Special Issue – *Law's Pluralities*

Law as Culture? Culturalist Perspectives in Legal Theory and Theory of Methods

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Abstract

This Article questions in what sense law in the German tradition has been—and can still be—considered a form of culture. The Article offers an overview of traditional approaches to law and culture in German Legal Theory and the Theory of Methods, and argues that the law has shifted from being perceived as culture during the nineteenth and early twentieth centuries to being in contrast with culture, which is considered the "other" of the law. Mediated by "legal culture," the discourse pendulum has swung back to the notion of "Law as Culture" during the last three decades. Thomas Gutmann, the German lawyer, has fiercely challenged equating law with culture, describing it as "murky" and irrelevant. Similarly, the concept of "Law as Culture" is questioned by the provocations of "Law and Affect." This Article claims that, irrespective of conceptual framework trends, applying the law remains a highly challenging cultural practice in terms of both fact-finding and interpreting legal norms.

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A. Law as Culture *Avant la Lettre*

From a jurisprudence viewpoint, the insight that law and culture are closely intertwined is not a recent one. It can be traced back to Ancient Greece when it was used particularly by historians—the first comparative lawyers. Notably, Aristotle discovered this link in Book IV of his *Politics*, when he discussed the interdependency of *politeia* and society. Stunned by the multitude of constitutional orders, Aristotle stressed the relationship between "constitution" and socio-political contexts.[1] Centuries later, Pascal and Montaigne once again highlighted the cultural and sociological embeddedness of law.[2] In a way, these philosophers constitute a "Law as Culture" movement *avant la lettre*.

In Germany, culture took on its specific current denotation during the eighteenth century. Marburg Professor Wilhelm Arnold's *Cultur und Rechtsleben*, written in 1865, appears to be the first explicit confrontation between culture and law from a jurisprudential point of view;[3] although Arnold's focus was on the relationship between civil law and the economy. Even at the beginning of the twentieth century, one did not perceive law and culture as opposing or contradictory concepts; rather, juridical norms (*Rechtsnormen*) and cultural norms (*Kulturnormen*) were seen as concurrent.[4] Accordingly, Josef Kohler, an early comparative lawyer and the co-founder of German intellectual property law, saw law as a "cultural phenomenon,"[5] that is a "creation of culture intended to promote culture."[6] Inspired by Max Ernst Mayer and Emil Lask, Gustav Radbruch described jurisprudence as a "verstehende Kulturwissenschaft," which roughly translates as a "science of cultural hermeneutics."[7] In other words, there is a long, notable tradition of law *as* culture in German legal thought.

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[1] *See, e.g.*, ARISTOTLE, ARISTOTLE'S POLITICS: BOOKS I, III, IV, VII: 1, 3–4; 7 (2007). 1288 b 24 et seq.

[2] HASSO HOFMANN, *"In Europa kann's keine Salomos geben."—Zur Geschichte des Begriffspaars Recht und Kultur*, *in* RECHT UND KULTUR 32–33 (Hasso Hoffmann ed., 2009).

[3] *Id.* at 36.

[4] *See generally* MAX ERNST MAYER, RECHTSNORMEN UND KULTURNORMEN (1903); *see also* HOFMANN *supra* note 2, at 40.

[5] *See generally* JOSEF KOHLER, DAS RECHT ALS KULTURERSCHEINUNG (1885).

[6] JOSEF KOHLER, EINFÜHRUNG IN DIE RECHTSWISSENSCHAFT 3 (3d ed. 1901) ("Das Recht ist eine Schöpfung der Kultur, es hat die Aufgabe, die Kultur zu ermöglichen, zu fördern und zum Gedeihen der Menschheitszwecke zu führen."). It may be noted that Kohler included his own poems in his legal essays. *See* JOSEF KOHLER, *Dichter und Erfinder*, *in* INDUSTRIERECHTLICHE ABHANDLUNGEN UND GUTACHTEN 1, 6 (1899).

[7] *See* GUSTAV RADBRUCH, RECHTSPHILOSOPHIE 118 (1932); GUSTAV RADBRUCH, RECHTSPHILOSOPHIE 115 (Studienausgabe ed., 2003). For a critique of the notion of legal science as a cultural science see HANS KELSEN, *Die Rechtswissenschaft als Norm- oder als Kulturwissenschaft*, *in* 40 SCHMOLLERS JAHRBUCH 95, 95 (1916).

B. Law and Culture

For decades, however, law and culture have been explicitly or implicitly placed in opposition to one another as two realms of life with entirely different rationalities. Often, law was conceived of as powerful and protective, whereas culture—whatever was meant by this label precisely—was viewed as a frail plant in need of protection.[8] Culture also served as a dialogue partner for law. As a societal subsystem of its own, culture may be considered both a formative and a limiting factor in relation to the law.[9]

The law and culture dichotomy also mirrors a fundamental distinction made between the state and society (*Staat und Gesellschaft*). This distinction pervaded German political and legal theory during the nineteenth and twentieth centuries. Accordingly, law could be seen as the state's instrument of control, whereas culture was perceived as the epitome of free activities within a society. This dichotomy is reflected in the famous *Böckenförde* Dilemma:

