12

CROSSING THE FUNDAMENTAL STATES OF LAW: CONTEMPORARY *AESTHETIC* APPROACHES TO *JURIDICAL* INTERPRETATION AND *JURIDICITY*[1]

Brisa Paim Duarte

Preliminary questions

If the interpretation problem has received a great deal of attention from different perspectives in contemporary juridical thinking, namely those especially focused on issues of language and meaning (whether from a scientific, analytic, and/or pragmatic, or from a more philosophical, hermeneutic, or post-hermeneutic linguistically-inspi-

[1] The narrative structure and content of this essay corresponds, with some changes, to that of the paper presented on April 27, 2017 at the First Luso-Polish Conference on Legal Theory and Methodology, at the Faculty of Law of the University of Coimbra.

red point of view), it is normally to highlight, if not as an explicit assertion, at least in the form of a presupposition, common arguments of lack of *clarity* or impossibility of *referentiality* associated to law's "immediate" (i.e. pre-given) verbal expressions (simply recognized as *texts*), mostly the ones lying at the bare surface of norms, contracts, precedents, doctrinaire categories, concepts and opinions…, in order to address such diagnosis in two basic ways, not necessarily self-exclusive:

1. as an exception that would lead to an *omission*, *defect* or *insufficiency* attributable to the moment of creation of *certain* "texts", in their proclaimed ambiguity, inconsistency, vagueness[2]…, or of *the* text, in its unremovable porosity[3], as if, at the end, it was confirmed and preserved, directly or indirectly, the fundamental basis of the mindset of modernity (by which the necessity of an isolated methodic moment of interpretation was ultimately linked to a fault in the formulation of legal precepts);
2. as a reassessment of this mindset and a reversion of *in claris non fit interpretatio/ interpretatio cessat in claris* dogma[4], and then an inherent quality of textuality in general, and, so, of law's in particular: as if more than surrendering both to polysemy and porosity as bare semantic features, this reassessment could take the whole surface of language to another level, assuming textuality itself as a device essentially grounded on an ontological problem of *reference and excess* and then linked to the (im)possibility of stablishing the discursive basis of communication and interpretation — consequently, of ethics —, in a dismissal or rupture of the referential capacity of specific texts (refusing to assert them a fixed *identity*) and in the moment of *Unentscheidbarkeit* in which the judge-

[2] See António Castanheira Neves (2003). *O Actual Problema Metodológico da Interpretação Jurídica,* vol. I, Coimbra: Coimbra Editora, 173-184.

[3] Since it has the future (future experiences) as an irremovable constitutive dimension, and since this constitutive dimension cannot be approached («objectified») in advance in order to clarify-secure the practical scope (the extension) of application-utterance of a pre-given textual expression (assumed as the determining *prius* of interpretation process), porosity announces itself as an «insuperable methodological limit» of linguistic-semantic analyses. See António Castanheira Neves, *O Actual Problema Metodológico,* 181.

[4] About the medieval origins of this dogma, its surprising survival nowadays (even after a number of important objections have been made, such as Savigny's), and the normative, semantic and linguistic inconsistencies that can be ascribed to it, see, for all, António Castanheira Neves, *O Actual Problema Metodológico,* 14-29.

ment based on texts would be entailed, a permanently contradictory, inherently falsifiable[5], and, so, interpretively open state of affairs[6], making the relation «between event and its significant reworking [...] one of suspicion and conjecture, a structure of indeterminacy which can offer only a framework of narrative possibilities rather than a clearly specifiable plot»[7]... exposing the «phantasmatic structure of legal practice»[8].

In any case, the clarity-obscurity/referential-non-referential assumptions function as bridges to orient a necessary or accidental, absolute or relative, *indeterminacy/undecidability*[9] diagnosis which

---

[5] «[F]or the apocrypha, crucially, undecidability and contradiction provide the conditions of possibility of discourse, of language, and above all, of ethics, exactly because they provide the possibility of their betrayal.». See Desmond MANDERSON (2001), "Apocryphal Jurisprudence", *Australian Journal of Legal Philosophy* 26, 27-60, 44.

[6] To be understood *neither* as a refusal to ascertain meaning, nor as an *unconstrained/unconstrainable* state (a state of «freeplay»), but as a moment of deferral, not of «hopelessness», regarding the first, a call for judgement *despite* indecision («[i]t calls for decision in the order of ethical-political responsibility. It is even its necessary condition»), and, regarding the second, as the absolute impossibility of fixing a stable, definite meaning to a given signifier-text circumstantially subjected to interpretation — of stating, in the absence of doubt, a necessary closure in interpretation processes by reference to an objective final meaning the signifier in question are claimed to be inserted in. See Jacques DERRIDA (1988). *Limited Inc.*, transl. Samuel WEBER, Illinois: Northwestern University Press, 115-116. Also, see Jacques Derrida's reading of Walter Benjamin's «*Unentscheidbarkeit aller Rechtsprobleme*» in Jacques DERRIDA (1992 [1990]). «Force of Law: The "Mystical Foundation of Authority"», in David Gray CARLSON / Drucilla CORNELL / Michel ROSENFELD, ed., *Deconstruction and the Possibility of Justice*, London: Routledge, 3-67, 50-51 (esp.); Walter BENJAMIN (2002 [1921]), "Critique of Violence [Zur Kritik der Gewalt]", in Marcus BULLOCK / Michael W. JENNINGS, ed., *Selected Writings,* vol. I, transl. Edmund Jephcott, Cambridge / London: The Belknap Press of Harvard University Press, 236-252.

[7] See Peter BROOKS (1984), «Fictions of the Wolf Man: Freud and Narrative Understanding», *Reading from the Plot — design and intention in narrative*, New York: Alfred A. Knopf, 264-285, 275.

[8] Tracing a «path of the law from the imaginary to the symbolic, from the icon to the body and from community to exile». Here in explicit paraphrase of Peter Goodrich's reference to the role performed by the Critical Legal Studies Movement in legal critique. See Peter GOODRICH (2003 [1996]). *Law in the Courts of Love - Literature and other minor jurisprudences*. London and New York: Routledge, 8.

[9] J. Derrida mobilizes the term *undecidability* (also) as a way to dismiss the bare semantic reference to «some vague "indeterminacy"», since the first always deals with strictly determined pragmatically defined options and situations: «from the point of view of semantics, but also of ethics and politics, "deconstruction" should never lead either to relativism or to any sort of indeterminism». See Jacques DERRI-

respectively touches either the texts themselves or the very nature of judgment directly, this not exactly as a moment of *formation-equilibrium* of "typical" or *centripetal* underlying *rationes decidendi,* but as the act of *decision* it ends with, an act that calls for different *rationes* and *justifications*. That diagnosis, in a way or another, ends up leading to a multiform defense of the desirable attitude to be adopted by an interpreter who plays in *ius*-methodological arena.

Regarding a number of perspectives closer to the second strand, that of undecidability, and as the result of an expansion from law's hermeneutic and semiotic analyses to other post-structuralist (anti--foundationalist) critical galaxies, the interpretation quest has been particularly relevant to those who seek to explore possible connections between juridicity and the various "macro" and "micro" subjects related to aesthetics (without dismissing here, as we shall see soon, the various meanings this word, far from been unproblematic, can circumstantially take on). In such a context, one might at least wonder: what does it mean to interpret the law — and to understand the interpretation problem in law — aesthetically?

In fact, such questions, despite of being intricate, are not necessarily equal nor equivalent, since they turn to two different main issues, one regarding a fundamental problem (touching law's normative-cultural meaning) and the other a complementary, but derivative problem (touching law's methodology), whose particular answer depends on the way the first query is responded to.

