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« WHAT CANNOT BE THEORIZED MUST BE NARRATED »: CASE, FACT AND EVENT IN PRE-MODERN LEGAL CULTURE

1. *Liquid contemporaneity and criminal law.*

In this article, I will endeavour to add my own perspective to the research suggested by Michele Pifferi and Alberto di Martino (1). Their proposal aims to uncover and explore the intellectual, doctrinal, historical, and political intersections, which, by taking their complementary perspectives to the extreme, can make the once

(1) A. di Martino, *Inter-Legality and Criminal Law*, in *The Challenge of Inter-Legality*, ed. by J. Klabbers, G. Palombella, Cambridge, Cambridge University Press, 2019, pp. 250-268; Id., *Dalla regola per il caso al caso per la regola. Variazioni brevi e stravaganti sul concetto di « caso » (case, Kasus)*, in *Studi in onore di Lucio Monaco*, ed. by A. Bondi, G. Fiandaca, G.P. Fletcher, G. Marra, A.M. Stile, C. Roxin, K. Volk, Urbino, University Press, 2020, pp. 357-373; Id., *The Importance of Being a Case. Collapsing of the Law upon the Case in Interlegal Situations*, in « The Italian Law Journal », II (2021), pp. 961-984; Id., *Dalla regola per il caso al caso per la regola*, in *L'era dell'interlegalità*, ed. by E. Chiti, A. di Martino, G. Palombella, Bologna, il Mulino, 2022, pp. 65-90; M. Pifferi, *Dalla casistica alle regole: la normativizzazione della responsabilità penale tra medioevo ed età moderna*, in « Quaderni fiorentini », LII (2023), pp. 401-423; Id., *The rise and fall of penal casuistry: medieval theological roots and modern systematization of criminal fault*, in « The Yale Journal of Law and Humanities », 2024; Id., *From casuistry to the general part. The conception of criminal responsibility from the ius commune to the penal codes (XII-XIX centuries)*, in *The Routledge International Handbook on Criminal Responsibility*, ed. by T Crofts, L. Kennefick, A. Loughnan, Abingdon-New York, Routledge, 2024, pp. 138-152.

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unthinkable into a reality in the criminal realm. Specifically, the fundamental premise of their project is the relationship between case and criminal decision-making, as well as the questioning of legality and the closely related « inventive role of interpretation » (2). This is a significant shift, especially in the modern legal landscape of continental Europe, where such ideas have remained unchallenged for centuries.

Modern criminal law, as is well known, despite its development being anything but continuous and coherent, has its roots in the legal Enlightenment and is deeply influenced by the 'science of legislation'. However, the new 'liquid' contemporary world (3) has now moved beyond the abstractions and simplifications of the eighteenth and nineteenth centuries. A multitude of complex regulations also weigh on traditional criminal nationalism, which had found its most stable and faithful support in legality (4).

In the wake of a reflection already initiated in recent years, the intention is to discuss the value and desirability of a jurisprudence that goes beyond a rigidly normative 'code' of provisions, described in a general and abstract manner. Rather, it should be capable of applying a law that is adaptable, flexible, and sensitive to the (irreducible) multiplicity of cases.

The path we are embarking on is certainly not an easy one. It requires everyone, both within and outside the legal world, to reevaluate their « historical regime of normativity » (5); to embrace the conflict with their established problem analysing mind-set and consider the possibility of cognitive deviation, recognizing the pro-

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(2) P. Grossi, *Della interpretazione come invenzione (la riscoperta pos-moderna del ruolo inventivo della interpretazione)*, in « Quaderni fiorentini », 47 (2018), pp. 303-312.

(3) Z. Bauman, *Liquid Modernity*, Cambridge, Polity Press, 2006.

(4) F. Palazzo, *Legalità penale: considerazioni su trasformazione e complessità di un principio "fondamentale"*, in « Quaderni fiorentini », XXXVI (2007), pp. 1279-1329; Id. *Principio di legalità e giustizia penale*, in *Percorsi giuridici della postmodernità*, ed. by R.E. Kostoris, Bologna, il Mulino, 2017, pp. 229-245. See also the fourth chapter of G. Zaccaria, *Postdiritto. Nuove fonti, nuove categorie*, Bologna, il Mulino, 2022.

(5) T. Duve, *Legal History as an Observation of Historical Regimes of Normativity*, in « Max Planck Institute for Legal History and Legal Theory Research Paper Series No. 2022-17 », September 19, 2022, available at SSRN: https://ssrn.com/abstract=4229345 or http://dx.doi.org/10.2139/ssr n. 4229345.

visional and conjectural nature of the results, inherent in social knowledge.

In the face of such a challenge, I will also attempt the strategy of diachronic comparison to try to « sharpen the critical gaze » and delve into the governance of the transformations unfolding (6). In particular, I will return to those studies of mine that, by their temporal framework, have intersected with the method of casuistry in pre-modern European ethical-juridical literature (7). I will be focusing on an era that precedes the powerful Enlightenment formulations of criminal legality: a vast expanse of time that I will intentionally leave undefined in its chronological boundaries.

The first legal text I will be examining cannot be labelled as a medieval source, as it is a late 17th-century treatise, published in the early 1600s (8). However, due to the characteristics I will soon highlight, I believe it can be considered, at least from the perspective that interests us, that is, the intertwining of legal theory and judicial practice, a text that maintains 'exemplary' its pre-modern essence. In other words, it is one of the many ripe fruits of that *media tempestas* (9), the long period that bridges the gap between antiquity and modern times. Despite its complex nature and ever-changing character, this era serves as a laboratory for a legal culture, where we can observe — even in matters historically linked to political sover-

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(6) P. Grossi, *Mitologie giuridiche della modernità*, Milano, Giuffrè, 2009, p. 9.

