

Legal and Musical Interpretation – On the historical and systematic elements in the interpretation of law and music

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Abstract

Law and music have inner links in their logical structure and both of them need “interpretation” owing to the “gap” between symbolic system and performance as well as between past and present. In the realms of both Western law and Western music, there are different attitudes towards “loyalty” to historical “authenticity”. On comparing the historical elements in law and music, it becomes clear that subjective historical interpretation is not useless in law and objective interpretation can be acceptable in music under some circumstances as in law. The wisdom from music can also be helpful for legal interpretation in the sense that, if an interpretation seems at first glance “superfluous” in the legal system, this does not necessarily mean it is redundant and must be avoided. On the contrary, it might be a hint that it is an “attentional” provision, which has its own value in the legal system, just like attentional symbols in music, which can be important reminders to performers. Finally, between Chinese traditional music and legal practice, there is an “inner link”, although the formality and completeness of the symbolic systems are no longer common features of the two disciplines.

Introduction

The connection between law and music is a topic attracting more and more attention in the fields of both legal science and musicology. But the most discussed facets of this connection relate only to the “external” links between these two fields, while the “internal” links are less mentioned. For example, in recent decades the legal protection of the copyright of music works has been one of the most “popular” topics concerning both law and music (Grossfeld/Hiller 2008: 1147). Nonetheless the “music” concerned in these discussion is not the special art form itself whose medium is sound, but individual pieces of this kind of art. That is to say, it is not the music itself, but the musical products that are discussed in this sense. What this essay deals with is rather the “internal” common points of these two disciplines, i. e. the common points of the structure and logic of law

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and music. Thus other kinds of relations between the external forms of music and law, such as the legal analysis of the texts of famous music pieces, the art-historical study of eminent musicians who received a legal education (e. g. *P. Tchaikovsky* and *R. Schumann*) and the legal protection of musical works are outside the scope of this essay.

In fact, one of the most important “internal” similarities between (Western or westernized) music and law is that they both treat rationality and order as merits, so that the manifestation of both (Western modern) law and music requires strict formalization. The “texts” of both law and music are generated by a series of rules with tight logic: “Since early times, music has been associated with order, and from there it has often been equated with law” (Grossfeld/Hiller 2008: 1148). Furthermore, the interpretation of the “texts” (Manderson/Caudill 1998-1999: 1327) of law and of music show similarities in their inner structures. On the other hand, some important differences between musical and legal interpretation should not be overlooked.

The Internal Links Between Music and Law in General

A. Inner Structures as Homogeneity of Law and Music

The focus of the following analysis being limited to the inner structures of Western, modern law and Western, classical music, it is relatively easy to find some real homogeneity between the two. Just consider that music is in Western culture widely recognized to be a quite special form of art with many of the characteristics of mathematics in its inner structure (Pahlen 2000: 12). That is to say, music is considered to be an art form with relatively strict logical rules and accurate precise system of symbols (Manderson 2000: 20)³, especially in the eyes of modernists. In this sense, *Debussy* compared music to arithmetic: “Music is the arithmetic of sounds as optics is the geometry of light” (Huckvale 2013: 7), and *Honegger* even defined music as “geometry in time” (Huckvale 2013: 7)⁴. Similar ideal features can be found in the world of law, at least according to the legal formalists. Without obeying logical rules, neither the law itself nor legal practice could fulfill their social tasks; even “the idea of law in the sense of modern legal philosophy” is

3 “The scale system re-created the language of music [...] in much the same way as hieroglyphics were replaced by a commodified alphabetic script.” Since a new note ordering system was able to redefine the language of music, it is clear that this kind of art is tightly connected with symbol systems and formality. (Manderson 2000: 20)

4 Along this path, we can easily find more arguments showing the common points of both music and mathematics (Gelfand 2006: xiii). This path has a time-honored tradition. In the era of ancient Greece, Pythagoras already held that music and mathematics were inter-related (Wille 1985: 7).

only thinkable with the help of logic (Rödig 1980: 27). In this sense, music and law have the common characteristics that they both require strict rules and rigorous formalization internally and have both developed formal languages to match these requirements and to ensure that their inner orders remain logical. In law the essence of this kind of language system is the so called “legal syllogism” or “legal subsumption” (Neumann 2011: 299), as well as a theory governing the usage of this kind of language, i. e. legal dogmatics. In music the essence of this kind of language system is the modern musical notation system and the theories include those of harmony, counterpoint, musical forms, orchestration, etc. In a word, both music and law regard a set of formalistic regulations and modes of manifestation based on their inner logic as an essential part of their nature. In this way the “text” of music, as a product of artistic creation, be it in the form of musical notation recorded by written musical symbols or of the sound of live performances or recordings, always uses formalistic methods to represent the inner logic and regulations of music. Although music, like any other form of art, is to a large extent a subjective matter, the existence of regulations of its inner logic is undeniable⁵. According to the famous Russian musicologist *Skrebkov*, one thousand years of European music tradition show that a “really” artistic musical composition must embody principles such as thematic elements, musical language and composition structures (Skrebkov (Скребков) 2008: 4 ff.). Likewise, another musicologist has also pointed out that five features which are widespread throughout Western and even non-Western music make the sound of music in the sense of tonality⁶. In most cases⁷, if a composition totally ignores these basic rules, it will not be accepted as a valuable musical work. In other words, the aesthetic judgement of a piece of music is more than just a “retreat” into personal taste (Manderson 2000: 23). Generally speaking, the “inner logic” of musical composition cannot be disregarded. On the contrary, it should be and in fact has been incarnated by the “text” of music.

Similarly, the “text” of law has long represented and in fact must represent an inner logic. No matter whether it is legislation or a written judgment, the legal text is always the result of logical thinking using methods of legal reasoning. Just as in the case of musical composition, if the process of law making totally ignores the basic rules of legal theory and the inner logic of law, this legislation will not be considered successful and will cause

5 “[I]f there are no rules in music, there can be no aesthetics of music.” (Watt 1922: 349).

6 These five features are conjunct melodic motion, acoustic consonance, harmonic consistency, limited macroharmony and centricity (Tymoczko 2011: 4-5).

7 There have been some famous counterexamples (e. g. 4'33" composed by *John Cage*, in which the performers keep their instruments silent during the entire duration of the piece throughout the three movements) in music history. But they will not be discussed here because of their atypicality (Pahlen 2000: 625).

unnecessary “chaos” (Rieß 2007: 140). In short, legal texts ought to reflect the rationality of the law (Peczenik 2008: 194; Ellscheid 2011: 186)⁸. In this sense, “law has often been seen as a kind of social music” (Grossfeld/Hiller 2008: 1148), because the rationality concealed behind the legal text is the same as that hiding behind the tones and rhythms of music.

What Western law and music have in common is the existence in their inner structures of rules which are based on their own logic and rationality. Thus, on the one hand, we acknowledge that both music and law have something in common with “formalism”. Especially for Western classical music, the importance of formality is undeniable. There are plenty of rules (about the usage of scales, keys, harmonics, orchestration etc.) that must be obeyed in a musical composition; otherwise the work will be seen as a failure. For some musicians, “the first and last duty of music is to be beautiful”, and whether a piece of music is beautiful or not, is – as described above – not a totally subjective matter; there exist objective criteria as to this, namely, the forms, so “it must be remembered that in music the relation between form and idea is much more intimate than in literature” (Hadow 1897-1898: 31). Likewise, other music researchers hold that “music’s meaning lies in its form” and “music is expressive of emotion in virtue of its formal characteristics” (Beever 2011: 216-217). It is true that the development of Western classical music itself is a history of the breaking of old forms and rules. For instance, during the classical period, it was hardly imaginable to write a symphony with more than four movements, but that has become increasingly common since the arrival of the romantic period. During the romantic era, new rules and forms were being established, and development in the 20th and 21st centuries continued this process, which means that the development of music does not have to go to the opposite of “formalism”.

