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***The Harmonies and Conflicts of
Law, Reason and Emotion:
A Literary-Legal Approach***

Proceedings of the Special Workshop on 'Law and
Literature' held at 27th IVR World Conference
Washington, D.C. 27 July – 1 August 2015

Edited by

Carla Faralli, Jeanne Gaakeer, Marcelo Campos Galuppo,
M. Paola Mittica and Ana Carolina de Faria Silvestre Rodrigues



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Presentation

Carla Faralli, Jeanne Gaakeer, Marcelo Campos Galuppo, M. Paola Mittica
and Ana Carolina de Faria Silvestre Rodrigues

‘memory is an integral part of any system of justice, [...] it is precisely the act of forgetting that makes it possible for law to be applied indiscriminately and therefore unjustly’
[Blumenthal 2007: 36]

What is so special about the topic of Law and Emotion? Law, at least as traditionally understood in some theories of jurisprudence, prefers the realm of reason above that of emotion. In order to legitimize their decisions, judges in civil-law jurisdictions refer to ‘law in books’, while in common-law surroundings to precedents and the rules derived from them. But in ‘law in action’, as the proponents of Legal Realism already pointed out earlier in the twentieth century, emotion is an indisputable factor, to be tested empirically as well. According to them, Law by definition leaves room for the subjectivity of judges, although not necessarily only of the kind of ‘law-as-what-the-judge-had-for-breakfast’.

If judicial decision-making were only be a matter of rationally determining the relevant legal criteria for the case at hand and then applying them, it would be correct to say that judges and legal actors in general depend only on their intellectual faculties to solve legal problems in concrete cases. However, if we assume that in the phase of the determination of the relevant facts of a legal case, there are more things at work, namely, a going to and fro, i.e., from the facts to the legal rule and back, then we can ask in what way the relevance of specific facts is determined.

Judging is choosing, and this not only goes for the applicable rule (statutory or otherwise), but also for the relevant facts *in concreto*. It is here that the idea that judicial perception is both professionally trained and character-dependent comes in, and that the question of the role of emotion in decision-making comes to the fore. Legality in contemporary jurisdictions demands of the judge to stay clear of her subjective persuasion so that the rule of law, rather than of men, can be guaranteed. But the judge needs ‘both a head and a heart’, as Supreme Court Justice Stephen Breyer claimed, because ‘when you are representing human beings or deciding things that affect them, you need to understand, as best you can, the workings of human life. [...] Only the most difficult cases get to the Supreme Court, those cases where perfectly good judges come to different conclusions on the meaning of the same words. In those difficult cases, it is very important to imaginatively understand how other people live and how your decisions might affect them, so you can take that into account when you write’ (Breyer 2015). To Breyer, in order to meet this criterion, judges need to seek nourishment in literature, if they are to develop both the necessary imagination for a good eye on the

circumstances of a case as well as the necessary empathy to judge well¹, since the under-determinacy of law draws the attention to judicial emotions as well. How do judges perceive themselves, how do they view their societal role and function, and their legal *personae* in daily practice? How do they educate themselves as far as their legal imagination is concerned? In which way does their *ethos* affect their *logos* (and *pathos*, when it comes to their court *personae*)?

Translated into the interdisciplinary field of *Law and Literature*, or, more broadly, *Law and Humanities* and *Law and Culture*, this suggests various interesting topics for research, such as:

a) the role of emotions in adjudication as a topic for empirical investigation to develop a literary-legal or narrative methodology and/or theory of adjudication that challenges traditional normative approaches, which usually focus only on rationality and cognition, and disregard, and even deliberately discard, emotion;

b) the combined development of ‘the heart and the head’ through literary works, as suggested in legal practice by Stephen Breyer, and in legal theory by Martha Nussbaum and others working on the topic of empathy and imagination as elements of judicial practical wisdom in Aristotelian studies;

c) the tension between reason and emotion that judges and other judicial actors experience, in themselves and in the people whose fates they are deciding. According to Aristotle, the virtuous person is likely to have appropriate emotions in different kinds of situations as her emotions flow from a firm character disposition. However, virtue is hard to achieve and so we can ask whether most of the judges and the parties in the legal process are prudent enough. What is more, judges in their daily practice must manage their private lives and feelings in order to create a ‘public face’ when they handle other people’s feelings and their own at the same time. However, this emotional and intellectual labor cannot avoid the ‘tragic dilemma’ or the ‘tragic legal choice’, i.e., when the choice to be made cannot avoid suffering and pain, as already depicted in Greek tragedy;

d) the representation of emotion in law in cultural artifacts such as novels (both high culture and popular), TV series, tabloids, and televised court dramas in which judges have gained popularity and notoriety these past few years. Is such representation not often a farcical portrayal of law (and its emotions in its various guises as noted above; think, for example, of Judge Judy’s display of ‘emotions’), or does such representation perhaps serve other ends? And, viewed differently, is not the gist of so many products of popular culture that law is the great redeemer (John Grisham’s template for legal fiction comes to mind here, as does the TV series *CSI*)? This redemptive aspect is often in sharp contrast to everyday legal reality with plea bargaining, problems in jury selection in common law legal systems, the law’s undue delays, or miscarriages of justice as a result of assigning heavy tasks to inexperienced (examining) judges.

The topic ‘Law and Emotion’ has prompted a collection of papers previously presented in the Special Workshop that the editors co-convened in 2015 in Washington, D.C., on the occasion of the XXVII World Congress of the International Association for the Philosophy of Law and Social Philosophy. Presented as articles in this volume, they explore (at least one of) the topics suggested above and they do so from a variety

¹ ‘Each of those stories involves something about human passion.’ ... ‘And so sometimes I’ve found literature very helpful as a way out of the tower.’ Hearings before the Committee on the Judiciary, 103rd Congress, 2nd session 232-233, 1994, statement of Stephen G. Breyer, Supreme Court Nominee.

of theoretical and cultural-disciplinary backgrounds. They find a common ground in the task of reflection on the relationship between law and emotion through the privileged lens of literature.

This Special Workshop has met since the Frankfurt edition of this Conference, and we have enjoyed organizing it not only due to the intellectual development that it provides, but also due the personal relationship that it has assured.

In particular, the Workshop has made possible a permanent relationship among our different experiences in Law and Literature in our countries: the European Network for Law and Literature, here represented by Jeanne Gaakeer; the Italian Society for Law and Literature, coordinated by Carla Faralli and M. Paola Mittica; and the research group rooted in Brazil under the guidance of Marcelo Galuppo.

The Editors

References

- Blumenthal, Michael, 2007. 'Poetic Justice, Legal Justice'. *Legal Studies Forum* 31.1: 29–37.
- Breyer, Stephen, 2015. Stephen Breyer on Intellectual Influences. <http://thebrowser.com/interviews/stephen-breyer-on-intellectual-influences>, <accessed 1 January 2015>.



Emotion, Reason and Political-Legal Bond: Ideas from Greek Literature

Giovanni Bombelli*

Abstract: The traditional representation of (the) Hellenic world relies on the close and symmetric relation between Greek culture, understood as the origin of the Western model, and ‘reason’ (including its legal-political reflexes). This reading dates back to the German neo-humanistic movement of the XIXth century, from Johann Winkelmann to Werner Jaeger and, although its recent (and partial) review by Martha Nussbaum, it moves from a peculiar interpretation of some moments of the Hellenic framework as a whole (mythology, art, literature and philosophy). This perspective mainly aims to remove the role of ‘emotion’ and, more widely, allows the equation ‘Western culture=reason’ or, in a consequent manner, ‘law=reason’. On the contrary Greek world presents a more articulated relation reason-emotion. Within the Hellenic context ‘emotion’, very broadly considered, seems to have a *dialectic role*: as a fundamental factor in order to almost *rationally* build the social-political-legal life and, at the same time, as a potential disruptive factor of the *polis*. Within the Homeric world some relevant tracks of this complex model emerge, especially in the light of two elements closely related to each other: the political-representative role played by the primitive forms of *agora* and the institution of the ‘duel’, which is to be regarded as a crucial legal-political tool to control the emotive dimension in the archaic world. Anyway only tragedy, through a reinterpretation of myth, offers relevant examples of the ambiguous role played by emotion *within the polis*: both as a *building factor of the public space*, closely related to the public function of tragedy, and as a disruptive force (with particular regard to the female dimension: for instance Medea and Electra). According to a very significant continuity literature-philosophy, Aristotle synthesizes in a more specifically political-legal direction this complex tradition: similarly to the Platonic perspective, within Aristotle’s model *polis and its peculiar political-legal institutions are grounded in emotion*. The Stagirite emphasizes both the constructive profile of emotion, which is grounded in the notions of *philia* and *thymos* as bases of the *polis*, and, on the opposite, its dialectical and ‘dangerous’ aspect (i.e. the doctrine of *pathos* and *chataresis* elaborated in his *Rhetoric*). In a wider perspective this re-interpretation of the Hellenic world elicits a new look over the nature of law as well as with regard to the anthropological model underlying the western legal tradition. *From the beginning* law (generally meant: ‘private’ and ‘public’) and politics structurally presented an ‘emotive’ profile and, then, took shape as a ‘tragic dilemma’. Hence the necessity to radically rethink the traditional pair emotion-reason and, especially, its role as the anthropological condition of the political-legal bond.

Key-words: Emotion-Reason-Law-Greek universe-Homer-Tragedy-Aristotle

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1. Greek Universe and Emotion

The traditional representation of the Hellenic world is based on a precise image: the close relation (or equation) between Greek culture, understood as the origin of the Western model, and 'reason' (including its legal and political consequences).

This insufficient reading, which was fundamentally elaborated starting from the XIXth century by the neo-humanistic movement which flourished within the German culture (up to Jaeger 1936-1947 and Nestle 1942 but at least dating back to Winckelmann 1934), was based on a peculiar reinterpretation of some moments of the Hellenic framework as a whole: mythology, art and literature. It mainly aimed to remove the role of the 'emotion' or, at least, to emphasize the 'control' of the emotion: only recently this simplified view has been partially rethought by Martha Nussbaum (Nussbaum 1986).

Furthermore it allowed another and wider equation based on the close correspondence 'Western culture = reason' and then, symmetrically, 'law=reason'. On the contrary, and on a closer view, the Greek world presents a more complicated relation between 'reason' and 'emotion' (without necessarily sharing the polarity proposed by Nietzsche 1972). In other words from a philosophical-legal perspective within the Greek universe the dimension of 'emotion', broadly meant, seems to have a *double role*: as a fundamental element of the social-political-legal life and, at the same time, as a potentially disruptive factor of the *polis*.

With regards to this aspect we can observe the presence of some relevant tracks in the Homeric context, especially where Homer puts in evidence the role of the primitive forms of *agorà* or, in a related manner, the institution of the 'duel'. But only the classical tragedy, through a complex reinterpretation of myth, offers relevant examples of the ambiguous role played by emotion *within the polis*: emotion as a *building of social bindingness* (i.e. the public function of drama) and, at the same time, emotion as a disruptive *shock through its representation* (i.e. the crucial role of women: for instance Medea and Electra).

As is well known Aristotle synthesizes and theorizes this tradition. From a political and legal point of view the Stagirite emphasizes both the constructive role played by emotion, especially with regard to the concepts of *philia* and *thymos* as bases of social life, and, on the opposite, its possible disruptive role. In other words, and only similarly to Plato's theory, according to Aristotle *polis and its peculiar legal-political institutions are grounded in emotion*.

In a wider perspective, this possible interpretation of the Hellenic world elicits a new look over law and the Western identity. That is to say: *from the beginning* of the Western tradition law (generally meant: 'private law' and 'public law'), as well as politics, always structurally presented an 'emotive' profile and accordingly represented a 'tragic dilemma'.

2. Homer and emotion

The entire Homeric society is fundamentally characterized by the dimension of 'emotion', which should be understood according to a wide acceptance (for a general survey about Homeric world and some related questions Fowler 2004; Koziak 2000).

We may refer, for instance, to the concept of *thymos* (impulse) in the *Iliad* (for this point see in particular the fundamental Koziak 2000). According to Koziak (2000: 39),

within a comparison with Plato, ‘Homer’s poetic depiction of warrior emotions is challenged and epic psychology is substantially altered in Plato’s *Republic*. [Plato] confines *thymos* to anger without the *Iliad*’s variety of possible emotional expressions’. In particular, the Authoress underlines that ‘anger often appears as, or with, *thymos*, but this is because anger itself is the central emotional subject of the *Iliad*’ (Koziak 2000: 40).

In fact *thymos* is a very complex dimension which is not exclusively linked to anger. Achilles is ‘the paradigmatic thumotic man’, but anyway ‘*thymos* is not an emotion itself, but a set or organ of emotional feeling, so that it moves with many other emotions.[...]Moreover, *thymos* participates in deliberation’ (Koziak 2000: 38). Furthermore ‘*thymos* is not entirely or simply anger, but harbors other emotions’ (Koziak 2000: 39). In fact ‘many emotions are found in *thymos* – indeed, almost all emotional descriptions involve *thymos* [which could be called] the ‘neutral bearer of emotion’ (Casswell 1990).[...] [It is] the interior mental but quasi-physical part where emotions happen’ (Koziak 2000: 43; see also 44-45 for the debate and the relation with *phrenes*). On the contrary Plato ‘confines *thymos* to anger without the *Iliad*’s variety of possible emotional expressions’ (Koziak 2000: 39): in other words, ‘although Plato invents the study of political psychology, he severely narrows the Homeric conception of *thymos*’ (Koziak 2000: 40; for the Platonic perspective see also in Koziak 62-80).

But, in the light of what we will remark later in this contribution, we have also to consider the relation ‘women-*thymos*’: ‘[u]pon closer inspection[...] a woman’s *thymos* is associated more with sorrow or grief than with anger[...]. So although the emotional constitution of mortal women may differ from the male warrior’s, they have a *thymos*’ (Koziak 2000: 46-48¹). More generally there is a relation ‘*thymos*-deliberation’: starting from some passages concerning Odysseus and Achilles the complex nature and role of *thymos* in the ‘decision-making’ processes emerges ‘not as a formula or as a intensifier, but as a sign of emotional evaluation and choice’ (Koziak 2000: 53; see also 53-55 for the relation ‘*thymos*-spiritedness’) also in a precise political-legal direction (Koziak 2000: 55-58).

Furthermore after all, and always in a general perspective, we should underline that many characters or heroes in Homeric world are dominated by emotive (or physical-emotive) dimensions: for instance ‘fair cheeks’ Briseis, ‘cautious’ Ulysses or ‘bellicose’ Menelaus.

Beyond these elements within the Homeric poems we can find some relevant tracks of the idea of emotion and, especially, with regard to two points: the notion of *agora* and the figure of the ‘duel’.

In fact within the Homeric poems it is possible to observe the emergence of the role of some primitive forms of *agora* and, according to a close conceptual continuity, the institution of the ‘duel’.

2.1 *Agorà* (Rhetoric and Emotion)

Notwithstanding a long tradition, according to which Homeric poems are only the expression of a primitive social model without reference to structured political-legal mod-

¹ In addition: ‘Men are not immune to sorrow and grief, but the constraint on women’s public actions means that as passive observers of male warfare their sorrow and grief will proliferate. In any case, *thymos* is not a thing or quality limited to one sex, or even to human beings’ (Koziak 2000: 48).

els, some scholars have recently showed the presence of important political and legal institutions within the Homeric universe.

More precisely the 'public' role of *agora* (assembly) has emerged as a sort of premise of the next classical institutions. In particular within *agorà* as a public space the role of rhetoric and emotion develops. So, for instance, we can remember some passages where the *agora* develops in the Homeric context.

For instance in *Odyssey*, at the beginning of the book 2, in a long passage we can observe the assembly of the people of Ithaca (but there are further occurrences also in the first book):

Soon as early Dawn appeared, the rosy-fingered, up from his bed arose the dear son of Odysseus and put on his clothing. About his shoulder he slung his sharp sword, and beneath his shining feet bound his fair sandals, and went forth from his chamber like a god to look upon. Straightway he bade the clear-voiced heralds to summon to the assembly the long-haired Achaeans. And the heralds made the summons, and the Achaeans assembled full quickly. Now when they were assembled and met together, holding in his hand a spear of bronze – not alone, for along with him two swift hounds followed; and wondrous was the grace that Athene shed upon him, and all the people marveled at him as he came. But he sat down in his father's seat, and the elders gave place.

Then among them the lord Aegyptus was the first to speak, a man bowed with age and wise with wisdom untold. Now he spoke, because his dear son had gone in the hollow ships to Ilius, famed for its horses, in the company of godlike Odysseus, even the warrior Antiphus. But him the savage Cyclops had slain in his hollow cave, and made of him his latest meal. Three others there were; one, Eurynomus, consorted with the wooers, and two ever kept their father's farm. Yet, even so, he could not forget that other, mourning and sorrowing; and weeping for him he addressed the assembly, and spoke among them:

'Hearken now to me, men of Ithaca, to the word I shall say. Never have we held assembly or session since the day when goodly Odysseus departed in the hollow ships. And now who has called us together? On whom has such need come either of the young men or of those who are older? Has he heard some tidings of the army's return, which he might tell us plainly, seeing that he has first learned of it himself? Or is there some other public matter on which he is to speak and address us? A good man he sees in my eyes, a blessed man. May Zeus fulfil unto him himself some good, even whatsoever he desires in his heart'. [*Odyssey*, II, 1-34; Homer 1976: I, 37-39]

In the same way we have to consider also the assembly of Pilian people in the third book or further tracks in the sixth book (54-55) and, especially, the reception of Ulysses at the palace of Alcinous (book 7, 43-45):

And Odysseus marveled at the harbours and the stately ships, at the meeting-places where the heroes themselves gathered, and the walls, long and high and crowned with palisades, a wonder to behold. [*Odyssey*, VII, 43-45; Homer 1976: I, 235; see also *Odyssey*, VII, 148-150, Homer 1976: I, 243]

Similarly it is interesting to consider the banquet in the house of Alcinous (at the beginning of the book 8):

As soon as early Dawn appeared, the rosy-fingered, the strong and mighty Alcinous rose from his couch, and up rose also Zeus-born Odysseus, the sacker of cit-

ies. And the strong and mighty Alcinous led the way to the place of assembly of the Phaeacians, which was builded for them hard by their ships. Thither they came and sat down on the polished stones close by one another; and Pallas Athene went throughout the city, in the likeness of the herald of wise Alcinous, devising a return for great-hearted Odysseus. To each man's side she came, and spoke: and said:

'Hither now, leaders and counselors of the Phaeacians, come to the place of assembly, that you may learn of the stranger who has newly come to the palace of wise Alcinous after his wanderings over the sea, and in form is like unto the immortals'.

So saying she roused the spirit and heart of each man, and speedily the place of assembly and the seats were filled with men that gathered. And many marveled at the sight of the wise son of Laertes, for wondrous was the grace that Athene shed upon his head and shoulders; and she made him taller and studier to behold, that he might be welcomed by all the Phaeacians, and win awe and reverence, and might accomplish the many feats wherein the Phaeacians made trial of Odysseus. [*Odyssey*, VIII, 1-23; Homer 1976: I, 259]

On the contrary, as a countercheck, we should notice the existence of some societies (i.e. Cicons, Lotophagi and Cyclops) which are without assemblies (*Odyssey*, IX, 106-115, 125-129, 252-255, 273-278, 347-352; among others XV, 468 but we should refer also to other places in book 16, 17, 20, 21, 22 and especially 24): that is to say they are lacking of public discussion.

For the *Iliad* (Mackie 1996: 21²) we can refer, for instance, to the following passages:

So, when they were assembled and met together, among them arose and spake Achilles. [*Iliad*, I, 56-57; Homer 1978: I, 7; but see also the ff.]

Furthermore:

So saying, he sate him down, and among them uprose Nestor, that was king of sandy Pylos. He with good intent addressed their gathering and spake among them[...]. He spake, and led the way forth from the council and the other sceptred kings rose up thereat and obeyed the shepherd of the host; and the people the while were hastening on. [*Iliad*, II, 77-79, vv. 85-88; Homer 1978: I, 57; but see also XII, 211-214]

Beyond these references the point for us is the role of the *agora in order to organize/to structure the public discourse and, hence, the emotion* as its peculiar and undeniable dimension *since the Homeric world*. In other words: starting from the archaic Greek society, the couple 'public discourse (deliberation)-emotion' is to be considered as a decisive moment of the Greek historical-conceptual model.

Following this direction it is not by chance that some scholars talk about the 'Homeric speech and the origins of rhetoric' (Knudsen 2014; but see also Griffin 2014

² 'The Achaean assembly is a forum for quarreling and strife that is ultimately directed toward political order. The very first assembly in Book 1 is a prime example of the Achaean type, revolving around a public quarrel between Achilles and Agamemnon. In all, there are five Achaean assemblies and four Trojan ones in the *Iliad*. [...] [T]hese are often fairly closely juxtaposed in the text in a way that invites comparison and contrast. [...] [There are] some general but marked differences between the two versions of the institution. At Trojan assemblies, fewer and shorter speeches are made. Fewer characters speak, and they speak fewer lines. The Trojan assembly is less extended and does not have the function of alleviating political tensions via contest and debate'.

and Mackie 1996): that is to say, the dimension of rhetoric, and hence its emotive profile, belong to the Greek framework as a whole.

In particular the *Iliad* ‘provides a sufficiently large body of evidence[...]about rhetoric in Homer’ (Knudsen 2014: 6; see also 8-14, for a series of passages from the *Iliad* concerning the emergence of a structured rhetoric within Homer’s world as well as the *Appendix* and chapter 1 for the debate about the Homeric rhetoric).

The analysis of many passages in the *Iliad* shows not only the development of some precise rhetoric schemes (Knudsen 2014: chapter 2), but also the crucial role played by emotion. Hence the possibility to put in evidence the presence of ‘patterns of Aristotelian rhetoric’ in the *Iliad* and, then, the role of emotion as a tool of persuasion (Knudsen 2014: chapter 3, especially 86-87 and the entire Part II with regard to the genealogy of rhetoric from Homer to Aristotle).

The conclusion is very precious for us: ‘The particular methodological approach Aristotle takes in the *Rhetoric*, so different from that of the *Poetics*, suggests why Aristotle fails to note the similarities between Homeric persuasion and his own system, and is silent about the possibility that the Homeric epics informed the *technê* of rhetoric.’ In fact it seems likely that ‘Archaic poetry had no place in Aristotle’s conception of the discipline of rhetoric – innovative, technical, and philosophical as it was.’ The reason is that by the fourth century ‘Homer was firmly associated with a religious and mythical past, and though Aristotle might cite the *Iliad* or *Odyssey* for the odd example of a rhetorical trope, these associations would have made it difficult for him to see Homer as a contributor to the *technê* of rhetoric’ (Knudsen 2014: 152).

In other words and more precisely: within the Homeric world, so at the origins of the Greek world, emotion draws and marks the connection between ‘public debate’ and ‘politics (or law)’ by developing some structured rhetoric scheme. That is to say that politics (deliberation) develops not only starting from reason but also *through* emotion.

2.2 The Duel: Social Order and Emotion

As previously suggested within the Homeric world, in continuity with the role of *agora*, emotion emerges also in another direction and, in particular, through the figure of the ‘duel’: then the decisive couple is represented by ‘emotion’ and ‘duel’. About this topic we have to pay attention in particular to the *Iliad*.

Within Homer’s *Iliad* the topic of the ‘duel’ is very frequent (i.e. book 3 between Paris and Menelaus, book V, book XI and XII until the final duel Achilles vs. Hector) and, similarly to what happens within all archaic societies, it is the manifestation of the *aristia* (the ‘excellence’). In some way the idea of ‘duel’ dominates the entire poem (in direct connection with emotion: for this aspect Adkins 1982; Mumford 1996): in other words we could understand the entire *Iliad* as a sort of great duel between Greeks and Trojans *based on emotion*. As a matter of fact as is well known Achilles’ ‘wrath’ marks the origins of the epic battle. That is to say: *from the beginning it is an emotion which determines the entire plot*, including its decisive political-legal consequences (war and peace) *until the end*. The final duel between Achilles and Hector (see hereinafter) can be read as the confirmation of this model and, hence, the instauration of a new social order.

We may take a look to the a) scheme and the b) meaning of the ‘duel’ in order to highlight c) some aspect of its relation with emotion.

a) *The scheme*. The Homeric representation of the duel is characterized by a fixed scheme. This is surely related to some narrative necessities but, in another perspective, we could say that the adoption of predetermined models aims to guarantee a 'procedure'. In other words there is a procedure of the duel: the point is that the expression of emotion (hate, vengeance and so on) cannot depend on the free individual behavior. *Emotion needs rules*. The point becomes clearer in the light of the typologies of the duel which characterize the *Iliad*: on the one hand the so-called ceremonial duels and, on the other hand, the final and particular duel Achilles-Hector.

As regards the two ceremonial (or formal) duels of the *Iliad* (see for instance Kirk 1978: 18-40, especially 24 and ff.) it is possible to observe the presence of some structural elements. In particular within these typologies there is a sort of 'contractual principle' and a 'code', which are to be understood as forms of ritualization of the struggle (similarly to the funeral games to Patroclus: *Iliad*, XXIII). In a paradigmatic manner we can shortly take a look to the ceremonial duel between Paris and Menelaus (*Iliad*, III) which is characterized by many interesting elements. Schematically it is necessary to highlight the following elements (for this scheme see especially Camerotto 2007).

Firstly the duel implies the end, or better the stop, of the war. It should be noticed that words and gestures seem to refer to a convocation of the *agora*, in confirmation of the suggested relation 'public discourse-(control of) emotion'. Moreover there is a similarity with the modalities and procedures underlying agons (*Iliad*, III, vv. 77-85: about the nexus 'agons-*agorà*' see Arend 1933: 120 and ff.; Beck 2005: 233-244, especially 233 and ff.).

Secondly there is the isolation of the two competitors (*Iliad*, III, 91) at the presence of the public: that is to say the struggle/battle is structurally *public*. In addition, and in confirmation of the procedural character of the duel, an award (*athlon*) is provided according to precise pacts which are guaranteed by a solemn sacrifice in the light of the rules approved by Zeus.

Thirdly some other rules concerning the details of the duel (i.e. with regard to draw, arms dressing and so on), and in particular the absence of the killing of the competitor as well as the proclamation of the victory, confirm the ritual character of the struggle. Furthermore another important point should be remarked: all duels, raising a *collective emotion*, show their public role and their relation with the dimension of *agora* (i.e. the political dimension or the public debate).

With a few differences the same elements are present, for instance, in the duel Hector-Ajax (*Iliad*, VII) but we should pay particular attention to the final and decisive duel Achilles-Hector (*Iliad*, XXII, 252-354). It shows a completely different type of struggle because it represents the climax of the *aristia* (the fundamental reason and goal of every duel) and, at the same time, the antithesis to the rules: in other words it is a very ambiguous duel.

On the one hand the confrontation Achilles-Hector presents the usual peculiarities of the duel: some elements related to the ceremonial duel and to the agons or, more in general, the same architecture. But, on the other hand, it has a specific and fundamental character: it is a struggle *peri psukès*, that is to say a battle *for the life*. Accordingly within this typology of duel, in so far as it is a *final* conflict, the 'contractual principles' of the duel are destroyed (by Achilles' decision). In other words the passage is from the 'control' and 'ritualization' of the emotion (i.e. violence, vengeance), as a typical trait of the ceremonial duel in order to guarantee its public role, to the complete manifestation of a ferine (wild) emotion.

Achilles' behavior (Mackie 1996: chapter 4 for the relation between strife and the language of Achilles) is dominated by two emotions (*menos* and *thymos*):

And Achilles rushed upon him, his heart full of savage wrath [*menos*][...]. Verily I know thee well, and forbode what shall be, neither was it to be that I should persuade thee; of a truth the heart (*thymos*) in thy breast is of iron. [*Iliad*, XXII, 312, 356-357; Homer 1978, II, 477, 481]

Anyway as someone suggested the presence of the emotion in the *Iliad*, in particular the *thymos*, is very ambiguous and dialectical (including Achilles: for Achilles' pity see Jinyo 2000, in particular 181³; more generally concerning the topic of 'pity' Konstan 2004, especially 128 and ff.) especially *in a political and legal perspective*. In fact if we look at the poem 'as a whole and interpret it as critique of the heroic ethic, we find that this critique centers on a crucial change in the *thymos* of Achilles'. More clearly the movement of the psyche of the central character of the *Iliad* 'reveals both the inherent pugnacity of *thymos* and its potential as a reservoir for other emotions, in Achilles case for grief and sympathy'. Hence through *thymos* 'he shows the potential both for the destruction of civilization and for the constitution of kinship between strangers. The destructive, savage force appears in Achilles' rage for revenge[...]. And yet the *Iliad* ends with a return to the human in a reconciliation of Priam and Achilles' (Koziak 2000: 58-59, but see also 58-62; see also Koziak's remarks quoted in the previous paragraph 2 of this contribution).

Menos and *thymos* become the extreme manifestations of ferocity (wildness). The duel is not only a game but it aims at the annihilation of the adversary, with the precise mention of the notion of *aikia* which is proper of animals: we could say the emotion at the animal level emerges. Following this direction, and within a project of an 'evolutionary literary criticism', Gottschall (2001) assesses the duels in the *Iliad* in terms of 'ritual combat' and 'intra-species sub-lethal animal fighting', by focusing on 'the tragedy of being a human animal' in Homer (see also Gottschall & Wilson 2005: vii-xv for a theoretical discussion).

b) *The meaning*. Beyond its different typologies, from a cultural and political-legal point of view the complex figure of the duel presents a constant meaning. In fact it is the expression of the 'honor' of heroes: more precisely the duel is the way they show their *aristia*. Starting from this perspective we have to evaluate the action of heroes within the particular context underlying the Greek archaic society which, according to a famous conceptual model, is a 'shame-based society' (Dodds 1973 chapters 1-2 for the theory about transition from the 'shame cultures' to the 'guilt cultures'). That is to say: unlike contemporary social models, the archaic social contexts are characterized by an interwoven relation among many dimensions: ethics, law and so on. This implies that the duel is not only a mere social procedure in order to control the emotion, or to provide the mutual recognition, but at the same time it involves a political-legal aspect which is to be understood within the complex and long passage from 'shame-cultures' to 'guilt-cultures'. Following this conceptual horizon the duel can be properly understood *as a political-legal rule*.

³ The Author states: 'The examination of the thematic connection between Achilles' *mēnis* and his pity[...]reveals[...]the ways in which the theme of Achilles' *mēnis*, specifically on the level of diction, is inseparable from those of the heroic code and human suffering and mortality'.

In other words: we should consider the ‘duel’ as a real *legal institution*. Through the *procedure developed by the duel*, especially if considered in its various phenomenology, the loser is placed in a different social, and hence political-legal, position. After all we should remember that, as is well known, the legal profile of the duel is confirmed by its long history within the European and Western tradition and, not by chance, *in the literature* (Kiernan 1988; Fontinoy 1969): once again a close relation law-literature.

c) *Conclusions: relation ‘emotion-duel’*. The figure of the ‘duel’ seems oriented to *domain* the emotion in order to achieve a double goal: the social, political and legal control of the emotion and the confirmation of a social order.

Firstly. Through the duel the archaic society is oriented to avoid the ‘excess’ of emotion, which entails a fatal consequence: the destruction of society, a point which will be re-called by Aristotle when he discusses the complex role of emotions in his *Poetics* and *Rhetoric* and, especially, an emotion as fear or *phobos*. Hence the duel could be understood as a form of ritualized, or codified, vengeance or revenge (for instance McHardy 2008).

Secondly. The duel is a tool through which it is possible *to confirm* the ‘social order’. More precisely the old social order, as in some way developed within the ceremonial duels, or the new social order established by the duel as in the final struggle Achilles-Hector.

With specific regard to the question of the relation law-emotion we can establish at least two important points.

Emotion has a crucial role within political-social-legal systems. Unlike modern-contemporary models the emotive dimension, which is to be understood according to its wide archaic semantic field (i.e. the Homeric lexicon), *integrates* the social models.

Emotion has a double face. Its dynamic force elicits that it should be ‘controlled’ and deeply ‘re-interpreted’ (rethought) in a legal and political direction. Only in this manner emotion can become a *political-legal factor* as a whole especially in order to avoid the ‘clan revenge’, that is to say a sort of public revenge (anyway in the light of the complex problem of the legal meaning of revenge): see, for instance, the reconciliation Priam and Achilles as well as Achilles’ pity. Furthermore this aspect should be considered in the light of the reception of Greek drama within the *polis* (see Revermann & Wilson 2008, in particular the essay of Helen P. Foley concerning *Audience and Emotion in the Reception of Greek drama*). At the same time emotion is the ‘motor’ for social life. It is underlying the entire Greek archaic society until the classical age (see hereinafter the paragraph 4): on a closer view *every* action, decision and so on of the heroes moves from the emotive dimension, perhaps according to a cultural model which connotes all archaic societies including the non-Western contexts.

In conclusion we should say that *the ambiguity of emotion could be connected to the ambiguity of social order*: the fundamental role of emotion as a structural foundation is always combined to the possibility to destroy the social architecture.

3. Polis, Tragedy, Emotion (Medea and Electra)

This long tradition about emotion, including its ambiguity and political-legal corollaries, in some way develops in the classical age. But this development presents an interesting

point: in spite of different historical and cultural conditions *emotion maintains its double identity*.

On the one hand emotion, according to what happens within the Homeric universe, is a decisive component of political-legal life, in particular for its connection with the public dimension of *agorà* (including the rhetoric profile). From the Homeric literature the idea concerning the political role of emotion references goes to Aristotle who, from this point of view, can be considered the catalyst of the Greek reflection and, hence, encompasses the previous long tradition (see hereinafter). On the other hand, and once again according to the Homeric universe, emotion is conceived as a possible disruptive element of social order. More precisely within the *polis* the *representation* of emotion as a disruptive force emerges. In other words the classical age synthesizes and rethinks the two crucial elements (*agorà* and ‘duel’) deriving from Homer.

Let us shortly consider the two points closely related to each other: a) the ‘public space’ (*agora*) and b) the ‘duel’.

a) As is well known the first one develops as a structured form of political organization. Here we can only remember as in the classical age the public debate *still* remains a sphere which is based on the emotive dimension: only following this direction we can completely appreciate the peculiar role of the rhetoric according to a close *continuity* with the Homeric premises. It will be never enough underlined this particular factor of the Greek social life (from Demosthenes to Isocrates): persuasion, *as a rational and emotive process* at the same time, is a pillar of politics (a factor which is completely unknown in other cultural models and dating back to the archaic period).

Anyway it is necessary to combine the well-known importance of emotion in rhetoric with the presence of other emotive elements *within* the polis: that is to say we should start to think seriously about the *polis* as a world strongly based on emotion. Beyond Martha Nussbaum’s suggestions, some recent works have put in light the emotive dimension of the *polis* as, for instance, the ‘courage’ (Balot 2014, especially chapter 3 about the nexus ‘free speech-democratic deliberation-courage’ and the entire Part 2 concerning the relation ‘equality-emotion-civic education’ with the conclusion 333 and ff.), in confirmation of the complexity of the Greek social order.

Furthermore, and following this direction, it is enough to remember the fundamental circle ‘politics-tragedy-emotion’ (for instance Sommerstein & Halliwell & Henderson & Zimmermann 1993, in particular 11-19). Starting from the crucial role played by drama within the polis, with particular regard to tragedy, we can grasp at least a key-point: *the relation between emotion and literature*. Beyond the political-representative-rational systems, drama involves the ‘other’ channel of the Athenian democracy. Through this channel the *political and legal* relevance of emotion emerges and characterizes the entire classical age, according to the problematic Aristotelian perspective which is paradigmatically synthesized by his theory of *catharsis*: is it to be understood as a control or as an elimination/repression of the emotion? (for a discussion about this point see at least, among many references, Nussbaum 1986: 388-391). At the same time it is very significant that this process develops starting from literature and myth. Here we cannot deepen the undeniable role of myth and its *direct political relevance within the polis* but anyway it is possible to outline an interesting conceptual sequence ‘emotion-literature-politics’: that is to say not only the relation emotion-politics but furthermore, and in a more specific manner, *literature-politics*.

b) But emotion, once again according to Homer, can have also a disruptive role. The figure of the ‘duel’, which dates back to Homer, in the classical age takes a new shape essentially based on the just mentioned tragedy. In some way we could understand this very particular Greek experience, according to a very significant parallelism with the institution of *agora*, as a form of ‘duel’ among different positions which are embodied by ‘heroes’. Always along the lines of the Homeric perspective, through a complex reinterpretation of myth drama as a whole, and especially tragedy, offers relevant examples of the structurally ambiguous role played by emotion *within the polis*: that is to say on the one hand emotion *as a building force of the polis* (i.e. the public function of tragedy), on the other hand emotion as a disruptive *shock*.

It is on this level that, in a very significant manner, the issue concerning emotion-*polis* emerges with a close relation with the thorny role of ‘woman’ above all if considered as a complex social-legal figure and role. Among many examples offered by tragedy we can paradigmatically focus at least on two figures: Medea and Electra.

The dramatic story of Medea (for instance Friedrich 1993; Griffiths 2006, especially chapter 6) directly concerns the previous topics, that is to say the problematic relation ‘*agorà* (public debate)-social bond- emotion (including its various manifestations)’. In other words once again it is an emotion (‘revenge’) which triggers the plot and its dynamic until the destruction of the social bond. In fact the lacking control of emotion involves the radical crisis of the basement of the *koinonia politikè* (according to an Aristotelian lexicon): the killing of the sons, the interruption of the dynastic lineage (according to the fundamental social bases and rules dating back to Homeric period) and, accordingly, the explosion of the *stasis* (civic conflict) with the implosion of social life. It is enough to refer to some passages about the ambiguous role of Medea as described by Euripides.

Medea radically destroys the social order and the social bond because she violates a fundamental rule: the prohibition of killing the sons. As is well known the starting point is an emotion: Medea kills her sons because at the basis of her behavior there is Medea’s desire to exact revenge on Jason (who is guilty party of *hybris*, 1366: ‘Nay, but thine insolence and thy new-forged bonds’).

Furthermore we should notice a sort of comparison, or balance, between two contrasting emotions: love for sons and revenge. The point is well clarified from the beginning by the nurse’s words:

[Medea]loathes her babes, joys not beholding them.
And what she may devise I dread to think.
Grim is her spirit, one that will not brook
Mishandling [...].
[*Medea*, 36-39; Euripides 1980: IV, 287]

The homicidal intention becomes clearer. Medea points out:

Woe! I have suffered, have suffered foul wrongs that
may waken, may waken
Mightily lamenting full well! O ye children accursed from the womb,
Hence to destruction, ye brood of a loathed one forsaken, forsaken!
Hence with your father, and perish our home in the blackness of doom!
[*Medea*, 111-114; Euripides 1980: IV, 293, with a following long passage where
Medea thinks about the Greek misogyny and mediates revenge and a final allusion
to the ambiguity of the female world]

Throughout the story we can observe the *progression*, in some way the emotive ‘construction’, of the homicidal project: threats (623-626; 790-798; 976-977), uncertainties (892 and especially the famous passage 1038- 1080 with the following comment of the Chorus at 1081-1115) until the final decision:

Friends, my resolve is taken, with all speed
To slay my children, and to flee this land,
And not to linger and to yield my sons
To death by other hands more merciless.
They needs must die: and, since it needs must be,
Even I will give them death, who gave them life.
Up, gird thee for the fray, mine heart! [vv. 1236-1242; Euripides 1980: IV, 379]

Furthermore it is possible to notice as Medea, similarly to other Greek figures and according to the complex and double dimension of emotion, puts in evidence the ambiguity which structurally connotes the female universe *within the polis* including its possible positive declination (i.e. the rescue of Corinthus by Medea from the famine and also the mysterious conclusion in 1317-1322; about the ambiguity of Medea see De Romilly 1970: chapter 4).

In a theoretical continuity Electra’s plot, according to two possible versions (Euripides and Sophocles: a comparison between the two versions in Avezzù 2003, especially 181-188; furthermore Van Nortwick 2012, in particular 149 for the three versions of *Electra* in Aeschylus, Sophocles and Euripides⁴) offers another example of the complex relation emotion-politics-female world. In fact the tragedy is characterized by some fundamental emotions as ‘hate’ (vengeance, revenge), anguish, ‘joy’ and ‘desperation’ which are closely related to each other and, in the final analysis, they are connected to a political-legal question, that is to say the problem of the dynastic lineage: the insurmountable problem of legitimacy of power.

Only some passages with regard to emotion.

Firstly, whether Medea moves from the desire of revenge, the entire behavior of Electra starts from the mix of emotions (or feelings) composed of hate, revenge and anguish. From the beginning these emotions appear and, primarily, the ‘hatred’:

Hail, black-winged Night, nurse of the golden stars,
Wherein I bear this pitcher on mine head
Poised, as I fare to river-cradling springs, -
Not that I do this of pure need constrained, But to show Heaven Aegisthus’ tyranny, -
And wail to the broad welkin for my sire.
For mine own mother, Tyndareus’ baleful child,
Thrust me from home, to pleasure this her spouse,
And, having borne Aegisthus other sons,
Thrusteth aside Orestes’ rights and mine.
[*Electra*, 54-63; Euripides 1978: II, 11]

⁴ ‘Aeschylus’ Electra is important as a part of the family whose history is cloud by past events, but she is not a prominent character in his play; Euripides’ character is the most powerful agent in the revenge plot and participates in the murder of her mother. Sophocles’ displacement of his heroine from the central acts of the myth and his devaluing of her emotions is unprecedented’.

In the same way Electra's anguish, which is connected and interwoven with the idea of revenge, emerges in this long passage:

Bestir thou, for time presses, thy foot's speed;
Haste onward weeping bitterly.
I am his child, am Agamemnon's seed, -
Alas for me, for me! -
And I the daughter Clytemnestra bore, 'Tyndareus' child, abhorred of all;
And me the city-dwellers evermore
Hapless Electra call.
Woe and alas for this my lot of sighing,
My life from consolation banned!
O father Agamemnon, thou art lying
In Hades, thou whose wife devised thy dying -
Her heart, Aegisthus' hand.
On, wake once more the selfsame note of grieving:
Upraise the dirge of tears that bring relieving.
Bestir thou, for time presses, thy foot's speed;
Haste onward weeping bitterly.
Ah me, what city sees thee in thy need,
Brother? - alas for thee!
In what proud house hast thou a bondman's place,
Leaving thy woeful sister lone
Here in the halls ancestral of our race
In sore distress to moan?
Come, a Redeemer from this anguish, heeding
My desolation and my pain:
Come Zeus, come Zeus the champion of a bleeding
Father most foully killed - to Argos leading
The wanderer's feet again.
[*Electra*, 112-139; Euripides 1978: II, 15]

Anyway only within Sophocles' version (a general introduction about Sophocles in Goldhill 2012 and, with regard to Electra in Sophocles, Dunn 2012) the idea of 'revenge' and its transformation into a sort of madness, that is to say an emotional madness, completely develops as well as the *failure of the control of emotion*. For instance:

Halls of Persephonè and Death,
Guide of the shades, O Hermes, and O Wraith,
Ye god-sprung Furies dread
Who watch when blood is shed,
Or stained the marriage bed,
O aid me to avenge my father slain,
O send my brother back again!
[*Electra*, 110-118; Sophocles 1978: II, 135]

Furthermore about madness:

Ah, noble friends ye come, I see
To ease my misery;
Your kind intent, O trust me, I perceive.
Yet can I never leave

My task, each day, each hour, anew to shed
Tears o'er my father dead.
O kindly hearts, so ready to repay
All friendship owes,
Leave me, O leave me (this one boon I pray)
To my wild woes.
[*Electra*, 129-138; Sophocles 1978: II, 137]

Along these lines it is not by chance that in comparison, and as a sort of opposition, we can observe the polarization between Electra and her fearful and resigned sister Chrysothemis. In fact this latter invites Electra *to control the emotion* (i.e. rage):

Sister, why com'st thou once more to declaim
In public at the outer gate? Has time
Not schooled thee to desist from idle rage?
I too, my sister, chafe no less than thou
At our sad fortunes, and had I the power,
Would make it plain how I regard our masters.
But in the storm 'tis best to reef the sail,
Nor utter threats we cannot execute.
I would thou wert likeminded; yet I know
Justice is on thy side, and I am wrong.
Yet if I am to keep my liberty,
I needs must bow before the powers that be.
[*Electra*, 329-340; Sophocles 1978: II, 151]

On a second level, in confirmation of the crucial role of the emotive dimension, it should be also underlined the different emotions on the occasion of the false Orestes' death within Sophocles' version. This passage is very relevant because in some way it draws not only the antithesis between the emotional universe of Electra and Clytemnestra but, in a political-legal direction, their different perspectives about the dynastic lineage. Accordingly this dystonia implies a different development of the plot. Here is the long passage:

CLYTEMNESTRA.
Strange is the force of motherhood; a mother,
Whate'er her wrongs, can ne'er forget her child.
AGED SERVANT
So it would seem our coming was in vain.
CLYTEMNESTRA
Nay, not in vain. How canst thou say 'in vain',
If of his death thou brings convincing proof,
Who from my life drew life, and yet, estranged,
Forgat the breasts that suckled him, forgot
A other' tender nurture, fled his home,
And since that day has never seen me more,
Slandered me as the murderer of his sire
And breathed forth vengeance? – Neither night nor day
Kind slumber closed these eyes, and immanent dread
Of death each minute stretched me on the rack.
But now on this glad day, of terror rid
From him and her, a deadlier plague than he,

That vampire who was housed with me to drain
My very life blood – now, despite her threats
Methinks that I shall pass my days in peace.

