

## “Seeing Law in Terms of Music” A Short Essay on Affinities between Music and Law

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Article abstract

It is often believed that law and the arts have very little in common, since law is perceived as a rather formalistic and inaccessible subject incapable of eliciting emotions in the same way as the arts. This article, however, aspires to offer a different picture : by exploring music in its interconnectedness with law, it condenses the main arguments discussed by literature to ultimately show that law and music may reveal, after all, surprising affinities, so that some thought-provoking parallels between them can be made. Similarly, the paper strives to find points of connection between law and music in order to show the profound resiliency of law as an academic discipline. Finally, the paper advances the idea that the unbridgeable distance between the two disciplines exists (partially) in appearance only and that, in spite of its allegedly technical nature, law is a very flexible field of knowledge whose intellectual structure can influence and inform other creative processes.

# “Seeing Law in Terms of Music” A Short Essay on Affinities between Music and Law

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Erika ARBAN\*

*It is often believed that law and the arts have very little in common, since law is perceived as a rather formalistic and inaccessible subject incapable of eliciting emotions in the same way as the arts. This article, however, aspires to offer a different picture: by exploring music in its interconnectedness with law, it condenses the main arguments discussed by literature to ultimately show that law and music may reveal, after all, surprising affinities, so that some thought-provoking parallels between them can be made. Similarly, the paper strives to find points of connection between law and music in order to show the profound resiliency of law as an academic discipline. Finally, the paper advances the idea that the unbridgeable distance between the two disciplines exists (partially) in appearance only and that, in spite of its allegedly technical nature, law is a very flexible field of knowledge whose intellectual structure can influence and inform other creative processes.*

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*On dit souvent qu'art et droit ont peu en commun, le droit étant perçu comme une matière plutôt formaliste et inaccessible, incapable de susciter des émotions à l'instar de ce que peut faire l'art. Cet article tente justement d'offrir un point de vue différent: en explorant les liens entre musique et droit, il condense les principaux arguments généralement avancés pour démontrer que les deux disciplines peuvent cependant présenter des affinités surprenantes de telle sorte que des parallèles stimulants pour la réflexion peuvent être faits. En outre, l'article cherche*

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*à faire ressortir des points de contact entre le droit et la musique de façon à montrer la profonde élasticité du droit en tant que discipline universitaire. Finalement, l'auteure suggère que la distance infranchissable entre les deux disciplines est (partiellement) apparente et que, en dépit de sa nature prétendument technique, le droit est un champ de connaissance très souple dont la structure intellectuelle peut influencer et nourrir d'autres processus créatifs.*

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*Con frecuencia se dice que el arte y el derecho tienen pocas cosas en común. Al derecho se le concibe más bien como una materia formalista e inaccesible, incapaz de provocar emociones como el arte. Este artículo trata justamente de ofrecer un punto de vista diferente, al explorar los vínculos que existen entre la música y el derecho, y condensa los principales argumentos esgrimidos generalmente para demostrar que las dos disciplinas pueden, no obstante, presentar afinidades sorprendentes, de tal manera que se pueden realizar paralelos estimulantes para reflexionar. Asimismo, el artículo busca resaltar los puntos de contacto que existen entre el derecho y la música, para demostrar la profunda elasticidad del derecho como disciplina universitaria. Finalmente, la autora plantea que la distancia infranqueable que hay entre las dos disciplinas es (parcialmente) aparente, y que a pesar de su naturaleza presuntamente técnica, el derecho es un campo de conocimiento muy flexible, cuya estructura intelectual puede influir y alimentar otros procesos creativos.*

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*Any musical innovation is full of danger  
to the whole State [...] when modes of music change,  
the fundamental Laws of the State always change with them*

PLATO<sup>1</sup>

*La constitution [...] de l'État est l'ouvrage de l'art*

Jean-Jacques ROUSSEAU<sup>2</sup>

It is a frequent belief that law and the arts (literature, poetry, figurative arts, music, etc...) have very little in common, and while a certain disagreement exists on its very nature as an academic discipline (does it belong to the social sciences or to the humanities? or is it a professional domain of its own<sup>3</sup>?), law is usually perceived as a dry and formalistic subject, often inaccessible to the lay person and certainly not an academic or professional subject capable of lifting the spirit and eliciting emotions in the same way as arts do: in other words, the cold, arid and technical nature of law can hardly be combined with the creativity of the arts. In this regard, Holmes once posited that “[t]he law is not the place for the artist or the poet” and that artists “shrank” from law “as [if] from an alien world<sup>4</sup>”. But is it really true that law and the arts cannot interpenetrate or contaminate each other in some way, that they are worlds alien to each other?

This article explores one particular form of art, i.e. music, in its interconnectedness with law: it condenses the main arguments discussed by the (limited) body of literature existing on the subject to show that law and music may reveal, after all, surprising affinities and similarities, so that some thought-provoking parallels can be made between them. The paper does not aspire to conduct a truly interdisciplinary research, in the sense of importing research methodologies from the field of music into law<sup>5</sup>; rather, the less ambitious goal is to find points of connection and comparison

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1. PLATO, *The Republic*, Book IV.

2. Jean-Jacques ROUSSEAU, *Du contrat social*, Livre III, chap. XI.

3. See, *ex multis*, David HOWARTH, “Is Law a Humanity (or is it more like Engineering)?”, *Arts and Humanities in Higher Education*, vol. 3, n° 1, 2004, p. 9.

4. Daniel J. KORNSTEIN, “Introductory remarks: panel on politics”, (1999) 20 *Cardozo L. Rev.* 1331, 1334, citing Oliver Wendell HOLMES, “The Profession of the Law”, in Oliver Wendell HOLMES and Harold Joseph LASKI, *Collected Legal Papers*, New York, Harcourt, Brace and Co., 1920, p. 29. Oliver Wendell Holmes (1841-1935) was a prominent American jurist and former justice of the US Supreme Court.

