Chapter 1

Jacques Rancière and the Dramaturgy of Law

Julen Etxabe*

When it comes to the appreciation of a thinker, there are two levels of investigation. One can

equality of intelligence between the one who creates sentences and the one who understands them.[1]

What Rancière means by 'method' is not an investigation into an author's propositions—what an author says, the internal consistency of what the author says, and the consequences that follow—but rather the kind of issues it addresses, the materials and givens it considers, the phrasings it articulates, the landscapes it portrays, and the solutions or aporias it generates. This sense of a method does not proceed by Cartesian simplification into clear and distinct ideas, for it entails selecting, discriminating, valuing, intervening, and indeed inventing. Rancière (2009a: 114) writes:

> A method means a path: not the path that a thinker follows but the path that he/she constructs, that you have to construct to know where you are, to figure out the characteristics of the territory you are going through, the places it allows you to go, the way it obliges you to move, the markers that can help you, the obstacles that get in the way. […] This idea of what 'method' means should never be forgotten when it comes to Jacques Rancière.

Note first here the shift from the third to the second person, where 'you' can refer either to the critic trying to make sense of the author's writings, to the author trying to explain his own method to the critic, or to both. Additionally, 'you' also alludes to the reader—say you or me

My purpose in this essay is to re-create such a Rancierian topography in order to elaborate a theatrical or dramaturgic model of law out of it. Indeed, Rancière has been said to espouse a theatrical model of politics based on scenes staged by actors who, acting out on the presupposition of equality, undergo processes of subjectivation that reconfigure the 'sense' of the common (e.g., Hallward 2009). Disavowing a purified or ontological concept of the political, Rancière instead proposes a *dramaturgy* conceived out of limit-scenes that stage its appearance and disappearance (Rancière 2009a: 119). Consistently, 'Rancière is only interested in ideas at work: not "democracy" for instance, but "democracy" voiced in sentences that stage its possibility or impossibility, not "politics" in general but discourses and practices which set the stage of its birth or of its fading away…' (Rancière 2009a: 116). In a similar manner, I, too, venture to offer neither an explanation of his ideas nor an application of his thoughts to a predetermined concept of law but a re-enactment of the legal landscape he invites us to traverse.

The analysis focuses on jurisgenerative[3] moments of dissensus, where those in principle without a place in the order of legalism are nevertheless able to stage a disagreement that reconfigures the sensible texture of law. Beyond teasing out the implications of the argument, I inquire how a claim perceived to be legally irrelevant could nonetheless be *heard* and registered as a novel legal inscription. This will lead us to consider a (non-Aristotelian) poetics of expression and of reception, including the role of judges as audiences of improper legal claims, and to test the practical implications of a Rancierian dramaturgy of law in the case of the post-2008 mortgage crisis in Spain. In the final analysis, a consistently Rancierian position leads to a radical relativization where law, just as democracy itself, has no proper foundations. My aim is

[3] This term is loosely borrowed from Robert Cover (1983); see also Etxabe 2010.

without the need of a universal vantage point (Rancière 2015). A scene creates a certain configuration of sense, namely, a form of linkage between perceptions, decisions, and meanings.[6] 'The main point is not what they explain or express, it is the way in which … they create a commonsense: things that the speaker and those who hear it are invited to share—as a spectacle, a feeling, a phrasing, a mode of intelligibility' (Rancière

inspiration from the 'panecastic method' of Joseph Jacotot, which is based on the assumption that 'you can see the whole in a very small fragment' (Rancière 2015).[8] This does not mean that everything is in the scene, but that what appears most at ThiJETB63(i)hl-1[(l)-312y

'"It might be" is a formulation consistent with Rancière's peculiar practice of "theory"' (Rancière 2009: 119).

