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# Law and Literature

*A Meaningful Connection*



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French sociologist Pierre Bourdieu claimed that law, which he considered to be strictly rational, is actually nothing but an act of social magic that actually works.<sup>1</sup> Magic means magic words. Words that go along with magic. Law is mostly expressed in words. The most common task in law is playing with words. Modern European state governed by the rule of law, too, is based on written law. It is therefore absolutely crucial that a lawyer be able to understand and comprehend a text, connect it with reality and, in some cases, transform it into action. That he be able to really work with a text. Basic contents of law are transmitted through a text. The path leading from words, or said social magic, to narration, is actually very short. Indeed, law is not merely a text, but is also connected with reality. When German philosopher and essayist, Walter Benjamin, reflected in 1936 on the decline of narration, in which no one was interested anymore and which had been losing its epic dimension,<sup>2</sup> he entirely neglected law. He thus left unnoticed an area which had been very closely interlinked with narration – description of history and of desired and wanted actions.

Law can be found on the point of intersection among several planes. From among these planes (or dimensions), the normative one plays a vital role. The law belongs to the sphere of norms – rules of human behaviour. Another marked dimension, which ultimately forms the design of law, is the dimension of ethics. Legal rules include moral contents, values or ideas which society considers correct. Law would make no sense without values. However, law is also affected by aesthetics. Emotions must necessarily influence law. Reasoning is an inherent part of legal argument. Law represents a force that also has a symbolic dimension and its ultimate character should be formed accordingly. The present text focuses on the aesthetic dimension.

Indeed, this dimension implies a link between law and literature. It shall be therefore examined how law can relate to literature and *vice versa*. How literature can be of help in lawyer's work. How knowledge derived from fiction can be employed in law. Naturally, we will not claim that law cannot exist without literature, but we shall rather try to show how literature can help, or at least cultivate, law. This ability of literature is pointed out by Jeanne Gaakeer, who claims that the original mission of the *Law and Literature* movement was quite simple: to achieve intellectual and aesthetic goals, to improve the ability to interpret and to see things from someone else's perspective.<sup>3</sup> None of the above is an inherent part of law. Nonetheless, these aspects can help law attain a closer link with the culture<sup>4</sup> in which law is embodied.

### **Possible manifestations of literature in law**

The backdrop against which shall be the connection between law and literature approach lies in the assumption that law can be perceived as a type of language.<sup>5</sup> Swiss linguist Ferdinand de Saussure understood law as a social product linked with the ability to speak. He considered it a set of social conventions adopted by society to actually implement this ability.<sup>6</sup> At the same time, language can be conceived as a conventional system of signs that expresses certain ideas.<sup>7</sup> Law, too, can be understood as a conventional system that expresses values and ideas, as well as the ensuing rules of proper behaviour. To this end, it uses a specific set of elements – rules – which

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<sup>1</sup> Pierre Bourdieu, *Language and Symbolic Power*, Polity Press, Cambridge 1991, p. 42.

<sup>2</sup> Walter Benjamin, *Illuminations*, Random House, New York 1988, p. 87.

<sup>3</sup> Jeanne Gaakeer, "The Future of Literary-Legal Jurisprudence: Mere Theory or Just Practice?", *Law and Humanities*, vol. 5, no. 1, 2011, p. 186.

<sup>4</sup> Clifford Geertz, *The Interpretation of Cultures: Selected Essays*, Basic Books, New York 1973, p. 89.

<sup>5</sup> James Boyd White, *The Legal Imagination*, University of Chicago Press, London 1985, p. xiii.

<sup>6</sup> Ferdinand De Saussure, *Course in General Linguistics*, Philosophical Library, New York 1959, p. 9.

<sup>7</sup> *Ibid*, p. 16.

have certain fixed mutual connections. American expert in constitutional law, Robert Cover, assumed that law was actually a language. In his concept, a norm is a sign used – depending on how addressees deal with it – to communicate attitudes towards ourselves and towards others.<sup>8</sup> By breaching (or setting) a certain norm, an individual makes a statement about himself and his relation to society. Together with further context, he can thus manifest his contempt for society or, on the other hand, conviction that its values are correct, etc.

It was already stated that law can be conceived as a language. Therefore its interpretation should be mentioned. Law as a social phenomenon is hidden in words and must be “reconstructed” from them. It is important how legal norms are written, how the addressees understand them and what is hidden behind these words. All that is law. It is a linguistic phenomenon that reflects links of power as well as cultural contents. Law is characterised by battles for influence.<sup>9</sup> Various actors try to obtain monopoly over the definition of individual notions and these battles have the nature of battles over language and interpretation.