5. In this regard, one article that tries to combine the interdisciplinary study of law and music, and that can be used as a point of reference for scholars interested in further exploring the topic, is the following: Allan BEEVER, “Formalism in Music and Law”, (2011) 61 *U. Toronto L.J.* 213.

between the two disciplines so as to show the profound resiliency of law as an academic discipline and fuel the intellectual curiosity of other scholars.

After a cursory overview of the nature of music and law, the article proceeds with a (non exhaustive) list of parallels that can be made between the two disciplines and that could be further explored and developed by interdisciplinary scholarship; next, it concentrates on one specific analogy—interpretation in law and music—and particularly on the paradoxes that may emerge when embracing a pure originalist approach in interpreting a legal text or a musical score. In the concluding arguments, the paper advances the idea that the unbridgeable distance between the universes of law and music exists (at least partially) in appearance only, to the point that several points of convergence can be found between them; in other words, despite its allegedly rigid and technical nature, law is a very resilient field of knowledge whose intellectual structure can influence and inform other creative processes (like music composition).

## 1 Law and Music

Although its precise etymology is still somehow uncertain, the word *music* derives from the ancient Greek μουσική (*musikè*), a locution commonly associated with τέχνη (*tèchné*), whose literal meaning can be translated as “the art of the Muses”. In Greek (and Roman) mythology, the nine Muses were the goddesses who inspired and protected various arts, including literature and the sciences<sup>6</sup>, and originally the term μουσική (*musikè*) did not refer to one particular art but to all the arts of the Muses. In contemporary parlance, music has assumed a rather general connotation, meaning different things to different cultures, to the point that the same term can be used to refer to profoundly different artistic expressions that have evolved throughout the centuries, ranging from what is usually referred to as *classical* music to more recent forms like jazz, soul, rap, heavy metal, or popular and folk music. Unless otherwise specified, however, in this article all references will be to *classical* music, i.e. the type of music rooted in Western culture and generally composed between the 17<sup>th</sup> and the 19<sup>th</sup> centuries.

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6. The nine Muses, all daughters of Zeus and Mnemosyne, were: *Calliope* (goddess of epic poetry), *Clio* (goddess of history), *Erato* (goddess of love poetry and lyric art), *Euterpe* (goddess of music), *Melpomene* (goddess of tragedy), *Polymnia* (goddess of hymns), *Terpsichore* (goddess of dance), *Thalia* (goddess of comedy) and *Urania* (goddess of astronomy). See the ONLINE ETYMOLOGY DICTIONARY, [Online], [www.etymonline.com/] (March 2<sup>nd</sup> 2017).

As noted in the introduction, it is commonly believed that law and music have very little, if nothing, in common: law entails sets of rules to regulate, structure and discipline society and individuals living in it, while one of the goals of music is to elicit emotions and lift the spirit of listeners, performers and composers, although the exact purpose of music is still somehow controversial<sup>7</sup>. Because of their contrasting nature, we may even perceive the association between law and music as an oxymoron. Yet, if we make the intellectual effort to look beyond appearances and explore more profoundly the true essence of both disciplines, we might be surprised to discover how many similarities exist, and how many analogies can be made, between these two otherwise different intellectual fields.

For Manderson and Caudill, rigour and creativity are traits common to both disciplines, as they argue that music is a “creative force and a rigorous art” but that also legal thinking should be “imaginative and rigorous<sup>8</sup>”. At the same time, Kornstein points to the sophisticated nature of both law and music, when he elegantly posits that:

[t]he word “music”, like “law”, conjures up a refined, elite endeavor, a product of man’s intelligence at its most highly civilized and highly disciplined. Both music and law are sometimes seen as expressions of the sublime, the beautiful, and the eternal [...]. Indeed, music has widened the sphere of legal ideas and enriched law with new images<sup>9</sup>.

It is not a coincidence that even in the most primitive societies it is possible to find rudimental legal and musical expressions, later evolved into more refined experiments, as if both the legal and the musical element belonged to the most innate and primordial needs of the human society, mechanisms through which individuals can relate and interact with each other. As Schmukler argues:

no culture so far discovered lacks music [...] all humans know music because [...] they do it. Whether we are aware or not, and whether we like it or not, the experiencing of music, or *musicizing* (Small, 1998) is a distinctive human activity, a serious and playful, conscious and unconscious endeavor in relation to others<sup>10</sup>.

Because of their pervasive presence in all types of societies known throughout the centuries, both law and music have become favourite subjects for interdisciplinary academic studies: for instance, scholars

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7. A. BEEVER, *supra*, note 5, 230.

8. Desmond MANDERSON and David CAUDILL, “Modes of Law: Music and Legal Theory – An Interdisciplinary Workshop Introduction”, (1999) 20 *Cardozo L. Rev.* 1325, 1328.

9. Daniel J. KORNSTEIN, *The Music of the Laws*, New York, Everest House Publishers, 1982, p. 18; see also D.J. KORNSTEIN, *supra*, note 4, 1331.

10. Ricardo SCHMUKLER, “Public Administration Theory as Musical Theory”, *Administrative Theory & Praxis*, vol. 24, n° 3, 2002, p. 415, at page 422.

have thoroughly researched the interconnectedness between music and ethnography, anthropology, history and sociology, among other things, and similar studies have been conducted in the field of law. At some point, interdisciplinary research started to explore even the correlation between law and the arts in general: the first efforts in this sense began in the 1960s in a number of universities in the United States, leading to what would become the celebrated movement *Law and Literature*, according to which law was studied both as a form of literature and through the study of literature, finding many prominent and enthusiastic followers<sup>11</sup>. As part of this academic strand, potential analogies between law and music have become the subject matter of a number of academic works authored by important scholars; yet, for some reason, these endeavours did not seem to eventuate into a complete and independent movement akin to *Law and Literature*<sup>12</sup>. So these contributions have remained scattered and sparse<sup>13</sup>, to the point that it is not possible to entirely separate the *Law and Music* strand from the *Law and Literature* movement and references to the latter are often inevitable<sup>14</sup>.

