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SPECIAL ISSUE INTRODUCTION

Why care about 'style' in legal scholarship?

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In discourses in and about law, the term 'style' proliferates. It is used in a bewildering variety of senses and contexts, mundane and refined, practical and theoretical, referring to characteristic ways in which (1) legislators, judges, law-enforcement agents behave and look; (2) specific legal institutions operate; or (3) legal systems solve problems and express distinctive mentalities and cultural patterns. Sometimes it refers to typical (national) features of judicial reasoning[1] or certain characteristics of judgments by individual judges (Yung, 2013), sometimes to professional 'folkways': technicalities and rhetoric to be followed by legal actors in how to write, talk and dress. 'Style books' in courts provide more or less binding guidance, assuring formal consistency in adjudication by regulating the written form of judicial decisions; a 'plain style' as opposed to legalese and jargon is supposed to make law accessible; the 'legal stylist' as a paralegal specialism in the ecology of modern law firms takes care of compliance with formal and substantive standards for legal documents.

Does this frequent use of the term also imply usefulness?[2] Is the concept of style helpful in understanding law or at least some aspects of law better? Arguably, style is best characterised as a proto-concept: 'an early, rudimentary, particularized and largely unexplicated idea' (Merton, 1984, p. 267) that has heuristic value but lacks a clear definition. At present, it seems too rudimentary to be used in a scholarly manner.

While there is a risk that the term causes confusion rather than contributes to organising and expressing our thoughts clearly, the problems it refers to are unlikely to disappear. If 'style' is to be used in legal discourse, it is worth asking how this use can be enriched by/distinct from the usage of the term in other disciplinary discourses, such as art history, cultural studies, linguistics or sociology of science. Perhaps legal scholars have simply not paid enough attention to other discourses and disciplines where the term 'style' has a well-established meaning. For clearly, or at least intuitively, art historians, linguists and sociologists of culture could not easily do without the term. Yet how is 'style' related to 'content', 'form', 'mentality', 'culture' or 'narrative'? Is legal scholarship able to rely on any well-established understanding of the term in those other disciplines?

If scientific ideas were patentable and legal scholars were brought to court to acknowledge that the term 'style' they use is not theirs, then, in the first instance, they would readily concede this borrowing. Lawyers and legal scholars could indeed refer to other disciplines for its precise meaning, not only by acknowledging the impact of art history and cultural studies, but embracing them as providers of genuine insights and starting points for new interdisciplinary research more generally. The very subjects of legal aesthetics, legal semiotics or legal rhetoric are hard to imagine without such interdisciplinary transfers of ideas.

But this is just the first instance of our imaginary trial or 'conflict of the faculties'. The second one is perhaps just as interesting. Law could make the counter-claim that, in fact, 'style' *is* a legal term. By this, I do not mean the trivial truth that, for instance, intellectual property law can provide legal protection for the use of certain patterns of design and, while doing so, introduce a technical legal

[1]Perhaps this has been the most productive line of legal research under the label of 'style'; see e.g. Wetter (1960); Gorla (1968); Kötz (1973); Goutal (1976); Lawson (1977); Lashöfer (1992); Markesinis (1994); Remien (1996); Markesinis (2000).

[2]For a similar question about the use of the term 'culture' in law, see Nelken (2012, pp. 2–4).

understanding of 'style' for this purpose. In most modern legal regimes, both private and criminal law can be invoked as a technique of protecting style as intellectual property (IP), if it fulfils certain criteria of originality, etc. set by particular IP regimes. Clearly, one could identify a legal concept of style in service of this practical goal, but here I have a closer connection in mind.

Legal historians have suggested persuasively that the origins of style as a technical term are in medieval legal discourse (Prosdocimi, 1962; Strätz, 1986). As a doctrinal term, style refers to either certain formal features of an official document or to customary procedural rules of specific courts. While most modern legal systems do not use the term systematically in such a technical sense any longer (Ranieri, 1985), its doctrinal use has been continuous in (Roman Catholic) canon law until this day.[3] In canon law, *stilus curiae*, the style of the court, is a doctrinal term of art, used in particular with reference to the Papal Court in Rome and interpreted in case-law and commentary.

This terminology goes back to the Latin *stilus*, which was first used literally then metaphorically, with increasing abstraction. Through several stages, the term was generalised from the writing tool to writing itself, and then to a mode of writing and a mode of expression. In this abstract sense, the term has only been received into art history and other humanities in the early modernity (Strätz, 1986). In the meantime, *stilus* has become a technical legal term already in late Roman times, to be solidified into an elaborate doctrinal category in the Middle Ages.

