JUDGE TRAINING FOR ORALITY: EXPERIENCE, HISTORY AND MEMORY OF THE UNWRITTEN LAW

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SUMMARY: *1. Pulling the strings of orality and dialogue. 2. The word said, the body viewed: the role of the senses. 3. Orality and the preparation of the actor. 4. Pedagogy, history and memory of orality.*

In the early days, when the hearings moved forward, and it was time to hear the witnesses, I used to get so anxious that I would feel a pain on my back that would leave me breathless. The effort to maintain the appearance of security would rob me of my body strength. And I was sure that fear and anxiety were stamped on my face, molding my tone of voice and escaping through my gestures. Everyone would notice: she is a new judge who is unable to hold hearings. The feeling of these first days has certainly gone by. The lawyers and attorneys took me by the hand and experience taught me how to do it. The lawyers kept on asking and asking, as they are supposed to do, and at each answer I manage to find the gaps and loops. After some time, it no longer hurt. It was just tiresome. After the 15th, 18th hearing of the day I usually went home happy. There were thousands of stories to tell, to laugh about, and to suffer. There were thousands of stories about life as it is, about law as it is. I felt as tired as someone who have run several kilometers. But it was not the body (muscles, bones, nerves) that was worn out. It was the soul that was sucked in by the conflict and needed time to recover. There was the weight of a responsibility that is not taught at any law school: the responsibility of the unwritten law that lives inside the courtrooms.

They are the places where a part of the memory of law is kept, which is embodied, made by senses, exposed through them, in the tactile perception that comes from the soul. And that touches the other and

is touched by them. And this memory escapes from courtrooms because they have doors that open inward and outward.

The door leaves the room and opens itself to the waiting room, the elevator, the street. The door leaves the room and opens into verb: the mouth of the room or *la bouche de la loi*. It explains what has happened indoors, like a story always ready to be revisited as the ontologically lived law.

The door opens to the heart of the office. It hides and reveals the rhythm of the case, its beep in circulation between various phases, the vital flow made out of paper or made on the computer screen. It meets people who will enquire about the progress of the cases. What is happening or what is going to happen next.

And whilst moving between doors and rooms, some say good morning, others don't. Some understand and gather. Others do not understand and disintegrate.

All unwritten stories can be told and shared because they happened one day. Someone saw it. Someone was present at that moment, even though there is not one single line written about what has happened. The law was experienced in that meeting: through health and sickness, through happiness and sadness; for good and for evil.

The purpose of this chapter is to talk about judge training under the perspective of these contingencies and to highlight the role of judge training as an opportunity to teach, learn, recover and keep the memory of orality.

1. Pulling the strings of orality and dialogue

It is tradition in academic writing to refer to the Greeks. Despite a consistent criticism of the disconnection between the bonds of historicity with remote and diverse situations, with time and space cultivated differently, we end up, deliberately, in a common place. Turn to the Greeks. The Western thought is founded on them and was, therefore, imbued by the dialogue. This is done, however, like a string that is pulled for the manufacture of a fabric known to be awkward, more due

to the poetic taste than to the literally philosophic or historical. And this reference takes the side with Jorge Luis Borges:

> Some five hundred years before Christianity the best thing ever registered in the universal history took place in the Magna Graecia: the discovery of the dialogue. Faith, certainties, dogma, curses, prayers, prohibitions, orders, taboos, tyranny, wars and glories besieged the orb; some Greeks contracted, we will never know how, the unique habit of talking. They doubted, persuaded, disagreed, and changed opinions, postponed. Perhaps they were helped by their mythology that was, like Shinto, a collection of imprecise fables and variable cosmogonies. These disperse conjectures were the first roots of what we now call, not without pomp, metaphysics. Without these few Greek talkers, Western culture is inconceivable[1].

The *Greek talkers* formulated the arrays for the thought around justice and conflict solving ways through laws that changed from oral emissions, lived in tradition, to the written text. Billier and Maryiolli described a "move towards abstraction"[2]. Along the way traced by the ancient Greeks, the history of law flows, with comings and goings that today arrive as means to learn the invisibility of the factors of concreteness and, in an essentially relevant way, the ones pertinent to orality of all circuits of law enforcement.

The classic philosophy with Socrates, Plato and Aristotle leaves a gap through which the instantaneous of orality escapes and, contradictorily, also the continuity of the troubles of the experience of treatment (solution) of conflicts[3]. The *unique habit of talking* passes by form and substance of humanity manifestation that build law.

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[1] J.L. BORGES, *Sobre a amizade e outros diálogos*, São Paulo, 2009, p. 21.

[2] J.-C. BILLIER, A. MARYIOLI, *História da Filosofia do Direito*, Barueri-São Paulo, 2005, p. 9.

