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Mônica Sette Lopes

Jurists and Journalists: Impressions and Judgements

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Edited by:
Goethe University Frankfurt am Main
Department of Law
Grüneburgplatz 1
60629 Frankfurt am Main
Tel.: [+49] (0)69 - 798 34341
Fax: [+49] (0)69 - 798 34523

Mônica Sette Lopes /Belo Horizonte, Brazil.[*]

Jurists and Journalists: Impressions and Judgements

Abstract: The process of finding evidence of what truthfully happened in a conflictive situation interests jurists and journalists but in different ways. When the work of journalists and judges are concerned the paradox is at stake. Both categories must tell a story about a conflict must listen to all involved, must inform what happened to the general public. Although both categories must use the freedom must use the freedom of speech their point of view about something with objectivity, their timing is different as well as the process and the effect of fulfilling their task. That question that should be made is what happen to law when it becomes the subject matter to the news in the world of full information? In what measurement journalists also pass judgements and how this affects the formal processes of law? The effort to answer these questions and the ones related to them is important to understand some of the problems that must be approached in order to establish the ways of law and of the mass media technological society.
Keywords: Journalism. Law epistemology.

> "I will deal (...) with the great romance of law that is written over the centuries, which is enriched each day until the most extravagant, most amazing, most fabulous existing text is put together, with its formidable episodes, its theatrical coups, like its unpredictable returns. A serial-novel if it ever was one, endless romance that follows all mutations, utopias, ghosts, dreams"[1].

The text above is at the beginning of a chapter called *The Reality Factory* (*La fabrique de la réalité*). It is part of the no less intriguing book entitled *When Lawyers Invented Reality* (*Quand les juristes inventent le réel:* la fabulation juridique). It illustrates a movement related to law and, therefore, is on the doorstep of this text which aims to make a short flight through scenery of staggering contemporaneity: one in which law and journalism interact. To transpose this space, it is necessary to live the great romance that follows changes, utopias, dreams and ghosts. A serial-novel that never ends.

In a world where fears and doubts are plausible, one can start with a question: If nowadays absolute information manages the human relations, will the means of mass communication be relevant or interfere when it comes to understanding or to explaining the legal phenomena? How

[*] Judge of Belo Horizonte's 12th Labour Court. Professor at the Federal University of Minas Gerais.
[1] Bernard Edelman, *Quand les juristes inventent le réel:* la fabulation juridique, Hermann, 2007, 159.

is the intercommunication between these two social sub-systems that have their own language and that appropriate from the cognitive openness in relation to the total social system[2] made?

The main question limits itself to the news, which is understood as the information published by the mass means of communications. But it refers, very particularly, to one portion - the moment when the law boosts the news.

The production of arguments, written on the news, is not a miraculous or automatic procedure. They are moulded by people who interpret reality and are influenced by it in random areas, from conceptual and/or operational knowledge of the law (which they may or may not have) to interest and ideology. Whatever articulates the text certainly covers the obvious: human thought has clearly been hit by the assurance of the interpreter's conditioning analysed by the hermeneutics of the 20th Century.

A billboard advertising a popular newspaper, sold at traffic lights at R$ 0.25 (approximately U$ 0.10) can set the tone of the problem: "News anyone can give; real information, only on 'Aqui' [*Here*]". The newspaper that diffuses the news briefly takes over the quality of the information as a personal value.

There is a gradation between the news, the information and the knowledge. It is intentional that the information have a less superficial analysis than the publication of the news, which is a simple recounting of facts[3]. The information should have a more complete participation or involvement of the recipient to the development of the message, to a more analytic extent. But this must not be confused with *knowledge.* Robert Kurz tackled the theme in an article published in the newspaper *Folha de São Paulo*:

> "Actually the concept of information is not, in any way, embraced by an elaborate understanding of the knowledge. The meaning of 'information' is taken in a much wider sense and also refers to the mechanical procedures. The sound of a horn, an automatic message announcing the next tube station, a wakeup call, the overview of the television news, the supermarket's speakers, the oscillations of the stock market, the weather forecast... everything is information, and we could add on to this list forever."[4]

[2] At the root of these settings is, as noted, a portion of luhmannian keynote. See Niklas Luhmann, *Social systems*, Stanford University, 1996.

[3] See, under the prism of history and about the various stages of the selection of news, Michael Kunczik. *Conceitos de jornalismo*: norte e sul. Edusp, 2002, 219-275 (The chapter is entitled *The Production of News*).

[4] Robert Kurz. O estágio final da evolução intelectual moderna será uma macaqueação de nossas mais triviais ações por máquinas? A ignorância da sociedade do conhecimento. *Folha de São Paulo*, caderno Mais, domingo, 13.01.2002, 12.

