

INTERVIEW WHIT JEANNE GAAKEER: *LAW IS AN ART*



BY DIETER AXT¹

The INTERVIEWS SECTION was designed with the goal of creating a space of interlocution with researchers who are considered exponents in studies of Law and Literature, as a means to enable the permanent exchange of ideas and the interaction of points of view, by bringing researchers and readers together.

To start off this section, we interviewed the Dutch researcher Jeanne Gaakeer, internationally apraised for the studies she has developed for years on the subject of Law and Literature. With a background in English Literature (1980), Dutch Law (1990) and Philosophy (1992), in 1995 her dissertation dealt with the history and evolution of Law and Literature, focusing on the work of James Boyd White. Together with Greta Olson (Giessen University / ALE), she is the founder of the European Network for Law and Literature (www.eurnll.org), whose core proposals are to encourage the study of Law and Literature and to promote European cooperation around the area. In 2013, she was awarded the J.B. White Award, given by the Association for the Study of Law, Culture and Humanities, in recognition for the originality and excellence of her contribution to Law, Culture and Humanities studies.

¹ Master's degree in Public Law by Universidade do Vale do Rio dos Sinos (UNISINOS). Bachelor of Law by Universidade Federal do Rio Grande do Sul (UFRGS). Screenwriter of the TV show *Law & Literature* (TV Justiça - Brazil). Member of the Brazilian Law and Literature Network (RDL). Editorial Assistant of *Anamorphosis - International Journal of Law and Literature*. Writer and editor of *Le Chien* Publishing House. Porto Alegre, RS, Brazil. CV Lattes: <http://lattes.cnpq.br/1582390811392545>. E-mail: dieter@rdl.org.br

With participation in several international events and publications, the focus of her research are interdisciplinary movements involving the theory of Law and its relevance to the legal practice, more specifically, to the studies on Law and Literature, Law and Humanities and narrative jurisprudence.

She is currently Professor of Legal Theory at the Erasmus School of Law in Rotterdam, in the Netherlands, and a senior judge in the criminal section of the Hague Court of Appeal after completing her practice at the Middelburg Regional Court.

Dieter Axt – *What is your assessment about the development of Law and Literature studies in Europe and how has the EURNLL helped to increase communication and cooperation between students and researchers?*

Law and Literature studies in Europe have by now developed into full-fledged interdisciplinary fields with institutional foothold. This development has not taken place overnight. Initially there were a number of individual scholars who took up the topic and began to promote it. It took a few years and a number of conferences (European and international)² before the field became academically acceptable, roughly around 2009. The European Network for Law and Literature, <www.eurnll.org>, has promoted the field since 2006. It is co-founded by professor Great Olson (Giessen University, Germany) and myself. We aim to provide a platform via our website in order to disseminate relevant

² To name a few: a “Colloquium on law and literature” at University College London, 1998 – see: FREEMAN, M.; LEWIS, A. (Eds.). *Law and Literature, Current Legal Issues*, v. 2. Oxford: Oxford University Press, 1999 –; a seminar on “Interrelations and Interstices of Law, Literature, and Science” at the 4th Biannual Meeting of the Society for Science, Literature, and the Arts, Amsterdam, 2006; a seminar “Literature and Law: an interdisciplinary approach” at the 8th Conference of the European Society for the Study of English, London, 2006; the Colloquium “Droit et Littérature XVII^e-XX^e siècles”, Paris, 2006; the conference “Teaching Law Through The Looking Glass of Literature”, Como, 2006; the seminar “Law and Literature, methods and readings in an interdisciplinary perspective”, Copenhagen, 2007; the conference “Exploring Equity and Addressing Law”, Verona, 2007; the “Rights, Ethics, Law & Literature” International Colloquium, Swansea, 2007; the “Shakespeare and the Law” conference, Warwick, 2007; a workshop on “Law and Literature” at the World Congress of Philosophy of Law and Social Philosophy, Cracow, 2007; the symposium “Worlds in Dialogue”, Lisbon, 2008. The Nordic Network for Law and Literature had a research project from 2005 to 2009, with participants from Finland, Norway, Sweden and Denmark.

information such as cfp's, academic positions and conferences. On our website novices in the field are find bibliographical information about the formative years of Law and Literature. In this way we hope to bring together scholars interested in the broad field of Law and Humanities. We have ties with the Italian associations AIDEL and ISLL, and with the Bergen colleagues of the Centre for Humanistic Legal Research. In short, in Europe the field is nourished both from the legal and the literary and cultural studies-perspective. The future looks bright, not least given increasing international co-operations in a Special Workshop on Law and Literature at the IVR conferences these past years, and given the rising interest from legal education and the legal profession (for example, I co-teach a course on Law and Literature for the Dutch Training Centre for the Judiciary).

