Mimesis, Imagination and Law

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Abstract: This paper assumes that a trial consists of a narrative that encompasses other narratives held in the Lawsuit. As such, the first question that arises is whether it is possible to transpose events into discourse, i.e., if it is possible to represent mimesically the reality in the judicial discourse. In order to this narrative process be legitimate, it needs to present narrative coherence so that it makes possible that other narratives (plaintiff’s, defendant’s, and witnesses’ ones) be understood as dialectically overcome in sentence’s narrative. Imagination plays a key role in narratives, and especially in judicial narratives, linking the events, disconnected and isolated in themselves, into a coherent, meaningful whole. This paper assumes that not only the phenomenology of trials can be better understood if one takes them at as a narrative, but also that Judge’s (and Jury’s) imagination plays a major role in building the meaning of this narrative. This perspective also rejects the traditional positivist view that court decision may be an objective description (neutral) of the facts involved in the case.

Key words: Narrative coherence, Law and Imagination, Law and Literature, Law and time, Mimesis, Narratology, Paul Ricoeur, Antoine Compagon, Trial, Evidence

INTRODUCTORY QUESTIONS

One of the most difficult problems faced by a Judge (or a Jury) in her daily routine is the problem of how to determine the truth of the facts alleged by the parties and how to transfer the events of the world, i.e., the actual state of things, into the judicial discourse, making them meaningful and consequential for Law.

Beyond the epistemological problem of how to transfer facts from the world of being (and the past events) into the world of ought (the world of Law), there is the much simpler problem, but not less distressing, of determining the state of the things that really exist (or

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2 Although these facts and their legal significance are always configured by our own conception of what Law is.
exists, the truth of the facts themselves. To determine the truth of facts means not (only) to verify whether these facts really happened, but which meaning these facts have to Law (Tamen, 2009). A person makes use of a gun and shot another one: this is a phenomenon. However, was it a murder, a self-defense, an accident or the execution of capital punishment? Its meaning to Law depends, among other issues, but essentially, on the way one connects it to the other facts.

The problem here is to know whether the state of things relevant for Law is just an addition of the past events or if it is the connection between them what gives reality and meaning to these events. In other words, the unity that composes the state of things that the Judge (or the Jury) assumes in her decision is just the evidences, which derive from the facts, which need not to be interpreted, or, on the contrary, it is attributed to these facts by some heuristic process? This, in turn, brings the following question: the facts have meaning in themselves, or, on the contrary, the meaning lies on the facts interstices, which link several events into a single, coherent story?

Obviously, this is not a simple issue. It also implies another question that is equally complex: can the facts be described in neutral terms, or does the viewer's gaze always interpret the facts? Take for instance the following description of a Bic pen: it is an object made of plastic, inside which there is a tube filled with ink and ending in a sphere that transfers the ink to its exterior by means of capillarity, and which is covered by a retractable cover. Is this a good description, i.e., a neutral description of the pen, although in any point it refers, for example, to pen's function? For even when one includes its purpose in the description, one does not describe neutrally and objectively what the pen itself is, since the words' choice in order to describe it is not neutral ever since. At most, it can enclose the features that someone considers to be relevant.

This issue raises the question of whether an impartial narrative or story is possible at all or whether, instead, description is always at the same time an exercise of (inter) subjective memory. In this case, may the narrative of the Judge (or of the Jury) be considered impartial, although it relies on the partial narratives prepared by the parties?

Furthermore, does the descriptive perspective make the facts more real? Does a good description imply that something is real? Does the description of a mermaid imply that she in fact exists? Or does her (apparent) description only camouflage, in fact, a narrative?

**MIMESIS, EVIDENTIAL PARADIGM AND LAW**

The transposition of events into discourse (literary or legal) is, actually, one of the major themes of Theory of Literature: it is the theme of mimesis. The term, used by Aristotle in *Poetics* to describe Art as an imitation of nature (Aristotle, 1995, p. 29 – *Poetics, I, 1447a ff.*), can also be translated as representation, resemblance, fiction.

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3 I'm trying in this paper not to mention the word “evidence”, since there are some dogmatic matters that concerns the legal use of this word in English. Nevertheless, evidence involves exactly the possibility of what happened to be known. This article was written from a Civil Law standpoint. Nevertheless, I strongly believe that its premises and conclusions apply also to the Common Law tradition.

4 One can assume that description is always contextual, but the attempt of Legal Positivism was, since its dawn, to include the context in the text itself.