The information, therefore, is also the sound thrown at the listeners/readers with such immediacy that does not leave room for interpretation. It's not expected from this interpreter more than the passive conduct of message recipient. It is at his discretion to transform the information into knowledge or to store it together with the sparse elements gathered over time. He sits in front of the TV or a news magazine and receives what they have to offer without any incentive to study the subject deeply. The effect that was initially raised by the offer of data fulfils and leads to an automatic reproduction that spreads along the streets.

The broadcasting of news brings about values which are not necessarily the ones that lead to knowledge. As sources of the reality of the world of information are also the urge and the transformation of the message into a product. For this reason, the broadcast channel disperses through spheres of lack of control. If, on the one hand, there is a conjecture or an ideology around the former involvement of the media, on the other hand the pressure made by its receivers in search of a given subject cannot be ignored. This is emphasized, nowadays, by the direct possibility of access and the broadcasting of the informative news through the Internet. Anyone can become a reporter given the ease offered by technology including the making of photographic and recorded images also using affordable mobile handsets.

To have an *opinion*, ever since the Greek origins, doesn't mean to have *knowledge*. Being the interpreters of other interpreters, the public receives the data with the input from its judgements and pre-judgements, from an intervention point, where the unfolding of the facts is not entirely measured. There is a change in aesthetic order: To what news do people want to listen to? What are the news that will sell more newspapers or increase the audience of the afternoon TV shows and the evening news?

It's an old story. The controversial Carl Schmitt refers to it whilst commenting on one of Arnold Clapmar's books dated from 1605 (*De Arcanis rerumpublicarum*). He talks about the *arcacanum* that are part of the dictatorship process ("meaning some sort of ordainment that, by principles, does not rely on the consent or the understanding of the receiver and does not expect such consent"[5]). The *arcanum* are "artifices, including astuteness and fraud, to reach their final goal. But certain manifestations to raise the sense of freedom to reassure the people, i.e. simulacrum, decorative institutions, are always needed in the State"[6].

[5] Carl Schmitt, *La dictadura desde los comienzos del pensamiento moderno de la soberanía hasta la lucha de clases proletaria*, Alianza, 1999, 43.
[6] Carl Schmitt, *La dictadura desde los comienzos del pensamiento moderno de la soberanía hasta la lucha de clases proletaria*, Alianza, 1999, 46.

Carl Schmitt's readings are always disturbing. It is not possible to ignore the fact that he wrote *O Führer protege o direito*[7] *(Führer protects the law)*, in 1934, after a speech made by Göhring demanding the law theorists to support Hitler's actions. The impression that stays from the scrutiny of the article, which comes from a deepened documental research, is that it is an example of risk-taking. All of the tragedies of the daily options are found (the potentiality of being a dictator), as announced by himself in his work. When an *uncritical* assimilation of the authoritarianism is taken, it becomes difficult to take back the essence of freedom of thinking and acting as ethical basis. Therefore, there is a meta-evaluation that is both possible and necessary, of his work.

The Nazis' propaganda or the information published by the Nazis' press coincide with the ideas stated in the sequence of the above mentioned text:

> "Therefore, the distinct methods used belong to the *arcane imperial* in the distinct forms of State (monarchy, aristocracy, democracy) to keep the people calm; for instance, in the monarchy and aristocracy, some sort of participation in the political institutions, but particularly a freedom of speech and press, that allow an evil but politically insignificant participation on state happenings, apart from an intelligent view of the human pride etc."[8].

Nothing is more important in the exercise of democracy than the critical participation, the constructive impugnation of the decisions, the manifestation of individual or group thinking in relation to the various themes set for discussion by communities or in any scale of the public space. Hence, the freedom of press is an essential transmitter, because it can diffuse knowledge and establish solid structures to the dialogical process of the formulation of concepts and of concrete projections of the diversity in public practices.

When the Brazilian Supreme Court leads the way to the direct manifestation of the various sectors of society[9] in relation to themes that would compose the so called *hard cases*, making possible the defence of antagonistic points of view, a place for the wide participation of the society in the process of the decisions of more general reach is opened. This is without any doubt

[7] Carl Schmitt, O Fuehrer protege o direito, in: Ronaldo Porto Macedo Júnior, *Carl Schmitt e a fundamentação do direito*. Max Limonad, 2001, 219.
[8] Carl Schmitt, *La dictadura desde los comienzos del pensamiento moderno de la soberanía hasta la lucha de clases proletaria*, Alianza, 1999, 46.
[9] Notably by the use of *amicus curiae*.

a (new) step that deserves to be covered by the media even if it is to determine how to get to the legal decision in the specifity of the conflict.

It's not a matter, therefore, of fighting off or limiting freedom of speech, but rather of turning possible to exercise its true essence of *freedom*. With regards to the law, one ought to, therefore, seek the means to access each detail that compose its prime matter, like a *complex doing*, and not just to deal with a partial image of it. This leads to the awareness of the responsibility of making possible to the people more than the *politically meaningless noisy participation*.

