

**THE AESTHETICS OF HUMAN RIGHTS: LAW, LANGUAGE
AND PERFORMATIVES***

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Abstract

This paper focuses on the conceptions of normative beauty in human rights instruments and discourse. Two questions will stimulate this conversation: what may be normative beauty and what may, if any, be the grounds of aesthetic judgement? Guided by these questions, the paper will try to revisit in particular Frantz Fanon's decolonial aesthetic, the crisis of culture thematic in Hannah Arendt, and the thought world of Jacques Ranciere concerning the aesthetic dimension, currently talked about as an aesthetic turn in political theory. The relationship between human rights and egalitarian inscription, as shifting geographies of sensing, seeing, believing, and knowing, will also be explored.

I Introduction

IN THIS additional to one conversation entitled, 'Towards an Aesthetics of Human Rights' the principal argument made was that one can extend aesthetics to human rights only when one constructs normative beauty in the law and jurisprudence in the idea of human rights and its law and jurisprudence. How is that notion to be construed for visual aesthetics and politics? And is that normative beauty lawless, that is beyond rational judgement in the complex terms of *Third Critique* of Immanuel Kant? The idea of lawless order may also be said to be endowed with normative beauty. The author revisited, the issue (in Immanuel Kant terms) of subjective truth and giving a rule to art, mechanisms through which these became inter-subjective and even became subjective universals mainly *via* art history.

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1 Ruth Lorand, *Aesthetic Order: A Philosophy of Order, Beauty and Art* (Routledge, London, 2000).

Following George Deleuze and Felix Guattari, chaosmos as a disordered order that variously animates both the arts and the idea of human rights. All the same, there is an undeclared right of imagination as a gateway through which human rights and arts may begin to converse. The important problematic of aesthetic regulation where positive legislative law and creative judicial power are deployed to construct beauty in urban and historical places and regulation wavers between harmful or harmless aesthetic wrongdoing is not a point of discussion here.² Finally, Merleau-Ponty's notion of intercorporeality, justice of the flesh and aesthesiologial body in studying the disembodiment practiced in art and politics re-inventing the notion a presocial body requires serious consideration.

In this paper, the focus is on what has been termed as the aesthetic turn in political theory. It signifies at least two directions: the practices of decolonising aesthetics and the problems of making universal, the cultures of validity.

II Decolonising aesthetics

Decolonising aesthetics was a major part of struggle against colonialism, colonisation, and their siamese twin imperialism. It is somewhat useless to discuss with whom and when this term came to be used because movement against colonialism led to social theory and *vice versa*. The term definitely came in vogue with the movements and struggles for independence. The demand for decolonization of knowledge in theory and movement for epistemic insubordination in movement and struggle were deeply intertwined.

In India, the principle of self-determination was reinvented as the practice of decolonisation which is in itself a beautiful thought. Mohandas Gandhi started the movement for independence which had as its cornerstone the

2 For discussion on the ways in which practices of education and politics as human rightlessness are created, controlled, and distributed in Delhi; see, Upendra Baxi, Education in Delhi: Marginalization, Diversity and Schools, Mar. 18, 2015 (Ambedkar University, Delhi, mimeo); David Ghertner Rule by aesthetics: World-class City Making in Delhi in Ananya Roy and Aihwa Ong (eds.), *Wording Cities: Asian Experiments and Being Art of Global* 279-306 (Oxford, Blackwell 2011); D. Ghertner, Analysis of New Legal Discourse behind Delhi's Slum Demolitions, 43 (20) *EPW* 57-66 (May 2008); Ashok K Jain, *Law and Environment* (Delhi, Ascent); Stephen Legg, *Spaces of Colonialism: Delhi's Urban Governmentalities* (Oxford, Blackwell 2007). See also as concerns the notion of aesthetic harm, Larry Alexander, Plastic Trees and Gladiators: Liberalism and Aesthetic Regulation 16 *Legal Theory* 77-90 (2010); John. E. Costonis, Law and Aesthetics: A Critique and a Reformulation of the Dilemmas 80 (3) *Michigan Law Review* 355-461 (1982); James Charles Smith, Law, Beauty, and Human Stability: A Rose Is a Rose Is a Rose 78(3) *California Law Review* 787-812 (1990).