ELECTRA

Ah woe is me! Now verily may I mourn
Thy fate, Orestes, when thou farest thus,
Mocked by thy mother in death! Is it not well?
[*Electra*, 769-790; Sophocles 1978: II, 183-185]

In this passage two points are to be noticed with regard to the question of the emotion. On the one hand the joy of Clytemnestra which, always according to an emotional level, in the eyes of Orestes becomes the proof of her cruelty. On the contrary Electra's desperation is the proof of her fidelity and sincerity: that is to say the possibility to reconstruct the dynastic lineage through the killing of Clytemnestra and, hence, to restore the social bond.

In conclusion. Medea and Electra, although in a different manner and according to various degrees (about the complex polarity of Electra see also Vernant 1965: 162-165) are representative of the fundamental role of emotion within the *polis*. But, in a wider perspective, we can underline the particular connection between 'emotion' and 'female world' within the Greek model: is it only by chance that in Greek literature many female figures play a disruptive role? This is a point which should be better deepened because it entails the role of woman as a whole.

On a closer view the latter seems placed between two extremes: on the one hand woman as an expression of the social order (i.e. Penelope), on the other hand the 'rupture' represented by the mentioned figures of Medea and Electra or others as Antigone and so on (once again closing related to myth: for instance some mythical female figures as Pandora). Following this direction we should take into account not only the relation law-emotion but, more widely, the pair politics-emotion *starting from the female perspective*: hence the research range should be extended to the field 'woman-emotion-law-politics' (see for instance Various Authors 2002; Craik 1993).

4. From Literature to Philosophy: Aristotle and the Relation *philia-thymos*

As previously remarked Aristotle, as well as Plato, synthesizes and *theorizes* the long Greek tradition related to emotion. The passage is from literature to philosophy in the light of the close continuity between the archaic society and the classical age and, hence, between narration (story telling) and theoretical/speculative approach. In other words: within the Hellenic world *in some way* philosophy can be considered as a sort of continuation of literature (for a general framework about Aristotle-literature Konstan 2006).

In confirmation of the nexus '*agorà* (political debate)-emotion' both philosophers understand the crucial relation between social life and emotion and, in the same way, political-legal level and emotive dimension. Similarly to Plato's theory, according to Aristotle *polis and its peculiar legal-political institutions are structurally grounded in emotion*⁵. But

⁵ For some ideas discussed in this paragraph see also, in a wider perspective, Bombelli 2013 and especially two my papers presented at the 2015 World Congress of the International Association for the Philosophy of Law and Social Philosophy, Washington D.C. (26th July 2015-1st August 2015): the first one, entitled

from a political and legal point of view there is a substantial difference. According to Plato emotion, although its social role, fundamentally represents a dangerous dimension: then it is to be controlled within the schematic and rigid order of the *Republic* grounded in the close analogy between the typologies of individual soul, including the different levels of emotion, and the social strata (philosophers, guardians/warriors and workers). On the contrary the Stagirite, although he is aware of the complexity of the emotive dimension (for a general survey Fortenbaugh 2002), emphasizes its constructive role in order to build up social life *as a sort of diffusive dimension*. I focus only on the fundamental emotions of *philia* and *thymos*.

The Greek (Aristotelian) notion of *philia*, and the similar concept of *omonoia* (here not deepened), should not be confused with the modern idea of 'friendship' (Konstan 1997⁶). Within the Hellenic-classical universe the former, which *is substantially absent in the archaic period*⁷, expresses the ontological origin of human relationships, whereas the latter indicates only a subjective relation frequently based on an individual choice.

Within the Aristotelian perspective the relevance of *philia* can be evaluated at least in two directions. On the one hand, and beyond the wide discussion proposed in the *Nicomachean Ethics*, *philia* can develop only within a communitarian context (household, *oikos*, *polis*): in other words there is a mutual and circular relation between community and *philia* (there is no community without *philia*). On the other hand *philia* immediately identifies a political dimension: being a *political dimension*, *philia* represents the theoretical as well as sociological basis for political obligation (*Politics*, III, 9, 1280b 30-1281a 11 and, more broadly for the nexus 'best *koinonia-philia*', *Politics*, IV, 11, 1295a 25-1296a 19). Along these lines we can appreciate the corollaries implied by the conceptual circle '*philia* (as an emotion)-community' with regard to *eudaimonia* and *paideia*.

The relation '*koinonia-eudaimonia*' (*Nicomachean Ethics*, I, 4, 1095a 14-20; I, 7, 1097a 30-1097b 11) marks the conceptual continuity between the two profiles which characterize the Aristotelian argumentation as a whole: the attention to the theoretical/anthropological dimension of the relation and, at the same time, the importance of its underlying contextual-empirical and communitarian reference. In other words *eudaimonia* is to be understood as an anthropological, and then ethic and political, flourishing including the emotive dimension related to *philia* as a pillar of social life.

The nexus '*koinonia-paideia*' (*Politics*, VIII) synthesizes the Hellenic tradition regarding the political role played by education and represents the logical conclusion of the entire Aristotelian philosophy. Human relations can develop only within the *polis-koinonia*

Emotion and Rationality in Aristotle's Model: From Anthropology to Politics, in the Special Workshop 'Aristotle and the Philosophy of Law' and the second one, entitled *Reason, Emotion and Politics. Remarks for a Contemporary Theory of Emotion in Political-Legal Debate*, in a Working Group. Both papers will soon be published.

⁶ According to some authors despite 'the ostensible continuities between classical and modern conceptions of friendship as mutual, voluntary, loving, and unselfish relationship, there are deep differences between them that reflect diverse values and psychological assumptions' (Konstan 1997: 14).

⁷ More precisely and with regard to Homer: 'As the oldest evidence for the history of friendship in the classical world, the two epic poems attributed to Homer present a paradox. The relationship between Achilles and Patroclus in the *Iliad* is often cited in antiquity as one of three or four legendary friendships.[...]Nevertheless, many modern scholars suppose that in archaic epic, friendship is conceived as a formal and non-emotional bond based on obligation rather than love.[...]The substantive *philos* (as opposed to the adjective) is not normally used in the classical period of family members, for example, or fellow citizens any more than 'friend' is today; rather, *philos* as a noun refers to people who associate voluntarily on the basis of mutual affection. This point is controversial[...]. in the language of Homer, however, *philos* does not apply specifically to friends, and this raises questions about the description of friendship in the epics' (Konstan 1997: 24-28).

(based on *philia*): hence this latter is philosophically, legally and politically legitimated to elaborate and, to some extent, 'to impose' a public education and, then, to give a precise direction to the social emotions (*Politics* VIII, 1, 1337a 11-22 and 35-36; see Newman 1950: I, 369-374).

Following this direction the communitarian model, *including its decisive emotive basement*, can be dynamically the ideal political-legal framework to enhance personal and collective identity and freedom: through Aristotelian lexicon to achieve the complete *eudaimonia*. But, *at the same time*, *koinonia* can develop into a totalitarian structure, that is to say into a platonic philosophers' republic (which is based, not by chance, on the role played by *paideia* and on the 'control' of emotion).

In conclusion. According to Aristotle human relationships and 'communitarian bonds' rely on a sort of superimposition/equation between 'relation' and 'community': in some way community *is* the relation. Moreover Aristotle consequently establishes the equation *polis-koinonia*, insomuch that legal/political obligation must be involved and justified within community.

In the light of these remarks the point for us is precisely the political and legal one. *Philia* as an *emotive dimension*, including its communitarian horizon and corollaries (i.e. the notions of *eudaimonia* and *paideia*), represents the basement of the *polis* and the *condition* for its *political and legal stability*: as someone suggested, 'few canonical political philosophers and even fewer contemporary political theorists make use of the possibilities that the Aristotelian treatment of political emotion offered' (Koziak 2000: 3; see also chapters 3-4 and hereinafter the remarks concerning *thymos* in Aristotle). Unlike the modern-contemporary tradition based on the idea of rational 'contract' as a basement of the political obligation, within Aristotle's framework politics grounds in a complex semantic area (from the public role of drama to the deep meaning of *philia*) in many ways related to emotion.

Following this direction the concept of 'impulse' (*thymos*) plays a relevant role within Aristotle's theory of emotion and has a close relation with desire and appetite (*orexis*). More precisely it could be considered as its (biological) dynamic and hence, in some way, the process underlying every form of emotion. In other words impulse(*thymos*) should be understood as the *genetic moment* of the 'movement' underlying emotions as *epithumia* (appetite, which is literally a form of *thymos*) or *orexis*.

Anyway it is a very complex notion. From this point of view Aristotle continues the long tradition of *thymos* dating back to the Greek archaic society (see especially the previous paragraph 2 of this contribution; furthermore Fortenbaugh 1983: 303-320, especially 304-307, about the complex emotive dimension in Medea, including the concept of *thymos*, and the relation with the Aristotelian perspective concerning emotion and women). Within the Aristotelian theory the word-category *thymos* covers a wide semantic field (for this point see again Koziak 2000, who severely criticizes the perspective about *thymos* as 'spiritedness inspired to Leo Strauss: Koziak 2000: 32; see also Berns 1984, Charney 1990, Zuckert 1990, Lord 1992) and, in a more specific manner, it presents at least a double and interwoven declination: a cognitive-theoretical dimension and a practical-political reflex.

In a cognitive-theoretical perspective *thymos*, which is the linguistic-etymological basis of *thaumathein*, could be understood as a sort of emotive puzzlement. That is to say: emotion, and therefore a physical or in some way genetic factor, seems to be the *condition* for theoretical activity or philosophy. Hence *thymos* is a *form of emotive knowledge* according to the famous passage of *Metaphysics* where Aristotle states that '[f]or it is ow-

ing to their wonder that men both now begin and at first began to philosophize' (*Metaphysics*, I, 982b, 12-13).

On a practical-political level within Aristotle's theory it is possible to distinguish three concepts of *thymos*: *thymos* as the emotion anger, as an aggressive force or 'spiritedness' (both according to Plato) and, especially, the innovation of *thymos* as the general capacity of emotion (particularly within *On the Soul*: Koziak 2000: chapter 3 for this distinction and all the references). Following this direction *thymos* has also a relevant political role (Koziak 2000: 2⁸; Sokolon 2006): more precisely, also in the light of its connection with friendship (*philia*), *thymos* represents the *condition* for social-political life and its institutionalization ('like friendship[...] *thymos* in citizen-rulers requires an institutional base': Koziak 2000: 122) and its possible destruction as well,⁹ starting from the relevance conferred by Aristotle to the *tensional nature* of *polis* between order-disorder (Bombelli 2013).

In other words, *polis* develops on a tensional balance (a dialectics) grounded *at the same time* in two paramount conditions: on the one hand intelligence/thought, or we could call 'rationality' (*logos*, *dianoia*), and, on the other hand, a combination of opposite factors (see for instance *Politics*, VII, 1327b 36-1328a 15). These factors are based on emotions as *thymos*, according to a possible translation of this very complex word, which is a condition for social life but, at the same time, *could be* the reason of the political division.

Nevertheless, and unlike a traditional interpretation of the Greek model (including Aristotle's perspective), there is no direct and mutual correspondence between the pair 'rationality (intelligence)-order' and the couple 'emotion-disorder': on the contrary emotion is also a condition of the social order and represents an unavoidable political factor *with relations to a specific context*.¹⁰ Hence the radical difference between the Greek model grounded in the particular experience of the *polis* and other social models as suggested by the Stagirite¹¹: the *blending* (or balance) composed of rationality (*dianoia*) and emotions (*philia*, *thymos*) marks the *decisive boundary* between freedom and slavery and represents the *condition* of social and political life.¹²

⁸ 'Aristotle's treatment of *thymos*[...] represents a theory of political emotion available to contemporary challenges to rationalistic explanations of political community'.

⁹ 'With Aristotle's final word on the best regime, *thymos* in its most complex sense loses its meaning of one emotion or of one drive or instinct, becoming instead the soul's capacity for emotion' (Koziak 2000: 110 also for many references to *Politics* and *Nicomachean Ethics*).

¹⁰ As someone has conveniently suggested, for Aristotle 'understanding an emotion requires knowledge of its typical context – the typical frame of mind, the typical grounds or reasons, and the typical objects, especially the kind of people toward whom we feel an emotion. And emotional habits can be changed by virtue of the political regime in which one lives.[...] Aristotle provides an essential contribution toward a comprehensive account of political emotion' (Koziak 2000: 21-24 with reference to *Politics* 1253a 29-31).

¹¹ 'Having spoken of the number of the citizens, we will proceed to speak of what should be their character. This is a subject which can be easily understood by anyone who casts his eye on the more celebrated states of Greece, and generally on the distribution of races in the habitable world. Those who live in a cold climate and in Europe are full of spirit, but wanting in intelligence and skill; and therefore they retain comparative freedom, but have not political organization, and are incapable of ruling over others. Whereas the natives of Asia are intelligent and inventive, but they are wanting in spirit, and therefore they are always in a state of subjection and slavery. But the Hellenic race, which is situated between them, is likewise intermediate in character, being high-spirited and also intelligent. Hence it continues free, and is the best-governed of any nation, and, if could be formed into one state, would be able to rule the world' (*Politics*, VII, 7, 1327b 16-33: all Aristotelian quotations from Barnes 1984).

¹² In fact, according to Aristotle the well-balanced relation 'rationality-emotion' allows the passage from the immediate and disordered (chaotic) relations to the legal-political dimension: 'And clearly those whom

In conclusion.

Aristotle draws a very delicate conceptual architecture which encompasses *at the same time* reason *and* emotion in order to guarantee the ‘just’ balance ‘order-disorder’ according to the entire tradition dating back to the archaic world (for this point we should also remember, in a negative perspective, the crucial role of fear-*phobos* in tragedy as it is theorized in Aristotle’s *Rhetoric*). This dialectical dynamic makes *polis* possible in order to avoid the *stasis*: that is to say the civic, political and legal ‘chaos’. Similarly to the concept of *philia*, *thymos* takes shape as a sort of *pretheoric* (in some way ‘emotive’?) disposition underlying the political and legal structure: ‘passion is the quality of the soul which begets friendship and enables us to love’ (*Politics*, VII, 1327b 40-1328a 1).

On this level we can better appreciate the complex relation between *philia* and *thymos*: the former should be placed within the horizon of a *basic and common friendship*, which implies the decisive question concerning the understanding of the ‘other’ *outside the polis*. Anyway this relation gives the confirmation of the emotive nature of *philia* as the basis of the political-legal structure of *polis*. Aristotle reaffirms this point also in *Rhetoric*¹³ and especially in another synthetic passage with regard to the structural and dialectic role of *thymos*:

notably the spirit {θυμὸς} within us is more stirred against our friends and acquaintances than against those who are unknown to us, when we think we are despised by them[...]. The power of command and the love of freedom are in all men based upon this quality, for passion is commanding and invincible. [*Politics*, VII, 7, 1328a 1-8]

5. Some Conclusions

The interpretation of some passages of the Hellenic world suggested in the previous pages elicits a new look over the relation between the Western cultural identity, ‘law’ and emotion and, to some extent, anthropological models. In conclusion, and in a very synthetic manner, we can try to fix at least the following points related to each other.

a) *Western identity and law*. Unlike a certain critical interpretation, *from the beginning* of Western culture (i.e. Greek world) ‘law’, generally meant as ‘private’ and ‘public’ law as well as politics, always presented a structural ‘emotive’ profile. More precisely all these notions took shape as a ‘tragic dilemma’ between two poles: on the one hand ‘emotion’, widely understood as a complex dimension (*menos*, *phobos*, *philia*, *thymos* and so on), and, on the other hand, ‘reason’ in turn to be interpreted according to multiple levels. This problematic horizon influenced the following legal tradition and civilization including its peculiar institutions. From this point of view it is possible to conceive some legal figures

the legislator will most easily lead to excellence may be expected to be both intelligent and courageous’ (*Politics*, VII, 7, 1327b 36-38).

¹³ He points out: ‘We may describe friendly feeling towards anyone as wishing for him what you believe to be good things not for your own sake but for his, and being inclined, so far as you can, to bring these things about’ (*Rhetoric*, II, 4, 1308b 35-1381a 1).

as systems to control emotion *through rules*: for instance the idea of ‘Court’ could be understood as a sort of ‘ritualized duel’¹⁴.

b) *The relation emotion-reason*. In a wider perspective the historical-conceptual continuity between Greek literature and philosophy (from Homer to Aristotle) suggests a close and problematic relation between the two dimensions. In particular an ambiguous model of ‘emotion’, and in a symmetric manner of ‘reason’, emerges: emotion as an undeniable element of the social bond and, at the same time, emotion as a potentially disruptive force (with the consequent problem of its control and the central dialectics ‘male-female’ which marks the entire Greek world).

c) *Anthropology*. In some way this entire conceptual framework entails a different understanding of the anthropological model underlying the Western theorization of political and legal models. The ‘archaic man’ as well as the ‘classical man’ seems to be characterized by a double nature which is based on a delicate balance of ‘reason’ and ‘emotion’. Is it time to deeply rethink the theoretical and anthropological *conditions* of law and politics?

¹⁴ I thank Prof. Jeanne Gaakeer for this suggestion and the discussion about this point in occasion of the Special Workshop ‘Memory and Oblivion, the Harmonies and Conflicts of Law, Reason and Emotion’.

References

- Adkins, W. H., 1982. Values, Goals, and Emotions in the Iliad. *Classical Philology*, 77, 4, 292-326.
- Arend, W., 1933. *Die Typischen Schenken bei Homer*. Berlin: Weidmann.
- Avezzù, G., 2003. *Il mito sulla scena. La tragedia ad Atene*. Venezia: Marsilio.
- Balot, R. K., 2014. *Courage in the Democratic Polis: Ideology and Critique in Classical Athens*. Oxford: Oxford University Press.
- Barnes, J., (ed.) 1984. *The Complete Works of Aristotle. The Revised Oxford Translation*. Princeton: Princeton University Press.
- Beck, D., 2005. *Homeric Conversation*. Cambridge Ma.-London: Harvard University Press.
- Berns, L., 1984. Spiritedness in Ethics and Politics: a Study in Aristotelian Psychology. *Interpretation*, 12, 335-348.
- Bombelli, G., 2013. *Occidente e 'figure' comunitarie. I Un ordine inquieto: koinonia e comunità 'radicata'*. *Profili filosofico-giuridici*. Napoli: Jovene.
- Camerotto, A., 2007. Il duello e l'agone. Le regole della violenza nell'epica eroica. *Nikephoros*, 20, 9-32.
- Casswell, C., 1990. *A Study of Thymos in Early Greek Epic*. Leiden: Brill.
- Charney, A., 1990. *Spiritedness and Pity in Aristotle*. In C. Zuckert, *Understanding the Political Spirit*. New Haven: Yale University Press, 67-87.
- Craik, E., 1993. *Tragic Love, Comic Sex?* In Sommerstein A. H. & Halliwell S. & Henderson J. & Zimmermann B. (eds.). *Tragedy, Comedy and the Polis*. Bari: Levante, 253-262.
- De Romilly, J., 1970. *La Tragédie grecque*. Paris: Puf.
- Dodds, E. R., 1973. *The Greeks and the Irrational*. Berkeley: University of California Press.
- Dunn, F., 2012. *Electra*. In K. Ormand (ed.), *A Companion to Sophocles*. Chichester: Blackwell, 98-110.
- Euripides, 1978. *Electra*. Cambridge Ma: Harvard University Press.
- , 1980. *Medea*. Cambridge Ma: Harvard University Press.
- Fontinoy, C., 1969. *Le duel dans les langues sémitiques*. Paris: Édition 'Les belles lettres'.
- Fortenbaugh, W. W., 1983. *On the Antecedents of Aristotle's Bipartite Psychology*. In J. P. Anton-A. Preus (eds.), *Essays in Ancient Greek Philosophy*. Albany: State University of New York Press, II, 303-320.
- , [1975] 2002. *Aristotle on Emotion. A Contribution to Philosophical Psychology, Rhetoric, Poetics, Politics and Ethics*. London: Duckworth.

- Fowler, R., (ed.) 2004. *The Cambridge Companion to Homer*. Cambridge, Uk-New York: Cambridge University Press.
- Friedrich, R., 1993. *Medea apolis: on Euripides' Dramatization of the Crisis of the Polis*. In Sommerstein A. H. & Halliwell S. & Henderson J. & Zimmermann B. (eds.). *Tragedy, Comedy and the Polis*. Bari: Levante, 219-239.
- Goldhill, S., 2012. *Sophocles and the Language of Tragedy*. Oxford et al.: Oxford University Press.
- Gottschall, J., 2001. 'Homer's Human Animal: Ritual Combat in the Iliad'. *Philosophy and Literature*, 25, 278-294.
- Gottschall, J. & D. S. Wilson, (eds.) 2005. *The Literary Animal: Evolution and the Nature of Narrative*. Evanston: Northwestern University Press.
- Griffin, J., 2014. *The Speeches*. In R. Fowler, *The Cambridge Companion to Homer*. Cambridge, Uk-New York: Cambridge University Press, 156-168.
- Griffiths, E., 2006. *Medea. Gods and Heroes of the Ancient World*. Oxon–New York: Routledge.
- Homer, 1976. *Odissey*. Cambridge Ma: Harvard University Press.
- , 1978. *Iliad*. Cambridge Ma: Harvard University Press.
- Jaeger, W., 1936-1947. *Paideia. Die Formung des Griechischen Menschen*. Berlin-Leipzig: W. De Gruyter.
- Jinyo, K., 2000. *The Pity of Achilles: Oral Style and the Unity of the Iliad*. Lanham: Rowman & Littlefield.
- Kiernan, V. G., 1988. *The Duel in European History: Honor and the Reign of Aristocracy*. Oxford: Oxford University Press.
- Kirk, G.S., 1978. *The Formal Duels in Book 3 and 7 of the Iliad*. In B.C. Fenik (ed.), *Homer: Tradition and Invention*. Leiden: Brill, 18-40.
- Knudsen, R., A. 2014. *Homeric Speech and the Origins of Rhetoric*. Baltimore: The Johns Hopkins University.
- Konstan, D., 1997. *Friendship in the Classical World*. New York-Melbourne: Cambridge University Press.
- , [2001] 2004. *Pity Transformed*. London: Duckworth.
- , 2006. *The Emotions of the Ancient Greeks. Studies in Aristotle and Classical Literature*. Toronto-Buffalo-London: University of Toronto Press.
- Koziak, B., 2000. *Retrieving Political Emotion*. University Park, Pa: The Pennsylvania State University Press.
- Lord, C., 1992. *Aristotle's Anthropology*. In C. Lord & D. K. O'Connor (eds.), *Essays on Aristotelian Political Science*. Berkeley–Los Angeles: University of California Press, 49-73.
- McHardy, F., 2008. *Revenge in Athenian Culture*. London: Duckworth.

- Mackie, H. S., 1996. *Talking Trojan: Speech and Community in the Iliad*. Lanham et al.: Rowman & Littlefield.
- Mumford, D. B., 1996. 'Somatic Symptoms and Psychological Distress in the Iliad of Homer'. *Journal Psychosom Res*, 41, 2, 139-148.
- Nestle, W., 1942. *Von Mythos zum Logos. Die Selbstentfaltung des Griechischen Denkers von Homer bis auf die Sophistik und Sokrates*. Stuttgart: Verlag.
- Newman, W. L., [1887]1950. *The Politics of Aristotle*. Oxford: Clarendon Press.
- Nietzsche, F., [1872]1972. *Die Geburt der Tragödie. Unzeitgemässe Betrachtungen* (1872-1874). Berlin-New York: W. De Gruyter.
- Nussbaum, M. C., 1986. *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy*. Cambridge: Cambridge University Press.
- Revermann, M. & P. Wilson, (eds.) 2008. *Performance, Iconography, Reception*. Oxford: Oxford University Press.
- Sokolon, M. K., 2006. *Political Emotion: Aristotle and the Symphony of Reason and Emotion*. Dekalb: Northern Illinois University Press.
- Sommerstein, A. H. & S. Halliwell & J. Henderson & B. Zimmermann, (eds.) 1993. *Tragedy, Comedy and the Polis*. Bari: Levante.
- Sophocles, 1978. *Electra*. Cambridge Ma: Harvard University Press.
- Van Nortwick, T., 2012. Last Things: *Oedipus at Colonus* and the End of Tragedy. In K. Ormand (ed.), *A Companion to Sophocles*. Chichester: Blackwell, 141-154.
- Various Authors, 2002. *Eros and Polis: Desire and Community in Greek Political Theory*. Cambridge: Cambridge University Press.
- Vernant, J. P., 1965. *Mythe et pensée chez les Grecs. Études de psychologie historique*. Paris: Maspero.
- Winckelmann, J. J., [1764] 1934. *Geschichte der Kunst des Altertums*. Leipzig: Allen & Unwin.
- Zuckert, C H., 1990. *On the Role of Spiritedness in Politics*. In Id. (ed.), *Understanding the Political Spirit*. New Haven: Yale University Press, 1-29.



End-of life care and dignity of dying (Literary flashes of inspiration)

Patrizia Borsellino*

Abstract: In the last decades, end-of life has become a crucial topic in philosophical-legal and bioethical research, which has focused and still does on questions regarding meaning of dying with dignity and conditions, to be granted to all individuals, for ending life in a dignified way. The debate has however highlighted relevant disagreements with regard to the notion of 'dignity of dying'. In order to overcome these different opinions, the best way is to propose a clear redefinition with the intent to initiate the discussion and possibly reach agreement on choices and courses of action useful to offer the best care to terminally ill patients. But how can we identify the conditions needed to properly discuss about dignity at the end-of life and dignified dying? Famous literary works may help to enlighten the search for the 'key-words' in ending life with dignity. The paper proposes a methodological analysis based on a passage of Francis Bacon's *On the dignity and Advancement of Learning*, where the author stigmatizes the habit of contemporary physicians of abandoning the cures of patients in their nature incurable and vigorously recognizes, for the first time, the binding duty of physicians to mitigate pain and suffering. The analysis includes three passages respectively extracted from *The Death of Ivan Il'ic* (1886) by Leo Tolstoj, *Buddenbrooks* (1901) by Thomas Mann, and *In the face of death* (1985) by Peter Noll. The analysis of these passages will be useful to argue in favor of the thesis that dying with dignity requires first of all that the suffering patient is never subject to others' interests, including family, who often wants to prolong life at any cost. In the second place, it requires that we really understand how devastating is the impact of lies on the patient's overall condition. Finally, it requires that efforts be made to overcome prejudices in order to preserve the patient from mortification caused by not been considered any longer a person with full rights: This occurs anytime the patient is denied the right to choose and possibly adopt nonconformist lifestyles. Conclusions of the paper focus on some considerations concerning values at stake and foreseeable impacts on health policies regarding the vision of dying with dignity in the shape of the examined literary inspirations.

Key-words: Bioethics, End-of Life, Literature, Law

In the last decades, the philosophical-legal and bioethical debate has increasingly focused on the end-of life. The primary reason for this is that modern technological medicine has brought deep changes in the scenarios of dying, and these transformations have played a major role in the attention paid to this key issue.

Over time, modern medicine has refined its abilities of controlling death. Indeed, medicine can now modulate times and modes of dying, and consequently the end-of life has become a field where choices are possible, and as such, it constitutes a privileged issue at the core of the ethical, critical discussion. In this context, the question

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concerning the meaning of dying with dignity and of the adequate protection of all individuals' right to end their life in a dignified way has cropped up repeatedly both in the philosophical reflection and in the ethical-legal debate. And the interest shown in this topic has been primarily associated with the echo that the concept of dignity has played in arguing in favor of the desirable modes of ending life. Arguments based on dignity have indeed represented the main strategy used to persuade of the 'goodness' of choices and lines for action to be adopted in the end-of life.

Although very different ethical positions have appealed and do appeal to the notion of dignity, relevant disagreements over the conditions of dying with dignity still persist. This may lead to consider 'dignity at the end of life' as a kind of 'empty box', as a rhetorical 'useless' artifice (as Ruth Macklin [2003] wrote in a challenging paper entitled *Dignity is a Useless Concept*), or even as a dangerous one, and for these reasons it should -as it is sometimes suggested- be avoided in order not to ferment the mystification of an agreement which seems to be, always and in any case, not only possible but even taken for granted. However, 'dignity' is a term that has 'an intense and emotively positive connoted power', as Uberto Scarpelli, my master of philosophical-legal studies, would have qualified it (Scarpelli 1992: 40). And the term, which is used in relevant international documents like the European Charter of Fundamental Rights (Nizza, 2000), deserves, in my opinion, to continue to be part of the theoretical, ethical-legal lexicon concerning the end-of life. This proposal is subject to the condition of framing the meaning of the concept by means of a re-definition in which the debate could be grounded. And according to this definition, we could achieve the desired goal of obtaining consensus of opinion on choices and lines for action that could provide the best assistance to incurable patients.

But how can we identify the conditions needed to properly discuss dignity at the end-of life and dignified dying? Famous literary works may help to enlighten the search for 'key-words' in ending life with dignity. By following some famous authors' line of reasoning, I think it is possible to frame a definition of 'dignity at the end-of life' deserving attention and positive evaluation with regard to the values it puts into play and to the practical impacts it may have.

The first 'key word' of dying with dignity is suggested by a passage excerpted from *On the Dignity and Advancement of Learning* by Francis Bacon, who was one of the major seventeenth-century pioneers of modern thought. In this passage, the author stigmatizes the habit of contemporary physicians of abandoning the cures of patients in their nature incurable ('the patient after the disease is thought past cure' in Bacon's words) and vigorously recognizes, for the first time, the mandatory duty of physicians to mitigate pain and suffering. He writes:

And further, we esteem it the office of a physician to mitigate the pains and tortures of diseases, as well as to restore health; and this not only when such a mitigation, as of a dangerous symptom, may conduce to recovery; but also, when there being no further hopes of recovery, it can only serve to make the passage out of life more calm and easy.... But the physicians of our times make a scruple of attending the patient after the disease is thought past cure, though, in my judgment, if they were not wanting to their own profession and to humanity itself, they should here give their attendance to improve their skill, and make the dying person depart with greater ease and tranquility. [Bacon 2013: 190]

With the help of the anticipatory ability characterizing important masters and directed by the expressive effectiveness of remarkable writers, Francis Bacon prefigured the model of medicine committed to curing even when healing is no longer possible three centuries ago. This model of medicine inspired palliative care during the early 1950s onwards, initially in Great Britain, and later in further countries. Bacon also identified, in this way, the first essential condition of dying with dignity, which consists in offering cares that are adequate for the specific situation of each patient till the end of her life. 'To preserve from abandon' by providing specific assistance is therefore the first and essential condition to be fulfilled in order to properly discuss the question of a dignified death. This is not however a sufficient condition. A suffering individual near to death may be indeed preserved from abandon and assisted, but with the intent to prolong his/her survival at any cost, and not with the intention of meeting his/her specific needs for mitigating suffering. This would be the response of a medicine that, in order to avoid patients' death, ends up in overlooking the patient who has his/her life at stake along with his/her needs, his/her feelings, and also his/her specific demands. This model of medicine is successfully portrayed in Thomas Mann's romans. Consider, for instance, the passage excerpted from the *Buddenbrook* (1901) where the author sketches out the dramatic scene of a terrible agony that the physicians refuse to mitigate by means of a sleeping pill, despite the fact that the patient implores them. In order to justify their refusal, physicians appeal to the conviction that mandatory duty of any physician is to preserve patients' life as longer as possible and to do so in favor of the patient's relatives and not for the benefit of the patient himself/herself.

In Thomas Mann's words:

Have mercy gentlemen, let me sleep! ... But the physicians knew their duty: they were obliged, under all circumstances, to preserve life just as long as possible...Doctors were not made to bring death into the world, but to preserve life at any cost. There was a religious and moral basis for this law, which they had known once, though they did not have it in mind at the moment. So they strengthened the heart action by various devices and even improved the breathing by causing the patient to retch. . [Mann 1924 : 480]

The reading of this passage helps us to grasp how high is the price, not only in terms of mortification and humiliation, but also of increase in suffering, that the patient has to pay whenever physicians decide and act without taking into account his/her point of view, and their decision and act is directed by the presumptuous conviction that they are the only ones able to evaluate quantity, quality, and tolerable degree of suffering as well as to decide what is 'good' for the patient.

Some years before Thomas Mann work, and more precisely in 1886, Lev Tolstoj, in his work entitled *The Death of Ivan Il'ic*, had already denounced the devastating impacts of a medicine, and more in general of a culture of life, that justifies, or rather demands for the exclusion of the patient from the decision making process concerning treatments, and that pursues this intent by denying the patient any access to information concerning diagnosis and, above all, prognosis of his/her illness. In this way, this model of medicine includes the patient in a 'conspiracy of silence' - a common and recurring expression in literature dealing with the end-of life - that is doomed to cause further suffering beyond the one caused by the illness itself. Tolstoj represents a first and effective image when he writes:

What tormented Ivan Ilych most was the deception, the lie, which for some reason they all accepted, that he was not dying but simply ill, and that he only need keep quiet and undergo a treatment and then something very good would result. He however knew that do what they would nothing would come of it, only still more agonizing suffering and death. This deception tortured him –their not wishing to admit what they all knew and what he knew, but wanting to lie to him concerning his terrible condition, and wishing and forcing him to participate in that lie...And strangely enough, many times when they were going through their antics over him he had been within a hairbreadth of calling out to them: 'Stop lying! You know and I know that I am dying. Then at least stop lying about it!' But he had never had the spirit to do it. [Tolstoj 1993: 48-49]

Both the passages excerpted from the works of Thomas Mann and Lev Tolstoj help us to understand that in order to achieve the goal, relevant for any human being, that is, a death that can be qualified as 'good', assistance ought not to be associated with mortification, of which the victim is the individual whose demands for help are systematically overlooked, and in particular the individual who, because of his/her illness and the fact that he/she is near to death, is no longer taken into account as a 'person'.

I think that we have reached a point where we can identify good reasons for proposing inclusion within the conditions for a good use of the expression 'dying with dignity' of two further aspects that we can sum up as following: 'impede any kind of mortification' and 'acknowledge that the individual who is dying has the right to be treated as a person until the end of his/her life'.

But what does it mean to recognize that an individual is a person? 'Person' like 'dignity' is a controversial concept, as there are no commonly shared views either of the requirements that constitute the status of person or of the individuals who deserve to be qualified as 'person'. However, it is not in doubt the relevance of the contribution made by the theoretical approach that argued critically against the qualification of the notion as a concept 'describing' ontological or empirical properties presumptively possessed by individuals. This critical approach has underlined the main normative nature of the concept, which recalls the legal and moral rights and duties attributed to individuals, in a concise expression (that is, 'person') as Hans Kelsen (2005: 172) observed in his analysis.

If we agree with this perspective, which highlights the fact that the qualification of specific individuals as person depends on normative choices made in the light of specific axiological options (Hart 1951; Scarpelli 1985), we will conclude that to qualify a dying individual as a person means to acknowledge his/her moral relevance, to legitimate the attribution of rights and duties, to confirm his/her role of active agent and not only of recipient of relevant decisions concerning his/her life.

It could be observed that current legal acts and documents relating to health care available in many Western countries like Italy, which is the country I come from, are absolutely clear about the fact that ill individuals and dying individuals ought to be considered as 'person' according to the meaning referred to earlier. The Italian Constitution confirms this view, for instance, in Article 3¹, which states equality of

¹ Art. 3: 'All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions'.

citizens irrespective of their 'personal conditions', or in Article 32², which states that 'no one may be forcefully submitted to medical treatment' without introducing any distinction with regard to patients with poor prognosis or in the terminal phase.

Do we then really need to claim the right of all individuals to be considered a 'person' till the end of life and to identify the protection of such a right as the third unavoidable condition of dying with dignity? In my opinion, the positive answer to the questions derives from the remark that, despite all the legal provisions ruling this right, the patient is denied the status of 'person', and his/her dignity is compromised whenever the seriousness of his/her illness is an excuse for not observing rules and principles, which, in the society we live in, are considered inalienable; whenever we deprive, more or less consciously, a patient of the opportunity of shaping the last part of his/her life according to his/her lifestyles, convictions, and values; eventually, whenever we justify and contribute to his/her social detachment, and thus we proclaim his/her civil death before the biological one occurs. This is a quite realistic scenario that we should not erroneously refer to the years when Tolstoj and Mann wrote their romans, and hence undervalue its persistence in the contemporary age, as it clearly emerges from the last passage I am going to quote in my discussion. I refer to the work of Peter Noll, *In the face of death*, posthumous publication, two years after the author's death, in 1985.

This work bears testimony to the experience of illness, specifically bladder cancer, which would have caused the death of the Swiss jurist. He lives this experience in full compliance with his ideal of life and death, and by fully implementing the right to self-determination with regard to health care, a right that ought to be considered an inalienable prerogative of any person - in the specific case, he denies consent to a surgical intervention proposed by physicians.

I had been knowing that I had cancer for three years. I had refused the advised operation, not because of heroism, rather because it did not coincide with my ideal of life and death...We live better if we enjoy life the way it is, limited in time. Christians, and especially non Christians like Seneca, Montaigne, and Heidegger were of the opinion that life has more sense when we think of death, instead of removing the thought.... I would have had the bladder removed, I would have had to be exposed to radiations, and despite all this I would have had only 35% of chances of survival, limited in time and mutilated...³. [Noll 1985: 97]

This powerful and clear image of an ill individual, who has made aware choices and has never ceased to be a 'person', is counterbalanced by the representation, well reported in a reflection of Noll's wife and published in the book, of the distance between the ill person Peter Noll embodied and the one commonly perceived as 'normal', that is, a patient who does what everybody expects him to do, specifically by completely entrusting physicians with the task of curing him and refraining from nonconformist decisions, even by not choosing at all.

² Art. 32: 'The Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent. No one may be obliged to undergo any given health treatment except under the provisions of the law. The law cannot under any circumstances violate the limits imposed by respect for the human person'.

³ Peter Noll 1984, *Diktate über Sterben und Tod*, Pend Verlag, Zürich. English title *In the face of death*. The quotation has been translated by the author from the Italian version *Sul morire e la morte*, Mondadori, Milano, 1985.

See, you bother people with your decision. When a person has cancer, she goes to the hospital and accepts operation. But if somebody has cancer and goes happily around as you do, the phenomenon is disturbing. People are suddenly urged to face death, and this is precisely what people do not want until they are in your condition. If you went to hospital, everything would be in the right way, they could visit you and take you out, and after some time it could be said: God blesses you, he has been dismissed, and after some time it could be said: now he went back, and it could be possible again to bring you out, but for shorter periods. You are a scandal for people, you are the living representation that death is among us.⁴ [Noll 1985: 97]

In the investigation aimed to find a re-definition able to fill with contents a notion like ‘death with dignity’, which is exposed to the risk of remaining an ‘empty box’, the passages excerpted from four famous works, despite difference in chronology and literary genre, have represented metaphorical step-overs, where the one who decides to pause will be, in my opinion, persuaded that to die with dignity is not possible if the social context, where an individual lives, is characterized, especially with regard to individuals suffering from incurable illnesses, by an indifferent attitude which hides a generalized removal of finitude and death. And if we are not able to understand the devastating impacts of lies on the condition of the patient because we are anchored in rooted prejudices. If, eventually, the patient is not protected against mortification deriving from the fact that he/she is no longer considered fully a ‘person’, and he/she is denied, because he/she is ill, the right to choose and adopt, if he/she wants to, nonconformist lifestyles, as Peter Noll did in the last part of his life.

At this point of my discussion, it could be opposed that the representation of the situations with a negative impact on the condition of the involved characters, which clearly emerges from the quoted passages, is the result of the wise use, of which only masters are able, of the expressive language that moves feelings and stimulates emotions.

Why then refer to and focus on that representation and the contents that can be extrapolated from it in order to fill the notion ‘dying with dignity’ by the point of view of a conceptual approach based on a conception of the philosophy of law as a critical reflection, that is, that refers to a set of reasons used to show that something is true or correct?

I think that we can answer this question by observing that from the passages of Bacon, Mann, Tolstoj, and Noll, I referred to in my discussion, the philosopher of law, who is loyal to his/her critical approach, can obtain something that goes far beyond the strong, emotive inputs.

I refer to the more or less explicit identification of values at stake and consequently of reasons based on principles that support the definition of ‘dignity of dying’, a definition grounded in two essential and sufficient conditions for properly using the notion, that is, the fight against abandon and mortification along with the assurance of being treated as a person till the end of life.

What values? Solidarity and beneficence, but with an essential role attributed to the value of autonomy in the clarification of the adequate conditions of implementation of solidarity and beneficence, or, as perhaps it is better to say, the value of the respect of

⁴ *Ibidem*.

individuals' convictions and will. These values have not reached full implementation yet, despite the fact that they have been ethically and legally recognized (consider, for instance, the Italian Constitution I referred to earlier), values that play a key role not only in the way human beings can end their lives, but also in the way they can actually live their lives. Our authors can help anyone to understand this point.

References

- Bacon, F., 2013. *On the Dignity and Advancement of Learning and Novum Organum: and Novum Organum* (1900). Reprint London: Forgotten Books.
- Hart, H.L.A., 1951. 'The Ascription of Responsibility and Rights'. In: AA.VV., *Logic and Language*, First series, (A. Flew ed.), Oxford: Blackwell.
- Kelsen, H., 2005. *Pure Theory of Law*. New Jersey: The Lawbook Exchange.
- Macklin, R., 2003. 'Dignity is a useless concept'. *British Medical Journal*, December.
- Mann, Th., 1901. *Buddenbrooks*. Translated by Lowe-Porter HT Penguin, Harmondsworth, 1924.
- Noll, P., 1985. *In the face of death*, translated by Hans Noll, Viking, New York.
- Scarpelli, U., 1985. *Contributo alla semantica del linguaggio normativo* (1959). II edition Pintore, A. (ed.), Milano: Giuffré.
- , 1992. 'Diritti positivi, diritti naturali: un'analisi semiotica'. In: Caprioli, S., Treggiari, F. (ed.), *Diritti umani e civiltà giuridica*, Perugia: Centro Studi Giuridici e Politici.
- Tolstoj, L. N., 1993. *The Death of Ivan Ilych*, in *The Kreutzer Sonata and Other Stories*, Dover Publications, New York, pp. 15-63.