To sum up, scenes offer a texture for 'theoretical' argument; a frame of interpretation for intersecting configurations of sense; an occasion for an exemplary appearance of objects in question; and a counterforce to inegalitarian expressions of 'what is'. A theatrical or dramaturgical conception of law finds its correlative in the legal scene, where no external position exists for the legal theorist to describe law in its totality, or as a totality. In order to gain a synoptic vision one has to go through the scene of law as an experience, rather than as an external object, field, or social subsystem. A dramaturgy of law also connects scenes from diverse origins, making them resound in their particular context of enunciation without refusing to draw lines of relevance beyond it. Scenes are chosen for their salience and ability to signify, just as 'hard cases' illuminate not only themselves but the entire legal landscape. To be sure, scenes may have blind spots and some events may not be seen on the stage. And yet absences, omissions, gaps, and silences often leave traces of their absence that are to be interpreted, and can even be sensed, like a chill in the air, an ominous silence, or violence in Greek tragedy, which is not shown on stage, but must be re-enacted. Lastly, a dramaturgy of law critically engages 'not only the "is" and the "ought", but the "is", the "ought", and the "what might be"' (Cover 1983: 10).

2. Politics and Jurisgenesis:

> *Politics is not primarily a matter of laws and constitutions. Rather it is a matter of configuring the sensible texture of the community for which those laws and constitutions make sense* (Jacques Rancière).[10]

[10] Rancière 2009b: 8.

Frenchmen who live off their labor and who are deprived of political rights!' After this unexpected rejoinder, the judge instructed the clerk to list proletarian as a new profession.

A favourite is the scene of the Plebs of the Aventine Hill in 494BC, their retreat from the city as a result of the harsh rule of Appius Claudius, their failed negotiation with the patricians who denied them their status as proper interlocutors, and their eventual reintegration into the city with creation of the office of tribune of the plebs. Rather than follow Livy's account, however, Rancière goes for the nineteenth-century retelling by Pierre-Simon Ballanche, who objected to Livy's inability to think of the event as anything other than as an uprising devoid of all political meaning. In contrast, Ballanche restages the conflict as one in which 'the entire issue at stake involves finding out whether there exists a common stage where plebeians and patricians can debate anything' (Rancière 1999: 23). The plebeians claim a symbolic place in the city in which they as yet have no representation, while the patricians are compelled to acknowledge them despite their harsh rejection.

Contrary to what some commentators suppose, Rancière's examples are not always heroic. Sometimes they are small, almost imperceptible events, and range from a modest meeting of nine persons in a London tavern to create a 'Corresponding Society', to a slight modification of the timetable of a worker's evening. Each action seems to require some measure of courage—not least the conviction and determination to follow it through—but not a martyrology of self-sacrifice. Nor does politics consist in moments of hysterical upheaval after which everything becomes calm again. In fact, politics may begin with a 'tiny modification in the posture of the body' (Rancière 2009d: 275), even though major consequences can follow. What these examples have in common is that

the political actor[12] must do something 'unimaginable' from the perspective of the given order; something to which they are not in principle entitled, but which ends up rearranging the community's configuration of sense.

Politics acts on the police. By police Rancière means not the petty police or the state apparatus, but a more general 'order of the visible and the sayable' that arranges the tangible distribution of society. As reformulated by Rancière, the police is a nonpejorative term which defines, often implicitly, 'that a particular activity is visible and another is not, that this speech is understood as discourse and another as noise'. (Rancière 1999: 29). Thus, '[p]olicing is not so much the 'disciplining' of bodies as a rule governing their appearing' (Ibid.). Additionally, however, the police order designates a specific type of saturated community that rules out any supplement or empty spaces, with the motto: 'a place for everything and everything in its place' (Davis 2010: 78). In this restricted sense, police and policing are specific ways of partitioning the sensible [*partage du sensible*] which are antagonistic to politics. Surely, then, the

as well. Some potential avenues are to be resisted: the first is

law is to be created together with the stage where it is to be understood. The resulting

