reliance on the positive contribution of alternative systems for discourse and meaning, in an explicit and consistent refusal to corroborate the litany of exclusive "idioms" or "unitary languages" (Bakhtin, 1981, pp. 270-271), both the one that wakes the phantoms of known orthodoxies came from "the grave" of nineteenth century formalist thought[2], and the other that engages in a number of straight operating formulas or schemes for pragmatic action and goal-oriented thought that gradually "desertify" legal culture, thinking of law in terms of a bare means-to-an-end mindset, branched into a number of technocracies (Linhares, 2010, pp. 25-26; Neves, 2008, pp. 75-80 esp.; Ost & Kerckhove, 2000).

Once expanded beyond the narrowness of mechanical models of rationality (White, 1996, pp. 31-33 esp.), erupting the traditional paradigm Pierre Schlag once called "grid aesthetics"[3] (however not necessarily renouncing any form of juridically

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2 In explicit reference to Pierre Schlag's assertion that "[i]n fact, not only do the old forms rule from the grave, but much of their substance is still around as well" (Schlag 2002, 1068).

3 Despite referring more specifically to the context of what can be understood as a late "pre-realist" formalism traced in North-American scenario from the last decades of the 19th till the first two decades of 20th century, Schlag's reference to an aesthetics of "fixed entities" consisting in "bright-line rules, absolutist approaches, and categorical definitions", which would be followed by a "border control jurisprudence" (Schlag 2002, 1051, 1053, 1055-1070 esp.), can be easily ex-

driven *interiority* or *intent*), and, simultaneously, rejecting the "new grids" imposed to subjects and society in a *rational actors* world ruled by maximizing instincts and atomistic wills and interests[4], the law could be experienced, then, according to the aesthetic branch[5], within a more "colorful" and wide frame, making it possible to rethink the overall relationship between legal institutions and legal practices and those practices and institutions and the interpellant, questioning, demanding reality as well. The task of enhancing here a practical and methodological core component implies thus an exercise of both contention and expansion: by one side, the previous knowledge of the risks involved in intertwining particular itineraries traced by complex, singular, and, sometimes, internally opponent voices (such as the ones of James Boyd White, Costas Douzinas, Robin West, François Ost, Desmond Manderson…) commands an attitude of positive surveillance and self-restraint – as if every word chosen, as a particular decision, albeit illuminating a new path of its own, could automatically lead to darken, simultaneously, all the "external" surfaces around it, due to the very determinative, asserting power each choice contains; artificially freezing, as a consequence, what is essentially a moving, if not slippery, territory[6].

By the other side, though, the very constitutive expansion mentioned above, i.e., from the tight circle of a mechanical legal practice and way-of-life compressed into a "formulaic" impoverished rhetoric (White, 2009, p. 271) towards selected

tended, in general, to any formalistic classical conception, especially, of course, to the original European counterparts – the scientificism of both German conceptualism and French legalism.

4 "[…], a moment's reflection on the economist's basic analytical tool for studying markets will suggest the possibility of using economics more broadly. That tool is the assumption that people are rational maximizers of their satisfactions. […] If rationality is not confined to explicit market transactions but is a general and dominant characteristic of social behavior, then the conceptual apparatus constructed by generations of economists to explain market behavior can be used to explain nonmarket behavior as well"(Posner 1981, 1 ff., 60 ff.). See, additionally, Minda's summary on Posner's concertation between a "neopragmatic attitude" and the law-and-economics mindset (Minda 1995, 86-88). In contrast to Posner's position, see, for instance, Desmond Manderson's critical argument regarding the equivocal subjective model upon which the premise of law and economics scholarship is assented, which could be characterized as "an impoverished understanding of human motivation and meaning [that] explicitly eliminates the aesthetic dimension", in a way it is "too weak a currency to offer us any purchase"(Manderson 2000, 33), besides Boyd White's interdisciplinary critique – "[e]conomics cannot do what law does" (White 2008, 14); "One cannot do law in the language of economics, or economics in the language of the law" (White 2009, 272-ff.).

5 Except when specifically indicated (usually in association with specific authors to be nominated), the term *aesthetic(s)* will be employed henceforward in a broad sense, as a connection point between the various perspectives in current juridical thinking that (and despite possible inner specific complexities), being linked to a creative mindset and evoking a *certain kind* of sensorial input or *aisthesis*, or even a certain kind of artistic or literary-inspired rationality and/or sensibility, seek to irrigate the appointed common dryness in canonical juridical/legal experience.