On the Borders, In Trial: Sabahattin Ali and His Documents

Gökçe Çataloluk*

Abstract: This paper attempts at analyzing the image of an author (Sabahattin Ali, 1907-1948) that stands in the intersection point of law and literature. Unlike a literary critique, the paper does not elaborate much on Ali's fiction but rather on a recent book collecting the legal documents of his life as an ordinary suspect. Petitions, letters, bills of indictments and court verdicts by or about him constitute a rich source for the literary interpretation of his work and recent history of Turkish law - but not necessarily in this order. They are fictions of law in the literary sense and valuable proofs of the construction of a legal subject, out of a well known writer. Through these documents, the *pathos* ('My whole life is but a disturbing dream to me') is derived out of the writer's *logos* ('I do not beg mercy or tolerance from your court, I demand justice') to understand his very *ethos*. Albeit highly challenged by law and humanities, the systems theory as developed by Niklas Luhmann is employed as the theoretical framework of the article. Focusing on the metaphor of border to dissect the structural coupling, I consider my motive as a problem of legal imagination and a re-reading of literary memory.

Key-words: Systems theory in literature, border, structural coupling, Sabahattin Ali, legal imagination.

1. Introduction

A letter written in 1945 to the Minister of Education of Turkey, as a response to an inquiry, ended with the Latin phrase:

Dixi et salvavi animam meam.

It was written by a German teacher suspected of socialist propaganda. The teacher's name was Sabahattin Ali (1907-1948) and he held many more titles apart from being a full time teacher: a well known novelist and poet of his time; a publisher, columnist and a symbolic name for the struggle for emancipation.

As it is a very hard task to evaluate and comment on an author's work in a language that it is not translated into¹, the limits of the attempt must be clearly defined and

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¹ Actually, the work of Ali was translated during the cold war years in Eastern Europe, Russia and Greece due to geo-political reasons but it has recently been published in German and French and finally the English translations will be available in 2016, from Penguin Classics.

a wider discussion must be left aside until the translations are in daylight. Therefore this article is focused on the legal documents of Sabahattin Ali which include his petitions, letters, notes he made in prison and bills of indictments and court verdicts about him which are gathered together in a book named *Mahkemelerde* [At the Courts]. The aim of this article is to limit to discussing about the ‘subjection’ of Sabahattin Ali by the legal system to argue that he is in a position which makes his literary work a piece of legal history and legal documents concerning him that of modern Turkish literature.

To pursue this attempt, I will introduce Ali’s fiction first, then discuss about the law’s fiction of Ali and finally try to comment on the *ethos* of this modern writer and the symbolical aspect of his existence.

2. An Intellectual on the Borders- Ali and His Fiction

The author’s role and its limits on his/her work (even to determine whether it is a ‘text’ or a ‘work’) is equally important in law and literature studies as it is in literary theory. Quite a number of literary theorists such as Roland Barthes to Terry Eagleton have claimed that for analysis, ‘the author is dead’ and that it is the text that is open to interpretation of the reader. Although this seems to be quite a liberating approach, I agree with Ian Ward that in context of law and literature, textual analysis can’t be thought apart from the author as this field basically has educative aims and it is meant to create a historical and social consciousness of critique² which is impossible to create without reference to the author. But the author here is not taken as an actor but as the producer of the communications, which leads us to the borders of another theory. To get to that point, we must start with introducing Sabahattin Ali as an author.

2.1 The Author

Sabahattin Ali belongs to the first wave intellectuals of the newly founded Republic of Turkey (1923) after the War of Independence³ (1919-1922). Using both the old (Arabic) and the new alphabets (Latin)⁴ he was also one of the pioneer youth to build the new Republic that were sent abroad to get western education. After the two years he spent in Berlin (1928-1930), he returned to Turkey and was appointed as a German teacher. He travelled in Anatolia and witnessing the social and economic panorama, he adopted firstly a quasi-nationalistic and later a socialist world view.

Although he is widely known as a socialist writer, his fiction cannot be framed boldly with his ideological affiliation. As almost all of his short stories fit in the genre, one can observe that two out of his three major novels do not fit in particularities of the dominant social realism at his time. He was even subjected to serious critique about his individualistic approach after the publication of the last two novels. Ali’s poems, written

² Ward, I., *Law and Literature. Possibilities and Perspectives*. New York: Cambridge University Press, 1994, p.38

³ The War took place right after the WWI, against the allied forces of Great Britain, France, Italy, Greece and Armenia. As a consequence, the Ottoman Empire fell and was replaced with the Republic of Turkey and the Caliphate and Sultanate were abolished.

⁴ As the Arabic letters were used to write Ottoman language which was under heavy influence of Arabic and Persian, the Republic of Turkey made a reform to adopt Latin alphabet in 1928 which was more suitable to write Turkish.

in a folk spirit, sometimes up to the point of *naïveté*, were composed into very popular songs long after his death.

Just to take a quick glance at his first novels can provide us a basic opinion about his narrative. The first published novel, *Kuyucaklı Yusuf* [Yusuf from Kuyucak] is perhaps his most realistic work and a good modern example for brigandage narratives in Turkish folk culture. Writing about an orphan adopted by a bureaucrat who struggles against the local gentry, Ali challenges the moral values and customs of a small town.

İçimizdeki Şeytan [The Devil Within], his second novel, reveals the modernist progress of Ali and combines the social with a Dostoyevskian individualistic existentialism. Influenced perhaps too much by the Notes from Underground, The novel is based on a love story and focuses on the intimate evil potential of man. Having direct references to social and economic corruption, the novel stays in the border of the realism and romanticism.

And finally *Kürk Mantolu Madonna* [Madonna in Furs] is a partly autobiographical story of a young Turk in Berlin falling in love with a German Jew and his angst which turns into a catatonic sense after having to leave her and settle down back home in Istanbul. Although it has connotations about the rising fascism in Germany, this novel is the most individualistic piece of his work and it exhibits the writer's talent of portrayal. The influence of the German romantic writers; especially Goethe, whose work and Heinrich von Kleist, whose life and death fascinated Ali is also obvious in this latest work.

It must be noted that Ali was not only a fiction writer and that he also owned a weekly satirical magazine called *Markopaşa* where he and a couple of left-wing intellectuals wrote political satire. Although it was read by masses, the magazine was closed and was re-opened under different names⁵ and could only survive two years under the oppression.

In the beginning of 1948, after a series of legal cases I will elaborate on later, the exhausted and offended Sabahattin Ali disappeared. Some months later, his bones were found in a forest on the westernmost spot of Turkey and a highly suspicious man, Ali Ertekin admitted that he murdered Sabahattin Ali who had paid him to help him to cross the border of Bulgaria. In his testimony, the suspect said that the well known unpatriotic attitude of the writer provoked him and he committed the murder under the pressure of his nationalistic feelings. This incident was one of the very first unsolved murders of Turkish intellectuals, which would later grow in number⁶. Today it is almost certain that Sabahattin Ali was first interrogated and then murdered by the 'deep' state, not as a particular act of homicide but as a threat to the leftist movement.

2.2 Law's Subjecting Fiction

⁵ In September 1947 *Malumpaşa* [Certain Pasha] , after 1947 *Merhumpaşa* [Deceased Pasha]

⁶ The impact of this murder at time it was committed can be traced in the memoir of Sabiha Sertel, a leading woman figure of leftist movement and a journalist: '... Everybody had their own predictions about the incident. We all knew that Sabahattin wanted to flee but could not believe in the story the newspapers told. Ali Ertekin, the papers claimed, had killed Sabahattin for money. But there was so little money found on him. It was written that he had books of Karl Marx and Lenin in his bag. Why would someone need to take those books to Bulgaria? The incident was obviously served to the papers from one source and the truth was hidden' (Sertel 1978: 372).

The author's figure, then, is a very 'political' one. And his work is also political – not because it speaks about political matters, because writing *an sich* is a political action. And as what is legal cannot be clearly separated from what is political (as these systems are co-evolved and therefore interpenetrate), it is also a legal figure. But there is more to say, from a systems theoretical perspective.

Niklas Luhmann describes law in a way that resembles the tale of King Midas, who turned everything he touched into gold: Law is what law says that is law. To be clearer, where a communication that can be declared as legal or illegal takes place, there functions the system of law, which is one of the social subsystems (Luhmann 1987: 221). I won't go in the details of the theory but it should be noted that the system of society is the totality of the communications of these sub-systems and nothing else. Therefore, the theory employed here for the analysis is not an actor theory but a functional-istic structuralist one, in which not the individuals but the communications constitute the parts of a society.

On the other hand, a system only accepts communications that can be translated into its own language. Therefore, for Sabahattin Ali's communications to fall into the legal sphere they must be eligible for taking any value of the binary code of law. And this could only be possible if the producer, as a psychic system can be reconstructed by the legal (social sub-) system as it is the result of these communications⁷. This process of reconstruction, is legal subjection as we know it. Against the illusion that people are naturally subjects, regarding law as one of the ideological apparatuses of the state (also a repressive apparatus) Louis Althusser points at the construction process:

I shall then suggest that ideology 'acts' or 'functions' in such a way that it 'recruits' subjects among the individuals (it recruits them all), or 'transforms' the individuals into subjects (it transforms them all) by that very precise operation which I have called *interpellation* or hailing, and which can be imagined along the lines of the most commonplace everyday police (or other) hailing: 'Hey, you there!' Assuming that the theoretical scene I have imagined takes place in the street, the hailed individual will turn round. By this mere one-hundred-and-eighty-degree physical conversion, he becomes a *subject*. Why? Because he has recognized that the hail was 'really' addressed to him, and that 'it was *really him* who was hailed' (and not someone else). Experience shows that the practical telecommunication of hailings is such that they hardly ever miss their man: verbal call or whistle, the one hailed always recognizes that it is really him who is being hailed. [Althusser 1970]

It is not only Althusser who supports the relational point of view in this context. James Boyd White, in his classical work *The Legal Imagination*, claims that 'the whole point of judicial process'⁸ [*which, according to Luhmann is the center of legal system G.C.*] is to call a person or event a name, affix a label' (White 1985: 238). However complex this analysis might seem, the case in the life-world is easy to distinguish. It might even resemble a Leonard Cohen song. The legal life of Sabahattin Ali started when 'law called him by his name'.

Now, let us take a brief look at the cornerstones of this construction.

⁷ This, is the autopoietical process of any social system which is the constant process of self-structuring of the system by its own parts.

⁸ The courts, according to Luhmann constitute the center of the legal system for they produce the pure legal communication (Luhmann 1993: 299-306).

In 1932 acting upon the testimony of an informer, the state prosecutor claimed that Sabahattin Ali had recited the following poem in public:

O those who haven't left the motherland
Have the blurry rivers become lucid?
Have the streams of blood stopped?
Have the high ambitions been reached?
Do they still hang the worshippers of rights?
Do they make an MP out of each clown?
Do the peasants have their plows?
Have their skinny oxes been resurrected?
Those who will all confirm if he says he's God,
Do they still worship the old pimp??
Haven't they imprisoned Ismet⁹ yet?
Hasn't Ali the Bald, been beheaded?
Once the old pimp drinks it up.

.....

Once he sneered even Alexander the Great
Hasn't the earth blushed with shame? [Ali 2004: 11]

The poem obviously blames Mustafa Kemal of being a drunkard dictator surrounded with clowns. But the lines are so naïve that it would certainly have been protected under the regulations concerning freedom of speech, if it wasn't the earliest years of the Republic, the revolutionary phase. Although Ali never openly admitted to have written the poem, a short analysis on the folk rhyme, syntax and the apparent cynicism implies that it is probable. In any case, Ali's first petition of defense provides us a rhetorical piece of communication:

I am a man who bows his head and keeps silent when he is wrong, but shouts out loud when he is right and struggles against those who deny his being right. It is my duty as a free citizen not to stay silent as long as I am subjected to injustice and that is not corrected. I consider the possible negative consequences but yet I do not refrain from claiming my right because it is more honorable to be in prison where injustice is prevalent than to walk freely. [Ivi: 37]

Despite all his efforts, the author was found guilty and had to spend five months in prison: And this incident paved the way for a series of trials.

In 1937, he was sued for being a threat to both the family and military life of the citizens and propagating against the system in his novel *Kıyıcaklı Yusuf*, depicting Turkish soldiers as lazy and corrupt and an honest man reuniting with his wife even though he knows about her being into prostitution (Ali 2015a). But this case dropped after three expert reports in defense of Ali, one of which was written by another well-known novelist, Resat Nuri Güntekin. *Mahkemelerde*, includes this report as well:

...books of this genre are written to criticize the institutions that are benignant for a society. To exonerate family, woman, school, police, municipality from this critique would lead to the elimination of the moral genre and replace it with a hypocritical, artificial and cheap literature. As in any state, there are rules that restrict daily political press in the Turkish Republic, too. But abstract ideas and art are given absolute freedom. I think that as Turkish writers do deal with even communism

⁹ Comrade of Kemal Atatürk in the War of Independence, the 'second-man' of the Republic.

as an idea, there is no harm in writing a critical novel about any of our institutions.
[Ali 2004: 66]

It was in the year of 1945 when a reactionary crowd destroyed the progressive publishing house that published Markopaşa. The same year, having been stigmatized as a threat to public morality, Sabahattin Ali was put on the shelf as a German teacher by the Ministry of Education. Perhaps it was at this point, in a momentum between *bekon* and *akon* (Goodrick 1991: 56), he made his tragic choice. In other words, as his destiny was already fixed by the gods above, he decided to take his life in his hands and walk to his own end. The letter he wrote the letter he wrote to the Minister of Education, mentioned above, reflects this moment of illumination:

I spent many sleepless nights and I examined over and over again these days, whether I am or my ideas are wrong. But only a quick look at the methods of struggle my enemies use, I concluded that they have no chance of being right. The right ones never take such a road; no right would never abandon the side of words and ideas and support the kicks and sledges. [Ali 2004: 99]

And taking this moment as an opportunity, he openly marked his standpoint and described his analysis about his homeland in detail:

Only socialism could resurrect a nation like ours, the production level of which is very low and raise it to the state of art. But as many regions of our land is living in a primitive social and economic state and culturally, the understanding of people is not suitable for grasping socialism, in my opinion the urgent task is to serve to change the circumstances. [*İv*: 96]

But in contrast to the Latin phrase aforesaid, *dixi et salvavi animam meam*, this very act couldn't save his soul. Actually, this tragic choice determined the climax of his life as a legal subject: He stepped right in the soul of the legal trap as an 'ordinary suspect'. From a systems theoretical perspective, this 'soul' is where law speaks only its own language. According to Luhmann, by 18th century, when law completed its *ausdifferenzierung* and developed the prohibition of the denial of justice principal, the courts gained their unique place in autopoiesis: the center of the legal system.

After this turn, Ali maintained his place in the pink files of Turkish legal system and his work became a part of legal history, entering into petitions, verdicts and police information sheets. And things became so superficial that he had to return to his original profession: teaching.

This is called humor. It exists everywhere in the world...These two articles are based on jokes. To take offense at jokes and touchiness are signs of low self confidence for the people who have reached a high civil and cultural level. [*İv*: 128]

In 1947 he was tried four times: first for defaming a Minister in 1947 and second for addressing the members of the government as 'Forty Thieves'. The excerpt above is from his defence in the first one. He was acquitted from both, thanks to the expert reports.

In the third trial, Ali was sentenced to three months in prison for defaming an MP and finally in the fourth, having tried him for defaming two Turkish racists (Ali called one of them 'Hitler's apprentice' and the other, 'Albanian's Son' in one of his articles)

the court decided in favor of the writer but by the time verdict was given, he had been held in custody for two months. The expert reports and defenses trying to point out that calling an Albanian ‘Albanian’ is not an insult, hold their unique places in the legal document of this tragicomedy. Here is an excerpt from a petition by Ali’s lawyer:

The fact that the honorable grandfather of honorable İsmet Tümtürk¹⁰ is from Prezne might make you think he is an Albanian. Page 725 of Hayat Encyclopedia, printed in Istanbul in the year [1]932 might state that the grandfather of Cenap Sahabettin and the baker of the palace of Sultan Mahmut , ‘Osman Aga of Preznen’ is Albanian. But, yes, he might as well be the son of conquerors that rode their horses from Konya and therefore of pure Turkish race. But being the son of an Albanian or the son of a Turk does not have any significance for this case. Because being a Turk is only constitutionally meaningful and there is no sign of defaming here neither legally nor rationally. [*İvî*: 152]

As it was the case in the trials of Oscar Wilde (Wan 2011: 710), Ali’s subjection by law obviously turned his fictional work into legal communications through excerpts in petitions and verdicts and citations in many legal documents. But the process fed also a reverse movement. As an ‘ordinary suspect’, going deep in the sewage of the legal system, Ali tried to objectify legal communications for his fictional work. In the book that gathers all the above quoted legal documents, *Mahkemelerde*, there are also a few petitions by other prisoners including a demand from Greek and Armenian prisoners to be allowed to write their letters in their native language, a very striking description of the maltreatment and torture of young political prisoners, personal notes on being in prison and a detailed description of an execution night. As for the latter one, on a postscript, he notes that he got this information from the wardens and he will use it in his stories. Although he never wrote a totally corresponding story, other pieces can easily be traced in his short stories:

Isolating a prisoner from the world is the best thing you can do for him. Because what would knock him down is to know that freedom is so close. Listening to the waves of the sea that is ten steps away, which leads to the greatest freedom but having to watch the walls of a castle, seeing the sea only in dreams...isn’t it a pain so deep? One would choose to be kept at some place that has nothing to remind freedom rather than meeting a bird that eats bread crumbs in the yard, at one’s feet and then watching her leave these walls by a strike of her wings to meet her liberty, after sharing imprisoned steps inside. [Ali 2003: 40]

3. The *Ethos* of Ali and His Work in Intersection

Recreation of the author in legal system has its consequences in literature. But this, as psychic systems do not produce communications but mere perturbations for social systems to transfer, is not a linear process from the systems theoretical perspective. Therefore what follows is an attempt to dissect this complex relationship and point at the opportunities the theory offers.

¹⁰ As the law on appointing surnames had only recently passed, the people in concern in this case had the chance to pick up their own surnames. The surname of İsmet Tümtürk, one of the complainants, literally means ‘Totally Turk’. The lawyer of Sabahattin Ali is implicitly making fun of the complainant.

3.1 A Metaphor to Define It All

The very ‘existence’ of Ali was surrounded by crowds but at the same time, a stark loneliness oozed from his works.

I knew that there was an empty space in me and it oppressed me morally. Something was obviously lacking but what was it? I was so sad like the men who suddenly realize that they forgot something right after they leave home but cannot find what it is and desperately search their pockets. Just like them, I was taking further steps, unwilling to walk. [Ali 2015b: 117]

This is not hate...I never hated people...It's just the need for loneliness. There are days I can't put up with any word or even a small sound around me. I feel that I fully feed my own self and even overflow. Irreplaceable perfect dreams that seem stronger than everything, race in my mind. [Ali 2015c: 88]

He suddenly thought that he had slits on his chest like the slits on the bark of this tree and felt that a fire rose up to his throat. Oh God, how alone he was... Alone he was in this huge night that spread from the stars in the sky down to the pebbles in the water, from the clouds that came from the east to the sea that lay on the west. [Ali 2015a: 15]

As a realist writer with an acute romantic tendency, Ali was criticized for his ‘confusion’ (Bezirci 1974: 195-6)¹¹. Not only this, his existentialist approach was considered as an individualistic weakness by many critics¹².

Starting from this point and following a line of thought, I think ‘border’ is the metaphor that could fully surround his Ali's image. Not only is he in the border of romanticism and social realism, but also he is in the border of his political ideas. The critique of Nazim Hikmet soon after Ali's death, about his being an independent socialist and staying just on the border of the party, shows this direction:

If he was a Party member, maybe this would not prevent his being jailed and killed. But he wouldn't be the victim of that fascist provocation this easily, he wouldn't be slaughtered in that forest, that way. [Ali 2004: 2]

Ali wrote his best known poem ‘Never mind my Heart’ in a prison castle on the northernmost spot of Turkey right by the sea¹³ but to crown the metaphor, died on the border between Bulgaria and Turkey, just like Walter Benjamin who now sleeps in Port-Bou.

¹¹ Especially the quotation Bezirci chooses Nazim Hikmet's critique on Madonna in Furs.

¹² Nowadays, under the rule of the ‘mild’ Islamism in Turkey, Ali is hailed as an anti-Kemalist writer and his work has become popular again, which I think is another unhealthy approach making it harder to analyze his work in depth.

¹³ The poem has been composed and became a very catchy popular song, just like many of Ali's other poems. Just to give a quick impression, here is an excerpt:

‘Outside, wild waves
Rush the walls
Their sound entertain you
Never mind my heart, never mind’.

The metaphor of border also corresponds to the concept of boundary in systems theory. It finds its roots in the Laws of Form of Spencer-Brown that is one of the pillars of the theory stands on. To start with, a distinction must be made to produce any kind of form. Once a distinction is made, there is a marked (system) and an unmarked (environment) space that are subject to crossings or any kind of alterations. But the crucial point is that a marked space can only gain its meaning with the boundary that creates the distinction and leaves the unmarked space out. This is called the 'the unity of a distinction' and when transferred to social systems, it means that a system can only be totally grasped with reference its environment. More specifically, to say that there is a boundary of law that separates it from the other systems does not simply mean that it isolates the system. It merely 'defines' the system but without the examination of the ways of a system to relate to its environment, a system cannot be understood completely.

It is illustrated above, how the legal documents of Ali constitute a source for literature. But again, the literary work of Ali is frequently used to accuse or defend the author in the legal documents. If Ali's legal documents lay on the boundary of the system of law and the system of art, the boundary here, must be understood not only as distinction of the marked (law or literature) and the unmarked space (law or literature and the rest of the environment) but also the unity of this distinction (Spencer-Brown 1994:3-4), therefore a reference must be made to both of the systems.

3.2 Art and Law- Interconnection of Two Social Systems

But how then, are these systems interrelated? How can one grasp the unity of this distinction? If the systems are not structures trapped in their own boundaries, then there must be an adaptation process that does not lead to the disorganization of the systemic properties. The term autopoiesis not only refers to the reproduction of one system but also this 'boundary issue'. From a systems theoretical perspective, autopoietic systems only take cognitive impulses from their environment and code them in them meaning producing mechanisms (Witteween 1999: 645-648).

Since the boundaries of the systems are only determined by communications and what is social is always defined by a set of complex relationships, it is generally the case that two or more systems produce communications and coexist in life. In this case, the overlapping systems interact continuously. In systems theory, there is a specific term to define this case: Structural coupling (Maturana & Varela 2010: 98). Just to give a quick example; in a Constitution, it is easy to observe the structural coupling of politics and law. The document belongs to the legal system, determined by law's dual code and it belongs at the same time to the political system, determined by its dual code. But the legal and political communications preserve their systemic characteristics and do not replace or merge in each other.

The system of art however, has a peculiarity among all other social systems according to Luhmann:

Artistic communication distinguishes itself both from communication that relies exclusively on language and from indirect communications that are either analogous to language or unable to secure the autopoiesis of communication, because the communicative intent of conveying information can always be denied. Artistic

communication, by contrast, employs perceptions that it prepares exclusively for its own use. In so doing, artistic communication realizes specific forms of structural coupling between consciousness and society. It communicates by means of distinctions located within the work or by means of forms, for the concept of form, in the sense we use it here, implies a two-sided form, a distinction that can be distinguished. The work of art, then, is anything but an ‘end in itself’ [Luhmann 2000: 52]

But this does not restrain it from coupling with other systems. In his *Art as a Social System*, Luhmann comments on art and economy as two distinct systems and refers to patronage as their area of structural coupling (Luhmann 2000: 161-167). Following the same line of thought, I think that the trials of a writer due to his work of art may be considered as another area of structural coupling, this time between art and law. Both systems observe these documents from their own perspective and to analyze the coupling, there is a need for a ‘second order’ observation.

Law, as a normatively closed system, is actually cognitively open (Luhmann 1993: 65) which means that there are environmental reasons for its normative operations. The system takes these ‘irritations’ and codes them in its own language as it is the case with Sabahattin Ali. But when it comes to art, it is worth noting that as he determined the meaning producing dual code of legal system quite easily (lawful/unlawful), Luhmann himself had a great difficulty in determining the dual code of the art system and came out with the very loose couple: art/ non-art that is determined by fitting by the form. The problem then, is whether the legal documents gathered in *Mahkemelerde* fit (or don’t fit) the form of art.

Andreas Philippopoulos-Mihalopoulos, in his *Beauty and the Beast: Art and Law in the Hall of Mirrors*, comments on the dual coding of art:

The value of non-art in the determining binarism ‘art/non art’ of the art system includes not only what is not considered art aesthetically, but also what is not considered art by the art system itself. To compare it to the lawful/unlawful schematism, while both non-art and unlawful belong to their respective systems, non-art includes also the environment of the art system (‘anything can be art these days!’) The unlawful as opposed to ‘non-art’, does not constitute a gate for the environment of the system to enter the system. [Philippopoulos-Mihalopoulos 2003: 17]

Following this comment and the paradoxical fact that social systems are ‘closed in an open way’, structural coupling of the two systems can easily be observed in Ali’s trials and the documents thereof.

4. Conclusion

The fact that systems theory is met with hesitation if not with refusal within the law and literature studies, I think, has a few basic and good reasons, some arising from the theory itself. Firstly, when he examines the society, Luhmann briefly sees a complex network on the move. Therefore he fears oversimplification and accuses the ‘and’ disciplines of missing the whole. A second reason also has to do with reductionism but from the opposite side. Talking about boundaries and this way or other ‘closed’ systems does not

seem fitting for interdisciplinary approaches like law and literature¹⁴. And finally there is the chronic ‘humanities’ issue fearing the grand theory to oversee the very human story. But on the other hand, these hesitations feeding each other, miss the great opportunity of *Aufhebung*.

Leaving this issue aside for a detailed analysis, I would like to stay within the borders of systems theoretical perspective to claim that in the case of Sabahattin Ali, the author subjected by law and his work re-coded in law’s own language constitute a coupling area for both systems of law and art, more specifically the subsystem of literature which have been co-evolved in context of metaphors, analogies and authorial points of view (Amsterdam & Bruner 2010: 110). And to conclude, this observation (keeping in mind that each observation is another construction) comes out with the claim that in context of memory, Sabahattin Ali is in a position where his legal heritage not only belongs to legal history but also to the literary history of Turkish Republic, and vice versa.

¹⁴ See for example Berbee (2010: 245). Berbee recognizes the paradoxical relationship between autonomy and interdependence (2010: 250) yet is critical against the ‘transfer’ rhetoric.

References

- Ali, S., 2003. *Kağı, Ses, Esirler*. İstanbul: Yapı Kredi Yayınları.
- , 2004. *Mahkemelerde*. İstanbul: Yapı Kredi Yayınları.
- , 2008. *Hep Genç Kalacağım*. İstanbul: Yapı Kredi Yayınları.
- , 2014. *Markopaşa Yazıları ve Ötekiler*. İstanbul: Yapı Kredi Yayınları.
- , 2015a. *Kıyıcaklı Yusuf*. İstanbul: Yapı Kredi Yayınları.
- , 2015b. *Kürk Mantolu Madonna*. İstanbul: Yapı Kredi Yayınları.
- , 2015c. *İçimizdeki Şeytan*. İstanbul: Yapı Kredi Yayınları.
- Althusser, L., 1970. *Ideology and Ideological State Apparatuses*. <https://www.marxists.org/reference/archive/althusser/1970/ideology.htm> <accessed 2 May 2015>.
- Amsterdam A.G. & Bruner J., 2010. *Minding the Law*. Cambridge: Harvard University Press.
- Berbee, T.O., 2010. 'Can Law –and- Humanities Survive Systems Theory'. *Law and Literature*, Vol.22, No.2, pp. 244-268.
- Bezirci, A., 1974. *Sabahattin Ali*, Ankara: Gözlem Yayınları.
- Goodrick, E.R., 1991. *The Tragic Middle: Racine, Aristotle, Euripides*. Wisconsin: WUP.
- Luhmann, N., 1993. *Das Recht der Gesellschaft*. Frankfurt: Suhrkamp.
- , 1987. *Soziale Systeme*. Frankfurt: Suhrkamp.
- , 2000. *Art as a Social System*. Trans. Eva, M. Knodt. California: Stanford University Press.
- Maturana H. R. & Varela H. R., 2010. *Bilgi Ağacı. İnsan Anlayışının Biyolojik Temelleri*, İstanbul: Metis.
- Philippopoulos-Mihalopoulos, A., 2003. 'Beauty and the Beast: Art and Law in the Hall of Mirrors'. *Entertainment Law*, Vol.2. No.3, Autumn, 1-34.
- Sertel, S., 1978. *Roman Gibi (1919-1950)*. İstanbul: Cem Yayınevi.
- Spencer-Brown, G., 1994. *Laws of Form*. Portland OR: Cognizer Co.
- Wan, M., 2011. 'A Matter of Style: On Reading the Oscar Wilde Trials as Literature'. *Oxford Journal of Legal Studies*. Vol. 31, No.4 . 709-726.
- Ward, I., 1994. *Law and Literature. Possibilities and Perspectives*. New York: Cambridge University Press.
- White, J.B., 1985. *The Legal Imagination*, Chicago: University of Chicago Press.
- Witteween, W.J., 1999. 'The Hidden Truth of Autopoiesis'. *Law and Literature*. Ed. Freeman, W. Louis, A. New York: Oxford University Press.



Emotions and Sentiments in Judicial Deliberation: The Role of Literature

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Abstract: The traditional perspective on emotions assumes a structural dualism between emotions and reason. Emotions are assumed as forces which can blind a person's view and conduct her to do terrible things. For the common sense and including the legal common sense, emotions are dangerous and have nothing to do with the rational decision-making. However it's absolutely interesting and fruitful the Aristotelian's perspective about the relation between emotions and cognition. Emotions are not blind forces completely dissociated from reason but they are sustained by thoughts, opinions or impressions about an object. Aristotle did not elaborate a complete theory of emotions but he recognized that they are strongly connected with thoughts.

The relation between emotions and law has been studied for a large range of scholars from different legal movements and with diverse objectives. We intend to explore it from Aristotle's perspective about the relation between reason and emotions drawn on Nicomachean Ethics; the jurisprudentialism – a jusphilosophical approach elaborated by António Castanheira Neves - and the power of literary work to the development of *phrónesis* and other judicial virtues to the practical realization of law.

Key-words: Aristotle on emotions, jurisprudentialism and the power of literary work.

‘Occasion by occasion, one knows what to do, if one does, not by applying universal principles, but by being a certain kind of person: one who sees situations in a certain distinctive way’.
(Van Domselaar 2014: 226)

1. Introduction

In the Western world, reason and emotion are traditionally assumed to be distinct universes that nothing, or very little, has to do with each other. This vision of emotions as completely dissociated of reason goes back to classical Greek antiquity, exemplary, to Plato. Although Aristotle was Plato's student and member of the academy for twenty years, he rethought the relation between emotions and reason in practical life and in other fields as rhetoric etc.

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In this paper, we will explore the relation between emotions and reason in ethics according to Aristotle's point of view. Our main point is to rethink the practical realization of law challenges and the role of literary pieces to the development of the excellence of *phrónesis* and the judicial virtues of the non-rational part of the soul. The used methodology was the descriptive-analytical.

2. Aristotle on emotions in Rhetoric

In Rhetoric, Aristotle realized that facts are perceived differently under the influence of different emotions (*Retórica*: 1378a). The good speaker knows that. The reality itself in practical matters does not exist (in a pure objective way); what is true for me is what I perceive as true and emotions are an important part of my experience of life, my perception of correctness and to the judgment in a particular case.

Aristotle realized that emotions are not an auxiliary element of persuasion as the ancient tradition used to assume, but they are important because they affect the judgment of the audience or, in other words, emotions change the way one perceives and evaluates the facts of life. The emotional arguments are much more complex than we normally see them. According to Aristotle in Rhetoric, emotions are the causes that make humans amend and introduce changes in their judgments, insofar as they involve pain and pleasure (*Ivz*: 1378a)¹.

Plato, in effect, studied the emotions and realized that the emotional responses are different from the bodily sensations and bodily drives. In Philebus, Socrates distinguishes between three kinds of mixed pleasures and pains. There are mixtures which concern the body and are found in the body, those that belong to the soul itself and are found in the soul, and those that belong to the soul and to the body. Emotions as anger, fear, lament, love, longing, emulation and envy are understood as mixed pleasures and pains belonging only to the soul. According to Fortenbaugh:

The importance of this classification is to be seen in the union of emotional responses into a single class marked off from other kinds of mixed pleasures and pains that depend upon certain bodily conditions. Socrates is clear when say that anger and fear are fundamentally different from itches and tickles and hungers and thirsts, that emotional responses are neither bodily sensations nor bodily drives and therefore are to be grouped separately as pleasures and pains of the soul itself (Fortenbaugh 1975: 10).

However, Socrates is not clear about the cognitive nature of emotional response. "The Philebus certainly makes clear that Plato saw an intimate relation between emotion and cognition. But it fails to make this relation clear" (*Ivz*: 11). In Philebus, Socrates and Protarchus discuss about the relation between emotions (and other kinds of pains and pleasures) and cognition. Protarchus understands that an opinion can be true or false but he is not ready to concede that pleasure and pain can be classified as true or false.

¹ There are many different definitions of emotions in Aristotle's Works. In Nicomachean Ethics, emotions are defined as 'appetite, anger, fear, confidence, envy, joy, friendly feeling, hatred, longing, emulation, pity, and in general the feelings that are accompanied by pleasure or pain' (*Nicomachean Ethics*). These definitions do not present a full account of emotions on Aristotle's thought. According to Zingano (2009), thoughts, opinions or evaluative judgements are the decisive element of emotions.

Facing the provocative theme, Socrates points out the similarities between opinion and pleasure and pain. In order to establish that pleasures and pains can be true or false as opinion, he affirms that pleasure often occurs *together with* false opinion. According to Fortenbaugh, the use of 'with' reflects a simple concurrence between opinion and pleasure. Opinion accompanies pleasure but is external to pleasure. It's clear that Plato understood that emotions and pleasures are close related but it is not clear what kind of relation exists between emotion and cognition, stated Fortenbaugh (*Ivi*: 11).

In Rhetoric, the relation between emotion and cognition is much clearer than Aristotle's answer to this debate presented in Topics. There we can find an explicit relation between the thought of outrage (as an efficient cause) and the emotion of anger, for example. 'For Aristotle, the thought of outrage (...) [is] not merely characteristic of anger (...) [It's] necessary and properly mentioned in the essential definition of anger' (*Ivi*: 12).

The efficient cause of anger is the thought of outrage which means that someone cannot be angry when she thinks herself as treated justly. If I did something wrong and I know it, I will not feel angry. In that case I can feel shame, fear, sadness or another emotion but never anger. There is a logic distinction between similar emotions. Let's analyze the logic distinction between hate and anger.

Anger, as we stated under Aristotle's perspective, is an emotion motivated by the thought of outrage. Someone said or did something outrageous, without any reason, to me or to someone who I care about. Anger is directed to one individual who I perceive as an outrageous one. Hate is distinct from anger because for its occurrence it's not necessary to believe in personal outrage but to think of someone as a certain kind of person (*Retórica*: 1382a).

The efficient cause became a powerful tool for distinguishing the logical boundaries between related emotions. Both fear and shame involve disturbance and both can be labeled as *phobos*. But they are essentially different because fear necessarily involves the thought of impending harm, while shame necessarily involves the thought of disgrace (Fortenbaugh 1975: 15).

Notwithstanding the importance of efficient cause to definition and distinction of one emotion from another, Aristotle is not concerned exclusively upon one kind of cause. His scientific purposes move him toward the identification of other causes as the material and final cause (*Ivi*: 15).

In regard to emotions, this means that he will prefer definitions which mention more than the thought which moves a man to respond emotionally. Anger is not to be defined by the efficient cause alone. Mention must be made of material and final causes, that is to say of blood boiling around the heart and a desire for returning pain (*Ivi*: 15).

Aristotle realized that emotions are based on impressions, thoughts or opinions that can be altered by arguments. The good speaker can't ignore the emotions because they are crucial lens through which we see the facts of the world. However, the importance of the emotions, inside Aristotle's thought, is not restricted to rhetoric. The study of emotions also reflected in the need of rethinking the role of tragedy and music

in the development of a theory of benefits through purgation (*katharsis*)² and with regards to our main concern in this text, it culminated in a challenging approach to ethics.

3. The education of the desire through reason and the practical deliberation

In Book VI of the Nicomachean Ethics, Aristotle is dedicated to reflect on the fair means between excess and lack in practical deliberation. What does it mean that human action must be oriented by indication of the guiding sense?

Aristotle begins his reflection stating that there are two dimensions of the human soul: one that engages in reasoning and one that cannot itself reason but is nonetheless capable of following reason. The first one may be split into two: a) a contemplative part, which studies the invariable truths of science and mathematics (scientific faculty); b) one that deals with the practical matters of human life (calculative faculty) (*Ética a Nicómaco*: VI, 1139a 5-10).

Ethics is on the dimension of ‘what can be otherwise’. It is not governed by well-defined accessible principles, but is a practical search for the best decision under a specific situation.

To make progress in this sphere we must already have come to enjoy doing what is just, courageous, generous and the like. We must experience these activities not as burdensome constraints, but as noble, worthwhile, and enjoyable in themselves (...) we approach ethical theory with a disorganized bundle of likes and dislikes based on habit and experience (Kraut 2014).

The calculative faculty and desire are the basis of the choice which is the efficient cause of the action. The man constituted by thought and desire is the origin and the efficient cause of the action: good actions if you have true thought and right desire and bad actions if you have false thought and wrong desire.

Emotions are desires which can be educated by habituation and, above all, through the action guided by deliberation. The goal of the moral education is to educate the desire in order to make it pursue what is good – and the good in practical issues, in general, is the fair means between excess and lack.

The whole problem lies exactly in the relation between the desired and the thinking in the concrete moment of decision. Moral virtue is a disposition on the choice/election (...) so the thought has to be right and the desire straight so that the *proairesis* is good. There has to be a coincidence between what reason says and the desire pursue so that the *proairesis* is serious (free translation)³.

Professor Nuno Coelho goes on to say that:

² For the contributions of the analysis of emotions to Aristotle's poetics, politics and ethics. See for all Fortenbaugh 1975.

³ ‘Todo o problema radica exatamente na relação entre o desejar e o pensar no momento concreto da decisão. A virtude moral é uma disposição relativa à escolha/eleição (...) logo o pensamento tem que ser correto e o desejo reto para que a *proairesis* seja boa. Tem que haver coincidência entre o que a razão diz e o desejo persegue para que a *proairesis* seja séria’ (Coelho 2012: 97).

On the act gives the mobilization of the whole soul. The different dimensions of the soul (the rational and the irrational ones) are mobilized on the act of serious man even because only then he, while serious, constitutes its own character (free translation)⁴.

Habituation precedes the rational deliberation of the wise man. We start to do what is right since childhood – if we have wise parents, are influenced by wise people and live in a place ruled by good rules etc - before the very understanding and the reflection on what is good and bad. ‘First the alogical half is habituated correctly and then this habituation is confirmed by the reflections on the logical half’ (Fortenbaugh 1975: 49). Between habituation and practical deliberation a dialectical relation is established, i. e, since childhood we are used to act according to what is right. As we are growing and facing alone the practical situations - the concrete problems of the practical life which demand a solution - we need to evaluate what is the right thing to do in practice (*Ética a Nicómaco*: 1106b 5).

The habituation and the previous deliberation will not solve the real problem of doing the right thing in a practical situation. Notwithstanding, the more I act according to the true thought and the right desire, the more habituated I am in acting that way. Action on ‘what is, but it could be otherwise’ constitutes the dispositions of character of the non-rational part of the soul and the excellence of *phrónesis*.

This understanding of the challenges of practical life is very realistic because it is not focus on the avoidance or the rejection of emotions in practice but on the education of the desire by reason in practice. The excellence of *phrónesis* and practical virtues predisposes the phronimos person to act in one direction and not in the other (*Iv*: 1106a 1-5).

Affirming that desire is persuaded by reason is different than affirming that desire is chosen by reason. If it could be chosen rationally in a deliberate way, then there would be no need of the habit as a formative practice of the desire. Desire can not be immediately and directly determined by reason. It must be prepared, cultivated and used to obey reason. If we could choose what to desire, there would be no need of educating desire and even less to keep the education of the desire as a regular practice of the virtuous actions (...) That’s the reason why it is not possible to choose the desire in a deliberative way. It would not make sense if it happened this way (free translation)⁵.

The good deliberation in practical life includes emotions and the wise man rather than suffocating/avoiding the emotional experience should feel emotion in the right way. Aristotle states that the following advise must guide the emotional experience of

⁴ ‘No agir, dá-se a mobilização de toda a alma. As diferentes dimensões da alma (seja a racional, seja a irracional, cada qual também com suas diferentes dimensões) mobilizam-se no agir do homem sério até porque apenas assim é que ele, enquanto sério, constitui o seu próprio caráter’ (Coelho 2012: 97-98).

⁵ ‘Dizer que o desejo é persuadido pela razão é bem diferente de dizer que ele é escolhido por ela. Se pudesse ser escolhido racionalmente, i.e., deliberadamente, então não haveria necessidade do hábito como uma prática formativa do desejo. Ora, o desejo não pode ser imediata e diretamente determinado pela razão, pelo o que ela dita como certo. Ele deve ser preparado, cultivado, habituado a obedecê-la. Se pudessemos escolher o que desejamos, não haveria necessidade alguma de se educar o desejo e menos ainda de manter essa educação com a prática regular de ações virtuosas (...) Por isso, não só não é possível escolher deliberadamente o desejo, como não faria sentindo algum para ética aristotélica se assim fosse possível’ (Aggio, 2010: 6-7).

the wise man in practical situation: ‘feel [emotions] at the right times, with reference to the right objects, towards the right people, with the right motive, and in the right way, is what is both intermediate and best, and this is characteristic of virtue’ (*Nicomachean Ethics*. 1106b 20).

However, not every action nor every passion admits of a relative mean between two extremes. Adultery, theft, murder, envy are examples of actions and passions that are themselves bad (*Ética a Nicómaco*: 1107a 9). Once they are done it can’t be right. It’s not possible to admit a mean intentional murder toward a right person, at the right time, and in the right way but simply to do it is to go wrong (*Iv*: 1107a 15).

4. The excellence of *Phrónesis* in Law

The law is not a strictly theoretical science. It is a science that is called to solve problems arising in *praxis*, in the world of life always in motion which does not follow a logical or natural order or are ruled by fixed principles and norms. The ethical thought in Aristotle is both political and legal, clarifies Coelho: ‘If wisdom is not an excellence (a way of thinking) specifically legal, it is, however, central to the law as it is mobilized around act in any and all circumstances in the practical sphere where the law is inscribed’ (free translation)⁶.

The wise man is the one who, in every situation of life, is invested with the task of figuring out what is good; the best thing to do in a concrete problem. On the dimension of ‘what is, but it could be otherwise’, there will always be a decision. The judgment is the core of practical life and also the core of adjudication. ‘What characterizes the judgment is the resolution of a practical controversy (...) by an argumentative weighting rationally guided which leads, therefore, to a communicatively founded solution’ (free translation)⁷.

According to Castanheira Neves law is an uncomplete task because between the legal system and the legal case a dialectical relation is established. What does the human dignity principle mean in a concrete case?

We can read about this subject matter and this scientific knowledge can help in clarifying the general concept of human dignity but it will not solve the practical legal problem of finding the best legal answer for the concrete legal case.

The judge cannot excuse herself to provide a reasoned response to the cases. However, the legal answer is not previous defined in the legal system but the result of a dialectical process in which the judge has a crucial role.

In judgment there is decision, even though it is desired to reverse the dimension of the *voluntas* into *ratio*. The methodological dimension of the practical realization of law aim to establish the conditions, the assumptions and the requirements of this exercise. Notwithstanding, it does not solve the practical realization of law challenges by itself.

⁶ ‘Se a sensatez não é uma excelência (uma forma de pensar) especificamente jurídica é, no entanto, central para o direito à medida que é mobilizada em todo agir, em toda e qualquer circunstância no horizonte prático, em que se inscreve o direito’ (Coelho 2012: XVI).