The academic and scholarly success of *Law and Literature* resides mainly in the connections existing between the two disciplines: in fact, as Posner observed, many literary works talk about trials or other law-related issues, such as crimes, deaths, etc.; both legal and literary scholarship are concerned with the meaning of texts (and their interpretation); judicial opinions resemble literary texts; literature is a subject of legal regulation and literary works may be the subject of litigation; finally, the Anglo-American adversarial process in criminal and civil trials has a theatrical dimension<sup>15</sup>. But besides these points of convergence, law and literature can be easily paralleled, as in both instances there is a written, intelligible text (a romance, a book, and by analogy, a piece of legislation or a judicial

11. In particular, Richard A. POSNER, *Law and Literature*, Cambridge, Harvard University Press, 2009.

12. Without pretending to be exhaustive in this regard, see for example Richard A. POSNER, "Bork and Beethoven", (1990) 42 *Stan. L. Rev.* 1365; Jerome FRANK, "Words and Music: Some Remarks on Statutory Interpretation", (1947) 47 *Colum. L. Rev.* 1259; Jerome FRANK, "Say it With Music", (1948) 61 *Harv. L. Rev.* 921; Sanford LEVINSON and Jack M. BALKIN, "Law, Music and Other Performing Arts", (1991) 139 *U. Penn. L. Rev.* 1597; A. BEEVER, *supra*, note 5; D.J. KORNSTEIN, *supra*, note 9.

13. It is perhaps worth mentioning that in April 1998 the Benjamin N. Cardozo Law School organized a symposium on "Modes of Law: Music and Legal Theory – An Interdisciplinary Workshop" with the participation of musicians, musicologists, law professors and lawyers, whose contributions were published on the *Cardozo Law Review*, vol. 20, 1999.

14. D. MANDERSON and D. CAUDILL, *supra*, note 8, 1326.

15. R.A. POSNER, *supra*, note 11, p. 5 and s.

decision) that can be used as the point of departure for the analysis : having this similar foundation, it becomes easier to investigate how law is depicted in literary works, or how law decisions follow a certain literary pattern.

Conversely, the analogy between law and music is less obvious and more abstract. Certainly, both music and law find expression through language, so they can be regarded as forms of language. Yet, music composers do not use traditional language to create musical scores ; rather, they use music notation, a set of universally accepted symbols that, in and of themselves, cannot be immediately compared to a written (legal) text. Furthermore, even if we construe music as a form of language, “what it communicates is not obvious, and [...] music does not put forward theories about the world, in the same way as language does<sup>16</sup>”. Most importantly for our discussion, however, although music has been used to deliver a number of political and social messages and to foster political ends<sup>17</sup>, music scores never refer to law, and “music’s contribution is in its very nature dreamlike and indeterminate in a way that limits its role in public deliberation<sup>18</sup>” as Nussbaum posits. Consequently, because of the different nature between these two forms of language, any analogy, connection and point of convergence between law and music will be identified not so much on the comparison between legal texts and musical scores, but elsewhere, in ambits such as interpretation, rituals and dynamics of powers, as I am going to explain in more detail in the remainder of the article.

## 2 Analogies and Points of Convergence between Law and Music

As we have just noted, law and music use different languages and modes of expressing ideas (sounds and written text), although both the legislator and the music composer usually abide by rather precise techniques or rules when writing a piece of legislation or composing a musical score, to the point that the final work is the result of careful choices made by the author(s) insofar as words, notation and style are concerned, so as not to lead to cacophonous results<sup>19</sup>. In fact, while mainly a creative endeavour,

16. R. SCHMUKLER, *supra*, note 10, at page 422.

17. Philip V. BOHLMAN, “Musicology as a Political Act”, *The Journal of Musicology*, vol. 11, n° 4, 1993, p. 411, at pages 411-418, with regards to rap music in African-American culture.

18. Martha NUSSBAUM, *Poetic Justice: the Literary Imagination and Public Life*, Boston, Beacon Press, 1995, p. 6.

19. Richard F. WOLFSON, “Aesthetics In and About the Law”, (1944) 33 *Kent. L.J.* 33, 44 and 45, citing John C.H. WU, *The Art of Law and Other Essays Juridical and Literary*, Shanghai, Commercial Press, 1936.



music must follow some rules : sounds become music only when organized according to certain laws, the laws of harmony and composition<sup>20</sup>.

We also noted that, because of the very nature of the legal text and the musical score, all points of convergence or analogies between law and music, if any, are identified not so much on the text, but on other traits. So, which parallels can be drawn between law and music ? Are there specific elements that are common to both, and that can be considered as the point of departure for a comparative and interdisciplinary scholarly analysis ?

First, a focus of the investigation could be whether there is any relationship between legal thinking and artistic creativity. In fact, Kornstein reminds us that a generous number of well-known composers and musicians received, at some point in their lives, some legal training: Handel, Schumann, Tchaikovsky, Stravinsky, Bartok and Sibelius are just a few examples<sup>21</sup>. The same scholar does not see this as a mere coincidence, and thus wonders whether similarities exist between the type of mind attracted to music and that attracted to law, or whether some resemblance exists between the process followed to construct a legal argument and that of a musical composition<sup>22</sup>.