Dieter Axt – The United States, as pioneers in the field of Law and Literature, have developed, especially since the 1970s until today, important theoretical work. How do you assess possible similarities and distinctions in the study of Law and Literature in Anglo-American tradition with a Common Law basis in relation to the continental European tradition based on the Civil Law?

I came to the field of Law and Literature when I had to chose a topic for my Ph.D. thesis. Since I had both a law degreee and degrees in English literature and philosophy, the topic came naturally. Obviously, given the Anglo-American roots of Law and Literature, I turned to Anglo-American scholarship for guidance.

As I continued my parallel education in law and literature, I began to find my own topics for further research in the expanding field, and I began to see the implications of the fact that as European scholars' interest in literary-legal studies developed, homage was paid almost exclusively to American models and topics, disregarding the European roots of the bonds between law and literature and perpetuating the canon(s) given by Anglo-American scholarship.

I found that American *Law and Literature* scholarship tended to present its research on American politico-legal and cultural issues as the images to be mirrored.

It was not until the day that I became a judge that I fully understood the importance of what my research taught me, i.e. that success in practicing law depends to a large extent on the legal imagination in its various guises, so I began to work more on that topic.

While over the years I have kept finding many exciting things in what is being done in American *Law and Literature*, I do not turn a blind eye to the impossibilities when it comes to importing the results or translating the recommendations found there to European *Law and Literature*, given the specificity of the (historical) development of law in what we now call Europe.

The agonistic structure of the American legal process and the political aspects of constitutional interpretation are prime examples in this respect when compared to the inquisitorial approach dominant in most civil law countries, one that favors a process of verification of evidence.

So, paradoxically perhaps, this speaks for a thorough study of and a dialogue with Anglo-American *Law and Literature* if only when it comes to (implicitly) importing features of other legal systems to preclude the repetition of mistakes made.

Now that interdisciplinary movements originating in the United States have these past few years been incorporated in European legal education and embraced by European scholarship, with *Law and Economics* as its most prominent example to date, I want to emphasize that this development occasions at least two lines of research.

First, an investigation of the various forms that disciplinary cooperation may take, from the trans-disciplinary via the multi-disciplinary to the inter-disciplinary, for all too often the terms are mixed up or used indiscriminately without giving the conceptual implications any further thought.

Secondly, and building on the former, this development speaks for an elaboration on the methodological aspects of law itself, especially if we

also consider that legal methodology and hermeneutics inescapably have to deal with the influx of modern technology, e.g. in the form of results of blood or DNA tests on a defendant's body materials, and with other disciplines in various fields of law, varying from the behavioural sciences to environmental sciences, and, last but not least, with the broad range of studies of law in the humanities.

I say so also given the development at the supranational level of the European Union, one that transcends national law.

One aspect that comes to the fore in supranational law is that the word law itself leads to a semantic issue within the European Union and shows the relevance of our attention to the problems of translation.

In the legalistic, nineteenth-century idea of law as the sum total of a nation's codified rules in statutes, "law" is just that. That is to say, law in the sense of just decisions or justice is identical with law as rules, denying the possibility that there may be legal principles that do not have the binary quality of the legal rule but work by giving weight to specific arguments, and refusing to incorporate elements of morality. This is a viewpoint we have left behind for good reasons, but we should keep asking the question what we mean by law in our academic research.

Dieter Axt – It appears clear that you consider Literature as something that promotes increased empathy and the exercise of otherness. Do you think Literature favors the humanization of the legal practice, as opposed to the solely technocratic or bureaucratic attitudes of some legal practitioners? How could one prevent the legal practice from remaining oblivious to interdisciplinary studies?

To me, what reading literary works can contribute to the works of jurists, is that – ideally at least – it makes us ask questions such as: "What would I have done in this situation?", and "What must I decide now for those involved?"

The narrative in and of law distinguishes between matters of fact and points of law, and necessarily deals with the discrepancy between what happened and what was expected, and by means of literature we can gain insight in examples of the particularities of the human condition that may otherwise be inconceivable or beyond our reach.

So what Martha Nussbaum has consistently argued since the publication of *Love's Knowledge*, that compassion is a moral sentiment characterized by a certain mode of reason or of judgment, i.e. it has a “cognitive edge” which it shares with the narrative emotions evoked by literary works, is most congenial to me.