(7) On the traditional practice of casuistry, which reached its all-time apogee roughly between 1580 and 1720 see among the most recent and interesting publications: *A Historical Approach to Casuistry. Norms and Exceptions in a Comparative Perspective*, ed. by C. Ginzburg, L. Biasiori, London, Bloomsbury, 2019; R. Schuessler, *The debate on probable opinions in the scholastic tradition*, Leiden, Brill, 2019; Id., *Casuistry and probabilism*, in *A companion to the Spanish scholastics*, ed. by H. Braun, P. Astorri, E. De Bom, Leiden, Brill, 2022, pp. 334-360.

(8) Baltasar Gómez de Amescúa, *Tractatus de potestate in se ipsum*, Panhormi, Apud Erasmum Simeonem, 1604; see M.S. Testuzza, *« Ius corporis, quasi ius de corpore disponendi ». Il Tractatus de potestate in se ipsum di Baltasar Gómez de Amescúa*, Milano, Giuffrè, 2016.

(9) On the expression « media tempestas » conventionally attributed to Giovanni dei Bussi, secretary of Nicolò Cusano, see P. Pontari, *"Nedum mille qui effluxerunt annorum gesta sciamus". L'Italia di Biondo e l'invenzione del Medioevo*, in *A New Sense of the Past: The Scholarship of Biondo Flavio (1392-1463)*, ed. by A. Mazzocco, M. Laureys, Leuven, University Press, 2016, pp. 151-176.

eignty, such as criminal law — the triumphs and failures of the great osmosis between the authoritative corpus of norms and the unique characteristics of each case. It also highlights the interplay between legal law, jurisdictional law, and customary law on the one hand, and the « jurisprudential moment of law » on the other (10).

In the second part, I will dive into another treatise, this time from the German and Protestant world, dating back to the second half of the 17th century (11). I am revisiting it here because it is the perfect tool to display a final, pivotal moment in this extended legal period. In particular, it helps me to shed light on the significance of a factor that plays a crucial role in shaping the profound crisis or radical transformation of this enduring cultural perspective.

This work finds itself in a phase where the habit, typical of a pluralistic system, of returning to the « shifting particularities of the case » is still alive and well (12). However, answering casuistic questions no longer requires resorting to casuistry as was done in the past (13). As we will see, it does not necessarily follow the same *modus operandi* or serve the same purposes. Instead of allowing for differentiated and variable responses depending on the circumstances, the focus on the concrete case is used to emphasize the need for a close and rigorous connection between, as Galilei would say, « sensory experiences » and « certain demonstrations » (14). Between the pages, one can truly grasp the profound impact of the observational-inductive method of the new scientific discourse on legal knowledge demonstrations.

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(10) L. Lombardi, *Saggio sul diritto giurisprudenziale*, Milano, Giuffrè, 1967, p. VIII; p. 497.

(11) S. Stryk, *De iure sensuum* (1671), Francofurti ad Viadrum, Impensis Joh. Godofr. Conradi, 1737; see M.S. Testuzza, *Lo* ius sensuum *nelle architetture teoriche di alcune* dissertationes *giuridiche di fine Seicento*, in « Quaderni fiorentini », LI (2022), pp. 89-129.

(12) R.E. Kostoris, *Presentazione. Un diritto post-moderno*, in *Percorsi giuridici della postmodernità*, cit., p. 9.

(13) On the distinction between casuistry and casuistical questions, see R. Schuessler, *Kant, casuistry and casuistical questions*, in « Journal of Philosophy of Education », 55 (2021), pp. 1003-1016.

(14) G. Galilei, *Lettera a Madama Cristina di Lorena*, in *Le opere di Galileo Galilei*, ed. by A. Favaro, Firenze, Barbera Editore, 1932, vol. V, pp. 309-348.

2. *A pre-modern jurist 'in action' among a multitude of laws.*

The first work I mentioned is the *Tractatus de Potestate in se ipsum*, which emerged from the Palermo press in 1604 and was reprinted posthumously a few years later in Milan. The author, Baltasar Gómez de Amescúa, was a jurist from Toledo who studied canon law for a few years in Salamanca, the most famous and influential of the universities *of las Españas*. The young man, however, cleverly hastened to complete his academic career in a minor Iberian university (that of Sigüenza) to first secure the title that would allow him to become part of that legal-administrative elite which, subjected to strict royal control and exceptional mobility, accompanied the Habsburg power on a planetary scale in the government of the Spanish multipolar system. In fact, shortly thereafter he is to be found in Sicily, holding important positions in the major magistracies of the viceroy and in particular as the viceroy's consultant, a key office in the dialectic between Spaniards and islanders (15).

These brief biographical details serve as a testament to the diverse background of our author, setting him apart from the traditional *doctor iuris*. Emblematically, as a high magistrate, in the same way as the scientist of the *ius commune*, he was engaged in the intricacies of legal-authoritative texts. However, as a 'professional' and as a user of the law, in close contact with a set of different socio-juridical practices, his interpretation typically reaches the normative sources starting from specific situations, a transgressive action, a precise conflict, or a specific problem. As we will discover in his treatise, the Spanish jurist — even more than a 'master' of law, who is still open to such an approach — tends to confidently return to the situation, the case and its circumstances, and, with a certain skill, seeks a concrete legal reason to suggest a potential solution to the dispute.

This inclination becomes even more significant when considering his connection to what, with some simplification and stretching, can be seen as the central administration of public affairs at that

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(15) For a more in-depth biographical exploration of the author, see TESTUZZA, *« Ius corporis, quasi ius de corpore disponendi »*, cit., pp. 27-78.

historical juncture. Despite this public affiliation, the legal landscape for him remains marked by the presence of other 'decision-making centres' of power, which involve both competition and mutual recognition.

