

LAW/ART: Constructive Interferences

Sabine Mueller-Mall

In this article I will reconsider the way we typically think of the relation of law and art from a legal theory perspective, and perhaps this could even lead to a little rerouting of the conventional imagination we attach to law.

I. Law and Art – Attraction or Repulsion?

Many works of art¹ involve legal topics, legal ideas, or legal procedures and practices—recent examples are, for instance, Rimini Protokoll's *Zeugen! Ein Strafkmammerspiel*,² or Milo Rau's film and theatre productions *Die Moskauer Prozesse*³ and *The Congo Tribunal*⁴. At the same time, art is not rarely the object of legal cases (e. g. *Mephisto*⁵ and *Esra*⁶ before the German Constitutional Court)⁷, or of legal thought⁸. The reason for a reciprocal appearance of "the other" could be found in a specific attraction as well as in a pronounced repulsion of law and art: is it the "scandal" (more or less) hidden in every legal case that renders legal topics attractive for art? Does the law have particular difficulties dealing with the "as if" which often characterizes the sphere of art? Or alternatively, is art attractive for legal thought because the aesthetic and the juridical have something in common? Or do we have to think the other way round: is it the impossible relation, the impossibility of any relatedness, the conceptual repulsion of law and art that makes confrontations so attractive?

Although law and art have the reputation of belonging to widely different spheres, certain structural peculiarities of law might work as possible catalysts for both: for law's orientation towards art as well as for artworks that include aspects of influencing, challenging, or questioning the law. Examples I shall outline in the next sections are the *performativity* of law and its directedness towards *judgment*. Of course, there are possibly "structural peculiarities of art" that foster the same effects, too—my concentration on a law-oriented perspective is based on a decision (which is caused by the fact that my expertise is limited to this perspective) and not on necessity.

But before delving deeper into that law-oriented perspective, before crystalizing those peculiarities of law that could be vantage points from which we could undertake further experiments of artistic and legal co-working, we should take one step back and have a look at the conventional and familiar picture of the relation of law and art:

"Modern law is born in its separation from aesthetic considerations and the aspirations of literature and art, and a wall is built between the two sides. The relationship between art, literature, and law, between the aesthetic and the normative, is presented as one between pluralism and unity, surface openness and deep closure, figuration and emplotment. Art is assigned to imagination, creativity, and playfulness, law to control, discipline, and sobriety. There can be no greater contrast than that between the open texts and abstract paintings of the modernist tradition and the text of the Obscene Publications Act, The Official Secrets Act, or indeed any other statute."⁹

Often quite solidified in discourse, the relation of law and art is drawn as one of radically distinct spheres. And in fact they are very different in a certain sense: if we think of law and art as institutionalized practices, of course both fields can be identified as different universes, e. g. courts and galleries, could we think of more distant places? A tribunal and an installation—who would dare to think of any similarities? A lawyer and a curator—do these roles share anything at all? At first sight, those questions seem to be rhetorical. Of course there are no similarities, maybe not even thinkable junctions. The relation of art and law, therefore (as is a widespread judgment), has to be limited to hierarchical treatments: legal judgments on art (e.g. on copyrights), or artistic judgments on law. Either law deals with art or art deals with law—but both connections are more treatments than linkages; in this understanding (that I shall challenge in the following sections), the one's dealing with the other has no further implications. If a legal court judges on art, this judgment does not fall back on law itself or the other way round with art on law.

And still, in both spheres, in legal thought and in art, the very different sphere of the “other” is the rage, as mentioned above: the list of publications on law and art, law and the image, etc., is probably slightly smaller than that of artworks dealing with legal material or procedure. And it is not only the great amount of cross over in both directions that attracts my attention, but also the observation that these linkages do not remain without consequences: the above-mentioned works (of art) and (legal) cases do not make the (legal) cases and works (of art) *objects* of the latter (former). I would turn it around and affirm that the relation of art and law in these constellations could be better described by a concept of *reciprocity*. As far as *The Congo Tribunal* makes use of legal procedures, this “making use of law” drops back to the art work—in this particular case (which serves as an example here), the spectators of the play/performance get into a juridical situation: their judgment is not purely aesthetic but also juridical; the question of beauty or “good” art turns into a question of justice or rightness. And the prohibition of the selling of a novel does not only formulate a juridical verdict, but will also cause a special reading of the forbidden novel in the future: it is irreversibly an illegal act to read the novel, then, and of course this legal aspect influences the artistic quality, and so the legal case will become part of the reading act¹⁰ and thus the novel.