[3] See, among others, for a general view, W. JAEGER, *Alabanza de la ley: las origenes de la filosofía del derecho y los griegos*, Madrid, 1953; ID., *Aristoteles: bases para la historia de su desarrollo intelectual*, Mexico, 1995, ID., *Paidea: a formação do homem grego*, São Paulo, 1979, L.C. DE MONCADA, *Filosofia do Direito e do Estado*, 2. ed. rev. e acres., Coimbra, 1955, v. 1, Parte histórica; G. REALE, *História da filosofia antiga*, São Paulo-Loyola, 1995, 5v.; G. REALE, D. ANTISERI, *História da filosofia*, 4. ed. São Paulo, 1990, 3v.; J.-C. BILLIER, A. MARYIOLI, *História da Filosofia do Direito*, Barueri-São Paulo, 2005.

Thus lies Socrates and his own judgment, in a dialogue to death. It is transformed into matrix of the syllogism that takes the inevitability of the end as an identification of the human being (*Every human being is mortal. Socrates is human. Therefore, Socrates is mortal*). The remembered path is recomposed in the version of the days in the dialogic lecturing about the justice in The Republic and in The Laws that Plato wanted to be kept. Socrates goes with his pupils, mingles with them, and requires the expression of their own doubts:

> The Socratic dialogue theme is the desire to reach with other men an intelligence to which everyone must follow, about a subject that ceases an infinite value to all: that of the supreme values of life. To reach this target, Socrates always goes from what the speaker or men in general agree with. This situation serves as a "foundation" or hypothesis, after which the consequences that result from it are developed, confronting with other data from our consciousness considered as established facts[4].

In a courtroom, there are established facts. They are in the law, in a tradition of interpretation of the theme, in the evidence already brought to the process. It is common, however, for people to notice the data under dissonant interpretative approaches. The talk usually concentrates on risk levels that will reach fields ranging from law to the prospects differed during an execution. As in the Socratic dialogues, the goal is to reach an understanding of the situation in which everyone has a vision, even if distinguished. The way the conversation goes is vital to any achievement, even to the establishment of the premises for negotiation that will be fulfilled only in a remote future.

In Plato, the structure of the dialogue that gives voice to Socrates, between a character and a historically situated person, records the most significant features of the practice of public speaking, which are the *never knowing enough*, the availability to know with and in the other, justice as something that is exercised by knowledge. This is the raw material for preparation of the process in the oral scene[5].

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[4] W. JAEGER, *Paidea: a formação do homem grego*, cit., p. 523.

[5] M. GAGARIN, P. WOODRUFF, *Early Greek legal thoughts*, in E. PATTARO, F.D. MILLER, JR., C.-A. BIONDI (eds.), *A treatise of legal philosophy and general juris-*

In regard to law, the path taken from this dialectic around the ignorance may recede in essential questions of the binomial *knowledge-ignorance* of incisive expression for its effectiveness. In a courtroom, in which the most varied public gathers, the effects of ignoring are constantly experimented. The dialogues that intersect the days are not mere reproduction of the text of the law. The judge must deal with *non-knowledge*: his *non-knowledge* in relation to the parties and theirs in relation to him or her and to the law. The discovery of the *not known* highlighted in the facts that he did not witness and the revelation of the meanings of the law to the conflict require attentive ears, action contained to control the scene, awareness of the fragility of his knowledge as a legal agent. It is a caution that allows time for the conclusion to be formed for the decision or the improvement of the solution by consensus. The courtroom is a place for the teaching linked to legal knowledge. It is a means of communication in the small sphere of the concrete dynamic of legal relations.

It is worth saying one more time (as it is in the alphabet in which legal effectiveness is composed) that the purpose of the law is the spontaneous adhesion as balance point between differences.

Aggressiveness, recklessness and rudeness of dialogue disrupt the sharing of words. Patience, understanding, and attention provide the rebalance, making the image of the judge and the State.

And once again there is the human body to represent the city as in Plato's Republic. The comparison is irresistible because, when the judge sits on his or her chair and listens and speaks, he or she is a body available for the distribution of the justice by the word; for the trial of the equality in a scale bordered by the difference of interests, of antagonism, of conflict. The State is transformed in a live and tangible human spark, with pains and smells.

The classic Greek also resonates in the voice of Aristotle, to whom the structure of the dialogue is modeled on the otherness of the experience of the virtues, especially justice and, in its counterpoint, the friendship. The citizenship of the *polis* only takes place in the city, dia-

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prudence, Dordrecht, The Netherlands, 2007, v. 6; *A history of philosophy of law from the ancients Greeks to the scholastics*, p. 36.

logically, because it is natural. This happens in the rhythm of daily life, permeated by the need to exercise the *better justice*, the equity, which is the one that adapts general to private, in the shaping of the measuring ruler to the irregularity of surfaces. And this is done whilst exercising the virtue that exists to the city, from the premise that there is no training in relation to the moral virtue. It follows from the "nature that gives us the capability to receive them and this capability is improved and matured by habit"[6]. There is, however, a possible training for prudence, which is a virtue to the practice of the solution of daily conflicts. This practice is in the essence of the processes of judge training.

