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Legislation: Work of Art or Artefact?

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Abstract

The title of Willem Witteveen's *De wet als kunstwerk* is an utter challenge for translators with a philosophical mindset. In English, the choice readily at hand for 'kunstwerk' would be 'work of art'. But a different translation looms large. A 'kunstwerk' (in Dutch) also means a technically advanced construction in an already cultivated landscape. Let us call such constructions 'artefacts', to distinguish them from 'works of art'. The latter are wrought by artists, the former by engineers. My question departs from the ambiguity inherent to 'kunstwerk' as it hovers between work of art and artefact. From a philosophical point of view, what, with regard to contemporary legislation, remains of the artefact as over and against the work of art?

Keywords

Legal philosophy – Witteveen – Law as art – artecraft or technè – Fuller – Inner morality of law

The title of Willem Witteveen's *De wet als kunstwerk*[1] – so tragically a posthumous publication – is an utter challenge for translators with a philosophical mindset. In English, the choice readily at hand for 'kunstwerk' would be 'work of art'. This translation would be doubtlessly preferable, given Willem's explicit references to, and exercises in, the visual and literary arts, as well as his argument about the legislator being 'a poet' in the classical, Aristotelian, sense of the word; i.e., someone who masterfully, hence persuasively, captures societal order by language, thus opening up a future for people mindful of their past.

* Van Roermund was a close colleague of Willem Witteveen.

1 Willem Witteveen, *De wet als kunstwerk. Een andere filosofie van het recht* (Uitgeverij Boom 2014).

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But a different translation looms large. A 'kunstwerk' (in Dutch) also means a technically advanced construction in an already cultivated landscape. A viaduct, a tunnel, or a bridge in a road, for instance, will be referred to as a 'kunstwerk' in procurement and maintenance language. A sluice in a river is a 'kunstwerk', and so is a pumping station in a polder, or an aqueduct in a water supply system. Such constructions are part of what is called 'infra-structure', indeed the most sophisticated part of it, leaning heavily on state of the art (!) technology. Let us call them 'artefacts', to distinguish them from 'works of art'. The latter are wrought by artists, the former by engineers.

My question in this paper departs from the ambiguity inherent to 'kunstwerk' as it hovers between work of art and artefact. From a philosophical point of view,[2] what, with regard to contemporary legislation, remains of the artefact as over and against the work of art? I propose to take the following steps. In section 1 I capture what I take to be Witteveen's main thesis about legislation as a work of art. In section 2 I show the problem of this claim by arguing that there are three different ways in which one may conceive of the 'art' or '*technè*' that governs constituent legislative power: hypostatic, esthetic, and democratic. In section 3 I submit why Witteveen's book should be understood from the third perspective by commenting on its ultimate source of inspiration: Fuller's internal morality of law.

1 Art, Craft, and *Technè*

At first sight, my question seems to miss the point of Witteveen's book. On numerous pages, and right from the start, it emphasizes that 'art' encompasses craftsmanship. In classical languages like Greek and Latin, there is only one word for both (*technè, ars*), and until well into mediaeval times, 'artists' were praised for their craftsmanship rather than their 'originality', let alone their 'authenticity', as we do in our days. Also, a craft used to be a joint enterprise, exercised in guilds, in which masters, journeymen, and apprentices each had their own roles to play, notwithstanding their ultimate interdependencies. The 'fine arts' gradually developed from these roots in craftsmanship.[3] Our connotations of the artist as an individual expressing subjective 'emotions' the way

2 A vantage point I share with Witteveen, given the subtitle of the book: 'An alternative philosophy of law'.

3 One sees the differentiation growing in pre-modern times, e.g., 14th century Florence, where guilds were publicly distinguished between 'higher arts' (arti maggiori) and 'lower arts' (arti minori).

he or she sees fit, or the public calling such self-willed eruptions 'creativity' – these are the inventions of modern, in particular romantic, times. If Witteveen tries and undercuts the presuppositions of legislative instrumentalism by reminding us of poetry as a model of legislation, he certainly conceives of poetry as an 'art' in this classical sense, including the masterful use of instruments. All arts are 'instrumental' in so far as they involve instruments[4] in creating an orderly world. Indeed, they engage and invent instruments to become (more) responsive to the order that is to be revealed in such creation: the sharper the chisel, the better the piece of wood or stone will reveal the form it hides inside. Regarding legislation, says Witteveen, the problem is not instrumentality; it is instrumentalism, i.e., the view that law is exclusively a means to achieve the targets of a political program, however just or justified the program may be in its own right.