On the other hand, this argument should not be restricted to the relatively narrow understanding that the common feature of law and music is merely the “formalism” of both disciplines. In fact, this common feature extends further: it lies rather in the rationality or logic behind the formalism of both fields. In law the concept of legal formalism itself has something to do with the rationality. Legal formalism in the conventional sense means “belief in the availability of a deductive or quasi-deductive method capable of giving determinate solutions to particular problems of legal choice” (Unger 1983: 564). This is exactly a process of “formal rationality” in the sense of *Max Weber* (Eder 1981: 157). In a broader understanding, legal formalism asserts the possibility of a method of

8 It is also noteworthy that the rationality might be one of the conditions (*Vorgegebenheiten*) of legislation by *Kant*, too (Ellscheid 2011: 186).

legal justification that can be clearly contrasted to open-ended disputes about the basic terms of social life (Unger 1983: 564-565). In this conception, “law features a mode of rationality that is different in kind from the less determinate rationality of political and ideological contest” (Weinrib 1988: 953). Thus legal formalism postulates not merely the compresence of rationality, immanence and normativity, “but their mutual dependence and interrelationship in a single approach to legal understanding”; “[the law’s] rationality, for instance, consists in its being immanent to the normative relationships that it orders” (Weinrib 1988: 955). Seen from the postmodernists’ angle, the legal rationality could be an “illusion”, which “never existed at all” (Manderson 2000: 96-153). But we should be aware that the postmodern critique of legal rationality is based on the background of a relatively highly developed legal system, where the concept of legal rationality has largely fulfilled its “original tasks” (for example, the “promise of an objective, rule-bound, certain interpretation of the law” (Manderson 2000: 96)) already, while the remaining unsolved problems require a new road. With the help of *Manderson’s* metaphor that the aesthetics of legal formalism is like geometry while the perspective of legal pluralism is like geography (Manderson 2000: 177), it is clear that these two viewpoints are not mutually exclusive. On the contrary, modern geography can hardly do without the support of basic geometric knowledge.

In music, especially Western music, the rationality behind the system of formal musical elements (such as harmonics, scales, keys etc.) has long been recognized. For instance, according to *Max Weber*, “the development of a comprehensive rational harmonic system is unique to Western art-music” (Martin 1996: 58). Whether this kind of “homogeneity” is a feature of Non-western music and law is another problem, which will be dealt with later.

B. The Need for Interpretation of Both Law and Music

The other side of the coin seems to be more complicated. Although rationality as well as inner order and logic are the basis of both law and music, neither the world of law nor that of music is exclusively made up of order, rationality, logical rules or other abstract principles⁹. The texts of both music and law must be interpreted (Grossfeld/Hiller 2008: 1150).

9 “... dass Logik sicher nicht alles ist, was es zum Recht zu sagen gibt...” (Joerden 2010: 2).

1. The “Gap” between Symbolic Systems and Performances

The fact that music has been widely recognized to be one of the art forms that are nearest to mathematics does not necessarily mean that the former can be considered equivalent to the latter. Music is an art form, not a branch of science. The formalization of the western musical symbolic system makes musical performance a highly standardized and precise art form. But there is still a “gap” between this kind of symbolic system and the actual musical performance (Kivy 1995: 271): The musical notes on the page are not the whole world of music (Balkin/Levinson 1998-1999: 1531)¹⁰. The world of law faces the same situation. The professional training and the appropriate use of legal methodology will make the processes of application and making of law rational, stable and predictable. These might approach the level of pure logical calculus, but can never reach it.

Since law cannot be perfect from the logical perspective, it must be interpreted in order to be put to practical use in society. One of the reasons why it cannot be logically perfect lies in the fact that the language of the law is not totally different from our everyday language. It is true that legal terms cannot be easily understood without special learning, but they are not written in mathematical formulae. Only artificially invented formulaic systems can totally avoid misunderstanding. So it is in a way inevitable that law texts will be misunderstood, and this is the reason why legal hermeneutics is a necessary “art” of law application (Schroth 2011:270). In other words, because of the limitation of natural human languages, law texts tend to contain vague or inaccurate statements. According to the dichotomy of *Savigny*, if law texts are mainly composed of such problematic statements, they should be classified as “unsuccessful laws” (Savigny 1840: 222). But even if the law is “successful” in *Savigny’s* sense, it still needs interpretation (Schroth 2011: 279). An example is the legal concept of “social adequacy” (*Sozialadäquanz*) used by modern German criminal law. This shows expressly that in the real process of law implementation there will always be a gap between written legal texts (*Tatbestand*) and the goals behind these texts. This gap can be “filled” only by introducing this concept in instances where society might not treat minor conduct as a crime. Thus to give small presents to a postman on duty on Christmas Eve is viewed as natural and normal in Germany, despite the fact that the law clearly defines it as the crime of offering a benefit to a public official for the discharge of a duty, amounting to the crime of giving a bribe according to § 333 I German Criminal Code), while social opinion would regard the punishment of this conduct as unnecessary (Xiong 2012: 131-141). In other words, since some petty criminality still prohibited by the law may be “accepted” by society, the law

10 “A Beethoven symphony is more than a set of marks on a page” (Balkin/Levinson 1998-1999: 1531).

texts must be further interpreted in accordance with the concept of “social adequacy” so that the application of the law will not stray from the will of society, and this makes the application of law deviate from the literal meaning of written legal texts. In fact, this “gap” between the “signifier” and the “signified” of the legal text is made inevitable by the inadequacy of legislative techniques (Zipf 1975: 131-141): There is no perfect legislative technique which can differentiate between prescribed conduct with a defined state of mind legally treated as a crime and the same conduct with the same state of mind not legally treated as a crime owing to the lack of punishability and thus socially accepted (Kunz 1984: 128). Thus the concept of “social adequacy” plays the role of “interpretation helper” (*Tatbestandskorrektur*) of legal texts, which is necessary in the application of the law.

To summarise, the natural limitation of the world of law makes legal interpretation a necessity for almost every modern lawyer. For a similar reason, the world of music also needs interpretation. The symbolic system of musical notation is also not perfect¹¹.

2. The “Gap” between Past and Present

The other reason why both law and music need interpretation lies in the fact that the “original text” generated by the author and the real effect of its “performance” seem quite remote from each other (Godlovitch 1988: 259). In music, it is crystal clear that nobody knows how *Bach* or *Beethoven* played their own music, since the phonograph and other recording systems had not been invented at that time. It is also likely that the modern performance of their works would quite dissimilar to what *Bach* or *Beethoven* originally wanted. Moreover, we often hear declarations that the playing of some of our contemporary musicians is “authentic” or “convincing”. Some cases of this “authenticity” are based on the technical revival of historical musical instruments, scoring and performance practices (Godlovitch 1988: 258). But in more cases, when music is played on a modern instrument that is technically totally different from its historical predecessor, such as when *Bach*’s piano works are played on modern piano by *Serkin*, we can still hear someone declare that a modern performance was “authentic” (Gradenwitz 1950: 279). In this case, the musician who wishes to be regarded as an authentic performer need not rely on the restoration of the old-styled instrument, but on the use of the old-styled technique, phrasing, ornamentation, rhythmic idioms, dynamics, tempo, etc. (Godlovitch 1988:

11 In the modern musical notation system, the main functions of the musical notes can only represent two qualities of music, namely the sounds with different pitches and time duration (Callcott 1817: 14). Yet the world of music consists of far more elements than these two qualities.

259). That is to say, what he relies on is the manner of “interpretation” of the music rather than corporeal instruments. Furthermore, we can even give examples of performances on modern instruments using modern technique, phrasing, ornamentation, etc., which are still estimated to be “convincing”, though no longer “authentic”. An illustrative example is *Yo-yo Ma’s* performance of *Bach’s* unaccompanied cello suites. Obviously he did not play these suites on a baroque cello, neither did he play the pieces in the style of the baroque era. On the contrary, he played this monumental work with his own emotions in a rather modern musical language (for example, playing with expressive and strong vibrato). He even added some elements of other kinds of art to his musical performance, such as playing with a dance accompaniment, which made his playing controversial but at the end widely accepted (Lesser 1997: 21). This case shows us clearly that it is a convincing interpretation that makes a musical performance acceptable, no matter whether the style of performance is authentic (i. e. an imitation of the way of playing in the past¹²) or modern.

