III: *Rechtsgefühle* in Legal Theory and Practice

III: Rechtsgefühle in juristischer Theorie und Praxis

Consulting One's Legal Consciousness: Unsimple Fact or Dangerous Fiction?

Jeanne Gaakeer

> 'Absolutely just law cannot be had'
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> 'Multi-faceted and difficult to translate, this concept's [*Rechtsgefühl*'s] spectrum of meaning ranges from an innate feeling for justice or an inner moral sense to a trained feeling from the written law and for legal right. It is also related to the process of making a judgment in a case, understood as a juridical intuition or hunch. Even concepts like *Rechtsbewusstsein* (consciousness of justice) and *Gewissen* (conscience) were used synonymously with the term.[1]

I. Nature or Nurture

1. Nature

As my starting point for a discussion of the relevance of the concepts of '*Rechtsbewusstsein*' and '*Rechtsgefühl*' as legal consciousness and/or feeling or sense of justice and right(s) in contemporary legal theory and legal practice, I turn to Ulpian's definition of law, *ius*, which, as he claims, is derived from justice, *iustitia*: 'unde nomen iuris descendat. Est autem a iustitiam appellatum: nam … ius est ars boni et aequi'[2]: law is the art of knowing what is good and equitable. Ulpian then distinguishes between public law and private law, the latter consisting, firstly, of civil law as the law of a specific community, secondly, of *ius gentium* or what we would now call international law, and, thirdly and lastly, of natural law as the

1 Adolf Lasson, *System der Rechtsphilosophie* (Berlin & Leipzig: Guttentag, 1882, 243, my translation of 'Das absolut gerechte Recht ist nicht zu haben'; Sandra Schnädelbach, 'The jurist as manager of emotions: German debates on *Rechtsgefühl* in the late 19th and early 20th century as sites of negotiating the juristic treatment of emotions', trans. Adam Bresnahan, *InterDisciplines* 2 (2015): 47-73, 47.

2 *Digests*, I.1.1 (Ulpian).

precepts that are innate to all human beings[3] and the norms for human conduct that are good and equitable at all times, i.e., irrespective of the place and the situation.[4] The inclusion of natural law in the concept of law is relevant for a first distinction between meanings of legal consciousness. This distinction pertains to the question whether a sense of justice is innate or not, that is to say either in an individual or a group or people, and if it is relevant for contemporary jurisprudence. First, however, a note on terminology. The term I will use throughout this essay, not out of terminological carelessness, at least I hope, but because of the huge differences in disciplinary, definitional outlooks and/or translations of the works of prominent German legal scholars discussed below, is legal consciousness.

Proponents of the 'nativist approach' claim that justice is planted in the human heart by nature. This biological-anthropological-psychological view comes in different forms, starting with the Historical School of Jurisprudence. Its main theorists Friedrich Carl von Savigny (1779-1861) and Georg Friedrich Puchta (1798-1846) not only vehemently opposed the very idea of the codification of law but also rejected the prioritising of human reason as the means to understand law that had been advocated by Enlightenment thinkers, on the ground that this was ahistorical. The Historical School aimed to understand law by looking for the true legislator and found it in the spirit of the people, the *Volksgeist*, a term coined by Johann Gottfried Herder (1744-1803). The thesis that the root of law is to be found in the people builds on Herder's views on the organic relation between language and culture.[5] Von Savigny argued that the development of Roman law could be traced back throughout the centuries since the rediscovery of the *Corpus Iuris Civilis* and that law had therefore organically developed from the consciousness of the people. Thus, to von Savigny, the Roman *Pandects* could be reconceived as contemporary German law, that is, as Roman law's natural synthesis. If the seat of ethical consciousness is transferred from the individual to the people, the *Volksgeist* is the collective

3 *Digests*, I.1.3 (Ulpian).
4 *Digests*, I.2.1.1 (Paulus).
5 For an analysis of Herder's thought, see Jeanne Gaakeer, 'Close Encounters of the "Third" Kind', in *Diaspora, Law and Literature*, ed. Daniela Carpi and Klaus Stierstorfer (Berlin: De Gruyter, 2016), 41-67; see also Jeanne Gaakeer, *Judging from Experience. Law, Praxis, Humanities* (Edinburgh: Edinburgh University Press, 2019), chapters 2 and 11.

legal consciousness implanted in the heart of the people and it determines what (the) law is and how to act with it.[6]

Another, yet different, nativist approach to legal consciousness can be found in the Free Law Movement of the late nineteenth and early twentieth century. A first instance of it is already clear in the fierce debate between Rudolf von Jhering (1818-1892) and Joseph Kohler (1849-1919) about the meaning of the bond in Shakespeare's *The Merchant of Venice*. This debate deserves mention because it revolves around Portia's judicial interpretive position and her subjective legal consciousness, and both are important for the relationship between legal consciousness and equitable justice. Von Jhering initially adhered to the Romanist strand of the Historical School but later on developed a proto-sociological jurisprudence.[7] The starting point for this legal theory was found in the interests of individual persons within a given society, the so-called *Interessenjurisprudenz*.[8] The Free Law Movement, by contrast, took its leave from a sociological starting point to view law as a whole and from the concomitant idea that the judge should take into consideration the principles of justice as well as law; this included the lawgiver's intention in the sense of the purpose of a specific piece of legislation in favour of a discretionary, i.e., a free form of judicial interpretation. To von Jhering, Shylock did not get justice because Portia wrongly failed or deliberately refused to deny the validity of the bond on the ground that it was unconscionable.[9] To Kohler, Portia

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6 A view expressed by the Dutch legal philosopher Hendrik Jacobus Hamaker, 'Het rechtsbewustzijn en de rechtsphilosophie', in *Opstellen over Recht*, n. ed. (Amsterdam: Müller, 1907), 1-35, 20-21. For nativist approaches, see also Wolfgang Fikentscher, 'The Sense of Justice and the Concept of Cultural Justice', in *The Sense of Justice, Biological Foundations of Law*, ed. Roger D. Masters and Margaret Gruter (Newbury Park/London/New Delhi: Sage Publications, 1992), 106-127.

7 In his three-volume *Der Zweck im Recht* (1877-1840); in English translation, Rudolf von Jhering, *Law as a Means to an End,* trans. Isaac Husik (Boston: Boston Book Company, 1913).

8 It is comparable to the Benthamite sociological idea of law as a means to an end and is echoed in Oliver Wendell Holmes Jr.'s 'The life of the law has not been logic: it has been experience', Oliver Wendell Holmes Jr., *The Common Law* [1881] (Cambridge/Mass.: Belknap Press, 2009), 3.

9 For purposes of citation I use the 4th edition in German and the 5th edition in English:
Rudolf von Jhering, *Der Kampf ums Recht,* 4th edition, in *Rudolf von Jhering Ausgewählte Schriften*, ed. Christian Rusche (Nürnberg: Glock und Lutz Verlag, 1965); Rudolph von Jhering, *The Struggle for Law*, trans. from the 5th edition in German John J. Lalor (Chicago: Callaghan and Co., 1879); here von Jhering, *Struggle for Law*, 81, note 1: 'The eminently tragic interest which we feel in Shylock, I find

deserves praise for her legal consciousness that makes her aware of the fact that the old law needs to be set aside. Obviously, Kohler argues, the lawgiver should be aware of the instincts of the people and preferably change the law accordingly. But, since this is not always possible, the judge should act as the intermediary between the lawgiver and the people. She should grasp the straw she needs to legitimise her decision, i.e., her instinctive judicial legal consciousness and conscience as the foundation of her decision, which she then clothes in the legal garb of interpretation, as Portia does.[10] This is the herald of the Free Law Movement, or so Kohler claims in a self-congratulatory vein.[11] What matters in the context of this essay is that Kohler prioritises the legal consciousness of a people and a society, as well as that of the individual judge as the starting point for judicial decision-making. The idea that subjective judicial consciousness is the decisive factor in the judicial construction of the applicable norm sits uneasily with the principles of equality before the law and legal certainty. And, even though Kohler insisted that the judge's discretionary power was not absolute in the sense that it could go *contra legem* (against the law), the Free Law Movement was increasingly criticised during the first decade of the twentieth century. Whereas Hermann Kantorowicz had argued that the progress of the law ultimately depends on culture and the will of the

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to have its basis precisely in the fact that justice is not done to him; for this is the conclusion to which the lawyer must come. . . . when the jurist submits the question to a critical examination, he can only say that the bond was in itself null and void because its provisions were contrary to good morals. The judge should, therefore, have refused to enforce its terms on this ground from the first'.

10 Joseph Kohler, *Shakespeare vor dem Forum der Jurisprudenz* (Würzburg: Verlag der Stahel'schen Universitäts Buch- und Kunsthandlung, 1883), 83, 'the legal consciousness of the judge, the legal instinct that lives in him, that has not yet developed into a complete and clear insight and therefore hides itself behind the mock argument of the wise Daniel', my translation of 'das Rechtsbewusstsein des Richters, der im Richter lebende Rechtsinstinkt, der sich noch nicht zur vollständig klaren Erkenntnis heraufgearbeitet hat und sich daher hinter den Scheingründen des weisen Daniels verbirgt'.

11 Josef Kohler, *Shakespeare vor dem Forum der Jurisprudenz*, 2nd ed. (Berlin: Rothschild, 1919), iii, 'Was sind meine Ausführungen über den Spruch der Porzia anders als die Morgenröte der Freirechtsbewegung, welche hier und in meinem Aufsatz über die Interpretation der Gesetze zuerst zu Tage getreten ist?' My translation: 'What are my explanations of Portia's decision other than the dawn of the Free Law Movement, that is brought to light here and in my essay on the interpretation of the laws?'.

(individual) judge,[12] attendees of the second Conference of German Judges in 1911 restricted the freedom that the Free Law Movement assigned to judges. The Free Law Movement subsequently petered out and was discontinued in 1933.[13] The year is as significant as it is ominous, because by then what the Free Law theorists had propagated had been trumped by the very instincts of the people (healthy as these supposedly are) as the new, formal and sole guideline for judicial decision making, 'das gesunde Empfinden des Volkes', as the National Socialist creed had it.[14]

Because of the stark contrast between their views on legal consciousness, the debate between von Jhering and the nativist Gustav Rümelin is of related interest. Rümelin viewed legal consciousness when denoting the feeling for law and justice as an innate, psychological property, i.e. an inner source of law;[15] because to Rümelin, such form of legal consciousness starts as a form of sympathy for one's fellow human being and then becomes a general principle,[16] the notion of the organic growth of law follows out of it. This brings to mind contemporary discussions on the

12 Gnaeus Flavius [pseud.], [Hermann Kantorowicz], *Der Kampf um die Rechtswissenschaft* (Heidelberg: Winter, 1906), 34; Gnaeus Flavius [pseud.], 'The Battle for Legal Science', trans. Cory Merill, *German Law Review* 12, no. 11 (2006): 2005-2030, 2025 (my italics), 'We therefore demand that the judge … decide a case as much as a case can be decided according to the clear wording of the code. He may and should abandon this, first, the moment the code appears to him not to offer an undisputed decision; secondly, if it, according to his free and conscientious conviction, is not likely that the state authority *in power at the time of the decision* would have come to the decision as required by law. In both cases he ought to arrive at the decision that, according to his conviction, the present state power would have arrived at had it the individual case in mind. Should he be unable to produce such conviction, he should then decide according to *free law*. Finally, in desperately involved or only quantitatively questionable cases such as indemnity for emotional damages, he should – and he must – decide according to *free will*'.

