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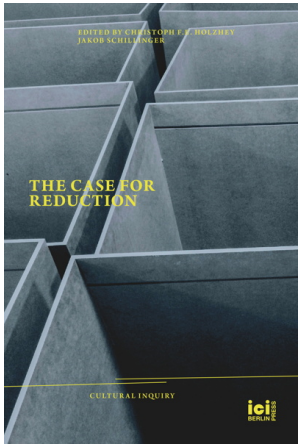

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XENIA CHIARAMONTE

Law Is Other Wor(l)ds

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RIGHTS STATEMENT:

ABSTRACT: This paper turns to the thought of Yan Thomas to address the way of constructing categories and operating through them that is typical of law. The art of law displays a special quality: the reduction of the 'things' of the social world through the construction of categories, and the use of these same categories to conduct legal operations. The paper argues that the quintessential legal performance is instituting, and it finally asks how to exercise a legal imagination for Gaia.

KEYWORDS: Thomas; Yan; Instituting; Nature; Case law; Abstraction; Legal imagination; Gaia; Judge-made law

Law Is Other Wor(l)ds

XENIA CHIARAMONTE

> there is no single road per se to human improvement. There are many paths, each situated in the actual places, such as prairies, forests, deserts, and so forth, and environments where our tribal societies and cultures emerged. The experiences of time and history are shaped by places.
>
> Daniel R. Wildcat[1]

REDUCTION TO TEXT

The law, perfect stranger: a high-ranking stranger in front of which fear or reverence, gestures that recall the sacred, emerge and tend to prevent a deeper inquiry. As a matter of fact, the knowledge of law seems destined to belong to a restricted circle of people, and to remain an affair for specialists, the only ones able to understand its concocted and redundant language. As for the others: as long as they do not find themselves 'before the law' they can cautiously ignore that door.

1 Daniel R. Wildcat, 'Indigenizing the Future: Why We Must Think Spatially in the Twenty-first Century', *American Studies*, 46.3 (2005), pp. 417–40 (p. 434) <https://journals.ku.edu/amsj/article/view/2969> [accessed 1 June 2022], quoted in Karen Barad, 'Troubling Time/s and Ecologies of Nothingness: Re-turning, Re-membering, and Facing the Incalculable', *New Formations: A Journal of Culture/Theory/Politics*, 92 (2018), pp. 56–86 (p. 60) <https://doi.org/10.3898/NEWF:92.05.2017>.

In the genealogy of law, we already find this trace as it is a specialized class that deals with law: the jurists. It is a privileged class, of course, but it should be noted that it is not the one in power, and therefore to be confused with neither politics nor morality nor religion, as they have other social figures.

The word *jurist* is registered exclusively in the Latin language because in the nebula surrounding the origin of *ius*, at least one thing is certain: it was invented in Rome.[2]

Here a preliminary clarification is needed. The English language does not distinguish precisely between *ius* and *lex* and tends to use the word *law* indiscriminately. To clarify the distinction, in these opening lines we will employ 'law' to mean *lex* and 'right' to mean *ius*.

What does it mean that *ius* or *right* is a Roman invention? After all, have we not always known that laws were also issued in ancient Athens? Ancient Greece did not know the profession of the jurist. There were legislators — there is no doubt about that — but not jurists. The laws emanated from kings and bore their names. Those laws often died with them. There was a coincidence between ruling, or being the political head of Greek society, and being a legislator. The law always had a 'father'. One might say that psychoanalysis has remained attached to this Greek vision of the law: a law bearing the name of the father. Indeed, the Greek law was the law of the father.

The opposite is true about *right*, which qualifies as such precisely insofar as it is impersonal, acephalous, and in a state of perpetual transmission. Law and right are two apparently similar forms, and indeed are often confused with each other even though they carry different etymologies, thus inviting different archaeologies.

Lex, which derives from *legere*, refers to the action of publicly reading a text that contains an injunction to a person who is present, and doing so in the presence of the ordering magistrate. This is the form of law that existed in Greece. However, what was invented within the walls of the city of Rome was another form, which consisted in a depersonalized and apocryphal *reduction* of the law to a text. The text as such is *ius*. As Yan Thomas writes, following the effective distinction

2 Aldo Schiavone, *Ius: The Invention of Law in the West* (Cambridge, MA: Harvard University Press, 2012).

sketched by his mentor André Magdelain: 'Between *ius* and *lex* lies the whole difference between a prescription that has no origin and one that must be attributed to someone.'[3]

THE ARCHITECTURE OF THE CITY

What is the origin of this prescription without origin? From Thomas we know only one thing about the origin of *ius*, and we know it *de relato*: it emerged *ab urbe condita*, in a founded city. Only indirectly, therefore — that is, relying on the very space that brings *ius* into being — can one affirm that it originated.

Hence the genealogy of right — through this mediated and spatial origin — shows the traits of a form that is in fact always already a *relation*.

If right is first and foremost a relation (here within the space of the city), rather than detecting its identity — intended as its individual elementary structure — we would only have to explore its primal relationality, its always already *common* character. And from that, perhaps, we would be inclined to see in it a kind of architecture. Indeed, right could be described as the invisible and magical architecture of the city. But if, like architecture, it coincides with the space of the city, its relational nature can lead to more appropriate questions than those commonly asked of it. Instead of the classic moot question 'what is right?' such a genealogy proposes to look at *how* and *where* it acts, how its operations function, that is, what is implicated in this primal relation.

Once the distinction between *ius* and *lex* has been made and explained, one is permitted to use the more common English word 'law' (intended as *diritto*, *droit*, *derecho*, *direito*, *Recht*) with reference primarily to *ius*, that is, the legal technique and juridical science.