The experience of justice by the spoken word is sprayed in the consciousness of error and accuracy, in the capability to see what is consolidated as tradition or custom and to measure the actions and reactions from risks and limits. Attention is needed to understand the example and the importance of the look, the gesture, the posture.

The sinuosity of the comparison with those so remote *Greek talkers* is justified only as a path to the differentiation between the written and the spoken from a very marked perspective that may hide the permanence of means of expression or communication even under the view of a law that is predominantly expressed in the text that is visually shown on paper.

The illusion that the cycle between orality and writing is something arranged just in relation to law cannot be created. Shaped in the human culture and influenced by it, law is a means of communication (of justice) that responds to the gradations of time. McLuhan uses the primary verbal movement for Greek writing with the purpose of exploring the history of humanity in which the transit from one to the other carried the already solid signs of the means of communication used until them. Beginning with the Greeks, it reaches the electric age and could port in the electronic age where he would see his theories confirmed:

> The alphabet is a technology of visual fragmentation and specialism, and it led the Greeks quickly to the discovery of the classifiable data. (…) As long as the oral culture was not overpowered by the technologi-

[6] ARISTÓTELES, *Poética*, in ID., *A poética clássica: Aristóteles, Horácio, Longino*, 12. ed., São Paulo, 2005, p. 63.

> cal extension of the visual power in the alphabet, there was a very rich interplay of the oral and written forms. The revival of the oral culture in our own electric age now exists in a similar fecund relation with the still powerful written and visual culture. We are in our century "winding the tape backwards". The Greek went from oral to written even as we are moving from written to oral. They "ended" in a desert of classified data as we could "end" in a new tribal encyclopaedia of auditory incantation[7].

The speech was, in both ancient and middle ages[8], the predominant medium of spreading the message and it was being mixed to others or being changed, or even *going backwards* with the invention of other means of communication. The effects can be felt in relation to all expressions of the Western culture whether to make a meaningful time, or to project the expression of the last way of electronically capturing the image and diffusing it in channels unimagined a few year ago, such as YouTube. The vision and the hearing in the movement of speech comes back to the scene, but the means are different from the old age and that certainly interferes in the way that the message is transmitted and even in its contents.

Briggs and Burke emphasize that the verbal communication does not receive due attention when it comes to changes in the visual culture in early modern Europe[9]. It was the essence of the religion (the practices, the pulpit, the processions, the preaching), of the teachings in academies and the emissions of the daily culture was noted on the corner, on the rumors. The changing processes do not happen in isolation but are committed to the obstacles that are interposed and to the nature of the means that are happening or accumulating.

It is no different with law. It does not fit into writing. It is intended for the integration in people's lives. It resides in the speech, which molds it. The conflict is essentially oral in most cases and it is renewed

[7] M. MCLUHAN, *Media and cultural change*, in E. MCLUHAN, F. ZINGRONE, *Essencial McLuhan*, New York, 1995, p. 92. It is also very provocative the description made in B. RUSSEL, *História da filosofia ocidental*, São Paulo, 1957, v. 1, p. 10-13.

[8] A. BRIGGS, P. BURKE, *Uma história social da mídia*, Rio de Janeiro, 2006, p. 20.

[9] See A. BRIGGS, P. BURKE, *op. cit.*, p. 36.

orally at the judge's meeting when evidence is produced or when it is performed in the *Day in the Court*.

The law, as one of the main contemporary legal phenomena, is product of verbal processes that range from the meandering, sometimes inaccessible. Their dynamic is kept trapped in the invisibility and intangibility, which makes the contours of the legal theory sometimes poor and meaningless.

In a historical perspective, one of the materializing signs of the change in the ways of message exposition about the rules is the official writing of the customs, in middle age, which were aimed to ease their proof through their translation by the registration in paper. It changes the *ius commune*. Gilissen highlights, however, that this writing process implied interpolation, or else, "due to the process of drafting and approval, each custom is more or less modified, above all towards unification and, often, the Romanization"[10]. The history of law in continental Europe experiences this transition with more emphasis from the fifteenth and sixteenth centuries. It coincided with the media changes introduced by the press[11]. It denotes the steps in the construction of a *ius commune* where the feeling was, according to Antonio Manuel Hespanha, in large, "caused by the homogeneity of the intellectual education of agents in charge of building the medieval legal knowledge – the scholar jurists"[12]. The tendency changes with the influence of the spirit of subsequent times and the complexity of this movement is not the subject of this chapter[13]. However, the literate legal culture is, therefore, predominantly written and it tends to disregard the maintenance of oral factors as considerable influence on statutory law interpretation.

