# *NAVEIÑ REET:*
# Nordic Journal of Law & Social Research

## Special Issue on Law and Art (Volume 1)

An Annual Interdisciplinary Research Journal, Number 5 2014

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# Nordic Journal of Law and Social Research

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Printed in cooperation with Department of Cross-Cultural and Regional Studies at Univesity of Copenhagen, Gillani Law College, Bahauddin Zakariya University, Multan, Pakistan, Department of Law, The Islamia University of Bahawalpur, Pakistan.



New name of the journal is *NAVEIŃ REET:* Nordic Journal of Law and Social Research (NNJSLR). *NAVEIŃ REET* is a punjabi word and means "New Tradition".

Printed and bound by by GRAFISK – University of Copenhagen
Layout and graphic design by Åse Marie Fosdal Ghasemi
Cover Art work, Metamorphosis of Lawyers by Rubya Mehdi
Cover design by Åse Marie Fosdal Ghasemi

www.jlsr.tors.ku.dk

Subscriptions:
All subscription requests and orders should be sent to
The Editor
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rubya@hum.ku.dk

ISSN 2246-7483 (print)
ISSN 2246-7807 (online)

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## Special Issue on Law and Art (Volume 1)

Edited by: Hanne Petersen & Rubya Mehdi

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# Introduction

*Hanne Petersen and Rubya Mehdi*

At the end of 2014 a Japanese colleague told that in Japan, which has a very high number of private universities (although with considerable state funding) legal education is now experiencing a considerable decline in students applying for enrolment. Law students can no longer expect (privileged) jobs after graduation, and they are thus turning away from legal education to other more lucrative forms of education for instance as engineers and in business. It is well known that Japan imported European, especially German legal models and legislations at the beginning of the 20th century. It is also well known that Japan as a medium range country in an Asian region has had an economic upturn, but also that it has for more than a decade been stagnating and on the decline.

The Japanese example may be an example of the challenges modern legal culture is facing – not only in Asia, but perhaps also in the Western world. – The relation between law and art – the rather new topic of this special issue of a transnational journal of law and social research – could be an expression of another challenge. When we set out to prepare for this issue at the end of 2012, we were warned by a knowledgeable American colleague (Lawrence Rosen) that this was an interesting topic, but one where it might be difficult to find authors qualified to deal with it. Therefore we decided to set up a workshop in Copenhagen on the topic in December 2013 to be sure that we would have at least some articles for this issue. We did not want to limit the issue to topics on law and literature, which has been a field of major interest amongst lawyers for a long period, but wanted to broaden the perspective.

However, when the Critical Legal Studies conference on Reconciliation and Reconstruction was to be held in Belfast in September 2013, and a call for papers for a workshop on *Artistic and cultural praxes in the transitional and contested territory of urban public space* was sent out earlier that year, it turned out that the conveners, Peter Bengtsen and Matilda Arvidsson, who have contributed to this issue, received nearly forty proposals, the greatest number of all the workshops. Proposals came from all over the world – most of them from architecture, art history, urban studies and ethnography, from artists and activists –very few from legal scholars. This indicated a considerable interest in the topic at least outside the professional legal culture.

One reason for the growing interest to integrate law with various art forms perhaps has emerged from a necessity of understanding plurality in the globalized world. The language of art can be interpreted in multiple ways regardless of linguistic, literacy and professional

skills. Thus they may give more space to law professionals to open up for diversities. Art has the potential to help in comprehending the complex human experience of law and legal process in a globalized world. And it may give voice to experiences of (in)justice and ambivalence as well as to many other emotions, which may have difficulties in reaching the ears of professionals and of normative institutions.

At our workshop on *"Law and Art: European and Global Perspectives"* seven papers (all of which are published in this volume) were presented, as was an exhibition of Rubya Mehdi's painting titled "Law and Justice" representing an effort towards a multidisciplinary engagement of law and art.

Due to the great interest amongst the fifty-something participants and writers from around the world, we could see that we would not be able to fit all articles; we have received, into this one volume. We therefore decided to publish two volumes. This is thus the first volume, and the next will be published in 2015.

The papers in the two volumes deal with a wide range of areas of art forms and their interaction with law for example literature, film, TV, opera, street art, music, dance, and paintings etc. Furthermore the articles deal with various aspects of law and art engagements for instance: aspects of censorships and other restrictions on artistic expressions; the role of art in providing a new understanding about law in an era of increasing diversities in society; interdisciplinary engagements with the method of law and art and reflections on jurisprudence etc. In the following part of the introduction we will try to elaborate on some of the reflections and experiences which both the workshop and this Volume One on Law and Art has given rise to.

Hanne Petersen introduced the workshop with a longish quote by the American artist, Walt Whitman, who in 1870 produced a small book called "Democratic Vistas." It was translated into Danish in 1874, and was interestingly retranslated in the year of the collapse of the Soviet Union and thus of the bipolar world and worldview, in 1991.

"I say that democracy can never prove itself beyond cavil, until it founds and luxuriantly grows its own forms of art, poems, schools, theology, displacing all that exists, or that has been produced anywhere in the past, under opposite influences. It is curious to me that while so many voices, pens, minds, in the press, lecture-rooms, in our Congress, &c., are discussing intellectual topics, pecuniary dangers, legislative problems, the suffrage, tariff and labor questions, and the various business and benevolent needs of America, with propositions, remedies, often worth deep attention, there is one need, a hiatus the

profoundest, that no eye seems to perceive, no voice to state. Our fundamental want to-day in the United States, with closest, amplest reference to present conditions, and to the future, is of a class, and the clear idea of a class, of native authors, literatures, far different, far higher in grade than any yet known, sacerdotal, modern, fit to cope with our occasions, lands, permeating the whole mass of American mentality, taste, belief, breathing into it a new breath of life, giving it decision, affecting politics far more than the popular superficial suffrage, with results inside and underneath the elections of Presidents or Congresses…"

This was written at a period of time where only very few people in the world, mostly white men with property, had received the suffrage, and where democratic voices came from many angles – several of them from artists, organizers, intellectuals and representatives of emerging political movements. The link between a new understanding and expression of art, democracy and law was part of emerging 20th century thinking and practice and all these and many other fields.

Whitman underlines the necessity of a modern and democratic society and law going hand in hand with a democratic new and modern art. Are we now in this century in a situation, where we need global/planetary art, law and other normative expressions to interact? Globalized markets are influencing art and law, technology and design. Does this lead to greater diversification or to more commercially created homogeneity – or both?

This seems to be a period, where old paradigms are in crisis and to a certain extent falling apart – crumbling into ruins, as Modeér writes in his final article. But it could perhaps also be a period of new beginnings and returns to earlier understandings of ethics, morality, norms, and traditions – or perhaps to the parts of these understandings, which seem attractive to diverse groups of beings or individuals in the 21st century. Groups and individuals, who are seeking for voices and movements, experimenting with forms of expression, of coexistence and with relations, which seem suitable – or undesirable – in this globalized, fragmented, crisis ridden world full of injustices and new potentialities.

All of the articles in volume one deal with changes and challenges to contemporary societies – primarily but not only Western and European, and mostly in the 20th century. The changes include the shifts from agricultural to industrial societies (legal, and social); from colonial to post-colonial; from national to globally diversified societies; from an exclusively male legal profession to a more gender neutral one; from portrayals of the legal profession in live popular opera performances to popular moving pictures accessible in

private homes via television (by now old style flow TV); from nation states and national laws, to artistic presentations of states' military engagement in upholding the (old) world order in all parts of the world – an order which may be perceived as a straitjacket.

They explore a shift from an understanding of law and art as fixed and permanent, to one viewing both as ephemeral going beyond the dichotomy of legal/illegal and seeing law and artistic practices in urban contexts as codependent, mutually reinforcing and creative. They study the influence of decorative arts and decoration in normative female dress practices, reflecting on their interaction with other social and societal norms. They hypothesize that late modern legal scholarship of the 21st century can be identified as a part of a new romanticism. And finally they reflect on how – or whether – the transformations of Western legal culture during the 20th century are also creating new beginnings. Art can appear immanently or be embedded in legal contexts. Law and art interact and intertwine. Both are created within a historical process. The neo-romantic trends within current legal scholarship can be seen as a counter force to as well as related to the realistic, pragmatic and positivistic modernity of the 20th century.

The following section will present very brief reflections on the individual articles in this issue, thus hopefully enabling a reader to see links between the different articles – links that have been created and/or traced by the editors, and which may be interpreted and created otherwise by other readers.

The first two articles by Osama Siddique and Helle Blomquist deal with some of the major conflicts of the 20th century, (post)colonial conflicts, class conflicts, and conflicts related to global migration.

Osama Siddique's gives a fascinating presentation of the author Saadat Hasan Manto (1912-1955), who was to become a Pakistani citizen with considerable experience of the new courts of the new state, as he was accused of obscenity. Siddique writes that Manto belonged to the generation that directly witnessed, deeply felt, and acutely internalized the traumatic outcomes of the partition of India in 1947, its depressing human toll, and the consequent massive social displacement. He examined and faithfully described the complex and disturbing social phenomenon of a deeply fragmented society with fluid spontaneity and unflinching honesty. Manto himself wrote that it was "not too difficult to answer the question as to why today's writers primarily focus on sexual matters – we live in an age of strange paradoxes – women are more proximate now and also afar – at places one encounters utter nudity and at other places they remain covered from head to toe; one comes across women in male guises as well as men dressed as women… the

world is undergoing a great change – eastern civilization is being deconstructed as well as reconstructed; western civilization is being exposed as well as being adopted – there is a kind of chaos everywhere…"

Helle Blomquist asks whether fiction as a creative expression may provide an advantageous framework for discussions about law and legal culture in an increasingly diverse society, and asks who are we in terms of the law in such a society. Her method is a combination and comparison of two works of fiction created at the beginning of the 20th and the 21st centuries and a socio-legal analysis of the reaction of some of her students, future welfare professionals, to the 21st century poem. The first piece by Danish author and communist, Martin Andersen Nexø (1968-1954), deals with issues of class conflict, rural-urban migration and the creation of a new (class) consciousness and a new 'welfare state legal culture'. The second piece by Palestinian-Danish poet Yahya Hassan (b.1995), is called *Poems,* and deals with current important social conflicts between a (national) population and contemporary immigrants, who come from both the European Union and/or from conflict ridden areas of the global countryside to a place in the world expected to be a safer and more prosperous area. However both newcomers as well as the 'indigenous' may experience more hidden forms of conflict and violence in the welfare institutions of this society.

Ole Hammerslev reflects on the use and presentation of artworks by contemporary (Nordic) artists in the period of 2006-2013 presented on the cover of a Nordic critical and interdisciplinary journal *Retfærd*, rooted in the Marxist and critical legal heritage of the 1970s. The artworks selected for discussion relate to the war in Afghanistan and the impact of this war on Western law, they examine covers that focus on law and commerce, and some that focus on law and identity – all three areas of concern for the beginning of the 21st century and the legal discourses related to this period. The artists relate the war in Afghanistan to global trade and to legal changes in the west and to morality, where social and geographical factors determine the development of different forms of law in different societies. International politics has latent and manifest global consequences for local living conditions – and the rule of law is of limited success if it is not based in the *lifeworlds* of and supported by the people it effect. None of the images illustrate more positive impacts law has had on societal development. Modern images of justice do not communicate with law in the language of the law, but they may ask questions about law, which law does not manage to ask itself.

Legal scholar Inger Høedt Rasmussen and opera singer Lise Lotte Nielsen investigate representations of lawyers in operas performed in the period between 1786 and 2014.

They claim that relations between law and the performing arts such as music and drama are even closer than the relations between law and literature and that law should be studied as a performing art. Operas often question power including legal power, and lawyers are generally negatively depicted in operatic works as caricatures, which are often ridiculous, despotic, dishonest and pedantic. Men in power with a legal background are often portrayed as curtailed, one-dimensional, and convinced of their own legitimacy as well as pedantic, petty and crafty. The music may support the characteristic of the individual lawyer, portrayed as ridiculous with a nasal voice, thin and sharp, and monotonous. This creates mistrust against the legal profession(al) , and portrays an arrogant human being with a big ego. At present the legal profession's monopolies and its common code of conducts are under pressure, and judges in particular have lost influence in society. Two very recent operas, however, have a somewhat different take on this (male) caricature.

The changing face of the legal profession has also left its mark on contemporary popular culture and its reflections of social, economic and gender changes. Peter Robson's article focuses mainly on two TV-series with women barristers as protagonists produced respectively in 1971 – the pre-Thatcher era – and in 2011 – the era of globalization. The first series was called "Justice is a Woman" – and was produced at a time, when the proportion of the legal profession who were women was 3%. The second series from 2011, which was also the only legal series in 40 years with a female lawyer protagonist was called "Silk" which related to the process of attaining the highest and most famous rank available to British barristers, that of Queen's Counsel (Q.C.), known as "taking silk." By 2011 the number of female lawyers in Britain had risen to 40% and over 50% of barristers called to the bar were women, while 11.8% of Q.C.'s were women. Even if both dramas deal with 'the particular struggles of women in a male world' (and a market world) the 'economically driven structural context' is much stronger in "Silk". In this respect popular culture reflects a general development of law and legal practice over the decades since the early 1970s.

Peter Bengtsen and Matilda Arvidsson write about street art and spatial justice, where street art literally takes a place already taken and – temporarily – imposes itself in an already appropriated urban public space. Street art is ephemeral, impermanent, and short lived and fleeting. The presentation goes beyond the legal/illegal dichotomy and focuses on the relation between art and justice as codependent, mutually reinforcing and creative. Street art is inherently non-permanent. It does not usually work with permanent appropriation from which legal title can be drawn and it invites a radical oscillation between appropriation and dispossession of public space. Thus indirectly it also contests a dominant perception of ownership as permanent and exclusive. Spatial justice, as the

authors conceive of it, should first and foremost be understood as an embodied ethics – a unique and singular place-taking in the metaphysical, psychological and material sense. Spatial justice becomes the very tangibly pronounced ethical demand to withdraw. It is not only an ethical demand but also an exposition of vulnerability to the desire of the other: it enforces a bond of permanent oscillation, mutual reinforcement and creativity.

Hanne Petersen discusses and suggests interpretations of emerging female urban dress practices (large printed patterns), asking to what extent fashion norms are influencing and interacting with other social and societal norms including, what has in the Western world long been called legal norms – most often understood as state produced norms. Nordic and Danish legal culture have been strongly affected by modernism, minimalism and functionalism, as well as by Protestantism's suspicion of images and (floral and temporary) rituals. Architecture, design and fashion as well as legal culture and legislation have all been influenced by these trends, which reflect the impact of social and democratic welfare societies in all fields. At the turn of the 20th century globalization, market economy and commercialized normative culture is demanding and creating new trends in all of these fields – trends which lead to understandings of norms as not only state designed. The attraction of decoration could reflect an interest in broader and more fluid forms of expression and collective behavior both in fashion and (legal) norms.

Kjell Åke Modeér's article is based upon the hypothesis that late modern legal scholarship of the 21st century can be identified as a part of a new romanticism. Late modern legal cultures are defined as the cognitive structures of the contemporary legal actors, and transnational deep structures are an important part of the current legal paradigm. The trend towards romanticism – also defined as a 'neo-romantic turn' – is a trend rather than a dominant paradigm. It has the character of a legal construct composed as a counter-force to the characteristics of the modernity of the 20th century. Where romanticism of the 19th century was a counter-force to the rationality of the Enlightenment, the national romanticism of the early 20th century was a counter force to the dominant positivistic, social, realistic, and even naturalistic trends within science, law, literature and are. The article seeks to identify the relationship between law, religion and art and compares the romanticism of the 19th century and the 'neo-romanticism' of the 21st century. Not only art, but also law is created within a historical process, and what we are seeing now is that romanticism is again expressed in European legal culture.

Finally in the review by Marya Akhtar on *Subversion and Sympathy – Gender, Law and the British Novel* edited by Martha Nussbaum and Alison La Croix it is clear how the transformations of the Western legal culture during the 20th century are creating new

beginnings. Interaction between law and art sensitizes lawyers as human beings (no longer only men) to the conditions of a changing world, a changing understanding of law and relations considered (il)legal and perhaps also a changing legal mentality which is able to move beyond one's own conventional horizon.

On a final note we would like to thank the anonymous reviewers, whose comments have contributed to the improvement and clarifications of the ideas and thoughts presented in these articles, and we would of course also want to give our thanks to the contributing presenters and authors, who have shown unusual enthusiasm in their work with these articles.

NAVEIÑ REET: Nordic Journal of Law and Social Research (NNJLSR) No.5, 2014, pp. 15-40

# Capturing Obscenity: The Trials and Tribulations of Saadat Hasan Manto

*Osama Siddique*[1]

## Abstract

*There is something extraordinarily evocative about great fiction or literary narratives by great writers of fiction on the theme of coercive authority. The celebrated South Asian Urdu essayist and short story writer Saadat Hasan Manto (1912-1955) belongs to a long tradition of highly gifted authors who had the occasion of personally encountering and confronting the cumbersome machinations and the at times mindless and oppressive logic of authority. Like other eminent writers of his ilk, his reflections on his experiences – Manto underwent several criminal trials for allegedly obscene writing – have left posterity with much more than the irate chronicles of someone confounded by an exhausting personal ordeal. We are bequeathed instead with a wealth of deep, astute, and compelling observations of a keen-eyed, sensitive, and articulate man – observations that continue to hold great relevance and wide appeal so many decades later. This article endeavours to capture Manto's unique critique of imposed legal frameworks for 'acceptable' creative expression, as well as his memorable picturization of the spectacle of the legal trial in colonial and post-colonial contexts.*

## Introduction

When it comes to providing a fascinating commentary on abusive or insensitive application of power and its discontents, Manto is quite similar to other illustrious writers, including literary giants such as Dickens, Kafka, Orwell and Coetzee. They too experienced such application of authority in diverse personal ways and subsequently adopted a vantage point from where they could examine the phenomenon from both within and without. The vital insider's perspective allowed them to decipher the special, and at times cryptic, languages and imperatives of the structures of power and authority. However, at the same time, they also developed an appreciation for and remained cognizant of the various nuances of everyday impulses, perceptions, hopes, fears, and reactions of their fellow folks who also encountered these power structures, thus universalizing their collective

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1 Osama Siddique, B.A (Punjab), M.B.A (LUMS), B.A (Hons), M.A (Oxon), LL.M, S.J.D (Harvard) is a legal scholar, lawyer and justice sector reform advisor based in Pakistan. The writer would like to thank Mr. Bilal Hasan Minto for his useful comments on this article. The writer would also like to thank Dr. Rubya Mehdi and Professor Hanne Petersen for inviting him to the highly stimulating 'Law & Art Conference' at the University of Copenhagen in December 2013, which led to the envisioning and eventual writing of this piece.

experience. Importantly, while developing that vital insider's view, these writers became neither creatures of institutionalized tyranny, nor its continuing victims – they ultimately found their escapes (albeit, at times only temporarily) from such insularity and forced dependence, saw the world and its additional facets, and came to embrace a multifarious comprehension of the vagaries of social existence and the overall human condition. That, and their remarkable skill and creative imagination as highly talented writers of fiction, then allowed them to look back and make sense of their earlier encounters with authority.

## Manto and Other Great Literary Commentators on Authority – The Common Threads

For Charles Dickens, his early experiences as a child from an impoverished family incarcerated in the debtors' prison, his dull and grinding work as a young law clerk, and his subsequent interfaces with the courts as a litigant, provided him an invaluable insight into the workings of the nineteenth century English court system. What subsequently emerges in several of his classic novels – most notably in *Bleak House* – is an incisive sociological critique of this system, its more comical idiosyncrasies as well as its soul-sapping delays, a vast and amazing cast of characters that typified those who ran, stood by or suffered through its operations, and a highly poignant lament about the multiple injustices that it meted out to the poor. Dickens documents several levels of privilege as well as disempowerment. His works often dwell on themes of legally sanctioned and upheld modes of exploitation based on lineage, class, gender, age and religion. On the other hand, Franz Kafka – who trained initially as a lawyer and was later subsumed by one dull and dreary vocation after another – investigates the remoteness and unaccountability of an unintelligible and often cruel bureaucracy; though his are more abstract and at times phenomenological explorations. Kafka's work may be set in the context of the early twentieth century Austro-Hungarian Empire but its scope is universal and its value truly enduring. His masterful examinations of the overt and covert persecution and psychological torture that comes with interfacing with a complex, seemingly senseless, and utterly inaccessible authority, serve as templates for on-going analyses in all those contexts that may harbour such a phenomenon.

In George Orwell, we have a past master at laying bare the unmistakable as well as the more subtle underlying racism of colonialism – an artist whose potent skill for expose in this arena few others have arguably managed to replicate. His great novel *Burmese Days* remains a masterpiece for the adeptness with which it dissects the racist demarcations that characterized life in the colonial outposts – whether in the club house or in the courtroom; may it be in the official jurisdiction of the *pukka* sahib or within the household domain

of the *memsahib*.[2] Of course it was Orwell's early career experience in the Burmese police around the first quarter of the twentieth century that left an indelible imprint on his later writing. Finally, J.M. Coetzee's various works, especially his celebrated novel *Waiting for the Barbarians*, has developed an abiding appeal owing to its clinical expose of the calm callousness of imperialism, set as it fittingly is in a timeless world. Coetzee's lifelong exposure and firsthand observation of the sinister workings of apartheid in South Africa may have introduced that brutal immediacy and utter believability into his fictional worlds, for which he is so well recognized.

Where one might ask does Manto fit into all of this? Quite apart from having the benefit of several personal run-ins with authority that furnished him with that important insider's perspective, what Manto further shares with the aforementioned writers is his unflinching honesty as well as extraordinary skill in exposing what he finds repulsive or untenable – as a litigant, as a writer, as a citizen, and above all, as a highly sensitive human being with a strong commitment to personal freedom and a sense of justice for all. Of course, in Manto's case the authority in question is neither abstract nor symbolic, but very palpable. It is the authority of the formal law itself – and that too a colonial law; a law imposed and implemented first by a colonial power, and then equally diligently by the young post-colonial state with its inherited *corpus juris*.

Manto writes about his encounters with the law as only a gifted writer of fiction can. Which is to say that his insights and perspectives leave one with not just a unique understanding of the experiences and emotions of a person caught up in a bewildering maze of officialdom and formal legal norms, but also a special, brooding, overall mood that he magically conjures up. A mood, which at times conveys so much more than a mere well chosen arrangement of words. All the aforementioned writers have frequently displayed this extraordinary talent. Allow me to draw attention here to how the successful creation of a special mood or particular feeling which reminds one of their works has led to the necessity of describing certain kinds of writings or descriptions as Dickensian, Kafkaesque, Orwellian, or in the style of Coetzee. The very terms say it all. It is because they denote the peculiar combination of words and emotions that Dickens ascribed to the exploration of legally preserved poverty and social injustice; that Kafka introduced to the analysis of the surreal and nightmarish experiences of disempowerment at the hands of a remote and elusive authority; that Orwell brought to an assessment of the degrees

2 *Pukka sahib* and *memsahib* are colloquial terms commonly used, invariably by the non-white subjects, for the quintessentially stiff, blunt and fastidious white male masters and their white married and/or upper class female counterparts during the colonial era.

of dehumanization caused by totalitarianism – a theme linked to his other literary forays into the murky worlds of colonialism and racism; and, that characterize Coetzee's stark, precise, unpretentious and yet pithy analyses of imperialism and its tools of intimidation, torture, and subjugation. I would argue that when Manto encounters the debilitating processes, definitions, and frameworks of an alien formal law he leaves behind some very distinctive narratives. They are singular and peerless for their scathing wit, irreverent critique and highly provocative challenges to authority – an authority that is both formal legal as well as popular moral.

In other words, there is something uniquely *Manto-esque* about these narratives which makes them stand out for their distinctive style and depth of feeling. This is that something special and unparalleled – both in terms of perspective as well as description – that the great writers of fiction have brought to the examination of the phenomena of law, authority and control. This is something that mere expository writing or even robust academic analyses cannot quite hope to match, particularly when it comes to capturing the feelings of oppression and despair – the human dimensions of subjugation to unfeeling rules. This is what extends such a strong and compelling appeal to the field of law and literature, and indeed to the treatment of law in literature.

## The Ambit of the Essay

This essay discusses the various trials faced by Manto during his all too brief lifetime (and indeed also Manto's own commentaries on these trials), which quite significantly had to do with his writing, the purpose of writing in general, the relationship of law and literature, and the level of legally permissible freedom (though also discussed at times by judges as socially permissible freedom) that ought to be allowed by the society and the law to writers. The very themes of these legal *trials* – especially since Manto was repeatedly accused of being obscene in the choice and treatment of his subjects – are fascinating. This is because they frequently pitch legal definitions of what art, and more particularly what fictional literature, ought to do or ought not to do, against the multifarious perspectives of various men of letters, academics, bureaucrats, journalists, psychologists, judges, public moralists, and more importantly, of several writers, including Manto.

The fact that the laws under which Manto was tried were of colonial origin – and that he was tried both by colonial and post-colonial judges – makes this contest all the more significant; especially given the much debated trends and themes of continuity between the colonial and the post-colonial. At the same time, these trials were literally quite a *trial* for Manto – impoverished, maligned, betrayed, isolated and abandoned as he often

found himself while boldly speaking up for his freedom of expression and that of others. It is not unsurprising, therefore, that a third meaning also ascribes itself to Manto's trials. That is owing to the nightmarish Kafkaesque feel to his repeated experiences of fighting legalized hegemony – quite like Josef K. in Kafka's *The Trial* – as day after day he found himself having to explain to a judge why he wrote what he wrote and why it was not important or desirable for that to fit into the judge's definition of what was permissible for him to write. While describing his trials and tribulations, Manto leaves us with a telling account of the perennial tussle between alien and hegemonic formal norms and the more organic and socially contextualized informal norms that the former endeavour to subdue and suppress. That is what imbues his writings with the lasting value of great fictional narratives that meaningfully assail the hegemony of unpopular authority.

## The Paradox of Manto – Deeply Denounced and Widely Revered

Manto belonged to the generation that directly witnessed, deeply felt, and acutely internalized the traumatic outcomes of the partition of India in 1947, its depressing human toll, and the consequent massive social displacement. He examined, probed and faithfully described the complex and disturbing social phenomenon of a deeply fragmented society with fluid spontaneity and unwavering honesty. The elevated anxiety and angst of his unanchored and disconsolate existence continues to resonate in words, phrases and stories that still shock, provoke, sadden and brazenly question established and convenient perceptions of things. Though a social commentator of great genius at several levels he was also quite often the victim of a reductionism that degraded him as a writer of obscene stories.

Manto was prolific and often deliberately provocative. Perhaps what vexed his detractors the most was that he could not be conveniently categorized and pinned down for a definitive castigation. After all those who maligned him throughout his writing career included the religiously orthodox as well as secular liberals; colonial sympathizers as well as post-colonial bureaucrats; die hard nationalists as well as those cynical of narrow statist positions; and, litterateurs in the classical mould as well as progressive new age writers. Manto's fiercely independent and diverse expositions of overt and implicit exploitations through the mechanisms of colonialism, nationalism, religion, class, and sexuality, irked many; his stark exposes of the dark and sombre facets of the human condition regularly riled up ideological adversaries as well as prudish aesthetes. And the more they berated and ostracized him the more scathingly he wrote. This mutual torment continued till penury, alcoholism and disenchantment took his life when he was not yet forty-three. The year 2012 marked the first centenary of his birth and the resonance and longevity

of his uniquely bold, multi-tiered and perceptive social critique is undeniable.[3] However, at various levels many of the official and unofficial tributes seem faux to more astute observers.

Noted Pakistani novelist Mohammed Hanif notes wryly in his homage to Manto: "If you were writing today, and specially if you were writing in English, you could go to all the literary festivals and drink all the free booze you wanted. But they probably wouldn't invite you because before and after drinking their booze you'd rant against the festival organizers, you'd raise questions about the sponsors' parentage. Just like you maligned us judges. Having made your acquaintance while you were in the dock, and having familiarized ourselves with the filthy bits in your writings in the privacy of our chambers, we just wish to elaborate on the verdicts we handed down in those trials. No, this is not an apology on behalf of the Islamic Republic's judiciary, just some observations, clarifications—and we are sure you still hate it—some literary advice. Times have changed. If you were writing today, we'd probably ignore your little blasphemies against good taste and national interest and would just book you for that half pint in your pocket" (Hanif 2012).

From amongst the vast cast of Manto's tormentors Hanif has chosen the fictional voice of the judges for his posthumous appraisal. It is only too appropriate. Manto was frequently in trouble with the law and six decades after his demise exponents of narrow interpretations of the letter of the law (and its frequent coercive use by growing forces of radicalism and obscurantism) have come to entrench themselves as the final arbiters of acceptable and unacceptable speech in his homeland; the classifiers of piety and blasphemy; and, the adjudicators of the chaste and the obscene.

However, moving back to those earlier years when Manto was still probing and prodding with his sharp pen, it is time now to put him on trial yet again.

## Manto and the Obscenity Laws

As mentioned earlier, prominent amongst the several accusations routinely hurtled at Manto, was that of writing obscene stories. And to drive home the point, he was often dragged to court in order to seek legal sanction for such literary and moral denunciation. The applicable law in question was the British colonial law of obscenity brought into force in colonized India through the Indian Penal Code in 1860. It was a law which like many other colonial laws from that period was coloured by and based on colonial prejudices

3 There is a steadily growing body of literature on the life and art of Manto.

about the character of the colonized subjects. As a recent history puts it, "The pursuit of truth was a persistent source of anxiety to the British in India. Colonial administrators, Christian missionaries, and a wide range of commentators on Indian society consistently characterized the subcontinent as a place teeming with perjurers, forgerers, professional witnesses, and a general population that did not value truth. British ideas about Indian deceptiveness stretched steadily across historical time and the spectrum of political positions…Colonial anxieties about the unreliability of native knowledge took a very literal turn when it came to the administration of justice" (Kolsky 2010: 108-109). It is with this in view that we now proceed to an examination of the law itself.

Section 292 of the Indian Penal Code of 1860 did not define obscenity but endeavored to proscribe everything conceivable to do with obscene writings and objects, only carving out an expedient exception to assuage any religious sensitivities – thus pragmatically taking into consideration situations where the Indian notions of the sacred overlapped with European notions of the obscene.[4] The social, political, moral and public policy imperatives underlying a law from mid-nineteenth century colonial India were in turn deemed to be of timeless application by post-colonial India, Pakistan and Bangladesh. As a result, to date, their respective legislatures have not thought it worthwhile to alter one syllable of the original text, and where they have the amendments are negligible (Siddique

4 It is worthwhile to reproduce here the text of this law: According to Section 292: Sale, etc., of obscene books, etc., "Whoever-
(a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene books, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever; or
(b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation; or
(c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation; or
(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person; or
(e) offers or attempts to do any act which is an offence under this section,
-shall be punished with imprisonment of either description for a term which may extend to three months, or with a fine, or with both.
Exception: this section does not extend to any book, pamphlet, writing, drawing or painting kept or used bona fide for religious purposes or any representation sculptured, engraved, painted or otherwise represented, on or in any temple, or on any car used for the conveyance of idols, or kept or used for religious purposes." The Indian Penal Code, 1860 (Act No. 45 of 1860), S. 292.

2013). It seems that the various prejudices and apprehensions held by the colonizer's mind regarding the Indian mindset that in turn contributed to the shape and substance of the Indian Penal Code, 1860 as well as other criminal laws from that era, were deemed unimportant to merit a revisiting and upgradation of these laws as the erstwhile Indian subjects became citizens after winning freedom in 1947 (Siddique 2013). The various trials of Manto – more or less evenly distributed on both sides of 1947 – the year that marks the independence of the Indian sub-continent from colonial rule – are thus fascinating both for the seamless continuity of applicable laws and procedures, as also for the continuation of the various contestations, contradictions and paradoxes underlying the court battles, between the worlds of formal law and the realm of literary expression. A pitched battle for turf is evidently on display as they both endeavor to comprehend and interpret the complexities of society, freedom, morality, ethics and art and consequently what ought to be written and allowed to be read.

As Manto found himself regularly hauled before the courts because someone or the other had complained that what he wrote was unfit for societal consumption and even anathema for state, religion and society, we are furnished with a fascinating collage of a creative writer's impressions of the court system (Manto extensively recorded his impressions in his inimitable style) as well as the courts' impressions of the creative writer and his creativity. We can also unearth significant underlying battles in the nascent nation-state between highly incongruous views on the future shape of the state and society and indeed the acceptable as well as desirable role of the writer in a country created in the name of religion. We come across a dazzling cast of local intellectual, scientific and literary luminaries who were summoned by the court as witnesses in order to weigh and gauge the artistic, literary and social merit of Manto's works. While evaluating his stories, these 'expert' witnesses provide a window to the deepening political, social and cultural divides in the Pakistan of the 1950s and the emergence of several schisms that were to aggravate in coming years. While judicial minds grappled to legally envision and shackle the concept of the obscene, noted writers, academics, psychologists and literati held forth on what was literary and what was vulgar.

Against these mega-debates, one can almost overlook the slim, bespectacled and harried-looking Manto – the instigator as well as target of these legal spectacles – reflecting on the extent of hullabaloo that a short story about a repentant rioter and rapist; a study of carnal awakening in an adolescent; a snapshot of the clinical staidness of settled upper middleclass matrimony; a sketch of a courtesan seeking new black clothes to commemorate a holy day with due sobriety; and, a tale about nostalgia for past sexual dalliances by a newly

married man, could generate.[5] However, Manto is not a silent observer and luckily we have some excellent essays that provide his version of what went on around him.

## The Writer's Window – Manto on the Physical Experience of his Trials

Already physically and financially fragile, the trials were draining for Manto in every sense of the word. His recorded impressions of his trials are often witty but also stoic, indignant, curious, anxious, long-suffering and at times both infuriated as well as deeply anguished. The title of one such essay – *Zehmat-e-Mehr-e-Darakhshan* (Torment of the Blazing Sun) appears cryptic till one links it to the classic Urdu poet Mirza Asadullah Khan Ghalib's couplet which says:

> *Larazta hai mera dil zehmat e-mehr-e-darakhshan par*
> *Mein hun who qatra-e-shabnam kai ho khar-e-bayaban par*
> My heart trembles at what the blazing sun portends
> For I am a dew drop on a thorn-tree in the wilderness

Thus, precarious like a dew drop in a parched landscape where a blazing sun will soon ascend, Manto seemed to await each new day in court with heightened trepidation. The perpetual delays, costs and myriad additional inconveniences of a legal trial taxed Manto who describes the dispiriting topography and physical architecture of formal justice in detail: "This was not a new place for me – several times before I had squandered time here in connection with my three earlier trials. Though it is called the district court it is a filthy place. Mosquitoes, flies and other insects – the jangling of manacles and shackles, the monotonous tap tap tap of obsolete typewriters. Three legged chairs missing the rattan that forms the seat – the plaster peeling off the walls – a garden with a lawn as bare as the bald head of a dirty, impoverished Kashmiri. *Burqa* clad women sitting cross-legged on the bare dust-covered floor. Some people are engaged in foul swearing; some are scowling. In the courtrooms, the magistrates are sitting behind nonsensical tables and hearing legal proceedings. Nearby sit their friends with whom they engage in banter during the hearings. Words cannot quite capture the district court. It has a distinct mood, a distinct atmosphere, a distinct language and distinct terminology – it is a very strange place indeed. God preserve us from it" (Manto 1995a: 358-359).

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5 The references here are to some of the famous short stories by Manto – respectively, *Thanda Gosht* (Cold Flesh); *Dhuan* (Smoke); *Oopar, Neechay Aur Darmiyaan* (Above, Below and In Between); *Kali Shalwar* (Black Trousers); and, *Bu* (Odor) – all of which led to trials for obscenity. All translations of Urdu text in this article are by the author.

That justice comes at a price – the proverbial 'speed money'[6] – is ever evident. Manto reports, "If you want to procure the copy of a legal document you have to attach 'wheels'[7] to your application. If you want to access a legal document for review, then too you need to attach 'wheels.' If you need to meet an officer of the court you need to attach 'wheels.' If you need to expedite anything the number of required wheels goes up. You don't need to look hard – as long as you possess sight you will observe that in the district court every application moves on wheels. Four wheels to get from one office to another. Eight wheels from the second to the third office and so on. If you are not a habitual culprit your heart will be seized by the desire that someone attaches wheels to you and thereafter pushes you so that you can speedily exit the district court" (Manto 1995a: 359).

Interminable hearings, the ravages of intense weather and premises ill-equipped to shelter and protect, at times contemptuous and easily irritable judges, the troubles of identifying and arranging defense witnesses, the prosecutions' witnesses often engaging in *ad hominem* attacks, the perpetual anxiety of an uncertain legal outcome, and the sheer indignity of standing in the dock harangued Manto. Despite a veneer of fortitude, one can easily sense why he loathed each new day in court. Empirical research conducted over sixty years later reveals that not only is the trial process as tedious and cumbersome as it was during Manto's time but that the 'district courts' that he longed so desperately to escape are as dreadful a prospect for a sensitive soul.

