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The Limits of Law: Introducing a Rarely Frequented *Topos*

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Abstract
This introductory chapter integrates two different steps: a global consideration of the problems which the "signifier" *limits* (concerning Law and *legal thinking*) is able to include and a detailed mapping of the reflective path which the following thirteen chapters (notwithstanding the diversity of themes and the plurality of perspectives) effectively pursue.

Keywords Law's autonomy and limits · Science · Comparability · Legal system · Limits of interpretation · Law &… movements

1 The Problem (or the Problems?) of the Limits of Law: An Introduction

In a practical-cultural context which (in the words of François Ost) allows us "considering the scenario of a post-juridical society" (une *societé post-juridique)*, dissolving Law in "an ocean of indistinct normativity" [1: 1], the theme of the *limits of law* is far from constituting a frequent or obviously explicit *topos*.

The wide range of meanings attributable to the significant *limits*, whenever these meanings appear related to Law and legal thinking, is certainly the first difficulty to be taken into account. An experience of limits can, for example, be associated with a diagnosis of *insufficiencies* or *failures*—if not with a generalized loss of *naturalness*

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(obviousness) or *self-evidence* (*Recht ist nicht selbstverständlich*) [2: 5 ff.]—, but it can also be justified as an attempt (internally or externally thought out, i.e., self-referentially or hetero-referentially legitimized) to discuss real or aspirational *borders* with other *arenas of practice* or *discourse* (and establish the corresponding conditions of possibility or impossibility). To increase these difficulties, the limits or boundaries to be considered in this counterpoint are often submitted to a kind of double dynamics, since they can be experienced (once again from an external or internal perspective) not only as those which Law and legal discourses determine (as self-referential conditions of validity) or those which Law imposes on other arenas, but also as those which these arenas (involving the different faces of tecno-science, aesthetics and morality, but also the constraints of political and economic systems) impose on Law.

This complexity (with the tensions and paradoxes it generates) is aggravated on one hand when we distinguish the different fields of legal practice and the layers of the legal system—considering, for instance, the limits of jurisdictional judicative creation and the borders of legal dogmatic reflexive reconstitution, as well as the *linguistic limiting effects* of legal order, when not directly the connections of a discourse about boundaries with a plausible systemic approach (and its conclusion-claim to unity or coherence)—, on the other hand when we recall that those diagnoses of failures and these "boundary disputes" [3] (now involving also philosophy, literary criticism and sociology) concern a certain Law—significantly *inscribed* in the deployment of what may be called the *Idea of Europe* (or the *possibilities* of the Western Text) [4: 244–246, 248–257]—and that therefore the *limits* to be considered can also be those which are recognized from a Non-Western perspective. This, in effect, means engaging with the opportunity to distinguish Law's cultural answers not only *from* the conceivable alternative answers *in* the Western canon—exploring experiences of power and of rationalizing *autonomous* (scientific, ideological and ethical) intentions which are (as well as in Law) decisive factors in a certain *Idea of Europe*—but also *from* the cultural challenges that other practices, from *alien* civilizational horizons, present when they respond to the problem of social institutionalisation (and social order), i.e. when they conceive of this *life in common* problem (and plausible solution) by referring to a practical *continuum*—a kind of horizon-*ethos* in which communitarian morality, religious (and mystical) practices, shared narratives, concepts *of good life*, self-understanding *exempla* and other social canons are experienced as constitutively inseparable and *Law* is not a specific *identifiable* (separable) voice (determined by an explicit claim to autonomy) but only a (relatively effective and subsidiary) regulative or coercive projection of the content of this *continuum.*

Last but not least, we should not forget that our time favours also the proliferation of the so-called "tragic cases" (Atienza) and that those cases (with the choices they involve) enable us, without leaving the institutional environment of democratic Welfare State, to experience the *limits* of Law's *responsivity* as the impossibility of obtaining plausible *correct* legal answers: in fact, these cases identify situations in which the mobilization of the presupposed materials (materials with a relevant "expansive force", corresponding as such dominantly to principles and policies legislatively prescribed in *Zweckprogramme*) prevents (precludes) the autonomous

setting of authentic alternative answers, and as such condemns us to a dilemmatic structure *(la adopción de una decision* (…) *no significa ya enfrentarse con una simple alternativa, sino con un dilema)* [5: 252].