This is why Witteveen advises us to invert Shelley's famous dictum that 'poets are the unacknowledged legislators of the world.'[5] Although the language of Shelley's *Defense* is utterly romanticist, in this particular text he argues a point that goes far beyond a critique of rationalism as the legacy of Enlightenment. He does not submit that poetry is instrumental to moral and civil life in the sense that it is subservient to a certain political program or regime. It is 'educational' in a much more profound sense, namely that it makes people sensitive to their multifarious potentialities to make the world a better place if only they would start out from grasping, by their imagination, the underlying order of all things existing.[6] Poetry prompts to a certain 'passivity' in our dealings with the world, and this is why it may become paradigmatic of

4 Singers even refer to their voice as their 'instrument' even while they see it as their role 'to be sound' in an ultimately 'beastly' way; See e.g. Barbara Hannigan in an interview available at <https://www.youtube.com/watch?v=eiN1ub88Axc> accessed 23 May 2015.

5 Percy Bysshe Shelley, 'A Defense of Poetry' in Mary Shelley (ed), *Essays, Letters from Abroad, Translations and Fragments* (Edward Moxon 1840) 44. However, Witteveen would certainly not have signed Shelley's comparison between 'the great poets' (Dante, Petrarca, Boccacio, Chaucer, Shakespeare, etc.) and 'the great philosophers' of Modernity (Locke, Hume, Gibbon, Voltaire, Rousseau).

6 ibid 46, where Shelley also criticizes the instrumentalist ring of utilitarianism: 'The functions of the poetical faculty are twofold; by one it creates new materials of knowledge, and power, and pleasure; by the other it engenders in the mind a desire to reproduce and arrange them according to a certain rhythm and order, which may be called the beautiful and the good. The cultivation of poetry is never more to be desired than at periods when, from the excess of the selfish and calculating principle, the accumulation of the materials of external life exceed the quantity of the power of assimilating them to the internal laws of human nature.'

legislation.[7] It renounces instrumentalism in the sense that it does not convey 'messages', it does not communicate 'information', and it is certainly not a vehicle of volitions, least of all on the part of the poet.[8] Similarly, a law is not a vehicle of expression for policies on the part of the government, consented by parliament. It is, first and foremost, the creation of a symbolic order that is meant to evoke response and respect. This is why, indeed, 'legislators may be regarded as the unacknowledged poets of the world'.

2 Political *Technè*: Between Artefact and Work of Art

And yet, read in either direction, the metaphor is uncanny. For all the literature that Witteveen brings to his grand thesis – and there is an astonishing lot of it that deserves to be (re-) read – there is also a salient part missing. I'm not saying that Witteveen should have read more. What I mean is that the book does not address the literature that, in the twentieth century, most explicitly promoted the idea of the law as a work of art, poetry in particular. I am quite certain that Witteveen's argument is meant to incisively criticize this literature. But strangely enough, it does not engage with it at all. In this section I am going to arrange this confrontation, so as to clarify (what I see as) the critical potential of the book. Indeed I submit that it transcends the author's critical intentions at the time of writing.

Most helpful in this pursuit is the work by Philippe Lacoue-Labarthe.[9] It shows how much a western tradition of political thinking is dependent on a specific *technè*; namely, the joint effort of people in a society to recognize themselves as a bounded whole. Of course they will regard their unity as having a certain plasticity, their boundaries as showing some porosity.[10] But this is quite compatible with seeing their unity as 'organic' in the threefold sense of

7 In this respect, Luigi Corrias – based mainly on Merleau-Ponty – is very much in line with Shelley. See Luigi Corrias, *The passivity of law competence and constitution in the European Court of Justice* (Springer 2011).