This circumstance clearly affects the sources he employs, shaping his choices and influencing his decisions. Despite being officially authorized to reason on the *leges* rather than the *interpretationes*, the normative material it draws on remains heterogeneous and composite. He delves into the texts of Roman and canonical law, as well as the doctrinal commentaries that have been built around them over the centuries. He applies the *ius proprium* (in this case, Spanish Royal law), as well as manuals for confession and those used by inquisitors. And what is more, he draws on the volumes of new theology, the scholastic philosophy rooted in Aristotle and Thomas Aquinas, originating from Salamanca, the great university whose disputes guided the Spanish sovereigns in their new global government.

The 21st-century jurists, living in a society, characterized by a multiplicity of sources, courts, actors, and interests, may find themselves disoriented. However, they have embraced a significantly broader vision of positive law compared to the traditional one and are now accustomed to setting aside the most common biases of state derivation (16). Therefore, it should not be too difficult for them to envision, in a way that echoes their post-modern reality, the legal landscape of Gómez de Amescúa as a reticular structure where multiple normative forces coexist and thrive, without any one force dominating or surpassing the others, but each finding its own unique

(16) P. Grossi, *Novecento giuridico: un secolo pos-moderno*, in Id., *Introduzione al Novecento giuridico*, Roma-Bari, Laterza, 2012; Id., *Verso il domani. La difficile strada della transizione*, in *Percorsi giuridici della postmodernità*, cit., pp. 25-42; Id., *Sistema moderno delle fonti del diritto ed esperienza giuridica posmoderna in Italia*, in « Rivista internazionale di filosofia del diritto », XCVIII (2021), 2, pp. 158-159. On the topic of legal pluralism, consider: P. Costa, *Il 'pluralismo' politico-giuridico: una mappa storico-concettuale*, in « Quaderni fiorentini », 50 (2022), pp. 29-118; *Pluralismo giuridico. Itinerari contemporanei*, ed. by P. Cappellini, G. Cazzetta, Milano, Giuffrè, 2023.

place (17). This means that roles and positions are only partially defined; the division of competences is not static; legal subjects are not strictly separated by rigid boundaries, leaving ample room for overlapping and interferences.

Despite its growing autonomy within the legal system (18), criminal law has not yet acquired the 'insular' character it exhibits in the legal landscape of the modern West (19). Instead, it remains intertwined with other normatively structured social areas, guided by rules of conduct that, while not legally binding, continue to have certain legal implications (both indirect and concrete). Additionally, the procedures are not just a series of formally dictated steps, but a symphony of interconnected actions that harmoniously blend with the material law, creating a dynamic and unified whole. The dialogue between the two most traditional normative bodies of knowledge, law and theology, emerges, and their joint function of shaping social reality remains a powerful force.

Regarding the topic that the Spanish magistrate chooses to address in his work, the power over oneself (*potestas in se ipsum*), I believe this too can be significant for our purposes. The choice of theme undoubtedly reveals its intellectual roots in humanistic culture, particularly in the neo-Stoicism of Justus Lipsius, who left an indelible mark on the contemporary intellectual landscape (20). It then reflects, above all, the influence of the late scholasticism. As is well known, inspired by Aristotle-Thomas's philosophy and influenced by the theological schools of Paris, moral theologians had long since begun to explore the realm of *dominium sui*, infusing it

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(17) S. Cassese, *Gli Stati nella rete internazionale dei poteri pubblici*, in Id., *La crisi dello Stato*, Roma-Bari, Laterza, 2002; Id., *La rete come figura organizzativa della collaborazione*, in Id., *Lo spazio giuridico globale*, Roma-Bari, Laterza, 2003, pp. 21-26.

(18) On this process of modernization of criminal law see M. Pifferi, Generalia delictorum. *Il* Tractatus criminalis *di Tiberio Deciani e la "Parte generale" di diritto penale*, Milano, Giuffrè, 2006.

(19) Palazzo, *Legalità penale*, cit., p. 1285.

(20) S. Burgio, Sapiens par Deo. *Il neostoicismo di Giusto Lipsio. Premesse storiografiche e prospettive di ricerca*, Catania, University of Catania, 1998.

with the fresh impetus of individualism, voluntarism, freedom, and personal autonomy (21).

The author, therefore, embraces this process of modernization, deeply rooted in the consciousness of his century, which will ultimately lead to a crisis in law and a significant portion of the institutions in his world. However, despite his innovative thinking, his approach remains traditional.

The theme is in fact explored in a very concrete way: the relationship between life, the body (as a physical extension and in its spiritual projections) and law is at the heart of the reflection, but this is refracted in a multitude of cases related to suicide and the acts of disposition of the body.

In this historical context, these themes do not represent « no man's land » and therefore not a new conquest. On the contrary, an interrupted and increasingly incisive conflict between powers has been and continues to be waged on them: the subject's own power and that of external authorities, which we would now call public and private. In the midst of precarious boundaries, a diverse set of legal provisions, each supported by a suitable sanctioning system, converge on these topics. Therefore, a problematic area emerges char-

