

*Werner Gephart /
Jure Leko (Eds.)*

Law and the Arts

Elective Affinities and
Relationships of Tension



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Werner Gephart and Jure Leko

Introduction:
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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 aesthetic 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*.