

The Aesthetic Sense of Law: Tragedy in Nietzsche and Christianity

Timo Slootweg, Leiden University, The Netherlands, T.J.M.Slootweg@LAW.leidenuniv.nl

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In philosophical perspective, ethics and aesthetics are known to be firmly intertwined. Fundamental thought on the relation between ethics and law also implies careful reflection on the subject matter of the aesthetics of law. This field of interest necessitates a philosophical inquiry into the art and beauty of jurisprudence, lawgiving and legal adjudication. It needs to clarify the aesthetic dimensions of law, to explore to what extent law is aesthetically conditioned and in what sense legal judgments can be seen as aesthetic judgments.

While in general, the relevancy of philosophical aesthetics with respect to law is rather underappreciated, the importance of Nietzsche, and in particular his *The Birth of Tragedy* (1872), has been largely ignored. This is remarkable considering what this work has to offer for anyone interested in the art of law as *ars inveniendi*. Nietzsche's inspiring intuitions and impressions concerning the archaeology of philosophy and science emerging out of music and tragedy, radically question the existential and aesthetic legitimacy of any subsequent system of law. Since Socrates' 'emancipation' of thought (of the Apollonian from the Dionysian element), the art of politics and law has been founded almost exclusively on scientific knowledge, on logic and rational deliberation. As a consequence to this historical process of rationalization, universal laws and regulations (legal, moral and religious) have taken on an unhealthy importance in almost every part of life. Justice however remains illusory when the autonomous reason and its self-evident necessities are left to determine the limits of the possible and the impossible (e.g. negativities, contradictions and paradoxes).

With respect to jurisprudence, this tradition of 'optimistic socratism' - the 'primal sin' of philosophy and science - eventually culminated in a nihilistic legalism and legal positivism that almost entirely subdued the acknowledgement of life, tragedy, subjectivity and creativity. This also explains why traditionally questions concerning the aesthetics of law did not arise, or were ruled out of order.

Against this pervading Socratic tradition and in accordance with Nietzsche, the paper explores the prospective - in the theory and practice of jurisprudence - of a 'rebirth of tragedy'. In contrast to Nietzsche however, the paper designates this rebirth to develop from out of the spirit of Christianity. To this account, it argues that early modern and contemporary Christian existentialism best interprets this original spirit, in sharp contrast to the (Socratic) religious traditions of natural law (Thomas Aquino) and idealism (Kant and Hegel). The religious thoughts of Pascal, Kierkegaard, De Unamuno, Berdyaev and Shestov typically resound a tragic sense of law, which is strongly affiliated with the Nietzschean concept of tragedy. Their biblical personalism in relation to God (*sola fide*) and the neighbor inspires towards an essential critical

stance in respect to the rule of law. It also fuels a vital sensitivity towards a creative ethics of a beauty *beyond Good and Evil*. It is tragic wisdom not to see the good in goodness. Christianity seeks a God who is higher than 'the good'. It seeks a God for whom 'everything is possible'. 'Lead us not into temptation': the renaissance of tragedy works against the sickening temptation of reason that threatens to degenerate ethics into a rigid and legalistic morality that tends to undermine the legitimacy of law.

The paper argues that law is much the same as faith. Law is a form of art in service of which man's natural desire for knowledge, a desire credited so highly by Aristotle (Met. I 980 a 25), needs to be critically assessed and held in check. The further exploration of the aesthetic dimensions of jurisprudence (their theoretical development and methodological deployment) can very much benefit from the tragic theology of Christianity as well as from 'the religious turn' in postmodern philosophy (Derrida).