One can retain the history of the removal of oral tradition mainly by the introduction of new means that enable the expansion in the written production and the facilitation of transporting the texts (including the laws). Rouland emphasizes to the effects of the writing in relation to the

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[10] J. GILISSEN, *Introdução histórica ao direito*, 2. ed, Lisboa, 1995, p. 274.

[11] See J. GILISSEN, *op. cit.*, p. 274 and C.A. CANNATA, *Historia de la ciência jurídica européia*, Madrid, 1996, p. 169-170.

[12] A.M. HESPANHA, *Cultura jurídica européia: síntese de um milênio*, Mem Martins, Portugal, 2003, p. 90.

[13] See A.M. HESPANHA, *op. ult. cit.*

understanding of the different legal systems, mainly when the point of departure is focused on less complex systems and heteronomy that are predominantly more oral:

> Despite the appearances (the verbal message is limited in its fixation and more difficult to maintain), the orality does not constitute a "primitive" form of communication, and no more than the verbal law is "pre-law". It corresponds to a type of society that can be classified as a community and that thinks like the union of complementary groups, in a hierarchy of different degrees. The writing insists above all in the message that it conveys. Moreover, it applies in certain anonymity of the social relations[14].

The question is still how law communicates. And it has relevance when considered that the judge is also the agent of this knowledge which is the subject of communication and also experiences the effects of the efficiency and inefficiency of the processes.

António Manuel Hespanha mentions a research made to understand the means of access to the knowledge of law. The conclusion is that the sources or means, according to the respondents, were, in descending order, "talks, experience, television and, a little less, newspapers"[15]. So, it is important to point out the role of the written legal text as a source of knowledge:

> With little informative effectiveness (also in descending order of quality, as it is noticed by the respondents): brochures and formal education, conferences and law books. This apparently strange hierarchy, in which the sources that a jurist would recognize as having the best quality of information are found among those to which the respondents assign less informative impact, ultimately reveals, once again, – to beyond the hermetic of the most technical legal speeches – the distance that takes apart the beliefs of the legal world from the beliefs of the real world[16].

Orality continues to be a channel of knowledge that supersedes the text of the typical legal phenomena (law, decision, theory). The strength

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[14] N. ROULAND, *Introduction historique au droit*, Paris, 1998, p. 422.

[15] A.M. HESPANHA, *O caleidoscópio do direito e a justiça nos dias e no mundo de hoje*, Coimbra, 2007, p. 293.

[16] A.M. HESPANHA, *op. ult. cit.*, p. 293.

of the speech in relation to legal texts sharpens when its role in everyday life is considered: The voice is found in places where laws are enforced and decisions are made. This goes even far beyond the role cited by Hespanha[17]. The voice is present in the places where laws are made and where laws are enforced.

The courtrooms are territories that carry in their horizons the strength and the stigma of a world that demands a constant translation into writing or the transformation of the speech into text. The *civilization of the alphabet* meets the speech one, but always seeks to attract it in its web of distance and anonymity.

In orality, the reaction is immediate, visible, and corporal. It is given in the response of the speech, in the body motion. Actions and reactions become invisible in the aridity of the letters recorded on paper. The experience of speaking becomes memory and turns into a text that can keep some of it, but will not register all the nuances. It remains in the individual experience of the parties, of their lawyers and of the judge that become witnesses of the other side of the coin: how is law before it is translated into writing?

To deal with this issue with regards to the training of judges is not, therefore, only to emphasize what Jurisprudence says about the principle of orality and its problems, because this is a technical concept and aimed at the maintenance of the abstract focus.

The education for orality cannot be understood apart from the contingencies subjacent to writing. The understanding of the characters that participate in this performance should be encouraged, and attention should be brought to something essential: the oral expression builds an image of what the judge is, which, therefore, is integrated in the image of what the Judiciary is beyond the static of the writing which has many details that can be heard, seen or felt. It represents the senses – all of them – in the exhibition. The judge who does not greet the staff, who mistreats the employees, who is rude to lawyers, who is harsh with the parties, who addresses to them as if they were an object instead of a person, is building in the speech an image of themselves and of the Ju-

[17] A.M. HESPANHA, *O caleidoscópio do direito e a justiça nos dias e no mundo de hoje*, cit., p. 295.

diciary that will never dissipate. In the daily scene, they are responsible for a small scale by which the knowledge of the law is widespread.

The written translation is always restrictive. And it always becomes more synthetic and less linked to the performance of the interpreter. This is a complication in the processes of educating judges, because there is a tendency to getting far from the circumstances of reality.

