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Roberto Bin,

A discrezione del giudice. Ordine e disordine una prospettiva 'quantistica',

Franco Angeli, Milano (2013)

reviewed by G. Martinico

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The new book by Roberto Bin is characterised by a highly innovative and interdisciplinary approach.

The author develops a series of intuitions that were already present in previous essays, transforming them into a very rich and inspiring book.

His research originates from the argument explored by Laurence Tribe, in an old but still important piece, "The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics" (*Harvard Law Review*, Vol. 103, No. 1, 1989, pp. 1-39).

The goal of the work is described in the Introduction: law still has to experience its quantum revolution, since it has to abandon some *cliché* which does not correspond to reality.

To embark on such an enterprise the author decides to examine judicial discretion in the application of the law, starting from the difference existing between judges and legislators in the modern constitutional systems, the latter being the "*only authority who is able to lay claim to full democratic legitimacy, any enforcement of public power that is not securely grounded in his instructions appears arbitrary and unacceptable"* (p. 7).

On the contrary "*With increasing frequency, judges' decisions appear unconstrained, taken on the basis of personal beliefs, rather than embedded in criteria fixed by the legislator"* (p. 7).

The issue of the discretion of the judges has always gathered the attention of scholars. In this sense, Bin recalls two very different approaches to the subject: Kelsen's pure theory of law and the theory of interpretation by Dworkin.

These are two very different conceptions but both share, according to Bin, a "Newtonian" flavour when perceiving the judge as "external" to the interpretation, as he/she were a kind of Laplace's Demon, an external observer who does not influence the observed system: ("*However, what these approaches have in common is the postulate of a clear separation between the object and the subject of legal interpretation/application. A 'legal datum' does actually exist, to be constructed and applied to a concrete case by the legal interpreter. The interpreter is an outside observer, detached from both the legal datum and the facts of the case to which he/she has – if possible – to match the legal datum*", p. 15).

Indeed, this separation between the subject and the object of the interpretation is questioned by Bin who recalls this idea under the formula "*materialist ontology that makes 'law' a physical object independent of its interpretation and author*", p. 11).

The book is divided into two big sections (plus an Introduction).

The first one is entitled "What lawyers can learn from modern Physics" and is subdivided into six chapters while the second section, called "Hamster wheels", is subdivided into four chapters (including the conclusions).

The first chapter ("Why Physics?") is devoted to the "Laplace's demos" of law, that is to the reconstructions - so different but at the same time so similar from this point of view - which are based on this materialist ontology. Particularly interesting is the comparison between the Hercules judge of Dworkin and this Demon.

The idea behind this is that quantum physics offers interesting clues for the theory of legal interpretation as well.

To develop this point, Bin recalls four premises of the quantum physics that can be applied to law:

a) "*The observer acts inside the observed system and is a part of it*" (p. 18)

b) "*If each observer is a part of the observed system – as Niels Bohr pointed out – all the possible results of observation coexist*" (p. 19)

c) "*The observation determines what is to be observed, because the result of an observation depends on what the observer chooses to observe*" (ibidem).

d) "*Every act of observation is an irreversible process: this is true for acts of legal interpretation, too*" (p. 20).

These four premises are invoked to support two main points: to reject the separation subject/object of the interpretation (interpreting, like observing, implies acting in the system, and then interacting with the object of the interpretation, selecting and altering it), and to support the non-uniqueness and non-objectivity of interpretation.

The second chapter ("Quantum mechanics and hard cases: a matter of optical resolution") focuses on the need to re-read the difference mentioned at the beginning: that between the legislator and the judge (as quantum physics is not in fact a total denial but a completion of the classical physics, so Bin suggests we should integrate and not fully overcome the classical approach of the studies in interpretation).

It is necessary to review, with different eyes, the relationship between interpreter/text and to conceive the single judicial case as influenced by the context in which the interpreter operates and

the interpretation as the interaction between the object and that subject that leads to the transformation of the interpreted thing: "'*Facts' are objective events, perhaps: 'cases' are not. The 'case' is a construction of the human mind. The quantum-approach suggests looking at legal interpreters as a part of the system they are interpreting. We cannot adequately conceive the question of legal interpretation without bearing in mind the cultural and institutional characteristics of the system as a whole*" (p. 25).

The third chapter ("Legal Indeterminacy. So What?") begins with what might be called the physiology of legal indeterminacy, inconsistency and conflict and, sometimes, of the constitutional texts, as a product of political compromise.

Once again, interpreters are influenced and influence the system in which they live (their own cultural context), or "suffer" the inconsistencies of a legal system but try to deal with them by relying on dynamics that cannot be traced back to the figure of the judge as the "mouth of the law": "*By contrast, indeterminacy is a constant and objective situation that accompanies interpretation and adjudication when examining infinitely small or infinitely big details, as in the hard cases mentioned above*" (p. 31).