A dramaturgic conception of law builds on scenes of disagreement between heterogeneous normative worlds. In Rancière's terminology, a dis-agreement [*mésentente*] is not a simple case of misunderstanding when one of the parties does not understand the meaning of terms, or of misconstruction, when one of the parties does not know what she is saying through dissimulation, ignorance, or delusion. Nor is it a case of someone who says white and another who says black. Rather, 'it is the conflict between one who says white and another who also says white but does not understand the same thing by it or does not understand that the other is saying the same thing in the name of whiteness' (Rancière 199: x). A parallel term for it is *dissensus*, which is a division in the *sense* —sensory experience and meaning— of the common (Rancière 2010: 38). A dissensus cracks open a situation from within and reconfigures it in a different regime of perception and signification (Rancière 2009c: 48); it does so by inscribing one perceptual world into another—for example, the world in which proletarians and women can participate in the other world in which they are either uncounted as a collective or relegated to domesticity (Rancière 2003b: 226). Disagreement and dissensus are not Schmittian confrontations between friends and enemies, or the opposition of interests or opinions, but fractures over constitutive questions such as 'where are we?', 'who are we?', 'what makes us a we?', 'what do we see and what can we say about it that makes us a we, having a world in common?' (Rancière 2009a: 116).

Rancière situates his argument between Habermas and Lyotard (and thus between two opposing ideas of modernity

(Rancière 2010: 38). Indeed, '[p]arties do not exist prior to the conflict they name and in which they are named as parties' (Rancière 1999: 27). According to Rancière, before any confrontation of interests and values, 'the place, the object, and the subjects of the discussion are themselves in dispute and must in the first instance be tested' (Rancière 1999: 27). Therefore, 'it is necessary to simultaneously produce both the argument and the situation in 297.38 38.275 Tm[( )] 2h3y-312(i)90(n)63( )[(i)90(s)14(3(s)-4852n)63()2811(pl)90(a0.08

procedure to

'takes place' in the space of the police' (Rancière 2011a: 8), for Rancière this 'means reshaping those places' (id). There appears to be a double sense of 'place' at work here, at once material and theatrical.[21] While in the first sense 'there is no place outside of the police' (Rancière 2011a: 6), in the latter, the stage is transformed accordingly. We might say that the encounter 'takes place' not so much within, but *upon* an order (of police/legalism) that the dissensual-jurisgenerative logic simultaneously reconfigures.

Having suggested that the stage of disagreement also reconfigures the place of encounter, several questions remain: first, do limits exist to the kind of disagreements susceptible to being thus staged? Second, what would it mean to bring a Rancierian disagreement to the legal arena? Jean-Louis Déotte reflects on the first question by setting up Rancière against Lyotard (Déotte 2004). He argues that the blind spot in Rancière's dis-agreement is that this genre of political discourse (which he equates with 'the deliberative') remains insensitive to cases of intercultural *differend*, for which no common scene of interlocution would be available. He cites the example of a Malian mother responsible for the genital excision of her daughter, who is condemned by a French tribunal of child abuse or sexual mutilation. Déotte argues that the conflict is not political in the modern sense of the term, for she has no pretension to inscribe her law into the virtual community of deliberation and furthermore she will never be able to

her identity, and hence to abandon her own relationship to the law. For Déotte, this example 'demonstrates how insurmountable is the différend between those whose life on earth is predestined by stories and 'us,' who … know that we must deliberate over everything.' (Ibid.: 87). In other words, disagreement presupposes that the cultural-legal differend has been dealt with, for '[t]here can only be political disagreement between those … who share the same sense of history' (Ibid.: 88).

This passage contains much to unpack, but the argument rests on an initial mischaracterization. Déotte subsumes Rancière's disagreement into a genre of discourse, the deliberative, which is ill-suited to capturing the ruptural logic that the Rancierian disagreement is meant to introduce.[22] On the one hand, dis-agreement employs forms of demonstration that include bodily gestures, role-playing, mimicking, ironic tossing back, poetic world-openers, and dramatizations, none of which fit easily with abstract models of deliberation. On the other hand, the genre of the deliberative does not exhaust Rancierian dis-agreement, which is not a conflict of values and interest, but of making visible what had no business being seen.