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(21) On this historical evolution and to fully appreciate the complexity of this property framework and the slightly different interpretations of the notion of *dominion*, see M. Villey, *La formation de la pensée juridique moderne*, Paris, Montchrestien, 1975; R. Tuck, *Natural Rights Theories. Their Origin and Development*, Cambridge, Cambridge University Press, 1981; P. Grossi, *Il dominio e le cose: percezioni medievali e moderne dei diritti reali*, Milano, Giuffrè, 1992; B. Tierney, *The Idea of Natural Rights*: *Studies on Natural Rights, Natural Law, and Church Law, 1150-1625*, Michigan, William B. Eerdmans, Grand Rapids, 2001; Id., *Dominion of Self and Natural Rights Before Locke and After*, in *Transformations in Medieval and Early-Modern Rights Discourse*, ed. by V. Mäkinen, P. Korkman, Dordrecht, Springer, 2006, pp. 173-203; A. Brett, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought*, Cambridge, Cambridge University Press, 1997; J.A. Tellkamp, *Ius est idem quod dominium: Conrado Summenhart, Francisco de Vitoria y la conquista de América*, in « Veritas », 54 (2009), pp. 34-51; W. Decock, *Theologians and Contract Law. The Moral Transformation of the Ius Commune (c. 1500-1650)*, Leiden/Boston, Brill, 2013. See also the recent review of the history of dominion rights in late medieval sources and its relationship to Spanish neo-Thomist teaching offered by V.H. Mäkinen, *Dominion Rights, Their Development and Meaning in the History of Human Rights*, in *A Companion to Early Modern Iberian Imperial Political and Social Thought*, ed. by J.A. Tellkamp, Leiden, Brill, 2020, pp. 149-171.

acterized, as Alberto di Martino aptly put it, by « a greater density of law » (22). In the face of the fragmented, non-consequential, and interdependent nature of this normative material, the interpreter's reasoning embarks on a familiar journey, like a seasoned traveller navigating a complex yet captivating landscape.

The Spanish jurist's ambition is to establish and ground individual power over one's own body within a framework of 'legislative' sobriety, thereby offering a new general theoretical framework in the spirit of modern times. However, it is fascinating to note that in his endeavour to categorize lawful and unlawful behaviours regarding bodily use, and in the need to resolve this intricate regulatory convergence, he only sets the guiding principle for the interpreter/judge in abstract terms. He then turns to the concrete situation and its circumstances as the decisive criterion for the decision.

I will address this point in more detail below.

3. *« What cannot be theorized must be narrated »: the case, the recognition of the* factum*, and the use of a wealth of* argumenta.

According to Gómez de Amescúa, the general formula that restricts any individual's decision-making power over their own body is the prohibition of suicide (23). More specifically, the limit of human choices regarding life and body is found in the absolute divine prohibition of any action that, by its very nature, could significantly compromise physical integrity or even lead to death. The jurist derives this principle from the Digest's rule, « No one is master of their own limbs » (*Nemo est dominus membrorum suo-*

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(22) DI MARTINO, *Dalla regola per il caso al caso per la regola*, cit., p. 77.

(23) On the subject of suicide, there is now a vast literature. Here we only recall A. MURRAY, *Suicide in the Middle Ages*, voll. I-II, Oxford-New York, Cambridge University Press, 1998; M. BARBAGLI, *Congedarsi dal mondo. Il suicidio in Occidente e in Oriente*, Bologna, il Mulino, 2009; M. CAVINA, *Andarsene al momento giusto. Culture dell'eutanasia nella storia europea*, Bologna, il Mulino, 2015; A. LANDI, Iste actus non est virtus. *Il suicidio tra scelta consentita e illecito penale nell'esperienza del Diritto comune*, in *Pluralismo delle fonti e metamorfosi del diritto soggettivo nella storia della cultura giuridica*, I, *La prospettiva storica*, ed. by A. Landi, A. Petrucci, Torino, Giappichelli, 2016, pp. 155-174. On the casuistry that, historically, lives at the heart of such question, see *A Historical Approach to Casuistry. Norms and Exceptions in a Comparative Perspective*, cit.

rum) (24), and from a meticulous investigation, including terminological analysis, of the Thomistic axiom « Man is not master of his own life » (*Homo non est dominus suae vitae*). However, for its full validation, a wide range of legal sanctions is also invoked. These range from canonical sanctions, such as irregularities in receiving sacred orders or the deprivation of burial in consecrated lands, to corporal and pecuniary sanctions handed down from Roman sources, or arbitrary ones imposed by the ordinary judge, up to the confiscation of assets specifically provided for by Castilian law (25).

After establishing this, the jurist, as we have mentioned, delves into concrete situations to assess the true legitimacy of decisions regarding one's body and the potential responsibilities.

Despite his modern inclination towards a systematic approach, it is indeed the cases that are explored, and it is these, more traditionally, that are scrutinized to envision and articulate a comprehensive discipline of *potestas in se ipsum*. Moreover, when tackling the specific issues identified, the author's approach is not one of rigid consistency, but rather a focus on the circumstances and consequences of the event, revealing the interplay of different rules. In fact, since regulations cannot be merged, but only coordinated, the attached arguments do not always follow a syllogistic pattern. More often, they involve a wide range of factors beyond formal deductions (26), and are ordered by prioritizing the needs arising from the specific situation and drawing on observations from everyday life.

In the text, therefore, we witness the creative process that every rule undergoes — even the most stringent divine precept, the royal will, or the already positivized customary or jurisprudential rule — to govern the action. After all, as Emanuele Conte wrote, the norm in this pre-modern legal landscape « was not meant to mirror reality: the realm of real things was the domain of *aequitas*, while the

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(24) A. Landi, *Nadie es dueño de sus miembros*: *Nemo est dominus membrorum suorum. Una regula iuris para los actos de disposición del propio cuerpo*, in *Los derechos del cuerpo humano y sus actos de disposición*, ed. by A. Petrucci, R. Gómez Alcalá, Mexico, Escuela Libre de Derecho, 2021, pp. 59-84.

(25) Testuzza, *« Ius corporis, quasi ius de corpore disponendi »*, cit., pp. 127-162, 233-253.