This conceptual history of style is worth an entire study in itself yet, for our purposes, a succinct summary is sufficient. The term was used in two related senses (Prosdocimi, 1962). First, and mostly in the writings of the so-called canonists, it referred to the form of written, originally hand-written, documents. The particular attention to the appearance and certain formal qualities of legal documents was, and still is, a means to prevent forgery.[4] In this sense, the term *stilus curiae* was related to the authenticity of documents. Second, especially in the writings of the so-called civilists, the term referred to certain customary, namely unwritten, mainly procedural rules of the court. The court's 'art and manner' of dealing with cases, though not regulated in detail by written law, has by the passage of time stabilised and was considered binding in certain respects. When the meaning of a legal act was contested, the customary practices of the issuing court may be invoked as an aid of interpretation. *Stilus* in this second sense then refers to judicial custom as a tool or method of interpretation.

The rise of national legal systems and national procedural laws in Europe in the eighteenth and nineteenth centuries has overshadowed this doctrinal tradition (Ranieri, 1985; Meyer-Pritzl, 2003) so that modern or current legal scholarship cannot easily rely on it. Rather, it tends to borrow the term 'style' back, as it were second-hand, from linguistic, cultural or aesthetic discourses, in order to better understand legal phenomena. For instance, through the example of Konrad Zweigert's use of style in identifying legal families, Cserne's paper illustrates how modern comparative legal scholarship only shows marginal awareness of the doctrinal legal tradition.

However, in a third round of interdisciplinary exchange, legal scholars may stop and ponder whether such a transfer or recapture of the term 'style' from humanities to legal scholarship is overall necessary or beneficial. An analogy with the history and sociology of science may be useful here to understand some initial doubts. Sociologist Anna Wessely argues sceptically: 'Neither art history nor philosophy has supplied us with a satisfactory explanation of the concept of style. Transferring that concept to the history of science gives rise to additional problems that may outweigh the heuristic value of the concept' (Wessely, 1991, p. 265). Replace 'history of science' with 'law' or 'legal scholarship' and the suggestion is clear – while the substantive issues may be worth studying, one should probably abandon the term 'style'.

A less sceptical option would be to simply take 'style' as a pragmatic terminological starting point and focus on substantive issues. Taking the analogy from science again, here is a suggestion for such an approach:

[3]*Corpus iuris canonici* (CIC) [1917] canon 20, CIC [1983] canon 63.

[4]This is still important in printed documents; think about passports and banknotes.

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> 'Scientific styles raise at least three issues for the history, philosophy, and sociology of science: the carriers of style, the causes of style, and the consequences of style. None of these depends crucially on an analysis of the meaning of style itself, which is an advantage in the current fog of abstractions and associations that envelops this concept.' (Daston and Otte, 1991, p. 229)

In other words, one can still raise and possibly answer meaningful questions about style in law, without pinning down the meaning of the term in general.

In the rest of this introduction, I should make a few remarks on each of these three elements suggested by Daston and Otte and, through this, also highlight some of the arguments in the five papers in this collection.

First, the carriers of style and the proper unit of analysis can be individuals, sometimes schools, sometimes texts, sometimes whole nations. The paper by Bor and Könczöl provides some important insights in this regard, by identifying the proper level of generality where legal style can be meaningfully and fruitfully located, allowing the examination of the symbols and metaphors that make for the expressibility of experience-based patterns of action and interpretation in law. Cserne's paper analyses Konrad Zweigert's 'style doctrine' on legal families where the carriers of style are entire legal systems: extremely complex human artefacts but arguably ultimately dependent on patterned beliefs and behaviour of individuals. Mercescu focuses on individuals (legal scholars) as the carriers of style yet she identifies distinct cultural patterns related to the professional socialisation ('disciplinary training') that constrain and explain the writing style of these individuals. Starting from the idea that the way legal ideas are expressed matters substantially (a generalisation of Bouffon's famous adage 'le style c'est l'homme'), she argues that cultivating a certain style could make scholarship, and perhaps indirectly also law, in some sense 'better'. In Mercescu's paper, this connectedness of style and epistemology is supporting her plea for a 'humanistic' legal scholarship or law as a humanistic discipline. Other papers address this connection of style and epistemic issues at the level of legal language and the public understanding of law (Ződi).

