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Sociological Aesthetics of Law

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Abstract
Aesthetic theory has the potential to develop a sensorium for the rational and arational forces of law. But the aesthetic knowledge of law is underdeveloped. That is why this article proposes a self-reflective sociological aesthetics of law that is capable of acknowledging human and social forces. The article unfolds its argument in three steps: first, it outlines the main approaches in the field of “law and aesthetics”; second, it connects these approaches in legal aesthetics with sociological and philosophical discussions on aesthetics; and, third, it suggests what distinctive contributions such a connection could make to jurisprudence and legal practice.

Keywords
aesthetics of law, aesthetic knowledge, deconstruction, systems theory, rationality, arationality, force (of law)

The enactment and application of law produce texts by recourse to texts. It is hardly surprising, then, that jurisprudence is also mainly thought of as a text-based discipline. Law, according to conventional legal theory as “theory of legal knowledge,”1 is linked to visual and auditory communication channels: it observes its environment visually, with the ear playing at best an ancillary role.2 But as Niklas Luhmann pointed out early on, it

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1. See the critique of unreflective theories of knowledge of law in Alexander Somek, Rechliches Wissen (Frankfurt am Main: Suhrkamp, 2005), p.7 – associated with the observation “that an appropriate theory of law must be formulated as a theory of legal knowledge.”


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is a fundamental misconception to think that the reproduction of existing knowledge with an increase in novelty is tied to the (visual or auditory) “churning of masses of texts.”\(^3\) Knowledge is neither text nor image, neither mere words nor empty images. It does not represent something objective, but is instead an attitude that finds expression in communication. Knowledge is “an expectation stylized as cognitive experience.”\(^4\) “Legal knowledge,” therefore, is not many things it appears to be: it is not objective, nor is it a matter of rationality realized in intersubjective discourses of knowledge. Rather, legal knowledge under social conditions of uncertainty is volatile, fragmented, and polycontextualized – a result of temporal dislocations and inaccessibilities between communication and consciousness, between consciousness and the unconscious, and “between brains and the outside world, which only acquires form in the brain.”\(^5\)

Therefore, reflection on legal knowledge cannot build on a meta-rule for legitimizing knowledge in a uniform way\(^6\) but must be based on a theory of difference: knowledge of law arises only in the difference between law and non-law. Thus a theory of legal knowledge takes this basic epistemic difference as its analytical starting point and not the distinction between rational legal rationality and arational external world.\(^7\) The central question from the difference-theoretical perspective, therefore, is whether legal rationality makes adequate reference back to the non-legal – in other words, whether law, in differentiating between law and non-law, develops a sufficiently complex picture of this relationship. The resulting requirement to develop a sensorium also for phenomena that are not an expression of rational, but instead of arational forces aims to develop an aesthetic knowledge of law\(^8\) that does not drive its concepts and dogmatic systematizations to more and more dizzying heights of legal abstraction in self-sufficient isolation from its social contexts but, on

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the contrary, is responsive to social and human forces. Law is law only in its difference from its non-legal environment in which arational and rational forces alike unfold. Only through law’s self-reflection on this difference between law and non-law – this is the thesis that I want to develop – can a form of low arise “that knows this about itself.”

What is called for, therefore, is a “modesty of nescience” that puts an end to the self-promotion of “those who know the true law.”10 The autonomy of the law is not guaranteed by an expertocratic accumulation of knowledge, but only insofar as the law of world society opposes to trends toward mercantilist, statist, militarist, of scientific colonizations of legal form11 something proper to law itself which upholds the idea of human and social emancipation and lends it effectiveness in an alliance with the forces of civil society.12

The prerequisite for this is that legal rationality faces up to the heights and abysses of human and social existence, while resisting the temptation to “harness the problem that arises here to the distinction between rational and irrational.”13 The rationalization of law is not a matter of replacing the “irrationality in the primitive legal procedure” by a purely rational legal system.14 On the contrary, legal rationality – that is, law as a social system of communication that has become differentiated, like economics, politics, and art – is an organized form (also) of arationality.15 Rational and arational – and also, as part of the latter, negative anti-rational/irrational – forces are effective in law. We cannot develop a complete picture of law by placing a taboo on what lacks rational form, but only through reflection on its rational and the arational moments, on its semantic moments and its moments of force, on its meaningful and sensuous moments:16 legal knowledge is

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11. When Foucault observes that “normalizing procedures are increasingly colonizing the procedures of law” and hence that “there is a greater and greater need for a kind of arbitrating discourse, for a sort of power and knowledge that has been rendered neutral because its scientificity has become sacred” (“Society Must be Defended”: Lectures at the Collège de France 1975–1976, trans. David Macey, [New York: Picador, 2003], pp. 38–9), he underestimates the drama of polycentric colonization through which law is confronted with conflicting processes of normalization.
12. This is also the basic motif of Hauke Brunkhorst, *Critical Theory of Legal Revolutions: Evolutionary Perspectives* (London: Bloomsbury, 2014).
14. Contrary to Weber’s argument in *Economy and Society*, p. 882: “[T]he formal qualities of the law emerge as follows: arising in primitive legal procedure from a combination of magically conditioned formalism and irrationality conditioned by revelation, they proceed to increasingly specialized juridical and logical rationality and systematization…”
15. See also Thomas Raiser’s critique of Weber’s concept of rationality: “Hence we must acknowledge the facticity of irrational moments and also understand them as a positive contribution to individual and social life” (“Max Weber und die Rationalität des Rechts,” *Juristenzeitung* 63 (2008), 853ff., 858).
knowledge of the law both about its rational and its arational dimensions, consequences, and contingencies – and about the tasteless aspects of law, its callousness and its tactlessness toward the concerns of social and human emancipation.