However, this experience of law may become a vestige, in *a vessel of the pre-history of the law*, if the digital process reaches where imagination allows it to be taken. The forecasts are the recovery of the reaffirmation of the past through evidence in a new way of recording and communication that merges speech and reproduction of the full image. The means of communication, once again, will certainly interfere not only in the process of knowledge, but also in the interpretation with nuances that cannot be entirely defined at this instance, but for which one should be aware. The electronic world will include and exclude. It is always that way and it is not advisable to only celebrate technology's achievement. One should pay attention to the rhythm of reality and, therefore, the education for orality gains importance in relation to the media by which it will be expressed. It is no exaggeration to think that the image, in its audio and visual aspects, will never replace the text, even because the way of reaction to the text on paper and on the screen is different. This always implies the possibility of hypertext and of connections not previously envisaged. The narrative of a movement will never be the same as playing it live.

The question to be asked, therefore, is the following: how to prepare judges to deal with these various forms of speech that persist as means of legal communication?

2. The word said, the body viewed: the role of the senses

The experience of playing a musical instrument with someone else or singing in group, in a choir, gives the exact tone of the practice of orality in a work like the doings of the law. To know the keynotes is not enough. It is not enough to know the musical tempo, the precise dosage of what is interpreted. One needs to be substantially connected with the

other. It is not only about the music. It is about the relation between two bodies in space. An interpreter cannot suffocate the colleague with his instrument[18] or with his voice, jeopardizing the sense of music. He must listen to himself and listen to the other even if mechanically dealing with the counting of the beats, the technique, and the alternation of notes and rhythms in the score.

The conductor's position is equivalent. His role is not to be in the front of the orchestra shaking his arms in a definite rhythm. He needs to communicate with the musicians. His and their memories revive their prior work during rehearsals, in the definitions of the meaning to give each piece played. A signal of the body, the look given to musicians of a certain suit recalls something that is expected of them. And attracts the others to the need to allow that emphasis that must come from a certain group: softer, more aggressive, *piano*, *forte*. The communication is established by the viewing of the movement that restores the sense. This communication may not happen. And, just like in the courtrooms, there are people carrying their horizons, their concepts and prejudice. The performance, in any of the cases, marks the lives of those who are present. And sets in space and time the relational data to which are exposed the ones who interpret the acts of musicians and judges.

A very shy judge tells us that he did not effectively know what to do during his hearings in the very beginning. Everyone reacts in their own way. There are those who become aggressive. There are those who become instable in their decisions. The reaction of this judge was silence, followed by an attention, also silent, and an expression that, instead of doubt, led the viewers to imagine that he was in a deep reflection about the facts, and that the solution would come full of serenity and wisdom. In those days as a beginner, no decision more serious was taken immediately. They came in time. As painful as this learning was for him, his experience does not highlight systematic conflicts created in courtrooms or more compelling relationship problems. The image of serenity

[18] To exemplify with sound and image, the guitar played by two people – the same guitar and the same song (http://www.youtube.com/watch?v=CcsSPzr7ays); two guitars and the song that I find beautiful and was never able to play (https://www.youtube.com/watch?v=M8RuMlSOeBY) – Bachianinha n. 1, by Paulinho Nogueira, in his interpretation with Toquinho.

ended up contaminating lawyers' reactions as the issues were being resolved at their own pace.

Silence, through which he spoke, communicated a willingness to learn what was consistent with the Socratic doubt. He boosted on others the dialogue and the engagement and allowed himself time to learn by the expression of shared knowledge.

His movement in time of silence is a clear image. The openness to understanding is, in this case, more plastic, more adaptable, because the log of the typical orality was not set. There was no verbal speech and the respect to which he is a creditor, nowadays, follows from an image that has been set.

This silence and these feelings are a fact of life, for which there is no turning back. It is not only about orality, but the dialogical and complex communication in a space that also communicates (with its rituals) and takes part of the culture of law that assumes total knowledge and dissemination. Even when the messages are understood, in most cases, by lawyers, who get used even to the disruptions, setbacks and excesses, they are not assimilated by the parties that do not belong in that environment. There is a blatant silent language that governs this interlacing of cultures from which the judge has control.

The need to be understood is essential in the formal structure of law. It is in the roots of the due process of law. Even if the oral decisions renounce the detailed motivation and their written record are not essential in all cases, there is an implicit demand for the understanding of the adopted options.

And this relates to something that is atavistic in each one of us, because we learn from listening and speaking since childhood. That was how the ability of understanding appeared. It is this voice that returns, subliminally, as if we were reviving the deepness of the game, of the play, of the contest in the earliest circles where we learned how to communicate.

The courtroom reproduces this impact of separation between spoken and written. A place where the implementation takes place, in it the voice keeps on talking.

