

“PREFERRED READING” OF LEGAL TEXTS

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INTRODUCTION

American law professor and literary critic James Boyd White perceives the law as language, or in some sense culture:

“It is an enormously rich and complex system of thought and expression, of social definitions and practices, which can be learned and mastered, modified and preserved, by the individual mind.”¹

Law is an imaginative world in which people behave like in any other world. It is a *possible world* with its own rules, thoughts, behaviors and imaginations. This is also the reason why the law can be referred to as a culture – the culture *largo sensu*. In 1973, American anthropologist Clifford Geertz defined culture as a “*historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate, and develop their knowledge about and attitudes toward life.*”² Again, symbols and their sharing are important for society to survive. In addition to law, culture gives the world its meaning. Italian semiotician and novelist Umberto Eco described this environment as a *cultural world*,³ where codes are accepted by society. In this sense, law is culture (as White asserted) and law is simultaneously part of a culture. Law exists in the real world but creates a specific, abstract world which exists as its subjects think and express abstract ideas.

In conjunction with the idea that law is culture, we should not forget that law operates surrounded by culture. The culture, its narratives, rules and contexts enables law to operate but, at the same time, creates boundaries of it. Culture actually creates boundaries or obstacles that impede the addressee in order to arbitrarily manipulate or dispose of law. Cultural traditions and factitious boundaries have to be obeyed by the application of law. In its every aspect, law is manipulated by dominant stories disseminated by culture. American feminist scholar Catharine MacKinnon asserts that dominant narratives are so strong that they are not stories, but reality.⁴ Every part of law

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¹ James B. White, *The Legal Imagination* (University of Chicago Press 1985) xiii.

² Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (Basic Books 1973) 85.

³ Umberto Eco, *Teorie sémiotiky* (Argo 2009) 80.

⁴ Catharine MacKinnon, ‘Law’s Stories as Reality and Politics’ in Peter Brooks and Paul Gerwitz (eds) *Law’s Stories. Narrative and Rhetoric in the Law* (Yale University Press 1996) 235.

is influenced by a relevant mode of thinking and speaking. The culture of speaking and thinking influences law itself and, of course, the law is influenced by culture *stricto sensu*, meaning that it is influenced by art such as literature, dramas, poetry, movies, music etc.

The culture *stricto sensu* imprints the law. It would be more attractive to connect law with something we can call *high culture*.⁵ However, the much more approachable culture to a legal audience is popular or mass culture in that popular culture has the capacity to unify its audience. In 1944, Theodor W. Adorno and Max Horkheimer stated that movies, radio or magazines create a system that is uniform in its whole and in every part.⁶ It is a system as complex as the legal system. According to Adorno and Horkheimer, popular culture tends to uniform totality with *chains of meanings*. Every part of it should be identically defined. It is advantageous for interpretation but, at the same time, prevents the dissemination of any potential alternatives. Popular culture creates a system from which no-one can escape and which transforms its audience. Popular culture changes and transforms all its recipients *en masse* and serves them the same content.⁷ All parts of popular culture are the same. We can presume that popular culture reproduces the existing interpretative frames and power constellations because they are advantageous to it. Popular culture prefabricates meaning and opens doors to the facile dissemination of power in society. The function of popular culture is to produce *cultured recipients*.⁸ Any legal content represented by popular culture nurtures its recipients to interpret any other legal content according to the *status quo*. Obedient subjects are alongside other things fabricated by images of law shared in popular culture.

Aside from popular culture exists mass culture and, although there are differences between mass culture and popular culture, the article will predominantly focus on mass culture in order to emphasize the role of the audience. The audience of mass culture exists without social boundaries or identities and lives in relative isolation⁹ but does share the same meanings disseminated through mass media.

I. MASS CULTURE AND LAW

Popular or mass culture very often portrays legal issues. Legal stories, narratives about crime and punishment excite mass culture authors and producers. Legal narratives are understandable and express a very simple division between 'good' and 'evil'. Law is something that interests a lot of people and is why mass culture massively fabricates legal consciousness and legal culture. American professor of law Richard K. Sherwin claims that

⁵ Herbert Gans, *Popular Culture and High Culture: An Analysis and Evaluation Of Taste* (Basic Books 2008).

⁶ Theodor Adorno and Max Horkheimer, *Dialectic of Enlightenment* (Verso 2008) 120.

⁷ *ibid* 122.

⁸ John Storey, *Cultural Theory and Popular Culture* (3rd edn Pearson Education Limited 2006) 3.

⁹ Paul DiMaggio, 'Market Structure, the Creative Process, and Popular Culture. Toward an Organizational Reinterpretation of Mass-Culture Industry' (1977) 11 *The Journal of Popular Culture* 436, 436.