An important role in the process of interpretation is played by the reader. Italian semiotician Umberto Eco believes that a text can have no meaning without a reader as the latter contributes towards its meaning.<sup>10</sup> A text is never complete without its relevant addressee. Pierre Bourdieu uses the term competent reader in this connection.<sup>11</sup> Although both Bourdieu and Eco speak about art or the aesthetic aspect of a text, there is no reason to believe that law would be any different. Here, too, a certain text must be prepared for someone who will be able to understand it, for a reader who has sufficient qualified information that is necessary for understanding it. The reader acts in a context whose rules and values he must share with others. The decisive role is played by the reader’s actual or desired community, the community that forms the basis for legitimacy of legal concepts. Law finds its expression in public space and its existence is conditional on its acceptance by the public. Or at least by the professional public. By his own interpretation which is connected with his environment, the reader thus construes the legal text and gives it its meaning. It is the reader’s intervention which enables the implementation of a normative text in real situations.

### **Legal interpretation and literature**

Consequently, it comes as no surprise that law can be interpreted as any other text. However, account must be taken of the context of power in which law exists, and also of the fact that a legal text is expected to be implemented. It is not a text intended for intimate reading. Law is a special system of signs that is reflected in the lives of specific people. In spite of its abstract form, it is an instrument that interferes with the functioning of the society. It does so in a special way that requires persuasion – it is necessary to persuade the addressees of the correctness of the legal regulation and legal procedures. Jack M. Balkin and Sanford Levinson consider that this forms the basis for the close interconnection between law and music. In music, as well as in drama, and law, crucial role is played by performance.<sup>12</sup> Law is an object that is presented to the public. The audience becomes a relevant element in the process of interpretation. When law is interpreted, it is necessary to transform the words by which a legal norm is expressed to functioning

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<sup>8</sup> Robert Cover, “Foreword: Nomos and Narrative”, *Harvard Law Review*, vol. 97, no.1, 1983, p. 8.

<sup>9</sup> Pierre Bourdieu, “The Force of Law: Toward a Sociology of the Juridical Field”, *The Hastings Law Journal*, vol. 38, no. 5, 1987, p. 816–817.

<sup>10</sup> Umberto Eco, *Lector in fabula: la cooperazione interpretativa nei testi narrativi*, Bompiani, Milano 2006.

<sup>11</sup> Pierre Bourdieu, *The Rules of Art: Genesis and Structure of the Literary Field*, Stanford University Press, Stanford 1995, p. 286.

<sup>12</sup> Jack M. Balkin, Sanford Levinson, “Interpreting Law and Music: Performance Notes on “The Banjo Serenader” and “The Lying Crowd of Jews””, *Cardozo Law Review*, vol. 20, no. 5-6, 1999, p. 1530.

social relationships. It is imperative to transform it to a rule of behaviour and let this rule actually influence human behaviour.

Law is a culture of arguing and interpreting.<sup>13</sup> This is why law can only be understood in view of the culture in which it is implemented and through which it obtains its meaning. This is not only about the given text, but also about its meaning that emerges in relation to culture. Consequently, law can be perceived as the art of rhetoric, consisting in the ability to convey specific meanings of a certain text to another person and convince the latter of the need to read it in a certain way.<sup>14</sup> It is imperative to limit the possibilities of reading the text and limit the number of possible meanings.

Let's summarise the above: the manifestations of the aesthetic dimension of law can most often be found in interpretation, performativity and arguments, or more specifically persuasion. Law must be interpreted – it is necessary to determine the ways of correct perception of a legal text. This text also needs to be implemented in a manner that corresponds to the expectations of the audience, or community to which it is addressed. That is what is called “performativity”. And it is also necessary to argue. To persuade, i.e. to enter the above battle for meanings. This is where “legal imagination” plays an invaluable role.<sup>15</sup> Legal imagination is the ability to work with abstract mental constructions on which law is founded. The knowledge of legal imagination can improve the understanding of what law actually is, what place it occupies in society and in what forms it acts. With sufficient legal imagination, law can be examined in a broader context.

In this way, we can partly answer the question inherently embedded in this text: why connect law with literature? Literature provides useful guidance in the field of interpretation, as well as in the areas of performance and argument. A lawyer must read a text in the same analytical fashion as, for example, literary critics. He also must act in a strategic manner, determine what stands “behind a given text” and be able to use this knowledge.<sup>16</sup> This brings us to functions that literature can serve in relation to law. Literature has the ability of cultivating law and lawyers. This process of cultivation by literature also includes improved ability to create a text and interpret it. Literature offers enough means for increasing the perception of narration and telling stories in a persuasive manner. However, it also refines the capability of understanding stories and texts.