A 2011 snapshot of sections of the same court premises has the following to offer: "The 'Aiwan-e-Adal' (literally the "Hall of Justice") is the official name of the main premises that house the civil courts of the Lahore district. Situated in the heart of the old colonial

6 'Speed money' is a colloquial term used by lawyers and other legal functionaries during Manto's times. It remains en vogue even today. It denotes the tips and small bribes expected by and given to court functionaries and staff to ensure that the case proceedings flow smoothly and without any petty bureaucratic hitches and delays. Such hitches and delays could be actually created by the court staff itself in order to extort money from litigants or were simply part and parcel of the outdated procedures and the slowly functioning court system.

7 Once again the context here is the slow and grinding pace of a legal system characterized by outdated and time-consuming procedures and judges and courts over-burdened with cases. In order to ensure that one's legal case does not get bogged down in such a system the expectation on part of court functionaries and staff is to be paid some financial reward to speed up things, expeditiously produce necessary documents or perform other small but vital administrative tasks which may otherwise take a much longer time. Manto uses the metaphor of a 'wheel' for the additional speed and alacrity with which any simple but necessary steps in a court battle – procuring a copy of a legal document, meeting an officer of the court to get some standard information etc., – could be undertaken after extending some financial incentive to the provider of such routine services.

part of the city it constitutes a couple of large and drab four storey buildings which are connected by bridges at the third and fourth levels, surrounded by lesser structures and fronted by a very busy road. Upon entering through the main portal one is surrounded by scores of tin-roofed sheds and flimsy make-shift wood and board structures that act as lawyers' offices or the work places of several service providers to the court operations. The area is crowded by lawyers, law clerks, litigators, visitors, legal paper sellers, court staff, photocopying and typing service providers, tea and snack vendors and various other ancillary operatives of the court system as well as regular frequenters of the courts who may or may not have any particular reason for being there. The main buildings contain court rooms, retiring rooms for judges and work spaces for the court staff and are fronted by open corridors with occasional cement benches for public use.

The ground floor corridors are specially cramped and difficult to navigate due to encroachment by chairs, desks and benches that belong to lawyers. Along with an additional chair or two or a bench for clients, they constitute the entirety of their office space. These chairs and benches are invariably chained to the walls for safekeeping and display the names and qualifications of their owners. The outer walls of the court premises are covered by the name plaques of lawyers and visiting cards of candidates contesting the district bar elections and their supporters..." (Siddique 2011: 7-8).

The court premises are much more crowded today than Manto's times and the collective consternation of concerned litigants as palpable as what he encountered: "… The constant bustle, crowds and at times unsavory characters that frequent such places added to the already closed, suffocating and unappetizing mood of the place...

…Though, the official court hours were from 9:00 am to 4:00 pm, by 1:30 pm judges would normally be done with the day's hearings and crowds of litigants would start thinning out. Though many of them seemed not to have made any appreciable progress in their cases, it was more or less generally understood that there would be no more court activity after 1:30 p.m. Many of the litigants could then be seen thronging outside the judges' readers' offices and seeking the next dates of hearing..." (Siddique 2011: 8).

Manto frequently complains about the tortures of undergoing a trial in the summer months. The challenges are no less for those embroiled in court proceedings in the bleak winter months: "The months during which the Survey was conducted are the coldest in Lahore … early day time temperatures dropped to 3 or 4 degree Celsius. The days were invariably overcast and gloomy. The general state of melancholy was accentuated by the fact that the court premises have minimal basic facilities. The only places provided for the

public to sit are occasional cold cement benches. It was a struggle to simply stand in the exposed corridors, verandahs and bye-ways of the court premises. There are few public lavatories and a minimal fee is charged for using them – which in spite of being minimal was described as a burden by some obviously very poor litigants who come from long distances and have to spend the entire day on the court premises. There is one partially covered, ramshackle cafeteria within the court premises to cater to the few thousand people who come to the court every day and it offers meagre, and for many a fairly over-priced, fare. There is another cafeteria – both covered and more comfortable – but that is accessible only by the lawyers. Furthermore, the open corridors, especially on the upper floors of the court premises, were exposed to cold winds and freezing temperatures. The extreme cold and general gloominess contributed to both a lower than usual number of litigants as compared to summer months as also to a general tendency to huddle and crouch in corners and thus be generally unapproachable" (Siddique 2011: 9).

Over sixty years on, anyone wanting to relive what Manto physically went through during his trials can revisit his haunts in the courtroom corridors. They are like a living museum for they have changed but very little in all these years. The mood that Manto captured can still be breathed in today.

## The Writer's Window – Manto's Challenge: What is Obscenity?

It is against this debilitating backdrop that Manto's artistic soul and hyper-sensitive personality grappled with the ephemeral legal nuances of obscenity. In his trials he vociferously insisted that what he wrote was not obscene and that he simply described what he observed. Therefore, the fault lay not with what he wrote but with those who found fault with it. In another famous essay *Lazzat-e-Sang (The Taste of Stones)*,[8] a typically candid Manto retort to the charge of obscenity is: "God alone knows why the prosecution describes a short story as obscene when it is not even remotely so – if I want to mention a woman's breasts then I will call them a woman's breasts – a woman's breasts can't be called peanuts, or a table or a shaving razor – though it has to be said that for some people the very existence of women is an obscenity, but what to do of that …" (Manto 1995b: 636-637).

8 A long-suffering artist's self-inflicted partiality for harsh criticism, or metaphorically, for the stones hurtled at him by his adversaries, can persuade us to also translate this title as 'A Taste for Stones.'

When the prosecution or the witnesses or the court pointed to what they thought was a particularly offensive choice of words in his stories, Manto would counter: "There are few words that are obscene *per se*. It is usage which can make the chastest of words obscene. I don't think anything is inherently obscene. However, even a chair or a cooking pot can become obscene if presented in such a way – things can be deliberately made obscene to serve a particular purpose" (Manto 1995b: 633).

When his legal detractors said that they detected that his choice of writing on a sexual theme was inherently motivated to inspire immoral tendencies in people, Manto would provide an analogy to assert that no theme was inherently or necessarily obscene, but it was obscene only if the artist intended it to be obscene: "An art gallery displayed many nude portraits of women. None of them – as is to be expected – corrupted anyone's morals, nor did they arouse lust. However, one particular painting of an otherwise fully clothed woman with only one part of her body provocatively left uncovered, was deemed to be obscene. Why so? Because of the artist's less than noble intent – he had knowingly shown the woman's dress to be awry in such a manner that it provoked and invited the viewer's imagination to envision the woman as nude, even when she wasn't. To find obscenity in writing, in speech, in poetry and in sculpture, one has to first uncover the underlying intent. If there is even an iota of an enticement to obscenity then the writing, speech, the verse and the sculpture are utterly obscene" (Manto 1995b: 633).

But why write on a potentially sexual theme in the first place? Should a writer not be more discerning in his choice of topics? To this Manto retorted that he refused to be cowed into restricting himself to themes that some officially sanctioned morality approved of. Why? In his own words: "If a woman in my neighborhood gets beaten up by her husband every day and then takes out time to clean his shoes I feel no sympathy for her; but when a woman in my neighborhood gets into an argument with her husband, threatens to commit suicide and then ambles off to see a movie, and I witness the husband racked by emotional turmoil over the next two hours, I develop a strange empathy for both of them. The notion of a boy falling in love with a girl is of as much significance to me as the common cold; however, my attention would surely be drawn to a boy who conveys the impression that hundreds of girls are madly in love with him, but who is in fact as hungry for love as a famine stricken Bengali – in his colorful tales of requited love I will hear the underlying moans of a tragedy and I will then narrate his tale to others. A hardworking woman who finds peaceful sleep at night cannot be the heroine of my story. My heroine would rather be a harlot who lies awake at night and whose day-time rest is often disturbed by nightmares of impending old age – her heavy eyelids encrusted by years of lost sleep can be the theme of my story. Her filth, her ailments, her irritability,

her profanities – they all appeal to me – I write about them – and I bypass the soft speech, the glowing health and the sophistication of domesticated women" (Manto 1995b: 619-620).

And what indeed sets Manto apart is his open disdain for the ubiquitous, more exalted, romantic and aesthetic themes of classical Urdu literature. Instead, Manto took up and mastered realistic portrayals of life in all its meanness, pettiness and ugliness. The hangers on in the by-ways of life; the ancillary, the ignored and the marginalized; and, even the positively resented and frowned upon are the very people he finds worthy of attention. The utter baseness of humans is often Manto's inspiration, but not without a meticulous excavation of any remaining signs and hopes for humanity – his own humanity drives him to look for charm where others merely see hideousness and to unearth virtue and goodness where all but a few only perceive vice. He regularly juxtaposes and assesses his characters against what society anoints as respectable and worthy, and unravels the hypocrisy and inner rot that respectable society often suffers from but cleverly disguises. And then there are the complex multi-tiered sexual tensions between the opposite sexes, further complicated by social taboos, popular prejudices, entrenched dogmas and stiff aversions to any open discussion of the same, even though voyeurism may otherwise be the societal norm. Manto is valiantly defiant about his freedom to express himself as a creative writer and his liberty to select his own themes – including sexual ones.

In addition, he also deeply analyzes the role of the creative writer in society and provides several justifications for why writers ought to act as a mirror to society – and if the reflection in the mirror is ugly then he staunchly maintains that it is the unsightly face in the mirror and not the mirror itself that is to be blamed: According to Manto, "People object that the new writers are fixated on the sexual relationship of men and women. I cannot answer for all but I will say for myself that I like this theme. Why is that the case? Well because that is the case – think of it as a perversion that I harbor. And if you are astute and can gauge things well then understand why I am so. If you are unfamiliar with the age which we are living through then read my stories. If you find my stories unbearable that can only mean that this age is unbearable – my ills are the ills of this age – my writing suffers no defect, the defect attributed to me is the defect of this age – I don't cherish chaos – I don't want to send people's thoughts and emotions into disarray – and how can I undress civilization and unclothe society for they are already naked – I don't try and cover up or dress them up either for dressing up is the trade of tailors and I am not a tailor – people call me a black pen. But I don't use a black pen on a blackboard. I use a white chalk so that the blackness of the blackboard stands out even more. I have a distinctive style, a particular mode. It has been described as pornography, progressiveness

and God knows what else – Saadat Hasan Manto be cursed for he can't even be abused properly" (Manto 1995b: 620).

Oftentimes, Manto throws down the gauntlet for those readers who find his stories obscene on a regular basis and provocatively asks them if the perversion lies in their minds instead of in his writings: "… Only an unhealthy body, a diseased mind can harbor such an impression. However, it is for those who are spiritually, mentally and physically healthy that a poet writes poetry, a short story writer pens stories and a painter paints. My stories are for the hale and hearty – people who consider a woman's breasts to be a woman's breasts and nothing more – who do not look upon a man and a woman's relationship with astonishment – who do not swallow a masterpiece in one gulp" (Manto 1995b: 636).

## 'Cold Flesh' – Brilliant Explorations of the Depths of Human Depravity or Sexually Arousing Gibberish?

And what did the purveyors of the law and the custodians of official morality think of these arguments and justifications? It is illuminating to compare and contrast Manto's perspectives with what the judges thought of obscenity in general and the specific accusations of obscenity directed at Manto's works in particular. In this context, it is significant to examine the trial triggered by Manto's short story *Thanda Gosht* (Cold Flesh) – arguably the most infamous of all the Manto trials (Manto 1995c: 404-411). The story revolves around an ultimately fatal rendezvous between Ishar Singh – a brawny, brutal and lascivious man – and Kulwant Kaur, his licentious paramour. We find out that Ishar Singh is a veteran provocateur of murder and mayhem in the aftermath of riots in the city and also that killing a man has never dampened his appetites. However, this time around when these two meet and indulge in extended verbal and physical foreplay, Kulwant Kaur notices an inexplicable pallor and lack of libido in her lover. Her strident harangues finally force Ishar Singh to reveal that while involved in some recent looting and killing he carried off a comely young girl in order to ravish her. However, after having left the scene of bloodshed when he put her down by the road side he discovered that she was dead – all along he had been carrying a corpse.[9] Neither the savagery he had committed at that place (having killed six men) nor the gaping wound that the

9 Some commentators have pointed out that the story clearly insinuates that Ishar Singh actually engaged in necrophilia. Though Manto admittedly makes references to necrophilia elsewhere in his work, the writer finds unpersuasive direct textual support for the same in this story.

maddened Kulwant inflicts on him with his own dagger (initially convinced that his lack of sexual drive was attributable to his dalliance with some other woman and taking that as a grievous insult), seems to trouble Ishar Singh. However, as the story draws to a close it emerges that he has resigned all his virility, all his manly appetites, and indeed his very life as it steadily trickles out of his wound, to the horrible memory of that dead girl whom he had carried off in order to rape. Always animal-like in his thoughts and deeds, it seems that some last vestige of humanity in Ishar Singh finally allows him to feel human and thus truly encounter horror as a human being must.

The story is admittedly explicit in its employment of sexual metaphors and swear words – but arguably quite realistically so as two earthy and equally dissolute characters meet in the privacy of their room to fornicate. Manto explained in his defense and also in his eventual writings on the trial that the choice of language, the sequence of events, the narrative style, and the overt theme were all necessary in order to make the story realistic. They were neither meant to titillate nor the main purpose and focus of writing. In other words, while many of the aforementioned aspects of the story were consciously and deliberately sexual, the underlying intent was not (Jalal 2013: 152-157). Though apparently revolving around a point of sexual psychology, according to Manto, the story contained a subtle message for humans – that even when they reach the ultimate limits of cruelty, barbarity and animalistic behaviour, they still don't completely lose their humanity. Had Ishar Singh completely lost his humanity he would not have reacted so strongly to the corpse of the young girl so as to lose his virility (Manto 1995a: 390). Manto further quizzes as to how a depiction of loss of virility due to the acute psychological shock caused by a macabre recollection could be deemed as sexually arousing? (Manto 1995a: 374).

## The Judges' Window – Legally Permissible Art; Socially Acceptable Creativity

The judges, however, were not convinced. According to the Order dated 16 January, 1950 by the Magistrate First Class who conducted the trial of Manto as well as the editor and publisher of the story: "I have read this story closely and found that it contains a filthy style of language and impolite swear words. I have also felt that this story has several libido inducing aspects and sexual insinuations. In order to determine whether a story is obscene or not it is imperative to set a benchmark to determine obscenity …" (Manto 1995a:385).[10]

10 This is the writer's translation of Manto's Urdu version of the Order.

While identifying a benchmark, the Magistrate states that all Indian Courts have been following the standard set in an 1868 English case.[11] The judgment defined as obscene any impugned materials that may inspire any such people who can access such materials and whose minds are vulnerable to such influences, to immoral and depraved actions (Jalal 2013: 158). The Magistrate goes on to underline the importance of social context while legally determining what was pornographic (Manto 1995a: 385). He then surmises: "… Those things that may be regarded as harmful to a Pakistani's morality may be deemed as innocuous to a Frenchman's morals. Every society has its own moral standards and those things that define one society's morals can be considered immoral by another society's morals … therefore, whether the short story under discussion is obscene or not can only be determined against the backdrop of Pakistan's established moral standards and also on the basis of the impact that such a writing may have on the minds of those that constitute this society … furthermore the standard proposed … is not a complete and comprehensive standard. It is after all, as it says, a standard. There can be additional standards as well. For instance, these include a tendency (which exists in the impugned materials) that hurts the moral sensibilities of the readers – this standard too depends on the moral standards of the readers." (Manto 1995a: 385-386).

So it emerges that there is an 'established' Pakistani moral standard which in turn is to be the benchmark for legally determining obscenity. The question, however, still remains as to whether there is really such a thing and if so then how does one identify it? The learned Magistrate continues: "As mentioned earlier, the term 'obscenity' used in the penal code has a technical significance that has to be assessed by the court. Expert testimony is also necessary to the extent of determining established standards of literature for sophistication of expression, vulgarity, moral/immoral worth and the inclinations it inspires in the readers' minds. Thereafter, on the basis of all this, it is for the court to determine whether something meets the requirements of 'obscenity' or not" (Manto 1995a: 386-387).

## Capturing Obscenity: Multiple Methodologies; Diverse Definitions

Once the trial started and the prosecution and defense witnesses were asked to testify, problems soon arose as the vast cast of prosecution and defense witnesses divulged, not surprisingly, highly variant views about what was imagined to be an 'established' Pakistani moral standard as also the actual artistic merit and moral value of *Thanda Gosht*. The Magistrate acknowledged that the defense witnesses – all literary and academic luminaries – were of the view that a realistic portrayal of life could not be considered obscene, and

11 Regina v Hicklin, L. R. 3 Q. B. 360 (1868).

further that while certain words and the sequence of events in the story may be thought vulgar in isolation, they were necessitated by the demands of realism and *per se* the plot and the story were neither obscene nor did they incite licentious behaviour. Nevertheless, despite claiming the existence of an objective standard, the Magistrate fairly subjectively found *Thanda Gosht* capable of corrupting morals and in violation of the country's ethical standards and went on to convict and sentence the accused.

It soon transpired that not just writers and intellectuals but even the exalted judges could be completely at odds when it came to the prescribed process and modus of capturing obscenity based on some hypothetical objective standard, as also the very nature of such a standard.[12] The verdict was appealed and the conviction overturned by the Sessions Court. The Sessions Judge disagreed with the Magistrate on whether such matters could at all be resolved by expert testimonies. Scrutinizing the trial record he found it only natural that some witnesses found *Thanda Gosht* obscene while others did not – after all, different types of readers would always have different views on what is moral and what is not and what counts as obscene and what doesn't. Hence, what was required, in his opinion, was a single standard in order to reach a resolution. The Sessions Judge agreed with the Magistrate that different societies have different moral standards. However, he felt that while identifying such a standard for Pakistan and declaring it to be based on the Quran, the Magistrate had erred. In the Sessions Judge's view that may well be the societal aspiration but it was surely not its reality. He then advocated that while searching for a society's moral standard, one ought to examine society in its actuality rather than in terms of its aspirations – hence the need to focus on the 'is' rather than the 'ought.'

In a sense the Session Judge's perspective is not dissimilar to Manto's who had maintained all along that as a writer all he did was to provide verbal snapshots of the actual state of society. The Judge then went on to point out and discuss various prevalent social practices

12 In a separate subsequent trial for obscenity, the Magistrate treated Manto with great respect and courtesy. Though he convicted and fined him Rs. 500, upon Manto mishearing the fine as Rs. 25 he smiled and immediately reduced it to that amount. He then requested Manto to meet him the following day at a coffee house and there he informed him with great affection: "Manto sahib, I look upon you as a great short story writer of this age. The sole reason I sought this audience with you is that I did not want you to leave with the impression that I am not a great fan of yours." An astonished Manto asked him that if he was such a big fan of his then why he was fined. Upon this the judge smiled and responded that he would explain in a year's time. In a subsequent essay Manto addressed the judge and said that many months had since passed and only a few remained and that he awaited the revelation from the learned Magistrate who had come across as a man of his word. We don't know whether Manto ever received a reply or whether the Magistrate could not quite come up with a persuasive standard for convicting obscenity (Manto 1995e: 578-581).

that he regarded more objectionable than the impugned short story. This was not to say that he approved of the story for he said that he didn't; however, importantly, he said that he did not find it more obscene or more objectionable than various other things that routinely carried on and were tolerated in society (Manto 1995a: 397-402), (Jalal 2013: 158-159).[13] In other words, Manto's output was no more obscene than the society he wrote about – it met the low moral standard that the society actually adhered to. This may be considered a rather backhanded compliment but the outcome was gratifyingly real for Manto's appeal was successful.

## The Judges' Window – The Law, and not the Littérateurs, decides what Literature is and what it is not

However, Manto's trials and tribulations were not over yet. The State appealed and the Lahore High Court was less sympathetic. According to Justice Muhammad Munir in the now infamous case of *Crown v Minto*: "In its outline the story is perfectly innocuous though it is a question whether what is narrated is a likely sexual phenomenon. It is the details of the story and the words used by Ishar Singh in his conversation with Kulwant Kaur that are alleged by the prosecution to be obscene. Some of the expressions used are extremely vulgar while others are crude metaphors having reference to the performance of the sexual act. The most objectionable scene, however, is that where on his second visit to Kulwant Kaur, Ishar Singh attempts to prepare her and himself for the sexual act. The technique of a debauch is described there in plain terms. The passage is full of references to Kulwant Kaur's naked body and describes in full details what he did to her in order to bring her to the pitch of a "boiling kettle." These preliminaries are described by a metaphor "phaintna" and the culminating act by "patta phainkna."[14] Judged by every standard of decency, this passage is definitely obscene."[15]

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13 In this regard, it is significant to note the support for Manto during his trials from diverse quarters, including those who regularly read and admired him as well as those who did not but who believed that trying him for obscenity was a travesty and/or that his freedom of expression ought to be inviolable. At the same time, his abandonment and isolation by several literary peers and ideological comrades for political and literary as well as petty parochial reasons further embittered Manto's days and nights and forced him to simultaneously face his legal battles as well as several additional open fronts (Jalal 2013:159-176).

14 Manto uses common terms employed by card players in order to describe the sexual act. "Phaintna" or shuffling a pack of cards is meant to symbolize sexual foreplay while "Patta phainkna" or actually playing a card by placing it on the table (though "phainkna" is actually a more casual act and denotes throwing or flinging) is meant to symbolize sexual intercourse itself.

15 Crown v. Saadat Hassan Minto, P L D 384 (1952) (Pak), at 387.

Having denounced the story as reprehensible by 'every standard of decency,' it is interesting that the Judge then feels compelled to acknowledge that morality is a subjective and comparative phenomenon. However, his argument is eventually circular as once again he ends up discovering a universal standard of morality. In his words: "It is true that morality and obscenity are comparative terms and what is obscene or immoral in one society may be considered to be quite decent and moral in another. But while considering the question whether certain words or representations are obscene or not, one has to apply standards that are current in the society in which those words have been uttered or representations made. In the present state of society in this country or anywhere else in the civilized world, there can be no doubt that a description of the acts preparatory to sexual intercourse, however graphic or lifelike that description may be, would be considered obscene."[16]

Justice Munir is also dismissive of the value of the opinions of men of literature and knowledge in the quest for identifying society's moral standard – their differences of opinion on what constitutes obscenity deemed by him as surprising. The significance of broader social context, though initially highlighted, is ultimately held subservient to the narrow domains of legal definitions; the requirements of artistic realism discarded as sufficient justification for employment of particular language and terminology in creative output; a legal test laid down in an English case in the mid-nineteenth century held to be perfectly relevant to the living social reality of Pakistan in the 1950s; and, finally, received legal doctrine decisively elevated over and above sociological and artistic perspectives and imperatives: "It is regrettable that this issue should have been made in the Trial Court the subject of controversy between men of literature and surprising that there should have existed a difference of opinion between them in regard to the story in question being obscene. Whatever conception of art and literature those who considered the publication in question to be innocuous may have, it becomes necessary to remind them that they are completely mistaken in their conception of "obscenity" as used in law. Since the case of Reg v. Hicklin 1868 L R 3 Q B 360, one test of obscenity has always been whether the tendency of the matter charged is to deprave and corrupt those whose minds are open to immoral influences and into whose hands a publication of this sort may fall and that the motive, or intention in publishing the work does not prevent it from being obscene if the descriptions in it are in themselves obscene."[17]

16 Crown v. Saadat Hassan Minto, P L D 384 (1952) (Pak), at 387.

17 Crown v. Saadat Hassan Minto, P L D 384 (1952) (Pak), at 388.

He then highlights words and passages which he finds fully capable of corrupting the morals of the public and declares the actual intent of the writer to be of no consequence: "The passage in the story, to which special reference has been made earlier in this judgment, is full of grossly indecent and sexual details of a sexual episode and would undoubtedly suggest to the minds of the young of either sex, and even to persons of more advanced years, thoughts of lewd and libidinous situations. It is utterly irrelevant what the intention of the author in writing the story was; what matters in such cases is the tendency and not the intention. Were it otherwise, a girl parading the symmetry, outline and development of her body by walking along the Mall in a state of nudity would not be guilty of any obscene act if her intention in so doing were to display the physical advantages of the cult of nudism. But, in the instance given, can there be two opinions whether her act would or would not be obscene?"[18]

Through the course of this and his earlier trials, Manto – who frequently represented himself and advocated his case in court – made several persuasive and thought-provoking arguments in his defence. We are fortunate that he has recorded these in detail, as also his diverse impressions of the entire experience of being put on trial. He pleaded that he sought to merely portray the myriad real faces of society – regardless of whether they were hideous or comely – and nothing more and nothing less. He asserted his freedom of choice to pick his themes and characters as a creative writer – if he chose to write about what was ugly, then that was a choice that needed to be unassailable or else the world would see nothing in art and literature but an unrealistic and highly sanitized and monotonous sameness. He exhorted that surely the writer's underlying intent and not his eventual output is what really mattered; nowhere in his impugned stories was there any intent to titillate or arouse. All his twists of plot, his specific use of language, and his particular description of events were integral to the stories that he told and the characters that he portrayed. He implored that if certain very natural and realistic themes were to be proscribed as being inherently obscene then that would be a huge disservice to both life and to art. He pointed out that there would always be those who would see obscenity where it did not even remotely exist, and thus the fault lay with their tainted gaze and not in the artist's art.

Implicit of course in all of this was Manto's zealous commitment to meaningfully employ art to provoke and disturb, but not just for the sake of it, as he stressed time and again. Instead, a deep desire to shock and shame society – a brutal and rapacious society as he

18 Crown v. Saadat Hassan Minto, P L D 384 (1952) (Pak), at 388.

often encountered and perceived – to mend its ways, always permeated his motivations. All of Manto's aforementioned arguments – philosophical, sociological, psychological and literary – and his particular defense of his choice of certain words and phrases as well as his cogent references to shifting social and cultural attitudes to the works of such literary greats as Maupassant, Flaubert and Joyce, were eventually silenced by the terse and curt verdict of the law. A verdict of law which also contains a blanket indictment of Pakistan's literary luminaries. "… We find all the respondents guilty and since very perverted notions of decency in literature seem to prevail in some literary circles of Pakistan, of which Minto is a member, we sentence each of the respondents to pay a fine of R. 300 each or to undergo rigorous imprisonment for one month."[19]

It is perhaps not ironical that the same Justice Munir was to subsequently import a purely abstract philosophical concept from Austrian legal realist Hans Kelsen in order to legally justify a military coup d'état in the 1950s, and thereby earn perpetual infamy – for his unadulterated scorn for opinions and processes civilian and democratic may have had its seeds in these early judicial musings. So how should those judges, who judged Manto and other socially and politically inconvenient voices, be judged in turn? According to one sarcastic perspective: "We are the judges, you can't judge us. There were other writers who we put on trial but in the end we came around to accepting them, even celebrating them. We put Faiz Ahmed Faiz on trial but for his extra-curricular activities, not his poetry. We beat the hell out of a poet called Habib Jalib for his poetry. But now we can't have a dinner party or political rally without shouting their verses. Even those who wear a taj[20] and sit on a takht[21] keep threatening: *hum dekhenge*.[22] We can live happily ever after with cuddly revolutionaries" (Hanif 2012).

19 Crown v. Saadat Hassan Minto, P L D 384 (1952) (Pak), at 389.

20 Taj is the Urdu word for crown.

21 Takht is the Urdu word for throne.

22 *Hum Dekhenge* literally means 'We Shall See.' The reference is to a famous revolutionary poem by the highly renowned Urdu Poet Faiz Ahmed Faiz. The poem – which has the title and carries the refrain *hum dekhenge* – conveys the hopefully defiant voice of the downtrodden who declare that they stay confident of seeing a day when fortunes will change and despotism will be defeated. The sarcasm in this passage is directed at certain powerful Pakistani politicians who routinely co-opt such revolutionary lines in their political speeches. The irony of course is that these lines are meant to inspire the toppling of despots in power, and yet they are at times employed by the very people against whom they are meant to be directed.

## Manto's Continuing Resonance

It is apparent that artistic and political dissent can only temporarily be curtailed through legal sanction. Manto remains as relevant and thought-provoking today as during his lifetime – and so does Justice Munir, but for all the wrong reasons. There are still many who accuse Manto of being a writer of indifferent talent who essentially sought attention by being provocative and obscene. As with his other retorts to such criticism, Manto's response to this allegation, while having traces of his characteristic wit and satire, is profound and ultimately socially constructive.

To conclude in Manto's own thoughtful words: "It is not too difficult to answer the question as to why today's writers primarily focus on sexual matters – we live in an age of strange paradoxes – women are more proximate now and also afar – at places one encounters utter nudity and at other places they remain covered from head to toe; one comes across women in male guises as well as men dressed as women … the world is undergoing a great change – eastern civilization is being deconstructed as well as reconstructed; western civilization is being exposed as well as being adopted – there is a kind of chaos everywhere … in this cacophony you find us writers wielding our pens and grappling with this issue and that … if you see excessive discussion of the male-female relationship in our writing that is only to be expected – countries can be politically fragmented, religions can be set apart based on differences in their core beliefs, adjacent pieces of land can be demarcated by laws. However, no politics, religion or law can separate women and men.

Efforts have been made in every age to bridge the gap between women and men – every century and each epoch has witnessed attempts to bolster or demolish the wavering wall separating women and men – those who consider this pornography ought to be ashamed at the crudeness of their thought process; and those who judge it on the crucible of morals ought to know that morals are like rust carelessly allowed to accumulate on the razor edge of society.

The thought that new literature has spawned sexual issues is fallacious; in fact it is sexuality that has generated the new literature – when you and I see our reflection in this new literature we become indignant for reality is always bitter in essence, even if sugar coated.

You may find our writings harsh and acrid but that is because you have been accustomed to sweeteners. How did humanity gain from that – after all, the leaves of the Neem tree are bitter but at least they cleanse the blood" (Manto 1995d: 688-689).

And while Manto spent a lifetime attempting to cleanse the lifeblood of the diseased society that surrounded him, instead of artistic freedom all that his adopted and free new country's laws could rather comically, and ultimately tragically, offer him was: "We sentence each of the respondents to pay a fine of Rs. 300 each or to undergo rigorous imprisonment for one month." This was also deeply symptomatic of the emerging chasms between Pakistani society and its various laws; between diverse social aspirations and a progressively bureaucratic state; and, between liberal popular notions of the acceptable and meritorious and the coalescing hegemony of dogma, intolerance and state power – chasms that were to deepen in the coming decades.

## Conclusion

Manto's closely felt, highly impressionistic and deeply moving accounts of his trials and his spirited fight for freedom of creative expression are a continuation of the long and great tradition of literary fiction as well as literary essays dealing with contemporary realities that has endeavored to explore and unravel the complex phenomenon of official authority and its frequently despotic manifestations. All too often such accounts have left a far more resonant and lasting impact than other disciplinary narratives looking at the same themes. There may be several reasons for this. The foremost could be the fact that truly evocative fictional accounts or non-fiction literary narratives by writers of fiction discard the neutral staidness of other analytical approaches for a more flexible style – a style much better suited for an empathetic and humanistic treatment of the plight of those who live under the sway of despotic authority. An additional reason could be that the realms of fiction and literary expression better endow the writer with the creative omnipotence of giving voice to multiple perspectives as well as their respective points of conviction, contradiction and vacillation – may it be the architects of despotism and all their front men, henchmen, collaborators, and supporters or their various detractors, critics, and ultimate victims. As a result, such accounts possess the power and ability to truly demystify and deconstruct authority and thereby show it for what it truly is – embedded as it may be in myriad theories, assumptions, justifications and legal constructs that prop up its structure and expedite its operation, and manifest as it may be in its equally numerous modes and methods of belittling, alienating and exploiting those on whom it is exercised.

This essay illustrates the above by essentially exploring how a probing and ever-rebellious fiction writer such as Manto looks at the law and its complex dynamics of officialdom, power structures and legalized coercion – all the time while the law also scrutinizes him and unsuccessfully tries to fit him and his work into one of its prescribed categories and

definitions. At times, it takes a highly sensitive and astute external observer like Manto, endowed also with a unique set of personal experiences that equipped him with that vital insider's perspective, to fully capture and comprehend the enigma of a system that takes pride in its complexity – even its unintelligibility – to the lay person. Such a system and its specialist functionaries may envision themselves as a self-contained and complete reality – and also one that is both actually dominant and is deemed worthy of being dominant. It is a uniquely perceptive onlooker like Manto – at times watching from afar and at other times temporarily embroiled and caught up in the mesh of such a system – who possesses the requisite panoramic view, the critical sense, and also the social empathy to fully appreciate what the system's juggernaut stands for and how it treats those that stumble onto its path.

Often times such a writer speaks a very different language and conceptualizes the world in a very different manner from the languages and conceptualizations of those who characterize the system. This creates an unavoidable conflict. At the same time, it provides an invaluable independent gauge for assessing the form and meaning of the language that prevails within the system – a language that may be deemed unassailable and superior both because of the insularity of the system, and also because the system overwhelmingly dominates other systems and normative frameworks in society. Live as we do in times when in various parts of the world such domination of coercive authorities has only escalated since the days when Manto wrote, his thoughtful and critical writings carry even more meaning than before.

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NAVEIÑ REET: Nordic Journal of Law and Social Research (NNJLSR) No.5, 2014, pp. 41-62

# Literary Lessons in Law: Legal Culture in a Changing Welfare State

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## Abstract

*Can literary fiction provide a specifically advantageous framework for discussions about law and legal culture in an increasingly diverse society? This study addresses the challenges that some aspects of postmodernity pose to legal culture and legal thinking in the Danish welfare state. Showing how literature can take an open space in public debate I venture into an analysis of two Danish literary creations – the poem 'The Coffee Break Team' [Da: Kaffeholdet. My translation] from 2013 and a novel Pelle, The Conqueror, written 1907-10. As a third dimension a small sample of students is inquired about the poem. They are studying to become welfare state professionals and hence bearers of the relation between the state and its citizens. I discuss my literature samples against changes that have taken place in the Danish nation building project involving inclusion or exclusion of groups of the population. In a concluding section I balance my findings in relation to the initial question and place them within the law and literature tradition.*[1]

Can fiction as a creative expression provide a specifically advantageous framework for discussions about law and legal culture in an increasing diverse society? My question is motivated by a desire to contribute to the establishment of a framework for debating who we are in terms of the law in such a society. In addressing the overarching problem – inclusion into political society and the state- I draw inspiration from Hanne Petersen who has shown how literature possesses the ability to catch the novel and still unsaid as well as the unexpressed repressions, lending a voice to groups that have been excluded from public affairs (Petersen: 2014, 310). I hope to show how – in this ongoing battle - literature can offer insights into the functioning of the law.

What has urged me to address the problem is the diagnosing of profound changes in the Danish welfare state as an integrated part of a globalized world, sparking off a whole new understanding of who we are as a state and a society. As such I deal with a concrete case and I make no claims to a wider validity of my findings. I ask if in in two specific samples of literature I can find reflections of legal culture and whether those reflections may

1 This paper has made its way in a long working process where I have benefitted from thoughtful suggestions from my colleagues at Metropolitan University Collage as well as valuable response from law professor Hanne Petersen, Copenhagen University Law Faculty and the generosity of several other colleagues from Copenhagen University.

provide a platform for debating the law, casting a light on its blind spots and dark corners of relevance to the inclusion of groups into siciety in the nation building project. The authors of the samples are Yahya Hassan (born 1995) and Martin Andersen Nexø (1869 – 1954). The samples are: 1. The poem *The Coffee Break Team* (My translation) *[Da.: Kaffeholdet]* by Yayha Hassan from his 2013 collection of poems; 2. the novel *Pelle the Conqueror* by Martin Andersen Nexø, written 1907-10. Both texts have drawn massive attention from their contemporaries. As was the case with the rise of the original Law and Literature movement at the US law faculties, (White: 2011, 33; Weisberg: 2011, 51) there is a pedagogical perspective to my enterprise with a view to include the diversity that we see unfold as a result of the changes. I aim to support my students' ability to navigate as professionals in a democratic and constitutional state with an increasing cultural diversity. I test the poem in conversations with a few students learning constitutional and administrative law, looking for a way to open up their interest for the functioning of the law in practice in state and society.[2] I also want them to assert themselves more actively in the legal argument, being more attentive to various aspects of reality in ascertaining the relevant facts and devoting attention to the consequences of a legal decision, weighing the facts, as opposed to simply quoting the code and make a simple syllogism. I denote my student interviews 'conversations' to indicate an approach that differs from a traditional qualitative inquiry. I am the students' teacher. However, I made clear to them that I also sought their advice on how to advance classroom discussions about law. I decided that the way to go about this challenge would be to address the context openly and regard my presence as one of participation in the vein of action research. In this approach I found inspiration in the WLSA research methodologies that contain in them also a mixture of different roles, asymmetrical relations and educational projects, (Julie Stewart:1997, 41-43)[3] as well as in Shirin Zubair's inquiries on literature as a mediator of identity in a society with conflicting values (Zubair:2006, 249-271).