The alert is pointed out in various parts of the work of important authors from the 20th Century, and Umberto Eco is among them:

> "The information is diffused through numerous independent channels, the system is acephalous and incontrollable, one can argue with others, and does not simply react emotionally to real life survey, but chews on deepened messages which are slowly discovered, building relationships and discussions more important than what has been the parliamentary dialectic or the obsolete journalistic polemic"[10].

The attempt to answer the questions made above starts here.

The work of the jurists[11] can be destined to the internal understanding of the instrumental data of the law, creating a subsystem that is closed for the laymen. It has this functional character. There is, however, a dispute to make the communication reach a wider audience, mainly in relation to the decisions and manifestations that interfere in the limits of conduct that are compulsorily demanded from them. Here are the parts or the people who are directly interested in a certain cause and, concurrently, the entire society, as potential recipient of the message about what the law *is*. As a background, there is the conflict and its imminence, which are the data inherent to humanity.

The conflict is essential raw material for the journalistic work. It is a source of feelings. It attracts the collective imaginary. It raises reactions from the ones who want to make a more peaceful society and also from the ones who do not worry about it.

[10] Umberto Eco, Sobre a imprensa, in: *Cinco escritos morais*, Record, 1998, 86.

[11] The term is used in a comprehensive version that reaches all those who have formal qualification to express arguments about the law, written or verbally (law graduates, judges, lawyers, prosecutors, solicitors, teachers, theorists).

Perhaps the adequate way is hidden behind the original idea of justice as a *doing* that does not belong to some, but to all. It's possible to take the basic line of justice as a virtue that is accomplished in the daily action of each person in relation to all of the *others*[12]. It does not exhaust itself. It demands everydayness and it is not exclusively in charge of the State.

In a society of comprehensive information, judges pass the sentence on, but the means of media also conduct trial sections, in the informal way by which they submit conflicts to the views of the public. Therefore justice (or injustice) is also made by journalists, TV and radio broadcasters.

In a work about the various ways of narrative by the law (of decision, of the theories, etc), Alejandro Nieto highlights how the jurists must be careful about the way they express themselves, given the relevance that they have to transmit knowledge. He points out the lapses to be avoided:

> "Nowadays it is still important, in an immediate way, the enthusiasm of the citizens in order to tolerate the exterior war or the internal despotism; but it might be even more important to make them opened to the interests of the sellers, once the market depends on the quality and the price of the production as well as on the *marketing practices*, and it has reached such extraordinary extremes not even suspected by the clients"[13].

When justice becomes an object or consumer goods, a dialectic exercise of confrontation is needed, to indicate the dimensions and face the threat of subjecting itself entirely to the practices of *marketing*. It is not possible to depurate the questions of law or to keep them safe from the conditions of a society that is avid for news – each conflict constitutes a great source of them. There is no way to point exclusively the monotonous side of the technique and the concepts as being the essential point of the law's functional acting. This takes shape in the solid interaction of the principle with social expectations built for the operational dynamics of the law. Judges, attorneys, prosecutors and solicitors take the frontline of the visibility and the legal technique is mixed with another technique in which the image, created from an implemented representation, has a substantial importance.

[12] A return to Aristotle can give accurate measure of this, especially in Book I, which explains the active sense of virtue in the city– Aristóteles, *Ética a Nicômaco,* EDIPRO, 2002, 53-54.
[13] NIETO, 2002, 288.

Although not possible to ignore, from the science of law troublesome point of view, the existence of a stream of verbal argumentation that operates in the normative formulation, the publicity, in a written version, is inherent data in the legal expression. This means that it can be seen, researched and analysed in its entire extension. It is the law, the decisions, the processes, and the theory. However, there is no way to grade or to schematize all of these manifestations. They are characterized by the variety and by the casuistry, versed chaotic and simultaneously with an inclination to an exhausting reiteration. To make the *legal thing* public is different, however, from making *publicity* out of it. If the word *publicity* becomes a legal principle[14], with not rejectable ballast in democratic service, it cannot stand off from its implication to the consumer society. The ones who create the phenomenon of the law are usually conscious of the importance of their action's publicity, but do not worry or control any of the publicity's techniques, or else, those that create a language that is sometimes artificial to the dissemination/sale of the information and to the search for a greater number of consumers or of adepts in a gap that must not be kept empty. The news and TV times must be completely filled, without a possibility of a silent pause or of a piece of paper in blank.

One can question if the law must surrender to this pressure of being like everything else; one can scrutinize about what use the law can make from these means of a society where everything is sold. The fact is that the need to communicate with the public and to make him pay attention to a given message of law and legal decision tends not to gain a good outcome when the teaching and hermetic methods of formulation of the legal text are maintained. Its language operates not only with the terms that functionally denote concepts, but also as a construction of synonyms without ballast with the technique.