> *The liberal, secularised state is nourished by presuppositions that it cannot itself guarantee.* That is the great gamble it has made for liberty's sake. On the one hand, it can only survive as a liberal state if the liberty it allows its citizens regulates itself from within on the basis of moral substance of the individual and the homogeneity of society. On the other hand, it cannot attempt to guarantee those inner regulatory forces by its own efforts—that is to say, with the instruments of legal coercion and authoritative command—without abandoning its liberalness and, at a secularized level, lapsing into that pretension to totality out of which it led the way into the denominational civil wars.[10]

The author of this dilemma, constitutional judge Ernst-Wolfgang Böckenförde, sees culture as the key to the problem:

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[8] *See* Leo Rosenberg, *Die Gründe der Rechtsbildung. Akademische Rede zur Jahresfeier der Hessischen Ludwigs-Universität am 2. Juli 1928*, 2 SCHRIFTEN DER HESSISCHEN HOCHSCHULEN, UNIVERSITÄT GIEßEN 19 (1928) (*"Gibt es doch keine Kultur und keinen Kulturfortschritt als hinter der schützenden Mauer des Rechts*.") ["There cannot be any culture and cultural progress if it does not occur behind the protective wall of the Law."].

[9] *See generally* HORST DREIER ET AL., KULTURELLE IDENTITÄT ALS GRUND UND GRENZE DES RECHTS, AKTEN DER IVR-TAGUNG (Franz Steiner Verlag eds., 2008).

[10] ERNST-WOLFGANG BÖCKENFÖRDE, *The Rise of the State as a Process of Secularisation*, *in* STATE, SOCIETY AND LIBERTY 45 (J. A. Underwood trans., 1991).

> In culture cognitive powers, mental states and traditions come together and create attitudes, habits and a concomitant ethos. Such a culture is, however, not a given, let alone a fixed entity. Culture lives, particularly in the secular state, in freedom and out of free, spontaneous impulses . . . .Under the auspices of freedom of expression, of art and of Weltanschauung she tends to become a mobile, fluid element . . . .That is why the secular state must support, and as far as possible, protect existent and lived culture.[11]

According to this perspective, culture—in this particular sense—is a *conditio sine qua non* for the liberal, secular state; it substitutes for a civil religion that has turned out to be intolerant.[12] It is no surprise then that the question concerning the sources of the liberal state raised by the Böckenförde Dilemma and related questions concerning multiculturalism and *Leitkultur* (the controversial concept of a so-called defining culture), gained momentum in Germany in the aftermath of a peak in migration in 2015. In such a situation, it has become more and more common to take recourse using the vague concept of values. To be sure, the use of this concept in constitutional law dates back to the 1950s. According to the Federal Constitutional Court, the concept of civil liberties is enshrined in the Basic Law (Germany's constitution) as an "order of values" and a "system of values."[13] Values have, in public discourse, become a label for the majority's expectations of how minorities should behave. It was in this sense that Federal Constitutional Court Justice Peter Michael Huber declared that "the stronger society's fragmentation in ethnic, religious, social, and cultural aspects becomes, the more the state must generate a sense of community. As an immigration state, Germany is dependent on a state which enforces its values."[14]

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[11] ERNST-WOLFGANG BÖCKENFÖRDE, DER SÄKULARISIERTE STAAT 30–31 (2007)

> ("In der Kultur wirken geistige Kräfte, mentale Gegebenheiten und Traditionen zusammen, formen sich zu habituellen Einstellungen und damit verbundenem Ethos. Solche Kultur ist freilich kein statischer, vor allem kein fester Bestand, sie lebt, zumal im säkularisierten Staat, in Freiheit und aus freien, auch spontanen Antrieben . . . Im Zeichen der Meinungs-, Kunst- und Weltanschauungsfreiheit wird sie stärker als früher ein bewegliches, auch fließendes Element… Gerade deshalb ist der säkularisierte Staat darauf verwiesen, vorhandene und gelebte Kultur zu stützen und, soweit er vermag, zu schützen.").

[12] *Id.* at 28–30.

[13] BVerfGE, 7, 198 [205], Jul. 12, 2016, http://www.servat.unibe.ch/dfr/bv007198.html.

[14] Peter Michael Huber, *In der Sinnkrise*, FRANKFURTER ALLGEMEINE ZEITUNG (Oct. 1, 2015), http://www.faz.net/aktuell/politik/staat-und-recht/gastbeitrag-verfassungsstaat-in-der-sinnkrise-13832632.html ("Je stärker die Fragmentierung der Gesellschaft in ethnischer, religiöser, sozialer und kultureller Hinsicht wird,

These and similar claims concern the alleged relevance of culture for the legal system as a whole. On a less abstract level, awareness of the contingency of the law, its non-autonomy, and its embeddedness has also grown. Given post-World War II Germany's dense system of regulations on the one hand, and the insistence on civil liberties on the other, the deficits of "law according to the books" soon became glaringly obvious. Further, the prerequisites of "law in action" also attracted attention due to the insights of the Law and Society movement and telling observations about the discrepancy between the codified law and actual practice. The water protection law provided a good example of this: Despite wonderfully sophisticated administrative laws, protections could not be enforced due to the lack of a government agency to do so.[15] But even at the beginning of the Bonn Republic (1949–1990), there seemed to have been a sensitivity to the cultural, material, and aesthetic preconditions of a functioning legal system which was presumably driven by the desire to enhance acceptance for the newly created democracy and its institutions.