⁷ ‘O que caracteriza o juízo é a resolução de uma controvérsia prática (...) mediante uma ponderação argumentativa racionalmente orientada que conduz, por isso mesmo, a solução comunicativamente fundada’ (Castanheira Neves 1993: 31).

4.1. The dialectical relation between the legal system and the legal case and the role of *phrónesis*

According to Professor Castanheira Neves, as stated above, the realization of law is composed by two dialectically intricate dimensions: the legal system and the legal problem.

The meaning of the legal system is not static. Despite of a previous juridical knowledge available on positive norms, precedents, doctrine etc, the legal problem is always ‘the expression of an obstacle, a perplexity or a doubt raised in the middle of the intentional assumption [of the legal system] and the real situation’⁸. The normativity of the legal system⁹ is an open *constituens* due to the aim to overcome the legal problems in a practical-normativity manner¹⁰ (which the result could be the resignification of the legal system) and due to its other constitutive dimension; the axiological-normative validity.

If we assume the concrete case as the methodological *prius* of the practical realization of law¹¹ and the axiological dimension of law as ‘a validity to assume and to problematize in the very realization of law’¹²¹³, than we are able to conclude that the practical realization of law demands the Aristotle’s *phrónesis* excellence.

In judgment there is decision, even though it is desired to reverse the dimension of the *voluntas* into *ratio*¹⁴. However, are the judges prepared for the practical realization of law challenges under the jurisprudencialism approach and the Aristotle’s theory of practical reason?

⁸ According to Castanheira Neves, ‘um problema é sempre a expressão de um obstáculo, de uma perplexidade, de uma dúvida nascida na relação entre uma intencional pressuposição, com as suas exigências específicas de cumprimento, e uma situação real que resiste ou é opaca a esse cumprimento’. (*Ivi*: 159-160).

⁹ When we talk about ‘legal system’, we are not talking about a closed system of normativity, but in an open one which is being constituted greatly through the questioning of the legal case. Certainly the legal system begins by enclosing and predetermining the field and the type of problems. Nevertheless, this statement does not necessarily lead us to the conclusion that the ‘legal issues’ are just the problems and facts previously assumed by the legal system as legal problems. The stabilized normativity reflects the intentional assimilation of a given concrete, unique and unrepeatable legal experience, being in the same measure, limited by that. (*Ivi*: 158).

¹⁰ The meaning of the legal system is not constituted in advance. The normative dimension of the legal system is immediately imbricated to another one, i. e., the dimension of the concrete legal problem. Between the legal system and legal problem establishes a dialectical relation. You could say that normativity is provisionally stabilized due to the questions or queries addressed by the concrete problem to the legal system. However, new problems that have arisen in the world of life, can put new questions or reveal the inadequacy of old ones. New problems can bring new intentions (valuations, principles) that may require relativisation of previously established intentions in a congruent whole (*Ibidem*).

¹¹ The core problem of the practical realization of law, i. e., the capital and problematic objective of the legal thinking.

¹² ‘O direito (...) é uma validade a assumir e a problematizar na sua realização’ (Castanheira Neves 2008: 396).

¹³ A human-cultural binding validity which the very existence is beyond the values and the fundamental normative principles available in law.

¹⁴ When the legal problem interrogates the legal system unanswered, the relation between the legal system and the legal case turns an aporetic one. The legal system ceases to be the expression of an available hypothetical solution to reveal yourself as an uncomplete task. By the questioning of a situated legal case, as an aporetic experience - because the practical queries and problems posed by the concrete legal case has not yet been absorbed by a fundamental systematic-dogmatic exercise (Castanheira Neves 1993: 158).

We understand that the judges would be more realistically prepared to judge if, among other things: a) the decision dimension of the judicial deliberation process were assumed rather than (artificially) eliminated by judicial methods and judicial procedures – jurisprudencism proposes a methodological approach which does not aim to eliminate (because it is impossible) the decision dimension of the judicial deliberative process; b) they were allowed to recognize the presence of the emotions in judicial decision process and that the best way of dealing with emotions is educating them in practice. The education of the desire is an important part of the judicial virtuous process (which is developed in practice ‘acting and responding as a virtuous judge (...) the development of judicial virtues requires a set of practices that adequately engage dispositions, affections, emotions and demands for concrete virtuous behavior’ (Van Domselaar 2014: 244).

The only way of being a virtuous person is acting as a virtuous one, states Aristotle. When we read literary pieces, specially the realistic ones¹⁵, we are called to reflect about other forms of thoughts and different ways of dealing with practical challenges of life. Reading (and imagining through) a literary piece we can learn from the bad and good actions of the characters and their impacts in the other characters lives; we can reflect about our own previous actions and decisions; we can also decide to change the way we were used to dealing with a kind of situation because now we are able to see some unnoticed impacts of that etc. The imaginative experience of reading literary works can change the way we act in practical life and can also be an opportunity to experience tragic choices and tragic dilemmas.

Law, as we have seen before, is an open human task. It’s constituted by a dialectical relation between the legal system and the legal case and it has a decision dimension that can’t be converted into *ratio*. There are not available correct legal answers in the legal system to be applied on the legal case. Every practical realization of law implies the judge herself (in different degrees). The judge must be committed to educate her desires and emotions and to be aware of the challenges of the practical realization of law¹⁶. In order to accomplish the first task, literature can be very helpful due to literary works can present examples of virtue acts and virtuous persons whose examples can be followed by us. For the second task, literature can illustrate the challenges of the practical decisions in Western constitutional democracies in which a variety of heterogeneous basic liberties and social goods enjoy legal protection. The judicial decisions as a special kind of practical decision can’t overcome the tragic dimension of the practical realization of law in a pluralistic constitutional democracy experience¹⁷. ‘[The] acknowledgments that the losing claim has not been sufficiently

¹⁵ According to Nussbaum, reading a literary piece is an interesting emotional experience because we can feel emotions as a concerned reader who does not feel the emotions in the way the main character does but it’s not completely out of the situation. It allows us to create bonds of identification and sympathy with the characters, to share with them certain hopes, fears and general human concerns. This way, the reading literature, specially the realistic ones, is much more than an intellectual activity. It is an emotional exercise experienced in a vividly way by the reader (Nussbaum 1995).

¹⁶ ‘Emphasizing the importance of rules does not exclude that in some legal cases there is no adequate rule or principle available, nor does it exclude the possibility of conflict between relevant legal norms. In such cases the choice for a decision might be tragic, also from a legal point of view’ (Van Domselaar 2010: 2).

¹⁷ ‘A legal tragic choice is that the underlying practical conflict is one between fundamental legal values, goods or interests. Choosing between granting a permit to build a shed and protecting the neighbor against the nuisance resulting from the building of the shed is not a tragic choice. Although these interests

honoured by the legal choice and that this very fact is morally disturbing' (Van Domselaar 2014: 295). The literary experience (as a vivid and imaginative human experience) can contribute to the recognition of the tragic choices in law.

5. Final notes

The realization of the law is a practical task. If we assume the Castanheira Neves's jurisprudentialism, we will be urged to look to the law as a task that is performed in practice. Ending a legal problem means much more than offering a legal answer for the legal case. It demands judges and legal professionals in general who are really committed to the practical deliberation under the legal case questioning, which involves emotions.

The core of the realization of law is the legal case (assumed as a methodological *prius*) and the adequate answer for it is not available in the legal system but it is a human task. By exercising this task which encloses at its core judgment and choice, the judge can develop and improve the excellence of *phronesis* which is fundamental for the law as a practical-normative issue.

The only way of being a virtuous person is acting as a virtuous one. When we read literary pieces, we are called to reflect about other forms of thoughts and different ways of dealing with practical challenges of life. Reading a literary piece we can learn from the bad and good actions of the characters and their impacts in the other characters lives; we can reflect about our own previous actions and decisions; we can also decide to change the way we were used to dealing with a kind of situation because now we are able to see some unnoticed impacts of that etc.

The imaginative experience of reading literary works can change the way we act in practical life. Law is not a strictly theoretical science but a practical science of establishing the adequate legal decision for a concrete legal case in a specific situation. The judge more than being a cultivated person, she must be a virtuous one – committed to the practical realization of law task. Literary works can present examples of virtue acts and virtuous persons whose examples can be followed by us. Literature can illustrate the challenges of the practical decisions in Western constitutional democracies in which a variety of heterogeneous basic liberties and social goods enjoy legal protection. It can prepare us as moral agents for the practical realization of law challenges in a plural and heterogeneous world.

may enjoy legal protection, they are not 'the stuff of tragedy', i.e. they are not fundamental constitutive elements of the human good. Which legally protected values and goods are fundamental enough to constitute a tragic choice in the legal domain, cannot be inferred from the concept itself. Tragic choice as a legal concept is open-ended qua moral substance. But, it does imply a group of heterogeneous values and goods that are necessary elements of the human good. The concept, therefore, only makes sense in a legal order providing legal protection to a plurality of fundamental values and goods and as such 'fits' with Western constitutional democracies in which a variety of heterogeneous basic liberties and social goods enjoy legal protection' (*Ivi*: 9).

References

- Aggio, J. A., 2010. educação do desejo segundo Aristóteles. *Revista do Seminário dos Alunos do PPGLM/UFRJ*. n.1, pp. 1-12. Available at: <https://seminarioppglm.files.wordpress.com/2009/04/ortegosa-j-a-educacao-do-desejo-segundo-aristoteles.pdf>. Last access at: 2.6.15.
- Aristotle, 1908. *Nicomachean Ethics*. Translated by W. D. Ross. Available at: <http://classics.mit.edu/Aristotle/nicomachaen.html>. Last Access at: 28/10/15.
- , 2004. *Ética a Nicómaco*. Translated by António C. Caeiro. Lisboa: Quetzal editores.
- , 2005. *Retórica*. Translated by Manuel Alexandre Júnior, Paulo Farmhouse Alberto and Abel do Nascimento Pena. 2ª ed. Lisboa: Imprensa Nacional Casa da Moeda.
- Castanheira Neves, A., 1993. *Metodologia Jurídica: Problemas fundamentais*. Boletim da Faculdade da Faculdade de Direito: Stvdia Ivridica 1. Coimbra: Universidade de Coimbra.
- , 2008. O sentido actual da metodologia jurídica. In *DIGESTA: Escritos acerca do direito, do pensamento jurídico, da sua metodologia e outros*, vol. 3º, pp. 381-411.
- Coelho, N. M. M. S., 2012. *Sensatez como modelo e desafio do pensamento jurídico em Aristóteles*. São Paulo: Editora Rideel.
- Chabot, D. & Chabot, M., 2010. *Pedagogía Emocional: sentir para aprender. Integración de la inteligencia emocional el el aprendizaje*. First reprint. México: Alfaomega editor.
- Fortenbaugh, W. W., 1975. *Aristotle on emotion*. London: Duckworth.
- Kraut, R., 2014. Aristotle's Ethics. *Stanford Encyclopedia of Philosophy*. Available at: <http://plato.stanford.edu/entries/aristotle-ethics/>. Last access: 7.7.15.
- Nussbaum, M., 1995. *Poetic Justice: the literary imagination and public life*. Boston: Breacon Press.
- Van Domselaar, I., 2010. Tragic choice as a legal concept, *Archiv für Rechts-und Sozialphilosophie*,. Available at: <http://ssrn.com/abstract=1792725>. Last access: 20.7.15.
- , 2014. *The fragility of rightness: adjudication and the primacy of practice*. Amsterdam: Universiteit van Amsterdam. Supervisor(s): prof. Mr. D.W.J.M. Pessers & prof. Dr. F.C.L.M. Jacobs.
- Zingano, M., 2009. Emoção, ação e felicidade em Aristóteles. In: Zingano M., *Estudos de Ética Antiga*. 2ª ed. São Paulo: Discurso Editorial: Paulus.



The rational emotions by Martha Nussbaum: importance in legal framework

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Abstract: From the study of Martha Nussbaum about the role of emotions in the process of judicial decision-making in his book 'Poetic Justice', we seek to understand what the emotions and what the differences between them and the rational one are. We intend to analyze the influence of Aristotle in Poetic Justice. Although western philosophy sustains the bivalence between reason and emotions, this paper tries to analyze if the total split of them is possible. We also question what the limits of the emotions are, especially in the legal system, so that the logic and the body of laws are not lost. Can we judge a real case without the presence of emotions? Are the judges able to achieve full impartiality in their decisions? Judicial decisions directly affects the lives of those who seek the State in order to get a solution to their problems. Is it correct to disregard of emotions in something so important?

Key-words: rational emotions, judgment, Martha Nussbaum

1. Introduction

The emotions, as well as many other peculiarities, are part of a complex mixture resulting in humankind. If we look at history up to now, we can see that, long ago, thinkers analyses the importance and the weight we give to what we feel.

According to Plato, the body and the mind are forces in constant tension: 'the body, with their limitations and needs, is the responsible for the deviations from what really matters: the reason. [...] Access to truth was conditional upon the rationalization of emotions' (Silvestre 2011: 285.).

Just as in science in which rationality is too valued in detriment to other forces, law, so far, made no effort to further the study in the field of the influence of the emotions in the legal system. Since emotions are inherent to all human beings, how can the science that seeks the solution of societal conflicts close the eyes to this reality?

This paper proposes a descriptive analysis of the relation between law and emotions, especially the important relevance of rational emotions in the judicial decision making process; together with a critical reflection on the subject. As a theoretical framework and guidance, this work focuses on the book 'Poetic Justice'.

2. Emotions and rational emotions

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We understand that good decisions don't need to be necessarily devoid of emotions. For law, the importance of emotions is so big that we consider them in Brazilian legal system. The Suspicion and the Court Desqualification are good examples, presented in the Civil Procedure Code, articles 189 to 211 (Saraiva 2012).

According to Maria Helena Diniz, in her legal dictionary, Suspicion (Diniz 2010: 544) is the suspicion about judicial impartiality; the fact that magistrate is unable to act, in a particular case, to exercise its function; exception that can be held against the judge presiding the case, the authority in public prosecution, the witnesses, the technical assistants, the expert and the interpreter. Court Desqualification (Diniz 2010: 315) is the suspicion of the judge that prevents and invalidates their acts, even without the opposition. In this sense, by impartiality, we can understand the lack of personal interest in a case.

If there are personal, relatives, friends or enemies interests, for example, the judge is unable to take legal decision because it is known that there is no possibility of complete separation of professional and personal life of the judge. Of course this magistrate will not be able to be impartial with the person with whom he already relates in some way, and this possibly results in tendentious jurisdiction.

In the field of law, Martha Nussbaum argues about the importance of fair conduct, especially when she makes us realize that the legal professionals deal with human beings in their full complexity and the future of their lives. Precisely because of this complexity, and contrary to the paradigm reason versus emotion, it is necessary that decisions don't be only determined by rational motivations. So, to the author, there is an impoverishment of human conduct towards others when one takes only theories into account (Nussbaum 1995: 88). The author believes that intellect and emotions act simultaneously. For her, the emotions are the central of moral judgments. In other words, emotions are not irrational forces; they are intelligent responses to the perception of values and importance of objects. Intellect without emotion is blind to the values, and the trigger of that blindness is precisely the denial of emotions and the undeniable influence they bring to our daily decisions.

It is worth to differentiate between emotions and bodily impulses: the emotions are always related to an object, a person. They derive from a specific perspective - the individual who experiences it, to an object or person, which results in a certain emotion, such as love, compassion, fear. Anger is not impulsive; it is felt by someone regarding any subject that, for some specific reason, made him feel like that. On the other way, bodily impulses are merely the result of a biological process, they don't need external stimulus to come out, such as sleep and hunger.

Beliefs are fundamental elements for the identification and individualization of an emotion - these are closely related to beliefs about the object. Compassion requires the belief that someone else is suffering significantly (*Ivi*: 95), for instance.

Nussbaum argues that we should consider the reason and emotions – specially the rational ones - in order to make the right decision

¹. Emotions are ways of perceiving (*Ivi*: 94); besides, the way we notice the object is essential for the qualification of the emotion. An anonymous and indifferent mass does not arouse emotions.

¹ The rational emotion is the rationalization of emotion. What makes it rational or irrational is the intensity we feel it. If it comes from weighting between extreme rationality and pure emotion, then we will have a rational emotion – that is the one used by judicious spectator.

Emotions are valid for the judge to clearly imagine what each person is supposed to be in a given situation, for instance. We emphasize the extreme importance of this imaginative capacity for pondering in the interest of getting a fair consideration of certain decision about a person's life. Deleting the emotions from the decision process leaves aside important and necessary information for the neutrality of the judge and consequently justice. Instead of hiding the emotions, we must assume them once they are inevitably part of us.

Nussbaum believes that compassion is the basis of social rationality. In the conception of the author, this emotion consists in put yourself in another's place and realize that the drama experienced by the other can be lived by anybody in some point of life. When we imagine ourselves passing through a negative situation in which another person has been living we can measure the adversities of other people. When there is no contact with emotions, we are not able to recognize the compassion. Furthermore, Martha argues that, by reading realistic literature, we can feel empathy with the characters. We can, therefore, identify ourselves with the story presented. However, even when we do not feel empathy, even when we see the horror of a terrible crime, for example, because it is a human drama, we cannot say that we, or a person that we care about will never pass through it.

In *Justicia Poetica* (Nussbaum 1995), when analyzing the realistic work *Hard Times*, she argues that emotions, particularly empathy and the compassion for the characters through the imagination, is essential for ethics and coherent argument of judges. For Nussbaum, compassion happens as an identification result (Ivi: 1995: 99).

3. The disgust

The rational emotion is the rationalization of the emotion, it is not the excess or the lack of it, but the half-term. However, Nussbaum thinks there are essentially dangerous emotions, such as disgust. What makes the emotion rational or irrational is not the emotion itself - fear can be good or bad; a person who doesn't feel fear is fearless, on the other hand, who feels too much fear is fearful. The half-term of fear is the prudence: when it is possible to rationalize and make a decision based on reason without ignoring the emotions.

In human evolution process, the disgust was an important emotion for the maintenance of the kind. It distinguished good food from bad food, for example. However, to Martha Nussbaum, in the public sphere, disgust is always a potentially dangerous emotion, given the desire to repel its cause. The action of this emotion in judicial decision-making process can affect negatively one of the parts and impartiality will not be concretized. The disgust, in this context, cannot be the strongest emotion.

The disgust is connected to prejudice - we are shaped by the social conception of what is grouse. That is why it is so important not to let ourselves to be carried away by this particular emotion: even though it is an inherent part of human nature, it repels us from people and situations that are considered disgusting when analyzed by the cultural and social dimension. The impartiality and neutrality of the actions of the democratic state actions and their representatives are not only restricted only to the situations that please them.

According to Brazilian Constitution, in its fifth article, caput:

Art. 5. All persons are equal before the law, without distinction of any kind, guaranteeing to Brazilians and foreigners residing in the country the inviolable right to life, liberty, equality, security and property, as follows. [Saraiva, 2012: 7]

When talking about judicial neutrality in *Justicia Poetica*, Martha Nussbaum argues that the judge does not grant any special favor to groups or individuals motivated by the relationship he has with them. The judicious spectator does not consider irrelevant feelings, the neutrality that he seeks does not require an arrogant distance from social reality (Ivi: 1995: 123).

The reality must be questioned with imagination and emotional responses obtained through the judicious spectator perspective. Imagination, through the judicious viewer filter, allows the compassion, the key to emotional responses.

4. The judicious spectator role and the trial of the poet judge

The judicious viewer is not personally committed to the interests of the parties, his judgment is free from the influence of feelings such as his confidence or his happiness, it would allow us to affirm that his judgment is impartial. He is not devoid of emotions and his analyses do not focus on suppressing them. A compassionate relationship is established between the viewer and the part. [Silvestre 2011: 302]

The books have the power of transporting us to the universe created by the author. Along the reading, we identify with the characters and, from there, empathy arises. Then, we are able to recognize emotions arising from this empathy - if the character goes through suffering, injustice or any unpleasant situation, we feel pity. On the other hand, if something good happens, we feel happy for the characters.

There is an empathetic relationship between the reader and the characters from the books. Nussbaum argues that this reader is the judicious spectator: attentive to narrative details, able to be moved by the events that occurred with the characters, but still able to use the reason for a good value judgment as a whole; the emotion that the judicious spectator feels do not blind him so he cannot clearly perceive the details of the situations. Because of this, Nussbaum believes that the judicious spectator is a juror model: being the third person that observes and still sympathizes with the story of the protagonists. Judicious spectator has the capacity, while perceives the general situation, of not being carried away by the disproportionate emotions that take the parts.

At the end of this process, the judicious spectator has his emotions filtered, once he received the influence of reason and, therefore, his emotions are not the result of the passions of who lives the story. Reading realistic books allows us to experience rational emotions because we are in a privileged position in face of the scenario, making us judicious spectators.

The poet judge has the judicious spectator vision, which makes use of the literary imagination; translated as a search for fair judgment through the sense of compassion. This is the arbiter of difference, which realizes the drama of the parties in a rational manner. In other words, compassion passes through the filter of the judicious viewer, which focus on the justice. The judgment of the poet judge asks for judicial materials and literary imaginations, which allows experience of compassion.

Nevertheless, the literary imagination acts with boundaries; it works within a possible juridical framework that cannot be exceeded, given that we live in a democratic state. Imagination involving the poet judge and his judgment have well-defined borders for the implementation of the law; the body of existing laws, central aspect that should be taken into account by legal professionals, is the frame of its use. Despite the compassion, the judge cannot forget that signed a commitment to the rule of being the representative of the judiciary.

The poet judge is the realization of emotions in law. It is one who comprises empathetic and emotionally parties of the situations that appears to him, being able to answer the particulars and details of each case.

5. The influence of aristotle and his theory of emotions

Martha Nussbaum has been influenced by Aristotle. According to him, the emotions are not irrational answers to events. In *Rhetorica*, the author realizes the importance of the speech about passions and report the power of persuasion witch emotions cause on those who feel them.

The passion witch Aristotle refers to demands ponderation of values and beliefs about the object or the person. It is necessary to have clear opinion, which will be surrounded by everything our personal experience, our culture and our education tell us about that. The emotions tell a lot about the nature of the one who feels it. Aristotle believes in cognitive emotions – they are the result of ponderations, beliefs and, obviously, body reactions, once the human being is also an animal.

What tell us apart from other animals is the fact that we are rational. We perceive the world the same way other animals, but we are not slaves of passion and impulses as the others. We, provided with rationality, constantly have a dialogue between desire and reason related to a given situation. Deciding is dealing with passion.

Being a rational animal for Aristotle means the ability to see beyond the current moment. Inevitably, we often deal with the resignation of pleasure in order to have a future pleasure; the human being is capable of renouncing the immediate pleasure due to reason. As a result, we are able to distinguish the useful and the harmful, the good and the bad, the fair and the unfair.

The perception that we make decisions under the pressure of emotions is very important for deliberation; it is extremely important to know the value of emotions related to an object or a person in order to make a wise decision. The emotional charge is required to act well. We are the result of what we live; the soul, the intelligence and the character are the result of our history and our daily actions. We are the result of the decision we make, our mental experience; the way we think and act is built along the time.

According to Aristotle, the influence of emotions in the decision making process doesn't imply in a bad decision. As human beings, it is impossible to separate emotions and reasons like western philosophy is used to doing. Based on the fact that it is impossible not to have emotions in our lives, we must deal with them the best way we can, in order to make good decisions.

In keeping with Aristotle, there are four powers of the soul witch influence along the decision making process: perception, emotion, desire and reason. Every single decision depends on the sensitive perception of the five senses; deciding always requires a certain context. The perception of a situation automatically produces an emotion.

By the moment we realize that something is real, a passion emerges. The desire comes connected to emotions – if we feel fear, right after we will have the desire of step back from what causes the fear. The same thing happens when we are happy, we wish to be close to what makes us feel that way. This phenomenon happens immediately after the perception.

According to Aristotle, the pleasure and the pain are signs of who we are – the feeling of pleasure is what we do related to what we are. That is why we show who we are based on what we feel about the world we live.

6. Final considerations

The relation between law and emotion is close connected. Unfortunately, due to much more complex motives, the reason pointed out in the western dichotomy ‘reason and emotion’. The law sets out the specific courses to people’s life throw the judge, who is the voice of the law.

Therefore, we can not forget that the body of law is the way to reach the end: the best solutions to the case. That is why we can not ignore the human complexity in every level; including the ones from those who make the law. Our investigation suggests that when we do not take the emotions into consideration in law, either the emotions of the parts or the judge’s, it can result in bad decisions. Thereby, the reflections about the importance of rational emotions need to be developed. We can find in brazilian literature a good example of it in Dom Casmurro. A literary piece of Machado de Assis. Where the author makes us to think about the possibility of the betrayal between his best friend and his wife.

References

- Aristóteles, 2005. *Retórica*. 2ª edição. Lisboa: Imprensa Nacional- Casa da Moeda.
- Dickens, C., 2015. *Hard Times*. Available at:
<http://www.dominiopublico.gov.br/download/texto/ph000198.pdf>. Last access:
7 mar. 2015.
- Diniz, M. H., 2010. *Dicionário Jurídico Universitário*. 1ª edição. São Paulo: Saraiva.
- Konstan, D., 2015. *A raiva e as emoções em aristóteles: as estratégias do status*. Trad. Maria Cecília de M. N. Coelho. Available at:
<http://www.revistas.fflch.usp.br/letrasclassicas/article/viewFile/643/570>. Last access: 21 feb. 2015.
- Nussbaum, M., 1995. *Justicia Poética*. Barcelona: Editorial AndresBello.
- Platão, 2015. *Fédon*. Trad. Carlos Alberto Nunes. Available at:
<http://www.dominiopublico.gov.br/download/texto/cv000031.pdf>. Last access:
20 feb. 2015.
- Saraiva, 2012. *Vade Mecum*. 13ª edição. São Paulo: Saraiva.
- Silvestre, A. C. F., 2011. 'As emoções racionais e a realização prática do direito à luz da proposta de Martha Nussbaum; o papel das obras literárias e das emoções racionais no processo de tomada de decisão judicial'. *Revista de Estudos Jurídicos UNESP*, v.15, n.22, p. 285-307. Available at:
<http://seer.franca.unesp.br/index.php/estudosjuridicosunesp/article/view/417>.
Last access at: 07 mar. 2015



Is Atticus Finch still with us? - the iconic lawyer in modern pop-culture

Marta Dubowska*

Abstract: The influence of Harper Lee's iconic novel 'To Kill a Mockingbird' is indisputable. It has become widely popular among the common readers as well as the ones who practice and study law, and provoked a much heated debate about the issues raised in the book. The debate revolved- and still does- around the emotion and empathy portrayed in the novel, focusing on the somewhat main character, Atticus Finch. The portrayal of this particular lawyer has left a huge imprint on the society's imagination, becoming one of the most recognizable literary characters of the second half of the 20th century. But has this iconic lawyer stayed in the last century? Has he ever escaped the frames of literature? As far as I'm concerned, we will never be able to escape Atticus Finch, as he is- maybe even subconsciously - the main inspiration behind the new wave of popularity of all kinds of legal TV series (mostly 'Suits', 'Damages'). What links those artifacts is the focus put on the emotion in the work of the lawyer- how his personal feelings and life situation inflict upon his professional work and why so commonly the deprivation of emotion is considered the lawyer's best quality. The emotional complexity of Harper Lee's character is so wide that it's visibly split into two main characters of previously mentioned TV series. The issue here is, how is the heritage of this hero-lawyer treated? Is it simply modernized to fit the present-day realities, or transformed in some other way, maybe a common pattern? All these questions and the answers they eventually lead to, form an interesting comparison between the portrayal of a lawyer in high-profile literature and products of modern pop-culture, raising a question how the needs of the society influence the image of the lawyers presented to them.

Key-words: Atticus Finch, Emotion, Empathy, Iconic lawyer, Pop-culture, Lawyer's portrayals

1. Introduction – how do we perceive lawyers these days?

The concept of 'perfect lawyer' has been long a subject of the public debate. Whether in the professional environment, soon-to-be-lawyers academic groups, or even at a simple family dinner - I would have to say lawyers are getting a pretty disgusting rep. The professionals - don't seem to have a shred of belief left that a lawyer can possess a 'heart of gold', the students – some of them naive, but mostly centered for the wealth part of pursuing this career path, while in the plain social gatherings - lawyers are simply the worst of the worst. All of those deliberations are obviously highly general, but it really does seem that lawyers are often associated with the worst traits that a person dealing with people's troubles on a daily basis could possibly possess. Calculating, cunning, lack of soul, and mostly – no empathy. But then again, when one begins to observe the

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‘cultural’ portrayals of lawyers, the cinematic ones or the heroes of many TV series (it appears the legal environment is the most captivating to portray) they are all linked by the same approach – empathy is not a trait that a good - successful - lawyer should possess. And that kept me wondering - what is the basis for that kind of approach? How did we get to a place where empathy – one should think the trait that actually makes us ‘human’ - is considered not only unwanted, but basically a burden?

That problem has begun to niggle me even more when I started analysing the most famous pop-cultural lawyer – Atticus Finch of ‘To Kill A Mockingbird’ by Harper Lee. The winner of the Pulitzer Prize, the book behind a very successful movie which went on to obtain an Oscar for Gregory Peck’s incredible portrayal (along with ones for screenplay and scenography) – has made a great social impact. It would seem that the most characteristic and yet obvious trait that made Atticus so beloved is his incredible empathy for every single person that crossed his path. But again - the careful analysis of that character reveals a much complicated emotional background.

2. The Wonder That Is Atticus Finch

When I have started working on the person of Atticus Finch, I don’t think I have realized how much there is to discover. And I’m not only speaking about the character complexity, but also - or even mainly - about the amount of essays, articles and different work developed on this particular subject. With each paper I read on Atticus Finch, I was amazed with how many approaches there were - it seemed every author had a different take on the character, saw different qualities or different flaws, sometimes put an emphasis on an aspect I would never have thought to analyze. I can safely say each take on the matter had a different approach. But what was common for all of them, was the fact that each and every one of those people had a strong opinion on the matter. These were not cases of mere analysis, or simple collation – if a person made a statement about Atticus Finch, it was always unhesitating. What I think is – nobody can walk past Atticus and not be biased. It’s a simple love/hate thing. He’s either your god or your biggest enemy- in each case you feel compelled to defend your position. So how is Atticus Finch recognized in those works, and also globally?

Mostly when talked about, the synonym for Atticus Finch is *hero-lawyer* – for how he opposed to his prejudiced society and stood by the truth, and *gentleman-lawyer*- for how despite hateful approach towards him, he still respected every single person in his community. But I have come across also much detailed descriptions, such as ones stating him to be ‘perhaps the most revered lawyer in modern literature’ (Menkel-Meadow 1999), an ‘ethical role model’, or even ‘the ultimate idealized attorney’ (Huston 2004: 161, 162).

But what struck me the most, was how personal everybody’s approach was. Personal to a point when we don’t regard Atticus as a literary character anymore, but as a real-life human lawyer, who actually lived in Alabama in the 1930’s, who took on the Tom Robinson case, who defended those who could not be defended. Helping to create that illusion was the fact that the Atticus’s character was supposedly largely based upon the person of Harper Lee’s father, and the fact that such trials were a common thing in the 1930’s, which makes the illusion of actually once existing a lawyer named Atticus Finch a lot easier.

To quote:

Atticus has become so embedded in the collective consciousness as the quintessential good lawyer that even widely-adopted law school textbook treats his as if he were real. [Phelps 2002: 925]

3. The Kenneth Starr Case

The perfect example of such approach is a case of Kenneth Starr- a prosecutor, the author of the famous ‘Starr Report’, which was a 455 page analysis on the sexual relations between Bill Clinton and Monica Lewinsky, containing numerous accusations, but none of which were actually provided with arguments to back his claims, having been later denounced as without any basis or logic, which eventually led to a public opinion of this report being some kind of a political vendetta. This caused many public mockeries of said prosecutor, but the jokes ended when Ken Starr compared himself in one of his speeches to whom? No one else, but Atticus Finch.

That, for the American lawyers, was a drop too much. Shook to his very core, Clinton’s personal lawyer, David E. Kendall, issued a public letter in *The New York Times*.

To quote:

(..) the attempt to make Atticus Finch into a docile figure who bows to the prosecutor’s will simply won’t do. Atticus, a white lawyer in an Alabama town during the Depression, represented Tom Robinson, a black man falsely accused of raping a white woman. He defended his client despite community hostility. Atticus knew “truth” is not the sole possession of the district attorney’s office, that Bill of Rights procedural protections belong to even the most unpopular of defendants, and it was his duty to defend his client against a hostile world. (..) No, this appropriation of Finch won’t do. If Atticus were brought to life today, what would he be doing? He’d be championing some unpopular citizen hauled before a legislative committee or representing some witness harassed by an overzealous prosecutor. [Kendall 1998]

Another of many responses to that incident and the person of Ken Starr in general, was a book by James Carville ‘And the Horse He Rode In On’, in which he writes:

Those of you who read my last book, ‘We’re Right, They’re Wrong’, know of the tremendous influence *To Kill A Mockingbird* had on my life. So you can probably guess how hopping mad I became when I heard Ken Starr compare himself to Atticus Finch in a recent speech. How horrific it must be for Harper Lee to hear the esteemed Inspector, an unabashed trampler of constitutional rights, try to evoke a comparison between himself and Atticus Finch. [Carville 1999: 148]

4. Why So Serious?

So why this enormous debacle about just a literary character?

Here’s what. The first and most important thing we notice about Finch is his enormous for the times he lived in empathy towards absolutely everyone. We praise him for his admirable solution of how Renee Knake puts it ‘the fundamental disconnect

between the rule of law (or one's role in the law) and individual morality' (Knaake 2008: 37). To quote the book itself, '*Atticus is the same in the courtroom as he is on the public streets*'. By that he has achieved a rarely met integrity that embraces all of his social as well as the professional encounters. He presents empathy as *the key tribute* of true professionalism. But what he excels in is the way in which he omits the part we usually associate with 'empathetical lawyers' presented in pop-culture – the grand gestures, the riveting speeches, the thrilling plot twists. There's no high words or blows with Atticus Finch. He delivers his moves in a dry, but not cold way, with reasoned professionalism. So what he does actually is combining empathy with *detachment*. As put by Harvard Law Review,

(..) this takes a form of a ritual – where *empathy and detachment intersect*. Empathy is less likely to overwhelm the individual to the point of obstructing the fulfillment of his or her duties. It becomes instead a source of inner strength that supports and gives meaning to the outward form of restraint and detachment, while guarding against degeneration into the hollowness of indifference. [*Being Atticus Finch*: 1690]

But more importantly, this detachment is not indicative of any lack of feeling. In fact, much of Atticus's speech and conduct in fact suggests great reserves of feeling.

So we have been presented with a pretty amazing profile of a lawyer. Getting to the point of my paper- in our times, would it be possible for a profile like that to even be believable? Analyzing the most common law-related artifact in modern pop-culture, which is the law based TV series, at first glance I would have to say- not at all. Nowadays a character with such strong morals and a very deep emotional complexity and nearly courageous integrity simply would not be believable, or more importantly- it would be dull for a viewer.

5. Have We Actually Thrown Atticus's Heritage Away?

For the last couple of years there have emerged the type of 'master-apprentice' kind of TV series, lots of them concerning lawyers. The highest popularity of them all gained 'Damages', starring Glenn Close and Rose Byrne, and the series I am going to discuss further - 'Suits'. The dynamics of this particular series is based on the relationship between the older lawyer, Harvey Specter (portrayed by Gabriel Macht), and his younger assistant, Mike Ross (played by Patrick J. Adams). From the very beginning of the series, there was drawn a clear distinction between the two of them. Seniority combines with success, cool, wittiness and respect. Youth is emotions which lead to failures. Throughout the whole series we are faced with multiple examples of how *detachment* is basically a recipe for legal fame, and whenever you stray from that path, punishment awaits you (numerous situations when Harvey lost his cool or felt empathetical towards his client, in which case his punishment for such behaviour has become a major plot-point).

All these observations come to one conclusion – in modern pop-culture, we have grown accustomed to the exclusive division between empathy and detachment. They no longer intersect, they no longer form a successful union - they need to be separated and any effort of combining them together needs to be explicitly punished. So what is the reason behind these kind of portrayals?

I claim the producers and pitchers of those TV shows are not oblivious to what is going on in society altogether. They simply are aware of the fact that a character who keeps his integrity on both professional and personal level, manages to combine empathy and detachment and basically is as crystal as a chandelier - would simply not be believable, or more importantly – lucrative. Nowadays we are not attracted to the characters we can measure up to, but rather we want to be reassured that other people also make mistakes, have problems, moral dilemmas and so on. We do not want a perfect lawyer staring us at our face. Even if Harvey Specter manages to be successful most of the time, don't we enjoy his mistakes when they finally happen? Don't we rationalize 'well his professional life is perfect, but isn't he lonely? Wouldn't he rather be loved? Doesn't he feel worse when he blocks out his personal feelings?'? A perfect role model is not what we want. But isn't it something we need? We twist and turn, we divide, but when analyzed closer, one can see that the problems and dilemmas that stood in front of Atticus in 'To Kill A Mockingbird', are nearly the same that Harvey and Mike have to deal with (especially the on-going moral debate about Mike not actually being a licensed lawyer).

So when it comes to answering the question posed in the title of my paper, I think Atticus Finch IS still with us. We are just not capable of carrying him with us the way he was born.

6. (not) The End

When I have started my research, I have been blessed with a wonderful turn of events (or so have I thought at the beginning) - a new novel by Harper Lee was announced. The story behind the book is that it was in fact the manuscript that H.L. gave to her editor, who was the one to advise her to re-write it from a childhood perspective of the narrator - Scout. The original, entitled 'Go Set A Watchman', takes place 20 years later, when older Scout comes back home and faces her much changed previously-heroic father. Not to spoil much of the plot, the admirers of the book and the believers (how else should we call them) of Atticus Finch were left shocked after learning what happened to their role model.

For example:

One was U.S. District Judge Richard Story, who told the Daily Report in 2007 that Finch is a 'superhero in the world of law' after the judge portrayed Finch in a theater production of 'Mockingbird'. Story declined to be interviewed about the Finch revelations, saying through his secretary that he was 'in mourning'. [Monyak 2015]

But not all of the reactions were this negative. Professor Abbe Smith of Georgetown University Law Center, while recognizing that 'maybe it's a good thing that the white male Atticus Finch bites the dust—maybe he's not the right hero for this period in time' (which actually gets perfectly in line with my perceptions on the matter presented in this paper), she also makes a point that beats all those 'ha see he wasn't that perfect, all you Atticus believers are wrong' kind of approaches.

To quote :

Atticus Finch is now a much more complicated literary hero. It doesn't render his lawyering of Tom Robinson any less heroic. [*Ibidem*]

That, in my opinion, is all that matters. One's heroic actions are not diminished by latter behaviour.

And I think I am not alone in my stand of defending Atticus forever.

7. Conclusions

Even if we deem Atticus unrealistic or agree that he possesses the bad traits that some critics attach to him, we should be aware of the fact how much debate and self-checking he has influenced, and how by his creation, his 'life' and his choices, he has become a mirror, not only for lawyers, but for people of all backgrounds, to reinvent our ethical and moral choices and rules. And that I think is why we should always be grateful to Harper Lee.

As pointed out by R. K. Knake :

Martha Nussbaum powerfully argues that the study of law and literature particularly is suited for understanding ethical behaviour. She suggests that thinking about narrative literature allows for a humanistic conception of the world around us. [Knake 2008: 43]

I couldn't agree more. I have always felt that getting to know Atticus Finch and reliving his life choices in my head made me much aware of a person, not only in my private life, but also as a studying lawyer. It indeed gives a different perspective and makes one reinvent his attitude towards the chosen profession.

As Robin L. West wrote :

The good lawyering to which we should aspire, on this view, and the aspiration for which we should instill in students, is importantly informed not by economics, but by literary and humanistic industry. [West 1996: 1187, 1188]

There has always been and I hope always will be a debate going on about Atticus Finch. We will forever point out his rights and wrongs, analyze his emotions, his behaviour, his approaches to different matters. But what I deem to be the most important, is to remain humble while discussing this eternally famous literary lawyer. Using the words of Monroe H. Freedman to conclude:

In short - Atticus Finch is both more and less than the mythical figure that has been made of him. He is *human* - sometimes right and sometimes wrong. And one criticizes Atticus Finch not from a position of superiority, but with *respect*, like a sports columnist reporting the imperfection in an athlete whose prowess he himself could never match. [Freedman 1994: 482]

References

- Being Atticus Finch : The Professional Role of Empathy in 'To Kill A Mockingbird'. *Harvard Law Review*, Vol. 117, No. 5 (Mar. 2004), pp. 1682-1702.
- Carville, J., 1999. *And The Horse He Rode In On : The People vs. Kenneth Starr*. New York City: Simon and Schuster.
- Freedman, M. H., 1994. 'Atticus Finch- Right and Wrong'. *Faculty Scholarship*, Paper 220. Available at: http://scholarlycommons.law.hofstra.edu/faculty_scholarship/220
- Huston, K., 2004. Comment: The Lawyer as Savior : What Literature Says About the Attorney's Role in Redemption, 73 *UMKC L. REV.*
- Jarvis, R. M., 2006. *The Admiralty Lanyer in Popular Culture*. 37, *J. MAR. L. & COM.* 23 n.46.
- Kendall, D. E., 1998. *Prosecutor Starr, You're Not Jack Webb- Or Atticus Finch*; June 5th 1998. Available at: http://articles.philly.com/1998-06-05/news/25729030_1_atticus-finch-prosecutor-starr-independent-counsel
- Knake R. N., 2008. Beyond Atticus Finch: Lessons on Ethics and Morality from Lawyers and Judges in Postcolonial Literature. 32 *J. Legal Prof.* 37
- Menkel-Meadow, C., 1999. The Sense and Sensibilities of Lawyers: Lawyering in Literature, Narratives, Film and Television, and Ethical Choices Regarding Career and Craft. 31 *MCGEORGE L.REV.* 1, 12.
- Monyak, S., 2015. 'Atticus Finch Revelations Has Lanyers Reeling', for the Daily Report, 21.07.2015
- Phelps, Teresa G., 2002. Atticus, Thomas, and the Meaning of Justice. 77 *Notre Dame L. Rev.* 925.
- West, Robin L., 1996. The Literary Lawyer. 27 *PAC, L.J.*



Practical Wisdom and Judicial Practice: Who's in Narrative Control?

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Abstract: In this article I focus on the Aristotelian requirements for the art of good judging in connection to the suggestions made for the role of emotion in adjudication as developed in the interdisciplinary fields of *Law and Literature*/ *Law and the Humanities*: how to combine the heart and the head in legal practice by finding inspiration and guidance in literary works, and in the suggestions more recently made in cognitive narratology. Or, in other, words, how to incorporate empathy and literary-legal imagination into a judicial methodology in such a way that the requirements of the rule of law (rather than of men, i.e. the subjective persuasion of the judge) are fulfilled.