In any case, this plurality of approaches and meanings should appear as a reflexive stimulus. Why, even so, is the discussion about limits (at least an explicit one) still relatively rare? In our present context two different sets of reasons, only partially convergent, allow us to understand this frustrating restraint: the first set has to do with the challenges of self-celebrating plurality (if not *incommensurability*), which the second half of the twentieth century introduced, and which, thanks to a very specific (even though heterogeneously built) *critical deconstructive ethos,* achieved significant projections in the so-called post-modern legal thinking; the second set concerns a much wider ensemble of phenomena, convergent (notwithstanding their radically opposed features) as manifestations of a global a-problematic *pan-juridism*. The first celebration favours in fact the conclusion-claim that "the sense of the expression the 'law' is constructed internally, and separately, within the system of semantic values of each [semiotic] group" (Jackson) [6: 346]—which means arguing that only "the signifier" is common, not the "signified", as well as admitting an implacable diversity of interpretative communities (involving incommensurable cultural-civilizational, political, ethical and professional codes or canons). The second diagnosis, successfully corroborated by the relentless emergence of hyper- or ultra-specialized dogmatic fields (from energy law to health law, from biolaw to cyberlaw, from neurolaw to geo-law), justifies a passive assimilation of hetero-referentially constructed interpretations of *social need,* reducing Law to a mere conventional order (with contingently settled frontiers) or even to an ensemble of institutionally effective coercive resources—which in any case means depriving *juridicity* or *juridicalness* of any practical-cultural specific or intrinsic (non-contingent) sense claim. Does this second diagnosis, with its avowed instrumentalism, converge with the first celebration? We would say it does. The celebration at stake, whilst justifying a practical commitment to the openness and instability of every context, dilutes Law's claim to comparability and can in fact be experienced as a kind of a microscopic projection of pan-juridism: up to the point where we might confess (in a very Foucaultian manner) that, according with this perspective, we don't really know what Law is, since everything is juridically relevant or may be used to answer juridically relevant controversies. Certainly because answering those controversies means microscopically fighting (or compensating for) the violence against singularity perpetrated through legal principles, statutes and judge-made criteria [7: 86–90].

However, do our present circumstances condemn us unavoidably to this complacent nominalism, preventing us from attributing any effective relevance to the problem of the limits of Law? Even without departing from the "semio-narrative" ground (and its *external point of view*), it may be said that plurality and difference do not exclude a productive exploration of *inter-semiotic aspirations* (if not *inter-semiocity*)—relating differently contextualized claims of *juridicity* and paving the way for the reconstruction of plausible *arguments of continuity*. These arguments may, in turn, justify a return to the well-known questions on the *concept* and/or the *nature* of Law (in the sense in which, in an *all or nothing approach,* Hart and Raz have taught us to understand the corresponding answers) [8: 17 ff., 90–91], and may

also, conversely, lead to the reinvention of an *archetypal* or *aspirational* perspective (Fuller, Simmonds), in relation to which the reconstituted *features* of the autonomy and the limits of Law do not representcharacteristics but rather *guiding intentions* or constitutive *aspirations* or *promises* (if not *desiderata*), with reference to which past or present expressions and their institutional instances should permanently be judged [9: 52–54]. Following this path means acknowledging how the problem of *limits* becomes an indispensable thematic core whenever the reflexive agenda, developing a critical-reflexive connection between issues of *sense* and *limits* (*aspirations* and *borders*), involves rethinking Law's *autonomy* (or rethinking this autonomy beyond the possibilities of *legal formalism*) as an autonomy or claim to autonomy which should be seriously considered in terms of its cultural-civilizational specific (non-universal) base, as a decisive manifestation of European identity and European heritage (Castanheira Neves) [10: 25–28].

2 "Mapping" the Following Reflexive Path

The thirteen essays which follow—and which, as we have already said [*supra*, Foreword], represent an eloquent (even though drastically concentrated) sampling of the debates developed in Coimbra during the 20th Roundtable for the Semiotics of Law— corroborate the variety of problems and the plurality of approaches and reflexive trends that we have just outlined. Notwithstanding their plurality (as well as the transversal presence of central interrogations), we shall distribute them through five parts or steps, with the following titles: Rethinking Law's *thirdness*/ Exploring the category *legal system*/Reconsidering the limits of jurisdictional discourse/Reframing the challenges of *Law &… movements*/Exploring legal-dogmatic border problems.