## The Invitation – Law as an identity project

An entry into my analysis is the understanding of law as culture. What has inspired me was Lawrence Rosen's notion that a 'fit of legal sensibility and cultural style will take place whether we try to ignore it or not, and it is by grasping the very nature of culture and law's place within it – grasping the symbiotic relation of a culture's constituent domains and the

2 I am grateful to my colleague Anne Nyland who has transcribed the conversations for me and willingly – together with Pia Freil - offered her comments and observations.

3 http://www.wlsazim.co.zw/index.php/home.html Accessed July 16, 2014. WLSA stands for Women and Law in Southern Africa Research and Education Trust and seeks to advance women's rights in an action oriented approach.

ways in which they are interlaced – that the place of law in the ordering of relationships may most realistically be sought' (Rosen, p. 199). On this note Rosen extends an open invitation to think about who we are and what we are, using the law and legal institutions as an entry for this activity (Rosen: 200). Applying Rosen's anthropological insight of law as being a part of a culture that can be empirically examined, I shall look for characteristics of Danish legal culture, not in empirical examinations of legal institutions, but in literature samples. Law as reflected in literary narratives becomes my focus when identifying legal culture. Because culture has a 'capacity for creating the categories of our existence and with that imperative it traverses all fields of our lives, knitting them together, thereby making sense of life for us while bridging the gaps' (Rosen: 4), I look for the ability of legal culture to bridge the gaps between the individual and the community and amongst various communities in society. Given that there might be a tension, can it be mended by an overriding narrative as a tale of who we are? This is Jerome Bruner's focus when he emphasises the ability of the narrative to characterize who we are, to understand the mind of the other – and moreover having the potential to wander from its narrative status to into the law, thereby contributing significantly to the legitimacy of law, because we recognize the narrative of the courtroom from our daily narrative (Bruner: 2002, 47-49; 65-68).

## From the welfare state to Postmodernity and the competition state

In Danish society 'law is a matter of policy which is located in the national parliament, the Folketing and to some extent in the local municipalities …. 'Nothing above and nothing besides the Folketing' was a catchword in the late 19th century and it is still a part of the tale' (Schaumburg-Müller:2010, 73). The quote is from a seminar discussing law and literature in Denmark. Schaumburg-Müller will not exclude authors and filmmakers from telling stories about culture relevant to jurists. However, he holds law, politics, and economics for equally important storytellers (op.cit,76-77). Fiction, then, will not provide the specifically advantageous position that I maintain.

The catchphrase 'Nothing above and nothing besides the Folketing' was coined in 1878 by a Danish politician fighting for the decisive legislative power of the Folketing against the upper house with its privileged members (Thorsen:1972, 16). In the subsequent constitutional struggle the privileged chamber lost. A constitutional custom was established that favoured the Folketing. In this respect the catchphrase is a part of a modernization project involving universal suffrage, and thus an example of the struggle for gaining access to a say in public affairs. The modernist project was fortified by the

welfare state granting a large extent of social equality, compared to other parts of the world. The battle was won. But does this mean that the war is over?

Zygmunt Bauman- the sociologist of postmodernity - has identified its qualities as an awareness of the containment of the features that modernity produced inadvertently: Institutionalized pluralism, variety, contingency and ambivalence (Bauman:1993, 187). With the fall of communism the West has lost 'the other' against whom it has defined itself.[4] A phase of redefinition occurs (Op. cit., 175-186). In this context also welfare bureaucracies could find themselves in the lurch, since their features are ascribed to modernity: rational planning and the organic and ordering agency of the state. The postmodern changes are echoed in the indicators that political scientists find for a number of structural, correlated and radical changes in Danish state and society. They call for a new characterization – or diagnosing - of the state as the competition state. The development is interwoven with trends in the global community that have affected the Danish welfare state radically. The competition state seeks to actively involve its citizens to participate in global competition as opposed to the welfare state that would seek to compensate and shield its citizens and enterprises against the cyclic trends in the economy. It is a state making its citizens responsible for their own lives. It regards the community as part and parcel of work life and freedom as a right to enact your own needs instead of the welfare state ethos of community as democracy and freedom as a right of participating in political activity: We go from welfare to workfare. While the welfare state would seek stability, the competition state advances dynamic and constantly ongoing changes (Pedersen: 2011, 11-12).

A number of specific changes go together with this overriding characterization, contributing to a blurring of categories and multiplication of diversity. Immigration to Denmark has increased and more than half of the immigrants are from non-western countries.[5] This particular group also includes a larger proportion of persons of Muslim belief, some of them with limited or no education compared to the population as a whole, as well as refugees with socio- psychological problems rooted in the traumas inflicted on them as refugees. Others have a higher education but are unable to find work meeting their qualifications. The enlargement of the EU has opened for an influx of workers from the East to the West: Today Denmark has 82,000 workers from East Europe.[6] EU

4 The recent revival of East-West in Europe has not decreased the ambiguity.

5 http://www.denstoredanske.dk/Samfund,_jura_og_politik/Sociologi/Grupper/indvandrere (Accessed June 25th 2014)

6 http://politiken.dk/oekonomi/dkoekonomi/ECE2222470/der-er-tre-gange-saa-mange-oe-starbejdere-som-ventet/ (accessed 14 July 2014)

regulation guarantees free movement of labour within the union. This mobility has put the Danish welfare system under pressure, exemplified by a decision from the European Court of Justice to nullify as discriminatory and hence unlawful a Danish national statute protecting Danish student welfare benefits.[7] Thus national legislature and courts answer to a human rights discourse that takes its legitimacy from international conventions and the application of professional courts rather than daily debate in democratic assemblies. Job security or stability in job functions is not necessarily the order of the day in the competition state – fundamental rights are not stretched that far. A new concept – the precariat - has entered into the vocabulary: members of the workforce met with uncertain terms of working conditions (Standing:2013). In a Danish context this situation could apply even to young academics with degrees in law, economics and social science.[8] From previously being guaranteed a formative role in the nation's identity project, a member of the educated class might now be included in the non-working proletariat. The educated class has obtained an ambiguous quality.

All amounts to a transformation of state and society into to the postmodern condition. Open borders, contingency, flux, absence of fixed categories and with that lack of predictability. Some ties of regulation have been slackened, as when the requirement of membership of a specific workers' union cannot be enforced by law, since it violates the European Convention of Human Rights clause on freedom of association. Power has flowed from the people's assemblies to the more aristocratic courts. Thus regulation has become more complex, more undefined and the call is for more initiative on the part of the individual who at the same time does not have a stable road map to navigate by, since categories have become less fixed, redefined and ambiguous. The demands on the individual are more undefined and boundless, obviously leaving more strain on the individual, more room for conflict and diversity and less for consensus. Demands have been passed on to the individual to define on his own, the internal pressure – the self-exploitation - being much more efficient than the external one (Han:2010, p. 26). In addition, interface with public offices is increasingly being expressed in the binary language required by information technology, a language that hardly reflects the ambiguity of the time.

7 Se the judgment of 21 February 2013. http://www.euo.dk/upload/application/pdf/8d-faf478/C0046_2012%20DA%20(2).pdf%3Fdownload%3D1 Accessed on 21 July 2014.

8 http://www.djoefbladet.dk/blad/2014/01/akademiker-boom.aspx (Accessed 25 June 2014)

## The open space and the entry of art

In politics new dichotomies appear. The definition of the new 'other' unfolds, drawing on tradition and cultural discourse: The nation state and the EU; welfare and workfare; Danish citizens and migrant (or 'illegal' workers); Ethnic Danes and Non-Western Immigrants – often being equated with the assisting dichotomy Danish Church members and Muslims. Thus political discourse opens up to dichotomies potentially ruled unlawful as discriminatory by the EU court or European Court of Human Rights, inspiring politicians – playing the game – in new codes - to construct smart criteria to fit the unlawful dichotomies.[9] Through this politicians contribute to installation of a static nationalistic identity project that might exclude a growing fraction of the population. The culture project reflected in this chain of events is a static and rooted concept, in that it implies that there is a more or less fixed and identified Danish culture that can be distinguished from equally static cultures firmly rooted in other parts of the world (Hansen: 1987, 66-70). One politician even took resort to de-humanizing his 'other' by labelling migrants from East Europe 'locusts', alluding to the Exodus tale of the plagues of Egypt.[10] There is a close correlation, then, between the coded language of the law and the dichotomies.

I wish to emphasize that in my choice of dichotomies I do not maintain that there is a stronger hostility to immigration in Denmark compared to other parts of Europe, that dichotomies could not appear with other ethnic groups than Danish, or that dichotomies do not appear in other policy sectors, such as crime or gender equality. I also have not explored to which extent the dichotomies appear. I have singled out these examples simply because they unquestionable are a part of public debate and they correspond to a duality unfolding in a large part of Hassan's poems. With this they open up to discuss literature's potential for offering an alternative narrative. A few examples from Hassan's poems should suffice as illustrations of his dual identity: some poems are written in broken Danish, similar to the fashion of uneducated Middle East immigrants (Hassan: 2013, 121-22), while others have a sophisticated treatment of the Danish language (op. cit., 65-66; 74); in one poem the poet is an Arab prince (Ibid., 11), in others he is Danish, although expressing himself in a broken tongue (Ibid., 154; 37); in some he contains both Arab and Danish qualities (Ibid., 53-54). And yet we are assured that it is the same person, the same voice speaking. Dichotomies have been deployed while at the same time falsified in the simple fact that one person contains them all. Hassan makes a mockery

9 http://www.b.dk/politiko/brasilien-skoser-venstres-syn-paa-verden (Accessed on 26 August 2014)

10 http://www.bt.dk/politik/mikkelsen-oesteuropaeere-suger-som-graeshopper (Accessed 25 August 2014)

of the safe haven of dichotomies and fixed categories – while also reflecting the hurt they can do to those innocently taking them seriously (Ibid., 5-7). In a third position he contains the conflicting qualities as a multicultural identity (Hansen: 127). There is a splintering of the grand narrative of the rooted and static identity that preconditions the dichotomous discourse. Different perspectives have been inserted and the defining difference has vaporized. A bridge has been established with several dynamic, third positions to encompass the Danish and the Palestinian identity, the hoodlum and the intellectual.

Recently the Danish literature scene has witnessed a number of works in the autobiographical genre,[11] where the writer mixes biographical elements with fiction and in some cases sets himself in front of his work. Hassan's poem, then, is a part of a larger fusion of genres as well as an example of a certain border crossing to be seen also in other areas: Art moves from the galleries into public space and enters into a dialogue with people passing by.[12] Or art and law explore the tension between rule and creativity and thereby in a dialogue inform our understanding of politics and aesthetics.[13] In a US context the law and literature movement has started to redefine itself in broader terms, including Native American ceremonies, hip-hop or documentary theatre, forwarding performing elements and with this providing for a new social community. (Sarat et.al.: 2011, 3: 25). Drawing on Bauman, this brings to mind the defiance of postmodern art of a synchronic and diachronic order and its reservoir of a pool of resources that can be picked at will and random (Bauman: 1992, 27-28).

## The Poet in front of His Work: The Empty space occupied

As has already been pointed out by Hanne Petersen, Yahya Hassan as a poet and an angry young man contains several seemingly conflicting characteristics. He declares himself a stateless Palestinian with a Danish passport (Petersen: 2014, 318). Upon his debut as a poet he also was a drug pusher. He is a ghetto boy and an intellectual. He is a public figure but he is also a young man who was institutionalized for committing crimes.[14] He

11 Vor tids helt [A Hero of Our Time] by Jacob Skyggebjerg; Den hemmelige socialdemokrat [The Secret Social democtate] by Anonymous; Livet, det forbandede. [Life. The Cursed] by Ken Rasmussen.

12 http://us2.campaign-archive2.com/?u=76ba27ae829c3bf75050c-c36a&id=b6a977392a&e=fec59a4ab2 (Accessed on 2 July 2014)

13 http://www.kultur.lu.se/en/research/symposium-art-life-and-the-rule-of-law/ (accessed on 2 July 2014)

14 http://www.bt.dk/danmark/laes-hele-digterens-historie-yahya-hassans-kamp#kap1 (Accessed on 3 July 2014)

possesses contrasts and dual characteristics and already as an individual he challenges our understanding of categories. He transgresses borders. In his poems he spells out his anger in capital letters. In other words: he is a young person containing seemingly contrasting identities, something that he holds in common with other youths trying to adjust to conflicting requirements originating from for instance a clash between traditional values on the one hand and westernized ones on the other (Zubair: 2006, 263). He occupies an open space – a third position between the dichotomies.

Contrary to what would be expected from a collection of poems it was a huge sales success. The collection – all poems written in capital letters- was published in October 2013 and by the end of 2013 it received a print of 100.000 copies.[15] Translated into German the collection received good reviews with the *Frankfurter Allgemeine Zeitung* and Hassan's reading at the Leipzig Book Fair drew attention in *The New York Times*.[16] Media coverage attests to the fact that Yahya Hassan's story struck a chord with a wider forum than a homebred Danish one. [17] We are talking about popular literature in the objective sense that it awakes wide spread interest, perhaps also owing to the fact that its author as a young man of Palestinian extraction addressed a series of problems hitherto the hallmark of the nationalist discourse: That some members of Muslim communities skim the cream of welfare benefits, while at the same time turning their backs to society, living in the dichotomy of black and white such as believers / infidels; allowed / forbidden.[18] In other words: His opposition to dichotomies goes both ways. In March 2014 Yayah Hassan participated in a debate with another young poet, Theis Ørntoft. The two of them recited their poems from the stage and went into a discussion. The event drew headlines in a leading newspaper, declaring the event a 'summit meeting'.[19] It all amounts to a fusion of poetry, music, performance and political debate into a theatrical format, distributed through viral channels.[20] As spectators we gain access to a direct experience of the relationship between the individual and the community, setting the public scene for a narrative alternating the public dichotomy and the creation of a new community, from which something new can appear (Han: 30-31).

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15 http://politiken.dk/kultur/boger/ECE2161023/rekord-yahya-hassan-runder-de-100000/ (Accessed on 3 July 2014)

16 http://www.nytimes.com/2014/04/03/books/young-immigrant-in-denmark-lashes-out-in-verse.html?_r=0 (Accessed on 15 July2014)

17 http://www.youtube.com/watch?v=3frM5_F71FY (Accessed 3 July2014)

18 http://www.youtube.com/watch?v=gIP3djcRFdA (Accessed on 3 July 2014)

19 http://politiken.dk/kultur/boger/ECE2248646/hassan-og-oerntoft-samlet-til-poetisk-top-moede-paa-hvidovrevej/ (accessed 3 July 2014)

20 http://www.youtube.com/watch?v=N839DlASGkA (Accessed on 3 July 2014)

## The poem The Coffee Break Team. The setting and the narrative

Could this dynamic approach to society and identity provide a platform for discussing the law in the welfare state? As a test case I chose the poem *The Coffee Break Team*. It is set a state financed institution that rehabilitates young criminals and other young persons with serious psycho- social problems as opposed to the harsh and repressive prison.[21] I chose this poem because it relates directly to my students' curriculum involving welfare state institutions.

What do we experience, then, when we deal with the poem *The Coffee Break Team*? What does its narrative reveal to us? And what can it tell us about the law?

The poem opens with a matter-of-fact piece of information about a note posted on the bulletin boards of all the wards of 'The Sun Garden'. On the note a telephone number is written down. Not much alarming about that. We also hear that the pedagogues can make use of it if they are unable to control the characters of the ward – the characters being the young people institutionalised in the Sun Garden. We are still in the realm of the daily 'business as usual' humdrum. When this number is activated – however - assistance will come from the other wards as well as from friends of the warden and other farm folks. In this one line the poet has drawn up a picture of an almost massive invasion of people from three different directions. It continues:

> *AND WHEN ALL HAVE BEEN THRASHED*
> *AND BEEN SENT TO THEIR ROOMS*
> *COFFEE WILL BE DRUNK*
> *OVER BLANK FORMS FOR REPORTING THE USE OF*
> *FORCE (My translation)*

One striking feature about the poem is its objective, impersonal narrative: Everything is being related as an almost naked narrative, a step-by-step recipe or a habitual set of actions – like a culture. The choice of words does not reveal any emotion. And yet the capital letters spell it out: 'Look here – isn't this despicable'. Form and content contrast each other. And the contrasts multiply: the city boy is being beaten up by farm folks; pedagogues deposit their influence in unqualified personnel; enforcement in a state financed institution is taken over by the warden's acquaintances; the young people are

21 http://www.socialstyrelsen.dk/born-og-unge/kriminalitet/ungdomssanktionen-ny/hvad-er-ungdomssanktionen/baggrunden-for-ungdomssanktionen (Accessed on 14 July 2014)

thrashed and yet the relevant forms testify to the opposite; a mere anonymous notice on a bulletin board can carry a sign, a representation of a violent episode; the thrashing goes together with a coffee break.[22] And to top it all, the place where this violent episode unfolds is a state welfare institution with the name Sun Garden. The violent clashes in the text give rise to the question: How can one person contain these contrasts? As the usage of capital letters in the text seems to imply, the containment is no routine matter. There is no soothing logic, no grand scheme, no benevolent system to which these contrasts can be referred – or perhaps there is a logic, but it is not benevolent. Contrasts come together in the face of the individual who must create himself on these premises. This is the existentialist challenge that the text conveys to us. Where were you, God? I do not claim that Yahya Hassan with his recital style implies that God has died and each one of us is our own god. However, I see that the art form he has chosen for his recitals – in the eye of many spectators or listeners- refers to believers hailing the power of creation (Petersen: 2013, 318). This lends an additional significance to the poem as an indication the creation of self, also a condition of postmodernity.

The narrative of the poem corresponds to one in court. As pointed out by Bruner, narratives wander back and forth between literature and legal institutions. At the court of first instance in the Danish city of Ålborg the events that took place at the 'Sun Garden' are now (September 2014) being unravelled in a criminal case against staff members at the institution. A number of them have been indicted for breach of the criminal code. Indictments include assault, crime against personal liberty, threat against witnesses, and criminal damage. A decision was to have been given in March 2014. However, with strong emotions rampant and the number of witnesses having exploded to 150, it is clear that judgment will not be passed until the end of 2014. Under the course of the proceedings the judge remarked: 'Until now we have heard mostly about emotions. Maybe now finally there are a few facts.'[23] [My translation]. Apparently the case is not entirely about lawyers' rational concept of law. Popular narratives have wandered into court – all 150 of them, including our poet.

22 Court proceedings also revealed another meaning of the word coffee break: When staff members were going to sanction or react against a young person, the word would spread that 'coffee is being served'. This would unleash an influx of personnel to crowd the youngster. (From the author's notes from court on August 28 2014)

23 http://ekstrabladet.dk/112/article2245964.ece

## The law: Gangs and hierarchies

This leads me to ask: What kind of law has wandered into the poem? In the poem the battle unfolds between two crowds or gangs. The hierarchy is there. There are two of them – the near hierarchy represented by the warden and the more distant one, the intended receiver of the forms for reporting the use of forcible measures. Both hierarchies have abdicated, the warden through active will by delegation of powers to his friends and the imaginary recipient of the form – the city hall supervisor - through passive escape, since the forms will never reach her.[24] Everything then becomes about the fight for territory between the crowds, initiated - as if it were a computer game - through the activation of a message on the bulletin board. And in the end, what happened? The forms were not filled out. Nothing – apart from our poet- testifies to the violence. It might as well not have happened and yet we feel that it could happen again and again at any welfare institution – the poem inscribes the event in the culture. There is a repeating, routinely nightmare quality to the poem. We learn that the 'farm folks' are friends of the warden. We sense a private force cutting its way through the institution, beating up on the guys they meet. Hassan holds up a drama where enforcement makes a mockery of the welfare state legal culture as well as the will of the Folketing.

If this is law and order being enforced what is then its source and which theory is behind and supports it? On the concrete level the source of law is the note on the bulletin board. It authorizes the administration of thrashing as a way of treatment. The institution has established its own, home-grown law, the deployment resting upon a discretionary decision of a random sample of pedagogues present at any time.[25] The authorization covers use of violence growing haphazardly from three different directions – or four, if we count the pedagogues making the original call. The enforcement depends on the connections amongst all the groups gathering in the block. The result – isolation of the youngsters - flows directly from the explosion of violence and only indirectly from a legal consequence articulated in a source of law. A horizontal relationship has replaced the vertical one. A theory covering this pattern more fully than a hierarchical ordering of written legal sources of law could be Deleuze's and Guettari's concept of the rhizome as a set of relations. The concept is borrowed from biology. Examples of rhizome orders would be the onion or animals running in packs or arts. The rhizome grows in multiplicity. It is always there, even when it breaks and deterritorializes, it is cast back and hits its own

24 Testimony in court shows that in fact the supervisor received plenty reports on the use of force and also dealt with them. (From the author's personal observations from court proceedings on 27 August 2014.)

25 Testimony in court had it that only 3 staff members out of 70 had a pedagogical education, while others were craftsmen and unskilled workers.

lines again. Dualism or dichotomies cannot be established within the rhizome order itself. Each element relates to the other without a hierarchical order being imposed. While the tree represents the hierarchy and the top or central point of order, the rhizome order will oppose the hierarchical order. One consequence is that genealogy or roots becomes irrelevant for understanding its evolution. A new understanding of the written text can emerge: not as a reflection of the world, but connected with it. The adaption of one element to the other should not be understood in terms of reflection, copying or mimicry (Deleuze and Guettari:2005, 9 - 15). In case of the gangs and the youths, both groups enter into a combined rhizome, feeding on each other, creating a common destabilization of the institution. A new law is set and the rhizome as a concept fit its foundation. Both groups have become tribes (Bauman:1992, 134-35), dangerous drop-outs from postmodern seduction society (Op. cit., 97-98), hence left to the control of repression (Ibid, 112). To this corresponds the discourse in the Ålborg court, where witnesses for the defense talks of the specific dangers being part and parcel of these youngsters and the 'Sun Garden' as the last station.[26] Another corresponding link is the fact that the 'Sun Garden' is not the only institution where similar cases have piled up.[27] And we have seen an increased interest from city hall in engaging volunteer workers for a number of tasks. We even have heard claims made to the effect that the survival of the welfare state depends on municipalities being able to do this.[28]

## Conversations with students: What to do about the Sun Garden?

I had conversations with 12 students, indicating two themes for our talk: (1) If you received the information in this text, how would you handle the case, given that you were a supervisor at City Hall?; (2) What is you general opinion of the way you are introduced to law- textbooks, exercises and classroom discussion?[29] What I try to explore in these conversations is my assumption that Hassan's poems has a potential for student involvement and the creation of a 'real-life' setting and with that activating the students' talent for reasoning and arguing in a chaotic practice field. Apart from telling the

26 As for instance the former inmate telling the court how his social worker had recommended 'Sun Garden' because a stay there would spare the young man several stays at other, more lenient institutions.

27 http://www.tvmidtvest.dk/indhold/opholdssted-under-skaerpet-tilsyn (Accessed 8 September 2014)

28 http://www.kl.dk/Momentum/momentum2012-11-3-id115189/ (Accessed 8 September 2014)

29 In the following student quotations I have used other names for the students. Our discussions were elaborate and my analysis only covers a small part. I am grateful to my students for taking the time to engage in the conversations.

students that the poem took place in an institution for young people, I gave no further introduction.

The poem proved efficient in offering an 'adventure' as a basis for discussion. It both stirred and surprised them. I received responses such as: 'All alarm bells are ringing', 'This is fierce'. The students' own moral judgment came into play, as when one student indicated that it was selfish of the thrashing team to drink coffee at this time of the procedure. Some students had initiate instincts as to a course of action, saying 'I would shut up that place' and Karl: 'I would fire the whole rotten bunch and employ new, qualified staff', or Youssouf: 'I would call in the police'.[30]

The interesting thing in their next reaction was that even though they initially were emotionally involved, all of them turned around and suggested a course of investigation. This was couched in various phrases: 'I would start an investigation'; 'talk to the warden'; 'talk with the staff/ the inmates/ relatives'; 'talk to witnesses'; 'talk to the members of the staff, individually…. Find out what really happened'. Marta went one step further in that she imagined how the interaction might take place when she entered into the institution to ascertain facts, how she would affect the employees and how she could act to keep a dialogue, thus sensing that an objective investigation could be an illusion.

From here basically three different approaches appeared: To some this scenario faded gradually into some kind of measure for the future: 'I would initiate a dialogue'; Karl: 'I would have a workshop – In fact, my first reaction would be to sack the whole bunch. But in doing so, I would risk law suits from all of them. So trying to mediate the situation would be preferable '. In other words: a clear cut legal solution was discarded at an early stage.

Interestingly enough, the students simultaneously indicated a view of the law as being binary and hierarchical. One student, Karl stated that his idea of law was that it was black and white. There was legal and illegal. 'My thinking is very Weberian.' Other students expressed something in the same vein, although differently, as Jill: 'It is exciting to know what is right and what is wrong'. Or, in the wording of Nick: 'A good administrator is a person who can separate his job from himself – Weberian like'. To Karl the law and legal

30 In fact, one of the city hall supervisors on the behalf of her department and the municipality reported the institution to the police. This is clear from the testimony given in court on 27 August 2014.

method will hold the answer, the correct 'verdict'. The modernist concept of law gave them a platform from which to criticize the practice in 'Sun Garden'.

A second approach was suggested by two students who saw the need to bring in the police. This was not founded in expressed assessment of a violation of the criminal code (which is not a part of their curriculum). It could testify to a folk law concept – a subtle feeling that this could border on a criminal offence. Also they took resort to the hierarchy, to an authority to help sort out the mess.

The third approach was suggested by Klaus. He stood out from the rest in that he was unable to feel empathy for the youngsters at the institution – or the staff for that matter. A fellow student had informed him of the text, its author and the setting. He found both parties playing a blame-game or seeking the role of the victim. He pointed out that the youngsters were at the institution for some reason and that they were probably rough guys from crime ridden neighbourhoods. Even so his first step also would have been an investigation into what had happened. Interestingly enough he did not mention dialogue or workshop as a part of his repertoire, having no confidence in the truthfulness of either party. In this his viewpoint was similar to the understanding of both groups as a part of the rhizome. To break it he would put up surveillance, comparing the situation to that of central Copenhagen and London, where there were cameras all over the place as a preventive measure against crime. In this he inserted a competing narrative, different from the one the other students had drawn on. His knowledge of the context helped him frame the case as one involving crime. It also made it obvious for him to point to a technical solution to the problem of 'what really happened', thus resorting to a modern panoptical solution and inserting a hierarchy in place of the missing ones in the text and finding the 'objective' solution where the decision-maker could draw the line between 'black' and 'white', adversarial paradigm of the law, in other words: the positivist assumption that by sorting out the facts we will get to the bottom of the problem.

## The novel Pelle The Conqueror

In the Hassan poem I found a striking absence of welfare state legal culture. So – if '*Kaffeholdet*' represents the way we do not want to order our social relations in a state institution – where can we find a narrative of welfare state legal culture?

The most authentic and coherent product I can find to picture this is the novel *Pelle, the Conqueror*, written by Martin Andersen Nexø from 1907 to 1910.

The novel is in four parts in which the main character. Pelle rises from the life as a herd boy into being the leading figure of the workers' cooperation movement. In this journey he epitomizes the emerging proletariat and he represents the hope for change of capitalist society into a socialist one. After having failed to reach its audience through established channels of distribution, the novel obtained a print of 70,000 copies in subscription directly to its target group. This is probably as close to viral distribution as one could come at the time. To the contemporary encyclopaedia of the educated the novel depicted the workers' situation with 'equally great poetic fervour as fanatic one-sidedness'.[31] Just as Yahya Hassan, Andersen Nexø occupied an open space. Part one of the novel about Pelle's childhood was adapted for the screen and won the Academy Award for best foreign film in 1988. All four parts of the novel have been widely translated into foreign languages – not the least because of the author's popularity with the Soviet regime. Hence the novel testifies to a global popularity in the bipolar world system – however perhaps for diverse reasons. The story about the bright boy climbing up the ladder in capitalist society appeals to Western thinking, while the story about capitalist oppression appealed to the Soviet dominated world. The novel's narrative, then has been widely adopted.

The third part of the novel is entitled *The Great Struggle*. Here the author depicts the conflict taking place between the factory owners and the workers who in the end were granted the right to collective bargaining. Today the 1899 settlement is the manifestation of the origin of the 'Danish Model', regarded officially as the foundation of the welfare state.[32] Nexø pictured an epoch-making event that unfolded in his own time and he put it into a fictional story 10 years after it had taken place. Nevertheless we should not regard the novel as a realistic or historical novel. By involving all elements of society: State institutions, law, Christianity, and organizations in bourgeois society and replacing them with their socialist counterparts he presents us with a creation myth of a new society where social justice rules. With Rosen we might say that Nexø knits together human fields into a comprehensive whole.

## The law in the novel

In the novel *The Great Struggle* bourgeois or private law equals injustice, institutional brutality. The law and Christian hypocrisy are contrasted with social justice, solidarity and the promise of a new community of man on earth, in line with a Marxist understanding of macro development. The narrative elements of the Christian gospel are being replaced

31 http://runeberg.org/salmonsen/2/17/0945.html Accessed on 16 July 2014

32 http://denmark.dk/en/society/welfare/flexicurity/

with socialist solidarity, and the saviour is the young man who stands up for the oppressed. The law is interlaced with this dialectic movement. Every time a conflict unfolds in the epic of *The Great Struggle* we see an underlying theme of a conflict between private law and social law and institutions distributing social justice – the point made being private law's incapability to solve the social problem involved. While witnessing the failure of private law, we are – at the same time - introduced to social institutions that serve as alternative narratives and an entry to a rehabilitating state. This happened at a time when the workers' movement functioned parallel to the political forum, since many workers were excluded from voting rights. In other words: It is a part of the struggle for inclusion into the state. The novel is a harbinger of the new order, in line with Hanne Petersen's observations on literature to catch novelties (Petersen: 2014, 309-10).

Hence the law and state institutions are omnipresent. Returning to the issue of the legal culture of the welfare state, the question then is: How is social justice to be installed into society – how are these people to be included? The novel is perhaps not so specific about this. However, there is a clear allusion to the hierarchy. Pelle is the epitome of the socialist movement, organizing his people in the struggle, and victoriously leading them to a demonstration in front of the King's palace as a warning to him that he – Pelle - will replace him as the top of the hierarchy and the workers will sweep their way into the state. The dialectic forces will work for a replacement of one hierarchy – the bourgeois - with another – the socialist.

Hence the novel and its black-and-white ethos harks a new layer in the nation building process of the late 19th century while also providing a baseline for our sense of the rational and modern welfare state. In 2004 the author was awarded a place in the Danish literary canon. Before that generations of Danish school youths have read excerpts from the novel.[33] Thus – through the secondary socialization of the school it has been internalized by those exposed to the public school system (Berger and Luckmann: passim) in full correspondence with the catchphrase 'Nothing above or besides the Folketing'.

## Balancing the findings

Using culture as my playground I have – from different directions – approached my question if fiction as a creative expression can provide a specifically advantageous framework for discussing law and legal culture in an increasing diverse society. Rosen's anthropological concept of law as culture has been an inspiration to search for Danish

33 http://pub.uvm.dk/2004/kanon/ (Accessed 8 September 2014)

legal culture as reflected in two samples of literature and in conversations with students, holding up a static understanding of culture against a dynamic one.

My conversations with students confirmed that Hassan's poem provided a framework for discussions about the law and its conditions in an institutional setting in a welfare institution. The poem, in combination with other poems in the collection, moreover, could lead to a discussion on legal culture, identity and the postmodern condition, involving the focus of the practitioner, which is: how to handle the case, which also invites the reader to ask additional questions, such as: How do I read the situation in the institution and how do we see the role of the practitioner? The question then is: Why use literature, when social science analyses of society obviously carry information on the changes that I want to address? The answer to that question lies mainly in reactions that I received to the poem. All students got involved, some of them perhaps identified with the youngsters, some did not. However, the personal standpoint was alerted when my students imagined themselves act in the field as practitioners and with that the opportunity to critically question one's own position. Hence the conversations on literature brought forward another dimension of culture apart from the empirical concept, namely the normative or ethical and educating or forming aspect of culture (Hansen: 63-64). This corresponds closely to the reading that law professor Agnete Weis Bentzon chose when she took elements from Lion Feuchtwanger's novel *The Oppenheims* as a yardstick for her analysis of a possible infusion of Nazi norms into the Danish environment and hence a standard for the humane (Bentzon:1987).

The confrontation with literature also introduced my students to a new understanding of the law, quite novel to the one they had experienced in their textbooks. They came to see the law and its enhancements as an element in legal culture.

Another argument for using literature deals not so much with the pedagogical motivation as it addresses the content. It hinges on the border-crossing potential of the literature, art and the aesthetics, reaching out across the open space, bridging the cracks that have appeared in the midst of the postmodern process. My reading of the Hassan poem opened up for an understanding of the law different from the adversarial or the hierarchical one. In the poem the law is represented by force and flows in an interconnected movement between two gangs or tribes. They establish connections, similar to those of the web of the rhizome. Merima Bruncevic in her original deployment of Deleuze and Guertarri's concept of the rhizome shows how the concept of the rhizome allows for connections to create common space (Bruncevic:2014, 37).

In Hassan's poem the situation differs from a number of Bruncevic's analyses. Where Bruncevic shows the benefits of the rhizome view on the law, a rhizome of violence had been established in the dysfunctional institution, described by our poet.[34] Where is the yardstick, then, that we can hold up to rule out this concept of 'dangerous youths, excluded from society'? The answer to this I find not necessarily always in the code, at least not as long as we talk law in action. However, Bauman's understanding of our obligation to 'the other' seems more relevant. We are in a period of time in some ways similar to the one pictured in *Pelle the Conqueror* and the struggle of the late 19th century, when some groups of the population experience barriers to their access to society. I am not in favour of replacing the coded democratic law – or even the less democratic human rights law and court practice with literature. However, when talking about the law's role in a nation building process, we could get a lot wiser by engaging in the inclusive and identity shaping voice of literature (Petersen: 2014, 311; 318-19, channelling the unsaid and the ambiguous into our conversation and questioning our assumptions of the clear cut and simple truth. If – on the limited background of this analysis – I were to advance a tentative characterization of Danish legal culture, I would emphasize its capacity for inclusion of new social groups into state and society, not through repressive regulation, but through custom and institution building.

## Relating to the law and literature movement

An introduction to the interdisciplinary method of law and literature to the legal professions in the Nordic countries mentions the increasing importance of human rights and European law as one of the reasons for a growing awareness of the law and legal institutions, perhaps related to the EU and importance of human rights; 'law and literature is perhaps not a direct answer to this situation; but it is part of a larger questioning of or an investigation into law's cultural or ethical foundations' (Simonsen and Tamm:2010, 8). In this analysis, I have separated the human rights perspective from the cultural one, allowing a discussion about culture as reflected in literature to take a place of its own. I will not claim that literature makes us better persons. Or literature may offer a richer impression. In this way literature and with that the Hassan poem provides a low-cost, low-risk surrogate experience (Posner: 482).

Also literature is open to the reader, while human rights discourse does not do away with dichotomies. When employing the human rights discourse we activate its

34 I distinguish here between the institution of the poem and the situation being unraveled in the court case.

constitutionally embedded fundamental rights, whether those rights are stipulated in the Danish constitution, in the EU treaty or the European Convention of Human Rights. The discourse takes resort to another hierarchy, two, in fact (or maybe three), while the human rights discourse both implies that the politically elected legislative branch of government may be overruled by the non-democratic judicial one and – moreover – it includes the international dimension in a recourse to both the European Court of Justice and the European Court of Human Rights. However, the human rights courts address the issues in retrospect – in court. But as was the clear in the 'Sun Garden' case, the problem is not exclusively about lawyers' law. To take another example: Debating Danish welfare benefits we have examples of politicians willingly catering to the insecurity, using de-humanizing dichotomies or writing off the fundamental rights perspective as the 'pettifogger interpretation', [Da.: *prokuratorfortolkninger*] as it happened when there was a discussion about Danish national regulation to secure student benefits for Danish nationals (Mortensen: 2014, 2; See also above). Either way this bodes ill for the human rights discourse as framework for a dialogue about the legal culture we want to advance, assuming that law is not the exclusive domain of lawyers in court, but also performs a democratic function in public debate, in the education of government officials and in nation building – and, in fact – lends part of its legitimacy from this communality of narratives.

In a world of rapid and uncomforting changes, forming a fortress of the static concept of culture is perhaps the fastest way of creating solidarity (Bauman 1992: 172, referring to East Europe). But as history shows, it may come at an extremely high price that very few are willing to pay at the end of the day. Human rights were introduced as a reaction to this expulsion. So will human rights – once again – be the answer? It will be part of the answer. But it cannot cover the whole range.

