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THE CLAIM FOR «CONSONANCE» BETWEEN PRINCIPLES AND PROBLEM-SOLVING PRACTICES: THE CHALLENGE OF PLURALITY AND THE INDISPENSABLE MEDIATION OF *JURISTENRECHT*

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> «Are these principles *valid* despite *value pluralism* in modern society?»
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> [A. Peczenik, *Scientia Juris. Legal Doctrine as Knowledge of Law and as a Source of Law* (vol. 4 of Pattaro, ed., *A Treatise of Legal Philosophy and General Jurisprudence*), Dordrecht: Springer, 2007, 38]

Is it possible to experience principles, in association with their juridically relevant practices and discourses (i.e. practices and discourses which explicitly or implicitly assume a claim to juridical relevance), as

an axiological (not only regulative but also constitutive) *context* and simultaneously and inextricably as a normative *correlate* (inferred from the practices themselves)? This is the key question I would like to explore here, less in order to defend or impose a single answer than to highlight the multiple dimensions involved in its *Erfragte.*

The knotty problem here is undoubtedly the practical circularity which, as an authentic experience of constitutive historicity, interchanges and overlaps the tasks-roles of guiding and guide-following, specifying and transforming, fixing and developing, all involving *on the one hand* the governing normative context offered by principles and *on the other hand* the determining dynamics imposed by problem-solving practices —here as the *novum* introduced by principled realization, i.e. by the practices which follow those principles (whilst they also follow them). The intelligibility of this circularity depends, in fact, on an ensemble of distinct (heterogeneous) elements whose congruence is neither evident nor a-problematical, and their potential to combine therefore demands immediate (albeit very brief) clarification.

The main cluster of elements on which we should focus our attention originates directly from a very specific claim, namely the one which, following Castanheira Neves' *jurisprudentialism*, conceives of principles as *foundational warrants* and incorporated or «objectified» *jus*[1] (Hart would say «parts of the law itself»[2]), whilst simultaneously reflecting on *communitarian validity* and *normative incorporation* (and their methodological implications) as decisive (*necessary*) performative components (or resources) of a certain Law and the *form of life* it institutionalizes (and/or *aspires* to institutionalize). These are

[1] This treatment of principles as *jus* (as specifically juridical warrants which are also autonomous *law in force*) rejects both the concept of principles *as ratio* and *as intentio.* Whereas principles as *ratio* correspond to the normativistic *general principles of law* obtained through a logical operation of *concentration* (as a process of « quantitative simplification», if not as a discovery-*Auffindung* of a plausible logical *centre*), principles as *intentio* correspond to the experience of principles conceived of as pre-juridical moral or communitarian regulative intentions, which become constitutively binding only through authoritarian (statutory or judicial) decisions. I have developed this counterpoint and its different origins and legacies in "Na 'coroa de fumo' da teoria dos princípios: poderá um tratamento dos princípios como normas servir-nos de guia?", in F. Alves Correia / Jónatas Machado / João Loureiro, ed., *Estudos em Homenagem ao Prof. Doutor José Joaquim Gomes Canotilho*, vol. iii, *Direitos e interconstitucionalidade: entre dignidade e cosmopolitismo*, Coimbra: Coimbra Editora, 2012, 395 f.

[2] « For Dworkin, the principles thus identified are not only parts of a theory of the law but are also implicit parts of the law itself.» (Hart, *The Concept of Law,* 2nd ed. with Postscript, Oxford: Clarendon Press, 1994, 241)

components which are significantly *inscribed* in the *possibilities* of the Western text and whose open and radical (metadogmatic) discussion (treating them as practical-cultural artefacts and, as such, questioning their plausible contemporary endurance or congruence) seems absolutely indispensable today as we reflect on European identity, its limits and crises (if not its irreversible decadence)[3].

The simple allusion to the different claims associated with this *normative incorporation* and the growing attention it reflexively deserves makes it clear that preserving this ensemble (with its reciprocal tensions) in a *limit*-situation such as our own is, in fact, a far from easy task, since these tensions (and the corresponding search for plausible, balanced solutions) generate frequent *borderline issues* (disputed in different *idioms*). In highlighting the formulations which accentuate the tensions involved, this essay endeavours precisely to allude (only allude) to some of these issues and to the corresponding answers (all of them as explicit exercises in *demarcation*). This is immediately the case with the reference to the performative indispensability of principles as *jus*, allowing *on one hand* a transparent acknowledgment of the connection between principles and values, as well as a confirmation of the dogmatic intelligibility of their incorporation within the legal system (as a praxis of stabilization of an autonomous *normans*), whilst on the other hand simultaneously demanding meta-dogmatic (*internal*) reflection which treats the practical world of law (with the corresponding artefacts) as a culturally-civilizationally moulded (and, as such, *non-necessary* and *non-universal*) answer to the *universal* (anthropologically *necessary*) problem of the institutionalization of a *social order*[4]. Deliberately insisting on these formulations, with their troubling interweaving of *necessity* and *contingence*, involves more than drawing a pseudo paradox (and fuelling the corresponding *de-paradoxisation* exercise): it primarily involves providing a transparent reflexive (demarcation) resource whose potential will prove resilient precisely in considering the idiom of *foundational conventionalism*

[3] See Linhares, "Law's Cultural Project and the Claim to Universality or the Equivocalities of a Familiar Debate", *International Journal for the Semiotics of Law* 25/4 (2012) 489 f.

[4] This is one of the most fruitful and challenging lessons of Castanheira Neves's philosophy of law. See, in particular, two key essays: Castanheira Neves, "Coordenadas de uma reflexão sobre o problema universal do direito ou as condições da emergência do direito como direito" and "O problema da universalidade do direito ou o direito hoje, na diferença e no encontro humano-dialogante das culturas", both now included in Castanheira Neves, *Digesta*, 3rd vol., Coimbra: Coimbra Editora, 2008, 9 f., 101 f.

in general and *inclusive positivism* in particular, i.e. in reconstituting the neighbouring relations which, given the issue of incorporation of principles, this idiom unavoidably favours[5]. In fact, defending a *conventionalist* (albeit *robust*) incorporation of principles always means admitting a contingent possibility, corroborated by certain legal orders (the orders in which following, determining and fixing the Rule of Recognition validate the effective inclusion of moral tests as plausible criteria for legal validity) but, equally importantly. also involves pursuing Hart's legacy of a *general philosophical enquiry* or a *general theory of law* which (from its *moderate external point of view*)[6] preserves an a-cultural understanding of the concept and /or nature of Law[7], whilst a-problematically presupposing the universality of the features which constitute relevant legal *sociability* (at least within the mature connecting framework which the full institutionalization of primary and secondary rules demands[8], if not directly within the appeal for a *non normative* Rule of Recognition[9]). In contrast, highlighting principles as *jus* means defending the *necessary* experience of incorporation, whilst simultaneously acknowledging the cultural-

[5] See Linhares, "In Defense of a Non-Positivist Separation Thesis Between Law and Morality", *Rechtsphilosophie*. *Zeitschrift für Grundlagen des Rechts,* Beck, 4 (2016) 425-443.