A similar situation can be observed in the world of law. There is often a distance between the will of the historical law makers and the need of legal practice today, so that methods of legal interpretation must be put into use to bridge the gap. Someone who seeks answers to questions of his own era in the law, is engaging in interpretation of the law (Larenz 1991: 318).

The Historical Elements in Legal and Musical Interpretation

A. Musical Historical Interpretation Compared with Legal Historical Interpretation

Besides the grammatical, systematical and sociological-ethical interpretations, the historical interpretation (*historische Auslegung*) is one of the four “mainstream” methods of legal interpretation in the continental law systems, the aim of which is to ascertain the meaning of the legal concepts and statutory provisions from its historical development (Coing 1959: 8-9). There is no doubt that the carriers of the law makers’ thoughts, such as the published record of the debates, committee reports, early bills and other materials, may be very important for the explanation of the legislative purpose, because they shed light upon what the legislature did and why.

12 Sometimes to imitate the way of playing music in the past is obviously senseless, when the “historic way” of playing is unrepeatable, for example the “Quartet for the End of Time” by *Messiaen* (Manderson 2000: 162).

As in the field of legal interpretation, the historical elements play a very important role in the field of musical interpretation. In a sense, they are even more important in the world of music, since the importance of the “creator” of a legal text is obviously not so high as the “composer” of a musical piece. It is a part of our general knowledge that it was *Bach* who composed the *Air on the G-String*, *Beethoven* who composed the *Moonlight Sonata*, *Shostakovich* who composed the *Leningrad-Symphony*. But normally no-one would be able to tell who “created” the Chinese Penal Code or the German Law of Narcotics. Even if there were a detailed list of the participants in the legislation, few people would care about it.

Owing to the importance of historical elements in the process of art recreation, in the world of music, different “schools” concerning the same issue came into being: We find different attitudes toward musical historical interpretation, namely the approaches of purism, liberal eclecticism and hodiernism (Godlovitch 1988: 260-73).

The word “purist” refers to a musician who plays musical instruments of an earlier age and builds their aesthetic appeal on the assumption that sounds originally designed to be heard under the technical conditions of the past can produce a comparable effect upon a large and varied audience in a modern concert hall (Cone 1995: 242). According to the purist, preference must be given to historical factors (Godlovitch 1988: 259). The word “hodiernist” refers to the opponents of purism, who argue that there are strong reasons favoring present day renditions of older music. “Liberal eclectic” refers to those musicians whose standpoint is between purism and hodiernism — they “allow on more-or-less equal footing a variety of options among which are included both historical and modern possibilities” (Godlovitch 1988: 259).

1. Different Answers given by Musicians and Lawyers to the Same Question

We are concerned here with comparable situations in historical interpretation. In both fields we have two opposites: for the legal, objective vs. subjective interpretation; for the field of music, hodiernism vs. purism). In each of these there is a standpoint of a relative compromise that is closer to one of the opposite positions than the other: (in the case of law, objectified-subjective interpretation, and in the case of music liberal-eclecticism. Taking these similarities as our starting point, we shall find that both worlds are trying to solve the same “ultimate” question by the method of historical interpretation. This is the question whether we should follow the intention of the historical composers and put the emphasis on their historical conditions, and if so, why? In the realm of music, this is the

controversy between purists and hodiernists. In the field of law, it is the debate between the subjective standpoint and the objective standpoint.

As shown above, the world of law has on the whole taken a negative attitude toward this question. “Mainstream” opinion holds that the will of historical legislators is relatively less important. According to this viewpoint, there is no clear reason that requires us to follow the view of the historical lawgivers. This opinion has resonance in the world of music. Instead of trying to reconstruct the historical conditions when playing older music, a hodiernist would rather play it in a modern way. This resembles the preference for the “will of the law itself” in the world of law. Just like the objectivists, who treat legal history as an independent process of “self-development” of legal concepts and institutions, the hodiernists treat some of the indications of composers in early music as historical relics and are not going to obey them. For instance, a hodiernist would ignore the indication on the score that a concerto was assigned to a baroque instrument such as a harpsichord, recorder or lute. Instead, he would rather play it on a grand piano, western concert flute or classical guitar. Similarly, a hodiernist cello player might ignore the indication on Suite V of the Unaccompanied Cello Suites of *Bach* saying that the A-string should be tuned down to the G tone (Bach manuscript 2011) and would still use the A-string in its normal pitch. It is noteworthy that hodiernism in this sense does not entail an arrogant attitude toward the historical sources of music. If a musician shows such an attitude toward the original scores and indications, it would be correct to call him an “only-instinct-musician” (Fabian 2001: 164).

The charges against purism laid by hodiernists include the following three points (Godlovitch 1988: 260-62). (1) The present day rendition of older music often promotes the technology of musical interpretation, because many old instruments are technologically inferior to modern ones. (2) It is logically impossible to go back to the historical conditions of performance, and the use of old instruments and techniques does not make a performance upon them genuinely historical. (3) Performance involving a studied attention to some interpretive and technical idiosyncrasies in order to make music sound historical is often artificial, and seems “derived, stilted, far too self-conscious”. If we leave the technical problems of music performance aside, (and also do not discuss point three, putting the emphasis only on attitudes towards the past implied in the points 1 and 2, we find that these have much in common with the arguments that are used to refute the standpoint of subjective legal interpretation.

As for point 1, the development of modern technology is also often used as an argument against the search for the historical will of the legislators. It has long been claimed that

subjective interpretation could slow the pace of improvement of knowledge (Naucke 1969: 276), which is certainly a comprehensible claim. The historical lawgivers' intentions were naturally restricted by the limitations of their era. For instance, legislators in China when drafting the fraud crime clauses of the Chinese Penal Code (Art. 266, Art. 196, etc.) were not able to contemplate a situation in which automated vending or cash machines could be "cheated", e. g. by the illegal use of another's credit card which the owner had lost and which the finder used to draw money from an ATM machine; or by inserting coin-like metal slugs into a vending machine to obtain goods from that machine. Hence it can be argued that it makes little sense to seek what the historical lawgivers thought about this possibility because they did not think of it at all, and so they did not intend to extend the range of fraud crimes to such circumstances. However, if we followed closely what the historical lawgivers thought about this topic, we would have to give up the attempt to use Art. 266 in the cases of "cheating" of machines, and that would really hinder the development of society. The problem in the first situation (the illegal use of other's lost credit card to draw money from an ATM machine) was officially solved by a judicial legal interpretation issued by the Supreme People's Procuratorate of China in 2008, which said that in this case Art. 196 (on criminal fraud in the field of finance) should be put into use. The second situation (the insertion of coin-like metal slugs into a vending machine in order to obtain goods from it) was solved by another judicial interpretation issued by the Supreme People's Procuratorate of China in 2003 saying that in this case Art. 264 (on the crime of theft) should be applied. The theoretical problem remains unsolved, because these two self-contradictory official interpretations show that it is still unclear to the Chinese Supreme People's Procuratorate whether a machine can be "cheated" or not (Zhang 2011: 712-13). More important, it is obvious that both solutions are built on something other than the will of the law makers.