This may be illustrated with an anecdote concerning the Federal Constitutional Court, probably the most successful actor in the German political system. In a famous memorandum from 1952 concerning its constitutional status, the Court pointed out that "only if the attempt to imprint the representative position of the Federal Constitutional Court to the people is visually successful will the Court be able to fulfill its function to politically integrate the whole of the state and the people entirely."[16] As a result of this memorandum and a victorious struggle for power and authority, the Court gained administrative and fiscal independence. Yet, even before the Court enacted its own rules of procedure in 1975, which provides in Section 64 that the Justices "in the oral proceedings wear a robe with cap," the Justices had decided to wear a specific type of robe in 1957 and delegated the preparations of cases to a committee of three of the Justices. After a four-year discussion led by Justice Erwin Stein, the Justices voted to adopt a red robe tailored by

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desto mehr muss der Staat Gemeinsamkeit stiften. Gerade als Einwanderungsland ist Deutschland auf einen Staat angewiesen, der seine Werte durchsetzt.").

[15] *See generally* GERD WINTER, DAS VOLLZUGSDEFIZIT IM WASSERRECHT (1st ed., 1975).

[16] *Denkschrift des Bundesverfassungsgerichts, in* 6 JÖR 144, 146 (1957) ("*Erst wenn es gelingt, dem Volk die repräsentative Stellung des Bundesverfassungsgerichts auch bildhaft einzuprägen, wird das Bundesverfassungsgericht seine zugleich politisch integrierende Funktion innerhalb des Staats- und Volksganzen voll erfüllen können*."). The Chief Justice Höpker-Aschoff apparently considered the site of the Court to be of paramount importance. *See* 6 JÖR 156 (1957) ("*Der Wunsch, die repräsentative Stellung des Bundesverfassungsgerichts dem Volke auch bildhaft einzuprägen, ist berechtigt; ich fürchte indessen, daß er sich schwer erfüllen läßt, nachdem der Gesetzgeber das Bundesverfassungsgericht in die dörfliche Einsamkeit einer ehemaligen Residenzstadt verbannt hat*.").

the staff of the Badisches Staatstheater.[17] This robe of "operetta-like opulence"[18] has become familiar to all German television viewers. It can be seen as a part of the success story of the Federal Constitutional Court[19]—the branch of government that citizens trust more than any other branch within the German political system.[20]

C. Legal Culture(s)

In a period in which comparative law has become omnipresent, it seems uncontroversial that legal systems have their respective "legal cultures" in the sense of the pre-legal and paralegal conditions of a given legal system or the legal reasoning in a given jurisdiction. Probably going back to the concept of a "Kultur des Rechts"—a culture of law, as described by the legal theorists Savigny and Jhering—[21]the term is frequently used in the plural form; in any event, it serves as a description of the cultural particularities of a given legal system

[17] Sebastian Felz, *Die Historizität der Autorität, oder: Des Verfassungsrichters neue Robe*, 6 INSZENIERUNG DES RECHTS. LAW ON STAGE; JAHRBUCH JUNGE RECHTSGESCHICHTE. YEARBOOK OF YOUNG LEGAL HISTORY 101, 115–16 (2011).

[18] CHRISTOPH SCHÖNBERGER, *Anmerkungen zu Karlsruhe*, *in* DAS ENTGRENZTE GERICHT 9, 26 (Matthias Jestaedt et al. eds., 2011).

[19] Felz, *supra* note 17, at 101. Similarly, see Hans Vorländer, *Regiert Karlsruhe mit? Das Bundesverfassungsgericht zwischen Recht und Politik*, APUZ (2011), http://www.bpb.de/apuz/33164/regiert-karlsruhe-mit-das-bundesverfassungs-gericht-zwischen-recht-und-politik?p=4

> ("*Wird die Tätigkeit des interpretierenden Verfassungsrichters nur ausschnittweise sichtbar - für die Bürgerinnen und Bürger spielt sie im Arkanum des Rechts -, so findet auf der anderen Seite eine demonstrativ sichtbare Inszenierung des kollektiven richterlichen Spruchkörpers statt. Die Rituale des Einzugs des Hohen Gerichts in den großen Saal des BVerfG, die Respektbezeugung von Parteien und Publikum, die Verkündungspose sind Mechanismen verfassungsgerichtlicher Selbstinszenierung, welche die Autorität des Verfassungsgerichts und der von ihr autoritativ gedeuteten Verfassung sicht- und spürbar werden lassen. Von dieser Auratisierung der Rechtssphäre und ihrer fallweisen Verkörperung durch die in würdevoller Distanz zur Politik agierende, in roter Robe die Entscheidungen verkündende Richterschaft profitiert ganz ohne Frage eine Institution wie das BVerfG*.").

For an analysis of the enter-exit mechanisms of the court, *see* Korsten chapter in this volume.

[20] HANS VORLÄNDER & ANDRÉ BRODOCZ, *Das Vertrauen in das Bundesverfassungsgericht*, *in* DIE DEUTUNGSMACHT DER VERFASSUNGSGERICHTSBARKEIT 259–96 (Hans Vorländer ed., 2006).