5 This “imitation” involves three different types of action: to look to do the same, to try to do the same and to do effectively the same (Veloso, William Claudio. Aristóteles Mimético. São Paulo: Discurso Editorial, 2004 p. 174). Although the history of the term has privileged the first sense, all three are involved in the concept of mimesis.
The issue that divides literary criticism concerning mimesis is whether the world can be transposed into discourse, if it is possible to represent the world in the discourse and if such representation is "neutral" and "objective" (as for example, realists defend in literature and legal positivists defend in Law), if one can actually translate the world into words. Two positions that traditionally try to answer these questions are summarized by Compagnon:

According to Aristotelian, humanist, classical, realist, naturalist, and even Marxist tradition, literature's purpose is to represent reality, and it does this rather appropriately. According to modern tradition and literary theory, reference is an illusion, and literature speaks of nothing but literature (Compagnon, 2004, p. 82).

If mimesis is simply a transcription of facts into discourse, then it is necessary to adopt an objective concept of truth as mere adequacy between the thing and the intellect, as Thomas Aquinas did. On the other hand, if mimesis is not possible (at least not possible as a neutral transposition of life into the text), if the text and discourse cannot be somehow connected to the reality, then activity of the Judge, who prepares the sentence, can only be conceived as self-referential. Nevertheless, if the world is to be somehow connected to Law, then Law itself depends on the possibility of mimesis.

Maybe, following the footsteps of Compagnon, one can tread a different path, escaping the dualism imitation/self-referentiality:

If one can declare the truth of the referential fallacy, it is because there is a way of talking about reality and referring to something that exists, because language is not always entirely inadequate. It is not easy to eliminate reference completely, for it intervenes at the very moment it is denied, as the condition itself of the possibility of this negation (Compagnon, 2004, p. 85).

According to Compagnon, there is a characteristic of mimesis included in the limits of language that needs to be highlighted. It is the fact that mimesis is also anagnorisis, a way of (re) cognition:

close to the hero`s recognition in the plot, another recognition - or the same – intervenes, namely the reader`s discovery of the theme in the reception of the plot. The reader appropriates anagnorisis as the discovery of the work`s total form and thematic coherence. The moment of recognition is therefore, for the reader or spectator, one in which the intelligible design of the story is grasped retrospectively, in which the relation of the beginning and the end becomes manifest, precisely in which the muthos becomes dianoia, unifying form, general truth. The reader`s discovery, beyond the perception of structure, is subordinated to the reorganization of that structure in order to produce a thematic and interpretative coherence (Compagnon, 2004, p. 94).

This recognitional model, in which the events of the plot become a whole and meaningful story, is called evidential paradigm by Carlo Ginzburg and binds to what occurs in the activity of the historian, as well as in the Judge's activity: “the model of this type of knowledge, in contrast to deduction, is the art of the hunter who deciphers the narrative of the beast’s passage by the tracks it has left. This sequential recognition leads to an identification based on marginal and tenuous clues” (Compagnon, 2004, p. 97). And perhaps the idea of narration and mimesis, intrinsic to this model,

May have originated in a hunting society, relating the experience of

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6 Even though self-referential may mean just that the Judge is merely an organ of the Law to whom is assigned the duty of saying what the legal significance of a fact is.
deciphering tracks (...) The Hunter would have been the first to tell a story because he alone was able to read, in the silent, nearly imperceptible tracks left by his prey, a coherent sequence of events (Ginzburg, 1992, p. 103).

During the trial, gradually the Judge (or the Jury) links the several clues of the case making sense of the events that are presented to her with the aid of her imagination7, as looking for a hidden murder in a detective thriller. The use of this evidential paradigm, when compared to the deduction model, could bring some difficulties concerning precision and accuracy. But Ginzburg answers this objection by showing that the search for precision and accuracy is a vice acquired from the natural sciences which tends to contaminate (and to delegitimize) human sciences:

The quantitative and antianthropocentric orientation of natural sciences from Galileo on forced an unpleasant dilemma on the human sciences: either assume a lax scientific system in order to attain noteworthy results, or assume a meticulous, scientific one to achieve results of scant significance. (Ginzburg, 1992, p. 124).

In other words, human sciences, and also, if one includes it among them, Law, dissipate their specific objective of revealing the particular and the specific function of something when approaching the ideal of precision of the natural sciences.

This evidential perspective, inherent to the judicial activity, implies the need for understanding such activity as a mimetic one.

**LAW AND NARRATIVE**

That there is some kind of mimesis in Law (or at least that judicial activity is supposed to be mimetic in some extent) is a solid indication that Law could be a kind of storytelling. But of what kind?

