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Law and the Arts

Elective Affinities and Relationships of Tension

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Werner Gephart and Jure Leko

Introduction: Law and the Arts. Elective Affinities and Relationships of Tension

I. Structural Relationships and Contradictions

The determination of the »meaning« of the spheres of law and art seems to run into contrary directions. On the one hand, law demands direct and unconditional validity of the normative expectations it formulates for society as a whole: expectations that are symbolically embedded in order to develop their effectiveness and inherent force of law, anchored in organizational contexts of places and times of law, and affirmed by peculiar rituals known to us as legal proceedings.[1]

Art, on the other hand, raises an increasingly individualized claim to validity, seeking to interpret and represent the world with reference to historically variable »beauty«. Even if there are *règles de l'art*[2] and art is set in places – from workshops to manufactories to ateliers, galleries, and museums – that are distinguished by their sovereignty over the symbolic material of tones, colors, forms, and shapes and are ritually transformed and elevated to higher spheres beyond daily life through procedures of recognition by art critique, art plays with other options, extends references of meaning, opens horizons, and allows for even more possibilities through the realm of the imaginary.

In the normative realm, the view is narrowed to the decision that presents itself without alternatives, that imposes itself on the individual with imperative force. Given these circumstances, one could be forgiven for wondering how law could possibly be related to the arts. Granted, art in the widest sense can be functionalized by law: Judges and lawyers rely on the art of words, just as dance passes through places that resemble theater stages in the material used as well as in the sacralesque arrangement and is reflected in emblems of justice that remain an *obiter depicta*,[3]

1 Cf. Gephart: Recht als Kultur.
2 On this topic, cf. Bourdieu: Les Règles de l'art.
3 On this topic, cf. Goodrich: Legal Emblems and the Art of Law.

but nonetheless belong to the total work of art that is law. The indisputable claim to autonomy of the arts, however, runs counter to this type of functionalization, for it is the inherent power of art freed from practical applications, moralistic prescriptions, political exploitation, and subservience to religion that brought about the art of modernity. It may be that an expanded concept of law that goes beyond an understanding of law as a purely normative order to include the symbolic and ritual dimension of legal life features affinities and relationships of law with the outward appearance of art, but these do not step out of their accidental role to enter the sphere of art itself.

Would it then not be wiser to separate law and art from the outset, precisely to identify the *encroachment*, *iniquities*, and *commingling* of spheres? For these contain their own potential for criticism that can be made plausible as follows:

If law is aestheticized, we end up with kitsch or legal fascism centered on the production of a more or less tasteful, pretty appearance of legal reality, while the search for truth, the pursuit of the idea of justice, or the factual formation of order is made subject to an aesthetical logic. If law not only protects the intellectual property rights of artists, but bindingly prescribes the content of art or selects it through censorship, then art becomes impossible: an iniquity of spheres. And if, conversely, artists no longer know if they are judge-priests in the realm of the normative or if judges wonder whether, with their sharp analysis and artful words, if they are not the real poets to whom linguistic measure is more important than respecting procedural rules, then law is in danger.

If we then dare to relate law and the arts, we should be aware of this danger arising wherever art enters into contact with politics, economics, or community, as the power of art to produce beautiful appearances may lead to bursts of aestheticization that run counter to the fulfillment of the tasks accorded to these aesthetically overwrought spheres of human societies. Yet, we claim that there are insights to be gained from theoretically confronting these spheres in philosophical-sociological reflection, namely learning about law from art and acquiring a deeper understanding of the peculiarity of the arts from law. Allow us to illustrate this claim by first beginning with the relationship between law and literature:

1. Law and Literature: A Subtle Elective Affinity?

Why do so many great writers have a legal background – from Johann Wolfgang von Goethe to Peter Handke, from Heinrich von Kleist to Alexander Kluge, from Franz Kafka to Juli Zeh? Does this not speak volumes about the special proximity between these spheres? Or even the Brothers Grimm, who are beloved around the world not only as collectors and narrators of fairy tales, but also as legal his-

torians. Or what about the figure of Shakespeare,[4] whose biographic substrate remains mysterious, but whose works could not have been written without profound legal knowledge yet still could have never made their way to the Supreme Court in such a fashion?

Are there relationships of meaning beyond biographical coincidence that can explain this ascendancy of literary jurists? The thesis of narratological universalism tells us that the world only exists as a narrative.[5] And to the extent that a lawyer at least attempts to grasp the world in its factuality when it comes to legal facts, this legal construction of reality only takes shape when it is narrated. To master law as a technique of constructing the world would then mean to be able to »narrate« the world. The person relating legal material might then narrate it as a story capable of being subsumed or as an entertaining occurrence: the attorney making his or her plea in a criminal procedure might narrate it as a tragic event; it might be told as the story of a failed love in divorce proceedings or as the story of the menace of the evil neighbor jealous of one's own happiness in the neighborly dispute. The constitutional lawyer, too, must narrate when seeking to uncover illegitimate party donations and corruption, as an iniquity of spheres between economics and politics also requires narration in order to deliver a striking presentation of the act of mutual assurances of favors under candle light with red wine in a marina and in the company of beautiful women in the courtroom.[6]

The history of rhetoric is instructive regarding the relationship of this type of narration and legal narratives. Narratological analysis of legal speech points out its sequences, its logic of forming argumentative punch lines and temporal order, and its selective use of words. These aspects have likewise been deconstructed in the science of history as a narrative art. But while the great narrative performances in literature can bear 100 years of solitude and bask in dainty imaginations that leave our temporal and spatial parameters of order in disarray, the lawyer, at the end of the day, has to focus his or her interest on why a burglar did not break into an apartment for reasons of philosophical experiment, but with the intention to remove other people's movable objects or – as numerous horror movies demonstrate – to drive actors to madness by moving around everyday objects.[7]

Literature unleashes vast powers of imagination; it is perhaps even able to elevate us beyond ourselves as only religion does. Also, literature is dangerous: Women who read are dangerous – or become like Madame Bovary. In legal matters, however, we do not wish to be tempted by punch lines or intimidated by the rolling vocal power of the attorney making his or her plea in the style of a recital.