[6] The text quotes formulations by Postema (in his eloquent reconstitution of «Hart's Hermeneutics»): Gerald Postema, *Legal Philosophy in the Twentieth Century: The Common Law World* (vol. 11 of Pattaro, ed., *A Treatise of Legal Philosophy and General Jurisprudence*), Dordrecht/ Heidelberg: Springer, 2011, 285 f. (7.3. «Social Rules»).

[7] The *nature/concept* counterpoint is presupposed here in the sense developed by Raz in the first three essays included in *Between Authority and Interpretation. On the Theory of Law and Practical Reason,* Oxford: Oxford University Press, 2009, 17-125 [«Can There be a Theory of Law?», «Two Views of the Nature of the Theory of Law…» and «On the Nature of Law»]. «The general theory of law is universal for it consists of claims about the nature of all law, and of all legal systems, and about the nature of adjudication, legislation, and legal reasoning, wherever they may be, and wherever they might be…» (Joseph Raz, *Between Authority and Interpretation*, 91).

[8] «[In] a mature legal system, we have a system of rules which includes a rule of recognition [,] so that the status of a rule as a member of the system now depends on whether it satisfies certain criteria provided by the rule of recognition…» (Hart, *The Concept of Law*, 110).

[9] « In this respect, however, as in others a rule of recognition is unlike other rules of the system. The assertion that it exists can only be an external statement of fact. For whereas a subordinate rule of a system may be valid and in that sense 'exist' even if it is generally disregarded, the rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact.» (Hart, *The Concept of Law*, 110).

civilizational identity (*non-universality*) of the *way of life* in which this *necessity* is considered. As a matter of fact, the necessity in question only gains full meaning (a very specific, relative meaning!) when it is explicitly made compatible not only with the experience of the constitutive historicity of principles (as open human acquisitions) but also, and without paradox, with the defence of the *non-necessary* (fully cultural) identity of law itself. The *necessity* in question —considering principles as *practical commitments* and as normative expressions of a project-*proicere*[10]— is, in fact, exclusively related to a certain response to the problem of *common life* — i.e. to a *certain* practice of law which, as a specific way of creating communitarian meanings (following a persistent, albeit permanently reinvented, *claim to autonomy*), is significantly *inscribed* in the deployment of what may be called the *Idea of Europe.* It is as if, in this clash of idioms, we could draw a counterpoint between two unmistakably contrary movements and their unreconcilable accentuations of *necessity* and *possibility*.

Precisely on account of the borderline that is explored (and the alternative idioms laying claim to it), this clarification proves particularly productive when considering the main challenge of our cluster, namely the one which, as we have seen, mobilizes two contrary irreducible constitutive forces, the first irradiating from the axiologically relevant presupposition of principles (and their integrating dogmatic *normans*), the second stemming from the irreducible problematic *novum* introduced by practices (and their plural contexts of stabilization and realization). Unsurprisingly, like many other challenges concerning practical reasoning, this has to do with the

[10] This *proïcere* is neither a *plan* in the onto-teleological pre-modern sense nor a *programme* in terms of its modern finalistic intelligibility, but a historically constitutive (circularly reinvented) *form of life* (presupposing the treatment of *communitas*, in its juridical relevance, as a *self-transcendentally* conceived *artefactus*). In the words of Heidegger, referring to this pre-modern sense, «[d]as Entwerfen hat nichts zu tun mit einem Sichverhalten zu einem ausgedachten Plan, gemäß dem das Dasein sein einrichtet, sondern als Dasein hat es sich je schon entworfen und ist, solange es ist, entwerfend» [Martin Heidegger, *Sein und Zeit*, 18th ed., Tübingen: Max Niemeyer Verlag, 2001, 145]. The knotty point lies in the formulation *projecting* (explicitly borrowed from Heidegger's understanding of *constitutive historicity*) or, alternatively, in the way the signifier *projecting* (mobilizing explicit signifiers justified by an experience of *Geworfenheit-thrownness*) identifies the development of a practical-cultural autonomous *circle* as a simultaneous experience of *throwing* and *being thrown (in his own throw)*, with the coherent refusal of *necessity* and *contingence* [Heidegger, *Sein und Zeit*, 142-148, 310-316]. This means considering *projecting* as a permanent constitutive tension between *continuity* and *change* — involving a communitarian *self-availability* which is simultaneously and inextricably *self-transcendentality.*

permanent quest for a specific point of equilibrium, precisely the one which (as a kind of successful, even though always momentary, situated transcendence) recreates a productive dialectical intertwinement between the poles and the contexts or horizons involved (if not an authentic *point of reversibility* between the corresponding terms)[11]. It is only when this intertwinement occurs that it seems possible to invoke a full «practical consonance» of *content* between the intentions of performance ascribed to principles (considered as foundational warrants and practical commitments) and the acts of adjudication which follow (perform) these intentions, reinventing them in each case[12]. Treating principles methodologically as *foundational warrants* not only means breaking radically with the *continuum* imposed by the category *norm* (even when this continuum, justifying the *norms-rules/ norms-principles* binomial, explores a *qualitative* differentiation)[13], but also freeing them from the impact of an *indetermination thesis* or an *indetermination generating theory*[14]. This is because we renounce any abstract pre-determination of their normative content — arguing that principles provide decisive (argumentative) warrants «*to take up a position* before concrete situations» or situations which are to be determined concretely (surprisingly, the words are by Zagrebelski![15]) — whilst simultaneously acknowledging that precisely due to the axiological judgement this involves (or the *axiological acquisition* that this judgement should reflect), this *taking up of a position* first and foremost claims a *discourse of limits* (the normative limits of *validity*[16]) whose *negative productive impact* Drucilla Cornell (no

[11] The formulation *point of reversibility* explicitly involves Merleau-Ponty's heritage: see, for example, Glenn A. Mazis, "Merleau-Ponty and the 'Backward Flow' of Time. The reversibility of Temporality and the Temporality of Reversibility», in Thomas W. Busch / Shaun Gallagher, ed., *Merleau-Ponty, Hermeneutics, and Postmodernism,* Albany: State University of New York, 1992, 53 f.