In a way, we could state that there is a reciprocal attraction of law and art. Thus, we have to admit at second sight: perhaps the opposition of law and art (and not the question of analogies) is more provisional than it seems to be. Even if we outline the institutional settings, there are some structural similarities to be explored—ones that are in contrast to the conventional attributions to law and art¹¹. However—to specify my current project—I do not aim to expose analogies of law and art. Rather, I shall try to develop an idea of law that allows an emphasis on vantage points for the observation and creation of linkages of both spheres. The notion of “linkage” might indicate the more complex relationship of art and law to be developed: the logic of linking presupposes distinct objects of which the relationship has to be characterized by a certain balance of attraction and repulsion, which is stabilized through the linkage again. It prevents the melding of both spheres and at the same time it bridges them.

II. Analogies – Why not actually look for parallelisms?

However, before having a closer look at the law, I would like to say a few words on the question of why I am not looking for analogies of law and art. Especially concerning law and literature, analogizing is a quite common strategy to

encompass the relationship. There is an already rather well-established field of research and experiments called “law and literature”¹² or “law as literature”¹³. Those movements might indicate that the assumption is true that it could be promising to look for structural analogies or parallelisms of law and art. One prominent example of such a structural analogy: both law and literature (art) are dependent on practices of interpretation. In other words, neither law nor art can be perceived without using hermeneutic techniques, at least on a very basic level. I can neither apply nor grasp the meaning of a legal norm text without interpreting it. And the same is true for reading a literary text (or watching a play).

Although such kinds of analogies can be taken as an argument for the assumption that both law and art are not those radically distinct spheres that they seem to be at first sight, I will not try to focus on finding such analogies in order to approximate the relation of law and art. In addition, although it is quite clear that the relation of art and law would be designed in an overly simplified manner if law were described only as a possible object of art or if art were understood as a simple object of law, I am convinced that analogies are not very productive for our enterprise because they take a step in the wrong direction. Analogies show similarities on the one hand, but on the other hand they keep a distance that does not allow us to think of intersection points—*parallel lines do not meet*. Instead, my considerations are based on and, at the same time, trace the assumption that there are intersections of law and art that matter for both. As I would turn it around—it is not a parallelism, but instead it is the difference of law and art that makes interferences in both areas effective. Therefore, I shall not place special emphasis on such analogies, although they might appear from time to time in my following considerations. Nevertheless, I am convinced that the differences of law and art that should instead be the focus are to be found in other places than a conventional picture of law might suggest. But what does this conventional picture of law look like, and in what sense does it have to be adjusted? These are the questions I will now further address in the following sections.

III. Law’s Image

Law’s image is not the best. Typically we think of law as a set of rules defining political spaces and especially: borders. Thus, law is often seen as a limiting instrument, even if it is also a concept that allows us to think of rights. On the other hand, law is also seen as the field where justice is the most important value. Furthermore, law is the technique that makes democracy possible, because democratic decisions would not be associated with a normative force without the idea of law (which is not necessarily true the other way round). We imagine law as creating the distinction of just/unjust and thus creating (metaphorical) spaces, spheres of justice, and other worlds. And still, we often connect law to bureaucratic procedures, boring people, and courts that feel “un-bound.” Law is the main technique of conservative, slow institutionalization.

In this picture, the concept of law shares two kinds of very different attributions: that of (good) justice and that of (bad) bureaucracy/institutionality/conservatism. Therefore, we have a twofold picture of law, law’s difficult image, as the field searching for justice, but also representing motionless institutions that aggregate power.

IV. The Case of Law

The “case of law” is to be found in the always-to-be-bridged difference of law’s image and law’s practice. Briefly said: if the image is that of a conservative and

sometimes boring technique that is still able to provide justice, then its practice is that of a discomposing and shockingly open, everlasting attempt to balance norms and normative questions. Of course this equilibration, and this is the specific difficulty of law, only works if law can observe [certain] proprieties: only (the image of) a conservative technique can inspire and safeguard confidence in law's normativity and ability of solving conflicts. The difficult task in challenging or criticizing, in provoking or influencing the law is then: to recognize the object of these involvements. Who and what actually is the law? What do we mean when we talk about "law" besides the simplified image described above?