(26) Pifferi, *Dalla casistica alle regole*, cit.

jus, despite being crafted by the legislator with the material provided by *aequitas*, was still a product of rational abstraction. As such, it could not — and was not supposed to — align perfectly with the equity of the concrete case it governed » (27).

The resolution of the case and any potential criminal charges stem, then, from careful consideration of the event and its social consequences. The assessment is made, at least to some extent, *ex post*, beyond the rigid framework of regulatory requirements. This is achieved through a dialectical interplay between *jus* and real fact, focusing on the traditional argumentative structure of *ius commune*. Rather than the formal will of legal precepts or the intentions of the parties (parties, judge) involved in the case, the focus is on the considerations made by those parties to ensure the disciplinary framework of the case (the 'consequences') is organically directed towards a legal purpose, without being at odds with the prohibition of choosing certain death, even as a means. In practical terms, it is crucial to assess the subject's perceived risk of death as high but uncertain; to clearly distinguish between common good and purely individualistic aim, or health-related and non-health-related purposes; and to determine the necessity and proportionality of the action.

I will focus on a single example.

Among the many issues, the Spanish author examines the topic of consensual murder, starting with a premise (28). As he demonstrated earlier, it is undoubtedly right to submit to public authority and, by virtue of its jurisdiction, and after a fair trial, to accept the ancient and legitimate power of death. Beyond the execution of a death sentence, he asserts, in line with a long-standing collective interpretation endorsed by Bartolo, that anyone who killed a *volens* would face the same ordinary punishment as for murder. He explains it like this: if no one, even if they were their own master, was granted the divine right to end their life, no one could pass on this power to others and absolve the agent of their responsibility.

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(27) E. Conte, *Declino e rilancio della servitù: tra teoria e pratica giuridica*, in « *Mélanges de l'École française de Rome. Moyen-Âge* », 112 (2000), 2, pp. 663-685, here p. 676.

(28) Testuzza, « *Ius corporis, quasi ius de corpore disponendi* », cit., pp. 172-177.

Given this premise, the jurist soon abandons the dichotomy of 'particularity-generality' that classifies reality in theoretical terms. Instead, he shifts to the level of 'singularity', capturing the essence of the event in its concrete and unique space-time coordinates (29). The case is therefore prioritized over the rule. Moreover, as Michele Pifferi puts it, the « case-by-case decomposition of *hominis occisio* » transcends the rigid boundaries between morality and law, sin and crime, and instead explores the subjective elements of the perpetrator's actions, their degree of intent, and the purpose of their will (30).

The murder of a consenting individual, as the Toledo jurist elucidates, would be unlawful, whether it was requested by an enemy to quell fiery conflict or by a relative to escape the ignominy of the gallows. In the latter case, relatives would face the most severe penalty of parricide, as they would rather cast their parent's soul into the eternal flames of hell than endure a fleeting moment of shame.

In the face of a law that largely relies on legal opinions not predetermined by abstract and comprehensive rules, and in a context that values the fullness of deciding by reasoning, the interpreter/judge is thus in a position of significant reconstructive initiative. The Spaniard, for instance, when discussing the potential of applying the general rule, does not hesitate to share his personal experience, gained during his time on Iberian soil, adding a unique perspective to the conversation. To paint a richer picture, he regales the reader with a tale of one of the many bloodstained episodes that, due to ancient rivalries, were a common occurrence in pre-modern society.

Here is the story: a young Spanish aristocrat stumbles upon a Lusitanian and, with a mocking and provocative tone, challenges him to prove that the Portuguese are strong and brave enough to face the battlefield. He says yes. Consequently, the nobleman brandishes his sword, challenging his opponent to strike. The Lusitanian does not flinch, piercing the challenger's head with a knife. *Quid iuris*?

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(29) See T. Gazzolo, *Il caso giuridico. Una ricostruzione giusfilosofica*, Torino, Giappichelli, 2018.

(30) Pifferi, *Dalla casistica alle regole*, cit., p. 406.

Gómez de Amescúa delves into his assessment, never losing sight of the ever-changing practical data and the social acceptability of the action's consequences. He underlines that the plebeian status of the killer is enough to rule out the possibility that the scuffle was a cover for one of the many duels of honour that, despite being banned after Trento, continued to be fought in secret across Europe, following the chivalrous codes of the past. He then emphasizes the randomness of the encounter, highlighting the Lusitanian's lack of a deliberate intention to kill or inflict serious harm. He describes his action as a spontaneous and necessary response to the verbal attack and physical threat posed by the other person. After all, who, he asks, in this affair would not have limited, for the sake of equity, the rule that always holds the one who harms a consenting party guilty? In a similar scenario, the Spaniard argued that the instigator, if he survived, would have been denied the *actio iniuriarum*, as he had acted as an accomplice to the crime.

The jurist emphasizes that judges must always diligently weigh up the circumstances (« oportet sane hic iudicem facti circustantias diligentissime pensitare »). For instance, the case of a woman who, driven by anger, pain, or despair, incited her husband to violence against her would have been a completely different story. The circumstances were entirely different: the general rule would have reigned supreme, and both private action and official proceedings would have been considered valid against the man.

The jurist's task is to shape the discipline in a concrete way, rather than constructing it in abstract terms. He does this by striving for a flexible coherence with the strategic objectives that can be discerned from the entire 'normative order' (such as the salvation of the soul, the preservation of the homeland, or the physical and spiritual protection of others). The case, after all, had to be the focal point of scientific invention, not to establish a rule that would serve as a precedent, nor to fill any theoretical gaps or achieve a comprehensive classification, but to explore the emerging or unresolved needs, rewriting them in a narrative way. The case-by-case approach, in this sense, did not result in a scientific understanding or a dogmatic method, but rather a research practice that was not necessarily characterized by rigorous consistency and uniformity. Gómez de Amescúa is still a far cry from the 'scientist' cult, the

logical necessity, and the resolute and definitive demeanour of the modern legislator. He has not yet experienced his yearning for perfection and his need for stability.

