

Performances in Law: a Lesson from Literature.

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'.... the measure of a singer's freedom is in his own creative personality. He can sing the composer's song as his own, if he has the power creatively to assert himself in his interpretation of the general law of the melody which he is given to interpret.'

-Tagore²

This paper explores the idea of 'performance' in relation to law. My starting point is to analyse the performance of law *through* text. The basic argument is that rather than simply reading the text of law as 'black-letter' law, appreciating it as 'performance-oriented' enhances our understanding of it, expands the paradigm and opens new avenues for interpretation. Next, I examine 'performances' of justice in and through law.³ Finally, the scheme and rituals of the courtroom setting are discussed to situate the character of the lawyer within this space, as a performer.⁴ The underlying theme is

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²<http://www.schoolofwisdom.com/history/teachers/rabindranath-tagore/tagore-and-einstein/>
Nobel Laureate Indian writer, philosopher, musician and painter Rabindranath Tagore.

Tagore conferred the title of 'Mahatma' (meaning 'Great Soul') on Gandhi.
³Levinson acknowledges, understanding literature *sensitivities* lawyers to the concept of justice. S Levinson, 'Some [brief] Reflections about Law and Literature' *Cardozo Studies in Law and Literature* Vol. 10, No. 2, Tenth Anniversary Volume (Winter, 1998), pp. 121-123

⁴ Peter Goodrich 'Law by Other Means' *Cardozo Studies in Law and Literature*, Vol. 10, No. 2, Tenth Anniversary Volume. (Winter, 1998), pp. 111-116. He writes (at p 113): 'If the legislator was regarded, at least in one medieval tradition, as the unacknowledged poet of the world, the lawyer was historically a sub-species of linguist, variously depicted as a purveyor of fictions, an actor and narrator, an artist, "conteur," and spinner of verbal images or painted words.'

to advocate the reading, teaching and understanding of law as a humanities based discipline which is best appreciated in terms of ‘performance.’

It has often been said that Shakespeare’s plays lose their intricate construction and therefore have a lesser impact when enacted. Commentators such as Charles Lamb have argued that Shakespeare’s work can be better appreciated if it is read, rather than performed.⁵ According to Professor Hibbits, this preference for text over ‘performance’ is mirrored in (American) legal studies as well. He argues that the preference for studying black letter law over learning the skills of advocacy, runs throughout the curriculum at law school. However, he also argues that, whilst black letter law is an important source of law, separating law from performance takes away from law its true ‘flavour’. Law, he writes, is ‘made in performance,’ from the ‘ritualised’ debating of motions in the Parliament. Then, a rule, once decided parliament, still is not law until it is ‘performed.’ The performance, in this sense, is the implementation of the rule.⁶

In addition to the ritualistic performance of law at its incubatory stage, the idea of performance carries on throughout the corridor(s) of law. Levinson writes that, just as *King Lear*, *Hamlet* and other plays are not written to be read in the classroom but, in fact, they are brought to life by performance, with a ‘distinct set of actors, with their own strengths and weaknesses, in front of a distinct audience who, indeed, might have

⁵ See Professor Bernard J. Hibbits a paper delivered at the Performance Studies Conference, Northwestern University, Evanston, IL, March 1996. ‘De-scribing Law: Performance in Constitution of Legality’ available at <http://faculty.law.pitt.edu/hibbits/describ.htm>

⁶ *ibid.*

to be lured to spend their hard-earned income on tickets',⁷ law has the same quality. His persuasive argument is that it is this quality of law-the demand of a performative base- which makes it is best understood as performance. He writes that 'just as the life of the law is experience and not dry logic, so is the living law the acting out of texts rather than the texts - or even the detached opinions about the texts - themselves.'⁸ Thus the 'bringing to life' of the legal texts requires the same traits of interpretation, and the art of exploiting a 'freedom of interpretation', that are associated with performance.

From the world of performing arts, echoing this idea, the website of the Royal Academy of Dramatic Arts (renowned for its international stature in advancing performing arts) mentions that:

'The text is an essential part of any actor's vocabulary. Ideally all clues to performance will be there and its translation is vital when developing a character. Nothing should be lost. By looking at a scene from a well-known Shakespeare and/or contemporary play, you will discover these 'signposts' and will be *encouraged to reinvent the scenes by improvising* and re-writing the text *to further discover the meaning behind the words.*'⁹ (Emphasis added)

Thinking of law as performance, and the people involved as actors, gives lawyers, and law students, a new perspective on how to bring law (as text) to life. In this sense,

⁷ S Levinson, 'Some [brief] Reflections about Law and Literature' *Cardozo Studies in Law and Literature* Vol. 10, No. 2, Tenth Anniversary Volume (Winter, 1998), pp. 121-123. Pp 122

