

# DIRITTI COMPARATI

Comparare i diritti fondamentali in Europa

## **REGULATING ART, PAINTING LAW. SOME THOUGHTS ON J. MCCUTCHEON AND F. MCGAUGHEY (EDS.), RESEARCH HANDBOOK ON ART AND LAW, ELGAR, 2020**

*Posted on 9 Aprile 2020 by [Andrea Buratti](#)*

1. The multifaceted relationship existing between law and art has often attracted my attention. I've always been fascinated by the complexity and deepness of the problems emerging from the art trials, as well as by the conflict between moral and artistic liberty represented in some landmark cases decided by national and supranational courts, as well as the conflicting values laying at the basis of the regulation of cultural heritage. In the last years, this deep interest has pushed me toward involving visual artworks in my academic courses. In teaching Comparative Law and Fundamental Rights, I discovered how problematic it is for students who do not possess a good background in modern and contemporary history, which I deem necessary for contextualizing legal issues and developing technical legal skills. In my teaching experience, those requirements are troubled especially for students coming from non-Western Countries, whose knowledge of Western history and culture is still developing. Teaching through the arts offers an alternative way of learning, by involving methodologies that comprise students' understanding of historical and theoretical problems related to legal theory and practice, in

a less information-based teaching method, and rather via fostering critical thinking and active participation. Teaching through the arts represents a perfect example of how interdisciplinarity can improve students' creativity, innovation and awareness, promoting out-of-the-box thinking, while also maintaining a high standard of technical knowledge.

Despite my effort to engage with this methodology, with all the related research required by mastering such an approach, I have yet to succeed in drawing up a research framework within which I can elaborate upon the relations between art and law.

2. An attempt to lay down a research framework on the relation between art and law is now available thanks to the "Research Handbook on Art and Law", edited by Jani McCutcheon and Fiona McGaughey (Elgar Publishing, 2020). As the editors, many of the authors work in Australian Universities, although some of them come from other academic environments, mainly European. Moreover, not all of them are law scholars: they are philosophers, scholars of the arts, artists themselves. Due to my attempt to engage with this field of research, I understood the necessity of an intense dialogue between scholars and professionals coming from these different fields: this volume enriches our knowledge of the topic exactly because it accepts the challenge to break the uniformity of the legal culture, engaging itself in communication with the artistic mindset.

The book presents the relation between art and law as a twofold one: the aim of the volume indeed is to explore «how art can challenge, enrich and explain the law in unforeseen ways, and the diverse and complex ways in which the law regulates, interprets and images art» (p. 9).

Following this theoretical premise, the volume is not only focused on the legal regulation of the making, reproduction and dealing in works of art. Of course, it does include studies related to traditional problems – i.e. copyright and intellectual property, cultural heritage, artistic freedom and criminal offences. In dealing with these issues, law and art are often seen as incomparable languages, the former based on rationality and authority, and the latter on creativity and imagination. This bias has affected the viability of exploring a second dimension of the relation between art and law. Therefore, after having provided a wide range of studies dedicated to

those traditional fields, the volume discusses how art “sees” law, examining how art represents the law, how art may function as law, and how artists engage with the law, including using law as a way of expression.

The two dimensions of the relation between art and law are both of the utmost interest for legal research.

3. Law regulates art: it regulates the creation, copying, copyright, trading and property of artworks, as well as the status of cultural heritage. It subsidizes artists and art, sometimes “using” them for spreading messages and values. It defines the borders between lawful and unlawful and adjudicates disputes that arise from the “middle ground” that art usually seeks and shapes, thus balancing artistic liberty with individual rights, national security, public order, public morality, religious sensibility, etc.

This legal regulation of art is particularly problematic as art is inherently subversive: it often strives to achieve independence from legal constraints or even reaches its very aim through violation and resistance to legal constraints. Art often conveys irrational emotions and impulsive passions of which the law is, on the contrary, requested to regulate and mitigate in the framework of an ordered community. The outcome of this tension is that art questions the law in a powerful way, shedding new light on legal issues, and allowing us to deepen our knowledge and awareness of law as a whole.

In adjudicating human rights such tremendous issues often come into conflict. Sarah Joseph discusses them in her essay, regarding cases that fell under the umbrella of the International Covenant on Civil and Political Rights and the European Convention on Human Rights. According to the Human Rights Committee’s and European Court of Strasbourg’s case law, artistic forms of expression do not receive enhanced protection compared to any other forms of personal expression. On the contrary, the case law analyzed by Joseph demonstrates the lack of a consistent definition of artistic expression which can guide the balancing of artistic freedom with conflicting values. The outcome is a set of jurisprudence that acknowledges to the states a wide margin of appreciation in adjudicating

disputes between art and religion, morality, dignity, etc. Such unsatisfactory conclusions can be explained in the light of the peculiar nature of international jurisdiction, where an overly intrusive assessment of domestic rules balancing artistic freedom with national interests is usually applied with care. However, the confrontation between opinions in the case law demonstrates the difficulty in achieving a legal definition of the very essence of art, and especially a misunderstanding of the provocative and subversive function it performs, triggering processes of awareness and transformations of our societies.

The same subversive function of art is also demonstrated by the problems arising from innovative forms of art, which implore us to rethink the traditional categories applied to property in artworks. The case of street art and graffiti, discussed in Enrico Bonadio's essay, is a vivid sample of the provocative function art performs, as opposed to public order and morality. Born as a form of rebellion against traditional forms of art and restrictions on artistic freedom, street art and graffiti painted on various urban surfaces give life to a dialectic between removal and preservation. In this dialectic, the rights of artists, the rights of property owners, and the interests of local communities are often conflicted, with the necessity to elaborate new categories useful to achieve a balance.

4. Art paints the law: it looks at law as a dimension of human societies and represents it through images that offer visions of it, often different and alternative to the metaphors and definitions law has created in defining itself. In so doing, art unfolds, with special strength and circumvention through the medium of language, the inherent and persistent ambivalences of law. Such a creative and alternative way of representing law and legal issues offers a more problematic awareness of law and exposes the – mainly formalist – legal canons to a critique rising from the evocative power of images, both abstract and realistic.

Visual art offers, therefore, many metaphors of law and justice, which question the law itself, pushing for self-criticism and self-reform. Ruth Hertz explains how art can improve the practice of law, offering an alternative understanding of legal issues, different from the traditional practical approach based on interpretation and application of rules

mediated by language: «The practical way of thinking discourages them from addressing fundamental issues, concerning society and morality in a world where antithetical values live side by side» (p. 286). Notwithstanding the increase of research related to the visual representation of law, «law practitioners are not aware of the immediate connection between law and art and of the ways of introspection into the legal every day» (p. 288). Moving from this assumption, Hertz leads us through a journey in an innovative gallery of paintings and artworks, mainly created by judges and lawyers in strict connection to their professional activity, offering visual metaphors of law and justice that distance themselves from the traditional image of the blindfolded Justice, holding the scaled and a sword, which has typically depicted justice in the western legal culture. The fascinating and enriching volume edited by McCutcheon and McGaughey is an important contribution in the never-ending effort of law to synchronize with society.