

# Law in the Time of Oxymora

A Synaesthesia of Language,  
Logic and Law

Rostam J. Neuwirth



“Professor Rostam J. Neuwirth has produced a scholarly work of real excellence that will be certain to test the concept of law. In the vanguard of research, his work re-conceptualises the perception and reality of law. Its contribution is more than important. It is fundamental.”

*Professor Gonzalo Villalta Puig, The University of Hull, UK*

“*Law in the Time of Oxymora*, like its title, brings together fields and thoughts that are often considered opposites, to present a well-reasoned and compelling argument about the durability and applicability of western binary approaches across many disciplines. Regardless of your field of expertise – from science to law to art – this book should be read for its original and imaginative insights that are delightfully well written and presented, and which are likely to make you rethink some of your accepted ‘truths’.”

*Colin B. Picker, University of Wollongong, Australia*

“Rostam J. Neuwirth’s study of the oxymoron – the word itself represents an oxymoron – in literature, art and science, and, dependent on these, law, shows that binary logic and universal principles without irreconcilable contradictions are difficult to maintain in a globalised world. Not only will the lawyer look differently at law after having read this fascinating book on oxymoronic concepts, the researcher will be delighted by the rich source material the author provides from literature, philosophy, science, law and politics.”

*Andreas Rahmatian, University of Glasgow, UK*

“Rostam Neuwirth’s book *Law in the Time of Oxymora* is a thoughtful and complex investigation of the varying uses of this fascinating figure of speech and its impact on our thought. While Professor Neuwirth focuses on the oxymorons of law, he also examines their use in science and the arts. He takes us on an exciting and informative journey through many areas of knowledge, leaving us more informed and more intrigued about the world and the many ways that we think about it.”

*Christine A. Corcos, Louisiana State University Law Center, USA*



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# Law in the Time of Oxymora

What do different concepts like *true lie*, *bad luck*, *honest thief*, *old news*, *spacetime*, *glocalization*, *symplexity*, *sustainable development*, *constant change*, *soft law*, *substantive due process*, *pure law*, *bureaucratic efficiency* and *global justice* have in common? What connections do they share with innumerable paradoxes, like the ones of happiness, time, globalization, sex, and of free will and fate?

*Law in the Time of Oxymora* provides answers to these conundrums by critically comparing the apparent rise in recent years of the use of rhetorical figures called “essentially oxymoronic concepts” (i.e. oxymoron, enantiosis and paradox) in the areas of art, science and law. Albeit to varying degrees, these concepts share the quality of giving expression to apparent contradictions. Through this quality, they also challenge the scientific paradigm rooted in the dualistic thinking and binary logic that is traditionally used in the West, as opposed to the East, where a paradoxical mode of thinking and fuzzy logic is said to have been cultivated.

Following a review of oxymora and paradoxes in art and various scientific writings, hundreds of “hard cases” featuring oxymora and a comprehensive review of the legal literature are discussed, revealing evidence suggesting that the present scientific paradigm of dualism alone will no longer be able to tackle the challenges arising from increasing diversity and complexity coupled with an apparent acceleration of change. *Law in the Time of Oxymora* reaches the surprising conclusion that essentially oxymoronic concepts may inaugurate a new era of cognition, involving the ways the senses interact and how we reason, think and make decisions in law and in life.

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First published 2018  
by Routledge  
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Routledge  
711 Third Avenue, New York, NY 10017

*Routledge is an imprint of the Taylor & Francis Group, an informa business*

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*British Library Cataloguing-in-Publication Data*

A catalogue record for this book is available from the British Library

*Library of Congress Cataloging-in-Publication Data*

Names: Neuwirth, Rostam J., author.

Title: Law in the time of oxymora : a synesthesia of language, logic and law / Rostam J. Neuwirth.

Description: New York, NY : Routledge, 2018. | Includes index.

Identifiers: LCCN 2017059167 | ISBN 9780815346692 (hardback)

Subjects: LCSH: Law--Language. | Semantics (Law) | Oxymoron.