[21] GUTMANN, *infra* note 34, at 32 (attributing the term "Legal Culture" to LAWRENCE M. FRIEDMAN, LEGAL CULTURE AND SOCIAL DEVELOPMENT (1969), but the concept seems to date back to the early nineteenth century); *See* HEINRICH LUDEN, 10 NEMESIS: ZEITSCHRIFT FÜR POLITIK UND GESCHICHTE 246 (1817); *see also* WENZEL ALEXANDER MACIEIOWSKI, SLAVISCHE RECHTSGESCHICHTE § 421 (1839).

or of a family of law.[22] Not surprisingly, therefore, practitioners of comparative law have rediscovered culture's relevance in the application of the law during the last two decades, and they have pointed to the fact that no regulation can really be understood outside the background of its specific tradition and culture.[23] In this sense, any given legal system has its respective culture.

It is tempting then to resort to dichotomies, such as case law versus statutory law, to qualify legal systems in terms of their alleged legal cultures. That said, it becomes quite clear on close inspection of many legal systems that they cannot be adequately described according to such labels.[24] In other words, the concept of "legal culture" often serves as a stereotype and a barrier to perception instead of an aid to better understanding respective legal systems.[25] Legal cultures may suggest the "unity of the legal order"[26]—to use a famous

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[22] *See, e.g.*, NIKLAS LUHMANN, DAS RECHT DER GESELLSCHAFT 163 (1993) ("Europa hatte auf Grund der Errungenschaften des römischen Zivilrechts eine entwickelte Rechtskultur.").

[23] Rainer Wahl, *Die zweite Phase des Öffentlichen Rechts in Deutschland*, 38 DER STAAT 495, 512 (1999) (explaining that the term "*Grundrechtskultur*" (i.e., civil liberties culture) by Peter Häberle equally aims at comparing different legal systems); *see also* Peter Häberle, *Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat. Zugleich zur Rechtsvergleichung als "fünfter" Auslegungsmethode*, *in* JURISTENZEITUNG 913–15 (1989).

[24] Felix Frankfurter, *Some Reflections*, 47 COLUM. L. REV. 527, 527 (1947)

> ("Even as late as 1875 more than 40% of the controversies before the Court were common-law litigation, fifty years later only 5 %, while today cases not resting on statutes are reduced almost to zero. It is therefore accurate to say that courts have ceased to be the primary makers of law in the sense in which they 'legislated' the common law. It is certainly true of the Supreme Court that almost every case has a statute at its heart or close to it").

Similarly the Annual Report of the German Federal Court of Justice for 1966 states:

> "Darüber ist jedenfalls unter Juristen kein Zweifel möglich, dass in allen übersehbaren Zeiträumen das verwirklichte Recht eine Mischung von Gesetzesrecht und Richterrecht gewesen ist, und dass dasjenige Recht, das sich in den Erkenntnissen der Gerichte verwirklicht hat, sich niemals in allem mit demjenigen Recht gedeckt hat, das der Gesetzgeber gesetzt hatte. Zur Erörterung steht immer nur das Maß, nicht das Ob eines Richterrechts."

Jahresbericht des Bundesgerichtshofes für 1966, NEUE JURISTISCHE WOCHENSCHRIFT 816 (1967).

[25] *See* Olson chapter in this volume. ("The use of 'culture' in the singular problematically infers that a given legal environment consists of one organic, stable, and unified whole. Such a position tends then to reify divisions of cultural entities into the local and the normative versus the 'foreign' and the non-normative.").

[26] KARL ENGISCH, DIE EINHEIT DER RECHTSORDNUNG (Cambridge Univ. Press ed., 1987) (1935); *See also* BverGE 19, 206 (220), http://www.servat.unibe.ch/dfr/bv019206.html (exemplifying the (in)famous notion of "unity of the constitution" in the jurisprudence of the Federal Constitutional Court).

phrase coined by Karl Engisch. But assuming that a legal system is homogenous and consistent reveals a failure to take into account the democratic disruptions in the law. Instead, we must "learn to live with a legal and constitutional order which is not a whole and homogenous one."[27]

D. Law as Culture Revisited

It seems that comparative law—in particular comparative constitutional law—with its objective of exploring the plurality of legal orders, has led to the rediscovery of law *as* culture. What was the dominant functional approach to comparative law has turned out to be unsatisfactory because it tends to conceive of law exclusively as a means to an end. Instead, it has become clear that to compare law means to compare cultures. For instance, what is regarded as a legal problem in Germany might be seen as a matter of republican traditions and values in France.[28] In Germany, constitutional lawyers such as Peter Häberle[29] and Rainer Wahl first expressed this insight.[30] In other words, dealing with the diversity of legal systems necessitates a closer or deeper investigation than mere legal comparison between single or indeed numerous provisions in the sense of the letter of the law; rather, this investigation entails exploring the law in action—by looking, for example, at the law's implicit premises, attitudes, routines, behavioral schemes, and divisions of labor, etc.

During the last three decades, analyses in which the law is seen as a deeply cultural phenomenon[31] or "Law as Culture" have become popular.[32] It goes without saying that the promise of this programmatic slogan cannot normally be fulfilled in terms of legal practice, neither by legal scholars because they lack access to the methods of cultural studies, nor by

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[27] *See* FRIEDRICH MÜLLER, EINHEIT DER VERFASSUNG 114 (1979) ("Wir müssen lernen, mit einer Rechts- und Verfassungsordnung zu leben, die kein in sich einheitliches Ganzes ist."); *See also* HELMUT COING, *System, Geschichte und Interesse in der Privatrechtswissenschaft*, JZ 481–88 (1951) ("*Das Recht ist . . . für die Interessenjurisprudenz ebensowenig moralisch wie logisch eine einheitliche Ordnung. Es hat überhaupt keine Einheit*.").