notions of *sampurna swaraj*: *Swaraj* is rather difficult to render in English, roughly it stood for complete independence through non-violent and permanent revolution from the British rule and involved a continuous transformation of the society, especially in the expectations and experience of the worst-off or the have-nots. A key associated concept was *swaraj* in ideas, first sounded by Mohandas and later elaborated by philosopher Krishna Chandra Bhattacharya in October 1931 under Sir Asutosh Memorial Lectures series.³

Bhattacharya elaborated the notion of cultural subjection of an unconscious character which implies slavery from the very start. He distinguished it from cultural assimilation, which may be positively necessary for healthy progress.

Cultural subjection occurs only when one's traditional cast of ideas and sentiments is superseded without comparison or competition by a new cast representing an alien culture which possesses one like a ghost. This subjection is slavery of the spirit: when a person can shake himself free from it, he feels as though the scales fell from his eyes. He experiences a rebirth and that is what I call *Swaraj in Ideas*.⁴

In another civilisational context, Walter D. Mignolo admirably articulates this (as a concept of Anibal Quijano): while modernity is presented as a rhetoric of salvation, it hides coloniality, which as integral to modernity, capitalism and coloniality that together established control of economy and authority, of gender and sexuality of knowledge and subjectivity as the logic of oppression and exploitation.⁵ He concludes the essay by saying that de-colonial projects dwell in the borders, are anchored in double consciousness, in *mestiza consciousness* (racial and sexual). It is a colonial subaltern epistemology in and of the global and the variegated faces of the colonial wound inflicted by five hundred years of the historical foundation modernity as a weapon of imperial/colonial global expansion of Western capitalism.⁶

3 K.C. Bhattacharyya, *Swaraj in ideas* 20 *Visvabharati Quarterly* 103-114 (1954). The concept was later richly developed by K. T. Shah (who established a journal by that name) and Daya Krishna who elaborated this notion further in understanding the role of public and campus intellectuals and philosophers in India.

4 *Id.* at 103. He decried what he defends as hybridization and called for a recovery of the lost mind.

5 Walter D. Mignolo, *Coloniality of Power and De-Colonial Thinking* 21(2-3) *Cultural Studies* 155-167, 162 (2007).

6 *Id.* at 165.

The words used to describe the consolidation of the Empire here are most important: the keywords are consciousness, wound, expansion and faces. The idea of modernity itself as a weapon also fascinates in all its cruelty and barbarism because expansion of global capital and the rise of double consciousness (of race and class, of the European and his other) is otherwise not possible without it.⁷ Colonisation as a wound, as mayhem and murder, as loot and plunder, as theft and expropriation, were acts performed, embodied, and lived. Not merely the people, resources, and environment were expropriated but also there was a recognisable epistemicide; it was as if that southern knowledge and theoretical thinking did not exist.⁸

It did not matter (and even now it does not) that almost all figures in the western tradition were apparently unfamiliar with the rich tradition of Indian aesthetics which culminates in Abhinavagupta, the 11th century Indian philosopher (noted only by Schopenhauer). And few in the West are aware that a highly developed aesthetic attitude theory is found in the Sanskrit writings.⁹ These examples can be multiplied endlessly in narratives of epistemologies of the global south and different ecologies (as Boaventura Santos calls these) of thought and knowledge traditions.