I shall try to approximate this not exactly simple question by exposing two aspects of law that could be interesting for the present considerations: its performativity and its connection to judgment. These two aspects will urge us, as I believe, to think of law as a practice that necessarily has to interact with other spheres. And, this is what I dare to believe at least, those aspects to be outlined will help us to leave a certain very simplified image behind in the dust: the one of (art as free and) law as bound¹⁴.

Law's performativity

"The" law "is" neither just conservative nor exclusively progressive—law refers to antecedence and at the same time it is positing something for the future. If a court judges a case, and does so by referring to a legal norm, the court usually states: we are applying this legal norm in this specific interpretation to that specific case in the version we assume to be true, and this application is fair/just/equitable/legitimate. This assertion is not describing the world, it is judging *and* providing this assertion representing the judgment with legal normativity, or to be more exact, reclaiming legal normativity for the judgment. This claim refers to existing rules (e.g. a rule that installs the court as a legitimate court; the legal norm to which the judgment refers), thus it has a historical component, but at the same time, as a *claim* for normativity it is referring to the future: a legal future of normative perception the original court cannot control by its judgment. Because whether we can speak of (realized, "existing") legal normativity depends not only on the court and its judgment, but also on the normative perception of this judgment in the future: if no other court, no enforcement officer, no administrative agency perceives this judgment normatively, then it would be difficult to call it "law". An example: if a parliament adopts a law, but no one ever takes it seriously and no one ever even tries to apply this law, is it still a "law"? Probably not.

These examples might hopefully illustrate what I mean by saying law is both conservative and progressive at the same time. Legal normativity (which is the necessary condition to identify any simple assertion with the formulation of a legal rule or of a law) cannot be generated by fulfilling a catalogue of requirements. It presupposes an event that refers to other events of law generation as well as it being normatively perceived by future events of law generation. Thus, it can become part of an infinite process of generating legal norms, a process that we call law. Now it might be comprehensible to state that a very common distinction is not really helpful: that of *law in the books* versus *law in action*.¹⁵ This distinction presupposes that there is a constituting difference of a legal norm that is written in a statute, for example, and the application of such a norm. In the picture I am outlining here, law that is "only" in the books can never be law. But how, then, can we imagine law? Is it not a set of rules that allows us to follow the path of regular/irregular distinction? Wittgenstein's rule-following considerations expose us to, among others, an important insight: that the idea of a static rule that is to be identified with its formulation and with its interpretation is not very convincing. Since

*rule following is a practice*¹⁶, applying legal norms has to be a practice, too—even if we conceive of legal norms as rules. This again implies nothing less than that “applying” a legal norm has an effect on this norm.

My proposal is to think of law in a different way: as *performative*. Thinking law as a performative practice includes the idea of a double-sided law. Performative law means always both—in the books and in action; it is constituted by the tension of both. Legal normativity is the result of a practice that is not completed when a legal norm comes into the world (by parliamentary decision for example). Law presupposes a practice—what should a law be like that is never applied?

Also, as I described above, law requires a performative moment to become law, or, to be more precise, it requires more than one performative moment: law is a performative practice. Law’s performativity is not identical with the concept of performance (even if we could probably find performance aspects in a trial for example)—it refers to a concept of performativity that describes a way of forming, of per-forming the world through a certain structure of the use of signs that is always both at the same time a *procedure* and a *connection* of a (historical) sign to a (new) context. The concept of performativity here describes a mode of doing something to the world.¹⁷ Thus, the concept of legal performativity describes the way law interacts with the world.¹⁸

Law interrupts the way of the world. Therefore, the assumption of law as a purely historically operating technique trying to simply apply something that has already been there before its application and will be there in the same way after its application, this assumption can never be true.

What are the consequences of thinking law as a performative practice? Among others, one main consequence is that criticizing law is more complex than criticizing certain discrete assertions assigned to law, because criticizing a practice that is altering the world in a performative way is not possible by referring only to a locution. On the other hand, influencing the law is manifoldly possible: vantage points could be the situation of a performative act generating or iterating a legal norm—e. g. the institutional context of a court, as well as the hermeneutic history of a certain assertion or in terms of the history of ideas involved; especially interesting for influencing the law could be a subsequent act of perceiving the original moment of performative practice.