2.1 Part I. Rethinking Law's *Thirdness*

We began this introductory note with a quotation from François Ost's *À quoi sert le droit?* (2016). This was certainly not by chance: it is an essay by Ost, specifically written and presented in the context of the Coimbra Roundtable, which opens the first part of our special issue. The thematic core explored here, stimulating a return to a kind of a reflexive *originarium*, directly considers the practical-cultural identity of Law as a *third voice* or a *third term* or *instance,* and it is precisely this *thirdness* which is unveiled to us as a *limit* (or a discourse of *limits*) imposed by Law *as jus* on the worlds of *unlimited* violence and love. This purpose justifies a development thematizing the "ideal types" of *bia*, *jus* and *agapè*, which means presenting the corresponding worlds of signification as if they draw three "secant circles", with troubling "interfaces" opening the doors to the dialectically dense territories of *agon* and *filia.* These are in fact indispensable to an understanding of the unmistakable specificity of Law, as well as its continuity or persistence (*le droit malgré tout!*), whilst revealing the constitutive relationship that associates its "formal equivalences" to the

claims of "reasonable terrestrial utopias" (somewhere between "the abysses of hell" and "the seraphic songs of paradise").

The second chapter, by Susan Petrilli, goes on to explore these tensions between limited and unlimited, comparable and incomparable, law and justice—now explicitly inscribed in a constitutive counterpoint between *limited* and *unlimited responsibility*, *legal order* and *primordial ethical orientation*, *humanism of identity* and *humanism of alterity*, *relative* and *absolute* alterity, *rights of identity* (of the "closed self") and *rights of the other man, feeling fear of the other* and *feeling fear for the other.* As these formulations unequivocally anticipate, the practical-cultural identity of Law as an order of comparability (arising "as a function of the other", but no less involving the "third party" and the condition of *tertialité*) is here exemplarily explored in a dialogue with Levinas' *ethics of alterity*. One of the most significant dimensions that this dialogue introduces is precisely the explicit interpellation of the "Western vision of the world" and the corresponding consecration of an "humanism of closed identity" and "short-sighted self-interest" (prevailing over "non-indifference"), as well as the awareness of a basic *non-convergence* between "unconditional responsibility" (which concerns the "individual" in its "singularity") and "State justice" (placing boundaries on "original responsibility" and guaranteeing "limited responsibility through generalization of the law"). The experience of our present context (with its succession of crises, the latest of them being certainly the pandemic) allows the Author to defend the need to reread Levinas "in light of global semiotics", thus opening the doors in order to "overcome the walls of silence and indifference towards the other", whilst admitting that "the universal" should be "constructed in dialogue with the particular, the singular, the unique" ("a dialogue that language presupposes and that just justice must recover").

2.2 Part II. Exploring the Category *Legal System*

The two chapters which follow explore the category of intelligibility *legal system* and its connections with the issue of limits from exemplarily distinct perspectives.

The first of these chapters, conducted by Pierre Moor, introduces the topos *legal system* as a "self-referential structurally differentiated organization" made of "texts, norms and actors", with specific ways of closing and opening. This approach allows the Author to explore the question of limits by reconciling two signifiers which we have already separately considered: the one which highlights the limits as *insufficiencies* or *shortcomings* (as the "inability" of legal order to "assume the expected regulatory tasks" and fully correspond to the "novelty" of problems) and the one which relates them to the *drawing of frontiers or borders* (now in a direct connection with the claim of unity or coherence, but also with the double programming which the systemic self-referentiality and the adequation to reality as *environment* effectively impose).

The second of these chapters, by Eduardo Bittar, privileges a reconstitution of legal system as "a web of legally relevant texts and meanings" obeying "a Semiotic (inter-textual) Mesh Model" (highlighting not only syntactic and semantic connections but also the significant dynamics of "pragmatic exchanges" and the

corresponding argumentative practices). Whereas this pragmatic accentuation reveals a non-negligible affinity with Pierre Moor's reconstruction, the development assumed by Bittar departs significantly from this reconstitution, whilst exploring a concept of *juridicity* which combines an explicit Greimasian semiotic perspective with a deliberate critical approach. The latter (named *Theory of Realistic Humanism*) explores in fact a specific version of critical realism, inscribed in the practical-cultural Latin-American environment and thus giving the signifier *social injustices* a decisive role. The conjugation of these different perspectives allows a reconstitution of the legal system as a dynamic ensemble of "concentric spheres of rings" (derived from the constitutional matrix and its normative consecration of human dignity), as well as a significant post-positivist reconnection with Morality, Society and Justice, with the corresponding consequences concerning the issues of the autonomy and limits of Law.