Another aspect that brings together law and music pertains to emotions. We already noted that one of the main purposes of music, like other artistic expressions, is to elicit deep emotions and feelings both in the performer/interpreter and in the audience. As Plato suggests, “what should be the end of music if not the love of beauty<sup>23</sup>?” Actually, this capacity to trigger emotions is one of the meters through which the greatness of a performer, conductor or composer is measured (along, of course, with technique). But law, although commonly considered a “dry” and rather technical discipline, is not totally immune from emotional contamination : in fact, just think of the profound emotional impact that some testimonies or victims in a criminal trial can elicit in the jury, the judges, the lawyers or the public, besides the emotions that a jurist can experience in reading a beautifully argued judicial opinion. In this regard, Frank claims that “[a] large component of a trial judge’s reaction is ‘emotion’<sup>24</sup>” but positive and negative emotions can play a role also when reading a decision on contested issues such as human rights protection or individual freedoms.

20. R. SCHMUKLER, *supra*, note 10, at page 422.

21. D.J. KORNSTEIN, *supra*, note 4, 1332. Similar remarks are made by Bernhard GROSSFELD and Jack A. HILLER, “Music and Law”, (2008) 42 *The International Lawyer* 1147, 1149.

22. D.J. KORNSTEIN, *supra*, note 4, 1334.

23. PLATO, *supra*, note 1.

24. J. FRANK, “Say it With Music”, *supra*, note 12, 932.

Positive emotions are in fact intimately intertwined with the concept of *aesthetics* and, more in general, with the feeling of beauty and pleasure experienced during a certain activity. Music, as all other forms of art, is the result of a creative process intended to nurture emotions and, consequently, to give pleasure to the musician (composer, performer, and conductor) and the listeners. Law, on the other hand, serves radically different objectives, as one of its main purposes is to help structure relationships among individuals in a given society (in their public and private rapports) and regulate the relationships among the various organs of a state, and among nations at the international level: in other words, the *aesthetic* element in law is not immediately recognizable, and in fact it is a widespread belief that “the nature of law precludes any aesthetic hypothesis<sup>25</sup>”. Yet, if we dig deeper into the concept, we may agree with the view that “the aesthetic sense extends to all fields of human endeavor<sup>26</sup>” and we may be surprised to find that beauty, after all, is not completely absent from the legal universe: in fact, anyone can appreciate and enjoy a judicial decision that is beautifully written, clear and organized, or a piece of legislation that is harmonious in all its parts and sections, or even a scholarly text that adopts a refined (almost literary) language. This concept of “legal aesthetics” is not new if we consider that *elegantia iuris* was fundamental in Roman law, Blackstone was himself an amateur poet, Sir Frederick Pollock talked of law as a “work of art” and the theme of beauty and aesthetics in law has been touched upon by Llewellyn and Wolfson, among others<sup>27</sup>.

Law can thus be seen as an artistic work or a form of artistic expression. In this sense, Frank defines judges as “creative artists<sup>28</sup>” while Schmukler posits that “melody is the musical name of *argument*<sup>29</sup>” and Howarth points to the fact that law suggests a creative process, as it:

involves making something that did not exist before. It does not merely seek to understand what already exists, but rather must decide what is to exist. It is not surprising, therefore, that law is constantly drawn into contact with thinking at a more abstract level about how we ought to behave<sup>30</sup>.

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25. R.F. WOLFSON, *supra*, note 19, 35.

26. *Id.*, 36, citing Karl N. LLEWELLYN, “On the Good, the True, the Beautiful, in Law”, (1942) 9 *U. Chi. L. Rev.* 224.

27. For this listing, see J. FRANK, “Words and Music: Some Remarks on Statutory Interpretation”, *supra*, note 12, 1259 and 1260. Specifically, Llewellyn talked about “legal poetry”: see K.N. LLEWELLYN, *supra*, note 26, 230.

28. J. FRANK, “Say it With Music”, *supra*, note 12, 921.

29. R. SCHMUKLER, *supra*, note 10, at page 428.

30. D. HOWARTH, *supra*, note 3, at page 21.

Parallels between law and music can also be found in the architecture of legal and musical texts. For example, Kornstein describes the nature of law as “quasi-symphonic” as :

[l]aw offers us certain basic themes with a multitude of variations. Justice, mercy, due process of law, equality before the law – these are a few of the recurring major themes that serve as leitmotifs in law. Variations on these legal leitmotifs arise from different factual contexts as well as changed moral and social values. But the point is that the major themes recur<sup>31</sup>.

Similarly, Kornstein identifies an analogy between law and a fugue :

[t]he fugue starts with a theme based on a particular rule of law as sung by a particular judge. While the theme is still being sung, a second judicial voice modifies the first legal rule and introduces a secondary theme – a countersubject – which provides contrasts to the subject. As modifications of the legal rule occur, each judicial voice enters in turn, singing the theme, often accompanied by the countersubject in some other voice. After all the judicial voices have joined in, there are no “rules,” only a collection of precedents that can be cited for either side of almost any legal proposition. The legal fugue – the play of principle and counterprinciple, the dialectic of theme and countertheme – fits neatly into the common law process. It shows how a confusing chorus may still be singing a basic theme<sup>32</sup>.

Another trait that both law and music have in common is what I refer to as rituality or solemnity in the conventional gestures, all following a rather precise, almost religious, sequence : the entrance on the stage of the soloist and the conductor, the glances that conductor and soloist exchange before the performance, the tuning of the instruments under the direction of the first violin, the gesticulation of the conductor, with his hands and body that become themselves art in movement and blend with music, not to mention the fact that professional musicians and conductors are often surrounded by an aura of sacredness and reverence. But rituality and gestures are not exclusive to music performance, as they appear also in courthouses, and the aura of reverence surrounding musicians also, to a certain extent, encompasses judges. In regard to rituality, Kornstein found some analogies between law and religion, but similar conclusions can be made in regards to law and music performance. Kornstein says that :

[a] major source of strength for both is the notion that the rules being applied are handed down from a higher authority than man-made institutions. This notion is consciously enhanced by the usually grand and impressive architectural style of houses of worship and courthouses, by vestments for priests and black robes for judges, and by dramatic use of ritual and formalized jargon<sup>33</sup>.