8 Shelley (n 5) 47: 'A man cannot say, "I will compose poetry". The greatest poet even cannot say it (…).'

9 Philippe Lacoue-Labarthe, *La fiction du politique* (Christian Bourgois 1987). Summarizing some tenets of this book, I owe a lot to a Tilburg dissertation by Sergio Espigares Tallón, supervised by Ben Vedder and myself. See Sergio Espigares Tallón, *Heidegger en het funderen van een politieke orde* (Eburon 1998) 57 ff.

10 Similar theses in contemporary thinking are to be found in the oeuvre of amongst others Cornelius Castoriadis, Jean-Luc Nancy and Claude Lefort – who all differ in their accounts of what this requires, entails, and presupposes. For a similar vantage point in philosophy

being (i) organizable, (ii) in need of organization, and (iii) to some extent already (but imperfectly) organized. These features characterize the 'work' (*ergon*) that politics is supposed to bring about in constituting a polis. Hence also, I add, the celebrated definition of the legal order as 'an order ordering as well as ordered' (*ordo ordinans et ordinatus*). Note, however, that this is not a summation of two features. Ordering and being ordered, they are at each other's origin. The ordering comes about in the representation of order, and these representational acts are what the order is about. In more lapidary language, the *technè* of the polis is to make what it fakes, over and over again. One may witness this in the gradual constitution of the European Union as a polis or legal order: in order to become a legal order, it has to present itself as being already one and mimic what it has yet to become. A clear example is the view that the EU legal order is 'of its own kind' (*sui generis*), i.e., neither a sovereign state nor a (con-) federation of states. It has developed into a sui generis legal order by gradually backing up its initial claim to be one.[11]

Simplifying things considerably, I submit that there have been three distinct ways to come to terms with this basic 'art' of exercising legislative (i.e., ultimately, constituent) power. Let me label them briefly as the hypostatic, the esthetic, and the democratic way.

(i) The hypostatic way models constitutional *technè* as an exercise in imitation rather than presentation: it is a matter of establishing the polis, not by shaping it, but rather by shaping it *after* some piece of reality. This, of course, can be conceived of in a variety of ways, depending, among other things, on one's notion of 'reality'. For Plato, the *idea* of the state was 'more real' than any actual state one could identify in socio-political reality. For Aristotle, the polis needs *technè* in order for her to reveal her true nature (*physis*), which would otherwise remain hidden. Like the sculptor helps the statue to emerge as the true form of the marble rock, so the well-ordered state arises from a flock of people through the hands of their founding fathers. The lawful order or polis is an 'artefact', but in the specific sense of an order brought out rather than brought about. 'Founding' such order means, ultimately, to build it on the solid ground of reality, i.e., to warrant politics by some form of ontology. When, in Modernity, Hobbes bids this frame of thought farewell and redefines the lawful order as an artefact, he turns to an alternative driver: individual

of law in a global perspective, see Hans Lindahl, *Fault Lines of Globalization. Legal Order and the Politics of A-Legality* (Oxford University Press 2013).

11 Case C-26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

human needs that are to be satisfied; but in doing so he preserves the idea of the legal order as an imitation of nature.[12] From now on, 'nature' will be the sum-total of individual, basic needs, even if – as in our day – these needs are captured by an ever proliferating human rights discourse.