[12] Castanheira Neves, *Metodologia Jurídica. Problemas fundamentais*, Coimbra: Coimbra Editora, 1993, 203-204.

[13] See Linhares, *O binómio* casos fáceis/casos difíceis *e a categoria de inteligibilidade sistema jurídico. Um contraponto indispensável no* mapa *do discurso jurídico contemporâneo?*, Coimbra: Imprensa da Universidade, 2017, 92-112, 171 f.

[14] See Linhares, *O binómio* casos fáceis/casos difíceis, 118-142.

[15] The words are by Zagrebelski, but also by Castanheira Neves (who explicitly quotes the former): «Se as normas são auto-suficientes no critério abstracto que hipoteticamente prescrevem, os princípios são fundamentos "para *tomar* posição perante situações, *a priori* indeterminadas, que venham a determinar-se concretamente" (Zagrebelski)…» (Castanheira Neves, *O problema actual do direito. Um curso de filosofia do direito*, 3rd version, Coimbra-Lisboa: policop., 1997, 59-60).

[16] Castanheira Neves, *O instituto dos «Assentos» e a função jurídica dos Supremos Tribunais,* Coimbra: Coimbra Editora, 1983, 197 f.; Idem, "Fontes do direito",

less surprisingly!) helps us to understand by eloquently describing principles as «lights which come from the lighthouse», essentially guiding us whilst preventing us «from going in the wrong direction».[17] All this culminates in the acknowledgement that «the true meaning of principles is only determinable in concrete» (Castanheira Neves[18]), which means arguing that the normative integrity of the *meaning* (and *sense*) of principles demands a well-defined experience which is simultaneously constitution, manifestation and performance (a performance which, in concretizing experiment, always involves a more or less explicit transformation) — and is entirely different from experiences which correspond to statutory, judicial and doctrinal *criteria* (or the corresponding experiences of autonomisation-stabilization). In contrast with principles, all these *criteria* provide plausible *problem-answer schemes* (which is why they should be methodologically treated as *criteria*![19]) and, as such, anticipate possible problems and situations, albeit in different ways (respectively through abstract typification-prevision and programming, concrete exemplification or reflexive reconstitution). Despite this clarification (which frees the jurisprudence of principles from the impact of an *indetermination thesis*), the question nevertheless remains more implacable than ever: is the said *point of equilibrium* (or *reversibility*) attainable when the *contexts of meaning* and *contexts of realization* which frame the practices of adjudication (whilst simultaneously interfering with the practices of *systemic stabilization* which they presuppose) appear increasingly *wounded* by plurality and fragmentation? Do these signs of disintegration not favour, on one hand, the closeness and dogmatic violence of principles, whilst on the other hand condemning concreteness to uncommunicable singularity? In fact, we should not forget that the pathos of these questions (and their critical reflectiveness, more or less naturally inscribed in the routines of a practice) appears significantly accentuated, and we should also note another decisive element in our initial cluster which reminds us

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Digesta, 2nd vol., Coimbra: Coimbra Editora, 1995, 75-79; Fernando José Bronze, *Lições de Introdução ao Direito,* 2nd ed., Coimbra: Coimbra Editora, 2006, 724-743.

[17] Drucilla Cornell, *The philosophy of the limit*, London: Routledge, 1992, 106.

[18] «Em síntese: as normas legais esperam a sua aplicação e em último termo visam-na, mas podem compreender-se e determinar-se sem ela, ou seja, na sua subsistência abstracta; não assim os princípios, já que o seu verdadeiro sentido não é determinável em abstracto, e só em concreto, porque só em concreto logram a sua determinação, e se lhes pode atingir o seu autêntico relevo...» (Castanheira Neves, *O problema actual do direito*, 59-60).

[19] See infra, note 20.

that doubting the integrating unitary intelligibility of principles (and their axiological acquisitions) ultimately means doubting the validity and effectiveness of the comparability (if not *tertialité*) offered by the *form of life* which distinguishes Law — which also wounds one of the major components of our *European* heritage and paves the way for alternative promises of integration (or the questions that make this an option).

We could resist this deconstruction by replying that a tentative response (a positive one, confirming our specific *form of life* capacity to endure) has less to do with the *practices of realization* themselves (notwithstanding their unrenounceable permanently constitutive dynamic) than with the *practices of stabilization* which, in assimilating but also conditioning (limiting) this dynamic (and its capacity to transform) at different paces (or movements), construct the different layers of the legal system, providing the presupposed *validity* (or at least the pursuit of a *principled response*[20]) with a stabilizing objectifying role. This perspective would enable us to discover plausible points of intertwinement between the poles, not only avoiding (or overcoming) the effect of fragmentation (and incommunicability) which the heterogeneity of the contexts imposes on adjudication, but also endowing the latter with the intelligibility of an authentic *judgement* (performing an effective *system/problem* dialectic). Is this a plausible answer? I would say that it is, even though great care must be taken to establish its meaning. This would involve reconstituting the paths (if not levels or platforms) through which, at a time when plurality and difference (and their effective celebration) impose a serious challenge, the pursuit of a claim of consonance between the principles and practices (of adjudication) remains resilient. The tentative sequence which follows briefly explores these paths (and the correlative institutional situations), whilst considering different practices associated with stabilization and the corresponding *strata*, which certainly means exploring (if only allusively) the possibilities of a *multilayered legal system*, as well as claiming that a reflexive (methodological) experience is not only capable, on the one hand, of distinguishing between *foundational warrants* and *criteria*[21]

[20] In order to reconstitute a counterpoint between *the pursuit of a principled response* and *going along with things as they are*, see Stanley Fish, *The Trouble with Principle,* Cambridge — Mass.: Harvard University Press, 211 f., 215-216 (in dialogue with Greenwald).

[21] A foundational warrant (*fundamento*) is a *rationale* which gives specific intelligibility or an autonomous sense to a certain field or domain of practice (mainly identifying the commitments that constitute this field): the *rationale* justifies a plau-

— which, as we have just seen, means disrupting the traditional continuum between *principles* and *norms*! — but also of identifying the presumptions of *bindingness* or normative force which, treated as (explicit or implicit) rebuttable presumptions, characterize the different kinds of *criteria* (statutory, dogmatic or jurisdictional)[22].