6 About the correlative tensions, difficulties, and impossibilities regarding the intent(s) of "mapping" with "opaque lines" the contemporary overlaps in juridical thinking, see Linhares' diagnosis in "Jurisdição, Diferendo e "Área Aberta" – a caminho de uma "teoria" do direito como moldura?" and ""JuízoouDecisão"? Uma Interrogação Condutora no(s) Mapa(s) do Discurso Jurídico Contemporâneo", in (Linhares 2009, Linhares 2016).

disruptive or expansive punctual *inputs*, seems to conduct as a natural corollary a parallel impulse to expand, if not to subvert, the limits of localized perspectives, testing, at the same time, the very limits of *this* discourse, till the temptation of a crossing dialogue deliberately designed in a transparent, dynamic, and *overlapping* attitude (Linhares, 2016, pp. 227-229). A dialogue, in fact, in which singular voices can be in some level abstracted from the specific slot they occupy in that microcosm to be intertwined and analyzed dynamically around the practical aspect to which they somehow seem to converge, insofar they insistently emphasize the importance of singularity and presuppose the notion that law is only real – being a part of the world of living – when it can be tested and confirmed against experience (there is no ideal abstract normative universe, either transcendent or immanent, naturally given or artificially conceived, out there to call for). A presumption that is far from being new, since it immediately brings back, even that transversely and superficially, some notes surrounding the extensive, intricate debate about the possible foundations of legal orders, traditionally polarized over the discussion of naturalism vs positivism, which is normally simplified according to a basic conception of the "ought" vs "is" normative dilemma.

However, the kind of questioning about law's grounds or even the "true" source of their validity and authority that is designed in the "artistic cluster" escapes the limited discursive frame that shapes the ways those two traditional answers, naturalism and positivism, are typically conceived[7]. Rather, generically assuming the overcoming of a pre-modern belief in meta-referential orders inhabited by fixed and stable objects, and dealing with the deep issue about the "possibility of law in a culture that has ceased to believe in foundations" (Douzinas, Goodrich, & Hachamovitch, 1994, p. 27), the focus is turned to the spectrum of relationship(s) between positive law or ius positum, with the institutions it designs or are designed by it, or the "law itself" ("the law of law"[8]), and the long thread of multiple intervener ambiances and contexts it circumscribes.

In a way that presupposing, as a common opponent, the prevalence of a worn out image of the rule of law – a rule of law conceived as an object or apparatus that exists as it is, placed in a concrete time and circumstance and usually perceived in its formal character, as a "law of rules" (Douzinas & Warrington, 1994, p. 4; Douzinas & Gearey, 2005, p. 7) to be "extended" as far as possible, summarizing here Scalia's famous formulation (Scalia, 1989, p. 1187), favoring generality against particularity, or, additionally, as a fixed skeleton of institutions[9]

7 As an example, one can look at Manderson's characterization of "polarity" as "not only an anti-positivist theory of law, but equally, and, despite many assertions to the contrary, an anti-transcendental one" (Manderson 2012c, 477).

8 In a direct reference to Douzinas' and Gearey's appointed object for a "general jurisprudence", i.e., "a much wider concept of legality" preoccupied with "[…] the legal aspects of social reproduction both within and without state law" (Douzinas and Gearey 2005, 10).

9 "[…] the law is not imagined as a set of existing institutions that can simply be described and evaluated, as if they exist always the same, for they are themselves constantly being created and recreated by judges and lawyers in the way in which they think and argue" (White 2008, 16).

acting upon a conveniently filtered "reality" (whose "gist" results from "the modern concept of legality par excellence" (Douzinas & Warrington, 1991a, p. 137; 1994, p. 151) in an authoritarian declarative way –, and claiming for an ethical and aesthetical recovery contemporary enough to leave behind outdated echoes of a timeless time, what is left is the pursuit of better forms to look at that rather caricatural image ultimately aiming to restore or replace it; a recovery that, concentrated in the realm of legal theory, seems to inspire a discourse of updated resurrection of alternative "phantoms"[10], experiences or expressions of law scared off by Modernity in the name of a complementary discourse of symbolic "critical" pluralism[11].

