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The Theory of Legal Characters

Mikhail Xifaras

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INTRODUCTION

For decades, we took for granted that jurists just "spoke the law." This was good news: the law, thanks to the continuous efforts of legal science to systematize it in a coherent manner, was rational after all. Yet, legal realism has been there along the way, raising along the way ideas of partial or absolute indeterminacy, associated or not with a thesis of the predetermination of law by sociological or ideological factors. Finally, post-realist approaches convinced us that jurists do not just "speak the law." Better said, if "the law" is what jurists say, and if what they say cannot be known until it is said, the jurists do not "speak the law" at all.[1] From there, understanding that the legal material was only a small part of the story, legal theory—once only busy with ontologies of norms—went to study legal actors' behaviors.

Many chose to formalize these behaviors with economic models, whether classical or behavioral, in search of a high degree of certainty. But this approach comes at the cost of excluding actors' motivations from the analysis. Therefore, it fails to explain why the jurists felt constrained to do what they did and the precise way they did it. And if, as Foucault says, acts of "[i]nterpretation and formalization have become the two main forms of analysis of our time,"[2] only focusing on the second can hardly be satisfactory. On the path to smoother, less formal accounts of the legal actors' behavior, one soon encounters the metaphor of "personae" or "characters."[3] This Article aims to take

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1. *See generally* Duncan Kennedy, *A Left Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation, in* LEGAL REASONING: COLLECTED ESSAYS 153, 153–73 (2008).

2. MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES 325 (Routledge 2002) (1966).

3. *See, e.g.*, Jerry Frug, *Argument as Character*, 40 STAN. L. REV. 869 (1988); Mitchel de S.-O.-l'E. Lasser, *Judicial (Self-)Portraits: Judicial Discourses in the French Legal System*, 104 YALE L.J. 1325 (1995); Duncan Kennedy, *The Hermeneutic of Suspicion in Contemporary American Legal Thought*, 25 LAW & CRITIQUE 91

the metaphor seriously by proposing a Theory of Legal Characters ("TLC").[4]

The TLC understands the legal character as both an idealized self-presentation that the actor performs for her audience and as a role model of professional behavior, which can also be interpreted as a dimension of her psyche. Among the theories that use the metaphor in order to suggest models of behavior, some take a single model of behavior as their point of departure—generally for normative purposes.[5] One cannot entirely rule out the possibility that a single type of behavior determines the approach of every actor. But it is unlikely that, in a given legal situation, there is only one available way of doing the work that remains faithful to the actor's *raison d'être*. Moreover, in the vast majority of situations the actors go to great lengths to illustrate and defend their own type of behavior when confronted with competing models, justified and pushed in turn by their colleagues who have good reasons to do so. Therefore, the TLC postulates that a defined number of characters—greater than one—is available to the actors in a given legal situation.

Legal theorists ordinarily assume that legal actors have direct and immediate access to this legal material as a matter of course. But these actors apprehend the legal material in the context of the exercise of their profession—that is, insofar as they are, say, a Justice at the U.S. Supreme Court or a French professor of administrative law. These jurists' apprehension of the legal material thus proceeds from a given place in the legal system and is filtered through the actors' conceptions of what is the best way to perform their professional activity. These conceptions mediate the actors' understanding of the legal material. The process of mediation is, in turn, a kind of relationship that we can describe as aesthetic—not aesthetic as in "artistic," but aesthetic in the broad sense, as in a "sensible apprehension of the world." This is because the mediation process carries the actors' whole relationship to the world, the law, and what to do

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(2014); Mikhaïl Xifaras, *Les Figures de la Doctrine*, LA DOCTRINE EN DROIT ADMINISTRATIF 175 (2009); CASS R. SUNSTEIN, CONSTITUTIONAL PERSONAE (2015).

4. For an extended version, see generally Mikhaïl Xifaras, *Théorie des personnages juridiques*, 2 REVUE FRANÇAISE DE DROIT ADMINISTRATIF [R.F.D.A.] 275 (2017) (Fr.).

5. For Dworkin, being a judge is to model oneself after Hercules. *See* RONALD DWORKIN, LAW'S EMPIRE 314 (1986). For Michel Troper, it is after *homo juridicus*. MICHEL TROPER, VERONIQUE CHAMPEIL-DESPLATS & CHRISTOPHE GRZEGORCZYK, THEORIE DES CONTRAINTES JURIDIQUES 15–16 (2005).

with it. Such "sensible apprehension" is an originating and creative relationship that determines the overall conditions, modalities, and limits of jurists' apprehension of the legal material. It constitutes the object of the TLC.

The TLC proposes a general theoretical protocol for modeling the typical attitudes available to the legal actors about the legal material in any given legal situation. These types are structures. They do not fix concrete behaviors in advance, but rather, condition behavior by limiting the actor's possibilities. These types are analogous to the grammar of a natural language: they determine the speaker's ability to speak rather than what she says. The legal characters do not therefore directly cause specific behaviors, but they do realize three crucial operations. The legal characters (1) condition the possibility of certain types of discourse, (2) constitute the legal material by ordering the conflicting considerations at stake, and (3) confer the discourses with a style.

In Part I of this Article, I expose how this theoretical protocol can be used in a given legal situation by defining the legal actors, the legal stage (or the interlocutory space), and the legal discourses which are relevant for the analysis.[6] In Part II, I suggest some strategies to define the structural properties of the characters and illustrate them with real-world examples.[7] In Part III, I focus on the performances in which the characters are instantiated by the actors.[8] Finally, in Part IV, I return to the crucial operations of the characters. This Part exposes the ways in which the present constellation of characters (1) determines which types of discourse will be pursued or excluded, (2) constitutes the legal material by ordering the conflicting considerations at stake, and (3) may deliberate throughout the discourse with a dominant style.[9]

I illustrate the TLC with examples taken from the activities of the French Constitutional Council ("CC") for two reasons. First, the CC is a Supreme Court dealing with constitutional matters; it should not sound too unfamiliar to a non-French audience. Second, the verbatim transcript of its deliberations is available for the public, with a limitation period of only twenty-

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6. *See infra* Part I.
7. *See infra* Part II.
8. *See infra* Part III.
9. *See infra* Part IV.

five years.[10] To my knowledge, this is a unique opportunity to look into the black box of judicial decisions.[11]

There are few things one needs to know about French institutions and about the functioning of the CC in order to understand what follows. The CC was instituted by the Constitution of the Fifth Republic (1958). Traditionally, the French conception of separation of powers leads to what is known as "jurisdictional dualism." As a result, two different Supreme Courts, the *"Conseil d'Etat"* and the *"Cour de Cassation,"* preside over only administrative and civil matters, respectively. In 1958, the CC was instituted as a third Supreme Court to control the constitutionality of statutes voted by the Parliament (National Assembly and Senate) prior to their promulgation. This is known as a "prior control," as opposed to the U.S. type of judicial review.[12] The CC is also tasked with controlling the legality of France's electoral processes.

