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DEONTIC VISUAL SIGNS. BETWEEN NORMATIVE FORCE AND CONSTITUTIVE POWER

abstract

The most of legal theories in the twentieth century have always asserted that rules are product of linguistic utterances and that they have nothing to do with "visual culture". In this paper I show, on the contrary, that the visual dimension is crucial to understand and found some legal-philosophical discourse. The relationship between images and law is always bi-directional, by the first direction following the way from law to images, and by the second one, vice versa, passing from images into the universe of normative discourse. In these pages I do not explore the second direction; I limit myself to investigate the first way asking two questions relevant for the construction of the legal order: Are there visual signs in the normative language? And, if so, what function do they have?

keywords

visual rules, traffic signs, social ontology, deontic power

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1. From words to images

Most of the legal theories from the twentieth century have always asserted that rules are the result of linguistic utterances and that they have nothing to do with "visual culture". The modern concept of "law" rules out every influence with visual elements and exclusively prefers the textual dimension: terms such as 'rule' and 'law' have always been put in a semantic relation with the terms 'word' and 'text'.

Recently, the French philosopher and legal theorist Pierre Legendre reasserted the intrinsic relation between law and visual dimension with the concept of "nomogram".

"Nomogram – Legendre specifies – est formé à partir de deux termes grecs, *nomos* νομσ (loi, règle, usage, ce qui a été adjugé, equivalent latin: *institutum*), et *gramma* γραμμα (tracé, schema, écrit, letter...) (Legendre, 2009, p. 271). While *nomos*' recalls the visual act of appropriation, measurement or occupation of a space, '*gramma*' further specifies the visual component in an original symbolic and ritual dimension, completely neglected by modern law theories.

It is a figurative dimension – the so-called "*figuralia*" in Legendre's language – often found, for example in Medieval jurists' texts which Legendre deems as indispensable to recover to comprehend new normative processes of this post-modern era.

According to Legendre, the normativity in this globalization era is not a mere textual and legal phenomenon anymore but it consists of "multiple writings of normative"; alluding to visual expression such as dance, ritual, cinema, painting, emblems and any other socially relevant normative signs[1].

The "nomogram" concept encompasses both visual elements and items belonging to the legal language proper – i.e. rules that are manifested through the language of images – as well as images or signs which compose law meta- language – i.e. pictorial or cinematographic images which tell us about the juridical universe.

In these pages I will not investigate the legal meta-language, but rather highlight some *signs* – not only rules, but also traces, images, material objects[2] - which witness the relevance of the visual dimension in the construction of the legal discourse.

1 For more on the concept of the "nomogram" see especially: Legendre (1992, p. 60); Goodrich (2006, pp. 13-34); and Heritier (2013, pp. 24-48).

2 See André Lalande's definition of 'sign': *"Objet matériél, figure ou son, tenant lieu d'une chose absente ou impossible à percevoir"* (1962, p. 991). On the concept of "sign" see: Eco (1973).

2. Visual rules

While the works of two legal positivists such as Hans Kelsen and Herbert L.A. Hart strongly support the idea 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[3]. A clarification is needed here: these are signs that entail a rule and are limited to "translating" the sense of the rule into something visual. 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, directions and advice) crystallised in generally widespread and recognisable images or visual impulses that serve to regulate pedestrian and motor vehicle traffic[4].

In *Eine phänomenologische Rechtstheorie* (1965), Hans Kelsen introduces the topic of *visual rules* in reference to the colour of traffic lights and the gesture that forces car drivers to stop a police officer makes. Kelsen states that not all rules must be expressed in linguistic utterances: there are also gestures, such as the movement of a police officer's hand or a red traffic light, which assert the full meaning of a rule.

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 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[5].

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.

3 Compared to Hart, the relation between linguistic proposition and rule in Kelsen is much more complex and it should be investigated taking the evolutions of Kelsen's philosophy into account starting from Kelsen (1934) up to the Kelsen (1979).

For a deeper analysis see: Conte (2007, pp. 27-35), in which the author indicates five referrals to the "norm" word. A deontic sentence, a deontic proposition, a deontic utterance, a deontic state-of-affairs and a deontic noema. It must not be forgotten that, as Conte underlines, there are authors, such as Rodolfo Sacco and Theodor Geiger, who have denied the equation *norm=Normsatz* [deontic sentence]. It would be interesting, also in Kelsen, to investigate the relevance of the concepts of "deontic state-of-affairs" and "deontic noema" for the construction of a more "visual" concept of rule.