13 Klaus Riebschläger, *Die Freirechtsbewegung* (Berlin: Duncker und Humblot, 1968), 89.

14 See also Jeanne Gaakeer, 'Fuss about a Footnote, or the Struggle for (the) Law in German Legal Theory', in *As You Law it – Negotiating Shakespeare*, eds. Daniela Carpi and François Ost (Berlin: De Gruyter, 2018), 155-181.

15 Gustav Rümelin, 'Über das Rechtsgefühl', in *Rechtsgefühl und Gerechtigkeit* [1871], ed. Erik Wolf, *Deutsches Rechtsdenken*, no. 9 (Frankfurt am Main: Vittorio Klostermann, 1948), 5-22, 5, 'in dem Innern des Menschen enthaltenen Wurzel oder Quelle des Rechts'.

16 Rümelin, *supra* note 15, at 13, 'Jener erste unter den humanen Trieben, das Mitgefühl, welches uns fremdes Wohl und fremden Schmerz sympathisch mitempfinden heisst, verdichtet und verklärt sich im Rechtsgefühl zu einem allgemeinen Prinzip, zu dem Satz von der Gleichwertigkeit aller Individuen'.

role of empathy in judicial decision-making that I turn to below in section III.1. According to Rümelin, we would have to consult psychologists to find out what it is in us that makes us create law and where it can be located. This view is interesting in light of recent findings in psychology, for example, a Chicago psychologist's insight that some people have a highly developed 'justice sensitivity' that is rooted in reason rather than emotion,[17] or the view that young children develop a sense of justice at around the age of six.[18] If we return to the topic of empathy, findings in the neurosciences suggest that empathy is an embodied capability. To Rümelin, conscience and legal consciousness, meant as a sense of justice, are related concepts in which the human quest for an ethical-moral order finds its form.[19]

2. *Nurture*

But, as Hegel noted, we should be cautious lest

> the Idea of right and its further determinations, are taken up and asserted in immediate fashion as facts of consciousness, and our natural or intensified feelings, our own heart and enthusiasm, are made source of right. If this is the most convenient method of all, it is also

17 See Mark Prigg, 'The Superhuman Tendency', *Mail Online*, 21 January 2019, available at https://www.dailymail.co.uk/sciencetech/article-2601994/, last accessed 25 January 2019, referring to a test by Chicago psychologists using functional magnetic resonance imaging (fMRI) as a brain scanning device to study what happens in the individual's brain as he or she judges videos depicting behaviour that was either morally good or morally bad. For an evolutionary view on the human sense of justice, see Dennis L. Krebs, 'The Evolution of a Sense of Justice', in *Evolutionary Forensic Psychology: Darwinian Foundations of Crime and Law*, eds. Joshua Duntley and Todd K. Shackelford (Oxford: Oxford University Press, 2008), 229-245, 231, claiming that 'the key to understanding the origin of a sense of justice lies in identifying the adaptive functions it evolved to serve', i.e., 'to induce members of groups to uphold fitness-enhancing forms of cooperation'.

18 See Angela Chen, 'At age six, children develop a sense of justice', *The Verge*, 18 December 2017, last accessed 1 February 2019, https://www.theverge.com/2017/12/18/16789966/justice-fairness-psychology-children.

19 Rümelin, *supra* note 15, at 12, 'Gewissen und Rechtsgefühl sind die zwei einander koordinierten, verschwisterten Gestalten, in welche sich der sittliche Ordnungtrieb ausprägt'.

> the least philosophical … [it] makes the subjectivity, contingency, and arbitrariness of knowledge into its principle.[20]

What is more, despite the attractions of nativist positions, it should be noted that for the Romans, who also understood that 'every definition in law is hazardous',[21] legal consciousness was first and foremost a reaction to what was perceived as a concrete injustice. Such a reaction implies the existence of norms and rules that regulate the relations between human beings, i.e., private law that is valid for any society, whether it is handed down orally or (ultimately) laid down in legal codes or discovered on the basis of a concrete case by a judge who knows that his or her sense of justice is in conformity with that of the people he or she represents. Roman law already understood then that without private law no community of people can exist.[22] In other words, legal consciousness presupposes law.

The contextual approach that claims that legal consciousness is culture-dependent was espoused by von Jhering in 'Über die Entstehung des Rechtsgefühles'.[23] It followed out of John Locke's work, who, as von Jhering points out, had been undeservedly forgotten. While von Jhering admits that, originally at least, he was charmed by the idea of legal consciousness as an innate property to be elaborated on by means of psychological viewpoints, his knowledge of Roman law made him deny the possibility of an innate sense of justice. The criterion for the proper judgment of human behaviour in cases that are not yet covered by law

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20 Georg Wilhelm Friedrich Hegel, *Elements of the Philosophy of Right*, ed. A. W. Wood and trans. H. B. Nisbet (Cambridge: Cambridge University Press, 2003), 27-28. Georg Wilhelm Friedrich Hegel, *Grundlinien der Philosophie des Rechts*, ed. Johannes Hoffmeister (Hamburg: Felix Meiner, 1955) 21, 'Die Ideen … so auch die des Rechts und dessen weiterer Bestimmungen als Tatsachen des Bewusstseins unmittelbar aufzugreifen und zu behaupten, und das natürliche oder ein gesteigertes Gefühl, die eigen Brust und die Begeisterung zur Quelle des Rechts zu machen . . . wenn diese Methode die bequemste unter allen ist, so ist sie zugleich die unphilosophischste . . . so macht die Manier des unmittelbaren Bewusstseins und Gefühls die Subjektivität, Zufälligkeit und Willkür des Wissens zum Prinzip'.

21 *Digests*, 50, 17, 202 (Iavolenus), my translation of 'omnis definitio in iure periculoso est'.

22 Cf., the Dutch legal philosopher Henri van der Hoeven, *De vraag: mag het Wetboek van Strafrecht ongewijzigd ingevoerd worden* (Leiden: E.J. Brill, 1884), 43, for the view that however sophisticated a sense of justice may be, its existence depends on prior law; in other words, an acceptance of it in legal norms or codes. This is obviously of great importance for criminal law and the principle of *nullum crimen sine lege*, and it implies the rule of law.

23 Rudolf von Jhering, *Über die Entstehung des Rechtsgefühles* [1884], ed. Okko Behrends (Napels, Jovene Editore, 1986).

is to seek guidance in existing law. The example that von Jhering gives is that of taking away objects from a deceased person's estate: in the sense that these objects no longer have an owner they could theoretically be taken by anyone, but since theft is prohibited, the rights of the heir should prevail.[24] Through this analogous form of reasoning, new law is made. In other words, for von Jhering legal consciousness develops against the background of institutional law and equitable justice, and needs their nourishment: 'Our sense of justice therefore depends on the real facts and circumstances that have been realised throughout history'.[25] This comes as no surprise, of course, given that von Jhering's starting point in *The Struggle for Law* is the struggle by the individual person for his or her interests within a society. In his view:

> It is not the sense of right that has produced law, but it is law that has produced the sense of right. Law knows only one source, and that is the practical one of purpose.[26]

Comparable to Hegel, von Jhering points to the role of legal philosophy and legal theory in elaborating the relationship between law, justice (distributive as well as punitive) and legal consciousness. From the perspective of legal philosophy and legal theory, concepts such as equality, as far as claims and rights are concerned, need to be entered into the debate, according to Jhering. This includes measuring an individual's interests also in terms of their obligations, on the view that the individual as a member of society bears responsibility for what he or she creates in the way of good and bad.[27] The echoes of the three fundamental principles of justice in Roman law are obvious. What matters in society is '*honeste vivere, alterum non laedere, suum cuique tribuere*', i.e., to live honourably, to not harm or injure other people, and to render to each his or her own. These notions are not only the legal, but also the moral precepts of a general,

24 Von Jhering, *supra* note 23, at 48.

25 Von Jhering, *supra* note 23, at 54, my translation of 'Unser Rechtsgefühl ist also abhängig von den realen Thatsachen, die sich in die Geschichte verwirklicht haben'.

26 Von Jhering, *Struggle for Law*, *supra* note 9, Author's Preface, lix.

27 Cf. the Dutch legal philosopher Rudolf Kranenburg, *Positief Recht en Rechtsbewustzijn, inleiding in de rechtsphilosophie,* 2nd ed. (Groningen: P. Noordhoff, 1928), pp. 129-135, for the claim that there necessarily is and should be correspondence between the individual sense of right/legal consciousness and the law that binds all.

broadly applicable concept of good faith in human relations, with justice understood as the quest for harmonious human relations.

II. Culture

It is precisely because the *quidditas* or whatness of law is hard to define, as Immanuel Kant noted, that '*Rechtsgefühl*' and '*Rechtsbewusstsein*' remain important though contested topics in jurisprudence. That is to say, is law a state institution, a power structure, a system of rules, or an instrument of justice or oppression? Is it a theoretical structure or a practice? Or, is it all of the above?[28] The same goes for culture. The number of definitions of culture that have vagueness as their most common characteristic is abundant.[29] This surplus of definitions obviously leads to a number of conceptual Babels when considering the cultural location from which to best start research on legal consciousness. Given the replication of the problem of contradictory definitions in cultural studies of law as well as investigations into the cultural lives of law, i.e., when law deals with cultures,[30] it is important to specify how and where legal research and culture meet. This might be, for example, on the site of what Roger Cotterrell calls 'law as a cultural projection'.[31] This would imply asking, 'How ought law

28 See Jeanne Gaakeer, 'The Future of Literary-Legal Jurisprudence: Mere Theory or Just Practice?' *Law and Humanities* 5, no.1 (2011): 185-196.

29 See Austin Sarat and Thomas R. Kearns, 'The Cultural Lives of Law' in *Law in the Domains of Culture*, eds. Austin Sarat and Thomas R. Kearns (Ann Arbor: University of Michigan Press, 1998), 1-20, 3 for the view that traditionally the study of culture was the study of 'that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society'. Such a definition is a broad umbrella under which practically every topic finds shelter. It disregards aspects of socialisation and acculturation connected to culture. Peter Burke, on the other hand, defends a broad definition that includes '… attitudes, mentalities and values and their expression, embodiment or symbolization in artefacts, practices and representations', *Cultural Hybridity* (Cambridge: Polity Press, 2009), 5. See also Jeanne Gaakeer, 'Reverent Rites of Legal Theory: unity-diversity-interdisciplinarity', *Australian Feminist Law Journal* 36 (2012): 19-43.