Key-words: practical wisdom/phronèsis, judicial practice, empathy, narratology

‘Give therefore thy servant an understanding heart to judge thy people, that I may discern between good and bad’ [1 Kings 3:9, AV]

‘This, Fiona decided as her taxi halted in heavy traffic on Waterloo Bridge, was either about a woman on the edge of a crack-up making a sentimental error of professional judgement, or it was about a boy delivered from or into the beliefs of his sect by the intimate intervention of the secular court. She didn’t think it could be both.’ [McEwan 2014b: 91]

1. Introduction

In 1 Kings 3:9 (AV) we read that Solomon when asked by his God what he would like most begs to be furnished with an understanding heart in order to be a good judge. Aristotle in his *Poetics* suggests that an essential quality of a good tragedy, the site of difficult decisions *par excellence*, is that it arouses fellow-feeling, or *philantropia*, a contested term that refers both to an empathetic stance with respect to the fate of the protagonist, and to a form of justice (Aristotle 1999: 68-69, 1453a, footnote 105; on pity in relation

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to justice cfr. Aristotle 2006: Book II, vii.6ff). Taken together these sources not only suggest that the topic of the 2015 IVR Conference, Law and Emotion, has a rich literary history, but also that the concept of empathy, discussed in the fields of *Law and Literature* and *Law and the Humanities* since the late 1980s (E.g. Henderson 1987; Massaro 1989), and proliferated since the publication of Martha Nussbaum's *Poetic Justice*, merits our further attention. I say so for the simple reason that what James Boyd White wrote in 1985 obviously still goes for our legal culture of argument, 'Law and literature are alike in that they both give voice to the voiceless and thus aim at "the extension of our sympathies"' (White 1985: 104)¹, but that so far, given the Anglo-American roots of the literary-legal approach(es), both the legal-theoretical and the judicial implementation of this proposition has predominantly been geared toward a common law judicial setting with a focus on the competing narratives of judicial opinions (McArdle 2012; see also on emotion and judging, Belleau 2007). What is more, the paradigm shift in common law adjudication toward Holmesian favourites such as economics and statistics, or, as Robin West calls it, 'scientific judging', has lead to, 'the demise of judicial empathy ... as a piece of the collateral damage in the movement from traditional, moralistic, and particularistic reasoning, to forward-looking scientific adjudication. Empathy is as irrelevant to the new paradigm of judging as it was central to the old' (West 2012: 288)².

This calls, I suggest, for a search for shared elements of judging, i.e. irrespective of common law or civil law orientation. Obviously conceptual clarity as far as the use of emotion in a legal setting is concerned is of great importance. As Terry Maroney's pathbreaking research on law and emotion has already outlined, we need to be crystal-clear about what we focus on when we 'do' law and emotion, or law and empathy. For purposes of this article I find inspiration in what Maroney calls the '*legal-actor approach*', one that, '... focuses on the humans that populate legal systems and explores how emotion influences and informs, or should influence or inform, those persons' performance of the assigned legal function' (See, for an extensive overview of approaches, Maroney 2006: esp. 125ff.). Given my own field of expertise in *Law and Literature* and the fact that I am a sitting judge, I will restrict my attention to the judge as a legal actor, not least because most common law oriented research usually takes the jury as object of inquiry.

Now emotion may seem to be a strange bedfellow³ if we consider that the demands of legality in contemporary jurisdictions order the judge to stay clear of her subjective persuasion so that the rule of law rather than of men can be guaranteed. In other words, is the emotion of empathy to be accepted as an essential and/or normative component of the art of judging, more specifically so in hard cases when the law, if not silent, is not particularly outspoken? That is to say, with Thomas Hobbes' *Leviathan* in mind⁴, can the judge then give her discretion, coloured by private emotion, free reign?

¹ The phrase is derived from George Eliot.

² The contributions to the 'Passions and Emotions' volume address issues of emotion in moral judgment as well as emotions in legal interpretation. On the political level, it is interesting to note that presidential candidate Hilary Clinton spoke of the necessity to promote empathy (she used the word literally), also as imagining being in someone else's shoes, in order to fight racial discrimination (speech at the National Urban League meeting held at Ford Lauderdale, Florida, 31 July 2015, CNN Newsreel 31 July 2015).

³ 'A core presumption underlying modern legality is that reason and emotion are different beasts entirely' (Cfr. Maroney 2006: 120).

⁴ I am thinking here of chapter 21 of Thomas Hobbes' *Leviathan*, where Hobbes discusses the situation in which the legislator is silent, i.e. there is no specific rule, and the subject therefore at liberty to use his own discretion.

The threat to the logocentric reasoning that we have cherished since the Enlightenment looms large for those of legal-positivist denomination. So the question would be whether empathy and a literary-legal imagination can be incorporated into a judicial methodology such that the requirements of the rule of law are fulfilled.

In the first part of what follows I will return to, and build on my recent arguments about the Aristotelian requirements for the art of judging well, in connection to the suggestions made for the role of emotion in adjudication as developed in the interdisciplinary fields of *Law and Literature*/ *Law and the Humanities*: how to combine the heart and the head in judicial practice by finding inspiration and guidance in literary works, and for what reasons. I do so also on the view put forward by William J. Brennan jr., that already in the early twentieth century, ‘Cardozo drew our attention to a complex interplay of forces – rational and emotional, conscious and unconscious – by which no judge could remain unaffected. ... this interplay of forces, this internal dialogue of reason and passion, does not taint the judicial process, but is in fact central to its vitality’ (Brennan 1988: 3). Thus my perspective in this part is geared toward empathy as a second-order emotion, i.e. as a, ‘mode of being in touch with the emotions, feelings, expectations, and vulnerabilities of others,’ and as ‘the capacity to make morally significant decisions in the light of empathy with the first-order emotions of others’ (Morawetz 1996: 523). In other words, on what from a literary-theoretical point of view is delineated as the combination of aesthetic empathy, i.e. empathy felt for a person whom we know to be fictional, say Effi Briest or Anna Karenina, and the empathy that we ourselves develop as a character trait (Hogan 2011: 276). The latter’s success, also in view of Benjamin Cardozo’s famous thesis about the unity of form and content of legal texts, and more specifically judicial decisions (Cardozo 1925), can be deduced from the reaction of those affected by such a decision. When the judicial text is logocentric and cold, this can evoke violent emotion.

Recently in the Netherlands, a father who heard the decision of a lower court with respect to the defendant-car driver who ran over and killed his two-year-old daughter and both her grandparents while they were cycling on a bicycle track, threw a chair to the judge reading the decision out of sheer disappointment and frustration. The decision itself was correct in terms of traffic law and criminal law, also as far as the sentencing was concerned, but did not at all, or rather not explicitly, recognize the enormous suffering of the parents of the little girl (See ECLI:NL:RBLIM:2014:10041). In other words, the judicial decision performed its legal function of decision-making and criminal law dispute resolution in the abstract sense only, and failed in its communicative and societal function because it did not show an empathetic stance towards the bereft parents who had understandably hoped for a severe punishment of the offender by way of retribution. As a concomitant result, the general audience felt with the parents; it did not accept the decision as fair. Thus the performativity of the (text of the) judicial decision is intimately connected to the narrative identity of the judge taking the decision, whether this identity is consciously chosen or not. An interesting fictional example can be found in Ian McEwan’s novel *The Children Act* to which I turn in more detail below in paragraph 3. Judge Fiona Maye’s opening remark in the hard case of the Siamese Twins is this: ‘This court is a court of law, not of morals, and our task has been to find, and our duty is then to apply, the relevant principles of law to the situation before us – a

situation which is unique' (McEwan 2014b: 26-27)⁵. This suggests the need for legal practice to at least consider the suggestions made by *Law and Literature*.

Then, in paragraph 4, I turn to the suggestions made in contemporary cognitive narratology in order to highlight the consequences for judicial practice of findings with respect to narrative conventions at work in all of us, such as script and schema. Then the first-order emotion of the judge, e.g. her fear, anger or distress, comes central stage as the objective of other people's narrative goals⁶. The topic is acute not least because contemporary neuroscience suggests that the mechanisms at work in the development of empathy are neural, and, '... science now suggests that, *even in law*, it is emotion or empathy, that motivates compliance ... ' (Bruner Murrow G. & R. W. Murrow 2013: 282, 284, my italics).

2. Narrative empathy in literature and law

It is my firm conviction, based on some seventeen years of experience on the bench, that in every case that comes before a judge emotions are involved in at least two related ways. To start with, the first-order emotion of the parties usually triggers the legal conflict, even though in corporate and commercial disputes this is mostly couched as a rights discourse involving money. In criminal law, the emotion of victim and perpetrator rather than the other party in the case, the state, are central stage. The judge has to be aware of these emotions and act upon that awareness. But, more importantly, the judge has to be aware of the 'subtext of a case', the stories of the litigants that matter to them personally but that are all too often filtered away in the course of the proceedings, geared as they are toward the finding of legally relevant facts in light of possibly applicable legal rules and norms. This requires of the judge a legal imagination that includes a concrete reflection both on what is and what is not actually argued, in either oral or written form, and what the emotional aspect 'really' is (Cfr. Meyer 2003: 1314-315). And since judges too, '... suffer the slings and arrows of outrageous fortune' (Shakespeare 1997, act 3.1, ll.59-60), such imagination would include professional and personal self-reflection on what she recognizes and accepts as valid, and on what remains unacknowledged given her own blind spot(s). For the stories in law as much as the stories in literature the claims about the necessary capacity of second-order empathy, made by scholars and legal professionals alike, are to be considered in connection to existing character traits in the reader, and these include her first-order emotions.

What Stephen Breyer claimed about the need for judges to seek nourishment in literature⁷ in order to correctly fulfill law's requirement of professionals to have 'both a head and a heart'⁸, is intimately connected to who judges are and how they view their

⁵ Cfr. McEwan (2014b: 13), 'Among fellow judges, Fiona Maye was praised ... for the compact terms in which she laid out a dispute.' See for a discussion of the case that formed the basis for this fictional example also Watt (2011: 93-107).

⁶ For empirical research conducted in Australian courts, see Roach Anleu and Mack 2005.

⁷ 'Each of those stories involves something about human passion' ... 'And so sometimes I've found literature very helpful as a way out of the tower.' Hearings before the Committee on the Judiciary, 103rd Congress, 2nd session 232-233, 1994, statement of Stephen G. Breyer, Supreme Court Nominee.

⁸ The reason for the combined heart and head being that '... when you are representing human beings or deciding things that affect them, you need to understand, as best you can, the workings of human life' ... 'Only the most difficult cases get to the Supreme Court, those cases where perfectly good judges come to

societal role and function, and their legal persona in daily practice. It also calls for continued attention in legal theory to the relation between law and morality in its connection to theories of adjudication⁹. Or, as Steven Winter suggests, ‘A literary turn of mind is vital to morality because it is through narrative enactment that we imagine how various situations might be carried forward and, thus, are able to assess their ethical implications’ (Winter 2010: 115).

Both aesthetic and practical empathy thrive on emotion. To me, the claim put forward by Patrick Colm Hogan that, ‘Our emotional response to stories is inseparable from our empathic response to the characters, their situations, actions, capacities, and so forth’ (Hogan 2011: 276), is relevant in both literature and law, especially since different forms of aesthetic empathy can help feed the legal imagination¹⁰. One cannot be a good judge without that, and I wholeheartedly agree with Gary Watt when he writes that, ‘Too much respect for law and a lack of humane imagination is a terrible thing in a judge’ (Watt 2009: 20). The 2009 confirmation hearing of Supreme Court Justice Sonia Sotomayor, however, show that this is not a universally accepted truth. Or rather, that a nominee for the bench risks vilification if she deviates from the enlightened path of rationality as the predominant factor in adjudication. When her views on the importance of her personal identity in its connection to empathy as criterion for judging were challenged, Sotomayor was quick to join the traditional ranks, i.e. while she acknowledged judicial emotion, she dismissed it as harmful in actual decision-making¹¹. And neither did president Obama’s warm plea for the empathy criterion survive the public debate. Such vilification is not new. One only has to think of the empathetic interpretive stance employed by Supreme Court Justice Blackmun who joined Justice Brennan’s dissenting opinion in *DeShaney v. Winnebago County Department of Social Services* (489 U.S. 189; 1989)¹², and added a voice of his own when he wrote,

different conclusions on the meaning of the same words. In those difficult cases, it is very important to imaginatively understand how other people live and how your decisions might affect them, so you can take that into account when you write’ (Breyer 2013). Cfr. Henderson (1988).

⁹ Cfr. Brennan (1988: 9, footnote 20), referring to Thomas Jefferson’s *Dialogue between my Head and my Heart*, and remarking that, ‘An appreciation for the dialogue between head and heart is precisely what was missing from the formalist conception of judging,’ i.e. the nineteenth-century Langdellian formalism that Benjamin Cardozo reacted against, one that not incidentally in the early days of *Law and Literature* was taken up by Brook Thomas and Robert Ferguson when they drew our attention to the period in which law in the U.S. was still part and parcel of the humanities, in *Cross-Examinations of Law and Literature* (Thomas 1987) and *Law and Letters in American Culture* (Ferguson 1984), a period that in Europe, roughly put, can be situated before the great codifications of national legal systems of the late eighteenth and the nineteenth century (cfr. Gaakeer 2012b).

¹⁰ ‘Empathy may involve imagining some other person’s experience as such (allocentric empathy), imagining oneself in his or her situation (projective empathy), or imagining some relevantly standard person in that situation (normative empathy)’ (Hogan 2011: 284).

¹¹ Confirming that the, ‘[T]he job of a judge is to apply the law. And so it’s not the heart that compels conclusions in cases, it’s the law.’ Nomination of Judge Sonia Sotomayor to Associate Justice of the Supreme Court before the Senate Committee on the Judiciary, 111th Congress, 1st Session, July 14, 2009. Cfr. Maroney (2011b: 1485); Sotomayor first brought forward the identity argument in a 2002 speech at Berkeley, see Martin Alcoff 2010. See also McArdle 2012.

¹² 489 U.S. 189 (1989). In 1984, Joshua DeShaney was subjected by his father, with whom he lived after his parents had divorced, to a battering so severe that he suffered permanent brain damage. He was profoundly retarded for the rest of his life. The evidence showed that the Winnebago Department of Social Services (DSS) knew what happened in the DeShaney home. After the final beating, Joshua and his mother brought suit against the county, the DSS, and several of its workers. They complained that Joshua had been deprived of his liberty in the sense of bodily integrity without due process of law, in violation of his rights under the

'Today, the Court purports to be the dispassionate oracle of the law, unmoved by "natural sympathy" ... But, in this pretense, the Court itself retreats into a sterile formalism which prevents it from recognizing either the facts of the case before it or the legal norms that should apply to those facts. ... the Court today claims that its decision, however harsh, is compelled by existing legal doctrine. ... I would adopt a "sympathetic reading", one which comports with the dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging. ... Poor Joshua, ... It is a sad commentary upon American life, and institutional principles that this child, Joshua DeShaney, is now assigned to live out the remainder of his life profoundly retarded ... ' (Ivi: 212-213). Blackmun was widely taken to task for his first-order emotional exclamation 'Poor Joshua', and his so-called 'jurisprudence of sentiment' (Rosen 1994: 13).

And yet I would agree with Martha Nussbaum when she claims as her epistemological position, '... that certain literary texts ... are indispensable to a philosophical inquiry in the ethical sphere; not by any means sufficient, but sources of insight without which the enquiry cannot be complete', and that we need literature, 'that talks of human lives and choices as if they matter to us all' (See Nussbaum 1990: 23-24 and 171;)¹³. This position originates in Nussbaum's earlier work in which she combines ethical philosophy along Aristotelian lines (e.g. Nussbaum 1986, e.g. pp.378-421 on Sophocles' *Antigone* and Euripides' *Hecuba*) with the suggestion to study the narrative and emotional structures of novels, and ties up with Nussbaum's construction of the truly moral judge founded in the good aristotelian judge, whose virtue lies correctly applying the equity of the flexible ruler. He is, '... a judge of practical wisdom, rather than being unreflectively subservient to law, [who] will apply it in accordance with his very own ethical judgment' (Nussbaum 1990: 99).

The combined argument about the literary-legal construction of a good judge is that real judges should read fiction because the lessons it teaches can directly be applied to decision making¹⁴. The argument runs like this. Literary works with legal themes, however remote perhaps from the traditional jurisprudential themes, can give us insight into the struggles and tensions that are created by law by the very way in which it regulates society and the lives of individuals. This is because literature differs from the abstract propositions of doctrine and jurisprudence. Literature is always an experience of the imagination, never a string of propositions. Literature's 'capacity' to contribute to the professional lives of lawyers makes it also an indispensable medium to learn about law. The experience of viewing the world of the text and its inhabitants empathetically can be transformed into a norm for judging human relations in general, or, as Nussbaum puts it, for 'our social existence and the totality of our connections' (Nussbaum 1990:

Due Process Clause of the Fourteenth Amendment, because the DSS et al. had failed to intervene to protect Joshua against his father's beatings. The majority opinion of the Court held that failure to protect an individual against private violence does not constitute a violation of the Due Process Clause, because no affirmative obligation is imposed on the State to provide this type of protection. The Court also held that the State's knowledge of Joshua's dangerous situation did not itself establish a special relationship which might give rise to such an affirmative obligation either, since the State did not hold Joshua in its custody during the final beating, which incidentally was not by a State official but by his father.

¹³ See also Cunningham (2001: 5), '... novels can literally help us to read for life'.

¹⁴ See also Heald 1998; Heald 2009. Given the scope of this article I refrain from addressing questions of the dominance of Western culture and canon in Nussbaum's works. Cfr. the critical note in Morawetz (1996: 520-521) 'For her [i.e. Nussbaum], the relevant moral community is Western culture as it has evolved over recent millenia rather than the Balkanized subcultures of contemporary cultural discourse'.

171). Thus, reading literature can make us aware of the complexity of the human condition and can help promote an empathic ability, i.e., ‘...to imagine the concrete ways in which people different from oneself grapple with disadvantage...’ (Nussbaum 1995: xvi). At the heart of her approach, therefore, is the emphasis on the particularity of human experience rather than an abstraction formulated on the basis of presuppositions that are hard to test. Nussbaum’s term to denote, ‘the ability to see one thing as another, to see one thing in another’, is ‘fancy’ (Nussbaum 1995: 36). This requires from the reader as the most important characteristic, ‘... the power of imagining vividly what it is like to be each of the persons whose situations he imagines’ (Nussbaum 1995: 73. Cfr. on empathy as moral sentiment Ward 2002).

What, then, does this mean for the judge in actual legal practice? This ‘narrative imagination’ as Nussbaum also calls it (Nussbaum 2010: 95-120, Chapter VI ‘Cultivating Imagination: literature and the arts’), obviously has to be translated to the language of judging, for literature and law are alike in that they need ‘... a language that is expressive of the kind of imagination that’s capable of perceiving the individual humanity of the people involved and their circumstances; recognizing that each has a complicated story with factors that make it not the same as anyone else’s’ (Nussbaum 1996: 24). This argument returns in Nussbaum’s defense of the arts and humanities against the instrumental profit motive pervasive in contemporary science and technology where she includes, ‘... the ability to imagine sympathetically the predicament of another person’ (Nussbaum 2010: 7, endnote omitted), as a salient characteristic to be able to voice other values (including those of citizenship and democracy). Not only is the very idea of ‘narrative imagination’ applicable in a concrete manner in any act of judgment since to Nussbaum emotions are rational, so that in common law and civil law jurisdictions alike it makes sense for juries and judges to try and imagine as best as they can the other’s situation before ‘doing justice’ (Cfr. White 2006: 90) by means of a final judgment, it is also essential when reading, as is mostly the case in civil law jurisdictions, the paper files, since words can never fully describe the emotions at work in, for example, the story of what happened by a witness of a terrible crime.

In the sense that the working of narrative imagination is based on the metaphoric process, its resulting empathy can be fruitfully connected to the legal-philosophical concept of *phronēsis* from Aristotle to Paul Ricoeur. In the spectrum of the intellectual and moral virtues Aristotle places *phronēsis* in the category of intellectual virtues (distinguished from *epistēmē*, i.e. theoretical, conceptual knowledge aimed at ‘knowing that’, and from knowledge of how to make things, *technē*)¹⁵. Perceptual and dispositional

¹⁵ Aristotle starts his analysis with a definition of the prudent man, the *phronimos*: ‘We may arrive at a definition of Prudence by considering who are the persons we call prudent. Now it is held to be the mark of a prudent man to be able to deliberate well about what is good and advantageous for himself [...] as a means to the good life in general’ (*The Nicomachean Ethics*, VI.iv.1, 1140a24-29, p.337) [...] But no one deliberates about things that cannot vary, nor about things not within his power to do. Hence inasmuch as scientific knowledge involves demonstration, whereas things whose fundamental principles are variable are not capable of demonstration, because everything about them is variable, and inasmuch as one cannot deliberate about things that are of necessity, it follows that Prudence is not the same as Science. Nor can it be the same as Art. It is not Science, because matters of conduct admit of variation; and not Art, because doing and making are generically different, since making aims at an end distinct from the act of making, whereas in doing the end cannot be other than the act itself: doing well is in itself the end. It remains therefore that it is a truth-attaining rational quality, concerned with action in relation to things that are good and bad for human beings’ (*The Nicomachean Ethics*, VI. v. 3-4, 1140a32-1140b7, p.337). For an extensive treatment of *phronēsis* in Aristotle and Ricoeur, see Gaakeer 2012a; 2015a.

in nature, *phronêsis* is the capacity to see what the situation demands and act upon it, i.e. it includes the application of good judgment to human conduct, 'knowing how'¹⁶. It is characterised by deliberation (or *bouleusis*), primarily with oneself but when transposed to the realm of the juridical, especially in legislation and equitable judging, also with others. *Phronêsis* is also a matter of *ethos*, character, in the sense it is the ability to apply understanding and insight gained in specific situations to new contexts. Understanding and *phronêsis* are about the same objects¹⁷. Since a judge has to reflect on what works and what doesn't in legal interpretation and application, the professional quality of *phronêsis* is crucial (*The Nicomachean Ethics*, VI.iv.1, 1140a24-29 and VI.v.3-4, 1140a32-1140b7, p.337). *Phronêsis* as knowing and being at the same time, enables the judge to bridge the gap between the generality of the rule and the particularity of the situation. As an actual form of reflective human judgment, it is a form of self-reflection that ideally leads to self-knowledge: why do I think that *this* rather than *that* is what is required under the circumstances?¹⁸

In Paul Ricoeur's work a connection between *phronêsis* and metaphor can also be discerned and it can be fruitfully connected to Nussbaum's arguments. The first step in Ricoeur's argument is to understand imagination as the insight into 'likeness' that is both perceptual and cognitive, a seeing and a thinking¹⁹. Here we recognize the combination of thinking (including theoretical knowledge of doctrinal law in the case of judicial *phronêsis*) and seeing the particularity of the new situation as comprised in the quality of *phronêsis*. Both *phronêsis* and metaphor depend on our imaginative capability to 'see' what connects that which we already know (or, see below paragraph 4, think we know) to a new meaning of the particular. It is here that the empathetic emotion as delineated by Nussbaum works. In short, Ricoeur connects the input from the humanities with the development of the judge's narrative imagination and intelligence by pointing out its interrelation with justice in terms of *phronêsis*. Literature offers us exemplary performances and thus helps us understand the importance of insight in what it means to write a story, or any other text for that matter, in a specific way (Ricoeur 1980: 178). *Phronêsis* also teaches us not to arrive at final decisions too quickly, i.e. the metaphoric aspect demands what Ricoeur calls suspension of judgment, and as Ammon Reichman suggest, that is literature's more important contribution to the act of judging²⁰.

On Ricoeur's view that there is a, '... close tie established by Aristotle between *phronêsis* and *phronimos*, a tie that becomes meaningful only if the man of wise judgment determines at the same time the rule and the case, by grasping the situation in its singularity' (Ricoeur 1992: 175), I turn to the relation of the deliberative aspect of *phronêsis* and the idea of narrative transfer: in what way, then, do specific types of

¹⁶ 'Prudence deals with the ultimate particular thing, which cannot be apprehended by Scientific Knowledge, but only by perception.' (*The Nicomachean Ethics*, VI.viii.9, 1152a27, p.351).

¹⁷ 'it [Understanding] is concerned with the same objects as Prudence', (*The Nicomachean Ethics*, VI.x.2, 1143a8, p.359).

¹⁸ Cfr. Morawetz (1996: 526), 'Self-knowledge, a precondition for empathy, is often painful to achieve and often achieved in a struggle with emotional predispositions.' Cfr. Ricoeur (2007: 7).

¹⁹ 'Imagination, accordingly, is this *ability* to produce new kinds by assimilation and to produce them not *above* the differences, as in the concept, but in spite of and through the differences,' Ricoeur (1978: 148) (*italics in the original*).

²⁰ Reichman (2006: 297), 'I propose that the benefit of literature as a learning tool is not that it makes readers judge empathetically; rather literature teaches one to withhold judgment so that when judgment is ultimately rendered it is more profound and meaningful'.

narrative transfer their stories in law and literature, for this too depends on making explicit the similarities and dissimilarities in a particular situation? And how do narratives influence our (empathetic) emotion? In doing so I keep in mind Ricoeur's view about, '[A]n essential characteristic of a literary work [...] is that it transcends its own psycho-sociological conditions of production and thereby opens itself to an unlimited series of readings, themselves situated in different socio-cultural conditions. In short, the text must be able, from the sociological as well as the psychological point of view, to "decontextualise" itself in such a way that it can be "recontextualised" in a new situation – as accomplished, precisely, by the act of reading' (Ricoeur 1981: 139). Why? Because what judges do in their act of reading and giving meaning to what they read in the form of a decision, is precisely that type of dealing with the texts of others. With this in mind I return to McEwan's fictional judge Fiona Maye whose emotional trials and tribulations are, or so I would suggest, both an exemplary performance of the arguments made so far, and a warning.

3. Empathy unbound or unbounded empathy?

The opening scene of the novel portrays our fictional legal actor, High Court judge Fiona Maye, professionally the paragon of legal rationality²¹, recuperating from the shock of her husband Jack's declaration that at fifty-nine he wants to have a love affair with a young woman named Melanie as a last shot because he longs for the physical intimacy he no longer has with Fiona²². Even now Fiona prioritises her professional duty for she starts to work on the decision that has to be ready the next day. This case is exemplary for the novel's main storyline: the choice between religion and life. It is a divorce case in the Jewish Chareidi community in which contrary to religious custom the mother Judith Bernstein wants an education for both herself and her children, so that Fiona writes, 'The court must choose, on behalf of the children, between total religion and something a little less. Between cultures, identities, states of mind, sets of family relations, fundamental definitions, basic loyalties, unknowable futures' (at 13). When writing about the moral differences between the litigants, Fiona, '... listed some relevant ingredients, goals towards which a child might grow. ... and having at the centre of one's life one or a small number of significant relations defined above all by love,' and becomes painfully aware of the fact that, 'Yes, by this last essential she herself was failing' (at 15). But the work comes first, 'Her judgment must be ready for printing by tomorrow's deadline, she must work. Her personal life was nothing' (at 16). The topic of religion versus life returns in Fiona's musings about a high-profile case she decided some weeks earlier, that of the conjoined twins Mark and Matthew that the hospital needed judicial permission to separate in order to save Mark whose chances of leading a normal life were highest, Matthew being unable to live independently from his sibling. The parents refused because they did not want to interfere with God's purpose. In both cases Fiona's decision favours life.

²¹ 'Among fellow judges, Fiona Maye was praised, even in her absence, for crisp prose, almost ironic, almost warm, and for the compact terms in which she laid out a dispute.' The Lord Chief Justice describes her as having, 'Godly distance, develish understanding, and still beautiful' (at 13).

²² '... before I drop dead, I want one big passionate affair' (at 5).

Then, at 22.30 hrs on the same night, the phone rings. Fiona who is on duty as a Family Division judge gets another case, that of a hospital looking for a court order to proceed with the transfusion of a leukaemia patient, seventeen-year old Adam Henry, against the wishes of his parents who are Jehovah's Witnesses. Even at this time of night and under these specific personal circumstances, Fiona immediately instructs her clerk what to do, as her husband leaves for his lover. Next day, at the Royal Courts of Justice, however, Fiona thinks back on her successful career and how she has held back for years to decide about having children; she realises '... the game was up, she belonged to the law as some women had once been brides of Christ' (at 45). For Fiona, the law is her religion²³. During the hearing later that week, the expert statement of the haematologist Carter gives Fiona reason to believe that without transfusion Adam Henry will soon die a horrible death. Adam Henry, it is established, is extremely intelligent and fully aware of the consequences of his refusal of treatment. His parents dote on him, but their faith and his is so strong that they accept he will die. Fiona announces that she will go to hospital to hear from Adam Henry himself, or rather, to find out, '... his understanding of his situation, and of what he confronts should I rule against the hospital,' and to tell him, '... that I am the one who will be making the decision in his best interests' (at 89). Here Fiona's private *persona* comes to the surface, since it is the social worker rather than the judge who does such visits²⁴. Is the pleasurable period she herself spent in hospital when she was thirteen the trigger? Or is it her (maternal?) interest in 'young Adam' (at 69), this 'young patient' (at 97) 'a lovely boy' who seems to be 'one confused little puppy' (at 98), because he is intelligent and writes poetry? In hospital Adam immediately tells her that, '... he had known all along that she would visit him' (at 100). Their conversation goes smoothly and within minutes Fiona is telling Adam about a court case of parents prosecuted for satanic abuse of their children which proved totally unfounded, and she knows, '... she had strayed onto his ground. Satan was a lively character in the Witness construction of the world' (102-103). She also realises that by asking, 'Would it please God, to have you blind or stupid and on dialysis for the rest of your life?', '... her question overstepped the mark, the legal mark' (105).

The intimacy between them develops when Adam asks Fiona whether he can call her 'My Lady', the honorific court term that he obviously uses more in the chivalric and private sense. They discuss his poetry, he reads to her and plays the violin to her, Benjamin Britten's setting of the Yeats poem 'Down by the Salley Gardens', one of the encores Fiona habitually plays with the barrister Mark Berner when they perform

²³ Cfr. the next day in court, moments before the hearing, upon seeing the neat stack of paper on her desk, when Fiona realises, '[S]he no longer had a private life, she was ready to be absorbed' (at 63). In sharp contrast with Fiona's decisions are two miscarriages of justice in the novel. Mr Justice Sherwood Runcie who tried a murder case four years ago: a mother, Martha Longman, was accused of the death of two of her children, since the chances of a child dying from Sudden Infant Death Syndrome were 'nine thousand to one' (at 50) according to the prosecution's expert witness. This case is based on the Sally Clarke case as Ian McEwan explains in an interview in *The Guardian*, (2014a), in which only by the second appeal it became clear that the pathologist had withheld vital evidence of a fatal bacterial infection in one of the children. Clarke was released but the vilification by the media and the bullying in jail had broken her.

The second case McEwan uses in the novel (at 183-190) is that of the son of a close acquaintance of McEwan's who was caught at the edge of a pub brawl, but charged with 'joint enterprise' and so sentenced for offences committed by others to two-and-a-half year in prison.

²⁴ 'She would have liked to see this boy for herself, remove herself from a domestic morass, as well as from the courtroom for an hour or two...' (at 35).

together at the Inns of Court. This triggers her to sing along with him. Back at the court, later that evening, Fiona gives her decision. She sets out the facts, acknowledges that Adam Henry, '... possesses exceptional insight for a seventeen-year-old,' (at 121) and then when everything seems to go in to the direction of finding for Adam and against the hospital, Fiona suddenly points out that her decision is, '... not ultimately influenced by whether he has or doesn't have a full comprehension of his situation. I am guided instead by the decision of Mr Justice Ward...' (at 123). In short, Fiona reverts to the legal domain by employing the basic principle derived from this precedent that the welfare of the minor is the concept guiding the decision. So Adam Henry, '.... must be protected from his religion and from himself' (at 123).

This oscillation between public role and private feeling will ultimately lead to professional transgression. It starts when Fiona gets a letter from Adam. He has had the transfusion and his parents are joyful. Why? Because Adam lives. They remained faithful, so the blame can be put on the judge and the legal system. It becomes clear from what Adam writes that he has developed feelings for Fiona and that the Yeats poem is immensely influential in that development. Fiona writes a short and cool letter, impersonal to the core, that she then does not send. A second letter from Adam arrives, now at her home address. Fiona asks the social worker Marina Greene to go and see Adam, who is doing fine at school. 'A week later, on the Monday morning she was to leave for the north-east of England, there occurred a minuscule shift along the marital fault lines...', (at 143) her husband with whom relations had been strained since his return, offers Fiona coffee which she accepts. Later that day, in Newcastle, when Fiona is having dinner at Leadman Hall, her clerk tells her that Adam Henry is there. Fiona goes to see him in the kitchen. He has followed her to thank her for saving his life as she saved him from his religion. He's eighteen now and has left home. It is immediately obvious that he is smitten with Fiona, and that the Yeats poem about 'The Salley Gardens' has been instrumental in the development of his feelings for her. Baffled when Adam announces that he wants to come and live with her, Fiona knows no better than to respond that she will ask her clerk to bring Adam to a hotel. However, before he gets into the taxi, '... she took the lapel of his thin jacket between her fingers and drew him towards her. Her intention was to kiss him on the cheek, but as she reached up and he stooped a little and their faces came close, he turned his head and their lips met. She could have drawn back, she could have stepped right away from him. Instead, she lingered, defenceless for the moment' (at 169). She senses that it was '... more than the idea of a kiss, more than a mother might give her grown-up son' (at 169). So their brief encounter ends. Fiona probes her state of mind and immediately swings back in the legal mode, '[S]he was not prone to wild impulses and she didn't understand her own behaviour. She realised there was much more to confront in her confused mix of feelings, but for now it was the horror of what might have come about, the ludicrous and shameful transgression of professional ethics, that occupied her. The ignominy that could have been hers' (at 172). Back at her London court, she receives a poem from Adam Henry. It's a ballad reminiscent of 'The Salley Gardens' that ends with Jesus saying to the protagonist, 'Her kiss was the kiss of Judas, her kiss betrayed my name' (at 180-181). Even though Fiona realises that his infatuation differed from hers, she dismisses the idea that she is the Judas of the poem, convinced as she is that he will move on, do well at university and forget about her. Again the presumed rational response. In December, however, she breaks down after a concert with Mark Berner, with whom as we have read earlier on, she forgets the law when they play together. The

trigger is their playing 'The Salley Gardens' combined with a phone call from the social worker Marina Green that Adam is dead, having refused a transfusion after the leukaemia came back. Fiona has admit to herself that she was '... the treacherous creature that led the poet astray and kissed him' (at 203). With Adam too, 'The Salley Gardens' made Fiona forget the law, but this oblivion comes at a high cost. She realises that, '[H]er transgression lay beyond the reach of any disciplinary panel' (at 212) because as a human being she has failed Adam completely. She has kissed him on an impulse and left it at that; she has failed to read the message in his poem and now he's dead. Fiona then confesses to her husband, '... her shame, [of] the sweet boy's passion for life, and her part in his death' (at 213).

I suggest that the importance of McEwan's novel is that it is literally and figuratively a 'mirror for judges', and one that gives food for thought to legal professionals as John Wigmore described one of the reasons why jurists should turn to literature, a view adopted in contemporary *Law and Literature* (Wigmore 1922). Its documentary character as far as the choice of legal cases is concerned, based as that choice is on McEwan's view on the parallels between the legal and the writing profession²⁵, as well as the development of the main character Fiona Maye together offer a basis for judicial self-reflection on professional behaviour and judicial regulation of emotion, in and out of court, as much as on the demand to balance the private and the public *persona*. This is also to say that the 'ethics of the story told', or rather the reading for the message, should be complemented by the 'ethics of reception', how the narrative influences us, as James Phelan suggests when he writes, 'Narrative ethics explores the intersection between the domain of stories and storytelling and that of moral values. Narrative ethics regards moral values as an integral part of stories and storytelling because narratives themselves implicitly or explicitly ask the question, 'How should one think, judge, and act – as author, narrator, character, or audience – for the greater good?' (Phelan 2014).

What, then, is it that judges especially can learn from reading *The Children Act* if they read the novel with the necessary narrative empathy?²⁶ Following Terry Maroney, I suggest that it is that they should concern themselves more than is done to date with the normative issue of the role of emotion in judicial decision making (Cfr. Maroney 2011a: 1488). The story of Fiona Maye shows how her completely internalised legal methodology of distinguishing the relevant facts is predominant. It also shows her initially second-order, allocentric empathy for the individuals whose lives she decides about, long remains the normative, legal kind as she looks for legal precedents to decide the cases, the recognition of relevant precedent being a metaphoric process of dealing with similarities and dissimilarities so that one arrives at the imaginative creation of the standard person in that specific situation (See Hogan 2011). It changes into first-order empathy, however, as a result of triggers in her personal life. From a judicious spectator of the kind Martha Nussbaum delineates in *Poetic Justice*, Fiona Maye changes into a

²⁵ Cfr. Interview with McEwan, (2014a), in which McEwan tells how at a dinner he attended, Alan Ward '... got up and took a volume of his own judgements from a shelf,' one that upon reading McEwan greatly admired, 'It was the prose that struck me first. Clean, precise, delicious. Serious, of course, compassionate at points, but lurking within its intelligence was something like humour, or wit, derived perhaps from its godly instance, which in turn reminded me of a novelist's omniscience.'

²⁶ Cfr. Keen 2015, 'Narrative empathy is the sharing of feeling and perspective-taking induced by reading, viewing, hearing, or imagining narratives of another's situation and condition.' Such '... shared feeling enables a living reader to catch the emotions and sensations of a representation'.

judge who loses her phronetic capacity to act and judge correctly under the circumstances. Would she have acted the way she did if she had had children of her own, and/or if she had not met Adam Henry in the vulnerable emotional state that she was in as a result from the problematic relationship with her husband? What is the emotional trigger of the song ‘The Salley Gardens’?

Thus, we as readers are asked whether we can feel with her, i.e. can we develop aesthetic empathy for her, and whether we ourselves can develop empathy as a character trait. And that is perhaps also to ask whether we can feel for fellow-judges like her in real life²⁷.

Much depends on who we ourselves are and that would include not only our professional²⁸, and cultural but also our private values, which for judges are, mildly put, usually solidly middle class. And it would include earlier experiences that add to our emotional colouring, from youth, for example, just as much as from professional life. Our being hermeneutically situated and culturally determined is an inescapable fact of all human life. In other words, it is important to be knowledgeable about how narrative works to activate our deep frames of (re)cognition, because what affects us in a fictional narrative may be indicative of what affects us in other texts as well, and such affect has consequences for the way in which judges impose narrative coherence on defendants’ and litigants’ acts against the background of the normative system, i.e. the applicable rule²⁹.

4. Narrative Control: Judging and the Cognitive Turn in Narratology

The topic of how to influence the judge’s mind and decision has been with us since Aristotle and Cicero’s *De Inventione* already deals with the topic of the plausibility of a narrative, i.e. what it is in the narrative that convinces those who judge. Judicial narrative imagination and phronetic intelligence therefore need an education in narrative affect heuristics, in order to be able to recognise the narrative techniques that are used in any text to deliberately guide the judge-reader’s perception and cognition, her ‘seeing and thinking’ as discussed above in paragraph 2, including an empathetic stance (Cfr. Stern 2014: 116, 129). To this end, the expansion of literary-legal studies into the domain of what is called the ‘cognitive turn’ in narratology is required. Not only to offer guidance in what it is that can trigger judicial emotion – necessary also because judges need to fulfil the requirements of impartiality and equal treatment under the rule of law³⁰ –, but also to help the judge in suspending judgment, i.e. to recognise what anti-suspension

²⁷ In the 2015 course ‘Language, Literature and the Judiciary’ that I co-designed in collaboration with the Dutch Training and Study Centre for the Judiciary as part of Dutch professional judges’ permanent education, *The Children Act* was the set novel. Responses to the character Fiona Maye widely differed; while most of my fellow-judges responded empathetically, recognizing the dilemma’s she faces and the circumstances she finds herself in, some found the story of Fiona and Adam utterly implausible since ‘no real judge would do a thing like that’. For an earlier overview of the course, see Gaakeer 2013.

²⁸ Cfr. Cardozo (1921: 178), on the ‘subconscious loyalties’ to the group(s) we belong to.

²⁹ Cfr. Desantis (2012: 159), that stories, ‘work to activate deep frames – cognitive principles that are so fundamentally a part of our identity that, once activated, evoke subconscious reactions that can lead us to real decisions.’ Cf. McArdle, *supra* note 4, at 180, n.41, ‘For empathy – when its relevance is recognized – to be effective, it must tap into the cultural narratives and expectations that are meaningful for others’.

³⁰ See also Minow 1988 for numerous suggestions and criteria to diminish the risk of personal judgments.

elements (i.e. other than case load and time pressure) are deployed³¹. Does the text, for example, exploit judicial psychological traits, such as anger or vanity³², or does it specifically appeal to empathy as a judicial response?³³

The topic of narrative as operative in how we construct 'the world as we know it' is important given the risk all humans run because of their psychological make-up in the sense of their minds' natural proclivity to structure reality by means of narratives³⁴, and that is the risk to fall into the pitfall of narratives becoming set stories and in the judicial environment of applying them as set rules. The judge's past experience of specific situations (and the people in them) can engender expectations with respect to human behaviour that will, in turn, guide her application of such expectations in future cases. It can lead to psychological errors such as confirmation bias and belief perseverance (See Festinger, 1957; Tversky & Kahneman 1974) when on such basis the judge, for example, 'reasons away' either incriminating or disculpating evidence, and then errors of judgment are sure to follow.

As the findings of neurosciences suggest, emotions have a basis in '... *mirror neurons*, which fire both when a person performs an action or feels an emotion and when that person views someone else having the same experience,' and at the same time they are also context- and culture-dependent³⁵. This suggests even more to be alert to subconscious activation of the judicial mind as far as the phenomenology of perception and judging is concerned³⁶. As Richard Gerrig suggests, human beings are guided in their life experiences as much by intuition as by reflection, and their general cultural knowledge affects their reading, i.e. the narrative processing of information. As a result, resonances of such knowledge in any given text help trigger our memories, tap the *schemas* that are present in us, the 'organized clusters of information in memory,' and these would include genre-expectations in experienced readers (Gerrig 2011: 39, 49).

³¹ Cfr. Maroney (2011b: 653), 'Thus, as Cardozo proposed, to engage fully with 'what judges really do' required dialogue on the contrast between 'reason versus emotion'. Cfr. also Maroney (2006: 132) 'Traditional legal theory either presumes that judges have no operative emotions about the litigants and issues before them or mandates that any such emotions be actively suppressed, reflecting an untested, commonsense wisdom that emotion distorts the objective legal reasoning demanded by the judicial role.' See Belleau et al., (2007: 13) '... the experience of reading is filled with moments of seduction and betrayal'.

³² A good example of a combination of anger and vanity can be found in the reaction of the judges to an advocate who called the notes that he saw the judges exchange during his cross-examination 'ravasakia', love letters. They put him in custody to await his trial for contempt because they had been deeply offended as persons, i.e. not as professional *personae*. Case of Kyprianou v. Cyprus, EHRC (Application no. 73797/01) 15 December 2005. For an extended discussion, see Gaakeer 2015b. See also Maroney (2012: 1225) on the risk of judicial trait anger.

³³ Bar-Cohen (2003: 2) defining empathy as, 'the drive to identify another person's emotions and thoughts, and to respond to them with an appropriate emotion'.

³⁴ Cfr. Turner (1996: i) '*Story* is the basic principle of mind. Most of our experience, our knowledge, and our thinking is organized as stories'.

³⁵ Jurecic (2011: 10, 12) 'The significance of culture and context for empathy is reiterated in recent work by neuroscientists who explain empathic concern as dependent not just on emotion, but also on cognition, context, and the relationship between the empathizer and the object of empathy.' Cfr. Bruner Murrow and Murrow (2013: 298), '... embodied empathy, broadly defined, involves the sharing, or automatic neural simulation, of the actual neural affective, neural somatosensory, or neural motor states of others with whom one "empathizes"'.

³⁶ See already Stein 1989, 3rd revised edition translated by Waltraut Stein, a translation of Stein's 1916 doctoral dissertation done under Edmund Husserl with a strong foundation in the phenomenology of perception.

The latter is of course immensely important in the setting of legal texts that given substantive, doctrinal and procedural constraints constitute a highly specific genre of text. In contemporary cognitive narratology³⁷, research centres on various questions that may fruitfully be used in judicial surroundings. For example, as Fludernik and Olson suggest, the question of how narrative functions as a mode of mental access and ‘how narratives reveal the phenomenology of perception, [...] how they control the decision-making processes by which we intuit how stories are most likely to turn out’ (Fludernik & Olson 2011: 5). This would include attention to ‘[F]rames, and particularly scripts, i.e. culturally recurring sequences of actions or processes, ... since they concern ingredients of plots (*Ivi*: 10)³⁸. Frames are the expectations on how domains of experience are structured, for example, how we recognize a room as a university classroom rather than a cell in a penitentiary institution (Herman 2009: 33). If we consider that in acknowledging or recognizing some sequence of events as a script, our natural inclination is to fill in the blanks of the unfolding story, or rather fill in the blanks (or the plot holes) (Cfr. Ryan 2009 on plot holes as deficiencies in the story line) and thereby structure the narrative into something we can deal with. In law, this is of great importance to acknowledge³⁹. What does the presumption of innocence actually mean if the script suggests that a masked man running out of a bank with a satchel of money is likely to be *the* bankrobber who robbed *this* bank⁴⁰. The schemata or ‘textual’ clues of such a narrative may ease judicial doubts too soon! This is dangerous on the view that the judge is the one constituting what are to be deemed the relevant ‘facts’ from the information on events that is presented to her, and she does so always with the legal norm and rule in mind. That is to say, the masked man with the satchel is probably irrelevant to the coherence of the story if the legal case before her is about a traffic incident.