That said, more than a remark about the different forms of treatment a *textual indeterminacy* diagnosis has deserved in the realm of specific *ius*-aesthetic approaches (in the dialectics of tensions in which this diagnosis becomes entangled with that of *undecidability*), and thus a commentary on the specific ways juridical (*centripetal*) materials are thought of to be treated throughout interpretation process and the particular methodic/methodological cannons thought of to coordinate such process according to an *ius*-aesthetic outlook[10], any possible answer to those questions requires first a preliminary reflection on aesthetic interpretation itself: the conception of which differs from common understandings on the same subject, mainly because, here, interpretation can only be properly understood when the intelligibility

---

DA, *Limited Inc,* 148.

[10] Moreover, the *ius*-aesthetic non-linear treatment of an indeterminacy thesis was the subject of the sequel of this paper, the one presented on May 11, 2018 at the Second Luso-Polish Conference on Legal Theory and Methodology, at the Supreme Administrative Court of the Republic of Poland, in Warsaw.

of the universe to be interpreted is expanded to non-paradigmatic comprehensions about law's system's material limits and intentionality and the contents the same system includes. In a way that, in addition to a reflection about interpretation as the activity of constituting meaning in law's practical and dogmatic world, those answers require also a fundamental look on the aesthetic comprehensions of juridicity that give themselves meaning to such an activity. In fact, what notion(s) could be implied in an aesthetic comprehension of juridicity? What does it mean to look at the law — not simply at law*s* — aesthetically?

Not pretending to give in to the easy temptation of offering partial single answers to what are primarily *moving* issues, the aim of this essay is, instead, to address the subjects of an aesthetic interpretation of law and of an aesthetic interpretation of juridicity through the intertwining of *some* critical contemporary voices, either European or connected in their core to a strong European (both Classical *and* "postmodern") philosophical heritage, and, in doing so, to touch transversely some of the traditional tensions and boundaries between ethics, law, art and politics, objectivity and subjectivity, reality and fiction, the symbolic and the real, imagination and authority.

Setting the terms: juridical interpretation and aesthetics

Furthermore, the options announced behind the very title chosen for this essay conceal a twofold demand: first, they lead to the necessity of clarifying what is meant by *juridical* interpretation, since the adjective applied implies a previous departure from the familiar references to both *interpretação da lei/interprétation de la loi*, especially meaningful in the context of civil law systems, and *statutory interpretation*, mainly resonant in common law systems. The second demand was already introduced: it is linked to the use of *aesthetic* as an adjective specially uttered as a determinant attribute of specific contemporary legal discourses, to the point all these discourses could be reasonably agglutinated over that same quality, and so correspondingly recognized under it.

Regarding the *first* demand, and somewhat predictably, the adjective *juridical*, then claimed to mark a distinction against *legal*, clearly appeals to something *else,* and, simultaneously, implies an underlying rejection of legalistic mindset and its constitutive implications on juridical discourse and practice — and so a rejection of the multiple constraints imposed by the assumption of a traditional, narrowing type of *textualism* normally based on a fundamental normative pro-

position or statement: ultimately, the law is a sort of underlying voice or entity who manifests itself while it directly speaks, although more or less silently, through certain kinds of *authoritative texts*.

The endorsement of this normative statement entails a specific posture, since it determines not just what interpretation *already is* and what *it can possibly be* as a pre-conceived activity taking place *within* the ontological, discursive and normative constraints identified in a so-called "legal universe" (one typically commanded top-down by specific laws or statutes), but, foremost, it *locks* interpretation, by bare force of words, into a pre-given box, since the activity itself (not an ongoing process, but a routine) can only make sense as such — both in grammatical and in logical level — when the association to a pre-determined *object* is fulfilled — a "law" or "statute" and their well-known counterparts, a "norm" or a "rule".

If to be contained by more or less flexible "linguistic boxes" can be seen as something inherent to all sorts of predicates, being just a necessary feature of the qualifying acts continually played in the games of language and discourse, the boxes on the legalistic side just add more stiffness to the formula. They constrain the limits of *that* interpretation within constellations of words and sentences put together in specific steps by authorized agents who act as permanent legitimate sources, reflectively structuring in deliberate, non-arbitrary ways the textual contents they consciously created and in this way preserving their integrity. As a result, an already-there, albeit somewhat distant, meaningful cosmos is brought to the fore, one which needs to be discovered by a compromised interpreter/reader, who must fulfil the obligation to act accordingly to pre-assumed normative expectations — owning *maximum* fidelity to the *object*, the *phantom*, *the text* — «speak, God!»[11] —, and, desirably, remain attached to *reasonable* (centripetal) interpretive choices, whatever that means. The reference to *legal* interpretation already specifies in advance, in sum, its own center of gravity; the lexical, the logical, and the restricting normative cosmos it belongs to.

Even in the contexts of systems of law built in legalist traditions, the attachment between the *lawful* and *the legal* (as immediate sy-

[11] In reference to Roberto Mangabeira Unger's "Benjaminian" apparent appeal to mysticism, which was exposed by Desmond Manderson to a critical standpoint insofar as it was taken by him as a «combination of nihilistic despair and need rooted in legal romanticism». See Roberto Mangabeira Unger, *Knowledge and Politics*, New York: Free Press, 1975, 295; Desmond Manderson, "Modernism, Polarity, and the Rule of Law", *Yale Journal of Law & the Humanities* 24 (2012) 475-505, 487; Idem, "Apocryphal Jurisprudence", 33.

nonyms), and, accordingly, between the *law* and the *letter*, however, cannot be taken unproblematically, and, in the same way, the direct association between a given *text* and a necessary *message* (especially in law's field) cannot be taken easily, whether due to hermeneutic, linguistic, or (foremost) to normative reasons, as juridical thinking keeps accentuating in many ways, already summarized at large in *1* and *2* (*supra*)[12] (contemporary thinking especially, but *not* exclusively[13]).

In order to make sense of the *aesthetic* outlook on juridical interpretation to be referred, which rely on critically composed artistic *inputs* to re-read law's institutional culture and expand its limits beyond orthodoxy, it will be necessary — at least — trying to rethink and surpass that boxes. Consequently, paying attention to such a context and its implications, the word *juridical*, as an intentionally

---

[12] Regarding the relations between law and letter, text and message, in different routes that cover several conceptions of that *indeterminacy thesis*, generically linked to the trends in contemporary methodological thinking that attribute to the problem of interpretation in law, after all, a hermeneutic nature (focusing on the issues of *reading* and *comprehension* of legal texts); the *undecidability* trend; besides the relocation of the interpretation problem's core to practical-normative comprehensions centered on the issue of validly constituting normative, and not barely semantic, practical meanings in *response* to specific juridical *questions* or, simply, problematic *cases* (for instance, António Castanheira Neves' *Jurisprudentialism*). See António Castanheira Neves, *Metodologia Jurídica — Problemas Fundamentais*, Coimbra: Coimbra Editora, 2011 [1993]; Idem, "Matéria de facto — matéria de direito", in Idem, *Digesta — Escritos acerca do Direito, do Pensamento Jurídico, da sua Metodologia e Outros*, Coimbra: Coimbra Editora, 2008, vol. 3, 321-336; Idem, *O Actual Problema Metodológico da Interpretação Jurídica — i,* Coimbra: Coimbra Editora, 2003; Idem, "Jurisprudencialismo: Proposta de uma Reconstituição Crítica do Sentido do Direito", in António Sá da Silva / Nuno Morgadinho dos Santos Coelho, ed., *Teoria do direito: direito interrogado hoje - o jurisprudencialismo: uma resposta possível?: estudos em Homenagem ao Doutor António Castanheira Neves,* Salvador: Podium, Faculdade Baiana de Direito, 2012, 9-79; José Manuel Aroso Linhares, "Jurisprudencialismo: uma resposta possível em tempo(s) de pluralidade e de diferença?", 109-174.