The response from the world of music looks different. It is true that musical instruments are evolving from their ancient forms to more modernized forms, but this does not necessarily mean that hodiernism is superior to purism. For instance, from the point of view of today, recorders are technically inferior to modern concert flutes because of their technical disadvantages such as the inconvenience of their fingering systems, and their limited sound range and volume. But this does not entail that recorders have a lower artistic expressivity than modern flutes. On the contrary, it is widely accepted that "the recorder's tonal 'objectivity' is suited to music characterized by a higher degree of abstraction, a greater formality of structure" (Boeke 1982: 8). The same can be said of other musical instruments such as the viola da gamba and the valveless natural horn. A natural horn is doubtless technically awkward when compared with modern horns, because it can only play natural harmonics, which means it is almost impossible to play

a normal E Major scale on it. But even such a musical instrument with these visible “defects” can produce a sound of “delicate poetry, magic and drama all its own” (Stobart, 2000 (CD Notes)). A pithier refutation lies in the fact that electronic instruments are functionally superior to all modern acoustic instruments, in that they provide “the most reliable, the cheapest, the most effective means of music-making”, but few hodiernists are prepared to throw away normal instruments (Godlovitch 1988: 261).

As for point 2, it is logically impossible as well as senseless for us to go back to the history of either music or law. With reference to law, it is widely accepted that the answers given by the historical legislators are no longer helpful to the solution of new legal policy problems (*rechtspolitische Fragen*) (Naucke 1969: 276). What is more, it is less and less helpful to search for the historical legislators’ intention as time passes (Leisner 2007: 693). As for music, the question is almost the same. Even if we play baroque music instruments in the old performance style, we still cannot really experience the feeling of that era. So why bother to do it? The reply from the side of music is distinctive again: “When we use old instruments and former interpretive directives we’re closer to the spirit of the past than if we neglect these altogether” (Godlovitch 1988: 262). On the one hand, we have to admit that to go back to history is illogical and senseless. On the other hand, the illogicality and senselessness arise from the extreme case of “going back to history”. If we give up that impractical aim and set ourselves a goal of “approaching” history, this will be possible and meaningful at least in the world of music.

Concerning these two points, the responses from the world of music seem to be far more optimistic than those from the world of law, although both are facing the same “ultimate” question as to whether we should follow the intention of the historical composer and, if so, why? The main reason behind this phenomenon lies in the difference between the purposes of a legal historian and those of a legal dogmatist (Engisch 1997: 108). The historian is interested in searching the whole historical situation from which the law has developed, so as to understand the motives behind the law by researching the social and historical backgrounds, and also to understand the personalities and spiritual powers of the law makers. A legal dogmatist on the other hand rather concentrates on the substance of the law itself and tries to determine the application of a legal provision by analyzing the range and content of legal definitions in it (Engisch 1997: 109-10). In other words, for a legal dogmatist (as well as for a legal practitioner), the purpose of legal interpretation is to give instructions for solving actual problems. If the lawgivers did not think of a situation at the time of legislation, their wisdom would not help to solve the problem arising from that state today, so it would not be helpful to research the historical background to know why they had not thought of it.

The situation in the world of music is quite different. A performance conveying the atmosphere of the old era accords with an aesthetic taste. The authentic style of music performance is meaningful enough for many people, including the original composers (according to the purists), the players (especially the revivalists) and the audience (Bartel 1997: vii). For this reason, the technical awkwardness of a baroque wind instrument, the incompleteness of the musical scale playable on a valveless brass instrument, the gentle and mild (and thus less dramatic) sound of a string instrument of the gamba family are all meaningful for a musical performance. To be a part of history, or to approach the historical conditions of the composer in a musical performance, is therefore significant *per se*. However, it will never be the purpose of a law practitioner to go back to (or approach) the history of legislation.

Hence, the kernel of the question is the same whether it is to be answered in the world of music or law. That is, we are originally not aware of the importance of the historical conditions. Only if we ask a further question about the meaning and value of these conditions will we be able to give an answer to the kernel question. From the world of music comes a positive reply, because the attempt to go back is to a certain extent significant in itself for a musical performance.

Consequently, in the world of law it would be easy to jump to the conclusion that the will of legislators is in all respects and beyond doubt inferior to the will of law itself. The argument against the subjective legal interpretation, that the psychological will of the legislative organ does not really exist and the individual “objective” meaning of the law can be totally independent of the legislators’ will, could be logically and legally wrong. This argument is not really “objective”, but on the contrary, is no more than a “subjective” will of the legal practitioner (especially the judge) that is different from the will of the law makers, and this attitude is suspect of being inconsistent with the principle of legality (*nulla poena sine lege*) (Roxin 2006: 152). The more important question to ask is whether the investigation of the will of the law makers (subjective) or of the law itself (objective) can help us to solve the problem in front of us. According to this approach we should agree with the objectified subjective historical interpretation so far as no real intentions of lawgivers existed, or their intentions are not ascertainable, as when trying to answer the question whether an ATM machine can be “cheated”.

In this regard, it seems to be true that there is little space left for the use of subjective legal historical interpretation, since the historical law makers did not even think of the situations which give rise to the most puzzling problems of legal application today. But that is still not the whole story. The German scholar *Naucke* holds that subjective

interpretation is useful on the following two grounds (Naucke 1969: 278-86, 282-83).
 (1) The subjective interpretation makes the correct conclusion expressible (*formulierbar*);
 (2) The subjective interpretation helps us to determine whether a law is exact or inexact, a determination which will help us to take an appropriate attitude towards it.

When talking about historical interpretation there are common points of music and law. There must be a reason why we need to “go back” to history when applying the law to solve a case of today or when playing for today’s audience. In music, the reason is the aesthetic meaningfulness of historical conditions. In law, the reason is the fact that the investigation of the historical conditions (either the will of the lawgivers or the will of the law itself) can assist the legal practitioners who are trying to solve today’s problems. *Naucke’s* viewpoint supports this conclusion by showing that the usefulness of subjective (historical) interpretation is that it keeps clear the border between the legislature and the judiciary.

2. The Boundary of Historical Interpretation in Music and Law

Thus far we have discussed the similarities and dissimilarities of attitudes toward the “gap” between past and present in the worlds of music and law. In other words, the discussion has been about why the “past” is important for music and law. But it is implied in this that the past is important. This implication should be examined carefully¹³.

To begin with music, it has been mentioned that some musicians obviously ignore the historical conditions when playing music of an old style, but their performances are still widely accepted. Given the huge amount of transcribed musical works, it is not surprising that it is acceptable to play a work of *Bach* which was designated for harpsichord or clavichord on a modern grand piano,; or to play a work of *Handel* which was designated for recorder on a modern concert flute. Apart from the disregard of the composer’s choice of instrument, if a performer intentionally ignores some of the old-styled techniques such as phrasing, ornamentation and rhythmic idioms, his performance may still be considered “convincing”. An example is *Yo-Yo Ma’s Bach* Cello Suites, which are played with deep philosophical thought about the life and good taste of beauty of sound, but with little connection to the original baroque style of *Bach’s* era. Hence we can say that

13 Anyhow, modern performers “are free to choose among these instances in accord with their educated musical taste” (Hall 1998-1999: 1613). But the problem is still unsolved, because what is the “educated musical taste” is still unknown. Does paying attention to the original indications on the score belong to the “educated musical taste”?

what the composers have left us as historical legacy, namely, the designation of musical instruments, remarks and notes on the scores may be ignored under certain conditions.

On the other hand, it seems to be an inviolable commandment for all the musical interpreters that the historically original notation (not only the notes on the scores, but also all kinds of other remarks) must be respected, because they represent the will of the composers. The most impressive admonition on this was made by the famous conductor *Toscanini*, about whom it has been written: “He says, ‘I want to hear the work as the creator of it conceived it, and in no other form’ and to the conductor who maintains that it is his undoubted right to impregnate a performance with a strong injection of his own personality he replies: ‘My dear fellow, you flatter yourself. Who are you to stand between me and *Beethoven*?’” (Turner 1937: 689) No doubt *Toscanini* was showing his respect for the composers who created the music. However, according to his description, the conductor seems more like a “living metronome” than an interpreter with his own feelings that can be transmitted to the audience. A good conductor’s task is to give not only a correct but also an expressive performance (Mavrodin 1980: 68), and *Toscanini* over-emphasized correctness.