“people absorb a broad array of stories and images about the law, lawyers, and the legal system from books, newspapers, television, news programs, documentaries, docudramas, and feature films. We carry these stories and images in our heads wherever we go, including voting booths and jury rooms, where legal meanings – popular, formal, and mixtures of the two – take effect.”¹⁰

Popular and mass culture creates borders in which people think of law. It creates estimations about law that any legal object must satisfy in order to be sufficiently legal, regardless of whether these estimations are based on truth or not.

Naomi Mezey and Mark C. Niles declare that television (as a classical example of mass culture) provides

“consistently idealized and mythic images of law and government which support the status quo.”¹¹

They argue that mass culture is full of idealized and, especially, fictional pictures of law. They also argue that the impact of mass culture should not be overemphasized for the reason that in mass culture we see only

“fictional stories produced by people much more interested in telling a compelling tale than in providing a documentary of our legal system.”¹²

I think that the statement regarding fictional stories about law communicated through mass media, as stated by Mezey and Niles, is wrong. Mass culture cannot be reduced to fictional stories – even they are most distinguishable.¹³ Mass culture today is also represented by news or journalism (even we can speak about the phenomenon called ‘infotainment’ where the borderline between news and entertainment is blurred). It is possible to admit that the audience interprets these imaginary stories as fiction but, on the other hand, to interpret news as the same fictional stories is very difficult for consumers of mass culture. Clients of the culture industry regard news as a variety of factual stories.

II. MASS CULTURE, LAW AND INTERPRETATION

Mass culture (popular culture) has created a context for legal interpretation or even a context for every interpretation used in legal issues. Every interpretation takes place in society and thus in some context. Interpretation needs something Josef Esser called *Vorverständnis*.¹⁴ This context of interpretation is not in any ideological vacuum - it needs ideology to operate. Here lies the connection between law, mass culture and ideology. In addition, mass culture tightly connects ideology as well as every

¹⁰ Richard Sherwin, ‘Law in Popular Culture’ in Austin Sarat (ed), *The Blackwell Companion to Law and Society* (Blackwell Publishing 2004) 95.

¹¹ Naomi Mezey and Mark C. Niles, ‘Screening the Law: Ideology and Law in American Popular Culture’ (2005) 28 *Columbia Journal of Law and Arts* 91, 96.

¹² *ibid* 95.

¹³ See Lisa Scottoline, ‘Get Off the Screen’ (1999) 24 *Nova Law Review* 655.

¹⁴ Josef Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung: Rationalitätsgrundlagen richterlicher Entscheidungspraxis* (Athenäum Verlag 1972).

communicated message and its content. Mezey and Niles precisely depict this kind of relation as

“... the primary role of popular culture in our society is to communicate, promote and perpetuate the “dominant ideology...”¹⁵

The ideology is inseparable from any form of mass culture, the press or science included, just as it is inseparable from any legal interpretation. The ideological effect of mass culture is more powerful and more influential because it covertly manipulates. As stated by Italian philosopher Antonio Gramsci between 1929 and 1935:

“A study of how the ideological structure of a dominant class is actually organized: namely the material organization aimed at maintaining, defending and developing the theoretical or ideological “front”. Its most prominent and dynamic part is the press in general: publishing houses (which have an implicit and explicit programme and are attached to a particular tendency), political newspapers, periodicals of every kind, scientific, literary, philological, popular, etc., various periodicals down to parish bulletins.”¹⁶

His observation can be used even today in mapping the influence of mass media on law and its ideological consequences.

The impact of mass media on the legal consciousness of recipients can also be increased by a lack of direct legal experience. Mass culture (culture industry) presents only one piece of information about law to many people.¹⁷ Their estimation, beliefs and assumptions about law are formed by mass culture and thus their consciousness is formed by dominant culture and dominant ideology. Of course, the mass media does not affect in isolation.

“The press is the most dynamic part of this ideological structure, but not the only one. Everything which influences or is able to influence public opinion, directly or indirectly, belongs to it: libraries, schools, associations and clubs of various kinds, even architecture and the layout and names of streets.”¹⁸

Mass media can; however, have a deciding influence on the *commodification* of law. Law becomes the same commodity as other products of any industry whereby mass culture and law are the commodities created by the cultural industry, controlled by holders of “*dominant ideology*”. It results to the inevitable conclusion that mass culture, law and jurisprudence are direct reflections of existing power relations in society. They express the interests of dominant groups. Law is nothing more than an instrument of domination.¹⁹

The process of commodification or the process of production of meaning is the part of the modern state and is fully pervaded by ideology.²⁰ The modern state distributes the symbolical means: the means intended for distinguishing what is important and what is not - means intended for

¹⁵ Mezey and Niles, ‘Screening’ (n 11) 95-96.

