WYDZIAŁ PRAWA
i ADMINISTRACJI
Uniwersytet Łódzki

Jędrzej Janicki

Aesthetics as a Source of Reflection on Law

Doctoral dissertation prepared
in the Department of Theory and Philosophy of Law
under the supervision of Professor Marek Zirk-Sadowski
in the discipline of theory and philosophy of law

Łódź 2022

The dissertation addresses the possibility of treating aesthetics (understood as a branch of philosophy) as a source of reflection on law.

Its aim is to show how one of the perspectives of the aesthetics of law indicated by Kamil Zeidler ("Estetyka prawa" [Aesthetics of Law], Wolters Kluwer 2018) may be elaborated. The perspective in question is the aesthetics of law in external frame, whereby a work of art serves as the basis for further legal reaction – theoretical legal, philosophical legal and dogmatic-legal at the same time.

The dissertation consists of three main sections, a conclusion and a bibliography. The main sections are as follows: 1) Terminological and methodological findings and specification of the research area addressed in the work, 2) A work of art as the basis for theoretical legal and philosophical legal reflection, 3) A work of art as the basis for legal reaction (a work of art as a potential violation of specific legal regulations).

The first section discusses terminological issues and specifies research area addressed in the dissertation. It examines the aesthetics of law with a particular focus on the law and literature approach (including law as literature and law in literature). This part indicates the proximity between the aesthetics of law in external frame (as understood by Zeidler) and the law in literature approach. Further, the section situates the orders of law and art within a broader order of culture. This part emphasises the normative dimension of embedding law within culture and the requirement of artefactuality in treating art as a component of culture. When delineating differences between the two orders (law and art), the following aspects are indicated: 1) the need to construct different models for interpreting works of art and legal texts, 2) the different values governing the order of law and the order of art and 3) the way in which the order of law and the order of art are evaluated through the prism of morality. This section also clarifies that, for the purposes of this dissertation, aesthetics is defined in narrow terms, as a theory of works of art. For this reason, it is specific works of art (and not art in general) that form the basis for further legal reflection. The concept of a work of art is understood in this dissertation as all man-made objects and human behaviours recognised as art on the basis of specific criteria; this formal definition meets the requirements of both art theory and legal practice. The first section of the dissertation describes and defines, in order to unify the terminology, aesthetic categories used by the legislator in the texts of legal acts. The categories in question are "work", "cultural assets", "monument" and "work of art" (in the light of legal definitions adopted by the legislator). The final part of the first section constitutes an attempt to construct a set of criteria to determine whether a given work of art can be considered as the basis for further legal reflection.

The second section attempts to present a work of art as the basis for further theoretical legal and philosophical legal reflection. In order to properly present examples of works of art that would elicit such a reaction, certain similarities and fundamental differences in the interpretation of literary texts and texts of legal acts are first specified. As far as the similarities are concerned, considering that both art and law are part of the order of culture, an interpretative model is indicated, which treats literary and legal texts as cultural objects. This is Jerzy Kmita's model of humanistic interpretation. As far as the differences in the interpretation of these two spheres of culture are concerned, the analysis takes into account such aspects as: the possibility of constructing different (perhaps even contradictory) meanings of a legal text and a literary text, the way of recognising the intentions of the authors of a legal text and a literary text, the way of recognising, in the process of interpretation, errors on the part of the authors of a legal text and a literary text, and the problem of the normative content of a legal text and a literary text.

Further, the section discusses an interpretative model corresponding to the requirements of presenting the content of works of art as the basis for further theoretical legal and philosophical legal reflection. This model is based on Eric Donald Hirsch's concept of objective interpretation, whereby the first stage of interpretation involves reconstructing the immanent meaning of the text (the level of objective meaning), while the second stage consists in contextualising the meaning by cultural and social aspects and reading it through the prism of elements chosen by the interpreter (the level of significance).

This perspective is applied to analyse three works of literature: *The Brothers Karamazov* by Fyodor Dostoyevsky, “The Fall” by Albert Camus and “Before the Law” by Franz Kafka.