The CC is composed of nine nominated members and the former Presidents of the Republic as de jure members. Its nominated members sit for nine years, unless they replace a member during its mandate, in which case they sit for the duration of this mandate. A third of the Council is renewed every three years. The members are respectively nominated by the President of the Republic ("PR"), the President of the National Assembly ("PNA"), and the President of the Senate ("PS"). The members do not have personal clerks; rather, the preparatory work is done by a General Secretary ("GS")—with the help of a team of legal professionals—under the authority of the President of the CC ("PCC"). To balance the power of the GS, the PCC has its own team of legal advisors (an innovation introduced in 1986).

Each case is examined based on a "report" made by one member (the *"rapporteur"*) with the help of the GS. The "report"

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10. *Comptes-rendus des séances*, CONSEIL CONSTITUTIONNEL, https://www.conseil-constitutionnel.fr/comptes-rendus-des-seances (last visited Jan. 22, 2021) [https://perma.cc/N67R-FYH8]. Oddly enough, not all deliberations are available on the official site. It is therefore useful to consult the whole of them at the Archives Nationales, 59 Rue Guynemer, 93383 Pierrefitte-sur-Seine, under the reference 20040168/1 to 20040168/31.

11. In Brazil, Mexico, Kyrgyzstan, and Switzerland, Supreme Courts deliberate online. This does not give access to the black box—it displaces it.

12. The July 23, 2008, revision of the Constitution introduced a mechanism of *a posteriori* control of the constitutionality of statutes, called *Question Prioritaire de Constitutionalité*. It allows the *Conseil d'Etat* and the *Cour de Cassation*, while examining an ordinary case, to address a preliminary question to the CC in case of serious doubt about the constitutionality of an applicable statute.

may propose one unique answer to the question at stake, or alternative contradictory answers (generally two). It can also propose alternative wording for the same decision. A simple majority of the court's members decides the case. If the CC is evenly split, the PCC breaks the tie. The records of the deliberation ("*comptes-rendus de séance*") are written by the GS and reviewed and signed by the PCC. Needless to say, it is not impossible to manipulate them, and they should therefore be read with caution.

I.   THE LEGAL STAGE (INTERLOCUTORY SPACE)

The TLC offers a general protocol for theoretical analysis, applicable to various legal situations. This means that the TLC does not offer a ready-made recipe to analyze every legal situation. Instead, it is an empty framework that has to be adjusted every time it is used. Indeed, for our purposes, it is only pertinent to examine what jurists do in concrete, legal situations. The legality of these situations imposes some specificities, even if analogous protocols can be set up for nonlegal situations.[13] Therefore, the first thing to do is to determine the interlocutory space, or legal stage, to which the protocol may apply, and to define the legal office, the legal actors, and the legal discourses relevant to the analysis.

A.   The Legality of the Situation

The legality of the situation is determined by three elements: the legality of an office (the official position); the qualities of the person who holds the official position (the legal actor); and the recognizable "legality" of the actor's speech (the legal discourse). The legal situation's "Constitutional Council" is made of legal actors pronouncing legal speeches in the exercise of their office, that is, as members of the Council. These elements are mutually constitutive. The office is only made "legal" by legal discourses (the Constitution). The discourse's legality, in turn, comes from the fact that it is spoken ex officio by legal actors, who are designated as such by the legality of their office, etc. And not only "etc.," but again and again, and vice versa. One

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13.   *See generally* ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1956).

might say this definition is circular, and borderline cases are numerous—which is true. But this circle is a result of the autopoietic nature of law and is not necessarily vicious.

B. Many Audiences, a Unique Legal Stage

In the exercise of her legal office, a legal actor must produce discourse. Each of these discourses is addressed to a given audience. Because the audiences are many, the officer must address them in different ways (i.e., the Dean of a law school presents her wishes to the staff, gives courses to her students, negotiates international partnerships, writes articles, gives interviews to the press, etc.). Different as they are, these audiences are not disconnected one from another (students skim the news, international partners read academic articles, etc.). It is because audiences are not hermetically sealed off from one another that they constitute one given interlocutory space.[14] For each legal situation, there is a unique legal stage.

This means that the TLC is *not* a theory of genres of discourse. The definition of the legal character must not be confused with the genre of discourse she pronounces. Indeed, on a given stage, the same officer can pronounce discourses of different genres, depending on the makeup of the audience she addresses. It also means that, since the constraints tied to the necessity of persuasion vary according to the makeup of the audience, the officer will very likely find herself subject to conflicting rhetorical requirements, or dilemmas, exposing her to "role conflicts." Such role conflicts are problematic for the actor. In the eyes of the public, the officer shall try to hide such role conflicts by attempting to achieve a certain consistency in her behavior. Her success will depend on the way she presents her professional onstage self. In other words, she achieves consistency by acting *en scène* an idealized self-presentation, her chosen character.

C. Discourses Relevant for the TLC

The TLC is concerned with the speeches that the legal actor gives ex officio in the exercise of her legal office, not the ones that are imputed to the office as such. Therefore, although they are

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14. OSWALD DUCROT & TZVETAN TODOROV, ENCYCLOPEDIC DICTIONARY OF THE SCIENCES OF LANGUAGE 331 (Catherine Porter trans., Johns Hopkins Univ. Press 1983) (1972).

obviously official, the TLC does not deal with the speeches that come directly from the office (the decisions of the CC), as they cannot be imputed to a peculiar legal actor (one of its members). But all speeches delivered by legal actors in the exercise of a legal office can be considered, in a way, "official."[15] For example, the interviews that a Judge gives to the Bulletin of her almamater University are still spoken as a Judge from her office. The TLC therefore deals with the ex officio discourses that are not ascribed to the office itself—that is, with the whole body of "gray literature."

Certainly, this corpus does not include "private speeches" (the legal actor does not speak ex officio in her private life). But it may well include "interior speeches," which are not spoken in a private language, to the extent the speaker can communicate to others what she says to herself. Although not spoken in public, interior speeches result from the officer's exercise of her office. This borderline case raises a question: Can the TLC provide an analysis of the existential condition of legal actors? Can it grasp in what respect the officer, when she is alone with herself in the exercise of her profession, considers herself released from the obligation of playing the character she plays publicly? Or again, to what extent does she "believe" in her character? And to what extent this character becomes an aspect of her psyche? Subject to the accessibility of such discourses, this is a possible—but not necessary—extension of the TLC.

Each legal situation is defined by a unique legal stage in which legal actors perform ex officio discourses to various audiences—including interior speeches, in case one wishes to add an existential dimension to the TLC. Within this legal stage, discourses can be imputed to "characters."

II. THE LEGAL CHARACTERS

In this second Part, I describe the characters as typical, idealized self-presentations performed by an actor to better convince her audience. To do so, I borrow from literary theory the distinction between the author (the person), the narrator (a fictitious character), and the actor (the performer). Then, I consider how, in a given legal situation, only a certain limited number of

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15. Mitchel Lasser highlights two registers of discourse for judges on the *Cour de Cassation*, the holdings and the report of the "advocate general," but he only casts the former as "official." *See* Lasser, *supra* note 3, at 1334.

characters are available to the legal actors. This limitation causes the characters to function as typified role models of professional behavior. Finally, borrowing from Greimas's actantial model, I describe a real-world situation: the repertoire of characters available to the members of the CC.