(ii) In an esthetic vein, constituent power is modelled after the keywords of the *theory* of esthetics[13] rather than the practice of art making. Some of these keywords sound traditional (cf. 'shaping', 'forming', 'beauty'). But in the course of recent centuries they acquired specific overtones: 'scene-setting', 'styling', 'performing', 'interpreting'. On a par with art, legislative power is admired in terms like 'overwhelming', 'invigorating', 'sublime', 'authentic', etc. These allow one to focus on the presentation of community yet to be achieved, prior to any *re*-presentation of community that is the task of everyday politics. It not only helps to see these initiatives as so many efforts that will never completely achieve their goal (similar to the artist who is never satisfied and will try 'to fail better' next time). It also provides arguments to turn defeat and failure into blessings in disguise, even success.[14] In Modernity, as over and against Antiquity, it undergirds counter-positions, in particular between subject and object, maker and work, maker and spectator, spectator and work. These oppositions, in turn, call for modes of mediation like 'gaze', 'vision', 'admiration', 'sensation', 'fascination'; but also 'education', 'orientation', 'disorientation'. They are embodied, in particular, by vital responses from the public such as cheers, applause, mobilization. Representing this tradition of thinking is, famously, Ernst Jünger, already from his early work on.

Despite Jünger's critical attitude towards Nazism, there is little point in denying that the idea of a 'totale Mobilmachung' or vitalization of society through politics as a work of art – and, inversely, through art as a work of politics – has gained enormous popularity in totalitarian regimes. Philippe Lacoue-Labarthe[15] refers to a daunting letter by Joseph Goebbels to Wilhelm Furtwängler, who as a conductor had protested against the Nazist discrimination policy in art. Goebbels replies by saying:

12 cf the very first lines of Thomas Hobbes, *Leviathan* Introduction by Kenneth Robert Minogue (first published 1651, Everyman's Library 1973), about the Leviathan as an 'artificial animal', the 'art of man' being an imitation of nature as 'the art of God'.

13 Hence Mottel's word 'poetologisch' in Lutz Hagestedt, *Ernst Jünger, Politik – Mythos – Kunst* (De Gruyter 2012) 307 ff.

14 cf Steffen Martus, 'Scheitern als Chance' in Lutz Hagestedt (ed) *Ernst Jünger, Politik – Mythos – Kunst* (De Gruyter 2012) 253–270.

15 Lacoue-Labarthe (n 9) 93.

> '(…) It is your right to feel as an artist and to see things from an artist's point of view. But that need not mean that you regard the whole development in Germany in an unpolitical way. Politics too is an art, perhaps the highest and most comprehensive there is, and we who shape modern German policy feel ourselves in this to be artists who have been given the responsible task of forming, out of the raw material of the mass, the firm concrete structure of a people. It is not only the task of art and the artist to bring together, but beyond this it is their task to form, to give shape, to remove the diseased and create freedom for the healthy. Thus, as a German politician, I am unable to recognize only the single line of division which you see—that between good and bad art. Art must not only be good, it must also appear to be connected with the people, or rather, only an art which draws on the people itself can in the final analysis be good and mean something to the people for whom it is created.[16]

(iii) For want of a better word, I call the third guise under which political *technè* appears 'democratic'. By this I do not mean to underline mere reference to 'the people' in creating a symbolic order that purports to be constitutive of a legal order. For, clearly, such reference is also present in the hypostatic and the esthetic modes of this 'art'. What I intend to argue is that the very structure of such references to 'the people' may be revisited and revised; and that this structure is at the heart of democracy, notwithstanding variation in its institutional design.

Let me therefore rephrase first what is pertinent in the other two modes. The hypostatic mode conceived of 'the people' as a prefigured reality. Constituent legislation should make this reality present under the factual conditions of a society here and now. Legislation, in this vein, is an engineering activity, operating on 'facts on the ground' after a blue print that precedes the actual political process. This prefiguration is regarded as the 'bearer' of the whole legal order, which all legislative power should hear to. In an important way, therefore, constituent power collapses into constitutional power, as the legislature is always already under the constituent 'rule' of this bearer. We might say that,

16 Philippe Lacoue-Labarthe refers to the French translation of Hildegard Brenner, *Die Kunstpolitik des Nationalsozialismus* (Rowohlt 1963). The exchange between Furtwängler and Goebbels appeared originally in the *Vossische Zeitung* on 11 April 1933. I used the translation of the correspondence as provided at <http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=1574> accessed 25 April 2015.

here, the lawful order of the polity is an artefact rather than a work of art. This mode of thinking can easily picture the law-making process as a joint activity; one in which countervailing powers are placed in a dynamic equilibrium. For the hypostasis of 'the people' governs such equilibrium, as if it were its gravity force.

