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CONFIGURING JUSTICE

Jeanne Gaakeer[1]

ABSTRACT

While scholarship on a variety of literary-linguistic connections of law and the humanities has these past few decades greatly augmented the scope of legal theory, I would argue in this paper that we need to consider the bond of theory and practice in law and jurisprudence when we turn to the humanities for our interdisciplinary ventures, on the view that the original idea(l) of literary-legal studies was to help provide nourishment to the legal practitioner. This is e traditionally conceived, remains important when it comes to investigating the possibilities of the humaespecially acute because, to me at least, it is through law in practice that we can learn to speak of justice. So the *quid-juris* question that is at the heart of legal doctrine and jurisprudencnities' contribution on the methodological plane. In other words, while we may discuss issues of justice in the abstract, it is only in the way in which actual legal issues are resolved that we can at all decide that justice is being done. We cannot, therefore, think about

[1] Holds degrees in English literature, Dutch law and philosophy (cum laude). The focus of her research is on interdisciplinary movements in legal theory (specifically *Law and Literature* and *Law and the Humanities*) and their relevance to legal practice. She is endowed professor of legal theory at Erasmus School of Law, Rotterdam, the Netherlands. With Greta Olson (Giessen University, Germany), she co-founded the European Network for Law and Literature (www.eurnll.org). She is the 2013 recipient of the J.B. White Award (bestowed by the Association for the Study of Law, Culture and Humanities). She serves as a senior justice in the criminal law section of the Appellate Court of The Hague.

justice without law in practice, because legal meaning and justice are the products of discussions on how to establish concrete legal and social relations. This speaks for attention to how law is and can be done. I aim to turn to continental-European philosophical hermeneutics, especially as developed by Paul Ricoeur, rich as his work is on the subjects of metaphor, practical wisdom and the equitable, in order to develop my main argument and offer suggestions for *Law and Literature in practice* through the lens of the *studia humanitatis.*

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This article forms the basis of professor Gaakeer's ongoing research in the field of *Law and the Humanities* in which her focus is specifically on the bond of literary-legal theory and legal practice. See also Gaakeer, J., 'Futures of Law and Literature: a Jurist's Perspective', in: Christian Hiebaum, Susanne Knaller, Doris Pichler (eds), *Recht und Literatur im Zwischenraum/ Law and Literature In-Between, aktuelle inter-und transdisciplinäre Zugänge/ contemporary inter- and transdisciplinary approaches*, Bielefeld, transcript Verlag, 2015, pp.71-103; Gaakeer,J., 'Practical Wisdom and Judicial Practice: Who's in Narrative Control?, ISSL Paper, The Online Collection of the Italian Society for Law and Literature, www.lawandliterature.org, vol.8: pp.1-17, ISSN 2035-553X; Gaakeer, J., 'The Perplexity of Judges Becomes The Scholar's Opportunity', *German Law Review* (forthcoming 2016).

1. INTRODUCTION

Research on a variety of literary-linguistic connections of law and the humanities has these past few decades greatly augmented the scope

of legal theory. Nevertheless I would argue that when as jurists we turn to the humanities to further our interdisciplinary legal projects, we need to reconsider the alliance of theory and practice in law and hence its importance for jurisprudence. Why? Lest we run the risk that, as has been the case so far, legal practice remains unresponsive to what interdisciplinary studies have to offer, and, when it comes to legal education, that courses of the "Law and" kind are dismissed by students as irrelevant because they supposedly lack a focus on the students' development of professional skills. Put cynically, as did US Supreme Court Chief Justice John G. Roberts jr. in a speech at the US Fourth Circuit Judicial Conference, June 2011, 'Pick up a copy of any law review that you see and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th-century Bulgaria, which I'm sure was of great interest to the academic that wrote it, but isn't much help to the bar.'[2] Such dismissal of interdisciplinary work not only forces us to reflect on whether or not we have so far created new academic ghettos but, more importantly, it reminds us that the *quid-juris* question that is at the heart of legal doctrine and jurisprudence traditionally conceived remains important when it comes to investigating the possibilities of the humanities' contribution on the methodological plane.

On the view that it is only through law in practice that we can learn to speak of justice, or rather, that while we may discuss issues of justice in the abstract, it is only in the way in which actual legal issues are resolved that we can at all decide that justice is being done, this speaks, on the one hand, for attention to how legal and social relations are established by means of our discourse on legal meaning and justice. On the other hand, this connection of law in practice and justice also ties in with the subject of the methodology of the legal perception of the particular case at hand, not in the least because the view of law as a normative set of propositions that are "out there" in an unadulterated form ready for our application is unfortunately still in need of further refutation. As Richard Posner also emphasizes, the

[2] Roberts, J.G. jr, 'Speech at the US Fourth Circuit Judicial Conference', June 2011, as cited at <www.abajournal.com/news/article/law_prof_responds> and <www.acslaw.org>.

law student 'must be disabused of the notion that "the law" is a set of propositions written down in a book and legal training consists simply of learning how to find the correct place in the book' (Posner 2008, 252).

It is the latter topic that prompts my contribution. Serving also as a judge in a continental European civil-law setting, I often perceive in my academic, interdisciplinary contacts that there are misconceptions about legal reasoning, in the sense that civil-law reasoning is supposedly a mere syllogistic rule-application and as such deductive in nature, moving from abstract codified legal norms to the decision in a specific case, and in contradistinction to common-law reasoning. The expectation raised by such conception of rule application seems to be that of an unproblematic existence and use of abstract norms, and that is oversimplified to say the least. If we start categorizing what is to count as knowledge in the field of law and start from the premise that law is a domain of rules, and rules only, that simplification can in turn contribute to the marginalization of interdisciplinary ventures based on it. Furthermore, it reaffirms a false opposition between common-law and civil-law thought when it comes to the act of judging, in that it proclaims for civil law a formalist hermeneutics of more or less self-applying rules, of 'outside-in' legal reasoning as Ronald Dworkin calls it, i.e. from the abstract to the concrete, rather than 'inside-out' reasoning (Dworkin 2006, 54) with a focus on the judicial effort of connecting what are deemed the relevant facts of the case and the legal norms.[3]

It is on this plane that the humanities can both help elucidate the problems connected to such misunderstanding and contribute to its possible solution. That is why I turn to continental-European philosophical hermeneutics, especially as developed by Paul Ricoeur. My aim is to draw a sketch of what the *studia humanitatis* can contribute to legal practice by bringing to the fore the resources

[3] See also Gaakeer 2012b, the text accompanying notes 13 and 49 discussing Greta Olson's view that 'legal reasoning proceeds through a process of deduction from abstract norms of codified law to the particular case at hand' (Olson 2010, 352) and Helle Porsdam's comparable view that, 'Civil law starts with certain abstract rules, that is, which judges must then apply in concrete cases' (Porsdam 2009, 174).

that can contribute to the judge's development of her professional quality of *phronèsis*, i.e. prudence or practical wisdom, with judicial ethos and *habitus* included. The view behind this enterprise is that despite their differences most legal systems share core values such as judicial impartiality, consistency and integrity which, not incidentally, are considered virtues in the Aristotelian sense. Methodological reflections on the subjects of the finding or constitution of "the facts", the judicial justification of deliberative choices made, and the way in which law establishes relations are therefore shared tasks.[4] What is more, I aim this sketch also to serve as an example of how humanities-oriented interdisciplinary legal studies themselves can move beyond the academic and into the realm of *praxis*.