30 See Priska Gisler, Sara Steinert Borella and Caroline Wiedmer, 'Setting the Stage: Reading Law and Culture', in *Intersections of Law and Culture*, eds. Priska Gisler, Sara Steinert Borella and Caroline Wiedmer (Houndmills/UK: Palgrave MacMillan, 2012), 1-13.

31 Roger Cotterrell, 'Law in Culture', *Ratio Juris* 17, no. 1 (2004): 1-14, 5.

to be understood as a cultural system?'[32] With this in mind, I turn to the second distinction that needs to be made in the various conceptualizations of legal consciousness.

With its focus on the *fons et origo* of legal consciousness, the first distinction fails to address the relationship between the individual and society when seen in terms of what Rehbinder calls the '*Rechtsbewusstsein*', as a consciousness of (the) law, versus '*Rechtsgefühl*', as an individual's innermost feelings.[33] The point was already noted in 1919 by the Dutch legal philosopher Boasson, who attributed both an intellectual and an emotional function to the term '*rechtsbewustzijn*', i.e., '*Rechtsbewusstsein*'. He claimed therefore that, on the one hand, the individual should consult with himself or herself and, when deciding how to act, ask whether he or she is required to take the interests of others into consideration. (This is important, for example, in terms of criminal law for discerning the difference between intent (*malus*) and guilt and/or culpability.) On the other hand, from a legal-judicial perspective, one should ask whether the individual's view deserves protection as opposed to the state as a whole.[34] In short, the cognitive versus the emotional aspect is important when it comes to dealing with spontaneous feelings of citizens juridically. That is to say, in the situation, whether rightly so or not, that their feeling for what is right and just appears to have been violated, either by fellow citizens or by the state or local administration. It is with this second distinction that the role of the judge becomes prominent in democratic societies under the rule of law. Whether a conflict regarding a point of law or conflicting views on what is just are at stake, a court proceeding and a judicial decision are required in order to arrive at a solution, and, it is important to note, that 'the decision of the judge is implemented by the force of public power', as Paul Ricoeur emphasises.[35] What is more, the meaning of legal consciousness in a concrete case or situation depends both on the concept of the 'rule of law' and the *Rechtsstaat* in which

32 Austin Sarat, 'Situating Legal Scholarship in the Liberal Arts', in *Law in the Liberal Arts*, ed. Austin Sarat (Ithaca: Cornell University Press, 2004), 1-13, 4.

33 Manfred Rehbinder, *Rechtssoziologie*, 2nd ed. (Berlin and New York: De Gruyter, 1989), 169.

34 Johan Jozef Boasson, *Het Rechtsbewustzijn, een onderzoek naar het leven der rechtsidee in het individueel bewustzijn* (Den Haag: Martinus Nijhoff, 1919), 41.

35 Paul Ricoeur, *Hermeneutics and the Human Sciences,* trans. and ed. J. B. Thompson (Cambridge: Cambridge University Press, 1981), 215.

this concept is used, and which, in turn, influences this very concept; the relationship is reciprocal.[36]

The role of public debate on matters that (may) divide a society also comes into play with the second distinction. People may experience a sense of alienation and powerlessness when there is too large a discrepancy between the individual's internal view and the institutional view of what is right and just, a Kafkaesque gap between '*Rechtsnähe*' and '*Rechtsferne*', what is close to or distant from the letter of the law, as Marc Hertogh notes in his analysis of the Belgian Dutroux affair. This affair involved the kidnapping and murder of four girls during the 1990s and the recusal of the examining magistrate Connerotte after he attended a fund-raising dinner for the families of the missing children and accepted a spaghetti dinner and a pencil there.[37] This recusal created 'a deep divide between the official world of the Belgian legal system and that of the ordinary citizen. In many cases this was explicitly linked to different opinions about the *Rechtsstaat*'.[38] Some citizens vehemently protested against the recusal, which they saw as a violation of their sense of rightness and the law.

My second example is that of a recent Dutch case. This involved the '*Blockade-Frisians*', citizens from the province of Friesland who blocked a major road, making it impossible for demonstrators from other parts of the Netherlands to reach the Frisian capital of Leeuwarden. Demonstrators had wanted to block the ritual entry of Saint Nicholas and Black Peter into the city and 'Kick Out Zwarte Piet'. They had wanted to raise their voices against the presumed racism and colonialism of this Dutch December tradition in the Netherlands. In court, it turned out that neither group felt itself to have been heard or recognised: the '*Blockade-Frisians*' assumed that the authorities lacked appreciation for 'real' Dutch people who merely wanted an event for their children to not be disturbed by the violence that was to be expected from leftist demonstrators; and, as victims of the intimidating road block, the demonstrators felt unheard by a Dutch society that they perceived to be racist. While the court duly noted the

36 Cf., Marc Hertogh, 'A "European" Concept of Legal Consciousness: Rediscovering Eugen Ehrlich', *Journal of Law and Society*, 31, no. 4 (2004): 457-481, for the differences in the European and American conception of legal consciousness.

37 Hertogh, *supra* note 36, at 458-459. See the Belgian Court of Cassation, 14 October 1996, no. 379.

38 Hertogh, *supra* note 36, at 459.

antagonists' differing motivations in its written decision, it did not bring about a mutual understanding between the two groups.[39]

Thus, a people's idea of what is law and what is right may differ significantly, as was already noted by Eugen Ehrlich (1862-1922). His work remains important because he was one of the first to point out that any degree of freedom in a judicial interpretive act and the decision that results from it, is not 'arbitrary … it grows out of the principles of juridical tradition'.[40] These principles include respect for the legal code, but that respect does not imply an interpretive restriction because even the 'simple' application of a legal rule 'is by its very nature creative'.[41] It should be noted that the judicial movement from facts to legal norms is always dialectical; it involves a going hither and thither between the facts and the norm, so to speak, as coined by the German jurist Karl Engisch in the phrase *das Hin-und Herwandern des Blickes*.[42] In performing this movement, judges need to constantly bear in mind the influence of their own interpretive frameworks on both the facts and the norm. As humans, we cannot escape our hermeneutic situation of being culturally determined, professionally as well as personally. That too is important to note in relation to the application of legal consciousness in legal judgment.[43]

What matters to me here are two things. The first is that Ehrlich emphasises '*the element of creative thought*', the second is that 'each application of a general rule to a particular case is necessarily influenced by the personality of the judge who makes it'; in other words,

> the administration of justice has always contained a personal element … The point is that this fact should not be tolerated as something unavoidable, but should gladly be welcomed. For the one important desideratum is that his personality must be great enough to be properly entrusted with such functions.[44]

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39 ECLI:NL:RBNNE:2018:4555; ECLI:NL:RBNNE:2018:4557; ECLI:NL:RBNNE:2018:4558; ECLI:NL:RBNNE:2018:4559; ECLL:NL:RBNNE:2018:4561. European decisions that have a European Case Law Identifier (ECLI) can be accessed via the European e-justice portal <e-justice.europa.eu>.

40 Eugen Ehrlich, 'Judicial Freedom of Decision: Its Principles and Objects', trans. Ernest Bruncken and Layton B. Register, in *Science of Legal Method* [1917] (New York: A.M. Kelley, 1969), 47-83, 71.

41 Ehrlich, *supra* note 40, at 73.

42 Karl Engisch, *Logische Studien zur Gesetzanwendung* [1943] (Heidelberg: Winter, 1963), 15.

43 See also Gaakeer, *Judging from Experience*, *supra* note 5, chapter 6.

44 Ehrlich, *supra* note 40, at 73 (italics in the original).

One thing is certain, ever since the term '*Rechtsgefühl*' was first used in von Kleist's *Michael Kohlhaas* (1810),[45] justice and the quest for justice have remained central to discussions in jurisprudence. As with the concepts of law and culture, '*Rechtsgefühl*' too remains an umbrella concept. This circumstance forces us to consider the 'whatness' of '*Rechtsgefühl*', the *quidditas* question in our research. As Christoph Meier notes, there are at least fourteen different ways in which the term can be used, and each of these specific perspectives will guide our research and its possible outcomes.[46] This goes to show that, in the spirit of Kurt Lewin, there is nothing more practical than a good theory.

In what follows, I will focus on the second distinction that was noted in this section, specifically on the differentiation between the elements that help guide the act of judging and its outcome, and the individual person's legal consciousness as compared to the legal consciousness that prevails in one's society. I do so because personal values and valuations of other people's actions (biases included) and expectations that people have of the state and of judges are intimately related to the topic of empathy prominent in *Law and Literature*, an interdisciplinary field in legal theory that started in the U.S. in the 1970s and heralded a renaissance of the humanistic study of law. By now, *Law and Literature* has morphed into the field of *Law and the Humanities* in which, not incidentally, current topics are affect and emotion in law and legal theory.

III. A Nimble Mind

1. Empathy and Emotion

As Sandra Schnädelbach rightly notes, the early 'debates on *Rechtsgefühl* gave emotions an epistemological function'; with this the main question in terms of legal practice in the twentieth century became 'Could a jurist

45 Cf. Katharina Döderlein, *Die Diskrepanz zwischen Recht und Rechtsgefühl in der Literatur. Ein dramatischer Dualismus von Heinrich von Kleist bis Martin Walser* (Würzburg: Königshausen und Neumann, 2017), 18 and 67 n. 228. *Michael Kohlhaas* marks the ultimate shift from divine to human-made law, and the brothers Grimm called the novella the oldest source for the use of the term '*Rechtsgefühl*' (see Jacob Grimm and Wilhelm Grimm, *Deutsches Wörterbuch*, Band 8 [Leipzig: Hirzel, 1893], 432).

46 Christoph Meier, *Zur Diskussion über das Rechtsgefühl* (Berlin: Duncker & Humblot, 1986), 44-45 and 137-155.

consult his *Rechtsgefühl* when making a judgment? Should he? Was he permitted to do so?'[47] As I have suggested elsewhere,[48] jurists generally and judges more specifically all necessarily combine the practical and the theoretical, i.e., legal doctrine and the findings of the academic study of and research into law. To reach the outcome of a specific case, legal practice always reflects on the consequences of any theoretical, doctrinal assumption. This reflection includes attention to the possible theoretical justification of the position that could be taken when viewed against the background of the wider significance of the combined legal and cultural framework, for example, in high-profile cases that attract societal and/or media attention. In turn, theoretical knowledge, in the sense of academic legal scholarship, is augmented by the actual *quid-iuris* questions that legal practice raises, for instance, what is the law? These often go far beyond what academic doctrinal discourse can even begin to fathom. Again, the relationship between the two is a reciprocal one. Whereas practice turns to theory for justification, theory thrives on practical input. So, it matters a great deal whether or not one's '*Rechtsgefühl*' is part of this process, and if so, which form it then takes.