I also want to emphasize the connection already made by Aristotle between the equitable and practical wisdom or *phronèsis* in relation to literature. That is to say, when Aristotle concludes, “This is the essential nature of the equitable: it is a rectification of law where law is defective because of its generality” (Aristotle, *Nic. Eth.*, V.x.6, 1137b28-30), he ties *phronèsis* to judgment as the right discrimination of the equitable. Equitable man is above all others a man of empathetic judgement who shows consideration to others, also in the sense of forgiveness. Thus, Aristotle ties both understanding of a case and (correct) judgment to *phronèsis*. The term justice, then, denotes the virtue as well as the idea of just distribution and a just corrective. As such, it is directly connected to the activity of *doing* law.

The judge is the one who interprets the lawgiver’s texts, and to her, technical acuity of the kind the lawgiver ideally possesses, is not enough. She needs the metaphorical “[...] leaden rule used by Lesbian builders: just as that rule is not rigid but can be bent to the shape of the stone, so a special ordinance is made to fit the circumstances of the case” (Aristotle, *Nic. Eth.*, V.x.7-8, 1137b30-33).

I also strongly advocate the literary turn of mind that Aristotle describes in his *Poetics*. It is a good way to learn about the lives and experiences of others and subsequently to develop an attitude of empathy and that is so very important because the judge mediates between the abstract world of the rule of law in democratic societies and the lives of their citizens. In this mediation lies her duty. She fulfils her duties in an imperfect world in which “Law never is, but is always about to be”³ as Cardozo wrote. In this understanding lies her challenge.

³ CARDOZO, B. *The Nature of the Judicial Process*. New Haven: Yale University Press, 1921, p. 126.

So, for the future of Law and Literature and its relevance to legal practice, the question would be whether empathy and a literary-legal imagination can be incorporated into a judicial methodology such that the requirements of the rule of law are fulfilled. That is, how to combine the heart and the head in judicial practice by finding inspiration and guidance in literary works, and for what reasons.

Dieter Axt – *You say that Literature can expand the capacity of understanding and, consequently, comprehension of a text, which contributes to the interpretation of legal texts. How can Literature help in avoiding solipsistic interpretations and overinterpretative hypotheses of legal texts?*

That is an important question.

What matters to me are two aspects: many-voicedness as promoted by James Boyd White, and resistance to closure.

To start with the first. What reading literary works can make us understand is the fundamental difference between the narrative and the analytical forces in law, hence also the need to balance “the mind that tells a story” and “the mind that gives reason”, because “one finds its meaning in representations of events as they occur in time, in imagined experience; the other, in systematic or theoretical explanations, in the exposition of conceptual order or structure”⁴, as White calls it. Legal professionals should be able to integrate both aspects of legal discourse in their actual performances. In short, they should understand that, “The law can best be understood and practiced when one comes to see that its language is not conceptual or theoretical – not reducible to a string of definitions – but what I call literary or poetic, by which I mean ... that it is complex, many-voiced...”⁵ as White explains in *Heracles’ Bow*. Hence, we should learn to practise, “the art of talking two ways at once, the art of many-voicedness”, and that is, “learning to qualify a language while we use it: in finding ways to recognize its omissions, its distortions, its false

⁴ WHITE, J. B. *The Legal Imagination*. Boston, Little, Brown, and Co., 1973, p. 859.

⁵ WHITE, J. B. *Heracles’ Bow: Essays on the Rhetoric and Poetics of the Law*. Madison, WI: University of Wisconsin, 1985, p. xi-xii.

claims and pretensions, ways to acknowledge other ways of speaking that qualify or undercut it”⁶.

The ability to command the language of law is a prerequisite for successfully accomplishing the act of translating the case and the relevant legal text to a new situation in the world. In the discussion of the legal aptitude that involves ordering materials in such a way that a new proposal for the world in the form of a judgment can be made, lies the starting point for further thought on the value of literature in fostering legal skills.

Connected to this is the second point, the resistance to closure that the literary work promotes. That is to say, there is not one interpretation, not one solution, so we should open up to the idea that in law too openness and poly-voicedness as well resistance to the closure are necessary to counter the mono-vocal authoritative voice of the language of legal concepts. Viewed this way, literature may help teach us not to jump to conclusions too quickly in law and legal practice. Or, a bit differently perhaps, on the view that a judicial decision is a form of reflection of what is and should be, the scenes that literary works evoke may serve as a form of *ekphrasis* to trigger resistance to the reification that results from of a one-sided attention to the language of legal concepts. So I suggest that the core business of jurists as readers, writers and hearers is trying “to figure out” the variety of meanings of the linguistic performances held before them and deal with these in terms of their (intended) consequences.