For a long time, Western Law tradition presented a narrative structure in its theories. If one thinks about the founding myths in Law, for example, in the presentation of the Mosaic Law, or, in the beginning of Modernity, in the Theories of Social Contract, one realizes that Natural Law always took the narrative function as a meaning giver to Law. Narrative is therefore in the very origins of Law. However, if one takes into account the history of legal thinking in the last 200 years, and if one considers the evolution of Legal Positivism and its elevation to the dominant comprehensive model of legal phenomenon, one can see that the descriptive function has prevailed over the narrative function in Law, which assumed thereafter a classical theory of mimesis that conceives as not problematic the transposition of facts and events into discourse. To name only one emblematic text, Kelsen says that the function of the Science of Law can only be to describe the Law (Kelsen, 1967, p. 73)8. Because of Positivism’s influence in legal reasoning, Judges and courts do not see their practice as a narrative exercise of meaningful storytelling in reality, but as a supposedly neutral and objective exercise description of events.

What are the consequences of the allegedly neutral descriptive nature assumed by

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7 In this paper, the term “imagination” does not mean imaginary (as in “Collective Imaginary”), but instead refers to the mental faculty of representing absent objects (especially reproducing them - memory - but also producing them originally).

8 It could be objected that perhaps Kelsen, using the verb to describe (beschreiben), do not refer to the referential function of language, but only uses the term metalinguistically as a constitutive criterion of legal knowledge itself. In other words, Kelsen doesn’t try to tell what Law (and legal institutions) is, but instead what the Science of Law is. In other words, Positivism would not use language in a referential way, but instead in an autotelic and self-referential mode. Nevertheless, his theory has a great impact on how Judges conceive their practice.
modern Theory of Law and Legal Practice? To say that one describes the events in the trial is to say that she narrate a story? To answer these questions, one must understand what it means “to describe” and "to narrate". If one takes into account the distinctions drawn by Lukacs (1965), one easily realizes that there are important differences between them. The most important one is that the description is done from the point of view of a spectator, with an intention of impartiality, completeness and a taxonomic attempt to scientific precision. Description assumes that the observer is external to the plot, i.e., description assumes a separation between subject and object. Kelsen, for example, says that the Science of Law can only know the Law from an external point of view and must describe it based on its knowledge alone (1967, p 75), avoiding any subjective valuation. This separation between subject and object, occurs also in Literature as a separation between the roles of author, narrator, character and reader. However, this separation is obviously artificial, at least in Law. Take the case of the Judge. Should she be considered as an outsider or, on the contrary, as Ronald Dworkin seems to assume (1985, p. 146 ff.), as someone internal to the plot of Law? Is she narrator, reader, character or author of the plot (Galuppo, 2009)?

What kind of narrator would the Judge be? Would she be a heterodiegetic, homodiegetic or autodiegetic narrator? Diegesis is, according to Genette, "the spatial-temporal universe designated by the narrative; therefore, (...) diegetic is ‘what relates or belongs to the story’"(Genette, 1995, p. 273). The homodiegetic narrator is the one who is present in the plot that is told by herself, while heterodiegetic narrator is one who does not participate in the plot that she tells. If homodiegetic narrator becomes the main character, the narrative is called autodiegetic (Genette, 1995, p. 243 and 244).

Unlike description, narration is performed from the point of view of a participant, who falls within the plot or to whom it is meaningful, even if that participant can take various configurations, since the functions of character, narrator, author and reader are often interchangeable in narration, as occurs, for example, in Dom Casmurro, by Machado de Assis.

If the Judge make any choice while telling a story, then Law and the judicial activity make use of mimesis, or at least intend to be mimetic actions; therefore Law is not a neutral attempt to describe the reality. It is not a kind of description. It must occur in the form of a narration that recreates the facts and their meaning. And the narrator (the Judge or, in some extent, even the Jury) has the status of a homodiegetic narrator, and, not so