[13] In effect, even the Enlightenment-inspired cognitive/declarative theoretical paradigm molded by traditional normativist conceptions of 19th century *(École de l'Exégèse, Begriffsjurisprudenz*) had already shown, in their anxious to contain extrapolations of pre-given law through a complex (although generally oversimplified *a posteriori*) interpretation theory (planned to be put in play in a specifically hermeneutical methodic moment/stage that was assumed as a presupposition for a posterior «merely technical» moment of *application*), a restless effort (overcame by 20th century's practical conceptions) to sustain the absolute relevance of an intra-textual universe of meaning, the normative limits of which were to be *a priori* determined by the letter of law. And, in this effort, they ended up showing also the difficulties and final impossibility of such a contention. See, for all, Fernando J. Bronze, *Lições de Introdução ao Direito*, Coimbra: Coimbra Editora, 2006, 372-376, 762-832.

deviant option, is here projected, then,

a) on the one hand, to accomplish a *specifying* and *qualifying function* (in a specialized linguistic level), as an affirmative means for emphasizing-determining not exactly the object(s) to be subjected to interpretation, but the very *activity* and *craft* interpretation stands for, focusing on the question of how it operates and what it can potentially *produce* in result, as a practical, transformative and, so, a *performative* (in opposition to a theoretical, confirmative and declarative) act[14] capable of creating realities of their own[15] (even if by «killing» the seeds of alternative realities, and, in this case, manifesting a *ius*-pathological character[16]). Besides that, it is an act that only takes place and makes sense as such in the realm of a particular culture, where it is consistently put forward by particular groups of subjects and interpreters who share a complex «non-transparent» communicative and regulative back-

---

[14] «Laws are intended to have performative effects: they are expected *to do* something» (Desmond Manderson, *Songs Without Music — Aesthetic Dimensions of Law and Justice*, California: University of California Press, 2000, 28, italics added).

[15] «Legal judgments are both statements and deeds. They both interpret the law and act on the world. A conviction and sentence at the end of a criminal trial is the outcome of the judicial act of legal interpretation. But it is also the authorisation and beginning of a variety of violent acts.» (Costas Douzinas / Ronnie Warrington, "A Well-Founded Fear of Justice": Law and Ethics in Postmodernity", *Law and Critique* 2 (1991) 115-147, 115, 115-117 esp., cit. at 115).

[16] In allusion to Robert Cover's *jurispathic* and *homicidal* comprehension of judicial interpretation (which he opposes to a constructive and integrative comprehension of *literary* — i.e. *non-legal* — *interpretation*), as an activity that would constitute a violent way of promoting «peace» (by asserting a particularly performative kind of «violence»: «[l]egal interpretation takes place in a field of pain and death»; «it [interpretation] must be capable of massing a sufficient degree of violence to deter reprisal and revenge.» / «Judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it. […] Confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest» (Robert M. Cover, "Violence and the Word", *Yale Law Journal* 95 (1986) 1601-1629, 1601, 1610, 1617; Idem (2004 [1983]), «*Nomos and* Narrative», in Martha Minow / Michael Ryan / Austin Sarat, ed., *Narrative, Violence, and the Law — the essays of Robert Cover,* Ann Arbor: The University of Michigan Press, 155). See also Carol] Greenhouse (1995). «Reading Violence», in Austin Sarat / Thomas R. Kearns, ed., *Law's Violence*, Ann Arbor: The University of Michigan Press, 105-139; Austin Sarat / Thomas R. Kearns, «Making Peace with Violence: Robert Cover on Law and Legal Theory», in *ibid.*, 211-250.

ground, or backgrounds, regarding the *nomoi* of juridical experience[17], so that, at the same time naming-qualifying an act and the type of community(ies) it belongs to or in which it is brought to life, from or instead of a moment of reading, interpretation becomes a specific ongoing *art-techné*, a progressive, instrumental, *poietic* practice played in manifold ways, even if not necessarily conventional;

b) on the other hand, to accomplish a simultaneous *heuristic encompassing function,* bringing about the comprehensive notion that the very *object* of the so-referred interpretation encompasses in its substantial core a number of different substrates, materials and contents to be *enacted* — apart from particular *laws, contracts, precedents*, and *statutes,* and from the traditional *sources of knowledge* of law given to textual recognition, other sources that can be assumed as important, even if not necessarily or not always autonomously, to the constitution of the normative criteria informing the *fundament-reasons* behind the acts of judgement concretely taken within *juridical* community*,* including non-formally authoritative, non-verbal, non-visual (and, in this way, non-paradigmatic) materials, especially those concerning symbolically constituted dimensions of historical *praxis,* subjectivity and intersubjectivity. So that the word *juridical* is meant to operate here, finally, a dynamic *naming* capacity, leading to the inclusion of "non-scripted" *performances* and elements *to be performed* in a normative universe or cosmos densified "juridically", and, consequently, under the interpretation umbrella.

The proposals to be discussed mobilize these complementary functions diffusely and interchangeably, and, although they do not necessarily disrupt the textual priority enterprise in an open fashion and with the support of consistent methodologies, overall preserving, for this matter, the *letter-acy of legalism*, their introduced framings of juridical world and interpretation bear very particular comprehensions of the nature and role of juridicity and its cultural place, practical autonomy and *modus operandi,* all implicated in intricate aesthetic notions of the nature of interpersonal relations and the propelling dynamics they can be embedded in (as we will see by exploring closer,

[17] See Robert Cover, «*Nomos* and Narrative», 98-99 (esp.); Franklin G. Snyder (1999), "Nomos, Narrative, and Adjudication: Toward a Jurisgenetic Theory of Law", *William & Mary Law Review* 40/5: 1623-1729, 1632 (esp.).

at the end, even though briefly, some related specific approaches[18]). What leads us immediately to the *second* branch of the mentioned twofold demand.

As anticipated, the use of *aesthetic* as a qualifying or specifying feature of certain contemporary juridical discourses is not properly easy. The difficulties here arise from various sources. *First*, there is the unescapable *complexity* of our present circumstance, a complexity that can also be perceived in a multiplying projection over contemporary juridical thinking, leading to complementary lexical and epistemological difficulties and also preventing, or at least putting on hold, the trace of strong conceptual and classificatory ambitions[19]. *Second*, there are historical difficulties as well. For the word *aesthetic,* and the types of contexts and connections it entails, are far from being fixed. In a way that any analytical reference to *aesthetic* as an adjective is not a solution, but, first, a problem.

As an appeal to the senses leading to a sensualist empiricism overall distant from the possibility of *true* knowledge, the immediate way of contact with and apprehension of a given object by a sensitive apparatus (a stimulus absorbed *outside logos* and *rationality*), the classical Greek reference to *aisthesis* indicates a type of generic *perception* or, simply, first impression, linked to *doxa* and its imponderability, and, in this way, not sufficiently solid and necessarily trustworthy. In fact, it is the first of the hypotheses tested and discarded by Socrates, in Plato's *Theaetetus* dialogue, as a possible *singular* answer to the fundamental philosophical question of what true knowledge *(epistēme)* really is[20].