Classification: LCC K213 .N485 2018 | DDC 340/.14—dc23

LC record available at <https://lcn.loc.gov/2017059167>

ISBN: 978-0-8153-4669-2 (hbk)

ISBN: 978-1-351-17020-8 (ebk)

Typeset in ITC Galliard Std  
by Swales & Willis Ltd, Exeter, Devon, UK

**For Holger S. Neuwirth**

**Engineer, Painter, Architect, and . . . Father**



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# Preface

The initial idea for *Law in the Time of Oxymora* gradually concretized as the result of diverse educational and professional experiences gained over the past two decades all around the world. Throughout these years, every new research question or experience at large appeared to invite the sole conclusion that a strongly dualistic conception of law as of life – expressed in a binary logic and in language through an infinite number of dichotomies, antagonisms or dualistic pairs – poses a serious obstacle to successfully tackling the problems caused by the increasingly complex and rapidly changing world in which we live. In this world, the complexity and the accelerated pace of change equally threaten – like a new pandemic global disease – to undermine law, especially the rule of law as an instrument providing legal certainty and predictability. These factors seem to contribute to the failure of law to meet expectations and to solve the great problems faced by the global governance debate today.

The apparent failure of the present international legal order, which is characterized by the absence of a coherent body of global law, is what invited the association with the book *Love in the Time of Cholera* written by Gabriel García Márquez, which provided more than the phonetical inspiration for the title of this book. By showing that love can flourish even in a time of pandemic disease, Márquez provided, in my view, encouragement to try to find ways for law to function as a “social medicine” as described so well by Pierre Lepaulle. To successfully do so, however, law must carefully address the prospects for global governance in the future, which James N. Rosenau described as the ability “to discern powerful tensions, profound contradictions, and perplexing paradoxes”. In law, however, contradictory language mostly causes a malaise, given the law’s strongly dualistic conception, which holds that a contract is either void or valid, an act legal or illegal, or a person innocent or guilty, but – usually – never both at the same time.

The possibility of a cure for this malaise of the law is what prompted my inquiry into the language and logic of the rhetorical figures of the oxymoron, the enantiosis and the paradox, or the so-called “essentially oxymoronic concepts”, as I described them in an article published in 2013 as a homage to the notion of “essentially contested concepts” coined by Walter B. Gallie in 1956. *Law in the Time of Oxymora* departs from the premise of a possible shift from contested

to oxymoronic concepts to an examination of the likely trend of an increase in the use of essentially oxymoronic concepts. Subsequently, it assesses the extent to which this linguistic trend is a harbinger of more profound changes, which could eventually pave the way to deeper cognitive and possibly genetic changes. The reason is that cognitive changes are urgently needed if the objectives of a drastic institutional and legal reform of the present system and the establishment of a coherent global legal order are to be accomplished. In trying to show how oxymora and paradoxes may trigger such changes in cognition and possibly genetics, synaesthesia provides an adequate metaphor for a greater unity of perception, whether it is applied to the different senses themselves, to language, logic and law, or to art, science and law. In sum, a greater unity of the senses, and in perception as a whole, is expected to form the basis for overcoming the global fragmentation of laws and possibly many other serious problems, the solution of which may have been prevented so far by a neglect of the fact that contradictions are only apparently absurd, however, they may in fact be or turn out to be true.

It is certainly true that this book would never have been possible without all the creators of the different artistic, scientific, legal and other works cited throughout this book, which are too numerous to be listed in a separate bibliography. They have all made the research for this book not only an exciting synaesthetic journey but have also provided many missing links and great intellectual support for a topic which has not yet been addressed in such a comprehensive way. In this task, great inspiration has come from the many people with whom I was so privileged to study and research at different places. The journey began with my studies at the law faculties of the Université d'Auvergne in Clermont-Ferrand (France) and the Karl-Franzens University in Graz (Austria). It continued at McGill University, where so many important insights were received during my postgraduate studies, notably in the classes by my supervisor Prof. H. Patrick Glenn, who sadly passed away too early and without being able to comment critically on my book as he had promised. His teaching and supervision were a true eye-opener to the rich and diverse world of law and the essential role of the comparative method for law and legal reasoning across the world's different legal traditions. At the same time, more inspiration came from Armand De Mestral, Rabbi Joshua Shmidman, El Obaid A. El Obaid and Stephen Tooze, who all reinforced my interest in the various foundations of the unity in the diversity of law in a global context. I would equally like to acknowledge the many interesting seminars or courses delivered by my supervisor, Bruno de Witte, as well as Giuliano Amato, Philip Alston, Gráinne de Búrca, Pierre-Marie Dupuy, Claus-Dieter Ehlermann, Christian Joerges, Karl-Heinz Ladeur, Neil Walker and Jacques Ziller during the time I spent at the European University Institute.