« Whereof one cannot speak, thereof one must be silent ». As is well known, Ludwig Wittgenstein concluded his renowned *Tractatus Logico-Philosophicus* with this statement (31). However, our jurist seems closer to what Umberto Eco wrote in 1980, in the dust jacket of the first edition of *The Name of the Rose*: « what cannot be theorized must be narrated ». This statement, with its irony and playful tone, almost reverses the aphorism mentioned earlier (32).

In the challenging task of considering all the claims and interests at stake, the pre-modern jurists approach cases by organizing a discourse around a subject that cannot be fully subjected to a general and abstract rule. They assume the same positive law from a dynamic perspective, maintaining a simultaneous and clever ambiguity on two levels, probabilistic and axiomatic (33). They engage in a complex activity that, as Pietro Costa explains, goes beyond simply representing something already given. Instead, it unfolds « through a mélange of the most diverse materials, where rigorous demonstrations intertwine with metaphorical associations » (34). This means embracing spontaneously to the world of legal and social practices, while also using rhetorical devices and arguments to individualize, focus on the 'here and now', and exalt diversity, surprises, and anomalies (35).

4. *Towards new architectures and aspirations.*

Now, with these premises as my foundation, I begin the second chapter of the historiographical narrative I am attempting to outline.

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(31) L. WITTGENSTEIN, *Tractatus Logico-Philosophicus*, London, Routledge & Kegan Paul, 1922.

(32) U. ECO, *Il nome della rosa*, Milano, Bompiani, 1980.

(33) R. AIELLO, *Continuità e trasformazione dei valori giuridici: dal probabilismo al problematicismo*, in « Rivista storica italiana », XCVII (1985), 3, pp. 884-931.

(34) P. COSTA, *Discorso giuridico e immaginazione. Ipotesi per una antropologia del giurista*, in « Diritto Pubblico », I (1995), pp. 1-34.

(35) *Ibidem.*

As previously mentioned, I will once again draw inspiration from a seventeenth-century treatise. However, this time we are in the second half of the century: the doors to the modern era are undoubtedly wide open.

The work I am referring to is the *Tractatus de iure sensuum*, a text that, unlike the previous one, originated from academic activities. It was published by Samuel Stryk, a renowned German professor of Roman law, who left his mark on legal history with his *Usus modernus Pandectarum* (1690). This other legal work, written a few years later, serves as a powerful testament to the enduring legacy of *ius commune* in Europe, while simultaneously highlighting its transformation in both practice and teaching, as a result of the ever-increasing emergence of various national laws (36).

For our purposes, this law professor's method is particularly relevant. Despite his preference for a new systematic-rational approach and his inclination to look at 'national' law and current practices, especially those that deviate from Roman law, he still shares a common thread with the jurists of the continental past. They both recognize the need to navigate a diverse array of sources to unearth the right legal norm and to consider the 'jurisprudential response' that best reflects the living unity of law.

Let us dwell, therefore, on *De Iure sensuum*.

Stryk, as Author and Speaker (*Auctor* and *Praeses*), brings it to the press, compiling ten scholastic dissertations publicly disputed by some of his students. Clearly, these students had been inspired by his erudite university lectures in a variety of ways.

This treatise, too, focuses on an 'extravagant' theme, perhaps due to its deep immersion in the Baroque era. Moreover, despite its radically unique perspective, it still demonstrates a 'bodily' interest. It investigates the relationship between law and the senses, or in other words, the law of the senses (the *ius sensuum*). Just like in *De Potestate in se ipsum*, this is a rather nebulous topic within a highly intricate regulatory landscape. However, in my opinion, the shift in perspective is truly remarkable, shedding light on how the face of criminal legality was undergoing a metamorphosis.

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(36) I. Birocchi, *Alla ricerca dell'ordine. Fonti e cultura giuridica nell'età moderna*, Torino, Giappichelli, 2002, p. 58 and the following pages.

Although I have already discussed this in other contexts (37), I would like to revisit the symbolic illustration that has served as the frontispiece to the volume since the third edition in 1685. It is not only captivating as the product of a culture that remains highly visual, but also plays a significant role in the overall meaning of the work and effectively supports our discussion. With the dramatic style that defines the seventeenth century, it captivates the reader, urging them to personally reconstruct and interpret the representation, drawing out elements that guide their reading.

I will therefore try to describe this illustration briefly.

The page is dominated by a portal, at the centre of which, framed by intricate curls and spirals, the name of the author/curator and the title of the treatise are prominently displayed.

The architectural composition is not limited to these few decorative elements, but is much more complex and richer. At the top, we see a sculptural representation of Justice, holding the symbols of the sword and the scales. This figure is depicted blindfolded, a common occurrence in German-speaking countries (38). In the two side niches of the building, with strong contrasts of light and shade, the statues of Fame and Deception are inserted, in the form of women, with the inscriptions at their feet, respectively: « fame is fallacious » and « even the eyes fall into error » (*Et fama fallax; fallunt et oculi*). Finally, under the architrave, as if it were a *trompe l'œil*, is the most curious image. In the confined space of a room, a group of men are engaged in an autopsy. The scene, vaguely reminiscent of Rembrandt's *The Anatomy Lesson of Dr. Nicolaes Tulp*, painted a few years earlier (1632), is crowned by the motto *Nusquam tuta fides*, the cry of Dido betrayed: « No trust is safe » (39).