Thus musicians face the following problem: Where should the boundary be drawn between loyalty to the original scores (correctness) and the creativity of individual musical interpretation (expressiveness)? Regarding respect for the original scores and the marks on them, if a rule can be broken, which one should it be? Is disregard of the composers’ dynamic marks forgivable? Or tempo marks, expressive marks or something else? In the eyes of a musician like *Toscanini*, any attempt to alter original marks on the score is a deviation from musical orthodoxy. In this regard, there is little space left for individual musical interpretation. However, to give up all possibility of (necessary) alteration of an original score in favor of “correctness” is like throwing away the apple because of its core: “To refuse interpretation is not to refuse the wrong meaning; it is to refuse meaning itself” (Kramer 2011: 173).

Since historical musical documents, such as scores and the marks on them, “authentically” represent the will of composers, it seems natural that they should be seriously obeyed by interpreters like *Toscanini*, i. e. they must be treated as “correct” in the eyes of interpreters. But this kind of “correctness” is often something “subjective” in the composer’s mind. In the eyes of today’s interpreters, it could be obviously “wrong” or “meaningless”; or there could be a necessity make some changes to render the performance (more) meaningful.

a) Where there is Something “Wrong” or “Meaningless” in the Original Indications

Apart from the transcription of musical works, after the classical period, whenever a certain instrument is designated to play a part in a piece of music, no change in this arrangement is generally allowed, because the orchestration is a very important part of a composer's will. But we can find some counter-examples, even in the performance of a *Beethoven* symphony.

In the first movement of *Beethoven's* 5th Symphony, at measures 303-306 (as shown in the example 1 below), a melody which appears several times is designated for bassoons, although previously it has been played on the horns (as shown in the example 2 below). What makes this situation special is that in many modern performances of this work (for instance, the version by the Berlin Philharmonic with *Furtwängler* of 1954, those of the Berlin Philharmonic with *Karajan* of 1962 and 1975-77, that of the London Symphony Orchestra with *Stokowski* of 1969, that of the Vienna Philharmonic with *Böhm* of 1977), the melody at measures 303-306 is played again on horns instead of on bassoons. This means the original orchestration of *Beethoven* has been changed, but this alteration has been widely tolerated.

Example 1:

The image displays a page of a musical score for the first movement of Beethoven's 5th Symphony, specifically measures 303-306. The score is written for a full orchestra, with multiple staves for woodwinds, strings, and brass. A specific passage is highlighted with a grey box, showing a melody originally assigned to bassoons being played by horns in this version.

(Version: Breitkopf und Härtel, Leipzig, "Beethovens Werke, Serie 1 Symphonien", 1862-1868)

Example 2:

The image shows a page of a musical score, likely a symphony. It features multiple staves of music, including woodwinds and strings. A specific section of the score is enclosed in a rectangular box, highlighting a passage where bassoons are used instead of horns. The score includes various musical notations such as notes, rests, and dynamic markings like 'ff' and 'p'. The key signature and time signature are also visible at the top of the page.

(Version: Breitkopf und Härtel, Leipzig, "Beethovens Werke, Serie 1 Symphonien", 1862-1868)

The performers of the versions which use horns instead of bassoons are all serious musicians. This alteration must have been considered thoroughly. Thus there must have been a reason behind it. According to the authoritative musician and musicologist, the German conductor *Weingartner*, the use of bassoons instead of horns at measures 303-306 is the "best of a bad bunch" of choices at *Beethoven's* time. To play them on horns in E-flat Major was at that time technically inconvenient owing to the difference of tonality, which would cause instability in the sound (*Weingartner* 1984: 67-68). *Weingartner* points out that the use of bassoons here is artistically regrettable or even comic, because the timbre of the bassoon is somewhat antic in nature. Thus their appearance here is like a clown's participation in an assembly of angels. It follows that it would be a "meaningless" interpretation to insist on playing these measures on bassoons nowadays when the technical problems of horns have been solved for years. What is more, according to *Weingartner*, *Beethoven* himself would have changed the orchestration at this point if the technically improved French horns had been introduced in his time (*Weingartner* 1984: 68).

If we draw comparisons with legal historical interpretations, we find that the attitudes of *Furtwängler*, *Karajan*, *Stokowski*, *Böhm* and others have much in common with those of the "objective" historical legal interpreters. Both think that the inner "logic" in the text

(either of legal provisions or of a musical score) is more important than what the original composers expressed as their will.

This situation could be a dilemma for an interpreter like *Toscanini* who thinks highly of historical authenticity. If he follows the original orchestration, the sound effect is “problematic”, but to change the original orchestration would be against his faith in musical orthodoxy. Interestingly, *Toscanini* himself compromised on this. In his performance with the NBC Symphony Orchestra in 1952, he let the bassoons and French horns play these measures together (Zhou 2011: 146). Considering that the standpoint of *Toscanini* was normally extremely in favor of loyalty to historically original notation, we can understand what he really meant by letting bassoons and horns play together, so did the conductor *Bareboim* during his performance with the West-Eastern Divan Orchestra in 2012. On the one hand, they could not ignore the apparent “senselessness” in the score when bassoons continued to be used; on the other hand, they did not want to disobey the instructions in the historically original notation.

b) Where Changes Would Make the Performance More Meaningful

Sometimes changes made to the original notations could make a musical performance more meaningful, even though the original score with its marks and other indications is not problematic in today’s view. This is often the case when music is rearranged. In the world of classical music, the rearrangement of music pieces is not only usual, but also necessary. Some instruments were less developed in the past, but now they have a potential expressiveness as high as historically more developed instruments. Because of this lack of expressiveness few composers were attracted by such instruments in the past. Now that the techniques and expression of these instruments have also been fully developed, it has become natural for their virtuosi to transcribe musical pieces for these instruments. For example, this has happened with the double bass, so we can hear many pieces originally written for violin and cello played on this instrument. Some of the transcriptions are remembered as historical breakthroughs, for instance, when *Karr* played *Dvorak’s* Cello Concerto on double bass, and *Azarkhin* played *Bach’s* Chaconne for solo violin on solo double bass. But more transcriptions are remembered because of their real success in the sense of musical aesthetics. For instance, *Karr* successfully rearranged and played *Paganini’s* Fantasia on “Moses” on double bass. This “good example” of transcription is said to remind us that “the biggest of our modern stringed instruments can be as light and nimble as its cousin the violin” (Harden, 1980). This kind of rearrangement does not make the original musical work more “correct”, but widens its form of performance.

Another possibility arises when a performer seeks to change the “stereotype” of a kind of music by using unconventional expression techniques. Here the performer ignores authenticity in favor of producing a different effect. For example, the rockstar *Sting* once sang songs of the renaissance period using the singing techniques of rock music in an album, and a review acknowledged the success of this “innovative” idea. “*Sting* will single-handedly do more to make *Dowland’s* music widely known than all the ‘early music’ performances over the century”, it was said (Knighton 2006: 531).

c) The Legitimacy of Musical and Legal Interpretation

From the two possibilities mentioned of deliberate disobedience to the historically original notation which can still make sense in a musical performance, we conclude that obedience to the original notation is not the only criterion, nor even the main criterion of “good” interpretation. Hence, a more important criterion should be put forward, namely the legitimacy of performance. If a performance is legitimate, it may be a good or at least an acceptable interpretation in the musical-aesthetical sense¹⁴.

“Legitimacy” is again a rather vague concept, which can be understood too narrowly or too widely. It is understood too narrowly when it is believed that only a “loyal” performance without any infusion of the personality of the performer is legitimate: “Unless we are completely filled with the desire to know, feel and express what the composer has to say, to the exclusion of all personal motives, our performance will never carry conviction” (Turner 1937: 95; Hatten 1994: 276). In this sense, the word “legitimacy” is no more than a tautology of the criteria mentioned above such as “loyalty to history” or “authenticity”. Legitimacy is understood too widely when it is given no clear, rationally justifiable boundary. However, as musical aesthetics change, increasing importance has been attached to the side of “ear” rather than to the side of “reason” since the 18th century (Bartel 1997: 25-27). In other words, if the rules of musical theory cannot tell us whether an “innovative” performance is acceptable, we should just follow our emotional feelings and use our own ears to determine the question.