4 Cf. Ost: Shakespeare.

5 Cf. Barthes: L'aventure sémiologique; see also Gephart: Narrative Identitäten.

6 Cf. Posner: Law and Literature; Ward: Law and Literature.

7 For an overview, cf. Olson (ed.): Current Trends in Narratology; see also Olson: Narration and Narrative in Legal Discourse.

Rather, modern law is to tempt us only with the pathos of objectivity. This, of course, can also culminate in an art movement of its own, as happened in the case of the no longer »new objectivity« (»*neue Sachlichkeit*«). The notion of the relatedness and otherness of law and art can also be illustrated with another example:

2. Law and Images: Images of Law and Image Rights

Baudelaire described the observer of modernity as »*peintre de la vie moderne*«, the painter of modern life.[8] The gesture of painting thus seems to constitute a special privilege of reality! While we had no trouble identifying the juristically socialized among the great names of literary history, they are an interestingly rare find among painters: Kandinsky held a doctorate in law, and the biographical information of Anselm Kiefer, too, reveals a history of legal studies.[9] On the other hand, even if Goethe himself held his drawing skills in high regard, these were evidently so limited that we do not see Goethe's accomplishments in his drawing of Castle Malcesine, but rather in his reporting: in *Italian Journey* his way of drawing raised suspicions of espionage leading up to the famous scene at Lake Garda.[10] Here, too, we thus need to uncover the relationship between law and image through systematic reflection and sensory appraisal.

Images of law have a long-standing tradition, and the iconological history of Lady Justice cannot be recounted in a few sentences: Her blindfolded eyes remain a mystery, even if Jose M. González García has delivered further revelations to us in this regard.[11] Peter Goodrich recently cast a new light on the emblems of justice as *obiter depicta*;[12] Gustav Klimt's faculty paintings wander off into their own sphere of artistic reflection and critique and confront us anew with the question of whether abstract ideas such as »justice« can be »depicted«. And in an own attempt found on the cover of our publication series *Legal Analysis as Cultural Research*, Lady Justice, who is originally an »Aurelia«, is torn between the pure and impure sociological legal doctrine, a mythological composition that wavers between »law« and »justice« and seeks to connect the ancient with the (avenging) angelic.[13] And yet another further attempt of the reversal of abstraction: Based on

8 Baudelaire: Le peintre de la vie moderne.

9 Even for the reason that he could not imagine something »more exotic« than the law (personal communication to one of the authors, Gephart).

10 For an explicitly sociological reading of the *Journey*, see Gephart: Goethe als Gesellschaftsforscher. For an overview of sociological readings of art, see Steuerwald: Klassiker der Soziologie der Künste.

11 Cf. the brilliant study by González García: The Eyes of Justice. For an overview of the debate about »law and the image«, cf., e. g., Douzinas/Nead: Law and the Image.

12 Goodrich: Legal Emblems and the Art of Law.

13 Cf. Gephart (ed.): Rechtsanalyse als Kulturforschung.

the logic of a sociological function scheme in which the law is placed in the complete penatrative center of spheres (culture, community, politics, and ecnomics), an AGIL-scheme forms, as visible in the following image:

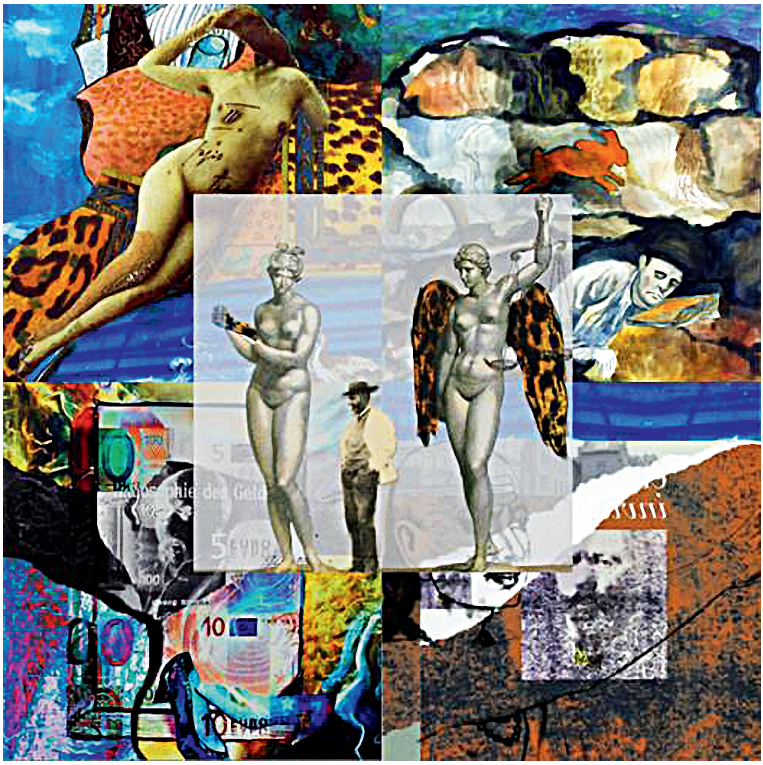

Figure 1: Werner Gephart, Figurative Abstraction: The Law in Society, 2014.