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(37) TESTUZZA, *Lo* ius sensuum *nelle architetture teoriche di alcune* dissertationes *giuridiche di fine Seicento*, cit.

(38) M. SBRICCOLI, *La benda della Giustizia. Iconografia, diritto e leggi penali dal medioevo all'età moderna* (2008), now in ID., *Storia del diritto penale e della giustizia: scritti editi e inediti, 1972-2007*, I, Milano, Giuffrè, 2009, pp. 155-208; A. PROSPERI, *Giustizia bendata. Percorsi storici di un'immagine*, Torino, Einaudi, 2008; M. STOLLEIS, *L'occhio della legge. Storia di una metafora*, Italian edition ed. by A. Somma, Roma, Carocci, 2007.

(39) *Aeneid*, 4, 373.

As I mentioned, the illustration holds significant informative value. The ideal of a serious and incorruptible justice, now blindfolded to avoid any distinction in treatment, and the aspiration for a fair sentence must be pursued without relying on the principle of authority, fame, public opinion, or the testimony of community members, even if they are of proven faith and moral rectitude (40). These methods only provide a changeable and unguaranteed understanding of facts. Instead, it is now considered more important to focus on sensitive data, objectivity, and natural causality — synonymous with rationality —, which the mind must reconstruct, organize, order, and classify.

The conceptual path presented in the text continues to unfold around the case, with a keen awareness of the judicial forum's pitfalls. However, it is suggested that the judge should be guided by a direct and scientific observation, which delineates and marks the boundaries within which the event unfolds. This is true in civil cases, and especially in criminal ones, where the effort to find satisfactory explanations must be even stronger. In criminal cases, the judge must be a subtle investigator, with a clear and perceptive mind (*debet enim judex in delictis subtilis esse investigator*). The primary objective now is not to identify 'open' parameters that can be adapted and depend on the specific characteristics of the case, but to cast the net of certainty over the case, abstracted from the context to facilitate its study, and to combine evidence and reason.

The 'microscopic anatomy' of the fact serves to capture the impersonal dynamics that define it, and to outline the general scientific-natural relationships that determine it. Concrete agents tend to be transformed into ideal subjects, and real-life events are reinterpreted as theoretical disputes that need to be explored gradually, based on clear and distinct 'chains of reasons'.

In Baroque culture, the Aristotelian concept of experience takes on a new meaning, as the development of science primarily raises the issue of truth and its implications. Experiences are now being used to evaluate or disprove theories that barely resemble the ancient metaphysics and theologies.

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(40) F. Migliorino, *Fama e infamia: Problemi della società medievale nel pensiero giuridico nei secoli XII e XIII*, Catania, Giannotta, 1985, pp. 49 and the following pages.

This is the ground-breaking and truly modern element that I believe holds the key to our discussion. From a « reflective conception of law », which, through the interweaving of narrative and argumentative forms, advocated for « the conversion into a set of shared boundaries » (41), there is a gradual transition towards the consideration of a more rigid system of prescriptive norms.

The legal discourse is gradually losing the persuasive power of practical reasoning, which aims to solve concrete cases. Instead, it is becoming more systematic and generalized, adhering solely to the rigor of logic. Alongside the 'scientist' inclination, it ultimately assumes a 'purely' descriptive character, 'evaluating' the statements it comprises, and a purely demonstrative force.

A brief example is also useful here.

In the midst of the witch-hunting craze, when trials were held not in ecclesiastical courts but in secular ones, particularly in certain German territories, Stryk tackled the theme of the *crimen magiae* and put a stop to the frantic search and easy condemnation of suspects (42). In his analysis, there is still no sign of any radical rejection of the crime: there is no dispute over the reason for the indictment, nor is there a request for decriminalization. It is not about denying the existence of magic through a pact with the devil, nor is it about dismissing the potential harm of witchcraft.

Stryk remains bound to the ultra-mundane order, but acknowledges the frequent occurrence of truth deficits. According to him, Satan sometimes merely deceives and creates the illusion that a truly natural event is actually the artificial result of a spell. Consequently, a simple confession or the demonic will of the woman is not

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(41) DI MARTINO, *Dalla regola per il caso al caso per la regola*, cit., pp. 80-81.

(42) See at least, B.P. LEVACK, *La caccia alle streghe in Europa agli inizi dell'Età moderna*, Roma-Bari, Laterza, 2012; M.R. DI SIMONE, *I giuristi e le streghe: dalla Constitutio Criminalis Carolina alla Constitutio Criminalis Theresiana*, in *Dalla magia alla stregoneria. Cambiamenti sociali e culturali e « caccia alle streghe »*, edited by A. Ciattini, Napoli, La città del sole, 2018, pp. 107-140; EAD., *Il crimen magiae nelle fonti normative austriache*, in *Honos alit artes. Studi per il settantesimo compleanno di Mario Ascheri*, IV, *L'età moderna e contemporanea. Giuristi e istituzioni tra Europa e America*, ed. by P. Maffei, G.M. Varanini, Florence, University Press, 2014, pp. 207-216; EAD., *Le donne e il crimen magiae. Il dibattito tedesco sulla prova dell'acqua tra XVI e XVII secolo*, in « Historia et Ius », XX (2021), paper 9.

enough to proceed with the special inquisition. The prosecutor must establish proof of *corpus delicti* before a defendant's confession can be admitted as evidence in court. In other words, he must verify with his own senses, and (possibly) with the help of medical and expert opinions that the crime, its circumstances, damages, and injuries have actually occurred.