The dilemma might be on what we could call the *words storage:*

> "The jurisprudential narrative is without doubt the oldest crossroads where the word is stored (before historiography, and sociology): the oral process, the testimonial, the signs registered by the men of the law, the common knowledge validated by a formal knowledge (*regime d'expertise*) are elaborated, a micro-history that demands a coherent organization and that compares the specific events with the architecture of the legal concepts"[15].

[14] See, even if slightly, the *caput* of art. 37 of the Brazilian Constitution.
[15] Jean-François Laé, *L´ogre du jugement*, Stock, 2001, 21.

The processes of word visibility, in law, escape from its limited technical universe and are absorbed by the interested parties in each process, but also by models of exposure and of selection like the ones that provide to the shiny reality of the means of the media. Hence having no means to become free from this diffusion by an uncontrollable channel, on one hand, and being this an essential mean for the spread of the information (and, forcedly, of knowledge) in the contemporary society, it is necessary to face the obstacles.

There is an ample line of theorist appropriation focusing on these themes to help the researcher or the interpreter. It can be connected to the Cultural Industry Adornment, the capillarity of the analysis of the power of institutions by Foucault, the interaction of the social subsystems by Luhmann, already quoted, the risks of the communicative action and of the formulation of the consensus by Habernas. However, the supporting point can be simply in assimilating the basic aspects and in avoiding the curtailment of the theory as a hiding place to the roughest aspect of the problem.

The presumption to make the laws known to everyone makes the means of communication a vital source for broadcasting a legal pedagogy. But one cannot be naive to imagine that this is going to be done spontaneously, isolatedly or uncritically.

Ricoeur describes public opinion as the amplifying source and the mouthpiece of a craving for revenge. For this, according to him, the publicity given to the means of media to the processes of application of sanction should constitute essentially of an "education for the equality, to the extent to discipline the anger for revenge"[16]. The first lesson to be learnt from such educational process would be the indignation. It leads to the formulation of techniques for the valorisation of the behaviour patterns fixed on the laws and by the spontaneous involvement of the receivers, apart from the imposition of the sanction as an artificial vector for its accomplishment. It can make the public discussions of the new regulations and the legislative reforms more informing, as long as it makes clearer the confusion brought by a solid legal experience.

Take into consideration, though briefly, for this is a bundle of multiple co-ordinates, the execution of the sanction as an example (*forced execution*). It is not enough to draw up on the headlines the problem of impunity as if it were an abstract spirit that is solved by simple elocution, a faith dogma that consumes itself. To punish is not an act, but rather a process and the its difficulties go from the examination's limits (which include the bad quality of the legal conduct and the forms in which the disputes - or leads - are made) to the operational facts which

[16] RICOEUR, Paul. Sanction, rehabilitation, pardon, in: *Le juste 1*, Esprit, 1995, 200.

involve the construction, maintenance and control of prison systems (which are relatively recent characters in the history of the law in relation to the amount of the individuals that must be accommodated there), transiting through the arduous work of transformation of the *res judicata*, that sentences to payments, effectively. Not always is the money made available in its absolute fungibility. It is necessary to pledge and to alienate judicially, with the certainty of the inconsistency with the real market value.

The narrative, therefore, has an educational duty, because it can make possible the decipherment of a wider (and more realistic) picture. It's not necessary to go back to the Greeks and reinstate the platonic method that describes the access to knowledge through the allegory of the cave[17]. The chained men who see the reality in a shadow can only look at the wall where the images are shown. The freedom of the one who gets out and experiences the light is described by the emphasis of the pain that is in the act of learning: knowledge hurts as much as the first light in the eyes of the person who had never experienced it.

When the subject is the law and the questions connected to it it's not possible to refer only to the factual moves around the conflict. The own way of the law is incorporated in the experienced scene giving it a connotative cover that transmutes the simple facts into a legal version. For this reason, there is always a risk of frustration when the description of the news is made without worrying about the complex and real data that converts it into a legal phenomenon. In a way, this free description, which aims to attract the person who's reading or watching it, in an immediate link, brings the danger of bringing back to the ancestral idea of revenge without any mediation.

Because the troubles of effective practice of law exist and must be analysed in their deepest meaning, the disturbances of such facticity go beyond the will of whoever presents the news and demand that the context in which it occurs is verified. The immediate and absolute appropriation of the conflicted scene, for the fast description of the news, can lead to the idea of taking the law *by its own hands*, rejected by the contemporaneous rationality.

The hermeticism of the legal communication bears a good dose of guilt in the unfolding of this process. Whilst the knowledge of the law is presented as an unreachable flank to the ignorant and not being the troublesome mesh exposed in a clear way, the perspective to canalize the frustration on to another dimension arises.

[17] Edelman strengthens the architectural assembly of this cave in order to serve precisely to the intended descriptive purpose – see Bernard Edelman, *Quand les juristes inventent le réel:* la fabulation juridique, Hermann, 2007, 27-28.