⁸ *ibid.*

⁹ <http://www.rada.ac.uk/productions-and-events/workshops>

considering the range of interpretations which can be applied to literary texts is useful. In *Macbeth*, for instance, there have been many ways in which the three witches have been portrayed. From their depiction as scary, unearthly beings, through to them being portrayed as sexy women,¹⁰ the many interpretations have been justified by the directors in relation to both the text and their own varied perspectives which can take into account such factors as contemporary issues and trends. Legal texts too, allow for a sort of freedom of interpretation *within the practices* of law. The power of interpretation that lawyers, especially judges, have, can be understood as a species of performance in law. Professor Hibbitts argues that ‘performance personalizes law by presenting it as the product of individuals.’¹¹ That is, as a process of many interpretations through successive performances which, necessarily, are the productions of a series of individuals. This concept of individuality in law is crucial to an understanding of the development of law through its various users, both lawyers and judges. Levinson argues that this crucial role should be recognised by adding the dimension of ‘performance’ to the teaching of law. He says that understanding law as performance adds a ‘social dimension’ to the idea of law, and gives it the validity of being ‘our product’ and something that we can use, change and implement’.¹² Peter Goodrich summarises the deficiency in thinking law only as text aptly. He argues that thinking of law only in the terms of a lifelessly, senseless, following of precedent

¹⁰ Examples of varied ‘interpretation’ of the witches role includes them being played as three Goth girls in the 2006 Australian movie of Gefferey Wright’s *Macbeth*, and to them being depicted as two manipulating policemen in the 2004 Indian movie Vishal Bhardwaj’s *Maqbool*.

¹¹ Professor Bernard J. Hibbitts a paper delivered at the Performance Studies Conference, Northwestern University, Evanston, IL, March 1996. ‘De-scribing Law: Performance in Constitution of Legality’ available at <http://faculty.law.pitt.edu/hibbitts/describ.htm>

¹² S. Levinson, ‘Some [brief] Reflections about Law and Literature’ *Cardozo Studies in Law and Literature* Vol. 10, No. 2, Tenth Anniversary Volume (Winter, 1998), pp. 121-123. Pp122

without understanding the fullness of the text is insufficient.¹³ Lifeless law, he characterises as being enshrined in the ‘museum of precedent.’¹⁴ Whereas, thinking of law as performance, and then treating it as text related to (made by) performance is arguably the best device to bring law to life.¹⁵

Performing Justice

Performances of law can also be extended to the idea of ‘performing’ justice in and through law. In the famous English case of *R v Sussex Justices*,¹⁶ the well-known aphorism that ‘not only must Justice be done; it *must also be seen* to be done’ was employed. This idea of seeing justice being performed evidences law as understood in much more than simply its black letter version. And this is not limited to only what is performed, so visibly, in the courtroom. Law, in fact, is best understood and fully appreciated as a social phenomena,¹⁷ which, in order to maintain its control, needs the recognition and ‘approval’ of an ‘audience’. This ‘approval’ comes, in part, through ‘performances’ of justice in law, which in turn cement and reinforce the authority of law. Performing justice ensures that law is seen by its audience as *the* means through which to bring about, and deliver justice, and not simply as a draconian set of imposed rules. Such an appreciation is understood as bringing about a better form of adherence to law. Horsman acknowledges that the ‘theatrics’ of justice help the

¹³ Peter Goodrich *Languages of Law: From Logics of memory to Nomadic Masks* (Cambridge University Press 1999)

¹⁴ Kate Green 'Book Reviews: Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks*. London: Weidenfeld and Nicolson' *Social and Legal Studies*, September 1993, Vol. 2, 3 pp361-367; pp 363

¹⁵ I strongly submit that the idea of ‘bringing law to life’ is not just a fancy banner. It has great implications in terms of the practice of law within the courtroom. This view has also been favoured by professional judges, see, eg, Lord Birkett ‘Books for Lawyers’ *American Bar Association Journal* (1968) Vol 54 pp 61

¹⁶ *R v Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER 233

¹⁷ H.L.A. Hart *Concept of Law* (2ndEdn, Clarendon Press1994)

population in general by restoring confidence in law. He establishes this within the context of the war trials of the Nazis, and argues that these trials served to ‘heal’ through ‘establishing an authorised version of the past.’¹⁸ It is rather as if ‘poetic justice’ was being played out, performed, and, in this sense, it closely resonates with Macbeth’s idea of justice as described in his famous soliloquy:

