"(Pre)caution Improvisation Area"[1]: Improvisation and Responsibility in the Practice of the Precautionary Principle

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In this note, I will make some suggestions about the relationship between responsibility, precaution, and improvisation from the point of view of legal theory.

At first sight, law and improvisation do not seem to have much in common. Law is (or at least aims to be) the realm of rules and certainty; improvisation is the realm of unheard sounds and unpredicted patterns. Law leaves room for interpretation, but does it do the same for improvisation?

American Realism (along with most of the subsequent post-modern legal movement) affirms that interpretation of law is de facto the free (i.e. arbitrary) creation of a rule by a judge, since the meaning is always created by the interpreter who assigns to the text a meaning that did not previously exist. This could be seen as an example of improvisation in law. But, I argue, the allegedly free creation of law by the judge interpreting the law is not a complete example of improvisation in law: even when creating new meaning, judicial interpretation of law turns out to be another linguistic formulation of the rule which still has to be translated into a practice (i.e. executed). Indeed, in improvisation music is not formulated through linguistic symbols (the notes) but is directly performed; it's formulated through its realisation. So is the realisation of a norm, which is something different from the interpretation of the legal rule, though not completely irrelevant to it.

In other respects, improvisation is not an arbitrary act of creation. Our understanding of improvisation in music is influenced by the predominance of the composition model, which distinguishes the acts of creating and performing music.

The emphasis on improvisation can be understood only assuming a tension exists between composition and performance. In Western music improvisation is traditionally understood as being opposed to the musical performance of a written text (the sheet music). Performance is not meant to add to the written music, but is expected to execute the author's intentions (despite the fact that the way for music to exist is through a concrete performance). In this model of composition the value of music is expressed by the notation: the composer (as distinguished from the performer) creates music by fixing it on paper. The performer is meant to respect the intention(s) of the author and to (merely) give concrete form to the written music. His role is therefore similar to that of a machine which operates under the control of the composer (which was made possible by the development of increasingly detailed musical notation).

Improvisation unifies the two allegedly separate acts of composing and performing (Sparti 121). The process of creation and its output are simultaneous; meaning emerges during the process and is not pre-codified. In jazz music there is not a clear distinction between composition and improvisation, nor between a concert and a jam session, so that changing the line-up during a concert or even a recording session is normal (Dyer 220).

In jazz music the meaning of an improvised solo cannot be separated from its performance; the process of improvising counts at least as much as its result, i.e. the improvised music. An improvised performance is necessarily situated: people, time, and space are essential features of its identity. Time is not "suspended" like in the act of composing by writing, deleting, integrating the sheet music until its final (definitive) version. Performance is essentially linked to time, and it is impossible to amend it; it is only possible to reproduce the same path in another performance. But the first performance and its meaning cannot be deleted and "re-performed." Composition in improvisation is interactive, since its "direction" is not entirely pre-determined but emerges—often in unpredicted ways—through the interplay between musicians, and between musicians and the public (Sparti 125). Creation in improvisation is therefore essentially linked to the commitment of participants, and music is not separate from the musician(s). Its meaning is acquired through the performance and is not external to it.

So is there room for improvisation in law?

Predictability, as a core value of law, seems to exclude not only the possibility but also the legitimacy of improvisation. Improvisation seems therefore to contradict a fundamental value associated with law. Improvisation in music produces unheard sounds, unexpected patterns; it does not have a previous legitimacy but is in search of it (or, better, is in the process of searching for itself).

Does law exhibit anywhere such a character?

Examples are not to be found on the side of the adjudication of law, i.e. on the pathological side of law, but rather in the physiology of law, which is the hidden part of the iceberg working beneath the judiciary. Examples of improvisation in law have to be found, I argue, looking to "law as a performance" (Balkin & Levinson), rather than to law as a system or as a sanction, enacted rule, official decision, etc. The perspective of the analysis therefore should not be that of the judge adjudicating the law, but rather that of the law taken as a reference point for her/his conduct (the famous "internal point of view" invented by H.L.A. Hart).

From this point of view, I would suggest that improvisation is analogous to the responsibility affirmed by the precautionary principle.