2. FACTS AND NORMS, THEORY AND PRACTICE

In what follows I proceed from a double premise. Firstly, that law as an academic discipline firmly belongs to the humanities given its historical development since the eleventh-century rediscovery of the Justinian Code, characterized as law is and has always been by a strong language-oriented, philological-hermeneutical perspective. That is to say, a perspective not done away with by new trends in mediality and visuality in law, because hermeneutics is not merely a methodology for interpretation, but rather a philosophical view for a broad mode of inquiry into both text and action, as Hans-Georg Gadamer already propounded in his seminal *Truth and Method*. And secondly, that as a consequence jurists necessarily combine the theoretical and the practical. Why? Because the art of doing law in its different professional guises always requires their attention to the reciprocal relation between fact and norm, as well as to the ways in which the system of substantive and procedural rules and norms is deployed to achieve justice. A characteristic feature, then, of legal methodology in the sense of the perception of the case or legal topic at hand is the constant movement from the facts to the legal norms, and back, a dialectic movement, this going hither and thither so to speak, coined

[4] The topic has been with me ever since I fully understood Ricoeur's importance for my judicial work. My argument here is a continuation of earlier work, see Gaakeer 2008; Gaakeer 2011; Gaakeer 2012a.

by the German jurist Karl Engisch as the 'Hin-und Herwandern des Blickes' (Engisch 1963, 15), a notion taken up an elaborated upon by Karl F. Larenz in his *Methodenlehre der Rechtswissenschaft* (Larenz 1991, 204). In performing this movement, jurists should constantly bear in mind the influence of their own interpretive frameworks on both fact and norm, because as humans we cannot escape our hermeneutic situation of being culturally determined, professionally and personally. And what is more, this also goes for the reciprocal relationship between perception and ordering: the systematization of knowledge in the field of law too is subject to a comparable movement back and forth. In other words, when confronted with a new case, the legal professional starts with a diagnosis of what are deemed the relevant facts (established facts and facts admissible as evidence and/or with a certain probative value), then proceeds with a first, tentative, legal classification of the materials on this basis, deliberating about the next step of formulating a response and fine-tuning his classificatory analysis. In all this one's specific position as a legal professional is of decisive importance, of course, in that a judge will combine this process with her prior experience of hard and easy cases, and a defense lawyer will seek as many as possible anchors for the construction of his argument.[5]

As far as the relation between theory and practice is concerned, from this follows that those working in legal practice always reflect on the consequences of any theoretical or doctrinal assumption for the outcome of the specific case.That includes attention to the possible theoretical justification of the position taken when viewed against the background of the wider significance of the combined legal and cultural framework, for example in cases that attract the attention of any given society as a whole (media attention included). In turn, theoretical knowledge in law is augmented by the actual *quid-iuris*

[5] Cf. Andrew Abbott on the tripartite division of diagnosis, inference after deliberation and treatment as a response to a diagnosis, 'Theoretically, these are the three acts of professional practice. Professionals often run them together. They may begin with treatment rather than diagnosis; they may, indeed, diagnose by treating, as doctors often do. The three are modalities of action more than acts per se. But the sequence of diagnosis, inference and treatment embodies the essential cultural logic of professional practice.' (Abbott 1988, 40).

questions that legal practice raises, because they often go far beyond what academic, doctrinal discourse can even start to imagine. Where practice turns to theory for justification, theory thrives on practical input. In short, the jurist's methodology is never purely deductive or inductive but always the combined effort of the perception and assessment of the facts against the background of what the legal norm (including the academic propositions made for it) means, and the awareness that the whole process is governed by the dynamics of the interpretive frame that is itself subject to constant developments and challenges of a varied nature (e.g. technological or societal). In this ontological uncertainty – at any time something new may crop up that challenges existing meaning – also lies the possibility of critique and innovation. The interrelation sketched here affects legal theory too, in that, ideally at least, as George Pavlakos and Sean Coyle argue, it should be understood as engaged in, rather than detached from, questions underlying doctrinal debates that concern moral and political aspects of law as well. The aim of legal theory in their view, one most congenial to me, would then be to understand legal ideas as a reflection of values and an explanation of how they came about. This concept of law as a discipline is what Pavlakos and Coyle call jurisprudence, derived from the Latin root '*prudentia* which engages in practical accounts of law' (Pavlakos and Coyle 2005, 2). Jurisprudence denies 'the possibility of generality in theoretical accounts of the nature of law' (Pavlakos and Coyle 2005, 12), because such generality entails a detached form of observation by legal theory, conceived as legal science or *scientia*, of the social institution that is law, with as its aim to provide an objective account of it. The latter presupposes the existence of theory and practice (in the sense I use it above, i.e. doing law broadly conceived) as disconnected entities so that the legal theorist's (i.e. the one who does *scientia*) sole task would be to analyze legal practice from a safe distance. The idea behind it is that there is such a thing as scientific neutrality or objectivity when it comes to taking theoretical standpoints, and that is precisely what jurisprudence rejects on the view that both the doing of law and the reflection on it are to be viewed in their historical, moral and cultural contexts. Furthermore, as Francis Mootz says, in reference to Gadamer on the point of human experience being fundamentally

interpretive, 'within legal practice we can understand a binding norm only within a practical context: understanding and application are a unified pact' (Mootz 2000, 721). Thus, legal professionals in their actions show their specific knowledge that is a "reflection-in-action" (Schön 1983, 130), consisting of a creative interaction with a problem situation. Obviously, they therefore benefit from reflection on what works and what doesn't and that is especially acute when they have to confront the situation that more than just one response to the problem is possible. It is here that the topic of *phronèsis* comes in, i.e. the ability to see what is the best solution under the given circumstances and act on it. For the judge this also means arriving at the decision that does justice to law's demand for coherence. Behind this enterprise is the idea that professional knowledge is transferred by means of reproduction in the sense of the constant recreation or renewal of a shared background that makes understanding possible. The intertwinement of theory and practice has as its most prominent feature a focus on adjudication of which the judge is the exponent. With this in mind I turn to the works of Paul Ricoeur because of his detailed attention to the virtue of *phronèsis* as originally conceived by Aristotle, and his insistence on the input of the humanities when it comes to developing judicial *phronetic* intelligence.

3. BUILDING BLOCKS FROM THE HUMANITIES FOR A MODEL OF JUDGING. PART I: INSIGHT INTO PARTICULARITIES AND (DIS) SIMILARITIES

3.1 Phronèsis

In the Aristotelian spectrum of the intellectual and moral virtues, *phronèsis* is placed in the category of intellectual virtues and distinguished especially from épistèmè, i.e. theoretical or scientific knowledge that is conceptual and propositional in nature, aimed as it is at "knowing that", and from knowledge of how to make things, the technical skill of the craftsman that is called art or *technè* that can relatively easily be taught and learned. Aristotle starts his analysis with a definition of the prudent man, the *phronimos*:

> 'We may arrive at a definition of Prudence (i.e. *phronèsis*) by considering who are the persons we call prudent. Now it is held to be the mark of a prudent man to be able to deliberate well about what is good and advantageous for himself […] as a means to the good life in general' (Aristotle 2003, Vi.v.1, 1140a24-29, p.337) […] But no one deliberates about things that cannot vary, nor about things not within his power to do. Hence inasmuch as scientific knowledge involves demonstration, whereas things whose fundamental principles are variable are not capable of demonstration, because everything about them is variable, and inasmuch as one cannot deliberate about things that are of necessity, it follows that Prudence is not the same as Science (i.e. épistèmè or *scientia*). Nor can it be the same as Art (i.e. *technè*).[6] It is not Science, because matters of conduct admit of variation; and not Art, because doing and making are generically different, since making aims at an end distinct from the act of making, whereas in doing the end cannot be other than the act itself: doing well is in itself the end. It remains therefore that it is a truth-attaining rational quality, concerned with action in relation to things that are good and bad for human beings' (Aristotle 2003, VI. v. 3-4, 1140a32-1140b7, p.337).