1. Let us begin with statutory practices (including the constitutional ones) and their specific way of contingently and conventionally programming integrated contexts. Nobody will contest the importance of this first path and the unmistakable constitutive identity of the permitted authoritarian and prescriptive specification, whilst consecrating and transforming meanings and performative models attributable to principles. Acknowledging this relevance and specificity is one thing: however, defending the exclusivity of the corresponding institutionalization — as a means of giving principles juridical force, in a kind of globalized, necessary (in its narrowest sense) *incorporation by enactment*, if not replacement of *first-order reasons* by *second-order ones*[23] — is another matter. Sustaining the first argument undoubtedly means admitting that it is possible (albeit not necessary) that some specific issues created by the explosion of multiculturalism

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sible conclusion, even though it does not propose a solution or a type of solution (i.e. it does not free us from the discursive effort which is indispensable to reaching the solution). The rule or criterion is an available («technical») device or apparatus which can be immediately mobilized («convened») to resolve a given problem and (or) provides a plausible scheme for finding the corresponding solution (albeit requiring a discursive effort in concretization or realization). The normative principles (extended by some doctrinal models that constitutively specify and reinvent those principles) should be methodologically treated as foundational warrants or rationales. Statutes, judge-made law and all the other dogmatic models are (or should be assumed as) *criteria*.

[22] With principles (as warrants) benefitting from a presumption of *communitarian validity*, statutes (as criteria) from a presumption of *political-constitutional pedigree* or *authority-potestas*, legal dogmatic models (as warrants or criteria) from a presumption of *rationality* or *rational conclusiveness* and, last but not least, precedents-*exempla* (as criteria) from a singularly contextualized presumption of *correctness (justeza)*. See Castanheira Neves, *Metodologia jurídica*, 154 f.; Fernando José Bronze, *Lições de Introdução ao Direito*, 627 f.; and Aroso Linhares, "Validade comunitária e contextos de realização. Anotações em espelho sobre a concepção jurisprudencialista do sistema", *Revista da Faculdade de Direito da Universidade Lusófona do Porto* 1 (2012) 58 f. (also at <http://revistas.ulusofona.pt/index.php/rfdulp/article/view/2966>).

[23] These are formulations which, thanks to Shapiro and Raz respectively, have strong affinities with *exclusive legal positivism*: see, for example Postema, *Legal Philosophy in the Twentieth Century: The Common Law World*, 363 f., 463.

and globalizing *deterritorialization* (Appadurai) — or even simply by the erosion of values and the improbability of consensus[24] — may not find an alternative unitary assimilation without a basic statutory democratic decision (and the distinction between *lawfulness* and *unlawfulness* that this decision conventionally prescribes)[25]. In contrast, sustaining the second argument involves arguing that a juridically relevant integrating function ascribed to principles (as well as the *opening* and *stabilizing* of institutional situations demanding a consonance of content between principles and adjudication) depends *necessarily* on prescriptive, authoritarian, programmed solutions. In treating this conclusion of *exclusivity* as a corollary to a pre-determined a-problematic *conventionalism* (Marmor) or to an explicit *pedigree* or *pre-emption thesis* (Raz), if not a global attitude of *ethical* or *normative positivism* (Campbell), whilst also invoking the political-cultural acquisitions of *democratic constitutionalism* associated either with the pursuit of a post-conventional *discursive project* (Habermas, Alexy) or the celebration of a «satisfactory form of life» (MacCormick)[26], the warrants which sustain this claim for *necessity* may be significantly diversified. There are, however, good reasons to refute it here and to uphold an unequivocal claim for *possibility* (and therefore also a claim for *incompleteness* or *openness* necessarily referring to other contexts of *stabilization* or *realization*). Is it because the *backing* of this argument[27], whilst radicalized (as an ensemble of *statements of fact* composing a diagnosis of heterogeneity and fragmentation), has a kind of self-destructive potential? I would argue that it is not only on account of this, even though we should not forget that the coherent development of the corresponding diagnosis presupposes that we seriously (if not exclusively) consider a *societas project* which, assuming the basic equivalence and commensurability of all the manifested goals, treats them as *preference organizing perspectives*, demanding, as

[24] Some specifications of the principle of equality (namely those which institutionalise same-sex marriage) certainly correspond to this condition of *improbable consensus*.

[25] Concerning this juridical *integrating function (função jurídica de integração)* which only statutory law is able to pursue, see Castanheira Neves, "Fontes do direito", 73-74.

[26] Whereas the previous *labels* dispense with any specific identification, it is perhaps relevant to identify the final one: MacCormick, *Rhetoric and the Rule of Law*, Oxford: Oxford University Press, 2005, 193.

[27] *Backing* in the rigorous sense which Toulmin has taught us to explore: St. Toulmin, *The Uses of Argument* (1958), Cambridge: Cambridge University Press, 1983, 103-107 («The Pattern of an Argument: Backing our Warrants»).

such, the exclusive answer of hierarchizing decisions and the social-political artefact that collectively legitimizes those decisions which, in turn, means renouncing the possibility of a constitutive dualism between *subjective purposes* and *human goods* and between *goals* and *values*, with the consequent suppression of the borders separating *principles* and *policies* (certainly for the benefit of these *policies* and their *final-rational strategic intelligibility*). I repeat, it is not only (or even mainly) on account of this *backing*. Even if only a moderate diagnosis of pluralism is admitted, enabling statutory practices (mainly through their constitutional expressions) to continue to ascribe an integrating function to *principles* (sufficiently distinct from the one which *policies* perform) — with the consequence that, whilst considering the «multicentric nature» of European experience, the core of juridically relevant identity would be treated as a purely constitutional project (whose principles would be encountered as an *inference* from constitutional particular traditions and their prescriptive expressions)[28] — the necessity and exclusivity of the authoritarian mediation would transform the claimed *consonance of content* (between principles and practices of adjudication) into a decidedly *top-down* program (with typified institutional situations and a contingent selective anticipation, but also an authentic *meta-prescriptive* textual form[29]), simultaneously allowing and demanding the self-sufficient abstract thematization which corresponds to statutory criteria. Does this not mean reintroducing, with intensified, irresistible strength, the need for a closed, self-referential *synchronic* recreation of juridical relevance[30] and with it the opposed (but no less implacably convergent) risks of indetermination and violence against singularity?

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[28] In this sense, see Bartosz Wojciechowski / Piotr Juchacz / Karoline M. Cern, «Whose Reason or Reasons Speak Through the Constitution? Introduction to the Problematics», *International Journal for the Semiotics of Law* 25/4 (2012) 455 f.

[29] In the sense which has been developed by Lyotard: see *Le différend*, Paris: Éditions de Minuit, 1983, 145 f., 159 f. I have explored this conception (as a specific reinvention of the category *norm*) in Linhares, *Entre a reescrita pós-moderna da juridicidade e o tratamento narrativo da diferença*, Coimbra: Coimbra Editora, 2001, 354-386 (4.)