And each one of us is exposed in embodiment adding voice to movements, to the gestures, to how a chair is lifted, to the reaction to

the staff who enters the room. I used to be concerned because I could seem more nervous or anxious than I would like to and I was certain of the damage that I could cause if this feeling permeates my talk, my gestures, my expression, because these are some of the endless ways of linguistic strengthening as referred by Umberto Eco in the book in which he anatomizes how the interpreter is integrated to the work:

> In face to face communication endless ways of linguistic strengthening (signing, ostentation, and so on) and endless procedures of redundancy and feedback are involved, one in support of the other. This is a sign that there is never a single linguistic communication, but a semiotic activity in a broad sense, where more systems of signs complement each other. What happens, however, with the written text that the author produces and trusts to multiple acts of interpretation, like a message in a bottle?[19]

The law and all its written forms, which are its predominant sources nowadays, are messages put in a bottle that are projected to meet the future. They formally reject these demonstrations of linguistic strengthening of orality as if they were not present. However, the time and the place in which the bottle will be opened matters, and it also matters especially what will happen when the parties, lawyers, judges and staff gather around the *fire* to know what is in it and to decide what to do with it. Their talk, their expression, their gestures are some of the various interpretation acts that will become part of the way the meaning of the message will be translated. We are all readers who create the history of law and frequently and continuously revert it to spoken and written data. And we are all subject to the effects of the media.

3. Orality and the preparation of the actor

Some of the possibilities for the practice of orality in judge training are the analysis of artistic expression (caricatures, films, music, literature as examples of interdisciplinary or analogy support), the understanding of the historical perspective of the procedural phenomenon,

[19] U. ECO, *Lector in fabula*, São Paulo, 2004, p. 35.

the analysis of difficult cases, the simulation exercises, the sharing of experiences, the interviewing of people (talking to people) who attend the Courtrooms. Judges on training must be encouraged to express themselves. They must be able to wide open the possibilities of the process of exposure of the context in which orality is experienced: listening and being listened. More than the face-to-face, as traditional pedagogical method, it is very significant for them to realize the effects of their own oral expression.

Although there are many ways to discuss the matter, theatrical techniques could be very efficient. And the training of actors in Stanislaviski's version would be very useful because it emphasizes the learning process[20].

It is not meant to say that the judge should pretend to be a character, acting and *fantasizing*. They must be aware of the role they play when they are seen, when their voice is hear, when their body moves.

McLuhan also brings the grand Russian director, who has built one of the most important techniques for drama acting, to explain the conflict between spoken and written word:

> The conflict between spoken word and its written form is enlightening. Even though phonetic writing separates and extends the visual strength of words, it does it in a relatively slow and rude way. There are not many ways to write the word 'night', but Stanislavski used to ask the young actors to pronounce it in fifty different ways and variations, whilst the audience recorded the different nuances of feelings and meanings expressed by them. More than one page on exam and more than one story have been dedicated to express what is nothing but a sob, a moan, a laugh or a piercing scream. The written word challenges, in sequence, what is immediate and implicit in the written word[21].

The speech allows a greater assertion or an imposition of disgust or rejection because it is not isolated. With it comes the gesture, body language, voice modulation, in addition to the meaning that it denotes or connotes.

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[20] C. STANISLAVISKI, *A preparação do ator*, Rio de Janeiro, 1982.

[21] M. MCLUHAN, *Os meios de comunicação como extensão do homem: understanding media*, São Paulo, 2005, p. 97.

To compare, therefore, the exhibition in the hearing to an actor is to force the judge to face more than their place in the density of the written text. He must be aware of the senses. They must keep in mind that the actor, even when acting in monologue, should relate to the scenario, with the whole context built from a message that must be carried by the text, and with the audience. The audience is the recipient of their manifestation, although they do not speak directly to it. They speak to the public. They are seen by the public. There is an adjustment to the peculiarity of the text, the context and the message. Each part of the communication must be prepared to give meaning and resonate on the interpreter-actor and on the interpreter-audience. These are the received and sent rays, as said by Stanislaviski:

> Every feeling expressed by us, while being expressed, requires an intangible form of adjustment, which is very peculiar. All types of group communication, with an imaginary object, present or absent, require adjustments peculiar to each of them. We serve from all our five senses and of all elements of our inner and outer conformation to communicate. We emit and receive rays, we use our eyes, our physiognomic expression, our voice and intonation, our hands, our fingers, our entire body and in each case we make the corresponding adjustments that may become necessary, whatever they are[22].

When the text is told, it must use the resources designed to reach the public in the most adequate way.

The actor prepares to improvise. The *ad libitum* only works well when founded in a previously calculated support and when not lost in excesses. Risks and results to reach must be balanced. To achieve it there are rehearsals, study, and practice. The judge training for orality does not discard the same efforts and care to prepare for action and reaction in improvising.

Hyperbole can take place. There is a risk to reach a sensitive point of someone or something that they can turn into artifice to promote the conflict and hide the essence of the dispute as the hearing takes place.

[22] C. STANISLAVISKI, *op. cit.*, p. 242.