Thus, the purist’s performance is surely legitimate, because it is loyal to historical indications and is thus viewed as “correct”, or because the old style of performing has an aesthetic meaning in itself. But the performance of liberal eclectics or hodiernists can also be legitimate, because disobedience to the historically original notation might be

14 The controversies about the role of Wagner’s music in post war Germany and Israel suggests that the musical-ethical issues are also important for the acceptability of a musical performance.

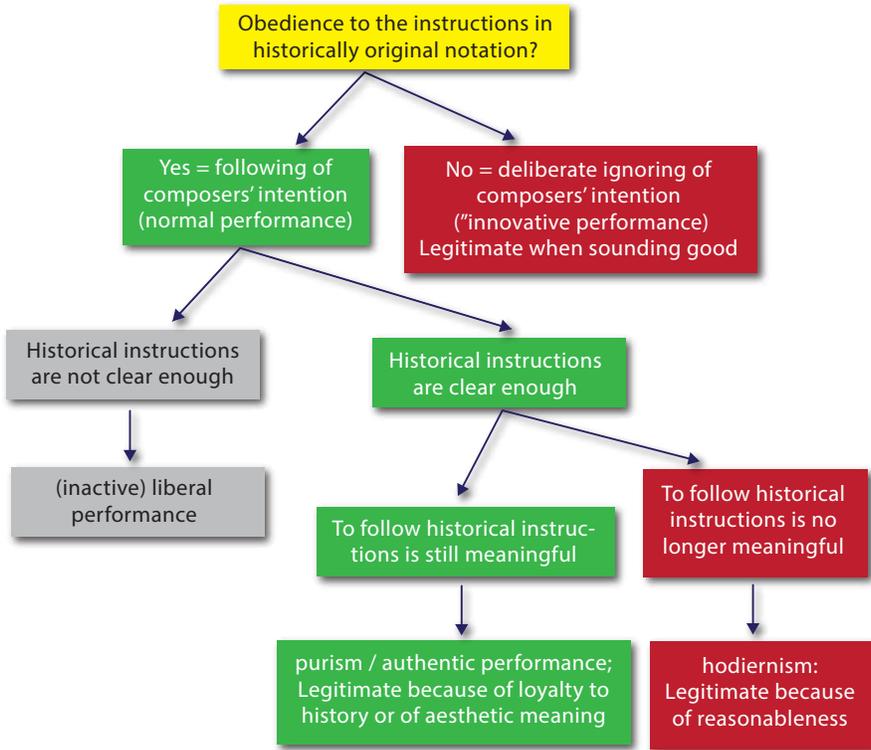
reasonable in the circumstances of today, or just because the “innovative” performance sounds good or at least acceptable. The whole situation is shown in the diagram below:

Thus historical interpretation in the realm of music has boundaries. To be loyal to historical elements does not always amount to being legitimate, since there are many cases where legitimacy can be built on other considerations. Exactly the same thing happens in the realm of law.

Firstly, according to some scholars, the “objective” historical interpretation or even the “objectified” historical interpretation can be outside the boundaries of real “historical” interpretation, because the method of interpretation has little to do with what is in the minds of the historical lawgivers. Furthermore, to investigate the historical purpose of the law does not help much, either (Lenckner/Eser 2014: § 1 Rn. 43). All that is important is how the law should deal with the actual problems of the world of today. This is clearly similar to the problem of whether to use bassoons or horns in the measures of *Beethoven’s* 5th symphony which we have considered. Even if we could know the reason why Beethoven used bassoons here, it is still musically acceptable (or even better) to use horns here nowadays, because the world of musical instruments has changed. In the realm of law, sometimes an interpretation can be legitimate even if we know that it is contrary to what the historical lawgivers thought. That is why it is called “objective” or “objectified”.

Secondly, all types of historical interpretation can be restricted by other criteria when necessary. Historical interpretation is often used as one of the available methods among others. Sometimes other methods of interpretation, often a teleological interpretation, must be introduced to solve a specific problem in conjunction with an historical interpretation (Schroth 2011: 283). Only the legitimacy of an interpretation really matters. If the historical interpretation comes into conflict with a teleological interpretation, it is possible to follow either, but the choice must be built on “legitimacy”. As in the realm of music, a legitimate legal interpretation can be found only after analyzing concrete situations in a specific case. As mentioned above, to be legitimate a subjective legal interpretation must often assume that the law is exact and the legal practitioner may not judge the law to be wrong. The legitimacy of an objective interpretation requires that change over time has *de facto* excluded the meaning of the original intentions of the lawgivers, or that a phenomenon appears which the historical lawgivers never contemplated.

Figure 1: The Different Legitimate Possibilities of Musical Interpretation



Systematic Elements in Legal and Musical Interpretation

A. Problems of Systematic Legal Interpretation and the Avoidance of Redundancy and “Attentional Provisions” in Legal System

Beside historical interpretation, systematic interpretation (*systematische Auslegung*) in law also belongs to the classical methods of legal interpretation, which have obvious features in common with the methods of musical interpretation. The key point of systematic legal interpretation is that the meaning of one legal provision can be investigated by comparing it with other legal provisions in the same legal system. The premise of systematic interpretation is the belief that there should be no, or as little as possible self-contradiction within one legal system (Schmalz 1992: 107).

Starting from this point, we may make the following deductions (Schmalz 1992: 108-09). 1) If a clause is a part of a chapter, the content of which is limited by its title, that limitation applies to this clause. 2) If a law uses a definition in different places, it can

be assumed that this definition has the same meaning everywhere. 3) If a definition is expressed in another way elsewhere, it should be assumed that these do not have the same meaning. 4) In case of doubt, a clause should not be interpreted in such a way as to make this or another clause “superfluous”.

Since both the starting point and a major purpose of systematic interpretation is the exclusion of logical self-contradiction in law, the process must avoid redundancy of any specific legal provision, because redundancy in law can also be a form of logical contradiction. This is what point 4 just mentioned tries to tell us.

In contrast to these theoretical points, we find in the actual application of law many cases of redundancy in the legal system. Furthermore, some of the “superfluous” legal provisions have resulted from careful consideration by the legislators or interpreters. They may be “attentional provisions”. An example is Article 247 of the Chinese Penal Code. This clause deals with the crime of torture: “Judicial workers who extort a confession from criminal suspects or defendants by torture, or who use force to extract testimony from witnesses, are to be sentenced to three years or fewer in prison or put under criminal detention. Those causing injuries to others, physical disablement, or death, are to be convicted and severely punished according to articles 234 and 232 of this law.”¹⁵

A problem arises from the provision “those causing ... to others ... death are to be convicted and severely punished according to [article 232]”. What does “causing death” mean here? Does it mean “to kill intentionally”, or “to cause death negligently”, or both? If we try to solve this problem by means of systematic interpretation, it should be admitted that the case “to cause death negligently” can be included. If the 1st case (to cause death negligently) is excluded, then only the 2nd case (to kill intentionally) remains, leaving a superfluous legal provision: Since the person committing intentional homicide is “originally” to be convicted according Art. 232 of the Chinese Penal Code,

15 Art. 232 of the Chinese Penal Code is a clause of intentional homicide: Whoever intentionally kills another is to be sentenced to death, life imprisonment or not less than 10 years of fixed-term imprisonment; when the circumstances are relatively minor, he is to be sentenced to not less than three years and not more than 10 years of fixed-term imprisonment. Art. 234 of the Chinese Penal Code is a clause of intentional injury: Whoever intentionally injures the person of another is to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, or control. Whoever commits the crime in the preceding paragraph and causes a person's serious injury is to be sentenced to not less than three years and not more than 10 years of fixed-term imprisonment; if he causes a person's death or causes a person's serious deformity by badly injuring him with particularly ruthless means, he is to be sentenced to not less than 10 years of fixed-term imprisonment, life imprisonment, or death. Where this Law has other stipulations, matters are to be handled in accordance with such stipulations.

and this would be the case even if there were not such a clause in Art. 247, it follows that Art. 247 is totally redundant — it says something that it would have been needless to say. In this sense, the clause does not bring any new information, but reminds us of something that we already know (in this case, to convict an offender of intentional homicide according to Art. 232 of the Chinese Penal Code), and we may call such clauses “attentional provisions”. If systematic interpretation requires us to avoid explaining a certain clause in such a way which makes it superfluous, it is clear that we should give up this interpretation.