[30] *Synchronic* in the very productive sense which Kellogg explores: see Frederic R. Kellogg, «What Precisely is a "Hard" Case? Waldron, Dworkin, Critical Legal Studies, and Judicial Recourse to Principle» (2013), available at <http:// dx.doi.org/10.2139/ssrn.2220839>. I have used the possibilities of this *synchronic/diachronic* counterpoint in *O binómio* casos fáceis/casos difíceis *e a categoria de inteligibilidade* sistema jurídico. *Um contraponto indispensável no* mapa *do discurso jurídico contemporâneo?*, Coimbra: Imprensa da Universidade, 2017, 119 f.

2. In considering *stabilization practices* which are significantly the closest to *adjudication practices* themselves (inscribed in a no-man's land between stabilization and realization), the next step, in contrast, entails a direct, *bottom-up approach* (if not a direct leap to the *bottom* line). Regarding the construction of meaning conditioning the semantic and pragmatic intelligibility of principles —and visiting a *topos* which, under the formulas of *constitutional protestantism* and *popular* or *populist constitutionalism*, is today inseparable from the well-known contributions by Levinson, Tushnet and Larry Kramer — it would be tempting to state that here we face *constitutional reality* and its multiple *protestant practices*, effectively developed outside (away from) the courts[31]. However, it is better to invoke a much broader *legal* reality, which is not reducible to a simple *application field* (where legal normativity should be projected) and which is seriously taken as an authentic specifying *stratum* of the legal system (Castanheira Neves[32]). Thanks to this approach, it is, in fact, possible to pay explicit attention to the assimilation of a *global external context* (developed as a constitutive concurrence between economic, politic and cultural realities)[33], whilst simultaneously considering the specific materiality of *law in action* and its historically evolving institutions (determining the global or partial obsolescence of *law in the books* criteria)[34], as well as the impact which different *internal perspectives* (justifying, in the name of «professional correctness» and their satisfactory performance, the multiplication

[31] «A protestant view of Court's authority (…) [assumes] (…) the legitimacy of individualized (or at least non-hierarchical communal) interpretation» (Levinson, *Constitutional Faith*, Princeton: Princeton University Press, 1988, 29). In this well-known approach, Levinson relates *constitutional Protestantism* to the need to consider the interpretations and practices of the Constitution developed by social movements and individual citizens (in counterpoint to *constitutional Catholicism,* which attributes the task of an authentic unitarian interpretation exclusively to the Supreme Court judicial review).

[32] Castanheira Neves, *Curso de Introdução ao estudo do direito. Lições proferidas a um curso do 1º ano da Faculdade de Direito de Coimbra, no ano lectivo de 1971-72*, Coimbra: policop., 1971-1972, 347-351 [d) A realidade jurídica (as instituições jurídicas)]., Idem, "A unidade do sistema jurídico…", *Digesta*, 2nd vol., 172-174; Idem, "Fontes do direito", 56-58; Id., *Metodologia Jurídica*, 149, 151 f., 157 f., 176 f., 182-184.

[33] Fernando José Bronze, O *corpus iuris lusitani* no hemisfério do sistema jurídico romano-germânico (Considerações introdutórias)», *Boletim da Faculdade de Direito* 74 (1998) 80-82 (e).

[34] Castanheira Neves, "Fontes do direito", 77-78; Idem, *Metodologia Jurídica*, 182-184.

of *interpretative communities*[35] or the stabilisation of differentiated *sociolects*[36]) effectively *have* in determining *principles* today.

The latter determinative *front* (with its «local contexts, that are stabilized, if only temporarily, by assumptions already and invisibly in place»[37]) is particularly interesting, since its *doing what comes naturally*, regarding the internal point of view of differentiated communities of jurists (judges, lawyers, prosecutors, academics, etc), all pursuing *disciplinary identity* in their own way (whilst confronting the coherence issues which this identity demands) seems, for once, directly accessible, both from a *moderate external point of view* considering *interpretive communities* — i.e. giving the stabilized practices the regulative intelligibility of flexible (*non-monolithic*) codes, canons, textualization and re-textualization procedures and standard examples that can be *confidently followed* (and are also *capable of being transformed* coherently, as long as the game is played)[38] — or from a *less moderate* one involving *semiotic groups* — reconstituting those practices less as *rules* or *canons* than as *regularities*, albeit preserving a significant sensitivity to their explicit *narrative configuration* (i.e. giving them the productive shape of falsifiable «narrative typifications of action», operating within their own system of semantic values)[39]. However, the conclusion (overlapping, as we have just seen, with reflexive resources due to Fish's *pragmatic conventionalism* and Jackson's *structural semiotics*) seems parallel to the first premise we have tested, in spite of determining (or precisely because it determines) an opposite dynamic effect. This effect counterposes the unicity of meanings associated with the meta-prescriptive statutory sentence consecrating a principle (or the global context which this sentence violently imposes) to the plurality of meanings that each community or each group, internally and separately constructing the sense of the expressions associated

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[35] Naturally in the sense which Stanley Fish's *pragmatic conventionalism* explicitly proposes: see, for example, the exploration of this category developed in «Change», *Doing what Comes Naturally*, Durham/London: Duke University Press, 1989, 141 f.

[36] If not *communications sociales restraints*, as opposed to *communications sociales généralisées*. The formulas are evidently from Greimas, "Sémiotique et communications sociales", in *Sémiotique et sciences sociales*, Paris: Éditions du Seuil, 1976, 45 f., 53-60.

[37] Fish, "Play of Surfaces: Theory and Law", in *There's No Such Thing As Free Speech: And It's a Good Thing, Too*, New York: Oxford University Press, 1994, 190-191.

[38] Fish, «Change», 150-153.