How that wound is visualised and performed during the time/space of the colony and how swiftly through the postcolonial it is dulled into *memory*, and how further that memory is transformed into *history* are very crucial matters not just for the craft of Clio and aesthetic theory but also for future narratives of globalisation and neo-liberalism. Still, we must note that across social theory in the non-West even today the dominance of Europe is a

7 See, especially, Freya Schwyz, Decolonization and the Question of Subjectivity 21(2-3) *Cultural Studies* 271-294 (2007); Chandra Talpade Mohanty, Under Western Eyes: Feminist Scholarship and Colonial Discourses 28 (2) *Signs: Journal of Women in Culture and Society* (2002); Madhu Dubey, *Black Women Novelists & The Nationalist Aesthetics* (Indiana University Press, Bloomington, 1994).

8 Bonaventura Sousa Santos, *Epistemologies of the South: Justice against Epistemicide* (Paradigm Publishers, London, 2014).

9 See Richard McCarty, The Aesthetic Attitude in India and the West 36:2 *Philosophy East and West* 121-130 (1986); Raniero Gnoli, *The Aesthetic Experience According to Abhinavagupta* 77 (Istituto Italiano per il Medio ed Estremo Oriente, Rome, 1956); Kanti C. Pandey, *Comparative Aesthetics* 153-154 (The Chowkhamba Sanskrit Series, vol. 1, Varanasi 1959); Sushil Kumar Saxena, *Aesthetical Essays: Studies in Aesthetics, Hindustani Music and Kathaka Dance* 3-34 (Chanakya Publications, Delhi 1981); S.K. Saxena, *The Winged Form Aesthetical Essays on Hindustani Rhythm* (D.K. Printworld, New Delhi, 2012).

part of a much more profound theoretical condition under which historical knowledge is produced in the third world. This condition ordinarily expresses itself in a paradoxical manner.¹⁰

Earlier, and still in some quarters, known as the condition and the circumstance of the colonial/imperial, and later as Orientalism, Eurocentrism and as postcoloniality, this domination meets too with some aesthetic resistance. The practice of domination now everywhere is neo-colonial; neo-colonial is space and time best defined (in the immortal words of Kwame Nkrumah, a freedom fighter, thinker, and later a Ghanaian President) as power without accountability and exploitation without redress.¹¹ Epistemic insubordination is the way of social movement and theory in this zodiac; the question is how did the aesthetic theory practice this in the past and how its praxis now and in the future will combat this? Both questions confront us with the problem of conceptualizing the futures past (as Reinhart Koselleck described this).¹²

III Mass Culture, Educated Philistines and Culture Industry

It may perhaps be useful to revisit these concepts, *albeit* briefly here, to understand domination and insubordination. The thought world of Hannah Arendt is mostly engaged here though Theodore Adorno persuasively developed the concept of culture industry. Adorno¹³ proposes the term culture industry in place of mass culture; he affirms that the culture industry is a control system which commodifies expression (and even intra-systemic dissent) and creates its own distinctive way of regulating social behaviour and even the production of its norms. He writes:¹⁴

10 Dipesh Chakravarty, Postcoloniality and the Artifice of Indian History: Who Speaks for the Indian Past? 37 *Representations* 1-16 (1992).

11 Kwame Nkrumah, Introduction in *Neo-Colonialism, The Last Stage of Imperialism* (Thomas Nelson & Sons, Ltd., London, 1965) He also said: A state in the grip of neo-colonialism is not a master of its destiny. It is this factor which makes neo-colonialism such a serious threat to world peace. What Nkrumah describes as neo-colonialism appears to a reader, in times of hyper globalization, neo-liberalism, and austerity in face of debt (and development) crises as illiberal governance and constitutional authoritarianism.

12 Reinhart Koselleck, *Futures Past: On the Semantics of Historical Times* (Columbia University Press, 1985).

13 Theodor Adorno, Culture Industry Reconsidered in J.M. Bernstein (ed.), *The Culture Industry: Selected Essays on Mass Culture* 85-92 (Routledge, London, 1991).

14 *Id.* at 86.