4 On the importance of road signs for the theory of the law see: Studnicki, *Traffic Signs*, (1970, pp. 151-172); Lorini (2011, pp. 1969-1976); Lorini (2017, pp. 421-441).

5 The universal semantics of traffic signs is highlighted in Wagner (2006, pp. 311-324).

Thus far visual signs are limited to simply "translating" the meaning of a rule.
Two questions: are all traffic signs the translation of a legal rule? And which kind of juridical rule can be interpreted by these signals?
Firstly, traffic signs must be set apart from other kinds of visual signs: geography maps, atlases, signs that point to particular places or subway/underground maps are all examples of signs that do not translate juridical rules but just provide a series of multiple information (also regarding the actual presence of deontic signs like no-entry signs, borders, etc.) to the observer. Public spaces such as railway stations, airports or museums often offer this information via graphic displays. All these kinds of signs which guide our sight never have a deontic force: they are mere information signs which do not regulate our life[6] from a legal point of view.
Similarly, signs that do not "translate" but "mimic" the presence of a juridical rule have no deontic force. Just think of a signal of "no entry" drawn by someone to protect the privacy of their house. Even if this sign has the same aesthetic shape of a visual rule, it does not have any juridical validity.
What are the rules that the traffic signs translate?
In a significant passage of *Directives and norms* (1968) Alf Ross highlights the nature of particular *traffic signs*: parking rules. Ross juxtaposes these rules to chess rules.
According to Ross, parking rules are particular traffic signs that regulate parking in a public space. They regulate the behaviour of drivers within enclosed spaces specifically assigned to vehicle parking. Ross compares these deontic signs to chess rules. Just like drivers, chess players must move pieces following chessboard geometry. There is a remarkable difference however: the activities which are regulated by traffic signs are acts that can be done without the presence of a rule (*natural activity* as Ross puts it). Chess rules are conditions of conceivability and possibility of the moves of the game itself. These rules make it possible for the acts which they themselves regulate.
In the first case we talk about "regulating rules" which just guide acts that naturally exist or exist independently from the rule. In the second case, however, we talk about "constitutive rules", in other words, rules which order acts which would not exist without the rule. While the concepts of pawn or driver exist independently from traffic rules, the concept of "bishop" exists only based on the rules of chess.
"This essential difference – Ross writes - can be expressed by calling parking rules *regulative* and the rules of chess *constitutive*"[7] (Ross, 1968, p.53).

6 In these pages I will not consider the complex ontology of geographical objects such as maps or atlases. I merely distinguish between signals that translate a legal rule (visual rules) and other signs that contain multiple indications including, of course, even with the presence of deontic force signals. On this type of objects see: Maynard (2005); Maynard (2015, pp. 27-48).
On the specific deontic value of maps and geographical maps such as urban planning plans see: Lorini, Moroni (2017, pp. 318-338).
7 Ross states: "The parking rules laid down by the police are concerned with the activity of 'parking a car', that is, with leaving it unoccupied in a public street. These rules prescribe how a person who wants to park his car has to behave. The rules of chess seem, in a similar way, to be concerned with the activity of 'playing chess', and to prescribe how one who wants to play the game has to behave. [...] Parking a car is a 'natural activity'; by this I mean an activity whose performance is logically independent of any rules governing it. Cars were parked before parking regulations existed, and it would be an obvious absurdity if I said that I could not park my car because of the absence of parking regulations in this town. Playing chess, on the other hand, is not a 'natural activity'. To play chess is to undertake certain actions according to the rules of chess" (Ross, 1968, p. 53).
In the now vast literature dedicated to the concepts of "regulatory rule" and "constitutive rule", I just want to point out: Conte (1995, pp. 237-252), Searle (1996); on the "eidetic-costitutive rule" and the "anankastic-costitutive" concepts see: Conte (1995, pp. 313-346); Conte (1995, pp. 517-561);. For an analysis of the various types of "constitutive

It should be clear now how traffic signs are regulative rules which are visually shaped exclusively in force of the pragmatic function of these particular norms.
If the *visual rules* are the translation of legal norms, the visual dimension of constitutive rules suggest the idea that there are signs capable of witnessing the existence of systems of rules, institutions and organizations.