This piece aims to explain how law — in this precise sense of *ius* — works: the implication of its always already transmitted 'origin', the operations it performs, and the technique by which the objects of law are forged and transformed. The attempt is to show the making of these categories through an eminently casuistic approach. The case is indeed

3 Yan Thomas, 'Idées romaines sur l'origine et la transmission du droit', in Thomas, *Les opérations du droit* (Paris: EHESS-Seuil-Gallimard, 2011), pp. 69–84 (p. 72). Unless otherwise noted, all translations are mine.

the essential laboratory for the practice of law. Once the toolbox has been defined, a specific case, that of 'nature', will be tackled in order to test the categories of law and see its technique of reducing the 'real' world at work.

A COLLECTION TRANSMITTED

The Romans do not accord law any origin, nor even a founder. Instead, we possess foundational traces of the city. They are mythical but the intent is to establish a foundation. However, the founder of Rome never intended to give himself the title of demiurge of the law. According to the sources, the emphasis is placed not on the origin or invention of law but on its *transmission*: 'the *ius* is presented in a body of rules known under the sign of their collector' and 'the origin of the norms is erased under the eponym of the one who received and transmitted them'.[4] The emphasis is so clearly placed on the legal text that it purposely eclipses the role of its potential authors: neither in the singular nor in the plural do we have traces of a subject of the invention of law. There are certainly several compilers but no authors.

Law is first and foremost text. Who are its inventors? Agents — whose names are in oblivion — who *succeed* one another in the service of a continuous translation. Hence the juridical temporality we are describing is not really historical: 'Jurisprudence does not have a history, but a genealogy. The unity of the same collective subject runs through it.'[5]

In the words of Cornelia Vismann, one can say that 'the beginnings of law lie in the archive', which functions as a *receptacle*:[6]

> As an archive can never contain itself as its own beginning, it is a commencement in the strict sense, this initial point can only be archived as a blank. [...] [A]n archive archaeology [...] refers to that which does not speak, the space of the archive, the shelves, the dust. It mistrusts words and especially the word *arkhé* itself.[7]

4 Ibid., p. 71.

5 Ibid., p. 77.

6 Cornelia Vismann, 'The Archive and the Beginning of Law', in *Derrida and Legal Philosophy*, ed. by Peter Goodrich, Florian Hoffmann, Michel Rosenfeld, and Cornelia Vismann (London: Palgrave Macmillan, 2008), pp. 41–54 (p. 42).

7 Ibid., p. 51.

Such an emphasis on materiality in the approach to law is by no means common. In order to offer an idea of how law is commonly thought of, one might resort to Max Weber's words: 'An order will be called *law* [Recht] if it is externally guaranteed by the probability that coercion (physical or psychological), to bring about conformity or avenge violation, will be applied by a *staff* of people holding themselves specially ready for that purpose.'[8]

The debate over what is meant by 'staff' and whether such a translation is adequate is far from over. What is certain is that this view carries a certain idea of law and its constructs, i.e. its institutional inventions: law is seen as command and sanction and the coercive aspect — coming from a certain handful of people — is underlined.

While looking at the archive-form, or better, at law as receptacle, means focusing attention on 'things', on the materiality of legal sources, an approach such as Weber's is systematically centred on the person (whether juridical or physical).

And there is more: looking at the constructs of law as things means focusing on the technical aspect emancipated from this or that social actor, and on law as a *medium* that creates with words what it designates and pronounces. Thus, an approach based on the law as a text, on *ius*, can be detached from an approach centred on *lex*.

But let us proceed in order. We shall see, first of all, how law, as a language and a means of constructing forms, is better understood through *legal* ways.

LOST IN TRANSLATION

Trying to read the language of law and its technical operations means not allowing oneself to be deceived by perspectives that hope to 'unveil' something by superimposing other languages on the language of law. This is a problem common to jurists, too, who become attached to other branches of knowledge and end up turning to other forms of knowledge in order to decipher the law, with the dramatic result that they fail to grasp the main aspect: law is first and foremost a technique.

8 Max Weber, *On Law in Economy and Society*, trans. by Edward Shild and Max Rheinstein (New York: Simon & Schuster, 1954), p. 5.

The crucial suggestion that we take up, starting from the teaching of Thomas, is that of refining the gaze that we turn to law, precisely by focusing on the techniques and language that this same art has constructed to operate in the social world.

Let us start by seeing how the operations of the law should not be seen (and do not work), and what kind of 'other' knowledge is superimposed on them to the detriment of an understanding of what is at stake in legal technique.

First of all, the macroscopic approach, whether political or purely theoretical: 'in general legal theory or political theory […] with the aim of considering everything, one ends up offering a general interpretation of the totality of the world, i.e. a meta-discourse, for which another can immediately take its place.'[9]

A commonly used phrase, at least among jurists, invites us to see the common functionality of philosophy and law but also to recognize their different spatialities: philosophy is to Athens as law is to Rome. These are two ways, two very different forms, but with a common function: organizing the world through categories. This shared function, and the substantial difference between philosophy and law, is not easily understood. On the one hand, the analogies are certainly there: they are both languages. On the other hand, they order the world in different ways.

The problem with a philosophical approach to law is that it fails to grasp the most important thing about law, namely that it is an operative language. Its language is technical in the sense that it pronounces what it does and does what it 'promises' to do through its own uttered words. Legal language is performative: law builds things with and through 'its' words. This is why the words of law are not only concepts but first and foremost *tools*. That is, they are words that serve to operate.

9 Yan Thomas, 'Prefacio', in Thomas, *Los artificios de las instituciones. Estudios de derecho romano* (Buenos Aires: Eudeba, 1999), pp. 9–12 (p. 10). In such a manner that recalls the process of being 'lost in translation', here we follow — and translate into English — the Italian edition of the text as the original Spanish foreword cannot be located: Yan Thomas, 'Prefazione a *L'artificio delle istituzioni*', trans. and presented by Michele Spanò, in *Almanacco di Filosofia e Politica 2. Istituzione. Filosofia, politica, storia*, ed. by Mattia Di Pierro, Francesco Marchesi, and Elia Zaru (Macerata: Quodlibet, 2020), pp. 249–53 (p. 251).