Mischaracterizations aside, Déotte's analysis has the further consequence of essentializing some kind of conflicts (ethnic, cultural, religious…). Rancière rejects the implicit fatalism of a claim that plunges these conflicts into a sense of archaic destination, excluding them from history. Déotte contrasts the case of the Malian mother with the Roman plebeians, nineteenth-century women, and the proletariat. True, the Malian mother may have no intention of inscribing her custom as law, but living in a

[22] The mischaracterization is part of a larger effort to link Rancière with the Western tradition of Aristotle, Descartes and Kant, bypassing the radical critique introduced at the heart of these three authors—the political animal endowed with logos, the autonomous subject, and transcendental Reason. Déotte turns Rancière into a Hegelian proponent of historical progress, a characterization he has explicitly denied (e.g., Rancière 2003a).

society where genital excision is generally seen as aberrant, she will be confronted with the disjunctive of either retracting or defending her position when challenged. She could then decide to withdraw and give up the practice, or else defend it, in which case she would be asking for a reconsideration of the societal norms according to which her action is judged to be aberrant. Herein would lie the potential *jurisgenerative* aspect of her claim, which

This leads to our second general question: What would it take to stage a Rancierian disagreement in law? The ideology of legalism presents itself as providing a neutral forum and a language in w

the encounter can be taken for granted, or foreclosed in advance. The practical difficulty is how to challenge an order of legalism that does not want to hear, frames the discussion to the disadvantage of one party, denies a party the status of interlocutor, or more simply, that there is anything to discuss.

4. T

are not exactly those intended? And if (some form of) hearing appears necessary, how can it be mobilized as an 'obligation' when the interlocutor 'refuses to hear'? In the context of law: what does it take to for a jurisgenetic act to make a dent and reconfigure the order of legalism?

We might begin to disentangle these questions, first, by focusing on an example of failure. Indeed,

13). This would suggest that, to come to fruition, an act could require a further constellation of accompanying events to fully disclose itself, particularly in the face of likely opposition of the hierarchical order. Some commentators are led to distinguish between moments of disruption and moments of reconfiguration, so that the slaves could be

social inequality. Here, too, the slaves had their say

completed (Constable 2014).[29] Thus social acts initiate new states of affairs and can instigate responses, but the speaker can never completely determine how a social act, or the state of affairs it initiates, will be taken up—or for how long it will endure (Constable 2014: 91). This creates a potential mismatch between the act and its dissemination, in the echoes, resonances, reverberations, or amplifications by which any act projects itself towards the future.

At the level of enunciation, these acts share features of the performative utterances famously elaborated by John Austin (1986). Still, they are not subject to the 'felicity conditions' Austin imagined.[30] Rancierian claims are spoken by those who are not 'entitled' to speak and hence spoken inappropriately, at the wrong time or in the wrong place, and with no regard for conventions or procedures. Moreover, they encroach upon the listener

the transformative effects that a jurisgenerative claim can have on the hearers. However, in Rancière a political demonstration has force even *in spite of* or *against* you, forcing us to consider the very different relation established with the interlocutor who rejects you as a proper interlocutor.[32]

For Rancière, this relation is polemic in the sense that the participants need not share the same goals, intentions, or understanding of the situation. This is a central and original point of Rancière that I want to illustrate with the example of Blanqui's magistrate, which conventional accounts of law-as-neutral(is

is fair to say that the structure of legalism was heavily tilted in favor of creditors and banks, which not only could auction off a house by paying 50 % of the appraisal but also could seize other properties in the ensuing procedure. In addition, if the bank were to sell the repossessed property at a later date at a profit, the amount was not computed towards payment of the principal debt. This led to painful situations of aged parents who had given their homes as collateral for their offspring's mortgages and now risked eviction, even after the mortgaged house had been repossessed by the bank.[37]

Against this dramatic backdrop

repossessed the house securing the mortgage, continuing the procedure would be an 'abuse of process' [*abuso de derecho*].[38]