If we look at law from this performative perspective, there is one other noticeable aspect that brings us to a further vantage point for investigating the relation of art and law: the question of *form and substance*, which will allow us to take a look at the concept of judgment.

Law and judgment

We could be sorely tempted to deny that there is a question of form and substance in law or with law at all. Is it not quite obvious that legal procedure, the *formality* of law, is representing form while the contents of the law are representing substance? As already insinuated in describing the law as a performative practice, the relation is more complicated, or at least, has a more intriguing side: if we comprehend “justice” as I indicated above, as a predicate marking a successive relation-building of a legal norm in a specific interpretation and a specific case, then the use of *justice* differs from a purely material idea. The question of legality becomes a question of “matching”.¹⁹ Making a legal judgment, then, means *ad-justing* legal norms and the legal case. The *ad-justing* procedure, now, comprises both

form and substance, but is not to be reduced to one of the two; there is no possibility of describing the procedure of making a legal judgment as purely formal, e.g. by an algorithm. And there is no possibility of giving a general rule of how to apply a legal rule to all thinkable cases, in other words, we cannot give a definite answer on the question of which cases exactly are contained in a rule.²⁰ Recognizing that legal judgment is still possible, we have to admit that it necessarily has to have a creative quality that can at least bridge procedure and material. A legal judgment, thus, is a pure judgment, thinking a “general” and a “specific” together.²¹ This thinking “together” cannot be completely described by the concept of “subsuming”—by subsuming a case to a rule—because a court has to find the general norm that (Wittgenstein!) *matches* with the case. And this finding process is hermeneutic as well as creative—it requires finding a matching legal norm to a case as well as interpreting this norm, adjusting it so that the matching becomes obvious. This procedure of perceiving a specific case and a general norm and adjusting both until they match is probably best grasped as a reflective judgment. This again is the kind of judgment Kant described along the example of an aesthetic judgment.

I am not indicating that legal and aesthetic judgments are identical or very similar, but instead that they could be understood as being members of the same family of judgments. And maybe this is one of the reasons why law and art have some respective attraction for each other: the versions of judgment in law and art are at least as close that they allow to make visible processes of judgment at all—by illustrating one kind of judgment, they refer to the other kind of judgment involved. If, for example, in a play at the theatre, we are forced to make a legal judgment, this confronts us with the role we have as spectators watching the play (artwork) at the same time. Legal and aesthetic judgments are able to refer to each other as practices. Judging an artwork as “good” or “beautiful” reminds us of judging something as “just” or “unjust”.

Therefore, not only does the hermeneutic precondition of every legal judgment show a proximity to aesthetic judgment, but also its predication as just/unjust. In other words: the whole concept of “justice” contains similar difficulties as that of “beauty”. There is no general rule to be applied concerning these concepts; we cannot define criteria of justice and beauty. Rather, those concepts designate a relation of matching. This relation is always to be established or produced again, in every single legal case and concerning every artwork. We can neither re-apply nor copy it. This singularity is shared by legal as well as aesthetic judgments. It might open a perspective on the relation of both: art and law are not merely modes of interacting with the world. They are, and at this point it is possible to compare art and law, they are modes of interaction with the world that are not necessarily only, but also *directed* towards, judgment. It means in effect that if we want to influence law artistically, this directedness towards judgment could be a weak point because every judgment is not only singular but also fragile; it is subjective and amenable to external influence.

V. Art on Law

Law’s performativity and law’s directedness towards judgment are only two examples of vantage points that might illustrate how we can approximate a relation of law and art. This relation has a quite abstract character on the one hand, but on the other hand it could liberate the way art imagines the law and thus have a rather concrete consequence: that being that law is not a story from a different planet, but to the contrary, in a way artists are experts of law. This is the case because they

are (possibly) experts of performative acts as well as of dealing with future judgments.

On a more general level, if we understand law as practice, the direct consequence is that law has to interact with other spheres, that there is no exclusive law. Because there is no practice without history, without context, and without future. Law is reacting to questions that are asked by the world, law is interrupting the world, and law is a sequel of the world.

The possibility of art on law, then, is not necessarily connected to a relation that makes law the object of art. Art can spin itself into law by becoming a protagonist of law, by becoming an involved party, by re-enacting (or: enacting?) law (or a part?), by demonstrating the difficult process of law-finding and law-making to the law. In addition, if law is not an unswayable sphere, if law as a judgment-based practice is context-sensitive, art on law will always make a difference.