The esthetic mode, by contrast, would conceive of 'the people' as the reality that is actually made in the acts in which it is presented. It is precisely what these acts are about. The people is 'there' by virtue of the sole referential gestures that such acts exemplify. In other words, the people is regarded as a reality that remains purely immanent to actual politics. Just as a song is what a singer sings or a dance what dancers dance or art what artists make, so 'the people' is what this or that political leader presents as such. And so, in the final analysis of this mode of thinking, political power is tantamount to constituent power, a radically creative act by which the polity is called into existence. In the idiolect of Modernity, this entails that, indeed, legislation is a work of art rather than an artefact. Consequently, it becomes less obvious to regard it as joint activity, since a true work of art is seen as the original performance of a singular, hence, single, mastermind. Though teamwork is common in some so-called 'performing arts' (an orchestra, a theater group), these artists usually acknowledge their dependence on the 'real' artist, the author of the piece. And when they seem to be jointly creative, like in a jazz session, the theme is often pre-given, as the hypostasis underlying all improvisation. Small wonder that in this line of thought it is well-nigh impossible to regard legislation as bounded by the rule of law, as making this rule is precisely what the work of art is about.

Now the democratic mode is driven by the intertwinement of both constitutional and constituent power. 'Intertwinement' between these two poles should be understood in a specific way. Neither of them is able to manifest itself without the other, and still they remain distinct in spite of their being mutual conditional. They are at each other's origin, to repeat a core formula already used above: 'co-original' or 'equiprimordial'. That is to say, in representing the *demos* as if it preceded politics, the people is constituted; and at the same time, every attempt to constitute the *demos* has to be staged as if it exercises power in the name of an already constituted people, i.e., as representational. By oscillating between the poles of constituent and constitutional power, the democratic *technè* remains at the level of politics. That is to say, it is bound up with the contingent attempts to build a polity the blue print of which is designed along the way, changing as the agents proceed in their praxis of building. Also the rule of law for this polity is not pre-given, even if it is treated as pre-given. It is 'une plebiscite de tous les jours', as in the 19th century

Renan famously said of the nation.[17] On the one hand, it will urge constituent power to present itself as constitutional power, i.e., to act as if it is bound by the rule of law in the process of creating it. On the other, it will explore the constituent meaning of constitutional power, i.e., it will be sensitive towards the creativity involved in complying with the rule of law. It does not regard representative democracy as a second best solution after direct democracy; rather it concedes that, by necessity, representation is of the essence of democracy. It therefore refuses to set up participation of 'the people' as over and against representation of 'the people', as all participation is representational and, inversely, all representation is participation. It presents fundamental rights as trumps on policies,[18] but admits that in the end they are policies all right; but policies that a polity finds too fundamental to deliver to the wheeling and dealing of everyday politics. In short and in a negative key, this *technè* is democratic in that it seeks refuge neither in ontology nor in esthetics. It keeps hovering between the polity as an artefact and as a work of art.

3 Legislation as Democratic *Technè*

It would be tempting to demonstrate now that Witteveen's kaleidoscopic work purports to convey the democratic intertwinement between legislative power 'under the law' and power 'over the law', i.e., constitutional and constituent power, by quoting extensively from his works, especially the posthumous book. This would be easy but also, in a way, laborious and unfair. The book is written in a different idiolect and I do not want to force it into mine. What I propose to do instead is probably both more honest and more pertinent; I will argue that the intertwinement lies in the grand thesis that inspires Witteveen's exercise in legal theory, one which he derives from Lon Fuller, to wit the thesis on the inner morality of law.[19] The whole of part II (roughly 3/5 of the text) plus various chapters of parts I and III deal with Fullers 'commands' to the legislator, extending them from eight to ten basic rules. Let me therefore turn to Fuller.