The end of such a theory of legal knowledge is a law that is mindful of the dangers of infiltration and therefore reflects on both the difference between law and non-law and on the interwovenness of rationality and arationality. The means for realizing this end of legal theory is aesthetics.\textsuperscript{17} Aesthetics is the discipline that thematizes relationships and contrasts, harmony and correspondence, counterpositions or analogies\textsuperscript{18} in a way that avoids an artificial split between the rational and the arational. Precisely such an approach seems to be particularly fruitful when it comes to developing a theory of legal knowledge. To concretize my thesis, I will first outline some of the main approaches in the field of “law and aesthetics” (section I). In a second step I will combine these approaches in legal aesthetics with sociological and philosophical discussions on aesthetics (section II). Finally, in a third step, I will suggest what distinctive contributions such a connection could make to jurisprudence and legal practice (section III).

I. Approaches in the Aesthetics of Law

The idea of reflecting on law in aesthetic terms has long since ceased to be “a test of academic courage.”\textsuperscript{19} Legal aesthetics can be traced back in the history of ideas to Plato. In the Republic, Plato connected the theory of the state with music in the notion of the organization of harmony.\textsuperscript{20} Both in the state as well as in music, he argued, things must be harmonious in an aesthetic sense. In Friedrich Schiller we also find a combination of aesthetics and theory of the state that takes the Greek idea of paideia as its starting point\textsuperscript{21} and stresses the importance of the aesthetic dimension of paideia for the political system.\textsuperscript{22} Already in the

\begin{itemize}
  \item \textsuperscript{17} See also Martti Koskenniemi, “Law’s (Negative) Aesthetic: Will it save us?,” Philosophy and Social Criticism 41/10 (2015), 1039ff.
  \item \textsuperscript{21} On paideia, see the classical account in Werner Jaeger, Paideia: The Ideals of Greek Culture, Vols. 1–3, trans. Gilbert Hightop (Oxford: Oxford University Press, 1945).
  \item \textsuperscript{22} Friedrich Schiller, On the Aesthetic Education of Man in a Series of Letters, trans. M. Wilkinson and L.A. Willoughby (Oxford: Clarendon Press, 1967); see on this already
1920s Gustav Radbruch called upon jurisprudence, in spite of the “autonomy of the domains of culture” that had developed in the meantime, not to neglect the connection that these early writings made between law and art. Thus, Radbruch advocated an “aesthetics of law” that should reflect specifically on “the peculiar mixture of coldness and passion,” the coexistence of the “poverty of a lapidary style” and a “combative sense of justice,” in law.23
In so arguing, he adopted a double perspective that is also characteristic of later works in legal aesthetics24 such as Heinrich Triepel’s treatise “Vom Stil des Rechts”25 in that it, on the one hand, analyzes the forms of artistic expression in law and, on the other, simultaneously focuses on the law as the subject matter of art.26
Legal aesthetics is pursued in this tradition in the first instance as literary aesthetics of law.27 In his text “Von der Poesie im Recht,” Jacob Grimm already pointed out that “law and poetry arose from the same bed.”28 As Hans Fehr put it in the 1930s in his trilogy “Art and Law,”29 law, like literature, wants to affect its addressees not only at the rational but also at the emotional level; it wants to “reach them in the inner recesses of the soul.”30 Studies on law and poetry that go beyond a mythopoetics of law31 take this as their starting point.32

Hermann Blaese, “Schillers Staats- und Rechtsdenken,” in Franz Beyerle and Karl Bader (eds), Kunst und Recht. Festgabe für Hans Fehr (Karlsruhe: Müller, 1948), pp. 48ff.; from the recent literature, see Klaus Lüderssen, “... daß nicht der Nutzen des Staats Euch als Gerechtigkeit erscheine”: Schiller und das Recht (Frankfurt am Main: Insel, 2005).
27. See Andreas von Arnauld and Wolfgang Durner, “Heinrich Triepel und die Ästhetik des Rechts,” in Triepel, Vom Stil des Rechts, p. XI.
29. Hans Fehr, Das Recht im Bilde (Zurich: Erlenbach, 1923); Fehr, Das Recht in der Dichtung (Bern: Francke, 1931); and Fehr, Die Dichtung im Recht (Bern: Francke, 1936).
30. Fehr, Die Dichtung im Recht, pp. 293ff.
32. Josef Kohler, Shakespeare vor dem Forum der Jurisprudenz, 2nd ed. (Berlin: Rotschild, 1919); on this, see Rainer Maria Kiesow, “Josef Kohlers Poesie,” in Kiesow et al. (eds),
The classical works in legal aesthetics — like the law and literature movement — engage in legal criticism of law. Law, legal methodology, and legal decision-making practices make use of the forms of rhetoric, art, architecture, and theater. A legal aesthetics that starts from here aims to use the aesthetic as a leading metaphor for the law — in particular for methodology and decision theory. Above all, these approaches reject the assumptions that conventional theories make about the rational basis of decisions. Normative decisions are supposed to be rationally justified lege artis with reference to legal norms. But that does not mean that normative decisions are in fact made on a rational basis. On the contrary, the production, justification, and also the consequences of legal decisions have arational as well as rational dimensions. The conventional understanding of law, which is generally criticized in works in legal aesthetics, truncates the legal process to its objectifiable and rational moment and hence takes account of only one segment of the law.