The outcome is unexpected, all the more so because the judge admits that 'the literal reading of the article [579 of LEC] does not seem to leave any interpretive doubts'. Notwithstanding, she assures that 'this does not mean that it should always and in every case be applied'. The judge notes a disparity between the 'nominal' and the 'real' values of the house, by which she means the gap between the price obtained at auction and the valuation agreed upon at creation of the mortgage, enough to cover the full debt. Moreover, the house is not sold to a third party, but the bank enters it in the balance sheet at the appraised value, not the price paid at auction. Therefore, to continue with the enforcement in these circumstances would be a 'manifest abuse of process'.[39]

The decision is as surprising as the reasoning itself, for the judge challenges the conventional wisdom that when the rule leaves no interpretive doubts there is no room for judicial discretion.[40] According to the standard posi4( )-124(t1nETBT/F1 12 Tf8Tm[(pr)21(i)./M/7(n)6

independently, but 'subject to the law' [*sujeción a la ley*]. After recalling the content of articles 1911 CC and 579 LEC (unlimited liability of debtors and possibility to seize for the remainder), the court does not hide its bewilderment: 'the normative content of the said legal precepts is so evident that it is hardly possible to comprehend the reasons why the judge eluded applying them in the case at hand'. Given that the facts fit perfectly with the rules, 'it is not for the judge to assume the legislative function, but to apply the law to the case at hand, [p]articularly when the decision affects the principle of legal certainty...'.[42] On the issue of valuation, the court faults the judge for mistaking the value of appraisal with the real value, which is none other than 'the amount of money

is also a fiction that assumes what the economic crisis has completely shattered, namely a perfect correspondence between supply and demand in conditions of free competition. What the second section actually does is to shed light on the inequality at the heart of this fiction and to replace it with a different, alternative *as if* that ties the valuation to the mortgage it served to secure, and in default of which it would not have been granted. Whether this valuation is less or more 'real' depends on considerations that the third section is unwilling to entertain. By contrast, the second section enquires into the conditions of enforcement. For this it is not irrelevant that the bank itself made the appraisal, later obtained the house at auction by paying only 50% of the appraised amount, and can still sell it when conditions improve—as banks did subsequently in many instances.[47] In bringing these circumstances to bear, the court offers a new configuration of the sensible which rearranges the equality of arms that the procedural laws slanted in favor of creditors and against debtors.

Finally, the third section's conventional submission to legalism (where the role of the judge is simply to follow the law regardless of its merits) displays a further feature of legalism: identifying the third section's opinion with the 'right and true view' of the law (Shklar 1964: 10). The court cannot fathom that a real difference of opinion can exist and seeks to evacuate dissent from the law. By contrast, the second section turns the role of the judge into an open question. Dissenting from the distribution of places and roles assigned by legalism, the judges of the second section turn the term 'judge' into a litigious name.

This process of subjectivation was most clearly articulated by the President of the Superior Court of the Basque Country, Juan Luis Ibarra, after the Court of Justice of

[47] This increase is recognized explicitly by the third section as part of ordinary economic dealings.

the European Union declared the Spanish enforcement procedure contrary to European Law in 2013. According to Ibarra, the European Court corrected an anomaly in Spanish law that turned judges into debt collectors and made judging imposs4 Tm68-62(jl)-124(c)0(ng)63( )0(m)90

Bibliography

Atienza, M. (2013) 'Los desahucios, los jueces y la idea del Derecho', *El Cronista*, vol. 37, pp. 14–19.

Austin, J. (1986) *How to Do Things with Words*, 2nd edition, Oxford: Oxford University Press.

Bengoetxea, J. (2014) 'Sobre-endeudamiento, desahucio, abuso del derecho y cultura judicial formalista', *El Cronista*, vol. 48 (2014) 50–55.

Bowman, P and Stamp, R. (eds.) (2011) *Reading Rancière*, London and New York: Continuum.

Cavell, S. (2005) *Philosophy the Day After Tomorrow*, Cambridge and London: The Belknap Press of Harvard University Press.

Chambers, S. (2013). *The Lessons of Rancière*, New York: Oxford University Press.

Christodoulidis, E. (2004). 'The Objection that Cannot be Heard: Communication and Legitimacy in the Courtroom', in Duff, R. A. et al. (eds.) *The Trial on Trial*, vol. 1, Oxford and Portland: Hart Publishing.