The cultural commodities of the industry are governed by the principle of their realization as value, and not by their own specific content and harmonious formation; and reiterates that [t]he entire practice of the culture industry transfers the profit motive naked onto cultural forms .

Even when Adorno acknowledges that ever since these cultural forms first began to earn a living for their creators as commodities in the marketplace they had already possessed something of this quality , he maintains that now the cultural entities typical of the culture industry are no longer also commodities, they are commodities through and through.¹⁵ In this sense, not merely has culture become commoditised; it has now become an industry; the key feature of this industry is that it creates its own norms of production of a pastiche in a capitalist economy. Though assuming diverse forms, the culture industry as a whole serves the market; mass media tend now to be consolidated in a few market hands that render citizens into interchangeable consumers whose tastes they shape and reshape by constantly modified in practices of commoditisation. Tabloid terror is just one recent, fierce, and gruesome, example of this tendency.¹⁶

In later works,¹⁷ Adorno theorizes the relations between the culture industry and organised politics, and the ways of pursuing supreme political power. A dialectical enlightenment of enlightenment discloses each image as script. It teaches us to read from [the image s] features the admission of falseness which cancels its power and hands it over to truth .¹⁸ This observation deserves the status of both a maxim and an enigma: as a maxim it carries a theory of reading and an enigma it reveals both (in Peter Goodrich's words) forms of iconophilia as well as iconophobia. What remains of the image when it is

15 *Ibid.*

16 See Francois Debrix, *Tabloid Culture: War, Culture, and Geopolitics* (Routledge, London, 2007); Upendra Baxi, 'Reading Terror: Reflections on Francois Debrix, Tabloid Terror: War, Culture, and Geopolitics' 12(3) *Theory and Event* (2009).

17 M. Horkheimer and T. W. Adorno, *Dialectic of Enlightenment: Philosophical Fragments* (Stanford University Press, Stanford 2002, 1947: trans. E. Jephcott) ; Theodor W. Adorno , *Negative Dialectic* (Seabury Press, New York, 1973: trans. E. B. Ashton).

18 *Id.*, *Dialectic of Enlightenment* at 18. See also, *Aesthetic Theory* (University of Minnesota Press, Minneapolis, 1997, 1970: trans. R. Hullot-Kentor); see also, L. Zuidervaart, *Adorno's Aesthetic Theory: The Redemption of Illusion* (MIT Press, Cambridge, Mass. 1991).

read as a text? How do we read images in words? What happens to words when images are read through them? And are admissions of falseness also not inherent truths: Is that which we call fake today not yesterday's lived truth?

Hannah Arendt did face this difficult, if not hazardous, last question. While it is true that they were both concerned with the genealogies of Auschwitz and total domination,¹⁹ Arendt confronted such questions differently. In her essay *The Crisis in Culture*²⁰ she famously put to use the distinction between culture and entertainment *via* categories of mass society and mass culture. Beginning from an etymological explanation—the Roman word *cultura* derives from *colere* (richly meaning to cultivate, dwell, care, tend, and preserve), she contrasted culture with domination, whether of nature or human.²¹ However, far from being durable as the standard conceptions of culture suggest, she demonstrated that durability is the very opposite of functionality, which is the quality which makes it disappear again from the phenomenal world by being used and used up.²² Therefore, for Arendt, developing nature dwelling place for a people as well as in the sense of taking care of the monuments of the past, determine even today the content and the meaning we have in mind when we speak of culture.²³

John Ruskin said a long time ago: remember that the most beautiful things in the world are the most useless; peacocks and lilies, for example; Arendt decries philistinism as a notion which designated a mentality which judged everything in terms of immediate usefulness and material values and hence had no regard for such useless objects and occupations as are implied in culture and art.²⁴ The difference between a cultured society that wanted culture, evaluated and devaluated cultural things into social commodities, used and abused them for its own selfish purposes, but did not consume them²⁵ and a mass society lay in a philistine disregard for the use values and habits of consumption of the exchange value of cultural products. Cultural

19 Dana Villa, *Genealogies of Total Domination: Arendt, Adorno, and Auschwitz* 100 *New German Critique* 1-45 (2007).

20 Hannah Arendt, *The Crisis in Culture: Its Social and Its Political Significance, Between Past and Future* 197-226 (Penguin Books, 1993).