Reflections on law based on the theory of language also adopt this perspective. They point to the difficulties in generating binding legal force through language and explore
the narrativity of law in its different variants. This approach addresses, on the one hand, the internal operativity of law but also, on the other, the limitations of language itself: translating social conflicts into the language of law, according to this tradition in legal aesthetics, estranges these very conflicts.

Aside from texts from the ambit of literature and law, there are numerous other currents that deal with aspects of legal aesthetics – mainly as criticism of the performative aspects of law and of the associated obfuscation of techniques of power and domination. For example, studies from the field of music and law not only revive Plato’s doctrine of harmony but also make comparisons between legal and musical forms of interpretation. Studies


that go beyond this stress the relations between law and dance. Situationist analyses address law as a spectacle and the relationship between law and theater. Contributions from the field of law and image uncover the visual strategies of legal discourse and forensic practice. Other studies shed light on the connection between law and the visual arts, law and architecture, law and film, law and new media, and on law and play.

The prevalent basic tenor of these studies is that law is influenced by arational forces\(^{58}\) which can lend passions\(^{59}\) and the subconscious\(^{60}\) force in the law.\(^{61}\) This is precisely what studies on the sense of justice and emotionalism in law have always claimed.\(^{62}\) The suspicion that there is an unconscious force at work in law that “has the ability to take the intellect’s place in the making of a judgement”\(^{63}\) can be found in many different versions in legal methodology:\(^{64}\) Carl Schmitt’s decisionism \textit{ex nihilo} takes this as its starting point, Josef Esser’s notion of preunderstanding,\(^{65}\) sociological studies of lawyers – all of these approaches seek to uncover and explain in methodological terms the share of the non-rational in legal decisions.\(^{66}\) Current studies on multisensory law\(^{67}\) and on the haptic


\(^{60}\) See the contributions in Peter Goodrich (ed.), \textit{Law and the Unconscious: A Legendre Reader} (London: Palgrave Macmillan, 1999).

\(^{61}\) Law, as described by Richard Sherwin, consists of “powerful impersonal forces, strange forms of reason, and unfamiliar ritual practices” (\textit{When Law goes Pop: The Vanishing Line between Law and Popular Culture} [Chicago, IL: University of Chicago Press, 2000], p. 191).


\(^{67}\) Colette Brunschwig, “Multisensory Law and Legal Informatics – A Comparison of How These Legal Disciplines Relate to Visual Law,” in Anton Geist et al. (eds), \textit{Strukturierung der Juristischen Semantik – Structuring Legal Semantics, Festschrift für Erich Schweighofer} (Bern: Editions Weblaw, 2011), pp. 573ff.; for a critical position, see Klaus Röhl, “Zur Rede vom multisensorischen Recht,” \textit{Zeitschrift für Rechtssozioologie} 33 (2013), 51ff. That “the legally relevant characteristics are of a tangible nature” was already emphasized by Max Weber: “The adherence to external characteristics of the facts, for instance, the utterance of certain words, the execution of a signature, or the performance of a certain symbolic act with a fixed meaning, represents the most rigorous type of legal formalism” (Weber, \textit{Economy and Society}, p. 657).
dimension of legal aesthetics take up this point: they argue that law-making and legal decision-making, aside from their rational dimension, also have a non-rational moment.

The identification of these kinds of basic aesthetic processes is a shared feature of such diverse concepts as Kant’s “transcendental aesthetic,” Nietzsche’s aesthetic philosophy (“the drive to truth,” the “sense of truth”), and Niklas Luhmann’s decision theory. Luhmann’s appeal to “sound judgment in relation to legal taste” insists that normative decision-making as a general rule is neither a purely cognitive process of recognizing correct law nor a matter of retrospectively concealing the exercise of institutional power with reasons: “Only angels or fanatics can get by without distinctions – that is, with intuition.”

Rational and non-rational drives come together in normative decision-making. Kant already anticipated the combination of rational and arational forces when he

73. See the contributions in Friedrich Müller and Rainer Wimmer (eds), Neue Studien zur Rechtslinguistik (Berlin: Duncker & Humbolt, 2001); also Friedrich Müller, Ralph Christensen, and Michael Sokolowski, Rechtstext und Textarbeit (Berlin: Duncker & Humbolt, 1997); Sabine Müller-Mall, Performativer Rechtserzeugung: Eine theoretische Annäherung (Weilerswist: Velbrück, 2012).
77. However, he ultimately subordinated imagination to the faculty of logic (Immanuel Kant, Critique of the Power of Judgement, trans. Paul Guyer and Eric Matthews [Cambridge: Cambridge University Press, 2000], §35, p. 167; Ak. 5: 287).
II. Sociological Aesthetics of Law