### **Literature as a method of cultivating law**

Let us now focus on the ability of literature to cultivate law and the legal environment in general.<sup>17</sup> John Wigmore is often ranked among the first authors forming the contemporary history of the Law and Literature movement. In 1907, he published an article titled “A List of Legal Novels”<sup>18</sup>, where he offered lawyers a list of literary works that should not escape their attention. In his opinion, lawyers must not neglect fiction which deals with law, because it is their general duty to be cultivated people. They, therefore, should also be educated in fiction. However, it is also their specific duty to master their own profession. They must know what expectations people associate with it.<sup>19</sup> A lawyer ought to be a cultivated person and must know what society thinks of his profession. This, according to Wigmore, is the foundation of responsibility borne by lawyers.

<sup>13</sup> James Boyd White, “Law as Language: Reading Law and Reading Literature”, *Texas Law Review*, vol. 60, no. 3, 1982, p. 436

<sup>14</sup> *Ibid*, p. 437.

<sup>15</sup> See James Boyd White, *The Legal Imagination*, Little, Brown and Company, London 1973.

<sup>16</sup> Daniel J. Kornstein, “A Practicing Lawyer Looks Back on Law and Literature”, *Cardozo Studies in Law and Literature*, vol. 10, no. 2, 1998, p. 117.

<sup>17</sup> David Kairys, *The Politics of Law: a progressive critique*, Basic Books, New York 1998, p. 663.

<sup>18</sup> John H. Wigmore, “A List of Legal Novels”, *Illinois Law Review*, vol. 2, no. 9, 1907 – 1908, pp. 574 – 593.

<sup>19</sup> *Ibid*, p. 576.

John Wigmore was not the only one to strive to offer students literary works that could extend their general knowledge. <sup>20</sup>Eugene Wambaugh can be considered one of his predecessors.<sup>21</sup> In his short essay, Wambaugh is, in fact, much less radical than Wigmore. Wambaugh considers that it is up to each student whether or not he will become acquainted with selected literary works. At the same time, he adds that a proper and educated lawyer cannot be oblivious to literature – even if this was an artistic description of the legal environment.<sup>22</sup> Wigmore has a number of followers, who have been further extending his list or, in contrast, reducing it by removing works that are no longer attractive or revealing for nowadays readers.<sup>23</sup> Similar lists are now even being drawn up of other works of art, such as films.<sup>24</sup>

In its early years, the Law and Literature movement tended to attribute to literature the ability to cultivate lawyers. Later, this element appeared to fade away,<sup>25</sup> or is rather deemed a matter of fact. Given the major importance of law for society, I believe however that we should not neglect this cultivating aspect of literature. This thesis can now seem trivial – there can be no doubt that fiction has a cultivating effect. However, in a situation where specialisation is prevailing in law and an increasing number of lawyers tend to perceive law in technical terms, it might be appropriate to return to a comprehensive perception of law associated with culture.

Benjamin N. Cardozo, too, considered that literature had the ability to educate.<sup>26</sup> He, too, perceived the role of fiction in terms of cultivation. At the same time, he concentrated particularly on decision-making by courts and especially on the concept and style of court decisions. For him, literature was a tool helping to establish a certain concept of judicial rulings. This is also a question of cultivation, but cultivation of expression, which necessarily – if court decisions to have any weight – influences the results of judicial work. Therefore it is important to distinguish the contents and form of decisions, where form is by no means secondary. It is form what enables us to orient ourselves in a text. There is not the slightest reason why legal texts, including professional legal texts, should not be readable, why they should not try to meet general requirements placed on any text. And this includes comprehensibility and clarity, as well as, perhaps, certain aesthetic criteria. This, naturally, also applies to a normative text, which must not give up on readability.

### **Law as narrative**

Along with the art of composition, which can be sufficiently mastered by reading literature, Cardozo also pointed out the ability to narrate. In forming his decision, a judge must create a certain image of reality. It is clear that this image cannot be sufficiently comprehensible if both important and unimportant elements are assigned the same position. A judge must be able to choose. It is not his task to provide or obtain an absolutely accurate image of reality. He must focus on elements important for his decision. Literature shows a judge how to paint a comprehensive picture composed of material elements. A picture that will not be a perfect copy of reality, or even hyperrealistic, but that will capture substantial elements of the given case,

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<sup>20</sup> See Richard H. Weisberg, “Wigmore and the Law and Literature Movement”, *Law and Literature*, vol. 21, no. 1, 2009, p. 141.