A perspective on this question can be offered when taking a closer look at the origin of the American law and discipline in the US as a reaction against the rise of the human right movement. The law and literature founders grounded their initiative on a refraining to enter into an 'equivocal discourse that leaves us open to avoidance or even an acceptance of what we thought bizarre but with a straightforward resistance and a strong reaffirmation of the values that the unacceptable discourse had offered (Weisberg:2011, 46-47; 48). Weisberg today has modified his original criticism of the coded approach – just because the coded approach in Nazi Germany has aided expulsion it does not mean that expulsion is coded into it (Weisberg: 2011, 47).

We cannot compare the situation of the USA in the 1970s with the present Danish one. However, the insight still stands that literature can fill the cracks whereas the bright light of the rational coded language will cast shadows that will make it possible to include and exclude.

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NAVEIÑ REET: Nordic Journal of Law and Social Research (NNJLSR) No.5, 2014, pp. 63-82

# Lawyers in Opera: The Transformation of the Legal Profession

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## Abstract

*For centuries lawyers, broadly understood as judges, notaries, legal officials and private practicing lawyers, have played important roles in society and been members of a strong profession possessing privileges. Also in operas, from the Italian Commedia dell'arte, 'Il dottore', to recent lawyer figures, judges, notaries, lawyers, courtrooms, prisons and legal cultures are exposed. These conditions have influenced the reputation of lawyers. This article contributes with reflections about lawyers' identity through a fruitful inspiring collaboration between an opera singer and a legal scholar. At three levels of analysis, this explorative study searches for connections between societal requirements (what to do), professional requirements (how to act) and legal and ethical expectations of specific lawyer-like behaviour, morality and good citizenship (who to be). The article brings into a dialogue the world of law and the world of opera and compares the construction of lawyer identities in society with different lawyer roles in opera.*

## Why law and opera?

How does opera interact with legal cultures, and how do operatic works influence and create a formal and informal picture of lawyers? It is certainly not the first time that this subject matter has been analysed by scholars and practitioners to explore the interrelation

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between law, lawyers and opera. However, it is probably the first time the following research question is formulated: Who are the lawyers and is it possible to depict lawyer identities in operas in a sociological setting based on Anthony Giddens's perception of identity? The aim of this article is to stimulate the conduct of an interdisciplinary study with a theoretical basis in sociology, legal studies and expert knowledge about opera music and librettos in relation to lawyers' identities.

Law and literature has during some years been a recognized discipline with close relations but there are even closer relations between law and performing arts such as music and drama, and to the collectivities and institutions that are charged with the responsibilities and duties of public performance. The actual president of the European Court of Human Rights, Dean Spielmann, 'confesses' to have been intrigued for long time by what he calls "the unusual, or original, relationship between music and law". In his contribution in the book "*Freedom of Expression. Essays in Honour of Nicolas Bratza, President of the European Court of Human Rights"* (Spielmann, 2012) he begins however by observing that only "little has been published" on the relationship between music and law, apart from the obvious copyrights aspect. Spielmann argues that music is not only a human right (Article 27 UDHR), but that music can also become noise pollution that may constitute a violation of Article 8 ECHR (right to privacy). Playing loud music incessantly for prisoners or detainees, consisting a form of torture or inhuman treatment, also violates international human rights treaties. Spielmann gives multiple examples how "music can amount to torture, and lyrics can be the vehicle of human rights abuses", such as racially offensive lyrics or "hate speech". Music has also been used as a political tool, sometimes to support ideas of democracy, solidarity and freedom, sometimes it has been put to the service of authoritarian regimes. Spielmann focuses on human rights as a source of musical inspiration (such as Beethoven's *Ode to Joy* , Benjamin Britten's *War Requiem*, Dmitri Shostakovich's *Thirteenth Symphony* and the entire oeuvre of Mikis Theodorakis) and music as a vehicle to promote human rights. In a letter to his sister, after the première of his *War Requiem*, Benjamin Britten wrote: "I hope it'll make people think a bit", expressing a hope for a better world to live in.

In this article we focus on other aspects of the relationship between music and law, analyzing opera as another form of representation of the legal world, and more specifically the legal profession.Therefore it is relevant to replace or supplement the study of law as literature with the more general study of law as a performing art. Law, like music or drama, can be understood as performance: The acting out of texts rather than the texts themselves. Balkin and Levinson (1999, p. 6) explain that the American Legal Realists distinguished 'law on the books' from 'law in action'. They extend this distinction one

step further and state: 'Laws on the books"— that is, legal texts—by themselves do not constitute the social practice of law, just as music on a page does not constitute the social practice of music.

Like music and drama, law takes place before an audience to whom the interpreter owes special responsibilities. Legal, musical and dramatic interpreters must persuade others that the conception of the work put before them is, in some sense, authoritative. And whether or not their performances do persuade, they have effects on the audience. The voices lawyers are given in many operas are far from flattering. How are lawyers pictured in operas? Do they work under the rule of law and with a consciousness of their societal responsibility in mind? In this article a number of lawyer figures in operas have been depicted and many will be included to support the analysis of the societal obligations of *what to do*, the ethical and professional frame of *how to act* and the individual and personal choice of *who to be*. Three opera figures are especially interesting to analyse: Dr. Blind from *The Bat* , Mr. Swallow from *Peter Grimes* and Jane Utterson from *Dr. Jekyll's advokat*. A list of all operas occurring in this article or used as background is included in the list of references.

The American Bar Association, ABA (2012), has asked: If the two disciplines are related, how is their relationship to be understood and what might be learned by examining opera and law in relation to one another? ABA has long been committed to the rule of law and the role that it plays in both opera and legal practice. As many legal and political theorists have pointed out, the rule of law is a multifaceted concept and cannot easily be reduced to a single definition. The rule of law also requires, or is intimately connected to a range of other important ideals and principles, such as: equality and impartiality, freedom of expression and other fundamental rights, judicial independency, fair trial, public accountability and transparency, commitment to democratic deliberation. In operas these principles can be challenged often in combination with morals, ethics and duties, like in Bizet's *Carmen*, 1875, when Officer Zuniga commands the soldier Don Jose to escort Carmen to prison due to a criminal offence, and Carmen charms Don Jose into letting her escape.

A musical language carries the dramatic situation, while the music also contributes to the creation of a special character of a lawyer, a notary or a judge. Sometimes the music in itself will be the determining factor for the understanding of a certain role.

## Identity - choice or assignment?

To identify and analyse the development and perception of the identity of lawyers in society as well as in operas, it is important to consider the distinction between choice and assignment. One can ask: who chooses a given identity, and to whom is it assigned? This dichotomy plays an important role when investigating the actual identity perceptions of lawyers. Individual lawyers choose a lifestyle and form a practice related to professional organisations. These organisations impose a set of national and international regulations that have a major impact on individual lawyers (Høedt-Rasmussen 2014, Chapter 4). Apart from this construction, groups or individuals far away from the legal context create pictures of the reputation and standardized perception of lawyers. These reputations are expressed through performing art, like theatre, film, multimedia, ballet and opera. There will be a constant interaction between the identity and the reputation, a reflection and adaptation between and internal perspective and an external perspective. In reality as well as in operas one is not born a lawyer, but will become a lawyer.

The opera lawyer must fulfil some expectations of the public to be recognized as a lawyer, which in itself reveals that the identity of a lawyer is a mere construction. In the operatic work the lawyer is shaped by a team and based on many sources. The *composer* interprets the text for the singer and for the musician. This interpretation is supported by the music in creating pictures. *Music* can create all feelings through the voice, dynamic, rhythm, speed, fermatas, pulse, pauses, gesture and posture. Furthermore the choice of instruments and choice of solo song, duets, trios, quartets or choirs plays a role. The *director* takes part in the casting. If a lawyer is needed it is important to find out how this lawyer must look and sound, e.g. high or low voice, tenor or bass. The *conductor* has great influence on the actual performance. The *design team, stage director, set designer and costume designer* agree on a visual concept for the opera. *Other experts* may influence how the lawyer is perceived like the *choreographer* and the *make-up and hair dresser department*. Where actors chose their own 'music', find their own rhythms, speed, and can decide when to pause or stop, the opera singer cannot chose, but must follow what the composer has written. When *the singer* is familiar with the score and has learned the role by heart, then the singer is ready to join the group and can hope to get some influence on his or her own character working with the director, conductor and the rest of the singers. The psychological and dramatic work starts. The tools of the opera houses used for creating an identity can be found in law firms where individualisation has led to a diversity of identities, which are supported by choices of lifestyle, performance, voices, hairdressing, clothes and accessories (Høedt-Rasmussen, 2014, Chapter 5).

## The role of lawyers in reality and in operas

Lawyers and judges are well-known figures in society and possess some common characteristics. Within the European Union it is possible to depict the ideal lawyer from legal sources; the question is whether this ideal is reflected in operas. Today it is an illusion to talk about one lawyer identity. Still lawyer roles are constructed to provoke or entertain, and hereby operas performed today inspire for further development of lawyers' identity, broadly understood as lawyers, judges, notaries etc. It has been said that lawyers are like opera singers, because they love the sound of their own voices.

Lawyers can be seen as warriors combatting for social justice or independent trusted advisers fighting for their clients within the law and with a consciousness of their societal responsibilities. Are lawyers members of a strong profession, with a collective vocation committed to ethical behaviour and access to justice for everyone? Is the ideal lawyer's professional identity built on the common values of the profession, reflecting charismatic, authentic and incorruptible characteristics of individual lawyers who maintain high ethical standards in courtrooms, in business and in public and private life?

The legal profession, broadly understood as lawyers with a diversity of societal and private functions, is under pressure from various potential and sometimes contradictory developments. Some parts of the profession tend to build fences around traditions and privileges, while others are willing to see new content and new models for lawyering. Lawyers, either losing their way or changing their identity, have been some of the more recent topics in legal sociology (Macfarlane, 2008). There have been some studies on the roles and identity of judges, combining law and sociology (Hammerslev, 2003) and other studies of identity development amongst lawyers. Identity changes can be found in operas concerning the role of lawyers as a reflection of identity developments in reality and vice versa.

Lawyers and judges are generally rather badly depicted in operatic works. Often they are ridiculous, despotic, dishonest and pedantic. They are normally dressed in black. The characteristics are supported or even installed by the composer in the choice of voices, instruments and interpretations. Before or along with the composing work, a librettist has adapted a story into poetic words. The music can reveal inner feelings and conflicts, often more nuanced than could be done by words (Claesson, 2014).

People in the legal world live in hierarchies. A hierarchy socialises and makes that lawyers adapt and adjust to a system and a certain role. Power and hierarchy may create inequality, while the ambition of law often is to prevent inequality, which is a major paradox. In

literature, this paradox is seen in Orwell's *Animal Farm*: 'All animals are equal, but some animals are more equal than others' (Orwell, 1945, p. 203).

When lawyers are organized in systems and hierarchies it appears that they fundamentally accept law and order, but once they are a part of the normative systems, once they are absorbed, one may wonder whether they still have an interest in questioning the system and its efficiency. Literature and music dare to raise the question and therefore literature is often subversive and confronting, likewise operatic works. Often this may be irritating for those who are in power. However, opera and other arts have also been used as tools for those in power, but there has always been literature and opera opposing and challenging power. When the agent-structure relation among lawyers in relation to society has stiffened, artistic powers can question what was not supposed to be questioned (Voorhoof & Høedt-Rasmussen, 2007).

## What to do at the societal level

The legal profession is one of the classic liberal professions, which were called 'status professions'. Only since the 18th century lawyers started to build up their professional identity by establishing professional organisations (Brante, 1988, pp. 119-142).

When looking at the interaction between lawyers and opera it is inevitable tempting to look for real court cases. One opera has attracted special attention from the European Court of Justice (ECJ), namely in *Land Hessen v. Ricordi*, 2002. The preliminary ruling by the ECJ concerned the right to have the opera *La Bohème,* by the Italian composer Giacomo Puccini, performed in the 1993/1994 and 1994/1995 seasons in the *Staatstheater* (State theatre) in Wiesbaden in the Land Hessen (Germany). A question on this matter was raised in proceedings between the Land Hessen and G. Ricordi & Co. Bühnen- und Musikverlag GmbH (hereinafter Ricordi), a firm publishing musical and dramatic works. The case concerned more precisely the discussion, at that time, whether the work of Puccini, who died in 1924, was protected in Germany for a period of 56 years after the author's dead (the Italian term of protection, at the time) or whether the protection term of 70 years needed to be applied (the German term of protection). During the 1993/1994 and 1994/1995 seasons, the Staatstheater in Wiesbaden staged a number of performances of that opera without Ricordi's consent.

Ricordi argued before a *Landgericht* (Regional Court, Germany) that, in the light of the prohibition of discrimination on grounds of nationality in the EC Treaty, Puccini's works were necessarily protected in Germany until the expiry of the 70-year term prescribed by

German law, that is, until 31 December 1994. The ECJ confirmed this interpretation. In this case lawyers and judges decided under which conditions an opera could be performed.

The legal profession's monopolies and its common code of conducts are under pressure. Lawyers work together with experts in other domains, such as ICT engineers, economists, financial advisers, insurance experts, psychologists, consumer advocates, labour representatives and environmental experts. Not only practising lawyers are under attack. This development puts further pressure on court systems and judges. Scandinavian socio-legal studies which focus on developments in the judiciary system, such as the research carried out by the Norwegian professor Vilhelm Aubert (1976) have shown that also judges are losing their central position to other professions. This is due to emergence of ADR, arbitration and mediation, and because administrative councils and regulatory bodies or agencies have the competence to make final rulings. Margareta Bertilsson has examined similar developments in the legal system in Sweden, and has found striking similarities with the developments described by Aubert. In Denmark, Dalberg-Larsen has studied the influential role of lawyers in society and has also come to the conclusion that judges in particular have lost influence in society. He observes, however, that they are finding new roles, especially in the context of internationalisation (Dahlberg-Larsen, 2005).

Turning towards the opera to investigate the societal tasks of opera lawyers and hereby answer the question 'what to do', it seems that themes concerning the maintenance of law and order, and upholding institutions in the judiciary and penal system such as courts and prisons have priority. Courts are found as a setting in many operas: Gilbert & Sullivan wrote in 1875, in *Trial by Jury*, which has a satirical approach to the legal system and to the judges and lawyers in the play, like it is seen and heard in the Judge's Song. Judges and courts also appear in operas like Benjamin Britten's *Peter Grimes* (1945), and *The Adventures of Pinocchio* (2007) by Jonathan Dove. Prisons are seen in classical operas such as *Faust* (1859) by Charles Gounod and in Puccini's *Tosca* (1900). Also in Bizet's *Carmen* (1875), the prison plays an important role as an institution. In more recent work like Brecht's *The Threepenny Opera* (1928), Scene Six (Act Two) takes place in a prison, the Old Bailey. Operas will certainly be connected to the time where they were composed, but all operas in this article are performed today and often in new settings and interpretations. These interpretations might give opera lawyers new societal functions.

## How to act within common norms of a legal practice

Having discussed the societal tasks, both for lawyers in reality and opera lawyers, the next step is to look at a few organizational and behavioural characteristics of lawyers. Organising a professional community, like the legal profession, is a constitutive act, which establishes common norms, a common professional language and an agreed 'truth' about what is right and wrong in a variety of questions about the nature of justice and which conduct is to be sanctioned within the profession. The legal profession has the characteristics of a 'constellation' or societal installation, which include: sharing historical roots, having related professional activities and serving a cause or belonging to an institution (Wenger, 1998, pp. 127-129). The individual lawyer can be squeezed between the professional norms, personal beliefs and attitudes, while they are contributing to the practices of their communities. 'Practice' is a term which can have different meanings in different fields. In relation to lawyers and the development of identity, 'practice' refers to the social structure that reflects shared learning and common norms. These predictable attitudes make lawyers recognisable. According to Wenger (1998, p. 47) it includes: 'the language, tools, documents, images, symbols, specified criteria, codified procedures, regulations, and contracts that various practices made explicit for various purposes'. It also includes all implicit relations, tacit conventions, subtle cues, on tool rules of thumb, recognizable intuitions, specific perceptions, well-tuned sensitivities, embodied understandings, underlying assumptions and shared world views. This gives the word 'lawyer' some immediate associations. Different lawyers are often interrelated, for example the judge is dependant from lawyers representing the parties in court, as the court case only can be completed when all are playing their proper roles.

Today's lawyers have common ethical rules and in their self-understanding most act with honour and dignity and with severe societal obligations. The artefact of the European lawyer is characterized by Ramon Mullerat, former President of the Council of the Bars and Law Societies of the EU (CCBE), who made important contributions to portraying the European lawyer as a 'good lawyer' committed to a global responsibility (2013, pp.1-8). He encouraged lawyers to contribute to the betterment of the world and emphasised the important role of lawyers in the modern globalised society. Mullerat saw lawyers' tasks as smoothing out difficulties, relieving stress, correcting mistakes, taking up others' burdens and contribute to peaceful life in a peaceful state. Mullerat disagreed with presenting lawyers as 'sharks', 'hired guns' or 'gladiators' fighting to annihilate their adversary, prepared to defend any cause depending on the fee. He argued in support of the model of a lawyer as a solution-finder or peacemaker. Being aware of the differences between lawyers in the different European States, Mullerat stated: 'In spite that the fundamental mission of all lawyers in the world is the defence of the rights and liberties

of the citizens and that their fundamental functions are legal representation in court and legal advice, the reality is that the identity, training, ethics, organization and methods of practice vary significantly from one country to another' (2013, p. 5).

The picture of lawyers representing honour and dignity is not found in general in classic operas. Nevertheless, opera can support the international development of new lawyer identities, as many operas are well-known if not worldwide, then in the western world.

According to the European artefact, practicing lawyers must act as the client's man who acts with honour and dignity following a strict set of ethical rules (CCBE, 2008). This professional commitment to honour and dignity is not recognized in opera. Rather the opposite. An example of the lawyer-client relation is found in *The Bat* (*Die Fledermaus*, 1874) where the lawyer with the significant name Dr. Blind assists his client Eisenstein in the most ineffective way, which results in his client being detained a few extra days in jail.

'How to act' also includes the practice of asking a fair fee. In Gershwin's *Porgy and Bess* (1935), the lawyer offers Bess a divorce for a dollar, but when Bess tells him she was never truly married the price rises to $1.50.

It must be assumed that the legal profession and all its members cannot be satisfied with this interpretation of the lawyer-client relation.

## Who to be as a human being

Lawyers often express firmly what they find right and wrong. A global frame makes it more difficult to define what is right. Considerations about the ideal of justice, which in its essence is based on law and order, ask for questions about which law and which order. The legal profession individualizes and in relation to the identity of lawyers, it is relevant to analyse and consider 'Who am I?', 'Who are we?' and 'Who do they think we are?'. Developing a professional identity is an ongoing process in the relations between the self, the group of lawyers and the surrounding society including all kinds of art that functions as a kind of sounding board for the individual (Alexander 2011, pp. 1-20). In this interaction norms develop and reflect roles and tasks. The relations between lawyers at stage in an opera and lawyers in another reality, like court rooms, influence each other. This dialogue supports the development of new competences of individuals or of the profession, and affects the identities both of individuals who are aligned with the group and individuals who distance themselves from it. In the imagination of societal and individual developments opera can either support or contradict existing powerful groups

and point towards a more respectful society based on other fundamental principles for human beings, animals and nature.

People of the law exercise power and influence. It is a profession wanting to use power. It is a profession where a number of members often are keen on exercising their power. However, according to Giddens, the self is perceived as internally referential, where personal integrity is seen as the achievement of an authentic self. Lawyers might be seen as the embodied mediation between societal tasks and subjective orientation. On this basis, Giddens talks about 'lifestyle', which can be defined as a more or less integrated set of practices which an individual embraces. In this context, lifestyles are to be understood as: 'routinised practices, the routines incorporated into habits of dress, eating, modes of acting and favoured millieux or encountering others' (Giddens, 1991, p. 81).

In operatic work the men in power with a legal background are often portrayed as curtailed, one-dimensional, convinced of their own legitimacy as community support and pedantic, petty and crafty. With these pictures operas make it possible to question the power. The stronger the power is, the more dangerous it becomes to question it legitimacy. The more power one has, the bigger the resistance will be to act in a way where there is a risk to lose the power; but what will one lose if power is never under debate? Below a few important lawyers in operas are analysed.

## Identity of a lawyer or a judge in an opera

In the following analysis, after a short introduction, an attempt is made to identify the role and identity of a few specific figures in operas, related to their role in society, their relation to the legal profession and their characteristics as human beings. The first lawyer figures appeared in *Commedia dell'arte* from 1518, where '*Il dottore*' had a dominant position. '*Il dottore*' was sometimes a lawyer, sometimes a doctor. At the societal level he (it was always a male) gave body to satiric attitudes and fun making with the people in power. Freedom of expression, the right to criticise and make parodies of the authority, was allowed in this theatre setting. The legal profession as such did not exist at that time and at the personal level. Il dottore was a locally well-known person, a disruptive chatterer who does not listen to anyone else from any of the fields that he claims to know about, which is many (medicine, law etc.). He is traditionally portrayed as having been educated either in Bologna or Padua, which since the Renaissance have two of the most prestigious universities of Europe. He is often rich. He is extremely pompous, and loves the sound of his own voice and he pretends to speak Latin and Greek. In the period from 1500 to 1600 '*Il dottore*' was a *Commedia dell'arte* figure with a particular mask. It was the only

*Commedia dell'arte* mask, which only covered a quarter and where the nose was often pressed to give the impression of a pig. It was important that the mouth was free from the mask, as a significant characteristic of '*Il dottore*' was his talkative appearance.

The baroque opera (late 1500s-early 1700s) had dancers and opera singers unfolding the mythology and beauty to please the dukes of the time, who wanted to be reaffirmed in their positions. The performances resembled classical Greek dramas with heroes, gods and goddesses and no place for lawyers.

The 18th and 19th century operas introduced a tremendous number of notaries or similar legal figures. Their societal tasks were most often to administer the signing of marriage contracts or a will. The early opera lawyer, notaries or judges often play inferior roles. Regularly, they had only few notes to sing, a recital or a mute presentation. They are now presented as member of a profession given some common characteristics. At the personal level they are often without a name but just 'a notary', 'a lawyer' or 'a judge' fulfilling some technical tasks on behalf of society. Nevertheless, some operas were considered dangerous or offending to such a degree that they were censured and could not be shown. That happened in 1792, when Antonio Salieri wrote the opera '*Catilina*', in which Cicero and Cato both are pictured as caricatures in a satirical frame. It can be discussed whether Cicero is more a politician than a lawyer in this opera. *Catilina* was censored until 1994, when it was performed in Germany (Schneider, 2014).

The 20th century introduced some lawyers with more considerations about justice and individualized personalities, more as human beings than just being 'a lawyer' or 'a judge', as seen later in the analysis of Britten's *Peter Grimes*. In Germany Brecht's lyrics, set to music by Kurt Weill, have made *The Threepenny Opera* (*Die Dreigroschenoper,* 1928), which underscored the hypocrisy of conventional morality imposed by the Church, working in conjunction with the established order, in the face of working-class hunger and deprivation. Brecht and Weill gave dramaturgical focus to social realism and social criticism and added new dimensions to the interaction between opera and society.

## Dr. Blind

Dr. Blind is a lawyer in the opera from 1874, *The Bat* (*Die Fledermaus*) by Johann Strauss (Paulik, 1976). Dr. Blind is the lawyer of the Eisenstein family. He is a tenor characterized through the music. The music supports the characteristics of the individual lawyer, who is often ridiculous with a nasal voice, thin and sharp, nearly pedantic and his text is a monotonous. He is repeating all words pretending to have a substantial legal knowledge

presented in an artificial legal language with a touch of Latin. Words like '*rekurrieren', 'appellieren', 'reklamieren', 'revidieren', 'rezipieren', 'subvertieren', 'devolvieren', 'involvieren', 'protestieren', 'liquidieren', 'exzerpieren', 'extorquiren', 'arbitrieren', 'resumieren', 'exkulpieren', 'inkulpieren', 'kalkulieren', 'konzipieren*', dominate the original text and support the creation of a lawyer. As mentioned above, Dr. Blind's stupidity and malpractice lead to longer imprisonment for his client. This compromises the lawyer's role as an agent of justice at the societal level, and it creates mistrust in relation to the legal profession. It also portraits a human being with a big ego and a ridiculous arrogance, a cliché or a caricature.

## Mr. Swallow from Peter Grimes

Mr. Swallow is the lawyer in the opera *Peter Grimes* by Benjamin Britten (Stein, 1945). Peter Grimes, a fisherman, is questioned at an inquest over the death of his apprentice. The townsfolk, all present, make it clear that they think Grimes is guilty and deserves a punishment. Although Mr. Swallow determines the boy's death to be accidental and clears Grimes without a proper trial, he advises Grimes not to get another apprentice. Peter Grimes has neither been prosecuted, nor acquitted, because the community including Mr. Swallow has already judged him. He has the societal authority to act. Grimes, however, engages a new apprentice and the talk of a bruise on the boy's neck makes the townsfolk evolve into a mob to investigate Grimes's hut. When the mob reaches the hut, Grimes is gone, and they find nothing out of order, so they disperse.

During the opera Mr. Swallow is presented as the efficient administrator of justice, as partying drunk at night hunting girls, with an authentic authority when his sense of fairness is threatened. A slight touch of fair trial is found as Mr. Swallow's music suddenly changes when he realises that he cannot find anything out of order in the hut of Peter Grimes. The music turns into a friendly, kind and pleasant melody accompanied by a bassoon and a tuba. But it only lasts for seven bars, very short (Christiansen, 2014).

Benjamin Britten uses the music as a fast drawing of all persons, present in the court room, where the opening scene takes place (Padmore, 1993, p. 16; The Royal Danish Theatre 1993). Concerning Mr. Swallow this is done through aggressive, jumping intervals, energetic and factual without exposing too many feelings. During the interrogation Mr. Swallow is often accompanied by instruments like woodwinds and brass with staccato, which create detached and separated words leading towards a verdict. By contrast, the accused Peter Grimes is accompanied by strings playing legato, smoothly and connected expressions. Mr. Swallow has an omnipotent role at the societal level, and represents a mixed character in the relation between his professionalism and his personal weaknesses.

## Jane Utterson from Dr. Jekylls advokat

The last example originates from a world premiere in Denmark in March 2014 at *Den Fynske Opera,* of a new written opera, in Danish, '*Dr. Jekylls advokat*'. The music is composed by Niels Marthinsen and the libretto is written by Eva Littauer. Jane Utterson, a female lawyer, plays the main character. She represents a disruption with the classical male lawyer. Her legal work requires strong involvement, not only in terms of expertise and content, but also with regard to interpersonal relations in the sphere of legal practice. A lifestyle perspective, like that of Giddens, connects the subjective dynamics of the professional with the human being's practical reality from experience and lifestyle choice. The more individualized character of a lawyer which is found among real lawyers is presented in the role of Jane Utterson. Her personal life dominates her professional life; she starts an educational journey including her development as a human being, as a lawyer and as a woman. She appears vulnerable and is one, who has not yet experienced lust or love. Her private matters are revealed and the main impression is that her professional life and private life, the conscious rationality and her emotions and lust must merge in a holistic meeting. She is the lawyer of Dr. Jekyll and represents a totally new lawyer identity (Littauer, 2012). This reflects the diversity of identities, which has developed in postmodern times. The societal role becomes blurred and the norms of the profession are heavily influenced by personal and even intimate considerations.

The relation between opera and lawyers goes further, as seen in the next part, where judges from the U.S. Supreme Court play the main roles in a recent opera. This can be considered as an advanced dialogue between law and opera in which the personalities of the judges form the dramatical framework.

## Real judges in real opera

Two well-known and influential associate justices of the Supreme Court of the United States have lend names and personal characteristics to a very special new comic opera titled *Scalia/Ginsburg* by the multitalented composer Derrick Wang, who graduated from the University of Maryland Law School (ABA, 2013).

Ruth Joan Bader Ginsburg (born 1933) is an Associate Justice. She is the second female justice and first Jewish female justice of the U.S. Supreme Court. She is generally viewed as belonging to the liberal wing of the Court. Before becoming a judge, she had a legal career as an advocate for the advancement of women's rights as a constitutional principle. She advocated as a volunteer lawyer for the American Civil Liberties Union. Antonin Gregory Scalia (born 1936) has been described as the intellectual anchor of the Court's

conservative wing. He has served on the Court since 1986, during which time he has established a solidly conservative voting record and ideology, advocating textualism in statutory interpretation and originalism in constitutional interpretation.

Many of the lyrics come from opinions and speeches of the judges. From Justice Scalia's rage aria, it sounds:

*The Justices are blind*
*How can they spout this*
*The Constitution says*
*Absolutely nothing about this!*

While the opening aria of Justice Ginsburg is:

*Dear Mr. Justice Scalia*
*You are searching in vain for a bright line solution*
*To a problem that isn't so easy to solve*
*But the beautiful thing about our Constitution*
*Is that, like our society, it can evolve.*

The theme is, in Justice Ginsberg's understanding, how two people with notably different views on constitutional interpretation can nonetheless respect and genuinely appreciate each other. This mutual respect can be seen as a precondition for having and open dialogue.

## Transitions - law and opera can evolve society

The importance of the traditionally strong professions, such as priests, doctors and lawyers, is diminishing. If the general trend is that lawyers are under pressure from other professions or experts, while their exclusive rights, monopolies and privileges are diminishing, one can ask if that will lead to less lawyers in opera. When looking at the various opera lawyers above it seems that the individualisation and more multifaceted lawyer has appeared in recent operatic works. It must be kept in mind that an opera lawyer is a construction made for a specific performance. Even though the music and the libretto is the same, an analysis of an opera lawyer is connected to the creation shaped by the composer, the instrumentation, the conductor, the design team including sets and costumes and the personal expression of the actual singer.

To conclude: The legal profession is old and well-established and actually under transition; opera is an expressional art also under constant development. In a globalized society ideological differences of operatic calibre can be seen, like in the *Ginsberg/Scalia* opera. In the interaction between law and opera, which definitely exists, the opera lawyers reflect real lawyers but will often create a counter-image that many will distance themselves from, and hopefully use to reflect on their task in society, their commitment to a profession and responsibility for who they are and which criteria they have chosen for exercising legal power. The representation of other types of lawyers in opera can through exaggeration create new images of lawyer and the structure of what to do, how to act and who to be is found both at the opera stage and in real life, where lawyers in both settings are struggling with the latter question: who to be? The answer cannot be found solely in a professional legal setting.

A plea for more poetry, literature and music will help to make the people of the law dream and raise questions both to society and to themselves with more hesitation and more nuances; with more doubt and more compassion; more uncertainty and therefore more need for sense of purpose and meaningfulness in a process of reflection. In the latest operas lawyers and judges are less stereotyped and in search of a personal identity.

Judges, lawyers and lawmakers have sometimes succeeded to extend the borders of reality. They might realize at a societal level, what once was a fiction, in the understanding of Giddens, that they are actors changing reality. Legal work can open new doors and help lawyers to grasp their professional dreams or the dreams of others. Also theatre and opera might bring to life what people were only seeking in their dreams. In this ongoing process law and opera are closely connected.

## Annex:

| Titel | Composer | Libretto | First Performance | Role and voice type | Time and Place |
|---|---|---|---|---|---|
| The Bat/ Die Fledermaus | Strauss, Johann | Carl Haffner, Richard Genée, after the Vaudeville "Le réveillon" by Henri Meilhac, Ludovic Halévy | 1874 Vienna | Dr. Blind A lawyer (tenor) | 1875 In a spa near a large city |
| Peter Grimes | Britten, Benjamin | Montagu Slater | 1945 London | Swallow A lawyer (bass) | Around 1830 England |
| Dr. Jekylls Advokat | Marthinsen, Niels | Eva Littauer | 2014 Odense, Denmark | Jane Utterson Lawyer (dramatic mezzo-soprano) | 1950s London |
| Carmen | Bizet, Georges | Henri Meilhac, Ludovic Halévy Based on the novella by Prosper Mérimée | 1875 Paris | | Around 1820 |
| La Bohème | Puccini, Giacomo | Giuseppe Giacosa, Luigi Illica. Based on "Scènes de la vie de Bohème" by H. Murger, Th. Barrière | 1896 Turin | | 1830 Paris |
| Trial by Jury | Sullivan, Arthur | W.S. Gilbert | 1875 London | The Learned Judge (comic bariton) Barristers, Attorneys | 1875 Court of Exchequer |
| The Adventures of Pinocchio | Dove, Jonathan | Alasdair Middleton Based on novel by Carlo Collodi | 2007 Leeds | Judge (bass) | Toscany |
| Faust | Gounod, Charles | Jules Barbier, Michel Carré Based on Carré and Goethe | 1859 | | 16th century |
| Tosca | Puccini, Giacomo | Giuseppe Giacosa, Luigi Illica, based on the play "La Tosca" by Victorien Sardou | 1900 Rome | | 1800 Rome |
| Threepenny Opera | Weill, Kurt | Bertolt Brecht | 1928 Berlin | | Victorian London |
| Porgy and Bess | Gershwin, George | DuBose Heyward Ira Gershwin | 1935 New York City | Simon Frazier (bariton) | 1930 S.Carolina |
| Catilina | Salieri, Antonio | Giovanni Battista Casti Composed 1792 | 1994 Darmstadt first time on stage | | Around 100 B.C. Italy |

| | | | | | |
|---|---|---|---|---|---|
| Scalia/Ginsburg | Wang, Derrick | Derrick Wang | 2013 U.S. Supreme Court | Justice Ginsb. (Soprano) Justice Scalia (tenor) | Our time |
| La Fille du Régiment | Donizetti, Gaetano | Jules Henri Vernoy de Saint-Georges, Jean-Francois Bayard | 1840 Paris | Notary (spoken role) | 1805 Tyrol |
| Don Pasquale | Donizetti, Gaetano | Giovanni Ruffini Michele Accursi/ AngeloAnelli | 1843 Paris | Notary (bass) | Around 1750 Rome |
| Martha | Flotow, Friedrich Freiherr von | Wilhelm Friedrich (pseudonym for Friedrich Wilhelm Riese) | 1847 Vienna | The Judge of Richmond (bass) | England During the reign of Queen Ann 1702-1714 |
| The Makropulos Case/Affair | Janácek, Leos | Leos Janácek after Karel Capek | 1926 Brno | Dr. Kolenaty, a lawyer (bass-bariton) Vitek, clerk (tenor) | 1922 Prague |
| The Marriage of Figaro | Mozart, W.A | Lorenzo da Ponte Based on the play "Le Mariage de Figaro " by Pierre-Augustin Caron de Beaumarchais | 1786 Vienna | Don Curzio, notary (tenor) | 1778 Spain |
| Così fan tutte | Mozart, W.A. | Lorenzo da Ponte | 1790 Vienna | Notary The maid Despina disguised (soprano changing her voice) | Middle of 18th century Naples |
| Gianni Schicchi | Puccini, Giacomo | Giovacchino Forzano, after Dante | 1918 New York | Ser Amantio di Nicolao Notary (bariton) | 1299, Florence |
| The Barber of Seville | Rossini, Gioacchino | Cesare Sterbini Based on the play "Le Barbier de Séville" by Pierre-Augustin Caron de Beaumarchais | 1816 Rome | Notary (silent) | Middle of 18th century Seville, Spain |
| Proces Kafka/ Kafka´s Trial | Ruders, Poul | Poul Bentley, original English libretto. Adapted from Franz Kafka's original German text | 2005 Copenhagen | Judge city court (tenor). Advokat Huld, lawyer, (bass) Examining Judge(bariton) | 1912-1914 Prag |
| Der Rosenkavalier | Strauss, Richard | Hugo von Hofmannsthal | 1911 Dresden | Notary (bass) | Around 1740 Vienna |

| | | | | | |
|---|---|---|---|---|---|
| Un Ballo in Machera | Verdi, Giuseppe | Antonio Somma, after dramma "Gustave III" by Eug. Scribe | 1859 Rome | Judge (tenor) | End of the 17th century Boston |
| The Beggar's Opera | Pepusch, J.C. | John Gay | 1728 London | | 1728 London |

The following list shows in which order the operas appear in the article:

1. The Bat, 2. Peter Grimes, 3. Dr. Jekylls advokat, 4. Carmen, 5. La Bohème, 6. Trial by Jury, 7. The Adventures of Pinocchio, 8. Faust, 9. Tosca, 10. Threepenny Opera, 11. Porgy and Bess, 12. Catilina, 13. Scalia/Ginsburg.

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- http://www.opera-guide.ch/index.php?uilang=en
- http://operabase.com/index.cgi?lang=en
- http://www.arkivmusic.com/classical/main.jsp
- The drawings by Daumier have been a source of inspiration.