Notes

1 "Art" is broadly understood here, and includes theatre, literature, performance, and not only visual arts.

2 cf. http://www.rimini-protokoll.de/website/en/project_172.html.

3 cf. <http://international-institute.de/?p=89> and <http://www.the-moscow-trials.com>.

4 cf. <http://www.the-congo-tribunal.com>.

5 "Mephisto", German Constitutional Court, Order of 24 February 1971 – 1 BvR 435/68.

6 "Esra", German Constitutional Court, Order of 13 June 2007 - 1 BvR 1783/05.

7 See for the case of Russia Sandra Frimmel, *Kunsturteile. Gerichtsprozesse gegen Kunst, Künstler und Kuratoren in Russland nach der Perestroika*, Wien/Köln/Weimar, 2015.

8 See, for example, Dennis E. Curtis and Judith Resnik, "Images of Justice," *Yale Law Journal* 96, 1987, pp. 1727-1772; Curtis and Resnik, *Representing Justice. Invention, Controversy, and Rights in City-States and Democratic Courtrooms*, New Haven, 2011; Oren Ben-Dor (ed.), *Law and Art. Justice, Ethics and Aesthetics*, New York, 2011.

9 Costas Douzinas and Lynda Nead, "Law and Aesthetics," in Douzinas and Nead (eds.), *Law and the Image: The Authority of Art and the Aesthetics of Law*, Chicago, 1999, p. 3.

10 See Wolfgang Iser, *The Act of Reading: A Theory of Aesthetic Response*, Baltimore, 1980.

11 I shall not delve deeper into this aspect; see, for example, Cornelia Vismann, *Medien der Rechtsprechung*, Frankfurt am Main, 2011.

12 See, for example, Richard Posner, *Law and Literature*, Cambridge MA, 2009.

13 See, for example, Sanford Levinson, "Law as Literature", *Texas Law Review* 60/3, 1982, pp. 373–403.

14 Of course, both sides of the opposition have been contested and have had different appearances in different times. For example, a movement called "legal realism" (in the U.S. and in Scandinavia) and "Freirechtsschule" (in Germany) contests the possibility of law being a *binding* normative force; Oliver W. Holmes, "The Path of the Law", *Harvard Law Review* 10, 1897, pp. 457–478; Hermann Kantorowicz, *Der Kampf um die Rechtswissenschaft* (new ed. by Karlheinz Muscheler), Baden-Baden, 2002 (orig. 1906).

15 See Roscoe Pound, "Law in Books and Law in Action," *American Law Review* 44, 1910, pp. 12-36.

16 Wittgenstein, *PI*, § 202.

17 See especially the works of *Austin* who introduced this concept: J.L. Austin, *How to do Things with Words*, Harvard UP, Cambridge MA, 1975; and J.L. Austin, "Performative Utterances" in J.L. Austin, *Philosophical Papers*, Oxford UP, Oxford, 1979, pp. 233-253.

18 For a detailed argumentation, see Sabine Mueller-Mall, *Performative Rechtserzeugung*, Velbrück, Weilerswist, 2012.

19 cf. also Ludwig Wittgenstein, *Lectures and Conversations on Aesthetics, Psychology and Religious Belief*, ed. by Cyril Barrett, Berkeley/Los Angeles, 1967, section III, No. 5: "We are again and again using this simile of something clicking or fitting, when really there is nothing that clicks or that fits anything."

20 This is the case because of the conventional problem of an infinite regress of the application of rules: there is no general rule that defines whether a rule is applicable in a specific case or not. See Wittgenstein, *PI*, §§ 198, 201.

21 cf. Immanuel Kant, *Critique of the Power of Judgment*, ed. Paul Guyer, translated by Paul Guyer and Eric Mathews, Cambridge University Press, Cambridge/New York, 2000.

Sabine Mueller-Mall is a Professor of Legal and Constitutional Theory at the Department of Political Science of the Technical University Dresden. She has also worked as a Post doc at the Collaborative Research Centre 626: Aesthetic Experience and the Dissolution of Artistic Limits/Free University and at Humboldt University/Berlin. Her main research interests include legal and constitutional theory, globalization of law, theory of judgement, law and aesthetics, and the concept of normativity. Recent publications: *Performative Rechtserzeugung* (2012); *Legal Spaces. Towards a Topological Thinking of Law* (2013).