The practice was one of teaching: when faced with alleged infanticides confessed by witches, a thorough questioning of the young victim's parents often revealed that the event was a natural and direct consequence of the child's fragile health. It was certainly not the result of diabolical arts. Thus, it was crucial to prioritize rigorous evidence and the utmost legal caution, ensuring a fair and just trial. As prescribed more generally by the *Constitutio criminalis Carolina*, precise questions, following a specific sample, were also to be posed to verify and assess the truthfulness of the suspect's confessed circumstances.

In my opinion, it is precisely this desire for truth and empirical-factual verification, as expressed by Stryk, which drives the search for and adherence to specific normative parameters in the criminal field. This applies both to the criteria for imputation in substantive criminal law and to the concrete procedural assessment of individual responsibility. And this is precisely what triggers a crisis of legitimacy in the old paradigm.

The judge/interpreter continues to argue, configure, and re-describe, from the starting point of the case. However, the focus is no longer on persuasively clarifying the rules of criminal liability, ensuring that the interpretative outcome aligns with the substance of the infringement, nor on relying on the 'effectiveness of doubt' as before. Instead, the aim is to strive for a comprehensive understanding of the factual reality, guided by new scientific knowledge and the need for certainty, and to achieve a perfect correspondence between this reality and the normative one.

In this context, a slow and uneven path emerges, where the state law's role in guiding individual conduct and judicial decisions will be asserted and strengthened. Just as the modern principles of individual guarantee (legality, prohibition of criminal analogy, and strict adherence to the law by the judge) will permeate the continental legal systems.

5. *Concluding remarks.*

From the comparison of these two works, not so far apart in time, yet culturally belonging to two distinct eras in European continental legal history, we can discern two distinct visions, 'mythical and anthropological', behind the same choice of casuistic method (43). Both hold a significant « ordering value » (44).

The first blooms in the dogmatic Roman and Christian legal tradition, striving for a personalized justice (45), while the second emerges from the nascent rationalist, scientist, and industrial system, aiming for a 'universal' ideal. The first, with its salvific connotation and, at the same time, strongly worldly and secular, presupposes the 'accommodation' of the interpreter/judge through the interweaving of the circumstances of the fact, and the power to discern and oppose the good/true to the bad/false. The other, in its quest for novel ways to measure facts, yearns for more rigid and formal frameworks which, with a focus on 'scientific' truth and predictability, bring meaning and reason (including economic) to social and interpersonal behaviours.

Let us return to our ever-changing present. Without jumping to conclusions from this exploratory comparison, I will simply use the insights it offers to formulate a few questions that I hope will guide the investigation.

In the face of the risk of a new « total » criminal law (46), can we carve out a space for an eclectic approach, which, rather than revisiting and combining the two perspectives that we have explored, allows for the development of a fresh case-by-case ap-

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(43) P. Legendre, *Il giurista artista della ragione*, Torino, Giappichelli, 2000. See also Id., *De la société comme Texte. Linéaments d'une anthropologie dogmatique*, Paris, Fayard, 2001; Id., *L'empire de la vérité*, Paris, Fayard, 2001.

(44) Regarding the term « ordering value » (*valenza ordinativa*), which refers « to the ability to reflect the order that society establishes (in its self-organizing dimension) to ensure social cohesion and renew the interest in coexistence », see M. Meccarelli, *Il limite della forma. La narrazione dei fatti normativi e la verità del diritto e della storia*, in « LawArt Rivista di Diritto, Arte », 5 (2024), pp. 204-247.

(45) P. Legendre, *Gli scomunicanti. Saggio sull'ordine dogmatico*, Venezia, Marsilio, 1976.

(46) F. Sgubbi, *Il diritto penale totale. Punire senza legge, senza verità, senza colpa*, Bologna, il Mulino, 2019.

proach? Can we once again reconcile rhetorical and hermeneutical dimensions to emphasize the crucial role of contexts and situations? Can « post-law » (47) become « art », to use a term that still holds a delightful ambiguity among the Enlightenment thinkers (48)? Most importantly: what are the primary 'dogmatic' elements, the myths, in which our contemporary society identifies itself and recognizes itself? In the ongoing rapprochement between the legislative and administrative aspects of law, can they be conducive to ensuring a new 'legality of meaning' and a more pragmatic and dynamic management of evolving individual and social needs?

With the obligatory prudence of a historian, I will leave the constructive and critical, innovative and creative response to others.

MARIA SOLE TESTUZZA, *« What cannot be theorized must be narrated »: case, fact and event in pre-modern legal culture*

This paper aims to highlight the evolution of case law in the history of European continental law. From the comparison of two seventeenth-century legal treatises, we can gain valuable insights. We can discern two distinct visions, 'mythical and anthropological', behind the same choice of casuistic method. The first blooms in the dogmatic Roman and Christian legal tradition, striving for a personalized justice, while the second emerges from the nascent rationalist, scientist, and industrial system, aiming for a 'universal' ideal. The first, with its salvific connotation and, at the same time, strongly worldly and secular, presupposes the 'accommodation' of the interpreter/judge through the interweaving of the circumstances of the fact, and the power to discern and oppose the good/true to the bad/false. The other, in its quest for novel ways to measure facts, yearns for more rigid and formal frameworks which, with a focus on 'scientific' truth and predictability, bring meaning and reason (including economic) to social and interpersonal behaviours.

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(47) ZACCARIA, *Postdiritto*, cit.

(48) I would like to refer to M.S. TESTUZZA, *« È bello tutto ciò che contiene in sé qualcosa che possa risvegliare nel mio intelletto l'idea di rapporti ». Un'indicazione estetica settecentesca feconda anche per l'interpretazione della giustizia*, in *Giustizia bellezza cultura*, a cura di A. Cappuccio, M. Gradi, A. Lo Giudice, S. Ruggeri, Milano, Giuffrè Francis Lefebvre, 2025, in press.