2.3 Part III. Reconsidering the Limits of Jurisdictional Discourse

The third part integrates three *methodologically-centered* essays, exploring *jurist's law* and *adjudicative construction.*

The first of these essays, by Adam Dyrda and Tomasz Gizbert-Studnicki, chooses critical positivism (or more rigorously Hart's legacy) as an immediate interlocutor (as far as the problem of the limits of Law is concerned), in order to highlight the challenges that Raz's counterpoint between "reasoning about the law" and "reasoning in accordance with (or according to) the law" effectively poses. This starting point opens up a path on which the issues of legal interpretation and of the theoretical meta-interpretive disagreements (viewed from the perspective of the corresponding limits) constitute almost natural stages. The answer comes however with an attempt to highlight common ground between legal positivists and non-positivists ("[T]here must be something all theorists share as a start…"), which allow the Authors to explore what they call a "general folk theory of law", i.e. the acknowledgement that Law is "a social artefact constituted by collective beliefs", beliefs which are "perceived as platitudes" (platitudes that are not "contingent" nor "culturally relative" and thus "cannot be false") and which constrain "both conceptual and interpretive enterprises in jurisprudence" ("no legal theory and no theory of legal interpretation can ignore commonly accepted beliefs, although it may be a matter of controversy which beliefs are commonly accepted and which of them are platitudinous").

Another approach regarding the limits of interpretation, explicitly exploring "the tension between reasonableness and limits", distinguishes the chapter which follows, written by Maurizio Manzin. It is now the counterpoint between proposals defending respectively the absence of limits ("no-limits option") and the unavoidable consideration of limits ("pro-limit options") regarding the methodological problem of legal interpretation which allows the Author, whilst refuting the decisionism opened up by the first ones, to defend an experience of juridical normativity "as inextricably linked" to the rhetoric-argumentative work "required by justification" ("in judicial

contexts (…) reasons (…) have notoriously to be exhibited through either 'internal' or 'external' justification").

The last essay included in this third part, by Alexandra Mercescu, goes on to explore judicial discourse as an adjudicative construction (and even the problem of the canons of interpretation), but now in order to evaluate the possibilities and the dangers involved in the incorporation of non-binding elements (foreign law references, but also extra-judicial and extra-legal information). The context of the promised evaluation is not however a strict methodological one, reconstructing rather the contemporary problematic of the so-called "judicialization of politics", as well as the role that the principle of proportionality and the method of *balancing* play in supranational courts.

2.4 Part IV. Reframing the Challenges of *Law &… Movements*

The fourth part introduces the challenges of *Law &… movements*, opening up however three different experiences of these challenges.

The chapter written by Mario Ricca inscribes the reconsideration of *Law &…* in a much broader theoretical context, sensitive to the distinction between "the limits of law" and "the limits of the discourses about law", but no less concerned with the possibilities of a semiotic *modus operandi* involving law and legal discourses (as well as "looking at the limits of law as limits of its language and its communicative signification")—which means risking an attempt to see "legal experience 'as a whole'" (considering the "alleged divides" in their "cultural ground"). *Walking* through a fascinating ensemble of major *literary loci*, Ricca explores in detail the metaphorical treatment of legal systems as "semantic and pragmatic enclosures" and this path allows him to confirm the impossibility of law creating (through a self-produced referential field) its own reality (and the sufficient conditions for its effectiveness or performativity)—which is also the impossibility of engendering a "complete closeness" regarding the "natural universe of discourse"—, as well as the inability of legal systems to delimit themselves. This last accentuation opens a productive opportunity to reconstitute a kind of dialectic *intertwining* (if not an authentic *nesting*) between the *inside* and the *outside* framed by legal rules and their unavoidable "categorial schemes", which is certainly relevant to deconstructing the methodological rationalizing ambitions of judiciary syllogism, but which is totally indispensable regarding the role of *Law &… movements.* It suffices in fact to highlight the permanent reinvention that teleological and axiological judgements impose on Law's linguistic and experiential world in order to understand the way that specific worlds of experience investigated by other disciplines (from literature to the hard sciences) are already unequivocally present inside the legal universe ("[A]n interdisciplinary understanding of the legal universe of discourse and the limits to 'its limits' is better captured by expressions such as 'literature in law,' 'anthropology in law,' etc.).