<sup>21</sup> Eugene Wambaugh, “Light Reading for law Students”, *Law Bulletin of the State University of Iowa*, vol. 2, no. 1891 – 1893, pp. 28 – 31.

<sup>22</sup> *Ibid*, p. 31.

<sup>23</sup> See e.g. Richard H. Weisberg, “Wigmore’s “Legal Novels” Revisited: New Resources for the Expansive Lawyer”, *Northwestern University Law Review*, vol. 71, no. 1, 1976, pp. 17–28; Richard H. Weisberg, Karen L. Kretschman, “Wigmore’s “Legal Novels” Expanded: A Collaborative Effort”, *The Maryland Law Forum*, vol. 7, no. 2, 1977–1978, pp. 94–103.

<sup>24</sup> See Tomasz Stempowski, „Prawo i film – instrukcja obsługi“, Tomasz Stempowski, Piotr Grabarczyk, *Prawo w filmie*, C. H. Beck, Warszawa 2009, pp. 3 – 16.

<sup>25</sup> Richard A. Posner, “Law and Literature: A Relation Reargued”, *Virginia Law Review*, vol. 72, no. 8, 1986, pp. 1351–1392.

<sup>26</sup> Benjamin N. Cardozo, “Law and Literature”, *Yale Law Journal*, vol. 48, no. 3, 1939, pp. 489 – 507.

without omitting or adding any. Although Cardozo focuses primarily on the wording of court decisions, it can be stated that narration is part of many fields of law. Let us now deal with narration.

Language – or rather cultivated and literary language – can help establish a certain order that follows in a linear way from a certain starting point.<sup>27</sup> It has its origin. The ability to narrate, to create a chain forming an order and linked to a certain original state, is desirable in legal argument. Allison Tait and Luke Norris<sup>28</sup> mention stories that are told in courtrooms, pertain to past events and serve to clarify facts. These stories provide a comprehensive picture of those parts of the history of events that have a legal bearing.<sup>29</sup> When describing facts of the case, it is thus necessary to compose pieces of evidence to form a story.<sup>30</sup> This procedure corresponds to what Neil MacCormick described as “narrative coherence”.<sup>31</sup> Although MacCormick tends to aim at analytical examination of court decisions, his concept that a description of facts must correspond to what is usual or what is backed up by experience is actually very close to narrative examination of law.

### **Persuasiveness of law**

Let us now return to Benjamin Cardozo. In his opinion, another reason why knowledge of literature is important lies in the desired persuasiveness of a decision. The reasoning of a decision needs to be persuasive and have a symbolic strength.<sup>32</sup> These are elements that a judge can learn from fiction. From fiction, judges can derive procedures and techniques they will then use in composing their rulings. A persuasive decision must be functional by its own force. It must be a self-standing document that will stand *vis-à-vis* the parties’ judgement as well as that of the public and of the superior authority,<sup>33</sup> not to mention that it may affect society as a whole and its legal awareness. This is why court decisions certainly must not neglect the form in which they are provided. Cardozo strives to develop a certain architecture of reasons (or “architecture of opinions”)<sup>34</sup> that would ensure clear arrangement, comprehensibility and literary quality of judicial decisions. It can be considered that if judges (and, as documented by Cardozo in the conclusion of his article, not only them, but also attorneys and members of other legal professions) improve their literary abilities, they will be able to render more persuasive decisions, including appropriate use of decorative and ornamental elements.

It follows from the above that knowledge of art – in case of the authors mentioned above, especially literature – will provide a lawyer with an overview of law itself and its functioning in society, without losing the ever-present appeal for values that are embodied in law and society. Literature cannot replace law. That would be the same non-sense as believing that law is identical with a statute (or the law in narrower sense). The ability of literature to provide inspiration was also dealt with by James Boyd White, who is considered the ideological founder of the Law and Literature movement.<sup>35</sup> In his book, “The Legal Imagination”,<sup>36</sup> published in 1973, he provided an analysis of certain literary works and attempted to capture their inspiration for jurisprudence and especially for teaching law. In his opinion, study of literature should

<sup>27</sup> Peter Fitzpatrick, *The Mythology of Modern Law*, Routledge, London 1992, p. 42

<sup>28</sup> Allison Tait, Luke Norris, “Narrative and the Origins of Law”, *Law and Humanities*, vol. 5, no. 1, 2011, p. 11.

<sup>29</sup> Guyora Binder, Robert Weisberg, *Literary Criticism of Law*, Princeton University Press, Princeton 2000, s. 261–264.

<sup>30</sup> Peter Brooks, “Narrative Transactions – Does the Law Need a Narratology?”, *Yale Journal of Law and Humanities*, vol. 18, no. 1, 2006, p. 20.