Dieter Axt – *Which literary works would you highlight in order to think about the judicial work?*

In the course of my own work I have often written about literary works that I consider important for legal practice.

Reading *Never Let Me Go* and viewing with empathy the characters that Ishiguro portrays, can help us escape out of the legal and ethical morass biotechnology has landed us in. Michel Houellebecq’s *Elementary*

⁶ WHITE, J. B. *Justice as Translation*, an essay in cultural and legal criticism. Chicago: University of Chicago Press, 1990, p. 27 and 26.

Particles is also a case in point if we think of how law has to deal with new technologies. The same goes for the German jurist-author Juli Zeh's *Dark Matter* (philosophy and physics) and *Corpus Delicti* (the new information society). But obviously, Tim Parks' *Judge Savage* is also important because it shows us what *not* to be. Recently I wrote about Ian McEwan's *The Children Act* on judicial emotion and empathy and what can go wrong when professional empathy turns into private sympathy. These are just a few examples, and obviously there is also much to be learnt by reading canonical works of literature e.g. Kafka's "In the penal colony" and *The Trial*, Shakespeare's *Othello*, and Musil's *Man without Qualities*. And for future co-operations the literatures of other continents than the European are important.

Dieter Axt – *To what extent is it possible to draw parallels and to identify similarities between the legal and the literary discourses? Is Law also a narrative?*

Law is definitely "narrative". But we must ask what we mean by that first, and that can only be done in a specific legal surrounding, e.g. common-law or civil-law, since the answer depends on the context in which it is used.

Given my neo-Aristotelian outlook, my argument would be that narratives can best be tested by exercising the phronetic ability where the goal is to ascertain the degree of narrative rationality. In law, the cognitive-epistemological aspect of narrative, *i.e.*, as a form of knowledge, is the important thing. For this argument, I find inspiration and justification in French philosopher Paul Ricoeur's views on narrative. In a nutshell, these are the following. To Ricoeur⁷, a first tie of *phronèsis* and narrative can be found in the ability to understand and appreciate metaphor, since to be able to see resemblances is the core of the ability to metaphorize well. A contemplation of similarities ideally leads to both insight into *what* is deemed a likeness, and *for what reasons*.

⁷ RICOEUR, P. *The Rule of Metaphor: multi-disciplinary studies of the creation of meaning in language*. London: Routledge and Kegan Paul, 1986.

Obviously, such imaginative perception needs testing, but in my view, the very idea of this quality is immediately linked to the imagination as an important concept in the continental-European hermeneutic tradition (also in the sense attributed to it by Immanuel Kant in his *Critique of Judgment* (1790), i.e., *Einbildungskraft* or *imagination*). Through the individual's imagination, the texts she reads are recognized in their perceptive moments of similarities, and, subsequently, translated into specific images, mental pictures, and, finally, a reflective judgment. So, translated to a legal context the metaphoric contemplation of (dis)similarities adds something new to the reservoir of accepted meanings and can help provide insight into the jurisprudential development of (the rule of) law, in common-law as much as in civil-law jurisdictions.

I mention all this to emphasize the point made in *Law and Humanities* studies that jurists should be imaginative about both the law and the people whose fates they determine when they use language to translate brute facts into the reality of the legal narrative. If the way in which the facts of a case are narrated, and, more specifically, the order in which they are narrated determine to a large part the outcome of that case, jurists need to develop and value narrative knowledge, not least because the events that did not make the grade of "the facts" may be of equal importance. Judges are therefore narrators in the configurational act of grasping together the facts and circumstances of the case and deciding what in the succession of events is relevant for the plot and what not.

Put differently, judicial emplotment and application when taken literally as *ad plicare*, folding the fact and the legal rule into a reciprocal union in order for a new meaning to unfold, need a narratology. First of all, because this process is guided by our interpretive frameworks. Secondly, because of the similarity between narrative and legal interpretation, since they are both not the application of the abstract rule to the story of the case, but a judgement about probability, verisimilitude and truth on the basis of the whole of our knowledge of the world. Thirdly, because in the whole process judges as those who bring about the reversal of fortune, the *peripateia* for others, may themselves fall short of the necessary quality of

recognition, the *anagnorisis* of what is indeed the truth in a specific case. I elaborate on this topic in « The Perplexity of Judges Becomes the Scholar's Opportunity»⁸

Dieter Axt – *What is your view on the possibility of seeing Law as Art? Does Law have counterparts to offer to Literature?*

As far as law as art, and law and art are concerned, I would say that in the sense that James Boyd White distinguishes, law is itself already an art in that it is a culture of argument. I wholeheartedly agree with that idea.