[28] Häberle, *supra* note 23, at 915.

[29] *See e.g.*, VERFASSUNG ALS KULTUR UND KULTURELLER PROZEß 28 (1998).

[30] *Verfassungsvergleichung als Kulturvergleichung*, *in* STAAT – SOUVERÄNITÄT – VERFASSUNG. FESTSCHRIFT FÜR HELMUT QUARITSCH ZUM, 70 GEBURTSTAG 163 (Dietrich Murswiek et al. eds., 2000).

[31] *See* KARL-HEINZ FEZER, TEILHABE UND VERANTWORTUNG 22 (1986); THEODOR MAYER-MALY, STAATSLEXIKON (7th ed. 1988); RECHTSWISSENSCHAFT ALS KULTURWISSENSCHAFT, BEITRÄGE DER JAHRESTAGUNG DER SCHWEIZERISCHEN VEREINIGUNG FÜR RECHTS- UND SOZIALPHILOSOPHIE (Marcel Senn et al. eds., 2007); Stephan Kirste, *Literaturbericht ARSP: Recht als Kultur*, 96 ARSP 263–69 (2010); *id*.; *Rechtswissenschaft als Kulturwissenschaft*, *in* WERT UND WAHRHEIT IM RECHT 105–23 (Stephan Kirste et al. eds., 2015). For further publications, see JULIAN KRÜPER, *Kulturwissenschaftliche Analyse des Rechts*, *in* GRUNDLAGEN DES RECHTS (2013).

[32] *See* Poster, Käte Hamburger Center for Advanced Studies, Forum *Recht Als Kultur* [Law as Culture], http://www.recht-als-kultur.de/en; *see also* Ulrich Haltern, *Notwendigkeit und Umrisse einer Kulturtheorie des Rechts*, *in* KULTURELLE IDENTITÄT 193 (Horst Dreier & Eric Hilgendorf eds., 2006).

cultural studies specialists because they cannot possibly have sufficient insight into the various branches of the legal system(s)—a problem which frequently leads to their promoting simplistic pictures of the law. Neither can this task be fulfilled through interdisciplinary research because "being interdisciplinary is so very hard to do."[33] In other words, due to disciplinary barriers, "law as culture," understood as an overarching research project, remains an unfulfilled promise.

E. Recent Challenges to Law as Culture

I. Dumplings in a Murky Soup?

A recent attack by the German legal philosopher Thomas Gutmann on the notion of "Law as Culture" sheds light on the dangers, chances, and challenges presented by culturalist approaches to the law.[34] While conceding that culturalist inquiries into the law can be fruitful in cultural studies, Gutmann doubts that there is any benefit to lawyers from such inquiries. Asking "what the concept of culture can contribute to the internal perspective of legal science, i.e. to critical reflection with the law," his answer is that it can contribute "nothing but confusion."[35]

Before distinguishing between "culture" as a methodological and a substantive concept,[36] Gutmann refutes the notion that culture provides a source of normativity.[37] Gutmann's first main concern, however, regards the validity of culture as a concept of legal methodology. He draws on Kelsen, postulating the necessary separation between "is" and "ought," and states that culture is a concept too highly aggregated[38] and too holistic. According to Gutmann, this applies in particular to the notion of "legal culture" as a method for practicing comparative law: "A culture-oriented comparison that refers to a holistic concept of culture

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[33] Stanley Fish, *Being Interdisciplinary Is So Very Hard to Do*, PROFESSION 15 (1989) http://www.jstor.org/stable/25595433.

[34] *See generally* THOMAS GUTMANN, RECHT ALS KULTUR? (2015); THOMAS FRITSCHE, DER KULTURBEGRIFF IM RELIGIONSVERFASSUNGSRECHT 176 et seq. (2015).

[35] *See id.* at 13 ("Es soll im Folgenden vielmehr allein um die normativen Implikationen der Verwendung des Kulturbegriffs im Recht gehen und damit um die Frage, was der Begriff der Kultur zur internen Perspektive der Rechtswissenschaft, also zur Eigenreflexion des Rechts, beitragen kann. Die Antwort dieses Beitrags wird lauten: Nichts, außer Verwirrung.").

[36] *Id.* at 15.

[37] *Id.* at 21 (referring to the process of differentiation of modern law and "the culture," he seems to forget—in spite of using quotation marks—his own caveat as to the multiplicity of concepts of culture and to assume a contrast between law and "the culture" which appears to be a classical *petitio principii*).

[38] *Id.* at 31.

as a homogeneous system of values is bound to fail. The notion that legal systems are like dumplings floating in a murky cultural soup slowly soaking full cannot explain anything."[39] As a specific form of cultural theory of the law, Gutmann analyses the concept of a *Menschenbild* (the image of human being) which he sees as an arbitrary mechanism for normative claims: "But this is exactly what such a concept of culture means: everything and nothing. What is lost, then, is again any discursive control over the normative contents of the law. This control, however, must be the objective of legal theory."[40]

Gutmann's second main point of critique concerns a culturalist fallacy which he identifies as the integration-oriented aspect of communitarian thought.[41] One of Gutmann's concerns is that culture and identity have, *inter alia*, always functioned as hegemonic concepts.[42] Yet, he also rejects multiculturalism, occidental culture, and deconstructivism as relevant normative positions. His conclusion is that, again, with regard to working with the law, one cannot expect any elucidations from the concept of culture.[43]

That said, it may well be that this erudite attack on the use of culture as a legal concept suffers from a lack of interest in a productive definition of culture which is neither minimalist nor maximalist. It is easy to identify fallacies on the basis of exaggerations and overstatements, but how convincing can a model of legal application be that aims to ignore the non-legal context of the law? How can law in action be understood and convincingly applied and improved without a sensitivity to law's intended effects or ascribed social meanings? In other words, the methodological purity of legal application that Gutmann proposed is bought dearly by the practical irrelevance of his model.