21 *Id.* at 211-212.

22 *Id.* at 209.

23 *Id.* at 213.

24 *Id.* at 201.

25 *Id.* at 204.

objects are preyed upon by mass society, and mass society will literally consume the cultural objects, eat them up and destroy them.²⁶

Not any more considered cultural objects, these consumer goods serve to while away time, and the vacant time which is whiled away is not leisure time, strictly speaking time, that is, in which we are free from all cares and activities necessitated by the life process and therefore free for the world and its culture it is rather left-over time which still is biological in nature, left over after labour and sleep have received their due.²⁷ Mass culture's entertainment industries equal in major respects with a consumer's society, in search for entertainment feeding on the cultural objects of the world.²⁸ Important here is the early beginning of biopower and biopolitics (though these concepts as moulded by Michel Foucault, Giorgio Agamben, and Roberto Esposito were not available to Arendt generation) that erase the distinction between cultural and entertainment industries.

Arendt is still right in the contrast between a cultured society and a philistine one, but she does not urge any underlying distinction between art for the sake of art and non-art. True, she seems to disagree with descriptions of culture which include room here for Coca-Cola as much as Chopin, for practical knowledge as much as religious symbolism²⁹ but she also rejects the eager and uncritical acceptance of such obviously philistine terms as highbrow, middlebrow, and lowbrow cultures as a rather ominous sign. For the only non-social and authentic criterion for works of culture is, of course, their relative permanence and even their ultimate immortality.³⁰ Her ire is more directed against the cultured or educated philistine who seeks higher status and social advance, and pursues perfection by specializing in the arrival of such ominous signs. The kitsch and the rap, the graffiti as well as the wall and floor paintings and murals, the street theatre and folk music are also mass culture and arts.

However, the post-Arendt accentuation of popular culture as more than merely mass culture may be said to inaugurate a new genre, if only because

26 *Id.* at 207; see also, *infra* note 30 at 281-282.

27 *Id.* at 205.

28 *Id.* at 204.

29 Robert Holton, Globalization's Cultural Consequences 570 *Annals APSS* 142 (2000) writes in a context wholly different from Arendt's marinating that globalization in its more contemporary forms is hospitable to more hybrid and syncretic cultures and that polarization is inadequate to deal with today's cultural complexities.

30 Hannah Arendt, Mass Culture and Mass Media 89 (2) *Daedalus* 280 (1960).

the popular culture foregrounded resistance (being mainly works on labour history and art) whereas the mass culture studies emphasized linkages between the market and culture. As the theoretical preface of Michel Denning reveals,³¹ Fredric Jameson (launching *Social Text*) and Stuart Hall (addressing historians)³² who theoretically brought to us respectively the problematic of the interpretation of cultural texts and of periodizing cultural transformations.³³ Both thinkers heightened the specificity of the political. Jameson maintained that culture, far from being an occasional matter of the reading of a monthly good book or a trip to the drive-in, seems to me the very element of consumer society itself Everything is mediated by culture, to the point where even the political and the ideological levels have initially to be disentangled from their primary mode of representation which is cultural.³⁴

For Hall, popular culture was not simply those things the people do or have done — Pigeon-fancying and stamp-collecting, flying ducks on the wall and garden gnomes but rather one of the sites where [the] struggle for and against a culture of the powerful is engaged It is one of the places where socialism might be constituted. ... That... is why popular culture matters. Otherwise, to tell you the truth, I don't give a damn about it ?³⁵