A.   The Theater Metaphor Applied to the Judicial Genre of Discourse

The analogy between theater and law is useful for understanding what jurists do. Like theater or music, the law is a twofold artwork consisting of the creation of the text (by authors) and the work of interpretation (by actors).[16] This analogy is limited, however, because interpretations of legal texts do not give rise not to representations. Rather, legal interpretations give rise to more texts which are immediately available for future interpretations. Legal actors are thus also authors. The theater metaphor is nonetheless instructive because it helps us to think of legal interpretation as a performance. It allows us to distinguish between the author (the person), the narrator or character (the fictional person), and the actor who performs the character.

The distinction between author and narrator is familiar. Marcel Proust, the flesh-and-blood person who wrote *In Search of Lost Time*, must not be confused with "Little Marcel," a character of that work, presented as the narrator. In the theater, the distinction is generally immediate and explicit: it is Phaedra—and not Racine—who says, "I saw him, I blushed, I turned pale at the sight." This is what literary analysis calls the principle of "twofold enunciation."[17] The distinction between the character and the actor is even easier. Sarah Bernhardt is not Phaedra; she just plays the role of Phaedra in such a way that the public confuses the two for as long as the performance goes on. This is the principle of theatrical illusion.

Let us add that the law is ultimately oriented toward practical purposes. Legal discourse falls (largely but not exclusively) into what Aristotle calls the "judicial genre," which aims to

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16.   *See generally* HENRI GOUHIER, LE THEATRE ET LES ARTS A DEUX TEMPS (1989).

17.   ANNE UBERSFELD, READING THEATRE 90 (Paul J. Perron & Jean-Patrick Debbeche eds., Frank Collins trans., Univ. of Toronto Press 1999) (1996).

persuade the listener in view of a decision.[18] If one applies these principles—double enunciation and theatrical illusion—to discourses that aim to persuade, it is fair to say that the speaker simultaneously presents herself to the public as the author of the discourse (Racine), the narrator (Phaedra), and the actor (Sarah Bernhardt). This theoretical device can be usefully marshalled in the study of legal discourse.

Again, according to Aristotle, there are three ways to convince an audience: the demonstrative value of the speech itself, the temperament of the public, and the character (ethos) of the speaker.[19] This last "way to prove" is in fact quite effective: the judicial discourse, in addition to the arguments and demonstrations always offers some self-presentation of the speaker, that aim to win the confidence of the public.[20] The force of conviction inspired by the legal discourse depends not only on the presented argument's quality but also on the potency of the artifices that the speaker deploys to convince the given audience of her authority. When such self-presentation is dramatized by directly addressing the emotions of the public, it tends to become a "character" in the proper theatrical sense of the word.

Taking all this into consideration, the legal character appears as a self-presentation of the author, both in place of the author and played by her. This character appears as designated by the discourse itself as the fictitious narrator of the discourse. An example follows.

B. Daniel Mayer's Inaugural Speech

On March 24, 1983, François Mitterrand (the recently elected socialist PR) nominated Daniel Mayer (a hero of World War II's Resistance and noted human rights activist) to the PCC. Mayer started his inaugural speech by regretting that, in the

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18. ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 48 (George Kennedy trans., Oxford Univ. Press 2d ed. 2007).

19. "But since rhetoric is concerned with making a judgment . . . , it is necessary not only to look to the argument, that it may be demonstrative and persuasive but also [for the speaker] to construct a view of himself as a certain kind of person . . . ." *Id.* at 112 (alteration in original).

20. "[F]or it makes much difference in regard to persuasion (especially in deliberations but also in trials) that the speaker seem to be a certain kind of person and that his hearers suppose him to be disposed toward them in a certain way and in addition if they, too, happen to be disposed in a certain way [favorably or unfavorably to him]." *Id.* (second alteration in original).

absence of any female members, he could not use the formula "Mesdames, Messieurs."[21] Then, after honoring the incoming and outgoing members by recalling their brilliant careers, he added: "As for me, nominated with them, I can only assure you that I will never give you the opportunity to lower your esteem of me." Afterwards, he pointed to the need for the CC to place itself above political divisions, even at the cost of the members' former political loyalties ("we must be ready to pay a price with our very selves"). He then insisted on the strength of the institution ("I feel being here in a robust house"), conquered by establishing itself as a supreme jurisdiction, guardian of the individual liberties. This led him to warn that, although disagreements were to be expected, "the war we fought during occupation was meant to give all of us the right to disagree." He then pled his colleagues to manage these expected disagreements with wisdom because "wisdom is our label. We are, it is said, wise men."[22] He then concluded: "It is by remaining loyal to my foolish daydreams that I intend to rejoin your wisdom."[23]

Daniel Mayer (the author) presented himself under the mask of a narrator: sketched as an outsider from "the club" sent by the left-wing PR to depoliticize a right-wing body, ready to extend the powers of the Court to promoting human rights. His narrator was not a professional politician, nor a jurist, nor even a statesman. He was an activist with high moral credentials and a humorous, independent spirit who, above all else, would obey his conscience—a "fool" rejoining "wise men."[24] Daniel Mayer (person) invents (author) and performs (actor) this character to open a space for disrupting routines, rendering possible his ability to play inspiration against legal technicalities and make room for new (left-wing) ideas.

C. The Repertoire of Available Characters

It is unlikely that legal discourse is so constrained that there is only a singular way for its actors to properly perform on

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21. Deliberation of the Constitutional Counsel, 24th of March 1983 [hereinafter D. 24/03/1983]. All subsequent deliberation sources will be cited as "D. [date]/[month]/[year]," and they are available online at https://www.conseil-constitutionnel.fr/comptes-rendus-des-seances [https://perma.cc/N67R-FYH8].
22. *Id.*
23. *Id.*
24. *Id.*

stage. It is likely, however, that legal discourse is constrained enough that there is not an infinite number of ways to perform it. Indeed, the universe of law is sufficiently frozen that it proves impossible for each person to do her job in whatever spontaneous or natural way she pleases. This reality contrasts most obviously with the world of artistic endeavor. The only constraint that weighs on the author of literary characters is respecting the inner coherence of the fictional universe in which they evolve. In the world of science fiction, one can create surprising characters, with many arms and legs. But in classical French theater, the characters must always be gods, heroes, or kings—preferably of Greek, Roman, or Biblical origin. The more a certain type of discourse is constrained, the more the works that belong to this type are also constrained. As the constraints increase, the characters of these works not only become more and more typical, the style and content of their discourses (as well as their interactions) become more and more predetermined. The canonical example is the *Commedia dell' Arte*. Pierrot and Columbine are completely reduced to role types. Since the legal discourses are in general much more constrained than science fiction, legal characters tend to be more like those in the *Commedia dell' Arte*. Thus, it is likely that, in any given legal situation, a constellation of typical characters will emerge.

D. Self-presentation and/or Narrative Syntax

To give an account of the character, one could describe the process of self-presentation and study it as "self-narrative" or link it to the larger structure of a stock collection of behaviors, a "narrative syntax."