However, the distinctive contribution of the traditional approaches to “law and aesthetics” to our understanding of law is sometimes rather limited. 81 Granted, they often managed to expose the rationality assumptions of law as mythologizations and to reveal the implications for a theory of power concealed by these performances. However, much of this work remains at the level of such external criticism of law and does not draw any conclusions for legal practice. The parallel references back to legal practice often end in a contribution to methodology and the general theory of legislation that calls for taking account of aesthetic criteria – such as coherence and choice of language – in the legislative process. 82 If we want to broaden the perspective of these studies, then we must find ways to inscribe aesthetic reflection into law. Such reflection must thematize the relation between the autonomous domain of law and its other, non-law, from within law itself. 83 If we want to criticize instrumental or functionalist rationality, then this is possible only in the medium of this rationality, through its own self-reflection.

83. See also Menke, Recht und Gewalt, p. 40, who locates the force of law in this difference.
I Sociological aesthetics

The aesthetic perspective focuses on the reflexivity of the aesthetic. Ontological approaches take the aesthetic object – in other words, art, nature, or the sublime – as a basis for developing aesthetics. Since Baumgarten they have been based on a theory of the sense faculties of the subject who is attentive to the aesthetic aspects of these objects.84 Recent approaches, by contrast, proceed in the opposite direction: according to them, aesthetics as a theory of the aesthetic first gives rise to the object as something “aesthetic.”85 At the center of the aesthetic search process, therefore, is not the aesthetics of elements but the aesthetics of relations.

Sociological theories of aesthetics do not adopt an ontological perspective either. Their aim is not to heighten the aesthetic in social structures86 but instead to uncover the duality of processes of social rationalization and to describe the relationship between the differentiated spheres of rationality, on the one hand, and society and human beings, on the other. This motif is especially prominent in Theodor W. Adorno’s sociology of music where Adorno refers to Max Weber’s rationalization thesis, but corrects it by insisting that rationality can develop “only by reflection on the social totality that finds expression in the special mental fields as well as in all areas separated from each other by a division of labor.”87 By aesthetics Adorno understands schematic reflection on the relationship between the individual domains of social rationality and the totality of society, together with the associated attentiveness also to the non-rational.88 His material morphology

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86. See the critique in Rainer Maria Kiesow, “Ach ist das Recht schön! Ach…,” myops 21 (2014), 60ff.
traces the arational in the rationalized world taking music as its guide. Adorno uses musical relationships to illustrate how society can be organized in an emancipatory way.89

From this perspective, aesthetics and social spheres such as law do not constitute mutually exclusive domains that could be connected through an arbitrary combination of “law and aesthetics.” On the contrary, the analysis of the aesthetic dimensions of law leads to the question of the relationship between law and society and human beings and of how the relation between the material and the form of law90 is configured.91 Sociological legal aesthetics enriches the existing perspectives on this relationship through the inclusion of sensuousness. Social systems, on this conception, consist not only of meaning but also of the sensuous.92 Sociological aesthetics since Georg Simmel is geared to the fact that, notwithstanding the imposition of rational form, “life remains instinctive, emotional, and irrational.”93 Without reducing the symmetry between the rational and the arational to either of its two components, the aim of sociological aesthetics is to explore how affective processes and structures are integral parts of social systems and how these systems in turn exert effects back on affective processes.94

Here an analysis in legal aesthetics can connect up with the discussion on emotionalism in law95 and on legal taste.96 Aesthetic reflection on law can contribute to

90. On this relation, see Christoph Menke, Kritik der Rechte (Berlin: Suhrkamp, 2015), pp. 122ff.
91. Thus, for Jean Marie Guyau the aesthetic character of sense impressions has less to do with their essential content than with their form. (Jean Marie Guyau, L’art au point de vue sociologique (1889) [Paris: Fayard, 2001]; cf. Kurt Blaukopf, Musik im Wandel der Gesellschaft [Munich: DTV, 1984], pp. 296ff.).
92. See already Parsons, who at first conceived of sociology at the science of the nonrational (as opposed to rational action), though in his later work he stressed the equal importance and interwovenness of rational and nonrational constitutive moments; see Talcott Parsons and Gerald Platt, The American University (Cambridge, MA: Harvard University Press, 1973), p. 93, and the instructive account in Rudolf Stichweh, “Rationalität bei Parsons,” Zeitschrift für Soziologie 9 (1980), 54ff., 60 and 73.
refining legal awareness of emotions, feelings, and unconscious forces\(^\text{97}\) at work in the social systems.\(^\text{98}\)

2 The aesthetic constitution of law

Whereas a wide range of metaphysical, ethical, and logical theories of justification have been developed for law,\(^\text{99}\) to date no attempt has been made to evolve a comparable theory that would provide a systematic analysis of the aesthetic constitution of law.\(^\text{100}\)

Jurisprudence, at least as regards its dogmatic aspects, has been reluctant to open itself up to legal aesthetics.\(^\text{101}\) For a long time the dominant reflex was to reject aesthetic analyses as extra-juridical and to insist that “aesthetics describes an essential aspect of the content of literature, whereas normativity is the decisive dimension of the content of legal texts.”\(^\text{102}\) It would indeed be inappropriate to equate aesthetic and judicial

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communication directly, because a sociological aesthetics of law cannot claim to develop standards for law from the outside which law would nevertheless have to internalize. However, through a reflective movement from within legal form itself, sociological aesthetics of law can cast new light on the other of the rationality of the law, on its repressed and often unthematized sides. Its instruments enable reflection on how rational and non-rational forces – hence the aesthetic dimensions of the constitution of reality – operate in law. Approaches along these lines have indeed been developed, especially in works that explore the connections between ethics and aesthetics. The result concerns a structural coupling of sociological aesthetics as a science with the legal system – in other words, an aesthetic elucidation of the law which has the potential to refine the modes of perception and the decision-making programs of the law.