However, if one assesses the representative power of the respective painters to create normative references, for instance in the *Volksbefragung* and other works by Kiefer, one problem remains completely unresolved. Even if we do share the opinion of many cultural theorists that we are undergoing a »visual turn« or a pictorial paradigm, the deontic power of images still needs to be explained.[14] How does the depiction of the soldier Lynndie England in Abu Ghraib serve to derive a ban on torture (one might also think of the provocative early works by Kiefer on the usage of criminally sanctioned gestures and symbols of national socialist rule and »unculture«)? In other words, how does normative power, which is said

[14] On the topic »deontic power«, cf. Searle: Making the Social World; see also Gephart/Suntrup (eds.): The Normative Structure of Human Civilization.

to render the »power of pictures« so dangerous, emanate from a picture and its framing?

Pictures and myths of law as the decor of the *force du droit* do not seek aesthetic truth but functionality.[15] And the legal protection of images, which we merely touched upon in passing, presupposes independence from those with legal power so as to prevent the encroachment of spheres through »degeneracy« as well as the arts from becoming kitsch. Deontic power does not spring from images of its own accord, but their inherent meanings remain dangerous; and the depictability of law, the civil law effects of representation, or the principle of abstraction fundamental to German civil law remain provocative challenges to those who seek to appropriate the world through images.

The inherent laws of the logic of images; the harmonies of color; and, when they are broken, the ruling and hatching, the setting of light and shadow, the symbolism of materials, and the haptics of surfaces – all these artistic elements – cannot be traced back to the normative orders of law or similar normativities. They can, however, create underlying links that cause us to question the paradoxical *règles de l'art* even in modernity and even when they claim to be absent of rules. Law cannot afford such paradoxes. It must file them off and diminish them, whereas the artist has the freedom of normative gesture to create his or her own respective laws. Perhaps this was what Georg Simmel meant with his »individual law«.[16]

3. Law and Music: For Those Who Are Musically Gifted and Those Who Are Not

One may be »unmusical«, i. e. not musically gifted. In that case, one should give up playing the piano. Even for religion, there are said to be »unmusical« people, as Max Weber claimed of himself in a doubly ironic statement.[17] Nobody can presume to be »unmusical« towards the law – to be subject to the law is no leisurely activity or hobby. Those who will not listen must find out the hard way, those who do not understand will be taught; even errors regarding illegality are excused in criminal law only in the case of excusable errors. Law is a permanent naysayer, an institutional denier. Law does not learn; it forces others to learn from it.[18]

He who cannot carry a tune will be kicked out of the choir, and he who cannot tell apart the piano pedals will not even be asked to play at a tea dance. And yet there are underlying, perhaps even unsettling, relations between law and music

15 On this topic, cf. Bourdieu: La force du droit.

16 Simmel: Das individuelle Gesetz.

17 Weber: Briefe 1909–1910, p. 65.

18 Cf. Luhmann: Rechtssoziologie; for the English version, see the translation by Albrow – Luhmann: A Sociological Theory of Law; also on this topic, see Gephart: Gesellschaftstheorie und Recht.

that have as yet hardly been studied. Ethnologists of law and music tell of procedures in which law is not spoken but »sung«.[19] And to Nietzsche, tragedy – a literary form defined by conflicts of norms – emerged from the spirit of music.[20] Before a national team match, the *tiffosi* and the *German Schlachtenbummler* sing national anthems that, while not intended to produce legal communities, do seek to band the fans together as a unit that transcends the life of individual beings. And one needs to have sat in the arena in Verona to experience effervescence that has no functional substitutes. Anyone not moved by medieval church chants or by Bach is doubly »unmusical«, both in a religious and in a musical sense. Yet, we do not know any regular legal music!

Despite this, music is heavily normatively laden. An irregular sequence of sounds is described with the particularly harsh-sounding word »cacophony«. The discovery of the rule-based nature of harmony, despite the irregularity of seventh chords, confirmed Weber in his idea to investigate structures characteristic of occidental modernity precisely in the sphere of irrational experience that is supposedly affected least by rationality.[21] The normativities of music are not called »laws of harmony« by happenstance. And even more astoundingly: beyond cultural boundaries, the Arabic language gives us a hint of the underlying relation between law and music, as »quanoun« refers to both a string instrument and a law, whereas »canon« can refer to a legal domain or have musical meaning. Music as a metaphor comprises the relationship of the charismatic creator of tone, the orchestration of wills to a collective will, and the distribution of roles in the production of tones and attunement. It comprises the overture and the end of a procedure as well as the role of a script that only allows for repetition since the invention of musical script and its modern modifications do not lead to an automaton of tonal subsumption, but to creative interpretation. Yet, despite all orchestrations of will and musical notations, music is still widely described as an abstraction from all empirical entrapments.

Insofar as law can be regarded as the actionable implementation of abstract concepts, we can regard concerts, and particularly opera, as a unique metaphor of law that knows all forms of law from polyphonic parts with several voices to harmonic progression, as well as the figures of charismatics, prompters, players or protagonists, counter-players, antagonists, etc. But it can also serve to exemplify »cultures of injustice« with techniques of degradation in camps[22] and the struggles for »bare survival« that are doomed to failure. Music is and remains »unsettling« much like law, whose *force du droit* is built on many irrational preconditions even

19 Cf., e.g., Pritzel: Die »Traumzeit« im kollektiven Gedächtnis.
20 Nietzsche: Die Geburt der Tragödie aus dem Geiste der Musik.
21 Weber: Zur Musiksoziologie.
22 Cf. the analysis in Gephart: Recht als Kultur, pp. 215–236.

in the rational state, as Emile Durkheim's work on crime and punishment serves to demonstrate.[23]