Therefore, it is not a matter of simply criticizing rule of law's precarious image or drawing up a list of law's faulty bases in order to promptly reject them without further ado, but, instead, all criticism and erosion seems to function, by essence, as tools for looking ahead and carving positive escapes, defying (and potentially altering) the paradigmatic hegemonic culture(s) and community(ies) that continually keep molding the law according to a "limited imagination of evidence and procedure" (Douzinas & Warrington, 1991a, p. 137) or to a "dominant" or "reining interpretation" of "legal justice" based on the "three legalistic ideals" of an "internal logic, or coherence, and an external vision" (West, 2003, p. 3). All in order to uncover, finally, possible best sights of law's heteronomous presence, as if it would be the case to oppose adverse images to rule of law's idyllic lost or false "paradise", whether able to enliven, re-imagine[12] or reconstruct the old bases in different grounds (West, 2003, p. 4); in a way or another, picturing the experiencing of law either as an inclusive "culture of argument" or "a set of people talking" (White, 1990, pp. 36, 47), a place for "more generous [normative] re-imaginings" (West, 2003, p. 9; West, 2011a), for the fertile tension caused by a defended "alternative "polarity"" capable of embracing contradiction (Manderson, 2012c, p. 476), or even, going further in the direction of a more openly disruptive posture, and (also) in line with key features of postmodern discourse, as a crusher weapon over difference that repels and smothers true "ethical responsibility" (Douzinas & Warrington, 1994, pp. 132-185), in extremis taking the possibility of a foundation itself, as an autonomous source of meaning and a sacred place to return to, as "an indispensable part of the fantasy of theory" (Douzinas, Goodrich, & Hachamovitch, 1994, p. 28), just another cultural myth (Douzinas & Warrington, 1994, pp.

10 "A general jurisprudence aims to bring back into the picture those other aspects of the legality of existence – aesthetic, ethical and material – which are absolutely crucial to social reproduction. By reminding us that writers and artists have legislated, while philosophers and lawyers (some celebrated, others forgotten) have spoken poetically, we suggest the possibility of new ways of thinking and living the law" (Douzinas and Gearey 2005, 34).

11 "Respect for aesthetics demands a certain kind of theory of law which I have summed up as critical and pluralist" (Manderson 2000, 200).

12 "The rule of law, thus re-imagined, is not the outcome of a foundation but a process of continually challenging them; it is governed by reasons but not reason; it offers a discourse by which the law learns and not a declaration by which it instructs" (Manderson 2010, 516).

172, 195; Douzinas & Warrington, 1991b, pp. 129-130; Goodrich, 1994, pp. 134-135) ("[p]aradise has not been lost. […] It never existed" (Manderson, 2012c, p. 499), or fiction[13]. At the end, only this artificial nature of law (Ost & Kerckhove, 1999, p. 161) seems to emerge as out of doubt.

## 2. Performance, Justice, Judgment

To the extent such posture demands an active and flexible comprehension of the communicative, dialectical and dialogical universe within the legal phenomena take place and evolve, centered on the ways by which legal materials are or should be enacted or the symbolism of law happens to be performed and materialized in practice, it necessarily puts the problem of the nature of legal judgment and of its proper degree of responsiveness in focus (a responsiveness to be measured by the level of comprehension of the most nuanced aspects of human problems and lives put before the law[14]), enhancing the related issues of law's sources and systematicity, of the interpretation of legal materials, and not rarely introducing particularly intricate discussions around specific models or images of actors or interpreters, either lawyers or other agents, as legislators, or (more prominently) judges[15], all of them usually conceived, implicitly or explicitly, as being in charge of the progress of specific performances.

The symbolic reference to performance deserves here a little more attention. Since it is not raised as a plain reference to some sort of task or action to be fulfilled and exposed to further measurement (an isolated event subjected to numeric evaluation in terms of clear results and effectiveness), it must be understood according to an artistic filter, resembling the enactment (the "showing doing" (Schechner, 2013, p. 28)) of a movie script or a musical sheet, which, when looked at individually, are just instruments, non-autonomous objects or insufficient parts of something else (virtually integrating a much more complex process for what they were conceived in the first place), needing to be acted out and creatively expanded to bring to life their final purposes, creating, in this reworking, new possibilities of meaning and new forms of existence (White, 1990, p. 102). Those fragmented materials only become, in sum, what they "truly are" when (and if) they can be executed and played.