Barthes refers to the professor's speech, as an ideal speaker, which observes what he calls Law to reach a result within an expected standard:

> Either the speaker selects, with all clear conscience, the role of authority; in this case it is enough to "speak well", i.e. speak in compliance with the law present in all speeches: without resumption, in a convenient speed, or even clearly (…); the clear statement is really a verdict, sentential, a criminal speech[23].

He reiterates the need to break these laws of consistency to achieve results, which also is peculiar to the actor's technique.

The clarity of expression must safeguard the standards, but must, simultaneously, seek to go beyond them to assimilate the message. It is not a matter of encouraging a disrespectful informality or a verbal excess, but of seeking approximation through the argument that could include all the participants of the conversation in the mildest possible way.

McLuhan's observation, reporting to Stanislaviski, that all words can be said in a thousand manners and each one with a different goal, is a lesson to be learned and used. Because sometimes the message is lost by the way it is (badly) said. Bitterness, hate, aggression overlap the meaning and prevent the interchange and the dialogue experience. The awareness that there are ways to say things is essential and in the hearing it can lead to a trial, as said by Stanislaviski always with reference to acting:

> When an actor is given a part, step by step, it can be expected that they, at a certain important moment, say their words in a clear, sharp, serious voice. Let's suppose that, instead, they adopt, most unexpectedly, a light, happy, very calm tone, in an original way to act their part. The surprising element is so curious and efficient that we are persuaded that this new way is the only possible interpretation for that part. And we ask ourselves: "How could I have never thought about this, not even imagine that those sentences were so meaningful?"[24].

[23] R. BARTHES, *O rumor da língua*, São Paulo, 2004, p. 386-387.
[24] C. STANISLAVISKI, *op. cit.*, p. 249.

The *surprising element* is not only a resource to the intense embodiment of the motion in football fields. It is a point to molding the argument of orality and can bring meaning to something that can fossilize in the routine.

It is necessary to master the scene and not only throw sentences looking for a result or to get rid of it quickly. It is necessary to do more than just *selling an image* as if it was merchandise. Even though it may be right, the artificiality of the issue will be kept, as it happens to the actor, once again as support to analogy. Stanislaviski shows his pupils what the effect of the protocol speech is, but not tuned in with the feeling that should chair the exhibition:

> For those who have significant outdoor equipment, what I did just now would not be difficult. Let the voice resound, the tongue clearly pronounces words and sentences, the plastic poses, and the general effect will be enjoyable. I have acted as a diva in a *café-chantant* constantly observing them, to see if it was a hit. I felt as if I was merchandise and you were the buyers[25].

The Russian director talks to his students after interpreting a passage just using the formal mechanical techniques available to actors. He wants them to recognize a fake interpretation. This is relevant within his way of conceiving the theatre, because he developed the technique of emotional or affective memory. It is inside it, in their past line, that the actor seeks the support to *feel what and how the characters feel* and passes this on through the text that is being acted and in the relationship with other characters, their actors and their respective *emotional memories*. A pleasant experience, or the pain of the loss of a loved one, or the feeling of fear of something and so on, all this fits in the drain from where reciprocal relations are taken out. Judges expose or present themselves with their reminiscences and feelings and are submitted to reactions of all present, with their conflicts and ways to confront them.

The practice of *emotional memory* can also promote relations of empathy. The judge, as an intermediary between the parties[26], must im-

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[25] C. STANISLAVISKI, *op. cit.*, p. 224.

[26] ARISTÓTELES, *Ética a Nicômaco*, Bauru-São Paulo, 2002, p. 144.

bue themselves of the reasons of the parties, even if they need to adopt one of them as being a guide for their direction to decide.

The time that judges, parties and lawyers spend together is short for an entire perception of all circumstances, for the entanglement of *emotional memories*, for the full empathic practice. The total completion of these processes would require deep and dilated interaction. However, the short period in which they interact is what is reserved for the restoration in the process of the life line of those involved in the most complex way for solving the case. In this interchange of resetting the parties' past and present there are, as characters of the process, something in common with what happens between the actor, the character represented and the public:

> The dramatist just gives us a few minutes of the whole lives of their characters. A lot of what happens behind the scenes is omitted. Often nothing is said about what happened to the characters in the backstage, nor for what reason they do what they do while back on stage. We have to fill in what is left unsaid. Otherwise, we would have to offer only scraps and pieces of the life of people we interpret. It's not possible to live like this, so we need to make, for our roles, relatively uninterrupted lines[27].

Outside the courtroom, the rest of the world is like a backstage to the judge. The processes are scraps of people's or businesses' lives and the notion of legal relevance contribute to this segmentation, but coherence must be preserved. The *whens*, the *wheres*, the *whys*, the *hows* interest only to the extent of litigation and dispute limits. Aggression between the parties or between the lawyers may come from something in their coexistence that does not even relate to work or to that process and to this part of the characters' lives, the judge has no access, despite the continuation of the stories: the audience integrates it even about that undisclosed contingency.