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9 Dom Casmurro tells the story of a man, already old and grumpy, Dom Casmurro, who tells the story of the person who he was as a younger man (called Bentinho), who tells the story of an unsuccessful love story between him and his beloved Capitu. Bentinho became along time into Casmurro, tormented by the possibility that Capitu could have betrayed him with his best friend, Escobar. The book, therefore, was written by Machado de Assis, who tells the story of Casmurro telling the story of Bentinho telling the story of the possible betrayal of Capitu. No other Brazilian work, in my opinion, expresses so clearly all this complexity of statutes of narrators and narrative levels as Dom Casmurro. It is really difficult to determine if the narrator is autodiegetic (and therefore homodiegetic) or heterodiegetic. Dom Casmurro begins the book saying: “Clearly my end was to tie the two ends of life together, and bring back youth in old age. Well, Sir, I managed neither to reconstruct what was there, nor what I had been. Everywhere, though the surface may be the same, the character is different” (Machado de Assis, 1998, p. 5). And he finishes the book talking about the woman who was loved by Bentinho in his youth and about his other love stories. “Now, why is it that none of these capricious creatures made me forget the first love of my heart? Perhaps because none had her undertow eyes, nor her sly, oblique, gypsy look. But this is not what remains of this book. What remains is to know if Capitu of Gloria Beach was already in the girl of Matacavalos, or if the latter had been changed into the former because of some intervening incident” (Machado de Assis, 1998, p. 243). The question is also up to Casmurro: was he already inside Bentinho (and, therefore, it is an autodiegetic narrative) or he had been changed into the former because of some intervening incident (and it resembles a heterodiegetic narrative)?
rarely, of an autodiegetic narrator (when, for example, the Judge discretion\textsuperscript{10} to reject a proof or an evidence, in which case she ends up taking the definitive role of narrator, interfering with the present configuration of the past that she should narrate to reconstruct the scene to decide\textsuperscript{11} at the end). Saying that the Judge is a homodiegetic (or even autodiegetic) narrator implies that she always chooses in some extent what to narrate (although the choice is limited by the Rule of the Law and guided in some measure by the parties), since there is no neutral description of the events.

In order to understand the narrative structure of judicial activity, one needs to understand the structure of the narrative itself. Ricoeur (1984, p. 52 and ff.) states that the intelligibility of the narrative assumes a threefold mimetic activity, which involves respectively prefiguration, configuration and refiguration (or reading).

Initially, there is an inherent narrative structure in life, in the existence itself. It is inherent in life and in the world (at least while lifeworld) a temporal structure that makes this world intelligible. The intelligibility of anything depends on the fact that everything is captured in a temporal structure. If events do not succeed temporally, even in a psychological time, they would not be understandable. Obviously, this does not mean that there is logical, immanent sense to the very structure of the world and life. On the contrary, the symbolic meaning is assigned by discursive reason to reality through configuration and refiguration. However, this can only be done in the temporal dimension, because it is necessary that the author’s world, the character’s world, the narrator’s world and the reader's world share some dimension so that there could be also a meaning to be shared. This is because the author's mind, the character’s mind, the narrator’s mind and the reader's mind share the same temporal structure that life and the world become understandable and subjected to narration.

Nevertheless, the prefiguration is not the only mimetical moment in the narrative. The narrative needs to be configured by the author. The author conducts a series of mediations in order to transform the succession of events in a text. In fact, the events in pre-narrative dimension, in prefiguration, are discontinuous. They are not related to one to the others in themselves. There is no relationship among them. It is a further act of the author that makes them a continuous structure, assigning a sense of connection among all of them. The transition from pre-narrative to the configuration of the narrative is an act that organizes the imagination, structuring a discourse. Reason and imagination operate mediation among the events, finding in them a unifying meaning.

\textsuperscript{10} In the Brazilian Legal System, for instance, the Code of Civil Procedure (from 1973) provides that the Judge has a discretion to choose between the evidences, pointing which she refuses to understand being “useless” or “delaying”, although she has to justify why she did it: “Art. 130. It will be up to the Judge, ex officio or upon request of a party, determine the necessary evidences to investigate the case, rejecting the useless or merely dilatory diligence.” Even more notable is the fact that the Supreme Court in the United States of America chooses which cases will be docked. One can argue that, in the USA system, for instance, there are dogmatic rules that determine when an evidence should be sustained or overruled (FRE). Nevertheless, judges must interpret if something falls into a federal rule or evidence and, although one can assume that its evaluation is only logical, all attempts to entirely controlling them in a rational way fails.