31. D.J. KORNSTEIN, *supra*, note 9, p. 18 ; see also D.J. KORNSTEIN, *supra*, note 4, 1331.

32. D.J. KORNSTEIN, *supra*, note 9, p. 18 and 19.

33. *Id.*, p. 58 and 59.

Finally, another parallel that can be drawn between law and music is the “power” dimension, relating to the power dynamics existing between the various powers of government and those within an orchestra. William Shakespeare himself sketched the analogy between music and the structure of a government in these terms :

For government, though high and low and lower  
 Put into parts, doth keep in one consent,  
 Congreeing in a full and natural close  
 Like music<sup>34</sup>.

Building upon Shakespeare, also Frank paints the analogy between government and orchestra in the following words :

the conscientious, intelligent judge will consider government a sort of orchestra, in which, in symphonies authorized by the people, the courts and the legislature each play their parts. The playing may sometimes be bad. There may, occasionally, be some disharmonies. But, after all, modern music has taught us that a moderate amount of cacophony need not be altogether unpleasant<sup>35</sup>.

The list of analogies just sketched is certainly not complete, and many others can be identified ; yet, it still provides a good foundation and some food for thought for scholars interested in delving more into one or more of these points of convergence between law and music. In the next sections, I will focus on one particular analogy between the two disciplines, one that has already been identified by scholarship as one of the most promising : the parallel between musical and legal interpretation and, more precisely, the intellectual battle between originalism and non-originalism.

### 3 Interpretation in Law and Music: Originalism and Non-originalism

Law is a rather intricate and multifaceted field of knowledge that involves a number of different actors, each of them playing a very specific role : legislators materially write legal provisions that are applied in real life ; lawyers and litigators enter into the game when issues arise pertaining to legislation, while judges act as the umpires, settling disputes, interpreting and giving some concrete sense to the laws in force. The creative process in music is equally complex : a composer acts as a legislator, with scores later brought to life by the performance of musicians ; in doing so, the

34. William SHAKESPEARE, *Henry the Fifth*, Act I, Scene I, as reproduced in J. FRANK, “Words and Music: Some Remarks on Statutory Interpretation”, *supra*, note 12, 1272, note 60.

35. J. FRANK, “Words and Music: Some Remarks on Statutory Interpretation”, *supra*, note 12, 1272.

music performer (if playing individually) or the conductor (in case of an orchestra) are called to give some meaning to the score, mirroring in this sense the task of judges when interpreting a legal provision. Kornstein is very clear in illustrating this process :

Lawmakers can be likened to musical composers : both write the texts that others must interpret. And judges and lawyers are the performers of legal music. They look at the texts, be they constitutions, statutes, or judicial precedents, and put on those texts their own interpretations. In performing their roles, judges and lawyers interpret the legal texts much as instrumentalists interpret musical scores<sup>36</sup>.

Frank, too, points out that the legislature “is like a composer” who “must leave interpretation to others, principally to the courts<sup>37</sup>”. A musical score, in and of itself, would have no sense without an interpreter (a soloist, or a conductor) bringing those signs to life : as scholars have indicated, “music does not exist until it is performed<sup>38</sup>”. The same can be said, although with some obvious differences, about law : a legal provision is almost a dead letter unless and until it is applied and interpreted. Consequently, one interesting avenue in comparing law and music is interpretation : in fact, just as “the musical composer delegates some subordinate creative activity to musical performers, so, [...] the legislature delegates some subordinate (judicial) legislation—*i.e.*, creative activity—to the courts<sup>39</sup>”.

Certainly, the task of interpretation was easier in the past : in fact, as Frank reminds us, there was a time where “every composer was the sole performer of his compositions” as judges (especially under English legal tradition) “actively participated in enacting the statutes which they interpreted” ; it was only later that these two functions, performing and composing, were separated<sup>40</sup>, thus complicating the reality.

One question that has emerged in the ambit of interpretation in law is whether statutory, legal or constitutional interpretation should be considered a science or an art<sup>41</sup>, and I am led to believe that it is a mix of both, as it is not always possible to apply rigid, pre-set rules in interpreta-

36. D.J. KORNSTEIN, *supra*, note 9, p. 19. Later in the text, the same scholar argues that lawyers can be defined as “professional interpreters” as they spend most of their professional lives interpreting documents (*id.*, p. 111).

37. J. FRANK, “Words and Music: Some Remarks on Statutory Interpretation”, *supra*, note 12, 1264.

38. *Id.*, quoting Julian HERBAGE, “Brains Trust”, *The Penguin Music Magazine*, vol. 1, 1946, p. 75.

39. J. FRANK, “Words and Music: Some Remarks on Statutory Interpretation”, *supra*, note 12, 1272.

40. *Id.*, 1268.

41. *Id.*, 1259.

tion and there is some room for creativity, although some scholars are more cautious on this aspect, arguing that, even if lawyers need to be creative, this does not imply that their work is artistic, or that it can be considered as a work of art or literature<sup>42</sup>; on the same line of thought, other scholars believe that the creativeness of judges “should always be limited<sup>43</sup>”.

The analogy between law and music in the ambit of interpretation is not new, as a number of prominent scholars have already attempted to describe it, especially noting that certain interpretative issues encountered by musical interpreters are no different from those faced by the constitutional judge when performing judicial review: in particular, a very close parallel exists in the intellectual battle between originalism and non-originalism. Many definitions exist in literature about originalism in constitutional interpretation: for instance, Posner explains that originalism is the view that “courts should apply the Constitution according to the principles intended by those who ratified the document<sup>44</sup>”; similarly, since originalism is the orthodoxy of the Constitution, when interpreting this fundamental text, judges shall be concerned only with how the words contained in it would have been understood at the time of its enactment<sup>45</sup>; other scholars paint originalist interpretation as a way of seeing the constitution “frozen” at the time it was adopted<sup>46</sup>.