<sup>31</sup> Neil MacCormick, “Coherence in Legal Justification“, Aleksander Peczenik, Lars Lindahl, Bert van Roermund, *Theory of Legal Science*, D. Reidel Publishing Company, Dordrecht, 1984, pp. 235-251.

<sup>32</sup> Benjamin N. Cardozo, “Law and Literature”, *Yale Law Journal*, vol. 48, no. 3, 1939, p. 492 – 493.

<sup>33</sup> *Ibid*, p. 505.

<sup>34</sup> *Ibid*, p. 503.

<sup>35</sup> Gary Minda, *Postmodern Legal Movements*, New York University Press, New York, 1995, p. 149.

<sup>36</sup> James Boyd White, *The Legal Imagination*, Little Brown, London, 1973.

become an inherent part of not only legal education, but also of the entire science of law. At the same time, Boyd focused primarily on interpretation. He considered that law and literature were interlinked by a similar method of interpretation. It is irrelevant whether a certain text is a legal text or fiction.

In view of this concept, Boyd did not limit himself only to a system of rules, which, in his opinion, was unable to fully capture the notion of law. He aimed at conceiving law as the world of ways in which people perceive their surroundings and by which they ultimately create their world. For him, law is inherently linked with language.<sup>37</sup> It is also art – it creates something new from existing elements.<sup>38</sup> It is based on human creativeness and the ability to transform the natural world the way people wish. Symbolically, take control over our surroundings. If a lawyer wants to interfere in a qualified manner in fights among human conscience, creativeness and the world surrounding us, he cannot avoid using and showing his mental competence. He cannot avoid using and proving his imagination.<sup>39</sup> This brings us back to intellectual challenges ensuing from the combination of law and literature.

## Conclusion

Literature can increase the ability to perceive a text and thus, in turn, improve interpretation and composition of legal texts. Topics, such as the role of the reader, or audience in general, actualism, originalism and narrative procedures, are only some of the procedures that are analysed in detail by literary critics and also find their image in law. Literature can also provide protection against overinterpretation. Robert F. Blomquist claims that overinterpretation is caused by the high number of tests established by courts to dissect each individual notion used in a legal regulation and attach to it a meaning that is considerably distant from usual and normal interpretation.<sup>40</sup> The basic meaning of a certain notion is often lost under the layers and loads of tests, settled interpretations and notional constructions. Umberto Eco speaks about texts becoming sacred when describing the issue of overinterpretation.<sup>41</sup> A text becomes so important, known or widespread that everyone provides its interpretation and everyone wants to be interesting in some way. If the obsessive desire for originality<sup>42</sup> is added, then every text becomes accompanied by numerous interpretations. It becomes overshadowed by the search for individual details, examination of every single word – both in and without context – and a search for individual theories (including bizarre ones) that would explain all its conceivable and inconceivable aspects. Interpretation thus veers towards a technical endeavour, which is not always desirable.

However, literature also offers tools that can be utilised in legal argument. It can improve the persuasiveness of legal arguments, even if serving merely as an ornamental element. Suitable composition can ensure the symbolic meaning of court decisions or, indeed, any other sources of law. By reading literature, a lawyer can improve his ability to describe and narrate the facts. It was already stated in the introduction that, in this paper, we do not venture to claim that law cannot exist without literature. Literature rather enables law to avoid tendencies towards technocracy and bureaucracy. By returning to cultivation, including cultivation of the creation and interpretation of a legal text, as well as improved legal imagination, the Law and Literature movement responds to both historic and current challenges.

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<sup>37</sup> James Boyd White, *The Legal Imagination*, University of Chicago Press, London 1985, p. xiii.

<sup>38</sup> *Ibid*, p. xiv.

<sup>39</sup> *Ibid*, p. 3.

<sup>40</sup> Robert F. Blomquist, “Overinterpreting Law”, [online] 2011, [25. 8. 2015] *Valparaiso University Legal Studies Research Paper*, No. 11-01. <http://ssrn.com/abstract=1766766>, p. 31.

<sup>41</sup> Umberto Eco, “Interpretation and Overinterpretation: World, History, Texts”, [online] 1990 [25. 8. 2015]. *The Tanner Lectures on Human Values*, Cambridge University, [http://tannerlectures.utah.edu/lectures/documents/Eco\\_91.pdf](http://tannerlectures.utah.edu/lectures/documents/Eco_91.pdf), p. 169.

<sup>42</sup> Ronald Dworkin, *Law's Empire*, Hart Publishing, Oxford 1998, p. 60.

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