The work of journalists and law professionals (judges, attorneys, solicitors, chief officers etc.) coincides in the filtering of facts and in the description of a history reconstructed with the essential respect to the *contradictory*. The parts have a right, in the process, that each decision expresses a position about the allegations and the opposed evidences. Whoever is mentioned on the news has the right to have their side of the story heard and investigated.

Journalists and judges have the duty to find out what has happened and to express themselves with convincing arguments. The legal decisions forcedly lead to a valorisation of the occurrences under the legality prism. They are necessarily motivated and may not correspond to the expectations of public opinion. The valuable judgement of the news can be subliminal and hide itself between the wordplay in the headlines in which the main goal is, traditionally, to attract the reader's attention. If, on one side, there is an excess of processes and laws, on the other is the unlikely presumption that journalists will command multiple and synchronized knowledge in fields of incisive technical complexity. The same difficulty increases for the judges who are forced to decide about the most varied facts, lots of them from a technical background, highlighting the specific terminologies that characterise the various streams of human interest.

But wider procedural questions are also shown as focus of errors in the field of access to the complete contents of the law.

One can insist to assure that it works by the documentation of techniques and concepts that operate in a troublesome way. It is known, to point out an area of gap, that the appealing system, which aims to ensure the safety of the parts, constitutes, paradoxically, one of the sources of slowness in the Judiciary. What is done to make more justice viable leads to less justice. The logic of journalism does not allow temporal delaying. Novelty is an essential characteristic of the selling news. The pernicious tendency will be to replace the truth by the impulse to get an urgent result. Haste, therefore, under the impression to lead to more justice, can collapse into less justice.

This is one of the most interesting fields of breach among the processes of appreciation of the facts by judges and by the mass communication media. The speed in which the news must be published prevents the worry about the maturation of the information and the consolidation of knowledge which are time-demanding. Hence it is worked around an incomplete image that is build at random, since it is difficult to keep up the interest in a time demanding appreciation process.

This could be one of the reasons why slowness is treated by journalists so frequently. As an ancestral and endogenous problem of the Law, its visibility by the media is duplicated by the imposition of the urgency to the urgency. The speed on answering, explaining and solving is crucial. Those who face the problem know that slowness is like a fabric of many textures and edges that do not orderly intertwine. In order to tell the story or to solve it, each texture will need to be detangled[18] and the specific demand left on sight. Thus, there is no unique image to concentrate upon, but a fragmented image, which will be faked by any attempt of summary to turn it into a uniformed synthesis. Such complexity trespasses the necessity to freeze the facts in its exposure, to turn it into an image where the message is with no doubt available.

This difficulty, not by chance, repeats the tonic of the messages' most trivial contemporaneous version, as highlighted by Gebauer and Wurf:

> "It is impossible not to notice the actual tendency to turn everything into image. The electronic character of TV images favours its ubiquity and its speediness. The images are mixed, edited, replaced by others and mimetically referred to others. From them elements to make a new image are extracted: the fragmented images built constitute a new entity. Different images look alike given their one-dimensional forms and their electronic and reduced character, despite the distinction of contents. They take part in the deepest mimetic transformation of today's worlds: they disaggregate the things and transpose them to a world of appearances"[19].

When the facts are built, related to a socially lived conflict, a deliberate choice is made to interpret them in order to achieve an end. The construction of an image can create an imitation of the reality and of what is relevant in it.

The background, however, is surrounded by an atavistic image of the justice, perhaps like scenery. It is related to a moving idea that is not disconnected to the facts to be reached, but that is formed in circles, coming from the demand for more justice, for another justice, or from new tracks of interest that start to be absorbed by channels of ideology or reassurance. Therefore, justice also has a moving image:

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[18] To mention just a few along with the appeal system, it can be talked about the structural difficulties in case management, with the historical characteristics of each court, the normal incidents that occur in the processes (the witness who is could not attend, the expert who was unable to complete the report), to the varied disturbances of the action.

[19] Gunter Gebauer, Christoph Wulf. *Mimésis* : culture, art, societé, Les édition du Cerf, 2005, 493.

> "The image of social justice changes all this by confronting the existing world with na image of what it is not. But not only does the image of social justice limits its other, the existing world, it is also reciprocally limited by its own others: namely, whatever is and whatever else may be. It is *just* this possibility that is opposed to the given in the image of social justice, and thus it and it alone becomes the standart for measuring progress towards justice"[20].

Journalists, in a greater proportion than jurists, end up being closer or more immediate channels of this wish for *progress towards justice*. They can perceive a lot more directly than the jurists where the needs are and in which way they change into rights to be demanded. The environmental demands are a clear example. This idea that is fed into the contingency is taken as a fundamental need of the human soul in all things. There is, therefore, a picture of justice that is built in an area of society and that, with the power of an agonal verb, spreads in spaces of wide visibility.