Law almost never offers definitions; it does not clarify the meaning of the words it uses. Rarely do we find norms that offer the meaning of a notion and the rules of interpretation of the notion itself. It would be more correct to say that the language of law, rather than being made up of concepts, is made up of words that over time can also undergo variations, even very profound ones, in meaning. They are signifiers rather than meanings, so to speak.

That is why an approach that wants to see as errors the inconsistencies that can be found in the different meanings of legal names forgets the nature of legal lemmas, and takes words for coherent logical categories. Further on, with reference to the signifier 'nature', we will see how different if not contradictory meanings of the same word overlap.

At the same time, the millennial refinement of the words of law tends not to allow a 'casual' use of lemmas. Law is not a language full of synonyms. On the contrary, legal language tends to regard as an error the equivalence between names that can often be found in ordinary language. Possession, ownership, or property can, for example, be used indifferently in common usage, but for law they are different categories, whose equivalence would only be seen as an error, and even a serious one at that. The rule — known to linguists, and seemingly outlandish — that states that synonyms do not exist, or are very rare, since etymology is always different and thus refers to different linguistic nodes and potential associations, applies to legal language too. Law, therefore, is first and foremost a performative language whose signifiers are almost never synonyms. As a result of this sophistication, we have the plethoric and almost tautological nature of the legal language.[10]

Let us then proceed to ask ourselves again: What happens when the words of the law are superimposed by other categories, which are entirely valid but belong to another field of knowledge (in which and for which they function)? What happens is that we end up *lost in translation*. We dare to say that even the most critical approach to law is often radically flawed and inherently naïve.

10 Bruno Latour, 'Note brève sur l'écologie du droit saisie comme énonciation', *Cosmopolitique*, 8 (2004), pp. 34–40.

LEGAL ILLUSIONISM

Law is not a person as we all too often end up treating it — with a voluntarist approach, then — but a thing, or a multiplicity of things together with their instituting praxis, the form that gives shape to things.

While philosophy is linked to its great thinkers, the study of law is never a study of this or that author or even of this or that theory. Only rarely, and specifically in doctrine, can theories be put forward that prove useful for understanding certain legal operations.[11]

This point is relevant for clarifying the fallacy of another approach to law, the sociological one. On the one hand, the sociological approach cares about social actors, so once again it is not so much the operations that are seen, but those who act on them. One could say — using the abovementioned formula — that scholars have become attached to the law of the father and are unable to kill him: they see the father everywhere and, in the vein of what Michel Foucault said of sovereignty, they are unable to cut off the head to finally see, in all its material multiplicity, the molecular nature of legal operations on the social world.

More generally, it should be noted that the object of law is not the 'real' world as it can be immediately perceived. Sociologists would call it a construction. But there is an important difference to be noticed between the sociological approach to law and the one advanced here.

First, legal construction has a normative vocation, not an explanatory one — as it does for sociology. Second, those constructions described by sociologists aim at revealing something real: they seem to think that by explaining law with a series of social constructs they unveil the 'true' character of law; approximating the categories of law to those of common sense, understood as real, they claim to show that law is 'doxa', or falsehood.

Law, however, does not need anyone to notice that it is 'false', because it does not consider itself 'true' or real. And there is more: in its 'falseness' lies its power. A possibly convincing metaphor we can offer

11 Marie-Angèle Hermitte, 'Le droit est un autre monde', *Enquête*, 7 (1999), pp. 17–37 <https://doi.org/10.4000/enquete.1553>.

is that of illusionism. When one sees a show of illusions, does one go to see reality at work? We are quite certain that the spectator wants to be amazed by the magician's artfully constructed tricks. And if someone comes along and says 'I'll tell you the secret now', what would happen? Well, this would ruin the show and deactivate the logic that presides over sleight of hand; the techniques employed by the magician would no longer constitute a performance but, perhaps, a course for aspiring magicians taught by an envious and malevolent colleague. In other words, the spectator knows that the game is true insofar as it is false, or, to put it better, the game works due to the special performance of its fictional nature.

Law does not care at all to be 'revealed' for what it is. Paradoxical as it may seem, law works insofar as it neither desires truth nor mimics reality: 'it reinvents another world.'[12] Clearly this passage is difficult to understand. Let us try to assemble a few bricks of this architectural composition that designs and informs the social world while we also recognize its formidable distance and abstraction from the latter — knowing that such a disposition might sound paradoxical for a technique that concretely organizes social relations.

INSTITUTING PRAXIS

Let us see how the legal technique of reducing the social world works and explore its operations. In fact, what operations do jurists carry out? As Thomas notes,

> when jurists have to qualify, according to the categories of law, any data likely to enter the legal sphere — any object in the 'external world' being virtually subject to such a sphere of influence — they have to combine two fundamentally irreducible operations, a judgment of knowledge and a judgment of value.[13]

It could be said that in the case of law, knowing and deciding are two operations that occur together and cannot be separated except at the price of irreparably splitting in two the very *res* of law, that is, its

12 Ibid., para. 1 of 50.

13 Thomas, 'Présentation', *Enquête*, 7 (1999), pp. 13–15 <https://doi.org/10.4000/enquete.1543>, para. 1 of 4, my translation.

elementary matter that simultaneously constitutes the subject matter of the dispute and the dispute itself.