The struggle for a place for '*Rechtsgefühl*' was the topic of Max Rümelin's 1925 study of *Rechtsgefühl und Rechtsbewusstsein*.[49] Unlike his father Gustav, Max Rümelin rejected the nativist view of '*Rechtsgefühl*'. In contradistinction, he focuses on how the legal professional develops knowledge by means of experience. For a judge, at least, this results in developing an intuitive feel for the right decision, on the basis of

> the totality of the representations of (the) law present in a person's consciousness, either on the basis of education or accumulated in the mind on the basis of one's own experiences, in other words . . . the sum total of all experience as a unity.[50]

Rümelin notes that such legal intuition stands in contrast with conceptual thought. This observation anticipates, I suggest, the attention to what, in the field of *Law and the Humanities*, has been emphasised as essential ability for any judge. James Boyd White first drew attention to this abil-

47 Schnädelbach, *supra* note 1, at 48-49.
48 Gaakeer, *Judging from Experience*, *supra* note 5, at chapter 6.
49 Max Rümelin, *Rechtsgefühl und Rechtsbewusstsein* (Tübingen: Mohr-Siebeck, 1925).
50 Max Rümelin, *supra* note 49, at 20, 'die Gesamtheit der in einem Bewusstsein vorhandenen, auf Grund von Unterweisung oder von eigenen Erlebnissen im Gedächtnis aufgespeicherten Rechtsvorstellungen, oder … die Summe aller Erfahrungen als Einheit' (my translation).

ity to bridge the fundamental difference between the narrative and the analytical, or the literary and the conceptual in the judge and what she recognises as the competing pulls in other people's texts. White calls this the difference between 'the mind that tells a story, and the mind that gives reason', because 'one finds its meaning in representations of events as they occur in time, in imagined experience; the other, in systematic or theoretical explanations, in the exposition of conceptual order or structure'.[51] This is especially important in the stage of justification, when the judge acts as the narrator of her own authorial act of comprehending the facts and circumstances of the case, and deciding what is and what is not relevant for the legal plot in the presented succession of events. This plotting in the form of a selection is always done with the aim of arriving at a decision, or, as Ricoeur put it succinctly, 'To tell and to follow a story is already to reflect upon events in order to encompass them in successive wholes'.[52] This also means, to me at least, that the way in which the outcome of this process is written down and then pronounced in an open courtroom is crucial for the acceptance of the decision by the parties involved, particularly in cases that draw attention in society at large and require people's acceptance.

Rümelin emphasises the importance of qualities that Aristotle had attributed to ethos and virtue long before him, when he claims that one does not become a good judge via intellectual achievements alone; rather, one needs a specific character and disposition for this.[53] In other words, a judge's ethos in the sense of her professional attitude cannot be separated from the persuasiveness of her judgement. A lack of reflection on this bond is an ethical and a professional defect. This means that knowledge of the law alone does not suffice. It needs to be complemented by love for the law and love for one's fellow human beings. The latter should not be confused with sympathy; on the contrary, as Rümelin claims, it is precisely because a judge should not lapse into feelings of sympathy that she needs '*Rechtsgefühl*' to do justice to the human condition in an individual case.[54] Rümelin's emphasis on the individual case is connected not only to '*Billigkeitsrecht*', or equity, a topic to which I will return, but

51 James Boyd White, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (Boston: Little, Brown and Company, 1973), 859.

52 Paul Ricoeur, 'Narrative Time', *Critical Inquiry* 7, no. 1 (1980): 167-190, 178.

53 Max Rümelin, *supra* note 49, at 76, 'Zu einen guten Richter wird man nicht bloss durch Eigenschaften des Intellekts. Ebenso wesentlich sind Gemüt und Charakter'.

54 Max Rümelin, *supra* note 49, at 76.

also to the empathic imagination. More recently, this type of imagination was eloquently promoted by U.S. Supreme Court Justice Stephen Breyer when he writes that

> Law requires both a head and a heart. You need a good head to read all those words and figure out how they apply. But when you are representing human beings or deciding things that affect them, you need to understand, as best you can, the workings of human life.

This is particularly so in hard cases,

> where perfectly good judges come to different conclusions on the meaning of the same words . . . it is very important to imaginatively understand how other people live and how your decisions might affect them, so you can take that into account when you write.[55]

The success of professional empathy, therefore, is intimately connected to readers' response to the texts of law, and such a response, in turn, co-constitutes the legitimacy and authority of the judge as author.[56] When the judicial text is perceived as logocentric and cold, it can evoke violent emotions. A recent example in the Netherlands concerns a father who was present to hear the decision of a lower court with respect to the defendant, the driver of a car that ran over and killed his two-year-old daughter and both her grandparents, who were cycling on a bicycle track. Out of sheer disappointment and frustration, he threw a chair at the judge who read the decision in a public courtroom. The decision itself was correct in terms of traffic law and criminal law, also as far as the sentencing was concerned: the punishment did not involve a jail sentence, since the text of the relevant article of the Road Traffic Act does not include criminal intent. Yet the decision did not at all, or not explicitly, acknowledge the enormous suffering of the couple who had lost both a child and a set of parents.[57] In other words, the judicial decision performed its legal function in criminal law dispute resolution only in the abstract sense. It failed in

55 Eve Gerber, 'Stephen Breyer on Intellectual Influences', available at https://five books.com/best-books/stephen-breyer-on-intellectual-influences/ [last accessed 12 January 2018]. Cf. John Rawls, 'The Sense of Justice', *The Philosophical Review* 72, (1963): 281-305, 281, that Jean-Jacques Rousseau in his *Émile* 'asserts that the sense of justice is no mere moral conception formed by the understanding alone, but a true sentiment of the heart enlightened by reason, the natural outcome of our primitive affections'.

56 Gaakeer, *Judging from Experience*, *supra* note 5, at chapter 11.

57 Rechtbank Limburg, 21 November 2014, ECLI:NL:RBLIM:2014:10041.

its communicative and societal function, because it did not demonstrate an empathic stance towards the bereft parents, who had understandably hoped that a severe punishment would be given to the offender in the form of a jail sentence as a form of retribution. Nor did the decision explain why the law did not allow for such punishment in light of the court's qualification of the criminal act.

As a concomitant result, the general public felt similarly to the parents; it did not accept the decision as fair. Therefore, the performativity of the text of the judicial decision is intimately connected to the professional ethos that the judge who is taking the decision shows in his or her narrative, whether or not this ethos as narrative identity is consciously chosen.[58] In the appeal, the defendant was sentenced to jail. But in 2017, when he was released temporarily in order to visit his pregnant girlfriend in Poland, public emotions again ran high, because the specific terms of the release did not include guarantees with respect to his having to return to the Netherlands to serve the rest of his sentence.

For all of these reasons, the legal narrative and its rhetorical form, whether deliberately chosen or not, cannot be treated as separate from one another. Ideally, the justification of the decision is geared to a specific audience. Rhetorically speaking, the judge must try and gauge the expectations this audience has and which emotions are involved. Hence judicial ethos depends on this judicial incorporation of both logos and pathos.[59] For this reason, we need to carefully consider the role of '*Rechtsgefühl*', both as the emotion that guides the person who applies the law and as the emotion that her decision sparks in her audience.[60] This is even more the case because, as the findings of neurosciences suggest, empathy may well

58 For law as performance and event, see Julie S. Peters, 'Legal Performance Good and Bad', *Law, Culture and the Humanities* 4, no. 2 (2008): 179-200; 'Law as Performance: Historical Interpretation, Objects, Lexicons, and other Methodological Problems', in *New Directions in Law and Literature*, eds. Elizabeth S. Anker and Bernadette Meyler (Oxford: Oxford University Press, 2017), 193-209.

59 Willem Witteveen, 'Wat doet de rechter als hij recht vindt: de formule van het algemeen rechtsbewustzijn', *Recht en Kritiek* 9, (1983): 192-208, 204.

60 See also Julia Haenni, 'Emotion and Law: How Pre-Rational Cognition Influences Judgment', *German Law Journal* 13, no. 3 (2012): 369-380, for a Kantian, phenomenological approach, concluding, at 380, that 'The phenomenon of intuitive evaluation is therefore not to be understood as a factor interfering with the application of the law, but as an insight into the interaction of rational and emotional factors in the emergence of a moral, but also juridical, decision'.

be an embodied emotion.[61] As such, it has a basis in '*mirror neurons*, which fire both when a person performs an action or feels an emotion when she views someone else having the same experience'.[62] This also suggests that the understanding of '*Rechtsgefühl*' as innate may not be as far away as we thought it was, given the development of the term during the last century. What is more, the findings of the natural sciences need to be taken into careful consideration in interdisciplinary legal research on '*Rechtsgefühle*' because law is a value-laden discipline.

2. *Seeing the Decision Intuitively*

The question of whether '*Rechtsgefühl*' could be a building block in rendering judgement was also answered affirmatively by Ernst Weigelin, who attached significance to three relevant meanings of '*Rechtsgefühl*'.[63] These are, firstly, a sense of what the law requires, or which individual entitlements exist in a specific case. This includes a *sensus juridicus*, as the ability to intuitively see what the case requires so that the judge arrives at the decision on this basis first and then seeks its legal justification. And as the greatest Dutch legal theorist of the twentieth century, Paul Scholten, noted,

> the judge, who intuitively 'sees' the decision immediately after the case is presented to him, even though he doesn't know precisely yet, how he will motivate it, uses his knowledge of law – his complete experience – in this intuitive view.[64]

Secondly, '*Rechtsgefühl*', according to Weigelin, implies a feeling for what law ought to be, that is, a keen sense for the ideal of law and an inclination

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61 See Gail Bruner Murrow and Richard W. Murrow, 'A Biosemiotic *Body* of Law: The Neurobiology of Justice', *International Journal for the Semiotics of Law* 26, no. 2 (2013): 275-314, 298, 'embodied empathy, broadly defined, involves the sharing, or automatic neural simulation, of the actual neural affective, neural somatosensory, or neural motor states of others with whom one "empathizes"'.

62 See Ann Jurecic, 'Empathy and the Critic', *College English* 74, no. 1 (2011): 10-27, 10 (italics in the original).

63 Ernst Weigelin, 'Das Rechtsgefühl in seiner ablehnenden Funktion', *Juristische Rundschau* 1950, no. 12 (1950): 361-362, 361, citing Erwin Riezler.