Then, blended in Aristotle's ethics and theory of knowledge, *aisthesis* is placed as a passive faculty and «interactive» appeal to the senses that can also function as a fertile device or first *cognitive step*

---

[18] Mainly those presented by Desmond Manderson / Costas Douzinas / R. Warrington. Approaches that must be taken, for this purpose, in an analytic and non-excluding manner, and, so, only as a discursive filter traced in order to highlight the importance of the pre-methodological contributions they specifically constitute. A filter that necessarily leaves aside, conversely, other stimulating possibilities…

[19] See, for all, José Manuel Aroso Linhares. "A Representação Metanormativa do(s) Discurso(s) do Juiz: O "Testemunho" Crítico de um "Diferendo"?", *Revista Lusófona de Humanidades e Tecnologias* (2008) 101-120, 108 (especially); Idem, "Juízo ou Decisão?": Uma Interrogação Condutora no(s) Mapa(s) do Discurso Jurídico Contemporâneo", in F. J. Bronze / J. M. Linhares / M. A. Reis Marques / A. M. Gaudêncio, ed., *Juízo ou Decisão? O Problema da Realização Jurisdicional do Direito,* Instituto Jurídico da Faculdade de Direito da Universidade de Coimbra, 2016, 227-249.

[20] See Plato (2006), *Teeteto*, transl. Marcelo Boeri, Buenos Aires: Losada, 29-34; *The Continuum Companion to Plato* (2012). Gerald A. Press, ed., London: Continuum, 96-98.

toward particular objects — even though not *properly* rational, since it is seen as a faculty belonging to all animals –; a cognition that could be subjected, in given circumstances, to further inquiry by proper rational devices, whether the ones concerning practical reasoning and *phronēsis,* and then relating to things exposed to *change,* or the others belonging to theoretical reasoning and *sophia,* related to fixed objects; so, in a way, *aisthesis* is linked to the realm of Aristotle's intellectual virtues, as they are exposed in *Nicomachean Ethics* — they stand, as R. Shiner asserts, «at the other end of one single continuum which begins with *aisthēsis*»[21]. Though not leading by itself neither to *alétheia* and *episteme* nor to practical truth[22], by the means of *aisthesis* a rational being could at least open the door for a possible further knowledge of what is close to the eye.

Only in 18th century, Alexander Gottlieb Baumgarten's work, which culminates in his incomplete *Aesthetica/Ästhetik* (1750-58), would explore the reference to *aesthetics* as a specific term to deepen (and increase) the classical Greek-Aristotelean reference and name a philosophical field and gnoseological theory (an approach later developed by Immanuel Kant and others), establishing the basis of «einer [...] metaphysisch fundierten Schönheitslehre und einer Kunsttheorie»[23]: for Baumgarten, aesthetics was a kind of knowledge[24] about art *(theoria liberalium artium)* and beauty *(perfectio phaenomenon*[25]), a *scientia cognitionis sensitivae*[26].

Additionally, if for Baumgarten «the truth of art remains sensual, unconceptualized» and «inaccessible by the means of logic»[27],

---

[21] «*Aisthēsis*, as an innate interactive capacity possessed also by non-rational animals, cannot itself be a state of mind which rehearses general truths in practical contexts, even though whatever faculty does so rehearse cannot do without *aisthēsis.*» (Roger A. Shiner (1979), "*Aisthēsis*, Nous, and P*hronēsis*", *Philosophical Studies* 36: 377-387, 379, 380 — cited, 381 — cited.).

[22] About the importance of the conjugation of *aisthēsis* and *nous* (then defined as «the ability to see the universal in the particular) to *phronēsis* and the formation of practical knowledge (marking, the same time, the insufficiency of *aisthēsis* to constitute the major premise of a practical syllogism), as projected in Aristotle's *Nicomachean Ethics*, see Roger A. Shiner, "*Aisthēsis*, Nous, and P*hronēsis*", 381 (especially).

[23] Alexander Gottlieb Baumgarten (2007 [1750]), *Ästhetik [Aesthetica],* transl. Dagmar Mirbach, Hamburg: Felix Meiner, xxvii (introduction).

[24] «Baumgarten's aesthetics refers to a theory of sensibility as a gnoseological faculty, i.e. a faculty that produces a certain type of knowledge» (Kai Hammermeister (2002), *The German Aesthetic Tradition*, Cambridge — u.k. / New York: Cambridge University Press, 4).

[25] Alexander Gottlieb Baumgarten, *Ästhetik [Aesthetica],* liii (introduction).

[26] Alexander Gottlieb Baumgarten, *Ästhetik [Aesthetica],* 10 (prolegomena § 1).

[27] Kai Hammermeister, *The German Aesthetic Tradition,* 13.

Romanticism added to these conceptions and ended up attaching the idea of aesthetic experience to the *seduction* provoked by a mysterious beauty and the mysticism it increases. In the extent beauty wakens the fine senses of human beings, it can also transform (and torment) the souls, it has indeed a *sublime* and a redeeming potential, although not in itself a purely instrumental value, making it possible for the observers, for instance, when before a piece of art, to escape from the arid terrain of axiomatic logic and reason, the limitations of material world and physicality, and to connect themselves, even though briefly, to the mystic power of the immaterial, the untouchable, the unknown. Reality is an illusion and illusion is the reality to wish for. The romantic aesthetics was then attached to rupture, subversion, and suspension, to the possibility of escape from an objective, exterior world infected by the alienation of modernity (Schiller, Novalis) — a delusive «physical» world rejected by the «exiled» artist and *aisthetikos*, who lives in a «sublime», elevated «state» (see Schiller's opposition between the «physical» and the «aesthetical state»[28]), only hoping the return to a «paradise lost» far away[29].

Anyway, there were always an expected *tension*, sometimes an *opposition*, between aesthetics and reason, and, consequently, the subjects, elements/categories, and questions to be considered in the scope of each, the sublime and the logic, the temporary and the long-lasting, the instantaneous and the perennial, evanescent and solid, the particular and the universal, contingent and necessary, the malicious and the serious, the *artistic* and the *lawful*; a tension that is revisited, explored, and, somewhat, availed, if not, in certain ways, rearranged and reconciled (certainly critically reassessed) by aesthetic comprehensions of law. Which is not equal to automatically erase, revoke and surpass the same tension — on the contrary, it is to make it profitable.

---

[28] Friedrich Schiller, *Über die ästhetische Erziehung des Menschen in einer Reihe von Briefen: mit den Augustenburger Briefen,* Stuttgart: Reclam, 2013.

[29] «[…] This alienation, keenly sensed, is often experienced as exile […] The soul ardently desires to go home again, to return to its homeland, in the spiritual sense, and this nostalgia is at the heart of the Romantic attitude. What is lacking in the present existed once upon a time, in a more or less distant past. The defining characteristic of that past is its difference from the present: the past is the period in which the various modern alienations did not yet exist» (Michael Löwy / Robert Sayre (2001). *Romanticism against the Tide of Modernity*, transl. Catherine Porter, Durham / London: Duke University Press, 21-22).

Law & aesthetics — an overview

If «nothing remains untouched by the aesthetic temperament», and if «reason and aesthetics stand not in hostile counterpoint», as D. Manderson affirms, let alone the law, «the most ostensibly rational of human endeavors»[30]. The aesthetic claim carries, then, an appeal for a constitutive moment of *sensorial input*: according to Manderson, and rejecting «the ideal of an objective or trans-historical content to aesthetic experience [...,] the aesthetic speaks to our senses and not our intellect; our emotions and not our logic are engaged»[31]. Pierre Schlag, despite his refusal to «equate an aesthetics with a jurisprudence»[32] and of his metadogmatic concentration on the multiple «grids» in legal thought[33], also expresses a classical conception of *aisthesis* noting that the *aisthetikos* is not properly preoccupied with «the province of beauty and fine arts», but, instead, with «the forms, images, tropes, perceptions, and sensibilities that help shape the creation, apprehension, and even identity of human endeavors, including, most topically, law»[34].