4. *What One Can Learn About Art from the Law and About Law from the Arts*

When our students and we looked at a so-called »robe picture« by Marcel Odenbach in the Bonner Kunstmuseum with the telling title *Taken off and hung up* – in the artist's presence – a student, wearing a red dress (the color of the robes worn by German constitutional judges), remarked that it looked as if anyone could slip on the judge's garment.[24] On a hanger, it is stripped of its aura, it is part of the liturgy of law from which the bloody traces of memory of shameful law still drip onto a marble table, more reminiscent of a butcher's shop than of the judge's bench, in this case at the German Federal Constitutional Court in Karlsruhe. This astute interpretation does not claim to be normatively binding. Yet, anyone willing to do so can learn from it. Artists are quick to learn from law: that giving legal form to their claims requires innovation from those drafting and interpreting the law; the ephemeral nature of performance; the merely conceptional idea of the artist's binding *Verwirklichungsauftrag* (roughly: mandate to implement) to replace the sunflowers as soon as they have withered (which is a moot point in the case of van Gogh or the lemon in the Joseph Beuys installation: *Capri Battery*); how imagination cannot only pour over society, but can also be legally protected. All this requires the art of the jurists, legal art, and perhaps legal aesthetics, thereby posing difficult questions of »identities« of an artwork.

The relationship between the spheres of law and the arts thus does not require iniquity, fusion, or commingling of spheres.[25] Only through their autonomy can the arts be protected by law instead of being sacrificed to theft, kitsch, or censorship and law understood as a laboratory for normativity, infinity loops, and paradoxes; the seriousness of speech and narration; and a paradigm for the production of truth, even if it may only be of procedural nature. Our plea is therefore that the reciprocal potential for insight be better utilized not only through conceptualization, aesthetic reflection, and sensory appraisals, but also through aesthetic practice through which the differentiated spheres can be brought closer to each other again.

23 Cf., e. g., Durkheim: Le Suicide; Les Règles de la méthode sociologique.

24 »Marcel Odenbach. Papierarbeiten 1975–2013« an exhibition by the Kunstmuseum Bonn (Germany), which took place from 19 September 2013 until 05 January 2014.

25 For the theoretical background, see Gephart: Sphären als Orte der okzidentalen Rationalisierung.

II. About the Volume's Contributions

The texts gathered in this book document the outcomes of a working group regarding »Law and the Arts«, which was organized by the Käte Hamburger Center for Advanced Study in the Humanities »Law as Culture«. The working group occurred on the occasion of the Center's fifth year which focused on topic »Cultural Forms of the Law: Literature, Film, and Architecture« (October 2014–September 2015).

1. Theoretical Orientations

The contributions in the first section are dedicated to theoretical questions about the relationship between law and art that have been sketched above in a more general way: The piece from *Eva Schürmann* puts forth the argument that acts of perception and interpretation are crucial aspects for understanding the law and picturing a case. Thus, she makes an effort for a concept of law that takes this into account, not only from the perspective of legal theory, but also legal practice. In her in-depth analysis of perception, she goes beyond examining a hermeneutic and rhetorical concept of law: rather than interpreting and applying the law only as a logic of classification, it should be also viewed as an art of perspectivization, both in a perceptual and epistemic manner. In this respect, aesthetic components, such as portrayals and other types of depiction, should take center stage when analysing the practice of law more precisely.

Using art as an example, *Angela Condello* and *Enrico Terrone* address the normativity of genres. They represent the thesis that art genres – whether visual arts or formative art, music, or literature – do not only possess the descriptive function that allows artwork to be grouped and hierarchized. Rather, each art genre also emanates a specific normative power that impacts both the respective practices of art as such as well as the appreciation of art.

In her section, *Tiziana Andina* discusses the role and position of normativity in contemporary art. The art object *Fountain* by Duchamp forms the core of her argument. While the definition(s) of art before Duchamp's time were especially based on the judgment of beauty, whose normative structure is inherent, this link has since diminished. In contemporary art, the normativity of aesthetic judgment hardly plays a role anymore; rather, an artwork's normative substance is defined based on the semantic traces that are inscribed in, and respectively on, the object. With that said, the author not only introduces a new definition of art, but also diagnoses new potential for artistic criticism.

José-Manuel Barreto's contribution examines contemporary art's potential to create a vision for a new human rights culture, whose validity and acceptance

should also grow from emotions. Based on Rortry's observation – according to which rational explanations are no longer sufficient to guarantee human rights, but rather a global education of feelings is necessary – Barreto poses the question which role art can play in the process. With reference to the pioneering works of Viola, Salgado, and Botero, he reaches the conclusion that their art is capable of showing new paths for a more just world, as they expand the capacity to empathize with human suffering and encourage solidarity with those disadvantaged in the world, which appears to be highly necessary considering the numerous atrocities and social injustices committed in modernity.

The codification of the law as a rationalization movement of modernity began with Napoleonic Code, then disappeared from the scene in the 20th Century, and is now currently being revived worldwide. Codification efforts underlie the assumption that legal codes should amount to a comprehensive, harmonious, and rational regulation of legal norms. *Uriel Procaccia* criticizes these ideals by drawing a different picture. To do so, he relies on findings that he gains from reflecting upon modern art. Based particularly on an analysis of works by Picasso, Joyce, and Schönberg, Procaccia illustrates that endeavors to codify the legal system are not only doomed to fail, but rather could change to the contrary, namely the creation of more legal disharmony and irrationality.

Based on classics of philosophical, sociological, and political theory, *Jan Christoph Suntrup* examines the power of judgment that unfolds in an ever-specific way in the social spheres of art, law, and politics. In doing so, he illustrates that the power of judgment has a dynamic and thus contingent moment but is nevertheless subject to social pre-conditions that pre-structure the possibilities and developmental conditions of the judgment. Using these sphere-differentiating perspectives, Suntrup discusses the question to what extent the power of legal judgment changes when its emotive foundation is also considered. He explores this not only in the context of human rights, but he also applies his argument to the law in general by addressing the ambiguous category of »legal taste«.