Following the second path, one may ask how to identify the rules that structure the properties of these characters. Using a loosely structuralist approach, one could stick to an internal analysis of discourses actually performed. First, one would seek to define the basic elements (Saussure's "concrete entities") of the types of attitudes in order to establish stable relations between them. A.J. Greimas applied such "narrative syntax" to theater and proposed an "actantial model," made of different functions, served by "facets" (which can include non-human

actors, like a sword or courage).[25] The "facets" are the building blocks of the structure, and Greimas's functions are as follows: subject, object, sender, recipient, opponent, and helper.[26]

E. Using the Actantial Model to Interpret the Deliberations of the CC

With this model in mind, I went through the deliberations of the CC, verbatim, in the reading mode—to borrow from psychoanalysis—of "floating attention." The formalizing is intuitive and proceeds step by step.[27] The first step draws a distinction between "talkative" and "silent" characters, or better said, between "active" and "passive" ones. The second asks which "senders" can be founded in the CC's deliberations. This allows us to elaborate the typology of characters. The last step introduces the "recipients" to refine and complete the typology.

In the context of the CC's deliberations, I understand the notion of "sender" as what ultimately drives the behavior of the character and the notion of "recipient" as the audience to whom the decision to reach shall mainly be addressed. Let me start by drawing the table of the existing senders and recipients as they appear from the speeches.

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25. *See generally* A. J. GREIMAS, STRUCTURAL SEMANTICS: AN ATTEMPT AT A METHOD (Daniele McDowell, Ronald Schleifer & Alan Velie trans., Univ. of Neb. Press 1983) (1966); *see also* UBERSFELD, *supra* note 17, at 37–46.

26. *See generally* GREIMAS, *supra* note 25.

27. I deliberately left aside the characters available for the PCC and the GS, which deserve a special analysis, as they are not subjected to the same constraints as ordinary members; although I may refer to them further in the Article, for example, in order to illustrate a performance.

TABLE OF SENDERS

SENDER	FORM UNDER WHICH THE SENDER APPEARS IN DISCOURSES
Respect for the Law = Respect for the Constitution	Respect for the Constitution can be: • Respect for the text • Respect for the immanent principles of justice • Respect for the constitutional doctrine
Political Loyalty = The Will of the Boss	The Boss can be: • The PR • The presidency, the government, the National Assembly, or the Senate (the four highest authorities of the State) • The Party • Friends
Moderation as Common Sense	Common sense is always based on: • Personal experience • Knowledge from the field
Dictates of the Consciousness	Dictates of the consciousness can be: • Anything
Ideological Positions	Ideological Positions go by binaries: • Parliamentarism vs. presidentialism (the middle term is "rationalized parliamentarism") • State order (or *raison d'etat*) vs. individual liberties • National sovereignty vs. Europe • Social policies vs. free market • Jacobins vs. Girondins
Bureaucratic Efficiency	Bureaucratic efficiency can be: • The clarity of legal standards • Smooth enforcement • Administrability • Good management

TABLE OF RECEPIENTS

RECIPIENT	FORM UNDER WHICH THE RECIPIENT APPEARS IN DISCOURSES
The President of the Republic	• The Boss • The author/guardian of the constitution • The highest authorities of the State
The Highest Political Authorities of the State	• The PR • The government (represented by the Prime Minister) • The ministers • The National Assembly (represented by the PNA) • The Senate (represented by the PS)
The Supreme Courts	• The Conseil d'Etat • The Cour de Cassation • The European Courts (European Court of Human Rights, European Court of Justice)
The Doctrine (Opinions Expressed by Law Professors)	• Legal literature • Op-eds in the press
Public Opinion	• The press • The "feedback from the ground"

Now, let's use these distinctions to draw the typology of available characters.

F. Repertoire of Available Characters for the Members of the CC

The first distinction to be made is between the active members of the CC and the passive ones. There are three kinds of passive members: Little Soldiers, Nobodies, and Retirees.

The Little Soldiers are only driven by their political loyalty.[28] They do not deal much with legal issues, and when they do, they are so bad at it that they lose credibility. Their ideological preferences always align with those of their boss. Their rhetoric is the language of ordinary politics: direct, familiar, sometimes vulgar, even violent. They rarely dare to develop articulated arguments; they would rather operate by slogans and act as snipers.

Other passive members, the Nobodies, present themselves as obvious bummers.[29] They too express political loyalties, but said loyalties are fluctuant and very easy to flip.[30] They are clumsy, have a hard time finding their words, are often embarrassed, and make other members wonder why they are really there.[31]

The Retirees would also be Nobodies if they were not respected ex-top-guns.[32] One may think the Retirees were sleeping or were too senile to seriously follow the debates.[33] Their presence can be explained by the fact that a nomination to the CC is seen as a reward for the end of an already long and great career. Their Retiree status is only exacerbated, however, by the term of nine, long years.

As for the active members, the taxonomy is complicated by the fact they must deal with a plurality of conflicting senders. When this happens, the active members can try to reconcile these conflicting senders. However, if they do so, they will either themselves appear as eclecticists—who are incoherent without

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28.   Jules Antonini, André Deschamps, Paul Legatte, and Henri Monnet are loyal to the PR (and to the PCC). Jean Sainteny is loyal to the PR but is also driven by (conservative) ideology—he is a hybrid.

29.   Françis Mollet-Vieville is "counting on the indulgence of his colleagues," D. 22/07/1987, considers being asked to write a report as "premature," D. 24/11/1987, and still presents himself as a "neophyte" a year later, D. 19/01/1988. There is no better way to suggest that he will always count for nothing.

30.   Françis Mollet-Vieville, him again, flipped twice in the same deliberation: "I indicated first that I was joining the solution of the rapporteur. Then, listening to the others, I slipped to the reverse position. At present, I now reach a conclusion different that which was my own earlier." D. 25/02/1992.

31.   Victor Chatenay; Charles Le Coq de Kerlan; Louis Pasteur-Vallery-Radot; Henry Rey; and Françis Mollet-Vieville. Jean Michard-Pellissier is a hard case (a kind of talkative Nobody?); Jacques Latscha is also a hard case: not passive, but transparent.

32.   Gaston Monnerville is the former president of the Senate. Louis Joxe is a former Head of the State department.

33.   It happened once that the PCC (Robert Badinter) had to speak for one of them (Louis Joxe). D. 05/01/1988.

noticing—or as explicitly "torn." In other words, the characters are either pure (one single sender) or hybrids (many conflicting senders). Hybrids can be further divided between those that are "integrated" or "torn."

There are six types of active members: the Officers, the Technocrats, the Notables, the Ideologists, the Priests of the Constitution, and the Fools.

The Officers are too driven by their political loyalty. But that's not the whole story. They are also either good lawyers and/or technocrats, which allows them to make use of their technical skills for their political agenda. They are always hybrids, but the will of the boss always comes first. Their main recipient is the boss. They are able to speak the crude language of everyday politics as well as the language of the law and bureaucratic efficiency. Needless to say, this is a formidable species: Officers have all the necessary means to accomplish their ends.[34]

The Technocrats may have strong political loyalties, but their ultimate norm of reference is always the efficiency of the legal system and good administration. When the Technocrat has no political loyalties, nor strong ideological views, their type is pure.[35] For the Technocrats, the main recipient of their speech is the higher state authorities, and beyond them, the entire state apparatus. They speak the gray, neutral language of legal technicalities, procedures, and good management.