The symbolism of performance connects the performative acts in law to a world-in-presence, feeding a (more or less constrained) walking reign of crea-

13 "The law is both necessary and fictitious. But law's fictions operate and change the world – they help establish the subject as free and/because subjected to the logic of institution" (Douzinas and Gearey 2005, 17).

14 For an instigating aesthetic discussion on the comprehension(s) of the legal subject, see "Klimt´s Jurisprudence – Sovereign violence and the Rule of Law" (Manderson 2015).

15 See, as non-exhaustive examples, the allegoric pictures of Ost's interpreters in "Jupiter, Hercule, Hermès: trois modèles du juge" (Ost 1991) and in "Juge-pacificateur, juge-arbitre, juge-entraîneur. Trois modèles de justice" (Ost 1983, 44-57 esp.).

tion, a process of transformation of isolated and heterogeneous elements into something bigger and positively different than themselves, making it impossible to anticipate completely this final form or its results. Performance seems to open the door for instantaneity and avoid the accommodation with the repetition of old formulas. Consequentially, it also stimulates change and adaptability, evolving a necessarily complex chain of relations between the performative moment and the social life, the performers and the audience, all entangled in a complex living chain of gestures, backgrounds, and particular circumstances[16]. If we can validly assume that "[l]e droit, le texte d'une loi, sont comme une partition nécessairement incomplète" (Izzo, 2007, p. 115), the law (in its possible positive expressions or scriptures) is to be improvised and performed inasmuch as it is to be enlivened (Ost, 2004, p. 36; Manderson, 2000, p. 73); confirming the assertion that "every text invites being remade into new texts" (Schechner, 2013, p. 227). Once one take this performative feature seriously, it seems, there is not much room, for instance, for Manderson's apparent duplicity between ways-to-do and ways-to-say, and then, to his intermittent dissociation between performative/concrete and rhetorical/expressive aspects of law (Manderson, 2000, pp. 28, 98 esp.); all rhetoric is performative. Indeed, to Jack Balkin and Sanford Levinson, this unavoidable performative nature of law is what leads to the exhaustion of the textual paradigm commonly explored by the law-as-interpretation hermeneutic assumptions that typically sustain the core of law-and-literature (in particular of law-as-literature) analogies[17]. In a different context, the almost "non-performative", merely-hermeneutic approaches on legal interpretation and legal judgment, more specifically the ones instigated by Gadamer-inspired "interpretative turn" and polarized around (limited) cognitive ("cogitative") resources and moves over legal texts to favor declarative, communicational, authoritatively settled intentions and purposes (and so turned to vertical performances of power), were also criticized by Robin West (West, 2000, p. 1144 esp.; West, 1987).

If the law functions not as a depersonalized machinery, but as a big performance or living opera put forward by many hands in the fulfilment of their many different signed roles[18], the moment of judgment marks the institutional final act (not

16 "Performance rather provides a frame that invites critical reflection on communicative processes. A given performance is tied to a number of speech events that precede and succeed it" (Bauman e Briggs 1990, 60-61).

17 "We believe that the comparison between law and the literary text interpreted by an individual reader is inadequate in important respects. A much better analogy, we think, is to the performing arts– music and drama– and to the collectivities and institutions that are charged with the responsibilities and duties of public performance. In other words, we think it is time to replace the study of law as literature with the more general study of law as a performing art" (Balkin and Levinson 1999), also available in "http://jackbalkin.yale.edu/law-performance" (cited here in the electronic version); also, see "Law, Music, and Other Performing Arts" (Balkin and Levinson 1990-1991).

18 "The court gives itself an ethos, or character, and does the same both for the parties to a case and for the larger audience it addresses-the lawyers, the public, and the other agencies in

necessarily ultimate, not necessarily stable…[19]) of such play. However, without dismissing here the *continuum* of new acts and effects[20] (the new performances) the judicial sentence can "trigger off" given to its *performative* (not merely *constative*) character, in the linguistic parallel explored by Douzinas and Warrington[21]… and remembering, though in a different sense, Boyd White's comprehension of the judicial opinion as "a socially constitutive literature", capable of creating a performative world of its own (White, 1985, pp. 130-131 esp., at 131), if that moment is not simply the bare culmination of a unidirectional and necessary institutional flow of stimuli and response, one governed by consequentiality and logically consistent modi operandi[22], in a way its "right answer" becomes plainly predictable, but, in addition, if it cannot be simply given to nihilistic insights (Manderson, 2012a, p. 22), romantic uncontrollability[23] and "indifferent relativism" where "nothing can be known or understood, no common values held" (White, 1990, p. 268), and, besides, if it cannot indulge dangerous, unmediated subjectivisms (Ost, 2004, pp. 38-39) nor (in)humanly uncompromised ways of thought (White, 1999, p. 103; West, 2011b), then… what is it so? What such moment actually represents? What kind(s) of judgment(s) should be held? And, foremost, what kind of rationality or, at least, of processes of reasoning, according to the open nature of such explorations, could possibly guide the judgment in a way legal experience gets to be re-enlightened, freed from its old and new strains?