[39] For clarification of concept, see Bernard Jackson, *Making Sense in Law*, Liverpool: Deborah Charles Publications1995, 154 f. (8).

with the same principle (reduced, as such, to a *nomen* or a signifier), inevitably provides (whilst playing the game of local context). In our present circumstances, however, the question is not only a matter of the breach of unity in the reference to principles and other layers of the legal system determined by these groups and communities. In our circumstances, the trouble comes from the internal fragmentation of these groups, to the extent that the increasing number of canons destroys the *naturalness* of their game with the inevitable vulnerability to the seductions of other practices (namely those which, multiplying the contexts, correspond to a plurality of movements and trends in *academic house*[40]). Such numerous (and different) practices of stabilization (legitimizing so many local contexts) expose us, on the borders, to a contextual vertigo (the experience of the «nonclosure», if not instability, of «every context»[41]), bringing with it the threat of pure, unlimited discretion and casuistry, if not the impossibility of distinguishing between juridically relevant *concreteness* and absolute, unrepeatable *singularity*. Moreover, in establishing another unavoidable correspondence, this submits the reconstitution of the meaning of principles (the attribution of signifieds to their signifiers) to another kind of performative violence…

3. It is precisely when faced with these two contrary threats (intensified whenever the possibilities of the second develop within the interstices of the first, generating a kind of irresistible complicity or convergence) that the mediation of legal dogmatics, in accomplishing the discharge function *(die Entlastungsfunktion[42])* which reduces the

[40] I have developed this argument in *Constelação de discursos ou sobreposição de comunidades interpretativas? A* caixa negra *do pensamento jurídico contemporâneo*, Porto: Edição do Instituto da Conferência, 2007, 48-55 (1.), considering two different examples, the first related to the community of lawyers — and the way in which heterogenous models of rational choice (with the corresponding representations of collective identity) dispute (positively and negatively) the legacy of Holmes' *bad man* (projected in the *lawyer's way of life*) [50] — and the second considering the significant spectrum of *judges' images* which divide us today and make the plausible reconstitution of their common community or group *institutional situations* an impossible task (condemned to frustratingly meagre outcomes)[51].

[41] In the words of Derrida, *Limited Inc.*, Evanston: Northwestern University Press, 152-153.

[42] Esser, "Dogmatik zwischen Theorie und Praxis", in F. Baur *et al.*, Hrsg., *Funktionswandel der Privaterechtsinstitutionen, Festschrift für Ludwig Raiser,* Tübingen:, 1974, 517 ff., 522 ff.; Alexy, *Theorie der juristischen Argumentation. Die Theorie des rationalen Diskurses als Theorie der juristischen Begründung*, Frankfurt am Main: Suhrkamp Verlag, 1978, 307 f., 329-330.

burden of jurisdictional jurisprudence, acquires a very specific urgency. It is certainly not because this doctrine in general and this function in particular appear immune to the challenges of plurality (and the added risks of violent abstract stabilization or problematic pulverisation). On the contrary, considering the illustrious sequence which began in the pre-modern context — if not immediately with the Roman republican «rise» of the secular «jurists» (and its casuistic *respondere*) and the imperial consecration of *Ius publicae respondendi ex auctoritate principis* (attributing an explicit *potestas* to the concrete respondere), at least with the medieval practice of *scientia juris* and its constitutively dialectic *textual hermeneutics* (mobilizing the presumption of *auctoritas* or *rationality* in a *subject/subject* rationalizing structure as indispensable specifications of a *communis opinio doctorum* canon) — the image of doctrine imposed in the nineteenth century by the *Naturhistorische Methode* and its Conceptual Jurisprudence (justifying, in contrast, an intentionally theoretic *dogmatic science of law*) was certainly the last to assure an effective *paradigmatic dominance*, with the corresponding effect of *unity* (a dominance which, notwithstanding the differences of discourse, allows Peczenick to see this Conceptual Jurisprudence as the «peak» of the «Classical legal doctrine»[43]). With the decline of this dominance, the possibility of understanding the *presumption of rationality* or *auctoritas* attributed to legal doctrine (and this presumption as a decisive methodologic resource in the performance of *Entlastungsfunktion*) has developed in disparate directions… and is simultaneously wounded by severe (heterogenous) criticism (and the corresponding diagnoses of insufficiencies or limits). It is as if these diverse diagnoses and alternative paths unfold without any solution in terms of continuity and we are limited to confronting a complex deconstruction/reconstruction cluster, over which (and over whose unavoidable *differend*) the legacy of the *naturhistorische Methode* still looms, both positively and negatively, for better or worse. It is sufficient, in fact, to recall how the direct consideration of plausible critical *topoi* — concerning the scientific or unscientific character and the compatibility or incompatibility of «normative» and «rational» approaches (if not the alleged «irrationality of all normative theories»), as well as the «ontological obscurity», the «unclear relation to political pluralism» or simply the «indeterminacy» of legal dogmatic arguments[44]

[43] Peczenik, *Scientia Juris. Legal Doctrine as Knowledge of Law and as a Source of Law* (vol. 4 of Pattaro, ed., *A Treatise of Legal Philosophy and General Jurisprudence*), Dordrecht: Springer, 2007, 65.

[44] See, for example, Peczenik, *Scientia Juris*, 65-80 («Criticism and Defence

— opens up a spectrum of alternative paths. More precisely, it presents a spectrum of alternatives, which expand whilst preserving their scientific-epistemological *quality* or refuting it, in the certainty that preserving and refuting it *are* (or *open up*) possibilities which themselves multiply in unmistakable (and frequently incompatible) *internal ways*[45]…

Confirming this *quality* means either following the analytical-conceptual trend or rejecting it and these alternatives are, in turn, far from homogeneously conceived. It is possible to follow an analytical-conceptual trend whilst invoking neoformalist orthodox reasons (experiencing law as a system of general rules which «are, in most of their applications, quite determinate»[46]), but it is also possible to follow it whilst defending a contrasting sociological-systemic autopoietic approach (justifying dogmatics as a *Sicherheitsnetz*, involved in the systemic protection of jurisdiction[47]). Rejecting an analytical-conceptual perspective also allows for incompatible assimilations of the common nomological empirical *explicative* basis, which may range from a *Ratio-Begründung* treatment of presumptive *auctoritas* to an explicit defence of *social technology*[48] — the latter (*als praxisorientierte rationale Jurisprudenz*[49]) radically overcoming this presumption (with all the relics of its normative-dogmatic conformation), whilst claiming the «production» of a purely *technological system* (including exclusively *technological propositions*)[50].

What about refuting the scientific (epistemic) identity? In

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of Legal Doctrine»); and also Jan Harenburg, *Die Rechtsdogmatik zwischen Wissenschaft und Praxis,* Stuttgart: Franz Steiner Verlag, 1986, 37-153 («Die Rechtsdogmatik und ihre Krise»).

[45] For a brief reconstitution of four significant contemporary conceptions of legal doctrine, see Linhares, "Rechtsdogmatik, Autonomie und Reduktion der Komplexität. Brauchen die Gerichte eine Sicherheitsnetz ?", in Schweighofer *et al.*, Hg., *Komplexitätsgrenzen der Rechtsinformatik.* Tagungsband des 11. Internationalen Rechtsinformatik Symposions Iris 2008, Stuttgart: Boorberg Verlag, 2008, 463-472.

[46] From Larry Alexandre, "With Me, It's All er Nuthin': Formalism in Law and Morality", *The University of Chicago Law Review* 66 (1999) 550.