The precautionary principle has been elaborated since the late 1970s and started to be affirmed in some international texts—mostly belonging to soft law—concerning the protection of the environment. Nowadays it is recognised as a standard even of hard law regulation in many areas both at the national and international level. The precautionary principle holds that a lack of scientific certainty about the noxious effects of a given action cannot be taken as a reason for omitting to mitigate those effects. Principle 15 of the Rio Declaration on Environment and Development contains this formulation of the precautionary principle: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation" (United Nations Environment Programme). Reversing typical perspectives on legal responsibility, the precautionary principle is a Copernican revolution: the lack of evidence is now the ground for affirming a responsibility rather than exonerating parties from the responsibility. But the content of this duty is far from being clearly pre-determinable: what is due cannot be listed in advance and has to be determined in the absence of scientific certainty.

The precautionary principle focuses on the preventive exercise of responsibility rather than on its subsequent ascription. Like in moral judgment, the precautionary principle gives birth to a "law in situation" linked to a singular judgment: "l'idée de précaution implique une épistémologie de la non-maîtrise et renvoie à l'idée de prudence, qui met en jeu un 'jugement en situation'" (Papaux 220). The precautionary principle does not introduce a new hypothesis of liability, which constitutes the classical form of legal responsibility. Indeed, the precautionary principle links responsibility to uncertainty.

> [L]e droit traditionnel de la responsabilité sanctionne moins une décision bien ou mal prise, que le non-respect d'un savoir disponible. Les logiques de la faute et de la prévention supposent que, dans les sphères qu'elles régissent, il soit toujours possible d'expliciter une norme de conduite que chacun doit observer. On engage sa responsabilité dès lors qu'on ne respecte pas les conséquences pratiques d'un savoir disponible, qui rend lui-même possible la définition de l'obligation sanctionnée. La précaution, qui nous resitue dans un contexte d'incertitude, réintroduit une logique de décision pure. (Ewald 409)

Focusing on the performance of duties, rather than on the (subsequent) judgment about compliance with them, the precautionary principle shapes a prospective responsibility rather than a retrospective one.

> In a temporal sense, responsibility looks in two directions. Ideas such as accountability, answerability and liability look backwards to conduct and events in the past. They form the core of what I shall call "historic responsibility." By contrast, the ideas of roles and tasks look to the future, and establish obligations and duties—"prospective responsibilities," as I shall call them. Accounts of legal responsibility tend to focus on historic responsibility at the expense of prospective responsibility. (Cane 31)

In the opinion of many influential legal scholars the core meaning of legal responsibility is that of liability. Responsibility is therefore essentially linked to the idea of response (latin: re-spondere) to a past action or situation, or to an accusation during a process: "sont responsables (mot qui est d'ailleurs de peu d'utilité, on n'est pas obligé d'en faire un usage constant) tous ceux qui peuvent être convoqués devant quelque tribunal, parce que pèse sur eux une certaine obligation, que leur dette procède ou non d'un acte de leur volonté libre. Nous qualifierons ce premier sens d'authentiquement juridique. Pour nous juristes c'est le meilleur, bien que le plus ancien" (Villey 51).

Where in ethics (at least after Hans Jonas's work) it is common to speak about a responsibility turned to the future, in law this would deserve the name of duty, as responsibility in law is the consequence of the breach of the duty. In other

words, talking about "prospective responsibility" in law may be but another way to talk about duties: holding somebody "responsible" for something prospectively is equivalent to affirming that he or she has a duty.

> Un enunciado de responsabilidad (ER) es un enunciado de imputación. La imputación de responsabilidad puede referirse a un estado de cosas pasado (ER retrospectivo) o futuro (ER prospectivo). En los ERs prospectivos lo que se afirma es que alguien tiene la responsabilidad de procurar que se dé algún estado de cosas futuro [. . .] [En los ERs prospectivos] la expresión "es responsable" puede ser reemplazada sin mayor alteración de significado por la expresión "tiene el deber o la obligación." (Garzón Valdés 182)

Nevertheless, another interpretation of prospective responsibility is possible, even recognizing that the core meaning of responsibility is linked to the (retrospective) ascription of actions (and sanctions). Paul Ricoeur argues that the roots of retrospective ascription are to be found in the idea of imputation rather than in that of response: "c'est hors du champ sémantique du verbe *répondre* qu'il s'agisse de répondre de . . . ou répondre à . . . qu'il faut chercher le concept fondateur, à savoir dans le champ sémantique du verbe *imputer*" (Ricoeur 43).