Jameson also suggests that the works of mass culture cannot be ideological without at one and the same time being implicitly Utopian ; they ... cannot manipulate unless they offer some genuine shred of content as a fantasy bribe to the public about to be so manipulated ... such works cannot manage anxieties about the social order unless they have first revived them and given them some rudimentary expression.³⁶

How about commercial culture ? In their distinctive ways both thinkers argue that these cultures are discrete but these also interact. More interesting to them, as Denning explains, it is the dialectic of containment and resistance, of reification and utopia which defines popular or mass culture that interests Jameson and Hall. Hall emphasizes the battle surrounding the texts, artefacts,

31 Michael Denning, *The End of Mass Culture* 37 *International Labour and Working-Class History* 4-18 (1990; hereinafter referred to by the author).

32 Fredric Jameson, *Reification and Utopia in Mass Culture* 1 *Social Text* 139 (1979); Stuart Hall, *Notes on Deconstructing the Popular*, in Raphael Samuel (ed.), *People's History and Socialist Theory* 234-239 (London, 1981).

33 *Id.*, Hall at 5.

34 *Id.* at 6.

35 *Id.* at 5.

36 *Id.* at 6.

and performances-the continuous and necessarily uneven and unequal struggle, by the dominant culture, to constantly disorganize and reorganize popular culture and Jameson emphasizes the conflict within the symbolic forms themselves.³⁷

Hannah Arendt would have welcomed these enunciations as completing her own perspective. She would have also been excited by contemporary debate on the scope of intellectual property rights, especially the traditional knowledge of the first nations peoples³⁸ as carrying forward the debates on the antinomies of mass society and culture and the vicissitudes of aesthetic appreciation. And she would have now revised her views on norms of human rights,³⁹ although her analysis of stateless persons and refugees would have held intact, if not grown fiercer.

The questions thus thrown up deserve anxious attention from those who will relate human rights to mass culture. In particular, what are the relations of affect and effect between mass/popular cultures with human rights cultures? What are, the popular cultures of human rights and if there are how are these distinct from the conceptions of mass culture? How are cultural manifestations of human rights different when these appear in governance and resistance cultures? To be more specific, what are the differences between police cultures and protest cultures? And how, if ever, can these be muted? How may we address the dialectic between containment and resistance within adjudicatory cultures? May one speak of relations of complementarities, conflict, and symbiosis between the wider societal cultures and human rights cultures, both adjudicatory and popular? And how do we discern any contradictory unity between the ideological and utopic in human rights cultures?

IV The concept of judgement in aesthetics, politics and law

Political theory and thought is now experiencing a new turn- the aesthetic turn.⁴⁰ Of course, all *turns* can be (and often are) *overturned*: and some

³⁷ *Ibid.*

³⁸ See for example, Rajshri Chandra Ahuja, *Knowledge as Property: Issues in the Moral Grounding of IPRs* (Oxford University Press, Delhi, 2010).

³⁹ See Hannah Arendt, *The Human Condition*, (Chicago University Press, Chicago, 1958); and the excerpt from *The Origins of Totalitarianism* in Peter Bather (ed.), *The Portable Hannah Arendt* 31-45 (Penguin Books, Hammondsport, 2000); Upendra Baxi, *The Future of Human Rights* (Oxford Perennial edn., 2013).

⁴⁰ See Nikolas Comprizes, *The Aesthetic Turn in Political Thought* (Bloomsbury, London, 2014). This work will be cited simply as *ATPT*.

overturned turns *return*. It remains now to be seen that the most recent performance studies approach to politics marks a new turn or is a part of the aesthetic turn.⁴¹

Turns, overturns, and even returns are a matter also of academic performance: under what social, economic, and political circumstances they occur, how durable or fungible these are, who do these address and for how long do they last are important subject matters of what earlier used to be named as sociology of knowledge or history of ideas and now passes under the disciplinary rubric social epistemology. Perhaps, the notion of turns is as interesting as one that of paradigms once was. This change in phrase regime invites attention to less rigorous and more fluid notions.