\textsuperscript{11} Although sometimes the Judge seems to act like a historian, there is a substantial difference between the activity of the Judge and the activity of the historian. The activity of the latter is, ultimately, inconclusive, always open to new meanings. In the other hand, the Judge, or at least the appellate courts, are compelled to impose a dogmatic meaning to the facts: she has to decide, putting an end to the cause. As the historian, the Judge intends to be an impartial interpreter of the question, though not infallible. But unlike the historian, in his case “the potentially unlimited circle of explanation ends relentlessly on the trial, which ultimately can only be a conviction or acquittal. It is then felt the incisiveness of the word justice.”(Ricoeur, 2007, p. 336).
However, the literary work still does not end in the narrative configuration. The third mimetic moment, which Ricoeur denominates refiguration, finally occurs. As every text is written to be read, its meaning does not finish in the creative act of the author. This accomplishes, as a continuation of the chain of signifiers and significances, the act of reading, which, in turn, is also an imaginative act. It is necessary to occur the act of reading for the fabric woven by the author to be completed, i.e., to gain a unified meaning. Somehow, the reader finishes the work, or rather; the reader gives continuity to the narrative through the merging of her horizon with the author’s horizon.

Through author’s configuration, the past time of the pre-narrative structure extends itself to the present. Through the evidence (especially witnesses and forensic evidences) the past time of events are set in the court by the plaintiff and by the defendant. Through the reader (Judges and Jury), the past time of the pre-narrative structure and of narration of the present time extend themselves in the future. Through the refiguration, the reader makes the story narrated by the author (plaintiff and defendant) her own story. The Judge and the Jury, the privileged readers of the case, integrate and dialectically overcome evidences into a narrative unit through refiguration.

As the narrative configuration follows the structure of meaning contained in the prefiguration, the work of the reader, the work of reading, must be a creative continuation and not a break with the author's work. About this refiguration, and its connection with Law, François Ost says that in it, "the reader is called to develop (...) a responsible reading - a reading that answers to the author and that answers to the text" (Ost, 2005, p. 38). Prefiguration, narrative configuration and refiguration are, mutually, conditions of intelligibility of the text: "Just as the experience (...) is waiting for narrative, so the narrative is waiting for (...) the readers "(Ost, 2005, p. 38).

Narration reveals a fundamental feature of human life: to live is to narrate stories. We all

Tell stories all the time, about us and other, both in Law and outside it. The need to tell the story of someone so it makes sense for that person and others can match, in fact, to the need of the deeper part of our nature that makes us human beings, like an animal that seeks direction (...) the story is the most basic mechanism that we have to organize our experience and claim meaning to it. (White, 1985, p. 169).

Above all, it is also the most basic mechanism through which we attribute meaning to the facts in Law.

NARRATIVE AND TRUTH

The traditional concept of truth can hardly be applied to trials and court decisions, among other reasons, because those decisions do not simply describe the order of events, but build it instead. Therefore, the idea of truth should be replaced, in the case of Law, by the idea of narrative coherence, achieved not only by coherence among discourses but, mimetically, by the coherence between discourses and facts. The Judge, in turn, should be considered a storyteller, since, by means of her narration, she homodiegetically intervenes in the story. Thus, the trial should be considered a narrative text instead of a description of the reality.

Nevertheless, Law’s stories are stories that involve multiple narrators (plaintiff and defendant, in addition to the Judge, Jury, witnesses and experts) who are, at the same time, authors and characters of the plot. It is no coincidence that Dworkin says that to properly understand what Law is, one should think of it as a chain, to which each new author (a reader, at the same time) adds a new link: Dworkin asks us to consider Law as a chain
novel. The chain novel is one in which a group of authors are joined to write a single novel, in which each of them adds a chapter to the plot. Each one should not properly interpret what the former author wrote in the previous chapter, but find a way to develop a consistent story that develops what has been written before. If it were not so, they would not write a novel: at best, they would write a treatise on the interpretation of a novel written by someone else. According to Dworkin (1985, p. 146 ff.), Law works exactly like that: each new author attaches a new link to the chain of Law. The goal for each one is to develop a story already started. Thus, the Judge should not only properly interpret what was said by the Framers and the Legislative Power on the one hand, and by the plaintiff and defendant, on the other, but should instead continue their works. Only thus can she achieve that quality that makes the enforcement of Law also fair, a quality that Dworkin calls integrity. For the righteousness required by Law demands continuity, not only between a particular decision and the general rule provided in a statute, but also between cases.

If this hypothesis is correct, then the strategy of Legal Positivism to use description as a mean able to understand Law is doomed, even while mere Science of Law. The description is only possible if it is also possible to separate, absolutely, author and characters, i.e., subject and object. However, when the Judge sees herself as continuing the work of the Framers and of the Legislative Power and the work begun by the parties in a case, this separation is no longer possible.