Everything I have said so far in this interview, is said under the guiding idea that law is an art.

On the plane of law and art in the sense of culture, I think that we witness today that the long dominant emphasis on high culture has shifted these past few decades, and that judges have even gained notoriety as actors in televised court drama. So, the portrayal of law in popular culture, including tabloids and tv series, is a new field in the broad spectrum of *Law and Humanities*.

It is interesting to note that, on the one hand, the portrayal of law in popular culture is often farcical, i.e. not related to law as the legal professional knows it, and that, on the other hand, the gist of so many products of popular culture is that law is the great redeemer (cf. John Grisham's template for legal fiction). This redemptive aspect is often in sharp contrast to everyday legal reality. This contrast is an interesting phenomenon for interdisciplinary research as it also provides an opportunity to connect research, more than is done to date, to legal practice.

On the view that popular culture contributes to the mental frames with which we perceive law and society, we can reflect on the topics of reading popular culture jurisprudentially, on mediality and popular justice in the courtroom, and on methodological aspects of disciplinary co-operations of law and culture(s) to explore our local cultural imaginations and scripts.

⁸ GAAKEER, J. The Perplexity of Judges Becomes the Scholar's Opportunity. In: OLSON, G.; REIMER, F. (Eds.). *Law's Pluralities: Arguments for Cultural Approaches to Law. Special issue of German Law Journal*, v. 17, n. 7, 2016.

As to the question of the reciprocity of our disciplinary relationships, i.e. your question about what law can teach literature, I would say the following.

Given the institutional and scholarly successes of *Law and Literature* and its intellectual diversity as far as the propositions for new jurisprudences are concerned, law has obviously negotiated a relationship to literature. If literature is supposed to teach lawyers to de-abstract their own field, if literature is thought to be the instrument with which to humanize lawyers, if literature is a storehouse of topics and claims of meaning to law, in short, if literature can serve a variety of utilitarian purposes, then the salient question would indeed be, “what is law to literature?”, or rather “what can literature learn from law?”.

Of course, a literary discourse impregnated by legal issues such as revenge and retribution can be found in classical Greek tragedies as sites of crisis and hence sites of judgment. Furthermore, as far as literary production is concerned, examples abound of the influence of law on the writings of authors as varied as Balzac, Stendhal, Dickens, Tolstoy, Dreiser, Kafka, Musil, and Gide. Additionally, one might argue that as far as the genre of the crime novel is concerned, that for it to be able to lay a minimal claim of authenticity it must be realistic in terms of law. I think it is fair to say, nevertheless, that when literary scholars turn to law in order to learn, they often do so in order to gain a better understanding of the socio-legal and socio-historical context of literary production, including issues of ideology and gender.

To me, the question of what literature can benefit from law, and the question of reciprocity force us to address the issue of what follows from the similarities and dissimilarities between literary production and legal production in the sense of our engaging in practice. This means that we would do well to shift our focus to the comparative aspects of literary-legal research in a European or other (national) context.

Dieter Axt – *Although in recent decades the research in Law and Literature has been spreading globally, one cannot fail to mention that the area suffers from a certain historical suspicion by more conservative sectors of the legal field. In your opinion, what are the main challenges that the study of Law and Literature will have to face in the near future and how do you propose to overcome them?*

In addition to what I have already said, I would draw attention to the importance of literary-legal studies for both legal education and legal practice. There is much more work to be done since academic Law and Literature seems to have forgotten the initial impetus for the field given early in the twentieth century by John Wigmore, and that is that legal professionals can benefit from reading literary works. The risk of academic Law and Literature becoming insular looms large. That is why I say that humanities-oriented interdisciplinary legal studies should move beyond the academic and into the realm of *praxis*.

In other words, when as jurists we turn to the humanities to further our interdisciplinary legal projects, we need to reconsider the alliance of theory and practice in law and hence its importance for jurisprudence. Why? Lest we run the risk that, as has been the case so far, legal practice remains unresponsive to what interdisciplinary studies have to offer, and, when it comes to legal education, that courses of the “Law and” kind are dismissed by students as irrelevant because they supposedly lack a focus on the students’ development of professional skills. We must not create new academic ghettos, but strive after a situation in which theory and practice, interpretation and application of our research results go hand in hand, so that both reflection and action may benefit.