The following chapter, by Brisa Paim Duarte, chooses in contrast a specific territory of the *Law &… enterprise,* identified as Law and aesthetics, if not, more rigorously, developed as an *aesthetic criticism of law*, demanding a "'bottom-up' transtextualist or (even) post-textualist methodological attitude". This concentration

does not however prevent the Author from carefully exploring the issue of autonomy and limits of law and this as a constitutive backing of a certain *jusaesthetic argument*, the warrants of which are directly inspired by Castanheira Neves' *jurisprudentialism.* The development of this argument allows in fact "a view on law's integrated autonomy enriched with aesthetic critical-reflexive pluralism", as well as an experience of Law's specific practical-cultural answer freed from formalistic misjudgments. The explicit attention paid to Levinas' ethics and his exploration of Law's *tertialité* ("[I]t is easy to see the proximity between legal aesthetics and Levinas' ethical reassessment of ontology") allows us finally to recognize the stimulant parallelism which (despite a very different experience of Law's possibilities) relates this argument with Susan Petrilli's proposal (Part I, chapter 2).

The fourth part of our special issue comes to an end with Melisa Liana Vazquez's exploration of another border field, this time concerning law and religion. The thematic core is the connection between law and secularization (seriously taken as manifestations of the Western Text), if not directly the *secular city*, inextricably treated as a concept and as a space of human interaction (as a "social, sensorial and (…) semiotic construction"). This concentration opens a reflexive opportunity to overcome the treatment of Law as a mere "imposer of barriers" (attempting to "confine" *space* and our *human world-making*, including the religious dimension) and to consider its possibilities as a truly "creative force" ("enabling and empowering a continuous re-shaping of space and experience"). The development—assuming an "intercultural use of law" (articulating "anthropologically and semiotically informed approaches"), whilst exploring a sequence of eloquent examples—in fact corroborates the complexity of this intertwining ("the circularity of the semantics of space, religion and law") and aims to open up a new understanding of Law's potentialities, transforming its own "spatial limits" in order to respond to the plural claims of a "multicultural urban populous" and to play a more inclusive integrating role.

2.5 Part V. Exploring Legal-Dogmatic Border Problems

Whereas the four previous parts, notwithstanding their combining of internal and external points of view, privilege a meta-dogmatic perspective on the problem of the autonomy and limits of Law, the fifth and last part, developed over three chapters, gives dogmatic concerns (if not *bridging* dogmatic and meta-dogmatic approaches) an indisputable protagonism.

The first two chapters have otherwise more things in common: both of them explore criminal law dogmatics (namely the concept of *culpability*) under the challenges of hard (empirical-explicative) sciences in general and *neurosciences* in particular. We start with Susana Aires de Sousa's reflection on criminal responsibility, exposing the normative concepts of *cause* and *culpability* to the effects of the general debate concerning *determinism* and *indeterminism* and the challenges of "scientific findings", these including either the contributions of twentieth century physics (regarding causality) and the progress in neurosciences (regarding culpability). The answering path emerges from an exercise of "comparison" between the "normative concepts and their 'equivalents' in natural sciences", allowing the Author to

defend their significantly different problematic contexts, methodologies and categorial intelligibilities and thus the unmistakable nature and their "relative autonomy". Inês Fernandes Godinho concentrates her problem on the challenges that, regarding the normative construction of *culpability*, the "techno-robotic society" (where we already live) indisputably imposes, this time in order to highlight the pre-concepts (of *intention* and *free will*) that sustain the dogmatically consensual ensemble of "general principles" or "maxims" integrating the *allgemeine Verbrechenslehre* ("some undebatable maxims(…) applicable to most legal orders, either from civil law or from common law"), as well as to conclude that, even going on defending the autonomy of culpability, we need an *inclusive approach* (able to offer some *juridically plausible* answers "to the emerging debate on artificial intelligence").

The sequence ends with Clara Chapdelaine-Feliciati's essay: the problem is still a dogmatically circumscribed one—the ratifying of international treaties *with reservations* in general (and the situation, concerning the *right to education*, which affects the *Convention on the Rights of the Child* in particular)—, the answering path (rejecting critically those reservations, as well as exploring different measures limiting their impact) is however constructed under the inspiration of a meta-dogmatic external point of view, this time involving a semiotic model (after Victoria Welby), but also a *semioethical reading* and, with this, the major interlocutor that our second chapter (Part I., chapter 2) has explicitly introduced (I mean obviously Alberto Ponzio's and Susan Petrilli's Levinassian *semioethics*).

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