So the core meaning of the idea of responsibility is not that of the (legal) response, which is derivative, but that of the capacity to recognize oneself (and be recognized) as capable of producing events and responding to them. Responsibility is then considered as the capacity to accept the ascription of responsibility for past actions (liability) and also as the capacity to assume responsibilities for the future.

How can we understand the idea of a prospective responsibility in law? Legal philosopher H.L.A. Hart presents four different meanings of responsibility: (a) role-responsibility; (b) causal-responsibility; (c) liability-responsibility; (d) capacity-responsibility (212).

The latter three types of responsibility are mostly linked to the retrospective ascription of responsibility (liability, causality, capacity), whereas the idea of role-responsibility, though connected with them, has a different meaning. In Hart's words, role-responsibility arises "whenever a person occupies a distinctive place or office in a social organization, to which specific duties are attached to provide for the welfare of others or to advance in some specific way the aims or purposes of the organization, he is properly said to be responsible for the performance of these duties, or for doing what is necessary to fulfill them. Such duties are a person's responsibilities" (Hart 212). Role-responsibility implies the use of discretionary powers and requires a performance over time: "I think, though I confess to not being sure, that what distinguishes those duties of a role which are singled out as responsibilities is that they are duties of a relatively complex or extensive kind, defining a 'sphere of responsibility' requiring care and attention over a protracted period of time" (Hart 213).

Role-responsibility shapes a prospective responsibility, which has some distinctive features compared to the classical retrospective one linked to a breach of duty.

> [T]o assume a new responsibility, either by occupying an office, or by receiving and accepting a task assignment, is typically to inherit problems to be solved and goals to be achieved. When these have a fairly high degree of complexity, one has no chance of success in coping with them unless one is given a good deal of latitude for the exercise of his own free judgment, and also, in many cases, the authority to requisition instruments and assign sub-responsibilities to others. It is this discretion and authority, as well as a near unconditional liability to blame for failure, that distinguishes the responsibilities of difficult jobs and responsible positions from the mere duties (to obey, to try one's best) of children, menial laborers, and soldiers. Prospective assignments of responsibility, then, ascribe not only liability to future retrospective judgments and responses from others (praise, promotion, blame, demotion); they usually grant discretion and often authority as well, and therefore might well be described compendiously, as discretionary liabilities. (Feinberg 95)

The precautionary principle aims at regulating the (prospective) exercise of responsibility rather than its (retrospective) ascription. Precaution could be considered a third general paradigm of responsibility after that of fault and risk (Ewald 30), making the nature of responsibility hybrid, since it introduces in law a responsibility which is not linked to already available rules to be followed: "Si le principe de précaution renvoie à la notion de responsabilité, celle-ci n'est pas engagée simplement en cas de crise pour assurer une réparation, mais plus largement elle peut agir en amont de l'accident et du dommage de façon cognitive et normative en orientant les activités de différents groupes d'acteurs" (Lascoumes 360). Thus the precautionary principle requires the capacity to manage unpredicted situations or, re-phrased, the ability to improvise new solutions. Does it make sense to link what I would call "precautionary responsibility" to improvisation?

Like improvisation, precaution is necessarily situated, that is, linked to a particular situation. Like improvisation, precaution requires engagement since it is essentially linked to the qualities of the persons who have to translate the principle into concrete practices.

A role, indeed, is open to a variety of interpretations: it is not written on something like binding legal music paper (*partition juridique*, Ruffier-Merlay 238), but it gives room for interpretation. But in the case of the precautionary principle it also leaves room for improvisation in law or, better, it needs it.

A role is not defined only by a set of duties and powers, but also by the individual qualities of whoever plays that role: "however much the rights and duties of the role affect a given action the morality of the action is never wholly reducible to the rights and duties of the role; there is always an irreducibly personal element in any moral action, and a person cannot completely transfer the moral responsibility for what he does to his role" (Downie 133). Just as the quality of improvisation is linked to that of the performer(s), the quality of role responsibility seems to be essentially linked to that of the role-players.

