

4. MUSICAL IMPROVISATION AND JUDICIAL ACTIVISM

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Abstract: *Can musical improvisation contribute to the development of music? Can judicial activism foster the progress of the law? Supporters of musical improvisation underline its popularity among performers of different countries, education, and stylistic views; opponents assert the higher appropriateness of a faithful performance of the piece, in accordance to the composer's wishes. Similarly, supporters of judicial activism affirm that it serves the needs of an evolving society, whereas opponents contend that in this way the judiciary usurps the role of the legislature. This article tries to shed a light on these issues, citing the opinions of important researchers on these themes.*

Key words: *improvisation, judicial decision-making, constraints, score, legitimacy.*

Introduction

Musical improvisation is the a creative activity in which a piece is composed in the same moment in which it is performed: the performer does not refer to a previously written piece, but rather spontaneously sings or plays a new passage or a whole piece extempore, usually structuring his or her musical ideas on a specific theme. In fact, musical improvisation may be practiced inventing variations on a melody or creating new melodies in accordance with a set bass-line. In the legal field, in order to decide a case, the judge searches for similar cases decided in the past, notes the basis of the past decisions, and converts the decisions into a rule which can be applied to the current case. However, precedents cannot cover all situations; as a consequence, courts sometimes issue innovative decisions. The rulings suspected of being based on personal or political considerations of the judge rather than on existing law are considered examples of judicial activism. This article makes a comparison between musical improvisation and judicial activism, focusing on whether or not their practice can be considered an appropriate contribution to the development of music and the law.

Supporting musical improvisation and innovative judicial decision-making

During the course of time, the relationship between performers and the score changed in a significant way. Before the invention of printing, scores were handwritten; music handwriting or copying was a very laborious and time-consuming task, and in spite of careful attention, many manuscripts contained scribal errors. For this reason composers and copyists usually wrote just the most important features of the piece, and performers completed it in the performance, often adapting it in compliance to the availability (or not) of specific musical instruments, the needs of the performers, or the requirements of the location. Research highlighted that during the seventeenth and the first half of the eighteenth century, each performance of a piece involved major or minor

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changes to the original score, above all if the composition dated back to a period characterized by a different music style (Harnoncourt, 1987). Modifications could be made also to coeval pieces, in order to meet the taste of the listeners, or to celebrate special events or anniversaries. Some theorists claimed that, even in the twentieth century, performing a piece can be deemed as more or less faithfully adapting it, because each performance implies intentional or unintentional changes to the piece, as it was originally conceived by its author (Busoni, 1907).

However, although extemporaneous composition may be unfettered by the prescriptive rules which characterize the original theme or piece, in any case it conforms to specific constraints, to which the improviser complies. Among them may be the following: 1) stylistic constraints, loosely specified by the improvisational style the performer adheres to; 2) internal constraints, which descend from what has already been performed, and the need to follow general principles of consistency or balance; 3) external constraints, such as superordinate principles of harmony and structure, or the wish to produce music meeting the audience's competence and expectations (Pearce and Wiggins, 2002). As a consequence, each performer intending to improvise in his or her performance, shall have a competent knowledge of the rules governing diverse compositional and improvisational styles, and the skills and experiences allowing him or her to apply them in an appropriate way.

Likewise, in the legal field, a judge has to ascertain the content of the law, and apply it to the facts of the case, complying with external and internal constraints, and with the interpretation theory he or she adheres to (Dworkin, 1977, 1986). Some researchers claim that when a judge has to give performance to the law, interpreting and apply it to a specific case before him or her, he or she firstly seeks to establish the existence and meaning of any purportedly authoritative directives of legal institutions. Therefore, the decisions of these institutions constitute the originals the judge is called to interpret and perform (Raz, 1996a).

Giving performance to the relevant rules requires an assessment of all aspects of the case, identifying how these aspects are linked to one another, and establishing a hierarchical order of importance. This implies the practice of legal reasoning, an activity in which premises and consequences shall be correctly linked in order to reach valid conclusions. To this end, the judge has the task of establish whether specific authoritative legal directives are currently in force and bear upon the legal issue at hand. Moreover, he or she shall avoid errors in reasoning, such as appeal to inappropriate authority, overzealous application of a general rule, or hasty generalization (Ramee, 2002).

As musical improvisers, also judges fulfill their role complying with a number of constraints; however, it may occur that the interpretation of both, musical themes on one hand, and laws, statutes and legal precedents on the other, requires not only a backward-looking conserving aspect, but also a forward-looking creative one.

Some researchers consider this forward-looking behavior positively, arguing that the role of the court is not merely the interpretation of the law, but also its maintenance and development. Only a progressive construction of the legal order, they claim, can avoid the charge of denial of justice (Lenz and Borchart, 2006). In their opinion, often courts are compelled to act as “quasi-legislators” by the very nature of their function (Harvey, 1978), aiming at filling procedural gaps (Rasmussen, 1986) or protecting fundamental human rights which are acknowledged as core values by the Constitution. Sometimes courts may deem that further development of the law is necessary in order to overcome the inefficiencies of governments and legislatures (Rodotà, 1996).

Indeed, these experts claim, both musical improvisers and judges shall not only reproduce and faithfully interpret the original documents on which they base their work, but also bring something new out of them (See e.g. Fiss, 1982; Dworkin, 1986; Marmor, 1992 & 2005; Endicott, 1994; Raz, 1996a, 1996b.) The central point lies in the dualistic nature of musical improvisation and legal decision-making: the role of both, musical improvisers and judges, is not only to observe, faithfully interpret and perform scores, Constitutions, statutes, and legal precedents, but also to adapt their interpretation to an ever changing world, contributing to the development and growth of music and law. Moreover, a cutting-edge improvisation or judicial decision may set a new trend in musical performance or legal reasoning, which could later be continued and developed further.