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[39] *Id.* at 36–37:

> *(Dies alles zeigt, dass eine kulturbezogene Rechtsvergleichung, die auf einen totalitätsorientierten Kulturbegriff im Sinne angeblich einheitlicher Sinn- und Lebenswelten und kollektiv geteilter Wertvorstellungen sozialer Großgruppen abhebt, zum Scheitern verurteilt ist. Die Vorstellung, dass Rechtsordnungen wie Knödel in einer trüben Kultursuppe schwimmen und sich langsam voll saugen, vermag nichts zu erklären.)*

[40] *Id.* at 43.

[41] *Id.* at 45.

[42] *Id.* at 50 (wondering if Gutmann would agree that *abusus non tollit usum*).

[43] GUTMANN, *supra* note 34, at 62 ("*Am Ende gilt auch hier, dass die Arbeit am Recht durch den Begriff der Kultur keine Aufklärung zu erwarten hat.*").

II. Law and Affect

Under the umbrella of "Law and Culture," numerous playful and fruitful confrontations have taken place. These range from "Law and Popular Culture" to "Law and Religion" and "Law and Visuality." Reflecting on the observation that many newer titles in the field of law and literature refer to madness, suffering, passion, resentment, and so on, Greta Olson has recently raised the question of whether "Law and Affect" have already supplanted law and literature.[44] The "Affective Turn" may be the newest in a series of paradigm shifts within cultural studies.[45] It draws on Spinoza's affect theory in his 1677 work *Ethics*,[46] as well on Massumi's concept of Affect as a "prepersonal intensity corresponding to the passage from one experiential state of the body to another."[47] It should be noted that "body" in this sense includes mental and ideal bodies. Affect "functions through encounters and the ensuing altered levels of intensity these encounters initiate and not through causally related change."[48] In other words, affect is not to be equated with feeling or emotion. In Shouse's words, "[f]eelings are personal and biographical, emotions are social, and affects are prepersonal."[49] The emerging concept questions the humanist-inspired notion of moral subjects; it explores the grammar of the body "that cannot be fully captured in language."[50] This implies an anti-linguistic and anti-narrative approach to law.[51] What then might be the consequences of such an approach for legal theory?

At first sight the anti-linguistic approach neatly matches with the recent tendency to explore and stress the visual dimensions of the law. The role of pictures in law—both *in sensu proprio et metaphorico*—has not exclusively been analyzed within cultural studies. Rather, various branches of legal research have begun to discover visuality. The visual turn in law[52] cannot be equated with an affective turn, but it may nonetheless show that the idea of text-based,

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[44] Greta Olson*, The Turn to Passion*, *in* SPECIAL ISSUE OF LAW AND LITERATURE ON LEGAL PERSONHOOD (Frans-Willem Korsten & Yasco Horstmann eds., forthcoming 2016) (on file with author), https://uni-giessen.academia.edu/GretaOlson/Forthcoming-Publications.

[45] *See generally* Herbert Grabes, *Theory Coming in Turns*, *in* TROPISMES 16, 9 (Universite Paris Ouest Nanterre La Défense ed., 2010). *See also* Ruth Leys, *The Turn to Affect*, 37 CRITICAL INQUIRY 434 (Spring 2011).

[46] BENEDICTUS DE SPINOZA, ETHICA ORDINE GEOMETRICO DEMONSTRATA (1675).

[47] Olson, *supra* note 44, at 3 (quoting BRIAN MASSUMI, A THOUSAND PLATEAUS: CAPITALISM AND SCHIZOPHRENIA xvii (1987)).

[48] Olson*, supra* note 44, at 4.

[49] *Cf.* Eric Shouse*, Feeling, Emotion, Affect*, 8.6 M/C J., para. 2 (2005).

[50] *Id.* at para. 5.

[51] Olson, *supra* note 44, at 5.

[52] For a recent overview, see JOHANNA BRAUN, LEITBILDER IM RECHT 43 (2015).

logocentric rationality is under pressure amongst jurists. Even though it is simplistic to assume that "the law has until today defined itself as the embodiment of rationality, reason, objectivity,"[53] affect is certainly not a key category in legal theory and jurisprudence. In order to draw a broader picture, it is important to note that some legal texts are quite explicit about the affective dimension of the law. For instance, the role of force and pain is omnipresent in the Basic Law. The text uses the term "force" (*Gewalt*) twenty times, reminding readers both of the forcefulness of the law and the state (*Staatsgewalt*, *öffentliche Gewalt*, and *Gewaltherrschaft*) and of the *raison d'etre* of the law, the protection of individuals from the force of arms (*Waffengewalt*). As an archive of national history, and a collective memory, the constitution is full of affective power, as when it states that "[p]ersons in custody may not be subjected to mental or physical mistreatment."[54] The obvious reason for this is an awareness of the vivid experiences that many of the founding fathers—and indeed mothers—collected during the Nazi period: Law can be used to pave the way to bodily harm and to the extinction of others, but it can equally serve as a barrier against such atrocities.