Perhaps it is not correct to assume that the narrative held by the Judge expresses the impartial description of the truth of the facts, but instead that it only presents a version of them, even if it is the best possible version for an actual Judge, which should be evaluated in its consistency with the other stories narrated in the case and in its ability to encompass these other narratives. As Taruffo says, the Judge is only

The final narrator, definitive, and therefore the most important within the case. At the end of the procedure, Judges face the various stories that were narrated by the witnesses and counsels, which are generally divergent or contradictory to varying degrees. The main function of the Judge is to determine which of them is the best narration of facts in relative terms, choosing a story from those already narrated, or building another original story, if authorized to do so and if none of stories presented by the parties satisfies (Taruffo, 2010, p. 65).12

Nevertheless, the structure of adversarial system and cross-examination can lead us to underrate the importance and priority of Judge’s narrative activity. Facts and events that shape the evidence presupposed by judicial decision "are dumb, and therefore it requires that, to hear them procedurally, they must be reconstructed through narration" (Calvo González, 1998, p. 10), what makes that "the act of narration and the way of doing so, the act of telling the facts to narrate them, be also part of the narration of facts" (Calvo González, 1998, p. 11). In a lawsuit, there is a dispute among many versions of the events, i.e., about their meaning. One must remember, however, that the expression "facts" is being used here in a metonymic sense. The actual facts do not exist. What exists is the interpretation of these facts (from a determined standpoint) and, accordingly, there is no ontological difference between questions of fact and questions of Law.

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12 I cannot agree, however, that this reconstruction is neutral or impartial, as Taruffo assumes, for epistemological reasons already presented. I consider, instead, that the Judge does so as a narrator, and therefore someone who plays a role in the plot (even we consider that her role should be only to report the story) at least choosing what to narrate.
To evaluate which of the versions presented by the parties is the best one, one needs to make use of the concept of narrative coherence, introduced in the Jurisprudence by MacCormick: when it is not possible to point out a simple correspondence between a proposition and the world (what, apart from epistemological problems, implicit to description, and ignored by the theory of truth as correspondence, also refers to the difficulties inherent to limits of evidence in Law), perhaps one should turn to another kind of theory of truth, conceived as coherence. MacCormick does not get to present an ultimate definition of what such narrative coherence is, but seems to assume that the criterion to evaluate something (as true or false) is its compliance (or noncompliance) with the whole (MacCormick, 1995, p. 90ff.)

Umberto Eco reminds us that, even in the case of fictions, one can say that the events are true if they express somehow that narrative coherence. As he says, Fictional statements are true within the framework of the possible world of a given story. We assume it is untrue that Hamlet lived in the actual world. But let us say we are grading the term paper of an undergraduate majoring in English Literature and we find the wretched student has written that at the end of the tragedy Hamlet marries Ophelia. I bet that any reasonable teacher would claim the student has said something untrue. The statement would be untrue in the fictional universe of Hamlet (Eco, 1995, 88).

But narrative coherence also serves to explain (at least one aspect of) what truth really is in the real world. In one does not want to make a wrong inference, consistency between the premises and the conclusion of the demonstrative argument are required. Therefore, even if one doubts the superiority of narrative coherence criterion on evaluating the correspondence between something and the discourse, one must recognize that consistency is at least a logical precondition for any true discourse.

Furthermore, narrative coherence should be understood as the ability to integrate the views of parties and witnesses in a coherent and cohesive whole. It is necessary to integrate the narratives performed by the characters in the case (plaintiff and defendant, but also, in a broader sense, witnesses), and, moreover, to integrate their differences in a plot that encompasses and at the same time rearticulates in a relatively independent way the imaginative order that connects the facts described in other narratives (Calvo González, 1998, p 14.), so the Judge becomes the true narrator of the story: one metanarrador who reports the narratives of other narrators, is after all the ultimate narrator of the whole story. Moreover, it would be exactly the narrative coherence of the Judge’s report with the other narratives that characterize Judge’s activity as impartial (not in the illusory sense of being neutral or objective, but in the sense of referring to the world as configured by the parties, although divergent in some of their reports).

In addition, it is this kind of narrative that Judges generally make in their decisions. It is still to investigate what conditions these narratives have to fulfill in order to implement a correct decision while retelling a story that is a coherent epilogue to the story of each of the parties involved.