64 Paul Scholten, *General Method of Private Law. Mr. C. Asser's Manual for the Practice of Dutch Civil Law* [1931] (Amsterdam: Digital Paul Scholten Project, 2014), vol. 1, Chapter 1, available at General-Method-of-Private-Law-3.pdf (paulscholten.eu) [last accessed 13 March 2021], Section 28 'The decision'.

to help materialise this ideal of (the) law. This view is comparable to Gustav Radbruch's understanding of jurisprudence as a cultural discipline, and law as an activity that strives to make its idea and ideals happen, i.e., the view that

> From the concept of law, a cultural concept, that is, a concept related to value, we were pressed on to the value of the law, the idea of the law: Law is what, according to its meaning, is intended to serve the idea of the law.[65]

Radbruch speaks in terms of the fundamental principles of law. In western culture these principles include human dignity, freedom, equality and solidarity. They are the products of the work of humans throughout the ages, and are bound by their cultural contexts and, as such, are open to change. But, these principles are also stronger than any purely rule-oriented form of law so that a positive law that runs contrary to these principles must be denied its validity, a topic I turn to below in section IV. Thus, Radbruch offers a humanistic, intermediate position between the value-absolutism of natural law and the value-relativism of legal positivism. Furthermore, in that Radbruch explicitly thinks of law and jurisprudence as belonging to the domain of the Humanities, his view is also interesting for a methodological discussion of the place of law in the disciplinary spectrum.[66] And,

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65 Gustav Radbruch, *The Legal Philosophies of Lask, Radbruch, and Dabin*, The 20th century legal philosophy series vol. IV, trans. Kurt Wilk and intro. Edwin W. Patterson (Cambridge/Mass.: Harvard University Press, 1950), 47-224, Section 9, 107 (the translation of the 3rd edition [1932] of Gustav Radbruch, *Rechtsphilosophie*, 3rd ed. [1914] (Leipzig: Quelle & Meyer, 1932). I also use Gustav Radbruch, *Rechtsphilosophie*, 8th ed., ed. Erik Wolf and Hans-Peter Schneider [Stuttgart: K. F. Koehler Verlag, 1973]).

66 See Gustav Radbruch, *Literatur- und kunsthistorische Schriften*, in *Gesamtausgabe*, volume 5, ed. Hermann Klenner (Heidelberg: C.E. Müller, 1997). For a discussion of Radbruch's literary analyses, see Hans-Albrecht Koch, '"Aber bald gewannen meine literarische Neigungen wieder die Oberhand": Gustav Radbruch als Literaturhistoriker', in *Grenzfrevel, Rechtskultur und literarische Kultur*, eds. Hans-Albrecht Koch, Gabriella Rovagni und Bernd H. Oppermann (Bonn: Bouvier Verlag, 1998), 153-166. Max Rümelin, *supra* note 49, at 75, also advances the interdisciplinary argument that in order to understand the distinctive elements and possible impact of '*Rechtsgefühl*', we need to combine the findings of the behavioural sciences, sociology, (cultural) history, and the narratives of '*Rechtsgefühl*' in literary works such a Shakespeare's *Measure for Measure*, *Hamlet* and *King Lear*, and those of Ibsen, Tolstoy, and Dostoevsky. See also Friedrich Kübl, *Das Rechtsgefühl* (Berlin: Putkammer & Mülbrecht, 1913), chapters 10 and 11 for '*Rechtsgefühl*' in the works of Shakespeare, Goethe, and Schiller.

I would add that the realisation of law's values is indissolubly connected to the furthering of (social) justice and the struggle necessary to obtain that goal in concrete cases, for example, in the case of the right to vote, and all kinds of social rights that were fought for at the end of the nineteenth century and the early twentieth century. This includes the U.S. civil rights movement of the 1960s, and, more recently, the fight for gender equality. Finally, Weigelin points to the necessary understanding of the legal order and its institutions, including their limitations as part of *Rechtsgefühl*. To me, such an understanding includes a good working knowledge of procedural law.

In those cases in which the legal norm should be put aside on the basis of a judicial '*Rechtsgefühl*', we are also squarely in the domain of the *sensus juridicus*. There, the judge either seeks a solution that satisfies her '*Rechtsgefühl*' through extensive or restrictive interpretation, or, contrastingly, by making it explicit that existing law forces her to come to a specific decision that is undesirable and unjust and leads her to therefore ask legislators to take up the task of changing that law. As far as this second solution is concerned, the judge also faces a professional moral-formal dilemma that ensues on the basis of her decision, and she may experience an incompatibility between her cognitions, i.e. a cognitive dissonance between the claims of her professional and private self. What is she to do when the law that she has to uphold becomes repugnant to her '*Rechtsgefühl*'? As Robert Cover noted, the judge can either retreat into a mechanistic application of the law, or try to find a justification for her adherence to formal obligations, for example, by claiming that the responsibility is that of a different power, such as the lawgiver.[67] This obviously clashes with the principle that judicial independence entails that judges are liberated from hierarchical subordination when deciding cases. This independence obviously implies that one cannot hide behind the order of a supposedly superior state power, be it the lawgiver or the political administration. Hence the need for judicial daring. The point is eloquently addressed by Piero Calamandrei, arguing that in those situations

> when the judge's sense of justice is not in harmony with that of the legislator; when as a result of abrupt political changes and a break in juridical continuity, the judge is called on to apply a law that he believes unjust. It is very well to say that under the rule of law the principle of *dura lex sed lex* applies and that consequently the judge

67 Robert Cover, *Justice Accused, Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975), 1-7 and 226-229.

> must take the law as he finds it, without judging it. But the judge is a human being, and as such he automatically judges the law before applying it; even if he is willing to obey it, he cannot avoid making a moral and political evaluation according to the dictates of his *conscience*. And even if he *stifles the voice of his conscience*, when he is obliged to apply a law in which he does not believe, it is only natural that he will apply it mechanically, as an official duty, with a cold bureaucratic pedantry; he cannot be expected to vivify or to re-create a law that is extraneous or actually hostile to his philosophy.[68]

Judicial solutions remain in the domain of law in the sense that their outward appearance complies with what Rudolf Stammler calls the natural feeling for the law in hard cases, which is not a subjective feeling but an objectively valid art of contemplating things juridical.[69] Yet it is obvious that the methodological struggle with respect to the place of judicial '*Rechtsgefühl*' remains in full swing precisely because of its wide-ranging *quidditas*. Since this is unavoidable, conceptual clarity is of the utmost importance, even more so in interdisciplinary settings. I emphasise this point because there is broad consensus, theoretically at least, that the job specification for judges comprises at least three criteria: firstly, integrity as the combined result of impartiality, candour and daring – understood here as the guts to take unpopular decisions that may cause societal disapproval and/or unrest –; secondly, craftsmanship, i.e., both knowledge of the law and the imagination necessary to gauge what is at stake for the parties in an individual case; and, lastly, the ability to assess autonomously what is just (and act on that).[70]

From a methodological point of view, this means that the judge must be able to acknowledge the views of the opposing parties in a case as valid

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68 Piero Calamandrei, 'The Crisis in the Reasoned Opinion', in *Procedure and Democracy*, trans. John Clarke Adams and Helen Adams (New York: New York University Press, 1956), 683-696, 692 (italics mine).

69 Rudolf Stammler, *Die Lehre vom dem richtigen Rechte* (Berlin: Guttentag, 1902), 146, 'das natürliche Rechtsgefühl' and 'eine *objektiv* gültige Art der Betrachtung rechtlicher Dinge' (my translation).

70 See Hans F.M. Hofhuis, 'De rechtspraak van binnen en van buiten', Speech held on 10 June 2011 for the Dutch Association of Jurists. The judicial panel which Hofhuis presided showed such daring in the Urgenda case (ECLI:NL:RBDHA:2015:7145) when it ordered the Dutch government to take measures in order to reduce the emission of greenhouse gas by 25% (compared to the level of 1990) before 2020, a decision that was confirmed in appeal (ECLI:NL:GHDHA:2018:2591).

propositions against the background of the legal order, and the demands of the society in which law performs its authoritative function. Legal rationality is more prominent, of course, in the phase of legitimisation, when the grounds for the decision are stated by giving reasons, i.e., the justification of the decision on the basis of the relevant facts and applicable law, in interaction with each other. In this way, the parties involved in a case, and society more widely, including legal scholarship, can reconstruct the line of reasoning which led to the decision. So obviously judicial decision making thus encompasses an appeal to the decision maker's legal conscience and consciousness.

Acknowledging different views requires an empathic attitude and an ability to move from the facts to the legal norm and back again that requires both insight into what makes a specific fact (and that includes insight into similarities and dissimilarities, in short: the metaphorical) and a keen sense of when to deviate from the legal certainty that law's interest in '*Normgerechtigkeit*' seeks to accomplish. I mean by this, the notion that justice follows from the application of the legal norm. In short, when it is correct to seek the equitable solution of '*Einzelfallgerechtigkeit*' in the individual case. As Boasson already noted in 1919, each judicial decision is an expression of the judge's combined consciousness of what the law is and what the facts and circumstances of a case are. According to Boasson, to arrive at this stage, the judge needs to use her 'productive imagination'[71] to understand and gauge what others tell her, and, more importantly, where it is necessary to bring forth novel, yet convincing interpretations of the case at hand. Such interpretations are nourished by experience and knowledge of the human condition. Boasson also warns the judge that her expectations on the basis of her productive imagination need to be mitigated by her maintaining a keen sense of the mistakes that professional and private biases may provoke.[72]

3. *Grasping the Singularity of the Situation*

The demand that a judge be able to see intuitively and correctly what the case requires brings me to the topics of practical wisdom or *phronèsis*,

71 Boasson, *supra* note 34, at 135 (my translation of the Dutch 'eigen produktieve fantasie').

72 Boasson, *supra* note 34, at 135.

metaphorical insight and imagination, and the equitable, all in connection to '*Rechtsgefühl*' as a *sensus juridicus*.

In the Aristotelian spectrum of the intellectual and moral virtues, *phronèsis* is placed in the category of intellectual virtues. It is distinguished from *épistèmè*, theoretical knowledge aimed at 'knowing that'. *Phronèsis* is the virtue of knowing not only human beings' ultimate goals but also how to secure them. In other words, the virtue includes the application of good judgement to human conduct, and that is a 'knowing how' rather than a 'knowing that'.[73] Yet although *phronèsis* is categorised as an intellectual virtue, i.e. a virtue in the sense of a dispositional quality that one acquires, for example, through instruction or one's education generally, it is nevertheless a matter of *ethos* or character. *Phronèsis* is more than a combination of knowledge (for example, the knowledge of widely accepted moral rules) and deliberative technique. It entails instead the ability to apply insight – gained in specific situations, and context-dependent, as such insight necessarily is – to new questions as they crop up. Ethics and epistemology thus go hand in hand in *phronèsis* as a *praxis* of concrete action in specific situations. To Aristotle, the critical quality of human 'understanding' answers the imperative quality inherent in and posed by *phronèsis*. This means that 'its end is a statement of what we ought to do or not to do'.[74] While not identical, understanding and *phronèsis* concern the same objects,[75] as Aristotle points out, because understanding is also about those things that are subject to questioning and deliberation rather than the strictly defined, universal givens of scientific knowledge. In examining the nature of human actions, Aristotle says that

> matters of conduct and expediency have nothing fixed or invariable about them ... the agents themselves have to consider what is suited to the circumstances of each occasion (*προσ τον καί*ρον), just as is the case with the art of medicine or of navigation.[76]

That the demands of legal practice include the need to do whatever is necessary under the circumstances requires insight into the nature of ac-

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73 See also Gilbert Ryle, 'Knowing How and Knowing That', *Proceedings of the Aristotelian Society* 46 (1945): 1-16.