Avoiding revisiting, in general terms, the theory of interpretation, Bin takes into account two main aspects: the phases immediately preceding and immediately following the interpretation, i.e. the moment of choice of the text to be interpreted and the description of the result of interpretation.

The fourth chapter ("Interpretation of what?") focuses on the problem of the choice of the text to be interpreted. This is not a minor problem. What is really a source of law? How should courts move, for example, in the jungle of para-legal acts represented by soft law provisions or those acts with no real legal effect although vested with the form of a "typical legislative act"? A second problem concerns the issue of the validity or, again, the current capacity to produce effects by a legal act.

This leads the author to address the issue of the implied repeal and the relationship between the legislature and the product of its activity, with an interesting parallel between the United States and Europe on the express power to declare the unconstitutionality of the laws. This is an element that, according to Bin, makes the question of the "counter-majoritarian" less problematic and in part also explains the roots of the whole debate on the originalism in the US.

The third problem analysed in this chapter (which is perhaps the richest one), is based on the reconciliation between conflicting norms through the use of techniques such as the consistent or the systematic interpretation.

Consistent interpretation perhaps represents the last attempt at the disposal of the interpreter in order to avoid the recognition of the invalidity of the rule, respecting a kind of presumption of constitutionality of the same.

The conclusion drawn by the author is that the interpreter has at its disposal a very broad set of instruments: "*We are talking about some decisions of the interpreter which come before taking the 'high way' of legal interpretation, where principles and moral values could perhaps come into play. A sharp distinction has been drawn between questions about application of laws and questions about their justification, the former being related to the (prima facie) appropriateness of a norm to the situation described in the case at hand, rather than its validity: that is another question*" (p. 48).

The fifth chapter is entitled "Right Answers and Wrong Questions" and that's where Bin responds positively to the question on the existence of "one right answer", questioning, at the same time, the representation of judge Hercules, since that does not correspond to the actual activity of the judge.

To demonstrate this point, the author further develops the subject of the interaction between the text and the context and between the subject and the object of interpretation. Through operations such as systematic interpretation, the interpreter ends up applying something which is different from the provision originally considered and his/her choices related to having to "contextualise" the text results in bringing the interpreter far away from the original provision, according to a process that does not allow to distinguish with any clarity between the discovery of the text to be applied and the interpretation *stricto sensu* understood (p. 55).

However, the court must decide, in light of the principle of *non liquet*, which does not allow an alternative and then the difficult moment of motivation comes, where the arguments to justify the choice of interpretation accomplished become inevitable and heavy: "*Not Hercules, but any judge is required to provide one full answer to the question the litigants pose to him/her: it must be given, must be univocal, and must be the one the judge believes to be right – and the motivation must seek to convince that the judge could have given no better answer. This is the institutional duty of the judge, as a judge – an ordinary judge, not a mythological one*" (p. 59).

The last chapter of the first section ("Penumbra of uncertainty, the Wonderland of Entropy") reprises the subtitle of the volume ("order and disorder in a quantum perspective") and is devoted to the concept of entropy.

The image of entropy is borrowed to describe the mass of information collected and filtered by a judge before, during and after the operation of interpretation. The key idea is once again to question the separation of subject/object at the heart of the materialist ontology. When interpreting, in their interaction with the provision judges result in taking into account a number of additional elements that will change irreversibly the original provision (acts of soft law, non-law, factual situations, and situations related to the context in which they operate). No matter how accurate the motivation is, the judge will never be able to re-line the mass of elements taken into account ("*Entropy is*

concerned with information, because the process reduces the state of order of the initial systems, and therefore entropy is an expression of disorder or randomness" (p. 62)).

In this sense Bin recalls Greene's adage "Eggs break, but they do not unbreak" (B. Greene, The Fabric of the Cosmos: Space, Time, and the Texture of Reality, New York, 2004, p. 13) and to develop a full parallelism one could say that the interpretation is like an omelette: once made it is not possible to reconstruct the eggs.

The second section begins with a chapter entitled "'Law is what judges say it is', but judges are what laws say they are" and presents an argument against possible legal realistic misuses in the theory of interpretation. As noted, text and context are inseparable, and so also the activity of the judge and that of the other actors cannot be separated, they are part of a whole. The judge does not decide in splendid isolation, nor has the monopoly of interpretation.

Inspired by the writings of Vermeule and Tuori (p. 70 ff), Bin represents judges and legislators as sub-systems that are physiologically intertwined, each interfering in the work of others: "*Both sub-systems have to deal with rights and interests, and both are consequently connected with individuals. However, there is a basic difference between them, because the legislature looks at rights as a general and political issue, whereas courts look at one case at a time*" (p. 73)).

The eighth chapter ("Mr. Mani and the rhetoric of judgments") is devoted to the idea of judgments as "*rhetorical acts, which are directed to a specific audience*" (p. 81) and touches upon the triangle of case-judgment-motivation.