> [T]here are various ways in which a role can be enacted, and a person can bring to his actions a quality which may either mitigate or exacerbate its evil effects. Indeed, the actual structure of a role may be gradually altered if it is enacted with a characteristic quality. Just as there is no clear distinction between the interpretation of existing law and the creation of the law, so there is none between enacting an existing role and gradually altering the structure of that role. (Downie 140-41)

Despite the difficulties of its practical realisations, the "application" of the precautionary principle seems to be essentially a performance of law that gives room for improvisation in law (Nitrato-Izzo 112). Just as music prevails over the text in which it's composed, in the precautionary principle law is a realisation rather than an enunciation of a norm. The practical realisation of the norm is necessarily effected through individual actions. The sheet music of the law is neither sufficiently detailed nor binding enough to limit improvisation (Combacau 277). Interpreting the precautionary principle could not be identified only with the ascription of a meaning to a text; the kind of interpretation required by the precautionary principle, and by role-responsibility in general, is therefore closer to that of a piece of music (or theatre, ballet, etc.) than to the classical interpretation of a legal text. What is at stake here is the way to translate the principle in concrete practices rather than translating the concept of precaution in different legal terms**:** "Il n'y a donc guère de sens à vouloir lier le principe de précaution à ce qui serait son essence, ou à vouloir déduire d'une de ses formulations son véritable sens. La signification pratique du principe de précaution ne peut se déduire d'une spéculation sur ses formulations; elle se trouve dans les dispositifs qui le mettent en œuvre" (Ewald 46). So I would suggest the precautionary principle could be better understood from the perspective of the performance of law, and in particular as an improvisation with the characters noted above, rather than as the interpretation of (legal) texts.

Innovation is an essential feature of improvisation. Improvising implies creating new content in a given context (that of a performance) which, by definition, is different from others. Since the precautionary principle leads to the elaboration of a "law in situation" and not of a general rule, improvisation encompasses its meaning and way of working. It could then be possible to talk about the "interpretation" of the precautionary principle, but as an "involved interpretation" ("interprétation impliquée": Combacau 274), which is a realisation of norms not in a textual but in a practical way. Improvisation highlights a dimension often neglected in the analysis of law. Adjudication of norms is often considered the ideal epistemic paradigm of law, best explaining how law works "outside the books." What characterizes both the idea of role-responsibility and the precautionary principle is not an interpretation in the sense of a re-formulation of the norm but the (practical) realisation of the law fitting every particular situation. This seems to be better explained by the idea of translation rather than by the classical idea of interpretation.

> [M]ais si le complexe des faits demande à être aménagé en vue de la règle, la règle à son tour doit être remodelée en vue de son application satisfaisante aux particularités du dossier. Qui soutiendrait encore que cette démarche s'apparente à un simple syllogisme, comme s'il suffisait de déduire la solution de la catégorie légale posée à priori et ne varietur? Ici encore il sera question de pesée, de négociation, d'ajustement par essais et erreurs, d'abduction, exactement comme dans le travail du traducteur: ce sont deux mondes, à la fois proches et distants, étrangers et pourtant familiers, qu'il s'agit de rapprocher et de faire dialoguer. (Ost 412-413)

In cases of role-responsibility, and particularly those covered by the precautionary principle, our understanding of the law may be better if it is analogized to an improvised performance. So precaution can be considered an "improvisation area" of the law.

Notes

[1] Recalling the album *Caution Radiation Area,* the title of this note is a tribute to the Italian progressive-rock group Area and to its singer Demetrio Stratos, on the 31th anniversary of his premature death (June 1979). Stratos was a great performer, known for his research on the nature of the voice, whose legacy is nowadays pursued by, among others, the singer Diamanda Galás. Some months before the recording of that album Stratos performed (both in the recording studio and in public concerts) *Sixty-two Mesostics Re Merce Cunningham,* a composition by John Cage based on vocal improvisation that contributed significantly to shaping Stratos' approach to vocality (Laino 138). Albeit based on his individual capacities, Stratos affirmed that the vocal techniques he developed are not grounded in his individual skills but are accessible to anyone willing to try to take consciousness of her/himself. He has not written texts in which he explained his thoughts about voice, rather he worked as a "living laboratory" of vocal experiences (El Haouli 55). The way he could produce some sounds with his throat (see albums *Metrodora* and *Cantare la voce*) is not yet fully scientifically explained, and thus is the object of mere conjecture (like the roots of the law). See the documentary *La voce Stratos* (2009); a trailer movie with English subtitles is available at: http://stratos.route1.it.

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