Second, the causes of style is an area of research where legal scholarship rarely goes beyond mere speculation:

> 'Individual style may be consigned to the psychological blackbox of quirk and creativity, but collective style demands a more accessible, structural explanation.… The socialization into what Ludwik Fleck called a *Denkstil* can be shared experience of education, career trajectories, and professional organizations that teach, articulate, and reward a certain kind of science.' (Daston and Otte, 1991, p. 231)

This applies to law, citizens and legal professionals just as well. Research on the cause of style can engage with this question in several fruitful ways and each contribution in this collection has something interesting to say on the sociological causes, historical origins or logical preconditions of the style patterns they identify in the language, arguments or institutions of law.

Third, as for the consequence of style, historians and sociologists of science ask, among others, the following question:

> 'How can innovations so intimately and minutely linked to a highly contingent and particular context be so widely communicated and accepted? The standard response has long been to insist upon the distinction between the context of discovery, which may be as idiosyncratic as one likes, and the context of justification, which screens out all that is merely personal and local. However, many of the same historical studies have cast doubt on the empirical validity of that distinction: justifications can be as local as discoveries.' (Daston and Otte, 1991, p. 231)

This questioning of the opposition of discovery and justification has obvious parallels in law. One is identified in the culturalist/functionalist divide and its supposed transcendence in comparative legal

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scholarship, discussed briefly and generally in Cserne's paper. Catherine Valcke's analysis of contract law reasoning in England and France provides a more specific example. Intuitively, one would think that the idea of bindingness of contracts should be based on reasons that are not just translatable and intelligible, but essentially identical in French and English contract doctrine. Yet Valcke argues that the English and the French ways of understanding contracts are emphasising different aspects of the legal institution and (moral) authority of contracts, namely the moral commitment dimension at French law and the reciprocity dimension at English law – thus the justification of contractual claims seems to be genuinely different across jurisdictions. Going further into the consequences of style, Zsolt Ződi's paper starts at the level of linguistic (semantic and pragmatic) analysis of different law-related texts and provides insights into the social consequences of various style registers of these texts, for instance in terms of equal access to the law.

Thus, the five papers in this collection are all indebted to various non-legal disciplines to some extent. As they tend to borrow the term 'style' back from linguistic, cultural or aesthetic discourses, in order to better understand legal phenomena, one should not expect them to converge towards a unitary well-defined legal concept of style. Instead, they provide a diverse set of case-studies of the modern second-hand use of 'style' in legal scholarship.

Overall, this collection is then best seen as an attempt to map the uses and think about the usefulness of 'style' in law and legal scholarship. In this way, this themed section promotes the aims of this Journal by presenting contextual work about law and its relationship with other disciplines. First, it contributes to distinguishing and clarifying the numerous ways in which 'style' is used in legal discourses, including legal reasoning (Ződi), legal semiotics (Bor and Könczöl), comparative law (Valcke, Cserne) and legal education (Mercescu), among others. Second, the papers also generate and/or reflect on possible cross-disciplinary connections and explore and expand the boundaries of law and legal studies. They not only enrich the analytical toolkit of contextual legal studies by exploring the potential of the concept of style, but also provide novel insights into a number of substantive issues, including access to and uses of law; the role of doctrinal and interdisciplinary arguments in legal reasoning; the interaction of legal and moral values; and the reform of legal education.

This themed section had a long gestation. Back in November 2015, at the invitation of Professor András Jakab, then director of the Institute of Legal Studies of the Hungarian Academy of Sciences, Miklós Könczöl and myself, then visiting fellow at the institute, organised a symposium on 'Law and style: From Aristotle to Zweigert'. In July 2017 in Lisbon, at the World Congress of the International Association for Legal and Social Philosophy (IVR), the two of us, together with Viktor Lőrincz, lawyer and art historian at the same institute, convened a special workshop on 'The Many Faces of "Style" in Law and Legal Scholarship'. The papers in this collection are based on drafts presented at these workshops but all have gone through more or less extensive revisions.

Many thanks are due to all participants of these workshops for their engagement and enthusiasm, comments and questions during the discussions; to the editors of this Journal, Professors David Nelken and Marc Hertogh, for supporting the idea of this themed section from birth to maturity. Last but not least, I am grateful to my four co-contributors for their effective and good-humoured collaboration throughout the lengthy editorial process.

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