The above clearly shows why to Aristotle *phronèsis* is not just the virtue of knowing the ends of human life, but also of knowing how to secure them, that is to say the virtue includes the application of good judgment to human conduct, "knowing how". As such it necessarily pertains to the probable in the sense of provisional truths, because whatever theoretical knowledge it does incorporate in its reasoning, this is always occasioned by the practical aim of action (i.e. in the sense of *doing* well as distinguished by Aristotle). Perceptual and dispositional in nature, *phronèsis* is the capacity to see what the

[6] A note on translation: both in the translation used for purposes of this article and in other translations available that I consulted the terminology is awkward in that *technè* is translated as 'art', a term which for modern readers has a connotation different from the Aristotelian meaning of 'technical skill'. In the sense, however, that *technè* also refers to the knowledge of the artisan embodied in his hands and eyes, this opens up the possibility of a reading that goes beyond the idea of a purely routinely artisanal skill in that it emphasizes professional skill, and that is, of course, also a characteristic of the *phronimos* in action.

situation demands and act upon it.[7] Thus, it defies methodological reduction because its main characteristic is deliberation (or *bouleusis*), primarily with oneself but when transposed to the realm of the juridical[8] deliberation is also with others, so that as a way of reasoning it does not aim at arriving at universal, abstract truth, but thrives on dialectical reasoning.[9] It therefore has its focus on advancing arguments for and against a specific premise. Although categorized as an intellectual virtue, as a virtue in the sense of a dispositional quality that one acquires, e.g. through instruction and one's education generally, *phronèsis* is nevertheless at the same time a matter of *ethos*, character, on the view that it is not a mere combination of knowledge (e.g. knowledge of widely accepted moral rules) and deliberative technique, but rather the ability to apply insight gained in specific situations, context-dependent as such insight necessarily is, to new questions as these crop up. Thus ethics and epistemology go hand in hand in *phronèsis* as a *praxis* of concrete action in specific situations. The critical quality of 'Understanding' (*sunèsis*), then, answers the imperative quality that *phronèsis* is and has. That is to say: to start with, one needs to have good understanding (*eusunèsia*) in order to be able to judge well, and *phronèsis* then takes this one step further in that additionally it emphasizes the need to act on that judgment.To Aristotle this means that the end of Understanding 'is a statement of what we ought to do or not to do' (Aristotle 2003, VI.x.2, 1143a9-10, p.359). Understanding and *phronèsis*, while not identical, are concerned with the same objects ('it [Understanding] is concerned with the same objects as Prudence' (Aristotle 2003, VI.x.2, 1143a8, p.359)), as Aristotle points out, because understanding is also about those things

7 'Prudence deals with the ultimate particular thing, which cannot be apprehended by Scientific Knowledge, but only by perception.'(Aristotle 2003, VI.viii.9, 1152a26-28, p.351).

8 Aristotle's argument allows this, given the connection he makes between Prudence, generally, 'Prudence as regards the state […] Legislative Science' (Aristotle 2003, VI.viii.2, 1141b25-26, p.347) and Prudence as essential for the faculty of judging equitably that is dealt with below.

9 For an Aristotelian view on the ideal of the lawyer-statesman who epitomizes *phronèsis* in relation to its professional, educational and political consequences, see Kronman 1993.

that are subjects of questioning and deliberation, rather than about the strictly defined, universal givens of scientific knowledge.

This concept of *phronèsis*, then, permeates Ricoeur's thought on justice and the law. It is constitutive also of his views on morality and ethics as well as of his view on equity as a corrective of law as a (codified) system of rules, that is to say of equity as 'the *sense* of justice, when the latter traverses the hardships and conflicts resulting from the application of the *rule* of justice' (Ricoeur 1992, 262).[10]

What matters to me here, to start with, is that Ricoeur consistently connects his discussion of the deliberative aspect of *phronèsis* with the idea of the hermeneutic movement, circular as it were, of the 'back-and-forth motion' as he significantly puts it in *Oneself as Another* (Ricoeur 1992, 179) between the idea that we have about, say, the good life or justice, and the decision to be made about that.[11] This ties in neatly with the legal methodology of connecting the facts and the relevant norm, as well as with the tripartite structure of professional practice as diagnosis-inference/classification-treatment, as can also be seen in Ricoeur's view on rule application in the situation of a criminal trial, 'The application consists both in adapting the rule to the case, by way of qualifying the act as a crime, and in connecting the case to the rule, through a narrative description taken to be truthful.' (Ricoeur 2007, 55-56). Ricoeur also approvingly refers to 'the close tie established by Aristotle between *phronèsis* and *phronimos*, a tie that

[10] This is important to note because of the differences in perspective on the subject throughout his works, and hence the philosophical gradations to be discerned and distinguished. In the studies that form *Oneself as Another*, *phronèsis* is discussed in the ethical realm of deliberation on the good life, so that the emphasis lies on moral judgments in specific (and uncertain) situations in relation to the ethical aim or rather end to be pursued. In *The Just* the focus is on the relation between the idea of justice conceived as a moral rule and justice mediated by the institution, i.e. 'incarnated in the person of the judge, who, as a third party between the two parties, takes on the figure of a second-order third party' so that the concept of justice as 'just distribution' (Ricoeur 2000, xiv and xiii) becomes pivotal, as can also be seen in the engagement in *The Just* with John Rawls's *Theory of Justice* and its description of society at the level of the distribution of market- and non-market goods.

[11] It should be noted that Ricoeur's treatment of *phronèsis* invariably starts from (applied) ethics before moving to the analogous examples of medicine and law.

becomes meaningful only if the man of wise judgment determines at the same time the rule and the case, by grasping the situation in its singularity'(Ricoeur 1992, 175). On this view, secondly, *phronèsis* is thus perceived as an essential component of actual judging. A judge may well be the best there can be as far as her theoretical knowledge of the black letter law of relevant statutes, principles and precedents is concerned, but if she lacks *phronèsis*, the outcome in the individual case may prove to be unsatisfactory or downright unworkable for the parties involved, and/or others concerned.

In Ricoeur's terms, in short, the wise judge is a *phronimos*, a sensitive person who combines attention to the circumstances and insight in the demands of a specific case with the theoretical knowledge that law suggests her to apply, and orients her deliberation at choosing the best of the available legal means in order to translate these into the appropriate action: '*phronèsis*, which became "prudence" in Latin … consists in a capacity, the aptitude, for discerning the right rule, the *orthos logos*, in difficult situations requiring action'(Ricoeur 2007, 54). On this view, the right rule may be a (codified) rule of law in the one case, while it may be the equitable decision in another case. That is to say, it depends on the circumstances. Furthermore, *phronèsis* as an actual form of reflective human judgment is also a form of self-reflection and hence self-knowledge, as good reasons for a specific decision unfold to oneself, and subsequently legitimize why in a particular situation *this* rather than *that* is what is required under the circumstances. In the sphere of the juridical, self-reflection should thus always be a constitutive element of the judicial *habitus*.

What makes Ricoeur's thought especially attractive from a point of view of humanistic legal studies is not only that it is embedded in the literary tradition, canonical as we now perhaps critically perceive it, starting with the Greek dramatists Sophocles and Euripides, but also that Ricoeur consistently argues that the particularity of these literary 'profiles of virtue' such as liberality, courage and justice, culturally informed as they are, (Ricoeur 2007, 54) invites rereading and rewriting in the sense of adapting what they teach us to our contemporary situation. A fine example is his analysis of Sophocles' *Antigone* in the study entitled 'The Self and Practical Wisdom: Conviction' in *Oneself as Another* (Ricoeur 1992, 240-296) in which

he offers *phronèsis* as the lens through which to view tragic conflict on the plane of the political when it comes to just distribution. If we combine this with what Ricoeur calls analogy at the level of forming judgments and making decisions in spheres as otherwise as different as the medical and the juridical, although both 'imprint praxis with a tragic stamp' (Ricoeur 2007, 57),[12] the need to develop our understanding of the close tie between the singular, the particular and *phronèsis* by means of augmenting our insight in metaphor becomes acute.