There is, in fact, no easy answer, since it is not possible to reduce the methodological complexity of those approaches to a unitary model or even to a unitary way of thinking about judgment in law. It is so because, despite presenting a strong practical verve, such proposals are not necessarily preoccupied with the establishment of specific methods or proceedings to guide decisions, instead, what is left to examine are a number of particular understandings about the forms through which the law projects and manifests itself, and the symbolism of its authority or power, over reality, or the relationship between institutional law and the subjects and communities who happen to be touched by juridical decisions, or even the kind(s) of ethical-political *idearium* recommended to

government. It creates by performance its own character and role and establishes a community with others" (White 1990, 102).

19 Recovering Manderson's allusion to "painful result of provisional reasons", and his assertion that "corrigibility is the soul of justice" (Manderson 2012a, 22, Manderson 2010, 513-514).

20 "A decision is not settled when it is first expressed: the full extent of its implications unfold and ramify over many years" (Manderson 2015, 518).

21 "Legal judgments are both statements and deeds. […] A conviction and sentence at the end of a criminal trial is the outcome of the judicial act of legal interpretation. But it is also the authorization and beginning of a variety of violent acts" (Douzinas and Warrington 1991a, 115-117 esp., at 155).

22 "If we take the underlying forms of both the rule and the fact as narrative, we have further reason to reject the application of deductive logic" (Jackson 1991, 89). See, additionally, Ost's "Raconter la Loi: aux sources de l'imaginaire juridique" (Ost 2004, 36).

23 "[T]he quality of art and invention is of course not to say that we are totally free and unconstrained" (White 1990, 265).

orient juridical interpretations and evaluations, all these as individual steps of broader comprehensions on the complementarity of the parts to be played by law's enterprise and community as a whole. The methodological feature is to be comprehended, then, more as an atmosphere (or byproduct) than as a scientific-like, pedagogically organized or oriented endeavor.

There can be many reasons for this absence, which is hardly to be seen as a lack. On the contrary, it appears whether as a deliberate abstention or a refusal. For now, it is sufficient to say that in its background lies a generic distrust, in a markedly contemporary, "postmodern" fashion, in the very notion of *method* in general, which is normally associated to a simple remaining of late Cartesian framework and identified rapidly with plain theoretical accounts on science, and then with the impoverished empiricism of scientific-inspired abstractionism, or, still (as a kind of overcoming of *epistēmē* by *technē*), with the pragmatic fixation in "means-to-ends" rationalities. Because of that, the reference to method is commonly subjected to a certain degree of generalization. And, being the world of law a world of living, the rational frameworks of science, theories and "methods" are incapable to embrace its complexity. One cannot forget Boyd White's "the "methods"" statement and his assertion that the *modi operandi* of social sciences are autonomously blind to the special features and concrete nuances of law's praxis[24]. Likewise, one cannot leave aside the criticism directed by Manderson and West to legal thought's limiting "courthouse" obsession (West, 2011a, pp. 58, 74 esp.; Manderson, 2000, pp. 42-43).

Therefore, if "we must descend the courthouse steps" (Manderson, p. ibid.) to make sense of law from a comprehensive perspective, such a world requires an elastic and artistic mindset to be able to deal with law's *poietic* nature and its potential for interception, reproduction and creation of meaning. And, being so, that rejection of orthodoxy and the statement against Court fixation must not be comprehended as leading to an automatic impossibility of saying how (essentially) the processes of interpretation and judgment in law work or should work, what kind of communitarian *ethos* or imagination must be guiding at the background or what kind of attitude(s) and perspective(s) must be at front in order to synchronize their results with the singularity of present, and, then, with multiple views of an inclusive, dialectic, dialogic, material justice (if not with the basic *ethical and political claims* it reinforces). So, if justice symbolizes the engagement with a plural community-to-come, based on a "shared vocabulary" (Manderson, 2000, p. 199) of meaningful (inter)reciprocity (West, 1988, pp. 876-877; White, 1990, p. 269), and if "the aesthetic community is in a continuous state of formation and dissolution; [since] it is the precondition and horizon of judgment but each judgment passed marks the community's end" (Douzinas & Warrington, 1994, p. 182), for what it is necessary, in either way, to establish *face-to-face* relations with others'