The Notables elect moderation as their main sender and public opinion as their first recipient. They can also be concerned with legal or technocratic considerations, but not always. Often, they express political loyalties or ideological identifications, but they always make sure to confuse them with "common sense." As a result, the Notable is always a hybrid character. One can classify them as Notable-Politician[36] or Notable-Jurist.[37] The Notable-Jurist follows common sense but "within the frame of the constitution." The Notable-Politician merges it with its political loyalties. Oddly enough, the Notable-Ideologist has never been performed. What makes these hybrids nonetheless

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34. George Pompidou (fully integrated); Maurice Patin (integrated, with exceptions); Jean Chenot (fully integrated); Victor Chatenet (torn).

35. André Segalat (pure); Robert Lecourt (torn).

36. Maurice Faure (integrated Notable-Politician), never takes the law seriously.

37. Achille Perreti and Robert Fabre (Notable-Politicians), who take the law seriously. Louis Gros is a wannabe Notable-Politician who listens to too much of its own feelings to not fail in most of its performances.

Notables is that moderation and common sense always prevail when they fail to identify with the law or the will of the Boss. Notables both speak the common people's language (due to "experience" and "knowledge from the field") and share their concerns. They perform their hybridity either on the torn or the integrated mode.[38]

The Ideologists choose a given ideology as their main sender; the highest political authority of the State is their main recipient. Whatever the chosen ideology, they will use all other types of consideration to promote it. They use parliamentary rhetoric often, even sometimes in the prophetic style. They, too, are always hybrids (Ideologist-Politicians, Ideologist-Jurists, or Ideologist-Notables), maybe because it would cost them too much to just be "pure" zealots of an ideology.[39] These hybrids are Ideologists because in the end, their ideological preferences prevail—even when they fail to confuse them with moderation, the law, or the will of the Boss.[40]

Many members adopt respect for the law as their sender, and thus present themselves as Priests of the Constitution.[41] They all agree that the decisions of the CC shall only be determined by the constitution, but vastly disagree with one another on what the constitution is. Those who think of it as a text are Priests of Text.[42] Those who think it is a set of principles of justice are Priests of Justice.[43] Those who think it is a doctrine are Priests of Doctrine.[44] They are often hybrids bound by political loyalties, ideologies, and their consciousness, etc., but they are always concerned with producing "legally right answers." Their main recipient is the opinion of jurists, especially the two other

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38.   Léon Jozeau-Marigné (integrated Notable-Jurist); Jean Cabannes (torn Notable-Jurist).

39.   Vincent Auriol, a former PR, *de jure* member of the CC, and pure ideologist of "Parlementarism," completely failed all of its performances to the point he had to stop attending.

40.   Jean Gilbert-Jules (Ideologist devoted to "Parlementarism," fully integrated); Paul Coste-Floret (Ideologist, devoted to Parlementarism) but also a (literalist) lawyer. Jean Sainteny's performs the Little Soldier but fails, due to his strong ideological commitments ("State Order").

41.   George Vedel: "When the Council acts within the frame of the Constitution, this is like being in a shrine as a Priest of the Constitution." D. 10-11/10/1984.

42.   François Goguel (torn by its moral view).

43.   René Cassin (torn by its political loyalty to Charles De Gaulle); George-Léon Dubois (integrated).

44.   Marcel Waline (torn by its political loyalty to Charles De Gaulle); Jean Luchaire (integrated); George Vedel (integrated, with a strong ideological component); Jacques Robert (pure).

Supreme Courts and law professors ("*la Doctrine*"). Even when
the Priests of the Constitution refer to moral principles and po-
litical considerations, they are trying hard to speak in the lan-
guage of the law.

Pure types are always less effective than hybrids. Indeed,
their repertoire of arguments is narrow and their style monoto-
nous. As such, they are far more predictable.[45] It is also notable
that torn types are no less efficient than integrated types. If well
performed, it can be a great source of credit to expose your tor-
ments, especially if followed by a beautiful sacrifice of your own
opinion at the altar of the sender.

The last available character is for unpredictable minds. Its
preferred sender is the dictates of its own consciousness. The ac-
tors performing it are always on the edge in terms of credibility;
they often end up marginalized. Indeed, playing this character
while remaining in the game requires a lot of charisma and per-
sonal moral weight. The one who succeeds is an "anomiast" for
whom the law is a secondary matter. They must give weight to
the circumstances and to the moral rightfulness of the decision,
often determined by personal considerations.[46] They speak the
language of inspiration and high duty. One may say that their
main sender (and recipient) is God, under any of His possible
names. Quoting Daniel Mayer speaking about himself, let's call
them the Fools.[47]

In sum, the available characters are the Little Soldiers, the
Retirees, the Nobodies, the Officers, the Technocrats, the Nota-
bles, the Ideologists, the Priests (of Text, Justice and Doctrine),
and the Fools. To my own surprise, it works fairly well. Aside
from a few hard cases, which are most probably failed perfor-
mances, this typology offers a good account of what is played on

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45. George Vedel is always called "Dean Vedel," while Jacques Robert, despite
being a former Dean, will ever remain "professor Robert." Vedel is more successful
because he also does legal politics, deploying a whole set of strategies guided by a
political vision (center-right) of judicial review.

46. To succeed, it took Edmond Michelet to be a founder of the resistance group
"Combat," a survivor of Dachau, and to be considered for canonization by the Vati-
can. Mayer, whom we know, felt relief from his political loyalty toward Mitterrand
after Robert Badinter endorsed the role of "voice of his master" in 1986. René
Brouillet, a former diplomat with literary pretentions, was left with his personal,
unpredictable views on natural law by the political retirement of the Charles de De
Gaulle in 1969. Pierre Marcilhacy would have been a Nobody if he had not been so
talkative—a fool by under-determination, so to speak.

47. D. 24/03/1983, *supra* note 21.

stage—according to the deliberations. But there are many other structural relations to unveil.

G. Beyond the "Actantial Model"

Structuralist approaches of the "actantial model" are often considered too formal. How true. Sometimes for a given character, certain functions are occupied alternatively or simultaneously by several facets. Multiple facets may take up the same functions and therefore contradict one another, opening up the possibility for the constitutive properties of each character to be itself contradictory. This ought not be surprising, since the character is the fictional synthesis of potentially conflicting determinations; the actor's projection of an idealized professional identity meant to convince the public that the unescapable dilemmas she faces have been harmoniously resolved.

Furthermore, Greimas's actantial model is meant to ascribe a function for each facet along the lines of one of the three following axes: communication, desire, and power.[48] This is very promising for a legal analysis because law is very much about communication, desire, and power. But one can certainly feel free to work out other, less formal, functions, like the modes of reasoning or the dominant style in use. Some new properties could therefore be ascribed to a given character (the Priest of Doctrine *necessarily* loves doctrinal analysis), or at least be referred to in terms of the inclusion or exclusion of given properties (Little Soldiers *never* use the prophetic style; Technocrats are *always* sober, etc.). At this point, we are getting away from examining the narrowly understood "structure" itself, to enter into a discussion of the way it is instantiated—the performance of the characters.[49] There is not only a whole grammar of arguments but also a semiology of the ways to present them.