The plot of *The Brothers Karamazov* allows for a juxtaposition of the ways of establishing subjectivity through: 1) an ontological approach to responsibility (existential level), 2) reference to violence (sociological level), 3) reference to inalienable dignity (legal level). The dissertation indicates also another possible way of establishing subjectivity on the legal level than through reference to inalienable dignity. Such a possibility is provided by the dialogical concept of law developed by Anna Rossmanith. While elaborating her concept, the author refers to the thought of Emmanuel Levinas and his ontological approach to responsibility. These three basic ways of establishing subjectivity correspond to different models of defining truth, respectively the model of relational truth, the model of relativised truth and the model of constant and unchangeable truth.

In “The Fall”, the character of the penitent judge is crucial for the outlined research perspective. It is noted that with this character Camus refers explicitly to the well-known legal construct of the right to a trial. As illustrated by the writer, however, this right takes an inverted form, becoming a “compulsion to be tried,” a phenomenon referred to in the dissertation as the “inverted right to a trial”.

Early in the analysis of “Before the Law”, it is indicated that the text can be read in at least three ways: 1) in reference to the Jewish tradition, 2) in reference to Immanuel Kant's philosophy of morality (Jacques Derrida's reading of “Before the Law” allows for such an interpretation) and 3) in reference to the possibility of regarding law as an autopoietic system. As part of sub-point 2, the dissertation presents the construct of the “law of law” (a metasearch rule governing law), according to which law must be deprived of any hints of empiricism in order to retain its binding force. This Derridean intuition corresponds to Kant's construction of moral law and the possibility of presenting the legal system as an autopoietic sensitive system. The “sensitivity" of this system consists in its reacting to the stimuli of the changing world, but only on the basis and within the framework of the rules produced by itself.

The third section presents the possibility of showing works of art as the basis for legal reaction, bearing in mind that works of art can violate, or engage in polemics, with certain legal regulations.

Early in this section, it is noted that law constitutes, regardless of the artists' will and declarations, a form of art objectivisation. All artists refer to law in a certain way, even if in the sense that their work of art (or the creative process itself) violates legal regulations or complies with them. Thus, the artists' behaviour is to some extent regulated and modelled by law.

In order to highlight the problem of potential transgression of social norms (which can be regarded as legal norms) by works of art, the dissertation presents works of art that are in conflict with the norms of public law, with particular emphasis on the violation of the norms of substantive criminal law and substantive administrative law.

The discussion of violations of substantive criminal law norms by works of art is oriented on three basic ways in which the unlawfulness of an act can be possibly excluded: 1) the institution of the countertype (specifically the countertype of art), 2) the construct of the victim's consent and 3) primary legality.

The three aforementioned institutions of criminal law are confronted in this dissertation with specific works of art and artistic behaviour that can be defined in this way. Primary legality is discussed in the context of graffiti by Ice'n'Rike, the victim's consent in the context of a performance by Chris Burden and the institution of the countertype of art in the

context of an incident that occurred during one of the concerts of a Polish death metal band. The construct of the countertype is indicated as a particularly important one; one of the postulates presented in the dissertation is to introduce this type of construct into legal practice. Such a solution, however, requires a definition of art (or rather "work of art") that would be operative enough to be used by ruling bodies. The disjunctive theory of art by Władysław Tatarkiewicz is referenced in the paper as meeting the requirements posed by the legal practice.

Further, the section presents the spatial order clause from administrative law. There are at least two reasons for including this clause in the dissertation: 1) the category of spatial order is *de facto* an aesthetic category transferred to the legal level and 2) this category in some way limits the freedom of artists, especially of architects and urban planners. At the same time, however, as illustrated in the dissertation by tramway stations in Lodz, the nature of this clause leaves relatively much space for bringing an artistic vision into life.

The final part of the third section, which can be treated as its conclusion, indicates the need to redefine the notion of freedom of artistic creativity. The examples of works of art presented in this section have become a kind of voices in the public space. They have gone beyond evoking a specific aesthetic experience and, due to their transgressive character, they have become a polemical voice, e.g. against the existing legal regulation. As noted previously in the dissertation, broadening the limits of the understanding of the freedom of artistic creativity would allow potentially bolder works of art to emphasise new social problems, thus expanding discourse on social issues, something that is sorely needed. Moreover, as indicated in the dissertation, freedom concerning art should not be considered only through the prism of the freedom of artistic creation. Equally important as artistic creation, especially in the context of the development of anthropological aesthetics, is the artist himself or herself. For this reason, artistic freedom in its broad sense (understood as the freedom of an artist and the freedom of creation) should be the framework in which to consider questions related to, for example, the material situation of an artist, which are conditioned by the functioning system of grants and scholarships.