From a point of view of legal theory, we may also look upon precedent as a form of script. For example, the ‘reasonable man’, or ‘my neighbour’ as found in the ‘neighbour principle’ in tort, a.k.a. ‘my brother’ as in ‘my brother’s keeper’⁴¹ guide the search in a new case put before the judge, and the same of course applies to other fields of law. In basing one’s decision on precedent too, what does not fit the script (also: as deliberately presented by litigants) gets filtered away. Viewed from another angle, that of presenting evidence in a court of law in a specific sequence, narrative knowledge is important because empirical research shows that people more easily accept evidence as ‘true’ when it is presented in ‘story order’ rather than when presented in ‘witness order’,

³⁷ Fludernik, M., ‘Histories of Narrative Theory (II): From Structuralism to the Present, in: Phelan, J. and P.J. Rabinowitz (eds), *A Companion to Narrative Theory*, Oxford, 2005, pp.38-58, at 48, on the cognitivist turn in narratology that concurred with the ‘narrative turn’ in the social sciences. See also Herman, D., ‘Cognitive Narratology,’ in: Peter Hühn et al. (eds), *The Living Handbook of Narratology*, Hamburg, Hamburg University, <http://www.lhn.uni-hamburg.de/article/cognitive-narratology-revised-version> <accessed 1 December 2014>, and Herman, D., ‘Narrative as Cognitive Instrument,’ in: Herman, D. et al. (eds.), *Routledge Encyclopedia of Narrative Theory*, Milton Par (UK) and New York, 2008, pp. 349-350.

³⁸ Cfr. Herman (2009: 33) defining script as, ‘a type of knowledge representation that allows an expected sequence of events to be stored in memory,’ and that includes an expectation of how story in the sense of a sequence of events is supposed to unfold, ‘supposed’, that is, on the basis of prior experience.

³⁹ See also Emmot & Alexander 2015 on how texts guide the production of meaning and on the gap-filling done by readers.

⁴⁰ I draw this example of a script from Herman 2014. Cfr. Toolan 2014; also Turner (1996: 16) that we recognize objects, events, and stories by means of ‘image schemas’, ‘skeletal patterns that recur in our sensory and motor experience.’ E.g. the idea of ‘motion’ suggests the presence of a ‘path’.

⁴¹ As developed in the case *Donoghue v. Stevenson* [1932] AC 562.

regardless of the actual veracity of that evidence⁴². So whether or not the judicial 'sweet spot' is deliberately or unconsciously influenced by means of narrative in order to activate judicial empathy⁴³, what matters most is that it may lead the judge to confabulate, explain away anything inconsistent with the story, and *a posteriori* create the illusion of there being good reasons for specifically *this* decision by way of legitimation. It is hard to change one's mind once one has literally and figuratively '*made it up*!' That all this becomes even more important in hard cases, and that is irrespective of one's theoretical standpoint on judicial discretion, nightmarish as many legal theorists think that is.

By way of conclusion, I would therefore suggest that when it comes to law, empathy and emotion, the legal professional can greatly benefit from what literature and narratology can offer by way of education and caution. And since as human beings we are all prone to mistakes – after all, to err is human –, in doing so it behooves us to keep before our mind's eye Franz Kafka's remark in a letter to his friend Oskar Pollak, 'Many a book is like a key to unknown chambers within the castle of one's own self'⁴⁴.

⁴² Lempert (1991: 561) story order, being '... in the temporal and causal order that matched the occurrence of the original events, and witness order being a succession of witnesses testifying 'in turn', i.e. 'each told the jury everything she knew about the events regardless of where that information fit into the unfolding story of the events that occurred'.

⁴³ Chestek (2010: 34) 'Focusing on the story of the case is the most likely route to finding that sweet spot where a deep frame is activated (becoming the foundation of persuasion) without it being so obvious that the reader's natural defenses are triggered'.

⁴⁴ Originally, 'Manches Buch wirkt wie ein Schlüssel zu fremden Sälen des eigenen Schlosses,' Letter to Oskar Pollak, dated Sunday 8 November 1903 (Kafka 1966)

References

- Aristotle, 1999. *Poetics*. Cambridge (Mass.) and London: Harvard University Press.
- Aristotle, 2003. *The Nicomachean Ethics*. Cambridge (Mass.) and London: Harvard University Press.
- Aristotle, 2006. *Rhetoric*. Cambridge (Mass.) and London: Harvard University Press.
- Bar-Cohen, S., 2003. *Essential Differences, The Truth about the Male and the Female Brain*. New York: Basic Books.
- Belleau, M.C., R. Johnson and V. Bouchard, 2007. 'Faces of Judicial Anger: Answering the Call', 1 *EJLS* no.2 special issue 'Judging Judges', pp. 1-41, available at <http://www.ejls.eu/issue/2> <accessed 2 May 2015>.
- Brennan, W.J. jr., 1988. 'Reason, Passion, and "The Progress of the Law"'. 10 *Cardozo Law Review*, pp. 3-23.
- Breyer, S., 2013. Stephen Breyer on Intellectual Influences. <http://thebrowser.com/interviews/stephen-breyer-on-intellectual-influences> <accessed 1 January 2013>.
- Bruner Murrow, G. & R. W. Murrow, 2013. 'A Biosemiotic Body of Law: The Neurobiology of Justice'. 26 *International Journal for the Semiotics of Law*, pp. 275-314.
- Cardozo, B.N., 1921. *The Nature of the Judicial Process*. New Haven: Yale University Press.
- Cardozo, B.N., 1925. 'Law and Literature'. *Yale Review*, pp. 489-507.
- Chestek, K.D., 2010. 'Judging by the Numbers: An Empirical Study of the Power of Story'. *Journal of the Association of Legal Writing Directors*, pp. 1-35.
- Cunningham, A., 2001. *The Heart of What Matters, the role for literature in moral philosophy*. Berkeley: University of California Press.
- Desant'is, C. H., 2012. 'Narrative Reasoning and Analogy: The Untold Story'. *Legal Communication and Rhetoric: JALWD* 9, pp.149-171.
- ECLI:NL:RBLIM:2014:10041. Available (in Dutch) at www.rechtspraak.nl, < accessed 2 May 2015>.
- Emmot, C. & M. Alexander, 2015. 'Schemata'. In: Peter Hühn et al. (eds.), *The Living Handbook of Narratology*, Hamburg: Hamburg University. <http://www.lhn.uni-hamburg.de/article/schemata> <accessed 16 February 2015>.
- Ferguson, R., 1984. *Law and Letters in American Culture*. Cambridge Mass.: Harvard University Press.
- Festinger, L., 1957. *A Theory of Cognitive Dissonance*. Stanford: Stanford University Press.
- Fludernik, M. & G. Olson: 2011. 'Introduction'. In: Olson, G. (ed.): *Current Trends in Narratology*, Berlin: De Gruyter, pp. 1-33.

- Fludernik, M., 2005. 'Histories of Narrative Theory (II): From Structuralism to the Present'. In: Phelan, J. and P.J. Rabinowitz (eds), *A Companion to Narrative Theory*, Oxford: Blackwell Publishing, pp.38-58.
- Gaakeer, J., 2012a. 'Configuring Justice'. *No Foundations, An Interdisciplinary Journal of Law and Justice*, 9, pp.20-44.
- Gaakeer, J., 2012b. 'European Law and Literature: Forever Young. The Nomad Concur'. In: Porsdam, H. & Th. Elholm (eds), *Dialogues on Justice: European Perspectives on Law and Humanities*, Berlin: De Gruyter, pp.44-72.
- Gaakeer, J., 2013. 'The Literary Judge: A Dutch Experience'. 6 *Italian Society for Law and Literature Online Collection*.
<http://www.lawandliterature.org/index.php?channel=CONTENTS>
- Gaakeer, J., 2015a. 'Futures of Law and Literature: a Jurist's Perspective'. In: Hiebaum, C., S. Knaller, and D. Pichler (eds), *Recht und Literatur im Zwischenraum/ Law and Literature In-Between, aktuelle inter-und transdisziplinäre Zugänge/contemporary inter- and transdisciplinary approaches*, Bielefeld, transcript Verlag, pp.71-103.
- Gaakeer, J., 2015b. 'The Judge's Voice: Literary and Legal Emblemata'. 9 *Pólemos, journal of law, literature and culture*, issue 1, pp.99-124.
- Gerrig, R.J., 2011. 'Conscious and Unconscious Processes in Readers' Narrative Experiences'. In: Olson, G. (ed.), *Current Trends in Narratology*, Berlin: De Gruyter, pp.37-60.
- Heald, P.J., 1998. 'Law and Literature as Ethical Discourse'. In: Heald, P.J. (ed.) *Literature and Legal Problem Solving*, Durham (North Carolina): Carolina Academic Press, pp.3-13.
- Heald, P.J., 2009. 'The Death of Law and Literature'. *Comparatist*, 33, pp.20-28.
- Henderson, L., 1987. 'Legality and Empathy'. 85 *Michigan Law Review*, pp. 1574-1653.
- Henderson, L., 1988. 'The Dialogue of Heart and Head'. 10 *Cardozo Law Review*, pp.123-148.
- Herman, D., 2008. 'Narrative as Cognitive Instrument'. In: Herman, D. et al. (eds.), *Routledge Encyclopedia of Narrative Theory*, Milton Par (UK) and New York, pp. 349-350.
- Herman, D., 2009. 'Cognitive Narratology'. In: Hühn,P., J. Pier, W. Schmid, & J. Schönert (eds), *Handbook of Narratology*, Berlin: De Gruyter, pp. 30-43.
- Herman, D., 2014. 'Cognitive Narratology'. In: Peter Hühn et al. (eds), *The Living Handbook of Narratology*, Hamburg: Hamburg University. <http://www.lhn.uni-hamburg.de/article/cognitive-narratology-revised-version> <accessed 1 December 2014>.
- Hobbes, T., 1987. *Leviathan*. London: J.M. Dent and Sons, Everyman's Library.
- Hogan, P. C., 2011. *What Literature Teaches Us About Emotion*. Cambridge: Cambridge University Press.
- Jurecic, A., 2011. 'Empathy and the Critic'. 74 *College English*, nr. 1, September, pp. 10-27.

- Kafka, F., 1966. Letter to Oskar Pollak, dated Sunday 8 November 1903. In: Max Brod (ed.), *Briefe, 1902-1924*, München: Fisher. Also available at <http://homepage.univie.ac.at/werner.haas/1903/br03-002.htm> <accessed 1 July 2015>.
- Keen, S., 2015. 'Narrative Empathy'. In: Hühn, P. et al. (eds), *The Living Handbook of Narratology*, Hamburg: Hamburg University. <http://www.lhn.uni-hamburg.de/article/narrative-empathy> <accessed 15 February 2015>.
- Lempert, R., 1991. 'Telling Tales in Court: Trial Procedure and the Story Model'. 13 *Cardozo Law Review*, pp.559-573.
- Maroney, T., 2006. 'Law and Emotion: A Proposed Taxonomy of an Emerging Field'. 30 *Law and Human Behavior*, no.2, , pp.119-142.
- Maroney, T., 2011a. 'Emotional Regulation and Judicial Behavior'. 90 *California Law Review*, pp. 1481-1551.
- Maroney, T., 2011b. 'The persistent cultural script of judicial dispassion'. 99 *California Law Review*, pp. 629-681.
- Maroney, T., 2012. 'Angry Judges'. 65 *Vanderbilt Law Review*, pp. 1207-1286.
- Martín Alcoff, L., 2010. 'Sotomayor's Reasoning,' 48. *The Southern Journal of Philosophy*, issue 1, March, pp.122-1238.
- Massaro, T.M., 1989. 'Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?'. 87 *Michigan Law Review*, pp.2099-2127.
- McArdle, A., 2012. 'Using a Narrative Lens to Understand Empathy and How it Matters in Judging'. 9 *Legal Communication & Rhetoric: JALWD*, pp.173-206.
- McEwan I., 2014a. Interview in *The Guardian*, Friday 5 September. <http://www.theguardian.com/books/2014/sep/05/ian-mcewan-law-versus-religious-belief> <accessed 26 November 2014>.
- McEwan I., 2014b. *The Children Act*. London: Jonathan Cape.
- Meyer, Ph. N., 2003. 'The Darkness Visible: litigation stories & Lawrence Joseph's *Lanyerland*'. 23 *Syracuse Law Review*, pp. 1311-1336.
- Minow, M.L. & E.V. Spelman, 1988. 'Passion for Justice'. 10 *Cardozo Law Review*, pp 37-76.
- Morawetz, M., 1996. 'Empathy and Judgment'. 8 *Yale Journal of Law and the Humanities* issue 2, pp. 517-531.
- Nussbaum, M.C., 1986. *The Fragility of Goodness*. Cambridge: Cambridge University Press.
- Nussbaum, M.C., 1990. *Love's Knowledge*, Oxford: Oxford University Press.
- Nussbaum, M.C., 1995. *Poetic Justice, the literary imagination in public life*. Boston: Beacon Press.
- Nussbaum, M.C., 1996. 'Emotion in the Language of Judging'. 70 *St. John's Law Review*, issue 1 Winter, nr 1, pp. 23-30.
- Nussbaum, M.C., 2010. *Not for Profit, why democracy Needs the humanities*. Princeton: Princeton, University Press.

- Phelan, J., 2014. 'Narrative Ethics'. In: Hühn, P. et al. (eds), *The Living Handbook of Narratology*, Hamburg: Hamburg University. <http://www.lhn.uni-hamburg.de/article/narrative-ethics> <accessed 2 December 2014>.
- Reichman, A., 2006. 'Law, Literature, and Empathy: Between Withholding and Reserving Judgment'. 56 *Journal of Legal Education*, nr. 2, pp. 296-319.
- Ricoeur, P., 1978. 'The Metaphorical Process as Cognition, Imagination, and Feeling'. *Critical Inquiry*, pp. 143-159.
- Ricoeur, P., 1980. 'Narrative Time'. *Critical Inquiry*, pp. 167-190.
- Ricoeur, P., 1981. 'The hermeneutical function of distancing'. In: Ricoeur, P., *Hermeneutics and the Human Sciences*, Cambridge, Cambridge University Press, pp. 131-144.
- Ricoeur, P., 1992. *Oneself as Another*. Chicago: University of Chicago Press
- Ricoeur, P., 2007. *Reflections on the Just*. Trans. D. Pellauer, Chicago: University of Chicago Press.
- Roach Anleu, S. & K. Mack, 2005. 'Magistrates' Everyday Work and Emotional Labour'. 32 *Journal of Law and Society*, nr. 4 December, pp. 590-614.
- Rosen, J., 1994. 'Sentimental Journey: The Emotional Jurisprudence of Harry Blackmun'. *The New Republic*, 2 May.
- Ryan, M.-L., 2009. 'Cheap Plot Tricks, Plot Holes, and Narrative Design'. 17 *Narrative*, nr. 1, pp. 56-75.
- Shakespeare, W., 1997. *The Tragedy of Hamlet, Prince of Denmark*. In: Greenblatt, S. et al. (eds.), *The Norton Shakespeare*, New York and London: W.W. Norton & Co.
- Stein, E., 1989. *The Collected Works of Edith Stein*. vol.3, 'On the Problem of Empathy', 3rd revised edition translated by Waltraut Stein, Washington D.C.: ICS Publications.
- Stern, S., 2014. 'Law and Literature'. In: Dubber, M. D. and T. Hörnle (eds), *The Oxford Handbook of Criminal Law*, Oxford: Oxford University Press, pp.111-130.
- Thomas, B., 1987. *Cross-Examinations of Law and Literature*. Cambridge: Cambridge University Press.
- Toolan, M., 'Coherence'. In: Hühn, P. et al. (eds), *The Living Handbook of Narratology*, Hamburg: Hamburg University. <http://www.lhn.uni-hamburg.de/article/coherence> <accessed 1 December 2014>.
- Turner, M., 1996. *The Literary Mind*. New York and Oxford: Oxford University Press.
- Tversky, A. & D. Kahneman, 1974. 'Judgement under uncertainty: heuristics and biases'. 185 *Science*, pp. 1124-1131.
- Ward, I., 2002. 'The Echo of a Sentimental Jurisprudence'. 13 *Law and Critique*, pp. 107-125.
- Watt, G., 2009. *Equity Stirring. The Story of Justice beyond Law*. Oxford and Portland (Oregon): Hart Publishing.

- Watt, G., 2011. 'The Case of Conjoined Twins: Medical Dilemma in Law and Literature'. In: Carpi, D. (ed.), *Bioethics and Biolaw Through Literature*, Berlin, De Gruyter, pp.93-107.
- West, R., 2012. 'The Anti-Empathic Turn'. In: Fleming, J. E. (ed.), 'Passions and Emotions,' *Nomos*, LIII, , pp.243-288.
- White, J.B., 1985. *Heracles' Bow*. Madison: University of Wisconsin Press.
- White, J.B., 2006. '... imagination is the root of justice'. *Living Speech, Resisting the Empire of Force*, Princeton: Princeton University Press.
- Wigmore, J.H., 1908. 'A list of legal novels'. 2 *Illinois Law Review*, pp. 574-593.
- Wigmore, J.H., 1922. 'A list of one hundred legal novels'. 17 *Illinois Law Review*, pp.26-41.
- Winter, S.L., 2010. 'Law, Culture and Humility'. In: Sarat, A., M. Anderson and C. O. Frank (eds), *Law and the Humanities: An Introduction*, Cambridge: Cambridge University Press, pp. 98-121.



Harmony, Emotion & Law: Narcissus at COHERENCE's Pool

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Abstract: The paper attends critically to the current vogue foregrounding COHERENCE in theoretical approaches to law. In the paper I argue that existing scholarly exposition of COHERENCE suffers from a particular and striking weakness. Using my arguments elsewhere as a starting point I contend that COHERENCE at work in current legal scholarship is not the quasi-logical notion supposed (and supposed to be so elusive) in the literature, but instead stands as a token, unwittingly reflecting the individual theorist's deeper commitments about their primary object of concern. This is because the meaning of COHERENCE is routinely - indeed, as it happens, universally - confused with features possessed otherwise by the objects taken to instantiate it. I show that essaying COHERENCE has thereby caused legal theorists inadvertently to expose their emotions, aspirations and passions about law itself under service to analytic conceptual precision. Gazing down without recognition at their own subject in the depths of coherence's pool, scholars have been powerless to pull themselves away, imputing to COHERENCE features of justice, morality, emotion, wholeness and harmony that, I contend, are merely unexamined projections of scholars' deeper notions about law and legal reason. The unguarded conceptual essays that result are significant in showing a richer set of conceptual commitments than either we or the theorists themselves have supposed. I close by considering the opportunities that this literature offers to extend the range of legal theory beyond its traditional boundaries.

‘...coherence is not so much a category of analysis that one could ever learn to define in a satisfactory way and thus come to feel comfortable with, as it is the name of a neuralgic point of contemporary intellectual endeavor, a point of probably incurable instability and discomfort, a dilemma’.
[Herbert 2004: 186]

‘A further puzzle ... has its roots in the fact that coherence theorists have been unable to reach anything like a consensus on how to define their central notion. This book explains why this is so: coherence is in a sense not definable’.
[Olsson 2005: viii]

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1. Introduction

Over the last three decades legal theory has become entranced by the notion of COHERENCE¹, but despite routine claims for its value nobody has been able to say with confidence what COHERENCE is². As successive theorists have attempted to embrace the notion each has found COHERENCE complex and elusive, always slipping from sight just when its capture seemed near³. These theorists are Narcissus at the pool: 'coherence' is no elusive object of theoretical desire ('devoutly to be sought' as one theorist proclaims (BonJour 1985: 94)) but is rather a mirror-image of the old discipline-centered predispositions, avidity and inclinations of the theorists staring down onto the surface of the water. COHERENCE entrances, but the entrancement is narcissistic.

If I am correct, my claim (to be substantiated in what follows) is a blow to all those who have perceived in COHERENCE a solution to the most intractable and awkward questions that beset the disciplines in which its use is urged. However, in this paper my aim is not, as it has been in other writing, to sweep away the phenomenon as an error, leaving COHERENCE in better shape to be fitted to more purposeful application. Instead my ambition is to point to and extol the residue that the phenomenon has left in its wake. It turns out that the oversight in question has caused theorists to drop their guard and reveal, inadvertently, their deeper and unwitting predispositions and understandings about their principal topic or theoretical concern. It is in the nature of the mistake and its consequences that this is of more interest in the analytic domain, where theorists suppose they are construing COHERENCE in a logical or quasi-logical manner, subject to reason and modality alone (see, e.g., Spohn 2009; Shimoji 2007; Angare 2010; Thagard 1999, 2000, 2003; Roche 2013; Amaya 2015). At least, this is where my attention is focused; i.e., on the scholarship in law and beyond that has sought out a crisp, universal, ahistorical and decontextualized concept of COHERENCE, but which has happened by turns to unwittingly plot an unruly mass of contingent, contextualized and (ironically in light of the supposed target) factious features of the primary objects of the theorists' gaze.

The paper, then, amounts to an essay on reason and emotion emerging from theorists' attention to COHERENCE, the concept itself having come to occupy a principal place in theoretical approaches to harmony and conflict across diverse disciplines and topic fields. Thus we find COHERENCE invoked in the resolution of discord and conflict in fields such as politics, IR, management studies, literary criticism, music theory,

¹ In the paper I adopt the philosophical practice of using small caps where mention is made of a concept *as* a concept; e.g., COHERENCE. This helps to distinguish occasions where the concept is deployed in an expression; e.g., 'the coherence of the narrative...', which retains regular lower case statement. It will become apparent that this distinction is particularly important in the present paper.

Of the literature referred to here, see, e.g. Alexy and Peczenik 1990; J M Balkin, 1993; Dworkin 1986; Gunter, 1989; Hage 2004; Hurley 1990; Jackson 1990; Kress 1996; MacCormick 1978; MacCormick 1984; MacCormick 2005; Morgan 2004; Raz 1994; Rodriguez-Blanco 2001; Schiavello 2001; Soriano 2003; Weinrib, 1995.

² Of the wider literature see, e.g., BonJour (1999: 123): '[T]he precise nature of coherence remains an unsolved problem'.

³ Even theorists attempting to be optimistic attest to the difficulties thought inherent in the project: e.g., Berteau, (2005) at 156: 'Legal theorists have become increasingly concerned with coherence over the last few decades, emphasising its importance and relevance in law. We owe it to their efforts if we now have a better understanding of the nature, scope and limitations of a notion so inherently elusive and slippery as coherence.'

ecology, decision theory and law. COHERENCE is also sought out in solution to difficulties in metaphysics, epistemology, moral philosophy, archeology, paleontology, theology, artificial intelligence, argumentation theory and spiritualism, whilst helping to articulate core concerns in optics, quantum theory, linguistics, literary studies, history and the techniques of good document design. And as more and more is claimed for the notion's deployment, so too does the felt need increase for its advocates to deliver statements of just what COHERENCE is, and what it is not⁴. This pressure is felt keenly in law, in which COHERENCE is urged in processes of the assessment of fact, in normative reasoning, in summing the nature and value of legal systems, and in the techniques of hermeneutics and exegesis that supposedly deliver to us the content of the laws themselves (e.g., Dworkin 1985). The pressure, particularly among analytic philosophers of law, is to deliver an articulation of COHERENCE in which the notion is clear, unambiguous and individuated from related concepts, and so is sharp-edged, transparent, repeatable and capable of being subject to appellate and other forms of judicial, political and social scrutiny. It is important to the jurists and others working within this frame that the concept be drawn dispassionately, for it is called upon to arbitrate on matters that are otherwise bound to raw emotion and the plays of power and force⁵. The paper unsettles all of these boundaries, perceiving in the literature a deeper commitment to conceptual richness than the relevant theorists or their followers have hitherto been prepared to concede.

The paper is structured as follows. Following this introduction, at 2 I quickly set out the theoretical oversight on whose commission the paper depends before, at 3, showing how the oversight has led to interesting if unwitting capitulations by theorists of their deeper commitments and understandings in their subject area. At 4 I comment on the phenomenon, finding merit in the residue of the oversight, focusing on law in particular. At 5 I conclude.

2. The Oversight

Coherence, though pressed in aid in relation to numerous apparently insuperable problems (e.g., den Hertog & Stroß, 2013), is subject to the surprising but standard lament (on the part of its supporters) and glee (amongst its detractors) that it is an elusive, slippery, multi-faceted, complex, contentious and even mystical notion⁶. Yet despite this its use continues to be pressed in high-value contexts, causing attempts to render the notion in precise terms to become ever more feverish, programmatic and, strikingly, detailed - though without ever reaching modal closure, and without any widespread acceptance or conspicuous success. I aim to help explain and expand upon

⁴ MacCormick's ambition is exemplary: '[my ambition is]... to elucidate this elusive notion of 'coherence', of 'hanging together', of 'making sense' (MacCormick 1984, at 235).

⁵ For example, the legal positivist and theorist of COHERENCE Neil MacCormick, in his seminal treatment over a quarter of a century, returns frequently to the infamous English 'brides in the bath' murder trial of 1915, *R v Smith*, advocating coherence in the prosecution's narrative as the determinant of Smith's guilt (Smith was tried and convicted, and then executed for his crime in August of that year). See, e.g. 2005: 214-236.

⁶ See MacCormick (1984) - 'elusive'; Berteau (2005) - 'slippery'; Haack (2004) - 'multi-faceted'; Kress (1996) - 'complex'; Sinclair (1991) & Bublitz (1999) - 'mystical'.

the frustratingly asymptotic⁷ nature of these enquiries into coherence. The explanation suggests that theorists, across multiple disciplines, have succumbed to the fate of Narcissus at his pool because of a striking and recursive error. This error is universal through the relevant literature, in which successive commentators within the analytic tradition have failed to attend to the(ir) distinction between the intension of coherence and its extension⁸. In short, my claim is that these theorists, writing both for and against coherence, have come routinely to elide the meaning of coherence with various *other* features of the objects taken to instantiate it (as if 'possessing a motor' was imagined a necessary feature of *the meaning of* COMPLETE when looking at motor cars in illustration, because no motor car could be complete without one). Moreover, the commission of this first mistake then prompts a series of others raised on the back of it, for the mistake naturally results in a profusion of different accounts of any concept (think motor-car completeness; jigsaw completeness; sentence completeness, etc.), leading theorists to surmise that there are many conceptions of (e.g.) COMPLETE, not just one, and concluding that (e.g.) completeness, etc. must be a surprisingly complicated concept – slippery, multifaceted and frequently contentious. Of course this has never happened with COMPLETE, but it has happened everywhere with COHERENCE, despite the commitment running throughout the analytic literature to careful conceptual disambiguation of the concept, seen in the routine call for its more general and precise articulation (e.g. BonJour 1985: 93; Thagard 2000: xii).

Thus we find that the argument theorists with induction in mind characteristically imagine that COHERENCE requires consistency, certainly, but also some additional elements that stop just short of entailment, with a great falling out over what the elusive additional elements might be⁹. So these theorists inadvertently produce as an account of coherence an account *of induction* (inference involving 'consistency and something more, stopping short of entailment'). Linguists, meanwhile, imagine 'grammaticalness' – textual or discourse cohesion and then something more – *as* COHERENCE; physicists in the science of optics in turn take COHERENCE *to mean* an invariant phase relation between waves of light; and so on. In this manner theorists throughout the disciplines have procured more or less detailed imaginings of their theoretical objects cast instead in the guise of COHERENCE, with the notion accruing attention, confusion and dissent in exact proportion to that levelled routinely at the primary object of their theoretical concern. The oversight can appear benign in some disciplines (e.g. optics), but can have serious consequences indeed where the primary object is some contentious hypothetical theorem in a high-value and contended context, such as encountered in law¹⁰.

Naturally enough, the oversight in question ensures that the prospect of finding a general account of coherence is frustrated from the outset, as commentators unconsciously attach to coherence features of the (many) discipline-specific objects they have in mind when bringing coherence into view; and precision is left equally frustrated, as commentators seeking accuracy are pushed to peer with ever-closer attention into the detail of myriad cohering objects with no idea where this process of cataloguing the notion should stop, and with the desired object, coherence itself, retreating bafflingly

⁷ I borrow this concept from its more familiar home in physics and mathematics.

⁸ The distinction is one I hold to as well, and indeed my critique in this paper depends on it.

⁹ See treatment and examples in Pethick (2008).

¹⁰ In light of the nature of the error, the oversight *appears* at its most benign in the typically consensual ontology of the natural sciences, and presents as most worrying where coherence is advanced in a method to resolve a contested, high-value matter in social practice – for example, in law.

into the shadows – just in step, as it happens, with the diligence of the enquiry in question.

The last point above is important, for in it the three characteristic responses to the elucidation of coherence are provoked. Thus theorists canvassing the notion within a single domain or use often imagine that their (incomplete) account picks out the sole real or true meaning of coherence, and that other meanings are thereby mistaken. Others who take a more inter-disciplinary approach notice that different meaning is offered elsewhere, and so deflate down their claims about coherence to just one of a number of possible kinds, types or conceptions of it. And theorists prompted to pursue coherence doggedly both across domains *and* into its fine detail finally conclude the impossibility of conceptual definition for coherence, and attest sorrowfully that the best we can do is point to multiple ‘coherences’, with no ability to state what might join these various and perhaps limitless instances together.

Thus we find, under the mistake, a proliferation of detailed and increasingly sophisticated but incomplete accounts of the concept in which all the structures of intelligibility on offer within the analytic canon are wheeled out in aid. Coherence is thereby understood as a matter of degrees (e.g., Roche 2013), as a matter of kinds (e.g., Thagard 2000), sometimes of degrees *and* kinds (e.g., McCormick 2005), of supposedly *necessary* modal conditions but never *sufficient* modal conditions (e.g., Kress 1996), of plural conceptions under a unifying but still putative concept (e.g., Haack 2004), and so on, and on. And, at every scoring of the notion through these structures, extensional content is poured in, in theology, Bayesian probability calculus, document design, moral philosophy, literary studies, spiritualism, self-help and law.

3. The Oversight Evidenced

As might be supposed, in technical subject areas, or in areas of high-value application, the pressure to produce a bright-line articulation of coherence ready for use has led to coherence as algorithm (exemplary is the work of Paul Thagard 1999; 2000; 2003)) or logical device (e.g., Roche 2013). Spohn, for example, provides us with a *relatively* simple elucidation through a number of ‘principles of coherence’. Thus he writes:

I have just argued for a third principle of coherence: (PCo3) For any $j \in I^*$ and any contingent j -proposition B with $\alpha^* \in B$ there is a I^* - $\{j\}$ -measurable, ultimately α^* stable reason for B relative to β^* . Briefly: for each singular truth there is an ultimately stable inductive reason. If there are reasons with stronger than ultimate α^* -stability, say, with α^* -stability within Ω , all the better. But such stronger forms of stability do not seem to be required in PCo3 on coherentistic grounds. [Spohn 2009: 226]

Whatever this articulates, it is not a principle of COHERENCE as Spohn maintains (rather it is, here, a principle of epistemic and explanatory value, as indicated by the focus on induction, truth, reason and measurement within the passage). In fact, the phenomenon with which I am concerned has generated a rich and diverse literature that runs in style from the algorithms of computational theory and notations of symbolic logic to the grandly impressionistic and even mystical. Throughout this scope two features can be discerned: (i) increasingly rich, detailed and vivid content; and (ii) the disappearance of *the concept* as the explanatory richness increases. Thus we can imagine, in a furious

attempt to trace the meaning of COMPLETE through attention to a *Mini* on a production line, all sense of the core notion disappearing in a welter of information concerning the form, composition and relations of the multitude of pieces that comprise the finished vehicle. The irony is that *this* project could never begin in the first place unless the concept (COMPLETE) had already been grasped at the outset, before ever leaving with research funding for the factory. Again, nobody would consider the method for COMPLETE, yet everybody has employed it in elucidating COHERENCE.

Let's begin by coming at the complex phenomenon in a helpfully pared-down manner, by attending to one of the few recent examinations of COHERENCE that aims in method and ambition to provide a properly *general* account of the notion in question. Such studies have been offered by Ziff (1984a,b), Haack (2004) and others, but I focus here on the examination undertaken by Erik Olsson in his paper 'Cohering With' (1999). Olsson's study provides a useful focus because in it he aims, following Bender's prompt (1989), to 'start from scratch and try and arrive at a theory that is simple and transparent' (Olsson 1999: 275).

Olsson promisingly takes as his principal task the 'systematising [of] our intuitions of coherence as a relation', but then proposes an analysis 'according to which a set of beliefs, *A*, coheres with another set, *B*, if and only if the set-theoretical union of *A* and *B* is a coherent set' (all, the *Abstract* at 273). Yet despite the plainly contingent features of his approach (i.e. seeking coherence through attention to sets of beliefs), the distinctive feature of Olsson's approach remains his attempt to take seriously in analysis the core *intuitions* on which his proposal rests. To this end he places considerable weight on analysis of 'just what it means to say that '*A* coheres with *B*' (at 275). The trouble is, he never gets near to an answer.

Having canvassed ordinary situations (e.g., a sofa's aesthetic fit with other furniture), Olsson notes: 'One central thesis of this paper ... is that the statement '*A* coheres with *B*' expresses that *A* somehow fits coherently together with *B*' (*ivi*: 275). But this claim is nowhere near as illuminating of COHERENCE as Olsson imagines. To see this, consider the easy way in which the supposedly core idea of [coherence] can be substituted for other notions within the relevant proposition: e.g., '*A* is [consistent] with *B* expresses that *A* somehow fits [consistently] together with *B*'. The capacity of *consistency* to substitute for COHERENCE in the relevant expression immediately begins to unsettle the significance of Olsson's conclusions, in which the central informative claim is that "cohering with" is a species of "fitting with" (*ivi*: 276). But as it now appears that *consistency* is a species of 'fitting with' too, we may begin to wonder how far this set extends, and whether much is shown about COHERENCE by attention to it. However, the problems besetting Olsson's analysis are much greater than this.

To see the wider problems it is important to notice how easily further, more colorful, substitutions can be made. Thus, again following Olsson carefully (he writes of a sofa *fitting beautifully with* a living-room at 276): '*A* is [beautiful] with *B* expresses that *A* somehow fits [beautifully] together with *B*'. The ready intelligibility of this new substitution is a serious worry for Olsson's project, for whilst 'coherent' and 'consistent' can reasonably be individuated as species of 'fitting with', *beautiful* cannot. We can now perceive that, rather than providing us with the desired analysis of 'just what it means to say that '*A* coheres with *B*' (my italics), the features elicited by Olsson in fact amount only to an extended - though unwitting - articulation of the conjunction '*-with*' and any conjunct proposition of which it is a part.

Because of his method, Olsson tells us little that is illuminating about COHERENCE itself, for everything he imputes to the notion can be ascribed to the conjunction. This is bad for Olsson's stated project, but it is illuminating about his deeper theoretical values and concerns. Indeed, his attention throughout the paper to notions of aesthetic judgment *through the idea of relation* is interesting and conceptually rich (see also Ziff 1984 a&b).

The remarks above are only preliminary, showing that results about coherence that are intended to be simple and transparent can fail to meet their mark. More significantly, Olsson's mode of analysis presages the oversight that I claim to be present in all of the relevant literature, for though he imagines that his paper elicits helpful detail about 'cohering with', his enquiry elicits information in almost every way *except* that concerning the core concept itself. Thus COHERENCE persists only as a phantom presence throughout Olsson's paper, as it does through the rest of the literature too.

A clear example of the phenomenon is provided in Laurence Bonjour's influential coherentist monograph *The Structure of Empirical Knowledge*, in particular where the author writes under the sub-heading 'The Concept of Coherence':

What, then, is coherence? Intuitively, coherence is a matter of how well a body of beliefs 'hangs together': how well its component beliefs fit together, agree or dovetail with each other, so as to produce an organized, tightly structured system of beliefs, rather than a helter-skelter collection or a set of conflicting subsystems... Thus various detailed investigations by philosophers and logicians of such topics as explanation, confirmation, probability, and so on, may be reasonably taken to provide some of the ingredients for a general account of coherence. But the main work of giving such an account, and in particular one which will provide some relatively clear basis for *comparative* assessments of coherence, has scarcely been begun, despite the long history of the project. [1985: 93-94]

However, the production of the general account sought by Bonjour is frustrated immediately by his opening intuition – that coherence is a matter of how well *a body of beliefs* 'hangs together'. Significantly, Bonjour does not consider whether coherence might intuitively be cast wider than a hanging together of beliefs alone: his opening intuition simply hangs there, without reflection. This is unfortunate, because under the narrowness of this intuition other uses of coherence (- of sentences, narratives, art exhibitions, and so on) amount either to misapplications of the concept or suggest that there are different *kinds* or *types* of coherence – and so many of these, perhaps, that it becomes impossible to speak meaningfully about 'coherence' across the range of its use. What is more, by committing the meaning of coherence to features of a body of beliefs Bonjour consigns his articulation of coherence to the complexity and dispute that has attached to that object, particularly as he intuitively coherence to be a matter of 'how well' the object hangs together. In this manner Bonjour makes the pursuit of coherence co-extensive with the pursuit of epistemic value, and so it is little surprise to discover that *this* project is presently incomplete and a matter of heated division¹¹. Indeed, Bonjour proceeds, over the next ten pages (and on into his work of the subsequent two decades), to attempt to articulate coherence through attention to all of the fractious and most beguiling features of his wider topic field, before finally abandoning epistemic coherentism because of the elusiveness of its core concept, by 2005.

¹¹ These ideas repeat Pethick (2014: 121).

BonJour goes wrong by his own lights in the attempt to analyze coherence without any concern about, deliberation of, or even attention to, distinctions between this abstract general predicate and features of the object(s) instantiating it. In this way BonJour's stated project, of providing a general account of coherence, is meekly surrendered from the outset, though its passing appears to have been noticed by no-one. Perhaps more significantly however, the oversight condemns even the instantiated notion to failure, as BonJour is thereby prompted to hunt for his idea of COHERENCE through all of the well-worn topic areas of epistemology (i.e., explanation, confirmation, probability, *and so on*) with no idea of how coherence should be dug out of the various topics listed, and with little awareness that the 'coherence' in question is merely a mirror-reflection of the standing predispositions, concerns and preoccupations that draw the scope of his own topic area.

BonJour had already presaged his eventual failure in the introduction to his treatment of coherence in 1985, writing at p.93 that, 'A fully adequate explication of coherence is unfortunately not possible within the scope of this book (nor, one may well suspect, within the scope of any work of manageable length)'. Not only is this conclusion predictable in view of the oversight I claim exists, but it was in turn already presaged in the work of another writer, philosopher Laurence Margolis, in his paper *The Locus of Coherence* one year earlier (Margolis 1984).

Margolis notices that most writers assume that mere consistency is insufficient to furnish an accurate account of coherence, and observes that Nicholas Rescher and others presume that another characteristic is required – 'the feature of being connected in *some special way*' (*ivi*: 27). Drawing on Rescher's seminal work from 1973 (Rescher 1973) Margolis comments that the 'special' connection required links consistency pragmatically with our affective (specifically, non-cognitive) life. Margolis then draws a conclusion on the basis of his expansive survey of supposedly relevant features: 'the informal survey we have made of a rather wide range of contexts of coherence shows, in a strongly convergent respect, that the relevant regard in which consistency is connected in some special way cannot be satisfied by any condition less than that of fitting a reasonable model of the rationality of human thought and action' (Margolis 1984: 27). Looking back at the survey itself we find Margolis asserting that 'context is the clue' (*ivi*: 22), picking through 'a set of dreams, thoughts, plans, endeavors, theories, stories, paintings, statements, utterances, fears, commitments, hopes or the like...' (*ibidem*), before finally concluding that,

...there are bound to be divergent ascriptions of coherence and incoherence. But before attempting to appraise such competing models we should first ascertain the conceptual locus of ascriptions of coherence themselves. And that we have now done. [*ivi*: 27]

As BonJour's contemporaneous - and later - study suggests, however, in this manner no book (or research programme) could ever be long enough to pick out the desired 'conceptual locus' of coherence sufficiently well to enable the notion's application in the desired settings. Indeed, Margolis throws the quest for the concept so wide that everything he values tumbles in; so it is with BonJour, and so throughout the literature.

BonJour and Margolis are philosophers whose principal interest is in epistemology, and though this subject is of direct relevance to law it does not take law as its chief concern. However, theorists who do invoke COHERENCE in legal theory

display the same qualities of the oversight. Thus we can reflect on Ken Kress's compendious treatment of coherence and law in his chapter entry 'Coherence' (1996), in which his attempt to articulate coherence over many pages can be read in the alternative, without any alteration, as an extended essay on what Kress thinks *law* is.

Kress's treatment is counterpart to that shown in the analytic philosophy, almost immediately and inadvertently construing coherence in wide terms that overshoot the asserted modal boundaries of his orthodox conceptual analysis to embrace all of the many teeming concerns of his primary focus. He begins in unambiguous and disciplined manner, setting out his aim on his first page (i.e., 533): 'Attention is next focused on the concept of coherence itself', before observing:

Three candidates for necessary requirements of coherence – consistency, comprehensiveness, the right answer thesis – are acknowledged to enhance coherence despite not being, at least generally, required for it. Seven techniques for enhancing coherence by eliminating or resolving conflicts among principles and counter-principles are described. The core concepts of coherence, monism and unity, are then examined. A taxonomy of monisms and unities is developed which employs the seven techniques to characterize degrees of coherence in normative theories. [1996: 533]

Here, then, Kress takes us by turns through a modal analysis (compassing *necessities* and *requirements* of the concept) to an ever-proliferating set of (exemplary?) instances ('a taxonomy of monisms and unities'), where this proliferation is still bounded by the corners of Kress's central concern, law. Thus the 'monisms and unities' in question are, for Kress, those that bear on political and moral justifications for law and legal force. Thus he states that 'To understand coherence in law, techniques thought to promote coherence, or properties or states thought to be aspects of, explanations of, or to be necessary or sufficient for coherence, will be examined' (*ivi*: 539-540). This is the precursor for the detail of his method, revealed in the next sentence:

The discussion will focus on justificatory coherence within normative theory, particularly ethics and law, although concepts more appropriate to the theory of knowledge will be discussed in passing. The primary aim is to serve as background for the later taxonomy of coherence in normative theory, although much of what is said here applies more generally. [*ivi*: 540]

Kress's attempt to elucidate 'the concept itself', employing the modal method of analytic philosophy, finally results in such a colourful proliferation of topics that Kress resolves only to address 'coherence in normative theory'. Yet even here, within this prescribed subset, Kress accepts the need for reserve, warning that,

The remarks that follow are not intended to be a complete and final definition of coherence in normative theory. Coherence is much too difficult a concept for that. There is a range of conceptions of coherence, not just one. What is offered here is the first approximation of a taxonomy of conceptions of coherence. [*ivi*: 543]

Such a range of conceptions of coherence is a feature of the literature in law, as elsewhere, and has continued to be a core aspect of coherence theorizing in the period since Kress's work.