2. Law and the Genres of Art

Following the general theoretical stances found in the previous section, texts in the second section focus on the changing relationship between the law and diverse art genres. *Thomas Dreier* opens by investigating the relationship between norms and images, regardless of whether the latter is to be understood as art or serve a purely illustrative purpose. Two diametrical observations provide him with the impetus for his examination. On the one hand, he assumes that images generate normative effects, although image theory regards these as inadequate. On the other hand, the »iconic turn« only gradually caught on within legal stud-

ies so that the general, image-theoretical requirements of law do not receive their corresponding analytical value. His goal is to close these research gaps by first investigating the idiosyncrasies of law and (artistic) images in order to then sketch their linkage. Using numerous examples, he reveals which normative powers, that in turn influence the law, originate from images. Building upon this, Dreier discusses the often-neglected model character of legal regulation and reaches the conclusion that the law itself functions as an image. In the inverted direction, the image can also then be read as law since deontic power which shapes the law emanates from the image.

Marie Bels and *Patrícia Branco* dedicate their section to the relationship between the law and architecture and analyze the spatialization of law using the example of European court architecture. Essentially, they assume that both the law and architecture depict social representations that enter into a symbiotic relationship in court architecture. Accordingly, the locations of justice can also be referred to as »petrified legal culture« (Gephart), through which not only the normative order of society is expressed, but also the power of the law should be reproduced. In a historic synopsis about models and types of courthouses – from the Roman Empire to the Middle Ages and modernity through to late modernity –, they illustrate how the balance between representationality and functionality expresses itself in the buildings. Four aspects of space, in particular, come into play in the architectural planning (size, room arrangement, security, accessibility), which in turn were weighted in a different manner at various historical points in time. According to Bels and Branco, present-day democracies wish to present themselves via their courthouses as open and heterogeneous as well as complex and dynamic societies at the same time, which poses a special challenge to today's architects.

Is there a pornographic moment hiding within the law? Or: is the law itself even underlined with a pornographic order? These are questions that *Laurent de Sutter* asks himself while assuming that there is a fundamental relationship between law and pornography that can be linked to the term »obscene«. The (self-reflective) porno *On Trial,* in which the U.S. Supreme Court's judicial regulatory options regarding the use of pornographic material takes center stage, serves as the hook for his argumentation. The decisive conflict is sparked based on the question of definition: what is considered obscene, and what is not in American law? Based on this, de Sutter employs a philosophical discussion to reveal that the law, especially, exhibits pornographic elements as it purports and regulates offensive (obscene) semantics of command, thereby normatively entering the social world hand-in-hand with an idea of order based on violence.

Morag Josephine Grant concerns herself with the under-researched relationship between the law and music, which, with the aid of an empirical analysis, reveals to what extent music can provoke hate and violence; where the limits

between free and hate speech are drawn from a human rights perspective; and how this legal coding impacts conflicts between groups. Essential to Grant is the assumption that music represents a versatile (non-)verbal communication medium that not only serves as entertainment, but also unfolds a meaningful power, produces emotions, conveys norms, mobilizes people for specific purposes, and, ultimately, contributes to the construction of an »us«. In this sense, music is a liked and effective medium to form identity during conflicts: It enters bodies in a subtle way, forms them, and thereby is suited for the bodies' political instrumentalization. Moreover, the author shows that the regulation of free speech and hate speech (in regard to human rights) impacts a group's cultural discourse, its image of the enemy, and the dynamic of intercultural conflicts. A music theory approach to this legal matter has the added analytical ability to decipher general cultural discourses and concepts of the enemy as well as conflict dynamics in a more profound way than with conventional methods.

Inge Kroppenberg discusses the sensual perception of the law, which has so far only been poorly handled by the theory of law, by using a rereading of Herder to examine the relationship between the law and sculpture and, in doing so, shifts the sense of touch to the focus of her analysis. Her starting point is the observation that legal theory and operative law concentrate almost exclusively on audible and visual, through which their analytical potential is limited. However, in order to recognize the roots of law in the world of the tactile and material, one must confront it with one's legal body. Symbolically, the author refers to the Statue of Lady Justice on the Fountain of Justice in Bern who, with her eyes and ears being covered, can only use her tactile sense to achieve justice.

In her contribution, *Marta Bucholc* shows us how poetry can contribute to a better understanding of normativity with the aid of three poems by Polish poet Zbigniew Herbert. In Bucholc's reading, Herbert develops a vision of cosmic justice by succinctly revealing fundamental facets and contradictions of normative dimensions of the social world. Here, normativity appears as something created – it is present in the social world but nevertheless uncontrollable by humans. With the assistance of the linguistic device of semantic transparency, Herbert unfolds the normative realm and thereby points to its object, tribunal, and virtue.

3. Legal Cultures and the Aesthetics of the Law

The contributions in the third section are dedicated to the relationships between legal cultures and the aesthetics of the law. *Werner Gephart* opens by investigating the principle of abstraction, which acquires a special position in both modern law and modern art. Contrary to occidental prejudice, according to which the principle of abstraction is a genuine accomplishment of Western modernity, Gep-

hart considers it as *phénomène totale* and as *a priori* of social life. Each form of community building as well as socialization is therefore dependent upon logical abstract work in order to even be able to establish institutional structures that transcend the particular case. Consequently, law and art of the modern era can be viewed as products of a logical abstract work: However, to what extent culture impacts the allegedly purely logical-universal process of abstraction is the main question. In principle, it is accepted that cultural factors not only predetermine the developmental conditions for the sphere of law and art, but also their direction of abstraction. In a critical debate with Weber, Gephart explains this through the use of examples from the Muslim, Chinese, and Indian cultural space. In doing so, he extracts the idiosyncrasies and draws a picture of another aesthetic that is related to the traits of religious ethics.