Despite *aesthetic* has always been taken for an unstable word to be put in reference to an unstable world in general, it should be reappraised, in the context of the aesthetic micro-universes in contemporary juridical thinking, both as a *particular bridge* to *rationality* and reason (though in a special and deliberately disruptive fashion, which means rejecting, in different ways, modern rationalism and the epistemology of scientificism — a point to what we shall return soon), and, complementary, as a milestone for the singularity of the concrete and for the place of *emotivism* in perception and in value judgment — it is therefore the case of evoking, approaching, a different reason or alternative types of reasons.

An emotivism, however, that is not exactly pure intuitionism, since it somehow rejects overpowering uncontrollability: rather, it enlightens the transformative and heuristic, the integrative capacity

---

[30] Desmond Manderson, *Songs Without Music,* 24.

[31] Desmond Manderson, *Songs Without Music,* 10-11.

[32] See Pierre Schlag, "The Aesthetics of American Law", *Harvard Law Review* 115/4 (Feb., 2002) 1047-1118, 1054.

[33] «While the grid does take a prodigious effort to create, one of its great virtues for both judges and academics is that it enables microthought». See Pierre Schlag, "The Aesthetics of American Law", 1050, 1051, 1055-1070, 1058 (quoted).

[34] See Pierre Schlag, "The Aesthetics of American Law", 1050.

of accessing and uncovering the underlying determining *immaterial* (foremost the *political*, *ideological*, *axiological* and *ethical…*) basis of practical actions and decisions. In short, aesthetics is projected as a call for *sensitive rationality* toward *particulars* that allows the related perspectives to draw *from outside* a given *dry* institutional, one-dimensionally conceived, juridical system the inspiration for a symbolic atmosphere able to put the "airless" legal order and its correspondent practices to breathe *again* through a number of material stimuli and demands, these necessarily filtered by the presence of expectedly humanifying living values. What just underlies the common persistence of orthodox, "already-there", comprehensions of the «rule of law» cultural and civilizational meaning and of the social and normative constraints and limits believed to belong to a static rule of law's world[35].

Mapping aesthetics

The appeal to an aesthetic mindset and rationality cannot, nevertheless, be referred lightly. Considering the convergence between a turn to practical reasoning and a parallel avoidance of romanticism and nihilism, there is, as already suggested, a strong methodological component normally involved, which brings back the problem of juridical interpretation to the center of the stage. So, any attempt to project the possibility of juridical interpretation (as the typically performative — and in this way not simply *mimetic* or even reproductive — *enactment* of *juridical sources* — in the sense already specified —

---

[35] Negative and somehow limited and caricatural views of a humanly claustrophobic "Kafkaesque" rule of law's empire are, at this point, a common trace easily identified in critical contemporary perspectives, aesthetic ones included. According to Costas Douzinas and Adam Gearey, the rule of law means an invitation for blindness and unethical abstention, reducing justice to nothing more than a procedural device subjected to further administration: «[…] indeed the main requirement of the rule of law is that all subjective and relative values should be excluded from the operation of the legal system. In formal terms, justice is identified with the administration of justice and the requirements and guarantees of legal procedure. In substantive terms, justice loses its critical character and acts, not as a critique, but as a critical apology for the extant legal system» (Costas Douzinas / Adam Gearey (2005). *Critical Jurisprudence: The Political Philosophy of Justice,* Oxford / Portland: Hart Publishing, 27). Desmond Manderson, however, presents here a sort of deviant or antagonist voice, since he tries to *recover* the meaning of the rule of law by the means of aesthetics: «polarity and modernism suggest a way past this false dichotomy — a way of understanding the rule of law while *at the same time* embracing contingency, uncertainty, and contradiction.» (Desmond Manderson, "Modernism, Polarity, and the Rule of Law", 477).

by communities of interpreters) in a typically non juridical field such as the one of aesthetics must overcome the previous requirement of establishing substantial connections (more than tracing positive analogies) between the experiencing of law and the aesthetic experience. In a way that the relationship between «law, values, and aesthetics» can appear as «mutually constitutive»[36], instead of simply expressive, figurative or external. To do that, it will be necessary to unlace fundamental points of intertwining between the assumed aesthetic and juridical universes.

In fact, despite the inner complexity of particular *examples*, and without dismissing the epistemological-methodological obstacles specifically involved, it is possible to synthetize better, at this point, some central or structural aspects to which seems to converge the typical law & aesthetics' core, so that we can try to submit it to the diagnosis of a sort of *congregating* map:

First, there is that mentioned *practical or methodological aspect,* always emphasizing the importance of singularity for a presently plausible constitution of normativity and starting from the notion that law only becomes real (only find the proper conditions to — partially and momentarily — descend from the culturally-constructed *myth* of a blindfolded *Justitia*[37]) when it is tested against experience, a presumption that puts the problem of *judgment* at the center*, enhancing the related problems of sources and interpretation,* and not rarely introducing the discussion of specific models or images of *interpreters* and *judges*. Notwithstanding the privilege of this methodological aspect, in the possibility of *becoming* real and *visible*, law would only confirm the apparent paradox of being first an *act of imagination*[38]*,* one that, in its essential *invisibility* (or in the *non-visibility*[39] that insistently haunts it)*,* if not in the invisibility and the myth, or the «forgetting» dimension, «repressed»/«suppressed» in its own foundations[40] (the founda-

---

[36] Desmond Manderson, *Songs Without Music,* 28.

[37] About the multiple images and respective symbols historically associated to the Roman Goddess *Justitia* (until the famous blindfolded version) and their successive manifold appropriations by the myth of creation of a secular and rational legal culture, see Jacques de Ville (2011). "Mythology and the Images of Justice", *Law & Literature* 23/3: 324-364, 348-355.

[38] See Jacques de Ville, "Mythology and the Images of Justice", 354.

[39] According to Jacques de Ville's reading on Derrida's conception of invisibility/blindness as «[...] the *absolute* invisible withdrawn from sight». See Jacques de Ville, "Mythology and the Images of Justice", 355.

[40] «[W]e have not *lost* the foundations of law, we *lack* them». See Desmond Manderson, 499.

tions of its practices)[41], stands in parallel with other acts belonging to the same imaginary quality, such as works of art and literature (in effect, law is seen as «a literature which denies its literary qualities»[42], based on a massive narrative of repression).

Second, there is also an *ideological or materially densifying foundational aspect*, grounded on the presumption that the law should be synchronized with certain views of what *justice* can potentially *mean* in a substantial sense and of the means by which law's experiencing could and could not possibly approach and correspond to such meanings, not intending to *consume* them, but to make them sufficiently *closer* (which is very different of attempting to specify or conceptualize in advance what justice *can* possibly *be* in normative terms, as a pre-conceived entity, by exclusion of other pre-conceived entities). It is, in fact, this opening of a material door that specifically prevents the acceptance by important authors like Costas Douzinas of simply procedural, functional or formal conceptions of law and justice, since such perspectives presuppose the impossibility of a materially humanly-based collective encounter to be mediated by law by the means of congregating values, opting instead to merely *regulate dissent* through functional or procedural instruments. Manderson follows this lead referring to the word *justice*, in various texts, as a *verb* and not a *noun*. Accordingly, Douzinas and Adam Gearey state that justice must remain *indeterminate* in a way it cannot be the subject of any truly theoretical effort, since «injustice [the feeling of it] exceeds the theory of justice»[43].

Such comprehensions of the relations between law and justice always presuppose, then, structurally, a situation of regulative distance and normative tension between law and the regulative criteria for constituting justice, one that can be manifested either as «polarity or deconstruction»[44], or as «nested opposition», based on an intricate

[41] See Peter Goodrich, *Law in the Courts of Love,* 121 f.