3.2 Metaphor

As far as I am concerned, Ricoeur's view on 'the rule of metaphor' as 'the metaphorical process as cognition, imagination, and feeling' is essential because it ties aspects of *phronetic* intelligence to 'the semantic role of imagination (and by implication, feeling) in the establishment of metaphorical sense'(Ricoeur 1978, 144). Here, too, Ricoeur turns to Aristotle for the elucidation of this somewhat dense phrase. The topic of metaphor is treated in both the *Poetics* and the *Rhetoric* (that adopts the definition from the *Poetics*). Aristotle denotes metaphor as '[…] the application of a strange term either transferred from the genus and applied to the species, or from the species applied to the genus, or from one species to another or else by analogy' (Aristotle 1965, xxi.7-9, 1457b7-9, p.81). Ricoeur shares Aristotle's interest in the semantic gain of metaphor as a process, i.e. ' "to metaphorize well" is "to see *resemblance*" (Ricoeur 1986, 23), arguing for the assessment of the role of the imagination, 'that it is in the work of resemblance that a pictorial or iconic moment is implied as Aristotle suggests when he says that to make good metaphors is to contemplate similarities or […] to have an insight into likeness' (Ricoeur 1978, 145). In the sense that the *lexis* of a text in the Aristotelian sense, i.e. the characteristics of its discourse that make that discourse what it is by means of, as Ricoeur explains, ' … diction, elocution, and style, of which metaphor is one of the figures', sets before our eyes what it wants to display, there is thus a strong '*picturing function* of metaphorical meaning'

[12] Cf. Eden 1986, 63f. for the Aristotelian link between the judgment that results from cathartic insight in classical tragedies and (literary) imagination and the human soul.

(Ricoeur 1978, 144). In other words, when metaphor performs its function adequately, it makes us say, "Oh, now I *see*". Therefore we should learn 'to understand *how* resemblance works in this production of meaning' (Ricoeur 1978, 146).

Here, I would claim, is an interesting connection with the concept of *phronèsis*, namely in the demand for an ability of seeing similarities and dissimilarities in a particular situation that *phronèsis* and metaphorical insight hold in common. This is especially so because *phronèsis* implies the *phronimos*' straight eye that immediately because of its professionally trained intuition 'by doing' perceives what it is that needs to be done, for 'To metaphorize well,' said Aristotle, 'implies an *intuitive* perception of the similarity in dissimilars.' (Ricoeur 1986, 6, emphasis mine). It should, of course, at once be noted that while this immediacy of perception may be the starting point for deliberation, it is not necessarily also its outcome. What seemed intuitively the *orthos logos* may need correction on second thought.The connection, then, between *phronèsis* and metaphor can be discerned in the scheme that Ricoeur offers to elaborate on the combination of metaphor and imagination. Its first step is to understand imagination as the "seeing", the insight that metaphor offers when it asks us to contemplate on resemblance. This insight is 'both a thinking and a seeing', and in the sense that what matters is that 'to see *the like* is to see the same in spite of, and through, the different', it emphasizes the need to develop our imagination (Ricoeur 1978, 147). Thus the combination of thinking (including theoretical knowledge of doctrinal law in the case of judicial *phronèsis*) and seeing the particularity of the new situation comprised in the quality of *phronèsis* is found back in this first step in and of our using metaphor.

This also goes for the second step of incorporating the pictorial dimension, now that both *phronèsis* and metaphor depend on our imaginative capability to 'see' what connects that which we already know to the new significance of the presentation of the particular. Added to this iconic moment, then, is the third step which consists of the requirement of what Ricoeur calls "suspension", 'the moment of negativity brought by the image in the metaphorical process' (Ricoeur 1978, 151). By it he means the moment that the ordinary reference, i.e.

the reference as it is attached to descriptive language, is abolished in favour of the new meaning produced by the metaphor. That moment is (also) brought about by the working of our imagination. This combination of the cognitive and the imaginative also ties in with the division of knowledge in épistèmè and *phronèsis*. It highlights the critical element of judicial *phronèsis* because that too (always) depends on the legal imagination in order to be able to see what ties the singular situation of the case before her to the existing framework of law. At the same time the combination of *phronèsis* and imagination enables the judge to see which aspect of the singular situation calls for an adjustment in her application of the normative framework, however slight this adjustment may be. *Phronèsis* thus enables the judge to bridge the gap between the generality of the legal rule and the particularity of the concrete situation.

To recapitulate, the Aristotelian focus on likeness as the basis for a good metaphor as elaborated upon by Ricoeur has as its linchpin the ability to understand how resemblance works in the production of meaning. Thus, insight into the metaphorical is essentially a contemplation of similarities and that not only requires insight into *what* is deemed a likeness, but more importantly, *for what reasons*. Given the reciprocal relation between theory and practice and its constitutive role in the formation of legal concepts, it is obviously very important to gain insight into the ways in which metaphor works now that doctrinal development and success in daily legal practice depend on it. And this should be done against the background of the local knowledge of a specific legal system, for example the Dutch, with its Penal Code and Code of Criminal Procedure, and a specific legal practice, for example that a Dutch defense lawyer needs specific authorization to represent his absent client during court procedures but that this authorization is not necessarily written down, so that how the judge can at all "know" for sure that authorization has indeed taken place and the lawyer is allowed to speak on behalf of his client is an aspect to be taken into consideration. Local knowledge is therefore important. Why? Because as '[…] [a]n inquiry into the capacity of metaphor to provide untranslatable information and, accordingly, into metaphor's claim to yield some true insight about reality'

(Ricoeur 1978, 143), we need to ground our research too in concrete circumstances.

Now one might argue that a judge has no need of metaphorical insight on the view that her analytical and logical competences not only prevail but suffice, and, furthermore, that metaphor as far as 'it consists in speaking of one thing in terms of another that resembles it' (Ricoeur 1986,197) easily leads to category mistakes. In defense of resemblance as the guiding feature, Ricoeur refutes the accusation of logical weakness by pointing to the logical structure of the similar itself because 'in the metaphorical statement "the similar" is perceived *despite* difference, *in spite of* contradiction' (Ricoeur 1986, 196), so that it is precisely resemblance that brings close what was initially perceived as distant and different. As a strategy of language, then, metaphor aims to break down established logical structures in order to build new ones because that is what is necessary to see things anew. This is not a deviation but basically the same operation by means of which any classification of concepts into categories takes place.