Opposing musical improvisation and innovative judicial decision-making

Until the second half of the fifteenth century music was copied out by hand. As this was a very labor-intensive and time-consuming process, music texts were very expensive and only libraries and very wealthy people could afford this kind of expense. Yet on the mid-fifteenth century mechanical techniques for printing music were first developed; in the course of time, continual improvement allowed large scale production of music texts and their spread out over different countries. In publishing commercial objects to be sold, publishers gained the power to control music production and its usage. Moreover, having the exclusive right to print and sell scores, they had also the right to combat piracy, imitations, plagiarism, and unauthorized performances (Attali, 1985).

Scores began to be understood not just as descriptions of the work’s content but also as prescriptions (Davies, 2011), and new interpretations theories were developed, calling for the most faithful performance of the musical work. The score was now conceived as “sacred” and unchangeable by performers, and improvisation was limited to very few sections of the piece, as cadenzas in concertos, or even dispraised. Likewise, in the legal field judicial activism is often considered with suspicion: the chance that courts can creatively interpret the texts of the Constitution and the laws, going beyond their traditional role as mere interpreters of the law, appears to many commentators as a usurpation of the role and powers of other branches of government (Rasmussen 1998). Some

researchers underline that, although judges exercising a policy-making role may serve the needs of a growing and evolving society, in this way they promote a shift of balance from the legislature towards the judiciary (Weiler, 1994), acting as legislators while lacking democratic legitimacy (Herzog & Gerken, 2008). However, it seems difficult to deny that improvement and development in both, music and the law, could be reached choosing a strategy combining the two different principles: faithful performance of music scores, legal statutes, the Constitution, and legal precedents on one side, and musical improvisation and innovative judicial decision-making on the other. Only this combined strategy can meet the goals of an ever-evolving society.

An “ongoing conversation”

Musical improvisation is common in many cultures: among them are the Indian, Pakistani and Bangladeshi classical music, and jazz. In Indian, Pakistani, and Bangladeshi classical music improvisation is usually practiced basing on ragas, which set the melodic framework for both composition and improvisation (Bor, 1999). Ragas can be considered like ancient European modes: they are set up on series of five or more notes, characterized by lines of ascent or descent, intonation, embellishments, and rendering styles (Jairazbhoy, 1995), and form the basis upon which melodies are constructed. The combinations of the different peculiarities which characterize ragas convey different moods; the emotional content of specific ragas is deemed to make them appropriate to be performed or listened to at particular times in the day, or in certain seasons (Sarkar, 2011). Performers are free to improvise as long as they maintain the raga’s basic structure.

One of the most famous performers of Indian classical music was Ravi Shankar, who toured all over the world since 1956. His improvisations on the sitar had a deep influence on rock artist George Harrison of The Beatles, and other leading artists, as Paul Simon, Donovan, and Bert Jansch. An admirer of Shankar, the British guitarist Davey Graham, became a pioneer of the *fusion* of jazz, blues, folk and Indian ragas. In the United States musical ensembles as Jefferson Airplane, Grateful Dead, and Quicksilver Messenger Service were followers of Shankar’s music, and included echoes of Indian ragas in their pieces.

Jazz is one of the styles which mostly rely on improvisation. In early jazz, performers merely embellished the melody with ornaments and passing notes (Schuller 1968), realizing a quite simple kind of improvisation. Later Louis Armstrong and Sidney Bechet introduced a more complex type of improvisation: jazz musicians extemporized totally new melodies fitting the chord sequence of the theme (Johnson-Laird, 2002). Since the 1940s a new type of jazz, called bebop, was developed by Charlie Parker, Dizzy Gillespie, Thelonious Monk, and others: bebop broke some of the confines of previous jazz soloing, so that performers became much freer in their improvisations.

However, although bebop musicians have a wide range of autonomy, their pieces follow a general structure: they begin and end with an ensemble

statement of a composed melodic theme. Between these statements, the performers take turns to improvise melodic solos of several choruses. In the improvisations, each improvising musician takes over from the colleague who improvised just before, acknowledging the content of the previously performed improvisations. In the ending statement, the ensemble sums up the theme and the most important contributions (Owens, 1995). Fusion music and jazz represent two ways in which performers may have a musical dialogue, recognizing each other's contributions and developing new music ideas and styles.

Likewise, in the legal field, in response to new kinds of problems, sometimes a more liberal interpretation of Constitutions and statutes may be promoted through an "ongoing conversation" between the highest courts: among them are the Constitutional Courts of the Member States of the European Union, the European Court of Justice, and the European Court of Human Rights. This steady "constitutional dialogue" between the highest courts might realize an open cooperation by means of the courts' mutual reception of their respective decisions. The courts may incorporate relevant passages of their respective innovative judgments (Voskuhle 2010), creating a "learning circuit". This, in turn, will enhance the development of a true integration-friendly European constitutional culture.

Concluding remarks

Although the opinions of opponents of music improvisation and judicial activism should be taken into adequate account, in my opinion improvisation has a central importance in music, as well as judicial activism has a fundamental role in the legal field. Law continues to develop through innovative judicial decisions and new legal interpretation theories, as well as music continues to develop through improvisation and new interpretation theories. However, it is important to note that interpreters of both, music and law, can develop new ideas starting from shared principles, and shall restate these principles also at the end of their creative process. In this way traditional and innovative values will be well-balanced and intertwined.

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