[42] See Peter Goodrich, *Law in the Courts of Love,* 112.

[43] Costas Douzinas / Adam Gearey, *Critical Jurisprudence*, 30.

[44] «Polarity allows us to more clearly see that it is not only an anti-positivist theory of law, but equally, and, despite many assertions to the contrary, an anti-transcendental one.»/«polarity respects the constitutive and ineradicable fact of their opposition-an unending and productive back-and-forth movement between incommensurable principles.»/«The tension between justice as sameness and justice as difference, between law as calculation and justice as the incalculable, describes a predicament that is *incapable* of yielding to a choice, a compromise, a balance, or a synthesis.». See Desmond Manderson, "Modernism, Polarity, and The Rule of Law", 477, 491, 497.

logic of similarity and difference[45], in which these similarities and differences can only be determined in context[46]. This distance would provide the necessary gap for operating aesthetics.

In the background of such relations, it is presupposed, also, now as an intentional aspect, the assumption of positive compromises at fundamental levels of communitarian engagement, which happen to appear as entangled with a somewhat caricatural postmodern comprehension of the *juridical subject*: the "new" person before the law is not expected to be the «bare life» that humbly kneels before the «sovereignty» of a law that comes from above, as Giorgio Agamben states and Klimt illustrates in the form of a monochromatic chained naked man in his painting *Jurisprudenz*[47]*,* or the general impersonal *homo juridicus* as his was conceived under the lenses of modernity, whose main trace was his inherent *fungibility* (not just revealed in the possibility of his continual insertion in interchangeable relations with other subjects, but in the fact of carrying in his philosophical kernel an essential fungibility expressed in the dual nature of his own identity, as sovereign and subject, and, so, self-bond to State's law)[48]. This person is, by opposition, the *fractured* women and men from the present circumstance, who find in their historical, social and phenomenological conditions the concrete keys for tracing particular and irreducible *identities*, and, in these identities, elementary dimensions of *unfungibility*, claiming for different ethical-juridical fundaments and bases for *recognition.*

This view of *justice* requires, then, the resort to an ethical component grounded on proximity and singularity that *tends to* enhance *responsibility* over *rights*, mainly attending to the influences of E. Levinas and J. Derrida. But it can also lead to an increase of the role of *rights* (human rights especially) as places for positive *recognition* of subjective singularity — «link[ing] the floating and symbolic signifier to a particular signified»[49] and putting in evidence a post-modern circumstance in which

---

[45] See Jack Balkin's conception of «nested opposition» in Jack Balkin (1990). "Nested Oppositions", *The Yale Law Journal* 99: 1669-1705.

[46] See Jack Balkin (1994). "Transcendental Deconstruction, Transcendent Justice". *Michigan Law Review* 92: 1131-1186.

[47] Here in open *dialog* with the instigating analysis of the relations between the subject, law, and violence purposed by Desmond Manderson in "Klimt´s Jurisprudence — Sovereign violence and the Rule of Law*", Oxford Journal of Legal Studies* 35/3 (2015) 515–542.

[48] See Alan Supiot (2005). *Homo Juridicus — Ensaio sobre a Função Antropológica do Direito [Homo Juridicus - Essai Sur La Fonction Anthropologique Du Droit],* transl. Joana Chaves, Lisboa: Piaget, 39.

[49] See in Costas Douzinas, *The End of Human Rights — Critical Legal Thought at the Turn of the Century*, Oxford: Hart Publishing, 2000, 259.

the very «legislation» is dreamed of — fantasized? — as an autonomous instance of «desire»[50]… a desire, however, grounded on another desire more profound and close to the self, not just in psychological, but in social-political levels, that of "expanding" the comprehension of juridical subjectivity and personhood to other/alternative experiences of the living and symbolic self «[…] often considered to be deviant, abnormal or alien»[51], even though such an expansion is to be achieved by linguistically narrowing the generality of rights by the means of particularization of specific communities or groups desired to be explicitly *seen* and *named by law*, manifesting a more individually-focused background — albeit not properly individualistic and liberal, since both the liberation of individual claims and naming of individual claimants function here as presuppositions for the liberation of *communities to be, communities to come,* intentionally based on values that only can be thought of and attained collectively, such as *solidarity* and *equality*.

In both ways, i.e. whether enhancing the role of rights or of duties, this ideological or foundational core component is essentially linked to the methodological aspect and puts the *judge* — the *third* — *inside*, instead of *outside*, the conflict[52], almost as if she has topically renounced to law's condition of thirdness (tertiality — *tertialité*), both in objective and subjective levels, to be entrusted with the role of a subject herself, capable, as any adjudicator, of "compare" and "calculate", but fundamentally (*personally and intimately*, not just *institutionally*) responsible for the equation made — including for possible failures[53].

An additional formative component of this ideological material aspect refers to a *political verve,* first inspired by the contributions of critical legal scholars in the eighties/nineties, but expanded to postmodern accounts of jurisprudence, like the ones presented by *feminist critiques of law*, the greater contribution of which would lie on the "personalization" of legal texts by adding to them an underlying

---

[50] «Rights are linguistic fictions that work and recognitions of a desire that never ends.». About the particularization phenomenon in its paradoxical relation to the necessary indeterminacy of human rights, see the critique proposed by Douzinas in Costas Douzinas, *The End of Human Rights*, 259-261 (esp.).

[51] Julia J. A. Shaw (2018), "From Beethoven to Bowie: Identity Framing, Social Justice and the Sound of Law", *International Journal for the Semiotics of Law* 31: 301–324, 308.

[52] «The judge and law teachers are always involved and implicated, called upon by the other to respond to the ethical relationship by the other.» (Costas Douzinas / Adam Gearey, *Critical Jurisprudence*, 27).

[53] See Costas Douzinas / Ronnie Warrington (1994). *Justice Miscarried: Ethics and Aesthetics in Law*, New York / London: Harvester Wheatsheaf.

personal and self-transformative aspect or, according to Manderson, a «standpoint»[54]. This political enthusiasm flows into a kind of ultimate *fusion* between the experiences of politics, law, and ethics.

But a *third* core component of the aesthetic proposals obliges us to confront yet again that *critical or disruptive aspect* related to the rejection of both "traditional" and "new" forms of rationality, and, to an extent, of irrationality as well. Therefore, refusing to accept the common references in methodological thinking to alliances between *transcendence* and *objectivity*, in this way trying to overcome the risks of a blind escape from proximity, the aesthetic voices, as already anticipated, fight directly the acceptance of axiomatic postulates and deductive mechanisms of reasoning, so understood as prompt expressions of orthodox normativist formalism; but they also reject any chance to recover those echoes behind the masks of pointed contemporary «orthodoxies»[55] or «faux-normative»[56] perspectives, such as the one generically recognized in Ronald Dworkin, «who never forgets the *distinctiveness* of the legal enterprise»[57], and both his view of law as integrity and his aesthetic hypothesis.

Expressly appealing to coherence and tradition throughout his theory of *law as interpretation*[58], and so highlighting the pending adjustment of new juridical decisions both before the past history of precedents and the moral consciousness, or simply political morality, of a given community, Dworkin is seen here as a nostalgic liberal conservative fantasizing with past perfection. Indeed, Douzinas and Ronnie Warrington, D. Manderson, Robin West, and many others, openly criticize the author's quest for innerness, arguing that there can be no such thing as a moral objective political *consciousness* to

---

[54] «One of the enduring legacies of critical legal studies, to some extent, and of feminist legal theory in particular has been their emphasis on personalizing legal writing as a means of opening up issues of subjectivity and of standpoint.» (Desmond Manderson, *Songs Without Music,* 34).