Applied to our subject this means that the work of metaphor does not take place outside law. On the contrary, it is inherent in it, so that the ability to metaphorize is part and parcel of *phronetic* intelligence, both for the development of law in theory and for the contribution to law in practice. This is even more so now that the days in which the legalistic and positivist idea of law as restricted to a set of codified rules are long behind us and law in civil-law countries since the early twentieth century includes principles, the interpretation and application of which by their very nature demands a deliberation about and balancing of the interests involved. The Aristotelian attention to resemblance thus also forms an argument in favour of a discursive view of metaphor given the way in which metaphor elaborates both terms of the comparison in their reciprocal relation, for example, when we say, "Judge Rex is a fox", or "Judge Hercules is a hedgehog". Obviously, this too pertains to the topic of conceptualization and classification in law aimed as it is like scientific language to eliminate as much as possible any ambiguities (cf. Ricoeur 1985), in that it is important to be aware of the metaphorical of the legal concept in general, and the legal fiction in specific. This can already be seen in Ricoeur's description

of the project of the rule of metaphor as primarily concerned with metaphor as '[…] the rhetorical process by which discourse unleashes the power that certain fictions have to redescribe reality' (Ricoeur 1986, 7). Following this, metaphorical insight is essential also for the topic of the development of law against its cultural and historical background, as Owen Barfield already explained in his work on the bond of poetic diction and legal fiction, in which not incidentally he also propounded the claim that '… every modern language … is *apparently* nothing, from beginning to end, but an unconscionable tissue of dead, or petrified, metaphors' (Barfield 1984, 63). Barfield translated Aristotelian thought on metaphor by analogy as described in the *Poetics*[13] for the legal fiction in the following way, 'The … analogy … may be expressed… in the formula: - metaphor: language: meaning :: legal fiction: law : social life'(Barfield 1977, 58). That is to say, 'metaphor is to language as language is to meaning' is comparable to 'legal fiction is to law as law is to social life'. And with the latter element of the comparison, at least as far as I am concerned, Barfield also points to the impact of the "metaphorical" choices made in law because of law's impact on people's lives. It makes the topic even more urgent for judges in that when they speak people's lives are changed,[14] especially given the interactionist metaphor for on the relation between theory and practice that Barfield then adds to his argument: 'There is not much that is more important for human beings than their relations with each other, and it is these which laws are designed to express. The making and application of law are thus fundamental human activities, but what is more important for my purpose is that they bear the same relation to naked thinking as traveling does to map-reading or practice to theory.' (Barfield 1977, 63). In short, it is far easier to design laws than to apply them to actual cases, just as it is far easier to plan your hiking trip by means of a map than to know what to do when

[13] 'Metaphor by analogy means this: when B is to A as D is to C, then instead of B the poet will say D and B instead of D (Aristotle 1965, 1457b11-12, p.81).

[14] Cf. Robert Cover's seminal article 'Violence and the Word' , '[…] legal interpretation takes place in a field of pain and death […] A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life' (Cover 1986, 1602). For an extended treatment, see Gaakeer 2009.

you encounter terrain that is rougher than expected. To Barfield, this should lead us to the study of jurisprudence in the humanistic sense I promote here, because it is 'well adapted to throw light on the mind and its workings,' and he therefore laments that the 'respectful attitude to legal studies' which used to be 'an essential element in a liberal education' [...] 'has long since been abandoned' (Barfield 1977, 63).[15]

Not only is this interesting from a point of view of contemporary forms of interdisciplinarity, but this also speaks for attention to metaphor on the level of the development of national law, i.e. the internal, socio-historical development of a legal system. More importantly, given the enormous growth of the importance of supranational law in Europe and global developments in, for example, new technologies that create new forms of contract and commercial relationships, it speaks for attention to metaphor on the plane of comparative law. Why? Because to compare is to translate and this act too needs a perceptive attitude and an awareness of the way in which we use the technical language of an institution such as law all too easily to impose its conceptual framework to the detriment of other languages, other voices, other contexts, semantic, cultural or otherwise. As Ricoeur points out, metaphor is not 'a simple transfer of words', but 'a commerce between thoughts, that is, a transaction between contexts' so that 'metaphor holds together within one simple meaning two different missing parts of different contexts of this meaning' (Ricoeur 1986, 80). What is more, in the sense that metaphor adds something new to the reservoir of existing meanings, it provides insight into the development of (the rule of) law. So we should carefully consider the way in which this rule of metaphor works because by means of the introduction of a new metaphor in a specific field, or by taking a metaphor from one field to another, new meanings are generated and, as a side effect, original meaning may be suppressed, if only for the time being.

[15] In this context Barfield refers to the Italian philosopher and jurist Giambattista Vico (1668-1744). To Vico, our faculties of imagination and understanding should be thought of as interacting, cognitive faculties, i.e. as *ingenium* or imaginative understanding. He also advises us to strive after cultural knowledge as a whole and promotes the idea of contextual understanding for law (see Gaakeer 2011 and 2012a).

As far as legal practice is concerned, in the fact that to Aristotle and Ricoeur metaphor belongs to both rhetoric and poetics, I find an additional argument to emphasize the judicial need to become sensitive to the workings of metaphor. As Ricoeur explains, in both works metaphor is placed under the rubric of *lexis* 'as the whole field of language-expression' (Ricoeur 1986, 13). While in the *Poetics* Aristotle rejects the idea of *lexis* (in the sense of discourse as mentioned above) as restrictively organized according to 'modes of speech' (Aristotle 1965, xix.7, 1456 b7, p.73), from a rhetorical point of view, however, metaphor as part of *lexis* is important for modes of speech as varied as prayer, threat, statement, interrogation, giving a command, and telling a specific story in a specific way. Here the focus is on the usefulness of metaphor for legal rhetoric as part of legal practice. Knowledge of the transference of meaning by means of metaphor thus gains importance too in legal settings in which persuasive claims for meaning are made in oral procedure. This is especially so given the additional requirement of immediately grasping the metaphorical thrust as it is presented, on the view that transcripts of oral argument often do not repeat the words spoken literally but give a more succinct rendering of the propositional contents of what was actually said, so that a loss of intended meaning may occur when the transcript is read back in an environment necessarily different. When we return to Ricoeur's definition of the imagination as 'this *ability* to produce new kinds by assimilation and to produce them not *above* the differences, as in the concept, but in spite of and through the differences' (Ricoeur 1978, 148) and we connect it with the idea of *phronèsis* as a virtue necessary for the judicial activity of deciding cases after having exercised critical judicial deliberation, the very fact that *phronèsis* is variable, i.e. it depends and thrives on the possibility of things being otherwise (Aristotle 1924, I.i.2,1357a5), points to its quality of contingency. As such it shows the importance of the heuristic function of metaphor for law: this "seeing as" ideally enables us to see before our eyes things as it were already actual. Thus metaphor in its referential garb appeals to our making actual what is shown as potential, by means of the very act of creating meaning (and that is an act that we perform). In this way it appeals to our willingness to acknowledge the possibility of metaphorical truth. That is to say, when metaphor moves beyond

the descriptive function of language it opens a new vista. Metaphor therefore cannot only make us say "Oh, now I *see*", as mentioned above, but also "I thought I knew, but now I see that it can also be otherwise". This ties in with *phronèsis* as 'a truth-attaining rational quality' discussed above.To me, the idea of metaphorical truth and what Ricoeur calls the pictorial or iconic moment are also eminently suited to illustrate the importance of the interconnection of *phronèsis* and metaphor, on the one hand, and (literary) narrative and the equitable, on the other hand, in good judging, because judges when they select what they consider as the facts of the case and grasp them together with the relevant circumstances, are authors that try to figure out what happened and then perform the act of configuring a new narrative, and, as Ricoeur says '*to figure* is always *to see as*'(Ricoeur 1986, 61 emphasis in the original). To them, then, narrative insight and narrative intelligence are of crucial importance to their professional iconic moments.

4. BUILDING BLOCKS FROM THE HUMANITIES FOR A MODEL OF JUDGING. PART II: CONFIGURING (A SENSE) OF JUSTICE

4.1 Narrative intelligence

'When a judge tries to understand a suspect by unraveling the knot of complications in which the suspect is caught, one can say that, before the story is being told, the individual seems entangled in the stories that happen to him. This "entanglement" thus appears as the pre-history of the story told in which the beginning is still chosen by the narrator.' (Ricoeur 1987, 129). In these lines from an article significantly entitled 'Life: a Story in Search of a Narrator', Ricoeur shows the importance of professional judicial attention to narrative in its various forms.