Thus we might reflect on Neil MacCormick's early analysis of coherence (1984), noting that he flies immediately to *kinds* of coherence in his treatment - commenting on normative and narrative coherence in relation to law. But as it is never made clear by MacCormick which features of the subsequent analysis are owed to coherence, and which to norms and narratives, disambiguation of the core notion is overthrown by contingency. And we might reflect on the proliferation of kinds of coherence relevant to law *since* MacCormick's introductory essay, for under the mistake in question the analysis of the notion into kinds naturally proliferates into whole series of distinguishable coherence relations, breeding complexity and dissent as they multiply. So where MacCormick opens by identifying normative coherence as a discrete kind of coherence, another theorist might push this line of analysis further and discover that normative coherence *in law* presents a further discrete kind (e.g., Kress at 537-543) and so on, presumably *ad infinitum*. Significantly then, in '10 Theses on Coherence in Law' (Amaya, 2013), Amalia Amaya, invoking Paul Thagard's analysis, comes to identify eight *kinds of coherence* relevant to law (i.e. factual, normative, explanatory, analogical, deductive, perceptual, conceptual, and deliberative), noting 'each kind requires different sorts of elements and constraints' (at 2). However, right at the start of her treatment Amaya accedes to a difficulty: 'it is also unclear how one may integrate the different kinds of coherence in order to give a solution to a legal problem' (4-5). This problem is substantial (and not without irony) but under my rubric can be understood simply as the problem to be had in integrating aspects of *concepts* with aspects of *perception*, *facts* with *norms*, *explanation* with *deduction*, and so on through all logical combinations. Notice, however, that my analysis suggests another unintended extension of the core concept, even though it goes unnoticed in Amaya's commentary. This is the question, prompted by the oversight, of whether there might even be *more* than the eight kinds of coherence that she identifies, relevant to law.

This problem is well understood by Thagard himself, as he writes in the monograph to which Amaya principally refers: 'Given the above discussions of explanatory, deductive, analogical, and perceptual coherence, the reader might now be worried about the proliferation of kinds of coherence: just how many are there?' (2000: 60). Thagard answers his own question in one sentence, writing, 'I see the need to discuss only one additional kind of coherence, conceptual, that seems important for understanding human knowledge' (*ibidem*). It is interesting to notice that the rest of Thagard's commentary on the existence of kinds of coherence is limited to (i) distinguishing between them (e.g., at 65), and (ii) speculating about their integration (e.g., at 169). Under my analysis, however, it is the worry about proliferation, so quickly passed over by Thagard himself, where his thesis is most obviously under pressure.

The spectre that presents itself is nothing less than theoretical collapse, for presumably anyone advocating the existence of kinds (or types or concepts) of coherence must account for the distinction between such 'kinds', etc., and particular instances of coherence in order to support their contention; after all, the meaning(s) of coherence are still reserved to kinds, types or concepts here, rather than a multiplicity of individuals. Yet an articulation of this central commitment is absent in Thagard and throughout the literature. As a result, the standard analysis of coherence into kinds inevitably presents under scrutiny as intuitive and underdetermined, whilst further attempts to pin down the required detail have thereby ended in the conclusion recently advocated by Olsson (2005), in turn interpreting Ewing (1934) constructively,

that defining coherence is *logically* impossible, that there is no formula or statement, however long, which could do the job adequately. Thus understood, [Ewing] is maintaining that there is no systematic account of coherence, and the best we can do is restrict ourselves to examples. [2005: 137]

But this conclusion is merely the result of the oversight in question, in which the elision of intension with extension inevitably terminates in a beguiling multiplicity of coherence-instances, reflected with dazzling clarity in the surface of the pool.

This is the fate stalking Amaya's analysis too. Because her concern is not human knowledge but deliberation in law, she immediately adds to Thagard's kinds of coherence, contributing the two kinds of 'legal coherence' that we find in her paper. And in the detailed working of her thesis at this point we can perceive the further impulse to instantiate the 'kinds of coherence' concerned. Thus, in the course of summing 'factual coherence' Amaya writes:

Explanatory coherence is the most important kind of coherence in a theory of evidentiary judgments in law. In addition to the positive and negative constraints established by the principles of explanatory coherence, it is necessary to add some constraints to account for the fact that the evaluation of explanatory hypotheses in law takes place within a highly institutionalized context. More specifically, the presumption of innocence may be treated as a constraint that requires that hypotheses compatible with innocence be given priority in being accepted and the reasonable doubt standard requires that the guilt hypothesis be accepted only if its degree of justification is sufficiently high to meet this standard (2013: 245).

Amaya does not tell us whether these additional constraints constitute additional *kinds of coherence* (consider: 'institutional coherence', or even, 'common law adversarial criminal-trial coherence'), but certainly they would seem - at least to any lawyer - to provide sets of elements and constraints sufficient to warrant the status. And if these, then perhaps further kinds - imagine criminal appellate court due-process coherence; and so on and on. Of course, Amaya's nuanced analysis deserves much further study than this (and indeed, I begin to offer this elsewhere (Pethick 2014)), but it is now useful to turn from philosophy and law to another discipline altogether, to show the broad scope of the oversight in question.

I now turn to linguistics, in which it is helpful in opening to present a significant passage provided by Wolfgang Bublitz:

[In] 1976 coherence was regarded or even dismissed as a vague, fuzzy and 'rather mystical notion' (Sinclair 1991: 102) with little practical value for the [linguistic] analyst. However, the past two decades have seen a considerable shift in orientation and, in particular, a fundamental rethinking of the concept of coherence. The amazing number of well over four hundred books and papers listed in the general bibliography, which concludes this volume, bears witness to this intriguing development and rapidly changing scene in coherence research over the last twenty years. Evidently, coherence has found its place as a key concept, perhaps even *the* key concept, in discourse and text analysis. [1999: 1]

At the beginning of this period, in a 1985 collection, Horanyi analysed a variety of visual texts (including paintings, cartoons and photographs) in an attempt to determine what made each coherent, and this led him to conclude that coherence 'is quite [a] complex bundle of concepts, and there is no answer to the question: when is a text

coherent?, because only the following question can be answered: when is a text coherent *hic et nunc*? And among the answers for these questions, there is no one single desirable or proper use of the term coherent . . .' (1985: 575-6).

But under the now familiar retreat to *hic et nunc* (*pace* Ewing, Ollson), there is no possibility of finding a general and precise understanding of coherence to satisfy supporters and detractors alike. Moreover, it might be expected that the research method would result in the proliferation of 'coherence relations', as investigators attach to coherence itself features of the supposedly coherent thing that they currently investigate. Indeed, this is exactly what has happened.

Thus Andrew Kehler notes that, regarding 'the possible ways in which a set of utterances can be connected to form a coherent discourse',

Several researchers have in fact attempted such a characterization, in which a set of connections is enumerated as a list of *coherence relations* (Halliday and Hasan 1976, Hobbs 1979, Longacre 1983, Mann and Thompson 1987, Polanyi 1988, Hobbs 1990, *inter alia*; see also Hovy (1990) for a compendium of over 350 relations that have been proposed in the literature). [2002: 3]

Strikingly, Kehler then pursues this 'list of coherence relations' as part of a theory of COHERENCE, contrasting it with his own more economical 'theory of coherence' (p.4 and thereafter), itself derived from Hume's analysis of relations. But as Kehler notes (at p.3), 350 is not the high-water mark in the project to catalogue relations of coherence, for some researchers have suggested that the set of coherence relations is open-ended:

Mann and Thompson claim that their [coherence] relations are suitable for describing a large and varied set of texts, but ultimately suggest that the set is open to extension: 'There are no doubt other relations which might be reasonable constructs in a theory of text structure; on our list are those which have proven the most useful for the analysis of the data that we have examined'.

So, not only does coherence retreat into a baffling variety of coherence relations *hic et nunc*, but it is also found (at least by Mann and Thompson) to be sufficiently open-ended to allow the theorist to select the specific coherence relations for their method that seem *to suit* the analysis of data best. This would appear to throw the understanding of coherence so wide that there is no prospect of comparing - or speaking meaningfully about - coherence relations across the range of their use. Indeed, Kehler recoils at the position taken by Mann and Thompson, though only on the ground that they take coherence relations to extend to a potentially *unbounded* set:

... if we are to have a scientific theory of relations, it cannot be up to us to concoct them for our own purposes – our job instead is to uncover the pre-existing ground truth. On scientific grounds, it is difficult to see how an unconstrained and potentially unbounded catalog of relations could give rise to an explanatory account of coherence. [*ibid.*: 25]

But significantly, what Kehler misses, even in the criticism of Mann and Thompson, is that no catalogue of relations could provide 'an explanatory account of coherence' where the enquiry only catalogues what is required in order for particular *objects* to possess coherence. This problem in the deep method persists whether a

theorist embraces an open set of coherence relations (Mann and Thompson), or determines that 350 exist (Hovy), or finds that there are only 3 (Kehler's own view).

4. Extolling the Oversight

The oversight I pick out has led to immense frustration on the part of those theorists who desire to put COHERENCE to use, in law as elsewhere. The frustration and worry is easy to discern, and appears as a motif through the relevant writings and their ambition:

[my aim is]... to elucidate this elusive notion of 'coherence', of 'hanging together', of 'making sense'. [MacCormick 1984]

A better account of coherence is beyond any doubt something devoutly to be sought. [BonJour 1985]

The concept of coherence and its practical utility in reference to the legal system and legal argumentation are still very far from showing unanimity and precision of content and definition ... [Zaccaria 1990]

Coherence has had a considerable appeal in legal, moral and political philosophy as a candidate for either theories of truth or epistemic theories ... However, the idea of coherence is often misunderstood. [Rodríguez-Blanco 2001]

Legal coherence, one would have thought, must be shared as a universal aspiration by lawyers (and even legal philosophers) ... Quite what 'coherence' requires, however, is immensely controversial. [Morgan 2004]

[I aim to consider] the many roles played by some of the many concepts of the coherence family. 'Concepts' in the plural; for 'coherence' has a whole raft of meanings, distinct though sometimes subtly related, and is applied to a whole range of very different things ... [Haack 2004]

Coherence is a more complex, more ubiquitous, and in many ways less accessible phenomenon than our intuitions and scholarship ever led us to believe. [Columb and Griffin 2004]

Coherence is not one thing. That doesn't make it incoherent, although it rules out a conceptual definition. [Barry Allen 2004]

However, despite these and a multitude of other, similar comments, there is value to be had in the residue of the oversight. In relation to the analytic-minded legal philosophers (such as MacCormick, Kress and Amaya) it has caused the production of a rich literature that reflects deeper commitments and understandings concerning the theorist's primary object, be that the legal system, or the determination of a legal rule, or making a finding of fact on a disputed point at trial. Perhaps most striking is these theorists' impulse not to be constrained in their summing of coherence within their domains and topic fields, despite the strictures of the analytic method with which they associate. So despite their own calls for a general, precise and clear account of 'the concept itself', and despite their attempts to impose the order of necessary and

sufficient modal conditions on coherence, the supposedly core notion is constantly lost amongst the swirl of features that are contingent, contextual and appealing.

I am not suggesting for a moment that the literature provides evidence of the failure of the post-Fregean analytic project (with which I associate), though of course the evidence could be treated that way - certainly theorists have found it difficult to constrain their analyses of COHERENCE, at least, within the precise modal form that so-called Anglo-American philosophy typically demands. But regardless of the wider point, the writings themselves provide a valuable resource within their relevant topic fields, offering up a liberation from the orthodox topics on the prescribed subject list. Thus we have, through the prism of Herbert's unsettled 'point of neuralgia', attention to morality, memory, love, narrative, utterance, monisms and unities, and so on. We also find a celebration of connections, each of which, having been stated, deserves to be explored. So if Kress imagines that one 'kind of coherence' has to do with power and law, then this should be a prompt to further investigation, perhaps exploring the relation between power and knowledge, or power, knowledge and law, and so on. In fact, having articulated coherence in such an accidental manner, the theorists concerned would, presumably, have to raise a special argument why, once said, the richness they describe should be excluded from consideration of law, or evidence, or reason. This insight works in another way too, for the corners of their elucidation of coherence would seem to map the subject with which they are really concerned - and though this may look like law, or legal reason etc., at the outset, careful consideration of their analysis might begin to show other interests emerging, subtly different from their stated concerns.

My suggestion is that the present foregrounding of COHERENCE in legal theory will have promoted, as a lasting if invisible legacy, an interest in and attention to matters hitherto considered contingent and extraneous within orthodox legal thought. So Paul Thagard's attempts to provide computational algorithms for 'kinds of coherence' over the last two decades may have as their success not a sharper concept of coherence, but an acceptance of excluded topics within the traditional legal domain. Thus the success of his paper 'Why wasn't OJ convicted? Emotional coherence in legal inference' (appearing in the journal *Cognition and Emotion*, 2003), might lie just in the attention to emotion in legal inference, and not to COHERENCE *at all*. A similar prospect presents itself through the more recent work of Amalia Amaya (who uses Thagard's ideas as a starting point). Her monograph *The Tapestry of Reason: an enquiry into the nature of coherence and its role in legal argument* (2015) contains, on my account, almost nothing dedicated to the nature of coherence, but every page presents a rich resource in the connections, contingencies and accidents that colour her primary focus.

The prospects are heralded from Amaya's first page onwards, writing of her topic (in now familiar fashion) on page 1 of her Introduction:

First, coherence is an elusive notion, and there is a need to further clarify how coherence should be understood for the purposes of legal justification.

We might ask, in similar fashion, how 'complete' should be understood for the purposes of jigsaws (etc.), but it would be better to ask what is required of a jigsaw in order to satisfy the predicate. Be that as it may, Amaya's instantiated and contingent sense of coherence then runs through 500 pages, leading from her idea (for example, on page 12) that hers is an idea of 'the concept of *legal* coherence' (my italics). Indeed, each of her chapter headings provides an indication of the corners of her idea of law,

knowledge, moral truth and finally rationality itself – reflecting at greater length aspects of the rest of the literature in doing so.

In the first line of her conclusion, at page 551, Amaya writes, ‘This book has scrutinized the concept of coherence from a variety of perspectives’. In fact, under my analysis, the concept of coherence is never scrutinized by Amaya at all, but really acts as a silent cypher in the celebration of the perspectives themselves. For Amaya, these perspectives include the traditional topics in epistemology and jurisprudence, but go further too, to embrace psychoanalysis, virtue ethics, and more. This celebration of connection stands, even if the prompt to its creation is abandoned.

5. Conclusion

If one thing can be discerned amongst the many treatments of coherence across domains and within them, it is discord, confusion and dissent. But perhaps a first step towards resolving these frustrations is to acknowledge that the commitments at stake are contingencies, bound to context and not to *the nature of* the concept itself. So it may be with harmony too, though perhaps that concept has benefitted from its less prominent treatment within technical literature. The paper has compassed reason and emotion, law, conflict and harmony, with this last engaged through its analogue of coherence. Memory and oblivion have, however, been conspicuous by their absence, and this calls for a return to Narcissus.

In his *Introductory Lectures on Psychoanalysis* Freud asserts that the oblivion of sleep is a narcissistic state: ‘In the sleeper the primal state of distribution of the libido is restored – total narcissism, in which libido and ego-interest, still united and indistinguishable, dwell in the self-sufficing ego’. Regardless of whether Freud is right about sleep, the ponderous longing of Narcissus at his pool warns us to be on our guard: if we remain entranced by *the notion of* coherence, in which each perceives aspects of their own theoretical desire, our enterprise will succumb to Narcissus’s fate. Our gaze, in short, will remain upon the asymptote of our own predispositions and attitudes, always beguiling, yet always out of reach, channeling our intellectual resources into an engagement that can never be realized. If, however, we recall what is really essayed in our enterprise we can move forward, with a better grasp of the contingencies of our own theoretical assumptions and interests. This is the hope, at least, in extolling the literature that remains once the oversight I pick out has been cleared away.

References

- Allen, B. 2004. 'The Ubiquitous Artefact: On Coherence'. *New Literary History*. Vol. 35, No. 2, Coherence (Spring), 259-271.
- Amaya, A., 2013. 'Ten Theses on Coherence in Law'. In Araszkiewicz, M. & Savelk, J. (eds) *Coherence: Insights from Philosophy, Jurisprudence and Artificial Intelligence*, 243-268. Dordrecht, Netherlands: Springer.
- , 2015. *The Tapestry of Reason: an enquiry into the nature of coherence and its role in legal argument*. Oxford: Hart Publishing.
- Bender, J.W. 1989. *The Current State of the Coherence Theory*. Dordrecht, Netherlands: Kluwer.
- Berteau, S., 2005. 'The Arguments from Coherence: Analysis and Evaluation'. *Oxford Journal of Legal Studies*. 25(3): 369-391.
- BonJour, L., 1985. *The Structure of Empirical Knowledge*. Cambridge: Harvard University Press.
- BonJour, L., 1999. 'The Dialectics of Foundationalism and Coherentism'. In J. Greco and E. Sosa (Eds), *The Blackwell Guide to Epistemology*, 117-42. Oxford: Oxford University Press.
- Bublitz, W., 1999. 'Introduction: Views of Coherence'. In *Coherence in Spoken and Written Discourse*. Bublitz, Lenk and Ventola, Eds. John Benjamin . Amsterdam.
- Columb, G. and Griffin, J., 2004. 'Coherence On and Off the Page: What writers can know about writing coherently'. *New Literary History*. Vol. 35, No. 2, Coherence (Spring), 273-301.
- den Hertog, L. & Stroß, S., 2013. 'Coherence in EU External Relations: Concepts and Legal Rooting of an Ambiguous Term'. In *European Foreign Affairs review* 18, no.3, 373-388.
- Dworkin, R., 1986. *Law's Empire*. Cambridge, Mass: Harvard University Press.
- Ewing, Alfred C., 1934. *Idealism: A Critical Survey*. Methuen. London.
- Haack, Susan. 2004. 'Coherence, Consistency, Cogency, Congruity, Cohesiveness, etc.: Remain Calm! Don't Go Overboard!' *New Literary History*. Vol. 35, No. 2, Coherence (Spring), 167-183.
- Halliday, M. and Hasan, R., 1976. *Cohesion in English*. London: Longman's.
- Herbert, C., 2004. 'The Conundrum of Coherence'. *New Literary History*, Vol. 35, No. 2, Coherence (Spring), pp. 185-206.
- Hobbs, J., 1979. 'Coherence and Coreference.' *Cognitive Science* 3:67-90.
- , 1990. 'Literature and Cognition'. *CSLI Lecture Notes* 21.

- Horanyi, O., 1985. 'Discoherent remarks on coherence' in Sozer, E. (ed.), *Text Connectivity, Text Coherence*. Hamburg: Buske, 567-594.
- Hovy, E., 1990. 'Parsimonious and Profligate Approaches to the question of Discourse Structure Relations'. In *Proceedings of the Fifth International Workshop on Natural Language Generation*. Dawson, PA., 128-136.
- Hurley, S. L., 1990. 'Coherence, hypothetical cases, and precedent'. *Oxford Journal of Legal Studies*, 10, 221-51.
- Kehler, A., 2002. *Coherence, Reference, and the Theory of Grammar*. Stanford, California: CSLI Publications.
- Kress, K., 1996. 'Coherence'. In D. Patterson (ed.), *A Companion to the Philosophy of Law and Legal Theory*, 533-52. Oxford: Blackwell.
- Longacre, R., 1983. *The Grammar of Discourse*. New York: Plenum Press.
- MacCormick, N., 1978. *Legal Reasoning and Legal Theory*. Oxford: Clarendon.
- , 1984. 'Coherence in Legal Justification'. In A. Pecznik et al. (eds), *Theory of Legal Science*, pp. 235-51. Dordrecht: Kluwer.
- , 2005. *Rhetoric and the Rule of Law*. Oxford: Oxford University Press.
- Mann, W. and Thompson, S., 1987. 'Rhetorical Structure Theory: A Theory of Text Organization'. In *Technical Report RS-87-190*, US Information Services Institute.
- Margolis, L., 1984. 'The Locus of Coherence'. *Linguistics and Philosophy* 7.
- Morgan, J., 2004. 'Tort, insurance and incoherence'. *Modern Law Review*, 67(3), 384-401.
- Olsson, E., 1999. 'Cohering With'. *Erkenntnis* 50: 273-291.
- , 2005. *Against Coherence: Truth, Probability, and Justification*. Oxford: Oxford University Press.
- Pethick, S., 2008. 'Solving the Impossible: The Puzzle of Coherence, Consistency and Law'. *Northern Ireland Legal Quarterly*, 59(4): 395-410.
- , 2014. 'On the Entanglement of Coherence'. *Ratio Juris*, Vol.27, No.1: 116-137.
- Polanyi, L., 1988. 'A Formal Model for the Structure of Discourse'. *Journal of Pragmatics*, 12: 601-638.
- Rescher, N., 1973. *The Coherence Theory of Truth*. Oxford: Oxford University Press.
- Rodriguez-Blanco, V., 2001. 'A Revision of the Constitutive and Epistemic Coherence Theories in Law'. *Ratio Juris*, Vol.14(2): 212-232.
- Roche, W., 2013. 'Coherence and Probability: A Probabilistic Account of Coherence'. In Araszkievicz, M. & Savelk, J. (eds) *Coherence: Insights from Philosophy, Jurisprudence and Artificial Intelligence*, pp.243-268. Dordrecht, Netherlands: Springer.
- Schiavello, A., 2001. 'On 'coherence' and 'law': an analysis of different models'. *Ratio Juris*, 14(2), 233-43.
- Shogenji, T. 2007. 'Why Does Coherence Appear Truth-Conducive?'. *Synthese*, Vol.157, No.3, 361-372.

- Sinclair, J. 1991. *Corpus, Concordance, Collocation*. Oxford: OUP.
- Soriano, L. M., 2003. 'A modest notion of coherence in legal reasoning: a model for the European Court of Justice'. *Ratio Juris*, 16(3), 296-323.
- Spohn, W. 2009. *Causation, Coherence and Concepts: A Collection of Essays*. Dordrecht, Netherlands: Springer.
- Thagard, P., 1999. 'Ethical Coherence'. *Philosophical Psychology*, 11: 405-422.
- , 2000. *Coherence in Thought and Action*. Cambridge, Mass.; MIT
- , 2003. 'Why wasn't OJ convicted? Emotional coherence in legal inference'. *Cognition and Emotion*, Volume 17, Issue 3.
- Zaccaria, , G. 1990. 'Hermeneutics and Narrative Comprehension' In Nerhot, P. (ed.) *Law, Interpretation and Reality*. Dordrecht, Netherlands: Kluwer.
- Ziff, P., 1984a. *Epistemic Analysis*. Dordrecht, Netherlands: D. Reidel.
- , 1984b. 'Coherence'. *Linguistics and Philosophy*. 7: 31-42.



The contribution of literature to the quest for the 'right answer'

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Abstract: In this paper we intend to investigate how literature can effectively contribute to overcome problems and contradictions brought about by Law, mostly by legal positivism. Through this, we try to show firstly, how literature can diminish the abstractionism and conceptualism that permeates Law. Developing the capacity to identify and more deeply understand the complexity and diversity of human being, literature contributes to the materialization of our relations with the world, allowing for a better acceptance of pluralism. Moreover, we will verify whether it is possible to extract normative concepts from literary narratives, that ends up permeating public rationality and judicial decisions. We also try to demonstrate the convergence between hermeneutics and literature, and to prove how literature can contribute in the strengthening of our interpretive skills with considerable gain for the enforcement of the law. Thus, the concept of judicial impartiality should be explored from the perspective of the 'judicious spectator' (Nussbaum 1995), this rich, real and democratic hermeneutic vector that literature allow us to develop. Literary contribution becomes of fundamental importance so that the judicial decision can be based upon concrete historical parameters. At the same time it can be delimited by normative guidelines that are in fact re-signified and deeply understood in light of the concrete cases taken seriously. The quest for the 'right answer' (Dworkin 2006) therefore becomes widely strengthened by contributions brought by literature.

Key-words: Literature; Judicial decision; Hermeneutics; Right answer

1. What can Law learn from literature?

The analysis of Law from a literary point of view can contribute to a closer approach to the contemporary project of legal Science, thus overcoming a dogmatic and normativistic vision of the legal phenomena. The purpose of this paper is to show it inserted into the dynamics of life, the only one capable to present the correct meaning of the norms, according to the contemporary legal philosophers. It also opens space for a permanent criticism of the legal institutes, through the open dialog with other social phenomena and sciences.

We should never forget that literature also possess a normative sense to be understood. It might lead the readers to act in different ways, adopting certain attitudes, choosing with the mind and emotions.

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One of the main consequences of the literary thought is the ability to develop a better understanding and acceptance of *alterity*. In this case, however, the acceptance of the other will not be approached as a mere postulate or an abstract and imperative vector, but as a consequence of the acute and thriving development of our capacity to recognize the diversity and richness inherent to human life. There is, therefore, from the very beginning, some sort of commitment to concreteness and facticity, since, by means of the literature, we are led to identify ourselves with the various characters enacting in its plots.

By reading literature we think and *intelligere* (*intus* + *legere* = read from the inside to the outside), and are endowed with a more acute capacity to reflect and analyze than the capacity we develop as spectators. The richness of the literary narratives is something that demands from the person interpreting them the constructive effort of the sensitive understanding, of the construction of horizons in which worlds are really delineated, but not simply as the spectrum of its own self. In this sense, Nussbaum states, based on Aristotle, that literature is more philosophical than history, because the latter limits itself to showing what occurred, while the former shows things as they could or should occur:

Unlike most historical works, literary works typically invite their readers to put themselves in the place of people of many different kinds and to take on their experiences. In their very mode of address to their imagined reader, they convey the sense that there are links of possibility, at least on a very general level, between the characters and the reader. The reader's emotions and imagination are highly active as a result, and it is the nature of the activity, and its relevance for public thinking, that interests me. [Nussbaum 1995: 5]

2. The convergence of hermeneutics and the literary thought

Literature has the power to make us wonder how men and women used to and still lead lives that are so different to mine, leading us to see that things could always be different. This means that literature provides a catalyzing potential for us to reach what Hans Gadamer called as 'historically effective consciousness'.

The analyses conducted for the work *Truth and Method* brought to surface that understanding occurs as a result of a hermeneutic dialogue, which entails the fusion between the horizon of the interpreter and the horizon of the interpreted. According to Gadamer, it is in the fusion of horizons that the 'plenitude of conversation, in which something that is not only of my own interest or of the interest of the author but of a general interest gains expression' (Gadamer 2006: 484).

Gadamer comes up with a hermeneutic twist by which it is no longer possible to describe the interpretation as the product of a solipsist subject (*solus ipse*). In this sense, rather than imposing his or her previous understanding of things upon the text, the interpreter should turn a critical eye on it and compare it with the reasonable possibilities offered by the context. According to Gadamer:

it is important to avoid the error of thinking that the horizon of the present consists of a fixed set of opinions and valuations, and that the otherness of the past can be foregrounded from it as from a fixed ground. In fact the horizon of the present is continually in the process of being formed because we continually have to test all our prejudices. [Gadamer, 2006: 305]

The truth of a passage does not lie just in its unconditional submission to the author's opinion, neither in the preconceived ideas of the interpreter, but in the fusion of these two horizons. The task of discovery of the truth in the object is of little avail, because as the man shifts his focus to the object, he is not, truthfully, coming across the object alone but the inter-subjective human action reflected in it. In this way, the interpretation rather than being a reproductive process, becomes a necessarily inter-subjective productive process, once the interpreter does not just reproduce the text, he updates it. A historically effective consciousness comes when the subject turns a new look onto his/her historical condition. Certain of his/her finite nature, and aware of the limitations brought about by the current pre-understandings, the interpreter is led to be open to perceive possible contradictions, hesitations and weak points present in the historical consensus shared by the interpreter.

Gadamer defends the point that we must seek to expand our awareness of the pre-understandings generated in the present, which become inherent to our understanding of other temporal and historical dimensions. If such acceptance occurs, the paving on the way to our self-understanding will be more solid. When the hermeneutist puts his sense of history into action and sees his own preconceptions, which are the result of consolidation of die-hard traditions, the desired interpretation is attained. Historical consciousness no longer listens with good ears to the voice that comes to him from the past, but when he reflects on it, he places it back in the context from which it came, in order to see its relative meaning and value. This reflexive behavior in view of tradition has been termed as interpretation (Gadamer 2006: 18).

We think that literature can really add an invaluable look capable of perceiving the world in a richer and more real way, allowing us to stand up against our pre-conceived ideas and freeing us from our pre-understandings. A very important excerpt from *Grande Sertão: veredas*, by Guimarães Rosa seems to translate this lesson from Riobaldo's mouth, when he says that:

Jagunço (a hired gun man) is a man who has given up on himself. [Rosa 2006: 51]¹

A jagunço is this, a jagunço does not crack before loss or defeat – for him almost everything is the same. There's nothing like it. For him life is set. Eat, drink, look at women, fight and that's it. And doesn't everyone think the same? Even the farmers? What they want is thunder in October, the granary full of rice. Everything that even me, deprived of it all, had forgotten. [Rosa 2006: 56]²

Here we see, in the literary construction of this ingenious Brazilian writer, the presence of several of the elements built up on hermeneutics. After all, here, Riobaldo's wisdom consists in seeking to bypass the pre-understand plot, in which most of the individuals are entangled. With his acute sense of understanding, he manages to win over his fragmentary side, generator of stereotypes. The author is totally aware of the limitations inherent to the *jagunço's* understanding of himself. In him, the human being as a whole, has already withdrawn, leaving behind a traditional conceptualist shared vision:

¹ 'Jagunço é homem já meio desistido por si' (Rosa 2006: 51).

² 'Jagunço é isso, jagunço não se escabreia com perda nem derrota – quase tudo para ele é o igual. Nunca vi. Para ele a vida já está assentada. Comer, beber, apreciar mulher, brigar, e o fim final. E todo mundo não presume assim? Fazendeiro, também? Querem é trovão em outubro, e a tulha cheia de arroz. Tudo o que eu mesmo, do que mal houve, me esquecia' (Rosa 2006: 56).

man lives to eat, get involved with women, fight and accept death. However, it can be noted that this segmentary vision, encaged in stratified pre-understandings is no privilege of the *jagunços*. Everyone, even the farmers, run the risk of expressing it. Riobaldo's deeply human eye, however, manages to set him free from this condition; making it possible for him to 'forget' it, which means to set himself free from it.

Here we have some sort of approach to daily life and history that is marked by particularization and concreteness, which makes it confront directly with the basically abstractionist and descriptivist vision, on which the legal science of a positivist bias was built. The literary narrative allows us to have a closer and more reflexive contact with what is common to us. On the other hand, the particularistic discourse which marks it is not independent from rationality, it being just a possible and necessary alternative to logical thinking, typical of the 'sciences of nature' (*Naturwissenschaften*). All this shows us, in a very emphatic way, that rationality should not be made hostage to logic, and that the universality of the concept will always be faced with an argumentative context ready to re-signify it. What is really sought is to build legal science on a deeply human ground, so that its fundamentals become more complex and philosophically coherent.

3. Literature and the expansion of the horizons of our senses

In this item I would like to depart from quoting two literary excerpts that point to more fertile grounds upon which literature can contribute concretely to the application of Law.

You think—I dare say, that our chief job is inventing new words. But not a bit of it We're destroying words—scores of them hundreds of them every day. We're cutting the language down to the bone. The eleventh edition of newspeak won't contain a single word that will become obsolete before the year of 2050.

It's a beautiful thing the destruction of words. Of course the great wastage is in the verbs and adjectives but there are hundreds of nouns that can be got rid of as well. It isn't only the synonyms there are also the antonyms. After all, what good is a word that is simply the opposite of some other word? A word contains its opposite in itself. Take good for instance. If you have a word for good, what need is there for a word like bad? Ungood will do just as well – better because it's an exact opposite, which the other is not.

You don't grasp the beauty of the destruction of words. Do you know that newspeak is the only language in the world whose vocabulary gets smaller every year? Don't you see that the whole aim of Newspeak is to narrow the range of thought? In the end, we shall make thought crime literally impossible, because there will be no words in which to express it. The revolution will be complete when the language is perfect. [Orwell 2013]

I will also make use of the quote from Dylan Thomas, for whom 'A good poem is a contribution to reality. The world is never the same once a good poem has been added to it. A good poem helps to change the shape of the universe, helps to extend everyone's knowledge of himself and of the world around him' (Thomas 2014).

This extract of George Orwell's *1984*, and the quote from Dylan Thomas are deeply connected with some lessons came from philosophical hermeneutics. After all, one of the most poignant lessons by Hans Gadamer is that the limits of our world are the limits of our language. He states that 'language is the universal medium in which

happens the understanding'. Only through the language can we understand. And language cannot be understood merely as the description of objects. It is through language that we can create and act in the world (Gadamer 2006: 390).

Not only tradition, but the very nature of linguistic understanding has a fundamental relationship with linguistics. As Gadamer points, the world itself is the common ground, not trodden by anyone and acknowledged by all, that unites all who speak to each other. All forms of community life are forms of linguistic community, and moreover, are forms of language (Gadamer 2006: 443). The linguistic worldliness of the world in which we have been always living is the condition for all of our concepts and thoughts.

Also noteworthy and deserving of reflection is Gadamer's assertion that there is a hermeneutic phenomenon, according to which there is no possible enunciation that cannot be understood as an answer to a question, and that is the best way it can be really understood (Gadamer 2006: 269-271). It is important to mention that the interpretation we make of a text is always the result of the dialogue we strike with it, whose conducting wire will be the questions we ask to this text, and those we allow it to ask us. In fact, as demonstrated by hermeneutics, the questions we ask will only become possible if they are based on the pre-understandings that language provides us with. These, in turn, will be determined by (and will determine at the same time) the horizons of our world. It is important to mention that the way we look at a passage is always the result of a complex process by which, crisscrossed by the language that pervades us – with its larger or smaller amplitude of senses and significations –, we ask it the questions that the horizon of our senses allows us to ask. This is an ontological question.

In this way, just as what occurs with the aims of Orwellian newspeak, it would be *exactly the impossibility to formulate any alternative thought, because of the* reduction of the horizon of the senses imposed on its speakers, it becomes imperative to recognize that the same effect, albeit in the opposite direction, can be offered by literature to the interpreters of Law. Well, if our cognitive filters are determined by our linguistic horizons, it becomes evident that a reader who reads only books on management and economics will have a totally different outlook on the world and Law from the reader who cultivates a wider range of literary works, especially 'the great literature'.

As demonstrated by Martha Nussbaum, literature will lead the reader to value the particularity inherent to each historical context, providing moral development that takes into consideration the emotions as an indispensable part of the reader's perception of life. In the novel *Hard Times*, the author narrates a passage in which someone says to Sissy that in a huge city of one million inhabitants, only 25 starved in the streets. Instead of an answer expressing contentment at such a small number Sissy says: 'it must be just as hard upon those who were starved, whether the others were a million, or a million million' (Nussbaum 1995: 68).

4. Literature and the quest for the right answer

The reading process is something complex and intricate, and its results are easily identifiable. From the very initial effort to identify with the characters and their points of view, moving on to the mental construction of the pictures formed by this whole world of words and the dispelling of stereotypes whether they are good or evil, beauty or ugliness, inserted in the narratives. All this conspires to prevent our conception of world

from being guided by less centralizing sense vectors. And the apprehension of this knowledge does not occur by means of abstract concepts and ideas, but by means of the perception of the concreteness and particularity one can only receive from the experience of reading. This is most probably what led the author Orhan Pamuk, literature Nobel Prize, to state that 'when we read, we understand that it is not only the world, but also our minds have more than one centre.' According to the Turkish author:

The fact that there is no single center became apparent to me when I read literary novels and when I saw the world through the eyes of characters who clashed with one another. The Cartesian world in which mind and matter, human figures and landscapes, logic and imagination are separate and distinct cannot be the world of the novel. It can only be the world of a power, an authority who wants to control everything – for example, the single-centered world of the modern nation-state. More than the passing of an overall judgement on an entire landscape, the task of reading a novel is the joy of experiencing every obscure corner, every person, each color and shape of the landscape. When we read novel, we devote our primary energy not to judging the entire text or to logically comprehending it, but to transforming it into pictures, clear and detailed in our imagination, and taking our place within this gallery of images, opening our senses to all its many stimuli. [Pamuk 2011: 1572-1576]

Here we have one of the most powerful foundations for the construction of this new parameter of impartiality, possible to be developed by means of literature; that is, the '*judicious spectator*' (Nussbaum 1995). This spectator does not participate, in person, in the actions that he witnesses, but takes interest in the participants. He sees the situation from a distance that prevents him from having thoughts of his own happiness and safety. 'Among his most important moral faculties is the power of imagining vividly what it is like to be each of the persons whose situation he imagines' (Nussbaum 1995: 73).

However, only this compassionate identification with the other is not enough for the rationality of the spectator to conform. Evaluation from the outside is also crucial in determining the degree of compassion considered rational in a person:

The compassion of the spectator must arise altogether from the consideration of what he himself would feel if he was reduced to the same unhappy situation, and, what is perhaps impossible, was at the same time regard it with his present reason and judgment. [Nussbaum 1995: 73-74]

Quoting Adam Smith, Martha Nussbaum sustains that emotions such as fear, compassion, anger or happiness are based on 'reason and judgement'. Therefore, the point of view of the spectator would be rich in emotions. These emotions are implicit in some thoughts considered appropriate to have before what happens to the people around us.

Then, this is the reason why great importance should be placed on literature as a source of moral guidance. This is so because reading can be considered a mock substitute for the situation of the judicious spectator, taking us, in a natural way, to assume an attitude that characterizes the good judge and the good citizen. On portraying this point of view, especially when related to the novel *A Hora da Estrela* (*The hour of the star*), by observing the narrative of Macabéa and Olímpico, we realize how remarkable the destruction of stratified conceptual models is. It allows the reader to broaden their horizons leading them to a better understanding of the world. In this novel, besides having

identical backgrounds, since both characters came from the poor Brazilian northeastern area, they have completely different personalities. Fragile, humble and innocent, Macabéa is a woman who has acquiesced to her insignificance, and has no expectations to be recognized for anything in special. Her strongest desires are simple things like having a meal at the end of the day, and having someone to love. Olímpico, on the other hand, who boasts to be forging in the embers of the strong and to have teeth of iron, took great interest in public affairs and dreamt of 'conquering the world', and one day become a congressman (Lispector 1998). As suggested by Nussbaum, reading the novel 'we can feel in a more balanced way than can either of them, precisely because we are at the same time both of them and neither' (Nussbaum 1995: 75).

This is the reason why Walt Whitman demanded that poets rule the public life of the nation. In his work *By the blue Ontario's shore* he says that only poets are really qualified to enforce codes of practice capable of keeping the states united as a nation, describing the poet as some sort of judge:

Of these states the poet is the equable man,
Not in him but off from him things are grotesque, eccentric, fail of their full return...
He bestows in every object or quality its fit proportion, neither more, nor less
He is the arbiter of the diverse, he is the key,
He is the equalizer of his age and land, ...
The years straying toward infidelity he withholds by his steady Faith,
He is no arguer, he is judgement (Nature accepts him absolutely)
He judges not as the judge judges but as the sun falling round a helpless thing
He sees eternity in men and women, he does not see men and women as dreams
and dots. [Nussbaum 1995: 80]

In fact, literature makes judges of us. Our experience as interested readers allows the search for the human asset we are looking for in and for the human community. What is sought is not just some vision that lends meaning to our personal experience, but one that can be defended and reinforced before those with whom we intend to live in community. This prevents literature from becoming the ground for extreme freedom of interpretative faculties. The reader applies the global meaning of a principle and tradition to a concrete context.

The literary judge is committed to what is termed as well understood neutrality. This means that he does not accommodate his convictions to pressure groups or does special favors to nurture his relationships with them. The judicious spectator will not fall prey to irrelevant or unfounded feelings. The fact that he remains neutral does not mean that he wants to keep a distance from social realities. He should regard these realities with the emotional answers typical of a judicious spectator.

Literature allows the reader to take part in a variety of lives. These lives that unfold consciously in different social stands, and the way the circumstantial arrangements shape the events in these lives are fodder that feeds the experience of the reader. Noteworthy here are Whitman's words as he refers to the poet-judge, saying that a judge should not judge someone as mere 'dreams and dots'. And it would be interesting to remember that for some theorists of the juridical positivism, people only have a juridical sense when conceived as 'imputation dots', to use the expression coined by Kelsen (2015).

Distancing is not incompatible with the literary imagination of the judicious reader, but this doesn't mean that one should ignore or refuse to recognize the sufferings and inequalities that write our history: 'Literary neutrality, like Whitman's sunlight, like the reading of a novel, gets close to people and their actual experience. That is how it is able to be fair and to perform its own detached evaluation correctly' (Nussbaum 1995: 90).

Literature can contribute to facilitate and rationalize the introjection of moral vectors in Law. This is because the reading experience allows us to have a better understanding of the values that pervade history from the perspective of a particularity, leading us to understand the singular nature of every human life. With this we will improve our chances to escape traditional forms of expression of hatred and collective oppression, usually disguised under the veil of impersonality.

Moreover, in this way, the quest for recognition, which pervades the Grammar of the social actions, becomes faster and more effective. What occurs is that now the stages for the introjections of the values brought about by such efforts can be abridged by means of the valorative constructions offered by the literary narrative. The literary experience, therefore, expands intersubjectivity and as a result the fundamentals of the social assumptions. Literary reading will, then, allow the axiological vectors to interpenetrate the juridical arguments, without them being marked by a mere subjectivism.

The judge who has developed in a satisfactory way the predicate of the 'judicious spectator' will be more closely protected against the always imminent danger of decisionism. What happens is that the very maintenance of his values will be hit by the concrete intersubjectivity found in the literary narratives. They, therefore, play an intrinsically critical and constructive role, submitting the individual values to the scrutiny of a subtle, autonomous and vigorous self-reflection, by departing from the place and point of view of the other.

Therefore, we start to experience a richer and more truthful understanding, since it takes into account, in a very concrete way, the experience of negativity. The fact is that real experience rather than confirming our expectations, frustrates them. The negativity of an experience is something extremely productive, as it contributes to expand our knowledge. This reveals itself as essentially dialectic, since it enfeebles previous knowledge (without, however, erasing it) and more expanded knowledge is acquired. In the Hegelian dialectic analysis, shattered expectations make the consciousness turn to itself, making the experience of self-consciousness possible. This is the reason why consciousness inversion could be considered, according to Hegel, as the real essence of experience (Gadamer 2006: 348).

We know that Dworkin's project seems to have undergone a shift since his work *Justice in robes*. This is because it is there that the author starts to recognize that the difference between rules and principles established since then did not get away with the 'semantic sting' in which so many positivists got entangled. In this sense, in his work *Justice in robes*, Dworkin recognised that the idea that Law would be formed by distinct normative species, that is, norms and principles, would be nothing more than 'reasonable elaboration' (Dworkin 2010: 8). Quoting him:

I may have contributed to the e mistake. In an early essay, I suggested that 'the Law' contains not just rules but certain principles as well. See *Taking rights seriously* (Cambridge, Mass: Harvard University Press, 1978, Chapter 2.) I quickly corrected myself, however. (See *ibid*, Chapter 3, 76. See also Chapter 8 of this book). [Dworkin 2006: 264]

My point was not that 'the Law' contains a fixed number of standards some of which are rules and other principles. Indeed I want to oppose the idea that 'the law' is a fixed set of standards of any sort. My point was rather that an accurate summary of considerations lawyers must take into account, in deciding a particular issue of legal rights and duties would include propositions having the form and force of principles, and that judges and lawyers themselves, when justifying their conclusions, often use propositions which must be understood in that way.

My target, in other words, was doctrinal, not taxonomic, positivism. I made the doctrinal argument that we cannot understand legal argument and controversy except on the assumption that the truth conditions of propositions of law include moral considerations. I did not mean to make, I said, the fallacious taxonomic argument that everything that figures among those truth conditions should be counted as belonging to a distinct set of rules or principles called legal. [Dworkin 2006: 234]

So, if the difference between the types of norms is only effective when we apply the definition of 'community of principles', so essential to the interpretation of Law, then a concrete delineation of the normative elements of its historical taxonomy should be included. Otherwise we may run the risk of falling back on a real decisionism since there will be no axiological or normative linguistic parameters capable of representing the historical self-understanding of some society. It means that the literary narrative plays a vital role in the maintenance of the Dworkian idea of 'community of principles' without the need to resort to some *ethos* of a communitarist nature, neither to get caught in the moralist dimension of subjectivity. After all, literary narrative offers the sophisticated subsidy we need for understanding the world and to lend meaning to the world that we can perceive. Therefore, literature presents itself as indispensable to the construction of a real 'community of principles', in line with Ronald Dworkin's proposal, which proves to be of great importance for the attainment of the right answer.