NAVEIÑ REET: Nordic Journal of Law and Social Research (NNJLSR) No.5, 2014, pp. 83-100

# Images of Justice: Contemporary Art in Retfærd. Nordic Journal of Law and Justice

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## Abstract

*Many of the texts written about the relationship between law and art have background in the perception of art that existed before the manifestation of idea based and conceptual art in the 1960s. By contrast, this paper examines how contemporary art visually portrays justice from a variety of themes and aesthetic expressions. It takes background in cover pages of a Nordic journal Retfærd. Nordic Journal of Law and Justice, which has exhibited contemporary art works since 2006. The paper discusses artworks that represent both thematic and aesthetic down strokes, to illustrate the variety in the artists' and art's engagement with law. Moreover, since all the artworks are contemporary, they illustrate issues of societal concern, not least images about the wars in the aftermath of the terror attacks on 9/11, identity formation and commerce.*

It is not unusual that past examinations of the relationship between art and law have focused on pre-modern art and examined how the law could be portrayed from aesthetic considerations and interpretations. Like modernist philosophy, images of law have been conceptualised through the key aesthetic category of the sublime (Douzinas, 2000: 815, Goodrich, 1995). Yet, rather than merely being about 'the Good, the True, and the Beautiful' (Bourdieu and Haacke, 1995: 143) or the sublime, different forms of art have had different functions in society in the 19th century (Bourdieu, 1996; Panofsky and Bourdieu, 2002; Bourdieu, 1993). Since the 1960s, Western contemporary art has developed into a critical enterprise, asking other questions than about the sublime, and has thus challenged both the very concept of art and the limitations of democratic processes. Many of the texts written about the relationship between law and art have background in the perception of art that existed before the manifestation of idea based and conceptual art in the 1960s, when new forms and formats of art proliferated and took the arts field in many different directions.[1] Quoting Jean-Pierre Vernant's text about Greek Tragedy, Carol

1 There are too many texts related to the area of law and art to refer to them all. But classic examples can be found in DOUZINAS, C. 2000. The Legality of the Image. *The Modern Law Review,* 63, 813-830, BEN-DOR, O. 2011. Introduction: Standing before the gates of law? *In:* BEN-DOR, O. (ed.) *Law and Art: Justice, Ethics and Aesthetics.* Oxon: Routledge, DOUZINAS, C. & NEAD, L. 1999. *Law and the Image: The Authority of Art and the Aesthetics of Law,* Chicago, University of Chicago Press.

Becker notes about contemporary art: 'Although it "appears rooted in social reality, that does not mean it is a reflection of it. It does not reflect that reality but calls it into question by depicting it rent, divided against itself, it turns it into a problem."' (Becker, 1994: xiii) Although art is developed within specific social circumstances and thus takes part in the specific struggles of dominant ideologies, it can nevertheless provide 'an unusually powerful challenge and alternative to the dominant ideological forms, and is in that sense an eminently contradictory phenomenon.' (Eagleton, 1990: 3) Parallel to the expansion of the public sphere and the state – partly through a process of juridification, where the law expanded to hitherto unregulated areas (Habermas, 1987) – art has also expanded its areas of societal concern through critical reflections about society. As Habermas (1987, 1984) has argued, contemporary visual arts are not only about aesthetics and the sublime but they have an emancipatory force attached to them. Law's textual form has made it common to examine it in relation to literature, where law and literature are two common enterprises focusing on linguistic, rhetorical and narrative aspects of the law (Dworkin, 1986, Aristodemou, 2000).

In contrast to the main part of the literature about law and art and law and literature, this paper focuses on contemporary images of justice as they are represented in *Retfærd*. In order to examine contemporary visual art's engagement with the law, this paper asks: How are images of justice represented in contemporary artworks covering the front pages of *Retfærd. Nordic Journal of Law and Justice*?

The article proceeds, as follows. After a short description of the background of the artworks chosen for this article, the second section discusses artworks that reflect on the law in relation to conditions of war in Afghanistan and how the war has impacted on Western law. The following sections examine, firstly, covers that focus on law and commerce and then law and identity. The article ends with a short conclusion.

## Background

In 2006 *Retfærd. Nordic Journal of Law and Justice* began to present contemporary art of younger primarily Nordic artists on the cover. At the same time it got a new and minimalistic layout so the full potential of the artworks could be explored.[2] The artists were invited to choose one of their works dealing with legal or political issues and they were asked to present their work and artistic practice in a one-page article. The decision to use contemporary artworks on the cover was taken at a Nordic editorial board meeting

2 *Retfærd* is accessible on www.retfaerd.org with a two year delay.

in Copenhagen in 2005. The decision was taken in order to stress the critical and interdisciplinary purpose of the journal, and to have alternative reflections, perspectives and representations of the law seen through the visual arts.

In 1976 *Retfærd. Nordic Journal of Law and Justice* was established as a Marxist legal journal to assist the struggles of the working classes against capitalism. In 1996 it left its socialist background and transformed into a non-ideological, yet critical, legal journal. The profile of the journal is stressed on the journal-webpage:

'The works published in Retfærd analyse the law from a theoretical and practical point of view on the basis of not only jurisprudence, but also sociology, criminology, political science, history, philosophy, economics, ecology, anthropology, feminism and other sciences. The journal therefore contributes to the interdisciplinarity of legal scholarship in a way that not only unveils relations of dominance in the law, but also focuses on critical legal science as an emancipatory endeavor. For these reasons, Retfærd publishes articles that examine law in broader context and challenge prevailing views on the law.' (www.retfaerd.org)

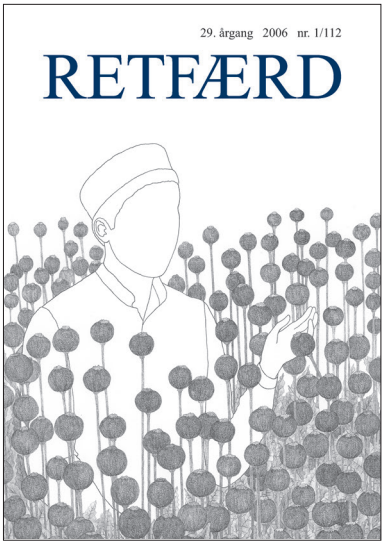
I have chosen to review the artists, whose artworks have featured on the covers of *Retfærd* in the period from issue 1/112, 2006 to issue 2/141, 2013. With four issues a year, I 'curated' 30 volumes.[3] Almost all the artists I invited accepted to deliver an artwork, even though we did not have the possibility to pay honorarium. During the first two years, *Retfærd* only had funding for black and white printing (with one exception), but from 2008 it could reproduce the covers in colour. The artworks represent a broad diversity of expression, approaches and themes. Most of the works are made by young Nordic artists, several of whom have exhibited at the Venice Biennale, but also artists from outside the Nordic countries have delivered works.

The artworks chosen as illustrations for this paper are selected from the issues I 'curated'. They are not representative for all the covers. They are, however, examples of thematic and visual variations of artists' relation to law.

3 During 2006-2009 I was the editor-in-chief of the Danish editorial board and in 2009-2013 I was the Nordic editor-in chief.

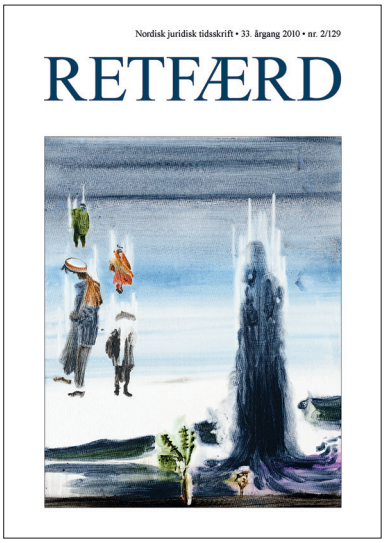
## Poetic aesthetics vs. law, war and commerce

In different ways, a number of the artworks on the covers of *Retfærd* discuss the war in Afghanistan and reflect on how the war is related to global trade, legal changes in the West and morality. Both Maria Finn's and John Kørner's works are subtle discussions of the background and consequences of the war in Afghanistan and play on poetic expressions.




The artwork that launched the new cover layout of *Retfærd* was the Swedish artist Maria Finn's *Poppy Power (Afghanistan)*. It is a black-and-white drawing of a person standing alone in a poppy field. The poppy field is drawn in explicit detail, while the person only appears in contour.

The work continues Finn's series of *Vita teckningar* (White drawings) which stress the sociological point that surroundings affect our identity and living conditions. The work is thus in accordance with Montesquieu's thesis from *In the Spirit of the Law*, in which he argues that social and geographical factors determine the development of different forms of law in different societies (Montesquieu, 2000 (1748)). The *Retfærd*-work is a poetic and symbolic comment on what happed in Afghanistan after the US increased the efforts in Iraq and even initiated the war against the Iraqi regime. According to Finn (2006), when the US decided to go to war in Iraq in 2003, the media attention changed from being on Afghanistan to merely being on Iraq. As a consequence it became more difficult to obtain international funding for the reconstruction of Afghanistan. Moreover, because of a decrease in US surveillance of areas in Afghanistan that could be used as poppy fields, it became easier to produce poppies. These new conditions gave profitable ways of living – especially for middlemen and distributors, but also for Afghan poppy farmers. Finn's drawing does not show the war, yet the anonymous person surrounded by poppies points our attention to global mechanisms of trade and crime with producers, middlemen, distributors and drug abuse. Moreover, it focuses on how international politics have latent and manifest global consequences for local living conditions, both in the states in focus and in the dominating states involved in determining international policies and transnational export of governance. The cover reminds the viewer that the existing exportation of law and state institutions that support democracy, human rights and the rule of law is of limited success if it is not based in the *lifeworlds* of and supported by the people it affects.



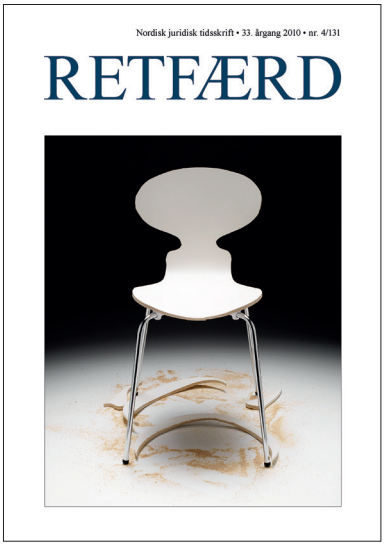

In *Christian ved foden af bjerget* (*Christian at the food of the mountain*) the Danish artist John Kørner discusses the loss of soldiers' and Afghans' lives in the war in Afghanistan. The work is a part of a series of paintings about soldiers that Kørner began with the first loss of a Danish soldier. He paints a work in the name of each fallen Danish soldier. The series symbolises the human tragedy when a young soldier returns home in a coffin, just as it symbolises the death of the Afghans. The work is a comment on the war and on the Danish participation in the war, demanding acknowledgement of the fact that Danish soldiers took active part in the battles. Referring in the title to Moses and the Israelis camping at the foot of Mount Sinai in Exodus, also reflected in the cloud and bushes surrounding the mountain, the work also symbolises the exodus of fallen soldiers to another place. In addition, reference is made to the Ten Commandments inscribed on the two stone tablets God gave Moses. By pointing to the fundament of civilisation with the explicit reference to Mount Sinai, where Moses got the Commandments, Kørner thus manages, in a understated way, to discuss the most uncivilised ways of solving conflicts in the modern world, namely by war. He relates the war to the ethical guidelines of life and to the fundament in most criminal codes. However, the painting also questions Danish Christian background and appreciated values, which partly are the reasons for the war: In order to stabilise and secure the West against 'evil', it is necessary to fight the evil with warfare. As such the Western hegemony is built on double standards. The artwork also questions the global consequences of warfare. The war in Afghanistan constituted a new type of war, where the enemy was a diffuse network and not a specific nation with soldiers (in a recognisable uniform). Suddenly, it was extremely difficult, if not impossible, to recognise the enemy, which was not limited to Afghanistan but had cells all over the world. The West itself could be hit by the network, by 'the other'. The West used a Weberian value-rational reasoning (Weber, 1978), based on undisputable arguments as if they were coming from God, to justify the implementation of new regulation giving the state the right to monitor, arrest and expel even its own citizens who did not materially conform to the standards of a higher justice coming from the Commandments.

Kørner's work also puts the journal title *Retfærd* and the concept of it in perspective. The title *Retfærd* plays on the word *retfærdighed* (justice) and could be translated to 'just

expedition' or 'just journey'. Was the war in Afghanistan a just journey and did the soldiers and ordinary people die because of a higher journey of justice?

## Law and commerce

Another general topic that has been taken up by the artists in *Retfærd* is how law engages with commerce.





In its works on economy, the Danish artists' group Superflex, reflects on democratic ways of production and governance. In the work *Copy Right* on the cover of Retfærd nr. 4/131 from 2010, a replica of Arne Jacobsen's famous chair 'Myren' (The Ant) from 1953 is modified in order to correct and make it more similar to the original Jacobsen design. The replica has been produced so it comes as close as possible in design to the original Jacobsen chair without violating copyright rules. Superflex changed the replica so it came to look even more like the original chair, transforming the legitimate replica into an illegal copy. With the transformation of the chair, Superflex discusses the arbitrariness and limitation of the copyright rules and the rules of intellectual property rights in contemporary society. The chair is Superflex' response to the censoring of their work *Guaraná Power*, which was planned for the Sao Paulo bienniale in 2006. The work comments on power and commercial hierarchies in global capitalism.

The work *Danish Passport* by the Danish artist Jens Haaning presents his own passport placed in a glass frame as an artwork. Like in many of his other works, such as Super Discount, Trade Bartering and Light Bulb Exchange, Haaning transforms an ordinary item into an art object. The transformation comments on the concept of

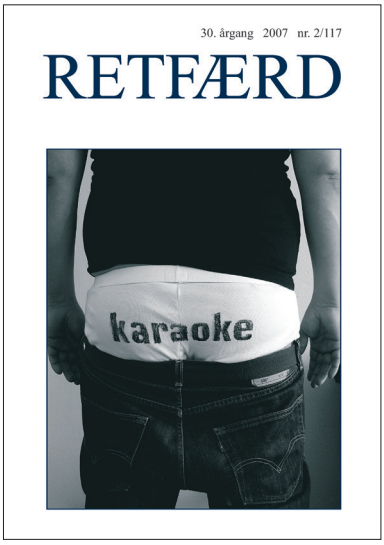
art as well as decontextualizing the document by placing it in a new context and transposing its meaning and function (Haaning, 2003). With a new context, the object transforms its legal status without changing form and material. This is also true for migration of citizens. When citizens migrate, their legal and social status transforms, which is symbolised by the passport. The passport is the modern symbol of nationality and citizenship, and it is thus nationality and citizenship that become valuable possessions. The passport becomes one of a number of goods that can be bought and sold on the global market. Yet, the value of the passport will differ according to the issuing country, just as the value of nationality differs. The passport is an explicit symbol of mechanisms of inclusion and exclusion. Within the EU, at the same time as we have seen a harmonisation and liberalisation of rules about traveling, work and social benefits, as well as weakened border control for European citizens, we have experienced a strengthening of rules and a stronger border control in relation to citizens from outside the EU.

## Law, identity and social space

The next series of chosen covers consider questions of how law affects our identity and social space and how identity and social space is formed through national and international structures of law, politics and commerce.


The work *Spændetrøjen – 'rigsfælleskabspause'* (*Straitjacket – Danish Commonwealth-lull*) by the Greenlandic artist Julie Edel Hardenberg is a straitjacket of the Greenlandic flag on a hanger. It examines the expectations of 'the individual' of two countries – Denmark and Greenland – and the difficulties creating a national identity when living on the periphery of the Commonwealth. The countries use different forms of mechanisms to create different national identities, which affect the individual's identity. In the artwork the individual manages to step out of the pressure, which is symbolised by the fact that the straitjacket is left on the hanger. Yet, the work also stresses how the Danish state violates Greenlandic culture and society in order to modernize it through law. Through modern legal reforms Danish ways of living, housing and organizing society have been exported

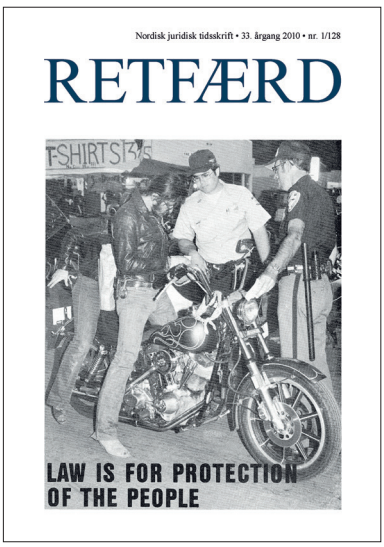
to Greenland and have suppressed local customs.[4] New forms of law, legal institutions and processes of modernization in society mean that the Greenlandic population lives in-between two cultures and is having to adhere to different forms of governance or in a kind of pluralistic system, with different (legal) cultures working closely together. Many of the legal acts in Greenland have been written in Denmark by Danish jurists with limited expertise in Greenlandic culture and conditions, as explored by Danish legal sociologists, Hanne Petersen (2006) as well as Verner Goldschmidt and Agnete Weis Bentzon (Goldschmidt et al., 1950). Goldschmidt and Bentzon examined informal norms in Greenland with the purpose of modernizing the legal system in the then Danish colony. They examined factors determining the judgments of the official decision-making authorities in Greenland, and found that social pressure and local cultures, which were not always in accordance with the imported Danish regulation, had an impact on the local decision-makers.




Without being as explicatory as Hardenberg, the Icelandic artist Arnfinnur Amazeen has some of the same concerns in his work *I'm not really making it, the feeling that I'm faking it – and other worries about coming from an unfashionably comfortable background* covering *Retfærd* no. 117/2007. His work touches upon identity processes in the then rather wealthy Island. In the work he discusses how it is possible to import street-subcultures from the US, as they are represented through rap-music on MTV, to Icelandic youth culture. The work asks if it is possible to transform identity and culture as a young person through buying expensive items and clothing, and wearing them in accordance with US street-subculture fashion, for example by wearing pants 'prison-style' like the rappers on MTV, even if (at the end of the day) you are a white middle-class Icelandic. The work points to global cultural supremacy that forms the visions and ideals for local cultures far away from the commercialised subculture centres. Even through the visions and ideals of the subcultures question the established rules, authorities and ideas of the perfect society, they merely end up being in a form of light protest. The word *Karaoke*

4 See also the special issue on Greenland in *Retfærd. Nordic Journal of Law and Justice* no. 16, vol. 4, 1981.

written on the back of the highly visible boxer shorts symbolises a performance form that has been associated predominantly with working and lower middle class cultures in the west (Drew, 2005: 374). The performance form was invented in Japan and used in business meetings and was an extension of older drinking and singing rituals. In Japan, it was the business class who first practised karaoke, and it has been argued, that in Asian societies imitation is a 'necessary phase in the acquisition of many valued cultural skills.' (Drew, 2005: 378) Karaoke is a mimetic activity, where a pre-existing activity is transformed into something different from itself. It ends up, as Amazeen notes, as 'a form of entertainment in which an amateur singer or singers sing along with recorded music. The music is typically of a well-known song in which the voice of the original singer is absent or reduced in volume.' (Amazeen, 2007) Thus, it can be argued that Amazeen also refers to the discussion about legal transplants and their translation into adapting legal cultures (Watson, 1974, Legrand, 1997). As Amazeen notes with the music, the original system of the law and the social structures around the law can be seen as absent in the importing country, where the field of power and legal cultures are different, making it very difficult to implement foreign law and legal institutions (Dezalay and Garth, 2002, Gardner, 1980, Hammerslev, 2010).



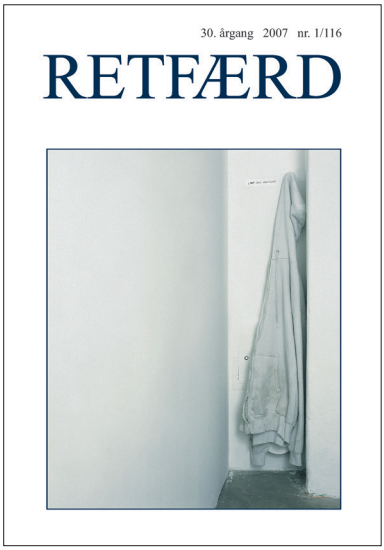

The Norwegian artist Gardar Eide Einarsson's work has the text 'Law is for the protection of the people', which is also the title of the work, written on a picture of policemen, guards or other authority persons who have stopped a motorbike rider. The motorbike, most likely a Harley Davidson, with its classic high positioned handlebar, and the persons riding the motorbike, in their jeans and leatherjackets, symbolise the ultimate freedom as it has been represented in American films such as 'Easy Rider' and by the motorbike clubs. By contrast, the persons of authority, with their batons, symbolise the boundaries of the freedom of the people. The contrast between the text and the fact that authorities limit the freedom of specific persons is striking and reminds us of Magritte's *Ceci n'est pas une pipe*, which Foucault (1998) examines. The work addresses, like other of Einarsson's works, how societal institutions and authorities interfere with different notions of freedom of subcultures. His work discusses how dominant cultures border parallel systems and that the borderline is negotiated through different strategies of inclusion and

exclusion. At the same time, the title of the artwork refers to a Kris Kristofferson song from the 1970 album *Kristofferson*:

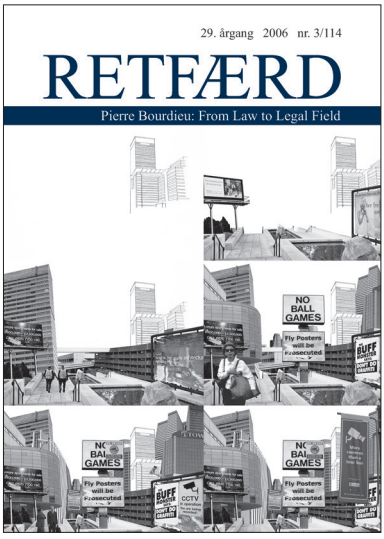
> Billy Dalton staggered on the sidewalk
> Someone said, he stumbled and he fell
> Six squad cars came screamin' to the rescue
> Hauled old Billy Dalton off to jail
>
> 'Cause the law is for protection of the people
> Rules are rules and any fool can see
> We don't need no drunks like Billy Dalton
> Scarin' decent folks like you and me, no siree
>
> Homer Lee Hunnicut was nothin' but a hippy
> Walkin' through this world without a care
> Then one day, six strappin' brave policeman
> Held down Homer Lee and cut his hair
>
> 'Cause the law is for protection of the people
> Rules are rules and any fool can see
> We don't need no hairy headed hippies
> Scarin' decent folks like you and me, no siree
>
> Oh, so thank your lucky stars, you've got protection
> Walk the line and never mind the cost
> And don't wonder who them lawmen was protectin'
> When they nailed the Savior to the cross
>
> 'Cause the law is for protection of the people
> Rules are rules and any fool can see
> We don't need no riddle speakin' prophets
> Scarin' decent folks like you and me, no siree

Like Einarsson's work, the song plays on one of the dilemmas of the law, namely that the protection of some people limits the freedom of others. Most often it is the dominant culture that is protected against other cultures. This touches upon one of the classic dilemmas of the law, which has been discussed in legal philosophy, perhaps most clearly by Hobbes (2009/1651) and Locke (1988/1689), in their discussions about how

freedom of men has been limited (in different ways) in order to get protection of the sovereign. Sociology of law has also shown that dominant groups can harmonise visions and ideas, dominant cultures and dominant forms of capital through the law, statistics and common currency (Bourdieu, 1998, Bourdieu, 2005, Arnholtz and Hammerslev, 2013). By representing the 'outlaws' through some of the most iconic symbols of freedom in modern American pop culture, the artwork stresses this dilemma.




In his 'Laws are straight' Henrik Olesen plays on the same theme, but he is also addressing concerns related to sexuality. The work is a photo of a subtle sculpture consisting of a dirty hooded sweatshirt hanging in a niche in the wall accompanied by a small note with a handwritten text saying 'Laws are straight'. The work challenges the dominating iconographies of how legislation and social structures form identities and the representation of them. As Olesen (2007) notes in *Retfærd* 'My projects have ranged over an area between art and politics, and have examined the representation of minorities within the demographic societal structure: how does legislation characterize certain social groupings and what are the consequences of these heterosexual, normative power structures?' The work puts focus on how social structures and societal institutions govern and regulate individuality by asking how and for whom rules are written. Thus, Olesen also questions issues of social structures, their (re)production in relation to dominating groups and minority groups. Again, the empty 'hoody' symbolises the marginalised and the criminal and how we – in social space – hide socially marginalised persons it in a corner, so we cannot see them and therefore forget their existence. Whereas the sticker text 'Laws are straight' points to the fact that legislation and other social rules define and legitimise normal heterosexual white non-poor behaviour (whatever that is), the corner could point to the old Marxist observation (see Hammerslev and Mathiesen, 2013), that law is created to reproduce social structures that benefit the dominating groups. This observation is also in accordance with feminist studies and studies on same-sex marriages, which attempt to highlight dominant structures that reproduce specific forms of the 'normal' way of living. Such studies (see, for example, Smart, 1995, Bridgeman and Millns, 1998) repeatedly show how the law manages to repress women, gay people, Afro-Americans etc. through its universal language.

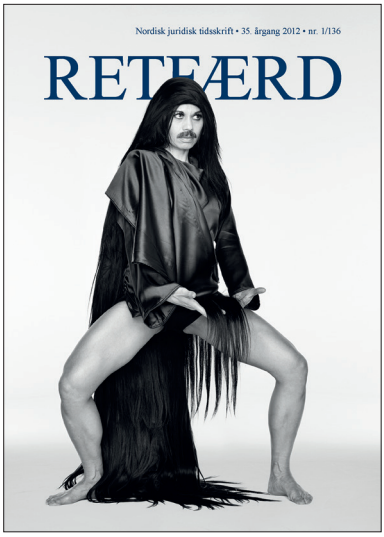



The work 'Spaced Out?' by the Danish artist Jakob Kolding, which was on a special issue of *Retfærd* concerning *Pierre Bourdieu: From Law to Legal Field*, consists of a series of billboards that are gradually filled with elements from what the artist calls 'gentrified office/living areas which by now exist in most western cities.' (Kolding 1996, 116).[5] It is a comment to the old industrial areas with old buildings and slum which now transform into expensive living areas and offices. It indicates a change in divisions of labour and thus also in power relations in new areas of the global cities. Like Saskia Sassen's study of the Global City (Sassen, 2001), the work points to the new global ways of domination by using physical and social control, new ways of organising and defining power and specific legitimate identities and cultures in public space – a public space that is related to urban planning, politics, economy and ideology. As Kolding notes, 'Areas increasingly regulated architecturally, commercially and legally. Luxury apartments, offices, commercials, security guards, business men and women, surveillance cameras and strict rules forbidding loitering, skateboarding, ball games, graffiti etc.' (ibid) Kolding's artwork engages in the discussions of how city planning forms city spaces that do not favour subcultures, marginalised persons or, more radically, the *lifeworlds* of the citizens. New city areas attract persons with resources; whereas persons with limited resources are ousted from the cities. Kolding was chosen for the special issue on Bourdieu on law because he implicitly seems to draw on the work of Bourdieu and his findings about how social classes are reproduced (Bourdieu, 1999). With his eye on social space and its creation and impact on social life, Kolding shows how investments and regulation in urban spaces affect the way social life can be organised and reproduced.

Similar to the works of Einarsson and Olesen, Kolding's work touches on how law and public space are related and have an impact on the conditions and possibilities of identity formation and how it is possible to live within the law through the different identities.

5 The work was originally done as a series of 14 large scale public billboards in Vienna. On the last billboard the Joker from Batman gambles for the city with a machine gun in his hand. It refers to Gotham City and its corrupt and criminal inhabitants.

With the new areas of the global city, the room for the marginalised, the homeless and subgroups become limited because of strict rules of conduct.




Lilibeth Cuenca Rasmussen works primarily with the performance art, including composed music, songs and visual elements, for example, specifically designed costumes, to explore a variety of issues such as gender, identity, socio-cultural relations, inclusion and exclusion. The work Rasmussen chose for *Retfærd*, *Afghan Hound*, is a photo from a performance that includes four stories of impersonations of characters from Afghanistan made for the Danish Pavilion at the Venice Biennale 2011, which addressed the theme of freedom of expression. After the controversy of the Muhammad cartoons, freedom of expression became once again a topical issue. It became relevant to examine the borders of freedom of expression. Which issues are relevant to take into account when deciding the limits of freedom of expression and who should decide where the boundaries are? In *Afghan Hound* Rasmussen addresses the complexities of gender in a Masculine Afghan culture, where sexuality and women are repressed but at the same time develop new constructions of gender and identity. These gender constructions appear and transform through the four stories in *Afghan Hound* narrated through dance, music and song with a costume made out of hair as the repetitive visual element. The costume is inspired by Afghan Hound dog racing and the transformation of genders and identities happens through the use of this costume. The first song quotes the Afghan activist, writer and politician in exile, *Malalai Joya*. The second story concerns a young boy trained to act as a girl, a *Bacha Bazi*, who dances at men's parties and is also a sex slave. The third story relates to masculine authority with a powerful voice. The last character mirrors a former girl raised as a boy in certain families with no sons, a *Bacha Posh*. *Afghan Hound* brings to the fore repressed voices and communicates Afghan tradition and culture by challenging stereotypical Western discourses on the Arabic World.[6] The work can thus be seen as a reification of Western images of the queer and non-heteronormative in contrast to the misogynist and anti-sex Afghan East. In that sense, Cuenca Rasmussen's work follows the agenda of Santos (Santos and Rodríguez-Garavito, 2005, Santos, 2002) who in his research tries to

6 The performance can be seen at http://vimeo.com/33152137.

give voice to repressed and voiceless groups in the third world. Santos argues that legal export from the west to the periphery is deemed to be relatively unsuccessful so long as local cultures and conditions are not taken into consideration.

## New images of Justice?

The artworks chosen for this article juxtaposing visual arts and law may seem critical of the law, since none of the images illustrate more positive impacts law have had on societal development. They engage critically in the surrounding society through critical questions and have thus developed the focus (and form) of art from being merely concerned with the sublime. The artworks reflect on legal transplants, on how law affects identity and how law is related to global commerce. Even though the images discuss important, topical issues, and therefore question the concept and function of law, they are merely exploring the issues and maintain focus on the morality and (double) standards behind our actions, without giving answers. In that sense they use their critical potential to keep reminding us of the consequences of our practices, governance and law. This stance to law can also be found in philosophy (of law) and sociology (of law) that also engage with 'law and society' issues, but often do not give any prescriptions to the way society should be organised and deal with its problems. The *Retfærd*-artworks illustrate how new and diverse contemporary art forms, mirrors and discusses topical legal and political issues seen in a global context, in particular, where political and social action in one part of the world has consequences in other parts of the world in terms of elements such as identity, commerce, legislation and politics.

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NAVEIÑ REET: Nordic Journal of Law and Social Research (NNJLSR) No.5, 2014, pp. 101-116

# Women Lawyers on TV – the British Experience

*Peter Robson*

## Abstract

*This paper examines the portrayal on British television of women as protagonists in TV dramas and how this has altered in the past half century. It focuses particularly on two series which follow the fortunes of two Junior barristers and their career paths, each over two separate series. Harriet Peterson and Martha Costello are both women lawyers who appear on behalf of clients in the courts. The barrister branch of the legal profession in England and Wales has always been regarded as the more prestigious branch of the profession from which, traditionally, judges have been selected. The characters are experienced and successful. They have reached that crucial time when they are hoping to be selected as Queen's Counsel. This step into the top echelon of the elite branch of the split British legal profession is a major marker in a lawyer's career. It is from the ranks of Q.C.s that the senior judiciary are chosen and where possible fame lies. This paper looks at their contrasting experiences - the context of women lawyers , the style and nature of the work they are shown as undertaking, the characterisation of the legal profession and in particular the principal protagonists. It also provides the crucial context in which these series were produced. It takes note of the ways in which their male counterparts are portrayed in comparable series The major thing which separates the struggles of Peterson and Costello is the passage of time of some 40 years. The paper explores what changes are found in the way the first and second women lawyer major protagonist appear and the context for these changes. In amongst an extensive roster of drama series centred on lawyers, it should be noted that the series Justice with Harriet Peterson ran between 1971 and 1974 and that of Silk with Martha Costello between 2011 and 2014.*[1] *This is a long gap which requires to be looked at in some depth.*

## Background

In 1969 a television version of a 1967 West End play, Justice is a Woman, was broadcast showing a woman barrister as the lead character. She is shown defying the male establishment and, with her subtle prompting and understanding of human nature coaxing a young man accused of rape and murder to engage with the system and fight to establish his innocence. The play's co-author, Jack Roffey, was a successful TV writer who

1 There were 3 series of 13 episodes in Justice – by 2013 the first 2 series were available on DVD and the 3rd series is scheduled for release. 2 series of Silk appeared in between 2011 and 2013. A third series was screened in the UK in March 2014.

had single-handedly written the first British TV lawyer series, Boyd Q.C. with former matinée idol of the 1940s, Michael Dennison, which ran from 1956 to 1964. [2] The actor who was pencilled in to play the woman barrister in the stage version of Justice is a Woman, and who took the role in its television adaptation, was Margaret Lockwood. She, like Dennison, had been a major star of British cinema from as early as the 1930s through the 1940s and early 1950s. She starred in Alfred Hitchcock's acclaimed thriller, The Lady Vanishes (1939) and the courtroom drama The Girl in the News (1940) along with Michael Redgrave. She is probably best remembered for her role as Lady Barbara Skelton, a part-time highwaywoman, in The Wicked Lady (1949). Her film career had stalled somewhat and she had been working in theatre and on television when the opportunity to play barrister, Julia Stanford presented itself. At the age of 53 she accepted. Initially, as noted, it was written for the theatre but it was the TV version in which Lockwood starred, [3] Here she anticipated by some 35 years the trend in the 21st century for woman film stars like Glenn Close and Candice Bergen to shift to television in their later years.[4]

Justice is a Woman was transmitted on Thursday 4th September 1969. In view of the success of the single play a series was commissioned using essentially the same character.[5] Julia Stanford was re-named Harriet Peterson and some 2 years after Margaret Lockwood's transmogrification from a highwaywoman into a lawyer, Justice was broadcast on the then sole British commercial channel, ITV ( Independent Television ). The show consisted of 1 hour episodes and, in the standard British style, ran weekly for three 13 week series at the prime time slot of 9 p.m. on Fridays between 8th October 1971 and 14th January 1972, between 9th February 1973 and 4th May 1973 and finally between 22nd February and 29th March 1974.

In 2011 the non-commercial BBC channel started transmission of a series about a woman barrister in her 30s. The main protagonist Martha Costello was played by highly

2 Roffey was also the author of the play and film Hostile Witness (1968), which featured in a prominent role for Sheila Sim as a promising young barrister who starts off defending a QC accused of murder. Despite her obvious competence in exposing the limitations of the case against her client, he decides to take on that role himself half way through the trial.

3 Although she was offered the stage role, Margaret Lockwood turned this down on the advice of friends. The role was finally played in a brief West End run by Constance Cummings - Tims at 268. Cummings was praised by the reviewer in the Spectator in an otherwise scathing review - 25 November 1966, Page 17 [ available at http://archive.spectator.co.uk/article/25th-november-1966/17/theatre ]

4 Damages (2007-2012) and Boston Legal (2004-2008) are the TV shows that these older women starred in.

5 The DVD version of the 1971 Justice series contains the original Justice is a Woman from 1969

successful TV actor, Maxine Peake. She had risen to prominence following a wide range of roles from Twinkle in the Victoria Wood comedy Dinner Ladies (1998 – 2000), through Veronica in Paul Abbott's comedy drama Shameless (2004 – 2007) and Myra Hindley in See No Evil; The Moors Murders (2006), to an acclaimed Alice Aisgill in Room at the Top (2011) and subsequently Grace Middleton in Peter Moffatt's The Village (2013). By the time of her appearances as Martha Costello, she had become one of the most sought-after rising stars of British television. Again, the show consisted of 1 hour episodes and in tune with recent developments in British TV scheduling, ran weekly for an initial 6 week series at the prime time slot of 9 p.m. on Mondays between 15th May and 19th June 2012. The third series was shown in 2014. [6]

In between these two series with a central female lawyer role we have a large number of male-centred legal series with hardly a woman lawyer appearing. If women lawyers existed and could be shown in a successful series as far back as 1971 then it seems worth asking ourselves why it took some 40 years for a series to appear with the same notion of a female lawyer in a major role. There had been, after all, in the 1980s a breakthrough on the more risk averse field of film of female lawyer protagonists. The roster from 1985 encompassed Glenn Close,[7] Cher,[8] Jessica Lange,[9] Theresa Russell,[10] Barbara Hershey,[11] Cindy Crawford [12] and Reese Witherspoon.[13]

We have, then, a somewhat paradoxical situation. Firstly we find British television recognising the existence of women lawyers but then, apparently forgetting about them for forty years during which time cinema produced a significant body of work on this very theme. In order to get a better sense of the significance of the first appearance of a woman lawyer protagonist in 1971 we need some background.