[47] Luhmann, *Das Recht der Gesellschaft* (1993), Frankfurt am Main: Suhrkamp-Taschenbuch, 1995, 297-337 (Kapitel 7).

[48] See the three global alternatives reconstituted by Jan Harenburg, *Die Rechtsdogmatik zwischen Wissenschaft und Praxis,* 232-241 [«Diese kann als empirische, als normative und als empirische und normative Disziplin konzipiert warden…» (231)].

[49] Hans Albert, *Rechtwissenschaft als reale Wissenschaft*, Baden-Baden: Nomos, 1993, passim, *Kritischer Rationalismus*, Tübingen: Mohr Siebeck, 2000, 41-91 (ii. Kapitel).

[50] Hans Albert, *Rechtwissenschaft als reale Wissenschaft*, 12.

this case, we should also contemplate two opposed clusters of possibilities: one which, assuming the *reduction of law to politics*, invests in an explicit *ideologization of doctrine* (opposing *core doctrines* with *deviational doctrines* and entrusting to the latter, inscribed in a project of *legal analysis as institutional imagination*, the reflexive task of inverting the *centre/periphery* movement),[51] and one which, defending law and legal thinking's claim to autonomy, restores the full practical intelligibility of legal dogmatics whilst also rethinking its unequivocal normative (simultaneously stabilizing and innovative) character, explicitly compatible with a *presumption of rationality* which is inevitably *practical-prudential rationality* (Esser, Castanheira Neves[52]).

In addition to the diverse solutions which separate (and close off) the paths from each other (revealing a troubling, if not paradoxical, combination of «isolation» and theoretical or even «philosophical fragmentation»[53]), this dizzying array of paths provides us with the cue to return to our main question concerning the claim to *practical-prudential consonance* attributed to (or expected from) principles *in action*. Considered from the perspectives of this *fragmentation* and *isolation*, the contrast between legal doctrine's practices of stabilization and other previously explored practices —attributed to statutes (*supra*, 1.) and interpretive communities or/and semiotic groups (*supra*, 2.) — seems insufficient to justify any privileged specific mediation. We could always say that, whilst presupposing a concept of *principles as jus*, the (serious) exploration of this *consonance claim* alone introduces a plausible filter, favouring a *normative-prudential* understanding of the intentionality of legal dogmatics —which should be central, not only when this doctrine directly explores a *practical-normative dimension*, producing authentic normative statements, but also

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[51] R. M. Unger, *The Critical Legal Studies Movement* (1983), Cambridge — Mass. / London: Harvard University Press, 1986, 1 f., 8-14, 43-90 («Two Models of Doctrine»); Idem, *What Should Legal Analysis Become?,* London/New York: Verso, 1996, 119 f., 129-134 («Legal Analysis as Institutional Imagination»).

[52] Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung*, Frankfurt: Athenäum Verlag, 1970, 87 f.; A. Castanheira Neves, "Fontes do Direito", 89-90.

[53] «Another kind of criticism emphasizes internal tension in legal doctrine. Juristic theories show a curious ambiguity vis-à-vis basic theories of practical reason and morality. They are often explicitly or implicitly based on such theories. Philosophical theories are notoriously controversial, however. To deal with this controversialism, legal researchers can split legal doctrine into fragments, some following one philosophical theory, others following another one. Also a way to avoid philosophical fragmentation is by isolating legal doctrine from philosophy…» (Peczenik, *Scientia Juris*, 73).

when the developed «tasks» assume *empirical-descriptive* and *logical-analytical dimensions* (in the sense that Alexy has helped to establish[54]). Moreover, this filter could help us to overcome the tension between description and change in legal research *de lege lata* (answering Svein Eng's perplexities about the "fused descriptive and normative modality" which distinguishes the corresponding statements)[55].

Even if it were possible to defend this *filter*, the main question would still not be convincingly answered. In order to understand the *prime* contribution of legal dogmatics as a mediation of *rationalizing limits* (mitigating, as far as the concrete realization of principles is concerned, the effects of *pulverization* and *abstract violence*), it is not, in fact, sufficient (even though it is certainly necessary) to treat doctrine as a component of the legal system (with the *presumptive bindingness* which comes from its *rationality*). Moreover, it is not sufficient even when this treatment already presupposes *on one hand* the objective incorporation of dogmatic normative criteria as intermediate ones (occupying a level of generality situated between *statutes* and *precedents*), as well as presupposing *on the other hand* an unequivocal *positive* answer to the problem of sources, clarifying doctrine at least as a «should-source»[56] or a «quasi-institutionalised kind of law»[57]. In order to understand the

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[54] Alexy, *Theorie der juristischen Argumentation,* 307-311.

[55] A reconstitution of Svein Eng's theory is proposed by Peczenik, *Scientia Juris*, 100-101

[56] Explicitly considering the distinction between the "must-sources," "should-sources," and "may-sources" of law, Peczenik highlights both the vagueness of the concepts involved and the defeasibility of the corresponding hierarchy: «"Must-sources" are formally binding *de jure*; "should-sources" are not. The consequences of disregarding "should-sources" are usually milder than the consequences of disregarding "must-sources." "Must-sources" are more important than "should-sources," which in turn are more important than "may-sources." (…) If a collision occurs between a more important source and a less important one, the former has priority, provided no overweighing reasons reverse the order of priority. If we assign priority to a less important legal source over a more important one, we will have the burden of arguing this priority. Overweighing reasons are thus required if we are to follow a precedent contrary to the plain meaning of a statute. (…) In sum, the hierarchy of legal sources is defeasible.» (Peczenik, *Scientia Juris*, 16-17).

[57] «The sense of the [distinction which applies] (…) to the expression "sources of law" the qualifiers "strictly institutionalised" and "quasi-institutionalised (…) is that statutory law, customary law, and judge-made law, for example, are each a strictly institutionalised kind of law, however much they are so to different degrees and in different ways; in contrast, legal dogmatics, the general theory of law, and legal logic, for example, are each a quasi-institutionalised kind of law, however much they are so to different degrees and in different ways…» [E. Pattaro, *The Law and the Right. A Reappraisal of the Reality that Ought to Be* (vol. 1 of Pattaro, ed., *A Trea-*

mediation of legal dogmatics as the prime contribution concerning *principled concrete realization*, it is certainly not sufficient to identify a significant (more or less corroborated) *difference of degree* in relation to other available *practices of stabilization* (including those which are attributable to *judge-made law*). It is, in fact, necessary to clarify that the privileged *mediation status* attributed to legal dogmatics has less to do with any pretence to the *claim of immunity* — as we have seen, legal dogmatics is far from immune to the sting of plurality and indetermination and the need for violent simplification! — than with the unique *performative competence* (a competence which only legal dogmatics intrinsically possesses) to treat the corresponding dangers reflexively.