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48. *See generally* GREIMAS, *supra* note 25.

49. On the intermediate space between *langue* and *parole,* see Barthes's concept of *"writing"* in ROLAND BARTHES, ELEMENTS OF SOCIOLOGY 21 (Annette Lavers & Colin Smith trans., 1977). On the use of this concept for legal analysis, see Mikhaïl Xifaras, *L'analyse Structurale du Droit (avec Barthes), in* BARTHES FACE À LA NORME 31, 31–65 (Jacqueline Guittard & Émeric Nicolas eds., 2019).

III. THE PERFORMANCE OF LEGAL CHARACTERS

In the classical perspective, the role of the jurist is one of interpretation, a purely intellectual activity (an act of cognition sometimes mingled with an act of will).[50] Finding this characterization far too abstract, others tend to understand what jurists do to be a concrete activity that requires effort, time, and talent—what Marx calls "work"[51]—or as the performance of "speech acts." In this path, elaborating on John Austin[52] and John Searle's work,[53] Judith Butler associates the performativity of speech acts with the constitution of identities. The performance is successful when unnoticed, but sometimes a word, a gesture, or an attitude disrupts the process of mutual recognition of identities. Such failures are places for resistance and subversion.[54]

This "ludic" perspective,[55] besides calling to mind the theatre metaphor, offers a way to understand the fact that the law is an activity at once tightly constrained, yet not entirely determined.[56] From this point of view, we can say that characters structure the typical behaviors of actors but that each performance always also makes room for the individual's irreducible liberty. In other words, the actors are not mechanically forced to obey the constitutive properties of the characters (this is the play *within* the structure), and their performance holds the possibility of transforming the characters themselves (this is the play *of* the structure).

50.	HANS KELSEN, PURE THEORY OF LAW 353 (Max Knight trans., Lawbook Exchange 2004) (1967).

51.	Kennedy, *supra* note 1, at 158.

52.	JOHN LANGSHAW AUSTIN, HOW TO DO THINGS WITH WORDS (J.O. Urmson & M. Sbisà eds., 2d ed. 1975).

53.	JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE (Cambridge Univ. Press ed., 1969).

54.	JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 163–80 (2d ed. 2002).

55.	*See generally* DONALD WOODS WINNICOTT, PLAYING AND REALITY (reprt. 1980) (1971).

56.	François Ost, *Between Order and Disorder: The Game of Law*, in AUTOPOIETIC LAW–A NEW APPROACH TO LAW AND SOCIETY 70, 75, 89 (Gunther Teubner ed., 1987).

A.   The Play of the Structure: The Life and Death of Legal Characters

One cannot create a character ex nihilo. On July 22, 1980, the newly appointed professor George Vedel presented his first report to the Council.[57] The case was low stakes, highly technical, and somewhat boring. But the forty-eight pages of the report offered a complete analysis of the law, long doctrinal dissertations, and a balanced conclusion, reflecting how sophisticated the author's construction is. A true piece of art! A Technocrat took the floor to share that he felt he had "recovered his youth while listening to one of the most brilliant reports he had ever had the pleasure to hear." However, the Technocrat also shared his "anxiety" that Vedel's "construction," although very "harmonious," will not help the CC to decide upon future cases.[58] A Notable feared that the draft of the decision "said too much," and found it unwise to "render a landmark decision" that would "bind" the CC "for the future."[59] A Retiree agreed. A Fool thanked "the orator for having been such a great provider of rejuvenation," but articulated that he would vote against the report.[60] George Vedel's debut was a complete failure. Why? Because he performed the nonavailable character of the "professor," bored his colleagues by addressing them as if they were students, and forgot that the CC is reluctant to bind itself with theories. He was harshly disciplined (albeit, in a very Proustian way). The next time George Vedel presented a report, he successfully performed the already existing character of the Priest of Doctrine. He learned his lesson.

In the law, as in all kinds of constrained discourse, originality can have high costs. The creation of an entirely new character risks surprising the audience and ruins the gain in legitimacy expected in the proof by character of the speaker. That is also why it is not advisable to change characters several times in the course of the same career. Just as we cannot speak first without having a language, we cannot make law without adopting already accepted patterns of behavior. In this regard, the character always presents himself as already there, written into the

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57.   D. 22/07/1980. This deliberation is not available on the Constitutional Counsel's website. It can be consulted at the National Archives.

58.   *Id.*

59.   *Id.*

60.   *Id.*

repertoire of acceptable models of behavior for the given legal situation. This explains the permanence of characters available in a given legal situation and, by extension, the continuity of the law, which may depend on the permanence of certain kinds of behavior rather than on the permanence of texts.

But one may occasionally tinker. When Robert Badinter was nominated as President of the CC in March of 1986, the alliance between the Priests of Doctrine and the Technocrats balanced the influence of two Notable-Jurists and took control of the un-predictable—two Nobodies and a Retiree. Badinter, obviously an Officer (serving the left-wing PR), sought alliances. Because he would not be credible as a Notable, he presented himself as the hybrid of an Officer and a Priest of Doctrine. As a Priest, he pro-moted his own doctrine,[61] but as an Officer, he imposed it on the others. His doctrine had to be designed so that it was agreeable to the Technocrats and compatible with the doctrine already pre-vailing in the CC.[62] This successful new alliance became the driving force of the CC for years to come. Badinter created the hybrid character of the Fighting Priest of Doctrines by merging available properties that up until that point had been associated with distinct characters. It takes a lot to tinker a new character.

Thus, one can "create" a new character from rearranging al-ready available material. The success of such creation depends on the audience, according to various factors. Its fate is in the hands of future actors, who may or may not decide to perform it (the fate of the Fighting Priest is unknown; the relevant deliber-ations are not available yet).

Characters can die too, generally from disuse. As a charac-ter stops being performed by new actors, it becomes less and less interesting to choose it, until the day it completely leaves the stockpile of available ones. It seems that the last "Ideologist" was performed by Paul Coste-Floret, who died in August 1979. No other member ever performed this character. Does this mean the character is no longer listed in the repertoire? At the very least, it would require a strong surplus of charisma to resurrect it.

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61.   The "Badinter Doctrine" is something like, "civil liberties are the highest, non-negotiable of all conflicting considerations."

62.   The "Vedel Doctrine" is something like, "the Chambers are sovereign within the frame of the Constitution, which means, as long as their policies remain some-where between the Center right and the Center right."

B. *Play* Within *the Structure: The Freedom to Perform the Character*

Actors are not forced to identically reproduce all the constituent properties of the characters at their disposal in order to perform them. For example, Marcel Waline is a torn Priest of Doctrines. His performance is driven by his own theories, which often conflict with his devotion to Charles De Gaulle. Jean Luchaire performs the same character, but he is an opponent to De Gaulle, which allows him to coherently present his own (good) theories in opposition to the (bad) political majority of the time. George Vedel too wishes to impose his own theories, not under the form of a political weapon, but as the necessary and desirable fate of the CC. One character, three very different performances.