Attention, firstly, to "the beginning" chosen for his story by the narrator-defendant, in relation to the competing stories as found in, for example, a victim's statement to the police or witness statements and/or written testimony. Is the story coherent? Is the sequence of events told and the way in which it is told at all probable? Questions about

the story's plausibility and the narrator's credibility require the active reader's insight into narrative on the level of what Ricoeur elsewhere calls 'the act of the plot, as eliciting a pattern from a succession'(Ricoeur 1980, 178). In order to answers these questions the judge must be able to understand what it means to grasp together events initially considered separate into a story with a plot. At this level it is important to be able to decide whether an event is just a singular event or an essential element to the development of the narrator-defendant's plot. It is here that the contribution of the humanities comes to the fore. The judge because she has to be able to read for the plot can learn from the wealth of literary examples of plotting, including but not limited to 'legal' plots in trial situations, also to learn to test the veracity of evidence presented, both as a reader and a spectator (Biet 2002, 20).

Secondly, judges are themselves narrators in the configurational act of grasping together the facts and circumstances of the case and deciding what in the succession of events is relevant for the plot and what not. This plotting in the form of a selection is always done with the aim of arriving at a decision, or, as Ricoeur put it succinctly 'To tell and to follow a story is already to reflect upon events in order to encompass them in successive wholes.' (Ricoeur 1980, 178) Thus the judicial configurational act has as its ultimate goal the (re-) structuring of reality. Like drama it is aimed at a dénouement, a solution of the problem (Holdheim 1969, 7). That is obviously always done with the normative framework of law in mind, also in the sense of a language of concepts. Here too, as with metaphor, being able to see difference and resemblance is important for the narrative construction of facts. What James Boyd White already emphasized at the start of what in legal theory we now call the interdisciplinary field of *Law and Literature*, as an essential ability for any jurist becomes poignantly clear: the ability to bridge the originally fundamental difference, both in herself and when recognized as competing tugs in other people's texts that the jurist needs to consider, between the narrative and the analytical, or the literary and the conceptual. White calls this the difference between 'the mind that tells a story, and the mind that gives reason' (White 1973, 859).

Especially important, now that the judicial construction of the plot is not just the arrangement of events in a (dramatic) sequence,

but the determination of what and who is to be included and what and who will be left out - and that is itself already a judgment –, is the professional demand of thorough judicial reflection before action. The outcome of the judicial configurational act ideally gives insight not only in 'the character of the judgment' (Ricoeur 1980, 178) but also in the judge's *ethos*. If judicial configuration is to be more than an automatism, it needs to be informed and the humanities can help provide insight in how narratives work both in theory and the actual world. Judges are the producers of sentences in at least two meanings: they sentence people and thus decide about the lives of others, and in writing down their decisions, in sentences literally, they have to state the grounds the decision is based on, so that others can form an opinion about its correctness. Ricoeur's thesis that 'to narrate is already to explain'(Ricoeur 1984, 178) thus points to the success demanded of a judicial decision as far as bringing together heterogeneous and contradictory facts and circumstances in one coherent whole that, as a story, must have an acceptable conclusion. This also links the ability to narrate well to the virtue of *phronèsis*. Here too the humanities can contribute to judicial training (and, of course, legal education generally),[16] if only to show, as Jerome Bruner contends, that the vitality of a culture lies '[…] in its dialectic, in its need to come to terms with contending views, clashing narratives' because '[W]e hear many stories and take them as stock even when they conflict with each other' (Bruner 2002, 91).

The input, then, of philosophical hermeneutics and traditional, as well as cognitive narratology aimed at providing insight into how the human mind deals with the very idea of 'story'[17] is of the utmost importance in order to instill into judges an awareness of what it is that they do and what that means. In his seminal trilogy *Time and Narrative* Ricoeur elaborates on the Aristotelian thesis that knowledge requires recognition or insight into the mimetic representation and that

[16] 'The reason why we enjoy seeing likeness is that, *as we look, we learn* and infer what each is, for instance "this is so and so".' (Aristotle 1965, IV.5, 1448b5, p.15, emphasis mine).

[17] For an overview of the different strands in narratology, see Fludernik and Olson 2011.

provides an important source for law and legal practice. His analysis of the threefold model of *mimēsis* ties in with his point of a necessary reflection on events before encompassing them in a narrative sequence as mentioned above, and with his analysis in *The Rule of Metaphor* of the discursive view on metaphor that includes *muthos* and *mimēsis* as constitutive elements.

To Ricoeur, narrative fiction as a composition shows us that *muthos* or emplotment in the sense distinguished by Aristotle is both fable in the sense of an imaginary and imagined story, and a plot in the sense of a well-constructed story. On this view emplotment is an integrative process. Going beyond Aristotle who restricts *mimēsis* to drama and epic, Ricoeur focuses on narrative as emplotment in a general sense. 'Plot, says Aristotle, is the *mimēsis* of an action'(Ricoeur 1984, xi) and to Ricoeur this means that narrative fiction as figuration of events also has the power to re-describe them. On this view, metaphorical redescription and *mimēsis* as imitation or representation of action are interchangeable.

Ricoeur distinguishes three stages of *mimēsis*.[18] The first is prefiguration, or *mimēsis1*. This term denotes the temporality of the world of action, and that includes the pre-understanding we have of the order of an action (Ricoeur 1984, xi), based on '*the pre-narrative quality of human experience*' (Ricoeur 1987, 129, emphasis in the original). It is inescapably a vicious circle, Ricoeur admits, because if human life is thought of in terms of stories, as '*an activity and a desire in search of a narrative*'(Ricoeur 1987,129, emphasis in the original), then any human experience is itself 'already mediated by all kinds of stories we have heard' (Ricoeur 1987, 129). At the same

[18] It should at once be noted that Ricoeur's definition of 'fiction' is not just "imaginary configuration", because the latter, as he explains 'is an operation common to history and fictional narrative and as such falls within the sphere of *mimēsis2*'(Ricoeur 1984, 267). In Volume 2 of *Time and Narrative* Ricoeur addresses the difference between historical and fictional narrative. For purposes of this article, I do not elaborate on this distinction on the view that precisely because the term 'fiction' can be thought of as both 'a synonym for narrative configurations', and 'as an antonym to historical narrative's claim to constitute a "true" narrative' (Ricoeur 1984, 64), it is so eminently suited to serve as a linchpin for a discussion of what jurists do in practice.

time, this circularity should alert us to our task of acknowledging our own tendency to stick to a story once we have located it or told it ourselves, as I will argue below. Why? Because for professionals especially there is the risk of professional blindness if Ricoeur is right and '[T]o understand a story is to understand both the language of "doing something" and the cultural tradition from which proceeds the typology of plots'(Ricoeur 1984, 57), on the view that any profession has its specific plots of how things are done and how things work, with the legal 'whodunit' story as a case in point.

The next stage is configuration, or *mimēsis2*, a term denoting the world of the narrative emplotment of events, i.e. the world of *poiēsis* as making something, as composition (Ricoeur 1984, xi). Its prerequisites are, 'the composition of the plot […] grounded in a pre-understanding of the world of action, its meaningful structures, its symbolic resources, and its temporal character' (Ricoeur 1984,54). This means that,

> '[…] an event must be more than just a singular occurrence. It gets its definition from its contribution to the development of a plot. A story, too, must be more than just an enumeration of events in a serial order; it must organize them into an intelligible whole, of a sort that we can always ask what is the "thought" of this story. In short, emplotment is the operation that draws a configuration out of a simple succession.' (Ricoeur 1984, at 54 and 65).

To Ricoeur, the importance of Aristotle lies in his already equating the plot with the configuring of opposite views. That is why Ricoeur refers to this simultaneousness as 'concordant discordance' (Ricoeur 1984, 66), for what we call narrative coherence combines the concordance of the ongoing plot and the discordance of the *peripateia*, i.e. changes in fortune, reversals, upheavals, unexpected events, and so forth.