Here studies in legal aesthetics as a general rule pursue a negativistic approach. In an attempt to unmask and deconstruct the mystical foundations of authority, they demystify legal juggling with dogmatics and concepts: “Disenchantment of the legal world, twilight of the gods and of the idols, demythologizing, for the sake of the human being and hence also of the law.” They oppose the “gigantic, radiant empty formulas,” decode “fake but seductive justifications” of law, and focus instead on possible signs

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103. Helge Dedek, “The Splendour of Form: Scholastic Jurisprudence and ‘Irrational Formality’,” *Land and Humanities* 5 (2011), 349ff., 382: “The pervasive depiction of Western history as the triumph of Reason, this self-portrayal of the enlightened man as the pinnacle of ‘rationality’, has led to the tendency to minimise the role of the irrational in modernity. Such a cult of Reason is, of course, nothing but mythical, irrational itself – an argument most notably made by Adorno and Horkheimer in their ‘Dialectics of the Enlightenment’.”


of tastelessness in the law. Thus, Heinrich Triepel, for example, read the Radbruch formula against the moral grain in an aesthetic sense and, with reference to the Nuremberg racial laws, disputed the external effectiveness of ugly law filled with disgust and revulsion. Similarly, Martti Koskenniemi has advocated applying the distinction between art and kitsch to the law in order to expose kitschy and false forms of law. The latter, according to Koskenniemi, are at work, for example, when law is invoked “to defend the easy truth, the nostalgic feel for an abstract mankind, and to curtain off death.” Niklas Luhmann also has the aesthetics of the law in mind when, with reference to blatant violations of law, he criticizes it as “tasteless” in the face of atrocities “to consult texts or to inspect the local legal system to determine whether such practices are permitted.”

A sociological aesthetics of the law that proceeds in this manner is not reduced to demonstrating which aesthetic expressions the law chooses, how theatrical it is, or how closely legal interpretation tracks musical interpretation. Rather, it unfolds its legal and social critical potential by facilitating a relationship conceived by Adorno as the relationship between critical subjectivity and systemic violence, by Habermas as the interdependence of lifeworld and system, and by Menke as the difference between the human being and the social subject. The point is to establish what possibilities exist for organizing social relations in humane ways – while eschewing the insufficiently complex approaches of natural law or rational law, which developed the normative a priori of social order from supposedly essential features of human nature or human reason. What is needed is instead a further stage of complexity: only if we recognize the ineluctability of the difference between human being and society will it become possible to relate them to each other in anything approaching an adequate way. The call for a humane law, therefore, is not a call to resolve the existing contradictions and disharmonies, but to give them free play in law.

Here Adorno’s aesthetic theory, in particular, which takes up Durkheim’s idea of the \textit{fait social}, offers the key insight that a “corrective correlate” must be introduced into the differentiated social formations in order to break open the paradigm of rationality and
to subject the social spheres to the requirement of humaneness. Adorno expressed this idea in the concept of mimesis. Thus in a study on Alban Berg he calls for restoring “human dignity to a banished, heretical yearning.” Such a form of mimesis is anti-essentialist. It will not resolve the incommensurabilities but will call for a form of interrelating that reflects on its relation to the human being as an “ensemble of the social relations” without dissolving the non-identities in identities.

III. Legal Practice

A mimetic responsiveness of law to its environment will not lead to the dissolution of the difference between law and non-law. The differentiation of law is irreversible. Therefore, mimesis of law does not aim to level down differences in a harmonistic way, but instead to reflect what is external to the law in the law in sophisticated ways. It aims at a form of law that is aware that law is receptive to and affirms rational and arational forces. It is also affected by these forces.


The corresponding science of law is a science of force. We must also avoid misinterpreting this in essentialistic terms. It is not about developing an ontology of legal force in order to derive specific legal contents from the existence of social and human forces. Rather, the point is, on the one hand, to understand how emotions and forces as potentials suspend the everyday routines of the law; on the other hand, the challenge is to develop a sense for the effects that law exerts on these affects and forces.

This is what Adorno is referring to when he attributes to “those driving forces that erupt and rebel against the horrific” the power to create a form of social existence fit for human beings and when he stresses that a humane societal order can be established “only when the drives of people are no longer repressed, but fulfilled and released.” In other words, reflection on the dialectic of rational and arational forces enables us to thematize the legal violence of a law “without feeling” through its confrontation with a legal force that opposes this violence and liberates human and social forces.

The point of this sociological aesthetics is that aesthetic reflection on social processes can, on the one hand, throw light on the dialectical processes of law as an arational system of rationality. But, on the other hand, it also makes it possible to conceive of law in a new transsubjective form. The point of reference of aesthetics is not the moral, political, or legal subject, but the human being. Humanity is not exhausted in being a subject.