There is, of course, a link between the play within the structure and the play of the structure. By the sheer force of successful and continuous repetition, with small changes to the character's properties on the margin, the same character can eventually lose some of its constitutive properties or acquire new ones. The character itself changes, and the structure evolves. That's why the law shall be described as *playing*, rather than *gaming*. In contrast to the common but misleading analogy between law and the game of chess, it is the actors that create the rules of the game that they play. Though the legal characters appear to actors as given—and always already there—the characters are the fruit of the collective imagination of the actors that reinvent them over time by performing them again and again.

IV. AESTHETIC CONTRAINTS IN LAW

Because the actor must perform the properties of her character, these properties act as constraints or as disciplinary mechanisms in the Foucauldian sense. The actor is bound to conform to the properties of her character faithfully enough to make her audience recognize the character she is playing. It is immediately apparent that these constitutive properties are far too general to determine the actors' behavior, let alone the unique right answer to a given case. This is not surprising. Characters are structures, and structures are codes within which one can always produce an infinity of contradictory instantiations. Thus, the character does not predetermine the argument itself. Rather, the character predetermines the types of arguments that

may be had.[63] There are dozens of examples of contradictory uses of the same types of arguments by a given character in the CC.

Moreover, the law not being a natural language, but a technical language (i.e., a sub-code),[64] it is possible to speak outside of the structure. On April 23, 1961, the CC was to advise the PR about the possibility of activating Article 16 (full presidential powers) due to the situation in Algeria.[65] A Priest of Justice (René Cassin) posited himself against such recourse but changed his mind in the course of the debate. Obviously torn between the necessity to play his role and his loyalty to De Gaulle, just once, he chose the latter, going back to business as usual after that. This play turned out to be not too costly: a useful little *pas de côté*.

The fact remains that the legal characters strongly constrain the behavior of actors. These constraints operate at three levels: they allow or exclude certain types of discourse and arguments; they command the ordering of the conflicting considerations; and, finally, they imbue discourses with a certain "style."

A. Conditioning the Types of Discourse (Drawing the Line Between the Speakable and the Unspeakable)

The constraints associated with the characters are sufficiently determinate to exclude certain types of arguments. In this sense, when the legal characters are put into operation, they are what Jacques Rancière calls a "distribution of the sensible."[66] The distribution of the sensible starts in a given interlocutory space and plays out between those who are empowered to speak and those who are not; that which can be said in the space (speech) and that which does not make sense (noise).[67] The interlocutory space is grounded on a system of shared evidence,

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63. A Priest of Text could never say, "I do not accept this deviation which is infringing the prerogatives of the Chambers. We cannot give way to such unacceptable practices, even if the Constitution has not been violated." A Priest of Doctrine, George Vedel, did. D. 28-29/12/1989.

64. Roman Jakobson, *Closing Remarks: Linguistics and Poetics, in* STYLE IN LANGUAGE 350, 352 (Thomas A. Sebeok ed., 1960).

65. D. 23/04/1961.

66. JACQUES RANCIÈRE, THE POLITICS OF AESTHETICS: THE DISTRIBUTION OF THE SENSIBLE 12 (Gabriel Rockhill ed. & trans., 2004) (2000).

67. JACQUES RANCIERE, DISAGREEMENT: POLITICS AND PHILOSOPHY 27, 30 (Julie Rose trans., 1999) (1995).

something that serves as a certain common conception (or shared illusions) of what constitutes "reality." Consider the following example.

On November 18, 1982, the CC deliberated upon an amendment modifying the electoral code. The amendment was introduced by Gisele Halimi, a famous feminist.[68] The amendment forbade more than seventy-five percent of the members of a Municipal Counsel to be of the same sex.[69] Three possible apprehensions of the legal material were available.

For the rapporteur, a Notable, the amendment was "a typical example of sophism." It implicitly introduced quotas of women, therefore "sectioning the people" in violation of the principle of indivisibility of the sovereign people. Two Retirees and a Fool rejoined the "report." So did a Notable, who nonetheless invited the CC to "soften the wording" so as to "take into account the context in which the decision [would] be received." In other words, the Notable wanted to add language stating that the CC was all for a greater participation of women in political life. A Technocrat agreed with the decision, but not with its grounding. In the Technocrat's view, quotas had nothing to do with the indivisibility of the people, rather, they contradicted the universality of suffrage. He also agreed to alleviate the "psychological shock"[70] that the decision would produce. The second Technocrat joined him. All members voted for the report, except the two Technocrats who abstained.

The third available apprehension was the legislators': the amendment does not introduce quotas because the rule was applicable to men as well as to women (a formalist argument). It reinforced the effectiveness of the universality of suffrage by favoring women's eligibility (an anti-formalist argument). This apprehension was (literally) on the table but was not even discussed. Why? A straightforward explanation is that the CC was filled with anti-feminist old men who would have a lot to lose if the amendment made it through. That is certainly true. However, if the members could be held to their explicit statements, some did favor women's participation.

To refine the explanation, we could mention that no character was readily available to make a feminist argument, even if some members wished it were. A hypothetical feminist Notable

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68. D. 18/11/1982.
69. *Id.*
70. *Id.*

should have been able to merge his ideological stance with com-
mon sense anchored in his personal experience. This would have
been a delicate operation to achieve in 1982 France, a time when
feminism was not a moderate opinion the in semirural areas
where Notables primarily lived. Technocrats dislike legal set-
tings, which made things more complicated. To overcome the
hurdle, a hypothetical feminist Technocrat should have shown a
strong feminist commitment. But remember that Technocrats
are allergic to strong ideological commitments, except for the
ideologies officially promoted by the state. And in 1982, femi-
nism was not yet an ideology homogeneously promoted by the
state. The Fool could have certainly embraced the cause (he
could embrace any cause) but would have had limited chances of
success. The Retirees are too passive to not follow the other
members' lead. The only potential champion of feminism would
have been a Priest of Doctrine, who could have produced the the-
ory articulating the formalist and the anti-formalism argument
and found robust textual grounds in the Preamble of the Consti-
tution of the Fourth Republic (1946). Alas, the only present
Priest of Doctrine (George Vedel) decided to recuse himself after
he publicly took a position against the constitutionality of the
amendment in the newspapers.[71] As a result, the feminist argu-
ment was only uttered from the outside and perceived from
within the arena as a noise. The present characters' aesthetic
constraints would have made it too difficult for any member to
take up the challenge.

The feminist argument was not left unsaid because it was
excluded by the legal material, nor because of the ideological
stances of the members of the CC (assuming some of them were
really in favor of women's participation). Indeed, it was only left
unsaid because the two aforementioned dimensions were medi-
ated by the aesthetic constraints drawn by the given constella-
tion of characters. In other words, all legal and ideological things
being equal, possible behaviors are not equally performable with
the same degree of credibility, depending on these aesthetic con-
straints. When the constellation of characters excludes a certain
type of discourse, dissensus will only come (if it comes) from the
outside.