From time to time, an awareness of the affective dimension of the law has popped up in academia. One of the most forceful descriptions is the passage by Rudolf von Jhering in his famous "The Struggle for Law" when he highlights that affect is at the very origin of law:

> The Law does not originate like language, painless, by way of mere conviction, but it is born with pain, and it is exactly upon the basis of this painful birth, which is like that of a child by its mother, that the power which then comes into the law is based.[55]

It is the visceral—as opposed to both the cognitive and the emotional—dimension of the law that Jhering highlights here. And not surprisingly, it is Jhering who also stresses the interdependency, if not equality, of law and force, and regards law as "the policy of Force."[56] But in spite of this prominent voice and other recent approaches, the field of "Law and Affect," unlike "Law and Emotion,"[57] has not yet been systematically explored. One reason

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[53] Olson, *supra* note 44, at 12 (citing and translating ANDREAS FISCHER-LESCANO, RECHTSKRAFT 117 (2013)).

[54] Grundgesetz [GG] [Basic Law], art. 104(1), § 2.

[55] RUDOLF VON JHERING, KAMPF UMS RECHT (1872), http://www.koeblergerhard.de/Fontes/JheringDerKampfumsRecht.htm (translated by author) ("*Das Recht entsteht nicht wie die Sprache, nicht schmerzlos, nicht im Wege bloßer Überzeugung, sondern es wird geboren mit Schmerzen, und gerade darauf, daß es mit Schmerzen geboren wird, wie das Kind bei der Mutter, gerade darauf beruht diese Kraft, die sich hinterher dem Rechte zuwendet.*").

[56] RUDOLF VON JHERING, DER ZWECK IM RECHT 249 (1884).

[57] It might be of interest that the International Association on Legal and Social Philosophy dedicated its 2015 world conference to "Law, Reason and Emotion." *See* "Law, Reason and Emotion"; Conference of the International

for this might be that the premises of the "Turn to Affect" as represented by Massumi, Shouse, and others, e.g. anti-intentionalism,[58] seem incompatible with the fundamental concepts of a legal system that is based on the idea of autonomous moral subjects. If "affect is independent of signification and meaning,"[59] then it is relevant within legal orders which aim to create meaning by way of norms in order to regulate society, and in jurisdictions which not only address individuals but define themselves by respecting and protecting his or her dignity. For example, consider the words of the Basic Law: "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."[60] That said, it would be a fallacy to regard "Law and Affect" theories as irrelevant solely because their premises differ, if in fact they do differ, from those of *lex lata*. It is true that within the framework of the law as it stands, affect may not be a valid criterion for interpretation unless the law itself permits it to be taken into account. Banned from the process of justification,[61] affect has been recognized as a major factor during the process of discovery.[62] In other words, even if the internal perspective on the legal order, including the law on the books and the doctrinal system (*Dogmatik*) offer no room for the concept of affect, the external perspective on the law has to take notice of it. Jurisprudence, legal theory, sociology of law, and legislation studies (*Gesetzgebungslehre*) have to reflect on the affective dimensions of the law. There is no way of avoiding the provocations of "Law and Affect."

These considerations lead to the question about the merits of affect theories for understanding—and indeed the amending—of the law. If affective dispositions hold human action so that cognition always "comes 'too late' for reasons, beliefs, intentions, and meanings to play the role in action and behavior usually accorded to them,"[63] then this resembles the nineteenth-century legal theoretical affirmation of determinism;[64] this

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Association on Legal and Social Philosophy (IVR) in Washington (July 26–Aug. 1, 2015), http://ivr2015.org/program-overview/ ("While all legal systems claim to serve reason and justice, they must also recognize and respect the emotional basis of human society. This relationship between law, reason and emotion can be presented as a conflict, harmony, or otherwise, but will always be present in legal discourse.").

[58] Leys, *supra* note 45, at 443.

[59] *Id.* As Leys summarizes one of the key convictions of "the new affect theorists."

[60] Grundgesetz [GG] [Basic Law], art. 1, § 1.

[61] RICHARD A. WASSERSTROM, THE JUDICIAL DECISION 26 (1961) (distinguishing the process of justification).

[62] *See* the anonymous Federal Constitutional Court Justice quoted by Uwe Kranenpohl. UWE KRANENPOHL, HINTER DEM SCHLEIER DES BERATUNGSGEHEIMNISSES 164 (2010) ("Every legal problem is soaked through with life experience, hopes, fears, emotions, ideas about a just world – all this is present" – "Jedes juristische Problem ist 'durchtränkt' von Lebenserfahrung, von Hoffnungen, Ängsten, Emotionen, Vorstellungen einer gerechten Welt – das ist alles mit anwesend.").

[63] Leys, *supra* note 45, at 443.

[64] *See, e.g.*, FRANZ VON LISZT, LEHRBUCH DES DEUTSCHEN STRAFRECHTS 136 (1900).

debate may then turn out to be as fruitless as the intellectually impressive discussion that was held more than a hundred years ago about freedom and determinism in the law.[65] The reason may lie in what Ruth Leys has criticized as the "false opposition between the mind and the body," i.e., "the sharpness of the dichotomy, which operates at once with a highly intellectualist or rationalist concept of meaning and an unexamined assumption that everything that is not 'meaning' in this limited sense belongs to the body."[66] In so far as "Law and Affect" draws our attention to the visceral dimensions of the subject's existence, without negating his or her status as a morally or legally accountable being, it is also an indispensable complement of the traditional perspectives which acclaim or presuppose rationality and autonomy of the subjects.