122. But see Lorenz von Stein, _Gegenwart und Zukunft der Rechts- und Staatswissenschaft Deutschlands_ (Stuttgart: Cotta, 1876), p. VII: “The science of law is not jurisprudence but the science of the forces that generate law; it is the consequence of these forces, which operate in subjects, the personality, and in the object, the nature of things. Therefore, I should not study what is or is taken to be law; I can leave that to memory and learn paragraphs only to forget them. But if I want to acquire knowledge of law I must examine what generates law.”

123. This is also at the core of the sociology of emotions developed by Deleuze; see Gilles Deleuze and Félix Guattari, _A Thousand Plateaus: Capitalism and Schizophrenia_, trans. Brian Massumi (New York: Continuum, 1987); cf. Robert Seyfert, _Das Leben der Institutionen: Zu einer Allgemeinen Theorie der Institutionalisierung_ (Weilerswist: Velbrück, 2011).


126. “Transsubjective” here has not only an institutional, but also a humane meaning (see the contributions in Thomas Vesting et al. (eds), _Grundrechte als Phänomene kollektiver Ordnung_ [Tübingen: Mohr Siebeck, 2014]). For this conception, see already Ludwig Raiser, “Der Stand der Lehre vom subjektiven Recht im Deutschen Zivilrecht,” _Juristenzeitung_ 16 (1961), 465ff., 472: “The possibility to develop one’s own powers and the opportunity to obtain economic benefits thereby should not be understood as subjective rights vis-à-vis competitors and customers.”
Human freedom is not the same thing as the freedom of the liberal subject. An aesthetics of law along these lines tries to answer the central question of how law as the “primal phenomenon of irrational rationality” can be subjected to the ideal of human freedom.127

The aesthetic enlightenment128 of law starts from social structures.129 Different creative mechanisms have taken shape in the sectors of science, religion, and art130 that regulate the development of human and social forces and affects and make room for the “aesthetics of existence.”131 Law reproduces these mechanisms and is affected by them in turn: justice is “sought,”132 courts are required to investigate the Begehrt (“desire”) of the claimant see §88 of the German Code of Administrative Court Procedure (VwGO).133

Law and the non-rational are interwoven in the various processes in which law and different social spheres co-evolve. It would be mistaken to take this intrication as a reason to raise an idealized affective tone into a normative yardstick that applies across

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129. As such they represent an “aesthetics from below”; on this, see Richard Klein, “Überschreitungen, immanente und transzendente Kritik,” in Adolf Nowak et al. (eds), *Musikalische Analyse und Kritische Theorie: Zu Adornos Philosophie der Musik* (Tutzing: Hans Schneider, 2007), pp. 276ff., p. 277.


systems. One can gain a more adequate picture of the connections with the non-rational only if one instead traces the legal points of contact with arationality in the different social relations of co-evolution. Here legal aesthetics leads to the question of whether the legal instruments can be designed in such a way that they exhibit more refinement, more tact, and more sensitivity to the emotionally conditioned character of social structures. There is no shortage of occasions for posing this question of appropriateness. To sketch some examples:

(1) Business/Law: When it comes to the relationship between law and the economic sphere, the rational choice paradigm was superseded long ago by theories which treat the non-rational as part of economic rationality. Profit seeking, greed, and the psychologically conditioned character of trade are not the exclusive preserve of behavioral economics. Law is not very receptive to these arational phenomena. Financial market regulation is a prime example of the interconnection between the arational and the rational – an interconnection to which the Federal Constitutional Court (BVerfGE) also appealed in its decision on *Outright Monetary Transactions* (OMT) when it examined the argument of the European Central Bank that OMTs would combat irrational effects on the money market. The Federal Constitutional Court rejected this justification on the grounds that “the rational/irrational distinction is meaningless in this context and in any case cannot be operationalized.” However, law will be able to address the epidemiological dynamics on the financial markets effectively only when it develops a more precise understanding of the interactions between arational and rational forces in economics.
(2) Religion/Law: Law is also confronted with the arational in the religious domain. The law often comes into contact with religiously connoted issues. This can be seen, for example, in how criminal law deals with so-called “honor killings.” In the discussion over whether “honor killing” satisfies the murder criterion referred to in §211 para. 2 of the German Criminal Code as “base motives,” a religious contextualization is often made in an attempt to distinguish “honor killings” from “separation killings out of separation anxiety,” in which the murder criterion is not considered to be satisfied. Court judgments that reject a sweeping demonization of honor killings are publicly criticized for granting a supposed “Islam allowance.” The ways of dealing with the arational in the law that originates in (supposedly) religious contexts must be subjected to critical examination.

