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## *Visual Legal Signs*

### 1. From rules to images, from images to rules

In his essay “Visiocracy. On the Futures of the Fingerpost” Peter Goodrich has shown that the visual dimension is crucial to the understanding and the foundation of any possible legal-philosophical discourse. Indeed, as suggested by the subtitle of his work, Goodrich views images as the “finger post of law”, as essential signals that guide the direction of any legal phenomenon.

One need only recall the etymology of the Latin word “*signum*,” which precisely designates both images (signs, banners, paintings and sculptures, etc.) and watchwords (signals, commands, predictions, symptoms, etc.), to understand how deep the connections run between the normative and visual spheres<sup>2</sup>.

Were we to outline an initial distinction in the relationship between law and image we would have to recognise that there are both “visual rules” and “normative images”: there are norms that are manifested through the language of images and images which have an undeniable normative force in the eye of the beholder. The relationship that binds images and law is always bi-directional, with the first direction pointing straight from the law to the image, and the second, vice versa, leading from the image into the universe of normative discourse. The first direction moves along the tracks of legal language proper, the second strays through the vast territories of meta-legal language.

The second direction represents the open, constantly metamorphosing set of all the images – symbols, emblems, geographical maps, pictorial and filmic representations – that exert some “coercive” force in relation to a hypothetical recipient. The historical and legal philosopher Pierre Legendre defined these “multiple writings of normative” as “nomograms,” alluding to visual expression such as dance, ritual, cinema<sup>3</sup>, painting, emblems and any other socially relevant normative signs<sup>4</sup>.

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2 On the etymology of the word “*signum*” see A. Suptiot, *Homo juridicus. On the Anthropologic Function of Law*, Verso, London 2007.

3 For more on the sociological and philosophical-legal significance of a particular “nomogram”, such as the “film poster”, please refer to: [eds.] C. Sarzotti, G. Siniscalchi, *eVISIONI. Il carcere in pellicola, collage e graffiti*, Edizioni Linfattiva, Barletta 2013.

4 For more on the concept of the “nomogram” see especially: P. Legendre, *Leçons VI. Les Enfants du texte. Étude sur la fonction parentale des États*, Fayard, Paris 1992, p. 60; P. Goodrich, *A theory of the Nomogram*, in: (eds.) P. Goodrich, L. Barshack, A. Schütz, *Law, text*,

In these pages I do not explore the second direction, but rather I limit myself to an investigation of the first by asking two questions relevant to the construction of the legal discourse: Are there visual signs in legal language? And, if so, what function do they have?

## 2. Visual rules

The answer to the first question is less obvious than it might seem. Most of the legal theories from the twentieth century have always asserted that rules are the product of linguistic utterances and have nothing to do with “visual culture.” Yet, the works of two legal positivists such as Hans Kelsen and Herbert L.A. Hart, answer my question in the affirmative. While acknowledging that rules are expressions of utterances or linguistic propositions, these authors explicitly or implicitly admit the existence of rules that are manifested through visual signs. Let me be clear: these are signs that presuppose a rule and are limited to “translating” the sense of the rule visually. The paradigmatic case considered by both authors is that of road signs, understood as a set of rules (prohibitions, obligations and permissions, but also gestures, guidance and advice) crystallised in generally widespread and recognisable in images or visual impulses that serve to regulate pedestrian and motor vehicle traffic<sup>5</sup>.

In *Eine phänomenologische Rechtstheorie* [1965], Hans Kelsen introduces the topic of *visual rules* in reference to the light of traffic lights and the stop gesture commanded by a traffic warden. Kelsen writes that not all rules must necessarily be expressed in linguistic utterances: there are also gestures, such as the movement of a traffic warden’s arm or the illumination of a red traffic light, which reinstate the full meaning of a rule<sup>6</sup>.

Likewise, in *The Concept of Law* [1961], Hart recalls the red traffic light to serve as an example for one of the key points of his theory of law: the difference between an “internal point of view” and an “external point of view.”