But in these cases

We still have judgment here; that we but teach

Bloody instructions, which being taught, return

To plague the inventor: this even-handed justice

Commends the ingredients of our poisoned chalice

*To our own lips..*¹⁹

Performances in the courtroom

‘Performances’ of justice in law most obviously take place within the confines of the courtroom, and here parallels with theatre performances are readily available.²⁰ The setting of the courtroom, at least in adversarial systems, is such that it resonates closely with metaphorical and literal setting in dramas. In *Titus Andronicus*, for example, in the opening scene, two parties enter from each side of the stage in order to present their cases to authority. Similarly, in trials too, two parties enter to present competing cases to authority. The courtroom, like a theatrical performance, relies

¹⁸YascoHorsman*Theaters of Justice: Judging, Staging, and Working Through in Arendt, Brecht, and Delbo*(Stanford University Press: 2010)

¹⁹William Shakespeare *Macbeth* 1.7

²⁰ Bernard J. Hibbitts 'Coming to our Senses: Communication and legal Expression in Performance Cultures.' 41 *Emory Law Journal* 4 (1992) 1-69

heavily on ritual and choreographed movements. Everyone stands up when the judge walks in, the usher calls out the names of the parties involved and presents the judge and the cause of the action, all of which unfolds according to a well rehearsed sequence of moves. Both the judge and the lawyers, must be properly dressed in order to perform their respective functions,²¹ and they follow established patterns in how they address each other. This regimented choreography is seen as very important, especially in an adversarial trial. It creates a sense of both drama, and ‘organised’ patterns.

Another ‘performential’ dimension is the skill of advocacy used in the courtroom. Speaking eloquently in order to persuade your listener, is an act accomplished in strikingly similar ways in both law and literature.²² In literature, examples of the skilled use of persuasion are found in the use of soliloquies, speeches and arguments. An example, again from Shakespeare, is the speech of Antony in *Julius Caesar*.²³ This speech uses literary techniques of irony and rhetoric, and has the impact of stirring the populace to avenge the murder of Caesar. Law, legal professionals claim, is all about logical argumentation, and positivists, such as Hart, further claim that law is simply what is contained in the legal documents. While both these positions are correct, they are only partly correct if the law is to be considered as holistic system or practice. Such a textual approach to law misses the important dimension on what goes on in the real courtrooms. Many of the famous trials in history heavily relied on

²¹ An interesting debate on the extent to which the importance of dress in the courtroom is still to be held in regard can be accessed on http://news.bbc.co.uk/1/hi/northern_ireland/3877019.stm

²² Bernard J. Hibbitts “Making Motions: The Embodiment of Law in Gesture,” 6 *Journal of Contemporary Legal Issues* 51-81 (1995)

²³ William Shakespeare *Julius Caesar* 3.2

persuasive techniques drawn from literary and rhetorical devices. One excellent example is of the case in which Sir Edward Marshal Hall, defending a prostitute for murder, summed up by asking the jury, ‘God never gave her a chance, so will you?’²⁴ He used ethos²⁵ to plead her case to the jury. Quoted in a newspaper, he said that ‘My profession, and that of an actor are somewhat akin except that I have no scenes to help me and no words are written for me to say.... But, out of the vivid, living dream of somebody else's life, I have to create an atmosphere; for that is advocacy’²⁶

Performances in legal education

It is interesting to reflect upon how modern performances of law in the courtroom resonate with the design of other performances of law – for instance, in much earlier performances enacted in the Inns of Court. Not only moots and other forms of ritualised debates, but also the performance of plays were commonplace, especially in the Middle Temple.²⁷ Indeed, when plays were performed, often law students took roles in such production. Similarly, law students had to act rather like actors when participating in moots, a practise still employed to develop advocacy skills.

²⁴ Steve Uglow *Evidence Texts and Materials* (2nd Edn, Sweet and Maxwell, London: 2006) p 35.

²⁵ Ethos is the use of emotions, and is extensively used in dramatic narratives. Another example, already alluded to, is the speech of Tamore in *Titus Andronicus* when she pleads with Titus to spare her son.