Finally, there is refiguration, or *mimēsis3*. This term refers to the moment at which the worlds of *mimēsis1* and *mimēsis2* interact and influence one another. It is the moment when our pre-understanding is informed and changed by our act of configuration itself, i.e. when figuration executes its power of redescription as mentioned above. That is to say, when applied to the jurist's activity, it is our emplotment of facts and circumstances as well as the stage of our doing so against the background of the legal norms. Here we see the tie with the

methodology of the 'Hin-und-Herwandern des Blickes' discussed above, for emplotment and application go hand in hand. In short, in the split second when the three stages of *mimēsis* come together, emplotment synthesizes multiple events and is itself a synthesis in that it unifies divergent components into a story. Thus it aims at creating unity, a whole comprising the story being told and the means for expressing it that should be investigated in their interrelation.

On the view, once again, that when judges speak the order in and the ordering of the world, and thus reality in the sense of the lives of other people, is changed by their sentences, the importance of the interrelation of the imagination, narrative and literature becomes acute. Ricoeur's threefold distinction of *mimēsis* provides a literary model for law, given the close resemblance of the forms of *mimēsis* to the hermeneutic steps taken in the process of deciding a case (i.e. "action" on the basis of a pre-understanding, professionally and otherwise, leading to an outcome in the form of an explanatory plot of what happened). '[W]hat is at stake […] is the concrete process by which the textual configuration mediates between the prefiguration of the practical field and its refiguration through the reception of the work'(Ricoeur 1984, 53), the practical field here being the existing legal background and reception referring to both the reception by the legal professionals and the larger field of societal reception including, in the end, societal acceptance. At this meta-level of reception, the idea of the justification of the judicial decision thus returns with a vengeance.

Furthermore, '[W]ith *mimēsis2*, opens the kingdom of the *as if*. I might have said the kingdom of fiction…' (Ricoeur 1984, 64). Here is the link with the topic of metaphor discussed above. Since what is constructed in fiction is *mimēsis* as *poiēsis*, i.e. not just imitation but construction in and as the act of composition, metaphor to Ricoeur has as its function to show the deviation from the ordinary in the service of *lexis* as the demonstration of what happened. Thus we have a link to the idea of negative capability, the metaphor coined by John Keats for what it means to write (and be) a great work of art, '… that is when man is capable of being in uncertainties, […] doubts, without any irritable reaching after fact and reason' (Gaakeer 2007, 31 n8). It is normative for the judicial virtue of impartiality in that

judges must give full attention to all the different aspects of a case, the manifold possibilities for meaning, always asking 'But what if this had been the case rather than that?', and in the meantime suppressing the inclination to come to a final decision (too) quickly.

Translated to the narrative aspect of a legal conflict, this also means that the chaos and tension of the initial phase of "what happened" are, ideally at least, translated into a manageable form in the various legal documents culminating in the trial phase that finds its (re)solution or catharsis, in the new order imposed on reality by the judicial decision. In this sense that the legal situation resembles drama, we find here an opening to connect Ricoeur's thought to contemporary discussions on visuality and mediality in law, for there too attention to metaphor and narrative construction is of great importance. What is more, the discomfiting effect of metaphor (and the same obviously goes for satire, irony, hyperbole and tropes generally when found in a legal setting) should alert jurists to cultivate their story sensibility or narrative intelligence to prevent them from falling in the professional abyss of belief perseverance and confirmation bias, and other psychological errors that humans are prone to. This is even more important now that cognitive psychology has also convincingly shown us that professionals rely on a variety of skills rather than simply applying a rule. Thus sophisticated knowledge of how narrative works in the world and in us is essential lest misreading and misunderstandings reinforced by our natural tendency to cling to our initial beliefs combined with professional overconfidence about how things are done lead to miscarriages of justice. The epistemological question to be kept in judicial minds should always be whether there is indeed a chain of circumstance "out there" or whether (some)one carefully fits together the evidence with other established facts, and, even more important, whether that someone is you.

Narrative intelligence ties in with the topic of professional ethos in yet another way. In the sense that any story of a professional's actions – and the written version of the judicial decision in which her line of thought unfolds is a prime example here - provides its author with a narrative identity, it leads, ideally at least, to self-knowledge in the sense of knowledge of the activities of which the judge as the knowing subject is the author, when she seriously engages with the

criticism her decisions engender in others. Here is also the link with the topic of the justification of (the products of) her narrative identity. If the judge's deliberation is oriented at choosing the correct legal ends and means, and at translating these into the appropriate legal action, this implies judicial integrity that transcends the obvious demands of clarity and coherence of the judicial decision in that it includes the ethical aspect in the sense of the judicial disposition to keep probing her inner motives and to reflect on the tensions that arise when one has to get a grasp of two conflicting views (on the facts of the case or the point of law, or both).To Ricoeur, narrative intelligence is '[…] much closer to practical wisdom and to moral judgment than it is to science and, more generally, to the theoretical use of reason' (Ricoeur 1987, 123). In short, in narrative intelligence we witness the triumph of *phronèsis* over *epistèmè*, for story belongs to "phronetic intelligence" (Ricoeur 1987, 124). In the sense that by means of literature we can gain insight in examples of the particularities of the human condition that may otherwise be inconceivable or beyond our reach, literary examples of the process of mimesis are therefore helpful too. Not in the least because, as Ricoeur explains, '[A]n essential characteristic of a literary work […] is that it transcends its own psycho-sociological conditions of production and thereby opens itself to an unlimited series of readings, themselves situated in different socio-cultural conditions. In short, the text must be able, from the sociological as well as the psychological point of view, to "decontextualise" itself in such a way that it can be "recontextualised" in a new situation – as accomplished, precisely, by the act of reading.' (Ricoeur 1981, 139; cf. for the heuristic force of fiction and the idea of intersubjectivity and fiction also Ricoeur 1991).

4.2 The right discrimination of the equitable

All of the above, I would claim, already settles the case in favour of the humanities as companions to law in order to augment the scope of legal *paideia*. In addition, attention to narrative can obviously also be translated into a meaningful vantage point from which to resist the reification that is the result of a one-sided, positivist attention to the language of legal concepts. Rules and norms are not self-applying.

They are applied by man who in turn is responsible for any reductive tendency, for as Ricoeur put is 'one massive fact characteristic of the use of our languages [is]: *it is always possible to say the same thing in a different way*' (Ricoeur 2007, 116, emphasis in the original). A lawyer's, more specifically a judge's ethos in the sense of professional attitude cannot be separated from the persuasiveness of his judgment. If a lack of reflection on this bond may rightly be deemed an ethical defect, we cannot do without the input from the humanities in the process of going from the abstract, general norm to its particular application in a concrete situation, for the justice of the outcome depends on it. On this plane the thoughts that Aristotle and Ricoeur offer on the subject of equity can also help elucidate the connections between *phronèsis,* metaphor and narrative. Aristotle, in examining the nature of human actions and ethical conduct, says that '[…] matters of conduct and expediency have nothing fixed or invariable about them [..] the agents themselves have to consider what is suited to the circumstances of each occasion *(*προσ τον καίρον*)*, just as is the case with the art of medicine or of navigation' (Aristotle 2003, II.ii.3-5,1104a4-10).[19] This is a call to find the persuasive materials suited to a task and appropriate to the occasion and one that is part and parcel of the virtue of *phronèsis* in its relation to law where the reciprocity of facts viewed in their specific contexts and the normative precepts of positive law is the cornerstone for 'doing law' and 'acomplishing justice', for the two cannot be separated. Justice in Aristotle means both the general, human virtue of justice as 'being a just person' and the legal idea of distributive and corrective justice.[20] When, then, an unjust result would ensue in an individual case due to the strict application of a legal rule, the divide between a positivist form of rule application and justice in the senses distinguished by Aristotle can be closed by means of equity. The reason is that equity not only parallels written law, but where necessary prevails over it as a corrective: '… law is always a general statement, yet there are cases which it is not

[19] For later views on equity (Christopher St. Germain, Edward Hake, Hugo Grotius, William Blackstone, and Immanuel Kant), see Gaakeer 2008.