Judges, however, do not deal with such justice properly, in a brutal meaning, with a powerful support that spreads among all things. They cannot do it with their own hands, because the law, made of shapes, ends up imposing ties that are sometimes even in the way in which the request is made, in the literality of how it was deducted.

There is, also, the most ordinary or residual area that is the recovery of the conflictual fact that involves the law case. For it there is an unique epistemology that reaches its version and applies itself to the law and to the journalism:

> "The epistemological statute of the facts then coincides with a *reality* that exists by itself, without any other human mediation apart from the effort to offer a mnemonic chronic, memorably reliable, to duplicate what was lived in an impeccable way; thence, with effect, the interest for the slow speech of meaning, of certification, denotative and in a great measure deliberatively autistic and anonymous"[21].

Anyone who militates in the hearing rooms knows how conscientious and full of nuances the collection process of the oral exam is. This mnemonic recovery is usually slow and of autistic appearance due to its aseptic and careless character which defines the posture of the judge. The rite can lead to the impression that he does not get involved with the questions that he asks. This

[20] WOLCHER, Louis E. Thought's prison: an image of images, in: Ronnie Lippens. *Imaginary boundaries of justice*: social and legal Justice across disciplines. Hart, 2004, 27.
[21] José Calvo. *Derecho y narración*: materiales para una teoría y crítica narrativística del derecho, Ariel, 1996, 70.

withdrawal, this quiet attention to the detail, the needed comparison of the declarations with the documented data that might define the meaning of the facts do not create an image that is sufficiently stimulating to the television, for example. A movement, a scenically finishing that would defy the voice and the word is needed, but this is incompatible with the depth in the recovery of the original scene of the conflict by the witness. In most cases, the bombshell revelation does not happen. The story is slowly captured in tenuous and not always clarifying details in an isolated way. Everything is only solved due to the interpretation of the judge condensed in the text of the sentence.

The representation of the *lived scene* does not usually have the colours or the dynamics that could attract and keep the public's attention.

Its own form is tedious. The questions proposed to the judge by the lawyer are repeated and the answers given are again repeated to the typist. There is a verbal excess that would be unthinkable for television. A director responsible for these scenes would surely impose the asked question directly and with a more dramatic chanting than that demanded by the technique.

There is a lot to be researched about the interference of theses processes of transposition of appearance and image in the audience of the Parliamentary Inquiry Commissions. The person who inquires the witness cannot overlap their personality or image and the questions cannot be random ones. They must be the product of the domain of the evidence or the indications constructed until then and must lead to the good use of the circumstances sometimes insignificant to a discovery of the facts. Truth does not always shows itself clearly and the contradiction that may compose a picture of indications in which it only reveals itself if there is calm to exercise what the American realists would call *hunch,* which is an addition of the domain of a technique consolidated by the practice of the duty and of the *guess* that comes from the intuition turned to the perception of the relevant aspects.

Whoever opens up the newspapers finds perplexity in several news in which the dilemma is to define what has happened. When, where, how, why has this happened? The conjectures that spread around the press don't always come from the integral visibility of data. And imagination can take one away from the truth, because the means to get to it are not given or predicted exhaustedly. They vary in each circumstance. It cannot be expected, because of this, that the statement of the effectively occurred to always be solved by confession.

The urge to have a confession by the person who has committed the illicit act proliferates in the idea of justice that perpasses the streets. There is no doubt that the confession is the process

that brings the greatest relief to the conscience of the judges. It makes the factic elements right. However, it is a sporadically present proof. And the exposure of facts needs to be validated by other methods, to which the visibility of the media is a troublesome angle, because they don't usually fully demonstrate it precisely. Therefore, a version of the truth that is accepted by the public as being absolute and unquestionable is created solely by the fact of its exposure. The judgement and immediate condemnation can be given and the principles of the contradiction and the wide defence become empty words.

Edelman talks about the world post-photography in which the image seems appropriate and dominated forever. He sees the struggles of a justice that register the occidental dream "more uncomfortable, more unlikely, but fancy": to make man the world's creature, the great demiurge". And goes on, referring to the story that begins with the appearance of photography:

> "In this story of such tiny, minimum relevance, it is played, in fact, with the appropriation of the world by the technique, its subservience to a machine – the camera – that will change into an extension of the subject. Ultimately, the technique will be subjectified and the technique will be applied to the subject; and it's due to this double mutation, registered by law, that man will become not lord of nature, but of its representation"[22].

Annie Leibovitz, known photographer of celebrities, who "has immortalized all people who matter on this planet, whether politicians, athletes, singers or entrepreneurs", reveals how photography work was a consolation in a moment of personal struggle: "Her emotion is visible but rapidly restored. She photographed enough celebrities to be carried out by the illusion of the images. You know, they are just pictures. I make a story. But it is not a life"[23].

The problem remains: how to discover life, real life? How to reduce it to an image? How not to fabricate a story and lend a tool to injustice?