At the same time, one must be careful to see how the logical operations that law performs are set up: as counter-intuitive as it may seem, and as much as one may believe that objects are first of all there in the world, and then secondarily to be legally inscribed, the reverse is rather true: 'from the beginning, and even before the somehow pre-legal nature of the objects has been established, the "thing" in question is already legally predetermined.'[14]

The assumption that the things of the world are already there, offered, given, and that they become legally qualified only subsequently, through logical reasoning, is itself a construct. 'Constructivists by profession, jurists need [...] the assumption that the data on which they operate are primary with respect to them.'[15]

Let us see what this constructivism means through an example. When a jurist today — let us say a judge, for the sake of clarity — has to qualify the events that the case offers her in a civil, administrative, or criminal trial, she performs exactly this kind of operation: she possesses a code in which certain constructs have been collected, which in fact take the name of legal institutions, and she translates the events occurring in the world into legal names. The point is: those instituted 'things' are the ones which enable the disjunction necessary for the unravelling of the legal conflict itself. Without these names of the law, the very elementary unit of the instituting act, we would not know how to articulate, disjoin, know, and eventually decide the facts. Such are the operations that law still performs today.

The opposition Thomas sees is therefore between the given and the instituted. The legal performance par excellence is that of instituting. Therefore, law does not participate in any kind of naturalness; on the contrary, it corresponds to the instituting practice. As Thomas incisively writes, 'In the world of institutions nothing can have the status of a given.'[16]

14 Ibid., para. 2 of 4.

15 Ibid., para. 3 of 4.

16 Thomas, 'Prefazione a *L'artificio delle istituzioni*', p. 250.

And, from the point of view of institutions, there is no place for what sociology and anthropology call *social facts*. A fact that presents itself as social cannot do so immediately and spontaneously. A procedure is needed to qualify it as such, otherwise it is like saying that it is natural. And, if one starts from the notion of social facts, the need to distinguish between what is natural and what is social would not be comprehensible. More technically, if one wanted to frame the 'social fact' per se, one would only derive a set of interconnections without disjunctions or categories. The links would remain internal to an 'interminable chain of interdependencies'.[17] As such, they would not find any kind of separation, distinction, or qualification that would bring them into the sphere of the social.

Law 'produces only a social rationality, to which it fictionally confers the necessity that most cultures, beginning with our own, attribute to the order of nature'.[18]

According to Thomas, what we call social (not given) cannot possess any kind of (hypothetically given) transparency. What is social cannot be given but must be instituted. Without an art of instituting, we cannot give any shape to social objects and therefore to institutions.

As Thomas notes,

> In the long history of the West, law has been the means par excellence of institutional construction — of these montages made up of words, which, as long as they are uttered by those who have the power to do so, have the ability to promote the existence of what they enunciate.[19]

At the origin is language as an act: without this special language that is law, which does what it says while saying what it does, institutional constructs could not have taken place — hence the social objects, which, precisely because they are constructed by distinctions, can be said to be instituted, and therefore social. This instituting technique shapes reality through linguistic artifices. Its devices are made of words. Law is that human art which creates things through its own words.

17 Ibid., p. 251.

18 Thomas, 'Présentation', para. 4 of 4.

19 Thomas, 'Prefazione a *L'artificio delle istituzioni*', p. 250.

Law is that language which names and decides, that vocabulary which invents the words it uses to 'order' the social world.

> The scholastic tradition referred to the things of law precisely as 'names of law' or as 'incorporeal things'. There is only a nominal legal nature, and the world of tangible realities is apprehended by law only through its own entities, operations classified and treated in turn as objects.[20]

Hence the *ars iuris* creates categories that it then uses, and that present themselves precisely as the objects of law, not as 'reality', which they have not the slightest intention of mimicking, and which on the contrary they duplicate in order to multiply the potential of the social relations which they at the same time institute.

This is why the criticism often levelled at the law, according to which it does not reflect the social world with its 'unnatural' — at times irremediably plethoric — language, is inappropriate. It does not intend to reflect the world: 'law is another world'.[21] And indeed, in order to function, it cannot but separate, discern, and operate among the objects it has named.

Law is a technical and creative form that functions as an art of radically denying 'reality' and reducing it to its own categories. The essential legal performance is to institute, and the Roman tradition teaches us the extraordinary legal skill of 'tearing apart' reality: here fiction makes fun of the constraints of external truth to law.[22]

ABSTRACTION AND THE CASE

But then what does the law do — one might legitimately ask — with the 'outside' world? Thomas would answer that the predefinitions and external constructions of objects serve only to circumscribe certain points for the application of norms:

> The objects of law are only social objects: the genome, the animal, or death […] are not here genetic entities, living beings,

20 Thomas, 'Présentation', para. 4 of 4.

21 As in the title of Hermitte, 'Le droit est un autre monde'.

22 Yan Thomas, 'Fictio legis. L'empire de la fiction romaine et ses limites médiévales', in Thomas, *Les opérations du droit*, pp. 133–86.

> or biological events, legally binding by essence: they are only places where norms of unavailability (of the genome), of appropriation (of the animal), or of suspension of the prohibition to kill (a living human subject) are projected.[23]

Once again law, instead of producing identities, constitutes the very *place* that informs social forms. The architecture of the city of Rome can still be seen as the infrastructure of our societies.

Law gives more importance to what its operative names can allow one to do than to the primary meaning to which these names would bind social relations. We will see shortly how the word 'nature' was used to perform different operations without being a conceptual category with univocal meaning. As Thomas affirms,

> the objects that law constructs must always be suitable for operations of generalization, however narrow or singular they may be. This is why legal rules never envisage singular units, but always logical classes, abstractions in which singulars are included (the person, property, the thing that is the object of legal relations between persons, etc., with all the sub-entities into which these abstractions are divided and subdivided). The world of law is not only an entirely constructed world. It is also a world of necessarily abstract constructions.[24]

The potentiality of generalization and the singularity of the case are always essentially inseparable. Indeed, the *extreme* that the case offers to legal science is such precisely to the extent that its radical singularity can offer ground for its stabilization. Conversely, what is ordinary is presented as intrinsically unserviceable to the cause of legal change. This is above all a view of casuistry that comes from the ancient Roman world.[25]

For this reason, both the Foucauldian fascination with the case and the Deleuzian passion for radical singularity pose problems with regard

23 By 'social' here Thomas clearly means 'instituted', 'invented' as opposed to 'natural' or 'given'. Thomas, 'Présentation', para. 4 of 4.