According to Hart, to an “external observer,” the red traffic light can only be an indication of the likely halting of traffic: by repeatedly watching the behaviour of the cars, the observer can easily predict what will happen every time the light changes from green to yellow and red.

The visual signal only testifies to the existence of a habit, a behavioural regularity. In the case of an “internal observer,” i.e. an agent who participates in and

terror. *Essays for Pierre Legendre*, Routledge, New York 2006, pp. 13-34; and P. Heritier, *Law and Image. Towards a Theory of Nomograms*, in: (eds.) A. Wagner, RK Sherwin, *Law, Culture and Visual Studies*, Springer Verlag, Berlin 2013, pp. 24-48.

5 On the importance of road signs for the theory of the law see: F. Studnicki, *Traffic Signs*, “Semiotica”, 2 (1970), pp. 151-172; G. Lorini, *Norma nuda: un concetto ipotetico*, in: *Scritti in onore di Franco Modugno*, Editoriale Scientifica, Naples 2011, pp. 1969-1976; G. Lorini, *La norma disegnata*, in [eds.] P.L. Lecis, V. Busacchi, P. Salis, *Realtà, Verità, Rappresentazione*, Franco Angeli, Milan [forthcoming].

6 The example is in: G. Lorini, *La norma disegnata*, in [eds.] P.L. Lecis, V. Busacchi, P. Salis, *Realtà, Verità, Rappresentazione*, Franco Angeli, Milan [forthcoming].

acknowledges the rules of a legal system, the turning on of the light expresses the existence of a genuine rule bearing a penalty.

The paradigmatic cases cited by Kelsen and Hart not only state the existence of visual rules, albeit implicitly, they also suggest the visual element has a *pragmatic* function in terms of the legal force of rules. Could we imagine a road marking consisting of long and complicated linguistic propositions? It would be the very legal force of rule that would be degraded. Traffic signals – both signs and light pulses – must necessarily have two characteristics: they must be immediately apparent and need to “speak” a language that is as general as possible. Both features are ensured by the iconic dimension of these rules.

It is no coincidence that Hart chose to exemplify the difference between internal and external point of views in terms of the perception of a traffic light. It is a rule that, by virtue of the visual element, can be perceived and understood immediately by a generality of observers/agents (both “internal” and “external”) who possess different levels of knowledge of the set of rules.

Thus far visual signs are limited to simply “translating” the meaning of a rule.

### 3. Institutional visual signs

But are there any visual signs that are not simply related to a rule but can, by their mere presence, testify to the effectiveness of the institutions and legal order? In this case, the visual sign would be indicative of a widespread deontic power not attributable to a single and well-defined rule, unlike a command to stop or a traffic light turning on.

A possible answer to our question is found in the theory of “institutional facts” by John R. Searle. In the volume *The Construction of Social Reality* [1995], Searle draws a fundamental distinction between what he calls “brute facts” and “institutional facts”: the former belong to the sphere of the phenomena described by the natural sciences, the latter are the result of a collective agreement between human beings. “Institutional facts” include citizenship, marriages, borders, strikes, laws, and so on. As Searle emphasises, they are facts that only exist because we collectively believe in their existence. That is why Searle identifies the verbal signs that help us to know and recognise “institutional facts”<sup>7</sup> (which have an epistemic function): permits, passports and public officials’ badges are signs of the existence of a series of “institutional facts” that we could not otherwise either touch or see. Searle defines these signals as “status-indicators”.

Generally, these status “indicators” prefer written form: in complex societies, the most common and widespread indicators are passports and driving licenses. This does not detract from the fact that there are also “indicators” that materialise

7 For a precise reconstruction of the debate on the epistemic or constitutive function of “status indicators” see: M. Ferraris, *Documentality: Why It Is Necessary to Leave Traces*, Fordham University Press, New York 2012.

in visual signs. As Searle writes, some status indicators do not need to be explicitly linguistic, that is, they do not need to be expressed through words.

Two examples: wedding rings and uniforms. In both cases we are faced with signs that can be grasped visually, clearly testifying to the existence of “institutional facts” such as marriage and the police. Though Searle considers the meaning of these status indicators as equivalent, we will see how these two examples can be configured to represent different hypotheses of the legal significance of visual signs.