The theme had already been laid by Walter Benjamin, with the purpose to compare photographs to scene settings:

> "This is where subtitles should be introduced, which includes photography in the concept of literalization of every life condition, and without which all photographic creation is doomed to remain in an inaccurate limbo. (...) But isn't each corner of our cities a crime setting? Isn't each one

[22] Bernard Edelman, *Quand les juristes inventent le réel:* la fabulation juridique, Hermann, 2007, 162-163.
[23] Claire Guillot. São apenas fotos, não a vida. *Folha de São Paulo*, the 29th June 2008, Caderno Mais!, 3.

> of the passers a criminal? And is it not responsibility of the photographer – successor of presages and haruspex – to reveal the guilt in his pictures and finger point the culprits? "The illiterate of the future", said someone [Baudelaire, in his essay of *The Modern Public and Photography*], "will be whoever is not able to read the pictures, and not the uneducated". But won't the photographer who is unable to read his own work be practically an illiterate? Won't subtitles become an essential part of the picture?"[24]

Subtitles are in fact interpolations of the pictured fact like legal decisions caption the perspective as the facts come in the evidence. It is for no other reason that Jerome Frank, the controversial American judge and thinker, says that judges are mere witnesses of the witnesses' testimony[25]. So are journalists.

Photography and even video expressions have brought the habit of a reduced, frozen, segmented, edited habit. What is seen is the piece chosen by the interpreter, the way in which he wishes the world to be seen. The judge runs the same restrictive piece when sections the facts in the writing of the sentence. In both cases the responsibility lies in knowing how to read, in knowing how to tell what was read and, mainly, in reaching the coincidence between image and life. In not creating an illusion.

In novels, detectives silently find out the truth[26]. The criminal only confesses the crime when confronted with a series of proofs and evidences so well presented that his excuses are taken apart. The detective, therefore, cannot be impatient. Nor can the reader. Reading the last part of the book is not allowed, not without first going through the whole story, page by page. Literature tells something about the experience in the process of production of proof. In real life, if the journalist, the sheriff, the prosecutor or the judge have no patience in the detection of the facts, they can end up making one more victim: the person who is unfairly accused.

Newspapers nowadays are packed with these risks due to the need of immediate information. The courts are packed with these risks due to the need to match speed and certainty and due to recalcitrance in the use of effective means of managing processes. It cannot be accepted,

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[24] Walter Benjamin. Beleza e a sociologia da arte, in: *A modernidade*, Assírio & Alvim, 2006, 261.

[25] "Trial judges and juries, in trying to get at the past facts through the witness, are themselves witness of what goes in the court-rooms" – Jerome Frank, *Courts on trial*: myth and reality in American Justice, Princeton University, 1973, 22.

[26] The same happens in the series that address the investigation of facts. Indeed, in its dramatic construction, the paradoxes between the media exhibition and the reconstruction of the frame of fact are constantly explored elements in an internalization of a metalanguage that digests the language of the system and gives it back in a cerographic expression, on line of theatrical tension.

however, that people's lives are covered by fear from this fake immediacy and urgency. Although the omission and inaction should not prevail, we need to be conscious that the processes for journalists and judges cannot transit in the easy game of superficiality. The truth is not simply what someone said about someone else. It involves a careful analysis of the evidence and the prospect of certainty that, generally, is not accessed with the desired readiness. It involves the explicit report of the facts and techniques that limits the application of the law. It is the analysis of the thoroughness, of the details, read in the harvest of successive correlations.

One of the sensitive points in this process in the Brazilian current affairs relates to wiretapping. The impression that one gets is of facing the highest quality test, because the technology would allow the gathering of manifestation of the party in its absolute spontaneity. From the source. Therefore, verbal expression thus registered would tend to overcome the weakness of the evidence in which there might be a preparation. The feeling is therefore that this test would have the same defining power of a DNA test.

They have something in common: the existence of a technological development that allows the invasion of what cannot be seen with naked eye. If the DNA test breaks into the genetic history of an individual, into the uttermost of the family structure, wiretapping breaks into an individual's privacy and penetrates the exposed thoughts without restraint, in the covered demonstration of the natural day to day talk.

However, in the DNA test science allows the reconstruction of the facts in its essence and in the wiretapping the path to an indication, which is not sufficient in itself but opens the vision of lines of investigation to more accurate points which, with the examination of documents, know-how and even witnesses (which already inquiry part of a composite trace that facilitates the assembly of questions), may determine the certainty in a clearer way.

However, one cannot imagine that wiretapping results correspond to an evidence in itself that can be isolated from the context, even because the excess may disqualify the process and its trivialization, without further research evidence (which requires time and caution), can lead to injustice and/or inefficiency.

The newspaper headline can give an idea of the importance of the facts: "Country has already lost control of judicial taps: More than 33 thousand telephone lines are legally tapped every month"[27].

[27] *O Globo*, Sunday, 13th July 2008, 1.