It is this clarification which brings us finally to *jurists' law (Juristenrecht),* although not for the purpose of reproducing what we all know and which directly concerns the way in which doctrinal jurisprudence — through a specific constitutive re-elaboration which is also a heuristic (more or less innovative) anticipation — contributes decisively to giving casuistic *judge-made law* the normative explicitness it needs in order to become authentic *institutionalized law* (at least when it does not benefit from a formally binding case law *stare decisis*). It is rather for the purpose of asking what we should specifically expect today from a successful articulation of jurisdictional and dogmatic jurisprudential practices (whilst performing their *doing what comes naturally*) as a condition for acknowledging (with Castanheira Neves[58]) that the identity of «communitarian conscience» in terms of its juridical relevance and regardless of the national or transnational stages where we may reconstitute it, depends decisively on these practices and their institutional situations.

The answer is not an easy one. We may, however, *risk* stating that, concerning dogmatics, the condition for continuing to play this role successfully demands a deliberate reflexive approach which effectively and manifestly extends beyond the mere *intensification of attention* allowed by the so-called *natural doing* (and its *canonical possibilities*). This means that it is not sufficient to highlight the permanent dynamic between *communis opinio* and *deviant flows*, even when this accentuates the fragility and instability of the actual modes of

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tise of Legal Philosophy and General Jurisprudence), Dordrecht: Springer, 2005, XXII]. See also A. Rotolo, "Sources of Law in the Civil Law", in R. Shiner/Rotolo, *Legal Institutions and the Sources of Law* (vol. 2 of Pattaro, ed., *A Treatise of Legal Philosophy and General Jurisprudence*), Dordrecht: Springer, 2005), 145 f.

[58] Castanheira Neves, "Fontes do Direito", 89 (quoting Betti and Esser).

equilibrium (reconstituting the tensions and circularity between the currents which are situated in the *centrum* or *core* or which dominate the *surface* and the small *peripherical* or *subsurface flows* which irresistibly grow or get stronger). A critically-reflected communication with the plural manifestations of *law in action* (at least through the different *interpretative communities* and/or *semiotic groups* playing the *game*) has become indispensable, not only when the function performed corresponds to the *inventio* of specific practical-normative criteria, but also when the purpose in question has directly to do with the *stabilizing* reconstitution of the legal system itself (in terms of all their different layers and reciprocal complex interrelations). The permanent *specification* of principles, by problematically rethinking their content from the perspective of the actual casuistry (assimilated from *Richterrecht*'s experience), as well as the challenges of a hypothetically recreated cluster of issues (autonomously inferred from the dynamics of *law in action*), whilst deliberately experiencing the polarized trends towards uniformization and fragmentation, is certainly the decisive core of this reconstitution and its *stabilizing* purpose. However, in order to understand this specification (as well as its projection to law's *principled concrete realization*) it is essential to emphasise how significantly the dogmatic reduction of complexity involved (notwithstanding some evident convergences) leads us far away from the «organization of redundancies» claimed by Luhmann (and from the cognitive *safety net* which this organization seeks to ensure)[59]. This emphasis in fact highlights the indispensable role which the incorporation of *meta-dogmatic* components plays (or should play) in contemporary *Juristenrecht*, which means, on the one hand, opening the door to an explicit thematization of *law's claim to autonomy* (considered in its cultural-civilizational aspects) and, on the other hand, allocating a special place to *principled concrete realization* and its specific claims (if not to adjudication as a specific *modus operandi*). In *dogmatically* projecting an expected *legal philosophical* radicality, the first thematization explores the cultural condition of comparability and its relation to *comparability/plurality* (if not directly to the problem of reinventing law's *tertium comparationis* and the argument for continuity which sustains it, in the plausible assimilation-domestication of plurality and fragmentation)[60] — with

[59] See *supra*, note 47.

[60] Linhares, "Jurisprudencialismo: uma resposta possível num tempo de pluralidade e de diferença?", in Nuno Santos Coelho / Antônio Sá da Silva, ed., *Teoria do Direito. Direito interrogado hoje — o Jurisprudencialismo: uma resposta possível?*

the possibility of discussing the persistence or the survival of relevant legal artefacts and their *practical world*, which is also an opportunity for questioning the limits of *jus*[61], if not the possibility-plausibility of an independent *thetic order,* corresponding to a cluster of strategical choices and their tactical execution. The second incorporation, dogmatically projecting an anticipation of methodic issues associated with adjudication, involves the reflexive attitude and spectrum of alternatives which, beyond the *naturalness* of dogmatic practices, only a genuine methodological meta-dogmatic research can provide, in its specific internal way. In fact, this intensified attention to performance and its various possibilities, converting disparately *esoteric* approaches into an integrated *exoteric* testimony of plurality (eventually with recourse to piecemeal narrative)[62], seems indispensable nowadays, not only as legal doctrine constructs its own *novum* (inventing and anticipating authentic criteria) but also as it reconstitutes the dynamics of the legal system in general and the contents of *normative principles* in particular. Concerning the mediation of *Juristenrecht*, it is indeed as if we could distinguish a very specific reflexive burden, as a *contextual* (or *environmental*) condition, which is essential in providing the presumption of *auctoritas* with the sense and success it needs in a limit-situation such as our own: a reflexive burden which does not in itself overcome the violent effects of dogmatic isolation and problematic fragmentation but nevertheless has the advantage of treating the corresponding threats and the intrinsically juridical search for plausible *modes of equilibrium* as explicit and autonomous *thematic cores*. Does this not, therefore, mean offering the expected reflexive outcomes the possibility of successful (plurally and dialogically conceived) *normative incorporation*? I would say that it does, which means attributing to this expectation the sense and productivity of a *promise*.

Estudos em homenagem ao Senhor Doutor António Castanheira Neves, Salvador: JusPodivm/Faculdade Baiana de Direito, 2012, 109-174.

[61] Castanheira Neves, "Pensar o direito num tempo de perplexidade", in João Lopes Alves *et al., Liber Amicorum de José de Sousa e Brito em comemoração do 70º aniversário. Estudos de Direito e Filosofia,* Coimbra: Almedina, 2009, 27-28 (V.2. «Os limites do direito»).

[62] Linhares, *Entre a reescrita pós-moderna da juridicidade e o tratamento narrativo da diferença*, Coimbra: Coimbra Editora, 2001, 863-865 (9.).