24 "For whatever the merits of the social sciences as methods for making and informing social policy, they cannot be applied to what is more distinctive about what lawyers and judges actually do. […] The "methods" cannot simply be applied to the law, any more than its "findings" can" (White 1999, 69-70).

"particular world(s)", or their constituting, unspeakable subjectivity (Douzinas & Warrington, 1994, p. 228; Manderson, 2000, pp. 74-75 esp.), *Justitia* has to be, finally, *unfolded* ("[j]ustice too must be construed as a recognition of the individuality and difference of others" (Manderson, 2000, p. 198)). As a sort of replacement of the blinded iconic Goddess by a richer mythology of a sightful *Dikē*[25].

Moreover, in parallel, and in congruence with what was already stated regarding the general avoidance of a "dead-end nihilism" (as Douzinas and Warrington's defense of Derrida seems to hint) (Douzinas & Warrington, 1994, pp. 202-203), it seems to be the case of maintaining the inevitable uncertainties in a tolerable level; not by searching for denialist ways to tame and control what is far from being transparent, such as the semantics, significance, or the performative potential of a legal text or principle – remember Boyd White's mistrust on the clarity of *rules* and his acknowledgement of "the invisible discourse of the law" (White, 1985, pp. 60-76) – but by embracing contradiction instead, repeating here Manderson's formulation, and making them "beautiful", meaning by that an "energized field of doubt" or "an unending and productive back and forth movement" between "incommensurable" units, a remembrance that life, and all that lives (including, of course, law), flows "not a[s a] reconciliation or a fusion, but an oscillation" – in explicit paraphrase of Manderson's reference to the role of *polarity* in the work of D. H. Lawrence (Manderson, 2010, pp. 515-516; Manderson, 2012c, pp. 490-ff., at 491).

## 3. (Some) Aesthetic Judgments

At this point, the recurrence to different models incarnating strings of practical rationality appears almost as a logical step, and so the turn to an apparatus consistently sewn between the inputs of *performance* (in the sense mentioned above), *narration* (which the law-and-literature paradigm exponentiate)[26], and *translation* (with the dialectic and dialogical features it provides, combined with its ethical permeability[27]), so punctually enhanced in their constitutive/innovative possibili-

25 As if reversing the paradigm Martin Jay (following Horkheimer and Adorno) associated to a modern *iconophobia,* pointing to the banishment of unwritten symbolism and multiple pictorial images of law and justice from the courtrooms and the election of a blindfolded *Justitia,* with the mysticisms that surround her, as totem. Written, textual law, are forbidden to see more than what it is expressed through the world confined inside textual limits, it has to be blind to what is close to the eye; and, in this way, confident in "the realm of certainty" it creates, it is unaesthetic as well. It is forbidden to attain *aisthesis*: "[t]he eye, by far the most discriminating of the senses in its ability to register minute differences, must therefore be closed to produce this reduction" (Jay 1996, 71, Jay 1999, 26)(Douzinas 2000, 813).

26 Against the common foundational and "internalist" argument sustaining the criticism of narrative models, see James Brockmeier and Rom Harrè, "Narrative: Problems and promises of an alternative paradigm" (Brockmeier and Harrè 2001, 50).

27 Such permeability manifests itself in two basic ways: both as a result of the natural openness of the translator to different symbolic worlds and the languages they entail, and as an ethic code by which she can guide her conduct. Boyd White's "Muslim" parallel ("honest attention to