For my legal formation and later academic career, an indispensable professional experience was provided by my work in the regional courts in Styria, as well as the International Law Bureau of the Austrian Federal Ministry of Foreign Affairs in the context of the Austrian EU presidency in 2006. Following the work in the Foreign Ministry, I moved on to teach at two National Law Schools in India, the Hidayatullah National Law School (HNLU) and the National University

of Juridical Sciences (NUJS) in Kolkata (India). Here, all my gratitude goes to Mahendra P. Singh, the former Vice-Chancellor of NUJS, for his unique mentorship, great intellect and kind support over all those years.

As a unique Eastern-Western place, my special thanks go to the Macau SAR and the University of Macau for providing such an interesting research environment in legal, economic, historical, cultural and culinary terms. Equal thanks go to my colleagues and students at the Faculty of Law for providing support for so many ideas through related research and teaching activities. Equally important were my various stays as a visiting professor at the University of New South Wales, the Eduardo Mondlane University, Hokkaido University, the European University Institute, the Pan-European University, Kobe Law School, the University of Life Sciences in Vienna and the Universidad Andina Simón Bolívar in Quito. Although there are too many to list, every single conference was a rich source of ideas, and I would like to especially mention the *Juris Diversitas* annual conferences in 2016 and 2017, which provided an open-minded platform for the presentation of the principal ideas underlying this book.

Finally, I also thank the following friends and colleagues who directly or indirectly contributed to the realization of this book: Irene Calboli, Ignazio Castellucci, Christine A. Corcos, Christiaan De Beukelaer, Denis De Castro Halis, Yvonne Donders, Iris Eisenberger, Rai Ekraj, Francesco Francioni, Miguel Goede, Christoph Beat Graber, Peter Griss, Sonei Griss, Véronique Guèvremont, Frank Hammel, Lilian Hanania-Richier, Daniel and Brigitte Hollegga, Andrew Johnston, Martin Kleiner, Michael Kratzer, Arno Kreilhuber, Andreas Kumin, Lee Keun-Gwan, Li Shiqiao, Michel Levi Coral, Bing Ling, Esther Lorenz, Salvatore Mancuso, Stefan Meyer, Gu Minkang, Olivier Moréteau, Colin B. Picker, Andreas Rahmatian, Akira Saito, Robert Schuetze, Martina Spornbauer, Alexandr Svetlicinii, Yoshiyuki Tamura, Gonzalo Villalta Puig, Wang Heng, Richard H. Weisberg, Peter K. Yu, Zhao Yun, and Lorenzo Zucca.

Beyond words, a true *conditio sine qua non* for the realization of the book is the strong support from my closest family, in the context of which I want to mention my father Holger, to whom this book is dedicated, as he laid the foundations to it in more than a dozen ways and provided important critical feedback on an earlier draft. To my mother Eva, I am grateful for her belief in me and for having, from the very beginning, truly set the foundations for me to pursue my career globally. Similarly, I acknowledge my grandparents, who continue to provide essential support, guidance and hope, even from the life after life. Further acknowledgements go to Iris P. Neuwirth, Mohammed M. Abderrahmane and Harald “Harry” Neuwirth, Gösta Neuwirth and Olga Neuwirth, who also provided great support to this book, far beyond the mention or explanation of specific oxymora. At last, my special gratitude and love goes to my wife Pui Mang and my very favourite “oxymora”, our two children Elam J. and Lea J.

*Rostam J. Neuwirth*, Macau, October 10, 2017





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# 1 Prologue

## The quest for light

*Dunkel wars, der Mond schien Helle!*  
(It was dark, the moon shone bright!)