3. Institutional signs

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, laws, and so on.
Institutional facts are the result of constitutive rules which, according to the famous formula "*X counts as Y in C*", assign through collective intention, agency functions to "brute facts", creating the institutional dimension of our common life.
That is why Searle identifies the verbal signs that help us to know and recognize "institutional facts" (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[8]".
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 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.

rules" see: Azzoni (1988); Żełaniec, (2013).
8 For a precise reconstruction of the debate on the epistemic or constitutive function of "status indicators" see: Derrida (1988); Ferraris (2012). On the ontology of documents see: Smith (2014, pp. 19-31).

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 non-uniformed 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. Axiotic 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[9].
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[10]. Furthermore, the idea of the homeland that does not coincide with that of the nation or other legal system, but rather involves a completely different dimension of values. Thus, it is no coincidence that one of the essays by legal historian Ernst H. Kantorowicz is vividly titled *Pro patria mori* (1951)[11].
The flag of the United States of America, for example, is full of symbolism. If the stars and stripes respectively indicate the number of states which increased up to the present number of 51 and the 13 founding colonies, the aesthetic value of the flag represents the fundamental values of the American people such as personal rights and freedoms granted by the Constitution and the Charter of rights.
More. There are flags that identify the values and the rights of universal and global communities. For example, the rainbow flag of the LGBTQI community designed by artist

9 On the irrelevance of ideal oughts, such as the duty to be loyal and loving, to rules, please refer to: Siniscalchi (2004, pp. 253-274).
10 The relevance of colours for legal discourse was recently underlined by Werner Gephart (2017).
11 See Kantorowicz (1951, pp. 472-492).

Gilbert Baker in 1978 and flown for the first time that same year in San Francisco displays the colours of the peace flag. It does not only assign different meanings to the coloured stripes, meanings such as health, life, sexuality. It is also the symbol of the fights for the rights of the gay and lesbian community in the entire world. The flag encloses and recalls a system of values which communities claim as universal rights. The symbolic force of the visual element awakens a sense of belonging and "affective participation" which, beyond statements or statues, perfectly expresses the sense of a community.
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, flags, ensigns, to provide other examples, are all "status indicators" that not only reveal the presence of the legal system, but also speak of rights, values and expectations rooted in the collective conscience of a people, of a community or a nation, a right that lives and is handed down, beyond any particular historical purpose, through symbols and values.

5. Symbolic signs

There is more since some of these symbols are not only bearers of principles and values within the law, but help constitute the very foundation of its force.
The idea is not new: already in the seventeenth century Thomas Hobbes represented the strength and power of the State with an image. The famous frontispiece of his book *The Leviathan or the Matter, Forme and Power of a Common Wealth Ecclesiastical and Civil* (1651), designed by the baroque artist Abraham Bosse, symbolically represents the power of the hobbesian sovereign: the gigantic body of the king, organically constituted of the bodies of his subjects, which holds a sword and a crosier is the symbol of the concept of sovereign power introduced by Hobbes's work par excellence[12].
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. In the famous book *The King's Two Bodies. A Study in Mediaeval Political Theology* (1957), Kantorowicz devotes the central part of his argumentation to the various meanings that the royal crown assumes in the constitutional and canonical jurisprudence of the Middle Ages, underlining the symbolic value of representing the unrepresentable, of making the invisible visible, of this particular sign.
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 and legal power, on the biological, mortal body. The sovereign thus has "two 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 symbol of the crown constitutes this "second" nature that characterises the figure of the sovereign and on which his legal power is based[13]. 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[14].

12 A classic study on the frontispiece of the Leviathan is: Schmitt (1938). More recent: Bredekamp (2007, pp. 29-61); Bredekamp (2012); Siniscalchi (2017).
13 A recent re-reading of Kantorowicz that combines the aesthetic, political and legal dimensions can be found in: Agamben (2011).
14 When considering symbols of the dual nature of the body of the sovereign we must also remember the analogy

In more recent times, 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[15]; 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 rationalizes 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.

6. The power of images

Therefore, not only is the dimension of visual rules and regulations necessary, the images can be constitutive of the entire legal phenomenon. The images allow us to rediscover new dimensions of the juridical discourse or guiltily neglected by law theory of the 20th century. The first one is the feature of universality of some visual norms which involves not only the juridical epistemology but also the perception of intrinsic ethical values of some signs and normative objects. The second one is the symbolic value of legal discourse that, from ancient medieval liturgies, projects law towards new global scenarios, beyond the text and the words of (post)modernity.

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between the crown and the halo.
15 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: Garapon (2001); Amato (2017).

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