(3) Politics/Law: There is nothing new about the claim that the arational is present in politics. On the contrary, this is the underlying thesis of political theology and its sovereigntist exaggeration of the political instinct as a seismograph for the political – the friend-and-enemy distinction. Contemporary aestheticizations of the political also emphasize the connections between politics and the arational, connect them with emotionality and stress their representation in music. Hymns and freedom songs are in this concept expressions of “soul forces.” One of the central questions of legal aesthetics at this point is how human forces


142. Federal Court of Justice October 29, 2008 – 2 StR 349/08.

143. See e.g. State Court Wiesbaden judgment of March 24, 2014 – Az. 2 Ks – 2234 Js 1018/13.


can be organized in order to render the idea of democracy socially effective. Ultimately it is a matter of activating self-healing forces against collective anxieties, forces that encourage “dissent, protest, opposition, and civic courage against the paralyzing atmosphere of … hierarchies and against pressures to conform.” The practice of whistleblowing is a prime example of the difficulties that law faces when it comes to dealing with people as “truth animals.”

(4) Media/Law: As a general rule, the processes in which public opinion is formed and expressed are charged with emotion. In this sense, Luhmann draws on Durkheim’s concept of colère publique to describe scandalization processes and manifestations of collective exuberance in the field of human rights. The example of freedom of the press demonstrates the difficulties faced by law in dealing with irrationality in the media. The decisions of the ECtHR, for example, generally conclude that freedom of the press should outweigh the protection of private life and the protection of one’s “good name” in reporting when there is a public interest in the content of the report. Protection of the freedom of the press does not apply, according to the court, when reporting only serves to satisfy public

149. In this sense, Kant’s theory of democracy already insisted that procedures must be created that would civilize even a “nation of devils.” This involves enabling human beings to organize their natural drives “in opposition to one other in such a way that one checks the destructive effect of the other” (“Toward Perpetual Peace: A Philosophical Project,” in Kant, Practical Philosophy, ed. and trans. Mary Gregor [Cambridge: Cambridge University Press, 1996], pp. 317ff., p. 335 [Ak. 8:366]). See also Albert O. Hirschman, The Passions and the Interests (Princeton, NJ: Princeton University Press, 1977), pp. 22ff., for whom political institutions must be established so that passions can neutralize each other, which in turn presupposes that the interests, as moderate passions, can be opposed to the excessive and destructive passions as “tamers.”


153. ECtHR, Heinisch v. Germany, judgment of July 21, 2011, application no. 28274/08, para.64ff.


curiosity\textsuperscript{156} – a distinction that the ECtHR has difficulty in upholding. This becomes apparent, for example, in its decision that a prince’s treatment of his illegitimate son was a matter of public interest, on the grounds that character traits of the prince could be inferred from this treatment, which in turn were also important for his performance of his public office.\textsuperscript{157} Here the formation of a sensibility for arational processes in the public arena should help to develop appropriate solutions for such cases that can contribute to stability at the dogmatic level.

(5) Family/Law: In the sphere of the family, it is obvious that the willingness to make sacrifices for the family, love, and also – especially in the case of failure, though not only (\textit{odi et amo}) – countervailing passions like hatred\textsuperscript{158} constitute a formative component.\textsuperscript{159} Here, too, the law all too often exhibits a deficient sensibility for the arational, as is also shown specifically and especially by the example of family guarantees. The legal foil for deciding cases involving such guarantees take its orientation as a general rule from asymmetries of knowledge and power.\textsuperscript{160} But the law does not accord sufficient weight to the fact that such guarantees are also a matter of protecting the family system, and its pattern of loyalty based on emotional ties, from economic corruption.\textsuperscript{161}

(6) Art/Law: When it comes to the relationship between law and art, law is not adequately attuned to the arational dimensions of the sphere of art either. The so-called “Pussy Riot” trials are prime examples of the arbitrariness of the way law deals with forms of musical expression. While the Moscow lower court attested that the members of the band had acted out of “religious hatred against a social group,”\textsuperscript{162}

\begin{itemize}
\item \textsuperscript{156} ECtHR, judgment of February 7, 2012, applications nos. 40660/08 and 60641/08 (\textit{Hannover v. German No. 2}).
\item \textsuperscript{157} ECtHR, judgment of June 12, 2014, application no. 40454/07 (\textit{Couderc et Hachette Filipacchi Associés v. France}): “insight into his personality.”
\item \textsuperscript{158} One of the central challenges for family law is to channel these guarantees and the resulting disputes over maintenance, custody, and access. “In practice, however,” writes, for example, Kurt Schellhammer, “the pious wish of the law is all too often thwarted by the implacable hatred of the parents” (see Schellhammer, \textit{Familienrecht nach Ansprüche und Garantien}, 4th ed. [Heidelberg: Müller, 2006], marginal no. 1170). On emotions of hatred in general, see Jens-Christian Rabe, “Agieren, reagieren, abreagieren: Hass als populäre Kunst,” \textit{Mittelweg} 36 (2015), 211ff.; on the role of legal proceedings in “wearing down the parties” and thus subduing the conflict, see already Niklas Luhmann, \textit{Legitimation durch Verfahren} (Frankfurt am Main: Suhrkamp, 1983), p. 4.
\item \textsuperscript{159} Georg Wilhelm Friedrich Hegel, \textit{Elements of the Philosophy of Right}, ed. A. Wood, trans. H.B. Nisbet (Cambridge: Cambridge University Press, 1991), § 158: “The family … has as its determination the spirit’s feeling of its own unity, which is love.”
\item \textsuperscript{160} BVerfGE 89, pp. 214ff.
\item \textsuperscript{162} See the reconstruction of the judgment in Caroline von Gall, “Vorwort gescheitert: ‘Pussy Riot’ und der Rechtsstaat in Russland,” Bundeszentrale für politische Bildung of November 6, 2012; on the emotionality of criminal violence, see the treatment of the underlying issues in Randall Collins, “Entering and leaving the tunnel of violence,” \textit{Current Sociology} 6 (2012), 132ff. (139).
\end{itemize}
the court of appeal relativized this accusation. An individual application against these Russian decisions is pending with the ECtHR. Here the decisive question will be whether the domain of artistic freedom granted protection in Art. 10 of the European Convention on Human Rights (ECHR) also extends to aesthetic criticism by punk music, specifically when this music lends social protest an “emotional timber.”