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6 The stills available on the internet from the filming reveal that Martha's rival in Chambers, Clive Reader had now been promoted to the rank of QC. The screening confirmed this in March 2014.

7 Jagged Edge (1985)

8 Suspect (1986)

9 Music Box (1987)

10 Physical Evidence (1989)

11 Defenseless (1990)

12 Fair Game (1995)

13 Legally Blonde (2000)

## The Changing Context of Women Lawyers in Britain

In 1971 in Britain the proportion of the legal profession who were women was 3%.[14] The profession was split into solicitors who were principally office-based and barristers who appeared in courts only representing clients as Juniors or Queen's Counsel. The latter are able to command higher fees and their rank recognises their skill and eminence as barristers. One became a Q.C. by one's name being put forward discreetly and the process of selection was arcane. Of the barristers called to the Bar, 5.8% were women, the first having been appointed in 1949. In legal education, at the start of the 1970s women were less than 10% of the intake into Law Schools. In the ensuing decades that percentage grew until the figures in the 21st century in Britain reveal around two-thirds of law students were female.

As a result of these career pattern changes, by 2011 the number of female lawyers in Britain had risen to 40%. Of the barristers called to the Bar, over 50% were women. The process of choosing a Q.C. had been professionalised and made more transparent. People responded to advertisements and the decisions were made on the recommendations of the independent Queen's Counsel Selection panel. [15] Women, by 2006, amounted to 15.3% of applicants and to 18.8% of appointed QCs [16] and by 2011, 11.8% of Q.C.s were women with success rates for women applicants at some 58% in 2012.[17] The face of the profession, then, had altered remarkably in the 40 years following the screening of Justice in 1971.

## Women on the small screen in Britain

In order to appreciate fully the significance of the rarity of the female lawyer protagonist it is necessary to indicate the extent of television programming devoted to lawyers in Britain during this period. Lawyers have always been a staple part of the British TV schedules. Between the first appearance of lawyers on the small screen in Britain in 1956 with Boyd Q.C. and 2011 there had been over 30 British dramas focusing on legal practice (Robson (2007a) (2007b)) These had invariably focused on men. They

14 Abel (1988) Fig 2.16

15 QC Selection panel was introduced in 2005 and its advice is passed on to the Lord Chancellor for approval by the Queen. Neither has the right to veto the appointments - http://www.qcappointments.org/.

16 Report of the Q.C. Selection Panel for England and Wales, 2005 – 2006 - http://www.qcappointments.org/

17 Bar Barometer: Trends in the Profile of the Bar November 2012 (available at www.barcouncil.org.uk)

ranged from series focusing on individuals like eponymous barristers Richard Boyd, [18] Horace Rumpole [19], James Kavanagh[20] and Fish [21] to solicitors like David Main [22], the Honourable Greville Carnforth[23] John Close and Graham True [24] and Peter Kingdom.[25] Women were not featured either in generic procedural products like The Verdict is Yours [26] and Crown Court [27] where the focus was on an individual case and the lawyers were unknown ciphers. There were also ensemble dramas where the focus was not on a single lawyer like Blind Justice,[28] Wing and a Prayer [29], Trust [30] , New Street Law [31] and North Square [32]. In these we find women lawyers achieving a profile in the background of the narrative. In these ensemble dramas women feature then but their role is never in the forefront with characters such as Anna Crozier (Maureen Beattie) and Amanda Dankwith (Kate Buffery) in Wing and a Prayer and Rose Fitzgerald, Wendy De Souza and Morag Black in North Square. In the major Scottish contributions to the genre, we shift from the all male lawyer world of John Sutherland's Sutherland's Law in 1973 [33] to the female lawyer support roles of Katherine Dunbar (Isla Blair) and Alex Abercorn (Stella Gonnet) 20 years later in The Advocates .[34] Although Isla Blair actually plays the senior partner in the firm , Katherine Dunbar, she is office bound and not part of the principal action in the streets and around the courts which are the focus of the series. This is the only

18 Boyd Q.C. (1956 – 1964) ITV

19 Rumpole of the Bailey (1978 – 1994) ITV (although the original play on which the series was based, was first broadcast on the BBC)

20 Kavanagh Q.C. (1996 – 2000) ITV

21 Fish (2000) with Paul McGann as Jonathan Vishnevski - BBC

22 The Main Chance (1968 – 1973) – although a female partner, the astute Margaret Castleton plays only a minor role alongside David Main - ITV

23 The Carnforth Practice (1974) - BBC

24 Close and True (2000) with Robson Green and James Bolam as Newcastle based solicitors with a female dogsbody - BBC

25 Kingdom (2000 - 2009) – two male solicitors and a dependable female dogsbody - ITV

26 The Verdict is Yours (1958- 1963 ) - ITV

27 Crown Court (1972 – 1984) - ITV

28 Blind Justice (1988) - BBC

29 Wing and a Prayer ( 1997 – 1999 ) Channel 5 (commercial)

30 Trust (2003) with Annie Naylor (Sarah Parish) as a woman determined to become a partner in a male-dominated City legal firm but with family responsibilities – also includes an ethnic minority nod with Chiwetel Ejiofor (Ashley Carter) - BBC

31 New Street Law (2006 - 2007) BBC

32 North Square (2000) – Channel 5

33 Sutherland's Law (1973 – 76) – BBC – there is by contrast a secretarial role for the woman character

34 The Advocates (1991 - 1992) - ITV

series with a woman writer – Alma Cullen. The ingénue role of Alex Abercorn played by Stella Gonnet is part of a theme for women lawyer characters which stretches from Rumpole and Kavanagh QC through North Square and Silk itself with its opportunities, one might suggest, for the male gaze.[35] What, then, we have is the appearance of women and a recognition that they are a part of the profession.[36] It is not, however, their skills and their lives which are the focus of the many programmes in between Justice and Silk.

As has been noted, Justice had its origins in a stage play. There is a link between the emergence of Justice and the first British legal series reaching British screens before Perry Mason, Boyd Q.C. All the episodes of Boyd were written by Jack Roffey who co-wrote the play [37] from which Justice is a Woman was adapted for Margaret Lockwood.

Martha Costello in Silk was novel in that it had been 40 years since a woman had occupied such a role in a British legal drama series. Her character, however, could be seen as part of an earlier development of male and female ensemble casting developed in the 1990s and in the early part of the 21st century. The creator and the writer of most of the episodes of Silk is Peter Moffatt. Moffatt had been the creator and writer of the award winning North Square,[38] as well as the acerbic look at the English legal system, Criminal Justice from the viewpoint of its victims. [39] North Square was centred on the fortunes of a group of barristers in Leeds working on the Northern Circuit. The main screen time was shared between Billy Guthrie, Alex Hay and their Senior Clerk, Peter McLeish. There are, however, significant roles for two women barristers – the partner of Billy, Rose Fitzgerald and a young Scottish ingénue, Morag Black. Like Grace van Owen, Anne Kelsey and Abbie Perkins in LA Law they operate as substantial but secondary roles

35 This seems to be the function of Phyllida Trant (Rumpole of the Bailey), Morag Black (North Square) and Niamh Cranitch (Silk). Possibly conscious of this theme the producers have included a feminist, Rosie Probert in Rumpole and we find in North Square Ali Hussein and in Silk Nick Slade and Daniel Lomas as male pupil barristers.

36 In this coverage of British lawyer programmes I have not included the various comedy lawyers since the male and female portrayals are characterised by being without exception caricatures – see Robson (2007a)

37 His co-writer Ronald Kinnoch (1910 – 1995) was a writer and producer whose work included other legal material such as the John Osborne play Inadmissible Evidence.

38 Broadcasting Press Guild Awards 2001 - Best Drama Series/Serial; Best Actor – Phil Davis (Peter McLeish); Best Actress – Helen McCrory (Rose Fitzgerald) ; Writer's Award – Peter Moffat. It is reported on the internet, however that "(d)espite gaining considerable critical acclaim the show failed to garner a substantial audience resulting in only the one series of ten episodes being produced." For further analysis Bainbridge (2009).

39 1st series with Ben Whishaw (June 2008) – 5 consecutive nights of 1 hour episodes; 2nd series with Maxine Peake (October 2009) – 5 consecutive nights of 1 hour episodes.

characters.[40] Blind Justice and North Square are links in the chain from the default mode of male lawyer central focus/role which we find in the 60s, 70s and 80s in Boyd Q.C., The Main Chance and Rumpole of the Bailey, in the 1990s in Trust, Close and True, Fish and A Wing and a Prayer and in the 21st century in The Brief, New Street Law, Judge John Deed and Kingdom. It is not until 2011 that we have a return to a major series where a woman is the lead despite the existence of the women in secondary.[41] Part of this delay can be attributed to the process of commissioning in British television.

The construction of the traditional series has centred on the production team getting a bankable star to head up the cast.[42] These have included those coming with a proven track record of successful long-running series – Kavanagh QC 's John Thaw as police characters Jack Regan in The Sweeney and Endeavour Morse in Morse; Robson Green and his series Soldier, Soldier (1991-95), Grafters (1998-99) and Touching Evil (1997-99); Judge John Deed's Martin Shaw – The Professionals (1977-81); successful television comedy actor/performers like Alan Davies (The Brief) and Stephen Fry (Kingdom) ; screen actors – Rumpole of the Bailey's Leo McKern (King and Country) and New Street Law's John Hannah (Four Weddings and a Funeral and Sliding Doors).

In terms of the career trajectories of the actors playing the two central roles in Justice and Silk there is a fascinating contrast. The male series appear, indeed, to have operated on the "bankable star" notion with no unknowns heading up the casts of these series. We get a similar operation in a somewhat different way with Justice and Silk. In the case of Margaret Lockwood, as noted above, we have a screen star whose heyday was some 20 years previously with her roles as Lady Barbara Skelton in The Wicked Lady (1949) and Cast a Dark Shadow (1955). From the late 1950s her film career had ceased and she had returned to the stage. The producers were relying on her past fame to attract audiences.

A slightly different calculation is encountered with the casting of Maxine Peak. She had enjoyed success and significant television exposure in Dinner Ladies , Shameless and

40 *pace* Grace van Owen whose role could be seen, arguably, as major

41 To be strictly accurate there was a legal series produced by BBC Wales featuring a young coroner returning to take up her mentor's old job on his demise - Mortimer's Law (1986) This involved her with her male assistant solving suspicious deaths and I would classify this as essentially a detective production. It lacked the language, location and trappings which Greenfield, Osborn and Robson (2010) talk of as constituting a Law film and which I am happy to adopt for TV law series.

42 Chris Kelly, in his role as producer of Kavanagh QC describes the process well in Kavanagh QC (1998)

Myra Hindley. Her star was in the ascendant with critical recognition. She had also worked with Peter Moffatt in one of the stories in Criminal Justice in 2009.

## The work and issues of Peterson and Costello

The set-up in the first series of Justice is the work of a woman barrister in an unspecified Yorkshire town on the Northern circuit. Harriet Peterson appears to have arrived relatively recently. She is divorced with a grown-up son. In her first case we meet her ex-husband. He is an ex-solicitor now working as a salesman having recently come out of jail and has been expelled from the ranks of his profession. In contrast to her male predecessors, Richard Boyd and most memorably in the public imagination, America's Perry Mason, Harriet's cases do not all turn out particularly well. From the way the "truth-telling" camera shows the narratives, in the earliest episodes, the audience knows her clients are often in the right and yet such is the realist approach taken that they do not always get their just desserts.[43]

The kind of cases we see undertaken in the 1970s are a wide range from criminal to civil cases including family matters. The criminal cases include burglary, murder [44] and medical negligence [45]. The non-criminal range from a custody battle [46] to a planning appeal. In the last case in the first series, back in January 1972, Harriet puts forward, as a plea in mitigation to a murder charge, what was to become the successful defence of battered woman's syndrome.[47] This episode aired before the public in Britain had been alerted to the prevalence of male domestic violence with the publication of Erin Pizzey's

43 By Order of the Magistrates (15 October 1971) – custody awarded to mother who neglects her children; Witnesses Cost Extra (22 October 1971) – bent solicitor "beats the rap" on a conspiracy to pervert the course of justice charge of which we know he is guilty; The Rain It Raineth (29 October 1971) – Harriet's innocent client insists on pleading guilty to a burglary charge

44 A Duty to the Court (14th January 1972)

45 When did you first feel the pain (26th November 1971)

46 By Order of the Magistrates (15th October 1971) – Harriet fails to secure custody of children for her client whose slatternly mother neglects them but who are effectively represented by a scheming local solicitor. The local magistrates are more concerned with their extra-judicial business and social engagements than discussing the matter in depth and the High Court judge resents any suggestion that the magistracy, this cornerstone of British justice, have been derelict in carrying out their duties

47 Duty to the Court (14th January 1972) – successful businesswoman who is accused of murder of her roistering hard-drinking husband turns out to have been a victim of his violence behind closed doors for many years.

domestic violence exposé Scream Quietly or the Neighbours Will Hear which appeared as a Penguin Special in 1974 (Pizzey (1974)).[48]

One man figures prominently in Harriet's professional life, brilliant London-based advocate, Sir John Gallagher. He has an arrogant and self-satisfied exterior but with a degree of self-awareness of his own pompousness and smugness. He is, nonetheless, shown to be a brilliant lawyer.

Gradually through the second series the veneer begins to wear thin and we find him becoming rather more fallible. He recognises that Harriet is good at her job and does not share the misogynistic attitudes of many of his contemporaries. He goes further than mere respect and persuades Harriet to move to London to join the Chambers which he heads. By the end of the second series, he even propose marriage – albeit to assist his profile in his political ambitions. [49]

In the 21st century by contrast, work is determined by the success of the whole set of the barristers – the Chambers - and the Senior Clerk's ability to draw in clients by satisfying solicitors. There are parallels between the themes and characters in North Square and those in Silk. In the opening episode of Silk we find a reprise of a scenario from North Square with the "touting party". The two series also share an ongoing theme involving the possibility of a breakaway by disgruntled members of the Chambers.

Through the two series, in contrast to the variety of work undertaken by Harriet Peterson, Martha Costello operates only at the criminal bar. We also see her engaging as a defence lawyer in a court martial of an officer who disobeys an order resulting in the death of one of the men under his command.[50] The range of issues, though is far more limited ranging from burglary and drug smuggling [51], rape [52], cottaging [53], attempted murder

48 Charley Rich had had a hit with the entirely un-ironic Behind Closed Doors in 1973 – the song was later used as the soundtrack to the publicity campaign between 2000 and 2004 in the media against domestic violence sponsored by the Scottish Government - http://www.scotland.gov.uk/About/People/Directorates/Communications/domestic-abuse-campaigns

49 Trespass to the Person (4th May 1973) – Sir John has been approached to stand for Parliament and his chances were he to be married would be enhanced, it is thought.

50 Series 2 Episode 2

51 Series 1 Episode 1

52 Series 1 Episode 2

53 Series 1 Episode 3

[54], wounding [55], property damage[56], a death penalty appeal from the Commonwealth [57] and murder [58]. Along with the swathe of crime there is a little variation with slightly different legal issues arising from criminal actions - an employment problem for a police officer accused of racism to a fellow officer [59] and representing a security van driver failing to take proper care of the prisoners in his charge resulting in the death of one of theprisoners.[60]

## The portrayal of Harriet Peterson and Martha Costello

In the intervening period between 1971 and 2011 the style of TV drama has altered in terms of production values and style. The courtrooms and interior shots in the first series of Justice are cramped and look like the studio sets they are, although the courts become a little more ornate as the years unfold. The investment of money in the 21st century series is obvious. Although this can be seen as simply the changes which technology has brought, the budgets of all TV legal series have not always been so lavish.[61]

One aspect of the older series which we do not find in the modern Silk is the parade of such a range of clients or work. Martha is a criminal defence specialist. She is ambitious but in a different way from Harriet. Her ambition is stark and reflects the changes from law as a gentleman's pursuit to a cut-throat business. This is the kind of change reflected in the literature about lawyers. The world of Henry Cecil with its absence of any sense of the need to cultivate solicitors has been replaced by "touting parties" and serious entertainment where they are plied with drink in the hope that they will brief the chambers.[62]

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54 Series 1 Episode 5

55 Series 2 Episode 1

56 Series 2 Episode 2

57 Series 2 Episode 5

58 Series 2 Episode 6

59 Series 1 Episode 4

60 Series 2 Episode 4

61 Crown Prosecutor (1995) stands out as looking as though it was shot with one camera – this may have been to convey the fact that this series dealt with the low rent world of everyday justice in the lower courts

62 Brief to Counsel contains nothing on this relationship nor does it feature in any of Cecil's considerable literary and scholarly output.

The personal is political in the world of the female barrister. We do get rather more of a sense of access to real inner lives of these women barristers than we get even in the internal soliloquising Horace Rumpole or the thoughtful James Kavanagh. This is partly down to the time spent with our female protagonists looking thoughtful as well as them discussing their goals and reflecting on the sacrifices they are making to succeed in the male dominated world they inhabit. Harriet Peterson talks about the problems she faces in the male world of law in the early 1970s. She wants to be treated on the basis of her forensic skill not her gender in a world of blatant male chauvinism. By the second decade of the 21st century direct themes of female exclusion and male privilege are less evident. These are not to the forefront in Martha Costello's world. We have, however, little idea of what drives Martha other than ambition. To adopt Prine's formulation about the nature of modern life, she seems to be "running just to be on the run".[63] Her inner emptiness is hinted at. She works to a bleak soundtrack of musicians from the Manchester area, The Smiths and Joy Division.

Both women differ from the original case centred model of Boyd Q.C. and Perry Mason where all the drama focuses on the case at hand. In both dramas a crucial element is the particular struggles of women in a male world. When confronted by a woman client who has worked and succeeded in what she knows is a "man's world" and hence wants a man as her counsel Harriet responds by telling her that she is getting precisely that – a woman who has succeeded in a bar of 200 where only 18 of the barristers are women. [64] She knows her worth too. She wants to maintain the lifestyle her income on the Northern Circuit has given her - £9,000 a year - a considerable sum at the time.

In addition, the dramas allow the women to have lives beyond the law but in rather different ways. The continuing early theme with Harriet Peterson as being a lone woman in a profession dominated by men is a focus. The world of the law is conspicuously male. The judges, the other barristers and the solicitors are all men. We encounter no other women in the law in the first series except as court stenographers. The intersection between gender and class is also illustrated in one episode where there appears an incipient gender solidarity between Harriet and the court cleaner. Harriet's distance, though, from the class of her client is shown in her snobbish acknowledgement that she does not care for the son of the cleaner and is only defending him out of duty and the sisterly solidarity dissolves in the face of class.[65]

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63 Speed of the Sound of Loneliness John Prine (1986)

64 A Duty to the Court (14 January 1972)

65 The Rain It Raineth (29 October 1971)

In the second series we see Harriet Peterson dealing with the demands of living in the north, being a minority demographic at the Bar and moving down to London further her career. The series' sub-theme beyond the week's case centres around the rivalry between Dr Ian Moody and Sir John Gallagher for the affections of Harriet. The former engineers visits to London on medical business to spend time with Harriet, and despite the attentions of his rival by the end of the second series when Harriet does marry him.

Martha Costello also has a private life. This, however, is reflective of the era she lives in. Priorities and issues have changed in the intervening 40 years. The options available to a woman have altered as has the age of the character. In place of a divorced woman in her mid 50s with a grown up son we have Martha, single in her mid 30s. Margaret Lockwood was 55 when she started her career as barrister Harriet Peterson while Maxine Peake was 36 when she started playing Martha Costello. The most stark contrast is with the development in the first series of Silk is Martha's unwanted pregnancy following a "one night stand" with her Chambers rival, Clive Reader. Like Rose Fitzgerald in North Square some years before [66] she determines that motherhood and the Bar are compatible but we do not see the implications of this as she has a miscarriage at the end of series 1.[67] Moffatt downplays what else Martha does and where she comes from. We hear in glancing references of her working class origins in Bolton but unlike, for instance, the family of barrister James Kavanagh or John Deed we never see them. The problem of portraying a rounded individual dramatically stems from the contrast between the tension and potential consequences of the work of a defence lawyer whose client's liberty is at stake and the minor inconveniences and scuffles of everyday family life. Giving these a significant secondary role did work in the other innovative series, Judge John Deed where the family life and professional life of the judge were permanently intertwined and inter-dependent. Otherwise, unless the light family relief has a special resonance, as with the exchanges between Hilda and Horace Rumpole, there is the risk of the family episodes merely interrupting the flow of the drama. The full backstory, then this is something which Moffatt sacrifices. This is in sharp contrast to North Square where the reality of combining a career and childcare is one of the compelling elements in the relationship between Billy Guthrie and Rose Fitzgerald. It means that the fact that we feel we know where Martha Costello is located socially and politically depends on hints rather than any direct narrative. Part of this comes from locating Martha and her accent in the Lancastrian working class. Here less is more. We know she is chippy and on the side of the underdog

66 North Square series passim

67 in episode 6 29th March 2011, following an altercation with her obsessed scummy client, Garry Rush, and a punch to the stomach.

but we infer this. There is actually precious little formal evidence. We do not see Martha doing the pro bono work which the middle class Harriet does.[68]

## Peripheral characters in Justice and Silk

One difference which we can see in the approach to TV lawyers dramas over the years has been the expansion of the roles and interest in peripheral characters. In Justice we have in the second series three principal players along with Margaret Lockwood's Harriet. We see the rivals for Harriet's hand in marriage – Dr Ian Moody and Sir John Gallagher in their professional roles, as well as, as suitors.

Both women's lives are significantly affected by another man in their lives – the Senior Clerk of Chambers. In Justice there is a broad brush explanation as to why it is so important for her success. The shift in Justice from the first series on the Northern circuit where clients seem to fall into Harriet's lap fortuitously to the cut and thrust of the London bar is marked. The Senior Clerk in Justice plays an Everyman role. Hence he changes from a straightforward chauvinist unwilling to brief this unknown woman to Harriet's biggest supporter. Like the audience he is able to see her get results. We see his influence in persuading solicitors that Harriet is a formidable advocate, although he is portrayed as a straightforward individual rather than the manipulative and mendacious characterisations of Senior Clerks which we find in North Square and Silk.

It is, however, something which becomes less of an issue as Harriet is soon established at the Bar in London. The ups and downs of Chambers' fortunes as opposed to individual reputations are, by contrast, constant looming major preoccupations in Silk. A much bigger set of Chambers is implied in Silk with Kate Brockman representing "the bottom end" of young Juniors. This is an important change of emphasis. Interestingly this issue of the context of Chambers rather than individual merit is an issue which Henry Cecil writing from the 1950s to the 1970s does not address in either his fiction or non-fiction. Whilst Cecil's writings are not a social scientific account of the world of barristers in this era he does capture the flavour of the times quite neatly (Robson 2014).

The economically driven structural context is the one we find in Silk. Just like Peter McLeish in North Square, Billy Lamb is Shoe Chambers' entrepreneurial conduit for business from solicitors. Exactly what he does is covered in greater depth in the second series with his relationship with gangland solicitor, Micky Joy which remains a third series

68 Series 2, Episode 12 Peacable and Quiet Enjoyment

theme. This is a far cry from the elegant world of Harriet Peterson and the characters of Henry Cecil's fiction.

## Concluding Remarks

The male world of legal practice which was encountered before and after Justice has been surprisingly resistant on British television. It has taken a long time for women lawyers to achieve the high profile found in Silk. This might arise, paradoxically, from the coverage of women's issues which we find in Justice. We have a far more direct engagement with women's problems and the male dominated world with Harriet Peterson. Her world offers an insight into the challenges which made Henry Cecil advise women that if they really wanted to become lawyers they should stick to the backwaters of being an office-based solicitor (Cecil (1958) 162). Martha Costello is still working in an environment that continues to offer less to women but the gender inequality is overlaid by the work she does and its focus on crime and male criminals. The same kind of contrast can be made between the equivalent TV shows from the United States and Australia comparing early woman protagonists and their more recent return to prominence, with the earlier shows having a much more progressive edge. [69] For a sense of women's continued oppression under the law in Britain, both past and present, Justice from 1971 perhaps surprisingly is a more useful guide than Silk in the 21st century.

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NAVEIÑ REET: Nordic Journal of Law and Social Research (NNJLSR) No.5, 2014, pp. 117-130

# Spatial Justice and Street Art

*Peter Bengtsen & Matilda Arvidsson*[1]

## Abstract

*This article presents the notion of spatial justice as a way of considering the relationship between law and street art in a manner beyond the legal/illegal dichotomy. Through a series of empirical examples, it is demonstrated how street art literally takes a place already taken and imposes itself in an already appropriated urban public space. Street art thus redefines the space in contestation to law. However, street art is ephemeral and its taking of space is not permanent. Street art points to an alternative spatial definition, one of spatial justice, before – and, indeed, while – withdrawing from the space it occupies. Street art creates a rupture in the lawscape which makes explicit the presence and claims of law, thereby also making the need for law's other – justice – pronounced. The question of relationality between law and street art which we bring forth in the present article plays itself out as a production of space and spatial justice in an exchange of place-taking, withdrawal and pronounciation. Spatial justice, as we perceive it here, is thus a way of thinking about law and street art not simply as polar opposites, but rather as co-dependent and bound together in an ongoing process of oscillation, mutual reinforcement and creativity.*

## Introduction

In the following article, we explore the relationship between street art and law through the notion of spatial justice. Our interest in the relationship between law and street art is borne out of a more general concern with artistic and cultural practices in urban public

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space.[2] Street art, as the term is used in this study, describes a range of artistic practices and resulting artworks in urban public space. These include – but are by no means limited to – *stenciling* (by which paintings are created by spraying paint through a pre-cut stencil), *wheat-pasting* (the adhering of thin sheets of previously painted or printed paper to surfaces in urban public space) and *yarn bombing* (the covering of objects with knitted or crocheted yarn). While a distinction is commonly made between street art and the related field of graffiti,[3] for the purpose of this article, graffiti is included in the category of street art, since the observations made in relation to spatial justice pertains to graffiti as well (for a visual example of street art as the term is used in this article, see Figure 1).

The unsanctioned and/or illegal nature is often discussed as being a significant trait of street art (Bengtsen 2014b; Lewisohn 2008; Riggle 2010). But what does the unsanctioned, and sometimes illegal, nature of street art actually mean for the art and for law? These are questions we explore in the following. We do so by relating street art to the lawscape and to spatial justice. Street art is here understood as both a practice and an end product consisting in ephemeral unsanctioned expressions which emerge and disappear continuously, predominantly in urban public space. The lawscape is understood here as a way to understand the infinite materiality of law within the urban landscape. Spatial justice is here understood as a notion which is reliant on the taking of and subsequent withdrawal from space – an oscillation through which conditions for justice in urban public space emerge.

2 In September 2013, we convened a stream dedicated to this theme at the annual Critical Legal Conference. Our call for papers, entitled 'Artistic and cultural praxes in the transitional and contested territory of urban public space', was met with nearly forty paper proposals from all over the world. Most of these proposals came from within the disciplines of architecture, art history, urban studies and ethnography, but also from artists and activists, while contributions from legal scholars were almost entirely lacking. Drawing on the experiences made from the stream, it seems that legal scholars take less of an interest in artistic and cultural expressions in urban public space than theorists, artists and activists of urban public space take in law. The current article grew out of a curiosity about what it would entail to address the relationality between art and law in urban public space, bringing into the project insights from art history and visual studies as well as legal science.

3 This distinction partly has its roots in studies of the often quite antagonistic attitude of graffiti writers towards street artists. There is also an aesthetic and communicative side to the distinction: while street art often speaks to a broad audience (in part by including features like images of human beings, animals and other recognizable characters, as well as references to current events), a lot of graffiti is primarily or solely aimed at other graffiti writers rather than the general public. It is often letter-based, but is frequently stylized to the point where the writing becomes unintelligible to anyone not already familiar with the subculture.

*Figure 1: Street art in Copenhagen, including a paste-up by Armsrock and graffiti tags (2010). Photo © Peter Bengtsen.*

## The lawscape, street art and spatial justice

In our thinking about urban space and ways to understand the relationship between law and street art, we have wanted to turn away from traditional criminological, juridical and sociological approaches to the subject. Acknowledging that it at certain junctures is called for to inquire into the legality or illegality of street art (e.g. Edwards 2009) and to think about the relationship between law and art in terms of legal decisions or reviews of current jurisprudential and/or executive approaches towards street art, within the scope

of the current article this is not our focus. We are neither invested in the project of securing street art as intellectual property (e.g. Lerman 2013; Smith 2014) nor are we explicitly addressing the social or political implications of the criminalization of practices of street art (e.g. Dickinson 2008; Young 2012). Instead, we want to elucidate on how the relationality between law and street art may be thought otherwise by drawing on the works of Andreas Philippopoulos-Mihalopoulos, and his notion of the lawscape and spatial justice (e.g. Philippopoulos-Mihalopoulos 2012; Philippopoulos-Mihalopoulos 2010a; Philippopoulos-Mihalopoulos 2010b. See also Arvidsson 2014; Bengtsen 2014a). Approaching street art and law in this way, we have arrived at an understanding of law and street art as mutually informing, producing and creating urban public space: *not* as opposite poles, and *not* simply in terms of illegality/legality. Rather than being of an 'illegal nature', we see street art as bringing to the fore both law and justice and their particular spatial interdependencies. Conversely law and the possibility for street art to emerge in contestation to law as an ephemeral articulation of spatial justice produce some of street art's particular – and central – potentialities as an artistic expression in urban public space.

What interest us in particular is the following: (1) street art *takes place* and thus produces space in a material as well as a legal sense, (2) it takes place specifically in contestation to something: to law, (3) but street art does not usually aim to work with permanent appropriation from which legal title can be drawn, and, conversely, it does not usually aim to work with legal title through which permanent appropriation, or place-taking, might be pursued.[4] The ephemerality of, and legal title to, street art has recently been challenged as street artworks – predominantly those attributed to the famed British artist Banksy – have been moved from the street into private ownership (Bengtsen 2014b: 86).[5] In spite of these developments, street art still largely works within an ontology of material

4 While this has generally and historically been the case, there are exceptions. For example, at our stream at Critical Legal Conference in 2013 (see note two above), papers by art historian Jacob Kimvall and former employee at the Swedish National Heritage Board Tomas Örn discussed the possibility of preserving a graffiti mural through legislation regulating the conservation of built heritage. While the creators of the graffiti mural in question (a work entitled *Fascinate*, located in Stockholm) may not have sought to permanently appropriate the space by making use of law, admirers of the mural sought to challenge the perceived illegality and consequent ephemerality of such work. For a related and interesting take on cultural heritage, intellectual property and art, see Bruncevic 2014.

5 See e.g. 'Banksy makes a splash in New York – but what will become of the murals?' in *The Guardian*, October 6, 2013; 'Off the Street: Onto the Auction Block' in *The New York Times*, May 2, 2014. While Banksy has so far been the prime target of the removal and attempted sale of artworks from the street, this has also happened to work by others, such as the French artist Invader, the American artist Bast and the Canadian-American artist collective Faile.

place-taking, ephemerality, oscillation and withdrawal. This position of materiality and non-stasis is of importance for our development of an argument concerning the relationality between law and street art. Street art, as we conceive of it in this article, is inherently non-permanent (although the different material properties of individual artworks make some more durable than others). Further, we make a distinction between commissioned and uncomissioned works of art, including only the latter in our study.[6] The ambiguousness of the term *street art* should be noted. It refers to art pursued in the 'street' which means that it produces public space within space – an artscape in public space. The notion of the 'street' does not solely refer to actual streets, but rather denotes places that are publicly accessible and/or visible in or from within public space (e.g. train stations, walls and parks). Street art, as we conceive of it, invites a radical oscillation between appropriation and dispossession of public space, while – literally – drawing on privately and publicly owned property, as well as on legal commons. In virtue of this radical appropriation and dispossession, we might say that any street artwork is a taking of a place which is already taken in both a material and legal sense. However, due to street artworks' ephemerality, this place-taking is not permanent. Although taking possession of place, street artworks are always about to take leave of this same place and the public space they have produced and claimed, as the place is overtaken by new street artworks or other forms of appropriation, not the least of which is the removal of street art by

6 In recent years, the emergence of so-called street art festivals in many parts of the world – e.g. the *Fame Festival* in Grottaglie, Italy (2008-2012) and *Artscape* in Malmö, Sweden (2014) – has meant that some street artists have been given the opportunity to create large-scale sanctioned murals, which are often of a permanent or semi-permanent nature and are hard to distinguish from sanctioned public art. While these artworks are commonly discussed as 'street art', their sanctioned nature means that they fall outside of the definition of street art in this article. Another and related development is designated places for street art. At these places street art is not commissioned, yet it is not generally approached by authorities as contesting legal claims – at least not claims to be present at the same place at the same time. As street art in these places is uncommissioned, it falls within the definition of this article. However, the (semi)permanent withdrawal of law from designated places makes the oscillation of place-taking between law and street art inoperable. Without that oscillation, spatial justice, such as we conceive of it in this article, cannot emerge. Street art, although keeping to its ephemeral ontology, cannot perform itself as an articulation of spatial justice as it does not take a place already taken by law. It rather becomes a place-taking in terms of opposing claims to artistic space: the claim of two or more street artists to perform their art in the same place at the same time.


*Figure 2: Graffiti on a train in Malmö, which has been partly covered with yellow and black tape (2012). Photo © Peter Bengtsen*

public authority or through private initiative.[7] This gesture of ephemeral place-taking and withdrawal might be understood in contrast to other – though not all – forms of art where law provides a legal title often necessary for safeguarding the artistic ownership of the piece of art in question, thus inviting capital as an artistic partner.

The train graffiti depicted in Figure 2 is an example of the place-taking and withdrawal which we find to occur continuously in urban public spaces. Here a place on the side of a train, which was already claimed in a material and legal sense (by the property owner of the train wagon in question), has been claimed anew by way of a graffiti piece. In creating the graffiti painting, a spatial definition which counters the spatial claims of law (in this

7 A curious phenomenon is the unsanctioned removal of street art and graffiti by individuals who take upon themselves to systematically 'clean' the city. The result of their effort to battle street art and graffiti is that they end up committing the same transgressions in the eyes of the law as the people whose practices they are fighting. This paradox is the topic of the documentary film *Vigilante Vigilante. The Battle for Expression* by Max Good (2011). It should be noted that more recently an opposing trend has emerged: citizens rally to restore and protect certain street artworks (usually attributed to Banksy) when these have been defaced.

case property law excluding the coexistence of more than just one legal claim to the outer surface of the train wagon) has been created, and has forced law to momentarily withdraw. Law recedes, yet while doing so it is simultaneously curiously intensely present in its absence, loudly pronounced and highlighted by the graffiti piece. The graffiti piece draws to our attention that the train is not just a train, but also a space of legal claims which are ours to relate to in contestation, approval or otherwise. In other words, street art in this example expresses and reminds us of the possibility of justice in the face of law. The place-taking on the train wagon is made with the understanding that the appropriation, and the spatial definition created by the presence of the graffiti piece, will not be permanent.[8] In the case depicted in Figure 2, both the place – and by extension the space – has already been symbolically reclaimed by law. While the graffiti piece has not yet been removed, black and yellow strips of tape have been put on top of it by the train authorities. This gesture indicates the presence of law in public space, and it constitutes a promise that a complete return to law is imminent. Law (in terms of the reaffirmation of the legal claim to space pursuant to property law) will return, but so will – it can be assumed – graffiti. The oscillation between place-taking and withdrawal on the part of both art and of law produces public space. Simultaneously, the oscillation is part of the production of art (we must remember that the taking place of graffiti precisely *here* is no accident but rather flows from its contestation to law and space as produced and claimed by law), and the reiteration of law as a mimetic and material practice. What is particularly interesting about the case depicted in Figure 2 is that the claims of the graffiti artist and the train authorities are co-visible. This gives us insight into the layering (both in a material and symbolic sense) of the claims to urban public space that are continuously put forward.

As mentioned above, in our search for a language by which our interest in street art and law and the ongoing processes of negotiation for urban public space can be pursued, we have turned to Andreas Philippopoulos-Mihalopoulos' work on the lawscape and spatial justice. Philippopoulos-Mihalopoulos draws on Doreen Massey (2007) when he defines space not as that which surrounds us (as if we were not space ourselves), but as

8 This is especially true when it comes to graffiti on trains and on the street level of the city, where law often reclaims the place rather quickly through the removal of the unsanctioned artistic expression. However, when artists work without permission on the façades of high buildings (for example by lying on the edge of a rooftop and painting the upper part of a façade with a paint roller), the legal structures of the city (e.g. safety regulations stipulating legally acceptable working conditions for workers commissioned to subsequently remove the artworks) actually mean that artworks often remain for a prolonged period of time. It is simply very costly for property owners to set up scaffolding and other safety elements required by law. Here the legal structures mean that unsanctioned, and often unwanted, artistic expressions can remain in situ for years.

the 'product of interrelations and embedded practices; a sphere of multiple possibilities; a ground of chance and undecidability, and as such always becoming, always open to the future', always conditioned on politics, always conditioned by law (Philippopoulos-Mihalopoulos 2013: 123).