Using Native Americans as an example, *Sabine N. Meyer* discusses which social effects originate from geographical maps. She assumes that geographical maps are not to be viewed as objective illustrations of the real world. Rather, they convey cultural knowledge and serve as power instruments in the distribution of physical space as they reach a factual binding validity over the course of their legal fixation. Meyer argues that an epistemological order of the white colonialists is inscribed in the current geographical maps of the United States, a claim that indigenous artists challenge in many respects. Based on two art formats, indigenous cartography and cartographic poems, she discusses the potential as well as the pitfalls and limits of remapping the social word using indigenous art. The treading narratives in the »alterNative« geographies thereby anticipate creating their normative power both from a reservoir of cultural memories as well as from current social practices and order structures. Nevertheless, Meyer suggests that there will always be the danger that artistically remapping the world could allow colonial order to pass through a loophole and reproduce.

Grischka Petri examines color to investigate what cognitive theoretical value art can offer the law. Fundamental is the assumption that the law is a model of social reality that finds its ideational moment in norms and is expressed in judicial verdicts. However, here, a copy of reality is not the topic of discussion but rather the depiction that follows its own logic – a logic that functions as an application filter and is shaped by culture. The law produces reality in a specific way and is therefore to be viewed as a creative medium. While traditional legal theories are skeptical about creativity in the judicial process, Petri, following an illustrative theoretical epistemology when finding the truth, distances himself from this stance. Instead, he discusses the question of which type of truth should emerge in processes where color is used as a creative metaphor for reaching a judgment.

In his contribution, *Zoltán Megyeri-Pálffi* comes back to the thesis of court buildings as »petrified legal culture« (Gephart). He discusses the influence Hungarian legal culture has on court architecture. Hungarian legal culture is shaped

by an interaction and linkage of various normative orders, which are to be viewed as a result of their (political) history, although the influence of West European legal traditions is unmistakable and defining. Using the connection between rituals and the symbolism and functionality of the law, Megyeri-Pálffi illustrates how Hungarian law spatializes, as particularly seen in the rules of procedural law in the architectural configuration of judicial buildings.

4. Living Art and Law in Action

An interview with the artist *Tim Shaw,* conducted by Morag Josephine Grant and Eva Schürmann, concludes the volume. It begins with a reflection upon his work *Breakdown Clown,* which he created during his time as Artist in Residence at the Käte Hamburger Center for Advanced Studies »Law as Culture«. The work is a speaking figure that is equipped with awareness and asks questions about the understanding of law in a global world – at the intersection between human and machine as a somewhat creepy sculpture on the move. As already hinted at in the clown's figure, the work takes on the role of mediating between the perceptual worlds and thereby constantly reminds people about the foundations of their human condition. Based on that, the artist's oeuvre is unfolded and portrayed in the interview. Topics such as which normative intentions emanate from his works; where he sees the relationship between aesthetics, beauty, and power; and what the art of interpretation means to him are also addressed. The socially critical dimension originates particularly from his last works. Emphasized here is the installation *Casting a Dark Democracy,* which makes his involvement with topics such as terrorism, torture, and war obvious and also allows insight into the human abyss.

With this volume, we hope to have looked beyond the classical subject matter of law and literature and incorporated the increasing interest for visual cultures, yet also encouraged new fields of research that relate to the hidden relationship between law and music as well as the colorfulness of law and law as sculpture.

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List of Figures

I. Theoretical Orientations

Eva Schürmann

Law as the Art of Picturing a Case

The right understanding of any matter and a misunderstanding of the same matter are not mutually exclusive.[1]

Since time immemorial, the academic status of jurisprudence has been disputed: clearly, the discipline cannot claim the same degree of empirical objectivity as the natural sciences. However, there is extensive debate surrounding the question of whether it is a *Geisteswissenschaft* due to its hermeneutic constitution, a social science due to its societal orientation, or a field of cultural studies due to its normative foundations.[2]

In this paper, I intend to show how an understanding of law as art can help in its self-clarification and positioning. I am not referring here primarily to the art of storytelling and rhetoric, although law can certainly be that, but rather to the art of finding and explaining comprehensive interpretive perspectives through the lens of what is right. This art form begins when a constellation is perceived and ends once a perspective has been provided on an interpretation in a court of law or in the opinion of the court. The German term *Darstellung* would be particularly appropriate because it implies much more than »representation«: it means presenting, picturing and embodying a view of something depicted. For this I use English terms such as portrayal, depiction, and figuration.

I do not consider art to be everything and anything, nor do I see it as an institution, but rather as the unrestricted ability to view things differently and bring them to light.[3] While in museum art, the freedom of seeing things in a different light is conditioned by discourse, markets, and history, the same freedom in a legal context is bound to a prescribed system of rules and its fundamental normative differences or legal principles. As I will argue, the art of portraying matters in a legal setting comprises a figurative moment of discovering and inventing effective points of argumentation as well as the configuration of productive perspectives, performative communication of evaluative attitudes, and a critical consideration of context with regard to power and interests.

1 Kafka: Vor dem Gesetz, p. 229.

2 For an overview, see: Simon: Es ist, wie es ist.

3 I examine this aesthetic concept in greater detail in my book: Schürmann: Sehen als Praxis, Ch. 8.

I will expand on this idea below. My aim is to introduce a concept for understanding law that does away with a rationalistic self-misunderstanding and a false image of neutrality without advocating a harmless whateverism. As such, my reflections seek to guard against two, if not three, errors. Firstly, I strive to counteract an (all too positivist) understanding of law as a tool for ensuring compliance by emphasizing the role of creativity and freedom[4] in ordering productive perspectives. Secondly, I look to dispel suspicions of arbitrariness by highlighting the gravitational forces that bind and limit the interpretative flexibility of the law, the discretionary scope of the courts, and the corruptibility of its actors. Thirdly, I endeavor to refute skeptics who stress that the violent aspect of lawmaking results, in particular, from the fact that it has no ultimate justification. The problem of contingent constitutive acts will be shown to be the structural moment of freedom.