In countries such as the United States, the dilemma between originalists and non-originalists in constitutional interpretation is far from being settled, and originalism found in the late US Supreme Court Justice Antonin Scalia one of its most convinced representatives. Conversely, in Canadian law the issue was settled a long time ago with the renowned metaphor of the “living constitution” crafted by Lord Chancellor Sankey in the notorious “Persons Case<sup>47</sup>” and it is now a commonly-accepted doctrine at the Supreme Court of Canada. In this landmark decision the Privy Council argued that:

[t]he British North America Act planted in Canada a *living tree* capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. “Like all written constitutions it has been subject to development through usage and convention” (Canadian Constitutional Studies,

42. D. HOWARTH, *supra*, note 3, at page 14.

43. J. FRANK, “Words and Music: Some Remarks on Statutory Interpretation”, *supra*, note 12, 1264.

44. R.A. POSNER, *supra*, note 12, 1366.

45. *Id.*, 1368, quoting Robert H. BORK, *The Tempting of America. The Political Seduction of the Law*, New York, The Free Press, 1989.

46. Bradley W. MILLER, “Beguiled By Metaphors: The ‘Living Tree’ and Originalist Constitutional Interpretation in Canada”, (2009) 22 *Can. J.L. & J.* 331.

47. *Edwards v. Attorney-General for Canada*, [1930] A.C. 124.

Sir Robert Borden (1922), p. 55). Their Lordships do not conceive it to be the duty of this Board – it is certainly not their desire – to cut down the provisions of the Act by a narrow and technical construction, but rather to *give it a large and liberal interpretation* so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the provinces to a great extent, but within certain fixed limits, are mistresses in theirs<sup>48</sup>.

In music, a movement akin to (constitutional) originalism is what is commonly referred to as the Authentic Performance Movement or Early Music Movement. Many scholars have attempted to define this specific movement: for example, Levinson and Balkin explain that it presents many facets (such as the rediscovery of forgotten music or the reconstruction of period instruments), although its most controversial aspect is “the claim of its followers that music should be played according to the ‘authentic’ performance practices of the era in which it was composed<sup>49</sup>”. In other words, followers of this movement seek to perform music “in a form which [the composer] would recognize<sup>50</sup>”. For instance, an attempt is made to “recreate ‘the original orchestral sound’” or assign “to notes the pitch assigned to them” in the given time, and also to reproduce the same tempo, rhythmic accent or dynamic colour described as common at the time of the composer<sup>51</sup>. Exponents of the Early Music Movement will also exclusively use instruments existing at the time the music was composed, with all the consequences that this choice might imply<sup>52</sup>. In other words, adherents to this movement are accused of what has been dubbed placing older music in a museum<sup>53</sup>. Posner further elaborates on the concept and, citing Lipman, defines the Early Performance Movement as one involving:

the required employment of original instruments – instruments resembling as closely as possible those on which the music was to be played at the time of its composition”; “reliance on what remains of the composer’s original text, freed of all inadvertent error in transmission and publication, and of all subsequent

48. *Id.* (emphasis added). Incidentally, the question discussed in the *Persons* case was whether women could be members of the Canadian Senate, thus involving an issue of gender discrimination. In fact, s. 24 of the *British North American Act* (BNAA) provided that only “qualified persons” could be appointed to the Senate, without specifying their gender. The Privy Council was thus called to determine whether women could be considered qualified persons according to s. 24 of the BNAA.

49. S. LEVINSON and J.M. BALKIN, *supra*, note 12, 1601.

50. *Id.*, 1615, quoting the Hanover Band, an English group embracing the Early Music approach.

51. *Id.*, 1615 and 1616.

52. *Id.* In fact, as the authors indicate, when playing Beethoven according to his time fashion, “horns will have no valves” or “pianos will produce sounds quite different from a modern Steinway” or even “violins will use catgut instead of contemporary metallic strings” (*id.*, 1616).

53. *Id.*, 1622.

editorial emendation”; and “the use of original performance styles – the complete observance of the composer’s explicit indications, and an untiring attempt to recover all that can be known of the unwritten, customary, and taken-for-granted methods of deciphering and implementing his written notation”. Thus, “[i]n authentic performances the sought-after styles, including details of rhythmic execution, instrumental techniques, and concert pitch, are those contemporaneous with the composer – the exact way a composer might have heard his works when they were first rendered, at the time of their composition or shortly thereafter, by the best and most representative executants of the day<sup>54</sup>.

Citing Krenek, Frank paints musical purists and adherents to the idea of “work-fidelity” in these terms:

[t]he performer of a musical piece – an individual pianist, violinist, or an orchestra-leader – should [...] engage in “authentic interpretation” which eliminates the interpreter altogether, by “the actual rendition” of the musical symbols just as they were written, in order to “serve the true intention of the composer<sup>55</sup>.

In any event, originalism both in music and in constitutional interpretation presents positive and negative aspects. So in the next section I am going to focus on some of the paradoxes that may emerge when embracing a too orthodox originalist interpretation.

#### 4 Paradoxes of Originalism

Many arguments can be made both in favour and against constitutional originalism and its musical equivalent, the Early Music Movement. First, we noted above how one of the distinctive traits of originalism in law and music is to closely look at the intentions of the legislator and/or the composer when interpreting a score or a legal text; in this sense, the first difficulty with this approach is how to assess these intentions, as this task reveals more complexities than one may expect.