The idea is to cast doubt on the famous image of law as a chain novel and to do so, Bin focuses on judgments as an act with distinct forms depending on its audience: what the author wants to say is that procedural aspects matter. It is no coincidence then that judgments of the same court often present different forms and offer different solutions depending on the interlocutor: "*When the Court addresses sensitive questions arising in jurisdictional disputes between branches of government (so-called* conflitti di attribuzione*), theoretical concerns are often to the fore, as is the effort generally to collocate the answer to the claim raised by (or against) a political organ within a highly theoretical institutional framework. By contrast, very different language and theoretical tools are employed by the Court in proceedings concerning jurisdictional disputes between the State and the Regions… By contrast, if the claim is lodged by judges in an incidenter proceeding…where the only interlocutors are ordinary judges, both language and reasoning become technical, as any overly 'doctrinal' treatment would be out of place*" (pp. 84-85).

Similar examples can be also drawn from the case law of the German Constitutional Court and the Court of Justice of the EU. Particularly interesting is the American case: authors such as Cappelletti or Lasser, have already stressed the particular impact that the judgments of the Supreme Court have

on public opinion and this also explains the importance given to the motivation and the length of many of the decisions of the US Supreme Court. The chapter ends with a look at the possible solutions to democratic problems that the work of the judges would present, with a mention of some of the proposals coming from the United States.

The penultimate chapter ("Hamster wheels") is inspired by the famous *Englaro* case (http://cadmus.eui.eu/handle/1814/21757), which saw the Italian Parliament facing the Italian Court of Cassation (also with the intervention of the Constitutional Court) in a fierce battle that has split public opinion: on the one hand an inert Parliament, which was not able to intervene to settle the question, on the other, judges who overturned the provision of the law. Both, for different reasons, according to many, were questionable.

But are these types of conflicts rare? Is it really possible to think of confining the two sub-systems (judges and parliaments) by means of a detailed *actio finium regundorum*?

Bin reads the separation of powers in light of the tension between the *rationes* of the judges and the *voluntas* of the legislator (see K. Tuori, *Ratio and Voluntas: the Tension Between Reason and Will in Law*, Farnham, Burlington, Vt., 2011, p. 165), tension that produces a complex of actions and reactions: conflicts, according to this reading, are physiological and are the basis of what Halberstam calls constitutional heterarchy (D. Halberstam, "Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States" in J. Dunoff and J. Trachtman [eds.], *In Ruling the World? Constitutionalism, International Law and Global Governance*, Cambridge University Press, Cambridge, 2009, pp. 326-355).

The conclusions ("Some concluding remarks") sum up what has been proposed to the reader and try to reiterate the important lesson from physics in order to overcome that materialist ontology mentioned at the beginning of the book.

At the same time Bin emphasises the importance of the tensions between legislators and judges conceived as a moment of strength of the rule of law: "*The tension between the power to make laws and the power to interpret and apply them to concrete cases constitutes the balance of strengths which underpins the Rechtsstaat principle and gives meaning to the separation of powers. As is the case of the triangular trusses supporting arches, sometimes for centuries and centuries, the two rising beams meet at the centre and, there, exert their opposing forces: to obtain the correct equilibrium, the points where they are fixed to the base must be well distanced, and the anchorage must be firm. The architecture of the rule of law can only endure if the political-legislative role and the power of legal interpretation and application are set at an adequate distance on the base and solidly fixed to it. The procedural bond to the "case" is the key with which the buttress of legal interpretation must be soundly pinned to the architrave,*" (p. 107).

The book reaches its goal: to open an important discussion in a field (the interpretation) that, however, as at the same Bin acknowledges, has already been "explored" but in light of new arguments and ideas, those coming from quantum physics.

A way to develop this relationship between law and physics is perhaps that of the language of complexity: in France, for example, the combination of physical and social sciences has influenced the work of many jurists (Delmas Marty's works for instance, also in light of the lesson of Edgar Morin).

The same pages on order and disorder, or entropy, in the book reviewed here could be supplemented by what is written in a more "classic" work in this context: the "Nouvelle Alliance" by Prigogine and Stengers (I. Prigogine and I. Stengers, *La Nouvelle Alliance: Métamorphose de la science*, Gallimard, 1979).

The book reviewed is really rich. However, it should be noted that this is not an easy book, the more you read it the more you will find in it. It is not easy to deal with in less than 110 pages with the amount of issues addressed by the author. Very much is in the footnotes, many insights are perhaps not fully detectable at first sight, even for the variety of cases which Bin refers to (taken from Italian law, to the case law of the US Supreme Court or of the Court of Justice of the EU). In short, this book is a mine to be read several times, an arsenal of ideas to be handled with care for the jurist interested in national, European or comparative law and its purchase is thus recommended.