[55] See Costas Douzinas / Ronnie Warrington, "A Well-Founded Fear", 115, n. 1 («orthodox jurisprudence»).

[56] See Robin West (2011), *Normative Jurisprudence: An Introduction,* Cambridge: Cambridge University Press, 189.

[57] See José Manuel Aroso Linhares. "Law in/as Literature as an Alternative Humanistic Discourse: the Unavoidable Resistance to Legal Scientific Pragmatism or The Fertile Promise of a Communitas Without Law?", in P. Mittica, ed. *ISLL Papers Special Issue. Dossier on Law and Literature. A Discussion on Purposes and Method [Proceedings of the Special WS on Law and Literature held at 24th IVR World Conference in Beijing, September 2009],* 2010, 39.

[58] See Ronald Dworkin (1982), "Law as Interpretation", *Texas Law Review* 60: 527-550.

inform the material constitution of legal *principles*, as well there is none consistent *objective* sense running through past history of juridical decisions to be shared and transmitted to the future[59]. In short, the overall conservatism detected in Dworkin's approach would arise from his insistence on hermeneutic interpretive features (submitted to these legalistic-inspired features, the "brightness" of Dworkin's «best-light» hypothesis would be just «blinding»[60]), which would lead to a frustration of truly aesthetic and transformative ambitions[61].

In this general critique of orthodoxy, then, are rejected basically any theory related to *centripetal* aspirations towards legal order that could potentially lead to the strengthening of the law we already *have* according to a *grid aesthetics*, quoting Schlag, i.e. an aesthetics consisting in «bright-line rules, absolutist approaches, and categorical definitions»[62], based on the correspondent claims of integrity, coherence and fidelity. Additionally, are rejected, also, at this point predictably, the appeal to anyhow *seemingly internally* constituted meanings of justice.

Finally, as a sort of counterpoint, it is rejected, at the same time, the peril of new forms of *centrifugal* rationalities akin to pure *pragmatism, technocracy, and economism*, as well any contemporary conception of the juridical subjectivity/intersubjectivity in which the rational, scientific, and calculating contingent aspirations towards atomized wills and interests are put ahead of the normative-aesthetic

---

[59] See Douzinas' and Robin West's critiques of Dworkin's perspective, for example, in Costas Douzinas, *The End of Human Rights*, 247 f., 328 f.; Robin West, *Normative Jurisprudence,* 5-6 (especially).

[60] Robin West, *Normative Jurisprudence,* 31.

[61] For Manderson, Dworkin fails both regarding hermeneutics and aesthetics: «there is a striking simplicity to his approach. He argues that our role when confronting a work of art is not to criticize but to make it "the best it can be," to read it as kindly as possible, and that likewise we ought to strive to interpret our legal system in the best possible light. But this misunderstands a hermeneutic approach, which, while it admittedly requires us to respect and participate in the tradition to which a work speaks, does not permit us to abandon our critical stance or to equate the "best reading" of something with seeing it in its "best light." This is sheer equivocation.» (Desmond Manderson, *Songs Without Music,* 30). More about this Dworkin critique can be read in Brisa Paim Duarte (2016), "O(s) Movimento(s) (do) Direito & Literatura no Cerco da Autorreferencialidade: Um Trajeto Polifónico e (alguns) Possíveis Mapeamentos [The Law & Literature Movement(s) Under the Siege of Self-Referentiality: a Polyphonic Path, and (Some) Possible Mappings]", *Boletim da Faculdade de Direito* 92/2: 1103-1160, 1123-1127.

[62] «For instance, the most obvious expression of the grid aesthetic is the "scientific" jurisprudence of the turn of the twentieth century (roughly I870-I920).» (Pierre Schlag, "The Aesthetics of American Law", 1051, 1053, 1055-1070).

implications of humanism[63]. In the same way, some voices, like Manderson and Douzinas, explicitly insist in refusing easy connections to relativism and nihilism, understood as manifestations of a pure romantic avoidance of compromising with trans-individuality in behalf of an even more romantic belief in transcendent inspiration and bare subjectivity, an open door to the irrationality of unnegotiable, inaccessible, and dangerous wills and values.

It is necessary to synthetize, yet, another two additional features that, essentially, complement each other, both connected to the issue of *system of law's comprehension*. The first concerns to the *problem of sources*, the second to what one could call the *imaginary dimension*.

Aesthetic comprehensions of law's sources are, as we suggested at the beginning, fundamentally based on *plurality*. Not exactly the plurality/pluralism manifested on the acceptance of the juridical value of a numerical variety of positive legal systems and formative contexts, so coexisting in the same time and space in a mutual internal normative tension that exposes, and, sometimes, reinforces, the frontiers between the official and the marginal, the institutional and the "parallel" legal orders, the legitimate and the illegitimate[64], but, diversely, the *formative* and the *performative* plurality that materially irrigates *the* system of law (in its exterior face, a pre-acquired recognizable group of official materials) with different kinds of sources came from different backgrounds, inside and outside the common field one can recognize as *the* canonic (or paradigmatic) legal system[65], plus the equally important *symbolic* plurality that nourishes the traditional sources in presence, as well other possible sources to be vindicated, with other possible senses and meanings, filtered by the sensibility (and imaginary ability) of institutionally authorized agents, such as judges, academics, and lawyers. The sacred importance traditionally

---

[63] See, for all, Manderson's argument regarding the equivocal premise of law and economics: «"Law and economics" assumes human beings to be fundamentally rational actors with economic desires. Such an impoverished understanding of human motivation and meaning explicitly eliminates the aesthetic dimension [...] law and economics is too weak a currency to offer us any purchase» (Desmond Manderson, *Songs Without Music,* 33).

[64] See Emmanuelle Bernheim (2011), «Le «pluralisme normatif»: un nouveau paradigme pour appréhender les mutations sociales et juridiques?», *Revue interdisciplinaire d'études juridiques* 67 : 1-41.

[65] See the congregating analysis proposed by Manderson regarding Douzinas' and Goodrich's contributions: «Not only poems and plays but paintings and architecture too are treated as creators of legal meaning, and this approach touches in innovative ways on the manner in which law is communicated through images, icons, and myths.» (Desmond Manderson, *Songs Without Music,* 32).

attributed to texts by Christianity, as well the banishment of idols by Protestantism, would be responsible for the institutions' secular distrust on the constitutive juridical power of cultural images and icons[66]. If, throughout legal history, the text became the easily-recognizable expression of law's approved manifestations, organization and systematicity, mainly, *but not exclusively*, in civil law systems, it was not without the institutionalized sacrifice of other richer dimensions of juridicity, or even — according to Peter Goodrich — the sacrifice of an imagistic and pictorial dimension of law which goes back to the original early-modern pre-textual experience, the complex *art of "legal" emblemata*[67].

The system here is in fact more like an open *place* or *space* that could be associated to the experience of law, a place that could be shared, and lived, by its subjects and interpreters. Since the unifying factor necessary to the very idea of systematicity is critically freed from its common positivist subordination to authoritative acts of will and power, besides the ideas of consistency, coherence, or even of any stable, static, and objective/objectifiable general shared consciousness, it depends, to an extent, of the convergence of a material understanding about the *unifying potential of an imaginary dimension* (which happens to be the final additional aspect we would like to refer).

This *imaginary dimension,* the comprehension of which is fundamental to the very understanding of sources' plurality, consists indeed in a changing driving force that *feeds* back the unsystematic system always synchronizing it with the *singularity* of the present. The constitutive link between a pluralist account of the juridical sources and the imaginary dimension contributes to affirm the ideas that law can be in any aesthetic mechanism performed and produced in "reality", such as paintings, songs and literary works[68], or in any form of cultural expression, and that the traditional sources are, ultimately, just tools historically and circumstantially projected, inside legal civilizational history and tradition, *to establish aesthetics*.

