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# Law and Art

Justice, Ethics and Aesthetics

Edited by  
Oren Ben-Dor

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Oren Ben-Dor



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For Keren

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Oren Ben-Dor  
Southampton 2011.

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**Kendell Geers'** work is strongly influenced by the social and political conditions which could (and still can) be found in South Africa, namely apartheid. Therefore, he continuously uses a wide variety of different materials deriving from the political, and he often utilizes a violent mode of expression to articulate his artistic points to view. His art is characterized by a multiplicity of media used (objects, installations, videos, performances), but in a very coherent way. Geers calls himself a "terrorist" in the field of art, i.e. through his art he wants to take a firm stand. He explores and criticizes our world in a very confrontational manner by turning his gaze to the phenomenon of alienation which he discovers in many objects, images and situations of the everyday. However, this critical positioning does not end up in a one-sided approach. On the contrary, it constantly questions the conditions of good and evil and the interdependence of these principles which underlie all things. By also addressing himself to moral and political issues as an artist, Geers reflects on the way exhibitions works, on the conditions of art in general and on artistic institutions as well as their protagonists in particular. Finally, through his art Geers enters life in a very comprehensive way and negotiates its bright and dark sides and its "dangerous beauty" which he searches in his personal experiences and which he always places before his art.

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# Introduction

## Standing before the gates of the law?

Oren Ben-Dor

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### I

Why should lawyers and artists be interested in the relationship between law and art? Works of art involve hermeneutic creativity as constraint by judgement. So is the activity of judges and lawyers. In law, texts are constantly created, re-encountered and interpreted. New legal arguments are the result of approaching legal texts in an ever surprising way, thereby marking moments of ‘beginnings’ of unexpected evolution of case-law. The very ambit of critical legal interpretation is at stake in the constant creativity that traverses ethical judgement which gives *political* voice to ever changing multiplicity of othernesses and differences which are for the most part silenced in conventional interpretation of past texts. A similar ethical moment challenges artists too. The moment during which the due of justice is understandingly brought into language, indeed challenging the very use of language, involves what Kant calls in his *Critique of Judgement* – a *reflective* judgement – a judgement of particular encounters which is made without subsumption of particularity under a general rule – a moment of genuine thinking that links justice and beauty. The happening of the just, ethical and aesthetic characterises law and art and the enriching asymmetry of their encounter. Aesthetic happening ethically destabilises the subject who creates/encounters the legal text or the work of art.

And yet, the response from both lawyers and artists to this topic combines interest with suspicion or even outright dismissal. There seems to be grasping that something important and unique happens when thinking with and through law encounters a work of art – something which points to a telling strife between the two, one that can generate in-sights that are transparent and audible and indeed useful for ethical, political and legal reflection but which, at the same time, can easily develop into a distortion of a primordial secret, a mystery that perhaps pertains to the actuality and beginning of both.

Contributions in this volume are about art and law – about the riddle of *aisthesis* as the imperative strange and beautiful beginning of perception as sensuous apprehension – perceivedness – and its relationship to the beginning of law and the normative thinking it harbours. They are about the ethical, political and legal

implications of those points where the sublime beauty of strangeness begins, as well as about the question of whether the law should protect mortals from the violence that might well come with that which this strangeness indicates at. However, contributions are also about how art relates to the need for the decisiveness of law, the *aisthesis* of such towards-a-decision, decisiveness that might indeed exist despite art, perhaps even as an ethical response to art. Contributions are about the points of overlap, differences, as well as the functional complementarities, between the truth that art protects and the truth that law protects. Art does protect something essential in humans and in their togetherness as a political community. That protection is, of course, transparent to legal and ethical judgement, but is far from clear how. The more this theme of protection casts light on the relationship between law and art, a corresponding riddle emerges and with it the question of the price to be paid by making good sense of some common theme of protection.

Nothing less is at stake in the relationship between law and art than what it is to be a mortal – what it is for mortals to be together in the mysterious beauty of justice and ethics. How does beauty and justice relate to law – arguably the most important of social institutions; one that constitutes the essence of moderate political community and through which such community aspires for constant re-evaluation and change? Dwelling on these relations, the book also constitutes a platform that canvasses the various conceptions of, and complementarities between, truth and power. Depending on these conceptions the book opens up questions about what does it mean to hold truth to power and, indeed, to hold power to truth.