### Proverb

It may be best called an “open secret” that the best hiding places are right before us, where we least expect them. Such may be the case with a large number of experiences we are all exposed to, i.e. experiences captured by concepts and rhetoric we all use and are used to, without duly understanding their impact on our mind and their role in our future. Artists, scientists, lawyers and all citizens – literally no one is spared from the creeping effects of this rhetoric. From Shakespeare’s “honourable villain” to Orwellian doublethink and Faulkner’s “peaceful despair”, from the pianoforte to free jazz and other sounds of silence, from architecture as the “art of construction” (*Baukunst*) or “petrified music” to paintings by Escher and Magritte – all the art forms thrive on these concepts. In science too, physicists formulate the “uncertainty principle”, biologists study “cognitive genetics”, like economists analyse competition through “creative destruction”, computer experts develop a “memristor”, or physicians diagnose an “anaesthesia dolorosa” or “noninflammatory arthritis”. In social science, critical theorists are occupied with the culture industry, and political scientists try to measure “soft power” in a world of glocalization. In law too, attorneys write “lengthy briefs”, judges hear cases on “welcome sexual harassment”, while scholars debate “intellectual property”, “substantive due process” or “binding policies” adopted by the government. Or else, we may just order a *frappuccino* while enjoying a gourmet pizza, drive a sports utility vehicle (SUV) to a nearby cinema to watch the movie *True Lies*, or wear a “skort” with a “real fake” knockoff luxury handbag.

Literally, there appears to be no end to the kind of experiences referred to here. These experiences can also be transformed into manifold questions, like the following: Is there or can there be “global justice”? Can someone lie and tell the truth or be guilty and innocent at the same time? How can we realize the global goals of “sustainable development”? Is it possible to be happy and sad, or happy and poor, as well as sad and rich, at the same time? Do we all want to live in developing countries? What do “global justice”, “somasochism” and the “creative

## 2 Prologue

economy” have in common? Is clean coal a reality or an alternative fact? Do we learn from history, and is logic innate? Is there life after death, do genes transmit experiences? Can words change the way we think, our mind, or even us and the reality around us? Is there a free will or only fate or “kismet”?

These experiences and questions all share as a common element the rise of so-called “essentially oxymoronic concepts” in contemporary discourses, artistic, scientific, legal and otherwise. The numerous experiences related to these concepts also share the paradox of the obvious, namely that, usually, the answers to the most complex questions may be hidden where we least expect them. This is also reflected in an old allegory regarding the human quest for “light” as a metaphor for the fundamental three questions of human evolution: “Where do we come from? What are we? Where are we going?” taken from the title of a painting by Paul Gauguin. The quest for light thus refers to efforts to discard the darkness obstructing a greater understanding and awareness of the direction that human evolution will or is supposed to take. By analogy, the quest for light is also closely related to the quest of law for truth and justice and the solution of serious problems on the way there. Metaphorically, the struggle of this quest is reflected in an old allegory which goes as follows:

There was a time in the history of the race when the gods stole from man his divinity, and, meeting in a high conclave, sought to decide where to hide that which they had stolen. One god suggested that they hide it on *another planet*, for there man could not find it, but another god arose and said that man was innately a great traveler and they had no guarantee that, eventually, he might not find his way there. “Let us,” he said, “hide it in the *depths of the sea*, at the bottom of the ocean for there it will be safe.” But again a dissenting voice was heard, and it was pointed out that man was a great natural investigator and that he might some day succeed in penetrating to the deepest depths as well as the greatest heights.<sup>1</sup>

Evidently, this allegory invites the question of what causes the current darkness and where, in the end, the light guiding humans was hidden. If the reader has not already guessed it, to find out, law can play a useful role in its rediscovery. In the following pages, therefore, the attempt will be made to show that it is, most likely, in the same place from which the phenomenon of the rise of oxymoronic concepts is taking its origin.

<sup>1</sup> See Foster Bailey, *The Spirit of Masonry*, 3rd ed (New York: Lucis Publishing, 1979) at 106–107 [*Italics added*].