In what does *ATPT* consist? Are all judgements rhetorical? Is political judgement different from the aesthetic one? Is aesthetic judgement (as Kant would say in the *Third Critique*) to be found in the *sensus communis* or enlarged inter subjectivity of the spectators and in the art of rhetoric rather than laws of logic? Are judgements of taste unique to the spectator or can these be shared inter-subjective with a true /authentic community? And what are the conditions, especially those of temporality, when aesthetic judgements become also *cognitive* ones?

Invariably, all these questionings invite a return to the creative tensions in the *Third Critique* of Kant; section 40 of Aesthetic Judgment speaks about the notion of a *sensus communis* or collective reason of humanity. To quote in full:⁴²

Under the *sensus communis* [or collective reason of humanity] we must include the idea of a sense common to all.... This is done by comparing our judgment with the possible judgments of others, and by putting ourselves in the place of any other man, by abstracting from the limitations which contingently attach to our own judgment.... However small may be the area or the degree to which a man's natural gifts may reach, yet it indicates a man of enlarged thought if he disregards the subjective private conditions of his own judgment ... and reflects upon it from a general standpoint (which he can only determine by placing himself at the standpoint of others.

41 See Shirin Rai and Janelle Reinsert, (ed.), *The Grammar of Politics and Performance* (Routledge, London, 2015).

42 James Creed Meredith (ed.), *Kant's Critique of Aesthetic Judgement* (Clarendon Press, Oxford, 1911).

This passage tells us many things: (i) one is talking in aesthetics about sense and sensibility (reflexive judgements of taste) not about concepts that are determinate; (ii) that sense and sensibility belong first and primarily to an individual spectator (as also including a reader) of the work of art; (iii) however, all such judgements are comparative in the sense that involves comparing our judgement with the possible judgments of others; (iv) further, such judgements require reversibility of perspectives (putting ourselves in the place of any other man, by abstracting from the limitations which contingently attach to our own judgment; (v) and individual judgements of taste are thus comparative (weak sense) and occur only because a judgement-community is postulated (strong sense). Neither cooperativity nor reflexivity, still less reversibility of perspectives, remain intelligible or postulable in the absence of a *sensus communis*.

What to make of the section immediately preceding; section 39 seems to rule out *sensus communis* outside judgements of taste. Kant explicitly states:⁴³

Moral feeling requires concepts [e.g., of persons as objective ends] and is the presentation of a purposiveness not free but according to a law. It, therefore, admits of communication only by means of very determinate practical concepts of reason ... The pleasure in the beautiful is, on the other hand [not] an activity according to law, nor yet one of a rationalizing contemplation according to ideas, but rather of mere reflection.

One standard interpretation of Kant negates any attempt to read the *Third Critique* as speaking to political judgements which arise only out of very determinate concepts of reason; there is thus a denotation between the political and aesthetic.⁴⁴ Others persist in what is perceived to be a deconstruction of Kant, notably said to be led in recent times by Hannah Arendt.⁴⁵

43 *Id.* at 47.

44 See recently, Mathew C. Weidenfeld, Visions of Judgement: Arendt, Kant, and the Misreading of Judgement *Political Research Quarterly*, XX(X): 1-13 (2002). Jürgen Habermas, Hannah Arendt's Communications Concept of Power, in Lewis Henchman and Sandra Henchman (eds.), *Hannah Arendt, Critical Essays*, Albany: State University of New York Press, 225 (1994); Albrecht Welmer, Hannah Arendt on Judgment: The Unwritten Doctrine of Reason, in Ronald Beiner and Jennifer Nedlesky (ed.), *Judgment, Imagination, and Politics: Themes from Kant and Arendt*, 165-181 (Boston: Rowman & Littlefield, 2001).

45 See Linda M. G. Zerilli, We Feel Our Freedom: Imagination and Judgment in the Thought of Hannah Arendt 33 *Political Theory* 158 (2005). This article will be referred to as Zerilli.