In our contemporary society, the law, like literature, is
among the most powerful machines for distributing the sensible.

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71. *Id.*

This makes law not only a normative order but also a way of imagining the real. In a given legal and ideological context, the constellation of characters conditions the access to, the place of, and the respective weights of speakers and types of discourse in the making of the law.

B. Ordering Multiple Conflicting Considerations

One important job performed by the jurists is the ordering of the available conflicting considerations (facts, texts, theories, values, political and policy arguments, constraints of administrability, etc.) available to interpret the legal material in a given case. Mainstream legal theorists assume that the ordering job is itself ordered by either legal principles ("legal beats non-legal considerations" or "special beats general norms," etc.); rules of interpretation ("texts beats doctrine" or "doctrine beats attitudes"); or values immanent to the law ("law as integrity"). The TLC starts from the opposite view. From this viewpoint, the legal material is often under-determinative. And even when it does not appear this way at first, the actor—according to her strategic choices—can always try to move the frame by producing an alternative effect of necessity, which would lead to another outcome.[72]

With this in mind, let's see how the constraints attached to the characters play in the ordering of the conflicting considerations at stake in a concrete case. On May 15, 1969, the CC had to decide upon the legality of the candidature for the presidential election of Alain Krivine, the speaker of the Revolutionary Communist League.[73] The piece unfolded in two acts.

The first act presupposed that conflicting considerations were ordered based on the principle that law prevails. According to the reporter, a Little Soldier, the electoral code applied because there was no special constitutional provision for the presidential election. Article 45 of the electoral code stated that eligibility was conditioned by compliance with military duties.[74]

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72. "Effect of necessity" is an expression for the actor's factual experience of being constrained by one of many considerations, regardless of the ontological status of the necessity produced. *See* Duncan Kennedy, *A Semiotics of Legal Argument, in* 3 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW, BOOK 2, at 309, 320 (Kluwer Acad. Publishers 1994).

73. D. 15/05/1969. This deliberation is not available on the Constitutional Counsel's website. I consulted it in the National Archives.

74. *Id.*

Krivine was suspended at that time; therefore, he was not eligible. A Priest of Doctrines objected that Article 45 emanated from the codification of Article 3 of the ordinance of October 24, 1958, which only set rules for legislative elections.[75] In the Priest's view, eligibility was a matter of "strict law." Thus, the interpreter should not extend such provisions to the presidential elections, and there were no legal grounds for the proposed decision. The PCC (an Officer) recognized a "lacuna."

The second round started with a dramatic move: The PCC read a letter from the Minister of Homeland Security that asked the CC to reject Krivine's candidatures because his campaign allegedly put the country at risk of riots.[76] The two Priests of Justice objected that in case of riots, a candidate would have no criminal immunity. One of them considered it "iniquitous" to declare a candidate ineligible on no serious legal grounds.[77] According to the Priest of Doctrine, one "cannot reject a candidate for moral, non-legal reasons."[78] He announced he would be voting against the report. But the Nobody declared he would vote for the report because the CC is the "guardian of the constitution and therefore must save the established order and the institutions."[79] The two Little Soldiers announced they would vote for the report as well, because the "moral aspect of the case prevail[ed] over the legal ones."[80] The ordering of the conflicting considerations had shifted. The alliance of Officers, Soldiers, and Nobodies imposed a new principle: politics prevail. It was in this moment that a Priest of Justice declared: "In all my consciousness, I would wish such a man to be ineligible, but a decision to reject would be a serious plate-form for social unrest."[81] The so far silent Officer (Victor Chatenet) confessed that this last argument is "strong" and concluded that he would vote against the report.[82] Thus, Krivine was eligible.

In this case, the legal material was under-determinate—none of the legal arguments produced any irresistible effect of necessity. Some actors then moved the frame by shifting the principle of ordering the conflicting considerations, but the move

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75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*

did not produce enough effect of necessity to determine the right answer. Evaluating the risk of riots is not rocket science.

From there, the TLC introduces the dimension of aesthetics constraints. The Officer successfully managed to impose the principle of ordering its character dictates (politics prevails). The Priest had to argue in favor of a decision that would in fact meet his own expected outcome (eligibility), derived from his own principle of ordering (law prevails), but on the grounds of the Officer's principle (politics prevails). This shows that the ordering of conflicting considerations is determined by the aesthetic constraints carried by the present characters. Each character carries distinct ordering principles of the legal material. It not only shows that the ordering of conflicting considerations does not necessarily determine the outcome, but also—and more importantly—that the ordering is indeterminate by its very nature. In other words, the ordering of conflicting considerations is a *distinct main stake of the deliberation*. Its determination therefore depends on a relation of force or on the most suitable combination in regard to the present characters. In the Krivine case, the atmosphere being one of trench warfare, the result lies in the relation of forces.

As for the "answer," the decisive move was made by an Officer who shifted the majority regarding the outcome (the decision) but who remained faithful to his character regarding the ordering (politics prevail). Acting otherwise proved too costly. This move might have been determined by his judgment upon the case (Chatenet was the Secretary of Homeland Security during the Algerian war, which somehow gave him authority for evaluating risks of riots). Or was it because he resented Raymond Marcelin, his successor, who bothered lobbying the CC?

One thing is sure: to disregard the actual constellation of characters and presume that a certain type of argument necessarily prevails over others is an act of faith. Even when the given constellation of characters allows a stable consensus of the ordering principles, those principles only prevail for the time being. They are subject to change when the constellation does. In fact, the preexisting but precarious aesthetic order imposed by the constellation of characters is an ordering of the ordering of the conflicting considerations.

C. *Matching Styles*

The notion of "style" is muddled. Classicism associates it with the genre ("tragic or comic style"). Romanticism sees it as the expression of the interiority of a person (*"Le style, c'est l'homme"*). More useful to the TLC is the fact that style also connotes the tone or the atmosphere of the discourse. In that sense, some characters are undeniably associated with a style, although others are not (the Fools are on their own).

The Notables are inclined to be smooth, the Ideologists lyrical, the Technocrats sober, etc. Those notions are vague. Yet, they play a crucial role in the audience's recognition of the character over the course of the performance: the character carries its own atmosphere, and the performance of the actor expresses it. Those notions may also play an important role in establishing a relation of force. Certain styles, when becoming dominant, connote discourses of a higher value, while other discourses find themselves demonetized. Between 1971 and 1977, the dominant alliance of Priests of Doctrine and Technocrats contributed to the loss of prestige that affected the casual politician style of the Officers and the unpredictable tirades of the Fools. This resulted in the deliberations of the CC taking a technical turn. It would be interesting to narrate the transformations of the dominant taste in a given legal situation and to grasp its exact role in changing the shape and content of the performances.

This also leads to the only normative claim of the TLC. In any given legal situation, the more characters that are available and the more styles that are performable, the better. Attempts to shrink the number of available characters—in the name of science, law, justice, or any of God's names—shrinks the repertoire of available arguments and the list of acceptable ways to present them. It narrows the Legal Imaginary and not only makes the law less open to the multiplicity of speeches, but also less malleable.