[20] In Roman law it says *non ex regula ius summitur, sed ex iure quod est regula fiat*, i.e. what is law is not derived from the rule, it is the other way around in that the rule is constructed out of what is just.

possible to cover in a general statement.' (Aristotle 2003, V.x.3-4, 1337b12-14, p.315). The error that arises from the universality of the law is an omission that can be rectified by '[…] deciding as the lawgiver would himself decide if he were present on the occasion, and would have enacted if he had been cognizant of the case in question'(Aristotle 2003, V.x.6-7, 1137b29-33, p.317). Aristotle concludes, 'This is the essential nature of the equitable: it is a rectification of law where law is defective because of its generality.' (Aristotle 2003, V.x.6, 1137b28-30, p.317). He then ties *phronèsis* to judgment as the right discrimination of the equitable. Equitable man is above all others a man of empathetic judgement who shows consideration to others, also in the sense of forgiveness, '[…] that consideration which judges rightly what is equitable, judging *rightly* meaning what is *truly* equitable' (Aristotle 2003, VI.xi.1,1143a24, p.361, emphasis in the original). Thus, Aristotle ties both understanding of a case and (correct) judgment to *phronèsis* and that is directly connected to the activity of *doing* law. The lawgiver deals with legal justice when he determines the rule, but he does so necessarily in general terms. The judge is the one who interprets the lawgiver's texts, and to her, technical acuity of the kind the lawgiver ideally possesses, is not enough. She needs the metaphorical '[…] leaden rule used by Lesbian builders: just as that rule is not rigid but can be bent to the shape of the stone, so a special ordinance is made to fit the circumstances of the case' (Aristotle 2003, V.x.7-8, 1137b30-33, p.317). The doing of equity therefore depends on the particular circumstances of each case, as it combines the virtue of legal justice and the moral virtue that is the product of ethos.

If we connect this to what Aristotle and Ricoeur argue on the subjects of metaphor and narrative emplotment, and we allow for the fact that it is indeed possible to say the same thing in a different way, our very act of configuring law and justice has to confront the paradox of rule-following. That is to say that language requires a user who knows how to use it in concrete situations, because (the words of the) rules are not self-applying as noted above in this paragraph. The words of the rules in the books of law need application before they can become active. On this view, legal concepts too derive their meaning from the contexts in which they are developed and applied, including the fundamentally unpredictable nature of our social environments.

As a result, the interpretation of language – not incidentally to Aristotle language and speech are the only means through the *zoon politikon* can discuss the topic of (in)justice – becomes a precondition for the development of law. On the view that interpretation is always linked to argumentation, the latter is necessarily a special form of practical reasoning, within, of course, institutional and procedural boundaries, and these too are subject to our *deliberative* reasoning as characteristic of the virtue of *phronèsis*. The right to speak within this framework implies a membership of the legal system and is therefore of enormous political and moral significance: 'Stating the law in the singular circumstances of the trial, hence within the framework of the judicial form of institutions of justice, constitutes a paradigmatic example of what is meant here by the idea of justice as fairness or equity.' (Ricoeur 2007, 63). Since to Aristotle justice comprises both the just as a regulative idea and ideal, as well as the legal as the domain of positive law (Ricoeur 2005, 15; cf. Ricoeur 2000), to Ricoeur this points to the social aspect, because 'Argumentation is the site where the bonds between self, neighbour, and others are established.' (Ricoeur 2007, 7).

Combined with the development of *phronèsis* by means of literary works as a matrix for ethics and law, and the exercise of this virtue as inseparable from the personal qualities of the capable *phronimos* in action, the conjunction between the self (legal and otherwise) and the rule shows that self-reflection is constitutive of the judicial *habitus*.[21] Since, as Ricoeur claims, '[…] interpretation of the facts of what happened [is] in the final analysis of a narrative order' (Ricoeur 2007, 69), this is even more crucial in hard cases. Equity's knowledge, too, is narrative in its attention to the particular aspects of the case, which are necessarily connected to the stories of the parties involved. The argument thus comes full circle as this also ties in with the idea of narrative emplotment and ordering and with that of narrative intelligence discussed above in paragraph 4.1

[21] 'The collection of stories that interpellate a person is his or her narrative habitus […]' and '[N]arrative habitus provides the competence to use this repertoire as embodied and mostly tacit knowledge […] A person's narrative habitus enables knowing how to react when a story is told, according to what kind of story it is' (Frank 2010, 52 and 54).

So far I have referred to Ricoeur; now I would further suggest that his line of thought can be fruitfully combined with the important topic that Miranda Fricker recently addressed, because taken together these authors offer yet another argument for a humanistic perspective on law. Perceptual as the tie of *phronèsis* and judgment is, it is important for our dealing with testimonial (in)justice because, as Fricker puts it, it depends on 'the virtuous hearer's perceptual capacity […] understood in terms of a sensitivity to epistemologically salient features of the situation and the speaker's performance' (Fricker 2007, 72). She offers an illuminating discussion of two types of epistemic injustice from which discourses can suffer: testimonial injustice, i.e. when prejudice causes a hearer to give a deflated level of credibility to a speaker's word (either credibility excess or deficit), and hermeneutical injustice, a stage prior to it, i.e. when a gap in collective interpretive resources puts someone at an unfair disadvantage when it comes to making sense of their own social experiences. She too illustrates the problems resulting from such injustice by means of literary works. The ideal situation should be ' […] that the hearer exercises a reflexive critical sensitivity to any reduced intelligibility incurred by the speaker owing to a gap in collective hermeneutical resources' (Fricker 2007, 7) and that sensitivity is an ethical as well as an intellectual virtue. But because as humans we are fallible, it is almost impossible to escape testimonial injustice, and to the extent that we lack self-reflection the risk of hermeneutical injustice increases. So we should at the very least strive to attain a reflective optimum. To do so as jurists, we need to understand the elements of our professional self-fashioning, even though such self-discovery and self-knowledge can be painful when we are confronted with our own prejudices. For example, when in the courtroom we ignore 'hermeneutically marginalized persons' because they simple have not been assigned a place in our collective understanding given the dominance of identity prejudices, so that they suffer a 'situated hermeneutical inequality'(Fricker 2007, 154-162). Obviously this ties is in with the subjects of belief perseverance and confirmation bias discussed above and thus deserves our continued attention.

5. THE DEFENCE RESTS

Firmly rooted in the idea of law as text as I am as a practitioner, I would contend that the core business of jurists as readers, writers and

hearers is trying 'to figure out' the variety of meanings of the linguistic performances held before them and deal with these in terms of their (intended) consequences, of the kinds discussed above. If jurists are informed, then, by what the humanities, and especially literature and philosophical hermeneutics, can contribute to an illumination of the tensions at work in doing law, they may be able to deal with noted suspicions and unnoticed biases, cultural and legal, as well as private and public. They may learn to express what otherwise all too often remains inexpressible to the detriment of doing justice. The humanities can inculcate jurists, and judges especially, with the professional humility that is required to do right rather than wrong. Thus, I would voice concern about the tendency of not a few literary-legal scholars of postmodernity to be averse to text traditionally conceived. As far as I am concerned we should cherish poetic faith[22] as a state of mind of openness to counter the waves of legal instrumentalism focused on policy rather than value that currently loom large in contemporary societies as they face a great variety of local and global challenges.

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[22] See Coleridge 1983, 6: 'that willing suspension of disbelief for the moment which constitutes poetic faith'.

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