Citton, Y. (2009) 'Political Agency and the Ambivalence of the Sensible', in Rockhill G. and Watts,

Etxabe, J. (2009) 'Antigone's Nomos', *Animus: The Canadian Journal of Philosophy and Humanities*, vol. 13, pp. 60–73.

Etxabe, J. (2010). 'The Legal Universe After Robert Cover', *Law & Humanities*, vol. 4, no. 1, pp. 115–47.

Etxabe, J. (2013) *The Experience of Tragic Judgement*, Abingdon: Routledge.

Etxabe, J. (2015) 'Book Review: Marianne Constable's *Our Word is Our Bond: How Legal Speech Acts*', *No Foundations: An Interdisciplinary Journal of Law and Justice* vol. 12, pp. 136–145.

European Mortgage Federation, 2013. '
and Housing Market'. Available at:
http://www.hypo.org/portaldev/objects/6/files/hypostat_2013.pdf

Frank, J. (2009) 'Staging Dissensus: Frederick Douglass and "We, the People"', in Schaap (ed.) *Law and Agonistic Politics*, Farnham: Ashgate.

Galanter, M. (1974) 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change', *Law & Society Review*, vol. 9, no. 1, pp. 95–160.

Gentier, A. (2012) 'Spanish Banks and the Housing Crisis: Worse than the Subprime Crisis?', *International Journal of Business*, vol. 17, no. 4, pp. 342–351.

Hallward, P. (2009) 'Staging Equality: Rancière's Theatrocracy and the Limits of Anarchic Equality', in Rockhill, G. and Watts, P. (eds.) *Jacques Rancière: History, Politics, Aesthetics*, Durham and London: Duke University Press.

Human Rights Watch, 2014. 'Shattered Dreams: Impact of Spain's Hosing Crisis on Vulnerable Groups', [Online], Available at
http://www.housingrightswatch.org/sites/default/files/2014-06-01%20Human%20Rights%20Watch%20-%20Spain.pdf

Jenkins, F. (2009)'On the Rationality of Disagreement and Feeling', in Schaap, A. (ed.) *Law and Agonistic Politics*. Farnham: Ashgate.

Lyotard, J-F. (1988) *The Differend: Phrases in Dispute*, translated by Van Den Abbeele, G., Minneapolis: University of Minnesota Press.

May, T. (2009) 'Rancière in South Carolina', in Rockhill, G. and Watts P. (eds.) *Jacques Rancière: History, Politics, Aesthetics*, Durham and London: Duke University Press.

Norval, A. (2009) 'Passionate Subjectivity, Contestation and Acknowledgement: Rereading Austin and Cavell,' in Schaap, A. (ed.) *Law and Agonistic Politics*, Farnham: Ashgate.

Norval, A. (2012) '"Writing a Name in the Sky": Rancière, Cavell, and the Possibility

Rancière, J. (2012) ‘Work, Identity, Subject’, in Deranty, J-P. and Ross, K. (eds.) *Jacqu*

White, J. B. (1984) *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community*, Chicago and London: The University of Chicago Press.

Woodford, C. (2015) '"Reinventing Modes of Dreaming" and Doing: Jacques Rancière and Strategies for the New Left', *Philosophy and Social Criticism*, vol. 41, no. 8, pp. 811–836.

Court Decisions

Auto 574/2009 November 13, 2009, of Judge of First Instance and Instruction of Estella/Lizarra Nº 2.

Auto 111/2010 of December 17, 2010 , Provincial Court of Navarre, Second Section.

Auto 4/2011 of January 28, 2001, Provincial Court of Navarre, Third Section.

Auto 24/2012 of May 4, 2012, Provincial Court of Navarra, Second Section.

Providencia of July 28, 2011, Judge of First Instance Number Five, of Elche (Alicante).

Auto 113/2009 of April 7, 2011Provincial Court of Girona, First Section.

Case C-415/11, *Mohamed Aziz v , Tarragona i Manresa*, March 14, 2013, Court of Justice of the European Union, First Chamber.