

„Blood On Your Hands“

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Metaphors are not just rhetorical devices. They are also a significant part of legal reality. A look across the Atlantic shows that the effects they can have even entail risks for the constitutional democracy. At present, however, legal interpretation does not allow an accurate grasp. Therefore, a rethinking is necessary.

The Case and Its Context

The transperson Zoey Zephyr is a member of the House of Representatives of the US state of Montana. In April of this year, a heated debate took place there about so-called gender-affirming care for minors. This type of care includes not only medical or surgical interventions, but also those that focus specifically on mental health. The majority of lawmakers in the Montana House of Representatives are Republicans. They opposed such a form of gender-affirming aid.¹⁾

Zephyr accused this majority of having „blood“ on their hands. Zephyr then refused to apologize and, as of April 20, has therefore been „barred from the floor“ deprived of her right to speak for the remainder of the 2023 legislative session. The metaphor of blood on the hands of the Republican representatives thus became the condition-sine-qua-non of Zephyr's disciplinary expulsion. However, how can a metaphor legally lead to an exclusion from the session? This exclusion was derived from the violation of the parliamentary rules of „decorum,“ i.e., propriety or decency. It was a matter of „hateful rhetoric“ (see here for an [overview](#)). The German Bundestag also knows a corresponding formulation in [§ 38 of its rules of procedure](#) (GOBT), which authorizes the exclusion from the session. The norm even contains a metaphor itself when it speaks of the „order or dignity of the Bundestag.“

Zephyr's subsequent path to the District Court for an emergency motion was unsuccessful. Judge Mike Menahan based his ruling against restoring speech rights for the remainder of the legislative session in early May on the principle of separation of powers. What Zephyr was asking for, he said, [“would require the court to interfere with legislative authority in a manner that exceeds this court's authority”](#). The Montana House of Representatives [had the exclusive, constitutionally guaranteed power to discipline its members](#).

The case fits perfectly as a link between two tendencies that can currently be observed in the USA. On the one hand, there is [a sharp increase in the number of anti-trans bills being passed](#). In the current year alone, 80 such bills have been passed. On the other hand, it can be observed that parliamentary disciplinary law is instrumentalized to exclude non-Republican opinions – especially regarding colleagues of marginalized groups. Thus, in addition to the trans community, the [BIPOC community in Tennessee](#) was also made familiar with the local „decorum“. As participants in a protest at the Tennessee House of Representatives for stricter gun

laws on the occasion of a mass shooting at a Nashville school, Justin Jones as well as Justin Pearson were expelled. Gloria Johnson, a white Democrat who was also protesting, did not face any consequences.

The (Linguistic) Image and Its Effect

But how does a metaphor work? Detached from linguistic, semiotic, or cognitive psychological²⁾ premises, metaphors are characterized by the fact that they create a pictorial moment. Often a comparison is inherent in them, which does not have to resort to a tautological „like“. This distinguishes metaphors from the descriptive statement one uses when someone actually has blood on their hands. The interesting thing is that in the case of description, the corresponding image is or was recognizable by the primary senses. At one point, someone will have seen blood on hands. The metaphorical effect, however, goes beyond mere description. It conveys another form of sense. The sensuality of metaphor is on the one hand derived via the original visual image. On the other hand, it is also originally sensual since it has an independent sense. Namely, it evokes an image that can never be seen with the eyes. In the concrete case, this image is the blood on the hands of those lawmakers who voted against gender-affirming care. Metaphors thus enable a special form of sensual cognition.

But it is not a matter of imagining dozens of Republicans standing around with their hands covered in blood. Rather, the metaphor opens an independent level of interpretation. However, it is not a matter of boundless ambiguity. For the circumstances already allow for a certain limitation. Zephyr's words have come up in the context of how access to gender-affirming care significantly lowers the high risk of suicide among minors who identify as trans. [Relevant studies](#) have shown this to be the case. Zephyr herself tweeted about this in the aftermath, saying that all deputies and the governor had received an emergency medical letter to that effect. This letter explicitly cites the legislation under discussion as a factor in the suicide attempt of a trans minor. The letter is attached to her [tweet](#).