F. Law in Action as a Cultural Practice

I. The Interpretation of the Law

The most famous German textbook on the Theory of Methods ("Methodenlehre") describes its subject matter as a "hermeneutic self-reflection of jurisprudence."[67] It is evident that hermeneutics is a key topic in legal methodology. Applying the law is normally equated with interpreting the law, and interpreting the law is traditionally associated with four guiding elements: the text, the context, history, and the rationale. These elements, in turn, are associated with the grammatical, the systematic, the historical, and the teleological methods of interpretation. These elements of interpretation have been mistakenly attributed to Savigny. Yet, they are canonical and have, in spite of many doubts, remained indestructible as the basis of interpretive methods. Irrespective of their linguistic cogency, these elements express a reasonable agreement within the legal community concerning their efficacy.[68] In any event, applying these elements demands considerable philological and historical skills. For instance, when reconstructing the genesis of constitutional articles—the everyday business of the German Federal Constitutional Court—the justices have to perform a second-order level of interpretation, i.e. they interpret non-legal documents in order to understand legal ones. This process sometimes results in competing stories of origin: Some are narrated within the judgment, and others are offered in the dissenting opinion.

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[65] *See generally* KARL ENGISCH, DIE LEHRE VON DER WILLENSFREIHEIT IN DER STRAFRECHTSPHILOSOPHISCHEN DOKTRIN DER GEGENWART 7 (1965).

[66] Leys, *supra* note 45, at 458 ("This too is a false dichotomy, one that . . . threads its way throughout much of the new literature on affect.").

[67] KARL LARENZ, METHODENLEHRE DER RECHTSWISSENSCHAFT 243 (1991) ("Hermeneutische Selbstreflexion der Jurisprudenz."); *id.* at 246 ("Selbstreflexion im Lichte der Hermeneutik.").

[68] *See* FRANZ REIMER, JURISTISCHE METHODENLEHRE 141 (2016).

Supporters of a rhetorical analysis of the law would see this as evidence of the fundamentally rhetorical structure of legal reasoning. [69]

Any careful interpretation of "the law" will show that—contrary to suggestive formulae such as "Einheit der Rechtsordnung"[70]—there is no monolithic body of law. Rather, every jurisdiction consists of a highly diverse set of layers of legal rules and institutions, some dating back to last week, and some dating back to 1,500 B.C. Therefore, almost any legal system can be viewed as a cultural archive—a repository of the history of social-political thought. While the plurality of legal systems has become very clear during the past few decades, the internal pluralism of all legal systems remains to be rediscovered and rethought.

II. Interpretation of the Facts

Applying the law does not only consist of interpreting legal rules. The main challenge is fact-finding. In spite of the usual perspective which identifies an insuperable difference between the two, "fact and law do not belong to two different worlds, as if fact occupied the earthly space of crude factuality and law was accommodated in a celestial universe of pure normativity."[71] It should, however, be noted that the term "fact" is a simplification, since in an information-based society such as ours, everything depends on the interpretation of the information at hand. In other words, hermeneutic skills are of paramount importance in finding, reconstructing, or construing the facts, and this process shall always include appreciating multiple meanings of so-called objective facts. Cases are normally decided based on fact-finding as opposed to the interpretation of laws.[72] But facts alone are not enough; to identify the meanings and effects of a headscarf worn by a Muslim teacher in a German school,[73] lawyers must enter into a dialogue with cultural analysts. Lawyers cannot reasonably claim to be theologians, sociologists, political scientists, and so on, yet they must become multilingual in order to understand the languages of these disciplines. In other words, in a complex and pluralist society, understanding the facts necessitates a deliberate division of labor-approach. This is perhaps where cultural approaches to law appear most relevant.

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[69] *See, e.g.*, Katharina Gräfin von Schlieffen, *Wie Juristen begründen*, *in* 66 JURISTENZEITUNG 109 (2011); *Juristische Rhetorik*, *in* HANDBUCH RHETORIK (Gert Ueding & Gregor Kalivoda eds., 2015).

[70] *Supra* note **Error! Bookmark not defined.**, *passim*.

[71] François Rigaux, *The Concept of Fact in Legal Science*, *in* LAW, INTERPRETATION AND REALITY 38–40 (P. Nerhot ed., 1990).

[72] *See* REIMER *supra* note 68, at 60.

[73] *See* Baer chapter in this volume.

G. Summary

Law has for a long period of time been considered as culture. The objections raised against this conceptual starting point rightly criticize, *inter alia*, the indeterminacy of "culture" but fail to define, or even to attempt to define, what culture could mean. Contrary to the prominent critique by Thomas Gutmann, a culturalist analysis of the law by lawyers can have, apart from its intrinsic value, three important results: First, it will improve the process of actually applying the law—particularly with an increasingly diverse society. Second, it will improve the process of creating legislation. Third, a culturally-oriented approach to law shall offer criteria by which to judge the legitimacy of the law and therefore the plausibility of critiques of the law. Both cultural studies and legal science can benefit from a dialogue about the law, its disembeddedness and embededdness, its autonomy and heteronomy, its pride and its prejudices.