Excerpt from
Cultural Techniques of Law.
Remarks on a Format of Legal Studies

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1 Symmetrical dogmatics and parajuridical training

What is at stake here? I want to present 'cultural techniques of law' as a research and pedagogical programme - a 'format' - which has developed between the disciplines of law, media studies and cultural studies; or more precisely, at the interstices of these respective disciplinary boundaries (Vismann 2012a). I do so in the form of an essay and try to make some further suggestions for the programme. The essay is written from a position that is not fully identical with 'law'. The term 'format' is meant to reflect the existence of such a programme, without claiming that it has been realised successfully. Such an incomplete identification of law with the method of its study is not a co-incidence. The starting point to think about law ought to be law's difference rather than identity. It is in this sense that *cultural* techniques of law are the techniques of differentiation, modification and transmission that reproduce law. Culture does not refer to a historically stabilised identity, but only to what is made and reproduced. Cultural *techniques* of law are techniques that 'operationalise' legal differences: they divide, translate and transmit legal differences along (pre)formed, directed, exterior routes. Research about law's cultural techniques rests

on these two premises: legal differences are reproduced and they are 'operationalised'.

What is the point of this peculiar ' format'? Why shall we not proceed as before? The programme intends to serve as a kind of hinge between academic studies of law and cultural- and media studies and addresses scholars of law, humanities, media and cultural studies. It could also be described as part of what Latour termed a "symmetrical dogmatics" of law (1995). He conceived of a "symmetrical anthropology", which he did not explicitly sketch out as a theorisation of constitutionalism, but which nonetheless helps us to think through foundational juridical issues. It aims at being a historical epistemology that thinks with its own, constitutive division, whilst simultaneously being reflective about the exclusions that this process engenders and the ways in which the excluded continue to exert a constitutive role. In Latour's anthropological context, this approach allows thinking with and about what escapes the boundaries of humanness and yet continues to shape it (for example, the entities that he calls "things"). This kind of working-with or co-operation (*Mitarbeit*) is full of complications. It would neither be accurately characterised as an interdisciplinary "pairing", nor can this cooperation described as being sufficiently contradictory to be labelled dialectical. My comments here serve to present these complications.

The proposed research programme of cultural techniques is rooted in a critique of modernity's constitution, its self-imaginaries, and systems of self-descriptions, as far as these are grounded in internalist claims and epistemic differentiations that are monopolistic and exclusionary. One such internalist view of legal self-constitution is the idea that law reproduces itself with the help of continuous and all-encompassing main medium, for example, with language, sense perception or consciousness. Critiquing such a view, cultural techniques as a research programme particularly attends to 'silent' knowledge techniques in order to trace ruptures in legal reproduction. Muteness is not only a theoretical concept, but also a metaphor for interruptions of continuity of language and senses. Something extinguishes and something else approaches

(*rückt an*) over the course of law's continuous reproduction. Thereby some processes come to our attention that can neither be explained by referring to law as a "semantic power" (posited, but not defined in von Bogdandy/Venzke 2014), or portray it as an "idea of sovereign consciousness" (Foucault 2000: 16) ... What is metaphorically called 'silent knowledge' occurs in a sphere that both exceeds and lies beyond the nameable or conceptually conceivable. The effects of muteness, that is to say, of such a constructed muteness, occurs in law's subterrains and also contributes (*mitarbeitet*) to its original foundation and justification (*Begründung*). As a result, it forms part of what Cornelia Vismann had termed "arca-logic" (2012b). As law's medium that is located 'under' or 'below' causes and foundations (*Gründen*), the arca-logic of cultural techniques participates in the production and reproduction of law. Cultural techniques form and shape arca-logic's archives, principles and premises, but also are part of the origin which disguises itself, which it has always already has done from its very inception.