In literature, intention has been defined as the “design or plan in the author’s mind” and this is something which bears “affinities for the author’s attitude toward his work, the way he felt, what made him write<sup>56</sup>” and this definition can be well exported also to law and music. Followers of originalism, in music and in law, seem to know exactly how a certain piece of legislation should be interpreted or how a musical score should be played, as they allegedly know the intentions of the composer or the legislator. In order to ascertain these original intentions, most of the time

54. R.A. POSNER, *supra*, note 12, 1366.

55. J. FRANK, “Words and Music: Some Remarks on Statutory Interpretation”, *supra*, note 12, 1260.

56. William K. WIMSATT and Monroe C. BEARDSLEY, “The Intentional Fallacy”, *The Sewanee Review*, vol. 54, n° 3, 1946, p. 468, at page 469.



the interpreter (judge or musician) relies on documents, written in the past, explaining the rationale behind certain choices. In law, retracing the original intentions of the founding fathers may be easier, as often documents exist of parliamentary debates, court opinions etc., which help the interpreter in this endeavor. Conversely, in music there are no recordings of past performances, so it is very difficult to know exactly how a piece of music was presented at the time the composer wrote and conducted it for the first time, even if historical documents can help us determine how instruments were manufactured in the past, their characteristics, etc.

In relation to the above argument, Frank reminds us that taste has also evolved with time:

[w]hen a modern performer plays Bach, it is all but impossible to reproduce the exact mood of that composer (who lived in a period in which the general mood was substantially different from ours), to recreate the “taste” of that period. So, too, a court, when called upon to interpret a statute enacted in the 17<sup>th</sup> century, or in 1789, or even in 1830. Often the judges cannot be at all sure that they have recaptured the purpose of the composers of the legislation who lived in an era with a quite different outlook<sup>57</sup>.

Taruskin identifies other difficulties in radically adhering to the originalist approach. In this regard, he suggests that, at least for music, in most instances “composers do not even have the intentions we would like to ascertain” and that “composers’ concerns are different from performers’ concerns, and that once the piece is finished, the composer regards it and relates to it either as a performer if he is one, or else simply as a listener<sup>58</sup>”. Similarly, Wimsatt and Beardsley make an interesting observation in regards to poetry that could again be exported to law and music. They say that:

[t]he poem is not [...] the author’s (it is detached from the author at birth and goes about the world beyond his power to intend about it or control it). The poem belongs to the public. It is embodied in language, the peculiar possession of the public, and it is about the human being, an object of public knowledge<sup>59</sup>.

However, even assuming that it is possible to retrace the original and true intentions of the composer or of the legislator, a radical and complete adherence to purism, both in law and in music, eventually frustrates the role of the interpreter (judge or musician): in fact, complete fidelity to the

57. J. FRANK, “Words and Music: Some Remarks on Statutory Interpretation”, *supra*, note 12, 1266 and 1267.

58. Richard TARUSKIN, “On Letting the Music Speak for Itself: Some Reflections on Musicology and Performance”, *The Journal of Musicology*, vol. 1, n° 3, 1982, p. 338, at page 340.

59. W.K. WIMSATT and M.C. BEARDSLEY, *supra*, note 56, at page 470.

musical work implies that the interpreter almost completely denudes himself or herself of all feelings to “serve the true intentions of the composer<sup>60</sup>” as the purpose of musical purists is to “eliminate the interpreter altogether, to eradicate the ‘human element’<sup>61</sup>”. By analogy, complete adherence to the intentions and meaning of the words at the time of the founding fathers in constitutional law significantly reduces the contribution of the judge, and in fact Frank recalls that two prominent despots, Napoleon and Frederick the Great, “each attempted to forbid judges from interpreting statutes” even if both attempts failed<sup>62</sup>.

In any event, whether or not one embraces originalism, one of the fundamental problems with interpretation is that the product delivered to us is never neutral. In music, even when adhering to the Early Music Performance movement, the performance will never be neutral and identical to that of other executants. In fact, two interpreters will never play in the same exact way, no matter how much they try to be faithful to the composer’s intentions: the touch of the fingers on the instrument, the sound produced by a wind instrument will never, to a well trained ear, be perfectly identical the one to the other. The feelings of the interpreter, his or her sensibility, will all play an important role, as it is important in this regard whether the instrument is played by a male or a female. Also, any music performer who approaches a score written in the past is inevitably biased by his or her musical education, as he or she knows the musical styles and innovation that have come after. Social and cultural factors can also play a role in the interpretation process: a Russian performer who interprets a Russian composer will probably have a different approach to the score than a performer with a different cultural background. Consequently, even if performers are extremely skilled, talented and prepared, their interpretations and renditions of the same musical text will never be identical. As Frank points out, “literalism cannot wholly prevent varieties of musical interpretation<sup>63</sup>” and, citing Krenek, asks: “[h]ow [...] does it happen that the “Seventh” as read by Furtwaengler will differ considerably when Toscanini conducts? How can this happen, when each claims to be an infallible executor of the composer’s will<sup>64</sup>?”

Similarly, when interpreting a legal decision, the interpretation rendered by a judge will hardly be completely neutral; the same fact of

60. J. FRANK, “Words and Music: Some Remarks on Statutory Interpretation”, *supra*, note 12, 1260.

61. *Id.*, 1268.

62. *Id.*

63. *Id.*, 1260.

64. *Id.*, 1260 and 1261.

adhering to originalism is, in and of itself, a biased and deliberate choice made by the judge, one that sets the prism through which the interpreter reads the legal text. Furthermore, judges have different opinions on the same statute or the same facts and, as a result, they read the text in different ways: this happens very often with dissenting opinions in common law jurisdictions, where the different modes of interpreting the various statutes or provisions at issue between one judge and the other are made clear. As a result, originalism in law and purist performance in music are, as some say, a chimera<sup>65</sup> or, at least, very difficult to achieve, as legal texts and musical scores do not exist in a vacuum, but require a filter (the interpreter) to perform the task of bringing them to life, a filter that is hardly neutral. As Krenek confirms, at least in the musical ambit, a composer wants to “get his message across [...] in undistorted and unadulterated fashion” but, since he cannot completely control the performer, he becomes “practically helpless” as “soon as he has handed his music over to the interpreter<sup>66</sup>”.