74 Aristotle, *The Nicomachean Ethics* [1926], trans. H. Rackman, ed. J. Henderson (Cambridge/MA and London: Harvard University Press, 2003), VI.x.2, 1143a9-10, 359.

75 Aristotle, *supra* note 74, at VI.x.2, 1143a8, 359, 'it [understanding] is concerned with the same objects as Prudence' [i.e., *phronèsis*].

76 Aristotle, *supra* note 74, at II.ii.3-5, 1104a4-10, 77.

tions to find how we ought to do them. This is also a point made by Paul Ricoeur, who insists on the input of the Humanities when it comes to developing judicial *phronetic* intelligence. What matters to me here is that Ricoeur connects a discussion of the deliberative aspect of *phronèsis* with the idea of hermeneutic movement as circular, as the 'back-and-forth motion' between the idea that we have about, for example, the good life or justice, and the decision to be made.[77] This ties in neatly with the legal methodology of connecting the facts and the relevant norm, the hermeneutic movement between norm and fact, to which Ricoeur approvingly refers when he writes that 'the man of wise judgement determines at the same time the rule and the case, by grasping the situation in its singularity.'[78] Or, as Radbruch notes, 'the sense of law requires a nimble mind that is able to shift from the specific to the general and back again from the general to the specific'.[79] Thus, *phronèsis* is perceived as an essential component in actual judging, in the sense that to judge is to act. As Paul Scholten observes,

> The judge does something other than observing in favor of whom the scales turn, he decides. That decision is an act, it is rooted in the conscience of he who performs the act. That which is expected of a judge is a deed … It is the task of the judge to deliver judgment. … It is not a scientific proposition, but a declaration of will: this is how it should be. In the end it is a leap, just like any deed, any moral judgment is.[80]

So the judge must choose. In connection to what this means for the judicial narrative, this means to choose between events and human acts considered to be – or not to be – legally relevant facts; between stories that are plausible in a legal context and those that are not; between narratives to which a legal value can be attached, or not, and for what reason. Because at the end of the day, the judge as reader-narrator tells the world how she interprets and evaluates what others have told her; lastly, this includes

77 Paul Ricoeur, *Oneself as Another* [1990], trans. K. Blamey (Chicago and London: University of Chicago Press, 1992), 179.

78 Ricoeur, *supra* note 77, at 175.

79 Radbruch, *supra* note 65, at Section 13, 'The Psychology of the Man of the Law', 130-136, 135; Radbruch *supra* note 65, 1973 edition, 199, 'Das Rechtsgefühl verlangt also einen behenden Geist, der vom Besondern zum Allgemeinen und vom Allgemeinen wieder zum Besondern hinüberzuwechseln vermag' (my translation).

80 Scholten, *supra* note 64, at Section 28.

a decision on the consequences of different choices. What weight should be attached to specific facts? What pieces of evidence should be valued as sufficient proof? Does, as the premise of the theory of anchored narratives claims, a 'good story' in criminal law have to be compatible not only with the available evidence but also anchored in our general knowledge of the world?[81] As Scholten notes, in the sense that each decision is rooted in the judge's legal consciousness, this consciousness '… speaks only then when a person who is aware of his responsibility forms his judgment'. Scholten also acknowledges that because the judge

> is always an agent of the community — his decision is not an individual moral judgment, but a statement given by somebody with power that binds the community. This implies that he has to be well informed about the conceptions held by those who are subjected to his jurisdiction.[82]

It is important to note that Scholten writes 'well informed'. Being informed does not imply that the judge is required to take people's '*Rechtsgefühl*' into consideration, particularly in the heat of the moment in socially controversial matters.

4. Intuitive Perception of (Dis)similars

The quality of the judge's phronetic discernment is important for the success of the process of interpretation and the evaluation of the circumstances of a given case. If we follow Kant in his *Critique of Judgment*, the first stage of any judgement is the imaginative one. In the sense that this includes reflecting upon what is 'not immediately there before our eyes', it suggests that judicial intuition as 'seeing' is also connected to metaphoric insight. That is because *phronèsis* and understandings of metaphor share an emphasis on the ability to see similarities and dissimilarities in a particular situation. In other words, a successful metaphorical performance makes us say, 'Oh, but now I see'. Secondly, because *phronèsis* implies the judge's professionally trained intuition of 'knowing by doing', it includes the immediate perception of what matters in a given situation.

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81 Willem A. Wagenaar et al., *Anchored Narratives: The Psychology of Criminal Evidence* (Harvester Wheatsheaf: St. Martin's Press, 1993).

82 Scholten, *supra* note 64, at Section 28.

As Ricoeur notes, '"To metaphorize well", said Aristotle, "implies an *intuitive* perception of the similarity in dissimilars"'.[83] When he elaborates on the combination of metaphor and imagination, Ricoeur suggests that the first step to be taken is to ask us to understand imagination as the insight that metaphor offers when it asks us to contemplate on resemblance. This insight is both cognitive and perceptual when the imagination is viewed as the 'ability to produce new kinds by assimilation and to produce them not above the differences, as in the concept, but in spite of and through the differences'.[84] What matters then is the phronètic combination of thinking – in judicial *phronèsis* this obviously includes recognising the relevant legal aspects – and then understanding by grasping the particularity of the new situation that metaphor suggests.

The second step is that of incorporating the pictorial dimension of the imagination. Both *phronèsis* and metaphor depend on the capability to see what precisely this specific thing is that connects that which we already know to the new significance of the particular that we have discerned. This is the productive step, i.e., when we move from the semantic aspect of the metaphor to our literally figuring out what the new thing is. It is the moment in which the ordinary reference of a word is discarded in favour of the new meaning produced by the metaphor? This requires not only imagination but – in order to preclude jumping to conclusions about the legal meaning of it all, both new and old – also Coleridgean poetic faith, i.e. 'that willing suspension of disbelief', and what John Keats called a 'negative capability', i.e. 'when man is capable of being in uncertainties'.[85] This ability to be in uncertainties resembles an ideal judge's being open to contingency and ambiguity more generally. Methodologically, the suspension of judgement – or ἐποχή, epoché in Greek philosophy – is normative for the legal profession. In the sense claimed here, it also points to an articulation of the conjunction in *Law and Literature*, when insights from literary theory can be transported to law to clarify existing notions.

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83 Paul Ricoeur, *The Rule of Metaphor: Multi-Disciplinary Studies in the Creation of Meaning in Language* [1975], trans. R. Czerny, K. McLaughlin and J. Costello (London: Routledge, 1986), 6 (italics mine).

84 Paul Ricoeur, 'The Metaphorical Process as Cognition, Imagination, and Feeling', *Critical Inquiry* 5, no. 1 (1978): 143-159, 147-148.

85 Samuel Taylor Coleridge, *Biographia Literaria*, eds. J. Engell and W. Jackson Bate, *The Collected Works of Samuel Taylor Coleridge*, vol. 1 (Princeton: Princeton University Press, 1983), 6; John Keats, 'Letter of 21 December 1817 to his brothers George and Thomas', in *The Norton Anthology of English Literature*, vol. 2, eds. M. H. Abrams et al. (New York: W. W. W. Norton and Co., 1974), 705.

The third step in Ricoeur's scheme is the final move to the cognitive import of metaphor. This combination of the cognitive and the imaginative ties in with the division of knowledge in theoretical, or *épistèmè*, and practical, or *phronèsis*, in that it highlights the critical element of judicial *phronèsis*. The judge's imagination enables her to see what ties the singular situation of the case before her to the existing framework of law. At the same time, it asks her to determine which aspect of the singular situation calls for an adjustment in the application of the normative framework. *Phronèsis* and metaphoric insight thus enable the judge to bridge the gap between the generality of the legal rule and the particulars of the situation at hand. Rules and norms do not apply themselves. They are applied by humans, who in turn are responsible for avoiding reductive interpretations, both of the rule and the facts and circumstances of the case. Hence the importance of '*Rechtsgefühl*' as *sensus juridicus* also in relation to the topic of legal narrative, for, as Ricoeur puts it, 'One massive fact characteristic of the use of our languages [is]: *it is always possible to say the same thing in a different way*'.[86] Here, '*Rechtsgefühl*' connects to the right discrimination of the equitable in law in the individual case.[87]

5. Perspectival Reaction

It is precisely because the statutory norm is general that we need a perspectival reaction to which the Humanities, especially literature and philosophical hermeneutics, may help give form. In the *Nicomachean Ethics*, Aristotle argues that equity not only parallels written law but, where necessary, also prevails over it as a corrective. Thus, any error arising from the fact that any law is a general statement can be rectified by

> deciding as the lawgiver would himself decide if he were present on the occasion, and would have enacted if he had been cognizant of the

86 Paul Ricoeur, *Reflections on the Just*, trans. D. Pellauer (Chicago: University of Chicago Press, 2007), 116 (italics in the original).

87 Cf., Eduard von Hartmann, *Das sittliche Bewusstsein, eine Entwickelung seiner mannigfaltigen Gestalten in ihrem Zusammenhange* (Leipzig: Hermann Haacke Verlagshandlung, 1886), 231, that the feeling of and for the just that lives in human conciousness is the equitable conviction of justice ('das Gerechte wie es im menschlichen Bewusstsein … als Überzeugung vom Gerechten lebt'), i.e., individualised and contextualised.