24 Ibid., para. 4 of 4.

25 Yan Thomas, 'L'extrême et l'ordinaire. Remarques sur le cas médiéval de la communauté disparue', in *Penser par cas*, ed. by Jean-Claude Passeron and Jacques Revel (Paris: Éditions de l'École des hautes études en sciences sociales, 2005), pp. 45–73 <https://doi.org/10.4000/books.editionsehess.19926>. Now also in Thomas, *Les opérations du droit*, pp. 207–37.

to how the case plays a role in legal casuistry. We do not need to delve too deeply into this matter here, but two methodological caveats are needed.

Both authors make of the case something that it is not, or rather exalt a polarity of the case without seeing its other face. For instance, Foucault's recounting of the case of Pierre Rivière, which elevates the case by making it a paradigm of an extremely significant change in the history of psychiatric and judicial power,[26] should be read in the light of Carlo Ginzburg's critique:

> A long time ago I realized that the norm cannot foresee all anomalies, while every anomaly by definition implies the norm. Hence the cognitive richness of anomalies, which should not be confused with their ideological idolization (I am thinking of Michel Foucault's attitude towards the case of Pierre Rivière).[27]

In Gilles Deleuze's genuine passion for jurisprudence, the case is seen as the quintessential site of law, while the normalization and stabilization of the case is to be radically avoided. As is well known, Deleuze argues that 'Jurisprudence is the philosophy of law, and deals with singularities, it advances by working out from [or prolonging] singularities'.[28] One might say — borrowing the words of Laurent de Sutter and Kyle McGee — that, for Deleuze, 'As an immanent practice of the case, law (*droit*) is the incarnation of what philosophy has to achieve for herself in order to be able to leave the world of law (*loi*), judgment and debt, whose fascinated observation has caused her stagnation.'[29]

The case must be kept, according to Deleuze, for its radical singularity — as if the case could survive on its own or represent an extreme that, contrary to Thomas's view, should not be 'stabilized'.[30] However,

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26 *Moi, Pierre Rivière, ayant égorgé ma mère, ma soeur et mon frère… Un cas de parricide au XIXe siècle*, presented by Michel Foucault (Paris: Éditions Gallimard, 2007).

27 Carlo Ginzburg, 'Il caso, I casi', *doppiozero*, 12 April 2019 <https://www.doppiozero.com/materiali/il-caso-i-casi> [accessed 2 June 2022], my translation. See also his introduction to *Il formaggio e i vermi. Il cosmo di un mugnaio del '500* [1976] (Turin: Einaudi, 2009), pp. xvi–xvii.

28 Gilles Deleuze, *Negotiations 1972–1990*, trans. by Martin Joughin (New York: Columbia University Press, 1995), p. 153.

29 Laurent de Sutter and Kyle McGee, 'Introduction', in *Deleuze and Law*, ed. by de Sutter and McGee (Edinburgh: Edinburgh University Press, 2012), pp. 1–14 (p. 4).

30 Thomas, 'L'extrême et l'ordinaire', in *Les opérations du droit*, p. 209.

legal technique, as we are trying to show here, can only contain and operate simultaneously with a radical abstraction and a concreteness of cases. The two aspects are not to be divided.

Keeping 'faith' with the radicality of the case would neither advance law nor multiply the potential of the social relations that law intends to institute. In the face of this historical or philosophical-legal passion for the case, one must therefore keep in mind that the case is all the more extreme insofar as it contains the characteristics that can be used for the stabilization of the solution that it provides. Therefore, it is not a question of giving primacy to the precedent, but on the contrary of seeing in the case the extraordinary potency of the events that challenge the categories of law and the solutions it has already found. Such an operation imposes the use of other fictions and names or of the same ones but changed in meaning, that is, interpreting those names that are signifiers in an original and innovative way.

THE QUESTION OF NATURE

Let us then take a case, that of the concept of nature; we have seen how the distance between natural/given and legal/instituted cannot be but sidereal. However, the concept of 'nature' today is taken up rather casually with reference mainly to the environment, particularly the natural environment.

In the face of climate breakdown, jurists are asked to dust off their complex and dangerous relationship with nature. Let us briefly recall the major events that connect law and nature.

In pagan Roman law, nature certainly existed, but it was never conceived as being in a conflictual position to juridical reason, whether as the source of law or as the ultimate, binding norm. For the Romans, only the laws and customs of the city were sources of law. Thomas shows the *making* of nature through the concrete operations of jurisprudential casuistry, which reaches a legal 'illusionism' that is unparalleled today. The Roman legal laboratory was so subversive with respect to the material 'fact' that through sleight of hand it institutes nature itself, each time enhancing its effects or cancelling its conditions, over and over again.

Casuistry demonstrates how nature meant at least three different things to Roman jurists. Here we follow the casuistic reconstruction and interpretation offered by Yan Thomas in 'Imago naturae. Note sur l'institutionnalité de la nature à Rome':[31] first, nature was undoubtedly the primeval wild world in which all original goods are found, which no one has (yet) appropriated: the *res communes* which, in the natural age, were common to all on the basis of a primitive indivision. Despite this apparently utopian vision, the law shows that it institutes nature by making it perform a series of purely technical operations: nature itself is a title to purchase, a reason for annulling, interrupting, or transmitting goods. In an apparently paradoxical way, nature seems to provide the strongest title (right) because it is original, and the weakest one because nature can always lapse. As if to underline its agency, for Roman jurists, nature gives what it could even regain one day or another, excluding the legitimate owner from enjoyment and returning *res nullius*, the good of everyone and no one. Second, nature can also be a kind of restored condition. Third, nature constitutes a reference that the law uses to extend legal relations.