5. Case study

On May 5th 2011, the Supreme Federal Court, (STF) the highest court in the Brazilian legal system, made the unanimous decision to consider as stable union the relationships between people of the same sex. With this, homoffective unions were no longer considered a mere *de facto* union to be treated as a family entity. Based on this decision, homosexual couples started to have the same rights as heterosexual couples, such as pension and inheritance in the event of death of one of the partners, sharing of assets and alimony in the event of separation.

The STF judged the case based on two actions: Direct Action of Unconstitutionality (ADI 4277) and a Petition for Certiorari (ADPF 132).

The result was that the decision of the Supreme Court, the way it was, was only possible because of the vital role played by literature and hermeneutic, such as interpretation dimensions that place the interpreter within the world of life, in the arena of history, and do not treat him as a mere descriptivist spectator.

Starting from the cause received from Luis Roberto Barroso - at that time an attorney and today Justice of the Supreme Court, representing the Rio de Janeiro government, who took as a basis the fertile literary soil to build the arguments he used in the trial.

Honorable Justices, *what matters in life are the people and things we have affection for*. Love and search for happiness are at the core of the main philosophical systems and of the main religions. *A good life is made of our beloved ones, a good life is made of legitimate pleasures, a good life is made of our right to seek our own happiness*. In 1876 Oscar Wilde wrote a very beautiful poem called *The Love that dare not speak its name*, in which he reveals his homosexual passion: Oscar Wilde was sentenced to two year's imprisonment because of this poem and his sexual preference. In the decade of the 1970s, an American soldier who had been decorated for fighting in Vietnam, said the following when he was expelled from the Armed Forces: *for killing two men I received a medal, for love of another man, I was banished from the Armed Forces...* [Brasil, Supremo Tribunal Federal 2011]

Most of the Supreme Federal Court (STF) Justices made use of quotations collected from literature in order to make a decision. By doing this, the Supreme Court Justices do not disguise their intention to bring to the session the emotions and feelings literature is capable of evoking. The main point made in this trial, however, is the search for the development of a shared feeling of what is fair, one which reflects the 'community of principles' we are. Since the aim of the legal action was to update the legal normative concepts, the exploitation of the potential injustice in the application of such concepts yielded very important results. The singularity inherent to the literary arguments, proved capable of showing the way to the development of a more unbiased justice, more in line with the life of various (and different) individuals who form the pluralist contemporary societies.

We can live in a passable house, / In a passable street, / In a passable city, / And may even have a passable government. /
What we cannot, / By any means, / Never, never, / Is love moderately, / Dream moderately, / Be a so-so friend, / [...] Or we will run the risk of becoming a so-so person. [Brasil, Supremo Tribunal Federal 2011]³

By quoting the poem written by the Brazilian medium Chico Xavier, Justice Carlos Ayres Britto referred specifically to the need for the equality of rights between heterosexual and homosexual couples, which, according to his vote, will only gain a comprehensive meaning if it results in the equality of rights subjected to the formation of an autonomous family. This being understood as being within the scope of the two typologies of juridical subjects, independent from any other nucleus and formed, as a rule, by the same factual visibility, continuity and durability. 'Pitiful to consecrate a homoaffective friendship by half or condemn it to occasional clandestine and underground encounters'.

Justice Cármen Lúcia, another author of a vote stuffed with literary quotes, leaned on the words by Guimarães Rosa. In a moment of critical importance, she quotes a passage from *Grande Sertão: veredas* in which Riobaldo joins Diadorim, whose identity he still didn't know.

When something like that happens, we will feel much more what the body is: heart beating all right... the real one spins and casts on. These are our hours. The oth-

³ 'A gente pode morar numa casa mais ou menos, / Numa rua mais ou menos, / Numa cidade mais ou menos' / E até ter um governo mais ou menos / O que a gente não pode mesmo, / Nunca, de jeito nenhum, / É amar mais ou menos, / É sonhar mais ou menos, / É ser amigo mais ou menos, / [...] Senão a gente corre o risco de se tornar uma pessoa mais ou menos' (Brasil, Supremo Tribunal Federal 2011).

ers, of all time, are the hours of the others ... love like that grows first; then it sprouts ... life is not too easy to understand. [Brasil, Supremo Tribunal Federal 2011]⁴

Reflecting on this passage that for her was the best synthesis of everything that was happening in that session, the Justice added:

We have to concede that life is not always easy to understand. You can touch life without understanding it; you may not make the same choice as the other person; you just cannot refuse to accept this choice, especially because that life belongs to the other person and his choice does not break the limits of law. Especially as it is Law that exists for life, and not life that exists for the Law. [Brasil, Supremo Tribunal Federal 2011]

Finally, in their votes, Justices Cármen Lúcia and Ayres Britto made use of a normative concept that is very close to a literary discourse, that is, pluralism. In the perception of the magistrates, political pluralism (normatively inserted in the Brazilian Constitution of 1988) cannot be dissociated from social pluralism. And pluralism, as emphasized by Marcelo Galuppo, is a key issue for the democratic configuration of contemporary societies (2001) This will demand openness and acceptance of the different life-styles people choose to lead, in line with their tendencies and vocations.

⁴ 'Enquanto coisa assim se ata, a gente sente mais é o que o corpo a próprio é: coração bem batendo... o real roda e põe diante. Essas são as horas da gente. As outras, de todo o tempo, são as horas de todos... amor desse, cresce primeiro; brota é depois... a vida não é entendível' (Brasil, Supremo Tribunal Federal 2011).

References

- Brasil. Supremo Tribunal Federal, 2011. Ação Direta de Inconstitucionalidade n. 4277. Relator: Aires Britto. Brasília, acórdão de 5 de mai. 2011. *Dje*, Brasília, n. 198, 13 out. p. 20. Available at: <http://www.stf.jus.br/portal/inteiroTeor/pesquisarInteiroTeor.asp>. Last access: 8 jul. 2015.
- , 2011. Arguição de Descumprimento de Preceito Fundamental n. 132. Relator: Aires Britto. Brasília, acórdão de 5 de mai. 2011. *Dje*, Brasília, n. 198, 13 out. p. 21. Available at: <http://www.stf.jus.br/portal/inteiroTeor/pesquisarInteiroTeor.asp>. Last access: 8 jul. 2015.
- Dworkin, Ronald, 2006. *Justice in robes*. Cambridge, Mass.: Harvard University Press.
- Gadamer, Hans-Georg, 2006. *Truth and method*. Translated by Joel Weinsheimer and Donald Marshall. 2. ed. New York: Continuum.
- Galuppo, Marcelo Campos, 2001. Hermenêutica constitucional e pluralismo. In: Sampaio, José Adécio Leite; Cruz, Álvaro Ricardo de Souza (Coords.). *Hermenêutica e jurisdição constitucional*. Belo Horizonte: Del Rey.
- Kelsen, Hans, 2005. *Pure theory of law*. New Jersey: The Lawbook Exchange.
- Lispector, Clarice, 1996. *A hora da estrela*. Rio de Janeiro: Rocco.
- Nussbaum, Martha, 1995. *Poetic justice*. Boston: Beacon Press.
- Orwell, George, 2013. *1984*. Boston: Houghton Mifflin Hancourt. Kindle Edition.
- Pamuk, Orhan, 2011. *The naive and the sentimental novelist*. New York: Vintage International. Kindle Edition.
- Rosa, João Guimarães, 2006. *Grande sertão: veredas*. Rio de Janeiro: Nova Fronteira.
- Thomas, Dylan, 2014. *The collected poems of Dylan Thomas: the new centenary edition*. Introduction by John Goodby. London: Weidenfeld and Nicolson.



Law and Politics in Plato's *Gorgias*

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Abstract: Law and legislation are quite relevant to fully grasp the unfolding of the story in Plato's *Gorgias*. They remain in its background up to the end. The juridical aspects of Plato's philosophy emerge to the surface from the discussions on politics, ethics and philosophy; and, ultimately, such relations are responsible for illuminating the question on the meaning of law. The present work begins presenting a kind of display brought up by Socrates in the early stages of the dialogue. There, he makes important distinctions between body and soul, the arts and flatteries related to each of them, and the goods they aim. He also presents why there are a parallel between all of them, both in form and in substance. Such display, although not straightforwardly clear, can be relevant for understanding the dialogue as a whole. Regarding to Law itself, according to the display, piety and moderation are the political goods directly associated with the art of legislation. Moreover, as the dialogue continues, the differences between Calicles and Socrates illuminates lawfulness as the embrative political virtue – a merger between moderation, piety and justice. The paper ends addressing the question on what is Law, and how this answer is related with Socrates' allegation of him being the only politician of Athens.

Key-words: Plato; *Gorgias*; Law; Politics; Legislation; Justice; Ethics; Philosophy.

1. Introduction

In the *Gorgias*¹, Plato shows *lawfulness* as being *the* political virtue, responsible for the emergence and preservation of the *rule of law*. Moreover, he also demonstrates that the political role of the philosopher is both to teach such a virtue to the ruling class, i.e., to those who make and apply the laws, and to keep them aware of the necessity to nurture and practice such virtue.

The *Gorgias* was probably written when Plato was in his late thirties. After it, Plato went away from Athens for a long period, in a journey to Italy and Sicily. It is only in his return to Athens that Plato founded the Academy. The dialogue, thus, marks Plato's transition into maturity, his grasp of the fundamental issues that were ravaging his city, and the foundation for his main dialogues on political philosophy (Voegelin 2000: 56) – that also includes Plato's approach to Law. For instance, Huntington Cairns says that,

Law was a subject which [Plato] kept constantly before him, and there is scarcely a dialogue in which some aspect of it is not treated explicitly. His theory of law is a

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¹ All quotations come from the English translation made by James H. Nicholson, Jr. Plato. *Gorgias*. transl. James H. Nicholson, Jr. (Ithaca: Cornell University Press, 1998).

fundamental part of his general philosophy, and it illumines and is illumined by the entire Platonic corpus. [Cairns 1942: 359]

As it is shown below, already in the *Gorgias*, Plato kept Law 'constantly before him'. As murky as the presences of Law and legislation in the dialogue might be, they are still there. Moreover, such dimness makes them even more important than one would suspect. Although Law and legislation are definitely not everything one can take out of the *Gorgias*, and besides the fact that they are not even the main point of the dialogue, they are still inseparable from, and relevant to, it. There is a juridical aspect related to the unfolding of the story, with both Law and legislation remaining in its background up to the end. By looking the dialogue through such juridical lenses, Plato's theory of law within it becomes clearer; which gives another dimension to dialogue itself.

Furthermore, there is a practical lesson to be learned from the obscure presence of Law and legislation, since it means that their relevance and meaning can be extracted even when they seem to have disappeared from the horizon. The juridical aspects of Plato's philosophy present in the dialogue emerge to the surface from the discussions on politics, ethics and philosophy. Ultimately, the relationships between them are responsible for illuminating the question on the meaning of Law as a whole.

The present work is divided in four parts. First, there is a presentation of the distinctions between body and soul, arts and flatteries, brought up by Socrates in a kind of display at the beginning of the dialogue. Such display is taken as key to understand the dialogue as a whole. Then, the point becomes showing that the display has *piety* and *moderation* as political goods directly related to the *art of legislation*. After that, the focus shifts to the differences between Callicles and Socrates and how their clash illuminates *lawfulness* as the embracive political virtue. Finally, the question on *what is Law* is addressed through its relation with Socrates' claim of being the only politician of Athens.

2. The Display: the arts and flatteries of body and soul

Amidst a debate with Gorgias and Polus, Socrates is asked to clarify his position on Rhetoric as a sort of flattery, a false art, unintelligible (*Gorgias*, 465a). His position is strong on the subject; at least, on that part of the dialogue. Later on, he admits the possibility of a good Rhetoric (*Ibid.*, 503a), but not in a way to contradict his older position. It would remain being flattery, however conduct toward a good.

In order to explain what he meant by such distinction between arts and flatteries, he presents a kind of display, where he establishes comparisons between rhetoric and other kinds of flatteries, in opposition to related arts.

2.1 The Dichotomic Structure of the Display

Socrates begins by pointing out the arts. For him, there is an art related to the body, and other, to the soul. Both, in turn, can be divided in two subordinated arts. The art of the soul, he calls it *politics*, and it is divided in *legislation* and *justice*; the art of the body, unnamed, is divided in *gymnastics* and *medicine*. He, then, states that legislation is to gymnas-

tics what justice is to medicine. Of those, legislation and gymnastic are *ordering arts*, while justice and medicine are *corrective arts*. Those are arts because they aim toward what is good.

Socrates follows by presenting a similar display of flatteries. Those flatteries are not arts, but *experiences*. The flattery of the soul, also without a name, is divided in two subordinated kinds, *sophistry* and *rhetoric*; the one of the body, nameless as well, is into *cosmetics* and *cookery*. As on the arts, they also related to one another: sophistry to cosmetics; and rhetoric to cookery.

Using the classification of the subordinated arts in *ordering* and *correctives*, it is possible to call the subordinated flatteries as *deranging* and *perverting*, respectively. They are not arts because their goal is *pleasure*, not any good. Therefore, the display as a whole is related in a series of opposites: legislation and sophistry; justice and rhetoric; gymnastic and cosmetics; medicine and cookery. The whole display seems to be perfectly balanced this way.

2.2 Problems within the Display

However, after a closer inspection, this balance should be questioned. There is a series of oddnesses that demand analysis before concluding the display is fully dichotomic. The first oddity that emerges from the display is actually not in it. The figure of the politician, as the artist, craftsman of the soul is there, but the philosopher is not. Philosophy is nowhere to be seen, at least, apparently. What this could mean?

Does philosophy has nothing to do with it, and that is why it is not mentioned? Or, maybe it has everything to do with it, so there is no necessity to bring it up? Or would philosophy be disguised under the name of *politics*? In order to answer those questions, it is necessary to go beyond the display itself, but without losing the sight of it.

The second oddity is the fact that there is no counterpart to the politician. The balance of the display is only achieved after the presentation of the subordinated arts and flatteries. According to Socrates exposition, only the arts of the soul have a real embrative art. The others do not seem to be subordinated to anything at all. But why is that? What does politics have differently from the others to be a special case? If politics has no counterpart, how does it relate with the flatteries of the soul? Here, as well, the display alone does not permit any answer to those questions.

The third problem is the fact that, while the political arts point toward a collective or social dimension of the human being, the corporeal arts – and all the flatteries – focus on a individual or personal dimension. Since the flatteries are *experiences*, according to Socrates, this should not be a surprise; all experiences are personal.

However, the corporeal arts are not experiences. Still, they seem to point to a different dimension as the political ones. While gymnastics refer to the physical exercise of *one* body, and medicine to the healing of *one* diseased body, legislation is always general², and justice is always relational³.

² If it were particular, it would be an order, not a rule. That is, for instance, the problem in the core of command theories of law, since they would necessarily negate the rule of law. For more on this problem of generality of law, see Voegelin (1991: 55-59)

³ There is nothing just *per se*. The debate on the *Gorgias* serves as an example, since it is centered not in something abstract as 'pure Justice', but on the difference of perpetrating injustice or suffering

These problems seem to point to the question on how the parallel between the arts of the body and the arts of the soul would work in accordance with the display. It could be said that there are more than one possibility, but they do not seem to contradict one another.

3. Ordering Political Virtues: equivalence in the arts of body and soul

As it was said above, there is one art of the soul, politics, but no art of the body. Although Socrates says there is one, he is incapable of naming it. That seems to imply that he hypothetically believes it is possible, but he does not know it. Therefore, their equivalence is only established after their respective division on subordinated arts. However, even then, the political arts are social while the corporeal ones are personal. These features did not stop Socrates to state their parallelism, though.

The answer to why he did not can be given twofold, with both parts complementing each other and bringing forth that the good intended by the arts of the soul is *virtue*; more precisely, the virtues of piety and moderation.

3.1 Piety: the different dimensions of Body and Soul

The first part of this twofold answer addresses the difference between body and soul. One way of presenting such distinction is by advocating in favor of the collectiveness of the soul in the Platonic thought, as presented – for instance – in the *Timaeus* (*Timeaus*, 35a-b), in opposition to the individuality of the body. There is something into that, but it would need some clarification. As Eric Voegelin puts it, some of the symbolizations used by Plato are considered outdated. This does not mean that they are false, but that, in some regard, they are not the best description of the reality they claim to represent.

The collectiveness of the soul is one of such cases. Plato's soul was more compact than the one differentiated by the Judeo-Christian tradition, since it does not imply transcendence (Voegelin 2000: 116). The soul is still a thing for Plato, but its collective assumption in the *Timaeus* shows a grasp on the oneness of being. Plato was aware of the issue. For instance, such oneness is not presented as an unit in the *Gorgias*, but as community between 'heaven, earth, gods, and the human beings'⁴ (*Gorgias*, 508a). Still, those are taken to be parts of a whole.

Socrates' distinction between body and soul in his display points to the fact that the soul and the body relate to distinct dimensions of the human being. The body relates to the realm of the many, of things, of concreteness, of changeability, of time, of difference, etc. If such is the case, it not only allows, but it demands specialization.

An art of all bodily things would be rather hard, if not impossible, to be established⁵. It is probable that it does not have a name because it does not exist and it never will. The parallel between corporeal and psychic arts is true, but relatively unbalanced due the different proprieties of the body and the soul.

⁴ Voegelin formulated this consubstantial community differently, as 'community of being', but still with a quaternarian structure: 'God and man, world and society' (Voegelin 1956: 1).

⁵ Although, in the *Symposium*, Eryximachus advocates medicine would be such art. For an account of his arguments in this sense, see Rhodes 2003.

The soul, on contrary of the body, relates to realm of the gods, of the One, of the Whole, of the Ideas, of the Everlasting, of the Timeless, of the Common, etc. There cannot be specialization on the study of such dimension. That is the reason why legislation and justice are arts under one embrative art; there is no way to split the soul nor to decouple the reality that it relates.

The oneness of this reality and its relation to the art of politics show that there are something divine connected to the political practice. Politics has something to do with piety as a political virtue. The politician must be a pious man.

If the soul is indivisible, the same must be true to the experience of flattery. That is why Socrates must add to his display on the flatteries. Therefore, he states that sophistry and rhetoric are indistinguishable from one another (*Ibid.*, 465c).

There is someone who opposes and, hence, balances the politician out, after all: the *politicker*⁶. Such man, in the dialogue, is represented by Callicles. He is engaged in politics, but he does not do actual politics in the Socratic sense.

3.2 Moderation: the different perspectives of ruler and ruled

Second, another way to establish a parallel is through the recognition that the arts were presented in different perspectives. The reason why legislation is collective is because it is a set of general rules for people to conform; justice is always relational because it depends on the relation between two or more people to become an issue⁷. On the contrary, gymnastic is individual because it refers to the one who exercises; medicine refers to the sick body that needs to heal.

However, gymnastics can also relate to the rules that set which exercise in to be done and how it must be done when the goal is to develop the body; medicine, to the precepts of its practice. Each case can be unique, but they are connected to general rules of the art it relates. The same apply to legislation and justice. There is the necessity to a person to abide to the action prescribed in the legislation; therefore, legislation refers to both the lawmaker and the law-abiding person. The same happens with justice, which refers both to the situation in which a just or unjust relation occurs and the just or unjust action perpetrated and/or suffered by the people involved.

Hence, the main difference between the arts in Socrates' display is that while the arts of the body were defined considering the point-of-view of the subject, the arts of the soul were considering the point-of-view of the craftsman. However, they are still equivalent because both perspectives are possible in both arts. There is something personal on the soul - each individual has his own, after all; and there are common features of the human body – which allow the existence of arts regarding it in the first place.

The arts of the soul and the arts of the body partake the same perspectives, from the point-of-view of the ruler, as well as of the ruled. The corollary from these shared perspectives is the emergence of the ruler as also a ruled; something completely different from the position defended by Socrates' interlocutors in the dialogue. There is an

⁶ This term fits well as someone different from the politician. According to the *Merriam-Webster* dictionary, it is 'someone engaged in often partisan political discussion or activity'.

⁷ To be precise, Justice ultimately refers to the relation between members of the community of being (see note 3 above), but it is relational nevertheless.

element of self-regulation on politics. The political man regulates himself; therefore, he is a moderate man. The display also shows moderation as a political virtue and Law having something to do with it.

4. Love: good and virtue

Roughly in the middle of the dialogue, Callicles interrupt the discussion between Socrates and Polus, and take over the debate. When he does, the opposition between his views and Socrates' becomes the main ingredient of the plot. Callicles is the first character to speak in the dialogue, and his also the owner of the house where the dialogue happens.

Although the dialogue has the title *Gorgias*, Callicles is, among the interlocutors of Socrates, the most engaged and the one that most endure. As he says at the beginning of the dialogue, for him, this is a matter of 'war and battle' (*Ibid.*, 447a). That is his spirit, although he is the one that accuses Socrates of being a 'lover of victory' (*Ibid.*, 515b); a feature Socrates does not deny, but qualifies it: win matters, but not for its own sake (*Ibid.*, 505e). Their struggle is a struggle of interests, since they love different things.

4.1 A Tale of Two Loves

The display can pass completely unnoticed throughout the dialogue. After all, no character of the story questions it, and there is no direct reference to it after its presentation. It is never mentioned again. However, without it, some features of the dialogue can pass unnoticed. For instance, right after the display is described, the focus of the conversation shifts to the question if it is better to do or to suffer injustice⁸.

This question has everything to do with the Socratic display. First, justice is one of the political arts, and it has 'justice' as its virtue, the good aimed by the art. Second, there is the relationship between the body and the soul. After all, to do injustice damages the soul, but not necessarily the body; while suffering injustice can hurt the body, but not the soul. Any damage to the soul, according to Socrates, is much more vicious than one to the body.

The greatest evil would be injustice (*Ibid.*, 480d), and it affects much more who commits it than who suffers it. That is why Socrates defends that the best use for rhetoric is for the wrongdoer to advocate for his own punishments and of those who he loves the most, if they are also wrongdoers⁹. Because of its absurdity, that is when Callicles interrupts and takes the dialogue over. As soon as he stormed into the conversation, Socrates marks the difference between them; and he does that by going back to the display, although not straightforwardly.

As Socrates says, Callicles and he love different things. Socrates loves philosophy and Alcibiades son of Cleinias; Callicles, the Athenian *demos* – the people of Athens –

⁸ There is a reason why the interlocutor of Socrates is Polus for such question. Polus needs Justice in his soul, badly. He shows himself incapable to understand what it actually means.

⁹ There is a contrast between this statement and the position Socrates takes in the *Euthyphro*. There, Euthyphro is willing to prosecute his own father, but Socrates argues against such action.

and Demos, son of Pyrilampes (*Gorgias*, 481d.). Such statement is not gratuitous, however. It is close related to the question Socrates instructed Chaerephon asking to Gorgias: 'who he is' (*Ibid.*, 447d). He wants to point out their distinct characters by distinguishing what they love, that is, what they aim. As with the arts and flatteries in the display, their loves are also divided in two; and as in the display, they aim different things¹⁰. Socrates explains.

There is a contradictory aspect of Callicles' love. Although he does not love anything but himself, he must follow the positions of their beloveds. He longs for their recognition, and so he tries to do what they please. Hence, he is able to change his opinions back and forth, if necessary to be attuned to both the *demos* and Demos. He wants power, but, at the same time, he is a slave of his beloveds. Socrates, on the contrary, does not need to agree with Alcibiades, who is like Callicles. Also, philosophy allows Socrates to remain the same person in every situation. Hence, he is never in contradiction, and he is never on the dependence of the circumstances. Socrates' love does not grant him power, but makes him free.

If the thesis here is correct, what Socrates wants to make clear through this differentiation is that he is a lover of the truth (good) and of the soul¹¹, while Callicles loves the appearances (pleasant) and the bodies. This difference between them, between the good of the soul and the pleasures of the body will remain true until the end. Callicles is never persuaded, although all the love that Socrates has for *him*. Callicles is like Alcibiades, after all (for instance, see *Gorgias*, 516d), and Alcibiades was not persuaded either (*Symposium*, 216a-b).

4.2 Lawfulness, the Political Virtue: moderation, piety and justice

Callicles does not want to concede any point, but Socrates manages making him to accept the distinction between the good and the pleasant (*Gorgias*, 499b). Once this agreement is established, Socrates changes the route of the conversation, going back to the display, now trying to explain why rhetoric is a sort of flattery. He points to the fact that there is a difference of finality between arts and flatteries. Pleasure cannot be, but the goal of experiences; never, of an art. According to Socrates, such flatteries cannot be an art because their goal is a random phenomenon. Every time, the pleasure-giver must find what pleases his targets, and give it to them in exchange of something he wants (*Ibid.*, 502e); just as Callicles was doing with his beloveds.

The craftsman, the artist, on the other hand, does not act randomly, but follows an order, in the sense of a specific sequence of acts and events; like Socrates. He arranges the object-matter in a certain way in view of the desired goal - to achieve a certain form, which is the good of that art. Hence, good, as Law, has something to do with order. So the good of the soul must relate to its order. Socrates compares it to an ordered body: an ordered body is called 'healthy', thus, health is a bodily virtue (*Ibid.*, 504c).

¹⁰ It is interesting to compare this part of the dialogue with the thesis of different types of *eros* developed by James M. Rhodes in his *Eros, Wisdom and Silence. op. cit.*

¹¹ The issue on Socrates loving Alcibiades for his soul is controversial. James M. Rhodes, for instance, adopts such position; with which I agree.

It is possible to affirm that, according to Socrates, an ordered body, being healthy, does not need the art of medicine (*Ibid.*, 505a). Now, the equivalent term for an ordered soul is called 'lawful' (or 'Law'. *Ibid.*, 504d). One could imagine that, considering what Socrates presented in his display that, if what is said of the body is true, an ordered soul would not need the art of justice. That could not be what he actually meant.

As it was seen above, there is only one virtue of the body, health; but there are two of the soul, moderation and justice (*Ibid.*, 504d). They were presented earlier as moderation *and piety*, but, then, the question was on the *ordering* political virtues. The key here is to note that Socrates introduces piety right after stating moderation and justice as the virtues of the soul. Piety, actually, is taken to be a specific sort of moderation, in relation to the divine (*Ibid.*, 507c). So, when Socrates says that the virtues of the soul are moderation (the ordering virtue) and justice (the corrective virtue), he is stating that is moderation, as moderation *and piety*, and justice.

Still, there is one bodily virtue but two of the soul. How is it so? First, the differences between the body and the soul, as seen above, do not allow a direct correlation between the two. It exists, but it needs to be worked upon to become clear. There are two arts of the body, but only one virtue that holds them together: health. There can be health without medicine. The nature of the body allows specialization, and gymnastics can achieve its good without medicine. The same does not apply to the soul.

A healthy soul, a lawful soul, needs both moderation and justice. The arts of the soul, legislation and justice, have both of the virtues as their goal (*Ibid.*, 478b). However, such arts are subordinated arts of politics. Such virtues are also subordinated virtues. Now, the correlation between body and soul is possible. If the healthy body has *health* as its virtue, a lawful soul has *lawfulness* as its virtue. Lawfulness is the virtue of the political art, which is the combination of both moderation and justice.

5. Law, Politics and Philosophy

Socrates says at the display that legislation and justice were arts subordinated to politics. If his scheme were misunderstood, it would be possible to use it in favor of the argument on the prevalence of the political over the juridical. However, if that was simply the case, Polus and Callicles would be right, not Socrates. They seem to have no regard to legislation and justice, after all.

If politics is supreme over legislation and justice, the path is clear for the argument that *might makes right* (*Ibid.*, 484b)¹²; which seems to be the prevalent notion among the leaders of Athens, against which Socrates struggles. His position is that *Law makes right*. In such a battle between Law and Power, to prove his position, Socrates' weapon is philosophy.

Plato presents a series of issues in the dialogue between Socrates and Callicles, which goes from the middle up to the end of the book. If politics seem no longer able to establish and preserve the right order of the community, how its members, especially those of the ruling class, will be able to restore the order in their own souls? In other words, how a politicker can become a politician? Another way to formulate the question is to wonder whether a political community could be able to form its ruling class appro-

¹² Callicles makes exactly this argument.

privately when its traditions are no longer up to such a task. The development of the exchange between Socrates and Callicles seems to be a long effort to respond this problem. As it was said, Socrates answer is *philosophy*.

5.1 The philosopher as professor of politicians

Recapitulating, philosophy is nowhere to be seen at the display. Also, it is never mentioned in the conversations Socrates has with Gorgias and Polus. Philosophy appears for the first time only when Callicles takes a spot on the center stage. The first mention happens when Socrates distinguishes himself from Callicles through their loves: Socrates loves philosophy; Callicles, politics.

Socrates goes on and repeats ‘philosophy’ three other times in the same speech, by stating that if Callicles disagrees with what he said, he needs to contest it, not him¹³; that what he says is always from philosophy; and that philosophy never changes its discourse. Comparing himself to Callicles, Socrates points out that his relationship with philosophy is not different from the one Callicles has with his beloveds. However, philosophy is completely different from all others beloveds.

Callicles accepts Socrates premises and reacts. If he needs to challenge philosophy, so be it. He mentions philosophy, in any of its forms, nine times in his reply. He lets clear that philosophy is a rival of politics, and he explains his view on what politics are. He actually agrees with Socrates that politics is about the laws of the city, its customs and its people. However, any similarity stops there.

Callicles adds that politics is about speeches, pleasures and desires. Such addition gives the clue that the aforementioned agreement is only apparent. The full meaning of Callicles’ account is that politics are about rhetoric – speeches – and sophistry (*Gorgias*, 484d), confirming the dichotomy presented by Socrates in the display.

Also according to Callicles, philosophy would good for the youngsters, since it makes them free and prepares them to become future politicians. For the older men, however, it is bad. He argues that it forbids them to be good at politics. That is why he advocates punishment for old philosophers. They need to be corrected in order to fit in the society they live in. If not, they could be prosecuted, and, once unable to defend themselves, condemned to death (*Ibid.*, 485c-d).

One does not need to read this account ironically, as a threat linked to the fate of Socrates (*Ibid.*, 487d). Callicles affirms they are friends and that he is speaking in goodwill (*Ibid.*, 486a). If this is taken seriously, then, Callicles is approaching Socrates with a soteriological goal. He is not a completely deranged human being, as some of his arguments apparently imply, but a mistaken noble man. He wants to convince Socrates to follow him and become a good man, a politician – as Callicles understands it to be, at least. Socrates seems to be aware of this. He affirms his belief in Callicles’ seriousness, but disagrees on what a political man, a politician, actually is.

Socrates ends up referring to himself as the only politician of Athens, even though he refers to his way of life as a life of philosophy (*Ibid.*, 500c). Socrates, at the same time that he identifies himself as a politician, he also recognizes Callicles as one. However, Socrates differentiates himself from Callicles and those alike. Socrates, to explain his po-

¹³ Such request is similar to a comment Socrates made in the Symposium, stating that Agathon could easily refute him, but not the truth. *Symposium*, 201d.

sition, states that he is a politician because he engages with people, talks with them, and makes speeches 'with a view to the best' (*Ibid.*, 521d). He wants to make people better. Such practices notwithstanding, Socrates is not a politician because he does not legislate, he has 'anything to say at the law courts' (*Ibid.*, 521e) and he becomes 'ridiculous' while dealing with political affairs (*Ibid.*, 484d-e). Once this is acknowledged, it is possible to understand which kind of politician Socrates believes himself to be, and how such a politician is somewhat similar to a philosopher.

As it was said, there is no philosopher at the display. However, the philosopher is the one presenting it. So, it was actually unnecessary to mention him, in the first place. Also, if the display remains at the background during the entire dialogue, this is because Socrates, the philosopher, kept it there. He is the representative of the display; he is the one responsible to defend the truth in it throughout the display. Still, to actually be successful in such a task, he would need to demonstrate it. He finally achieves it when proving Calicles to be the exactly opposite of a true politician; and he does it by showing what Calicles lacked, and therefore needed in his soul - moderation, piety and justice, i.e., the virtues necessary for legislating in accordance with the Law. Socrates, thus, as a politician, he is a professor of virtues; of those virtues he had developed in his own soul through philosophy.

It was said above that the counterpart of the politician was the politicker. In the context of the dialogue, Calicles is the paradigmatic politicker. So, one can identify him - alongside with Polus - as representative of the opposition to 'politics' in the display, engaged in state affairs, and seeking power for power's sake. However, this is not actual politics, but *politicking*. There is no virtue in power whatsoever for it to become a real good intended. Nevertheless, Polus and Calicles exercise such political flattery ferociously, because they are unable to recognize what is actually good. Such incapacity is consequence of a bad formation, and that should be understood as a failure of their masters; in the story, represented by Gorgias. It turns out that the philosopher and the politician are close related, although, they mean the exercise of different roles in society.

Socrates is the only politician of Athens because the so-called politicians of the city are actually politickers. Socrates exercises politics *indirectly* by philosophizing with people, always seeking for moderation, piety and justice in their souls; making them citizens, politicians, philosophers, etc. Hence, in certain extent, it is through such an exchange that the philosopher proves himself to be a politician. On the other hand by acknowledging that their task is making people better, the politicians also become like philosophers (*Republic*, 473c-d).

If one considers Socrates as the professor of politicians, Gorgias is the professor of politickers and the opposite of the philosopher in the dichotomic structure of the display. Gorgias opposes Socrates as the paradigmatic example of a *philodoxer* (Voegelin 2000: 120-121) - the lover of opinion. Gorgias exercises his profession by teaching his students, who are always seeking for some advantage. There is no virtue to be gained, no order to be achieved. Instead of getting better, the students of Gorgias get worse, as Polus and Calicles demonstrate (*Gorgias*, 519c-d).

Now, it is possible to realize part of the reason why the title of the dialogue is *Gorgias*. Gorgias appears as the real opposition of Socrates in the story and symbolizes the rivals of Socrates in Athens. Still, in such 'war and battle', victory is not necessarily obtained by destroying or subjugating the opponent. As it was said above, Socrates, differently from Calicles, understands that victory should not be pursued for its own sake.

Socrates wants to win over Gorgias and his students, Polus and Callicles, but by making them partners on the quest for truth and the good life.

5.2 What is Law?

The kind of victory Socrates intends to obtain and the role of the good rhetoric is directly related to the problem of Law. The main discussions of the dialogue are on rhetoric and its relation to justice, giving the impression that legislation and Law are put aside after the display for good. As it was seen above, legislation only emerges in relation to moderation as a virtue. This seems to imply, although Socrates does not say it expressly, that moderation is a kind of self-legislation. Still, legislation is never discussed as an art. Law, on the other hand, is not even in the display. However, it appears later in the dialogue as the good of the art of politics. Law, it seems, would have only an indirect relation to legislation. Legislation, alone, would not make law. If this is true, one might wonder how they would relate, then.

Law as such is introduced by Callicles, not Socrates, when he intervenes in the middle of the dialogue. Callicles first accuses Socrates of defending the world to be upside down (*Ibid.*, 481c). Socrates confirms it by affirming that he is indeed trying to turn the world *downside up*. Callicles, then, makes a long speech, one that Socrates never interrupts (*Ibid.*, 461e)¹⁴. In this speech, Callicles criticizes philosophy, introduces law to the debate (*Ibid.*, 474e)¹⁵, and threatens Socrates both physically and legally. Callicles believes law to be a kind of coup of the weaker against the stronger, violating the nature of the stronger to impose his will by force. Callicles is the one who makes the distinction between *physis* (nature) and *nomos* (law), and brings a definition of ‘natural law’ or ‘the law of nature’ (*Ibid.*, 483a). For him, such law is the one that justifies the stronger to do whatever he wants; it is the survival of the stronger. As Polus also believed (*Ibid.*, 466b-c), tyranny is the natural inclination of man (*Ibid.*, 483b)¹⁶, true freedom, the fully expression of the law of nature. Socrates, however, fully disagrees.

Socrates argues, on the contrary, that law is not a limitation, but the very source of liberty, because it brings moderation and justice to the soul of those who complies with it. Still, he does not refer to any kind of law. Athens is upside down, and so it is its laws. When Callicles says that law limits him, he is actually beating a dead horse. There is nothing in the laws of Athens that can hold him, or Alcibiades, or any other back. He just needs the votes necessary to get the realm. Rule of law, properly understood, is always a rule of moderate and just men. If there is none of those among the rulers within a society, its laws can mean anything.

This point is so hard to understand because there is actually no *rule of law* that opposes a *rule of man*¹⁷. The option is always between two different kinds of rule of men who makes and applies laws. Formally, the distinction between them is inexistent or not relevant at all. Nevertheless, they are substantially contrary to each other. The text or the customs, alone, are unable to defend themselves (*Pheadrus*, 275d), and that is why legisla-

¹⁴ He does not allow the same liberty to Polus.

¹⁵ Socrates mentions it once, before, but on a list of examples, without much consequences.

¹⁶ Those unable to be a tyrant were not even men, but life-worthless slaves.

¹⁷ Still, the temptation to separate them sometimes is too great to resist. According to Voegelin, that is the reason behind the ‘tendency to split the lawmaking process itself into two components, the valid rules and the acts of their creation, and to make each of the components independently the basis of theoretical construction’ (Voegelin 1991: 27-28).

tion is less important than the people who live it. If there are good people legislating and applying them, the laws take care of themselves. Hence, a society will live under a proper *rule of law*, or not, depending on the quality of those who rule it¹⁸. The kind of laws Socrates defends aims at moderation, piety and justice, the kind that is described as *rule of law*.

However, those laws ordering Athens at that time were not, because there was no person among the leaders of Athens able to carry the *rule of law*. Callicles symbolizes the typical Athenian politician of his time. Callicles is a politician in the common sense of the word; a *politicker*, as said above. He is seeking power. He does not believe in the rule of law, because he wants the rule of Callicles, instead. However, it was already seen above that Callicles is a slave of his own appetites. The *telos*, the finality of his action is pleasure. That is his *love*, which leads to insatiation and an everlasting pain (*Ibid.*, 494a-b). His opposition to law, or to the rule of law, is nothing but the recognition that law is an obstacle to his attempt to ease his suffering.

Under that cloth of a power-thirsting relentless political warrior, a miserable man is hidden. Socrates knows it. His effort in going into a heated argument with Callicles is revealed to have a soteriological goal. This is the same soteriological goal that it was said Callicles has toward Socrates. Both want to save the other. Their clash, thus, reveals itself as a struggle of persuasions. They are both using rhetorical tools to convince the other to live the good life, or, in other words, the political life. The problem is that they cannot agree on the meaning of 'politician'.

Socrates asks for an example of politician that made the Athenian better. Callicles can only name those that made Athens, the city, better by building walls, dockyards, ships, etc. The people, however, only got worse (*Gorgias*, 515e.). It is the evidence that the good aimed by the city is not a real political good, and this reflects in its laws. Being a law-abiding citizen in such environment does not make anyone good, since there is no virtue linked to legislation at all.

In the dialogue, Socrates points that Athenian legislation could not be law because it lacked moderation. It was unable to moderate its people because those who legislated were not moderate themselves. In the *Gorgias*, Callicles symbolizes this complete detachment of the Athenian elite to *lawfulness*, the virtue of politics; the right order of the soul. Law, as Callicles understands it, does not mean anything, letting the political order void of substance.

Whenever the truth of legislation is lost, and it becomes the result of wills clashing to each other, the task of regaining the lost order becomes harder. The laws and social customs become suspicious as their interpreters, who attempt to persuade others that their goal is noble and good. Rhetoric becomes as empty as those who practice it. That was the ill of Athens diagnosed in the dialogue. In *Gorgias*, Plato shows a way to reconquer the reality lost. In order to reestablish the order in the city, the politicians need to order their soul rightly, that is, to arrange it through love toward the actual and true Good.

However, this is achieved, first, politically through persuasion. Hence, rhetoric and dialectic are proven to be inseparable, making fully clear why the title of the dialogue is *Gorgias*, and what kind of victory Socrates was pursuing. Socrates wanted to win over Gorgias and his disciples for their sake. He wanted them to be virtuous, to use their talent to educate others toward virtue, and to rule lawfully. The only way to save

¹⁸ This could mean everybody, in a complete democracy. The political system is irrelevant here.

Athens from itself is to create a ruling class capable of legislating well, enabling the rest of the citizens to become better by abiding to the law. In the end, the right political order or, equally saying, the Law is nothing more than the social manifestation of the right order of the souls of the members of the political community.

6. Conclusion

The Socratic display of arts and flatteries of body and soul was presented as the key to understand the unfolding of the dialogue and its meaning. The analysis revealed what is the *art of legislation* and how it relates to its good: the lawmaker aims, or must aim, at securing a moderate and pious social environment. This would be the first step toward a just society, and it would enable the necessary margin of freedom for its citizen to flourish; i.e., to become more virtuous. In Chapter III, the question became how the lawmaker would be able to know what piety and moderation actually are. The answer appears in the debate between Socrates and Callicles from the necessity to love the substantial good, not the empty pleasure.

Lawfulness, as the right order of one's soul, establishes itself as the answer to the question of what is the political good intended. In its turn, lawfulness has brought Law into prominence. Thus, the question on *what is Law* is addressed. The answer of such question illuminated the meaning of Socrates as the only politician of Athens. The right political order, the Law, is the good of the art of politics. Law is also the social manifestation of the right order of the soul of the members of the political community; of which Socrates became the only representative. The social ascent of people like Gorgias, which would teach rhetoric without concern for what is good and just, resulted in the loss of substantial Law in Athens. People lost contact with the common good.

The title of the dialogue is *Gorgias* because he is the anti-Socrates in the drama, the paradigm, and main enabler, of philodoxers, the lovers of opinion. They are those against whom the philosopher reacts. They are also those Socrates knows he ultimately needs to change in order to save Athens.

References

- Cairns, H., 1942. 'Plato's Theory of Law'. *Harvard Law Review*, Vol. 56, No. 3 (Nov.), pp. 359-387.
- Plato, 1937. *Eutyphro*. In: The Dialogues of Plato. 2 vol. transl. Benjamin Jowett. New York: Random House.
- , 1937. *Gorgias*. transl. Benjamin Jowett. In: The Dialogues of Plato. 2 vol. transl. Benjamin Jowett. New York: Random House.
- , 1998. *Gorgias*. transl. James H. Nicholson, Jr.. Ithaca: Cornell University Press.
- , 1937. *Phaedrus*. transl. Benjamin Jowett. In: The Dialogues of Plato. 2 vol. transl. Benjamin Jowett. New York: Random House.
- , 1937. *Republic*. transl. Benjamin Jowett. In: The Dialogues of Plato. 2 vol. transl. Benjamin Jowett. New York: Random House.
- , 1937. *Symposium*. transl. Benjamin Jowett. In: The Dialogues of Plato. 2 vol. transl. Benjamin Jowett. New York: Random House.
- , 1937. *Timaeus*. transl. Benjamin Jowett. In: The Dialogues of Plato. 2 vol. transl. Benjamin Jowett. New York: Random House.
- Rhodes, J. M., 2003. *Eros, Wisdom and Silence – Plato's erotic dialogues*. Columbia: UMP.
- Strauss, L., 1989. *An Introduction to Political Philosophy: ten essays by Leo Strauss*. ed. Hilail Gildin. Detroit: Wayne State University Press.
- Svoboda, M., 2007. 'Athens, the Unjust Student of Rhetoric: A Dramatic Historical Interpretation of Plato's 'Gorgias''. *Rhetoric Society Quarterly*, Vol. 37, No. 3 (Summer), pp. 275-305.
- Voegelin, E., 2000. *Order and History, vol. III: Plato and Aristotle*. Columbia: UMP
- , 1956. *Order and History, vol. I: Israel and Revelation*. Baton Rouge: LSU.
- , 1991. *The Nature of the Law and Other Legal Writings*. Baton Rouge: LSU.