Spatial justice, as we conceive of it, should first and foremost be understood as an embodied ethics (Philippopoulos-Mihalopoulos 2010b: 202). In short it concerns one's own corporeal, ephemeral and repetitious emplacement as space in space – a unique and singular place-taking in the metaphysical, psychological and material sense. This emplacement by necessity excludes all other claims to the same spatial position at the same time. Spatial justice, however, also entails the radical gesture of withdrawing from the space one occupies momentarily. Following Derrida we must know that 'law (*droit*) is not justice' (Derrida 1990: 947).[9] The example presented in Figure 2 of graffiti on a train wagon illustrates this point. In order for justice to arrive (if only – and it is always only – temporarily) law must temporarily recede. As law is always material and embodied, this places a demand for a withdrawal as a condition for justice. This cannot be a legal demand (because it demands law's withdrawal) but emerges as an ethical one. The notion of spatial justice brings forth law's reliance on space: law – being material and embodied – produces, at each given moment, entitlement to emplacement. Law 'translates' the desire to be *here* into legal claims, making desire appear within the legal framework as legal argumentation and legal rights.[10]

At the moment law names rights, for example property rights giving legal title to walls, train wagons or billboards in public space, it distributes emplacement. In other words, it distributes the legal right to be at a particular place at a particular time. As is the case with street art, however, not all place-taking operates on the basis of an established legal right, a legal emplacement. Law as the distributor of space calls for something else to intervene on the side of law's other. With the process of legal emplacement, the need for justice arises. Justice is thus understood as that which law cannot entail but must recognize, which arises when law becomes materialized. Both law and justice in this sense depend on space. The particular notion of spatial justice concerns precisely the need for law to withdraw

9 Derrida continues: 'Law is the element of calculation, and it is just that there be law, but justice is incalculable, it requires us to calculate with the incalculable; and aporetic experiences are the experiences, as improbable as they are necessary, of justice, that is to say in moments in which the decision between just and unjust is never insured by a rule' (Derrida 1990: 947).

10 Examples of this are property rights, intellectual property rights and the right to assembly, to mention but a few legal rights relying on as well as producing space.

in the face of justice, as space is not only produced by and through legal entitlement but also by and through law's other: in this case manifest as street art.

The urban public space in which we find ourselves – where our interest in law and street art arise and reside – is a striated space characterized by boundaries, demarcations, points, lines and zones: walls meet streets which in turn are divided into sidewalks and separate driving lanes; traffic lights orchestrate the flow of traffic which pulses through the city; zebra crossings punctuate this movement and allow streams of pedestrians to pass from one sidewalk to another; framed billboards demarcate spaces of commercial advertisement separate from that of regular walls (see Figure 3 below). Urban public space is saturated by laws and regulations that zone, delimit and demarcate space. Emplacement and embodiment are done through and in contestation to these laws and regulations. Drawing on Philippopoulos-Mihalopoulos, we think of this urban public space as a lawscape, as the 'fusion of law and normativity' where 'the city is interlaced with the law' (Philippopoulos-Mihalopoulos 2012: 1).[11]

Spatial justice entails a rupture of the circularity between law and space, a circularity in which law and space otherwise reinforce each other mutually in the lawscape. While law at each given moment might have a perfect answer to street art in terms of illegal/legal, the question of spatial justice is one which inserts alteration, disruption, and fissure in the lawscape: it distorts its horizon and demands law to temporarily withdraw before reemerging.

In our everyday life we might think of law as the normal that we do not see, hear or smell but which flows beneath our feet (e.g. municipal planning laws regulating the size of the sidewalk), marks and names our bodies (e.g. inscribing gender through health and family law regulations) and traverses the sky (e.g. telecommunication law regulating the ways in which we are reachable through our cell phones). Although we are saturated in law, it appears as heightened, visible and pronounced only at certain junctures (Philippopoulos-Mihalopoulos 2012: 1). As the example of the graffiti on the train wagon in Figure 2 shows, those junctures might be precisely, although *by no means exclusively*, the moments in which street art enters urban public space in contestation to that space already being

11 Philippopoulos-Mihalopoulos defines the lawscape as 'neither a tautology nor a simple disciplinary coincidence', but rather as 'the ever-receding horizon of prior invitation by the one (the law/the city) to be conditioned by the other (the city/the law). It is the topos where *logos* and *polis* are fused in an embrace of escaping distance. In lawscape, the city and the law are found to operate in a double state of co-presence and absence, as expressed by the conjunction "and"' (Philippopoulos-Mihalopoulos 2007: 10).

taken, occupied and appropriated by someone or something else laying claim to a right to be 'here' through legal title. Law in this situation meets its other.

While we argue that street art can always be understood as an expression of contestation to an already-existing legal claim to urban public space, some cases are particularly well suited to illustrate this. We have already introduced the example of train graffiti (Figure 2). Another example is the type of street art which targets and subverts, or 'destroys', commercial messages in urban public space. Like train graffiti, these practices of street art are inherently ephemeral. They exist in contestation to the commodification of public space, creating momentarily other spaces. The commercial depicted in Figure 3 – as well as numerous previous commercials for the same brand in the same particular place (on the corner of Nørrebrogade and Stengade in Copenhagen, Denmark) – has repeatedly been de/refaced, but has always subsequently been restored by the legal property owner of the billboard. The history of repeated oscillation of place-taking and withdrawal, exemplified by the ongoing negotiation for this particular urban public space, demonstrates the way that spatial justice emerges through the relationality between street art and law: while the


*Figure 3: Add disruption in Copenhagen, Denmark (2012). Photo © Peter Bengtsen.*

repeated disruptions of the legal claim to public space in the example in Figure 3 force law to momentarily withdraw, they do so with the understanding that the disruptions too are only momentary. Spatial justice is here, just as justice is in the Derridian sense, always only possible momentarily. What we witness in such place-taking is a struggle over different spatial definitions, which oppose, but also inform and produce, one another.

## Conclusion

The ethical demand to withdraw inherent in the notion of spatial justice is directed at individuals, at street art as well as at law. One does not withdraw because one does not desire a certain space, or someone else's space, but precisely because the demand is to take leave of one's desire and expose oneself in a vulnerable request for others to do the same. The demand is not to withdraw and go away, but to withdraw and remain in an oscillation (which is not a dialectic duality) that does not fully position the individual, or law/justice, at a single place, but rather allows one to interact without staying put (Philippopoulos-Mihalopoulos 2010a: 201). Spatial justice thus entails withdrawing as part of one's taking place, as well as recognizing the priority of the other's claim to be, to take place without succumbing to self-annihilation or the annihilation of the other (Philippopoulos-Mihalopoulos 2010a: 200). As can been seen in the empirical examples presented in this article, in relation to street art, the ethical demand to withdraw is directed both at carriers of legal title (public and private property owners) and at street art itself. For spatial justice to become realized, street art must not turn into permanent appropriation of space, nor must property rights – or other legal rights – constantly supersede other claims to urban public space.

In this article we have contended that spatial justice converses well with an effort to think the relationality between law and street art in a manner beyond the dichotomy legal/illegal: street art literally takes a place already taken. It imposes itself on an already appropriated space. Street art thus makes space anew and takes a place for itself in contestation to a conflicting claim to space. By its very nature (to varying degrees as some art is more permanent than other, depending on, for example, technique and placement) it is ephemeral: it withdraws while remaining, it re-emerges in new zones, bending and bleeding over lines and points and demarcations of the lawscape. Street art creates a rupture in the lawscape and conjures up the notion of, and need for, justice – a spatial justice – in urban public space as it calls on law to pronounce itself: *'Come on and talk to me!', 'Who are you? What do you say? What is your position?', 'What is your proper name?', 'I dare you!'*

The question of relationality between law and street art which we have brought forward here plays itself out as a production of space and spatial justice in an exchange of place-taking, withdrawing and pronouncing law and street art. It is a relation that calls on justice as a means of coproducing urban public space: spatial justice becomes the very tangibly pronounced ethical demand to withdraw. The lawscape and law are loudly pronounced as street art takes place in urban public space. In this ongoing process, the need for spatial justice arises and a multitude of spaces is produced and dispossession takes place. Spatial justice is thus not only an ethical demand but also an exposition of vulnerability to the desire of the other: it enforces a bond of permanent oscillation, mutual reinforcement and creativity.

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# Surface Patterns – Surface Law

*Hanne Petersen*[1]

## Introduction and abstract[2]

*On my almost daily bicycle rides in the mornings of the spring and early summer 2013 I began noticing the presence of several women wearing trousers with large printed patterns. I wondered whether this might indicate a certain shift from the dominant modern mono-chromatic norm regarding Nordic / Danish women's urban (summer) dress. To what extent are fashion norms influencing and interacting with other social and societal norms including, what has in the Western world long been called legal norms – most often understood as state produced norms.*

Over the last decades the presence of the hijab in the public urban sphere has given rise to concern about (in practice) *women's* dress norms in much of Europe. Workplace, local and national regulations have been competing with religious and market norms influencing female dress and dress codes. Could fashion (and technology) driven (dress) practices indicate an emergence of surface patterns of urban conviviality and diversity? Patterns express repetition, variation, ornament and order, and have a long history. Modernity degraded ornament and handicraft (Bille, 1984, p.15). Ornament was associated with "Eastern decadence and feminine weakness" (Yelavich 2011). Design and designer education is bringing pattern and ornament back using new technologies, maybe supported by an increasing importance of (globalized?) market norms and market economy around the end of the 20th century. Chiba's concept of 'legal postulates' is a similar pattern, indicating the co-existence of formal (and also informal) norms and rules, and their underlying (sub-surface) patterns of meaning and 'spirit'/values/ethics (Chiba 1989).

Twining writes about 'surface law' that there is a suggestion 'that the surface is opaque and what lies beneath it may be different from what is observable on top" (Twining 2008, p.179). Could surface patterns and surface norms and 'laws' be ways of temporarily ordering globalized urban communities experiencing rapid changes?

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2 This is a very modified version of the abstract for my presentation at a workshop on *Artistic and cultural praxes in the transitional and contested territory of urban public space* at the CLS conference on Reconciliation & Reconstruction, Belfast (2013)

## Modernity, ornament and (pure/realistic) law

Around the beginning of the 20th century the Austrian architect, Adolf Loos (1870-1933) published an article called "Ornament and Crime", where he made a strong statement denouncing the value of ornament, underlining his message in italics:

"I have made the following discovery and I pass it on to the world: *The evolution of culture is synonymous with the removal of ornament from utilitarian objects*.… We have outgrown ornament; we have fought our way through to freedom from ornament" (Loos 1908).

I was (again) reminded of this article, when seeking inspiration for my presentation leading to this article, I went to see an exhibition in Copenhagen called *Flora Islamica. Plant motives in Islamic Art.* In the catalogue for the exhibition the author mentions the influence from Loos's polemical writing "Ornament und Verbrechung", which have influenced Westerners and perhaps not least Danes in the introduction (von Folsach 2013, p.9).

It is probably not unfair to claim that Danish (and Nordic) architecture, art, fashion – *and jurisprudence* – in the 20th century have been influenced strongly by modernism, minimalism and functionalism, as well as by Protestantism's suspicion of images and (floral) rituals. Scandinavian realism was strongly influenced by the developments in Austria after the collapse of the Austro-Hungarian Empire in the wake of World War I. The dominant Danish legal philosopher and proponent of legal realism, Alf Ross (1899-1979) who became increasingly influential in the Nordic countries and beyond, had spent 2½ years studying in Austria, France and England from 1923-1926. He dedicated his (rejected) dissertation *Theorie der Rechtsquellen* from 1926 to Hans Kelsen (1881-1973), whom he had met in Vienna, and by whom he was originally strongly influenced.[3] Both the *Reine Rechtslehre* and Scandinavian legal realism can be described as legal theories developed for social democracies and governments, where law was to be created by majority rule through parliaments, which had replaced emperors and kings. All forms of art and crafts were addressing new audiences and new markets and installing new yardsticks of quality and validity.

3 See the biographical article on Alf Ross http://www.denstoredanske.dk/index.php?title=Dansk_Biografisk_Leksikon/Samfund%2C_jura_og_politik/Jura/Jurist/Alf_Ross [Accessed May 24, 2014]

The monism of these *modernist* normative forms of expression – including architecture, law and not least legislation – reflect needs for escaping the influences of former regimes and their societal structures. Absolutist and monistic religious, status based regimes, had been based upon feudal and often pretentious and costly forms of ordering and representation. Loos (1870-1933), who was born in Brno in the Austro-Hungarian Empire, had spent three years from 1893-96 in the United States He was influenced by the democratic politics and concomitant style, and is quite outspoken about this in his small article:

"Ornament generally increases the cost of an article… Omission of ornament results in a reduction in the manufacturing time and an increase in wages. The Chinese carver works for sixteen hours, the American worker for eight… Ornament is wasted labour power and hence wasted health. It has always been so…

If all objects would last aesthetically as long as they do physically, the consumer could pay a price for them that would enable the worker to earn more money and shorter hours" (Loos 1908).

The links between modernist architecture and modern law – as well as to modern fashion – are in fact pertinent. The myth of feminine fashion, Coco Chanel (1883-1971) began producing her iconic models in Paris in the beginning of the 20th Century, when women were gradually gaining the vote, political rights, and access and obligations to work. Her ideals were freedom for women to be able to move (in the same stylish *and* almost rational dress) during all of the day[4] – instead of having to change complicated dresses several times as were the customs of upper-class women of the European empires of the 19th century or having to wear trousers as rural women might do.[5] Chanel dresses were comparatively simple, but elegant and with worked out details, meant for the 'new women' now populating the streets and public space of Europe's urban centres. Rural and upper class dress traditions were in practice overruled by fashion for the 'new'

4 The Museum für Kunst und Gewerbe, Hamburg, showed an exhibition on Coco Chanel from February-May 2014, *Mythos Chanel*. I managed to participate in the last and very large guided tour of the exhibition. The catalogue was completely sold out.

5 Edmund de Waal describes the life of a very wealthy Jewish banker family in Vienna around the turn of the 19th Century, describing the costly and time consuming dress codes and practices of his great grandmother in *The Hare with the Amber Eyes. A Hidden Inheritance, 2010,* especially Part II, Vienna 1899-1938.

urban women.[6] An increasing number were working women in need of new and more functionalist clothes reflecting changing gender and living conditions.

Art historian Sir E.H. Gombrich, born in 1909 in Vienna during the Austro-Hungarian empire in an assimilated and highly cultured Jewish family, grew up in the Austrian Republic and came to the UK in 1936 where he ended up spending the rest of his life writing his influential works on art and history in English. In the preface to the second edition of his book *The Sense of Order. A study in the psychology of decorative art,* originally published in 1979, he wrote:

"It would be missing the point of this book… if it were taken as propaganda for a revival of ornament in contemporary architecture and design. On the whole I even happen to share the prejudice of my generation in favour of functional form, but I still regret that this prejudice has led to the elimination of decoration from the art historical curriculum. This undeserved neglect is of fairly recent date. As this book shows, the rights and wrongs of ornamentation were much debated in the 18th century at the time of the Neo-classical revival, while in the 19th century the problems of the machine age raised profound issues and produced a spate of important writings" (Gombrich, 1984, p.xi)

He also writes that the art of ornament rose to "a number of awe-inspiring summits in the Far East, in the Islamic world, in Anglo-Irish illumination and in late Gothic" (1984, p.x). Order and meaning interact and "it is our search after meaning, our effort after order, which determines the appearance of patterns, rather than the structure described by mathematicians" (1984, p.147).

Gombrich addresses and quotes Loos' article on "Ornament and Crime" at length also commenting critically on the references to female beauty appearing in his article:

"It must interest the psychologist that here, as so often, the rights and wrongs of ornament are discussed in terms of feminine adornment – here too we may remember Cicero's remarks about the superior beauty of unadorned women. When Loos came to develop and expound his identification of ornament with barbarism and with crime he drew even more heavily on the erotic associations of decoration. In fact, he identifies ornament with

6 The guide at the *Mythos Chanel* exhibition underlined Coco Chanel's distaste towards trousers for women, which Chanel also voiced in a filmed interview at the exhibition, describing trousers as something rural women would wearl However given the demand for trousers especially after WWII, Chanel would also design and produce this piece of garment. Fashion was not art but business, she said.

primitive eroticism and, at least by implication, the absence of ornament with purity and chastity. Written in the era of evolutionism, and the aura of Freud, the article [by Loos – HP] presents the development of mankind as the story of moral evolution: 'The Child is amoral. The Papuans are equally so for us. The Papuans slaughter their enemies and eat them. They are not criminals. If, however, a man of this century slaughters and eats someone he is a criminal or a degenerate. The Papuans tattoo their skin, their boats, their oars, in short everything within reach. They are not criminals. But the man of this century who tattoos himself is a criminal or a degenerate… The urge to ornament one's face and everything within reach is the very origin of the visual arts. It is the babbling of painting. All art is erotic.'" (Gombrich, 1984, p.61).[7]

In the following section, Gombrich discusses '*Ornament versus Abstraction*' and concludes that there are "signs today that the estrangement between the two camps has subsided and that the new interest in problems of the painting surface has prompted abstract artists to look across the fence into the compound of the decorators." – This is an interaction which "makes the very distinction between fine art and applied art increasingly problematic" (Gombrich 1984, p.62).

His second preface from 1984 is written at a time, when the European Economic Community had reached ten member states. The UK and Ireland had joined in the EEC in 1973 together with Denmark, and in 1981 Greece joined after the junta had been dismantled and democracy reintroduced. EEC was beginning to become a legally and culturally more diversified community. The distinction between 'fine law and applied law' to paraphrase Gombrich, or as it began to be called between 'hard law and soft law' was gradually becoming more difficult to draw. The increasing importance of international relations meant that legal theories created to explain and understand primarily *intra*-national relations and regulations were no longer fully adequate or sufficiently convincing. Theories seeking to make sense of changing realities began to (re)emerge, especially theories giving room for more diverse and less state-centric understandings of law such as living law, legal pluralism and legal polycentricity (Ehrlich 1913, Moore 1978, Geertz 1983, Griffiths 1986, Petersen 1991 and 1995; Petersen & Zahle 1995).

7 Gombrich indicates that he is quoting and translating after the German edition *Sämtliche Schriften,* ed. Franz Glück, Vienna 1962, (1984, p.310). I have not had access to the German version. Indications about the publication date vary, but most references point to 1908 as the year of publication of Loos's polemical article.

## 'New' normative fashions?

A few years ago I came across a big banner at the entrance to a well-known former royal garden in Copenhagen, Frederiksberg Have, which said "*Moderne kunst er gammeldags*" – "Modern art is old-fashioned". Modern law has been in the process of becoming old-fashioned for several decades by now, even if the fragmented and diversified legal and other fashions that have succeeded it may have led to both rejection, anxiety and confusion. Modernity is becoming a description of an era rather than of a (highly valued) quality or characteristic. With this development goes perhaps a certain dismissal of modernist forms of expression – whether in urban dress practices of women, or in normative practices of inhabitants and users of urban space. Sionaidh Douglas-Scott in her recent book concludes that "both law and the ways in which we understand law have changed, and a former legal paradigm has been supplanted" (Douglas-Scott, 2013, p.383). Hers is an ambiguous but accepting attitude to this change and a reluctant recognition of legal pluralism as the new paradigm, where she underlines the need and the importance of concern with the injustices appearing in this new landscape. For her the emerging paradigm of legal pluralism seems to raise issues of (in)justices which were perhaps less distressing under a monocentric paradigm.

We do not yet know what *meaning* we may find in the patterns and multiple forms of law, representation and dress surrounding us. The law is *leaking* claims Merima Bruncevic in her ph.d. thesis *Fixing the Shadows. Access to Art and the Legal Concept of Cultural Comments* (2014), which is inspired by Deleuze and Guattari and their writings on the thousand plateaus – leading her to argue in favour of a 'rhizomatic jurisprudence' – one that moves beyond borders, exclusive identities and excluding concepts and understandings of property.

In their presentation of the stream on *Artistic and cultural praxes in the transitional and contested territory of urban public space* at the 2013 CLS-conference on Reconciliation & Reconstruction, the organisers, Peter Bengtsen and Matilda Arvidsson from Lund University wrote:

"Where people meet, so do conflicting interests and ideas: in cities, which are characterized by – among other things – a high population density, this invariably leads to incompatible spatial claims and on-going clashes between diverging agendas of a political, commercial, legal, moral, social, cultural and artistic nature. This is reflected in, for instance, people's everyday praxes on city streets, where legislation, social norms, and notions of spatial justice help regulate interaction in – and with – urban public space. While in this sense

constricting, these elements of social control also constitute a nexus of creativity as they continuously incite individual agency, as people seek to circumvent them.

While laws, regulations and norms play an important role in maintaining the relative openness of urban public space (by limiting what any one agent – an individual, organization, a company or other legal entities – can legitimately do there and lay claim to), this space is arguably also constituted by the individual and collective agency which takes place within this cross-field of diverging interests. The collaborative or conflicting acts, resulting from the multiple agendas and visions of the nature and purpose of urban public space, leave it in a state of constant transition and contestation."[8]

What I am claiming – perhaps even more now in 2014 than a year ago – is that ornament and surface patterned dress seem to form one of several streams in a highly diversified landscape of dress, body and other normative fashions, which are currently undergoing considerable change. We have witnessed the emergence of use of almost dramatic body tattoos especially but not only for men. I will not develop an analysis of the strong presence of male tattoos in (Nordic/European?) cities here. So far I have (to my surprise) not come across any serious social or cultural investigation of this phenomenon. It is surely no longer strongly related to criminality, as when Loos wrote about this link more than hundred years ago. But it still reflects a certain transgressive expression – also dependent upon the amount and character of tattoos. This development may be related to performances of (perceived) unique identities and claims for recognition of these identities, which however, seem to be gradually developing into patterns of interconnection and perhaps even conformity in spite of or along with their origin in dissent.

Barthes claims that dress is a balance of normative forms and has meaning as a social model of collective behavior, as expressed in the following quotes:

*"An item of clothing is indeed, at every moment of history, this balance of normative forms, all of which are constantly changing"* (Barthes 2006, p.4)

*"Dress is, in the fullest sense, a 'social model', a more or less standardized picture of expected collective behaviour; and it is essentially at this level that it has meaning."* (Barthes 2006, p.14)

8 E-mail by Matilda Arvidsson (Lund University, Sweden), May 8, 2013: Call for Papers, CLC 2013: "Artistic and cultural praxes in the transitional and contested territory of urban public space.

The 'individual' 'choices' and expressions (may) gradually become part of emerging patterns and thus of 'new' 'social models'.

Printed patterns and body tattoos are cheap, accessible and attractive for (perhaps especially white Northern European?) women and men. They may be an outgrowth of (imitations of) feline patterns (and fake materials), which have been in fashion for several years now. During a trip to Paris after the economic crisis in 2009, I noticed two things about art: the trend was now (after the economic crisis) to be "new modesty" and a fashion described as 'felin' was mentioned together with a 'camouflage fashion' (Petersen 2011).

What model of social behaviour are "wild" patterns and theatrical tattoos presenting to us? Are they a challenge to 'civilized' and 'uniform' modernity as we thought we knew it?

Are they – in a post-modern era – a return to a fascination with decoration and ornament, characteristic of pre-modern 'primitive' eras and societies as they were often called also by Loos? Can these 'social models' be interpreted as expressions of the complexity and tensions of normative patterns present in contemporary pluralist societies? Are they indicators of a revitalized 'art of ornament' which have been admired for long in the Far East and the Islamic world, as Gombrich wrote? Or do they reflect regressive developments and discontent palpable, when Freud at the beginning of the Great Depression in 1929 wrote his reflections on *Das Unbehagen in der Kultur* or as the English title ran *Civilization and its Discontent* (1929/1962)?

Can these social models incarnated in this fashion be seen as constituting 'a nexus of creativity' by visualizing a presence of repeated patterns – diversity in human decoration and (gender) display? Display can be perceived as frightening but also as fascinating, which is often the case with male tattoos and sometimes with the female scarfs, which have been outright banned in different fields in several EUropean countries. It seems that the disapproval of tattoos is executed by (some) private bars and discotheques, who (in Denmark at least) disallow persons with tattoos, which are visible on hands and neck.

Erving Goffman wrote about gender display in his publication called *Gender Advertisements*, and he claims that there is no gender identity, "only a schedule for the portrayal of gender" (Goffman 1976, p.8):

"Displays thus provide evidence of the actor's *alignment* in a gathering, the position he seems prepared to take up in what is about to happen in the social situation. Alignments

tentatively or indicatively establish the terms of contact, the mode or style or formula for the dealings that are to ensue among the individuals in the situation" (Goffman 1976, p.1).

I have discussed Goffman's concept in an article on dealing with gendered perspectives on religions and the public/private divide, where I write:

"Modern European women are by now expected to enter the public sphere, and to participate in public life. However, their entrance is, in practice, only approved if they submit themselves to the dominant though (somewhat) diverse surface-secular norms governing life in the particular sphere they enter. This includes adhering to existing but mostly tacit dress codes" (Petersen 2012, p.133).

Women are globally experiencing changing living conditions and expectations, which influence their behavior, attitudes and dress. What has been called the 'Indian rape crisis' could indicate some of the difficulties and brutal consequences following along with these changes. – But not all consequences are luckily as brutal. The banal – and sometimes not so banal – issue of women's dress points to both changes and to patterns of individual reactions to some of these changes.

By displaying gender through pattern printed trousers, women (and some men) *may* perhaps indicate a taste for diversity and a distance from modernist monochromatic monism in dress fashion, which are perceived as out-dated, and a support of a more diverse display of gender, which may go hand in hand with a support for a more diverse landscape of law. [9] Western middle and upper class men are also experiencing very strict normative dress codes, as can be observed in any business journal or magazine. But the acceptance of gender diversity, including homo- and transsexuality, may also lead to a certain acceptance of less disciplined (male) dress, and perhaps a return of the fascination of the dandy – also among conservative men (Petersen 2011).

9 This may be considered an overstretched interpretation, but I think it goes in line with some of the findings and data, which formed the basis for my article from 2012, which was based on my participation in a EU research project RELIGARE: *Religious diversity and secular models. Innovative Approaches to Law and Policy* (2010-2013)

## Urban life and surface orders

Control of female attire in modern societies mostly takes place through market norms and fashion trends, and less through explicit religious or legal norms, but that female clothing may cause outrage and transition in urban landscapes is probably a worldwide phenomenon, and fashion is in several (most?) cultures a way to mark political, cultural, religious, sexual and other affiliations and attachments.[10]

The famous 'woman in the blue bra' who was attacked and beaten up by a gang of men during demonstrations in Cairo in December 2011 in front of rolling cameras has become the subject of many artist's interpretations of the Arab Spring, and the woman became a symbol of the Egyptian revolution as an icon. A recent exhibition *Arab Contemporary, architecture & identity* at the Danish Museum, Louisiana, showed several images of this symbol of both (female) resistance to conservative ideologies and of hybridity in/under traditional/conservative female dress.

The globalized world we live in seems increasingly governed by surface normativity and surface law, as Twining claims. This goes for architecture, contracts and dress, and "what lies beneath may be different from what is observable from the top" (Twining 2008, p.179).

The Arab world today flaunts the most ostentatious and modern architecture of the world which is perhaps at odds with the underlying conservatism, although historian and critic of architecture, William Curtis claims that "(i)n times of rapid and sometimes violent change it is valuable to stand back from contemporary events and recall that societies and their architectures respond to long range wave motions beneath the surface of history" (Curtis 2014, p.149). Curtis also reminds us that one of the roles of monumental architecture is to idealize state power, and Jensen writes that "Architecture is a bound, relatively conservative art form and although it may be an unreliable sign, 'free' art often functions as a forewarning of the changes that architecture will later undergo." (Jensen 2014, p.225)

Perhaps the woman wearing the colorful bra under her black traditional dress may represent as much of a forewarning of global societal changes than the ultramodern surface of contemporary Arab cities, where

10 See for instance Tania Branigan (2014) North Korea's Fashion Police. *The Guardian* April 22, 2014

"a traumatic search for identity is creating an Arab architecture and shaping an Arab space characterized by dislocation and anachronisms, where the most advanced forms and technologies are pressed into the service of the most conservative ideals and lifestyles… The official Arab discourse especially in the conservative Arabian Gulf, constantly claims that modernity and modern architecture must respect old "traditions and customs" and the Islamic "cultural values". On the surface they apply the so-called 'co-existence model which takes into account the forces of modernization and change (globalization), while at the same time responding to the preservation of traditional elements in the society'" (Ziadeh 2014, pp.55-56).

Market conditions and market norms increasingly govern architecture, law and fashion. Fashion is probably the easiest to change and both on surfaces and under surfaces it may be a forewarning of changes to come even if it is business and not 'free art' by giving expression to social models and expected and tolerated collective behavior.

Ala Al Harmaneh in his article "What did the people want. Re-thinking the (Post-) Arab Spring" writes about the 'lessons' of this movement amongst others under the headline "It's the Women, Stupid":

"Several days ago, in a discussion on Facebook addressing the harassment of women not only in some Arab cities, but in India and elsewhere, I wrote "it must be a combination of poverty, social alienation, identity confusion, machismo, religion and troubled masculinity that lead men to harass women". Later on, I discovered that I was describing the main problem in the society in general." (Al Harmaneh 2014, p.209)

Surfaces may be modern, conservative, wild, confused, hard, softer, rough or more polished, as well as other things – and these surface layers and plateaus are increasingly linked in emerging globalized normative spaces and law-scapes. The diversity of fashion/dress may reflect market prompted reactions to diverse segments of consumers/costumers – who are becoming *accustomed* to rapidly changing living conditions and may be demanding images and representations of themselves, which reflect those changes – at affordable prices. Prices, which are again possible, because Chinese workers also in the beginning of the 21st Century work for low wages, not least in the textile industries, turning out high profit but low cost products geared towards different globalized markets and audiences, who no longer demand state uniformity but rather market conformity reflecting changing customs. Will we also be seeing market produced models of (gendered) norm- and law-making reflecting tensions between and co-existence of local traditions and globalized conditions? Will diverse, decorative and post-modern, post-sovereign,

post-positivist ideological norms and legal organisms take over the role of monist and uniform models governing the 20th century? Will that lead to increased concerns about justices, sustainabilities, harmonies, obligations and other values involved in and related to the crafting of these normative creations?

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NAVEIÑ REET: Nordic Journal of Law and Social Research (NNJLSR) No.5, 2014, pp. 145-162

# Romanticism in Law & Art
# German Romanticism, Creativity, and European Legal Culture

*Kjell Å Modéer*

## Legal scholarship and romanticism

The connection between law and romanticism is certainly for many lawyers a rather odd relation. This article, however, starts out with such a hypothesis: Late modern legal scholarship of the 21st century can be identified as a part of a new romanticism. Also the late modern legal cultures, defined as the cognitive structures of the contemporary legal actors (judges, lawyers, law professors), are included in this trend, in which the transnational deep structures of the law are an important part of the current legal paradigm (Tuori 2002). Romanticism is a phenomenon related to the early 19th century. Generally the law – and especially modern scholarship – has its roots in the early 1800's as an essential element of the romantic era (Ziolkowski 1990,94).

This late modern romanticism of the early 21st century has elements common with those of the early 19th and early 20th centuries even if interpretations and contexts are quite different. The current romanticism of the early 21st century has been described as "an almost obsessive return to Romanticism" (Ziolkovski 1990, 383). In relation to law and legal scholarship it's more an identifiable and visible trend than a dominant cognitive paradigm; it has the character of a legal construct composed as a contra-force to the characteristics of the modernity of the 20th century – a synthesis in progress.

The romanticism of the 19th century was a contra-force to the dominant rational cognitive structure constructed by the philosophers of the Enlightenment. Also the national romanticism of the early 20th century became a contra-force to the dominant positivistic, social, realistic and even naturalistic trends within science, law, literature and art. The current romanticism has been observed e.g. within comparative law by the Yale legal historian James Q Whitman and defined as the "neo-romantic turn" (Whitman 2003, 312) Also the legal anthropologist Rebecca R French at Buffalo University has identified keywords for this transmission within contemporary legal cultures, *retraditionalization* and *desecularization* (French 1998). The renaissance of legal concern in the concepts of customary law and traditions, (Glenn, 2014) and the visibility of religion in the late-modern societies as well as religious arguments in legal decision-making (Gordon 2010) are just a couple of examples to proof the contents of those keywords in current legal cultures. In this article I will try to identify the relationship between law, religion and

art and make a comparison between the romanticism of the 19th century and the "neo-romanticism" of the 21st century.

Two German artists, one from each paradigm, Caspar David Friedrich (1774 – 1840) and Anselm Kiefer (b. 1945), will demonstrate the validity of the hypothesis made. With help of the ruin, a metaphor often used within discourses on romanticism, this sketch will demonstrate the interdisciplinary transparence within law, religion and art as a necessary part of a romantic paradigm.

## Italy as a geographical center for 19th century romanticism

Johann Wolfgang Goethe's book on his *Italian journey* 1786–88 became one of the most important catalyst works for the counter-force to Enlightenment rationalism and to contemporary modern thinking. Goethe's book on Italy is no travel-guide for people fascinated in Italian landscapes of art (Michel 1976). Instead it has more the character of a subjective pleading for a reflection on the European cultural heritage. Conscious historical reflection was a key element for the romanticists, (Benjamin 2008, 19) and by going to Rome you were regarded as a reflecting individual included in the history.

Goethe's *Italian Journey* became a classic for all those romantics, who in the early 19th century made their cultural pilgrimages in his tracks. One of them, the Swedish professor of aesthetics at Uppsala university, Per Daniel Amadeus Atterbom, went on a journey to Rome in 1817. On his way to Italy he met in Dresden with Caspar David Friedrich (who born in Pomerania regarded himself as a "half Swede") (Atterbom 2002, 112). To Atterbom Friedrich was "a sort of metaphysicus with a brush" who expressed a symbolic meaning, "Bedeutung", in his art. Atterbom himself experienced such an "*Aesthetical Wonder*" when he for the first time observed Rafael's painting S:ta Cecilia in the art gallery in Bologna (Atterbom, 2002, 404). With help of his book Goethe not only inspired the first generations of Italian tourists of the 19th century, he also gave nutrition to the European romanticism as such.

Artists from Europe and the United States made their cultural pilgrimage to Italy and were inspired by the historical remnants of the Roman Empire embedded in the romantic landscape.

## The Ruin – a metaphor with different references

First of all we have to identify legal constructs related to culture, history and tradition. It was – and still is – the main task for jurists who act within the context of romanticism. The ruins in Rome or elsewhere in Europe were the most frequent metaphor for historical reflection. The English painter Joseph Mallord William Turner (1775-1851) is a good example of an artist who frequently used the ruins as motive for reflection on the past. His famous paintings on English ruins, *Tintern Abbey in Wales* (1794-5) were followed up some years later with William Wordsworth's poem *"Lines composed a few miles above Tintern Abbey"* (1798). During Turner's two Italian journeys 1819-20 and to Rome 1828-29 the Roman ruins became a repeated motive for his historical reflection (Costello 2012,166).

"The ruin of a building… means that where the work of art is dying other forces and forms, those of nature, have grown; and that out of what art still lives in the ruin and what nature already lives in it, there has emerged a new whole, a characteristic unit, a unit which is no longer grounded in human purposiveness but in that depth where human purposiveness and the working of non-conscious natural forces grow from their common root…"(Simmel 1959, 259).

Also within the rhetoric of 19th century jurists the metaphors became important to express their historical consciousness. When the professors of Roman law within the Historical school of law put all their efforts in reconstructing the Roman law system in Germany for the needs of the 19th century, they metaphorically made use of all the remains of legal ruins and their historical artifacts.

Savigny's imperative to his students was to return directly to the sources, to observe how history really took place; he wanted to explore "*wie es eigentlich gewesen ist*". And when Savigny talked of the importance of going back to the original sources and the dwells he constructed its elements by calling them *legal sources*. One of the main tasks, though, for the members of the historical school was to identify the historical legal sources and bring them to the public. For the historical school the living law, the customary law, which as a tradition continuously had been brought between the generations, became the dominant interest.

The German philosopher and sociologist Georg Simmel (1858 – 1918), a contemporary pioneer to the jurist and sociologist Max Weber, took an anti-positivistic view within sociology. In 1911 Simmel wrote a frequent-quoted essay on the ruin, (Simmel 1911, 265) in which he argued the ruin represented an encounter, a struggle, a battle between

a Hegelian will constantly striving and the "downward-dragging, corroding, crumbling power of nature." (Simmel 1911, 265) Simmel argued that ruins are articulations of the battle between nature and culture that resides within all people. For Simmel, the "form of the soul" was dictated by this struggle between nature and culture, something that the ruin preserved in a "profound peace." He noted: "The aesthetic value of the ruin combines the disharmony, the eternal becoming of the soul struggling against itself, with the satisfaction of form, the firm limitedness, of the work of art."(Simmel 1911, 265) To the American professor of comparative literature Andreas Huyssen (b. 1942), ruins allow for the "hardly nostalgic consciousness of the transitoriness of all greatness and power, the warning of imperial hubris, and remembrance of nature in all culture." (Huyssen 2006, 13).