Let us clarify the latter point by resorting to some examples of juridical reasoning and operations that Thomas provides. What Roman jurists postulate as 'nature' may be inferred from an analysis of procedures that use 'nature' itself as a reference point.

According to Roman law, in nature everyone is free, and slavery does not take place. This is the first assumption that law makes about 'nature' in relation to slavery: that slavery is not 'natural' but freedom is; this is a way of emphasizing that slavery cannot but be itself instituted by certain men, to the detriment of others, who are thus subjected *against nature* to the will of a master. However, it is at the same time

31 Yan Thomas, '*Imago naturae*. Note sur l'institutionnalité de la nature à Rome', in *Théologie et droit dans la science politique de l'État moderne. Actes de la table ronde de Rome (12–14 novembre 1987)*, Publications de l'École française de Rome, 147 (Rome: École Française de Rome, 1991), pp. 201–27 <https://www.persee.fr/doc/efr_0000-0000_1991_act_147_1_4171> [accessed 17 July 2022] (repr. in Thomas, *Les opérations du droit*, pp. 21–40). I also refer to the Italian edition in which Thomas is published together with Jacques Chiffoleau: Yan Thomas, 'Imago naturae. Nota sull'istituzionalità della natura a Roma', trans. by Giuseppe Lucchesini, in Yan Thomas and Jacques Chiffoleau, *L'istituzione della natura*, ed. by Michele Spanò (Macerata: Quodlibet, 2020), pp. 13–45.

clear that it is a matter of assuming the existence of a 'natural' freedom in order to actually be able to create freedom through an instituting dynamic.

In fact, once slavery was established, not by nature, but through law (first *fictio*), the *manumissio* — the formal emancipation from slavery — was established too (second *fictio*). In other words, freedom is constructed as natural, then abolished, and finally reconstructed. With the formal emancipation, law abolishes natural freedom through a legal operation and at the same time restores it. This restitution of rights can be partial as in the case of the person enslaved at birth, but also total as in the case of prisoners of war. Indeed, the latter would regain the freedom they had originally possessed. This would not be valid for the enslaved who did not originally enjoy it. Yet even this sharp distinction between two types of freedom — between the 'ingenui' who are born free and the 'liberti' (or 'libertini') who are 'manumitted from legal slavery'[32] — has ended up fading through a series of legal operations that sought to guarantee the natural freedom of the person enslaved at birth, that is, the freedom of one who, by status, had never enjoyed it. This case shows even more clearly that nature does not constitute an external limit at all, but that, on the contrary, it is instrumentalized: 'in any restitution of rights', Thomas writes, 'it is necessary to admit, thanks to fiction, that the legal act concluded by the incapable [in our case the enslaved] is non-existent: to cancel the effects retroactively, the magistrate restores the situation that existed prior to the act. Similarly, the *restitutio in natalibus* [restoration of original birth rights] […] suggests that birth in servitude did not take place. The *ingenuitas* [to be born free] of the subject is presumed because it is necessary for the remedial action of the procedure'.[33] The freedom that nature would offer everyone thus becomes the outcome of an artifice modelled by legal art, which ridicules 'natural' reality just as it institutes it through fictions of fictions.

32 See the entry 'inge'nui, inge'nuitas' in William Smith, *A Dictionary of Greek and Roman Antiquities* (London: John Murray, 1875), p. 637 <https://penelope.uchicago.edu/Thayer/E/Roman/Texts/secondary/SMIGRA*/Ingenui.html> [accessed 19 July 2022].

33 Thomas, '*Imago naturae*. Note sur l'institutionnalité de la nature à Rome', p. 221.

CRIMES AGAINST NATURE

The peculiar Roman use of nature becomes clearer by contrasting it to later understandings. It is in Justinian legislation that the so-called crimes against nature, above all homosexuality and incest, first take shape. Nature becomes a moral and universal norm, constituting an external limit to the law, one hitherto unknown to Roman jurists. Nature is seen as divine creation and thus becomes the Law. In fact, in the eleventh century — as Jacques Chiffoleau tells us — heresy and sodomy emerged as crimes against nature. Nature takes shape out of this division between appropriate sexuality and inadequate and unproductive sexuality.[34] The issue of homosexuality was central in the medieval discourse on nature. Nature and the limits it posed have contributed, in a decisive way, to an order of 'natural' discourse, which, among the many echoes it has scattered over the centuries, also reaches our contemporary ears in the Berlin speech given by Joseph Ratzinger in 2011, where he references the 'language of nature' as objective reason, *natura naturata* (understood as the order of the created world) derived from *natura naturans* (understood as God).[35] Furthermore, as Chiffoleau points out, there is another cardinal institutional formation that the discourse on nature serves: sovereignty. Nature is depicted as omnipotent, Mistress and Patron of the world; this understanding culminated in the interpretation offered by Alain de Lille: the crime against nature par excellence, sodomy, becomes an injury of the majesty of Nature, one could say a *crimen leasae majestatis Naturae*. The conjunction of majesty with nature, thus posed, grows new features and potential, establishing the connection between the conception of nature and forms of power. And there is more: it does not seem accidental that, in the same historical period, the inquisitorial technique was formed

34 Jacques Chiffoleau, 'Contra naturam. Per un approccio casuistico e procedurale alla natura medievale', trans. by Davide Pettinicchio, in Thomas and Chiffoleau, *L'istituzione della natura*, pp. 47–102. The original article is Jacques Chiffoleau, 'Contra naturam. Pour une approche casuistique et procédurale de la nature médiévale', *Micrologus. Nature, Sciences and Medieval Societies*, 4 (1996), pp. 265–312.