By now, it is clear that the Judge’s narrative has, as a result, a relative independence in relation to other narratives. This does not mean that her narrative occurs independently of any other narratives that take place in the case, but only that it subsumes the other narratives, since the Judge would not be "a kind of pontiff, being able of communicating with the vero, and giving us the bridge to the land of truth over the revolt and contradictory currents of arguments of parties "(Cunha, 1998, p 49.), she is not a kind of pontiff able to tell the truth as vere dicto (verdict). In a case, the ultimate narrative is built up from other legal narratives,
told buy the parties and the witnesses.

What we have to investigate now is what allows Judges and Juries to integrate the various events narrated by the parties and the witnesses in a single coherent narrative.\(^\text{13}\)

### THE INSTERSTICES OF FACTS: IMAGINATION AND LAW

In the *Critique of Pure Reason*, Immanuel Kant showed that the synthesis of the diversity of perceived objects by the senses is made by imagination (Kant, 1996, p 39 A 79). Imagination, therefore, is not necessarily a source of error. Rather, it necessarily intervenes in every synthesis of the multiplicity of occurred events.

In his *Anthropology*, he had already conceived imagination as the "faculty of intuitions without the presence of the object" (Kant, 1991, p 71, *Anthropology from a Pragmatic Point of View*, § 28). Explaining his theory of memory in this last work, Kant connects intrinsically a specific form of imagination (not the creative imagination, called phantasia, but the evocative or reproductive imagination) saying that memory is founded "on the association of representations of past and future states of the subject with the present and, although it is not Perception, it serves to link the perceptions in time, i.e., to link what no longer is with what is not yet, through what is present, in a coherent experience" (Kant, 1991, p 91). Memory is a kind of recognition, which operates through the imagination that connect and identify different things (Ricoeur, 2005). And recognition, understood as *anagnorisis*, is, as we know, one of the goals of mimesis.

These considerations create a whole field of research in Law and Literature, which allows us to better understand what the Judges do when they narrate in order to decide, and why their activity can be identified with storytelling. The central question touches the heart of the narrative structure of the court’s decision. To deepen this issue, and to understand why Judges tell stories in their practice, we need to study the role of imagination in judicial activity.

It is in the interstices between the events narrated in the case that imagination arises. In fact, the connection between the premises of a syllogism and between those and the conclusion does not operate without the intervention of imagination, which updates the demonstrative power of reason.\(^\text{14}\) Therefore, imagination plays a quiet but key role in legal arguments and in the sentence issued by the Judge: it is imagination that connects the isolated and disconnected facts and events into a meaningful narrative.

Take, for example, three events. Event 1: A man (y) openly said that he would kill a woman (x) for some reason. Event 2: Y is seen running out of a room with a bloody knife in his hand. Event 3: X is found dead with a wound in this room, right after event 2. This last event is the *in media res* of the story: the point from which it begins to be narrated (at least to the purposes of Law), and which presupposes (and sometimes demands) previous facts (to be explained). The conclusion seems to be obvious: Y killed X. But what makes the "obvious" result is a complex mental operation, a sort of flashback performed by imagination that inserts (at least) another event imagined in the succession.

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\(^\text{13}\) It would be interesting to study the anchoring effect of the first narration made in the process by its plaintiff and the limits for setting the terms of the res judicata. Aristotle said in its *Topics* that it is difficult, for example, to perform a good definition of something, but once it was done, it is difficult to refute it (Aristotle, I, 1996, p. 209 - *Topics*, VII, 5, 23).

\(^\text{14}\) This also seems to be Aristotle’s opinion, who denies to be possible to think without imagination (for example, in the treatise *De Anima*, III, 7, 431a, 14-7), also denying that imagination is the source of the error in reasoning (for example, in the same treatise, III, 3, 427b 17-24). On this, see Veloso, Cláudio William. *Aristóteles mimético*. São Paulo: Discurso Editorial, 2005. P. 649 ss.
of events, not seem by anybody else, turning them into a story (for example, the N1 Event: Y stabbed X). The N1 event is not an event in the same sense of the others (which are perceived by the senses). Therefore, they can only be imagined. Nobody saw the author stabbing the victim. To say that the event was imagined does not mean, in any way, that it did not occur. It just reveals that Judges’ activity is less objective and descriptive than they assume, and that it necessarily involves their own subjective sphere, which intervenes necessary and stealthily through imagination.

We assume that imagination plays an important role in the decision making, if we understand decision as a kind of narrative. It is not during its rational and legal argumentative justification, but before it, that we can realize the imagination’s importance for Judges (and Juries). Every author and every narrator use imagination to connect the events, what does not mean that sentence be pure imagination.