From the point of view of journalism and its expression, these means of evidence may be of further interest. It is easy to reproduce the phone conversation, not only because it is faster as informative collage than a thorough search of evidence, but also from a collective imagination's point of view it provides the most immediate standards for understanding: the idea of a reality show and of the research directly where the facts are happening are attractive in times of an entire domain of information feeling.

The danger is the loss of distance and, mainly, the loss of the exact dimension of facts.

The research of the evidence is necessary for whoever is speaking, but it is a definite requirement when the conversation refers to a third person. There could be lies about them, purely to incriminate or cast doubt. Whoever decodes the wiretapping is also the interpreter. This makes the newspaper headline assimilable. Suspicious about references to a biscuit factory in a tap, policemen went to the place certain that they would find a facility to refine cocaine. However, they found a real biscuit factory. The conversation is not always coded. And this is what makes the secrecy in the investigation and the necessary confront with other evidence elements essential for the verification of facts with the indispensable safety. The reasons for this are not in the personal interest of any of the individuals eventually involved. There is public interest that covers the social order as a whole, as part of the process view in the Democratic State, aimed, according to Ricouer, to establish

> "a *fair distance* between the conflict that unchains private and public hatred and the punishment inflicted by legal authority. While revenge causes a short-circuit between two sufferings, that to which the victim is submitted and that inflicted by the avenger, the process is interposed between the two, establishing a fair distance to which we refer"[28].

The goal of the technique is, therefore, to write and enforce this *fair distance* between the parties, taking to itself the idea of revenge. This formal clean up, this sterilization of effects are not seen naturally in the public display of law. The mass media cannot, in most cases, take away this pedagogical meaning for the restoration of social peace from the circumstances of the process and technical outbursts.

The complexity of this is compounded by the fact that the process in itself does not work as desired. Issues such slowness and obstacles of a settled and incomprehensible bureaucracy, the

[28] RICOEUR, Paul. Sanction, rehabilitation, pardon, in: *Le juste 1*, Esprit, 1995, 195.

use of technical and absolutely airtight language are factors that contribute to a portion of a desire for revenge, for overcoming the conflict from the suffering imposed by others and the certainty of ailment behind all media manifestations. When the formal channels of sanction structuring do not properly function, there is a contribution from the State itself for the breach of its mediator role. The sanction, therefore, becomes the dominant focus of attention for the interaction between law and facts. And if it does not work properly, the idea of revenge comes back to the scene.

Ricoeur, once again, sees in it a part of a process to regain *self-esteem*:

> "Punishment restores order; it does not recover life. These impertinent observations invite to emphasize the moral meaning of the sanction (...). The victim is publicly recognised as the offended or humiliated, or else excluded from the regimen of reciprocity by one that turns crime into the introduction of an unfair distance. (...) It can be said that something here is restored under the name as diverse as happiness, good reputation, self-respect and, I would insist on the term, self-esteem, or the dignity attached to the moral quality of the human being"[29].

The sanction acquired under the protective cover of the process the form of sentence, of compensation, of forced execution. However, the society of the absolute information installs the sanction by its exposure. The visibility of that which accuses implies, during the accusation process itself, the destruction of the entire personal dignity by the fraying of their personal reality and the trivialization of their image. The lack of time delay between the effects of someone's image exposition and the crumbling of his position in relation to the intensity of the accusation implies an immediacy of effects which removes any selectivity or identification of a particular process of accomplishment.

However, nothing is simple. To stop the media, restricting or controlling their tendency to permanent expansion is to censor it. To establish strict rules will add more complexity to the process, being known that any precept regulator will tend to a texture opened or full of principles in such a way that will by itself raise the conformation of interpretation.

The solution may be in the insistence in opening one's eyes to the possibility of learning as an infinite process. To doubt, to discuss, to criticize, to show, to display, and to expose: *poking the wounds*, all of them, with a finger.

[29] RICOEUR, Paul. Sanction, rehabilitation, pardon, in: *Le juste 1*, Esprit, 1995, 199.

Instead of representation, law should seek to be what it is in the simplicity of grounds. This applies to those who make it with the mastering of the technique and to those who turn it into news. Judges make decisions. Journalists make news. And both can commit an injustice if they don't have the patience to ask the right questions to the past and to seek the answer beyond the immediate impression or the pure and simple representation of the being. And both can become *reality factories*, can create the reality in the composition of a never-ending romance that follows all mutations, utopias, ghosts, dreams, conflicts. Behind the decisions and the news are the people and we are fundamentally equal in the breakages and dangers of life. We have to watch out to make sure that no one will suffer with the indelible scars of injustice; because to commit to it is the worst of the vices, as foreseen by Socrates in the ancestry of western thoughts.

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Address: Mônica Sette Lopes. Rua São Paulo, 2207/501 – Belo Horizonte – Brazil – 30170132 – msl@ufmg.br.