> case in question. … This is the essential nature of the equitable: it is a rectification of law where law is defective because of its generality.[88]

Equitable man is above all a man of empathic judgement, who shows consideration to others – also in the sense of forgiveness – 'that consideration which judges rightly what is equitable, judging *rightly* meaning what is *truly* equitable'.[89] Thus, Aristotle ties both the understanding of a case and the act of correct judgement to *phronèsis*. The doing of equity also depends on the particular circumstances of each occasion and each case – the *προσ τον καίρον* noted above – as it combines the virtue of legal justice and the moral virtue that is the product of ethos. If we combine this with Ricoeur's claim that 'Interpretation of the facts of what happened [is] in the final analysis of a narrative order',[90] the elements of *sensus juridicus*, taken together, suggest that equity's knowledge is also narrative in its attention to the particular aspects of the case, which are necessarily connected to the stories of the parties involved, not least of all, because judging requires hearing the other side in full. The idea of equity is also homogeneous with equality in the sense that Aristotle distinguished in Book 5 of the *Nicomachean Ethics*. There, he claimed that 'justice can only exist between those whose mutual relations are regulated by law, and law exists among those between whom there is a possibility of injustice, for the administration of the law means the discrimination of what is just and what is unjust'.[91] As noted above in section I.2, legal consciousness in the sense I am broadly conceiving it in this essay presupposes law, both codified and more generally as Ulpian's 'ars aequi et boni', the art of what is good, just and equitable. As a general notion of justness and fairness as fair dealing and doing to others as we would have them do to us, equity is also connected to the judge's conscience and consciousness of what is just, particularly if we look upon it from the point of view of the judge, who is responsible for bringing about justice. There is a rich and long tradition from Aristotle via St. Germain, Grotius and Kant to more recent authors such as Geoffrey Samuel and Gary Watt, on whether equity should to be viewed as part of law.[92] St. Germain, for example, argues that

88 Aristotle, *supra* note 74, at [1926] 2003) V.x.7-8, 1137b30-33, 317.
89 Aristotle, *supra* note 74, at VI.xi.1, 1143a24, 361 (italics in the original).
90 Ricoeur, *supra* note 86, at 69.
91 Aristotle, *supra* note 74, at V.vi.4, 291.
92 See G. Samuel, 'Equity and Legal Reasoning', *Pólemos* 11, no. 1 (2017): 41-53; G. Watt, *Equity Stirring: The Story of Justice Beyond Law* (Oxford and Portland/OR: Hart Publishing, 2009) for a common law view on equity.

the interrelation of conscience and equity is such that if you observe and keep equity in every general rule of the law, 'thy conscience shall never be extincted', because 'conscience [is] the law of our understanding'.[93] And while to Kant conscience and the equitable are part of one's inner forum rather than of the law, he defines the dictum of equity thus, 'The strictest right is the greatest wrong (*summum jus, summa injuria*) the remedies for which injustice cannot be brought before a court of law, but only before a court of conscience',[94] thus conceding that sometimes justice perhaps requires '*Rechtsgefühl*'.

IV. For Conscience's Sake

1. Popular Justice

Allow me to bring the strands of my argument together by returning to the second distinction made in section II between an individual and a societal '*Rechtsgefühl*', now in a different manner.

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93 Christopher St. Germain, *The Doctor and Student, or, dialogues between a doctor of divinity and a student of the laws of England containing the grounds of those laws together with questions and cases concerning the equity thereof*, [1518], Lonang Institute, 2006 electronic edition of the 1874 edition revised and corrected by William Muchall, https://lonang.com/library/reference/stgermain-doctor-and-student/, last accessed 15 April 2019, Dialogue 1, chapters 15 and 16 'Of conscience' and 'What is equity' ('a right wiseness that considereth all the particular circumstances of the deed … And such an equity must always be observed in every law of man, and in every general rule thereof: and that he knew well that said thus, Law covet to be ruled by equity. And the wise man saith, Be not overmuch right wise; for the extreme right wiseness is extreme wrong').

94 Kant's observations on equity can be found in an appendix to the first part of *The Metaphysics of Morals* (originally published in Königsberg in 1797 as the *Metaphysische Anfangsgründe der Rechtslehre von Immanuel Kant*). This first part is translated as the 'Introduction to the Elements of Justice' (*Metaphysical Elements of Justice*, second edition, trans. John Ladd [Indianapolis and Cambridge: Hackett Publishing Company, Inc., 1999]) or as the 'Introduction to the doctrine of rights' (*The Metaphysics of Morals*, trans. Mary Gregor, intr. by Roger J. Sullivan [Cambridge: Cambridge University Press, 1996]), or as the 'Introduction to the science of right' (*The Metaphysics of Morals*, trans. William Hastie, kant_morals.PDF (antilogicalism.com), last accessed 14 March 2021), and these differences in translation also show the complexity of the semantic problem of the concept of both law and equity.

When, as is often the case in today's world, the media, including social media, take up a legal issue, the *Volksgeist* can have severely negative effects in terms of actual justice when its feeling for law leads to a trial by media. This happened in October 2010 in Belgium, for instance, when a jury in the Court d'Assises convicted a woman of murder and sentenced her to thirty years imprisonment, presumably on the basis of the unpleasant impression she made during the trial which was prominently featured in the media, and despite the lack of directly incriminating evidence.[95] If the medium is indeed the message, our attention must be given to the combined effects of the medium's form and its narrative content. Narratives may be geared towards the development of empathy as much as towards an increase of antipathy. In other words, the judge who keeps in mind the Roman law maxim 'Give me the facts and I will give you the law' may find herself under serious pressure when she is bombarded by alternative facts and has to find her way through a morass of innuendo. If it comes to the point that her personal life becomes the object of media attention, this may cause professional dissonances as well, with negative consequences, for example, the judge's recusal for the wrong reason.

This brings me to a second perspective on popular justice in yet another sense: the decisions made by audiences of Ferdinand von Schirach's play *Terror*, in which the audience participates as the jury that has to decide on the question of whether or not the pilot Lars Koch is guilty of having killed the 164 persons on board an airplane that was hijacked by a terrorist and was on its way to crash into a sold-out football stadium.[96] How did it come about, and what does it mean that the audiences generally vote 60%:40% or more for an acquittal? Differences between national legal

95 Court of Cassation, Belgium, 3 May 2011, N292 – 3.5.11, available at https://justitie.belgium.be/sites/default/files/downloads/AC%202011%2005.pdf, last accessed 1 March 2019. The defendant denied all of the charges. The facts were seemingly simple. The victim and the defendant had been having a love affair with the same man; they both belonged to the same parachute club; the victim's parachute had not opened when she jumped from a height of 4 kilometers; and the defendant was deemed to be knowledgeable about how to sabotage a parachute and how to enter the parachute club without being detected. The decision was not quashed by the Belgian Court of Cassation.

96 Ferdinand von Schirach, *Terror*, trans. David Tushingham (London: Faber and Faber, 2017); originally Ferdinand von Schirach, *Terror, ein Theaterstück und "Machen Sie unbedingt weiter", eine Rede* (Munich: btb, 2016). See also Jeanne Gaakeer, '"Wrest once the law to your authority. To do a great right, do a little wrong?"' in *Law and the Humanities: Cultural Perspectives*, eds. Sidia Fiorato et al. (Berlin: De Gruyter, 2019), 477-498.

systems and jurisdictions have not seemed to influence European voting patterns. As noted by Mark Brown, in the United Kingdom 'A website for the play charts the number of guilty and not guilty verdicts across the 46 theatres in seven countries that have staged the show. In 1,063 trials, 91.9% of verdicts have been not guilty. Of the 287, 236 jurors who have cast a vote 60.7% voted not guilty.'[97] At the Berlin performance, the ratio was 255 to 207 for an acquittal.[98] The Dutch audience's vote, when the film adaption was broadcast on *National Geographic*, on 11 September 2017, was an astounding 95% for acquittal. Note that the way in which the film was broadcast was highly specific: the viewing was interlaced with commentaries of an air force general, a critic and an attorney, amongst others, each with their own form of legal consciousness.[99] So what does this tell us, as jurists, about our own legal cultures that from the point of view of positive (criminal) law, only the Japanese audience got it right?[100] Did the majority's '*Rechtsgefühl*' lead to a just decision, however utilitarian it is and however incorrect from a legal perspective? Or, did the majority vote arise out of the incorrect instructions given by the judge and the argumentative strategies of both the prosecutor and the attorney so that rhetorical and narrative affects won the case?[101] To me, the voting pattern for acquittal suggests that we should never forget that, 'in the telling of any story, it is possible to emphasize one particular aspect over another so that that aspect looms out of all proportion to the context'.[102] Nor should we forget that emotions are often unmanageable, and that popular justice usually does not sit well with the fundamental norms behind accepted legal principles if they are to be upheld under difficult circumstances. As

97 Mark Brown, 'Lyric Hammersmith's courtroom drama Terror will let audience be jury', *The Guardian online,* https://www.theguardian.com/stage/2017/mar/07/lyric-hammersmith-terror-courtroom-drama-ferdinand-von-schirach, last modified 7 March 2017, last accessed 28 August 2017.

98 Peter Kümmel, 'Ferdinand von Schirach, 255 gegen 207', *Die Zeit online,* last modified 10 October 2015, last accessed 10 May 2017, http://www.zeit.de/2015/41/ferdinand-von-schirach-terror-deutsches-theater. See also Thomas Möbius, *Ferdinand von Schirach, Terror* (Hollfeld: Bange Verlag, 2017), 105.

99 See 'Kijkers National Geographic vinden Lars Koch onschuldig', *Broadcastmagazin.nl,* last modified 11 September 2017, last accessed 15 September 2017, http://www.broadcastmagazine.nl/televisie/kijkers-national-geographic-vinden-lars-koch-onschuldig/.

100 Brown, *supra* note 97.

101 Cf. Greta Olson, 'The Turn to Passion: Has Law and Literature become Law and Affect?', *Law & Literature* 28, no. 3 (2016): 335-353.

102 Charlotte Rogan, *The Lifeboat* (London: Virago, 2012), 222-223. Cf., Ricoeur, *supra* the text accompanying note 86.

an aside: that legal professionals are not at all exempt from what von Schirach holds before us with his play *Terror* has been amply illustrated by the case of *Gäfgen v. Germany* before the European Court of Human Rights in Strasbourg.[103] The case inspired von Schirach to the degree that it also dealt with the border between legally justified and unjustified action. The majority decision expressed the formally correct legal norm that during the trial Gäfgen repeated his confession of having killed the boy he had kidnapped, one which had been made earlier under the threat of torture by the police. Yet, according to the dissenters, the majority decision diminished its value precisely by deciding that under these circumstances nothing had been wrong with Gäfgen's confession and trial. The dissenters held that

> there is an equally vital, compelling, and competing public interest in the preservation of the values of civilized societies founded upon the rule of law. … Though the situation in this case was critical it is precisely in times of crisis that absolute values must remain uncompromised.[104]

As von Schirach notes, the situation in the Gäfgen case was one resembling the plot of a Greek tragedy: as a state official, the policeman was prohibited from acting as he wanted to as a human being – namely, threatening torture in order to hopefully save the boy's life – precisely because he has to uphold the law.[105]

2. *Unpopular Decisions*

This brings me to the topic of judicial conscience per se and also back to the Rümelins, father and son. To Gustav Rümelin, 'Conscience and a sense of law share the idea of the good as their common goal … they pluck at the heart to realise the good'.[106] In the sense that Max Rümelin includes

103 European Court of Human Rights, *Case of Gäfgen v. Germany*, Application no. 22978/05, Grand Chamber, 1 June 2010, rectified 3 June 2010.

104 *Supra* note 103, *Gäfgen*, dissenting opinion, par. 12-13.