In order to better understand it, one needs to distinguish between the so-called context of discovery, in which the Judge, as the narrator of detective thriller or the Carlo Ginzburg’s hunter, unravels the clues of what actually occurred, and the so-called context of justification, when she justifies her decision according to what Law rationally requires her. These terms, context of discovery and context of justification, were used by Reichenbach to differentiate the almost free activity of discovering or enunciating a scientific theory as opposed to the methodologically controlled activity of its demonstration, and can also be applied to Law.

Although Legal Positivism has avoided all research about the context of discovery, and although the distinction between the two contexts is problematic and relative, more and more philosophers of Law are interested in this topic (for example, Holocher, 2010 and Atienza, 2000). It is obvious that imagination is linked to the context of discovery presupposed by the rationality of the context of justification. Notwithstanding, someone could objected that the use of reasoning is opposed to imagination, and, therefore, that reason does not presuppose imagination. However, Nozick observes, "someone might insist that rationality is merely to carry out the best choice among the alternatives given (... but) it seems to be a reduction" (Nozick, 1995, p. 173). For if the reason chooses between alternatives, what but imagination provides the alternatives?

This leads to the distinction between explanatory reasoning and justifying reasoning. As Atienza says,

To say that the Judge made (one ...) decision due to his strong religious beliefs means to enunciate an explanatory reason; to say that the Judge's decision was based on a particular interpretation of Article 15 of the Constitution means to state a justifying reason. Generally, the courts or administrative bodies do not need to explain their decisions: what they need to do is justify them (Atienza, 2000, p 22.).

The distinction between both kinds of reason was definitely established by Carlos Santiago Nino:

The explanatory reasons identify themselves with motives. They consist of mental states that are causal antecedents of certain actions. The central event of explanatory reason or motive is given by a combination of beliefs and desires (...). The justifying or objective reasons are not useful to understand why someone performed an action or possibly to predict the performance of an action, but to evaluate it in order to determine whether it was good or bad from different points of view (Santiago Nino, 2012: 126).

The distinction between the context of discovery and context of justification reproduces, to some extent, the distinction between explaining and justifying. In addition, this
distinction takes over another one, recalled by Palombella, between deciding the cause and justifying the sentence (Palombella, 1998). Imagination operates the connection between events in terms of *explanatory reasons* and helps to provide a decision, but not in terms of justifying reasons.

The fact that Theory of Law is primarily concerned with the justifying reasons does not mean that one cannot build a theory of explanatory reasons, in which one studies the mental process by which the Judge gets to decide, and in particular the role of imagination in this process. This, however, does not mean that the Judge explicitly reveals in her sentence the role played by imagination in her decision. Only after the Judge had mentally decided the case by means of a connection, in one hand, between the facts, what, as we have seen, occurs through imagination, and, in the other hand, between these facts and the Law, she passes from the context of the discovery to the context of justification, in which explanatory reasons are replaced by justifying reasons.

However, it would be a mistake to assert that imagination simply replaces the truth, i.e., that because one has no direct access to facts, she replaces them by imagination. Rather, imagination does not replace truth: it explains instead what one understands as true. As Posner has already shown, a narrative can be true or false, in the sense of that its discourse matches (or does not) the facts in the world, although a fiction is necessarily always false. But not every narrative is a fiction. Biographies, for example, are not. (Posner, 1998, p. and 344 ff.)

To assert the falseness of the whole narrative because it uses imagination would be falling into the trap of theories that see mimesis as pure self-referentiality. On the contrary, a consistent theory of mimesis requires one to consider that imagination is a part of truth. Only then can the Judge’s and the Jury’s act of deciding a case be a *vere dicto* (verdict), expressing the truth.

The consistency of judicial discourses should take place, not only from an internal point of view, at the level of discourse, but should also refer externally, on some extent, to the world. In other words, one cannot eliminate the mimesis in Law, yet one needs to overcome the idea of a pure and simple transposition of facts into the discourse, in a descriptive way.

Judges’ and Juries’ activity depends on the possibility of mimesis, which implies that there may be an analogy between the world of being and the one of ought (Kaufmann, 1976), between the facts and legal discourses, including that created by the Judge in court. And this, in turn, depends mainly on imagination. As Borges says in Pierre Menard, *Author of The Quixote*, ”Truth (...) is not what happened; it is what we think that happened.”

**REFERENCES**


15 This raises another question, which cannot be answered within the limits of this paper: if narrative coherence is present in both pure fiction as in nonfictional text, how to distinguish them? Umberto Eco also formulates this question in the final pages of *Six Walks in the Fictional Woods* (1995).