ties, in order to place the moment of interpretation and judgment as essentially distinct, in its substantive basis, from the formalist common reference to logical, segmented, and "mechanical" *application* (the rules-to-facts method)… but *also* as positively distinct, in its own normatively constituting sense (and in the meta-juridicity it manifests), from the contingent instrumentality of *tactical* decisions coordinated by scientific, technical or technological-oriented strategies – a mirror clarified by Ost's "post-industrial" picture of a "*juge entraîneur*"… an *Herculean* figure (Ost, 1991; Ost, 1983, pp. 44-47 esp.), albeit not the same as Dworkin's "superhuman" judge (Dworkin, 1975, pp. 1083- ff.). As if that *poietic* axis, once articulated before the challenge of performance-narration-translation, and combining these three strands in a sort of fragmented continuity, could be the key to stimulate the quest for different levels of concreteness and responsiveness regarding law's institutionalized materials and contents, by one side, and the balancing and satisfaction of the legitimate/legitimating normative intents rising from particular demands, by other. An axis that calls upon the practical branch of discursive, argumentative, rhetorical, and, of course, narrative rationalities, all sufficient to instruct and coordinate some related pictures of engaged practitioners, and capable, at different levels, to absorb the overall performativity attributed to law.

Without forget, yet… the very special combination of all of those complex references with a particular understanding of the normatively constitutive role of emotions in the formation and development of legal processes, including in the decisional character[28], besides the importance of Aristotelian *phronēsis* and the part attributed to this Classical intellectual virtue, once mixed with a comprehension of the cognitive input favored by *aisthesis*, as a type of instantaneous bridge to singularity. In this duo *phronēsis-aisthesis*, the stimulus favored by the latter would be responsible for opening the door for a possible further knowledge (to be treated prudently) of what is close to the eye. But… what translation, performance, and narration, then? What models of interpreters and/or judges?

According to Douzinas and Warrington, "aesthetic judgments are […] subjective and individual yet in the service of the undetermined universal" (Douzinas & Warrington, 1994, pp. 182-ff.). They announce, then, an appeal to universality grounded on the *aprioristically* assumed ethical affirmation of an absolute alterity, which always demands an absolute responsibility (in line with Levinas). Simultaneously, it is affirmed a counterbalanced appeal to particularity and *phronēsis*, not purely or relativistically casuistic (i.e., intentionally leading to the confirmation of an "anything goes"), since it is grounded on that universal ethical imperative, and so in the assumption that true justice is *necessarily intangible*(as much as it is the obscure face of the Other), and, because of this inaccessibility and of the "always-to-come temporality" (Douzinas & Warrington, 1994, p. 184) it invites, it could

language, to particularity of phrase and context [...] [being guided] by a principle of humility and sincerity") can be seeing as an example of this last "pedagogic" sense (White 1990, 268).

28 Already in an explicit interlacing with the interdisciplinary complexity of a *law-and-emotions* front, particularly driven by an *empathy* claim. See the recent analysis offered by West in "Law's Emotions" (West 2016).

add to law, through a postponed and open interpretation of legal materials and circumstances, and only by the recognition of its opposite, injustice, *when it appears*, that desirable ethical component. The community a just law designs/are designed by is fundamentally an aspiration, but also a moving-forward.

This ethical assumption, though, is not a remainder of any belief in consensual or unifying heteronomous values. Today's *phronimos* must move in the growing grey areas of a postmodern society. And, so, the constant movement between law's typical generality and life's typical instantaneity (particularity) is a pre-condition of the effectiveness of an always instable (tempted) equilibrium between law, justice and judgments. This vision of law and aesthetic judgment is essentially a performative one, but at least in two different senses: the first is casuistic, exposing the judgment to unpredictability of present and making it impossible to pre-regulate. Here, justice, as well the judgments that tries to achieve it, are "something to be performed in the future". The second sense is connected to a negative, but perhaps unavoidable, side of law, which, insofar it conceives an abstract normative universe essentially based on stereotypes, representability and uniformity, ends up masking and distorting (fantasizing?) the character of difference and promoting a performance of violence. In a way that, to return to that ethical imperative (the ethical subject, different from the juridical, cannot be objectified or fantasized), the judge must try, first, to move on from the pernicious, albeit inevitable, violent side of a "legality of form and subjecthood" to find a proper place for "the ethics of response to the concrete person" before the law (Douzinas & Warrington, 1994, p. 185).