Let’s consider the uniforms first. What differentiates a traffic warden’s command to stop from the turning on of a red traffic light? Both visual signs ask the recipient to stop their car. If we limit our analysis to the legal meaning of the gesture expressed by these signs, we would have no doubts about their equivalence. Even Kelsen, in the example considered above, says that the traffic warden’s gesture and the traffic light are both cases in which the rule need not be expressed linguistically. Yet, if we shift the gaze from the meaning of the gesture to the aesthetic dimension of the context, we quickly realise that the presence of a person in uniform is very different from the perception of an impersonal traffic light signal. As Searle writes, the uniform includes a deontic power that is rooted in the symbolic value of this particular “status indicator”: the uniform worn by law enforcement plays an expressive, ceremonial, aesthetic and, as Searle specifies, even constitutive function of the essence of a policeman. While the verbal status indicators – signatures, passports or documents in general – only have one epistemic function in relation to institutional fact they represent, visual indicators such as uniforms also have a constitutive function.

But what does this mean? It is clear that a uniform does not constitute the essence of a police officer because there are also plainclothes police officers. Searle responds by saying that the constitutive dimension of these indicators lies in their symbolic power. The presence of a police officer in uniform is not the simple translation of a rule, as in the case of order to stop indicated by a traffic light, but it is the symbol of the presence and the coercive force of an entire legal order. If, as Kelsen says, the legal meaning of the gesture of a policeman and a red traffic light is the same, the order to stop, the difference between the two signs lies in their symbolic value: the aesthetic dimension of the indicator affects its deontic power.

As such, just as there are simple visual rules that, to be effective, must necessarily be perceived visually, there are visual signs that do not relate to individual rules, but that are constitutive of the deontic force of the entire system. The constitutive power of these signs lies in their symbolic value.

#### 4. Axiological visual signs

Now I will consider the example of the wedding ring. Searle believes that wedding rings and uniforms represent similar cases. As with the uniforms, we know that a ring is not essential for establishing the status of a husband or wife, but we also know that the wedding ring is a visible and tangible symbol of the existence of legal and religious institutions that are a prerequisite for any form of marriage. As

with the uniforms, wedding rings are visual signs not attributable to a single rule, but a more complex “institutional fact” articulated through legislation.

Where is the difference, then? In the knowledge that the sight of a wedding ring on a finger is not only indicative of the existence of a legally relevant fact: that sign also evokes a system of values identified by the bond of marriage. Loyalty and love for one’s partner represent values that are not, and cannot be encoded by rules but which reveal an inevitable value-based dimension found in the “institutional facts.” A wedding ring is an object loaded with pathos that has a certain symbolic value, an evocative power that opens up landscapes of values that are difficult to translate into rules in written or verbal form<sup>8</sup>.

The same is true of national flags or ensigns. These are also “indicators” that belong to the language of law and possess an undeniable and necessary symbolic power. We need only think of the colours that represent a nation, the sense of belonging to a given community triggered by the sight of certain colours, the idea of the homeland that does not coincide with that of the nation or other legal system but involves a completely different dimension of values: it is no coincidence that one of the essays by legal historian Ernst H. Kantorowicz is vividly titled *Mourir pour la patrie*.

It is through shapes, and not words, that these signs construct immediately apparent legal worlds where even the aesthetic dimension testifies to an undeniable “morality of law”. Wedding rings, national flags, ensigns, to provide other examples, are all “status indicators” that not only reveal the presence of the legal system, but also speak of a right that lives and is handed down, beyond any particular historical purpose, through symbols and values.

## 5. Symbolic Signs

There is more. Because some of these symbols are not only bearers of principles and ethical values within the law, but help constitute the very foundation of its force. The idea is old but has been rediscovered in the twentieth century by Ernst H. Kantorowicz in his famous volume *The King’s Two Bodies. A Study in Mediaeval Political Theology* [1957].