Yet law's cultural techniques ought not to be mistaken as foundation or as a reason (*Grund*). They also cannot be explained by or mystified into subjects. Although the research format of cultural techniques depicts in detail the technological and mediated substrata of 'foundations', something which dogmatic approaches to legal scholarship unreflexively take for granted, such substrata do not necessarily represent *better* foundations. Insights into the underlying workings of law rather make visible the subversions through which law works and reproduces differences. Law operationalises the substrata, but never extinguishes them. That is why this proposed research format does not purport to bring law 'back' to foundational 'facts'. Rather it seeks to delineate the circumstances in which law differentiates and remains fundamentally equivocal - with both precision and ambiguity. This endeavour is thus both critical and constructive: it is critical of the ways in which juridical reasoning selectively represents law's unavoidable and necessary *demi-monde,* and it is constructive in the sense that a study of law's cultural techniques highlights law's constant need to cooperate (with others and us). Law is made-together and made-with.

Fabian Steinhauer

This research programme does not intend to refute or negate the role of language and its meaning for law. But it also seeks to point out limitations originating from language as well as the ones relating to it. A study of law's cultural techniques also takes into account premises that have their origin in science studies theories, such as in Latour. They allow for a reconstruction of knowledges that have hitherto remained unexamined because they were invisible under the radars of human subject, its laws, causalities and rationality.

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On "symmetrical dogmatics": Symmetry is not synonymous to 'supplement', 'harmony' or 'joining', but rather denotes the double existence of law's recurring differentiation, which occurs together and simultaneously with a carefully constructed internalist programme in the study of law. Although I would portray research into law's cultural techniques as forming part of basic research[2], I do not claim that it satisfies the craving for meaning ("*Geltungssucht*") or provides fundamental meanings and foundations. Law's theories and practices are remarkably successful in (re)producing their own meaning - even when legal decisions lead to nowhere - and they are not in need any support from media or cultural studies to assert their symbolic meaning. The mutual interest in and the extent of decentralised cooperation and coordination between law and the rest of society are, however, too big to be determined by a particular legal symbolic meaning alone.[3] A focus on law's cultural techniques can take account of the continuous "re-entry of the Other" within law, a process which also simultaneously occurs within law's "boundary objects" (Star and Griesemer 1989). These already form part of law's decision-making and differentiation. It is in this sense that symmetrical dogmatics is also paradogmatic. And research on cultural techniques of law can be understood as forming part of a parajuridical formation or training. Such a parajuridical programme traces passages in which transmissions and translations dissect and examine law in a continuous, historical way. There is neither a mind nor a being, not to mention a consciousness, of which such an examination and disentanglement (*Auseinandersetzung*) are part or

could be placated by (as in early laws regarding pictures, discussed in Steinhauer 2013: 96-114). All forms of reflection go together with blindness (Steinhauer 2009b). ...

Research of law's cultural techniques does not claim completeness towards the study of law because it is based on the premise that law comprises fragmented and irreconcilable discourses and rationalities. It however aims to account for and think with contradictions, ruptures, conflicts and uncertainties of legal practice. It also puts itself into competition with other kinds of knowledge which have their own 'juridisms': norms, canons, standards, classics and rules of the humanities; natural science's focus on heredity; or norm formations in practices outside academia or its disciplines. This implies that there is all a greater need to continue writing about histories of conflicts, unruly cooperation and unpacified coordination. A focus on the cultural techniques of law attends to and anticipates abysses of legal rationality rather than focusing on questions of law's foundation (Legendre 2010).

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2 Cultural techniques and textuality

Impetus for research into cultural techniques of law has also come from works on law's textuality by Augsberg (2009), Ladeur (2016) and Vesting (2011-9). ... They share the view that there is no specific and definable crux of what legal studies ought to be. Whilst they do not deny that legal knowledge is theoretically and practically distinct from other kinds of knowledges and needs to be distinguished from them, this realisation alone does not suffice. The recognition of law's difference does not rest on philosophical notions of law's substance, form, method, meaning or process. Rather it rests on law's disquiet, and law ought to be thought from this point of restlessness. Law's references are both its own (*eigen*) and outside itself. I would denote law's mode of referentiality, its way of reconnecting and reproducing, as one of *hyper-referentiality* than an exclusive self-reference. It constitutes itself through an act of separation from a reference, whilst also simultaneously ecstatically constituting and continuing the