²⁶ <http://www.lawgazette.co.uk/news/the-great-defender-sir-edward-marshall-hall>

²⁷ Luke Andrew Wilson *Theatres of Intention: Drama and the Law in Early Modern England* (Stanford University Press: 2000)

This idea of a regimented and ritualised performance within the Inns of Court, according to Dr Paul Raffield²⁸, resonates with broader connotations of the authority of law. He says:

‘The order of dining, and the associated educational exercises, represented the indissoluble trinity of divine law, natural law, and common law. Legal education was inextricably linked by common lawyers with their perceived sacerdotal role: the educational exercises undertaken by law students and barristers took place in hall, after the communal meal; the Word of God had been eaten, and it was now to be spoken by His ministers.’²⁹

Added to this notion of performing, in the learning of skills in the Inns, Levinson offers an interesting insight into modern legal education. He argues that a person preparing a lecture is best understood as ‘legal-interpreter-as-a-performing-artist.’³⁰ Such artists often, to be sure, begin with a text, but, ultimately, they must make a series of decisions as to how best to present the inert words of the text in a realized performance. Such presentations (indeed, they might even be called, in certain

²⁸ Himself an actor before becoming a legal scholar and law teacher, he is an editor of the journal *Law and Humanities*, and has also written extensively on Shakespeare and the law. A list of his published work can be accessed at <http://www2.warwick.ac.uk/fac/soc/law/staff/academic/raffield/>

²⁹ Paul Raffield ‘Rhetoric, Religion, and Education at the Elizabethan Inns of Court’ in (Eds) Jayne Elisabeth Archer, Elizabeth Goldring, Sarah Knight *Intellectual and Cultural World of the Early Modern Inns of Courts* (Manchester University Press: 2010)

³⁰ S Levinson, ‘Some [brief] Reflections about Law and Literature’ *Cardozo Studies in Law and Literature* Vol. 10, No. 2, Tenth Anniversary Volume (Winter, 1998), pp. 121-123; pp121

contexts, ‘performative utterances’) are significantly different from the ‘detached offering of opinions as to what a text might mean.’³¹

According to Gimmet, the cross-disciplinary approach of law and literature helps students to think from the ‘mind and heart at the same time.’³² Rather than applying just ‘dry logic,’ an emotional touch is added.³³ This ‘emotional touch’ not only enhances the practice of law, because the practitioner thinks of law in new, innovative ways, but also carries the potential of helping those involved in law to take an ‘internal’ view of law. Treating law as something that you can mould, influence and use, has the benefit of being able to see it from an ‘internal point’ of view. An ability to see yourself within law, has the effect of the feeling that you become a part of law, rather than a mere external agent. One mode for expressing and investigating this internal aspect of law is found through the idea of ‘performing’ law. In this sense, an interdisciplinary approach, and understanding law as performance, helps the law student to understand that the construction of an argument is not only based on using legal knowledge and logical argumentation, but also on and literary and rhetorical skills. Using the texts of law, with the advantages of the confident use of performative techniques improves the practice of law.

³¹ S Levinson, ‘Some [brief] Reflections about Law and Literature’ *Cardozo Studies in Law and Literature* Vol. 10, No. 2, Tenth Anniversary Volume (Winter, 1998), pp. 121-123; pp 122

³² Elizabeth Villiers Gimmette *Law and Literature Legal Themes in Short Stories* (Whitston Publishing Company Inc:1995)

³³ In Alain Lempereur ‘Logic or Rhetoric in Law?’ *Argumentation* Vol 5, No. 3 283-297, the argument posed is that logic and rhetoric can, and indeed very well go hand in hand in law. Building upon this, the use of rhetoric and persuasion in literature is extremely important in law.

The benefits of not only learning but also performing, are recognised by the professional law training bodies. The website of the Honourable Society of the Inner Temple, for example, advises aspiring barristers to take part in dramatic productions.³⁴ Not only does this improve public speaking skills, it also improves confidence. And, as unforeseen situations are inevitable on both the stage and in the courtroom, it helps one to develop the ability to think on one's feet. Accessing law from the perspective of performance also helps in an understating of the need to 'engage' with the law in order to bring about concrete results. Rather than simply reading black letter law, law is brought to life. Though many 'elders'³⁵ in the scholastic legal field have been dismissive of the idea of law as performance, I think they often hold the misconception that to treat law as performance is to consider it solely as for the purposes of entertainment. Thus, it has been claimed that 'lawyers are not actors and courtroom is not a stage.'³⁶ But it must be emphasised that treating law as performance is not undermining the seriousness of the courtroom, which is not about games or entertaining plays. To understand the idea of performing, the assumption that performance only serves the function of entertaining needs to be dissociated. Thinking of law in terms of performance, and actually experiencing it as performance, allows for what I have referred to as 'internalising law', becoming part of law. This freedom is an incentive, as well as reason to give thought to law as performance.

³⁴http://www.innertemple.org.uk/index.php?option=com_content&view=article&id=107&Itemid=25

³⁵ Professor Bernard J. Hibbitts a paper delivered at the Performance Studies Conference, Northwestern University, Evanston, IL, March 1996. 'De-scribing Law: Performance in Constitution of Legality' available at <http://faculty.law.pitt.edu/hibbitts/describ.htm>

³⁶ *ibid*