Without retracing the turning points in Kantorowicz’s theory, I would like to dwell only on a visual sign that occupies a very important position in the reconstruction of his historical and philosophical investigation: the king’s crown. Using Searle’s lexicon, we could define it a “status indicator,” even though the crown carries out a unique and unrepeatable function, at least according to the Anglo-Saxon jurisprudence from the sixteenth century investigated by Kantorowicz: it is a sign that “inscribes” the “mystical body”, which is immortal, invisible, and the foundation of the sovereign’s political power and legal, on the biological, mortal body. The sovereign thus has “two

8 On the irrelevance of ideal oughts, such as the duty to be loyal and loving, to rules, please refer to: G. Siniscalchi, *Normalità, idealità, dovere giuridico*, in: “Rivista Internazionale di Filosofia del Diritto”, 81, 2004, pp. 253-274.

bodies” and the crown is the visual sign of this dual nature. Or rather, the crown is the tangible symbol of that legal and political power that is eternal and unchangeable and is passed from body to body, from sovereign to sovereign, without interruption and without regard for mortal and fleeting human affairs. The act of coronation and the symbol of the crown constitute this “second” nature that characterises the figure of the sovereign and on which his legal power is based<sup>9</sup>. As Kantorowicz notes, in the lexicon of medieval political theology there are many signs where symbolic power establishes the very foundation of force of law: the crown is only the most important sign because, of course, represents and constitutes the origin of sovereign power<sup>10</sup>.

In more recent times, historian and philosopher Pierre Legendre reintroduced the aesthetic, symbolic and visual element to the centre of reflection on the foundations of law. Again, I will not retrace the complex theoretical architecture constructed by the French jurist in his famous *Leçons* – I refer mainly to *Leçons VI. Les Enfants du Texte. Étude sur la fonction parentale des États* [1993] and *Leçons VII. Le désir politique de Dieu. Étude sur les montages de l'État du Droit* [1988] – but I will limit myself to explaining the link between visual symbols and the foundation of law. According to Legendre, every device of political and legal power consists of a representation that depicts a “mythical third place,” that is absolutely necessary to establish the law; an indescribable bond that cannot therefore be expressed in verbal form, and which is the “genealogical principle” of every legal and institutional phenomenon<sup>11</sup>; a *Référence fondatrice*, in Legendre’s terms, which can only be represented symbolically, i.e. through visual signs, and which constitutes the “mysterious” origin of Western societies. For Legendre, inasmuch as it is symbolic, the visual is positioned as the very basis of law: every culture depicts this mythical bond by creating a fictional reality that rationalises the indescribable nature of the foundation.

The particular visual sign (crowns, rings, flags, etc.) is of no significance, but what counts is rather the recognition that there is a symbolic link at the origin of every legal phenomenon, a fundamental image that has the task of showing what cannot be expressed with words.

Therefore, not only is the dimension of visual rules and regulations necessary, the images can be constitutive of the entire legal phenomenon.

The images, as Goodrich argues, are the real “fingerpost of law” because they show the ultimate and indescribable foundation of law, that which – as Ludwig Wittgenstein reminds us – cannot be said, but can only be shown.

9 A recent re-reading of Kantorowicz that combines the aesthetic, political and legal dimensions can be found in: G. Agamben, *The Kingdom and the Glory: For a Theological Genealogy of Economy and Government*, Stanford University Press, Palo Alto 2011.

10 When considering symbols of the dual nature of the body of the sovereign we must also remember the analogy between the crown and the halo.

11 In these pages I do not, of course, consider the fruitful relationship between images and the theatrical dimension of law as *mise-en-scène*. On this point, see: Antoine Garapon, *Bien juger. Essai sur le rituel judiciaire*, Éditions Odile Jacob, Paris 2001; and, specifically in relation to the theatrical dimension of the trial, to: G. Siniscalchi, *Un coup de théâtre. Diritto, processo, mise-en-scène*, in [eds.] V. Garofoli, A. Incampo, *Verità e processo penale*, Giuffrè, Milano 2012, pp. 159-171.