divisive distinction within the reference itself. Law differentiates itself through its references, yet such acts of distinction also permeate the very references themselves. ... Wherever we encounter law's identity, alterity is already there at work. One could interpret this as an empty tautology of circumstances in which only law is able to (re)produce law, as in some readings of Kelsen's positivism. But the tautology does not work without complications because law's (re)production depends on sharing (dividing) and transmitting legal knowledge.[4] Law is in conflict (*Auseinandersetzung*) with itself by dismantling (*auseinandersetzt*) itself and effecting both identity and alterity. It attaches itself to something that might not be legal and is exterior to it. Law's limits are yet also internal; they go through itself. They are both insistent, as well as intervening. In the midst of law, we find files, staples of paper, witnesses, sluggish bodies, networks, stations, a selection of programmes, court architectures, high and low ceiling rooms, streets, morasses, and much more. In the midst of a legal subject, we may find flesh, skin, horn, hair, capital and assets, organisations and apparatus. In the midst of persons, we find things. The juridical is permeated by the political, moral, religious and all the forces that it promised to repudiate. Legal positivism is rattled with uncertainty and harbours a sense of lack and insufficiency within it, regardless of whether such a lack is productive or not. ... Law can be understood as the effect of a continuing process of differentiation that is always also lacking; the effect of such a lack is permanent openness.[5] [...] Instead of being content with empty and internalist self-sufficiency, legal research that follows this insight would identify and particularly focus on issues which manifest law's lack of differentiation and examine the specific ways in which it deals with such a lack.

3 Media studies and law

Media studies have had a long-standing interest in law. In German media theory, research into cultural techniques has incorporated diverse approaches that have had interest in processes that fall within the legal field. Works by Dommann (2014), Gaderer (2012), Giessmann

(2014), Kossmann (2012), Nellen, Siegert (2006), Sprenger (2015) and Vismann (2008, 2011, 2012) share such a specific media studies approach and it could form part of a programme of symmetrical dogmatics and para-juridical training. They resist the imposition and the ideal of an internalist self-proclamation prevalent in the German academic landscape, which insist that only lawyers are lawyers, lawyers are only lawyers, and that knowledge about law and legislations are exclusive or privileged domains of the Faculties of Law. ... The sub-discipline of legal history and its related disciplines share an interest with media studies: they examine the ways in which law fabricates itself with the help of something exterior to its self-definition. Lessig has expressed this with his well-known statement that "code is law", but also unfortunately smoothed over the innate tension between identity and alterity that are at play in the moment when law refers to cultural techniques. Law does not recognise itself in the code. Rather the code repeats and re-enforces the conditions of cooperation and coordination, which are regarded as 'law' in other social contexts. More interestingly and maintaining the inherent tension (but also the contradiction) between media and law, Kittler observed how media techniques are co-constitutive of law (2014). His assertion of media's importance is not trivial ("what else should law produce but media?"), as he brings into vision media's juridicality, which is different from legal ways of knowing. This distinction does not mean that media is not juridical. Rather, media's juridicality is similar to the effect of what Schütz described as law outside law (2012). One of the central modes by which legal knowledges operates is by separating itself from others. Similarly, media techniques entail juridical operations of decision-making, openness and blockages of access (Sprenger 2013). Also media define social categories, such as goods, things, personalities and subjectivities, notion of publicness and privacy, and of sharing and limiting. The processes of ordering and co-ordinating, voting and conflict resolution - all of which are often regarded as juridical processes - have become embedded in things. These things are not inert 'facts', but they are the modes through which 'law' is made without 'legal' methods. ...

Fabian Steinhauer

I want to illustrate this point with an example of law relating to personality in pictures. The legal practice in this area is concerned with images to a large extent. Yet legal dogma has neither developed a particular concept of what an image is, nor a deeper conceptualisation of its own treatment of images (Steinhauer 2009a). A lawyer makes decisions about images without being a scholar or theorist of images. Lawyers think that law decides over images; scholars of images think that images decide law. Regardless of these different self-understandings, the law of personality keeps on reproducing itself in *both* the legal concept of personality, as well as in images, continuing to carry out the expectation which a legal subject holds in the form of rights *to* an image and *within* (as part of) an image.