Assuming aesthetics as a sort of *aisthesis,* and also as an experience of understanding, "a way of knowing and of being" (Manderson, 2000, pp. 11, 23), Manderson links it to perception, justice, and values as a form of discursive communication[29]– as if individuals could resort to an aesthetic interpretation and experience of reality – including law's – in order to form the basis of non-orthodox arguments about practical subjects and to achieve alternative visions of pre-given pieces of information and data (Manderson, 2000, pp. 197-198). Since aesthetics here is not pure contingency, and therefore has not a bare subjective non-negotiable nature – it is not "a surrender to emotion and feeling" and "a denial of thinking", writes Manderson, quoting Schiller (Manderson, 2000, p. 199) –, the final test of practical pertinence or material adequacy of such arguments will be satisfied by submitting the same arguments to a further procedural dynamics of dialogical confrontation and evaluation, and so to the resistance test imposed by opposites, in an Aristotelian manner[30]. At the center of this notion lies an attempt to recover a sort of aesthetic sense to the rule of law, the meaning of which should

29 "The experience of aesthetic observation is always an experience of distance and therefore is intrinsically about the communication of otherness" (Manderson 2000, 199).The following considerations about the author's comprehension on the link between aesthetic and legal judgments are to be seen as a type of analytical concertation between Manderson's law and literature and law and aesthetics works.

30 According to Aristotle, rhetoric must be comprehended as "the other face of dialectics". As such, the dynamics it involves, linked to the living realm of *praxis* and probability, and

be reinterpreted and reenacted under the normative claim of *polarity,* which can be understood, as already suggested, as a strong material appeal to diversity and complexity, in a way that the judge, *a priori* exposed to his/her own fallibility, "must be willing to make the frequent discovery that he or she is a fool" (Manderson, 2012a, p. 21; Manderson, 2012c, p. 504; Manderson, 2010, pp. 516-514). This resource to fallibility or, better, *correction/corrigibility,* points to the necessity of a humble but "hard" listening of the different voices in presence, in an explicit recall of Bakhtin's "centrifugal", "dialogized", "double-voiced" heteroglossia (Bakhtin, 1981, pp. 272-273, 324-327; Manderson, 2012b), and, through this central argument on *polyphony*, besides the inclusive dynamics it entails, the very system of law would be improved: polyphony leads to contradiction and contradiction leads to the kind of disruptive, unsettling *difference* current law needs to absorb or at least try to achieve in its path toward aesthetics and justice.

Ost's mythological interpreter, *Hermès,* responsible for carrying messages and secrets from gods to men, plays the privileged role of a translator, leaving behind all practical and theoretical separations typical of a "droit analysé" and being able to correspond to the plurality and polyphony of a "droit raconté" (Ost, 2004), reconstructing and performing, inside a complex institutional web, the multiple unpredictable voices and noises (stimuli, inputs, demands, expectations…) projected over a post-modern law that has to deal with the complexity of a transnational juridicity (Ost & Kerckhove, 1999, p. 148). Translation is here called to represent a new "multilingual" bridge (Ost & Bary, 2012) "pour penser la grammaire de notre monde pluriel" or "pos-babélien", guiding "un droit sans écrit et sans texte" and allied to a hospitality ethics, "faite de conscience de ses propres limites, de respect de la parole de l'autre et de dialogue coopératif" (Ost, 2009, pp. 9, 12, 99). Here the legal problems are the locus of singular stories to be told and translated without violence or loss, functioning as "la pratique linguistique et l'activité mentale qui se développe entre les différents acteurs de justice" (Ost, 2014, pp. 129- ff.). A similar sense of translation can be found in Boyd White's work, with the remark that the translator, being herself "in a world of others", "owes fidelity to the other language and text but requires the assertion of one's own as well" (White, 1990, p. 264).

This final remark seems to impose some sort of equilibrium to the weight of ethical responsibility involved in the notion of hospitality. As if it was, finally, also a (silent) remark that the same basic ethical claim, despite promoting the reopening and nurturing of new places of/for subjectivity in law, can also pose other very different challenges to law's normative limits and autonomy (in any of its conceivable forms), almost as if the reassurance of the core of juridical singularity could only be brought into presence in the form of a pre-announced escape from the traditionally conceived juridical universe a priori constraining it, till it happens to be finally consumed by an overall ethical instilment that renounces, from the beginning, to

not to theoretical knowledge (*epistēmē*) and truth, implies the previous acceptance that constructive contradiction is intrinsically valuable (Aristotle 2005, 89/1354a, 97/1356a).

the very possibility of law, as an intentionally specific practical experience (and tradition), and, simultaneously, to the discursive possibility, cultural pertinence, and practical adequacy, of law's necessary normative distance or "*thirdness*" (*tértialité*) (Linhares, 2010, p. 37).

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