The next question to address refers to the practical consequences of a more or less faithful (or unfaithful) interpretation of the music score and of the legal text. Embracing originalism in music and in law can in fact lead to opposite, and sometimes extreme, results. For instance, choosing to approach a musical score through the lens of Early Music Performance can trigger sentiments of appreciation or disapproval in the listener: listeners can welcome and enjoy the interpretative choice made by the performer, or they can be in complete disagreement with it. But, from a practical standpoint, there are no extreme consequences, as adhering too closely to the score leads at the most to “an unbearable caricature of the composition<sup>67</sup>”. Conversely, in law the choice between originalism and non-originalism can lead to more dramatic results, especially in the ambit of the protection of individual rights and freedoms, as judicial interpretation in one sense or the other can lead to the recognition or denial of important rights. In fact, as Frank reminds us:

[s]ometimes a literal interpretation of a piece of legislation is indubitably correct. Often, however, so to construe a statute will yield a grotesque caricature of the legislature’s purpose. When, not so long ago, some judges were anti-democratic, they often obstructed the democratic will voiced by the legislature. This they sometimes did by obstinately construing a statute narrowly, without real regard to its intention<sup>68</sup>.

65. R. TARUSKIN, *supra*, note 58, at page 341.

66. J. FRANK, “Words and Music: Some Remarks on Statutory Interpretation”, *supra*, note 12, 1261.

67. *Id.*, 1261.

68. *Id.*, 1262.

Nonetheless, at least in law, originalism is not without some utility: among the virtues or reasons justifying originalism, scholars have identified the need to “curb judicial discretion” and to prevent judges “from seizing the reins of power from the people’s representatives<sup>69</sup>”. Another reason used to justify originalism is the need to “preserve the effectiveness of the Supreme Court<sup>70</sup>” although it has also been argued that “there is no evidence that the Court’s authority depends on adherence to originalism<sup>71</sup>”.

In conclusion, it could be argued that both in music and law it may well happen that interpreters (whether executants or judges) detect meanings and nuances in the legal text or musical score that the composer (the legislator, founding father or musician) did not necessarily envision. In this case, the interpretation rendered offers a richer meaning than the original intentions of the author. Consequently, in favor of a less fundamentalist or radical approach to music and legal interpretation, we can say that, by wholly embracing the originalist prism, the interpreter is probably closer to the true intentions of the composer or legislator; yet, this approach deprives the ultimate beneficiaries of the countless nuances that a more open interpretation may offer. After all, the composer or legislator could not possibly foresee, at the time he or she wrote the text or score, all the interpretative and factual developments to appear in the future.

## Conclusion

In this paper, I have extensively explored the interconnectedness between law and music, first by listing a number of possible analogies between these two apparently distant disciplines and, second, by particularly focusing on one specific analogy, interpretation in law and music. But what was the purpose of this comparative study (besides being a purely, though fascinating, intellectual exercise) and what conclusions can be drawn?

One of the objectives of this contribution was to advance the idea that the unbridgeable distance between law and music exists only (or at least partially) in appearance and that, despite its allegedly rigid and technical nature, law is a very resilient field of knowledge whose intellectual structure can influence and inform other creative processes (like music composition). In this sense, I identified a list of potential analogies between

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69. R.A. POSNER, *supra*, note 12, 1369, citing R.H. BORK, *supra*, note 45. Incidentally, the work of Bork discussed by Posner in regards to judicial interpretation mainly refers to the work of the US Supreme Court, but it could be extended by analogy to other countries as well.

70. *Id.*, 1370; R.H. BORK, *supra*, note 45.

71. *Id.*, 1371.

law and music and I compared interpretation in the two fields by exploring a number of potential avenues of research.

It is also interesting to note how, on the one hand, attempts are made to make the academic discipline of law more “scientific” as reflected in the constant quest for a more scientific research method to apply to the study of law: this explains the development and multiplication, over the past few decades, of a number of “Law and ...” movements, where the research methods commonly accepted and employed in disciplines such as economics, sociology, anthropology, geography, political science, etc. have been progressively applied to the study of law. On the other side, attempts are also made to find similarities and analogies between law and the arts, thus seeing law as a “cultural product<sup>72</sup>”. Yet, this contradiction is only apparent, as the two approaches do not necessarily move in opposite directions; rather, they testify to the profound resiliency of law as an academic discipline whose influence is broader than one might expect at first sight. In fact, law (as a set of rules) informs creative processes such as musical composition.

With regards to the relevance of literature for law, Kornstein once argued that: “[l]iterature allows us to pick up experience from art, to discover something about other people and ourselves. Law leavened by literature is law closer to life. We should be grateful that our judges read other things besides lawbooks<sup>73</sup>”.

As literature is seen as a way to expand the horizon of the jurist, so also music could help lawyers, jurists, and law students to broaden their minds: in fact, the creativity intrinsic in music (as in other arts) can initiate the lawyer or jurist to new forms of sensibility. Actually, all law schools should begin to enrich their curricular offer by adding more courses and seminars on cultural studies and law.

Certainly, our analysis of interpretation was perhaps cursory, and the analogies suggested do not exhaust all the possibilities for comparative work: this area of scholarship has the potential for being researched more thoroughly, for example by taking historical perspectives more into account, by strengthening references to musicology in the ambit of interpretation, or even by making cross-references to other forms of art such as painting. In any event, we hope to rekindle academic interest in this area of scholarship so as to continue in this endeavour and ultimately create an independent “Law and Music” movement.

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72. R.F. WOLFSON, *supra*, note 19, 45.

73. D.J. KORNSTEIN, *supra*, note 9, p. 195.