Knowledge of images remains in the status of an 'other' knowledge. ... Scholarship of images is inflected with its own juridicality. Every knowledge of an image hence is bounded - and this boundary remains as contested as much as unsurpassable (see Hubermann 2009 on Kafka's 'Before the Law'). This is why it is impossible to discard law - or take off the legal lens - and invoke and rely on allegedly innocent or pure 'facts'. Beyond law, there are not only others than law, but also often another law. This does not mean that it is impossible to differentiate. The boundaries between law and image remain recalcitrant and cannot be ignored or denied. And the differentiation between image and no-image cannot be relinquished, same as the differentiation between law and non-law. We need to take a leap, so to say, and cultivate a knowledge, but not of the kind that engages in internalist self-assertions. It would entail reconstructing differentiations that cannot be traced back to a common starting point and uniform discourse, but which only retain their differences in diversity. It would be necessary, however, not to get lost in the infinity of differences and differentiations. For purposes of critique and analysis, the focus would need to be on tracing those differentiations that have been regarded as 'really useful'. ... Attending to law's Others means to think about the lines, conflicts, definitions and exclusions, from which law is (re)produced (for examples of such analyses, see Steinhauer 2015).

4 Guiding Questions

The main question which the format of cultural techniques of law raises for legal research and pedagogy is: how is knowledge of and around law transmitted and shared? This question entails four aspects.

The first aspect concerns law's foundations embedded in certain media and cultural techniques, as well as production of a certain kind of legality through media and practices in society. Writing, codex, diagrams, commentaries, certificates, but also court room architectures are well-known examples of such media. Computers and their networks are some of the most discussed examples since the nineteen-sixties. Exegetic processes of juridical hermeneutic are also well-known instances of legal *techniques,* much of which are nowadays found outside of orality, writing and printed books. Rhetoric and dogmatics are some of the most well-known paradigms of assembling cultural techniques into a discipline.

The second aspect of the question touches upon how law co-constitutes media and cultural techniques. Rules of censorship and book privileges, the shaping the development of book, are some historical examples. More recent examples are coded privileges and access limitations that implement digital licenses and usage rights. Here, legal normativity has become 'built in': codes are technical achievements of engineers and programmers; but they are also a juridical feat by which a technical object becomes 'normed', receives an imperative dimension (it orders the realm of what is possible and legally permitted), and delineates and (co-)determines over social rules of access. ...

The question raises a third aspect about processes of transmission and translation between and within cultures (historically, for example).

Lastly, the question addresses foundations of media law. The concept of public media, in particular, lead to an entanglement of legal, media and cultural-technical phenomena. Legal knowledge is not only a sense-phenomenon, it is also an effect of media and of cultural techniques. ... Law is not only a creation of state sovereignty, but media changes produce shifts in legal and normative practices beyond instances of 'state' 'reasoning'. Moreover, structural changes within law do not

only arise from institutionalised politics and economy. New media and cultural techniques change and shape whatever remains recognisable and understandable as law.

Endnotes

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1. Notes to translation: *Rechtswissenschaft* transl. as legal studies; *Kulturwissenschaften* as cultural studies; *Kulturtechniken des Rechts* as cultural techniques of law; *Trennung* as division, separation; *Auseinandersetzung* as conflict, disentanglement, examination; *auseinandersetzen* to examine, disentangle

2. Translator's clarification: in contrast to applied research or practice.

3. Society does not need to have a sense of 'social' and can also be effective 'asocially'.

4. As Foucault pointed out the nature of language is double (1996).

5. The notion of an ongoing openness is a remainder or a rest of a differentiation, which has already occurred, but still remains left over. Damisch (2007: 135) best describes the problematisation of 'opening' and also refers to Trotsky's notion of permanent revolution and Heidegger's discussion of Heraclitus. Heidegger argues against an understanding of opening as "an open window" or "passage". In relations between human and things, "human openness towards things does not mean that there is a gap or hole through which humans can peek through" (Heidegger 1986: 202, translator's translation).

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