It is certainly true that the interpretative aspects of the hermeneutic method applied within jurisprudence have been researched extensively, but interpretation is more than the logic of subsumption. In philosophical terms, interpretation is the inevitable consequence of the structure-based perspectivism inherent in every human attitude to the world. Consequently, any philosophical derivation of interpretationism must start with perspectivism, as interpretations are akin to articulated perspectives, and perspectives are epistemologically transcendental. This also sheds light on why the *aisthetic* concept of the aesthetic that I am presenting must begin with perception. The optical laws of perspective are epistemic as well, and they determine what is discerned, in what way, and from which viewpoint.

Every judgment on appeal by a higher court is based on the hermeneutic and interpretative constitution of the law.[5] However, comprehension and apprehension are neither exclusively linguistic nor are they intrinsic acts of consciousness that can be worked out by a jurist in isolation. Rather, they sediment in aisthetically (perceptually) tangible, medium-embodied portrayals that necessarily represent a choice in terms of understanding the matters in question. And the fact that this choice is never without an alternative is a dimension of freedom within that what philosophers call the *space of reasons*.

As such, the concept of legal discourse as being permeated by creative scope for interpretation and portrayal should help to save us from the illusion that we are dealing with a nonpartisan, rational, and indifferent system of rule application and monitoring. At the same time, affirming this freedom and taking it seriously

4 Freedom in the sense of Hegel: »The basis [*Boden*] of right is the *realm of spirit* in general and its precise location and point of departure is the *will*; the will is *free*, so that freedom constitutes its substance and destiny [*Bestimmung*] and the system of right is the realm of actualized freedom, the world of spirit produced from within itself as a second nature.« Hegel: Elements of the Philosophy of Right, § 4, 35.

5 See Werner Gephart, who discusses this as an interpretative paradigm in: Gesellschaftstheorie und Recht, pp. 77–91.

in a world where decisions have to be made without the certainty of ultimate justification could aid reflection and self-understanding within the field of jurisprudence. Based as they always are on perspectives, these decisions represent weightings, which means they can never take equal account of everyone or everything. This concept of the law could also result in people learning to differentiate more effectively between an honest struggle to arrive at a conflict-resolving decision based on legal principles and the irresponsible assertion of particular interests, and in their developing an ability to see through the relativity of their portrayal more easily. In the first case, it is enlightening for us to know what we are doing when we pass legislation, vote for particular perspectives, prioritize one aspect over another, etc. In the second case, it might be possible to find and demonstrate the one-sidedness and insufficiencies of the perspectives being offered.

History has shown at any rate that it is impossible, regardless of whether control algorithms are used or regulations tightened, to completely rule out legislative abuses,[6] as an essential part of what makes free actions free is the possibility of them being abused. This makes it all the more important to have the critical diagnostic skills needed to distinguish legal principles from political objectives or the reckless assertion of power from genuine efforts to achieve equality when the arguments are first being put forward.

I will now proceed as follows: firstly, I will present my concept of portrayal as the provision of perspectives in order to explain what is meant by interpretation, configuration, conditionality of portrayal, and other key terms. This will shed light on why these terms are aesthetic in dimension, going beyond an understanding of law as argumentation. Secondly, I will examine philosophical perspectivism as the basis for every interpretation. Thirdly and finally, I will consider the difference between the justifiable and the axiomatic, as well as the problem of the contingency of decisions.

I. Portrayals, Readings, and Presentations

Human practice lives in and thrives on the tension between factuality and interpretation. Conflicting points of view arise from competing interpretations of what the facts are in a given case. These interpretations must be articulated and formulated in portrayals and other types of depiction, mostly, but not necessarily, linguistic (consider the explosive nature of caricatures). In these portrayals of events, controversial perspectives collide, along with the claims to validity based

6 See Rüthers: Die unbegrenzte Auslegung.

upon them. The interpretative disputes are thus a conflict over the correct construction of the factual.

It is, no doubt, impossible to emphasize enough in this context that interpretations in general are not matters of private language but are rather facilitated and limited by a socially shared practice[7] that is subject to the multilayered conditions of cultural convictions, technical possibilities, and medial embodiment. Consequently, portrayals make perspectives tangible in the sense of interpretative schemes. Together with the embodiment of social roles and technical visualization, the media and activities involved in portraying events in words and pictures therefore constitute a key category of cultural practice: the practices of articulating, depicting, and embodying create a basic form of mediality, which generates social realities.[8] These practices are found wherever something is ordered in terms of perspective and made aesthetically perceptible and, consequently, wherever interpretations become visible and patterns of perception tangible.

Admittedly, portrayal is first and foremost the pivotal element of all art forms. Images and text, films and theatre performances are principally portrayals of higher levels of reflection and degrees of production as everyday practices in the use of images or linguistic depiction. But we also portray something when we put on our work clothes and then assume the associated social role,[9] or when we talk about what happened to us or why we did something. The same is true when we tell a doctor about an illness or design a homepage. Journalists can sensationalize the news, while documentaries may attempt to present information in as neutral and unbiased a way as possible. And all of this is not taking place primarily in the aesthetic sphere but rather in equal part in the political, legal, and ethical spheres. Now, it would indeed be spherical sacrilege to flatten the boundaries between law and art by stressing that both are dependent on portrayal, as the respective scope for portrayal in each field is defined by very different discursive horizons. But if it is jumping the gun from an aesthetic point of view to confuse freedom with arbitrariness and underestimate the general historical and cultural conditions determining what can be said and seen when and in what way, then confusing perspectivity with arbitrariness in a legal context demonstrates that key requirements have been forgotten.