The other possibility is to understand “causing death” as “causing death negligently”. This interpretation undoubtedly brings new information. It provides that we should punish the offender who commits the negligent homicide according to Art. 232 of the Chinese Penal Code (intentional homicide) if he meets the other conditions of Art. 247. This does not state anything that we already know, because to punish a negligent offender according to a clause relating to intentional crime is something new to us — it is even something new to the entire Penal Code. To put it another way, according to this understanding, the last sentence of Art. 247 of the Chinese Penal Code introduces a “legal fiction” (Zhang 2011: 814), in the sense that it requires a form of unintentional criminal behavior to be punished as if it were intentional behavior.

In accordance with the principles of systematic interpretation, the “legal fiction provision” doctrine seems to prevail over the “attentional provision” doctrine, since the latter is in conflict with point 4 of systematic interpretation: it makes a clause superfluous.

However, the “legal fiction provision” doctrine has its own difficulties. It causes negligent behavior to receive the same punishment as intentional behavior, whereas the latter obviously means a greater social danger. Is this punishment still legitimate, especially when we consider that the highest punishment under Art. 232 of the Chinese Penal Code (for intentional homicide) is the death penalty? Is the avoidance of redundancy in the Chinese Penal Code so significant that we would rather risk the illegitimate use of the death penalty for a form of behavior for which this kind of punishment was seen as quite inappropriate (Ma 2014: 635)?

In this regard, wisdom from the realm of music can again be a guide. In the world of music, there are many cases similar to that of the “attentional provision”.

B. Musical Systematic Interpretation Compared with Legal Systematic Interpretation

Compared with the realm of law, redundancy seems not so undesirable in that of music. On the contrary, because of its function as a reminder, a “redundant” indication in a score might sometimes be indispensable.

For instance, according to basic music theory, “accidental” flat and sharp symbols “only affect the notes which they immediately precede, and those of the same letter which follow them in the same measure”; but when the flat and sharp marks “are placed after the clef, ... they affect all the notes of the same letter in every octave...” (Callcott 1817: 55). It follows that any sharp or flat symbol whose function is not described in either of these two rules is superfluous. But we can find such “redundancy” everywhere in musical works. For instance, *Brahms* used such *prima facie* superfluous accidental flat and sharp symbols in his scores many times, as shown in the example from his Sonata for Cello and Piano No. 1:

Example 3:



(Version: Mainz: B. Schott's Söhne, Ed.09494 & 09495/97, 1922)

As we can see, this movement is in E Minor, so that every F note must be played as F sharp, i.e. the sharp symbol in the 1st measure is obviously “superfluous”. In the 5th measure, preceding the E tone there is a natural symbol indicating that this E must not be played either as E flat or as E Sharp. However, since this movement is in E Minor, the E note is always to be played as E natural, i.e. this natural symbol is “superfluous”, too. In the following measure, *Brahms* used a natural symbol before the D note, but for the same reason the D note is always to be played as a D natural, so that this natural symbol is again “superfluous”.

Example 4:



(Version: Paris: Durand & Cie., 1922. Plate D. & F. 10,155)

Similar cases have appeared in numerous other musical pieces. In *Saint-Saëns'* famous work “Carnival of the Animals”, we find the same phenomenon. For example, a part of the double bass melody in the movement “Elephant” is:

As this movement is in E-Flat Major, the C note is supposed to be played throughout as C natural. However, before the first note of the 4th measure, a natural symbol is placed to indicate this is a C natural. Again this is “superfluous”.

Since it is unlikely that the composers did not know these rules, and so could have avoided the mentioned redundancies, they must have had a reason, namely, to call the attention of the performers. In example 3, *Brahms* used many “superfluous” sharp, flat and natural symbols, because the tonality of this motive is unstable and in each measure the melody is in chromatic progression. So, to bring each semitone interval to the player’s notice, *Brahms* used the accidental flat and sharp symbols uniformly in each measure, despite the fact that in some of them the symbols are grammatically necessary (in the 3rd measure, for example), while in other measures they are grammatically unnecessary. Similarly, in “Elephant” of “Carnival of the Animals”, *Saint-Saëns* used a “superfluous” natural symbol to draw the player’s attention to the C note, because before the 4th measure the melody is in E Major, where C is normally to be played as C sharp, but in the 4th measure, the melody is transformed into A Minor, where C is to be played as C natural. Thus the attentional mark, which seems redundant at first glance, is in this sense “useful” in that it reminds the performer that the melody here enters a new tonality and the marked note can easily be played wrongly. Both the examples of *Brahms* and *Saint-Saëns* tell us that a “superfluous” symbol can be significant to the performers if it draws their attention. That is to say, if a symbol is “attentional”, it is helpful.

Wisdom from the realm of music could provide a salutary lesson for the realm of law. On the one hand, it is true that an “attentional” symbol does not give any new information, because it just emphasizes what a well-trained performer already knows, such as the use of accidental sharp and flat symbols. On the other hand, the “attentional” symbol can be crucial to the musical performance, because it reminds of what can be easily forgotten in the specific situation owing to the change of, for example, tonality of the melody.

In this sense, it is not unacceptable to interpret the last sentence of Art. 247, Chinese Penal Code as an “attentional provision”. Because of its value, it is not against the basic principles of systematic interpretation to determine this clause to be an “attentional provision”. After all, it is practically meaningful in China to remind legal practitioners of the possibility of punishing a judicial worker who intentionally kills during an inquisition by torture. Such cases are not rare, and it is likely that the offenders sometimes receive lighter sentences because of their special status of judicial officer, even if they commit homicide by (often indirect) intention during the inquisition. In this regard, it is not

inconceivable that Chinese legislators set up this “attention” provision by design (Ma 2014: 635).

It is true that this interpretation seems to be not perfectly compatible with the principles of legal systematic interpretation, which require that in cases of doubt an explanation of a clause in such a way as to make this or another clause “superfluous” should be avoided. Only when the last sentence of Art. 247, Chinese Penal Code is interpreted as a “fictive provision”, i.e. as meaning that an inquisitor who unintentionally causes death during the torture is to be punished as if he had committed intentional homicide, is this sentence systematically meaningful (Zhang 2004: 264). But we should never forget what we are trying to weigh in the scales. On the one side, it is the neatness, completeness or purity of the legal system, but on the other side, it is the correctness of conviction and sentencing, which could determine the use of capital punishment. What is more, according to Art. 5, Chinese Penal Code, this kind of correctness is supported by the principle of responsibility. We should not sacrifice both the correctness of conviction and sentencing and the basic criminal legal principle in favor of “neatness” of the legal system, especially when there is a risk of using the death penalty incorrectly. In addition, we should not forget that there is a prerequisite for the avoidance of redundancy in the legal system, namely “in case of doubt”. But the doubt does not exist in this case, because the only possibility of making the last sentence of Art. 247 of the Chinese Penal Code compatible with the basic principle of responsibility of Chinese criminal law is to identify it as an “attentional provision”.