¹⁶ Antonio Gramsci, ‘(i) History of Subaltern Classes; (ii) The Concept of “Ideology”; (iii) Cultural Themes: Ideological Material’ in M. G. Durham and D. M. Kellner (eds) *Media and Cultural Studies – KeyWorks* (Blackwell Publishing 2006) 16.

¹⁷ Sherwin, ‘Law in Popular Culture’ (n 10) 95.

¹⁸ Gramsci, ‘(i) History of Subaltern Classes’ (n 16) 16.

¹⁹ Pierre Bourdieu, ‘The Force of Law: Toward a Sociology of the Juridical Field’ (1987) 38 *The Hastings Law Journal* 814, 814.

²⁰ Herbert Marcuse, *Jednorozměrný člověk: studie o ideologii rozvinuté industriální společnosti* (Naše vojsko 1991) 38.

anchoring the cognitive processes. In this situation, thanks to state bureaucracy, problems and issues which need to be solved are created without allowing individuals to think of their artificiality.²¹ When manipulating symbolic means for the state, it is important to separate them from their cultural meaning and interconnected social relations. British cultural theoretician Stuart Hall described it in the context of football. In his opinion, this traditional game was the object of persistent and substantial attack from the side of the state, bureaucracy, and ruling class. The game without unified rules, which used to be played in many different styles, was reconstructed to one unified set of rules. This attack was motivated by nothing more than the endeavor to moralize the lower classes, discipline their customs and subordinate them to industrial exploitation.²² In this example, ideological and symbolical means - legal interpretation included - serve to discipline and moralize proper subjects: with the intention of utilizing people for industrial exploitation.

It is easy to imagine that protection against dominant ideology can be given by a ‘neutral’ legal science. Unfortunately, classical legal science is hazy in that the ideology is concealed in the discipline. The science is subordinate to the relations of mass production as any other legal activity.²³ Law and legal science thus creates a reality that produces rituals through which the dominant ideology becomes truth. The subversive potentiality of legal science is corrupted by requirements of legal practice or by the unifying influence of proper form in which any theory should be communicated so as to be considered as sufficiently ‘scientific’.

As stated above, mass culture creates an interpretative context through its ideological influence. Even without any intent to enforce the dominant ideology, the interpreter construes the law as a meaningful and reasonable part of culture and society and thus as a part of dominant ideology. Anyone – a lawyer, judge, attorney, lay person etc. – is exposed to impacts of mass culture. Its omnipresence triumphs over any alternative approaches and creates a *rubber cage* that excludes any cells of subversive potentiality. As aforementioned, Adorno and Horkheimer described the system that surrounds any interpretive human activity:

“Films, radio and magazines make up a system which is uniform as a whole and in every part. Even the aesthetic activities of political opposites are one in their enthusiastic obedience to the rhythm of the iron system.”²⁴

To interpret law according to dominant ideology (or to the estimation of mass culture) does not have to be intentional. The reason is simple: dominant ideology creates narratives that give the impression of familiarity, narratives respecting dominant culture and credible narratives. German philosopher Walter Benjamin in his 1936 essay *The Storyteller (der Erzähler)* announced the decline of narratives. He thought that the ability to tell stories is disappearing. No-one wants any advice and/or experience(s) which are

²¹ Pierre Bourdieu, *Teorie jednání* (Karolinum 1998) 72.

²² Stuart Hall, ‘Popular Culture and the State’ in A. Sharma and A. Gupta (eds), *The Anthropology of the State. A Reader* (Blackwell Publishing 2006) 362.

²³ Douglas E. Litowitz, *Postmodern Philosophy and Law* (University Press of Kansas 1999) 70.

²⁴ Adorno and Horkheimer, *Dialectic* (n 6) 120.

communicated only through stories. No-one is interested in stories. Benjamin thought that the art of storytelling was disappearing because the truth was losing its epic dimension.²⁵ I think that Benjamin was being highly skeptical on the decline of narratives as, for ideology, it is important to use stories. Through stories, holders of any capital can influence oppressed social groups and lead them to interpret society according to existing rules and conditions. Of course, today's shared legal narratives are of a different style. They follow the demand for simplicity but still exist.

III. DISCOURSE AS A PRODUCT OF MASS CULTURE

Ideology as an inseparable part of mass culture and inseparable part of law indirectly affects the mind of the audience. It is violence hidden in knowledge, serving as an instrument in the power game.²⁶ Then there is a discourse that can control power or violence.²⁷ Everything is created and feigned by dominant ideology.²⁸ Knowledge without any context is not interesting – the context gives it a value. No-one should resist the law and no-one should resist the ruling ideology.