Law was classically understood as *ars iuris*, an art of law, legal aesthetics which used the panoply of humanist disciplines, from philology to fine art, in the exercise of the legal role and the scholarly understanding of its texts. That understanding which points to an essential aesthetic aspect of law has somewhat fallen by the wayside over time although has never been diminished, not even in the wake of modernism, with its increased specialisation of legal expertise and the entrenchment of the objectifying representations of a legal subject in legal rights and duties. Indeed, modernism itself has been shown to recast this aesthetic aspect of law within itself.<sup>1</sup> However, law and art are still captured by many as antagonistic, at best existing in a tense and uneasy, highly suspicious, relationship with each-‘other’.

Even, perhaps especially, at their seemingly possible discrete dynamic existences, the very suspicion between law and art indicates that each has always somehow desired the other – a feature which again indicates at an essential connectedness between the two. Post-Modernist and structuralist/post-structuralist meditations as well as open-Marxist critical frameworks of analysis<sup>2</sup> show that any separation between law and art is essentially impossible and thus, as illusion, constitutes a depoliticised form of social relations which cloaks behind objectivism for the sake of protecting existing structures of power.

Law and art serve both as instruments of oppression and as means for emancipation. This insight yields the active realisation (and in turn possibility for action) that not only is art transparent to legal reflection and growth, but that law

is essentially an aesthetic activity. Critical legal thinking constantly encounters works of art and generates possibilities for action (*praxis*) opening new paths for practical wisdom (*phronēsis*) that keeps the political community alive through both refusing uncritically accepted and oppressive conventions that justified ethical, political and legal decisions but also bringing constant explorations, contestations and negotiations of new expressions of togetherness. When philosophical truths become abstractions only to conceal them being a means to surrogate particular power relations, thus stifling the active life of the political community, engagement with art mercilessly mirrors that fact and is able to alter the dormant and domesticated collective [un]consciousness. The relationship between *praxis* and received 'theory' is thus constantly destabilised instrumentally, conceptually and symbolically through such engagement.<sup>3</sup>

Critical legal thinking engages with how law already contains aesthetic sensibility that symbolically constitutes the unconscious of the [legal] subject, but which also oppresses singular encounters and possibilities (also 'allowing' the encounter with too narrow a range of possibilities) of genuine alterity and in turn, of resistance. Through engaging with works of art post-structuralism brought forth the possibilities for law to constantly encounter the exposure, and then the critique of, the symbolic order. In turn, the background justification, of which the relationality and priority between legal rules and principles are the conclusion, could re-politicise as a work of art.

Post-structuralist critical legal thinking exposes the contestability of identity in the face of any identification. Appreciating the critical aesthetic aspect of law has considerably drawn on psychoanalysis and the unconscious forces which obey the law of desire of which legal subjectivity is but an essential aspect. Lacanian psychoanalysis has radicalised this insight further by pointing towards an underlying essential lack which generates a schism within subjectivity within the aesthetics of which the law and its normativity plays a key role.

Explorations of the multi-layered happening of the aesthetics within which, and as which subjectivity is constituted, constantly reveals the manner structures of power operate. This happens very intensely in the culture of control yielded by modernity. As Carl Schmitt, Michel Foucault and Giorgio Agamben have taught us, these structures persist within constant complicity and blurry boundaries between, on the one hand, sovereign exercise of power which is rationalised after the fact of its exercise, rationalisation that takes place through the justified representation of rights and, on the other hand, subjugation of the body and soul – life – to normalising, knowledge-producing scientism, disciplinary, and bio-, power that controls the politicisation of life itself through the very happening of governmentality.<sup>4</sup> The debates around the nature of this complicity and boundaries have led to contemplation about whether and how constitutionalism can respond to the mysterious antecedent arbitrariness of dominating power that its legitimacy always already belatedly conceals and rationalises. Such critical explorations help to articulate the condition for the legal and the political subject in a manner that can lead to the possibility of resistance to domination in a way that