The metaphor thus serves, quite counterintuitively, the opposite of a vague indeterminacy. Indeed, it lends pithiness (“Prägnanz”) to the precise facts of the studies. By evoking associations, the numbers become more vivid and newly linked. The suffering of young trans people, especially in the context of the accusation, becomes more imaginable. The German term “Prägnanz” in the original sense of the word means „pregnant with meaning“. Only in the figurative sense does it become „significant“ or „meaningful“. The English adjective “pregnant” has preserved this double meaning. In a nutshell, the expression “Prägnanz” is itself “pregnant”.³⁾

The Jurists and Their Interpretation

From the effect of the metaphor itself, the path leads to the question of its legal understanding. If the metaphor opens an independent level of interpretation, then it must be interpreted. Legal science is hermeneutic science. Its all-purpose weapon is

interpretation. Thus, to arrive at a legally justifiable result, the wording, systematics, telos, and history of a law are considered, at least in Germany. But the question of the wording of a metaphor is literally meaningless. It is neither about the actual hands nor about actual blood on those hands. The findings are not very clear when it comes to historical interpretation either, although a cultural history of the metaphor of bloody hands in law would be quite interesting. How are the meaning and purpose to be determined and to whom does one refer? To the person speaking or a model of an „objective“ third party? Only the systematics seems plausible as a question about the circumstances and contexts of the statement. The result is a number of unresolved questions, and yet it is not only the courts that are confronted daily with the task: How does one deal with metaphor in law?

Now, in the given case, this is not a law or statute as opposed to the „dignity“ in § 38 GOBT, but a statement in the context of parliamentary debate. Unsurprisingly, the task of dealing with metaphorical statements arises, in the context of public law, especially in the area of fundamental communication rights. It is about the limits of freedom of expression or the more specific concept of art. In Germany, the judicial outer demarcation of what is permissible plays out between prohibited defamatory criticism and opinion-friendly interpretation. But for the treatment of figurative ideas, as metaphors represent them, there are no transparent principles in dealing with them. Why is that? Law as a textual science is [replete with them](#). The „legal person“ is one, the „eternity clause“ in article 79 section 3 of the German Basic Law and the [„ecological person“](#) hopefully soon. Does the open concretization through linguistic images reveal a methodological „blind spot“? For the extremes are clear: on the one hand there is the censorship of the interpreting, on the other the flight into the metaphor of the expressing person.

A [domestic American comparison](#) illustrates this. When Texas Democrats failed to pass a quorum in 2021 in protest of new voting laws, Republican Greg Abbott railed that their absence also prevented passage of a crime bill. „The Democrats have blood on their hands for failing to step up and do their job,“ he said. So, you can also commit the act of „blood on their hands“ by omission. When Alabama sought to eliminate state permits to carry concealed handguns last year, Merika Coleman, a Democrat, addressed her colleagues directly: „And I tell you, some of you are going to have blood on your hands because this piece of legislation passes.“ In Florida, according to Democratic Senator Jason Pizzo, there was sometimes even talk of blood on hands more than once a day during a debate. No one, however, was excluded. Nobody had to apologize either.

If at one end of the hermeneutic ladder stands the merely absurd function of the literal meaning in the understanding of metaphors, the teleological view, on the other hand, is found at the other. It holds the greatest risk. It is genuinely sense-making. That means the interpreting person decides rather for a sense to be given than to recognize it. Thus, teleological interpretation can lead decisively, in the described dilemma, to a censoring interpretation. For if meaning and purpose are the result of interpretation, how can they at the same time be its means? The figurative effect of a metaphor is never merely passive-receptive, but also active-formative: A imagines something and simultaneously creates an idea of something with a metaphor of it.