35 Joseph Ratzinger, 'The Listening Heart: Reflections on the Foundations of Law', 22 September 2011: <https://www.vatican.va/content/benedict-xvi/en/speeches/2011/september/documents/hf_ben-xvi_spe_20110922_reichstag-berlin.html> [accessed 22 June 2022]. See also Paolo Cappellini, Natalino Irti, Andrea Nicolussi, and Aldo Travi, 'Dopo Ratzinger al Bundestag', *Vita e pensiero*, 1 (2012), pp. 61–66.

and refined, aimed at extracting confessions through unspeakable acts of torture, and at finding the hidden truth in the souls of the unfortunate, heretics, sodomites, or 'witches'. Chiffoleau underlines that it is precisely the 'witch hunt, presented above all as a defense of human and divine majesty', that 'contributes in a powerful way, I believe, to the institution of modern sovereignty'.[36]

Nature became a limit to law, an external reality that shall be respected. Nature has been constructed as an essence that is external to things instituted by humans, such as law, and at the same time as a boundary that one must be careful not to cross. And this consideration should recall, by analogy, certain current ecological and juridical positions, according to which nature is a sort of untouchable Eden that needs strict protection, especially from the human, as if nature is something from which the human is excluded.

BEFORE GAIA: THE PLACE OF LEGAL IMAGINATION

The order of ecological discourse, widespread among scholars and activists alike, still seems to look at nature as a form of law. Nature would dictate something that has the features of a norm. It would then be up to the human being to intercept, decipher, translate, and interpret this (law of) nature. Nature is still seen as the Other that demands something. What does nature require? What would nature tell us if it had a language? What would it oblige us to?

One might say that not only are these somewhat naive assumptions — which presuppose that nature itself exists as such and can have a rationality, if only we pay it due attention — but that they evade the most important question that should be asked today: that of cohabitation and togetherness. This is because they end up isolating an entity, an identity that is distinctly separate from the human although the underlying project (and modern guilt) would reside precisely in this separation. So even though the purpose of contemporary ecological discourse would be to bring the two sides together, it is precisely to speak of nature as a separate entity that reconfirms the distance one would like to reduce.

36 Chiffoleau, 'Contra naturam. Per un approccio casuistico e procedurale', p. 92.

This order of discourse ends up being counterproductive from an ethical and political point of view. It refuses to acknowledge that we are now faced with an extremely more complex issue: the challenge that Isabelle Stengers has vividly named as 'the intrusion of Gaia'.[37] It is a question not of protecting a nature with a peaceful face and in the form of a national park, but of building spaces of survival and cooperation,[38] of finding a way to live in the time of catastrophes in which both the human and the more-than-human are active agents: 'in this new era, we are no longer only dealing with a nature to be "protected" from the damage caused by humans, but also with a nature capable of threatening our modes of thinking and of living for good.'[39]

Instead of new ontologies that prescribe divisions, we shall exercise our attitude of conceiving the assemblage of different species and the transindividual dimension of the living. Instead of our human externality with respect to the natural entities to be protected, we would see the inextricable entanglements of objects and subjects, things and people, finally appear before our eyes, testifying to their mutual interdependence.

Looking at things from this perspective, one would discover that a place for ethics and politics as well as law still exists, and indeed can only be redesigned. And it is precisely the approach that makes nature into something untouchable that opens the door to defeatism. It does not make sense to pose the question in terms of what this nature, hypothetically radically separate and distinct from the human, would require or oblige us to do or not to do. The post-naturalist question could rather be formulated in these terms: what kind of coexistences do we want to build?[40] How, once we recognize the social world as a world in which human and non-human have always coexisted, can we build a better common form-of-life?

37 Isabelle Stengers, *In Catastrophic Times: Resisting the Coming Barbarism*, trans. by Andrew Goffey (London: Open Humanity Press, 2015) <https://doi.org/10.14619/016>, pp. 43–50.

38 Anna Tsing, *The Mushroom at the End of the World: On the Possibility of Life in Capitalist Ruins* (Princeton, NJ: Princeton University Press, 2015).

39 Stengers, *In Catastrophic Times*, p. 20.

40 Steven Vogel, 'Environmental Philosophy after the End of Nature', *Environmental Ethics*, 24.1 (2002), pp. 23–39.

As Bruno Latour highlighted, our problem as moderns — who have never really been modern — is that we imagine worlds that do not exist: a natural world without subjects and a human world without objects.[41] We imagine a clear separation which does not represent the condition of the *place* where we live in.

We alter, therefore we are. Can we, then, avoid using the term 'nature' to develop a theory and practice aware of the outrageous dangers our technologies are capable of producing? Can we develop a post-naturalist environmental approach that starts from the question: what kind of biodiversity do we want to institute? And, in biodiversity, it would be crucial and pioneering to also include the multiple forms-of-life of the human.

Let us conclude by sketching the implications of such a positioning in legal terms.

The dynamics of instituting provide a sure foothold. Through a view capable of seeing the process of instituting — clearly, a human one — we can finally say that the legal significance of 'nature' is necessarily instituted. There is no (hypothetical) spontaneity at work.

One cannot obtain legal protection effects, one cannot guarantee rights to nature — in whatever way one wishes to define them — without an institutive form, that is: there are no natural rights that can arise spontaneously without a process that institutes them as such. Nature will not obtain rights by itself. (It goes without saying that the whole tradition of natural law tends to return to the surface with the recent ecological turn in legal studies.)

At the centre of law are cases and forms of protections. What is important is that 'nature' —whatever this signifier refers to — becomes suitable for judgment, for the really relevant question is not whether 'nature' becomes a subject or not, but how non-human entities can act in court.[42]

To date the main option has been the personification of nature, as in the recognition of the rights of nature by the Ecuadorian constitution, by Bolivian laws, and more recently by Chile through a

41 Bruno Latour, *We Have Never Been Modern*, trans. by Catherine Porter (Cambridge, MA: Harvard University Press, 1993).