## Caspar David Friedrich (1774 – 1840) – The Master of Romantic Ruins

One of the most representative artists within German romanticism was Caspar David Friedrich, born in Greifswald 1774 and trained in Copenhagen. He spent a great deal of his career in Dresden even if many of his paintings found inspiration in his native region, Pomerania.

The young artists in Pomerania around 1800 made their peregrinations to the Scandinavian countries. The artists Philipp Otto Runge (1777–1810), Caspar David Friedrich and Georg Friedrich Kersting (1785–1847), all of them characterized as "awesome North-German pioneers within romanticism". All of them went to Copenhagen to study art. In Copenhagen the education was free of charge, and the professors Nicolai Abraham Abildgaard (1743–1809), Jens Juel (1745–1802) and Christian August Lorentzen (1749–1828) had international reputation. After the studies in Copenhagen all the German students went to Dresden, the cultural center of German romanticism, Friedrich in 1798, Runge in 1802 and Kersting in 1810.

Also Friedrich's contemporary friend in Greifswald, the law professor Karl Schildener (1777–1843) wanted to go to Dresden. This city not only had an art school and famous art museums, it was also an attractive center of its time – *Florence of the North*. Also to Schildener, who spent the summer 1800 in Dresden, the city became an impressive experience. Schildener left Dresden for Göttingen to study archeology, an enduring field of interest for him. To his friend Friedrich the archeological artifacts in the nature played an important role, too. His painting *Dolmen in snow,* "Hünengrab im Schnee" (1807) belonged to the most important pieces in Schildener's increasing art collection (Hinz

1968, 25). Karl Schildener aimed to be an artist, too, but the Greifswald law professor Emanuel Friedrich Hagemeister convinced him to be a jurist.

For Caspar David Friedrich German romanticism included a critical reflection to the motive he painted: "The painter shall not only paint what he sees in front of himself, but also what he sees within himself…". The artist has to have a mental, metaphysical relation to nature.

Friedrich's paintings belong to the masterpieces of German romanticism and have inspired not only artists but also lawyers and clergy. Of special interests are some of his paintings with ruin motives from Greifswald and the monastery of Eldena, some miles east of Greifswald. Those paintings are of special interest as the function of the ruin in Friedrich's motives has been widely debated. Karl Whittington has recently argued that Friedrich's painting *The Abbey in the Oak Forest* (1810), destroyed in April 1945 in Berlin, together with other of his contemporary paintings can be viewed as "deathscapes". Whittington argues, that in those pictures "death and burial - - - are depicted as separate from contemporary rituals and institutions, placing the space of death into the past, and, especially, back into the hands of the church, an institution from which death had become increasingly separate". (Whittington, 2012). I will argue that those painting demonstrate not only were interpreted as dead artifacts but also *as living ruins* (Modéer 2011, 128). Even if the landscape is desolated, the institution, the church is still working, upholding a *living tradition*, adjusted to a new context (Glenn, 2014).

For Friedrich gothic churches and monasteries represented "tremendous remains from past centuries, - - which as witnesses raises from a previous great past over an ailing present"(Friedrich 124, 173). His paintings were filled with metaphysical metaphors, attracted also the jurists of his time – one of them his Greifswald friend Karl Schildener. Schildener's cultural pilgrimage went to Sweden 1800 where he spent some years; he studied Swedish law at Uppsala University and was involved in discussions with his Swedish colleagues (Modéer 2007, 237).

Schildener was a representative of the historical school. He edited the medieval laws from the island of Gotland in the Baltic Sea, *Guta Lagh*. They were published in 1818 and became model for other similar editions in other countries, also in Sweden and Denmark (Modéer 2007, 238).

For Schildener and his contemporaries the artistic living ruins became an artistic metaphor associated not only to history and living traditions but also to historically founded legal systems (Modéer 2007, 233).

## Romantic Art in Legal and Religious Contexts

In the post-revolutionary period of the early 19th century, characterized by rationality and early tendencies of secularism, romanticism and early revivalist movement became important contra-forces (Modéer 2007). The jurists, conservative and critical to modern reforms, found their argumentation in traditions and history. With help of historical artifacts the archeologists concretely could proof Savigny's words "*wie es eigentlich gewesen ist*". The jurists were on the same track. The reconstruction of Roman law within the German legal system in the 19th century focused on the jurists' historical consciousness within a romantic paradigm as it was articulated by the artists, authors and composers of its time. And the romantic artists supported and stimulated this paradigm with their paintings; they painted landscapes filled with metaphors associated not only to historical law and traditional religion but also to the subjective being (*Dasein*). Idealistically oriented and believing jurists experienced a *sublime* relation between law and religion. They explored their experiences not only in the private sphere; the sublime was also visible in the public sphere in their daily-life profession as judges or law professors. The romantic jurists were to a great extent inspired from Friedrich Schleiermacher (1768 – 1834), theologian and philosopher at the Reform University in Berlin, and father of modern liberal theology with its individualistic and nature-oriented approach to belief.

The revivalist movement and members of the "*Historical Christian School of Law*" influenced Friedrich, Wilhelm Joseph Schelling (1775–1854), the idealistic philosopher, and historically oriented legal philosophers and law professors as Friedrich Carl von Savigny and his circle of students after 1815 (Haferkamp 2009). One of Savigny's special students, Moritz August von Bethmann-Hollweg (1795–1877), was affiliated to the revivalist movement. He regarded the historical courthouse comparable with a "gothic cathedral" in which "the vaults seemed to hover" ("Mit einem 'gotische Dome' vergleichbar, bei dem 'sein Gewölbe in der Luft zu schweben scheint'."- Haferkamp 2009, 7). Also the romantic law professor Schildener used this meta-physical metaphor.

The old oak forest could in Friedrich's paintings be identified as church pillars in the nature, creating a surviving continuity. His paintings were, so Ludwig Richter, "symbolic pictures from the nature, which sensualized abstract thoughts through landscapes"(Börsch-Supran 1973, 162).

Art, history, philosophy and theology were interacting in the time of romanticism. The small university town Greifswald in Pomerania (northern Germany) became a center for German romanticism the decades around 1800. Personalities like the historian Ernst Moritz Arndt (1769–1860), the clergyman and poet Ludwig Gotthard Kosegarten (1758–1818), the professor of legal history at the University of Greifswald, Karl Schildener (1777–1843), all of them were friends of Caspar David Friedrich. This intellectual cluster interacted in a very constructive interdisciplinary dialogue.

The legal historian Karl Schildener is a good example of the German legal scholars, who were attracted by the religious romantic movement. He was connected to the revivalist movement and its members of the Historical-critical school of law. In 1830 Friedrich Julius Stahl stated, that with Schelling a new movement had started in philosophy: "The pursuit to be a Christian philosophy" ("Das Streben, eine Christliche Philosophie zu seyn." Stahl 1830, 363).

The pastor of Altenkirchen on the island of Rügen, Ludvig Gotthard Kosegarten, was famous for his shore sermons in his parish. Schildener and Friedrich shared his romantic religiosity. In his autobiography Schildener emphasized the importance for him of the Sunday worships in the Greifswald cathedral. There he met with people, who had their daily works, but "in a building and under a vault which indicated something more than our earthly existence" (Schildener 1840); it had a great impact for his religious identity as a romantic legal historian. Metaphysics was a part of the law professors' cognitive structures in the 19th century.

Also the architects of the time found their ideals in the Gothic architecture and the medieval Gothic cathedrals. Karl Friedrich Schinkel's painting *Cathedral Towering over a Town 1813* is a good example of how art and architecture not only emphasized the historical perspective in a neo-classical style but also communicated the motive's metaphysical dimension. This painting is also destroyed. A copy by Karl Eduard Biermann (after Schinkel's original), Dom *über* eine Stadt, is to be seen in Neue Pinachotek, Munich.

## Neo-romanticism and the Law in the Late Modernity

Now we turn to the neo-romanticism of the 21st century. Several examples on the interest for romanticism in art can be mentioned. Successful exhibitions on Caspar David Friedrich and his paintings have been exposed in Germany, Sweden as well as in Denmark. His works have also inspired current artists in a remarkable way. How the Friedrich heritage has been administrated and developed by current Swedish artists was demonstrated in

an exhibition at the Swedish National Museum in 2009 (Friedrich 2009). Even if it has been argued that there always has been a continuous interest in romanticism – a romantic current a secret source also among the modernist artists of the 20th century – it was first with the post-modernism this new interest for romanticism and Caspar David Friedrich became manifest (Nilsson 2009, 8, 10).

Even if the "cult of ruins" – as we have learnt – has been a part of the sociological and literary critic discourse since the 18th century it has got a new renaissance in the late modernity. Andreas Huyssen has noted, "over the past decade and a half, a strange obsession with ruins has developed in the countries of the northern transatlantic as part of a much broader discourse about memory and trauma, genocide and war." (Huyssen 2006, 7). Not only the ruins of World Trade Center in NYC after "September 11", but also the ruins due to the decline of the industrial era have resulted in important discourses. "The more spectacular the ruin, the more intriguing it is. Probably because we recognize that someone invested tremendous time and effort bringing it into existence. What powerful motivation did they have? And what terrible fate overcame them and their aspirations, that their once–grand edifice is now returning to the earth?" (Skrdla 2006, 17).

## Germany as a Center for "Reckoning with the past": Anselm Kiefer

After World War II the ruins as a metaphor got a very special connotation. The devastated European civilizations became not only a symbol of an apocalypse but also for the collective memory of the upcoming generation. There was generally a fascination for ruins in the post-war era (Macauley 1953, 453). Also the concept of ruins got new dimensions and observations.

The works by the contemporary German artist Anselm Kiefer are in that respect of great interest. Kiefer was born in Donaueschingen, Baden Würtemberg 1945. He could have regarded himself as a child of *Stunde Null*, but as a grownup he distanced himself to this temporal concept as such. "Germany never went back to zero after the war", he has stated. "There is always the burden of history on your back." (Chayka 2010).

Instead Kiefer was included in the post-war generation, which from 1968 started to reflect on the history of the near past, the history of his parent-generation, which was closely involved with the WW II, its laws, politics, and culture.

In Kiefer's paintings there is an evident relationship between him and the great romantic painters of the 19th century, William Turner and Caspar David Friedrich (Wagner

2008). The 19th century romanticism can be identified as an iterated projection is Kiefer's paintings. Already and especially in his early paintings *Heroic Symbols* (Heroische Sinnebilder) from the late 1960ies associations to the Nazi-period became provocative parts in his paintings, which tried to catch German identity. His arguments became even stronger as he used irony as a part of his interpretations. Friedrich's famous painting *"Monk at the Sea"* got a historical projection when Kiefer made his interpretation of this painting with the monk substituted by a person (himself) making *Hitler-Gruss*. In 1970 such projections were taboo, today they are regarded as a contribution to an important and indispensible part of the German historical identity. From this period onwards Kiefer wanted to be regarded as an irritating part of the German cultural nuisance "worrying away at the scabs of memory until they revealed open and livid wounds again" (Schama 1997, 168).

The reckoning with the near past is a repeated theme in Kiefer's paintings. His 1981 painting *Interior* (Innenraum) in Stedelijk Museum in Amsterdam shows the Mosaic Hall in the New Reich Chancellery in Berlin, totally damaged in 1945 and only documented with help of photos, one of which inspired Kiefer for this monumental painting. Another photo from immediately after the war shows the Mosaic hall in ruins. Also this picture is interpreted in Kiefer's *Interior* of Albert Speer's neo-classicist monumental state architecture – totally laid in ashes after the war. In the Nuremburg Trial 1945-46 Albert Speer was sentenced to twenty years in prison. His moral and metaphysical guilt in the Holocaust became an iterating, immanent but evident metaphor in Kiefer's paintings (Busch 1999, 11).

The painting *To the Unknown Painter*, Dem unbekannten Maler (1983), has a similar motive interpreting the neo-classicist buildings by Albert Speer and contributing to the collective memory. Similar message appears in the painting *Pillars* (Säulen) from 1983 at Louisiana Museum of Art; its another example of how Kiefer used the impressive classical architecture, adored by the Nazi elite, laid in ruins. It's the burned black ruin of a building demonstrating power. As in the *Interior* there are no human beings in the painting. He shows the ruin as a dead artifact. Also in this painting Kiefer demonstrated his affirmation strategy, confronting the artist as well as the viewer with a taboo subject in the post-war Germans' conscience (Louisiana Undervisning 2011).

By identifying "*memorial sites*", Gedenkstätte, post-war Germany has been able to make the reckoning with the near past in a concrete way. The Historical struggle 1986/1987 among the historians about their responsibilities regarding their disastrous past became an important discourse for establishing the contemporary history as an important part of the

late modern German (legal) identity. Especially within the law the discourses regarding "Hitler's Justice" (Ingo Müller, 1991) resulted in a special subdivision within legal history – *Juristische Zeitgeschichte* (Stolleis, 2014).

A contemporary *memorial site* is the restored Parliament Building in Berlin, conquered as a site for democracy after the German reunification 1990, restored after having been laid totally in ruins 1945. In one of the towers of the parliament building Anselm Kiefer in 1998 created a painting "*Only with wind, with time and with sound: Hommage à Ingeborg Bachmann".* The painting shows a totally eroded mudbrick tower in Mesopotamia, and in the upper part of the painting the quoted line from Ingeborg Bachmann's poem "Exil" is transcribed.

"Only with wind, with time and with sound" associates to symbols of power and how the tower of Babylon demonstrated the hubris of human beings and their overestimation of pretended possibilities.

Kiefer has stated that in this painting he emphasized the mud of the remains of the tower, which in process of many centuries has fallen into ruins, the fugitive and instant occurrences that wind, time and sound represent, and he makes it so evidently, that the apparently solid and fugitive are equals in front of the eternity.

Kiefer urges the viewer to accept the temporal fugitive character of passing actions and plans, especially important in the German parliament building where the daily staging of power and feasibility is present (http://kunst-magazin.de/blog/page/191).

In his works Kiefer has a special relation to the ruin as a process: "What interests me is the transformation, not the monument. I don't construct ruins, but I feel ruins are moments when things show themselves. A ruin is not a catastrophe. It is the moment when things can start again." (Schwartz 2012).

In an interview at Louisiana Art Museum the artist explained his relation to religion. To Kiefer art can be defined as a quasi-religious phenomenon. When he was nine years old he as a Catholic took his first communion. He still looks upon this event as a crucial moment in his life. He expected an illumination, but it didn't happen. Instead he learnt from that experience that instead you get this quasi-religious form of illumination the moment when he creates art. Those moments are spiritual to him. Art connect things, which are separated. Art is the only way to connect sciences, he argues. The scientific specialists only way to have contact is by the art. Art as mystery connects (Louisiana Museum).

Kiefer began to study law but turned over to art. Nonetheless his paintings connect the historical perspective with that of law and justice. Duncan Kennedy has identified the period after 1945 as a human rights paradigm dominated by democracy, rights, rule of law and constitutional law (Kennedy 2006). Consequently Anselm Kiefer has used the Rumanian Jewish poet Paul Celan (1920–1970) and his famous poem *Death Fugue*, "Todesfuge" (1948) to investigate the horrors of the Holocaust. When he from the late 1960ies provocatively expressed his tries to come to terms with the past by identifying the dialectical relation between the German and the Jewish, he used Celan's metaphor, the two women Margaret (from Goethe's Faust) and Sulamith (from the Song of Solomon in the Old Testament) (Buhl 2010, 99). Margret with her golden hair, Sulamith with her ash-grey hair appeared in a couple of his paintings 1980 (Buhl 2010, 103). Even if German and Jewish culture couldn't be integrated in the fateful modern German history it will forever be unified in an involuntarily traumatic complex of guilt (Buhl, 2010, 103). War and Holocaust in Kiefer's works don't represent any romantic landscape under subjective reflection. In his paintings the landscape is transformed into a functional sterile military terrain, a memory site, where the tracks are transformed into a metaphor for transportations of Jews leading to the black hole in modern history, which can't be painted (Buhl 2010, 104). His landscapes are painted without possibilities for human dignity life to survive, the "*Unrechtsstaat*" as an apocalypse. If Friedrich's ruins after all can be interpreted as *living ruins,* Kiefer's apocalyptic ruins give no space for such an interpretations. They are dead, sterile and just – memory sites.

Also the ruin as metaphor is evident in Kiefer's works. In Sophie Fennies' film "*Over your cities grass will grow"* Kiefer has skillfully demonstrated his use of this metaphor. In his studio in southern France he created his works as a "ruination" with references to Friedrich's use of ruins in his art (Art 2011).

## Conclusion: "Art will survive its ruins" (Kiefer 2010)

Art is a great communicator to the relation between law and the past. As the past is in focus to romanticism, this period is a great period for an investigation of this relationship. Caspar David Friedrich in the early 19th century and Anselm Kiefer two centuries later are involved in discourses on the reckoning with the past in very different contexts.

Both of them have a fascinating relation to metaphysics. To Friedrich nature was a part of the creation, his Christian faith was an important part of his art. Friedrich's friend Karl Schildener embraced also this metaphysical approach – also to the law. Law was defined in a broader organic sense, not directly with legislative power. In his post-modern

historical paintings Kiefer has a similar approach. When Kiefer is reckoning with the past, he involves the viewer in his discourse on collective memory and guilt. With help of his infertile ruins and landscapes the viewer can identify the consequences of the historical past. Kiefer has in an interesting way worked with historical motives from the vulnerable 20th century and conceptualized the law and legal culture within his paintings.

If history by Friedrich was a motive for inspiration, by Kiefer history it's used as an argument not only for a moral reflection but also for a visualization of the consequences of the *illegitimate state*, der *Unrechtsstaat*. Constitutional perspectives are embedded in Kiefer's art. He demonstrates the manifest impacts of state power in relation to individual power: Totalitarianism in relation to democracy and human rights. Even if Kiefer is very modern and even to some extent avant-garde in his art his paintings also can be interpreted as related to the late modern legal culture, in which e.g. constitutionalism, justice and human rights are important key-words.

In Kiefer's paintings there is also a quasi-religious message on the need for a *civil religion* to uphold a modern society. Friedrich found his inspiration in the renaissance, Kiefer in the values identified in the pre-modern society, before the world catastrophes of the 20th century took place during the Great wars.

The two artists also used the constructs of time and space when they brought their messages to their viewers. Both of them make use of legal as well as historical metaphors for how to interpret our relation to history and the past.

Since the European legal profession appeared in the middle ages there has been a close relation between law and art. Art expressions have been exhibited in legal life and legal culture. But, as this article would like to articulate, art can also appear immanently or be embedded in legal contexts. Law and art can – as in the metaphysics of Caspar David Friedrich and Anselm Kiefer – interact and intertwine, telling us that not only art but also law is created within a historical process. This comparison between the legal cognitive structures of the early 19th and 21st centuries with their similar use of metaphors in relation to art indicates the hypothesis of this article: Romanticism is to be seen within the European legal culture also in the 21st century!

Let me conclude with a caveat: The methodology of comparative legal history has (at least) one major problem. Comparing different time periods means a comparison of different contexts and also different meanings of terms and concepts. Comparisons of time therefore have to be looked upon from a metaphorical perspective.

Universal legal metaphors were used by the jurists of the 19th century. They created the metaphor *legal sources* to describe the instruments to find the written as well as the natural law and the living customary law. In the more or less transparent legal cultures in the early 21st century the legal sources again are not only universal (e.g.international public law) but also traditional customary law (e.g.indigenous law).

This article has tried to demonstrate the relationship between law and art within two different cognitive systems and also different contexts. The romantic era of the early 19th century became a contra-force to the rationalism of the French Enlightenment. The neo-romantic trends within current legal scholarship can also be related to an earlier paradigm: The realistic, pragmatic and positivistic modernity of the 20th century. Both contra-forces are of importance for the artists chosen for this article, Caspar David Friedrich and Anshelm Kiefer – and also for the jurists in their individual paradigm.

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# Book Review:
# Subversion and Sympathy – Gender, Law, and the British Novel

Eds. Martha C. Nussbaum & Alison L. LaCroix, Oxford University Press,
New York, 2013, ISBN 978-0-19-981204-2

*By Marya Akhtar, Attorney-at-Law*

Law and art is – as this issue of the journal illustrates – a broad and far-reaching discipline. Within this, law and literature seems somewhat conventional as a vast amount of literature has already emerged on the subject and courses are being taught on the subject at law schools around the world.

The contribution found in the form of an anthology edited by Martha C. Nussbaum and Alison L. LaCroix, brings revival and new perspectives to the discipline, proving its continuing importance and the many facets yet to be explored in the law and literature interface.

The purpose of the book is according to the introduction by the editors to "*reinvigorate the law-and-literature movement by displaying a range of ways in which literature and law can illuminate one another and in which the conversation between them can illuminate deeper human issues with which both disciplines are concerned. It makes a substantive contribution, by shedding light on a range of gender-related issues, ranging from inheritance to money lending to illegitimacy; but it also makes a methodological contribution, displaying (and discussing) a range of perspectives that exemplify the breadth and range of this interdisciplinary area of scholarship […].*"

The list of contributors is long and includes both legal academics (Baird, Ferguson, Lacy, LaCroix, Levmore, Meyler, Nussbaum, Simon-Kerr and Stone), judges (Posner and Wood) and scholars from other fields, namely philosophy (Baron) and English (Claybaugh and Vermeule).

The book is thematically divided into four sections: 1) Marriage and Sex, 2) Law, Social Norms, and Women's Agency, 3) Property, Commerce, Travel, and 4) Readers and Interpretation.

In the first section of the anthology, an interesting history of obscenity is provided in chapter 3, focusing on the British novel, the background of the protection of free speech in the US First Amendment, and more specifically on American obscenity laws providing exceptions to free speech.

The author, Stone, states that contrary to common belief, laws on obscenity (i.e. the illegality of sexually arousing material) are not particularly old or deeply rooted in Western culture. We are taken through literature of the times (apart from ancient Greek, particularly British literature which is the focus of the anthology) until the 18th century and given examples of fiction and poems which could be written, bought and read freely despite its more or less explicitly sexual context. While such literature may have been perceived as immoral or perhaps just distasteful, the general opinion seemed to be that it was not a matter to be regulated by the State. Even when the first true obscenity prosecution in Anglo-American history took place in 1708, against James Read, a printer, for publishing the poem "the Fifteen Plagues of a Maiden-Head" about a woman desperately wanting to lose her virginity, it ended in a dismissal by the Queen's Bench Court. The grounds given were that the publication created "*no offence at common law*" and "*It indeed tends to the corruption of good manners, but that is not sufficient for us to punish*."

The author provides other illustrative examples of cases brought before British courts, most of which were exceptional and led to dismissal or charges only on specific grounds. Stone concludes that the US First Amendment seems not to exempt obscenity from the protection of free speech because of the common law heritage from the British, but rather, despite of it.

Posner's chapter on Jane Austen, chapter 4, begins and ends with a reminder that the law and literature movement is not only comprised of illustrative jurisprudential issues or specific doctrines, procedures or institutions (as the case is with Billy Bud, the Bonfire of the Vanities and Paradise Lost), but also: *"[t]he value for lawyers and judges and law students of great literature"* which *"stimulates the imagination; increases one's expressive resources; provides psychological insight; creates a sense of how social norms and institutions (though they are not our norms and institutions) influence behavior and make the reader a better, more careful, responsive reader; increases the reader's sensibility to irony, incongruity, and folly; and, like philosophy and history and social sciences, broadens one's intellectual horizons*".

In chapter 6, a part of the second section of the book, we learn of Tess of the d'Ubervilles' purity. Hardy's novel, analysed by Baron, portrays an ambiguity in the distinction between seduction and rape in a story about the young girl, Tess, who comes to work for Alec d'Ubervilles and his mother at their estate and here, loses her virginity to Alec whilst asleep in the woods. Baron quotes many pivotal excerpts from the novel illustrating the deliberately ambiguous setup for answering the "what happened"-question of the plot. On this question, Baron notes that it should *"not be confused with the "was it a rape?" question; the latter requires attending to what it takes for something to count as a rape, whereas*

*the former does not. In failing to give us what we need to answer the first question, Hardy prompts reflection on the second*."

Baron draws a contemporary comparison between the tactics used by Tess' employer and seducer/raper (his role is left deliberatively open according to Baron) and the commonly known strategies employed by sexual harassers at workplaces. This is interesting and shows the timeless relevance of the issues dealt with in the novel.

Another comparison is, of course, to the recent and current rape laws. Attention is given to the US rape laws and cases (although the same is true for many other jurisdictions as well), according to which verbal refusal generally is not sufficient for persecution and physical resistance is expected unless circumstances are such that resistance would be deemed dangerous or the victim is in a state of shock.

According to Baron, Hardy challenges the assumption that lack of resistance to the utmost inevitably leads to responsibility for the incident and that a women in such a situation cannot properly be viewed as a victim of rape. The powerful and current points in the chapter make it one of the very best contributions to the book.

Another particularly interesting chapter in the same section deals with illegitimacy, chapter 7, "The Stain of Illegitimacy: gender, Law, and Trollopian Subversion", by Nussbaum. Through reference to various writings, the chapter deals with the difference in how illegitimacy affects a child depending on its gender. Specific mention is given to two of Trollope's novels: Ralph the Heir and Doctor Thorne. Nussbaum shows how Trollope challenged the conventional description of the bastard child (male/female), a person with leanings towards lying, cheating and indecent behaviour; he did not do so by making his characters the exact opposite, but (and this is specifically true for Doctor Thorne dealing with the life of a girl born out of wedlock), by providing the reader with an understanding behind the anxiety of the Victorian society towards illegitimacy. The Victorian spirit of prohibition and control reacted forcefully against anyone embracing pleasure, play and jokes in a self-expressive and uncontrolled manner, anyone being "*in effect, the free human being*", as the illegitimate children in Trollope's two novels to a large extent represent. The novels, thus, confronted conventional thought of the time, in an artistic and subtle manner.

Braid's contribution, "Law, Commerce, and Gender in Trollope's Framely Personage" is the first chapter in the third section of the book. Braid's contribution is based on the novel Framely Personage, described as a "*cautionary tale of what happens when a man […]*

*seeks relationships outside those constituted by marriage and family".* Baird's analysis tells us that Framely Personage was a work of fiction meant to be the utopian dream for the professional class of the Industrial Revolution, oddly enough not mentioning commerce or industrial progress – the fundamental pillars of the Industrial Revolution – but instead reverting to traditional family values. The novel features female characters foreseeing the misfortunes of the male protagonist upon his attempt to act in the outside world of commerce where he is met with legal fraud and disloyal acquaintances.

LaCroix gives insight into "The Lawyer's Library in the Early American Republic" in chapter 12, part of the last section of the book. Taking up some of the points raised by Posner in the earlier chapter, LaCroix explores the role of fiction in the profession of lawyers and judges – specifically lawyers and judges in the late 18th and early 19th century US.

The importance of fiction in this circle and this period was no different than (and, indeed, a contribution to) the importance of a "*civilized environment of learning, culture and Enlightenment sensibilities*".

A part of the chapter focuses on lawyers and writers. Much of the analysis is concentrated on the Supreme Court Justice, Joseph Story's poem "The Power of Solitude". The poem, according to LaCroix, represents acknowledgement of the fact that individuals need to express their emotions and sentiments in order to live healthily within the Republic. Furthermore, these very individuals form a crucial part needed to improve the Republic: for scholars and practitioners alike "*involvement in literature was a symbol of natural virtue, progress, and membership in the community of civilized nations*".

The remainder of the chapter focuses on lawyers and readers. Here in particular, the importance of female literary contribution is highlighted in Story's letters and speeches. LaCroix states that *"[f]or Story, the shining practitioners of the novelistic craft, with their virtually unlimited potential to awaken kindred sympathies, were women*".

Overall, the book provides excellent insight – both to those familiar with the novels, the literary genre and/or the law-and-literature theme and those introduced to either part for the very first time.

Although each chapter in its own right sheds light upon the importance of the British Victorian novel in order to gain a deeper understanding of gender and law, Wood summarises the importance quite accurately in the preface to the book: the most important

contribution of these novels is their ability to put a judge into a different world where she lives in an alternate place and time for a brief moment. This helps the judge, according to Wood, to distinguish between what is fixed and what is culturally dependent.

The same, of course, is true for all lawyers. Practitioners (in law firms, governments or organisations) and academics alike need to have the ability to understand factual circumstances in depth and go beyond their conventional horizon whether writing a memorandum to be presented to a client, litigating a case in court, examining the need for new legislation or exploring interdisciplinary research. The mutual enrichment of law and literature has long been appreciated by writers and lawyers alike and still holds its significance, as proven by this anthology.

## SPECIAL ISSUE OF *NAVEIÑ REET:* NORDIC JOURNAL OF LAW AND SOCIAL RESEARCH: Law and Governance in Gilgit Baltistan, Pakistan

### Call for Papers for special issue 2015

*Edited by Livia Holden (Karakoram International University – Durham University)*

***NAVEIÑ REET:* Nordic Journal of Law and Social Research (NNJLSR)** is a peer reviewed annual journal striving to improve the quality of legal education, encourage legal research, and build a strong tradition of vigorous academic discourse and publication in Pakistan. NNJLSR aims to publish original and innovative legal scholarship in the diverse sub-fields of law and social sciences. NNJLSR is also keen to publish interdisciplinary socio-legal research that explores the interface between law and political, economic, social and legal institutions.

NNJLSR invites contributions for a special issue edited by Livia Holden on *Law and Governance in Gilgit Baltistan, Pakistan*. Contributions will examine the processes of policy making, state and governance, ancestral rights and indigenous knowledge, law and development, recognition of rights, and judicial and extra-judicial dispute resolution. In particular this special issue will scrutinize the discourse on democratic empowerment and participatory governance in relation to law practices and local conceptualizations of legitimacy. It will address the stakes of institutional development within and outside the state as well as the increasing role of NGOs and civil society. Commentaries of policies, case law, and ethnographic case studies with broader focus will also be considered if they adopt a comparative perspective that draws on the similarities and differences with the cultural and/or geopolitical setting of Gilgit Baltistan.

Non-exclusive questions and themes for enquiry will be:

1) Practices of law and governance
2) The role of ancestral rights and older practices of law within the transition process of development, globalization and negotiation of territorial boundaries
3) Multiple registers of governance and the epistemic construction of law
4) Universalistic vs. context-sensitive interpretations of rights and governance
5) Law and governance and the neo-liberalism political agenda in a contested territory
6) Law and governance in conflict zones as a field of research
7) Rights, cultural heritage, traditional knowledge and their recognition
8) Traditional methods of imparting knowledge and solving disputes

9) Use of natural resources and indigenous rights
10) Key-concepts for policy writing

The above-mentioned themes are illustrative and authors are encouraged to submit abstracts on a greater variety of subjects related to law and governance in Gilgit Baltistan. This special issue also aims to provide opportunities for debating on the socio-political agendas revolving around indigenous knowledge and the stakes of preservation, cultural heritage and change, social theories of authority and representation, legal and social identity, and public policy. Papers based on first-hand research will be privileged but theoretical discussions, engaged social research, and legal commentaries are also welcome.

Multidisciplinary approaches from academicians in all domains are solicited. Authors may use a variety of methods non exclusively including qualitative, quantitative, historical, ethnographic, financial, economic, and management analysis. Abstracts between 500 and 1000 words plus a short bio should be sent to Livia Holden at liviaholden@kiu.edu.pk, livia.holden@durham.ac.uk, and liviaholden@insightsproduction.net by the 31 December 2014. The authors of selected abstracts will be invited to present their full papers at a workshop to be held either in Pakistan or in Denmark. Subject to availability of funds and exhaustion of other financial resources scholarships will be available for covering travels and accommodation.

# SPECIAL ISSUE OF *NAVEIÑ REET:* NORDIC JOURNAL OF LAW AND SOCIAL RESEARCH: Law and Transitional Society: Chinese and Global Perspective

## Call for Papers for special issue 2016

*Edited by Rubya Mehdi, Ditlev Tamm and Bent Ole Gram Mortensen*

Law, as a proudly social practice, has been undergone tremendous transformation in a transitional society. Both empirical evidences and theoretical research reveal that law plays a more or less significant role in a changing world with the rapid development of science and technology, growing market economy, decaying traditional values, increasing environmental contamination, even with our epistemological grasp of the topsy-turvy world. Societies change ruthlessly and almost every legal system is struggling to be responsive. This trend is true in a globalizing world and of particular relevance in a Chinese context.

Obviously, the Chinese society has been changing since its reforming and opening up in late 1970s. As an emerging global power, the Chinese legal system is inscribed in political, economic, cultural, social and legal practices throughout the past three decades, resulting at times in new, hybrid forms of laws and legal institutions, but also often triggering continuing struggles and conflicts.

This special issue wishes to explore how the Chinese legal system respond the social transition and shaped by it and what roles would China play in the global legal environment. while we aim to engage in the global dialogue on China's legal system both from insiders' and outsiders' perspective, we also wish to gather all the theoretical and practical issues of any other countries who have experienced or are experiencing a transitional society.

We welcome contributions that address transitional society in both Chinese and global contexts, highlighting the legal aspects and address legislation, law enforcement, legal institutions, legal history and legal cultures, as well as more theoretically and methodologically oriented discussions.

Non-exclusive questions and themes for enquiry will be:

– Transitional society and legal responsiveness
– Chinese legal system and Constitutional changes
– Environmental Changes and Chinese Law

– Economic law and globalization relating to China
– Transnational issues in changing society

The feedback workshop is jointly organized in December 2014 in Copenhagen and March 2015 in Wuhan

– Danish Forum for Chinese Law and Legal Culture, Centre for Studies in Legal Culture, Faculty of Law, University of Copenhagen
– The Department of Cross-Cultural and Regional Studies, University of Copenhagen, Denmark
– The School of Law, Wuhan University, China.
– The research program in law and Legal Consultant and Service at Wuhan University

## Submission

Submissions should include the submitter's name, institutional address, e-mail address, short CV, and a 250-word abstract of the proposed paper and should be sent via e-mail to fxyxyw@whu.edu.cn and rubya@hum.ku.dk no later than April 30, 2015. Submitters will be notified of the outcome shortly after the deadline.

## Publication

The papers of the workshop will be published in the special issue of NAVEIŃ REET: Nordic Journal of Law and Social Research 2015, www.jlsr.tors.ku.dk

## Information for Contributors

Contributions must be complete in all respects including footnotes, citations and list of references.

Articles should also be accompanied by an abstract of 100-150 words and a brief biographical paragraph describing each author's current affiliation.

Articles usually are expected to be in the range of 3000 to 6000 words and presented double-spaced in Times New Roman 12pt. Longer or shorter articles can be considered.

Please use British English orthography (of course, do not change orthography in quotations or book/article titles originally in English). Use the ending –ize for the relevant verbs and their derivatives, as in 'realize' and 'organization'.

Italics are used only for foreign words, titles of books, periodicals, and the names of organizations in the original language (except when the original is in English).

Dates are written in this format: 11 April 2013.

For numbers please use the following formats: 10,500; 2.53 for decimals; 35%; 5.6 million.

If a footnote number comes together with a punctuation mark, place it after the mark.

## Standards for Source Referencing

It is essential that source referencing provides full and accurate information so as to enable a reader to find exactly the same source that is being referenced. Equally there needs to be pedantic consistency of presentation.

Please use the Harvard system of referencing which has grown in popularity in academic writing in education and the social sciences. In the main text, a reference or quotation is annotated in parentheses with the surname of the author, the date of publication of the work and the page number from which the quotation was taken. The full bibliographic details are then provided in a list of the references at the end of the work.

Contributors are requested to submit a soft copy of their article and abstract to rubya@hum.ku.dk in Word format.

# Articles

Introduction
*Hanne Petersen & Rubya Mehdi*

Capturing Obscenity: The Trials and Tribulations of Saadat Hasan Manto
*Osama Siddique*

Literary Lessons in Law:
Legal Culture in a Changing Welfare State
*Helle Blomquist*

Lawyers in Opera: The Transformation of the Legal Profession
*Inger Høedt-Rasmussen and Lise-Lotte Nielsen*

Images of Justice: Contemporary Art in Retfærd.
Nordic Journal of Law and Justice
*Ole Hammerslev*

Women Lawyers on TV – the British Experience
*Peter Robson*

Spatial Justice and Street Art
*Matilda Arvidsson & Peter Bengtsen*

Surface Patterns – Surface Law
*Hanne Petersen*

Romanticism in Law & Art
German Romanticism, Creativity, and European Legal Culture
*Kjell Åke Modeer*

# Book Review

Subversion and Sympathy – Gender, Law, and the British Novel
*Reviewed by Marya Akhtar*