In what sense would the internal morality of law harbor an intertwinement of constitutional and constituent power that defines them as 'co-original'? First of all, what Fuller means by 'internal morality' are what he calls 'the laws

17 Ernest Renan, 'Qu'est-ce qu'une nation?' in Raoul Girardet (ed) *Qu-est-ce qu'une nation? et autres écrits politique* (first published 1882, Imprimerie Nationale 1996) 241.

18 cf Ronald M Dworkin, *Taking Rights Seriously* (Harvard University Press 1977).

19 Lon L Fuller, *The morality of law* (2nd edn, Yale University Press 1969) 41–44 and *passim.*

of lawfulness'.[20] These laws, that is, are constitutive of legislation. They are the constitution of constitutions. Every specific constitution is itself 'constitutional' (i.e., constituted) in virtue of this inner morality. In this sense such constitution is an artefact – a concept that Fuller conveys by pointing to the example of 'the good carpenter'.[21] This is the reason why critics of Fuller have sometimes argued that complying with such requirements has more to do with legislative craftsmanship than with morality.[22] This critique, however, tends to forget the very first chapter of Fuller's classic, arguing the difference between a morality of duty and a morality of aspiration. This distinction applies to the inner morality of law in full.[23] Thus, complying with the requirements of law's inner morality is not just a matter of 'applying' the laws of lawfulness so as to fulfil a pre-given set of minimum standards. It is also, and more importantly, aspiring to bring these standards to perfection by exploring what they might mean under ever changing circumstances. Rather than premeditated 'conditions', these circumstances are 'events' in the true sense of the word: occurrences that do not fit into the established categories of our understanding and that, thus, require a constant revision of the requirements. They prompt to a creativity in law-making that justifies the label 'work of art' as one of the poles of *technè*. It should be doubted, however, whether the language of esthetics in Modernity, captures this creative responsiveness adequately, whether it concerns legislative or, for that matter, artistic practice.

As an example we may focus on the requirement of 'generality' as 'the first desideratum'[24] of the inner morality of law. Here, Fuller himself only stresses that law should have the format of rules rather than incidental commands, admitting that much more would need to be said.[25] In other words, the format of rules has to do, primarily, with the morality of duty and a minimum of skillfulness. Witteveen[26] joins Fuller in proposing generality as the first of his ten 'commandments'. But under his hands, generality of law-making becomes a topic that encompasses much more than a format. He discusses, for instance, equity as the necessary supplement of generality, inclusiveness in the face of

20 Cf Fuller (n 19) 155.

21 *ibid.*

22 See Fuller's reply to these critics at Fuller (n 19) 200 ff.

23 cf Fuller (n 19) 42: 'The inner morality of law (…) too embraces a morality of duty and a morality of aspiration.'

24 ibid 46.

25 ibid 48: 'The problem of generality receives a very inadequate treatment in the literature of jurisprudence.'

26 cf Willem Witteveen, *De wet als kunstwerk. Een andere filosofie van het recht. Hoe de filosofen onze wetgevers de maat nemen* (Uitgeverij Boom 2015) 114 ff.

global migration, biases challenged by civil emancipation, and much more. All this is part of the aspiration of legislation, not of making new law but of making law in a new way. It is the aspiration of constituent power, and therefore, indeed, of making law a work of art.

Finally, if more evidence from Witteveen's own work is needed for the position I attribute to him regarding the intricate relationship between legislation as work of art and as artefact, I would like to point to the title of the small collection of 'legislator's poems' he published at the occasion of his farewell as a Member of Parliament. It says it all: *During Proceedings, Out of Order*.[27] Willem Witteveen managed to reach beyond established order at the apex of legal ordering, and to reach for order in establishing new law.

27 Willem Witteveen, *Tijdens de werkzaamheden, buiten de orde* (Wolf Legal Publishers 2007).