The Arendt deconstruction, if it is so, is very significant. The problem of the new, as Arendt named it, is neither a moral nor an epistemic question but a political question about how we, members of democratic communities, can affirm human freedom as a political reality in a world of objects and events whose causes and effects we can neither control nor predict with certainty.⁴⁶ The problem of the new is the problem of the emergent, and what is emergent is contingent; the aesthetic and the political need to follow the logic of contingent rather than the causal.

Thinking out of the box is a popular expression for the moral and juristic human right to imagination. *Sensus communis* is yet another name for this. Outside imagination, there would be no social criticism or critique and no construction of any utopia. Whether or not Arendt recognized only the productive, not reproductive, right of imagination,⁴⁷ she insists on a world beyond the validity paradigm in which all norms tend to find their fate. One may, indeed, say with Zerilli that Hannah Arendt does not think that validity in itself is the all-important problem or task for political judgment—the affirmation of human freedom is.⁴⁸ And that freedom is to be located in human and social plurality; plurality that John Rawls described as ineliminable social fact, the tasks of social and political theory being one of constructing reasonable pluralism.⁴⁹ And the tasks are not performed by judgement as by an exchange of informed and persuasive dialogue inherent to any aesthetic judgement. The task in politics is no different.

For long, and even today, perceived to belong to the interlocution of Kant calls *streiten* (to quarrel or contend) rather than *disputieren* (to dispute), that is, the kind of interlocution that, if it generates agreement, does so on the basis of persuasion rather than irrefutable proofs (CJ, 56).⁵⁰ All said and done, *streiten* has to invoke authority of norms or force, often of a state; in contrast, *disputieren* is often resolved through understanding. And it here that at stake is the difference between understanding another person and understanding the world, the world not as an object we cognize but the space in which things become public, as Arendt says.⁵¹

46 *Id.* at 162.

47 *Id.* at 163-164.

48 *Id.* at 164.

49 John Rawls, *Political Liberalism* (Columbia University Press, 1993).

50 *Supra* note 45 at 170.

51 *Id.* at 177.

The idea that act of judging entails the creation, nurturance, and future of a community, typically Arendtian, this then brings together the art of political and aesthetic judgement. The act of judgement in art creates space: thus, for example, Arendt says that the judgement of the spectator creates the space without which no such objects could appear at all. The public realm is constituted by the critics and the spectators, not the actors and the makers. And this critic and spectator sits in every actor.⁵² The function of politics and law is also to produce, distribute, regulate, and destroy space; law and administration of justice often creates geographies of rightlessness.⁵³

V Conclusion

Jacques Rancière reminds us preciously how important it is to open up [the] world where argument can be received and have an impact.⁵⁴ To have a dispute with the world is precisely to open it up to future emergences that in brief is the recent history from the Czech to the Arab Spring. Some events emerge as texts; others (such as the occupy movement recently or as is said about the Arab Spring) remain events with little systemic impact but occur in ways that leave traces or open up to a future legibility in terms of the craving for, and aspects, of human freedom and core human rights.

Whether as Rancière said politics is aesthetics in principle, or aesthetics may be politics of future tomorrows, time is now to move much beyond cultures of validity to those of inter-subjective consensus on the meaning of freedom in an anthropocene era. In this era now upon us, the Kantian notions of aesthetic judgements as possessing finality without an end or purposiveness without a purpose may have to be re-imagined.⁵⁵

⁵² *Id.* at 179.

⁵³ *Supra* note 3.

⁵⁴ Jacques Rancière, *Dis-agreement: Politics and Philosophy* 56 (Minneapolis: University of Minnesota Press, trans. Julie Rose 1999).

⁵⁵ See Upendra Baxi, *Towards Climate Justice* *Journal of Human Rights and Environment* (forthcoming, Apr. 2016).