IV. Conclusion

All of the fields mentioned clearly exhibit an entanglement of rationality and arationality. If one wants to promote the subtlety of the associated legal emotional and perceptual culture, then one must first chart the relationship between law and the arational. Building on this, it then becomes a matter, normatively speaking, of sharpening the legal sense of appropriateness also with regard to the arational.

Thus this movement involves two steps. The first (descriptive) step is to gain an understanding of how the arational becomes inscribed in the social domains of rationality, in this case the law, in order to bring law closer to human beings and society. When “human freedom” is described as a central concern of “aesthetics,” this points to the

163. See Darya Kozhanova, “Something is Wrong with Pussy Riot’s Sentence According to the Supreme Court,” The Interpreter, December 12, 2013.


166. Peter Fuchs, “Wer hat wozu und wieso überhaupt Gefühle?,” Soziale Systeme 10 (2004), 89ff., 103: “As they evolve, social systems can develop more and more subtle expressions for feelings; they can develop their ‘affective cultures’."


potential of a sociological aesthetics for law, namely for assessing the legal presuppositions for shaping this freedom.\textsuperscript{171} This question is not answered by reconstructing a supposed human nature. Rather, it is a matter of legal reflection on the tension that pervades human life in the guise of the difference between human being and social subject.\textsuperscript{172} In this sense, an aesthetics of law can link up with aesthetic theories that conceptualize the aesthetic question in terms of the “idea of aesthetic autonomy.”\textsuperscript{173} The challenge for legal theory is to look for ways to realize this very human freedom, which is not identical with the freedom of the subject.\textsuperscript{174}

Then, the second (normative) step is to use reflection on the aesthetic constitution of the law to make legal practice itself more complex, that is, more adequate to human beings and society.\textsuperscript{175} In particular, the aesthetics of law makes possible a new approach to the justification of law. Whereas discourse-theoretical approaches situate the outcome of normativity in rational intersubjectivity, approaches in legal ethics generally externalize the normativity of law in morality, legal positivist interpretations treat the “basic norm” as the end point of reflection, political theories of law externalize the basis of validity in politics, and economic analyses of law elevate economic utility into the supreme measure of law,\textsuperscript{176} the aesthetics of law proposed here adopts a different approach. The basic normative reference of the law is not tied to a fixed point in the environment of law. Therefore, the law does not rest on a stable ground. Neither human nature, nor the consensus of subjects, nor the functional requirements of a social subsystem such as the economy, politics, or science constituted the outcome of normativity. The specific character of normativity resides instead in the relationship between autonomous law as a differentiated social sphere, on the one hand, and the rest of society and human beings, on the other. Aesthetic reflection on law enables us not only to thematize the relation between the domain of legal autonomy and its other, non-law, from within law, but also to develop legal safeguards for the social and human spaces of freedom.


175. The responsiveness of law to feelings increases the internal complexity of law – unlike the emotions themselves, which according to Jan Philipp Reemtsma, drawing on Jean-Paul Sartre (The Emotions: Outline of a Theory, trans. Bernard Frechtman [New York, Philosophical Library, 1948]), lead to a “reduction in complexity” (Jan Philipp Reemtsma, “Warum Affekte?,” Mittelweg 36 (2015), 15ff. (24)).

176. See the survey in Luhmann, Law as a Social System, pp. 125ff.
In all of this, an interdisciplinary analysis that aspires to throw light on the potential of an aesthetic perspective for the law itself must do justice to the normativity proper to law: aesthetic standards cannot be developed for law from the “outside” as it were. A non-violent force of law can arise only in a self-reflective manner, specifically by law becoming more responsive to human and social forces. Only when the law does justice to the rational and the arational alike will a different law “beyond legal violence” become possible.

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178. This is also what Derrida announces; see Derrida, Force of Law, p. 927; on this, see Andreas Fischer-Lescano, “A ‘Just and Non-violent Force’? Critique of Law in World Society,” Law & Critique 26 (2015), 267ff.
179. See the call in Karl Marx, “On the Jewish Question” (1843) in R.C. Tucker (ed.), The Marx-Engels Reader, 2nd ed. (New York: W.W. Norton, 1978), pp. 26–52, p. 46: “Human emancipation will only be complete when the real, individual man has absorbed into himself the abstract citizen; when as an individual man, in his everyday life, in his work, and in his relationships, he has become a species-being; and when he has recognized and organized his own powers (forces propres) as social powers so that he no longer separates this social power from himself as political power.” The translation uses “powers” where Marx used the German term “Kraft,” which is more adequately translated with “force” (a term Marx uses himself when he alludes to the French term “forces propres”).