The Internal Link Between Chinese Traditional Music and Legal Practice: Features of Chinese Culture

The analysis above has considered mainly the common features of Western music and Western or westernized legal systems. Our starting point, that both Western law and Western art-music have formal rules in their inner structures, based on their own logic and rationality, seems at first glance inapplicable to traditional Chinese culture. On the one hand, the formality of the symbolic notation system of traditional Chinese music is, compared with Western counterparts, a well-known “weak point”¹⁶. On the other hand, although the Chinese modern legal system has to a large extent been “westernized”¹⁷, some of the legislative and interpretive techniques of Chinese law have inherited important

16 As early as 1930, it was widely maintained by Chinese musicology academics that one of the reasons why old Chinese music pieces had been lost was the deficiency of the traditional notation system (Lin 2001: 44).

17 Or at least “russianized” (Chen 2012).

characteristics from Chinese traditional culture, which make the modern Chinese legal system and its practice quite different from their Western counterparts. The following part will focus on the possibility of a “general” internal link between music and law with a Chinese background.

A. The Notation Systems of Chinese Traditional Music and Their Cultural Characteristics

If we observe just a few bars of any piano score in modern Western notation form, we find the following merits: 1) The notes show their relative pitch and time duration; 2) The clef symbols indicate the absolute pitch of the notes; 3) The key signature indicates the key of the scales used in the score; 4) The meter signature specifies how many beats are to be contained in each bar and which note value is to be given one beat; 5) The tempo signature gives the speed or pace; 6) Articulation signatures give hints on performance technique. All these characteristics show that the modern Western notation system is a complete system. It successfully describes pitch, rhythm, tempo and articulation of the notes, that is, nearly all the formal essentials of modern Western art-music.

In contrast, the main notation systems of Chinese traditional music if treated as formal symbolic systems seem much more incomplete and less successful. This can be seen in the Guqin reduced notation system, which is used as a tablature system to indicate the finger positions and plucking technique of the Guqin, the plucked seven-string traditional Chinese musical instrument, which has something in common with the Western zither family:

Example 5:



(The first page of “Shenqi Mipu”, the traditional Guqin notation, volume 2, 1425)

From the Western point of view, the notation system of Guqin should have the potential to give the player step-by-step instructions and descriptions of performance (Wikipedia, 2006). In fact, this is impossible in many cases, because the Guqin notation system does not record the rhythm or tempo, nor does it clearly indicate the pitch. Many of these indispensable formal elements in the Western perspective are not distinctly “given”, but just “implied” or “insinuated” (Lin 2001: 44-45). The result is often that different “schools” have developed totally different performance methods when playing the same piece. This phenomenon has its roots in the aesthetics of Chinese traditional culture. For instance, the convention that the detailed formal elements are often deliberately omitted in the Guqin notation system is similar to the traditional Chinese painting skill of “blank leaving”, which requires the artist to leave some places on the canvas untouched. According to the traditional Chinese philosophy of art, to leave blankness in appropriate spaces in a picture will considerably promote its aesthetical taste. The same applies to music: the missing tempo or rhythm markers are “blankness” left by design.

This phenomenon is related to Chinese philosophical worldviews. In basic Taoist thought, the “image out of the image” as well as the “ideas not expressed by the texts” are pursued; consequently, the rhythm and tempo of a music piece need not be “strict”, but on the contrary, just like the “hidden meaning” of life, the appropriate rhythm and tempo are to be freely explored by each interpreter (Wang 2006: 8). However, according to the Confucian doctrine of the “golden mean”, the suitable tempo and rhythm will not be too far from conventional standards even if they are unspecified, so in this sense these elements also are unnecessary (Wang 2006: 8).

This kind of aesthetic simplicity is also widespread in other Chinese traditional notation systems. In the notation of Chinese operas and folksongs only the main melodies are written down while the ornamental parts are left to the discretion of performers. All these phenomena show an important principle of Chinese culture: it is wiser to spare the dispensable details than to be absolutely precise on everything. Through this approach artwork concentrates on the object’s soul instead of its exterior appearance (Wang 2006: 8-12).

B. The Aesthetics of Simplified Symbolic Systems and Chinese Legal Practice

Accepting that the law began not as an abstract theory, but an embodiment of existing custom, and that cultural trends can influence contemporaneous law (Richmond 2003: 814), we may recognise that a preference for the simplified symbolic system in traditional Chinese aesthetics has an impact upon Chinese legal practice. A long time ago, *Aristotle*

once argued that “a wise legislature will deliberately use vague and flexible standards” (Frank 1947: 1259). As seen above, this happens less often in the world of Western music and law, but in Chinese cultural and legal practice, it occurs quite naturally.

Firstly, the Chinese Penal Code officially encourages the use of flexible legislative techniques in relation to ethnic minority customs¹⁸. The background of this clause is the fact that China is a multinational country with 55 ethnic minorities. These groups have different religions (Islam, Buddhism, Christianity); their languages belong to different families (Sino-Tibetan; Altaic; Austroasiatic; Indo-European and others); and they have totally different cultures and customs. Thus, it would be practically very difficult for all ethnic groups to obey all the clauses of the same penal code. For example, the clause forbidding fornication with an underage girl (Art. 236 II of the Chinese Penal Code) could hardly take effect among ethnic groups which have the social custom of early marriage; the same would apply to the clause on illegal denudation of forest land (Art. 345 II of the Chinese Penal Code), if it were used among the ethnic groups in mountain areas which have no other source of income than lumbering; or to the clause prohibiting bigamy (Art. 258 of the Chinese Penal Code), if it is used among ethnic groups which have long treated polygamy as an acceptable custom (Wu 2004:3). In this respect, the original clauses of the Penal Code are similar to a score recorded in the Guqin notation. The main melodies (the main structure of clauses of the Penal Code) are given clearly, but the further performance indications (additional regulations to be used among ethnic group areas) are all flexible and left to the discretion of different players.

Secondly, from the 1950s to the 1980s, a principle called “to be general rather than to be detailed” dominated China’s legislative activities, which required speed and quantity in legislation rather than quality. The main reason why this “principle” was so warmly advocated was that the level of legal research and practice at that time was much lower than today, so that “general” legal stipulations were more suitable (Lin 1999: 62-63). Moreover, the fact that this principle was at that time so quickly accepted by the whole nation must have has its root in the cultural background. In the traditional Chinese notation systems, it is widely recognized that composers only write down general

18 Article 90 of Chinese Penal Code: In situations where the autonomous areas inhabited by ethnic groups cannot completely apply the stipulations of this law, the people’s congresses of the autonomous regions or of the provinces may formulate alternative or supplementary provisions based upon the political, economic, and cultural characteristics of the local ethnic groups and the basic principles of the stipulations of this law, and these provisions shall go into effect after they have been submitted to and approved by the National People’s Congress Standing Committee.

indications at first and then let different players perform the details as they wish. This mode is based on trust in the artistic level of the performers.

In a word, a link between music and law has been observed even in the background of traditional Chinese culture. The Chinese traditional music culture did not breed high formality and rationality, and Chinese legal practice has something in common with this music culture.

Conclusion

Since there are common points in the structure and inner logic of both law and music, they both treat a set of rules and manifestation modes as an essential part. Nevertheless, neither is completely formalized, so that both of them need “interpretation” because of the “gap” between symbolic system and performance, and between the past and present.

In relation to historical elements, we have found inner links between historical legal interpretation and historical musical interpretation in the following respects. (1) In both realms there are different attitudes towards the idea of “loyalty” to the historically original notation. (2) Subjective historical interpretation is not useless in either the realm of music or that of law. (3) Under certain circumstances, objective interpretation can be acceptable in music as in law.

In relation to systematic elements, we have seen that wisdom from the realm of music can be helpful for the world of law in the sense that we should take the “redundancy” of a specific interpretation into consideration more carefully. If an interpretation seems at first glance “superfluous” in the legal system, this does not necessarily mean that it is totally “useless” and thus to be avoided. On the contrary, it may be a hint that the provision is an “attentional” provision, which has its own value in the legal system, just as attentional symbols in music, which can be important reminders to performers.

Finally we find that between Chinese traditional music and legal practice, an “inner link” also exists, even if formality and completeness of the symbolic system are no longer the common points of the two disciplines.

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