42 Christopher Stone, 'Should Trees Have Standing? Toward Legal Rights for Natural Objects', *Southern California Law Review*, 45 (1972), pp. 450–501.

constituent moment. These are extremely important transformative processes that pivot on the Andean cosmovision. Recourse to similar references in the Western world, however, risks constituting, instead of a process of rethinking habitation on this earth, further plunder. This is the case, at least, without a profound work of *transduction* as a 'model of translation' in which 'difference is […] a condition of signification and not a hindrance'.[43]

Nature seen as substance poses many problems and, after all, does not challenge the main issue, which is the need to rethink forms of protection not so much of this or that subject but of the *places* in which the forms of assemblages cohabit.

Efforts should be made to think, and above all to rethink in a contemporary guise, the *rights of places* themselves, that is, to consider places as right-holders (which is quite different from places as subjects of rights) or, in other words, as the material form of inhabiting and being in common.[44]

Ecological damage shows that what is called into question is always more than one subject, human or non-human, because the damage affects both.[45] What is more, it can affect future generations, the inhabitants of the planet, as well as those closest to the affected area.

What is needed is a legal imagination that works toward lateral alternatives to subjectivation. A more technically equipped and historically grounded approach would lead us to grant value to proposals that are only apparently less politically expendable:

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43 Eduardo Viveiros de Castro, 'Perspectival Anthropology and the Method of Controlled Equivocation', *Tipití: Journal of the Society for the Anthropology of Lowland South America*, 2.1 (2004), pp. 3–22 (p. 20) <http://digitalcommons.trinity.edu/tipiti/vol2/iss1/1> [accessed 1 June 2022]. The reference is to a concept employed by Gilbert Simondon, *L'Individu et sa génèse physico-biologique* (Paris: Millon, 1964).

44 For insight into the issue of rights of places in antiquity, see at least: Emanuele Conte, *Diritto comune. Storia e storiografia di un sistema dinamico* (Bologna: Il Mulino, 2009); Thomas, 'L'extrême et l'ordinaire'; Ennio Cortese, 'Per una storia dell'arcivescovo Mosé di Ravenna (m. 1154) sulla proprietà ecclesiastica', in *Proceedings of the Fifth International Congress of Medieval Canon Law: Salamanca 21–25 September 1976*, ed. by Stephan Kuttner and Kenneth Pennington (Vatican: Biblioteca Apostolica Vaticana, 1980), pp. 117–55.

45 See Michele Spanò, '"Perché non rendi poi quel che che prometti allor?". Tecniche e ideologie della giuridificazione della natura', in Thomas and Chiffoleau, *L'istituzione della natura*, pp. 103–24.

> To realise that the debate on personification has virtually obscured any alternative solution is a striking experience. Nature's objectification might have provided safer ground for building protection regimes, looking at western anthropology.[46]

Conducting an archaeology of things, without having to make them persons — which, by the way, in law does not allow the acquisition of a higher rank — would allow us to consider their value as such. A way that is not naively naturalist, but consciously *instituent* would lead us toward a more materialist approach.

A certain way of dealing with 'things', even the things of 'nature', would steer us toward another course that would bring the category of unavailability to the centre of the debate and shift the axis to the 'value of things',[47] rather than to some sort of dignity of nature constructed in the image and likeness of the human one. Especially since even human dignity did not come from itself at all, and is once again the outcome of an instituting praxis instead of a given of nature. This path would lead to conceiving the so-called cultural heritage that generations transmit to each other as a place where biodiversity must also be central. Assigning a value to common things, and establishing a non-proprietary belonging based on use rather than property is at the heart of the current debate on the commons.[48] The *res communes*, excluded from commerce, may be seen as its Roman forerunners.

The *forest* — etymologically what lies outside (of the city) — claims to be protected and to be as much a part of our heritage as human inventions.[49] The place where the interdependence between

46 Yan Thomas, 'The Subject of Right, the Person, Nature', in *Legal Artifices: Ten Essays on Roman Law in the Present Tense*, ed. by Thanos Zartaloudis and Cooper Francis, trans. by Anton Schütz and Chantal Schütz, intro. by Thanos Zartaloudis and Anton Schütz, afterword by Alain Pottage (Edinburgh: Edinburgh University Press, 2021), pp. 107–43 (p. 117).

47 Yan Thomas, 'La valeur des choses. Le droit romain hors la religion', *Annales. Histoire, Sciences Sociales*, 6 (2002), pp. 1431–62 <https://doi.org/10.3406/ahess.2002.280119>.

48 See Paolo Napoli, 'Indisponibilità, servizio pubblico, uso. Concetti orientativi su comune e beni comuni', *Politica & Società*, 3 (2013), pp. 403–26 <https://doi.org/10.4476/74759>.

49 There are two possible etymologies of 'forest': in Latin *foris* means 'outside' (as in 'foreign') and *forestem silvam* are 'the outside woods'; another trace can be found in the Latin word *forestis*, 'forest preserve' from the legal lemma *forum*: 'court' or 'judgment', which might imply the concept of a wood subject to a ban.

humans and non-humans needs to be rethought and instituted is yet to be created and shall start with the deposition of toxic human exceptionalism.

An important warning coming from Karen Barad should be heeded as we begin this ongoing and collective labour:

> Not to privilege all other beings over the human, in some perverse reversal, but to begin to come to terms with the infinite depths of our inhumanity, and out of the resulting devastation, to nourish the infinitely rich ground of possibilities for living and dying otherwise.[50]

50 Barad, 'Troubling Time/s', p. 86.

Xenia Chiaramonte, 'Law Is Other Wor(l)ds', in *The Case for Reduction*, ed. by Christoph F. E. Holzhey and Jakob Schillinger, Cultural Inquiry, 25 (Berlin: ICI Berlin Press, 2022), pp. 227–50 <https://doi.org/10.37050/ci-25_12>

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