105 Ferdinand von Schirach, *Die Würde ist antastbar*, *Essays* [2014], (Munich: Piper Verlag, 2016), 109-116. In von Schirach's novel *Tabu*, the torture of the protagonist Sebastian von Eschberg is based on the defendant Gäfgen.

106 Gustav Rümelin, *supra* note 15, at 13, 'Gewissen und Rechtsgefühl haben die Idee des Guten zu ihrem gemeinsamen Inhalt und Ziel ... sie sind die Forderungen an das Gemüt, das Gute zu verwirklichen' (my translation).

a 'natural-law jurisprudence of emotion'[107] in the idea of '*Rechtsgefühl*', I see a connection to Radbruch. In his observation that 'The three aspects of the idea of law [i.e., justice, expediency, legal certainty as delineated in Section 9] are of equal value, and in case of conflict there is no decision between them but by individual conscience', Radbruch adds the important observation that 'there may be "shameful laws" which conscience refuses to obey'.[108] In other words, the conceptual borders between judicial conscience, legal consciousness and individual conscience may well become blurred in individual cases.

This is not to argue, however, that we should renew the theoretical debate on whether 'Rechtsgefühl' should be considered as part of law or outside it, or whether Max Rümelin and von Jhering should be contrasted with Radbruch or not.[109] Rather, it is to point out the simple fact that for a law to be set aside as 'supra-statutory law', one needs someone to interpret that law and that someone is the judge, if not the legislator who later changes that law. That is why *sensus juridicus* in the sense delineated here matters, not least of all because Radbruch insists that the goal of 'law, including positive law, cannot be otherwise defined than as a system and an institution whose very meaning is to serve justice'.[110] And, as Ian Ward observes, in his essay on 'Justice and Equity in International Relations', Radbruch invokes Aristotle's concept of equity as a kind of supra-norm of 'universal morality'.[111] From the perspective of legal practice this is important, given that Radbruch's view on law as a cultural phenomenon

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107 Max Rümelin, *supra* note 49, at 50, 'naturrechtlichen Gefühlsjurisprudenz'. Cf., Leopold August Warnkönig, *Rechtsphilosophie als Naturlehre des Rechts* (Freiburg im Breisgau: Wagner, 1839), 6, 'Nichts könne positives Recht seyn als was es zu seyn verdiene'. Available at https://archive.org/details/bub_gb_fcwGAAAAcAAJ/page/n17, last accessed 26 April 2019.

108 Radbruch, *supra* note 65, at Section 10, 118.

109 For example, Behrends in von Jhering, *supra* note 23, at 97-98.

110 Gustav Radbruch, 'Statutory Lawlessness and Supra-Statutory Law', trans. Bonnie Litschewski-Paulson and Stanley Paulson, *Oxford Journal of Legal Studies* 26, no. 1 (2006): 1-11, 7. It should, however, also be noted that Radbruch radically changed his view on law and justice after the consequences of Nazi law became clear to him. Radbruch started out as a legal positivist and the original 1914 edition of his *Rechtsphilosophie* is testament to that: 'Wir verachten den Pfarrer, der gegen seine Überzeugung predigt, aber wir verehren den Richter, der sich durch sein widerstrebendes Rechtsgefühl in seiner Gesetzestreue nicht beirren lässt', on the view that the (codified) law obtains its value precisely because it is the sediment of what is thought to be just, Radbruch, *supra* note 65, at 178.

111 Ian Ward, *Law, Philosophy and National Socialism: Heidegger, Schmitt and Radbruch in Context* (Berne: Peter Lang, 1992), 186.

was inspired by actual cases occurring after World War II, involving necessary attempts to solve dilemmas of whether or not to apply legal norms retroactively, and that assignment pertained directly to the validity of law itself. To reiterate, Radbruch's jurisprudential position is a humanistic, intermediate one between the value-absolutism of natural law and the value-relativism of legal positivism. As we all know, this has been widely acknowledged by the judiciary as the Radbruch Formula.[112] Other than the Roman jurists, discussed in section I.2, we no longer hold the view that some precepts are innate to all human beings, we can then agree that some norms of human conduct are good at all times.

What does this suggest for judicial practice? Two more examples serve to illustrate the continued importance of my topic. The judge eats his meals in solitude, wrote Piero Calamandrei, and his only table companion is his independence.[113] That judicial integrity may come at a high price is made clear by the aftermath of a decision of the Court of Appeal in Leeuwarden, the Netherlands, in 1943 during the German occupation. A panel of three justices tried the case of a defendant accused of theft. In those days, the occupier had made the penitentiary regime increasingly harder. The conditions in the camp Erika in the city of Ommen, where those convicted of petty crimes by the Leeuwarden Court were sent, were so bad that they meant an increase in the usual penalty. Bodily harm was inflicted by the guards, and starvation, endless drills, and heavy physical labour caused many inmates to die, and those who did survive were physically wrecked. The judicial panel in this case decided that the expected outcome of applying such a form of imprisonment was not only an undesirable increase of the penalty, but that it was against the principles of humanity and the spirit of the law. So, they sentenced the defendant to the time he had already spent in pre-trial detention, because, as they wrote by way of justification of their decision, 'for their consciences' they could not apply the then current norm.[114] This was their solution to the

112 Cf., Döderlein, *supra* note 45, at 289. Döderlein offers the literary examples of Bernhard Schlink's *Der Vorleser* and Juli Zeh's *Corpus Delicti*. For the latter, see also Gaakeer, *Judging from Experience*, *supra* note 5, at chapter 13, for an analysis of the novel in relation to modern technology and privacy.

113 Piero Calamandrei, *Eulogy of Judges*, trans. John Clarke Adams, Princeton, Princeton University Press, 1946 (orig. *Elogio dei giudici, scritto da un avvocato*, 1936), par.121.

114 *Nederlandse Jurisprudentie* 1951, no. 643, Court of Appeal Leeuwarden, 25 February 1943.

moral-formal dilemma that they faced and the cognitive dissonance that they experienced.

Writing this judicial decision was not the task of producing a narrative of compromise, for while the deliberations in chambers, secret as these remain, took a very long time, the outcome was unanimous. The case remained unpublished until 1951, when it became a tribute to the judicial panel and its president Viehoff, who with one of the other two justices had been immediately removed from office 'owing to gross neglect of their official duties'. When the newspapers published the news of the justices having been interrogated about their decision, the inmates of the camp where dissident intellectuals were interned made a bunk bed ready for them. Both justices went into hiding immediately after the interrogations. They had their suitcases ready at home, as one of their children later divulged.[115]

That judicial integrity may come at an even higher price is exemplified in a story by the German author Ernst Wiechert, *Der Richter*.[116] Its protagonist experiences cognitive dissonance between his institutional role and his conscience. The story is set in the days before the Second World War. During a court session when the protagonist, a judge in a lower court, is interrogating a witness, the town's old berry gatherer Veronika suddenly enters the courtroom and tells him, 'He lies in the stone quarry … and the light shines in his open eyes … he is cold already'.[117] When the judge asks her who lies there, she replies that it is Joseph Huber. The judge reassures her that he will do what is necessary, and she then casually remarks that in earlier times the judge's son and Huber had been great friends. The judge breaks off the court session and makes a phone call to the public prosecutor. The judge goes to the quarry. When the body is removed from the scene, the judge finds an envelope with a name on it in the field of berries. When later that evening his son Christean comes home, the judge sees a blackberry leaf on his arm. The judge muses that he too came down the blackberry slope that afternoon. Then he tells his son that he has found the envelope. Christean admits to the deed: a new era has started, and

115 For the details surrounding the decision I draw on Herman L.C. Hermans, *Om des Gewetens Wille, de geschiedenis van een arrest in oorlogstijd* (Leeuwarden: Friese Pers Boekerij, 2003).

116 Ernst Wiechert (1887-1950), *Der Richter* (München: K. Desch, 1948). To my knowledge no English translation exists. A French translation of the story can be found in Ernst Wiechert, *Histoire d'un adolescent*, trans. C. Santelli (Paris: Mercure de France, 1962).

117 Wiechert, *supra* note 116, at 3, my translation.

the dead man was a traitor to his country. The judge responds, 'So you thought a closed mouth is a silent mouth. But now you know that it is not silent, dear son. It has opened'.[118] When the judge says that there are only two persons who can tell the truth, Christean takes responsibility and goes to the police.

The next day, however, it turns out that the police have refused to take Christean's deposition or to accept the envelope, because he supposedly deserved a reward rather than punishment for his deed. Then the judge sends his son to town to the public prosecutor, but again Christean returns. The judge tells Christean they will go to the last court, meaning the victim's parents to whom Christean confesses the deed. The victim's father speaks softly too when he addresses the judge and tells him there is no heart more heavily burdened than the judge's own. I take this to be a reference to the double burden that the judge carries, to turn in his own son and to come to a decision about his own position. Three days later, the war breaks out, and Christean heads to the front. The judge writes his letter of resignation. It ends, 'Where there is need for a judge, there must needs be law. And where there is a law, justice must be done. But where there is no justice, there is no room for law and neither for a judge.'[119] When the context in which the judge has to uphold the law becomes repugnant to him or her, the ultimate consequence of such dissonance is to resign.

To end on a sobering note: it is indeed as Paul Scholten argued that

> The judge is expected to act. He has to have the courage to bear the responsibility: in the end I say a or b, not a and b. The judge who hovers in doubt and can't arrive at the act of taking a decision, isn't fit to be a judge.[120]

To Scholten the fact that we 'finally end up with the conscience of the judge' is not problematic, for 'it is better to accept that which is defective and subjective, than to gape at an appearance of objectivity and certainty, which is nothing more than show and doesn't hold out against criticism'.[121] By way of a conclusion, I reiterate what von Jhering wrote: 'Our

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118 Wiechert, *supra* note 116, at 8, my translation.

119 Wiechert, *supra* note 116, at 16, my translation.

120 Scholten, *supra* note 64, at par. 28. Cf., Ehrlich, *supra* the text accompanying note 44.

121 Scholten, *supra* note 64, at par. 28. Cf., Ulrich Matz, *Rechtsgefühl und ideales Wertreich* (Munich: Beck, 1966), 19-20, for the acknowledgment, 'dass die Erkenntnis des überpositiven Rechts in den emotionalen Bereich verlegt wird' and this

sense of justice … depends on the real facts and circumstances that have been realised throughout history'.[122] Yet at the same time the unsimple fact is that in democratic societies under the rule of law, laws depend on real judges to interpret them, on their *sensus juridicus*, and on their guts. To think that it is otherwise would be a dangerous fiction.

leads to a 'Gefühlsjurisprudenz' that combined with the accepted traditional, 'rational' legal methodology gives primacy to judicial conscience and legal consciousness as decisive elements of the act of judging.

122 Von Jhering, *supra* the text accompanying note 25.