Moreover, the lack of facts is a constant at the hearings. Judges fill in the lives of the parties that continue unknown to them and that are relevant to the outcome of the case. This happens with the hearing when deciding what and how to ask parties and witnesses. They be-

[27] C. STANISLAVISKI, *op. cit.*, p. 271-272.

come dramaturges when telling their conception of the facts as they rushed in through evidence. And it is not unusual that, at the time of ruling the decision, they notice a question that should have been made. The lack of it or the lack of evidence of the relevant fact has a solution that is not important to orality and which its artificiality reiterates the closing of the writing: the technique of distribution of the burdens of proof. It is a touch of magic kept by the system to establish a truth that enables the judge to decide even if only based on probabilities. They will never know if what they understood was right or wrong and, whatever the effectiveness of the consequences on the recipients of the sentence, there will be change in the circuit of their lives. So is the lesson that Stanislaviski gives his pupils:

> The life of a person or a role (…) consists of an endless change of objects, circles of attention, whether in reality, whether in imagination: in the kingdom of memories of the past or the dreams with the future. The uninterrupted nature of this line is of vital importance to the artist, and you must learn to establish them in yourselves[28].

Judges in training should also stay *on the side of the courtroom*, passing by it *as if they were not judges* to become aware that they will be seen and of how they will be seen.

At the end of each hearing or each day, a line of connection between our lives that is forever is established. It makes memory and integrates in the text of the decision to come. It will follow the description about that text like an invisible addendum. The story is improvised and acted every time the door is opened, and someone goes through it.

4. Pedagogy, history and memory of orality

The places where judge training is developed are within the scene and, therefore, have the possibility to considerer what is disregarded as a factor of law. They should not repeat the formulas of knowledge al-

[28] C. STANISLAVISKI, *op. cit.*, p. 273.

ready frayed by redundancy. It is their task to face the difficulties imposed by problems judges have in their routine.

The models for this pedagogical exercise are endless and should enable the interchange of the judges, replicating the vicissitudes of the scenes of permanent dialogue to which they are exposed. Silence them, therefore, with a face-to-face pedagogy that prevents them from listening their own voice and to contrast it with that of their colleagues, is to restrict their passage through zones full of danger to which the daily life will submit them.

Thus, even though writing is a means of substantial expression of the judges' activity, emphasis should be given to the distinction that is established between it and the orality, from the belief that the means of expression permeates the message and interfere in the substance of the communication, composing an image of the Judiciary itself that has implications to legal epistemology.

Simultaneously, there is an overcast of connections between writing and speaking leading to the need of a report about the circumstances that comprise the process of ruling a decision on a case. It is important to establish an organized core of sources for the recovery of the reminiscence about how the legal manufacture is done under unwritten and written exposures and about its influence on how law is understood.

The narrative about reality must seek the most varied ways of expression to enable the widest possible access. It can take advantage of correlations with artistic expression. It can use the most varied forms of literary expression, including the journalistic essays which enable a more immediate scrap with a moment-limit of reality. The experience of judge training is a place for the deposit of this source of fonts for the dissection of the influence of orality on law as a reality.

To register and share the feelings that encircled the experience of speech and, for this, "refer to the experiences of illusions, memories, feelings arising from the person that I am when I speak, the person who I was when I spoke"[29] can contribute to express the anxiety of the non-return and of the consequences that it involves for those who work as judges. Even if orality is maintained within the memory of those who

[29] R. BARTHES, *op. cit.*, p. 401.

are involved with a specific process, it is important to establish ways to recognize the relevance of the oral experience in the understanding of law's dynamics.

Magistrate schools, by the aggregating sense that should rule their actions, are the place by excellence in which the dialogical game can be reassembled in its various forms and in which one can return to it, as raw material essential to the education on how to be a judge.

For, in fact, to be a judge, a lawyer or a party in a process means only that we are only human beings entered into the course of life and facing the certainty of finitude. We are just like everyone else.

To educate for orality is to face the infinite not only in relation to the unlimited filed of the improvisations proposed by the dynamic of the days, as for the means that can be used to *prepare actors*. None of them will close the perspectives, nor define perfect formulas. The goal is, above all, to highlight the potentiality of the missteps, of the storms, of the wholesome, of the promising, of what is recorded in the memory of those who interact in places where justice is made. To educate to the speech is to navigate in the potentialities of the concretion in law, as told by Barthes to which it is turned to finalize: "Nothing to do: language is always power; to speak is to exercise a willingness to power: in the space of speech, no innocence, no safety"[30].

And no one lives in writing. Even without innocence and without safety it is vital to face the risks of the speech in action, this (sometimes) hidden side of the law.

[30] R. BARTHES, *O rumor da língua*, São Paulo, 2004, p. 388.