The decisive factor is that the ordering of events or items in portrayals does

7 Consequently, Günter Abel makes systematic reference to interpretative *practice*, stating that the whole of human existence is ultimately interpretative, »dependent on the underlying system of interpretation, the horizon of interpretation and the regularities of the interpretative practice that this requires.« Abel: Sprache, Zeichen, Interpretation, p. 45.

8 I have attempted to spell this out in anthropological terms elsewhere, as there are many reasons to see a differentia specifica between humans and other living organisms when it comes to the ability to portray things. Schürmann: Verkörpertes Denken, Medialität des Geistes.

9 Not only in terms of theatrical plays, as described by Goffman, but also in the sense of »scenic existence«, as Hogrebe calls it. Goffman: Wir alle spielen Theater; Hogrebe: Riskante Lebensnähe.

not simply involve picturing and formulating *something* but rather a very specific view of what is being shown. Consequently, as Ludwig Wittgenstein has rightly noted, portrayal in its general form is »the way we look at things,«[10] meaning a way of expounding them. What is portrayed is therefore something produced for the purpose of visualizing an attitude toward the depicted object and subject.

Witnesses taking the stand in court, lawyers making their closing arguments, and politicians giving speeches to parliament on draft bills are in an emphatic sense portraying and presenting something that will enable perspectives and interpretations to be perceived, while of course more or less concealing other interpretations at the same time. Criminal proceedings, in particular, involve especially controversial cases of portrayal and interpretation. After all, reconstructing the actual events of a crime has to do with questions of guilt and innocence, justice and truth.[11] Working out arguments and points of view that are capable of clearing the justification threshold of certain paragraphs is a matter of crafting their presentation and creating a picture that shows how something can be perceived. In the worst-case scenario, the freedom of interpretation that arises here could provide a gateway for shysters and pettifoggers; in the best-case scenario, it could provide an opportunity for closer approximation to the ideal of justice, which serves as its main principle.[12] Presenting a case for the prosecution and for the defense involves aesthetic activities of depiction, perspectivization, and articulation. Competing narratives[13] provide different accounts of a crime and determine which laws should be taken into account in the first place, and under which general category the crime should be subsumed. Judicial law is based on performative processes relating to the issuing of a ruling, which has come about as a result of the portrayals produced, which are the means of interests being asserted or subjected. As acts of perspectivization, these portrayals should be examined repeatedly in terms of their presentational intention in order to potentially counteract any strategic effects they are seeking to achieve.

Portrayal is undoubtedly closely related at a systematic level to argumentation,[14] rationale,[15] and justification. Despite this, considering jurisprudence as the art of portrayal represents a shift in emphasis from viewing it as an argumentation

10 Wittgenstein: Philosophical Investigations, p. 49, § 122.

11 See Thier: Die Wahrheit und nichts als die Wahrheit. Nonetheless, Thier rejects the truth model based on consensus theory, citing the absolute binding nature of the legislative norms.

12 For the significance of the ideal of justice as a starting point for legal criticism, see the highly convincing study by Reinhardt: Der Überschuss der Gerechtigkeit.

13 This is being discussed within the Cluster of Excellence »The Formation of Normative Orders« at Goethe University Frankfurt under the problem title of the justification narrative. See Fahrmeir (ed.): Rechtfertigungsnarrative.

14 Alexy: Theorie der juristischen Argumentation.

15 For the rhetorical creation of justification as based on the unspoken, see Gräfin von Schlieffen (ed.): Das Enthymem.

practice, because its perspectivist constitution, which already begins with the perception and apprehension of a fact constellation, comes into stronger focus than its rational order. The perspective-giving ordering of this perception in a portrayal before a court contains projective moments of depiction, showing how something should or could be discerned.

It would also be completely misguided from an artistic point of view to expect there to be no contradictions. As Kafka writes, it is possible to understand and misunderstand something at the same time, as it looks different from one perspective than it does from another. While the give and take of reasons is based on discursive processes of forming an opinion and reaching a verdict, art also comes into play through productive perspectives, a creative feel for interpretative options and decision-making leaps. Without wishing to embark upon an exegesis of Carl Schmitt at this point, I nonetheless would like to make reference to his conclusion that »the legal power of the decision … [is] not the same as the outcome of the rationalizing process.«[16] At any rate, it is decisions that put an end to the processes of weighing and evaluation.

We learn from aesthetics that content and form are inseparable, and that the power of the perspective for its object is constitutional. Anyone trained in the concept of aesthetic portrayal should be particularly well equipped to analyze and critique the interpretations that emerge in the course of the portrayal of events and issues, along with the strategies for creating particular impressions. This is related to the fact that, with the aesthetic, we are dealing with the necessary shaping, visualization, and articulation efforts that unveil the assumed neutrality of facts as a myth.

What I called the conditionality of portrayal focuses on the significance of a formulation for the content expressed through it or of perspective for its so-called object. For what the case *is* and how something shows or portrays itself are deeply interconnected. We cannot ascertain what something is without taking into account the way we speak about it or perceive it. The true nature of a thing is only realized, as it were, when it is formulated and interpreted. Decisively, however, the freedom of apprehension or perception relates to the choice of a viewpoint and attitude, not to the thing that can be identified from that viewpoint because it is visible and intelligible. The possibilities for adopting perspectives are endless, but, from a given perspective, the object being considered necessarily shows specific aspects, both optically and epistemically. Additionally, the choice of a viewpoint is not generally random or without motivation but rather determined by the embodied situation of being in the world. By contrast, there is certainly decisional freedom to change viewpoint and to picture a different choice.[17]

16 Schmitt: Politische Theologie, p. 38.

17 See Kaulbach: Philosophie des Perspektivismus, p. 1: »This truth is assigned to respective per-