In this way, unattached from the final fundament of a simply ra-

---

[66] See Desmond Manderson, *Songs Without Music,* 32.

[67] See Peter Goodrich / Valérie Hayaert, ed. (2015), *Genealogies of Legal Vision,* London / New York: Routledge; Peter Goodrich (2017), "Imago Decidendi — On the Common Law of Images", *Brill Research Perspectives in Art and Law*, 1/1: 1-57; Idem (2013), *Legal Emblems and the Art of Law — Obiter Depicta as the Vision of Governance*. Cambridge: Cambridge University Press; *idem* (2013). "Visiocracy: On the Futures of the Fingerpost", *Critical Inquiry* 39/3: 498-531.

[68] Although law & aesthetics is not exactly intended to be simply an outsource of the law & literature movement.

tional and deliberate act of creation made by contingent wills and authorities, and so from the very idea of law as a pure message of power, the final source of juridicity, then (which should be pursued by its interpreters), inhabits a symbolic and immaterial, culturally shared *ius imaginarium*, in a way it cannot be paralyzed or even fully perceived by current discourses and languages, since the kind of imagination that responds for shaping the core of the contingent representations of law's universe is always in progress, and, so, always ahead, as a type of macro-regulative principle.

Looking closer

But, taking a closer look at specific proposals, and considering the aspects enhanced in the suggested mapping, what could be concretely implied in an aesthetic interpretation of law or in an aesthetic comprehension of adjudication process[69]? For Douzinas and Warrington, «aesthetic judgments are […] subjective and individual yet in the service of the undetermined universal»[70]. Announcing an appeal to universality grounded on the *aprioristically* assumed ethical affirmation of an absolute alterity, which always demands an absolute responsibility for the Other's personal calling, they simultaneously affirm a counterbalanced appeal to particularity and a not-purely-casuistic Aristotelian *phronēsis*, one to be grounded on that universal imperative, and so in the assumption that true justice is always *necessarily objectively intangible,* and, because of its inaccessibility, it can function as a regulative imperative that can add to positive-institutional law, through the aesthetic interpretation of its circumstantially densified contents, that desirable ethical component.

Assuming aesthetics as a sort of *aisthesis,* Manderson links it to perception, as well as to the normative density of certain emotionally or aesthetically apprehended meanings and values involved in a comprehensive view of «justice», in order to perform his methodological appeal to complexity and pluralism by the means of discursive com-

---

[69] A previous and extended version of the following commentary to the models of judgement can be read in Brisa Paim Duarte (2017). "Law's Practical Realization and the Challenges of Narration, Translation, Performance, and Imagination: A Symbolic Reassurance of "Juridical" Singularity?", *Teoria e Critica della Regolazione Sociale* (2/2017); Flora Di Donato / Paolo Heritier, ed., *Humanities and Legal Clinics. Law and Humanistic Methodology/ Humanities e Cliniche Legali. Diritto e metodologia umanistica,* Milano: Mimesis, 2018, 55-69, 63 f.

[70] See Costas Douzinas / Ronnie Warrington, *Justice Miscarried*, 182.

munication — as if people could resort to an aesthetic interpretation of reality — including law's — in order to form the basis of non-orthodox arguments about practical subjects, favoring life instead of filtering it through the pre-established constraints and possibilities already-in-place in the idiom of theory. Since aesthetics, as said, is not simply identified to pure contingency, and therefore has not a bare subjective and non-negotiable nature, the final test of practical pertinence or material adequacy of the arguments specifically put in play, for instance, in the course of a judicial controversy, would be fulfilled by submitting the arguments in question to a further dynamics of dialogical confrontation, and, so, to the constitutive dynamics of opposition. At the center of this notion lies an attempt to recover a sort of aesthetic sense to the rule of law's empire (not simply a critique and a rejection of it)[71], the meaning of which ought to be reinterpreted and reenacted under the *normative assertion of polarity*[72], which can be understood as a strong material appeal to diversity and complexity, in a way that the judge, *a priori* exposed to her own ignorance and fallibility, and counting on her fruitful pre-disposition to self-criticism, «must be willing to make the frequent discovery that he or she is a fool»[73]. This resource to fallibility or, better, *correction/corrigibility,* evokes the necessity of a humble *but hard listening* of the different voices in presence, and so the very realization of law would be improved by the means of an institutional, but disruptive, *polyphony* and the dynamics it entails, one that is favored by a particular interpretation of Mikhail Bakhtin's *heteroglossia* and its «double-voicedness»[74]: polyphony leads to contradiction and contradiction leads to the kind of disruptive, unsettling difference current law needs to absorb or at least try to achieve.

In conclusion, under such lenses, normative contents, values, and intentions, whether the ones presented in laws or statutes, dog-

[71] See footnote 34.

[72] See footnote 43.

[73] See Desmond Manderson (2012), "Between the Nihilism of the Young and the Positivism of the Old: Justice and the Novel in DH Lawrence", *Law and Humanities - ANU College of Law*, 1-23, 21; Idem (2012), "Modernism, Polarity, and The Rule of Law", 504; Idem (2010), "Judgment in Law and the Humanities", in Austin Sarat / Matthew Anderson / Cathrine O. Frank, ed., *Law and the Humanities: an introduction,* 496-516, Cambridge: Cambridge University Press, 514-516.

[74] See Mikhail Mikhailovich Bakhtin (1981). «The Discourse in the Novel», in Idem, *The Dialogic Imagination*. Austin; London: University of Texas Press, 269-434; Desmond Manderson (2012), Mikhail Bakhtin and the Field of Law and Literature. Journal of Law, Culture, and the Humanities, 8 ed.: 1-22.

matic criteria, precedents and so on, plus the very social *mirror* (the *speculum)* of a legal order, as it is continually framed, by multiple intervening voices from the present and from the past, in its physical projections (considered in its concrete objective manifestations and interferences in "reality" of people's lives) and in its imaginary potential (considered in the positively assumed densifying capacity of an incorporeal aesthetic dimension), happen to be turned into a(nother) cultural/social body of texts to be interpreted, «to be defended and transformed in the flux of their ceaseless oscillation» (says Manderson regarding «legal decisions»[75]).

To the point that it is the whole of a given juridical universe which ends up being *textualized* and *performed,* if not ultimately *dissolved* in the anxiety to be synchronized with multiple views of an inclusive, dialogic, material *justice*[76]. Stating the law as an «aesthetic enterprise»[77] requires, therefore, taking seriously the challenges posed by humbleness and fallibility, unpredictability and openness, fragmentation and pluralism, and, fundamentally, it presupposes the questioning of law's secular "myths" and authority, a departure of law's fundamental states. Regardless of our possible different views on the source and nature of law's authority and autonomy, and also of how we could critically approach the new fracturing, increasingly complex and difficult problems posed by *liquid* times, those disruptive and constructive forces are always, nonetheless, important voices to be raised and challenges to be taken.

---

[75] See Desmond Manderson, "Between the Nihilism of the Young", 20-21.

[76] «A general jurisprudence aims to bring back into the picture those other aspects of the legality of existence — aesthetic, ethical and material — which are absolutely crucial to social reproduction. By reminding us that writers and artists have legislated, while philosophers and lawyers (some celebrated, others forgotten) have spoken poetically, we suggest the possibility of new ways of thinking and living the law.» (Costas Douzinas / Adam Gearey, *Critical Jurisprudence*, 34).

[77] See Pierre Schlag, "The Aesthetics of American Law", 1049.