B imagines something again under the idea of A's metaphor and creates his own idea based on it. In its pithiness, the metaphor is thus never propositionally „true“ or „false“, as, in contrast, the legal subsumption under precise terms pretends to be. It has an independent potency. This is possibly the reason why it causes such a difficulty for the syllogistic major premise.

The New Old Hermeneutics: Learning to Read Legal Images

The first step, then, is to acknowledge that today's jurists need to be trained to deal with more than just laws. Only then can it be a matter of appreciating metaphors as such and in law; of thinking about and justifying their contexts, of inquiring, of correcting. An interpretation, hermeneutics, that take this into account can offer an apt access. Indeed, hermeneutics is more than a methodology of legal dogmatics. Hermes was the messenger of the gods. He announced divine messages to human ears. Already here it obviously could not have been merely a descriptive communication. With Georg Gadamer it is therefore the fundamental achievement of hermeneutics to transmit a context of meaning from [„another world“](#). This is also how metaphor works. It transfers the anthropomorphic concept of dignity to the institution of the Bundestag. The metaphor smears organic blood on the inorganic numbers of a study. Thus, in order to do justice to the importance of metaphor in law, legal interpretation must open itself to this understanding of hermeneutics. Law needs a hermeneutics of figurative ideas.

Metaphors concretize a fact figuratively. In this respect, metaphor and legal interpretation are similar. The idea of legal interpretation is also to enable a concretizing understanding: of a norm, of a statement, of symbols in a broader sense [such as emoticons](#). In consequence, the understanding of metaphors through interpretation is a necessarily concrete one. For metaphor is not metaphor. It is context dependent. Nor is the legal context always the same. The institutional setting in parliamentary debate is different from a constitutional court's assessment of an opinion, the discussion in a scholarly text, or the interpretation of a declaration of intent. At any rate, the first two have in common, as its setting and its means, the guarantee of democratic protection of minorities. Thus, the valuation standard differs. While § 133 of the German Civil Code aptly recognizes that it is not a matter of [„adhering to the literal sense of the expression.“](#) However, in private law a metaphorical statement must in principle be measured against the need for protection of the recipient. Similarly, in personal terms, whether a legislative body is Republican-led, or a conservative two-thirds majority occupies the highest court in a country is crucial. Without a corresponding awareness, however, no risk can be recognized and consequently no principles of action can be developed, which would then in turn become transparently controllable. Otherwise, the door is opened in the metaphorical for an almost „unlimited“ interpretation – especially in the area of such general clauses as the „decorum“. Then it is no longer a matter of the figurative effect of the blood on the hands, but of the figurative effect in the actually wrong hands.

Metaphors are more than rhetorical devices. They are also a significant part of legal reality. A look across the Atlantic shows that the effects they can even entail risks for the constitutional democracy. Should Justitia therefore really remain blind in the aesthetic eye?

References

- Surprisingly, corresponding measures only pose a problem when they come up in discussions about trans rights. In contrast, they are not only used as a matter of course, but in the vast majority of cases by cis persons. Artificial derivatives of the „male“ sex hormone testosterone, anabolic steroids, are used to build muscle. A small blue pill is supposed to help achieve all-time „manliness“. The many and equally problematic images of „femininity“ lead to breast and lip enlargements, but also to the shaving of armpit hair. Cf. Schall, Theodor E./ Moses, Jacob D, Gender-Affirming Care for Cisgender People, The Hastings Center Report 53 (2003), Issue 3 May-June, pp. 15-24.
- For a cognitive psychological approach to legal analogies, see fundamentally Damler, Daniel, Rechtsästhetik. Sinnliche Analogien im juristischen Denken, Berlin 2016.
- See Gabriel, Gottfried, Präzision und Prägnanz. Logische, rhetorische, ästhetische und literarische Erkenntnisformen, Münster 2019, p. 16.