The discourse serves as a process of elimination by deciding what can be told and what is 'real' or 'trustworthy'. It consists of a set of sentences that can be related to any issue and the discourse is disseminated by mass culture, through which it penetrates the law. There is no performance of power without any discourse of truth influencing this power.²⁹ The discourse establishes borders of domination and oppression.³⁰ Discourse popularly held through mass culture serves to dominant ideology – as mentioned above – to preserve the *status quo*. Mass culture is the same apparatus as school, for example. Louis Althusser asserts:

“... children at school also learn the “rules” of good behaviour [...] rules of morality, civic and professional conscience, which actually means rules of respect for the socio-technical division of labour and ultimately the rules of the order established by class domination...”³¹

If Althusser sees the state as a machine:

“The State is a “machine” of repression, which enables the ruling classes [...] to ensure their domination over the working class, thus enabling the former to subject the latter to the process of surplus – value extortion...”³²,

we can see that this machine is inoperable without mass culture and/or any culture disseminated through cultural industry.

²⁵ Walter Benjamin, *Illuminations* (Random House 1988) 87.

²⁶ Michel Foucault, 'Truth and Juridical Forms' in J. D. Faubion (ed) *Power* (Penguin Books 2000) 32.

²⁷ Michel Foucault, *Diskurs Autor Genealogie. Tři studie* (Svoboda 1994) 9.

²⁸ Hubert L. Dreyfus and Paul Rabinow, *Michel Foucault: za hranicemi strukturalismu a hermeneutiky* (Herrmann & Synové 2002) 307.

²⁹ Michel Foucault, *Abnormal. Lectures at the Collège de France 1974–1975* (Picador 2003) 38.

³⁰ Dreyfus and Rabinow, *Michel Foucault* (n 28) 209.

³¹ Louis Althusser, *Essays on Ideology* (Verso 1984) 6.

³² *ibid* 11.

IV. PREFERRED MEANS OF INTERPRETATION

As a result of the influence of imported legal terms, we can identify the phenomenon described by Stuart Hall in the 1970s as *preferred reading*.³³ The effects of this phenomenon show that, in the process of interpretation, some meanings which correspond with everyday experience, everyday knowledge or dominant ideology, prevail against the ones which are new, novel, dangerous or unusual. The author's particular writings have a standard meaning, regardless of any author's individual intentions, solely by the effect of *preferred reading*.³⁴ It is a sign of the presence of the dominant discourse which subordinates any possible interpretation to its own. The result of this dominant interpretation is that one hears what he or she wants to hear in a discussion although the preferences of the particular speakers may vary.³⁵ Every piece of writing especially gains the interpretation which dominates society and complies with the expectation of what is standard in society. If the writing does not imply this interpretation, it is changed. The person interpreting the writings (interpreter) 'adjusts' them (by interpretation) to his or her expectations. It is evident that if some deep-rooted frameworks of interpretation are imported from another legal culture and if this also applies to terms and their meanings or context, it influences the final manner in which they are comprehended. With respect to the shifts in discourse, law itself is being changed. It may be assumed that recognizing the results as correct will be subject to success in this dialogue, in which one can find a tendency to seize control over the field of power³⁶ and to gain a monopoly over legitimate application of the correct procedures of interpretation.³⁷

To deal with law and to interpret it correctly, there is a need to adopt a preferred means of interpretation. Although there are additional means or methods of interpretation to be appointed to any legal problem; the community and the context – the ideology held by the ruling groups – prefer some of these and should be recorded as being right.

CONCLUSION

The law and its practice are rooted in ideology. Ideology surrounds every legal act. Today, ideology is disseminated mostly by mass media or mass culture. If we want to study law and its picture shared in society, we need to study the ways in which law is communicated to the audience. We can then see that, to escape this ideology, we need to escape society and the cultural industry that shape law. Furthermore, there is only a theoretical possibility to escape it. Legal discourse is subordinated to the current power

³³ Stuart Hall, 'Encoding/Decoding' in Stuart Hall and Dorothy Hobson and Andrew Lowe and Paul Willis (eds), *Culture, Media, Language* (Routledge 2005) 123.

³⁴ David Morley, 'Texts, Readers, Subjects' in Hall, Hobson, Lowe and Willis (eds) *Culture* (n 33) 158.

³⁵ Frank H. Easterbrook, 'Text, History, and Structure in Statutory Interpretation' (1994) 17 *Harvard Journal of Law and Public Policy* 61, 61.

³⁶ Bourdieu, 'The Force of Law' (n 19) 814, 818.

³⁷ Pierre Bourdieu, *Language and Symbolic Power* (Polity Press 1991) 189.

status quo and, as an example, can be used as the theory of preferred means of interpretation. To interpret law according to social estimations, we need to adopt ideology.

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